

NO. 63556-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ISMAIL HASSAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH

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COURT OF APPEALS
STATE OF WASHINGTON

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I.	<u>ISSUES PRESENTED</u>	1
II.	<u>STATEMENT OF THE CASE</u>	1
	A. PROCEDURAL BACKGROUND	1
	B. FACTUAL BACKGROUND	2
III.	<u>ARGUMENT</u>	11
	A. THE TRIAL COURT PROPERLY PERMITTED THE POST-VERDICT AMENDMENT OF THE INFORMATION	11
	1. Relevant facts: information and amendments	12
	2. Hassan was informed of the charges against him; there was no violation of his constitutional rights	18
	3. The amended information was not valid	20
	4. <u>Pelkey</u> and <u>Vangerpen</u> are not controlling	23
	B. THE TRIAL COURT DID NOT ERR IN OFFERING A MISSING WITNESS INSTRUCTION	26
	1. Legal standard: missing witness instructions	27
	2. Relevant facts: missing witness instruction	29
	3. The missing witness instruction was proper	31

4.	Any error in giving the instruction was harmless	37
C.	THE TRIAL COURT DID NOT ERR IN LIMITING THE TESTIMONY OF TWO DEFENSE EXPERTS	39
1.	Legal standard: admissibility of expert testimony.....	39
2.	Court properly limited testimony of Kay Sweeney	41
3.	Court properly limited testimony of Geoffrey Loftus	45
D.	THE FIREARM ENHANCEMENT INSTRUCTION WAS LEGALLY SUFFICIENT	48
1.	Relevant facts: firearm enhancement.....	48
2.	Hassan has waived right to raise lack of a "nexus" requirement in firearm enhancement on appeal.....	49
3.	The firearm enhancement did not need to establish that the firearm was "operable"	50
4.	Firearm enhancements do not need to be in the "to convict" instruction for the underlying crime.....	53
5.	The alleged error in the firearm instruction as to "operability" or "nexus" is harmless.....	56
E.	THE FIREARM ENHANCEMENTS DID NOT VIOLATE HASSAN'S DOUBLE JEOPARDY RIGHTS	57
IV.	<u>CONCLUSION</u>	58

TABLE OF AUTHORITIES

Table of Cases

Federal:

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).....	54, 55
<u>Ring v. Arizona</u> , 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).....	54, 55

Washington State:

<u>Auburn v. Brooke</u> , 119 Wn.2d 623, 836 P.2d 212 (1992).....	18
<u>In re Personal Restraint of Rivera</u> , 152 Wn. App. 794, 218 P.3d 638 (2009).....	56
<u>In re Rights to Waters of Stranger Creek</u> , 77 Wn.2d 649, 466 P.2d 508 (1970).....	26
<u>State v. Aguirre</u> , ___ Wn.2d ___, 2010 WL 727592 (2010).....	57, 58
<u>State v. Allery</u> , 101 Wn.2d 591, 682 P.2d 312 (1984).....	40
<u>State v. Alvarado</u> , 73 Wn. App. 874, 871 P.2d 663 (1994).....	20, 21
<u>State v. Atsbeha</u> , 142 Wn.2d 904, 16 P.3d 626 (2001).....	39, 40
<u>State v. Barnes</u> , 146 Wn.2d 74, 43 P.3d 490 (2002).....	20
<u>State v. Berrier</u> , 110 Wn. App. 639, 41 P.3d 1198 (2002).....	51

<u>State v. Blair</u> , 117 Wn.2d 479, 816 P.2d 718 (1991).....	27-29, 32, 33, 35-37
<u>State v. Brown</u> , 111 Wn.2d 124, 761 P.2d 588 (1988).....	52
<u>State v. Brown</u> , 147 Wn.2d 330, 58 P.3d 889 (2002).....	37, 56
<u>State v. Brune</u> , 45 Wn. App. 354, 725 P.2d 454 (1986).....	37
<u>State v. Carr</u> , 97 Wn.2d 436, 645 P.2d 1098 (1982).....	18
<u>State v. Carter</u> , 154 Wn.2d 71, 109 P.3d 823 (2005).....	37
<u>State v. Cheatam</u> , 150 Wn.2d 626, 81 P.3d 830 (2003).....	40, 41, 45
<u>State v. Contreras</u> , 57 Wn. App. 471, 788 P.2d 1114 (1990).....	27
<u>State v. Eaton</u> , 164 Wn.2d 461, 191 P.3d 1270 (2008).....	20
<u>State v. Eckenrode</u> , 159 Wn.2d 488, 150 P.3d 1116 (2007).....	49, 50
<u>State v. Farr-Lenzini</u> , 93 Wn. App. 453, 970 P.2d 313 (1999).....	40
<u>State v. Faust</u> , 93 Wn. App. 373, 967 P.2d 1284 (1998).....	51
<u>State v. Frost</u> , 160 Wn.2d 765, 161 P.3d 361 (2007).....	37
<u>State v. Gregory</u> , 158 Wn.2d 759, 147 P.3d 1201 (2006).....	34, 35

