

NO. 38979-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW RYAN HASTINGS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable John P. Wulle, Judge

APPELLANT'S BRIEF

LISA E. TABBUT
Attorney for Appellant
P. O. Box 1396
Longview, WA 98632
(360) 425-8155

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COURT OF APPEALS
DIVISION TWO

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A. ASSIGNMENTS OF ERROR

1. The trial committed reversible error when it refused to grant Mr. Hastings' request for a continuance of his trial.
2. The trial judge violated the appearance of fairness doctrine.
3. The trial judge provided some evidence of his own potential bias.
4. The trial judge should have recused himself from hearing Mr. Hastings' case.
5. Mr. Hastings' sentence violates double jeopardy because it includes firearm enhancements in addition to convictions for second degree assault based on the use of a firearm.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion and violate Mr. Hastings' right to due process of law by denying his request to continue the trial date in order to allow more time to obtain witnesses, review discovery, and consult with his attorney after witness interviews? [Assignment of Error 1]
2. Did the trial court violate the appearance of fairness doctrine by presiding over the trial despite having watched the events of the case unfold on television and being disturbed when he realized it was his signature on a warrant that sent a SWAT team into what later became a dangerous situation? [Assignments of Error 2, 3, and 4]
3. The double jeopardy clauses of the federal and state constitutions protect against multiple prosecutions and multiple punishments for the same offense. Mr. Hastings was convicted of two counts of second degree assault and the jury made a separate finding that he was armed with a firearm at the time of both offenses. Where Mr. Hastings received punishment for both the assaults and the firearm enhancements, was he punished twice for the same conduct

in violation of his constitutional rights? [Assignment of Error 5]

C. STATEMENT OF THE CASE

1. Procedural Overview.

(a) Judge Wulle denied Mr. Hastings' request for a continuance.

On August 28, 2007, Mr. Hastings was arraigned on a seven count information. CP 1-4; RP I at 3-4¹; RP II at 12-16. Over the next approximate year and a half, Mr. Hastings' trial would be continued six times at the request of defense counsel. RP IV at 23-28; RP V at 47-56; RP IX at 124-126; RP X at 144-145; RP XXVIII 2445-2446; RP XI 163-164; CP 9, 26, 27, 28, 35, 36, 37-41, 48, 49, 50-54, 55, 56, 68-70. The repeated continuances were needed for several reasons. First, Mr. Hastings' case was complex and the discovery voluminous. RP IV at 24; RP V at 42-45; RP IX at 124; RP X at 144-147; RP XXVIII at 2426-2436; RP XI at 164; CP 37-41, 50-54, 68-70. Second, interviews with witnesses were delayed while waiting for reports from the State. RP IV at 24; RP V at 42-47; RP VII at 83-86; RP VIII at 113. Third, related charges were filed on an alleged participant. RP IV at 24; RP V at 42-47; RP VII at 83-86; RP VIII at 113. Fourth, the original defense attorney, Charles

¹ Mr. Hastings' original arraignment date was July 25, 2007. However, his attorney, Charles Buckley asked that Mr. Hastings' competency be assessed. An agreed competency order was entered on August 28, CP 10-11, and a trial date set.

Buckley, requested that a second defense attorney be appointed as one defense attorney working on this huge case was not enough to assure Mr. Hastings a fair trial. RP 10 at 146-147; CP 46-47. And finally, although the court ordered that Mr. Hastings have access to the jail law library and discovery from his attorney, the provision of the discovery was hampered because the jail would not allow Mr. Hastings to have one-on-one contact with his attorney.² RP II at 13-14; RP V at 68; RP VI at 7; SRP XIV at 129-130.

Consequently, when the final trial date drew near, Mr. Hastings did not feel adequately prepared for trial. RP XIV at 2422. He had not received, and consequently not reviewed, all of the discovery. *Id.* He had not talked to his attorneys about the content of interviews with State's witnesses. *Id.* And because he did not know what the State's witnesses said during interviews, he did not have an opportunity to give his attorneys the names of appropriate defense witnesses. *Id.*

At the final readiness hearing, held four days before the start of his January 2009 trial, Mr. Hastings asked for a continuance of the trial date for all of the reasons mentioned above. RP XIV at 2422. The court

² On December 28, 2007, there was an in-court discussion about an allegation that Mr. Hastings held a person hostage in the jail and possessed a weapon. RP VI at 75.

denied the request.³ RP XIV at 2423. In so doing, the court did not acknowledge Mr. Hastings' legitimate concerns. Id. Instead, the court found that Mr. Hastings was "extremely manipulative." Id.

