

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 39173-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ZACHARIAH E. GARRISON,

Appellant.

BRIEF OF APPELLANT

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ORIGINAL

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it admitted the prior recorded testimony of a witness whose presence the state did not make reasonable efforts to secure at trial. RP 7-34.

2. The trial court violated Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it entered judgement against the defendant for a conviction unsupported by substantial evidence. RP 74.

3. The prosecutor committed misconduct and denied the defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, when he argued that (1) the jury should find the defendant guilty because of his propensity to commit similar offenses, and (2) that the defendant was guilty because he failed to present evidence or argument rebutting the state's claims. RP 211, 227-228.

4. The trial court violated the defendant's right to be free from double jeopardy under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, when it added a sentencing enhancement that was also an element of the underlying crime charged. CP 1-3, 11-13, 106-120.

Issues Pertaining to Assignment of Error

1. Does a trial court err if it admits prior recorded testimony of a witness into evidence when the state did not make reasonable efforts to secure the presence of that witness at trial?

2. Does a trial court violate Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it enters judgement against the defendant for a conviction unsupported by substantial evidence?

3. Does a prosecutor commit misconduct and deny a defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, if he argues that (1) the jury should find the defendant guilty because of his propensity to commit similar offenses, and (2) that the defendant was guilty because he failed to present evidence or argument rebutting the state's claims?

4. Does a trial court violate a defendant's right to be free from double jeopardy under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, if it adds a sentencing enhancement that was also an element of the underlying crime charged?

STATEMENT OF THE CASE

Factual History

On the afternoon of August 18, 2008, 23-year-old Jesse Guizzotti was in her apartment in Kelso, Washington, when the defendant Zachariah Garrison came over to speak with her and get a couple of items of his property. RP 47-53. The two had been involved in an intimate relationship for about two months, although they did not live together and the defendant did not have a key to Ms Guizzotti's apartment. RP 50-51. According to Ms Guizzotti, the conversation soon became a loud argument, during which she ordered the defendant to leave. RP 54-57. He responded by picking her up off the couch by her knees, dropping her on the floor, and then dragging her across the living room carpet. RP 55-57, 59-60. However, within a few minutes he tried to apologize. RP 61-62. He then left the apartment after Ms Guizzotti again told him to leave. *Id.* In fact, the next door neighbor heard the argument, including Ms Guizzotti's demand that the defendant leave. RP 114-120.

Later that day, Ms Guizzotti was in the apartment when she heard a tapping at the door, which she thought was her neighbor. RP 68-72. In fact, it was the defendant, who pushed his way in and locked the dead bolt when Ms Guizzotti opened the door to see who it was. *Id.* He had an open pocket knife in his hand. *Id.* When he entered, she started yelling at him to leave.

Id. When she did, he said that he wanted to kill her. *Id.* He also pointed the open pocket knife at her and at the walls and said that this would be a good place to “do something” to her. *Id.* However, he was not very close to her when he did this. *Id.* He also made statements about bouncing her head off the walls, about stealing cars, about the boyfriends of his prior girlfriends who he had injured, and about his extensive criminal history. RP 72-73. At one point, Ms Guizzotti grabbed her car keys and a cell phone that the defendant had previously given her. RP 75-78. The defendant responded by grabbing the cell phone and throwing it to the ground. *Id.* According to Ms Guizzotti, within a period of time, the defendant calmed down, apologized, offered to fix the cell phone, and eventually left. RP 78-79.

After the defendant left, Ms Guizzotti went to her parents house to stay the night. RP 83-86. Ms Guizzotti claimed that during this period of time, the defendant sent her a number of threatening and profane text messages and pictures, which she showed to a police officer. RP 78-79. However, she later testified that at no point during her contact with the defendant did she believe that he would kill her. RP 74.

Procedural History

By information filed October 9, 2008, and amended on December 17, 2008, the Cowlitz County prosecutor charged the defendant Zachariah E. Garrison with first degree burglary while armed with a deadly weapon,

attempted residential burglary, felony harassment, and fourth degree assault.

CP 1-3, 11-13. The first degree burglary charge alleged the following:

The defendant, in the County of Cowlitz, State of Washington, on or about August 18, 2008, with intent to commit a crime against a person or property therein, did enter or remain unlawfully in the building of Jesse Guizzotti, a family or household member, located at 120 Solomon Road, # E3, Kelso, and in entering such building and/or while in such building the accused was armed with a knife, a deadly weapon, and during the commission of this crime, the defendant or an accomplice was armed with a deadly weapon, to wit: a knife, as proscribed by RCW 9.94A.602 and RCW 9.94A.533(4); contrary to RCW 9A.52.020(1)(a) and RCW 10.99.020(3) and against the peace and dignity of the State of Washington.

RP 11.

