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NO. 60365-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DANIEL J. SIMMS,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE JUDGE MICHAEL SPEARMAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Must the State plead in the information, and prove to a jury beyond a reasonable doubt, prior convictions for sentencing purposes?

2. Does a conviction for unlawful possession of a firearm, and findings that a defendant was armed with a firearm when committing other offenses, violate double jeopardy?

3. Did the trial court abuse its discretion in rejecting Simms' attempt to admit his out-of-court hearsay statements?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Daniel Simms, was charged in Count I with first-degree robbery with a firearm enhancement (victim: John Jacobs), in Count II with second-degree assault with a firearm enhancement (victim: Ron Cogswell), in Count III with second-degree assault with a firearm enhancement (victim: Grace Astad), and in Count IV with unlawful possession of a firearm in the first degree. CP 1-3. Simms, representing himself, was tried by jury, the Honorable Michael Spearman presiding. Simms was found guilty as charged. CP 56-62.

Simms had an offender score of 14 on all but the unlawful possession of a firearm conviction. Simms also had a prior conviction that included a firearm enhancement. Thus, the firearm enhancements on his current offenses doubled. See RCW 9.94A.510(3). Simms received a low-end standard range sentence of 129 months on his robbery conviction, the greatest offense, with lesser concurrent sentences on the other counts. The court also imposed consecutive firearm enhancements as required, for a total sentence of 393 months. CP 113-22; see also CP 94-102, CP 152-66 (for a detailed account of Simms' scoring and sentence ranges).

2. SUBSTANTIVE FACTS

John Jacobs lives in the upstairs bedroom of a residence located at 1447 Northgate Way in Seattle. 6RP¹ 33. A number of people reside at the residence that also serves as the home office for Northwest Construction. 4RP 9.

On the evening of February 18, 2006, Ronald Cogswell, a Northwest Construction employee, and his girlfriend, Grace Astad,

¹ The verbatim report of proceedings is cited as follows: 1RP--6/8/06, 2RP--6/16/06, 3RP--6/22/06, 4RP--6/26/06, 5RP 6/27/06, 6RP--6/28/06, 7RP--7/27/06, 8RP--12/20/06.

went to visit Jacobs. 5RP 15. Although Cogswell could hear conversation coming from inside the house, nobody answered the door. 5RP 15-16.

Cogswell then walked around to the back of the house, and yelled up at Jacobs' room; still with no response. 5RP 15-16.

There was a ladder leaning against the house near Jacobs' window, so Cogswell climbed the ladder and knocked on Jacobs' window. 5RP 16. Cogswell then climbed through the window, went down the stairs and let Astad inside. 5RP 16. As Cogswell and Astad proceeded up to Jacobs' room, a female, unknown to Cogswell, walked down the stairs and left the house. 5RP 18, 20.

When Cogswell and Astad entered Jacobs' room, they were immediately pushed against a wall by Simms. 5RP 20-21. Simms pointed a .357 magnum handgun at Cogswell, Astad and Jacobs, threatening "to kill every mother fucking one of you." 5RP 22.

Cogswell could see that Jacobs was bleeding from the mouth; Jacobs later testifying that Simms, who he did not know, had robbed him of his wallet and struck him about the head. 5RP 25; 6RP 35-36.

Jacobs testified that he was alone in his room, when Simms, and a female he knew by sight as an acquaintance of someone in

the house, came upstairs and entered his room. 6RP 34-35. After talking for a while, Simms suddenly pulled out a gun and threatened to kill Jacobs, stating that he had treated someone's sister wrong. 6RP 36. Simms then began hitting Jacobs about the head, and demanded that he hand over his wallet. 6RP 36-37. Simms then took Jacobs' wallet from his back pocket, with the female taking half the money and leaving. 6RP 37. It was then that Cogswell and Astad entered the room.

