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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

28195-7-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT/CROSS-APPELLANT

v.

PAUL E. STATLER, APPELLANT/CROSS-RESPONDENT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE MICHAEL P. PRICE

BRIEF OF RESPONDENT/CROSS-APPELLANT

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I.

APPELLANT/CROSS-RESPONDENT'S ASSIGNMENTS OF ERROR

- (1) The trial court erred in denying defendant's motion for a new trial based upon newly discovered evidence.
- (2) The defendant was denied effective assistance of counsel.
- (3) The State violated defendant's due process rights by threatening to prosecute a defense witness for perjury if he testified.
- (4) The defendant's convictions for first degree assault and drive-by-shooting were based upon the same act and thereby violate his right against double jeopardy.
- (5) The defendant's right to equal protection was violated by the doubling provision of RCW 9.94A.533 because a jury did not find beyond a reasonable doubt the facts necessary to double the enhancements.
- (6) Defendant's right to notice under Washington Constitution art. I, §22 was violated by the omission of allegations in the charging pleading that the doubling provision of RCW 9.94A.533 would apply to any firearm enhancement found by the jury.

II.

RESPONDENT/CROSS-APPELLANT'S ASSIGNMENTS OF ERROR

- (1) The trial court erred in ordering that the sentences of two serious violent offenses be served concurrently in contravention of the provisions of RCW 9.94A.589(1)(b).

III.

ISSUES PRESENTED

- (1) Did the trial court abuse its discretion in denying defendant's motion for a new trial under CrR 7.5(a)(3) based upon allegedly newly discovered evidence?
- (2) Was defendant's counsel ineffective for not calling a witness who had indicated in pre-trial interviews that defendant and his co-defendants were not the perpetrators of the crimes charged in this case?
- (3) Was defendant deprived of due process when a witness indicated that he would not testify at trial because he had been warned of the possibility of being charged with perjury by law enforcement officers?

- (4) Was defendant subjected to double jeopardy by his convictions for first degree assault and drive-by-shooting because the crimes are the same in fact and law?
- (5) Is the doubling provision of RCW 9.94A.533 unconstitutional as a violation of the equal protection clauses of the United States and Washington State constitutions?
- (6) Was the Information filed in this case unconstitutional for not alleging that defendant faced the doubling provisions of RCW 9.94A.533 if the jury returned special verdicts finding that he or an accomplice was armed with a firearm during the commission of the crimes charged?
- (7) Did the trial court violate the provisions of the Sentencing Reform Act by imposing an exceptional sentence without articulating substantial and compelling reasons for such a sentence which were based upon a preponderance of the evidence in the record?

IV.

STATEMENT OF THE CASE

The Respondent/Cross-Appellant accepts the Appellant/Cross-Respondent's Statement of the Case for purposes of this appeal only.

V.

ARGUMENT

A. THE TRIAL COURT PROPERLY DENIED THE MOTION FOR A NEW TRIAL UNDER CrR 7.5(a)(3).

Criminal Rule ("CrR") 7.5(a) provides, in pertinent part:

The court...may grant a new trial for any one of the following reasons when it affirmatively appears that a substantial right of the defendant was materially affected:
...(3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial.

CrR 7.5(a).

Defendant moved the trial court for a new trial under CrR 7.5(a)(3) contending that the allegedly exculpatory evidence from co-defendant, Anthony Kongchung, was newly discovered evidence. The trial court extensively examined the subject evidence and concluded that neither the circumstances of its availability nor its content satisfied the standard for granting a new trial. There was no error.

CrR 7.5(a) uses the term “may,” not “shall”, in describing the trial court’s discretion regarding the resolution of this motion. The Supreme Court has developed a five-part test that must be satisfied before a trial court *may* grant a new trial. The Supreme Court wrote:

The first ground relied upon by the trial judge was "newly discovered evidence", CrR 7.5(a)(3). A new trial will not be granted on that ground unless the moving party demonstrates that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. *State v. Franks, supra* at 418. The absence of any one of the five factors is grounds for the denial of a new trial, *see State v. Franks*,¹ *supra*, or the reversal of the grant of a new trial, *see State v. Peele*, 67 Wn.2d 724, 731, 409 P.2d 663 (1966).

State v. Williams, 96 Wn.2d 215, 222-223, 634 P.2d 868 (1981) (footnote added). While a decision to grant or deny a new trial is reviewed for abuse of discretion, this court has noted that the granting of a new trial is frequently reversed since the matter usually involves error at law. *State v. Marks*, 90 Wn. App. 980, 984-985, 955 P.2d 406, *review denied* 136 Wn.2d 1024 (1998). The trial court’s discretion regarding this motion is primarily limited to an evaluation of the credibility and effect of the new evidence. The trial court denied the motion on the basis that factors (1), (2), (3), (4), and (5)

¹ The full cite is: *State v. Franks*, 74 Wn.2d 413, 445 P.2d 200 (1968).

were not satisfied. Report of Proceedings of May 20, 2009 (“RP-052009”) 24-30. That assessment was correct.