On December 17, 2009, the case came on for trial before a jury. CP 15-17. Although the state had apparently served Jesse Guizzotti with a subpoena to appear on that day, she did not appear. CP 9-10. As a result, the court issued a material witness warrant for her arrest, which the Cowlitz County Sheriff's Office was able to serve that day. *Id.* Thus, the state was ultimately able to call Ms Guizzotti as a witness, although she stated that she did not want to testify and that she was not in court of her "own free will."

RP 63. Unfortunately, the court later declared a mistrial based upon inclement weather. RP 1-6. On January 7, 2009, the court reset a new trial date of February 10, 2009. *Id.*

On January 20, 2009, the prosecutor filed a new subpoena to require Jesse Guizzotti to appear on the new trial date. SCP123. He then gave a

copy of this subpoena to Deputy Joe Conner, who is a process server for the Cowlitz County Sheriff's office. RP 22-23. Two days later, Deputy Conner went to the address listed on the subpoena and found out that Jesse Guizzotti had been evicted. *Id.* As a result, the subpoena went unserved. *Id.*

On February 10, 2009, the parties appeared before the court for trial. RP 7-21. At that time, the state moved to be allowed to present the videotaped recording of Ms Guizzotti's prior testimony since the state had been unable to serve her with a subpoena. RP 7-21. The defense objected, arguing that the state had not been reasonably diligent in its efforts to obtain the presence of the witness, given the facts that (1) the witness had previously ignored the subpoena for the first trial, (2) that the state had been forced to obtain a material witness warrant, (3) that the state had been able to serve the warrant on the day it was issued, (4) that the state waited for two weeks after the new trial was set before even trying to serve a new subpoena, and (5) that the state had failed to seek a material witness warrant from the time that it knew that its new subpoena had not been served. *Id.*

The court took the motion under advisement and ordered the parties to proceed with *voir dire*, which it then did. RP 21. The court then ordered the jury to return the next day, after which it heard the testimony from Deputy Conner concerning his efforts to serve Ms Guizzotti with the subpoena. RP 22-28. After this testimony and further argument from counsel, the court

granted the state's motion to play Ms Guizzotti's prior testimony to the jury. RP 34-35. The state did not seek, and the court did not issue, a new material witness warrant. *Id.* Two days later, the state presented its case to the jury by first playing the videotaped testimony of Jesse Guizzotti, and then calling Ms Guizzotti's neighbor and Deputy Tory Shelton as its only witnesses. RP 47-113, 114-142, 143-170. The defense then called two brief witnesses and rested. RP 171-176, 176-188.

After the state rested its case, the court instructed the jury without objection or exception from either party. RP 189, 190-208. The state then presented closing argument, which included the following comments:

Now, what is that when you say I want to kill you and you burst into somebody's home and you are waving a knife in their face? Is that a threat? Is a reasonable person going to think that is a threat? Of course. Somebody does that, you better believe they are serious because they are in your house. They've got a knife. And, what do you know about them? Well, what does -- does Jesse just say, "Well, this is just some guy." Is he a Boy Scout? Well, that's not what he has told Ms. Guizzotti. He has told Ms. Guizzotti that he has had these 26 felonies, these 13 misdemeanors. He showed her the statements that the other girlfriends had written. The ones that apparently wrote statements to the police before. And, what does he tell her about those other girls? You know what? These are the girls that snitched on me. They ratted me out to the cops and they got what was theirs. Are we seeing a pattern -- seeing a pattern here?

RP 211.

During rebuttal argument, the state also made the following comments to the jury.

Does she make the defendant send her the text messages? The ones that say he is “on his way for revenge. Don’t fuck with convicts. Let me in. I’m on my way to your apartment.” When I first -- in my first closing I said, there’s no explanation for those. There is no good explanation for the text messages. Well, we never heard one. We never heard an explanation for the text messages. And, that’s because, as I said, there is no good explanation. Text messages are pretty damning. And, the text messages are not -- are these the text messages of a man who has dumped a girl and is trying to get rid of her? Or, are they the messages of a guy that’s angry, that wants to keep her, that wants to hold onto her? What are these text -- that’s what these text messages are.

RP 227-228.

After the state finished rebuttal, the defense moved for a mistrial, arguing that the prosecutor had committed misconduct by presenting an argument that shifted the burden of proof to the defense. 231-232. The court reserved ruling, stating that it would only consider the argument if it were in writing and accompanied by a written brief. *Id.* The jury later returned verdicts of “guilty” to the charges of first degree burglary, felony harassment, and fourth degree assault, and “not guilty” on the charge of attempted residential burglary. RP 77-81. The jury also returned a special verdict that the defendant was armed with a deadly weapon during the commission of the first degree burglary. RP 82-83.