(b) Pre-trial, Judge Wulle acknowledged personal involvement in the case.

As the assigned trial judge, Judge Wulle presided over Hastings' case many times before the trial commenced. RP I, IV, V, VII, VIII, IX, XXVIII⁴, X, XI, XII, XIII A & B, XIV. During a hearing about courtroom security, Judge Wulle stated the following:

[T]his court has been concerned from the moment he sat down in front of a TV set one night and discovered that there was a SWAT standoff, and it wasn't till the - - it started to play out that I realized that it was, in fact, my signature that sent that team out there to that house, and I watched the event unfold on television.

RP XIII A at 212. Despite his personal involvement in the case, Judge Wulle did not recuse himself.⁵

(c) Mr. Hastings faced very serious charges all enhanced with firearm enhancements.

Mr. Hastings was tried to a jury on a second amended information. The first eight charges reflect two charges, charged in the alternative, of attempted first degree murder and first degree assault. CP 108-114. Each pairing of alternative charges specified the name of SWAT officers:

³ Defense attorney Buckley told the court that he was ready for trial. RP XIV at 2422.

⁴ This volume number is in chronological, but not numerical, order.

⁵ Defense counsel never asked Judge Wulle to recuse himself.

Vancouver Police Officer Chris LeBlanc (Counts 1 and 2); Vancouver Police Officer John Key (Counts 3 and 4); Clark County Sheriff's Sergeant Scott Schanaker (Counts 5 and 6); and Clark County Sheriff's Deputy Scott Holmes (Counts 7 and 8). CP 108-114. Vancouver Police Officers Brent Donaldson and Todd Schwartz were each named as alleged victims of second degree assault in Counts 9 and 10, respectively. CP 112. The second degree assault charges specifically alleged that the officers were assaulted with a firearm. CP 112. Additionally, all of the charges included firearm enhancements.⁶ CP 108-113.

(d) Mr. Hastings is convicted, sentenced, and appeals.

Mr. Hastings was found guilty as charged of four counts of attempted first degree murder and two counts of second degree assault all with firearm enhancements. CP 174, 176, 179, 182, 185, 186, 187. The court imposed a standard range, plus enhancements, sentence of 1,443 months. CP 223. Hastings made a timely appeal. CP 234-35.

2. Trial testimony.

Around 6 a.m. on August 18, 2007, a team of police and corrections officers set up surveillance outside of a rental house in Vancouver. RP XVII at 536-537. Their goal was to locate and arrest

⁶ Mr. Hastings was also tried on an eleventh count, first degree unlawful possession of a firearm. CP 112-113. Although Mr. Hastings was found guilty of the charge, the State dismissed it at sentencing. CP 187, 221.

Matthew Hastings on several outstanding arrest warrants. *Id.* The officers had information that Mr. Hastings might be armed. RP XVII at 537. Around 8:00 a.m., Detective Brian Acee made a phone call into the house and awoke the renter, Kim Runyon. RP XVII at 537-538. Detective Acee asked Ms. Runyon to step out of the house. RP XVII at 537-538. She did so, leaving her adult son, Shane Runyon, and Mr. Hastings, in the house. RP XVII at 538-539. Ms. Runyon told the police that Mr. Hastings was aware that they were outside. RP XVII at 539. The police did not allow Ms. Runyon to return to the house. *Id.*

A few minutes later, Mr. Hastings called Ms. Runyon's cell phone and spoke with her briefly. RP XVII at 540. Clark County Sheriff Detective Gordon Conroy took the phone and told Mr. Hastings that the police knew he was in the house and that he needed to come out. RP XVII at 579, 582. Mr. Hastings said that he was not in the house and that he had left before the police arrived. RP XVII at 582-583. Suspecting otherwise, Detective Conroy hit his car's air horn. RP XVII at 583. Because he could hear the air horn through the cell phone, Detective Conroy concluded that Mr. Hastings was in the house, and told Mr. Hastings that he could tell he was in the house. *Id.* Mr. Hastings said, "Oh, you want to play that way, mo...fu.....? You want some of this?" RP XVII at 584.

Seconds later, Detective Conroy heard what sounded like a gunshot from the back of the house. RP XVII at 585.

