

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 39077-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

TYREEK DEANTHONY SMITH, Appellant.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Smith's motion to sever.
2. The trial court violated the confrontation clause by admitting a redacted statement by Jackson that still clearly implicated Smith.
3. The trial court erred by denying Smith's motion for mistrial.
4. The imposition of a deadly weapon sentence enhancement on Smith's first degree robbery conviction violates double jeopardy.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. DID THE TRIAL COURT ERR BY DENYING THE MOTION TO SEVER WHERE ADMISSION OF THE NON-TESTIFYING CO-DEFENDANT'S STATEMENT, EVEN IN A REDACTED FORM, DID NOT ELIMINATE THE PREJUDICE TO SMITH? (Assignments of Error 1-3)
2. DID THE COURT VIOLATE DOUBLE JEOPARDY WHEN IT SENTENCED SMITH FOR FIRST DEGREE BURGLARY, WHICH INCLUDED THE ELEMENT OF BEING ARMED WITH A DEADLY WEAPON, AND ALSO ADDED A SENTENCING ENHANCEMENT FOR THE USE OF A DEADLY WEAPON? (Assignment of Error 4)

III. STATEMENT OF THE CASE

Trial Testimony:

This case arises from a crime where there were no eye-witnesses, no fingerprints, no DNA. Instead, the State's entire case is based on the

testimony of a participant, Pierre Spencer, who took a deal with the State in return for testifying against his two friends, Tyreek Smith and Darrell Jackson.

On September 23, 2007, police found Ruben Doria and Warren Abrazado dead in their apartment. RP6 599-600. It became immediately obvious that the men had been engaging in a marijuana grow operation inside the apartment and that many of the plants had been stolen. RP6 624, 626, 762. In addition, Doria's Isuzu Trooper, a computer, a small lock-box, and an X-Box system were missing. RP6 732, 735, 762, RP7 844.

Interviews with Doria's friends confirmed that he had been dealing marijuana and had recently begun a grow operation. RP6 752, RP7 867.

Friends had last seen Doria and Abrazado in the late evening/early morning hours of September 21 (Friday). RP6 687-88. It was a usual day for Doria, which meant working on his grow operation and selling marijuana from his apartment. RP6 683, 687, 689, RP7 869.

Friends said that it was common for Doria to sell marijuana from his apartment. RP7 869. Around 1 a.m. Friday night/Saturday morning, Jackson called and asked to come up and buy some marijuana—which he did. RP6 689. He left. RP6 691. Jackson had been there before to buy

marijuana. RP6 694. He apparently owed some money to Doria. RP6 697.

Doria's friends finally left his apartment around 5 or 6 a.m. on September 22 (Saturday). RP6 721. He talked with a friend by phone at 9:30 a.m. RP7 856. After that, friends tried all day to contact Doria by phone, but he did not answer. RP6 725-26.

Patrick Baska, one of Doria's friends, knocked at his door around 2:30 p.m. on Saturday. RP7 875. He had entered through the building's front door, which had been unlocked. RP7 875. He got no response to his knock, phone call, and text, but he thought he could hear people moving around inside. RP7 876. Getting no response, he left. RP7 878. As Baska drove away from the apartment, he saw Abrazado driving toward the apartment in Doria's Trooper. RP7 880.

A receipt found at the apartment placed Abrazado at Lowes at 2:38 p.m. that Sunday. RP8 983.

On September 23 (Sunday), Doria's friends still had not heard from him, which was odd because he had a party planned for that evening. RP6 728. At 6 p.m., two of his friends, hearing loud music inside the apartment, but still getting no response, climbed up on the balcony, entered the apartment, and found Doria and Abrazado dead within. RP6 731, RP7 817. They called the police. RP7 832.

Doria had duct tape on his mouth and restraining his hands and feet. RP8 1057, 1059. Both Doria and Abrazado had multiple knife wounds and had died quickly from blood loss. RP8 1026. In addition, Doria had blunt-force injuries to his head. RP8 1064.

The next day, Doria's Trooper was found abandoned in a parking lot. RP7 901. The driver's side window was down and the keys were inside. RP7 902.

The police found no sign of forced entry. RP9 1136. With no leads to go on, the police had no real suspects until January, 2008, forced to check into everyone who called Doria, and anyone who bought drugs from him. RP9 1148. It was at that time when an inmate in the local jail reported that Pierre Spencer had bragged about killing a drug dealer, saying it did not bother him because he had killed many people. RP12 1686, RP11 1544. Police had already been investigating Spencer because his employer's cell phone had been used to make calls to Doria. RP12 1688. Spencer was arrested January 14, 2008, but refused to give a statement. RP11 1485-86.

