

No. 41944-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

DESHONE V. HERBIN,

Appellant.

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

The Honorable Paula Casey, Judge  
Cause No. 09-1-01928-6

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BRIEF OF RESPONDENT

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A. STATEMENT OF THE ISSUES.

1. Whether Herbin waived any claim of error by failing to object to the unanimity instruction at trial.
2. Whether the trial court's imposition of firearm enhancements was supported by the jury's verdict, and whether they violated Herbin's due process rights. If they were not proper, whether Herbin waived his right to appeal.
3. Whether Herbin's attorney's performance was deficient. If Herbin's attorney's performance was deficient, whether it was prejudicial to Herbin's case.

B. STATEMENT OF THE CASE.

On February 25, 2011, after two mistrials,<sup>1</sup> a jury found Deshone Verell Herbin guilty of one count of first degree burglary, three counts of first degree kidnapping, and four counts of first degree robbery. CP 66. The jury also found that Herbin committed each of the eight offenses "while armed with a deadly weapon – firearm." Id. at 66, 58-65 ("QUESTION: Was the defendant . . . armed with a firearm at the time of the commission of the crime . . . WHILE ARMED WITH A DEADLY WEAPON – FIREARM. . . . ANSWER: Yes.").

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<sup>1</sup> 4/13/2010 RP 18-19 (in Herbin's first trial, the jury stated that it was unable to reach a unanimous decision); 11/5/2010 RP 40, 42 (in Herbin's second trial, after a juror committed misconduct, the jury also stated that it was unable to reach a unanimous decision).

During Herbin's second trial, Sergeant Kenneth Clark testified that he test fired the shotgun that police recovered from outside the victims' home, stating that the shotgun was a functioning firearm. 11/1/10 RP 41. While Sergeant Clark did not testify at Herbin's third trial, Detective Steve Hamilton recounted Sergeant Clark's conclusion that the shotgun was in fact a functioning firearm. 2/22/11 RP 85-86. Excluding Detective Hamilton's testimony regarding Sergeant Clark's test, witnesses during Herbin's trial referred to the shotgun found outside the victims' home over thirty-five times. See, e.g., id. at 20, 22, 29-32, 96-97; 2/23/11 RP 110-12, 118-19, 124, 136-38, 141, 149-50, 152, 154, 163, 165-66, 171-72, 180-81, 184, 199-200, 205-06, 215.

The trial court issued standard instructions to the jury, one of which stated:

You will also be given special verdict forms for the crimes charged in Counts I to VIII. If you find the defendant not guilty of these crimes, do not use the special verdict forms. If you find the defendant guilty of these crimes, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If after full and fair

consideration any single juror has a reasonable doubt as to this question, you must answer “no”.

Because this is a criminal case, each of you must agree for you to return a verdict. . . .

CP 48-49. Herbin did not take exception to any of the jury’s instructions. 02/24/11 RP 373.

On March 24, 2011, Herbin was sentenced to 629 months of total confinement. CP 66, 70. On March 28, 2011, Herbin filed a timely notice of appeal, CP 78, arguing that the trial court improperly imposed the firearm enhancement and that his trial counsel committed ineffective assistance of counsel, see, e.g., Appellant’s Opening Brief (Appellant’s Brief) at 1-2.

### C. ARGUMENT.

1. Herbin waived any claim of error by failing to object to the jury’s unanimity instruction at trial because the instruction did not violate Herbin’s constitutional rights.

To claim error on appeal, an appellant challenging a jury instruction must first show that he took exception to that instruction in the trial court. State v. Salas, 127 Wn.2d 173, 181, 897 P.2d 1246 (1995). The purpose of requiring objections or exceptions is “to afford the trial court an opportunity to know and clearly understand the nature of the objection” so that “the trial court may

have the opportunity to correct any error.” City of Seattle v. Rainwater, 86 Wn.2d 567, 571, 546 P.2d 450 (1976)(citing State v. Louie, 68 Wn.2d 304, 311-12, 413 P.2d 7 (1966)). The objecting party must indicate the instruction objected to and the reasons for the objection. CrR 6.15(c). An instructional error may be raised for the first time on appeal only if it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 684, 757 P.2d 492 (1988).