Two Vancouver police officers, Brett Donaldson and Todd Schwartz, were behind the house. RP XVIII A at 632-636; RP XVIII B at 730. Officer Schwartz is a K-9 officer and had his dog with him. RP XVIII A at 632-636. Both the officers and the dog were behind a woodpile. The officers had a good view of the backyard. RP XVIII A at 632-636; RP XVIII B at 732, 739. Around 8:20 a.m., both officers saw a portable air conditioning unit fall from a rear window and crash to the ground. RP XVIII A at 640; RP XVIII B at 740. Officer Donaldson saw Mr. Hastings' torso, foot, and face coming out of the unobstructed window. RP XVIII B at 740, 742. He and Mr. Hastings made eye contact. RP XVIII B at 742. He recognized Mr. Hastings from a photo he had seen at an earlier shift briefing. RP XVIII B at 740. Officer Donaldson called this out over his police radio. RP XVIII B at 741. Seconds later, he heard Swartz say something about a gun and then heard a shot fired. Id.

After that, Officer Donaldson heard what he felt were sounds of someone fortifying the inside of the house. RP XVIII B at 749. He could hear hammering and mattresses being pushed against a window. Id. All the blinds to the house were closed. Id.

After the initial shot was fired out of the back of the house, Detective Conroy used the public address system on a police car to loudly tell Mr. Hastings to answer his phone, to come out of the house with his hands up, and that they [the police] were not leaving as they had a warrant for his arrest. RP XVII at 547.

At 9:12 a.m., Officer Donaldson again reported a shot fired. RP XVIIIIB at 750. He could hear the bullet passing between Officer Schwartz and himself. Id. He felt that the shot came from the window where the air conditioner unit had been as it was the only open window in the back of the house. RP XVIIIIB at 751.

At one point, Detective Acee had Mr. Hastings on the phone. RPXVII at 550. Mr. Hastings told Detective Acee that he was going to shoot Shane [Runyon] in the head and that he had Mr. Runyon tied up. Id. He also told Detective Acee that he was a good shot, that he had saved up ammunition, that he had a couple of firearms, that he was not going back to prison, that he had been expecting the police, and that he had been practicing for this. RP XVII at 556. Mr. Hastings also said that he was going to hell and that he was going to take as many people with him as he could. RPXVII at 557. Detective Acee took this to mean that Mr. Hastings intended to harm the police officers. Id.

Detective Acee decided that it was time for help from the Southwest Regional SWAT team so he had them called out. RPXVII at 559; RP XVIIIIB at 853.

Because Shane Runyon was deemed a hostage, hostage negotiator, Vancouver Police Detective Patrick Kennedy, was called in. He made phone contact with Mr. Hastings. RP XXA at 1170. Mr. Hastings told Detective Kennedy that he took the air conditioning unit out so the police could not use the hole to come in the house or put gas in the house. RP XXA 1175. Mr. Hastings also told Detective Kennedy others things: he was barricading himself in the house by boarding things up; he wanted to make it more difficult for the police to reach him; he had plenty of rounds because he had been stocking up; and he did not want to go back to prison. RP XXA at 1175-1176.

The situation accelerated when Mr. Hastings told Detective Kennedy that the police had five minutes to move a SWAT vehicle from the front lawn. RP XXA at 1176-77. If the vehicle was not moved, Mr. Hastings said that he would cut off Shane Runyon's fingers and send them out the window. RP XXA at 1177. Mr. Hastings hung up, but Detective Kennedy was able to reestablish contact. Mr. Hastings moved up the timeline for cutting off fingers to two minutes. RP XXA at 1180.

Many members of the SWAT team had collected at the Runyon house by this time. The on-scene SWAT team leader, Vancouver Police Sergeant Joe Graaff, decided that Mr. Hastings 2 minute warning created a need to act immediately to prevent harm to Shane Runyon. RP XVIIIIB at 855, 870, 882. The plan was for a crisis team of four SWAT members to enter the home in a stick – or single file - formation. RP XXIIIA at 1859. The sole purpose of the entry was to remove suspected hostage Shane Runyon. RP XXA at 1235. The entry point was the rear sliding glass door. RP XXA at 1226. It was believed that that door had not been fortified. RP XXIIIA at 1860.

Clark County deputy and SWAT member Bill Sofianos used a raking device to “break and rake” the rear slider door. RP XIVA at 940. Four SWAT officers entered the home: Vancouver Police Corporal Chris LeBlanc; Clark County Sheriff Sergeant Scott Shanaker; Vancouver Police Officer John Key; and Clark County Sheriff’s Deputy Scott Holmes. RP XXIIIA at 1859. Gunfire started as soon as the SWAT team entered the house. RP XXIIIA at 1865. Mr. Hastings was shooting through the walls. Id. Almost immediately, a third shot hit the backyard woodpile. RP XVIIIIB at 753.