After pushing Cogswell and Astad to the wall, Simms began demanding that Jacobs open a safe that was in his room. 5RP 25-26; 6RP 37-38. When Simms turned towards Jacobs, Cogswell lunged at Simms, grabbing Simms' wrist and the barrel of the gun.² 5RP 27; 6RP 44. Ronnie Amaro, another employee of Northwest Construction, and a resident in the house, heard the fight, ran upstairs, pushed open the door and tried to help wrestle the gun away from Simms. 5RP 46, 49. While Amaro was trying to pull Simms' thumb back, Jacob hit Simms in the head multiple times with a hand weight until Simms finally released hold of the gun. 5RP 29, 34, 49-50; 6RP 44.

² At this same time, Astad jumped out the window, breaking her ribs, and ran to the neighbors for help. 6RP 39.

Once the gun was wrestled from Simms' hand, Cogswell let Simms go. 5RP 34. The fact that his gun was taken from him did not deter Simms. 5RP 51. Simms simply looked at Jacobs, said "you're not going to shoot me," and started fighting again. 6RP 45. The fight continued all the way down the stairs until Simms was subdued near the back door. 6RP 45. When police arrived, Simms was on the ground with two of the men crouched over him, money clutched in one hand and in possession of Jacobs' wallet. 5RP 79, 98; 6RP 46. The gun was recovered from the next room where Jacobs had taken it for safety. 5RP 82-83; 6RP 46.

A judgment and sentence from May of 2000 was admitted into evidence for purposes of the unlawful possession of a firearm charge. 5RP 124. The conviction was for second-degree assault with a firearm enhancement. Exhibit 27.

Simms did not testify. Additional facts are included in the sections they apply.

C. ARGUMENT

- 1. THE STATE IS NOT REQUIRED TO PLEAD IN THE INFORMATION, AND PROVE TO A JURY BEYOND A REASONABLE DOUBT, PRIOR CONVICTIONS FOR SENTENCING PURPOSES.**

For the first time on appeal, Simms contends that the information charging him with first-degree robbery and second-degree assault with firearm enhancements, did not contain all the essential elements of the crimes. Specifically, Simms contends that because the length of a term of confinement for a weapon enhancement depends upon whether an offender has a prior conviction with a weapon enhancement, the State was required to include in the information (and prove to a jury beyond a reasonable doubt), that he had previously been convicted of a crime with a firearm enhancement. This argument is not supported by the law and is without merit. The caselaw is clear, the State does not need to plead, and prove to a jury beyond a reasonable doubt, prior convictions for sentencing purposes. Recidivist factors are appropriately left to the sentencing court.

RCW 9.94A.533 provides that additional time shall be added to the standard range sentence for certain felony crimes if the offender was armed with a firearm. RCW 9.94A.533(3). The length of confinement depends upon whether the underlying offense is a class A, B or C felony, and whether the offender has a prior conviction for a firearm enhancement. Id.

An information must contain all essential elements of a crime. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). "Elements" are the facts that the State must prove beyond a reasonable doubt to establish that the defendant committed the charged crime. State v. Recuenco, 163 Wn.2d 428, 434-35, 180 P.3d 1276 (2008). An element is "essential" if its "specification is necessary to establish the very illegality of the behavior." State v. Yates, 161 Wn.2d 714, 757, 168 P.3d 359 (2007) (internal citations omitted).

It is true that a sentencing enhancement, such as a deadly weapon or firearm allegation, must be included in the information. Recuenco, 163 Wn.2d at 435-35. Specifically, the State must plead, and prove beyond a reasonable doubt, to a jury that the offender was armed with a firearm during the commission of the crime. Id. That was done in this case. The information specifically accused Simms "at said time of being armed with a handgun." CP 1-2.³ In convicting Simms, the jury instructions required the jury to find, "beyond a reasonable doubt," that at the time Simms

³ The same language was used in charging counts I, II and III.

committed the robbery and assaults, he was "armed with a firearm."
CP 90.

The amount of punishment allowable upon a finding that an offender was armed with a firearm is based upon whether the offender has a prior conviction and a finding that the offender was armed with a firearm. RCW 9.94A.533(3). This finding need not be pled and proven to a jury beyond a reasonable doubt. It is no different than determining an offender's standard range or whether a conviction is an offender's third strike. It is a pure recidivist factor properly the domain of the sentencing court.