Police had also been investigating Jackson because he was known to have purchased marijuana from Doria. RP12 1683. Later in the month, Smith and Jackson were arrested. RP9 1159.

Smith's only apparent connection to Doria was that Doria had purchased a box of cigars from Smith at Jackson's apartment on one occasion one to two months before the murders. RP6 694-95. Smith stayed occasionally with Jackson at his apartment. RP9 1122. Smith was known to sell Swisher Sweet Cigars. RP9 1122.

Spencer's first statement was November 7, 2008. RP9 1183. He was told that if he gave a statement, it could not be used against him in his trial unless his later testimony was inconsistent. RP9 1195-96. It was understood that he would receive leniency if he cooperated. RP12 1735. After the statement, Spencer was offered a deal—if he testified against Smith and Jackson, he would be permitted to plead to lesser charges and avoid the mandatory life-without-parole sentence he was condemning his friends to. RP10 1355. The deal was, he would have to plead guilty to all the charges, including two counts of aggravated first degree murder, but sentencing would not take place until after his testimony. RP10 1351. He was told that if his later testimony was not the "truth," the deal would be void and he would get life-without-parole. RP10 1354, RP10 1362.

Spencer and Smith had been in the army together. RP10 1363. According to Spencer's testimony, Smith called him Friday night, September 21, and asked him to go to Jackson's apartment to plan a robbery. RP10 1367. Spencer said the plan was to rob a marijuana dealer.

RP10 1372. Jackson was to call up and ask to go in to buy marijuana.

RP10 1378. He said there was no discussion of masks, duct tape, or murder. RP10 1377. They believed that there was no risk of the police being called by the dealer because of the drugs. RP10 1378.

They went to the apartment Friday and Jackson went inside, but they did not go through with it because there were others there. RP10 1382, 1384. They decided to try again the next day. RP10 1384.

On Saturday, Spencer said, he drove Smith over to pick up an SKS rifle. RP11 1414. Jackson had a gun, the .357 revolver. RP11 1424. According to Spencer, Jackson then called Doria and Doria opened the door for the three of them and walked them up to the apartment. RP11 1423. Doria was sitting down in the apartment. RP11 1529. After they were in the apartment, Jackson pulled out the gun. RP11 1428. Doria tried to go to the door, but someone pulled him back to the couch.¹ RP11 1440.

Spencer said both Jackson and Smith were pointing guns at Doria. RP11 1442. Then Spencer duct taped Doria's mouth, hands and feet. RP11 1440. Spencer said Smith turned up the music. RP11 1440.

¹ In the November 7th statement, Spencer said all three of them grabbed Doria; on February 2nd, Spencer said no one had grabbed him, and at trial, he testified that only Jackson and Smith grabbed Doria. RP11 1440, 1533.

Spencer said they were all wearing gloves, the ones he had brought. RP11 1440.

In Spencer's version of events, Smith hit Doria in the head with the .357, which Spencer said Jackson had been holding. RP10 1448. Spencer said that Smith said that they would have to get rid of Doria in case he retaliated. RP11 1450.

Then, they heard a knock at the door. RP11 1452-1453. Doria's phone rang. RP11 1452. Then the person went away. RP11 1453.

Spencer said he was surprised to see Smith stabbing Doria in the back. RP11 1455. Spencer said that Smith handed the knife to Jackson, who stabbed Doria. RP11 1457. Jackson then gave the knife to Spencer and he stabbed Doria, too. RP11 1458. Then, he said, Smith cut Doria's throat. RP11 1460.

A few minutes later, Abrazado came home. RP11 1464. Jackson and Smith pulled him inside and Jackson cut his throat. RP11 1465. Spencer claimed he never saw any further injuries to Abrazado. RP11 1465.

According to Spencer, Jackson and Smith then drove away in the trooper with the marijuana plants, leaving the SKS rifle with Spencer. RP11 1468-69, 1483.

After getting back to Jackson's apartment, Spencer said they remembered leaving the bag with their gloves at Doria's apartment, so they returned and Smith entered, without gloves, and got the bag. RP11 1478-79.

No fingerprints or DNA from Smith, Jackson and Spencer were found at the apartment or in the Trooper. RP8 942-945.