After an initial scan of the living room, where bullets were coming through the wall, the four SWAT crisis team members walked down a

darkened hallway. RP XXIII A at 1865-1868, 1870. A quick check of an open bedroom door revealed nothing in that room. RP XXIII A at 1869. A door on the opposite side of the hall was closed. RP XXIII A at 1870. Two of the SWAT officers forced open the door and entered a room that was almost entirely black. RP XXIII A at 1874-75.

Corporal LeBlanc, the first officer through the door, saw Mr. Hastings standing there holding a gun. RP XXIII B at 1968. Mr. Hastings shot two or three times and then retreated to an adjacent bathroom, shut the door, and continued firing through the door. RP XXIII B at 1968-1970. Deputy Holmes returned fire through the door. RP XX B at 1299. Corporal LeBlanc was able to push the door open a fraction, enough to see a muzzle flash from Mr. Hastings' gun. RP XXIII B at 1964.

Corporal LeBlanc suddenly felt a sensation as if he had been hit hard in the ribs. RP XXIII B at 1971. Sergeant Schanaker and Deputy Holmes heard LeBlanc say that he thought he had been shot. RP XX B at 1298; RP XXIII A at 1878. Simultaneously, the SWAT officers heard over their radios that the hostage had been recovered. RP XX B at 1301. Believing that their mission to locate and remove Shane Runyon was accomplished, the four officers retreated down the hallway in the same direction from which they had come. RP XXIII A at 1884. They continued to hear gunfire as they retreated. RP XXIII A at 1884. Corporal

LeBlanc was removed from the house by medics and taken to the hospital. RP XIVA at 943-943. He had been shot in the armpit where he was not covered by body armor.⁷ RP XVIIIA at 620; RP XXIIIB at 1974.

The three remaining SWAT crisis team members and other officers who had come into the house got behind a ballistics blanket in the living room. RP XXIIIA at 1885. The ballistic blanket is made from bullet proof material. Shortly thereafter, the shooting stopped. RP XXA at 1240. All told, the SWAT officers had been in the house for approximately two minutes. RP XXA at 1236; RP XXIIIA at 1922. What the officers had heard over the radio about the hostage being removed from the house was not true. RP XXIIIA at 1885. Shane Runyon had not been located and removed. *Id.* Negotiations immediately began again with Mr. Hastings. RP XXIIIA at 1886. Mr. Hastings shouted from the bathroom that the police had failed in their mission to rescue the hostage. XXIIIA at 1933.

A multi-hour standoff ensued. Over the next 18 hours, the Clark County SWAT team was replaced with three other SWAT teams from nearby Oregon communities, all of whom took turns in order to provide a fresh SWAT presence. RP XXB at 1355. Around 3:00 a.m., the last of the three replacement teams, the East Metro SWAT team from Gresham,

⁷ Although the injury was life-threatening, it did not damage any internal organs and we has back to work at the time of trial. RPXIIIA at 621-622; RP XXIIIB at 1974.

Oregon, used an explosive device to blow a hole in an exterior wall and shoot in gas. RP XXB at 1360-61. At some point prior to this – the record is not clear - Shane Runyon - left the residence. RP XXB at 1358. Shane Runyon had a bullet wound. XXIV at 2165. After the gas was shot into the house, Mr. Hastings came out of the bathroom, was shot with a taser, and taken into custody. RP XXB at 1361-1363.

While the trial was pending, Mr. Hastings told a custody officer at the Clark County Jail that he used real guns, that he was not afraid to use a gun, and that he shot a police officer. RP XXIIA at 1625-1626. Vancouver Police Officer Free, who was one of the SWAT officers at the Runyon house, also encountered Mr. Hastings at the jail. Mr. Hastings got Officer Free's attention by calling his name, laughed, and told another inmate that Officer Free was one of the police officers that he shot at. RP XXIIIB at 1811-1812.

D. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING MR. HASTINGS' REQUEST FOR A CONTINUANCE.

(a) Mr. Hastings was frustrated in preparing for trial.

Four days before trial was to begin, Mr. Hastings moved for a continuance of the trial in order to discuss defense witnesses with his

attorney, overcome delays in obtaining discovery, and review material related to his attorneys' recent interviews with witnesses. As the trial court was aware, although Mr. Hastings' trial had been pending for a year and a half, witness interviews were delayed while his counsel waited for key discovery before conducting the interviews. Overall, the discovery in Mr. Hastings' case was mountainous. Because the case was so immense and so complex, the original attorney, Mr. Buckley, requested and the court approved, the appointment of a second defense attorney, Mr. Rucker. Although the trial was scheduled to start in a few days, Mr. Hastings had yet to review all the discovery and all of his attorneys' notes from the witness interviews. Because Mr. Hastings had not reviewed that material, he had not been able to work with his attorney to choose defense witnesses who could rebut the claims that arose during interviews.