In State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), the defendant was charged with three counts of delivery of a controlled substance and a school bus stop sentencing enhancement. Id. at 137. The jury’s instruction that explained the special verdict forms stated: “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” Id. at 139. Rejecting the jury’s instruction, the Bashaw court stated that the trial court improperly instructed the jury that it must also be unanimous to answer the special verdict in the negative. Id. at 147. Citing State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), Bashaw held that “a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding

increasing the defendant's maximum allowable sentence." Id. at 146.

Bashaw listed several policy justifications (i.e., not constitutional rights) to support its holding:

The rule we adopted in Goldberg and reaffirm today serves several important policies. First, we have previously noted that "[a] second trial exacts a heavy toll on both society and defendants by helping to drain state treasuries, crowding court dockets, and delaying other cases while also jeopardizing the interests of defendants due to the emotional and financial strain of successive defenses." The costs and burdens of a new trial, even if limited to the determination of a special finding, are substantial. We have also recognized a defendant's "'valued right' to have the charges resolved by a particular tribunal. Retrial of a defendant implicates core concerns of judicial economy and finality. Where, as here, a defendant is already subject to a penalty for the underlying substantive offense, the prospect of an additional penalty is strongly outweighed by the countervailing policies of judicial economy and finality.

Bashaw, 169 Wn.2d at 146-47 (internal cites removed).

"Instructional error is not automatically constitutional error." State v. Nunez, 160 Wn. App. 150, 159, 248 P.3d 103 (2011). In Nunez, the defendant also received a school bus stop enhancement to his sentence following conviction for controlled substance violations. Id. at 153. The unanimity instruction to the jury at trial was similar to the one Bashaw rejected. Nunez, 160

Wn. App. at 157 n.1 (“Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. . . .”). Nunez, however, held that the trial court’s unanimity instruction was not an error of constitutional magnitude. Id. at 159.

Both the defendant and the court in Nunez were unable to find a provision in either the Washington or U.S. Constitutions that were violated by the trial court’s unanimity instruction. Id. at 159-60. Nunez also noted that the Bashaw court did not conclude that a constitutional provision had been violated. Nunez, 160 Wn. App. at 161-62.

[Goldberg and Bashaw] turned on a policy choice that the court acknowledged could be reasonably resolved either way. In short, the aggravating factors in Mr. Nunez’s [the defendant] case were imposed following a deliberative procedure to which he did not object; which no court, state or federal, has found to be unconstitutional or unfair; which has been acknowledged to have procedural advantages; and which, in the lesser included crime context, is preferred by a number of jurists and courts. *This is not constitutional error.*

Nunez, 160 Wn. App. at 162-63 (emphasis added). The court in Nunez also stated that although Bashaw did not conclude that the error impacted the defendant’s constitutional rights, it still vacated the sentencing enhancement on the grounds that it could not find

the error to be harmless. Nunez, 160 Wn. App. at 165 (citing Bashaw, 169 Wn.2d at 148).<sup>2</sup>

Acknowledging that this court previously rejected his argument, Nunez, 160 Wn. App. at 159, Herbin claims that the unanimity instruction in this case violated his constitutional rights, Appellant's Brief at 21. While the Bashaw court disapproved of Herbin's unanimity instruction, it specifically noted that its holding was based on common law precedent and not on a constitutional right. Bashaw, 169 Wn.2d at 146 n. 7. The error in this case therefore did not impact a constitutional right. See Nunez, 160 Wn. App. at 159.<sup>3</sup> And because the error is not of constitutional

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<sup>2</sup> Despite Bashaw's clear language, a Division I panel held that "under Bashaw, the error must be treated as one of constitutional magnitude and is not harmless." State v. Ryan, 160 Wn. App. 944, 949, 252 P.3d 895 (2011), review granted, 172 Wn.2d 1004, 258 P.3d 676 (2011). Another Division I panel, Division II, and Division III, however, agree that the instructional error analyzed in Bashaw is not of constitutional magnitude and cannot be raised for the first time on appeal. State v. Morgan, 163 Wn. App. 341, 351-53, 261 P.3d 167 (2011); State v. Grimes, 165 Wn. App. 172, 191, 267 P.3d 454 (2011); Nunez, 160 Wn. App. at 163, review granted, 172 Wn.2d 1004, 258 P.3d 676 (2011).