Spencer had owned the .357 revolver that was allegedly used in this crime, which he claimed he had "sold" to Smith. RP10 1363. Spencer brought gloves to the scene, but claimed he had no plan to use them. RP10 1366. Spencer brought an extra cell phone, which he said he gave to the others to use. RP10 1366, 1375. Spencer drove everyone to the scene in his car. RP11 1523. Spencer kept the SKS rifle. RP11 1483.

Spencer claimed he had no idea anyone would be hurt. RP11 1516. He also claimed he had no idea the State might give him a deal until his attorney showed up with the paperwork. RP11 1512-13.

Spencer had told his friend, Michael Johnston, that he and another friend had robbed a weed dealer and that he, Spencer, had cut his throat. RP11 1589, 1599, RP13 1840, 1843. Johnston saw Spencer with an SKS rifle in October. RP13 1839.

After Spencer's arrest, police arrested Smith and Jackson. RP12 1693, RP13 1757. Jackson immediately confessed. RP13 1759.

Smith was arrested while he was visiting family in Georgia. RP12 1693. Smith had gone to Georgia on September 28. RP12 1693. Smith readily gave a statement to police, telling them that he had been with “others” planning to rob Doria on that Friday night.² RP12 1695. However, when one of the others talked about using violence on Doria to “make it look good,” he told the others he wanted out and left. RP12 1696. He went to Sharon Lightner’s apartment and saw through the window when the others left. RP12 1697. They left around 10 or 11 a.m. and did not return until around 4 p.m. RP12 1697. Smith spent the night at Lightner’s and did not return to “the other’s” apartment until the next day, when he saw four or five marijuana plants. RP12 1697.

Sharon Lightner, Jackson’s sister, testified that Smith told her sometime before Labor Day, 2007³, that he was thinking he would “re-up on some marijuana” and asked if she would store some in her apartment. RP9 1122-23. She said that a few weeks later, Smith was at her apartment all day, acting strangely, repeatedly looking out the window. RP9 1126. She thought he might be expecting someone or something. RP9 1126. He also kept going over to Jackson’s apartment and then returning, although she said this was not unusual. RP9 1127.

² Again, this statement was redacted to omit references to Jackson and Spencer.

³ Labor Day was on September 3, 2007.

Bobby Simmons, a friend of Jackson's family, testified that he was also approached by Smith and asked if he would help move some marijuana plants to keep Jackson from getting in trouble. RP9 1210. Simmons saw six or seven plants in Jackson's apartment. RP9 1212. For impeachment purposes only, the State was permitted to introduce evidence that Simmons had told police that Smith told him "they went and robbed some plants and they needed to move them." RP9 1235.

Smith's ex-girlfriend, Natasha Sabin-Lee, testified that she had a cell-phone conversation with Smith toward the end of September on a Saturday (she could not be specific about the date) where she thought she heard Smith say he was involved in "hitting a lick."⁴ RP10 1281. Smith also told her he had a lot of marijuana plants. RP10 1281. Sabin-Lee asked Smith if this had anything to do with the recent murders, but he said it did not. RP10 1289.

Brian Moore, a friend of Smith's and Jackson's, testified that Jackson had asked him to hold some marijuana plants for him. RP12 1622. Jackson gave him three or four plants. RP12 1623.

Cell phone records showed many calls from Spencer's extra phone to Spencer, Doria, Smith relatives, and Sabin-Lee's work on September

⁴ What she actually said she heard Smith say was "Me and D hit a lick." RP10 1260. The reference to "D," Jackson's nickname, was redacted. RP10 1260.

22, 2007. RP12 1647-1657. In addition, Jackson's land-line had been used to call Sabin-Lee that day at 8:41 a.m., 1:17 p.m. (just after a cell phone call), and at 8:42 p.m. RP12 1662-64.

Sabin-Lee remembered that on September 22, Smith had dropped her off at work and picked her up after. RP10 1312. She worked from 1 p.m. to 10 p.m. RP10 1303. Smith often borrowed her car and would drop her off and pick her up. RP10 1310.

Jackson made two full statements to police, which were introduced in redacted form in their joint trial. RP13 1762-1773, RP13 1784-1812. Smith's and Spencer's names were replaced with various non-specific pronouns like others, someone, he. RP13 1762-1773; RP13 1784-1812. The jury was instructed to consider Jackson's statements only against Jackson. RP13 1758, 1779.

Procedural History:

Tyreek Smith was charged with two counts of aggravated first degree murder with premeditated intent, two counts of first degree felony murder, one count of first degree robbery, and one count of burglary in the first degree. CP 1-3, 17-21.

Smith moved pre-trial to have his charges tried separately from his co-defendant, Darrell Jackson, because Jackson had made a full confession to police in which he had implicated Smith, as well. CP 8-13.