In Almendarez-Torres v. United States, the United States Supreme Court rejected the argument that recidivist factors need to be charged in an indictment, proven to a jury, or proven beyond a reasonable doubt. Almendarez-Torres v. United States, 523 U.S. 224, 239, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998). The Washington State Supreme Court is in accord. State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003), cert. denied, 124 S. Ct. 1616 (2004); State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799, cert. denied, 535 U.S. 996, 535 U.S. 1037 (2001); State v. Manussier, 129 Wn.2d 652, 685, 921 P.2d 473 (1996), cert. denied, 520 U.S. 1201 (1997).

“Other than the fact of a prior conviction,” the Court said, “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.” Apprendi, 530 U.S. at 489-90.

The United States Supreme Court’s decision in Blakely v. Washington,⁴ reaffirm the holding of Apprendi.

This case requires us to apply the rule we expressed in Apprendi v. New Jersey. “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.

Blakely, 124 S. Ct. at 2536.

Simms’ only argument that a prior conviction for punishment purposes is an actual element of the crime, is his bare assertion that prior conviction for punishment purposes regarding enhancements is no different than a prior conviction necessary for proving the crime of unlawful possession of a firearm. Def. br. at 7-8. This assertion lacks merit.

Under the unlawful possession of a firearm statute, proof that an offender has a prior conviction is a statutory element that must be proved in order for the offense to have been committed.

⁴ 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

See RCW 9.41.040. If an offender does not have a prior conviction, he or she is not guilty of the offense--the prior offense is necessary to "establish the very illegality of the behavior." See Yates, 161 Wn.2d at 757.

In contrast, a firearm enhancement is committed if the jury finds the person was armed with a firearm at the time of the crime. This finding of committed does not require proof of a prior conviction for an offense with a firearm enhancement. Simms' argument to the contrary simply ignores this distinction and the caselaw on recidivist factors.

2. THE TRIAL COURT'S IMPOSITION OF A FIREARM ENHANCEMENT DID NOT CONSTITUTE A VIOLATION OF THE PROHIBITION AGAINST DOUBLE JEOPARDY.

Simms contends that imposition of a firearm enhancement, and a conviction for unlawful possession of a firearm based upon having been previously convicted of a crime with a firearm enhancement, violates double jeopardy. Simms is mistaken as to factual basis for his convictions, and he is incorrect as to the law. Contrary to Simms' assertion, his unlawful possession of a firearm

conviction was not based upon him previously having been convicted of a crime with a firearm enhancement, it was based upon his prior second-degree assault conviction. Further, the legislature made it abundantly clear, imposition of a firearm enhancement does not violate double jeopardy.

Without question, subject to constitutional constraints, the legislature has the absolute power to define criminal conduct and assign punishment. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). In many cases, a defendant's single act may violate more than one criminal statute. Without question, a defendant can permissibly receive multiple punishments for a single criminal act that violates more than one criminal statute. Calle, 125 Wn.2d at 858-60 (finding no double jeopardy violation where a single act of intercourse violated the rape and incest statutes). Double jeopardy is only implicated when the court exceeds the authority granted by the legislature and imposes multiple punishments where multiple punishments are not authorized. Calle, at 776.

The Supreme Court has set forth a three-part test for determining whether multiple punishments were intended by the legislature. The first step is to review the language of the statutes to determine whether the legislation expressly permits or disallows

multiple punishments. Calle, at 776. Should this step not result in a definitive answer, the court turns to step two to determine legislative intent, the two-part "same evidence" or "Blockburger" test.⁵ This test asks whether the offenses are the same "in law" and "in fact." Calle, at 777. Offenses are the same "in fact" when they arise from the same act. Offenses are the same "in law" when proof of one offense would always prove the other offense. Calle, at 777. If each offense includes elements not included in the other, the offenses are considered different and multiple convictions can stand.⁶ Calle, at 777.