As to the first element, nothing in this record shows why Anthony Kongchunji had to be believed, let alone why that evidence was so compelling that all of the contrary evidence would have to be disregarded. The test is not whether the new evidence *might* change the verdict. Rather, it is that the new evidence *will probably* change the verdict. *State v. Williams, supra*. Much stronger showings than this have failed to satisfy this standard. For instance, the post-trial retention of expert witnesses to challenge the State’s trial evidence routinely fails to satisfy this test, even though the experts contradicted the evidence produced at trial. *State v. Harper*, 64 Wn. App. 283, 823 P.2d 1137 (1992); *State v. Evans*, 45 Wn. App. 611, 726 P.2d 1009 (1986).² Other types of “new” evidence have met the same fate. *E.g., State v. Goforth*, 33 Wn. App. 405, 407-408, 655 P.2d 714 (1982) (testimony of another that he had committed the crime after defendant had been convicted at trial was insufficient evidence to say verdict would probably be changed); *State v. Peele, supra* (confession of co-defendant exculpating defendant and blaming another not enough to show verdict

² As noted in *Evans*, “The trial court concluded that it would probably change the result *if a jury believed it*. However, nothing in the findings or the record shows that a jury would be required to, would, or for that matter should, believe it.” 45 Wn. App. at 614. (*italics in original*).

would probably change); *State v. Austin*, 34 Wn. App. 625, 662 P.2d 872, affirmed sub nom. *State v. Koloske*, 100 Wn.2d 889, 676 P.2d 456 (1984) (new evidence supporting alibi insufficient). In both *Peele* and *Goforth*, the new evidence was from a person taking responsibility for the offense and exculpating the defendant. In each instance, that was insufficient to satisfy this factor. Here, the fact that Anthony Kongchunji, a co-defendant, indicated a willingness to testify post-trial that defendant was not involved simply does not establish that the verdict probably would have been different. This is especially the circumstance when the jury would then be made privy to the fact that Mr. Kongchunji had pled guilty to the very crimes with which defendant was charged based upon the same factual scenario as testified to by co-defendant, Matt Dunham.

The record before the trial court included the Amended Information (CP 220-22) and Summary of Facts that Anthony Kongchunji acknowledged as supporting his guilty plea. CP 115-170 (exhibits C and E). The Summary of Facts included that: Anthony Kongchunji, set up the victims to buy \$4,000 of Oxycontin from him; he went to the arranged address with his juvenile co-defendant, Matt Dunham; when the victim approached the vehicle, three men wearing masks assaulted the victims with a shotgun and stole the money; Matt Dunham identified the three masked assailants as Robert Larson, Paul Statler, and Tyler Gassman. CP 115-170 (exhibit E). Here,

defendant's post-trial claim that the result of the trial would have been different had Mr. Kongchunji testified would require the jury to find the testimony of Matt Dunham not credible regarding the identity of his co-defendants. Hence, Mr. Kongchunji's testimony was not newly discovered evidence because its primary value was in impeaching the credibility of Matt Dunham.

At the motion hearing, the trial court observed that it had reviewed the letter by Mr. Kongchunji and the transcript of his testimony in the subsequent trial of co-defendant Statler. The trial court found that at no point did Mr. Kongchunji's testimony vindicate defendant. Rather, Mr. Kongchunji's testimony concerned a different case with wholly different facts. Different times, different victims, and different alleged crimes arising from a home invasion robbery on April 21, 2008. RP-Statler-052009 at 24-26. The trial court correctly concluded that defendant's motion failed to satisfy CrR 7.5(a)(3).

The trial court acknowledged the five grounds the Supreme Court set forth in its decision in *Williams* and found that: the evidence attributed to Mr. Kongchunji had not been discovered since the trial because defense counsel had placed his name on their respective witness lists and had even obtained an order retaining him in the Spokane County Jail pending this trial. RP-Statler-052009 at 26. Additionally, the trial court found that the

anticipated testimony was known to defense counsel prior to trial so ground number three did not apply. As to materiality, the trial court noted that neither Mr. Kongchunji's unsworn post-trial letter nor his testimony in the trial of an entirely unrelated case were material to the issues before the jury in this case. RP-Statler-052009 at 24-26. Finally, the trial court properly noted that the subject evidence from Mr. Kongchunji was impeaching and, hence, exactly the type of evidence that the Supreme Court determined was not the appropriate basis for granting a new trial in the *Williams* decision. RP-Statler-052009 at 29.

B. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Defendant argues alternatively that trial counsel's tactical decision not to call Mr. Kongchunji to the witness stand in this trial constituted ineffective assistance of counsel. Defendant bases this claim upon an unsworn letter and the testimony of that witness in a subsequent trial. Defendant argued to the trial court herein that it should take the fact that a jury in a totally unrelated trial acquitted him as verification that Mr. Kongchunji's testimony in this case would have had a similar effect. The trial court reviewed the evidence presented by defendant in support of his motion and found it lacking when evaluated pursuant to the analysis used by the Supreme Court in its *Williams* decision. Nevertheless, defendant now

argues to this court that the trial court abused its discretion in rendering its decision denying the motion for a new trial. This position diminishes the tactical situation defendant's trial counsel faced at the time he decided not to call Mr. Kongchunji as a witness.

First, defendant's trial counsel faced the necessity of moving the trial court to compel Mr. Kongchunji to testify since he had indicated that he would not. Once Mr. Kongchunji was compelled to testify, trial counsel faced the prospect of placing a witness on the stand, subject to cross-examination, who possessed more damaging than exculpatory evidence regarding defendant's activities. Additionally, trial counsel had no guarantee that Mr. Kongchunji would testify as expected. Trial counsel faced the *Hobson's choice* of dealing with the known damaging evidence versus the jury hearing the damaging evidence that he did not know about. Defendant's appellate counsel concedes that trial counsel knew that Mr. Kongchunji *might* provide exculpatory evidence, *yet* had already provided incriminating evidence against defendant. Hence, defendant's trial counsel determined it was in defendant's best interests not to call this witness to the stand. A decision of trial tactics more to defendant's benefit than his detriment. The trial court properly recognized that placing Mr. Kongchunji's testimony before the jury would also open the door to cross-examination into his motives for so testifying. It would have placed before the jury evidence

which inferentially connected defendant to more criminal activity than was at issue before this jury.

A claim of ineffective assistance of counsel requires that a defendant establish that the attorney's performance was deficient and that the defendant was prejudiced by that deficiency. *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). The defendant must prove that the trial counsel's performance fell below an objective standard of reasonableness based on all the circumstances to show deficient performance. *Id.* Prejudice is established where the defendant shows that, but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *Id.* The failure to establish either prong of the test is fatal to the claim of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

There is a strong presumption that a trial counsel's performance was reasonable and effective. *State v. Thomas*, 109 Wn.2d at 226. A claim of ineffective assistance of counsel will not stand where the trial counsel's conduct can be characterized as legitimate trial strategy or tactics. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Here, the defendant alleges that the trial counsel failed to provide effective

counsel when he failed to call Mr. Kongchunji to testify in this trial. Defendant bases this claim upon his *belief* that Mr. Kongchunji would have offered exculpatory evidence regarding defendant's participation in the charged crimes. Defendant believes that Mr. Kongchunji's unsworn statement and his subsequent testimony in an unrelated trial are sufficiently exculpatory that the jury would have rendered a different verdict in this case. As noted previously, defendant argued to the trial court that Mr. Kongchunji's testimony would have been exculpatory, yet offered no proof that the anticipated testimony would amount to anything more than mere impeachment of the testimony by co-defendant, Matt Dunham.

As noted, defendant's trial counsel faced the very real prospect of proffering allegedly exculpatory evidence to the jury that would have opened the door for the State to cross-examine Mr. Kongchunji regarding his motivation for changing his statements. Then trial counsel would then have faced a record that included: Mr. Kongchunji incriminating defendant to law enforcement detectives that defendant participated in the charged crimes; Mr. Kongchunji affirming to the Superior Court that defendant participated in the charged crimes; and Mr. Kongchunji accepting on the record the Summary of Facts filed in support of the charged crimes as a basis for his guilty plea. Trial counsel's actions

constituted legitimate trial strategy or tactics based upon the record before the jury and the potentially harmful aspects of placing Anthony Kongchunji on the witness stand to provide sworn testimony that he lied to the detectives. Trial counsel would then have to deal with Mr. Kongchunji being cross-examined regarding his guilty plea and his affirmation of the factual basis for his guilty plea, including the participation of defendant. Trial counsel knew that this scenario was a very real possibility if Mr. Kongchunji was compelled to testify and that such testimony could be even more damaging to defendant's case. A defense counsel's effectiveness is not determined by the result of the trial. *State v. Early*, 70 Wn. App. 452, 461, 853 P.2d 964 (1993) (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)), review denied, 123 Wn.2d 1004 (1994). "[T]he court must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy." *In re Personal Restraint of Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (citing *Strickland*, 466 U.S. at 689), cert. denied, 506 U.S. 958 (1992).

There is no evidence in, or reasonable inferences to be drawn from a review of, the record to support that defendant's trial counsel was ineffective. Quite the contrary is evident from the record. The fact that the jury weighed the evidence and did not find Mr. Statler's theory of the

case credible does not establish that his trial counsel was ineffective. It is the sole province of the jury to determine the credibility of all the evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Those determinations are not subject to review. *Id.*, at 38. Here, the reasonable inference is that the jury did not find Mr. Statler's theory credible. Appellant has not shown that counsel's representation was objectively deficient and that the outcome would have been different. As noted previously, the failure to establish either prong of the *Strickland* test is fatal to a claim of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. at 697; *State v. Thomas*, 109 Wn.2d 226.