<u>State v. Haner</u> , 95 Wn.2d 858, 631 P.2d 381 (1981).....	21
<u>State v. Irizarry</u> , 111 Wn.2d 591, 763 P.2d 432 (1988).....	18
<u>State v. Johnston</u> , 156 Wn.2d 355, 127 P.3d 707 (2006).....	56
<u>State v. Kalakosky</u> , 121 Wn.2d 525, 852 P.2d 1064 (1993).....	40
<u>State v. Kelley</u> , ___ Wn.2d ___, 2010 WL 185947 (2010).....	57
<u>State v. Lutman</u> , 26 Wn. App. 766, 614 P.2d 224 (1980).....	24
<u>State v. Mills</u> , 154 Wn.2d 1, 109 P.3d 415 (2005).....	53, 54, 55
<u>State v. Montgomery</u> , 163 Wn.2d 577, 183 P.3d 267 (2008).....	27, 28, 29, 37, 38
<u>State v. Moon</u> , 45 Wn. App. 692, 726 P.2d 1263 (1986).....	40
<u>State v. Nguyen</u> , 134 Wn. App. 863, 142 P.3d 1117 (2006).....	58
<u>State v. Olds</u> , 39 Wn.2d 258, 235 P.2d 165 (1951).....	18
<u>State v. Padilla</u> , 95 Wn. App. 531, 978 P.2d 1113 (1999).....	51
<u>State v. Pam</u> , 98 Wn.2d 748, 659 P.2d 454 (1983).....	51, 52
<u>State v. Pelkey</u> , 109 Wn.2d 484, 745 P.2d 854 (1987).....	18, 23, 24, 25, 26

<u>State v. Powell</u> , 34 Wn. App. 791, 664 P.2d 1 (1983).....	21
<u>State v. Rehak</u> , 67 Wn. App. 157, 834 P.2d 651 (1992).....	40
<u>State v. Rhinehart</u> , 92 Wn.2d 923, 602 P.2d 1188 (1979).....	18
<u>State v. Stalker</u> , 152 Wn. App. 805, 219 P.3d 722 (2009).....	26
<u>State v. Thomas</u> , 123 Wn. App. 771, 98 P.3d 1258 (2004).....	40
<u>State v. Vangerpen</u> , 125 Wn.2d 782, 888 P.2d 1177 (1995).....	18, 23, 24, 25, 26
<u>State v. Willis</u> , 153 Wn.2d 366, 103 P.3d 1213 (2005).....	50
<u>Stevens v. Gordon</u> , 118 Wn. App. 43, 74 P.3d 653 (2003).....	29

Constitutional Provisions

Federal:

U.S. Const. amend. VI	18
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Washington State:

Const. art. I, § 22 (amend. 10)	18
---------------------------------------	----

Statutes

Washington State:

RCW 9.41.010..... 51
RCW 9.94A.533 51, 55

Rules and Regulations

Washington State:

CrR 2.1 20, 21, 22
CrR 3.5..... 8
CrR 3.6..... 9
ER 702 40, 41

Other Authorities

WPIC 2.10..... 52

I. ISSUES PRESENTED

1. Did the trial court err in permitting a post-verdict amendment of the information to correct a scrivener's error?
2. Did the trial court err in instructing the jury on the "missing witness" doctrine?
3. Did the trial court err in limiting the testimony of two defense experts (Kay Sweeney and Geoffrey Loftus)?
4. Was the special verdict jury instruction relating to the firearm enhancements legally sufficient?
5. Do the firearm enhancements violate the defendant's right against double jeopardy?

II. STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND.

Ismail Hassan was convicted by a jury of two counts of assault in the first degree, each with a firearm enhancement.¹ CP 51-54. Hassan received a standard range sentence. CP 99-106. Hassan has filed a timely appeal. CP 96.

¹ A detailed discussion of the original and amended charging documents is presented in the argument section of this memorandum.

B. FACTUAL BACKGROUND.²

On August 30, 2008, Yudith Fuentes Carrazco was celebrating her birthday. The festivities began at a hotel and then Yudith and her boyfriend, Fidel Juarez Castillio, drove to the apartment of Yudith's sister (Benecia Carrazco) in the Cove Apartments complex in Federal Way. Benecia shared this apartment with her boyfriend, defendant Ismail Hassan. 4RP 137, 140; 8RP 63-65; 9RP 48-51, 52-54.

When Yudith and Fidel arrived at the apartment Hassan was not there, but he arrived shortly afterward, accompanied by two other black males (his "cousins").³ 4RP 28, 141; 5RP 21; 7RP 77; 9RP 54; 10RP 92, 112; 11RP 91-92. Later Fidel's brothers Oscar and Luis Juarez Castillio, and their friends Mary Vasquez, Martha Mecado, and Eduardo Nicio, arrived at the apartment. 4RP 134-35; 5RP 10-14, 122-24; 6RP 24-25; 7RP 74-75.

² The verbatim report of proceedings will be referred to as follows: 1RP (April 9, 2009); 2RP (April 13, 2009); 3RP (April 14, 2009); 4RP (April 15, 2009); 5RP (April 16, 2009); 6RP (April 20, 2009); 7RP (April 20, 2009); 8RP (April 22, 2009); 9RP (April 23, 2009); 10RP (April 24, 2009); 11RP (April 28, 2009); 12RP (April 29, May 22, & June 26, 2009).