The State opposed the motion to sever, arguing that Jackson's statement could be redacted to "delete 'all references to'" Smith. CP 14-16.

Although it never directly rules on the motion, the court accepting the State's proposed redactions, and proceeded with a joint trial, impliedly denying the motion to sever. RP 12/2/08; RP 1/15/09.

During opening argument, Jackson's attorney told the jury that Jackson had given a statement implicating Smith and Spencer. RP5 577-78. Smith immediately objected and asked for a mistrial. RP5 577-78. The court denied Smith's motion, instead directing Jackson's attorney to tell the jury he had been "mistaken." RP5 579.

After the State rested, Smith renewed his motions to dismiss and sever, arguing that the introduction of the redacted statement substantially prejudiced his defense. RP13 1824. The court again denied the motion. RP13 1824.

The jury convicted Smith and Jackson on all charges. RP16 2020. In addition, the jury found four aggravating circumstances proved. RP16 2021-22. And, the jury returned special verdicts for deadly weapon and firearm enhancements on all six counts. RP16 2025-2027.

Finding that two murder convictions for each victim violated double jeopardy, the court merged counts I and III and II and IV, entering judgment for two counts of first degree murder with two alternative

means, felony murder and premeditated. Supp. CP (Order Merging Counts I and III and Counts II and IV).

Smith was sentenced to a mandatory term of life without parole on both murder count, and the maximum sentence on the two other counts. CP 104. This appeal timely follows.

IV. ARGUMENT

ISSUE 1: THE TRIAL COURT ERRED BY DENYING THE MOTION TO SEVER WHERE ADMISSION OF THE NON-TESTIFYING CO-DEFENDANT'S STATEMENT, EVEN IN A REDACTED FORM, DID NOT ELIMINATE THE PREJUDICE TO SMITH.

Prior to trial, Smith asked the court to sever his trial from that of his co-defendant, Jackson. CP 9-13. The primary reason for this motion was that Jackson had given a lengthy confession to police, in which he had implicated himself, Smith, and Spencer, in the crimes. CP 9-13. Although the State agreed to redact Jackson's statement, using non-personal pronouns, Smith objected and renewed his request for severance. RP 1/15/09 9; RP1 6. The court denied the motion. RP 12/2/08; RP 1/15/09.

Then, in opening statements, Jackson's attorney actually told the jury the names in Jackson's unredacted statement—told them Jackson was implicating Smith and Spencer: “He admitted that he took Mr. Spencer and Mr. Jackson over to Ruben's apartment on Friday night with the plan

being that there was going to be a robbery.” RP5 577. And then he said again: “He admitted that he . . . went back the next day with Pierre . . . and Tyreek.” RP5 577. Smith objected and moved for mistrial. RP5 577-78. The court denied the motion, ruling that the jury would be told that Jackson’s attorney merely “misspoke” and meant to say that Jackson and “others” did it. RP5 579. Following the ruling, Jackson’s attorney told the jury: “I misspoke in my last statement . . . that Mr. Jackson, in his statement, said that he and others went to the apartment.” RP5 579.

Jackson’s redacted statements:

First, Jackson’s statement to Detective Miller in a January 17, 2008, interview was put before the jury. RP13 1757. After initially denying involvement in Doria and Abrazado’s deaths, Jackson made a statement to police implicating himself, Smith and Spencer. RP13 1761, CP 10. The jury was told to consider Jackson’s statement against Jackson.⁵ RP 13 1758.

- According to Jackson, on Friday night, “he and *the others* went [to Doria’s apartment] together to do a, quote, lick.” RP13 1762.

⁵ “Ladies and gentlemen, the testimony that you are about to hear regarding the statements made by Darrell Jackson may be considered only for the purpose of deciding the case against Darrell Jackson. You must not consider these statements for any other purpose.” RP13 1758.

- Jackson said the plan was for him to call Doria and ask to buy marijuana and, “basically, be *their* way in.” But they did not go through with the plan because others were with Doria Friday. RP13 1762.
- Then, “Jackson claimed that he did not go over to Ruben’s apartment on Saturday because he did not want to be a part of the incident, but that *the others* did go there to do the robbery.” RP13 1763.
- Challenged again by police, Jackson admitted he had actually been there on Saturday. RP13 1764.
- “Jackson said that he had called Ruben to let him know that he was coming over as that was the way that they normally did their business. Jackson said that he and *the others* then all went over to Ruben’s. Jackson said that he called Ruben again when they arrived. Ruben came downstairs and opened the security door. Jackson said that he and Ruben were walking up the stairs to Ruben’s apartment when *the others* rushed in. According to Jackson, *the others* pushed Ruben into the apartment and he followed.” RP13 1764.

