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DIVISION II

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STATE OF WASHINGTON

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No. 39433-2-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

MONTEECE TRUSEAN SMITH-LLOYD,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 08-1-05094-9  
The Honorable Bryan Chushcoff, Judge

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OPENING BRIEF OF APPELLANT

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**I. ASSIGNMENTS OF ERROR**

1. By allowing the State to file a Corrected Information adding the allegation that Appellant acted as a principal to the crime, the trial court violated Appellant's constitutional right to know the nature and cause of the accusation against him.
2. The imposition of a firearm sentence enhancement for first degree robbery with a firearm violated the constitutional prohibition on double jeopardy because the enhancement is a lesser included offense of first degree robbery as charged in this case.

**II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Did the trial court violate Appellant's constitutional right to know the nature and cause of the accusation against him, when it allowed the State to amend a charge after resting its case-in-chief, and when the amendment broadened, not lessened, the nature of the crime charged?
2. Under Blakely and its progeny, did the imposition of a firearm sentence enhancement for first degree robbery with a firearm violate the constitutional prohibition on double jeopardy since the enhancement is a lesser included offense of first degree robbery as charged in this case?

### III. STATEMENT OF THE CASE

On the afternoon of October 27, 2008, Bryce Phinney pulled into the parking lot of a University Place 7-11 store, expecting to meet a person interested in purchasing a cellular phone that Phinney was selling. (05/04 RP 59, 60, 61)<sup>1</sup> Phinney testified that two African-American men approached him, and asked if he was selling a phone. (5/04 RP 64) He responded yes, and showed them the phone. (05/04 RP 64, 66)

Phinney testified that one of the men was shorter and was wearing diamond earrings, and the other was taller and was wearing a "do-rag" or beanie on his head. (05/04 RP 64, 65) He gave the phone to the shorter man so that he could verify that it worked, then the taller man asked Phinney if he could have one of Phinney's cigarettes. (05/04 RP 69)

As Phinney reached into his car to get the cigarette pack, he noticed the shorter man run away. (05/04 RP 70) The taller man then leaned closer, lifted his shirt to display a gun in his waistband, and told Phinney to hand over his money and car keys. (05/4 RP 71-72) Phinney complied by giving the man his keys and wallet,

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<sup>1</sup> The transcripts labeled Volumes 1 – 8 will be referred to as "RP" followed by the volume number. The transcript of the May 4, 2009 afternoon proceedings will be referred to as "05/04 RP."

which contained approximately \$400 (including several \$100 bills). (05/04 RP 72; RP4 91) The man took the items and ran in the same direction as the shorter man. (05/04 RP 73) Phinney then went inside the 7-11 and called the police. (05/04 RP 74)

Pierce County Sheriff's Deputies arrived minutes later. (RP3 46; RP5 291-92) Because the two suspects had fled on foot, Deputies used a dog to track their scent. (RP5 294) The dog followed a scent to a nearby home on 49th Street Court West. (RP5 295, 297, 299) Monteece Smith-Lloyd, Melvin Shobey, Brianna Lewis and Alissa Andrews were present when the Deputies arrived. (RP4 146, 147; 186, 227; RP5 299)

Police arrested Smith-Lloyd and Shobey. (RP3 55) Before they were transported to the station, Smith-Lloyd jumped out of a patrol car and ran away. (RP3 58-59) He was located soon after and taken back into custody. (05/04 RP 41-42; RP4 137, 138)

During a subsequent search of the home, Deputies found Phinney's cellular phone, a white "do-rag" and black knit cap, and a gun in a black bag hidden inside a closet. (RP5 265, 266-67, 268, 274-74; RP4 176; 05/04 RP 68) During a search incident to arrest, Deputies found \$377 in cash in Smith-Lloyd's pocket. (05/04 RP 13) Additionally, Shobey was wearing diamond earrings when he

was arrested. (RP3 54; RP4 181)

The State charged Smith-Lloyd with one count of first degree robbery while armed with a firearm (RCW 9A.56.190, .200; RCW 9.94A.530, .533), one count of first degree unlawful possession of a firearm (RCW 9.41.040), and one count of third degree escape (RCW 9A.76.130).<sup>2</sup> (CP 6-8) The State also charged Shobey with first degree robbery. (RP4 167-68) Shobey made a deal with prosecutors to plead guilty to a reduced charge of second degree robbery in exchange for testimony against Smith-Lloyd. (RP1 5; RP4 167-68, 195-96)