C. THE TRIAL COURT CORRECTLY FOUND CO-DEFENDANT ANTHONY KONGCHUNJI WAS AVAILABLE AS A WITNESS TO THE DEFENDANT FOR TRIAL.

Defendant concedes that the allegedly exculpatory testimony of Anthony Kongchunji was not newly discovered as contemplated by CrR 7.5(a)(3) since it was known to the defense counsel prior to the trial. Rather, defendant contends that he was denied due process because the alleged evidence was not available to the defendant at trial since Mr. Kongchunji advised that he would not testify due to alleged threats by the Deputy Prosecuting Attorney. Initially, it should be noted that the deputy

prosecutor could not have had any such discussion with Mr. Kongchunji absent the permission of he and his trial counsel. Defendant provided the trial court with no evidence that the deputy prosecutor had contacted his trial counsel and advised that the State would file perjury charges against Mr. Kongchunji if he testified for the defendant. Rather, the record reflects that during a “free talk”, it was Spokane County Sheriff Detectives who warned Anthony Kongchunji of the peril of possible perjury charges if he testified in contradiction to his prior statements which implicated his co-defendants. CP 115-170 (Appendix J to State’s Response Brief to Defendant’s Addendum for New Trial). Prior to this trial, co-defendant Kongchunji acknowledged under written oath (in his Statement of Defendant on Plea of Guilty) and orally affirmed to the Superior Court that the facts set forth in the Summary of Facts filed in support of the April 15th (later amended to 17th) robbery and other charges were what happened. CP 115-170 (exhibit D). Based upon Mr. Kongchunji’s affirmative representations to the Superior Court, the court accepted his guilty plea and sentenced him accordingly.

The record does support that it was only after Mr. Kongchunji had received the benefit of his bargain that he altered his perspective of the facts. A perspective that was presented to the trial court herein as newly discovered because Mr. Kongchunji had indicated before the trial that he would not

testify if called. Defendant argued that Mr. Kongchunji was therefore unavailable to testify or to be compelled to testify at his trial.

Defendant cites *United States v. Vavages*, 151 F.3d 1185 (9th Cir. 1998) to support his argument that his right to due process was violated by substantial governmental interference with Mr. Kongchunji's free and unhampered choice to testify. However, the Ninth Circuit also ruled that "a defendant alleging such interference is required to demonstrate by a preponderance of the evidence...[and] Whether substantial government interference occurred is a factual determination to be made by the [trial] court that [is] review[ed] for clear error." *Id.* at 1189. The Ninth Circuit cited the United States Supreme Court's *Webb v. Texas*, 409 U.S. 95, 93 S. Ct. 351, 34 L. Ed. 2d 330 (1972) decision in making its ruling. The Ninth Circuit noted that "perjury warnings are not improper per se and the Sixth Amendment is not implicated every time a prosecutor or trial court offers advice regarding the penalties of perjury." *Vavages*, 151 F.3d 1189, (citing *United States v. Davis*, 974 F.2d 182, 187 (D.C.Cir.1992)). The Ninth Circuit noted that:

"A defendant's constitutional rights are implicated only where the prosecutor or trial judge employs coercive or intimidating language or tactics that substantially interfere with a defense witness' decision whether to testify. A defendant's rights are not trampled upon by mere information or advice about the possibility of a perjury prosecution, but by deliberate and badgering threats designed to quash

significant testimony...The substantial interference inquiry is extremely fact specific.” (citations omitted)

Id., at 1189-90.

In Mr. Statler’s case, the detectives were justified in cautioning Mr. Kongchunji against offering false testimony and reminding him of the consequences of perjury in light of his guilty plea and statements incriminating Mr. Statler. The defendant offered the trial court no evidence that the deputy prosecutor or the detectives berated or badgered Mr. Kongchunji into electing not to testify. Ultimately, Mr. Kongchunji elected not to testify and the trial court was left to speculate on the basis for that decision. The trial court properly reviewed the evidence offered in support of Mr. Statler’s argument and concluded that Mr. Kongchunji was not coerced, rather, he voluntarily elected not to testify.

Mr. Statler was placed in this position by the decisions of his co-defendants, not by the deputy prosecutor or the detectives. Mr. Kongchunji had already resolved his case by his guilty plea, so the trial court correctly concluded that there was no United States Constitution, Fifth Amendment, privilege against self-incrimination existing at that point. RP-052009 at 26-28. Hence, defendant could have called Mr. Kongchunji to testify and actually had the trial court issue an order holding him in the Spokane County Jail pending the trial to facilitate the defense calling him to testify in this

trial. CP 115-170 (exhibit F). The trial court further noted that it was defense counsel who decided neither to call nor compel Mr. Kongchunji to testify at defendant's trial. RP-052009 at 26-28.