³ These two individuals, who were never located and did not testify at trial, were the subject of a missing witness instruction. As will be discussed in more detail in the argument section, these individuals will be referred to as Hassan's "cousins" as this is how Hassan referred to them in his conversation with officers at the scene and how defense witness Brian Williams also described the pair.

Also present were Brian Williams and his wife Erin Lyman, who lived in the Cove Apartments complex, and another woman. 4RP 141; 5RP 21; 7RP 77; 11RP 91-92. Shortly after Yudith and Fidel arrived, Brian, Erin, Benecia, and the other woman left the gathering. 4RP 141; 5RP 20; 7RP 76-77; 8RP 68-69; 9RP 56-57; 11RP 94.

Hassan welcomed the new arrivals and offered them drinks.⁴ 4RP 141-42; 5RP 19, 126-29; 6RP 27-28; 7RP 76. Hassan, who had curly hair, was wearing a yellow Polo shirt with a design on it.⁵ 4RP 142; 7RP 77; 8RP 66-67, 86. The other two “cousins” were wearing white and brown shirts. One of the “cousins” was bald, the other had only a little bit of hair. 4RP 142.

After a while, Hassan told some members of the group that they were being too loud. 4RP 144; 5RP 22-23, 131-32; 8RP 71. The visitors decided to leave. 5RP 22-23; 9RP 58-59, 78-80. Before they could do so, an argument and then a physical fight

⁴ Fidel had met Hassan twice before. 9RP 54-55. Luis had seen Hassan once before, but did not know his name. 5RP 19-20. Oscar had met Hassan once before. 5RP 129. Yudith had met Hassan often, because he had been married to her sister for over a year. 8RP 65-66. Yudith had seen the two “cousins” before as well. 8RP 66.

⁵ At trial, Fidel recalled a black Polo shirt with orange letters, but wasn't sure. 9RP 58. Everyone else who testified was certain that the Polo shirt was orange with black or brown letters.

erupted between Fidel and Hassan. Fidel's brothers tried to separate the two as the others gathered their belongings.

4RP 144-45; 5RP 23-26, 132-33; 6RP 28-29; 7RP 80, 85-86; 8RP 72-73; 9RP 60-61.

At some point during the altercation one of the "cousins" grabbed a knife from the kitchen and threatened Fidel. 4RP 146; 5RP 26-27, 145; 6RP 30; 7RP 85; 8RP 73-74; 9RP 78-79, 81. Yudith called 911. 8RP 73-74. Eventually the fight was broken up and the visitors fled the apartment, heading for their vehicles. 4RP 146-47; 7RP 86. As Fidel and the others were trying to get out of the apartment, Hassan said "get the gun" or "get the "9mm" or similar words. 5RP 28, 133; 8RP 75; 9RP 61. As the visitors fled, Hassan, or one of the "cousins," threw a bottle that hit Mary Vasquez in the head. 7RP 86; 8RP 75-76; 9RP 86-87.

Before he could get out of the apartment, Eduardo Nicio was grabbed by Hassan's "cousins" and struck in the stomach and chest. 6RP 31-32. As Nicio fled from this assault, he met Hassan on the stairs to the apartment. Hassan hit him in the face. 6RP 33.

Outside the apartment, the visitors got into two vehicles. Oscar and Martha Mecado got into Martha's vehicle with Martha driving. Fidel, Yudith, Luis and Mary Carmen got into Luis's truck,

with Luis driving. 4RP 147-50; 5RP 31, 135; 8RP 77-78. Luis led the way out of the complex with Martha following closely behind. 4RP 150; 5RP 137; 7RP 87; 9RP 62-63, 68-69.

To get out of the complex the two vehicles had to drive past Hassan's apartment. As they approached this building the individuals in the vehicles saw Hassan standing in the driveway holding a shotgun (also described as a "big gun" and a "long gun"). 4RP 151-52; 5RP 29, 30-31, 136; 7RP 87-89; 8RP 78; 9RP 26-27, 32-33; 9RP 70-71. One of the "cousins" was standing next to Hassan, the other was walking toward him. 4RP 167, 176-77; 8RP 80. At least one of the "cousins" was carrying a handgun. 4RP 185; 5RP 29-31, 136.

Hassan fired at least three, and possibly four, shots with the shotgun at the two vehicles. 4RP 152-53, 154; 5RP 32-34, 36-37, 119, 137-38; 7RP 88-89; 8RP 79-82. Both vehicles were hit, showering the passengers with glass and shotgun pellets. Yudith was hit with shards of glass. The injury, which bled, was on her side and face. 8RP 83-84. A building across the street was also hit, damaging a garage door and penetrating the window of an occupied apartment. 7RP 89; 8RP 82-83; 9RP 72-73.

A neighbor, Monique Castain, heard sounds of a commotion about 4:15 a.m. She looked out of the window and saw a man and a woman running from the apartment across the street. 7RP 19-20. A short while later she saw two black males, one with a shotgun and one holding a knife. 7RP 5-7, 25-27. The individual with the shotgun was taller and wearing an orange-colored shirt. RP 7. She saw a truck drive by and then two men follow it around a corner. 7RP 37-39. Castain called 911 and, while she was on the phone, heard four shotgun blasts. 7RP 12-13, 31-32. Because she had only seen the tops of their heads, Castain was not able to identify the individuals for the police. 7RP 17, 41.