The defense later filed a written motion for a new trial, arguing that the prosecutor had committed misconduct during closing when he argued that (1) the jury should convict the defendant based upon his propensity to

commit similar offenses, and (2) that the jury should convict the defendant based upon the defendant's failure to present any evidence rebutting the negative text messages that Jesse Guizzotti claimed the defendant sent to her. CP 84-89. Following argument, the court denied the motion. 243. After denying the motion, the court sentenced the defendant within the standard range on each offense, including an addition of 24 months to the sentence for first degree burglary based upon the jury's special verdict that the defendant had committed that offense while armed with a deadly weapon. CP 106-120. The defendant thereafter filed timely notice of appeal. CP 121.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT ADMITTED THE PRIOR RECORDED TESTIMONY OF A WITNESS WHOSE PRESENCE THE STATE DID NOT MAKE REASONABLE EFFORTS TO SECURE AT TRIAL.

Under ER 804(b)(1), the former testimony of a witness who has previously testified and been subject to cross-examination is not hearsay and can be admitted at a new trial if the witness is “unavailable.” This rule states:

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

ER 804(b)(1).

Subjection (a)(5) of this same rule defines the term “unavailable” as follows:

(a) Definition of Unavailability. “Unavailability as a witness” includes situations in which the declarant:

(5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subsection (b)(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means.

ER 804(a)(5).

Under this rule, the party offering an “out-of-court statement of a witness beyond the legal reach of a subpoena” must show that he or she “made an effort to secure the voluntary attendance of the witness at trial.” *Rice v. Janovich*, 109 Wn.2d 48, 57, 742 P.2d 1230 (1987). A good faith effort requires the use of reasonable efforts under the facts and circumstances of the case, and requires the use of those procedures reasonably available to procure the presence of the witness. *State v. Sweeney*, 45 Wn.App. 81, 723 P.2d 551 (1986). The decision on the admission of prior recorded testimony under ER 804(b)(1) lies within the sound discretion of the trial court and will only be reversed upon a showing of an abuse of that discretion. *State v. Whisler*, 61 Wn.App. 126, 810 P.2d 540 (1991). An abuse of discretion occurs when the trial court’s exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

For example, in *State v. Sweeney, supra*, the defendant appealed his conviction for indecent liberties, arguing *inter alia*, that the trial court had abused its discretion when it admitted the pretrial deposition taken of the 13-year-old complaining witness. The state had previously obtained a material witness warrant for the girl, and had released her to live with her mother in California following a deposition taken to preserve her testimony. The state served the girl with a trial subpoena prior to her release in Washington, and

she and her mother indicated her willingness to return and testify pursuant to the subpoena. The state later told the girl and her mother that the case would be settled. However, when the parties did not come to an agreement, the state again contacted the girl's mother. This time, the mother told the state that her daughter had changed her mind and would not come to Washington to testify.

After learning that the girl would not voluntarily return to Washington, the state did not attempt any type of process to compel her attendance. Rather, the state moved the court to admit the deposition under ER 804(b)(1) in lieu of her testimony. The court granted the motion over defense objection, and the state ultimately obtained a conviction. The defendant then appealed, arguing that the trial court had abused its discretion when it granted the motion to play the deposition to the jury. Specifically, the defendant argued that the state had failed to seek to compel the witness under the "Uniform Act" found in RCW 10.55, under which a state can obtain the assistance of another state in compelling the presence of a witness within the boundaries of the other state.

The Court of Appeals agreed with the defendant's argument that the state had not made a good faith effort under ER 804 to obtain the presence of the witness. The court held:

A good faith effort to obtain the presence of the witness at trial requires that the proponent use the means available to compel attendance of the witness at trial. While the State need not resort to

the Uniform Act when the witness appears to be cooperative, it must use the procedures of the Uniform Act when it becomes apparent that the witness is no longer cooperating. Here, the State moved to preserve the testimony by deposition precisely because of concern that Sharon might not appear at trial if released to the custody of her mother in California. The State became aware that Sharon might not cooperate on July 22, 1983, when Sweeney moved to depose Sharon's mother because of concern that Sharon would not cooperate in testifying at trial. Although the State contended below that Sharon was willing to testify at trial until 2 days before trial was to begin, the State could even then have moved for a continuance in order to obtain Sharon's presence by means of the Uniform Act.

State v. Sweeney, 45 Wn.App. at 86.

Finding that the trial court had abused its discretion when it allowed the state to present the videotaped deposition of the witness, the court then addressed the issue of prejudice. Noting that the case turned in part upon the testimony of the missing witness, the court found prejudice and reversed the conviction. The court held:

The error in admitting Sharon's deposition at trial without first establishing that she was unavailable was not harmless. An error in admission of evidence requires reversal if it materially affected the outcome of the trial. *State v. Sanchez*, 42 Wn.App. at 231, 711 P.2d 1029. The State's case consisted of the testimony of Jane Doe and of Sharon Sweeney's deposition, along with the testimony of the psychologist. Although it is questionable to what extent the jurors found Sharon's testimony credible on the charges related to her, jurors could have believed the portion of her testimony relating to Sweeney's actions on the night of March 22, 1983. Because Sharon's testimony so closely paralleled Jane's version of the events and because the conviction rested so heavily on the testimony of the two complaining witnesses, the error was not harmless.