This issue is currently before the Supreme Court in Nunez and Ryan, which the Supreme Court consolidated for purposes of its review (consideration of Division I's decision in Morgan has been deferred, pending the court's final decision in Nunez and Ryan). The Supreme Court held oral arguments in Nunez and Ryan on January 12, 2012. State v. Nunez, No. 85789-0 (consolidated with State v. Ryan, No. 85947-7).

<sup>3</sup> Harmless error analysis is applicable to constitutional errors. Nunez, 160 Wn. App. at 164. Nunez held that Bashaw's application of the harmless error standard did not compel the conclusion that the error was of constitutional magnitude. Nunez, 160 Wn. App. at 165. With Nunez's holding in mind, the State maintains that harmless error analysis does not apply because the instructional error in this case did not implicate Herbin's constitutional rights.

magnitude, RAP 2.5(a)(3) does not apply—Herbin’s failure to object to the unanimity instruction at trial prevents him from arguing that it was improper on appeal.

2. The firearm enhancements (1) were supported by the jury’s verdict because the jury found that Herbin was armed with a firearm, and (2) did not violate Herbin’s due process rights because the State’s charging documents stated that it was seeking firearm enhancements.

RCW 9.94A.533 provides for a term of confinement, in addition to the standard range sentence, to be imposed when the defendant was armed with a firearm (subsection (3)) or a deadly weapon other than a firearm (subsection (4)). RCW 9.94A.825 states that

In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are

included in the term deadly weapon: . . . pistol, revolver, or any other firearm. . . .

A sentencing enhancement must be based upon a jury finding. State v. Walker-Williams, 167 Wn.2d 889, 897, 225 P.3d 913 (2010).

[O]nly three options exist. First, if the jury makes no finding, no sentence enhancement may be imposed. Second, where the jury finds the use of a deadly weapon (even if a firearm), then the deadly weapon enhancement is authorized. *Finally, where the jury finds the use of a firearm, then the firearm enhancement applies.* Critically, the sentencing judge can know which (if any) enhancement applies only by looking to the jury's special findings.

Id. at 901-02 (emphasis added). The State must also give defendants notice in its charging documents that it is seeking firearm enhancements. State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008)(citing In re Pers. Restraint of Bush, 95 Wn.2d 551, 554, 627 P.2d 953 (1981)).

First, Herbin argues that the eight firearm enhancements were improperly imposed because the jury authorized deadly weapon—and not firearm—enhancements. Appellant's Brief at 24-25. In this case, the jury was instructed that:

"For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a *firearm* at the time of the commission of the

crime in Counts I through VIII.” CP 45 (emphasis added); and

“A “*firearm*” is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.” *Id.* (emphasis added).

*Id.* at 48. The jury was then asked: “QUESTION: Was the defendant . . . *armed with a firearm* at the time of the commission of the crime BURGLARY<sup>4</sup> IN THE FIRST DEGREE WHILE ARMED WITH A DEADLY WEAPON – *FIREARM* as charged in Count I?” *Id.* at 58 (emphasis added). The jury answered “Yes” on each of the eight special verdict forms. *Id.* at 58-65.

Unlike this case, the verdict forms in Walker-Williams did not mention the word firearm—and only used the words “deadly weapon.” *Id.* at 898. And in light of Walker-Williams, the State acknowledges that if the word firearm had not been on the special verdict forms in this case, only the lesser deadly weapon enhancements could be imposed. But in this case, the jury was (1) told that the State must prove that Herbin was armed with a firearm, CP 45; (2) told that a firearm constitutes a deadly weapon, *id.* at 58-65; and (3) asked if Herbin committed each crime while armed with

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<sup>4</sup> While the jury was asked to answer different special verdict forms for each of the eight crimes, the language used on each special verdict form was essentially the same (*i.e.*, Counts II through IV stated First Degree Kidnapping, CP 59-61, while Counts V through VIII stated First Degree Robbery, *id.* at 62-65.).

a firearm (to which the jury answered “yes”), id. The victims also testified at trial that the intruders were armed with a shotgun, see, e.g., 2/23/11 RP 110, and police found a shotgun in the bushes by the victims’ home, see, e.g., 2/22/11 RP 20. Shotguns are considered firearms, RCW 9.41.010(7)—and Herbin’s firearm enhancements were supported by the jury’s verdict.