At trial, Shobey testified that Smith-Lloyd told him that a friend was going to pick him up at the 7-11, so Shobey decided to walk with him so he could get himself an iced tea. (RP4 717-72) Phinney approached them in the 7-11 parking lot and asked them about the phone, so they stopped to talk. (RP4 172, 174) According to Shobey, Phinney handed him the cellular phone, and Shobey merely looked at it and gave it back. (RP4 174) Shobey testified that he decided to go home, so he jogged away. (RP4 174) Shobey claimed that he never planned to rob Phinney, and

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<sup>2</sup> The State also charged Smith-Lloyd with one count of possession of a stolen firearm, but dropped that charge before trial. (CP 7, 9-10; RP2 30)

that he does not know what happened after he left the 7-11 parking lot. (RP4 172, 183)

According to Shobey, Smith-Lloyd returned to the house a few minutes later, and dropped a cellular phone resembling Phinney's phone onto the dining room table. (RP4 177)

Shobey and Lewis are engaged, and were expecting a baby at the time. (RP4 141, 146, 238, 240) Andrews is Lewis' step-sister. (RP4 155, 222-23) Shobey, Lewis and Andrews all lived at the home, which was rented by Lewis' mother. (RP4 141) Smith-Lloyd stayed there occasionally. (RP4 144-45)

Andrews testified that she hid the black bag in a closet when she heard that the police had arrived. (RP4 232, 233, 236) In her written statement to investigators, she told police that Smith-Lloyd had handed her the bag and asked her to hide it. (RP4 232)

Smith-Lloyd testified on his own behalf. He testified that he is acquainted with Shobey, Andrews and Lewis, but doesn't know any of them very well. (RP5 307, 308, 309) He testified that he was asleep at the home until just before the police arrived. (RP5 309, 310) He denied going to 7-11 on the afternoon of October 27. (RP5 309) He denied giving the black bag to Andrews, and denied having any knowledge of the gun. (RP5 315, 320)

The jury convicted Smith-Lloyd as charged. (RP7 402-03; CP 46-49) The trial court sentenced Smith-Lloyd to a standard range sentence totaling 150 months of confinement. (RP8 418; CP 51, 59) This appeal timely follows. (CP 67)

#### IV. ARGUMENT & AUTHORITIES

- A. The trial court violated Smith-Lloyd's constitutional right to know the nature and cause of the accusation against him when it allowed the State to amend the first degree robbery charge after resting its case-in-chief because the amendment broadened, not lessened, the nature of the crime charged.

In the original Information, the State charged Smith-Lloyd only as an accomplice to first degree robbery. (CP 1) After resting its case-in-chief, the State asked permission to file a Corrected Information charging that Smith-Lloyd acted as either a principal or accomplice. (RP5 300, 302) Smith-Lloyd objected to the filing, but the trial court allowed it. (RP5 303-04; CP 6)

The accused has a right, under both the federal and state constitutions, to be informed of the nature and cause of the accusations against him. See U.S. Const. amend. VI; Wash. Const. art. I, § 22 (amend.10). Under the essential elements rule, the charging document must "allege facts supporting every element of the offense, in addition to adequately identifying the crime

charged.” State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991); see also CrR 2.1(a)(1) (“The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.”). The purpose of the rule is to inform the defendant of the nature of the charges so that he can prepare an adequate defense. Kjorsvik, 117 Wn.2d at 101; State v. Leach, 113 Wn.2d 679, 695, 782 P.2d 552 (1989).

The trial court may permit the amendment of the information “at any time before verdict or finding if substantial rights of the defendant are not prejudiced.” CrR 2.1(d). But if the amendment is made after the State has rested, the information may not be amended except to a lesser degree of the same crime or a lesser included offense. State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987), State v. Vangerpen, 125 Wn.2d 782, 789, 888 P.2d 1177 (1995); State v. Phillips, 98 Wn.App. 936, 941, 991 P.2d 1195 (2000).