State v. Sweeney, 45 Wn.App. at 86.

In *Sweeney*, the court found that the state's actions in obtaining the initial material witness warrant and deposition demonstrated that the state knew that the witness was unwilling, in spite of her subsequent statements to the contrary. Similarly, in the case at bar, the state was well aware that the service of a subpoena was insufficient to secure the presence of Ms Guizzotti at the first trial and that the only way to secure her presence was to obtain a material witness warrant. Indeed, in the case at bar, her testimony at the original trial, elicited by the state on direct, reinforced the conclusion that she would only testify if compelled by something beyond a simple subpoena. She stated the following on this point:

MR. SMITH: Are you happy to be here today?

MS. GUIZZOTTI: Heck no.

MR. SMITH: Are you glad to be here?

MS. GUIZZOTTI: No.

MR. SMITH: Did you come here of your own free will?

MS. GUIZZOTTI: Nope.

MR. SCUDDER: I would object as to relevance. Improper bolstering.

JUDGE WARME: Overruled.

MR. SMITH: Did you yourself get in your car and drive over here?

MS. GUIZZOTTI: Nope.

MR. SMITH: How did you get here?

MS. GUIZZOTTI: I got told by a sheriff -- sorry -- to get in the vehicle. I had to go.

MR. SMITH: Are you talking about Deputy Shelton over here?

MS. GUIZZOTTI: Yes.

MR. SMITH: He came out to your house and brought you to court today?

MS. GUIZZOTTI: Yes.

RP 63-64.

In spite of the fact that the state knew that the only way to compel Ms Guizzotti's presence was to obtain a material witness warrant, the state did nothing for at least two weeks after the new trial was set. It then only took the step of issuing a new subpoena, a step it knew from its prior dealing with Ms Guizzotti would not secure her presence at trial, even were it served. However, the subpoena was not even served. The state then did nothing for three weeks in an attempt to secure her presence at trial. It simply waited until the new trial, blithely believing that the trial court would rubber stamp its request to play the video-taped testimony. Under the facts of this case, the state made even less effort than the state did in *Sweeney*. As in *Sweeney*, these efforts were not reasonable under the circumstances of the case. Consequently, in the same manner that the trial court in *Sweeney* abused its discretion in allowing the state to present the videotaped deposition of the

missing witness, so in the case at bar the trial court abused its discretion in allowing the state to present the videotaped testimony of Ms Guizzotti.

In addition, in the case at bar, as in *Sweeney*, the admission of this evidence caused prejudice. Absent the testimony of Ms Guizzotti in this case, there would be no evidence that the defendant did not leave Ms Guizzotti's apartment when required, that he entered the second time without permission, or that he carried a knife. Thus, absent her testimony, the state would not have been able to put on a prima facie case. Consequently, the defendant is entitled to a new trial.

II. THE TRIAL COURT VIOLATED WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ENTERED JUDGEMENT AGAINST THE DEFENDANT FOR A CONVICTION UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In the case at bar, the state charged the defendant in count III with

felony harassment under RCW 9A.46.020. This statute states:

(1) A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

(2)(a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.

(b) A person who harasses another is guilty of a class C felony if either of the following applies: (i) The person has previously been convicted in this or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a no-contact or no-harassment order; or (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.

RCW 9A.46.020.

As the decision in *State v. G.C.*, 150 Wn.2d 604, 80 P.3d 594 (2003), explains, there is both a subjective and an objective element to the requirement under the statute to the victim's fear. That is to say, the victim must actually fear that the defendant will kill (the subjective requirement), and that fear must be reasonable under the facts of the case (the objective requirement).

In *State v. G.C., supra*, the state charged a juvenile with felony harassment. In this case the defendant, a student at Blaine High School, became angry and disruptive in class after she was accused of taking a pencil. Eventually, the teacher called Mr. Haney, the vice-principal who was responsible for disciplinary matters at the school. He asked G.C. to leave the classroom with him, and after some resistance the defendant went with him, although she continued to yell obscenities. The vice-principal then called another teacher for help, and at that point the defendant said “I’ll kill you Mr. Haney, I’ll kill you.”

The State later charged G.C. with felony harassment out of the incident. At the adjudicatory hearing in the matter, the vice-principal testified that G.C.’s threat “caused him concern.” He further testified that based on what he knew about G.C., she might well try to harm him or someone else in the future. The trial court found G.C. guilty, and she appealed, arguing that the record did not contain substantial evidence to prove that the vice-principal reasonably believed she would fulfill her threat to kill. The court of appeals affirmed, and the defendant then obtained review before the state supreme court.

In responding to the defendant’s arguments, the state claimed that in order to sustain a conviction for a felony, the state need only prove that (1) the defendant made the threat to kill, and (2) that a person reasonably believed

that the defendant would “harm,” as opposed to “kill” a person. This argument was based upon the fact that the requirement of a “reasonable belief” was included in subsection (1)(b) of the statute, not subsection (2)(b) where the statute defined felony harassment as a threat to kill. However, the court rejected this argument, finding as follows:

Whatever the threat, whether listed in subsection (1)(a) or a threat to kill as stated in subsection (2)(b), the State must prove that the victim was placed in reasonable fear that the same threat, i.e., “the” threat, would be carried out.