Second, Herbin argues that the firearm enhancements violated his due process rights because they were imposed without notice. Appellant’s Brief at 23. In this case, the Third Amended Information (and for that matter the Information, the First Amended Information, and the Second Amended Information, CP 4-12) alleged that Herbin committed Counts I through VIII while “armed with a deadly weapon – *firearm*,” CP 13-15 (emphasis added); and—for each count—included both RCW 9.94A.533(3) (which specifies the additional time to be imposed for a firearm enhancement) and RCW 9.94A.602<sup>5</sup> (which defines a “deadly weapon” as “. . . any other firearm. . .”), CP 13-15. The Third Amended Information also listed RCW 9A.52.020(1),<sup>6</sup> which

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<sup>5</sup> RCW 9.94A.602 is now codified as RCW 9.94A.825, which is quoted above at page 8. Laws of 2009, ch. 28, § 41. There were no substantive changes to the Legislature’s recodification of RCW 9.94A.602. Id.

<sup>6</sup> RCW 9A.52.020(1) states that “A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she

references deadly weapons, and RCW 9A.56.200(1),<sup>7</sup> which references firearms. CP 13-15.

In other words, Herbin claims that he lacked notice because the State included the words “deadly weapon” in its charging language. Herbin’s argument asks the court to ignore the word firearm—which is the word that immediately follows “deadly weapon.” *Id.* And his argument also asks the court to ignore the Third Amended Information’s other eight references to the word firearm. *Id.* But such an argument elevates form over substance to an absurd degree; Herbin had notice that the State would seek firearm enhancements.

Herbin also attempts to bolster his claims by analogizing his case to *In re Pers. Restraint of Delgado*, 149 Wn. App. 223, 204 P.3d 936 (2009), *see, e.g.*, Appellant’s Brief at 24, but *Delgado* is distinguishable from this case. First, while the State alleged—as it also did in *Delgado*—that Herbin was “armed with a deadly weapon – firearm,” the State in *Delgado* did not specify that it was charging

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enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) *is armed with a deadly weapon*, or (b) assaults any person.” Emphasis added.

<sup>7</sup> RCW 9A.56.200(1) states that “A person is guilty of robbery in the first degree if: (a) In the commission of a robbery or of immediate flight therefrom, he or she: (i) *Is armed with a deadly weapon*; or (ii) *Displays what appears to be a firearm* or other deadly weapon; or (iii) *Inflicts bodily injury*. . . .” Emphasis added.

the defendants under former RCW 9.94A.510(3).<sup>8</sup> Delgado, 149 Wn. App. at 229. Second, the trial court in Delgado asked the jury to return special verdicts if the defendant was “armed with a deadly weapon.” Id. at 235. And, finally, the jury’s instructions in Delgado did not define firearm. Id. Herbin, unlike the defendant in Delgado, had notice that he was being charged under RCW 9.94A.533(3),<sup>9</sup> CP 13-15; the jury’s instructions defined firearm, id. at 45; and the jury returned eight special verdicts that found Herbin was “armed with a firearm,” id. at 58-65. The result in Delgado was correct for that case, but not for Herbin’s.

Even if the firearm enhancements were improper, this court should not address them because Herbin waived any claim of error by failing to object at trial.

In general, appellate courts do not review claims of error not raised at trial. RAP 2.5(a); State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). To raise a claim for the first time on appeal, “the appellant must ‘identify a constitutional error and show how the alleged error actually affected the [appellant]’s rights at trial.” Gordon, 172 Wn.2d at 676 (citing State v. O’Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009))(quoting State v. Kirkman, 159 Wn.2d 918,

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<sup>8</sup> RCW 9.94A.510(3) is now codified as 9.94A.533(3). Laws of 2002, ch. 290, § 11.