- He said that *the others* had the SKS rifle and the revolver.
RP13 1765.
- Jackson said that “*someone else* was doing most of the talking” and “that he was, quote, the grunt.” RP13 1765.
- Jackson said he left the apartment and when he returned, “Ruben was, quote, taped up, using, he thought, duct tape that *someone else* had brought.” RP13 1767.
- “Jackson described *one of the others* stabbing Ruben and then, quote, slitting his throat.” RP13 1767.
- “Jackson then said that . . . *someone* was upset that they didn’t get much and was talking about it. He then started to stab Ruben in the back while Ruben was on the couch. According to Jackson, *that person* was standing behind Ruben at this time. . . . Jackson said that *that person* then, quote, slit, unquote, Ruben’s throat and Ruben fell to the floor.” RP13 1768.
- “He also described how Warren had returned home, and that *one of the others* hit him in the face as he entered.” RP13 1767.
- “Jackson said that Warren fell to the floor after being hit and started screaming when he saw what was going on.

Jackson said that was when Warren had been killed.”

RP13 1767.

- Jackson said that Abrazado was “attacked by *another person* as he entered the apartment. Jackson was said that he was not certain whether *that person* hit Warren with his fist or a gun as earlier in the interview, but at this point said it was with the butt of a gun.” RP13 1768.
- Giving even more detail, “Jackson said that *another person* then got the knife that had been used on Ruben and stabbed Warren before slitting his throat.” RP13 1769.
- Jackson said he left after Warren was killed and took the bus home. RP13 1770.
- Jackson said he next saw “*the others*” “later that evening.” “According to Jackson, *the others* returned to his apartment, but only one came in. *That person* had a couple of plants and a small safe when he returned.” RP13 1771.
- When asked why they had committed the crime, “Jackson explained that *one of them* was having money trouble and had talked of, quote, doing a lick, unquote.” RP 13 1773.

Then, further statements were given to the jury from Jackson’s taped interview. RP13 1780. Again, the jury was given the limiting instruction.

RP13 1779. The jury is then essentially told Jackson's entire story again, with redactions substituting "anybody," "guys," "they," "one of them," "one," "he" and "the others" for the names. RP13 1784-1812, In addition, he added the following new details about what these other men did:

- "*One* is hitting him in the back of the head saying, 'I am God.'" RP13 1796. "How many times does he say, 'I am God'? Twice, three—two or three times." RP13 1796-97.
- Then, "*He* stabs [Ruben]". RP13 1797.
- "How many times did *he* stab Ruben? . . . I would say about five or six times." RP13 1798.
- When Warren came home, Jackson says, "*He* stabbed him. With what? With the knife. Where did that knife come from? From *another person*. Did *one* hand it to *another*? I guess so." RP13 1802.
- "What does *he* do? Cuts his throat." RP13 1803.

Jackson's statements clearly implicate the two "others" in the crimes. It is very clear on the face of it that he used real names in his statements and that these have been replaced. What the jury does not know because of the redactions is that in Jackson's statement, it was Spencer who is yelling that he is God and killed Ruben. RP13 1819-21.

After Jackson's statement was entered into evidence, Smith again renewed his objection to the redaction and his motion to sever. RP13 1819-1821. Smith argued that the implication to the jury was clear that Jackson had implicated Smith and that the introduction of this statement without names had left the jury with the inaccurate impression that Jackson had corroborated Spencer's statement, when in fact Jackson said that Spencer had been the one who killed the victims, not Smith. RP13 1820. Smith again told the court that the introduction of the redacted statement substantially prejudiced his defense and asked for a mistrial/severance. RP13 1824. The court again denied the motion. RP13 1824.

The United States Supreme Court has held that to avoid violating the confrontation clause of the United States Constitution, sixth amendment, any court admitting a nontestifying codefendant's confession must redact the confession so that "not only the defendant's name, but any reference to his or her existence" is eliminated. *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S. Ct. 1702, 1709, 95 L. Ed. 2d 176 (1987); *see also Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968); *State v. St. Pierre*, 111 Wn.2d 105, 111-12, 759 P.2d 383 (1988). The reason for this rule, also referred to as the "*Bruton* problem" is that certain "powerfully incriminating extrajudicial statements

of a codefendant”—those naming another defendant—considered as a class, are so prejudicial that a limiting instruction alone is insufficient. *Marsh*, 481 U.S. at 207; *Bruton*, 391 U.S. at 135.