For a conviction as an accomplice to stand, the evidence must show only that a defendant solicited, commanded, encouraged, requested, aided or agreed to aid the principal in planning or committing the crime charged. State v. Berube, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003); see also RCW

9A.08.020(3)(a) (requirements for accomplice liability). As an accomplice, a defendant need not participate in or have specific knowledge of every element of the crime nor share the same mental state as the principal. Berube, 150 Wn.2d at 511 (citing State v. Sweet, 138 Wn.2d 466, 479, 980 P.2d 1223 (1999); State v. Hoffman, 116 Wn.2d 51, 104, 804 P.2d 577 (1991)). The proof required to support a conviction as a principal to the crime is therefore much higher.

To support conviction as a principal in this case, the State had to specifically prove that Smith-Lloyd personally took Phinney's property, that he had the specific intent to commit a theft of property, that he personally used force or fear of force to obtain the property, and that he personally displayed a firearm. (CP 34) None of these facts were required to prove that Smith-Lloyd acted as an accomplice. (CP 27)

Accordingly, amending the Information to charge Smith-Lloyd as a principal was akin to amending the Information to charge a greater crime. But because this amendment came after the State rested its case-in-chief, only an amendment to a lesser crime was allowed.

By allowing the State to file the Corrected Information, the

trial court violated Smith-Lloyd's constitutional right to know the nature and cause of the accusation against him, and undermined his ability to mount an adequate defense. "Such a violation necessarily prejudices this substantial constitutional right, within the meaning of CrR 2.1(e)" and the trial court "committed reversible error in permitting this mid-trial amendment." Pelkey, 109 Wn.2d at 491. Smith-Lloyd's first degree robbery conviction, and its corresponding deadly weapon sentence enhancement, must be reversed.

- B. The imposition of a firearm sentence enhancement for first degree robbery with a firearm violated the constitutional prohibition on double jeopardy because the enhancement is a lesser included offense of first degree robbery as charged in this case.<sup>3</sup>

Smith-Lloyd was convicted of and sentenced for first degree robbery (elevated to first degree because of the use of a firearm under RCW 9A.56.200(1)(ii)), and also received a firearm sentence enhancement under RCW 9.94A.533, for the use of that same firearm. (CP 1, 6, 34, 46, 49) In the past, Washington courts have rejected double jeopardy challenges to convictions of both a substantive crime that has the use of a firearm as an element, as

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<sup>3</sup> A double jeopardy argument may be raised for the first time on appeal because it is a manifest error affecting a constitutional right. RAP 2.5(a); State v. Turner, 102 Wn. App. 202, 206, 6 P.3d 1226 (2001) (citing RAP 2.5(a)).

well as a firearm enhancement for the same firearm.<sup>4</sup> Those challenges, however, have always been rejected on the ground that the underlying, substantive statute was considered a crime containing the element of unlawful use of a weapon, while the deadly weapon sentence enhancement was not an element of a crime, but merely a fact that enhanced an offender's sentence.<sup>5</sup>

That logic does not survive Apprendi, Blakely, and Recuenco.<sup>6</sup> In those cases, the courts ruled that any fact that increases the maximum penalty that may be imposed upon a criminal defendant is akin to an element of the crime, and must be proved to a jury beyond a reasonable doubt. Because a firearm enhancement is considered the "functional equivalent" of an element, it is now clear that RCW 9.94A.533 increases the maximum sentence over the statutory maximum.<sup>7</sup> Prior decisions holding that there is no double jeopardy violation because there is

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<sup>4</sup> *E.g.*, State v. Caldwell, 47 Wn. App. 317, 320, 734 P.2d 542 (1987) (robbery); State v. Pentland, 43 Wn. App. 808, 811, 719 P.2d 605 (1986) (rape).

<sup>5</sup> *E.g.*, State v. Claborn, 95 Wn.2d 629, 628 P.2d 467 (1981); State v. Husted, 118 Wn. App. 92, 95, 74 P.3d 672 (2003).

<sup>6</sup> Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); State v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

<sup>7</sup> See State v. Goodman, 150 Wn.2d 774, 785-86, 83 P.3d 410 (2004) (citing with approval portions of Apprendi and Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), and containing this "functional equivalent" language and analysis).

no duplication of elements between the underlying crime and the firearm enhancement must be reconsidered.<sup>8</sup>

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. V.<sup>9</sup> Washington’s constitution similarly provides that no individual shall “be twice put in jeopardy for the same offense.” Wash. Const. art. I, § 9.<sup>10</sup> The double jeopardy clauses forbid 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).