<sup>9</sup> As indicated above, RCW 9.94A.533(3) was formerly codified as RCW 9.94A.510(3). Laws of 2002, ch. 290, § 11.

926-27, 155 P.3d 125 (2007))). To constitute a manifest constitutional error there must be actual prejudice—that is, “practical and identifiable consequences in the trial of the case.” Gordon, 172 Wn.2d at 676 (citing O’Hara, 167 Wn.2d at 99)(quoting Kirkman, 159 Wn.2d at 935). A manifest constitutional error can be harmless, and the State bears the burden of establishing that the error is harmless. Gordon, 172 Wn.2d at 676 (citing Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)).

Even if there was error in this case, and even if the error was “manifest” and affected Herbin’s constitutional rights, the error was harmless—as the firearm enhancements were clearly based on the jury’s findings that Herbin was armed with a firearm. See, e.g., CP 58-65.

3. Herbin did not receive ineffective assistance of counsel (1) because Herbin’s attorney’s performance was not deficient, and (2) because even if his attorney’s performance was deficient, it was not prejudicial to Herbin’s case.

While appellate courts review claims of ineffective assistance of counsel *de novo* after considering the entire record, State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995)(citing Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988))—their review

always begins with a strong presumption that counsel's performance was effective, Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). "To prove that failure to object rendered counsel ineffective, Petitioner must show that not objecting fell below prevailing professional norms, that the proposed objection would likely have been sustained, and that the result of the trial would have been different if the evidence had not been admitted." In re Pers. Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).<sup>10</sup>

In this case, Herbin claims that he was denied effective assistance because his attorney failed to object to evidence regarding a shotgun's operability as hearsay. Appellant's Brief at 25.<sup>11</sup>

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<sup>10</sup> As with all ineffective assistance of counsel claims, the Strickland rule still governs: appellants must show (1) that counsel's performance was deficient and (2) that counsel's deficient performance was prejudicial to their case. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)(quoting Strickland, 466 U.S. at 687).

<sup>11</sup> Herbin's brief refers to both Sergeants Davis and Clark, apparently confusing the two sergeants for the same person. Appellant's Brief at 27. Because there is no Sergeant Davis mentioned in the transcripts from either Herbin's second or third trials, the State believes that Herbin's references to Sergeant Davis were intended to be Sergeant Clark.

- a. Herbin's attorney's decision to not object to Detective Hamilton's testimony was not deficient because it did not constitute hearsay.

"Hearsay is not admissible except as provided by these rules, by other court rules, or by statute." Evidence Rule (ER) 802. ER 801(c) states that "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A "statement" is "(1) an oral or written assertion or (2) *nonverbal conduct of a person, if it is intended by the person as an assertion.*" ER 801(a) (emphasis added). As Karl B. Tegland explains,

A preliminary determination under Rule 104 will be necessary to resolve the issue of whether the conduct was indeed intended as an assertion.

The result is obvious only at the extremes. Thus, the act of nodding one's head affirmatively or pointing to identify a suspect in a lineup would under most circumstances be considered an assertion, while an involuntary act such as trembling would not.

5B KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE ch. 8, at 324-25 (2007).

The Sixth Amendment to the United States constitution provides that, "in all criminal proceedings, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." Article 1, § 22 of Washington's state constitution states that, "In

criminal prosecutions the accused shall have the right to . . . meet the witnesses against him face to face.” The protection provided by the federal constitution is identical to the protection provided by Washington’s. See, e.g., State v. Florczak, 76 Wn. App. 55, 71, 882 P.2d 1999 (1994).

Out-of-court testimonial statements of witnesses absent from trial may be admitted “only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.” Crawford v. Washington, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), *reversing* State v. Crawford, 147 Wn.2d 424, 54 P.3d 656 (2002). A testimonial statement is a statement that the out-of-court declarant “would reasonably expect to be used prosecutorially” or “made under circumstances which would lead an objective witness reasonably to believe that the statement would be for use at a later trial.” Crawford, 541 U.S. at 51-52.