State v. G.C., 150 Wn.2d at 609.

The court then went on to address the issue of whether substantial evidence supported a finding that the victim reasonably believed that the defendant would kill him. Based upon the vice-principal’s testimony, the court found the evidence insufficient. The court held:

We thus conclude that under the plain language of RCW 9A.46.020, supported by the related statute, RCW 9A.46.010, the State must prove that the victim is placed in reasonable fear that the threat made is the one that will be carried out. Under the plain reading of the statute, G.C.’s conviction for felony harassment must be reversed because there is no evidence that Mr. Haney was placed in reasonable fear that she would kill him.

State v. G.C., 150 Wn.2d at 611.

In the case at bar, as in *State v. G.C.*, the victim to the crime did not testify that she believed that the defendant would kill her. In fact, she specifically testified that she did not believe he would kill her, although she

believed he would hurt her. The following is her testimony on this element of the felony harassment charged:

MR. SMITH: Jesse, did you believe that he would kill you?

MS GUIZZOTTI: Maybe not kill me but I sure believed that he would hurt me after that. He'd never acted like he could hurt me at all and he said he wouldn't.

RP 77.

This testimony is functionally the same as that in *State v. G.C.*. It does not constitute substantial evidence of a subjective belief to kill, and it precludes conviction for felony harassment, although not of misdemeanor harassment. Thus, in the case at bar, the trial court denied the defendant his right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it entered judgment against him for the crime of felony harassment. As a result, this court should vacate this conviction and remand with instruction to enter judgment for misdemeanor harassment. In addition, the court should vacate all of the other felony convictions and remand for resentencing since the conviction for felony harassment counted as a concurrent point on the other felony case.

III. THE PROSECUTOR COMMITTED MISCONDUCT AND DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN HE ARGUED THAT (1) THE JURY SHOULD FIND THE DEFENDANT GUILTY BECAUSE OF HIS PROPENSITY TO COMMIT SIMILAR OFFENSES, AND (2) THAT THE DEFENDANT WAS GUILTY BECAUSE HE FAILED TO PRESENT EVIDENCE OR ARGUMENT REBUTTING THE STATE'S CLAIMS.

While due process does not guarantee every person a perfect trial, both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). The due process right to a fair trial is violated when the prosecutor commits misconduct. *State v. Charlton*, 90 Wn.2d 657, 585 P.2d 142 (1978). To prove prosecutorial misconduct, the defendant bears the burden of proving that the state's conduct was both improper and prejudicial. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997). In order to prove prejudice, the defendant has the burden of proving a substantial likelihood that the misconduct affected the jury's verdict. *State v. Evans*, 96 Wn.2d 1, 633 P.2d 83 (1981).

For example in *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006), the defendant appealed his death sentence arguing in part that the prosecutor had committed misconduct by (1) obtaining an order in limine precluding the admission of any evidence concerning evidence of the

conditions in prison of a person serving a sentence of life without release, and (2) then arguing that the jury should consider such conditions in determining whether or not to impose the death penalty. The defendant appealed his sentence, arguing that this argument by the state constituted misconduct. The Supreme Court agreed with this argument and reversed the death sentence.

The court held:

Three factors weigh in favor of a finding of prosecutorial misconduct here. First, the violation of the trial court's order is blatant and the original motion in limine was targeted at preventing the defense from effectively responding to the prosecutor's argument. Second, although defense counsel attempted to paint a contrary picture of prison life, he was unable to introduce evidence to support his argument and his argument simply was not as compelling as the prosecutor's (perhaps because he did not expect to be allowed to make such an argument). Third, the images of Gregory watching television and lifting weights, when juxtaposed against the images of the crime scene, would be very difficult to overcome with an instruction. Again, these images would be central to the question of whether life without parole or death was the more appropriate sentence. Although this presents a close question, we conclude that the prosecutor's argument characterizing prison life amounted to prosecutorial misconduct that could not have been cured by an instruction. The prosecutor's misconduct independently requires reversal of the death sentence.

State v. Gregory, 158 Wn.2d at 866-867.

In the case at bar, the defense argues that the state twice committed misconduct when, in closing, it argued that (1) the jury should find the defendant guilty because of his propensity to commit similar offenses, and (2) that the defendant was guilty because he failed to present evidence or argument rebutting the state's claims. The following addresses these

arguments.