Typically, it is assumed that a legislature intended to bar convictions for both a greater and lesser included offense. See e.g. Harris v. Oklahoma, 433 U.S. 682, 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977); Brown v. Ohio, 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977). The question here is whether our Legislature acted in accord with this assumption where the use of a firearm is a required element of both the greater substantive crime and the

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<sup>8</sup> This issue is currently being considered by our State Supreme Court in State v. Aguirre, No. 82226-3.

<sup>9</sup> 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).

<sup>10</sup> Washington courts give 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).

lesser sentence enhancement.

Neither the first degree robbery statute, RCW 9A.56.200(1)(ii), nor the firearm enhancement statute, RCW 9.94A.533, specifically mention the other statute. And RCW 9.94A.533(4) specifies that the firearm enhancement applies to all offenses except those specifically listed in that section, and first degree robbery is not included on that list.

However, RCW 10.43.020 provides: “When the defendant has been convicted or acquitted upon an indictment or information of an offense consisting of different degrees, the conviction or acquittal shall be a bar to another indictment or information for the offense charged in the former, *or for any lower degree of that offense, or for an offense necessarily included therein.*” (Emphasis added.)

Given the enhancement statute’s silence about the possible interplay with the first degree robbery statute; given the general rule that lesser offenses merge with greater offenses; and given the more protective state statute barring conviction and punishment “for any lower degree of that offense, or for an offense necessarily included therein”; it follows that legislative intent about prosecution and punishment for both first degree robbery with a firearm and a

firearm enhancement is not clear.

But that does not end the inquiry. Even if one statute is not invariably a lesser included offense of the other, “if a court concludes that the facts the State must prove to convict the defendant under the two statutes are the same, the convictions violate double jeopardy and the analysis ends.” State v. Jackman, 156 Wn.2d 736, 750, 132 P.3d 136 (2006).

The lesser included offense analysis is applied “to the offenses as charged and prosecuted, rather than to the offenses as they broadly appear in statute.” State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997). When the evidence required to prove one crime is the same as what is required to prove the other crime, double jeopardy is violated. State v. Freeman, 153 Wn.2d 765, 772, 108 P.3d 753 (2005), In re Pers. Restraint of Orange, 152 Wn.2d 795, 817-20, 100 P.3d 291 (2004).

In this case, in order to obtain a firearm enhancement special verdict, the State had to prove that Smith-Lloyd possessed a firearm during the course of the robbery. (CP 6, 49) In order to prove first degree robbery as charged and instructed in this case, the State had to prove that Smith-Lloyd displayed that firearm during the course of the robbery. (CP 6, 34) The evidence used to

prove the elements of robbery were the same as the evidence used to prove the enhancement.

Because under Appendi, Blakely, and Recuenco a firearm sentence enhancement is the “functional equivalent” of an element of a crime that must be found beyond a reasonable doubt by the jury, conviction and punishment for both a greater offense that contains the use of a firearm as an essential element, and for a lesser offense or act of possessing a firearm while committing the greater crime, violates double jeopardy. Accordingly, the 60-month sentence enhancement imposed as a result of the jury’s special verdict must be stricken.

## **V. CONCLUSION**

The trial court violated Smith-Lloyd’s constitutional right to know the nature and cause of the accusation against him when it allowed the State to amend the first degree robbery charge after resting its case-in-chief since the amendment broadened, not lessened, the nature of the crime charged. This error requires reversal of Smith-Lloyd’s robbery and firearm enhancement convictions. Additionally, Smith-Lloyd’s right to be free from double jeopardy was violated when the trial court entered judgment and sentence for both the crime of first degree robbery while armed with

a firearm and the sentence enhancement for being armed with that same firearm during commission of the crime. This error requires that Smith-Lloyd's 60-month sentence enhancement be stricken.

DATED: February 6, 2010



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**CERTIFICATE OF MAILING**

I certify that on 02/06/10, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Monteece T. Smith Lloyd #333075, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 9832.



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