In this case, Detective Hamilton’s testimony regarding Sergeant Clark’s actions was not hearsay because Sergeant Clark’s conduct did not constitute a statement. 2/22/11 RP 85-86. Under ER 801(a), “nonverbal conduct of a person” constitutes a “statement” only “if it is intended by the person as an assertion.”

Sergeant Clark's decision to load the shotgun with three shotgun shells, to cycle and rack its action, to extract the shotgun shells, to fire the shotgun, etc., was not intended as an assertion that the firearm was operable—Sergeant Clark merely sought to determine whether the shotgun was a functioning firearm. 2/22/11 RP 85.

Similar to the act of nodding one's head in response to a question, Sergeant Clark's actions would have been an assertion and, thus, a "statement" under ER 801(a) if he had fired the shotgun in response to another's question of whether the shotgun was operable—but that is not what happened. In fact, if the court considered Sergeant Clark's actions a "statement" under ER 801(a), all testimony recounting a test's results would be considered improper hearsay. Because Detective Hamilton's testimony regarding Sergeant Clark's actions did not constitute hearsay, Herbin's attorney's decision to not object cannot be considered deficient. See Davis, 152 Wn.2d at 714.

Any assertion that Herbin's constitutional right to confront his witnesses was violated is without merit. First, Herbin has waived his right to any argument regarding his confrontational rights because he is unable to cite to an authority that says his

confrontational right was violated.<sup>12</sup> Ensley v. Pitcher, 152 Wn. App. 891, 906, 222 P.3d 99 (2009)(citing RAP 10.3(a)(6); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)). Second, even if Herbin's argument was considered, his confrontational rights were not implicated because Sergeant Clark's conduct did not constitute hearsay. See Crawford 541 U.S. at 59. And, finally, assuming Crawford applied and Sergeant Clark was unavailable to testify at Herbin's trial, Herbin's confrontational rights were satisfied because he was afforded an "opportunity" to cross-examine Sergeant Clark. 11/1/10 RP 41-42 (Herbin actually cross-examined Sergeant Clark during his second trial).

- b. Even if Herbin's attorney's performance was deficient and testimony regarding Sergeant Clark's conduct was excluded as improper hearsay, the State still established that the shotgun was an operable firearm.

To meet the requirement of the second prong, appellants must show that ""there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."" Thomas, 109

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<sup>12</sup> Similarly, Herbin also failed to cite an authority that says Detective Hamilton's testimony constitutes improper hearsay. See Appellant's Brief at 25-28.

Wn.2d at 226 (emphasis removed)(quoting Strickland, 466 U.S. at 694).

Appellant courts are not required to address both prongs of the test if the appellant makes an insufficient showing on either prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1986)(*superseded by statute on other grounds*). Courts may therefore dispose of an appellant's ineffectiveness claim on the ground of lack of sufficient prejudice if they prefer. Strickland, 466 U.S. at 697.

RCW 9.94A.533(3) provides for additional time to be added to the sentence for the underlying crime "if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010. . . ." RCW 9.41.010(7) defines a firearm as "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." See also CP 45.

The Recuenco court, for instance, was asked whether the trial court committed error because it imposed firearm enhancements when the jury found that the defendant was armed with a deadly weapon. Id. at 431. Responding to the dissenting opinion's arguments, Recuenco stated: "We have held that a jury must be presented with sufficient evidence to find a firearm

operable under this definition in order to uphold the enhancement.” Id. at 437 (citing State v. Pam, 98 Wn.2d 748, 754-55, 659 P.2d 454 (1983), *overruled in part on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988)). The question, then, is how Pam defines operability.