That tactical decision by defense counsel was made in light of the reality that Mr. Kongchunji's testimony would be subject to cross-examination. The tactical result of that cross-examination could well have further implicated, rather than exculpated, Mr. Statler based upon the emphasis it would have focused on the credibility of the witnesses. The trial court noted that exculpatory testimony by Mr. Kongchunji at that point would have opened the door to the State rebutting that evidence by testimony from the Detectives that Mr. Kongchunji had identified Mr. Statler as one of the three who perpetrated the April 17th robbery and related crimes. RP-052009 at 29. Mr. Kongchunji was available as a witness to be called to testify in Mr. Statler's trial. It was defense counsel's tactical decision not to call Mr. Kongchunji, nothing else, that prevented him from testifying in defendant's trial.

D. THE DEFENDANT WAS NOT SUBJECTED TO DOUBLE JEOPARDY BASED UPON CONVICTIONS FOR FIRST DEGREE ASSAULT AND DRIVE-BY-SHOOTING BECAUSE THE CRIMES ARE NOT THE SAME IN FACT AND "IN LAW."

Defendant contends that his convictions for the first degree assault and drive-by-shooting of Clifford Berger and the first degree assault and drive-by-shooting of Kyle Williams should be merged under the protections against Double Jeopardy. Defendant argues that the respective crimes are the same in fact and in law, so the protections against double jeopardy should work to vacate the drive-by-shooting convictions. The two offenses are not the same in law and fact, so the trial court did not err in permitting both convictions to stand.

The Fifth Amendment to the United States Constitution affords that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." This clause was applied to the states pursuant to the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).³

³ The language of Wash. Const. art. I, § 9 declares: "No person shall be . . . twice put in jeopardy for the same offense." The Supreme Court, affirming this court, has concluded that the state constitution receives the same interpretation. *State v. Gocken, infra. Accord, State v. Schoel*, 54 Wn.2d 388, 391, 341 P.2d 481 (1959) (double jeopardy clauses are identical in thought, substance, and purpose); *State v. Netling*, 46 Wn. App. 461, 463, 731 P.2d 11, *review denied*, 108 Wn.2d 1011 (1987).

The United States Supreme Court has held that the Double Jeopardy Clause protects against three abuses: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *United States v. Halper*, 490 U.S. 435, 440, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989); *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled in part on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). The third of these protections is at issue here.

In order to prevail on a double jeopardy challenge, a defendant must affirmatively establish that he has been "punished" twice for the same "offense." The multiple punishment prohibition applies only when the State attempts to criminally punish a defendant twice for the same offense. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 104 S. Ct. 1099, 79 L. Ed. 2d 361 (1984); *State v. Maxfield*, 125 Wn.2d 378, 400, 886 P.2d 123 (1994). The question of whether punishments are multiple under the Double Jeopardy Clause, "is essentially one of legislative intent." *Ohio v. Johnson*, 467 U.S. 493, 499, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984); *State v. Johnson*, 96 Wn.2d 926, 936-37, 639 P.2d 1332 (1982).

In *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), the Supreme Court ruled that punishment for two

statutory offenses arising out of the same criminal act or transaction does not violate double jeopardy if "each provision requires proof of a fact which the other does not." 284 U.S. at 304. That case involved the question of whether the sale of narcotics on one occasion could violate two different statutes. The court ruled that it could:

Each of the offenses created required proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. *Gavieres v. United States*, ... In that case this court quoted from and adopted the language of the Supreme Court of Massachusetts in *Morey v. Com.* 108 Mass. 433: "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."

284 U.S. at 304 (citation omitted). Specifically, the one sale violated both the original packaging statute (controlled substance must bear a stamp, found in §1 of the Narcotics Act) and the requirement that transfers of controlled substances be made pursuant to a written order form (§2 of the Narcotics Act). *Id.* at 303-304.

Blockburger, thus, established that double jeopardy was implicated only when multiple charges involved lesser-included offenses. The original analysis dealt strictly with the statutory elements of the charged offenses.

See Grady v. Corbin, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548, 561 (1990). Subsequently, that view has clarified somewhat over the years in that the analysis must be based on the charged facts rather than merely viewing the statutory elements in the abstract without regard to the factual allegations. *In re Orange*, 152 Wn.2d 795, 818, 100 P.3d 291 (2004); *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005). However, the *Blockburger* test remains the governing principle. *Id.* at 815-816. If the evidence necessary to prove one crime also proves the other crime, the two are the same in law and fact for *Blockburger* purposes. *Id.* at 820. In essence, *Blockburger* establishes a violation of Double Jeopardy only when one crime would be considered a lesser included offense of the greater crime. *cf.*, *United States v. Dixon*, 509 U.S.688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993); *State v. Laviollette*, 118 Wn.2d 670, 675, 826 P.2d 684 (1992); *State v. Gocken*, 127 Wn.2d 95, 107-108, 896 P.2d 1267 (1995). The court in *In re Fletcher*, 113 Wn.2d 42, 47, 776 P.2d 114 (1989), quoting, *State v. Vladovic*, 99 Wn.2d 413, 423, 662 P.2d 853 (1983) found:

In order to be the "same offense" for purposes of double jeopardy the offenses must be the same in law and in fact. If there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses.