(b) Trial courts retain discretion to continue trials.

Upon motion by any party, the court may "continue the trial date to a specified date when such continuance is required in the administration of justice." CrR 3.3(f)(2). A trial judge's failure to grant a continuance may in turn deprive a defendant of a fair trial to which he is entitled under due process. State v. Purdom, 106 Wn.2d 745, 725 P.2d 622 (1986); U.S. Const. Amend 14. The Washington Supreme Court has noted:

While efficient and expeditious administration is, for courts, a most worth-while objective, the defendant's rights must not be overlooked in the process through overemphasis upon efficiency and conservation of time of the court.

State v. Watson, 69 Wn.2d 645, 651, 419 P.2d 789 (1966). Where the denial of a continuance had deprived the accused of a fair trial, the appellate court must examine the totality of circumstances. State v. Jennings, 35 Wn. App. 216, 666 P.2d 381 (1983).

(c) The denial of Mr. Hastings' request for a continuance was an abuse of discretion.

In Mr. Hastings' case, the trial court's refusal to grant a continuance was untenable in light of the impediments over which Mr. Hastings had no control. A trial court's denial of a continuance request can specifically be overturned if it is based on a failure to exercise discretion. State v. Hubbard, 37 Wn. App. 137, 679 P.2d 391 (1984); State v. Hartley, 51 Wn. App. 442, 754 P.2d 131 (1988). A trial court's denial of a motion to continue should be reversed where the accused is prejudiced thereby, or the result of the trial would likely have been different had the motion been granted. State v. Early, 70 Wn. App. 452, 853 P.2d 964 (1993); State v. Bonisisio, 92 Wn. App. 783, 964 P.2d 1222 (1998).

An example of circumstances requiring reversal is found in United State v. Flynt, 756 F.2d 1352 (9th Cir. 1985). The defendant sought a continuance to enable him to consult with a psychiatrist in anticipation of

presenting a diminished capacity defense to a contempt charge. Id. at 1356. The trial court refused the request, and the case proceeded to hearing without expert testimony. Id. at 1356-57. The Ninth Circuit reversed the convictions, finding that “Flynt’s only defense ... was that he lacked the requisite mental capacity [and] the district court’s denial of a continuance...effectively foreclosed Flynt from presenting that defense.” Id. at 1358.

Here the trial court abused its discretion in refusing to grant a continuance so that Mr. Hastings could review the information obtained by his attorney during State’s witness interviews and obtain his own witnesses to rebut the claims made by the State’s witnesses. Examining the totality of circumstances, the trial court’s denial of the continuance was untenable. Mr. Hastings’ right to due process weighed heavily in favor of granting the request, particularly where the continuance was necessary to obtain witnesses critical to his defense. This Court should, therefore, find the trial court erred in denying Mr. Hastings’ request for a continuance and reverse his convictions.

2. THE TRIAL JUDGE VIOLATED THE APPEARANCE OF FAIRNESS DOCTRINE BY PRESIDING OVER THE TRIAL DESPITE HAVING WATCHED THE EVENTS OF THE CASE UNFOLD ON TV AND BEING TROUBLED WHEN HE REALIZED HIS SIGNATURE ON A WARRANT SENT THE SWAT TEAM INTO A DANGEROUS SITUATION.

The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV. Similarly, Article I, § 3 of the Washington Constitution provides that “No person shall be deprived of life, liberty, or property, without due process of law.” Wash. Const. Article I, § 3. Under both constitutions, due process secures for an accused the right to a fair tribunal. Bracy v. Gramley, 520 U.S. 899, 904, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997). Furthermore, “to perform its high function in the best way ‘justice must satisfy the appearance of justice.’” In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed 942 (1955), quoting Offutt v. United States, 348 U.S. 11, 14, 75 S. Ct. 11, 99 L. Ed 11 (1954). “The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.” State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972). “The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be

the actual presence or bias or prejudice.” Madry, at 70; Brister v. Tacoma City Council, 27 Wn. App. 474, 486, 619 P.2d 982 (1980), review denied, 95 Wn.2d 1006 (1981).

A decision may be challenged under the appearance of fairness doctrine for “partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party....” Buell v. City of Bremerton, 89 Wn.2d 518, 524, 495 P.2d 1358 (1972), quoted with approval in OPAL v. Adams County, 128 Wn.2d 869, 890, 913 P.2d 793 (1996).