Another neighbor, Melody Bruscas, also woke up in response to the sound of fighting. She went outside her apartment and saw two individuals open the garage door in the building across the street, open the trunk of the car in the garage, and take out a "large gun." 7RP 53-54. The individual with the gun was a black male wearing a yellow shirt. 7RP 54, 57. He was taller than the other individual. 7RP 59. The individuals walked around the corner and shortly afterward she heard gunshots. 7RP 58. Bruscas also called 911. 7RP 55.

According to the 911 calls and dispatch logs, officers were dispatched to the location just before 4:30 a.m. 4RP 90. The first officer arriving on the scene heard three shots being fired. 4RP 35, 38, 70-74. Within seconds, the officers saw two vehicles leaving the apartment complex. 4RP 38-39, 70; 6RP 91-92. Officers stopped the vehicles and detained Yudith and her friends.⁶ 4RP 39-42, 153; 6RP 92-93; 7RP 125-26; 8RP 21-22; 9RP 72-73; 10RP 13-14. Fidel was upset and crying; he told officers that "Ismail" had fired the shots. 10RP 16-17. Officers obtained a physical description of the shooter. 4RP 43-45; 8RP 23-24.

Officers secured the scene and established a perimeter. As they began to search the area, they were approached by Brian Williams (who had been at the apartment but left before the hostilities commenced). As Williams did not match the description of the shooter, he was told to leave the area. 4RP 79, 95. Williams stayed in the area and, by his own admission, tried to eavesdrop on the officers' subsequent conversation with Hassan. 11RP 104.

While they were speaking to Williams, Hassan approached the officers. 4RP 79-80. He fit the description of the shooter given

⁶ Eduardo Nicio, who had been left behind in the apartment, approached the vehicles shortly after they were stopped and got into one of the cars. 4RP 75, 172; 5RP 140; 6RP 34, 93.

by the victims. Hassan identified himself as Ismail Hassan and stated that he lived in apartment 111 (he actually lived in apartment 108). 4RP 43-44; 7RP 131. Hassan appeared to be intoxicated, but was walking and not stumbling around. 4RP 85-86; 7RP 138-40. Hassan was not wearing a yellow shirt. 4RP 98.

Hassan was placed into custody, and advised of his constitutional rights.⁷ 4RP 44-45; 7RP 131-32. After stating that he understood his rights Hassan became agitated, repeatedly calling the officers "racist." Hassan stated that he wanted the officers to remove his handcuffs so that they could "talk like men." 4RP 45. Hassan said that he had heard the shooting from inside his apartment and came outside to see what had happened. 4RP 46.

A field show-up was conducted and all of the individuals in the two vehicles that had been shot at positively identified Hassan as the shooter. 4RP 154; 5RP 37, 142-44; 8RP 85; 9RP 74-75. They did so despite the fact that Hassan was no longer wearing the yellow shirt.⁸ 4RP 154-55; 5RP 37-38, 144; 8RP 85-86; 9RP 74-75.

⁷ Hassan has not challenged the trial court's rulings pursuant to CrR 3.5 and the pre-trial testimony as to the admissibility of his statement will not be repeated.

⁸ The Cove Apartments maintenance manager heard arguments, dressed, went outside. As he was opening his door, he heard gunshots. 10RP 95-98. He went outside and, a few minutes later, saw Hassan dressed in a white tank top. 10RP 108-09.

Hassan was re-interviewed by officers at the scene. When asked where the gun was, Hassan stated that he did not have a gun and that he had been alone in his apartment. 8RP 28. When confronted about this statement, Hassan stated that earlier he had several people in his apartment, but they had gotten drunk and loud so he asked them to leave. Hassan stated that after they left he heard two loud booms. 8RP 28. When asked where his associates were and if there was anyone left inside the apartment, Hassan stated that his "cousins" had left, that no one was in the apartment, and that the police could check the apartment. 8RP 29.

Hassan consented to a search of his apartment.⁹ 4RP 119; 8RP 29-30. Inside, officers recovered a yellow Polo shirt with orange and brown writing on the front. 4RP 120-23; 19RP 23. The yellow shirt was shown to the victims and they identified it as having been worn by Hassan earlier in the evening. 4RP 125; 5RP 38, 141-42.

⁹ Hassan has not challenged the trial court rulings pursuant to CrR 3.6 and the extensive pre-trial testimony as to the admissibility of the evidence found during the search of the apartment will not be repeated.

Prior to this search, officers had conducted a protective sweep of the apartment. No evidence was found during this sweep and no other individuals were in the apartment. 4RP 47-48.

Inside the apartment officers also located a Taurus brand plastic gun case for a 9mm pistol. There was no weapon inside the case. 6RP 102-03; 7RP 117-18. A handgun holster was also recovered. 7RP 118. Hassan also gave consent to search his vehicle in the garage. Inside the vehicle's trunk officers located a duffel bag containing an empty box for Federal 12 gauge shotgun shells. 6RP 84.

Outside the apartment, two spent 12 gauge shotgun shells (made by U.S.A. Federal) (and two wads from inside the shells) were found near where Hassan had been standing in the driveway.¹⁰ 4RP 49-54.