Id. at 47; *cf.*, *Iannelli v. United States*, 420 U.S. 770, 785 n.17, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975); *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995).⁴

Application of the “same offense” test resolves this appeal contrary to appellant’s position. As noted, *Blockburger* directs that the reviewing court presume that the subject crimes are not the same offense for double jeopardy purposes if each crime has an element that the other does not. *Blockburger*, 284 U.S. at 304. First degree assault requires proof that an assault was committed with the intent to inflict great bodily harm by the use of a firearm or deadly weapon. RCW 9A.36.011(1)(A). Drive-by-Shooting requires proof that a firearm was recklessly discharged from a motor vehicle which created a substantial risk of death or serious physical injury. RCW 9A.36.045(1). The two crimes are not the same “in law” as each contains a different element from the other. The crimes are not the “same offense” for double jeopardy purposes. Each crime can be committed without committing the other offense. The fact that the offenses were committed contemporaneously does not alter the distinct legal elements required for conviction.

⁴ The court in *Calle* stated that the *Blockburger* test and the “same evidence” test employed in Washington are not controlling if there is a clear indication from the legislature barring the State from pursuing simultaneous criminal and civil actions against the defendant. *Calle*, 125 Wn.2d at 778.

In that regard, this case is very similar to what happened in *Blockburger* itself. There the defendant was convicted of two counts of delivery of morphine and a third count of selling without a purchase order. *Blockburger*, 284 U.S. at 301. Defendant Blockburger contended that the second delivery and the purchase order offense, which arose out of the same single act, could not both be punished. *Id.* The Supreme Court disagreed, stating its now famous test. *Id.* at 304. One act can violate multiple statutes as long as the Legislature so intended. That is the situation here.

The crimes at issue are not the same in law and fact under *Blockburger*. The fact that both crimes involve the same *actus reus*, the use of a firearm, does not resolve the analysis. If it did, then *Blockburger* itself was wrongly decided since there was only one act of delivering one controlled substance. Rather, the issue is whether, as *Orange* acknowledged, proving the one crime necessary proved the other offense. *Orange*, 152 Wn.2d at 820. It did not. Proving that defendant fired a gun from a motor vehicle did not establish the critical element of first degree assault – that he fired the weapon with the specific intent to inflict great bodily harm to a specific identified individual. Proving that Mr. Statler fired a gun out of a motor vehicle, the essence of a drive-by-shooting, likewise did not prove that he intended to inflict great bodily harm by that act which would amount

to first degree assault. Proof of each crime failed to prove the other offense. Under *Blockburger*, there was no violation of the Double Jeopardy clause.

Other cases likewise recognize that similar crimes committed by the same act do not therefore satisfy the *Blockburger* standard. *E.g.*, *State v. Calle, supra* [single act of intercourse supported convictions for both incest and second degree rape because each offense required proof of element that other crime did not have]; *State v. Jones*, 71 Wn. App. 798, 825, 863 P.2d 85 (1993), *review denied* 124 Wn.2d 1018 (1994) [child molestation and child rape not same offense under *Blockburger*]. *Calle* is dispositive in this case – a single act of sexual intercourse can violate multiple statutes without offending the constitution.

Defendant's argument here essentially conflates the legal and factual prongs of *Blockburger* into a "same act" analysis – if each crime was proven by the same action, then they are the same. That is incorrect. It is only if the same action proves the entirety of each offense that the *Blockburger* standard is met. That did not happen here. The one act of firing the firearm, although common to each crime, did not fully prove either crime. Each crime required proof that the other did not, and proof of one crime did not prove the other offense. Accordingly, the two crimes are not the same in law and fact. *State v. Calle, supra*. Double Jeopardy does not require that the drive-by-shooting convictions be vacated.

E. THE DOUBLING ENHANCEMENT PROVISION OF RCW 9.94A.533 IS NOT AN ELEMENT OF THE UNDERLYING CHARGED CRIME AND IS CONSTITUTIONAL.

The State charged defendant by Amended Information as follows: Count I First Degree Robbery of Eric Weskamp; Count II Attempted First Degree Murder, alternatively First Degree Assault of Clifford Berger; Count III Attempted First Degree Murder., alternatively First Degree Assault of Kyle Williams; Count IV Drive By Shooting of Clifford Berger; and Count V Drive By Shooting of Kyle Williams; Counts I, II, III, and IV included the allegation that the defendant committed the crime while being armed with a firearm pursuant to the provisions of RCW 9.94A.602 and 9.94A.533(3). CP 20-22. At trial, evidence was presented and the jury rendered its general and special verdicts. The general verdicts found defendant not guilty of the Attempted First Degree Murder charges, yet guilty of the alternatively charged First Degree Assault charges. The jury also found defendant guilty of the First Degree Robbery and Drive By Shooting charges. CP 75-81. The special verdicts found that defendant was armed with a firearm during the commission of the robbery and respective assault charges beyond a reasonable doubt. CP 82-84.