It is fundamental under our adversarial system of criminal justice that “propensity” evidence, usually offered in the form of prior convictions or prior bad acts, is not admissible to prove the commission of a new offense. *See* 5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383 (3d ed. 1989). This common law rule has been codified in ER 404(b) wherein it states that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Tegland puts this principle as follows:

Rule 404(b) expresses the traditional rule that prior misconduct is inadmissible to show that the defendant is a “criminal type,” and is thus likely to have committed the crime for which he or she is presently charged. The rule excludes prior crimes, regardless of whether they resulted in convictions. The rule likewise excludes acts that are merely unpopular or disgraceful.

Arrests of mere accusations of crime are generally inadmissible, not so much on the basis of Rule 404(b), but simply because they are irrelevant and highly prejudicial.

The rule is a specialized version of Rule 403, based upon the belief that evidence of prior misconduct is likely to be highly prejudicial, and that it would be admitted only under limited circumstances, and then only when its probative value clearly outweighs its prejudicial effect.

5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383-386 (3d ed. 1989).

For example, in *State v. Pogue*, 108 Wn.2d 981, 17 P.3d 1272 (2001), the defendant was charged with possession of cocaine after a police officer found crack cocaine in a car the defendant was driving. At trial, the defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court's permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state's request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: "it's true that you have had cocaine in your possession in the past, isn't it?" The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal, he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the

police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The court stated:

The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

State v. Pogue, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed and remanded the case for a new trial.

In the case at bar, the state elicited evidence from Ms Guizzotti that the defendant had told her that he had numerous felony and misdemeanor convictions for violence toward his prior girlfriends. This evidence was relevant to the charge of felony harassment because it made a fact at issue more likely. This fact was Ms Guizzotti's objective and subjective fear of the defendant, which is an element of felony harassment. However, the prosecutor did not use this evidence to argue the fact of her fear or the reasonableness of that fear. Rather, the state argued that it proved that the defendant had a propensity to commit the very crimes for which was currently being tried. This occurred during closing when the state argued the following:

Now, what is that when you say I want to kill you and you burst into somebody's home and you are waving a knife in their face? Is that a threat? Is reasonable person going to think that is a threat? Of course. Somebody does that, you better believe they are serious because they are in your house. They've got a knife. And, what do you know about them? Well, what does -- does Jesse just say, "Well, this is just some guy." Is he a Boy Scout? Well, that's not what he has told Ms. Guizzotti. He has told Ms. Guizzotti that he has had these 26 felonies, these 13 misdemeanors. He showed her the statements that the other girlfriends had written. The ones that apparently wrote statements to the police before. And, what does he tell her about those other girls? You know what? These are the girls that snitched on me. They ratted me out to the cops and they got what was theirs. *Are we seeing a pattern – seeing a pattern here?*

RP 211 (emphasis added).

In this argument, the state directly pointed out prior alleged misconduct by the defendant and invited the jury to convict on the current charges based upon the defendant's "pattern" or "propensity" for committing such acts. This argument constituted misconduct.

In addition, since the burden rests upon the state to prove every element of the crime charged beyond a reasonable doubt, it is prosecutorial misconduct for the state to comment upon the defendant's failure to testify, to call witnesses, or to present any defense at all. *State v. Cleveland*, 58 Wn.App. 634, 794 P.2d 546 (1990). In spite of this clear constitutional requirement, the state did comment on the defendant's failure to present evidence when it made the following comment during rebuttal argument.

Does she make the defendant send her the text messages? The ones that say he is "on his way for revenge. Don't fuck with convicts.

Let me in. I'm on my way to your apartment." When I first -- in my first closing I said, there's no explanation for those. *There is no good explanation for the text messages. Well, we never heard one. We never heard an explanation for the text messages. And, that's because, as I said, there is no good explanation.* Text messages are pretty damning. And, the text messages are not -- are these the text messages of a man who has dumped a girl and is trying to get rid of her? Or, are they the messages of a guy that's angry, that wants to keep her, that wants to hold onto her? What are these text -- that's what these text messages are.

RP 227-228 (emphasis added).

By making this argument, the state directly invited the jury to find the defendant guilty because he failed to present any evidence or argument rebutting the existence of the rude and abusive text messages that were introduced into evidence. This argument also constituted misconduct.

In the case at bar, the issue before the jury was not the substance of the defendant's rude and profane text messages. Rather, the issue before the jury was whether or not the defendant had entered Ms Guizzotti's apartment and threatened her with a knife. On this real issue, the jury had to rely solely upon Ms Guizzotti's testimony. The fact that the jury acquitted the defendant on the attempted burglary charge illustrates the difficulty the jury had with the credibility of this testimony. Thus, there is a substantial likelihood that the prosecutor's improper arguments in closing and rebuttal affected the jury's decision to convict. As a result, the defendant is entitled to a new trial.

IV. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 9, AND UNITED STATES CONSTITUTION, FIFTH AMENDMENT, WHEN IT ADDED A SENTENCING ENHANCEMENT THAT WAS ALSO AN ELEMENT OF THE UNDERLYING CRIME CHARGED.