Across the street from the place where the shotgun had been fired there was damage to two garage doors that was consistent with a shotgun blast. 4RP 54-57. A window in that vicinity had also been damaged. 4RP 54, 57-58. There was damage to the two vehicles consistent with a shotgun blast, this included gouges in some of the windows, other windows broken out

¹⁰ These shells were of the same brand but a different type from the empty shell box found in Hassan's vehicle. 11RP 49-54. These shells had been run over and crushed by either the police vehicles or other vehicles. Defense expert Kay Sweeney testified that it might be possible to obtain a partial fingerprint from the shells. 11RP 55-57.

(with the shards on the inside of the vehicle), and pock-mark indents in the vehicle's skin. 4RP 58-64.

Brian Williams testified for the defense. He stated that before contacting the officers at the scene he had agreed that Hassan's two cousins could hide in his apartment. 11RP 100, 104. On the following day, Williams drove the cousins to the Tacoma Commons mall and left them there. 11RP 104, 107.

An unknown witness told officers on the perimeter of the scene that he saw two black males running into the bushes shortly after the shots were fired. 9RP 38-39. An attempt to trace these individuals with a K-9 dog failed. 6RP 84-88.

III. ARGUMENT

A. **THE TRIAL COURT PROPERLY PERMITTED THE POST-VERDICT AMENDMENT OF THE INFORMATION.**

During trial, after appropriate notification to Hassan, the State moved to amend count II to correct the spelling of the victim's name. The filed information incorrectly changed count II from assault in the first degree to assault in the second degree. Trial continued, with all parties – including Hassan – understanding that the charges were two counts of assault in the first degree, each with a firearm enhancement. The trial court caught the mistake at

sentencing and granted the State's motion to amend the scrivener's error to reflect the accurate charge of assault in the first degree on count II.

Hassan now argues that the court lacked authority to allow a post-verdict amendment of the information. This argument fails because Hassan was fully informed of, and able to defend, the charges against him. Moreover, because the trial court never granted permission to amend count II of the information from assault in the first degree to assault in the second degree, the alleged amendment was never effective. The trial court correctly determined that it had authority to fix this scrivener's error.

1. Relevant facts: information and amendments.

The original information, filed on September 4, 2008, charged Hassan with two counts of assault in the first degree. CP 1-2 (attached as Exhibit A).

At the omnibus hearing on February 9, 2009, the State indicated that it would amend the information to add a firearm enhancement to each count of assault in the first degree. CP ____ (Sub. 45) (attached as Exhibit B).

On February 18, the information was amended to add a firearm enhancement to each count of assault in the first degree.

CP 11-12 (attached as Exhibit C). This is the first amended information. No deficiency is alleged concerning this information.¹¹

Trial commenced on April 9, 2009. 1RP 2. Virtually the very first words spoken by the prosecutor was that Hassan had been previously arraigned on two counts of assault in the first degree, each with a firearm enhancement. 1RP 3, 9-10.

During pre-trial motions, the State indicated that it would be amending the information to correct a scrivener's error in one of the counts to correct the spelling of one of the victim's names. 3RP 196-97.

It is clear that Hassan understood that he was charged with assault in the first degree with two firearm enhancements. Hassan acknowledged as much in his trial memo (CP 13); proposed jury instructions consistent with assault in the first degree, e.g., "great bodily harm" and deadly weapon definitions (CP 25); and proposed verdict forms that acknowledged that the charges were two counts of assault in the first degree each with a firearm enhancement (CP 40-41). The prosecutor stated that the charges were two counts of

¹¹ Hassan never mentions the first amended to the original information in his brief on appeal.

assault in the first degree, one count for each vehicle, during opening statements. 4RP 26.

In addition, Hassan's counsel, during a break in the middle of trial at which jury instructions were being discussed, and again at the end of the trial, specifically agreed that the assault in the first degree instructions proposed by the State were proper. 8RP 49; 11RP 140. Hassan's counsel also joined in the State's proposed definition of firearm to be used in the jury instructions. 8RP 50. Hassan proposed special verdict forms that recognized that he was charged with two counts of assault in the first degree. CP 42-43 (Exhibit H).

On April 28, 2009, at the conclusion of all testimony (including the three defense witnesses) and after both parties had rested, the State moved to amend the information to correct the spelling of the victim's name on count II. Here is the colloquy on this point:

MS. VOORHEES: Just briefly your honor, and this – I had my word processing completed prior to resting. Initially the State had moved to amend the information to correct a scrivener's error in one – or in a victim's name, and to include Ms. Fuentes Crosco's sur name of Crosco. So she's in the process of changing her name. Counsel had indicated they were not objecting to that. I do have the proposed amendment and motion to amend the information with respect to that.

THE COURT: Mr. Geisness?

MR. GEISNESS: That's correct. I previously stated I wasn't objecting to that.

THE COURT: You have received a copy and waive formal reading?

MR. GEISNESS: Yes, we do.

THE COURT: Motion to amend is then granted.

11RP 139-40.

Unfortunately, this information (the second amended information) incorrectly changed the second count to assault in the second degree with a firearm enhancement. CP 49-50 (attached as Exhibit D). This oversight was unrecognized by the prosecutor, the defense counsel, and the court.