In Pam, the defendant robbed an auto supply store in Seattle. Id. at 751. He carried a gun, pointed it at a victim but did not fire, and, as he ran away, his gun fell apart. Id. While police recovered a wooden forestock, no other parts of the weapon were produced at trial—and the trial court imposed a firearm enhancement after the jury found that the defendant was armed with a firearm. Id. But the Pam court vacated the trial court’s decision because the jury was not instructed that the State must prove the firearm enhancement beyond a reasonable doubt. Id. at 760. Citing to statutes which have since been recodified, the court stated that:

Under RCW 9.95.040, the State must prove the presence of a deadly weapon *in fact* in order to permit a special finding that the defendant was armed with a deadly weapon. A defendant’s penalty cannot be enhanced if the evidence establishes only that he was armed with a gun-like, but nondeadly, object. State v. Tongate, [93 Wn.2d 751, 613 P.2d 121 (1980)]. Under RCW 9.41.025, the State must prove the presence of a “firearm,” which is defined under WPIC

2.10 [like RCW 9.41.010(7)] as a “weapon from which a projectile may be fired by an explosive such as gun powder”. A gun-like object incapable of being fired is not a “firearm” under this definition.

Pam, 98 Wn.2d at 753 (emphasis in original).

Division II of the Court of Appeals addressed this issue in State v. Faust, 93 Wn. App. 373, 967 P.2d 1284 (1998). In that case, the defendant assaulted his wife with a firearm. Id. at 374. The police tested the gun and could not get it to fire because its round jammed, preventing the bullet from entering its chamber. Id. at 375. The defendant argued that since the gun would not fire, it did not meet the definition of a firearm under RCW 9.41.010. Id. While Faust found the definition of firearm to be ambiguous, it stated that:

The language “a weapon or device from which a projectile or projectiles *may be fired*” clearly indicates that a firearm must be capable of firing a projectile at some point in time.

Id. at 376 (emphasis in original).

The Faust court concluded that “the Tongate language relied upon by Pam did not limit the definition of a firearm to one capable of being fired during the crime. Rather, the distinction was between a toy gun and a gun “in fact.”” Faust, 93 Wn. App. at 380. Referring to the decision the court made in Tongate (the gun—to be

considered a firearm—must be a real gun, not a gun-like but nondeadly object), the court stated that Tongate “made clear that an unloaded gun, or one incapable of being fired, was still a deadly weapon within the meaning of the statute.” Faust, 93 Wn. App. at 380.

[W]hen the Legislature adopted the definition of a firearm in 1983, the Washington Supreme Court had clearly set out the definition of firearm in both Tongate and Pam. And the definition did not limit firearms to only those guns capable of being fired during the commission of the crime. Rather, the court characterized a firearm as a gun in fact, not a toy gun; and the real gun need not be loaded or even capable of being fired to be a firearm. . . .

In addition, we noted two policy considerations: (1) a loaded or unloaded gun creates the same apprehension in the victim; and (2) an unloaded gun can be loaded during the commission of the crime and, therefore, has the same potential to inflict violence. . . . Further, the potential to inflict violence also exists with a malfunctioning gun. If an unloaded gun can be loaded, a malfunctioning gun can be fixed.

Faust, 93 Wn. App. at 380-81 (citing State v. Sullivan, 47 Wn. App. 81, 733 P.2d 598 (1987); see also State v. Anderson, 94 Wn. App. 151, 162, 971 P.2d 585 (1999), *reversed on other grounds*, 141 Wn.2d 357, 5 P.3d 1247 (2000)) (“It begs reason to assume that our Legislature intended to allow convicted felons to possess firearms so long as they are unloaded, or so long as they are temporarily in

disrepair, or . . . temporarily disassembled, or so long as for any other reason they are not immediately operable.”).

An imposition of a firearm enhancement is also valid even if the actual gun is not produced into evidence: eyewitness testimony about a real gun that is neither discharged nor recovered is sufficient to support firearm enhancements. Faust, 93 Wn. App. at 380 (citing to State v. Bowman, 36 Wn. App. 798, 803-04, 678 P.2d 1273 (1984)). Disassembled firearms that can be made operational with reasonable effort in a reasonable time are firearms. State v. Padilla, 95 Wn. App. 531, 535, 978 P.2d 1113 (1999).