Our state Supreme Court adopted CrR 4.4(c) to avoid the *Bruton* problem. CrR 4.4(c) provides that a defendant’s severance motion “shall be granted” unless the prosecutor either agrees not to use the statement in his case-in-chief or deletes all reference to the moving defendant, thus eliminating the prejudice. *State v. Wheeler*, 95 Wn.2d 799, 806, 631 P.2d 376 (1981). Under CrR 4.4(c), the trial court has no discretion in this area and must grant separate trials unless one of the two conditions is met. *State v. Vannoy*, 25 Wn. App. 464, 472, 610 P.2d 380, *remanded on other grounds*, 93 Wn.2d 1027 (1980). As with a *Bruton* violation, a CrR 4.4(c) violation is reversible error unless shown to be harmless beyond a reasonable doubt. *Vannoy*, 25 Wn. App. at 472.

In *Richardson v. Marsh*, 481 U.S. 200, 206, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987), codefendants Marsh and Williams were tried for murder, robbery and assault. Williams’ statement was redacted to omit all reference to Marsh or any indication that anyone other than Williams and a third person participated in the crime. 481 U.S. at 203. The jury was instructed not to use the statement in any way against Marsh. 481 U.S. at 204. There was also eye-witness testimony that implicated Marsh in the

crimes. 481 U.S. at 202. In this situation, the Court held that the Confrontation Clause was satisfied. *Marsh*, 481 U.S. at 208.

However, a trial court may not satisfy the confrontation clause and *Bruton* by simply replacing the defendant's name with an obvious substitute. Obvious alterations that leave it clear by implication that the declarant is referring to the defendant violate the Confrontation Clause. *Gray v. Maryland*, 523 U.S. 185, 195, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998). In *Gray*, the Court held:

Redactions that simply replace a name with an obvious blank space or a word such as "deleted" or a symbol or other similarly obvious indications of alteration, however, leave statements that, considered as a class, so closely resemble *Bruton*'s unredacted statements that, in our view, the law must require the same result.

Gray, 523 U.S. at 192.

The court held that a redaction reading "[m]e and a few other guys" committed the crime was permissible, while "[m]e, deleted, deleted, and a few other guys" was not. *Gray*, 523 U.S. at 196-97. The Court found that, "unlike Richardson's redacted confession, this confession referred directly to the existence of the non-confessing defendant." *Gray*, at 192.

The problem with the latter statement is not the use of the term "deleted," but rather that it drew the jury's attention to the fact that two

specific defendants were involved and likely caused the jury to speculate about their identities, especially in a trial with three defendants. The Court reasoned that such statements:

obviously refer directly to someone, often obviously the defendant and . . . involve inferences that a jury ordinarily could make immediately. . . . [T]he accusation that the redacted confession makes “is more vivid than inferential incrimination, and hence more difficult to thrust out of mind.”

Gray, 523 U.S. at 196 (quoting *Richardson*, 481 U.S. at 208). The Court declared that “a jury will often react similarly to an unredacted confession and a confession redacted in this way, for the jury will often realize that the confession refers specifically to the defendant.” *Gray*, at 193. This would be true even if the prosecutor had not “blatantly linked the defendant to the deleted name.” *Gray*, at 193. The Court discussed how this type of redaction would not fool any type of juror, because “a juror somewhat familiar with criminal law would know immediately that the blank in the phrase refers to a codefendant.” *Gray*, at 193. “A juror who does not know the law and who therefore wonders to whom the blank might refer need only lift his eyes to [the codefendant,] sitting at counsel table, to find what will seem the obvious answer.” *Gray*, at 193. If this type of juror hears the judge’s instruction not to consider the confession as

evidence against the codefendant, the instruction will provide an obvious reason for the blank. *Gray*, at 193.

Since *Gray*, courts have struggled with the use of so-called “neutral pronouns” in redactions of co-defendant’s statements. It has been repeatedly noted that it is disingenuous to suggest that a jury hearing that a co-defendant and two unnamed people murdered the victims in the case can follow the court’s admonition to consider the statement only against the declarant. Noting that prosecutors will benefit from this “spillover effect,” the author of “Casting Light on the Gray Area: An Analysis of the Neutral Pronouns in Non-Testifying Codefendant Redacted Confessions under *Bruton*, *Richardson*, and *Gray*,” 55 UMIALR 825 (2001), stated:

The jury will be instructed by the judge not to consider the redacted evidence against anyone other than the confessor, but this does not change the fact that they already heard the confession that implicates more than one individual. While the limiting instruction offers some protection, there is no guarantee that the jury will follow this instruction. Furthermore, the jurors cannot erase from their minds what has been exposed to them, and even if a juror tries to follow the instruction, it remains embedded in his or her subconscious and may nonetheless permeate their thought process.