Closing arguments occurred the next day, April 29, 2010.

Both the prosecutor and Hassan's counsel argued and discussed the assault in the first degree charge on both counts as well as the firearm enhancements. 12RP 6-21 (State), 21-52 (Defense). Hassan's attorney specifically stated at the beginning of his argument that: "The State has not proven to you that beyond a reasonable doubt Ismail Hassan is guilty of assault in the first degree in two counts." 12RP 22-23.

The jury was instructed that the charges were two counts of assault in the first degree, each with a firearm enhancement. CP

73-74 (attached as Exhibit F). The jury returned a verdict of guilty on each count and found that the defendant was armed with a firearm while committing these crimes. CP 51-54 (Exhibit G).

Hassan's post-conviction motion for a new trial indicated that he understood he had been convicted of two counts of assault in the first degree, each with a firearm enhancement. CP 79-82. Indeed, in this motion Hassan specifically asked the court to find that there was insufficient evidence to convict on count II because (Hassan argued) the jury could not have found as a matter of law that the elements of the crime of assault in the first degree had been proven. CP 81-82.

Prior to sentencing, the court brought the error in the second amended information to the attention of the parties. 12RP 3. The State moved to amend the information to undo the clerical error. The State explained that it had never intended to amend count II to assault in the second degree, but simply to amend the information to correct the victim's name in count I.¹² 12RP 3-5.

¹² The prosecutor explained that the error occurred because, during plea negotiations, the State had proposed that Hassan plead to assault in the second degree on count II. An amended information to that effect had been drawn up and was the last information in the computer and so was erroneously included in the second amended information. 12RP 3-4.

Counsel for Hassan responded and specifically indicated that he had understood that the second amended information was intended just to correct the victim's name:

MR. GEISNESS: I would argue to the Court, I mean – yes, we, all sides were aware that it was at one point a first degree assault that was filed for Count II. And during the amendments that were made during the course of the trial we didn't object to any of the amendments, and we waived reading of the changes.

And it is clear, I think, on the record that everyone sort of sort of anticipated that it was a name change that was occurring.

12RP 5 (emphasis added). Nevertheless, counsel asked that the court enter a verdict on assault in the second degree as to count II.

12RP 6. The court rejected the defense argument and granted the State's motion to amend to correct the error:

The COURT: It is tempting to accept the Defense's argument, but I cannot do that. This was a clerical error, and the trial was on two counts of assault in the first degree, and that's what went to trial. That is what was tried and this is clearly an error. It was my intention to allow the filing of the amended information to correct the name of the victim and for no other purpose, and I probably should have reviewed the information more closely to make sure that the only thing that was in it was what my intention was, which was to file that.

So, and I did review the file from beginning to end when I found the error to make sure that the prior information that was filed was for two counts of assault 1, and it was.

So, it was clearly a clerical error in that I did not review what I was allowing more closely. And so I am signing this, the motion to amend, and it is to correct a clerical error. And I believe I clearly have the authority to do that.

12RP 7. The third amended information reflected the court's order.

CP 97-98 (attached as Exhibit E).

2. Hassan was informed of the charges against him; there was no violation of his constitutional rights.

U.S. Const. amend. VI provides in part: "In all criminal prosecutions, the accused shall. . . be informed of the nature and cause of the accusation. . . ." Similarly, Washington Constitution, article I, § 22 (amend. 10) provides that: "[i]n criminal prosecutions the accused shall have the right. . . to demand the nature and cause of the accusation against him." Thus, an accused must be informed of the criminal charge he or she is to meet at trial and cannot be tried for an offense which has not been charged. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995) (citing Auburn v. Brooke, 119 Wn.2d 623, 627, 836 P.2d 212 (1992); State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988)); State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987) (citing State v. Carr, 97 Wn.2d 436, 439, 645 P.2d 1098 (1982); State v. Rhinehart, 92 Wn.2d 923, 602 P.2d 1188 (1979); State v. Olds, 39 Wn.2d 258, 235 P.2d 165 (1951)).

In the present case, there is no doubt that these constitutional provisions were satisfied. Hassan was informed of the criminal charges he was to meet at trial and was tried for the offenses with which he had been charged. As outlined in detail above, Hassan was fully informed that he was being tried for two counts of assault in the first degree, each with a firearm enhancement. There is no doubt that Hassan was aware that these were the charges he was facing. At every step of the trial – pre-trial briefing, opening argument, presentation of evidence, presentation of jury instructions, and closing argument – Hassan’s counsel indicated that he knew that the charges were two counts of assault in the first degree, each with a firearm enhancement. Indeed, when the issue of the erroneous amendment was raised at sentencing, Hassan’s counsel candidly admitted that he understood that the State was only proposing an amendment to correct the spelling of the victim’s name and was not amending the charge to assault in the second degree.

Under these facts, Hassan’s constitutional rights were unequivocally honored. Both Hassan and his attorney were fully aware of the charges he was facing before trial commenced. Hassan defended himself against two counts of assault in the first

degree throughout the trial. Indeed, it was only after the trial had concluded that the parties realized there had been an error in the amended information. Simply put, Hassan was fully informed of the charges for which he was tried and convicted.