RCW 9.94A.533 provides that "additional times **shall** be added to the standard sentence range for felony crimes. . . if the offender or an accomplice was armed with a firearm" and, the offender is being sentenced for one of the crimes listed in the statute. RCW 9.94A.533(3) (emphasis added). First-degree

⁵ Referring to United States v. Blockburger, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

⁶ While not necessary to resolving this case, if the statute does not expressly allow or disallow multiple punishments, and the statutes are found not to be the same in law and in fact, a strong presumption in favor of multiple punishments is created. This presumption can be overcome only where there is "clear evidence" that the legislature did not intend for the crimes to be punished separately. Calle, at 778-80. This search for "clear evidence" of contrary legislative intent is the third step of the analysis.

robbery and second-degree assault are qualifying offenses.
RCW 9.94A.533(3)(a) and (b).

In addition, the statute requires that "all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements." RCW 9.94A.533(e).

Finally, the statute provides that the "[f]irearm enhancements in this section **shall** apply to **all** felony crimes," except certain enumerated crimes, such as unlawful possession of a firearm in the first and second degree. RCW 9.94A.533(f) (emphasis added). The excepted crimes are not exempted from prosecution by this statute.

Where "a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the same conduct under Blockburger. . . a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial." State v. Harris, 102 Wn.2d 148, 160, 685 P.2d 584 (1984) (citing Missouri v. Hunter, 459 U.S.

359, 368-69, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983),⁷ overruled on other grounds by, State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988). The case at bar is resolved conclusively by looking at the legislation that makes firearm enhancements mandatory without exempting prosecution for unlawfully possessing a firearm. The legislative intent is clear and unambiguous. Firearm enhancements attach to every qualifying offense regardless of any other provision of law. See State v. Husted, 118 Wn. App. 92, 74 P.3d 672 (2003), rev. denied, 151 Wn.2d 1014 (2004) (defendant broke into home and raped victim at knife point--court found legislature clearly intended two enhancements where there are two eligible offenses, notwithstanding the fact that being armed with a deadly weapon was an element of one of the offenses); State v. Caldwell, 47 Wn. App. 317, 734 P.2d 542, rev. denied, 108 Wn.2d 1018 (1987) (first-degree burglary with a deadly weapon enhancement does not violate double jeopardy); State v. Pentland, 43 Wn. App. 808, 719

⁷ In Missouri v. Hunter, the defendant was convicted of armed robbery and a separate crime which enhanced his punishment for committing a felony while being armed with a firearm. The Missouri Supreme Court found that the crimes were the "same offense" and therefore could not be punished separately. The United States Supreme Court disagreed. The Court held that it is irrelevant whether the crimes are the "same offense," when the legislative intent clearly shows they intended both crimes be punished separately. Hunter, 459 U.S. at 368-69.

P.2d 605, rev. denied, 106 Wn.2d 1016 (1986) (with "unusual clarity" the legislature clearly expressed that a person who commits first-degree rape with a knife receive an enhanced sentence notwithstanding the fact that being armed is an element of first-degree rape).

Ignoring the legislative intent, the first step in a double jeopardy analysis, Simms turns immediately to the "same evidence" or Blockburger test. However, he fails to apply this test correctly. Under the "same evidence" test, the court compares the two statutes "as charged and proved." State v. Freeman, 153 Wn.2d 765, 778, 108 P.3d 753 (2005); State v. Esparza, 135 Wn. App. 54, 65-66, 143 P.2d 612 (2006), rev. denied, 161 Wn.2d 1004 (2007).

Simms asserts his unlawful possession of a firearm conviction was based on the fact that he was previously convicted of a serious offense, the offense qualifying as a "serious offense" because there was a finding that he was armed with a firearm at the time he committed the offense. Def. br. at 12. This is incorrect. The fact that Simms had previously been convicted of an offense with a firearm enhancement was not the basis for his unlawful possession of a firearm conviction. The information charging Simms stated that the unlawful possession of a firearm charge was

based on Simms having been previously convicted of second-degree assault. CP 3. In addition, the jury was instructed that to convict Simms they had to find "that the defendant had previously been convicted of Assault in the Second Degree, which is a serious offense." CP 83. The fact that Simms' prior conviction also had a firearm enhancement played no part in his unlawful possession of a firearm conviction. Thus, Simms' "same evidence" argument fails--his convictions were not based on the same facts.