To prevail under the appearance of fairness doctrine, a claimant must only provide some evidence of the judge’s actual or potential bias. State v. Dugan, 96 Wn. App. 346, 354, 979 P.2d 85 (1999). The appearance of fairness doctrine can be violated without any questions as to the judge’s integrity. See, e.g., Dimmel v. Campbell, 68 Wn.2d 697, 414 P.2d 1022 (1966).

In this case, the trial judge himself provided a potential for bias. During a pre-trial hearing, while discussing trial security, the judge stated the following:

[T]his court has been concerned from the moment he sat down in front of a TV set one night and discovered that there was a SWAT standoff, and it wasn’t till the - - it started to play out that I

realized that it was, in fact, my signature that sent that team out there to that house, and I watched the event unfold on television.

RP XIII A at 212.

Because Judge Wulle's opinion of Mr. Hastings was impacted by what the judge saw on television and because the judge took personal ownership of placing the SWAT team in danger by signing a warrant, Judge Wulle should not have presided over Mr. Hastings' trial. Judge Wulle's comments are some evidence of potential bias under Dugan, supra. Accordingly, Mr. Hastings' convictions must be reversed and the case remanded for a new trial before a different judge.

3. THE FIREARM ENHANCEMENT FOR ASSAULT COMMITTED WITH A FIREARM VIOLATES DOUBLE JEOPARDY.

Mr. Hastings was convicted of two counts of second degree assault based on the use of a firearm and his sentence was enhanced because of the firearm use. Thus, Mr. Hastings was punished for the assaults with a firearm and his sentence was further increased because of the firearms. Mr. Hastings was thereby twice convicted and twice punished for using a firearm in the assaults in violation of the prohibition against double jeopardy found in the federal and state constitutions. Consequently, Mr. Hastings' firearm enhancements must be vacated.

(a) The double jeopardy provisions of the federal and state constitutions protect criminal defendants from multiple punishments for the same offense.

The double jeopardy clause of the federal constitution provides that no individual shall “be twice put in jeopardy of life and limb” for the same offense, and the Washington Constitution provides that no individual shall be “twice put in jeopardy for the same offense.” U.S. Const. Amend. 5; Wash. Const. Art. 1 § 9. The Fifth Amendment’s double jeopardy protection is applicable to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 787, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969). Washington gives its double jeopardy provision the same interpretation as the United States Supreme Court gives to the Fifth Amendment. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Double jeopardy is a constitutional issue that may be raised for the first time on appeal. State v. Bobic, 140 Wn.2d 250, 257, 996 P.2d 610 (2000). Review is de novo. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

The double jeopardy clause protects against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple

punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 726, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989)); Gocken, 127 Wn.2d at 100. While the State may charge and the jury may consider multiple charges arising from the same conduct in a single proceeding, the court may not enter multiple convictions for the same criminal conduct. Freeman, 153 Wn.2d at 770-71.

(b) The legislative intent must be reexamined after Blakely.

The Legislature has the power to define offenses and set punishments within the boundaries of the constitution. Freeman, 153 Wn.2d at 771; State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). Thus, the first step in deciding if punishment violates the double jeopardy clause is to determine what punishment is authorized by the Legislature. Freeman, 153 Wn.2d at 771. Courts assume the punishment intended by the Legislature does not violate double jeopardy. Id.; Albernaz v. United States, 450 U.S. 333, 340, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981) (reasoning Congress is predominately a body of lawyers and presumed to know the law). Thus, to determine if the Legislature intended multiple

punishment for the violation of separate statutes, courts begin with the language of the statutes. Freeman, 153 Wn.2d at 771-72.

RCW 9.94A.533 provides for additional time to be added to an offender's standard range if the offender was armed with a firearm:

(3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. . . .

(b) Three years for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection. . . .

(f) The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony.

RCW 9.94A.533.

The statute, part of the Hard Time for Armed Crime Act of 1995 (Initiative 195), was designated to provide increased penalties for criminals using or carrying guns, to "stigmatize" the use of weapons, and to hold individual judges accountable for their sentencing on serious crimes. Laws of 1995, ch. 129 § 1 (Findings and Intent). It provides that

all firearm enhancements are mandatory and must be served consecutively to any base sentences and to any other enhancements. RCW 9.94A.533(3)(e); State v. DeSantiago, 149 Wn.2d 402, 416, 68 P.3d 1065 (2003).

The language of the statute demonstrates that voters intended a longer standard sentencing range, and therefore greater punishment, for those who participate in crimes where a principal or an accomplice is armed with a firearm. But the statute creates a specific exception for those crimes where possession or using a firearm is a necessary element of the crime, such as drive-by shooting or unlawful possession of a firearm, demonstrating some sensitivity to double jeopardy concerns. RCW 9.94A.533(3)(f). The voters apparently did not consider the problem of redundant punishment created when a firearm enhancement is added to a crime and using a firearm is the way the offense was committed.