3. The amended information was not valid.

Pursuant to the Rules of Criminal Procedure, after the State files an initial information all subsequent amendments to that information must be approved by the Superior Court. CrR 2.1(d) (“The court may permit any information. . . to be amended at any time before verdict or finding if the substantial rights of the defendant are not prejudiced.”). Merely *filing* an amended information, without approval of the court, does not amend the information. See State v. Eaton, 164 Wn.2d 461, 466, 191 P.3d 1270 (2008) (citing State v. Barnes, 146 Wn.2d 74, 88, 43 P.3d 490 (2002) (amended information is effective once it is “approved by the court, accepted by Petitioner at arraignment, and used by the trial court in presenting the case to the jury.”)).

In State v. Alvarado, 73 Wn. App. 874, 875-76, 871 P.2d 663 (1994), without seeking leave of the court the State filed multiple amended informations, changing the crime, the date of the alleged crime, and correcting typographical errors. The prosecutor did not

seek leave of the court to file the amended informations until shortly before trial. Id. at 875. The Court of Appeals addressed the significance of former CrR 2.1(e), which is now CrR 2.1(d):

Mr. Alvarado contends CrR 2.1(e) implies that court approval is a requisite to amending an information. We agree. CrR 2.1(e) . . . “has been interpreted to mean that the prosecution is not free to amend the original charging document absent leave of court.

Alvarado, 73 Wn. App. at 875-76 (citing State v. Haner, 95 Wn.2d 858, 863, 631 P.2d 381 (1981); State v. Powell, 34 Wn. App. 791, 793, 664 P.2d 1 (1983)).

In the present case, the record is clear that the Superior Court never approved the amendment of the information to change count II from assault in the first degree to assault in the second degree. Most basically, the State never requested such an amendment. Rather, the prosecutor was clear that the State was only moving to amend count II of the information to correct the spelling of the victim’s name. The trial court was never presented with a motion to amend count II to assault in the second degree. Lacking such a request, the court could not, and did not, grant an amendment to the reduced charge. The trial court explicitly stated that it never intended to amend the charge to assault in the second degree: “It was my intention to allow the filing of the amended

information to correct the name of the victim and for no other purpose. . .” 12RP 7.

The absurdity of the suggestion that the trial court may unintentionally amend the information may be seen from the following scenario. Suppose the State (in a different case and prior to trial) moves to amend the information to correct the spelling of the victim’s name. Unrecognized by the parties and the court, the State accidentally adds an additional charge to the information. The defendant waives formal reading of the information, and so the error goes undetected. Under these circumstances, the amended information is invalid because it had not been explicitly approved by the trial court pursuant to CrR 2.1(d). Simply because the State manages to sneak a change in the information past the court does not make amendment valid. The trial court must be informed of the amendment in order to knowingly approve the filing of an amended information.

As the trial court recognized in this case, it never intended to approve an amendment of count II to assault in the second degree. Accordingly, the information was never validly amended. The filing of the document stating that count II had been amended to assault in the second degree was thus – as the trial court subsequently

recognized – a scrivener’s error. And, as the State Supreme Court has recognized, a scrivener’s error may be corrected by amendment after the State has rested.

4. Pelkey and Vangerpen are not controlling.

The Supreme Court cases of State v. Pelkey, 109 Wn.2d 484, 486, 745 P.2d 854 (1987), and State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995), generally establish a bright-line rule that the State may not amend the information after it has rested its case (except to amend to a lesser degree or a lesser included offense). These cases are not controlling under the circumstances of the present case because, as argued above, there was no valid amendment of the information during trial. Moreover, while Pelkey and Vangerpen were correctly decided on their facts, they are distinguishable because the concerns they raise are not present in this case. Finally, Pelkey and Vangerpen recognize that the information may be amended after verdict to correct a scrivener’s error.

In Pelkey, the defendant was charged and tried on one count of bribery. At the conclusion of the presentation of the State's case, the defense moved to dismiss based on the lack of evidence that the official being bribed was acting in his official capacity at the time

of the offense. In response, the State moved to amend the charge to trading in special influence. This charge, unlike the bribery statute, did not require that the result sought by the special influence affect a public servant's official duties. Pelkey, 109 Wn.2d at 485-87. The Court held that a "criminal charge may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same charge or a lesser included offense." Id. at 491. The Court emphasized that the defendant was constitutionally required to be given notice of the charge so he or she could meet the charge at trial and that an amendment to a new count violates this constitutional requirement. Id. at 487. The Court stated:

"It is fundamental that an accused must be informed of the charge he is to meet at trial and cannot be tried for an offense not charged."

Pelkey, 109 Wn.2d at 487 (quoting State v. Lutman, 26 Wn. App. 766, 767, 614 P.2d 224 (1980)).

In Vangerpen, the State had intended to charge the defendant with attempted murder in the first degree but the prosecutor inadvertently omitted the statutory element of premeditation and therefore the information failed to contain all the essential elements of that crime. After the State rested its case, the

defense made a motion to dismiss based upon lack of evidence of premeditation and for lack of sufficient evidence of premeditation.

The prosecuting attorney moved to amend the information to include that element. The trial court granted this motion.