In addition, Simms' convictions fail the "same in law" prong of the "same evidence" test. The first-degree unlawful possession of a firearm charge required proof that Simms possessed a firearm, and that he had previously been convicted of a serious offense. RCW 9.41.040(1)(a). Simms' possession could have been actual or constructive. WPIC 133.52; State v. Murphy, 98 Wn. App. 42, 988 P.2d 1018 (1999), rev. denied, 140 Wn.2d 1018 (2000). Actual possession "occurs when the weapon is in the actual physical custody of the person charged with possession." WPIC 133.52. Constructive possession occurs "when there is no actual physical possession but there is dominion and control over the item, and such dominion and control may be immediately exercised." Id. A conviction under this statute did not require proof Simms committed

a robbery or assault, nor did it require proof Simms was actually "armed" with a firearm.

To prove the firearm enhancement, the State had to prove Simms committed the underlying offenses--in this case robbery and assault, and that at the time he committed these crimes, he was armed with a firearm. RCW 9.94A.533(3). A person is armed with a firearm when it is easily accessible and readily available for use for either offensive or defensive purposes. State v. Brown, 162 Wn.2d 422, 431, 173 P.3d 245 (2007). As a part of proving Simms was armed, the State was required to prove that there was "a nexus between the defendant, the crime, and the weapon." Id. The mere presence of a firearm at the scene of the crime, mere close proximity of the weapon to the defendant, or constructive possession alone is insufficient to show that a defendant is armed. Id. To prove Simms was armed with a firearm, the State did not need to prove Simms had a prior conviction for a serious offense. Further, proving mere possession of the firearm would have been insufficient to prove Simms was "armed" with a firearm. In short, Simms' convictions fail both prongs of the "same evidence" test, a test this Court need not even reach because the Legislature clearly

intended that a person can be convicted of unlawful possession of a firearm, and another offense with a firearm enhancement.

3. THE TRIAL COURT PROPERLY SUSTAINED AN OBJECTION TO SIMMS' ATTEMPT TO ADMIT HEARSAY TESTIMONY.

Simms contends that under the "rule of completeness" he should have been allowed to elicit hearsay evidence that he told the police he had been robbed and assaulted. Simms claims this hearsay evidence was admissible because the prosecutor elicited testimony that Simms provided the police with a false name. Simms' reliance upon the rule of completeness is misguided. The hearsay evidence he claims should have been admitted did not "explain, modify or rebut" the evidence already introduced, and thus, the rule of completeness is not applicable. Further, Simms never indicated what evidence he was seeking to admit, and thus, this issue is waived.

Under the "rule of completeness," where one party has introduced part of a conversation, the opposing party is entitled to introduce other parts of the conversation that serve to explain, modify or rebut the evidence already introduced insofar as it relates to the same subject matter and is relevant to the issue involved.

State v. West, 70 Wn.2d 751, 754-55, 424 P.2d 1014 (1967). The rule contemplates that the part of the statement objected to must be connected to the part of the statement admitted and it must tend to modify or explain the part admitted. State v. La Pierre, 71 Wn.2d 385, 388-89, 428 P.2d 579 (1967). The trial judge need only admit the remaining portions of the statement which are needed to clarify or explain the portion already received. State v. Larry, 108 Wn. App. 894, 910, 34 P.3d 241 (2001) (finding excluded portions of defendant's statement were not necessary to clarify the portions admitted), rev. denied, 146 Wn.2d 1022 (2002); State v. Edwards, 23 Wn. App. 893, 896, 600 P.2d 566 (1979) (inference from excluded part of statement cannot simply be used to bolster a defendant's conflicting account of a conversation, it must explain or clarify the admitted portion).