At sentencing, defendant indicated that he had no objection to the State's calculation of his offender score. RP-060409-Statler at 41. Defense counsel advised the trial court,

Regarding the weapons enhancements...I don't know that there's an argument that I can make in good faith on that. The law is pretty clear. If they're found, these are the sentences to be imposed...When I look at...his history, his conduct is almost identical to Mr. Gassman's. The prior convictions, they were cohorts. But...Mr. Gassman didn't get a weapon enhancement, Mr. Statler did, and...he's looking at a far greater mandatory minimum on the weapon's enhancement.

RP-060409-Statler at 42. Accordingly, there is no dispute that Mr. Statler was subject to mandatory consecutive terms of confinement for the firearm enhancements for the general and special verdicts regarding counts I, II, and III pursuant to RCW 9.94A.533(3).

RCW 9.94A.533(3) provides that if the jury finds the defendant was armed with a firearm during the commission of a qualifying felony (i.e. first degree robbery and first degree assault), the court must impose a consecutive term for the enhancement. The statute specifically provides that the firearm enhancements are mandatory and must be served consecutively to all other sentencing provisions. RCW 9.94A.533(3)(d) further provides that if the defendant has previously been sentenced for a deadly weapon enhancement, the mandatory length of the term for the firearm enhancement "shall be twice the amount of the enhancement."

Defendant contends that the State's failure to allege in the Information his prior sentence for a firearm enhancement and that he was therefore subject to the mandatory doubling provision of RCW 9.94A.533(3)(d) violated the essential elements rule. Defendant cites *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008) (*Recuenco III*) as support for his position that the State should have to plead and prove that he had a prior conviction with a firearm enhancement before the doubling provision of RCW 9.94A.533(3)(d) is triggered. Finally, defendant argues that the State's failure to allege in the Information the facts necessary to qualify for the doubling provision of RCW 9.94A.533 violated Art. I, § 22 of the Washington State Constitution and the "essential elements rule."

The essential elements rule requires the State to plead and allege facts supporting every element of the crime charged in the charging document. *State v. Recuenco*, 163 Wn.2d at 434. "Elements' are the facts that the State must prove beyond a reasonable doubt to establish that the defendant committed the charged crime." *Id.*, at 434. The *Recuenco III* court held that the State must prove beyond a reasonable doubt that the defendant was armed with a firearm during the commission of the charged crime before a firearm enhancement pursuant to RCW 9.94A.533(3) could be imposed.

Division I of this Court recently analyzed this issue in *State v. Simms*, 151 Wn. App. 677, 214 P.3d 919 (2009), *review granted in part by State v. Simms*, 168 Wn.2d 1011, 227 P.3d 295 (March 3, 2010) (No. 83826-7). This Court noted that there is no constitutional requirement to plead and prove beyond a reasonable doubt an enhanced sentencing penalty based upon a prior conviction. *Id.* at 687. The Court further noted that the United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) held that “*other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.*” *Id.* at 490. (emphasis added by the Court). Finally, this Court noted that when the Washington Supreme Court applied *Apprendi* in *State v. Crawford*, 159 Wn.2d 86, 147 P.3d 1288 (2006), it held that there is no constitutional requirement to give notice or prove beyond a reasonable doubt a prior conviction for purposes of a sentencing enhancement. *State v. Simms*, 151 Wn. App. 677, 687-88.

This Court reasoned that the factual basis and resulting holding of *Recuenco III* is readily distinguishable from that presented in *Simms*. In *Recuenco III*, the information alleged that the defendant assaulted his spouse with a deadly weapon and the jury returned a special verdict that

Recuenco was armed with a deadly weapon despite the fact that defendant had used a firearm. Accordingly, the court concluded that a firearm enhancement was not justified because the jury was not asked whether defendant was armed with a firearm.

Here, as in *Simms*, the defendant knew that he had been charged with three crimes with attendant firearm enhancements as set out in the information per the holding in *Recuenco III*. The evidence was presented and the jury found beyond a reasonable doubt that defendant was armed with a firearm during the commission of the first degree robbery and two first degree assaults. At trial, defendant did not contest that he had a prior conviction with an attendant firearm enhancement. At sentencing, defendant readily acknowledged that the doubling provision of RCW 9.94A.533(3)(d) applied to his circumstance without question or objection. RP-060409-Statler at 42. As per *Apprendi*, the trial court based its application of the doubling provision of RCW 9.94A.533(3)(d) solely upon the fact of defendant's prior conviction with the attendant firearm enhancement. Accordingly, there was no violation of defendant's constitutional rights pursuant to the holdings of the United States and Washington State Supreme Courts.