The double jeopardy prohibitions found in both Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, protect against three distinct abuses: (1) a second prosecution for the same offense after 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, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969); *United States v. Halper*, 490 U.S. 435, 104 L.Ed.2d 487, 109 S.Ct. 1892 (1989); *Dept. of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 128 L.Ed.2d 767, 114 S.Ct. 1937 (1994).

In order for two prosecutions or punishments to violate double jeopardy, they must both have arisen out of the same offense. *Blockberger v. United States*, 284 U.S. 299, 76 L.Ed.2d 306, 52 S.Ct. 180 (1932). In *Blockberger*, the United States Supreme Court adopted a "same elements" test to determine whether the two punishments or prosecutions arose out of the same offense. In this case, the court stated as follows:

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied is whether each provision requires proof of an additional fact which the other does not A single act may be an offense

against two statutes; and *if each statute requires proof of an additional fact which the other does not*, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

Blockburger, 76 L.Ed. at 309 (emphasis added; citations omitted).

By definition, a lesser included offense does not constitute one for which “additional facts” are required. On this issue, the Washington Supreme Court has stated as follows.

A person is not put in second jeopardy by successive trials unless they involve not only the same act, but also the same offense. There must be substantial identity of the offenses charged in the prior and in the subsequent prosecutions both in fact and in law. . . .

The rule is, however, subject to the qualification that the offenses involved in the former and in the latter trials need not be identical as entities and by legal name. It is sufficient to constitute second jeopardy if one is necessarily included within the other, and in the prosecution for the greater offense, the defendant could have been convicted of the lesser offense.

State v. Roybal, 82 Wn.2d 577, 582, 512 P.2d 718 (1973) (quoting *State v. Barton*, 5 Wn.2d 234, 237-38, 105 P.2d 63 (1940)); *See also State v. Laviollette*, 118 Wash.2d 670, 675, 826 P.2d 684 (1992) (“If the elements of each offense are identical, or if one is a lesser included offense of the other, then a subsequent prosecution is barred.”) (citing *Brown v. Ohio*, 432 U.S. 161, 166, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977)).

For example, in *State v. Culp*, 30 Wn.App. 879, 639 P.2d 766 (1982),

the Court of Appeals found a violation of double jeopardy in subsequent prosecutions for DWI and Negligent Homicide out of the same incident. In this case the defendant had been charged in Municipal Court with Negligent Driving and Driving While Intoxicated out of an incident in which a person was injured, and later died. Defendant eventually pled guilty to the DWI and a reduced charge from the Negligent Driving. Later she was charged with negligent homicide out of the same incident, and the State appealed the ultimate dismissal of the charges as a violation of double jeopardy. However, the court affirmed, noting that since the DWI and Negligent Driving charges contained no elements independent of the elements for the negligent homicide charge, allowing the state to pursue the latter after having prosecuted on the former would twice put the defendant in jeopardy on the former charges. Thus, the trial court correctly ruled that the state was barred from bring the negligent homicide charges. *State v. Culp*, 30 Wn.App. at 882.

The Legislature has the power to define offenses and set punishments within the boundaries of the constitution. *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005); *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, 344, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981) (reasoning Congress is predominately body of lawyers and presumed to know the law). *But See Albernaz*, 450 U.S. at 345 (Stewart, J., concurring) (Legislative intent is first step in determining if punishments violates double jeopardy, not controlling determination). 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.

Under RCW 9.94A.533, the legislature has provided for additional time to be added to an offender's standard range if the offender or an accomplice was armed with a deadly weapon during the commission of the offense. This statute reads:

(4) 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 deadly weapon other than 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 deadly weapon enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the deadly weapon enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a deadly weapon enhancement. If the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any deadly weapon enhancements, the

following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Two years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(f) The deadly weapon 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(4)(a)&(f).

The statutory provision, which originated as part of the *Hard Time for Armed Crime Act of 1995* (Initiative 195), was designed to provide increased penalties for criminals using or carrying guns or weapons, in order to “stigmatize” the use of weapons, and to hold individual judges accountable for their sentencing of serious crimes. *Laws of 1995, ch 129 § 1*. It provides that all firearm and deadly weapon enhancements are mandatory and must be served consecutively to any base sentences and to any other enhancements. RCW 9.94A.510(4)(e); *State v. DeSantiago*, 149 Wn.2d 402, 416, 68 P.3d 1065 (2003).

The language of the statute demonstrates the voters intended a longer standard sentence range, and therefore greater punishment, for those who participate in crimes where a principal or accomplice is armed with a firearm

or a deadly weapon. But the statute creates a specific exception for those 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, demonstrating some sensitivity to double jeopardy concerns. RCW 9.94A.510(3)(f). The voters apparently did not consider the problem of redundant punishment created when a firearm or deadly weapon enhancement is added to a crime and using a firearm or deadly weapon is the way the offense was committed.

Significantly, the *Hard Time for Armed Crime Act* was passed before *Blakely, infra*, and other United States Supreme Court cases made it clear that a 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, 494 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, 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. This 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.