A reviewing court will not disturb a trial court's decision regarding a rule of completeness issue absent an abuse of the trial court's sound discretion. Larry, 108 Wn. App. at 910.

At trial, Officer Joseph Kowalchuk testified that just before Simms was taken to Harborview Medical Center, Simms told him his name was Terry Weeks, but that he had no identification. 5RP 87. Kowalchuk ran the name and got nothing. 5RP 89.

Kowalchuk then went to Harborview, and after doctors had finished treating Simms, Kowalchuk had another conversation with Simms. 5RP 90-91. Kowalchuk told Simms that he could not find any records under the name Terry Weeks. 5RP 94. Simms responded that the reason he wasn't finding any record is because he was a sovereign citizen of Alaska. 5RP 94.

During cross-examination, Simms asked Kowalchuk about statements Simms had made to him:

Simms: Okay. But do you remember the statement that I allegedly made?

Officer Kowalchuk: Yes, I do.

Simms: What was that?

Mr. Gross: Objection, self-serving hearsay, your honor.

Court: Sustained.

Simms: **He testifies to the name, but he can't testify to the truth?**

Court: If you have an objection, you need to address it to me.

Simms: That's it.

Court: Any redirect?

Mr. Gross: No redirect, your honor. Thank you.

5RP 100.

ER 103 provides that, "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked."

An offer of proof is required to allow the trial court to properly exercise its discretion when reviewing, reevaluating, and revising its rulings if necessary. State v. Ray, 116 Wn.2d 531, 538-39, 806 P.2d 1220 (1991). An offer of proof must be sufficiently definite and comprehensive fairly to advise the trial court whether or not the proposed evidence is admissible. Sutton v. Mathews, 41 Wn.2d 64, 67, 247 P.2d 556 (1952).

An additional purpose of an offer of proof is to inform the appellate court whether appellant was prejudiced by the exclusion of the evidence. Sutton, 41 Wn.2d at 67. If the party fails to aid the trial court, then the appellate court will not make assumptions in favor of the rejected offer. Smith v. Seibly, 72 Wn.2d 16, 18, 431 P.2d 719 (1967). A reviewing court will not speculate as to what the testimony would have been. Tumelson v. Todhunter, 105 Wn.2d 596, 605, 716 P.2d 890 (1986). This court may refuse to

review any issue that was not raised in the trial court. RAP 2.5(a); State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988).

On appeal, Simms claims that the hearsay testimony he was intending to elicit was his statement that he was being robbed. This is not supported by the record. The context of Simms' question and objection strongly suggests Simms was seeking to elicit more testimony about Kowalchuk's prior testimony about Simms' lack of identification and the false name he provided. After the objection was sustained, Simms told the court, "[h]e testifies to the name, but he can't testify to the truth?" 5RP 100.

Further, Simms made the statement to Kowalchuk about being robbed within two minutes of Kowalchuk arrival on the scene, after being asked what had happened to him. 4RP 19-20. Simms did not provide a false name until just before he was placed in the ambulance. 5RP 69. Simms provided the explanation for the lack of identification and false name 30 plus minutes later at Harborview Medical Center. 4RP 20; 5RP 69-70. One would be hard pressed to claim the statement about being robbed, and Simms' giving of a false name, were part of the same statement wherein the rule of completeness would even apply.

Finally, the statement about being robbed clearly does not explain, modify or rebut the admitted testimony that Simms provided a false name. As such, even were this the testimony Simms was attempting to elicit, this Court cannot say that the trial court abused its discretion in precluding the hearsay statement that Simms was being robbed.

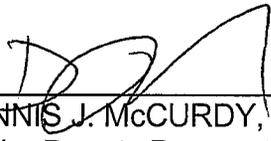
D. CONCLUSION

For the reasons cited above, this Court should affirm Simms' conviction and sentence.

DATED this 23 day of October, 2008.

Respectfully submitted,

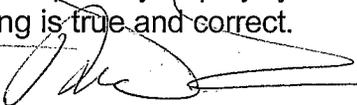
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. SIMMS, Cause No. 60365-5-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

10/23/2008

Date

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