Significantly, the Hard Time for Armed Crime Act was passed before Blakely, and other United States Supreme Court cases, made it clear that the fact that exposes a person to increased punishment is an element of an offense. Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 2536, 159 L. Ed. 2d 403 (2004); Ring v. Arizona, 536 U.S. 584, 604-05, 122 S. Ct. 2428, 153 L. Ed. 2d 18 (2002); Apprendi v. New Jersey, 530 U.S. 466, 476-77, n.19, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Jones v. United States, 526 U.S. 227, 243, 119 S. Ct. 1215, 153 L.

Ed. 2d 311 (1999) (Stevens, J., concurring). Those cases have made it clear that the relevant determination is not what label the fact has been given by the Legislature or its placement in the criminal or sentencing code, but rather the effect it has on the maximum sentence to which the person is exposed. Apprendi, 530 U.S. at 494; Ring, 536 U.S. at 602. The concept was succinctly stated in Ring:

If the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact, the core crime and the aggravating factor together constitute an aggravated crime. The aggravated fact is an element of the aggravated crime.

536 U.S. at 605.

This concept was reiterated when the United States Supreme Court considered whether double jeopardy principles were violated by seeking the death penalty on retrial after appeal where the first jury was unable to reach a unanimous verdict on whether to impose life or death. Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003).

Justice Scalia⁸ explained the holding of Ring and its significance:

[W]e held that aggravating circumstances that make a defendant eligible for the death penalty “operate as ‘the functional equivalent

⁸ Justice Scalia wrote the opinion for the five-member majority. Justice O’Conner, given her resolute opposition to the rule articulated in Apprendi, dissented from Part III of Justice Scalia’s opinion. 537 U.S. at 117. Four justices dissented because they believed that the State was barred from seeking the death penalty at the second trial. Id. at 118-19. The dissenters specifically relied on Ring for the proposition that aggravating factors in death penalty cases are the equivalent of elements. Id. at 126 n.6 (Ginsburg, J., dissenting). Thus, a majority of the justices agree with Part III of Scalia’s opinion.

of an element of a greater offense.” That is to say, for purposes of the Sixth Amendment’s jury trial guarantee, the underlying offense of “murder” is a distinct, lesser included offense of “murder plus one or more aggravating circumstances.”

537 U.S. at 111 (internal citations omitted.) The Court went on to find “no principled reason to distinguish” what constitutes an offense for purposes of the Sixth Amendment and for purposes of double jeopardy. Ring, 537 U.S. at 111.

The need to reexamine the court’s deferral to the Legislature in double jeopardy jurisprudence in light of Blakely has already been noted by legal scholars. Timothy Crone, “Double Jeopardy, Post Blakely,” 41 Am. Crim. L. Rev. 1373 (2004). The problems of “redundant” counting of conduct under the Federal Sentencing Guidelines, for example, was thoroughly examined by one commentator, who called for a reorientation of double jeopardy analysis to protect defendants from unfairly consecutive sentences. Jacqueline E. Ross, “Damned Under Many Headings: The Problem of Multiple Punishment,” 29 Am. J. Crim. Law 245, 318-326 (2002).

The voters and the Legislature were unaware that the firearm enhancements it created were an element of a higher offense because it

increased the offender's maximum sentence. See Blakely, 124 S. Ct. at 2537-38; State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005)⁹ (violation of Sixth Amendment rights to due process and jury trial to sentence defendant to firearm enhancement when jury verdict supported only deadly weapon enhancement). Because a firearm enhancement acts like an element of a higher crime, the initiative simply adds a redundant element of use of a firearm for crimes where use of a firearm was already an element, a result that voters would not have intended. See RCW 9.94A.533(3)(f).

(c) Mr. Hastings' assault conviction is the same in fact and in law as the accompanying firearm enhancement.

When it is not clear if double punishments are authorized by statute, courts utilize the Blockburger, or "same elements" test to determine if two convictions violate double jeopardy. United States v. Dixon, 509 U.S. 688, 697, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993); Gocken, 127 Wn.2d at 101-02. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact

⁹ The Supreme Court overruled Recuenco's holding that Blakely errors cannot be harmless error, but not the application of Apprendi and Blakely to firearm enhancements. Washington v. Recuenco, 548 U.S. 212, 126, S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

which the other does not. Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932); Dixon, 113 S. Ct. at 2856. This is similar to Washington’s “same elements” test for double jeopardy. Calle, 25 Wn.2d at 777. The test requires the court to look to the statutory offenses to determine if each crime, as charged, has elements that differ from the other. State v. Gohl, 109 Wn. App. 817, 821, 37 P.3d 293 (2001), review denied, 146 Wn.2d 1012 (2002).