In short, permitting the State to continue with a joint trial, while still admitting into evidence the otherwise inadmissible statement of a co-defendant allows it to “have its cake and eat it, too.”

In *State v. Larry*, 108 Wn. App. 894, 905, 34 P.3d 241 (2001), this court seemed to approve the use of “neutral pronouns” in a redacted statement. The court announced the general rule that:

Redacted statements must be (1) facially neutral, i.e., not identify the non-testifying defendant by name (*Bruton*); (2) free of obvious deletions such as “blanks” or “X” (*Gray*); and (3) accompanied by a limiting instruction (*Richardson*).

To the extent that this general rule does not comport with *Gray*, it should be overruled. It is not that the general rule in *Larry* is incorrect, it simply does not go far enough. *Gray* makes it clear that the statement’s redactions must be evaluated in the context of the case so the court can evaluate if it leave the jury with a “direct” implication of who the statement is referring to. “*Bruton*’s protected statements and statement redacted to leave a blank *or some other similarly obvious alteration* function the same way grammatically. They are directly accusatory.” *Gray*, 523 U.S. at 194 (italics added). The redactions in this case are exactly what *Gray* is referring to—an obvious deletion that will be obvious to the jury and is directly accusatory.

Like *Gray*, and in contrast to *Marsh*, where the primary State’s evidence was an eyewitness, the primary evidence in this case was Spencer’s testimony—the testimony of a co-defendant. Admitting Jackson’s redacted statement, leaving the clear reference to Jackson

working with two other individuals in the crime, serves to corroborate Spencer's testimony. This is exactly the prejudice predicted by Smith when he asked the court for a severance. Supp. CP (Defense Reply Memorandum of Law Re: Severance, 5).

Then, if the use of the non-personal pronouns had not given the jury a "direct" inference that Jackson had implicated Smith, they were specifically told that Jackson implicated Smith in Jackson's opening statements. This alone should have resulted in the trial court granting the motion for mistrial based on a violation of the confrontation clause.

Furthermore, in redacting Jackson's statement the way it was, the jury is left to believe that Jackson, like Spencer, had accused Smith of being the person who actually cut the victim's throat. This serves to corroborate Spencer's testimony and prejudice the jury even further against Smith.

Bruton and *Gray* required the court to redact Jackson's statement to omit all reference to other participants. This was not done. The redaction that was done prejudiced Smith because the use of grammatical placeholders clearly signaled the jury that Smith was implicated. Furthermore, any chance the jury would not have known who Jackson said was involved was eliminated when Jackson's attorney told them he had implicated Smith. Therefore, Smith's constitutional confrontation clause

rights were violated. For that reason, the trial court erred by denying the motions to sever and denied the motion for mistrial.

In a case with no physical evidence and essentially a credibility issue between a co-conspirator's testimony and Smith's own statement, this error cannot be said to be harmless beyond a reasonable doubt.

Therefore, the convictions must be reversed.

ISSUE 2: THE COURT VIOLATED DOUBLE JEOPARDY WHEN IT SENTENCED SMITH FOR FIRST DEGREE BURGLARY, WHICH INCLUDED THE ELEMENT OF BEING ARMED WITH A DEADLY WEAPON, AND ALSO ADDED A SENTENCING ENHANCEMENT FOR THE USE OF A DEADLY WEAPON.

The double jeopardy clause of the United States Constitution provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense. U.S. Const., Amend. 5. 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's constitution provides that no individual shall "be twice put in jeopardy for the same offense." Wash. Const. art. 1, § 9. This Court gives Article 1, section 9 the same interpretation as the United States Supreme Court gives to the Fifth Amendment. *State v. Bobic*, 140 Wn.2d 250, 260, 996 P.2d 610 (2000).

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).

To determine if separate prosecutions violate double jeopardy prohibitions, the courts utilize the *Blockburger*, or “same elements” test. *United States v. Dixon*, 509 U.S. 688, 697, 113 S. Ct. 2349, 125 L. Ed. 2d 556 (1993).

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 which the other does not.

Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Two offenses are the same offense for purposes of double jeopardy analysis when one offense is necessarily included within the other and, in the prosecution for the greater offense, the defendant could have been convicted of the lesser. *State v. Roybal*, 82 Wn.2d 577, 582, 512 P.2d 718 (1973). Thus, conviction or acquittal on a lesser included offense bars the government from prosecuting the defendant for the greater offense. *Green v. U.S.*, 355 U.S. 184, 190-91, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957). Likewise, 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. *State v. Freeman*, 153 Wn.2d 735, 770-71, 108 P.3d 753 (2005).

The question presented in this case is whether the deadly weapon sentencing enhancement is, for double jeopardy purposes, the equivalent of a lesser offense to a crime elevated due to a finding that a deadly weapon was used. This issue is currently pending in the state Supreme Court. *See State v. Kelley*, 165 Wn.2d 1027, 203 P.3d 379 (2009) (Sup. Ct. #821119—Oral Argument heard October 29, 2009); *State v. Aguirre*, 165 Wn.2d 1036, 205 P.3d 131 (2009) (Sup. Ct. #82226-3—Oral Argument heard October 29, 2009).

In this case, Smith was convicted of first degree burglary, which included the element of being armed with a deadly weapon.⁶ RCW 9A.52.020(1)(a), CP 3, Supp. CP (Court’s Instructions, #23, 34), CP 101. By special verdict, the jury again found Smith or an accomplice was “armed with a deadly weapon” in the course of the burglary. RP16 2025-27, CP 101, CP 91. The deadly weapon in both was the same—the knife. CP 3.

⁶ The first degree burglary statute includes an alternative means of assaulting a person in the course of the crime. RCW 9A.52.020(1)(b). However, the State did not charge this means and the jury was not instructed on this means, only on armed burglary. CP 20-21, Supp. CP (Court’s Instructions, #23, 34)

RCW 9.94A.533, the “Hard Time for Armed Crime” initiative, shows the voters’ intent to create exemptions for crimes where possessing or using a firearm is a necessary element of the crime, such as drive-by shooting or unlawful possession of a firearm. RCW 9.94A.510(3)(f). However, it appears that the voters were unaware of the similar problem of redundant punishment created when a deadly weapon enhancement is added to a crime where the punishment has already been increased due to the necessary element of use of a deadly weapon. There is no language showing an intent to punish twice crimes committed with a deadly weapon by adding a deadly weapon sentence enhancement. This is a change from prior law, where the legislative intent to attach two punishments was clear in the language itself. *See State v. Adlington-Kelly*, 95 Wn.2d 917, 924, 631 P.2d 954 (1981).

The “Hard Time for Armed Crime” initiative was passed long before *Apprendi v. New Jersey*, 530 U.S. 466 120 S. Ct. 2348; 147 L. Ed. 2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531; 159 L. Ed. 2d 403 (2004), reshaped the sentencing landscape. Thus, state law did not view additional findings triggering an increased sentence as implicating the rights to a jury trial, due process of law, or double jeopardy. *Cf.*, Former RCW 9.94A.535.

Under *Blakely*, and *Apprendi*, factual findings that support

sentencing enhancements constitute elements of a crime, and therefore they also constitute a new, greater offense for purposes of double jeopardy. There is no principled reason to distinguish between the statutory elements of the crime—which in this case included possession of a deadly weapon—and the statutory deadly weapon enhancement—which again punishes for the same finding. *See Sattazahn v. Pennsylvania*, 537 U.S. 101, 111-12, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003) (“The fundamental distinction between facts that are elements of a criminal offense and facts that go only to the sentence not only delimits the boundaries of . . . important constitutional rights, like the Sixth Amendment right to trial by jury, but also provides the foundation for our entire double jeopardy jurisprudence.”)

Smith’s burglary charge was elevated to a higher degree by the element of being armed with a deadly weapon while committing the crime. RCW 9A.52.020(1)(a). Therefore, again elevating the crime for the same underlying act—use of the same deadly weapon—violates double jeopardy. This court should reverse and remand with the direction that the deadly weapon enhancement be vacated. *See State v. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007).

V. CONCLUSION

The trial court violated Smith's constitutional confrontation clause rights when it denied Smith's motion to sever, but permitted the State to introduce into evidence the statement of a non-testifying co-defendant without redacting all reference to Smith. This error requires the reversal of the convictions.

Furthermore, the conviction for first degree burglary while armed with a deadly weapon, coupled with an enhancement for possession of that same deadly weapon, violates double jeopardy and therefore the enhancement must be vacated.

DATED: January 13, 2010

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COURT OF APPEALS
DIVISION II

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