Finally, defendant claimed that his right to equal protection of the law was violated because he received a greater sentence by virtue of the

doubling of his firearm enhancements pursuant to RCW 9.94A.533(3)(d). This argument is interesting when considered in conjunction with defendant's acknowledgement that his prior conviction with the attendant firearm enhancement is the only thing that differentiated his circumstance from that of his co-defendants. RP-060409-Statler at 42. Defendant specifically noted to the trial court that Mr. Gassman was a co-defendant in the prior incident and was convicted of the very same crimes. The only difference being that Mr. Gassman did not received a firearm enhancement from that prior incident. RP-060409-Statler at 42. Defendant acknowledged to the trial court the very reason why he legally was subject to a more serious sentence and why his right to equal protection was not violated. Mr. Statler is not similarly situated to his co-defendants in this case by virtue of his prior firearm enhancement. Accordingly, Mr. Statler was not eligible for the same sentence as his co-defendant herein based upon his own admissions.

Requiring the State to plead and prove beyond a reasonable doubt the fact that defendant has a prior conviction with a firearm enhancement to thereby invoke the application of the doubling statute might not be prudent. The jury would be advised that it must weigh the evidence to determine whether the State has proved beyond a reasonable doubt the prior conviction and the firearm enhancement. In such a situation, the jury

would have evidence that the defendant is a convicted felon who used a firearm in his prior crimes before it even began deliberations on the evidence before it in the current case. The trial court could also provide the jury with an instruction limiting the use of such evidence, yet the protections of ER 404(b) and 609 would thereby be rendered null and inapplicable.

F. THE TRIAL COURT IMPOSED AN EXCEPTIONAL SENTENCE WITHOUT SUFFICIENT FINDINGS OF SUBSTANTIAL AND COMPELLING REASONS TO JUSTIFY THE SENTENCE.

The Sentencing Reform Act (“SRA”), RCW 9.94A.030(45) defines “serious violent offense” as “...(v) Assault in the first degree.” The SRA, RCW 9.94A.589(1)(b) provides, in pertinent part:

Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct...all sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed [on non serious violent offenses].

RCW 9.94A.589(1)(b).

A trial court may impose a sentence outside the standard sentencing range if it finds that substantial and compelling reasons justify an exceptional sentence. RCW 9.94A.535.

The SRA provides a sentencing court with the discretion to impose an exceptional sentence by departing from the guidelines. RCW 9.94A.535 provides, in pertinent part:

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence...

Whenever a sentence outside the standard range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law...

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence.

RCW 9.94A.535.

Under RCW 9.94A.585, appellate courts may review an exceptional sentence to ensure that (1) substantial evidence supports the trial court's reasons for imposing the sentence; (2) the reasons, as a matter of law, justify a departure from the standard range; and (3) the trial court did not abuse its discretion in sentencing the defendant too excessively or too leniently. *State v. Ferguson*, 142 Wn.2d 631, 646-47, 15 P.3d 1271 (2001). Whether a court's stated reasons are sufficiently substantial and compelling to support an exceptional sentence is a question of law that is reviewed *de novo*. *State v. Suleiman*, 158 Wn.2d 280, 291 n.3, 143 P.3d 795 (2006).

Here, at sentencing, the court specifically noted that it could not justify imposing an exceptional sentence below the standard ranges for the

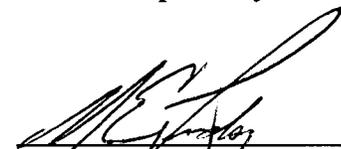
first degree assault convictions based upon sympathy for Mr. Statler's position *vis-à-vis* his prior serious violent felony and the deadly weapon enhancement. RP-060409-Statler at 61-65. Nevertheless, the trial court entered factual findings to support its imposition of the exceptional sentence as follows that: Mr. Statler's age, the amount of time he was receiving in comparison to his two co-defendants, and the fact that no victims were seriously injured. CP 313-315. The trial court's findings are especially troublesome when considered in light of the evidence proved at trial beyond a reasonable doubt that it was Mr. Statler who introduced the firearm into the scenario and actually fired the weapon at Mr. Berger and Mr. Williams. Neither trial court's oral comments at sentencing nor its written findings provide substantial evidence to support its departure from the provisions of RCW 9.94A.589(1)(b). Specifically, the record does not contain sufficient evidence, a preponderance of proof, that substantial and compelling reasons justify the exceptional sentence of running the sentences for defendant's two first degree assault convictions concurrently. The State respectfully requests that the exceptional sentence imposed herein regarding the two first degree assault convictions be reversed, and the case remanded for re-sentencing to impose consecutive sentences.

VI.

CONCLUSION

For the reasons stated herein, the convictions should be affirmed.

Respectfully submitted this 22nd day of June, 2010.



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