Ring, 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 Scalia 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 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. *Id.*

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. L. 245, 318-226 (2002).

The voters and the Legislature were unaware that the firearm and deadly weapon enhancements they created were, in some cases, elements 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) (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 or deadly weapon enhancement acts like an element of a higher crime, the initiative simply adds a redundant element of use of a firearm or deadly weapon for crimes where use of a firearm was already an element, a result the voters would not have intended. See RCW 9.94A.510(3)(f) (Effective until July 1, 2004). Thus, the use of a firearm or deadly weapon enhancement in a charge that has possession or use of the deadly weapon as an element of the offense violates the prohibition against double jeopardy under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment.

In the case at bar, the amended information included one count of first

degree burglary charged only under the alternative that required the state to prove that the defendant was armed with a firearm as an element of the offense. Although there is an alternative method of committing the crime that did not require the possession or use of a deadly weapon, the state did not allege this alternative. Thus, when the trial court added the deadly weapon enhancement to the sentence for first degree burglary, it violated the defendant's right under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, to be free from double jeopardy. Consequently, this court should vacate this enhancement and remand with instructions to strike the deadly weapon enhancement from the sentence.

In *State v. Nguyen*, 134 Wn.App. 863, 142 P.3d 1117 (2006), *review denied*, 163 Wn.2d 1053, 187 P.3d 752 (2008), and *State v. Kelley*, 146 Wn.App. 370, 189 P.3d 853 (2008), *review granted* March 3, 2009). Divisions I and II of the Court of Appeals have rejected the specific double jeopardy argument made herein. Although the Washington Supreme Court denied review in *State v. Nguyen*, the court recently accepted review in *State v. Kelley* on the double jeopardy issue. Appellant in this case respectfully submits that for the reasons set out herein, the decisions in *Nguyen* and *Kelley* are incorrect, and will be reversed by the Washington Supreme Court.¹

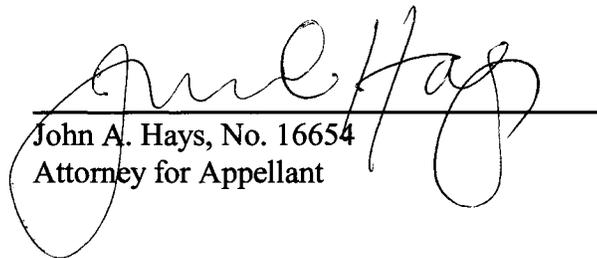
¹The majority of the briefing on the double jeopardy issue herein comes directly from the able brief written by attorney David L. Donnan of the

CONCLUSION

The court should reverse the defendant's convictions and remand for dismissal of the felony harassment charge and retrial on the burglary and assault charges. In the alternative, the court should remand with instructions to strike the deadly weapon enhancement from the defendant's sentence.

DATED this 15th day of September, 2009.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

Washington Appellate Project in *State v. Nguyen*. Counsel herein wishes to acknowledge his work, thank him, and recognize that his arguments on the law of double jeopardy, in current counsel's opinion, need no rewriting.

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 9**

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

**UNITED STATES CONSTITUTION,
FIFTH AMENDMENT**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 9.94A.533(4)(a)&(f)

(4) 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 deadly weapon other than 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 deadly weapon enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the deadly weapon enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a deadly weapon enhancement. If the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any deadly weapon enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Two years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(f) The deadly weapon 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 9A.46.020

(1) A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or

. . .

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

(2)(a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.

(b) A person who harasses another is guilty of a class C felony if either of the following applies: (i) The person has previously been convicted in this or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a no-contact or no-harassment order; or (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.

ER 804

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) Testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subsection (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

(6) A declarant is not unavailable as a witness if the exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement Under Belief of Impending Death. In a trial for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's

impending death.

(3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of Personal or Family History. (i) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (ii) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other Exceptions. [Reserved.]

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STATE OF WASHINGTON
BY Ca
DEPUTY

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

STATE OF WASHINGTON,
Respondent

vs.

GARRISON, Zachariah,
Appellant

NO. 08-1-01130-2
COURT OF APPEALS NO:
39173-2-II

AFFIRMATION OF SERVICE

STATE OF WASHINGTON)
County of Cowlitz) : ss.

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On September 14th, 2009 , I personally placed in the mail the following documents

1. BRIEF OF APPELLANT
2. AFFIRMATION OF SERVICE
3. SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS

to the following:

ARTHUR D. CURTIS
CLARK COUNTY PROS ATTY
1200 FRANKLIN ST.
P.O. BOX 5000
VANCOUVER, WA 98666-5000

ZACHARIAH E. GARRISON #846861
WA STATE PENITENTIARY
1313 N. 13TH AVE.,
WALLA WALLA, WA 99362

Dated this 14TH day of SEPTEMBER, 2009 at LONGVIEW, Washington.

Cathy Russell
CATHY RUSSELL
LEGAL ASSISTANT TO JOHN A. HAYS