Mr. Hastings’ second degree assault convictions were the same in fact and in law as the accompanying firearm enhancements. Factually, each count involved the same criminal act as well as the same victim. Moreover, nothing else established the firearm enhancement which simply required Mr. Hastings to commit the assault with a firearm. Legally, the assault conviction is the same in law as the firearm enhancement. The second degree assault statute, as it pertains to the charge, reads:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

...
(c) Assaults another with a deadly weapon.

RCW 9A.36.021(1)(c). The jury was similarly instructed:

To convict the defendant of the crime of Assault in the Second Degree, as charged in Count 9 [10], each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about July 18, 2007, the defendant assaulted Vancouver Police Officer Todd Schwartz [Vancouver Police Officer Brent Donaldson] with a deadly weapon; and

(2) That this act occurred in the State of Washington.

CP 161, 162 (Instruction 37 and 38, respectively).

The jury found Mr. Hastings was armed with a firearm during the commission of the second degree assaults, and RCW 9.94A.533(3) requires the sentencing court to add additional time to an offender's standard range score "if the offender ... was armed with a firearm as defined in RCW 9.41.010." But the assaults could not have been committed as alleged without Mr. Hastings being armed with a firearm.

Mr. Hastings was given an additional 36 months in prison for each firearm enhancement for a total of 72 months. The effect was to essentially sentence him for assaulting others with a firearm while armed with a firearm, and he was thus convicted and punished twice for the use of a weapon. The addition of firearm enhancements to Mr. Hastings' convictions placed him twice in jeopardy for use of a gun and violated the state and federal constitutions.

(d) The conviction for both assault and the firearm enhancement violate Mr. Hastings' constitutional right to be free from double jeopardy and the firearm enhancement must be vacated.

Mr. Hastings was punished four times for two crimes – twice for the second degree assaults committed with a firearm and twice again for being armed with a firearm while committing the same assaults. Because each assault and enhancement punishment combination are based upon the same facts and law, each combination violates the double jeopardy provisions of the federal and state constitutions. The firearm enhancement must be vacated and this case remanded for resentencing. Gohl, 109 Wn.App. at 824.¹⁰

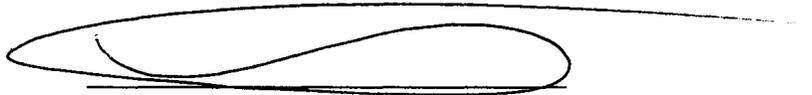
E. CONCLUSION

All of Mr. Hastings' convictions should be reversed and remanded for retrial in front of a different judge. The trial court erred in not granting Mr. Hastings' motion to continue the trial so he could work with his attorneys and be adequately prepared for trial. Moreover, Judge Wulle violated the appearance of fairness doctrine and should not have even heard the trial.

¹⁰ Both Division I and Division II of this court have previously rejected this challenge to the deadly weapon enhancements. See State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 (2006), review denied, 163 Wn.2d 1053 (2008) (Divisions I); State v. Kelley, 146 Wn.App. 370, 189 P.3d 853 (2008) (Division II). However, the state Supreme Court has accepted review in Kelley on this issue (see 82111-9.) Oral argument was heard on October 29, 2009.

Alternatively, the firearm enhancements on the two second degree assaults should be dismissed as each violate double jeopardy. Mr. Hastings' case should be remanded for resentencing.

Respectfully submitted this 2nd day of November 2009.

A handwritten signature in black ink, appearing to read "LISA E. TABBUT", is written over a horizontal line. The signature is somewhat stylized and extends to the right of the line.

LISA E. TABBUT
WSBA #21344
Attorney for Appellant

COURT OF APPEALS
DIVISION II

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CERTIFICATE OF MAILING

State of Washington, Respondent, v. Matthew Ryan Hastings, Appellant
Court of Appeals No. 38979-7-II

I certify that I mailed a copy of Appellant's Brief to:

Matthew Hastings/DOC#779698
Washington Corrections Center
P.O. Box 900
Shelton, WA 98584

and to:

Michael C. Kinnie
Clark County Prosecuting Attorney's Office
P.O. Box 5000
Vancouver, WA 98666-5000

And that I also mailed the original and one copy to the Court of Appeals, Division II.

All postage prepaid, as required, on November 2, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE
OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT .

Signed at Longview, Washington, on November 2, 2009.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Appellant

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