In this case, Herbin argues that if his attorney had objected to Sergeant Clark’s actions as hearsay, the jury would not have found that the gun was operable. Appellant’s Brief at 28. But not only would the judge have overruled Herbin’s objection (see argument briefed at pages 16-19), “operable” simply means that the gun is real (i.e., not a toy gun or some other object that a defendant pretends is a gun). See, e.g., Pam, 98 Wn.2d at 753; Tongate, 93 Wn.2d at 535; Faust, 93 Wn. App. at 380. Excluding Detective Hamilton’s testimony regarding Sergeant Clark’s actions, the shotgun found by the victims’ home is referenced more than thirty-five times at trial—which is more than sufficient to support a firearm

enhancement. See, e.g., Deputy Anthony Adams's testimony at 2/22/11 RP 29-30:

- Q. Can you identify what that is. [sic]  
A. This is a pump-action shotgun, the same one depicted in the photo.  
Q. Is that the – that is the shotgun that you took the photograph of.  
A. This is the shotgun.  
Q. And does that shotgun appear to be in the same condition as it was when you seized it?  
A. Oh, yeah. It's in the same physical condition, yes, but it's unloaded now. . . .  
Q. Now, when you seized that weapon . . . [d]id you check to see if the weapon was loaded?  
A. I did.  
Q. And was it loaded?  
A. It was.

Testimony like Deputy Adams's indicated that the shotgun was real, that it was loaded, that it was capable of being fired, and that it was a gun "in fact."

Because the evidence produced at trial demonstrated that the shotgun was operable within the meaning of RCW 9.41.010(7),

Herbin has failed to show that his attorney's decision to not object to Detective Hamilton's testimony prejudiced his case.<sup>13</sup>

D. CONCLUSION.

First, Herbin waived any claim of error by failing to object to the jury's unanimity instruction at trial because the instruction did not violate Herbin's constitutional rights. Second, the firearm enhancements were also proper because they were supported by the jury's verdict and because the State gave Herbin notice in its charging documents. Even if the firearm enhancements were not proper, Herbin waived any claim of error by failing to object at trial.

Finally, Herbin did not receive ineffective assistance of counsel because Herbin's attorney's performance was not deficient,

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<sup>13</sup> While the State believes that its arguments are persuasive, Herbin's arguments also fail on several procedural grounds:

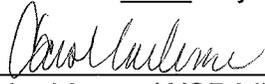
- (1) The burden is on the objecting party to persuade the court that the statement or conduct in question was intended as an assertion, and that it is therefore objectionable as hearsay. Advisory Committee Note, Fed.R.Evid. 801;
- (2) Doubtful cases should be resolved against the objecting party and in favor of admissibility. In re Dependency of Penelope B., 104 Wn.2d 643, 654, 709 P.2d 1185 (1985); and
- (3) Herbin's failure to object to Detective Hamilton's testimony at trial waived any claim of error. See, e.g., argument briefed at pages 13-14.

If Herbin had objected to Detective Hamilton's testimony at trial, it would have been his burden to persuade the trial court that Sergeant Clark intended his conduct to be an assertion. Given that Herbin is still unable to cite to an authority that says Detective Hamilton's testimony was improper, it is highly doubtful that he would have met his burden at trial. Herbin has waived his argument on appeal.

and because even if his attorney's performance was deficient, it was not prejudicial to Herbin's case.

The State respectfully asks this court to affirm Herbin's conviction.

Respectfully submitted this 21<sup>st</sup> day of March, 2012.



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Carol La Verne, WSBA# 19229  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on the date below as follows:

*Electronically filed at Division II*

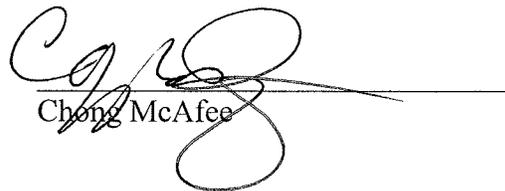
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950 BROADWAY, SUITE 300  
TACOMA, WA 98402-4454

--AND TO--

LISA TABBUT, ATTORNEY FOR APPELLANT  
EMAIL: LISA.TABBUT@COMCAST.NET

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 21<sup>st</sup> day of March, 2012, at Olympia, Washington.

  
Chong McAfee

# THURSTON COUNTY PROSECUTOR

**March 21, 2012 - 2:45 PM**

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