125 Wn.2d at 784-86. The Supreme Court upheld the Court of Appeals reversal of the conviction. Relying primarily on Pelkey, the Court stated:

In Pelkey, we pointed out that the amendment of an information to charge a different crime after trial has begun is much more likely to cause prejudice to a defendant than is a pre-trial amendment which should be liberally granted. In Pelkey, we explained that all the pretrial motions, voir dire of the jury, opening argument, questioning and cross examination of witnesses *are based on the precise nature of the charge alleged in the information.*

Vangerpen, 125 Wn.2d at 789 (emphasis added).

This case does not involve the understandable concerns addressed in Pelkey and Vangerpen. Unlike Pelkey, the State in this case did not attempt to amend the charge to a completely new crime in order to comport the charging document to the evidence presented at trial. Unlike Vangerpen, the State did not seek to amend the information to supply a missing element called to its attention after it had rested its case in chief. Here, the State simply desired to correct the spelling of the victim's name in the

information; an amendment that neither changed the charge nor supplied a missing element of the crime, and about which Hassan had received ample notice. Hassan was fully aware that he was being charged with two counts of assault in the first degree and defended himself accordingly; his constitutional rights were not violated.¹³

B. THE TRIAL COURT DID NOT ERR IN OFFERING A MISSING WITNESS INSTRUCTION.

Hassan alleges that the court erred in giving a “missing witness” instruction. This argument is without merit. The court carefully considered this issue and determined that the two “cousins” were either close friends or relatives of Hassan. Hassan made no effort to identify these individuals, who were peculiarly available to him. Pursuant to Washington’s well-established missing witness doctrine, the State was entitled to a missing witness instruction and the jury could infer that, had these witnesses’ testimony been favorable to Hassan, he would have called them to testify.

¹³ If rigid application of Pelkey and Vangerpen would require a different result – which the State submits they do not – then these opinions should be reconsidered as being both incorrect and harmful. See, e.g., In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970); State v. Stalker, 152 Wn. App. 805, 811, 219 P.3d 722, 724 (2009).

1. Legal standard: missing witness instructions.

The missing witness doctrine is well-established in Washington.¹⁴ It was fully articulated and endorsed by the Washington Supreme Court in State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991). The doctrine was recently affirmed in State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008).

A criminal defendant has no burden to present evidence, and it is error for the State to suggest otherwise. Blair, 117 Wn.2d at 491; Montgomery, 163 Wn.2d 598. However, under the missing witness doctrine, the defendant's theory of the case is subject to the same scrutiny as the State's. State v. Contreras, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990). The State may point out the absence of a "natural witness" when it appears reasonable that the witness is under the defendant's control or peculiarly available to the defendant and the defendant would not have failed to produce the witness unless the testimony were unfavorable. Blair, 117 Wn.2d at 485-86; Montgomery, 163 Wn.2d 597-98. The State may then argue, and the jury may infer, that the absent witness's

¹⁴ In his brief on appeal Hassan spends some time attempting to discredit the missing witness doctrine. As the doctrine is clearly the law in Washington, the State will not address these claims.

testimony would have been unfavorable to the defendant. Blair, 117 Wn.2d at 485-86; Montgomery, 163 Wn.2d 598.¹⁵

Certain limitations on the missing witness doctrine are particularly important when the doctrine is applied against a criminal defendant. Blair, 117 Wn.2d at 488; Montgomery, 163 Wn.2d 598-99. First, the doctrine applies only if the potential testimony is material and not cumulative. Blair, 117 Wn.2d at 489; Montgomery, 163 Wn.2d 598. Second, the doctrine applies only if the missing witness is particularly under the control of the defendant rather than being equally available to both parties. Blair, 117 Wn.2d at 488; Montgomery, 163 Wn.2d 598-99. Third, the doctrine applies only if the witness's absence is not satisfactorily explained. Blair, 117 Wn.2d at 489; Montgomery, 163 Wn.2d 599. For example, if the witness is not competent or if testimony would incriminate the witness, the absence is explained and no instruction or argument is permitted. Blair, 117 Wn.2d at 489-90; Montgomery, 163 Wn.2d 599. Finally, the doctrine may not be applied if it would

¹⁵ In Blair, the police found what appeared to be a ledger relating to drug transactions. The defendant claimed the list of first names and phone numbers represented loans and gambling debts from card games. 117 Wn.2d at 483. The prosecutor commented that only one person on the list testified and argued that if the others would have corroborated the defendant's explanation, they would have testified as well. Id. In finding that the missing witness doctrine was properly applied, the court relied on the fact that the people on the list were particularly available to the defendant. Id. at 490.

infringe on a criminal defendant's right to silence or shift the burden of proof. Blair, 117 Wn.2d at 491; Montgomery, 163 Wn.2d 598.

In this case, Hassan has not pursued a claim of prosecutorial misconduct, but only challenges the trial court's decision to offer a missing witness instruction. Legal error in jury instructions could have misled the jury is a question of law, which is reviewed *de novo*. Stevens v. Gordon, 118 Wn. App. 43, 53, 74 P.3d 653 (2003).

2. Relevant facts: missing witness instruction.

During pre-trial hearings, the State indicated that it might request a missing witness instruction concerning Hassan's cousins, depending on how the testimony at trial evolved. The State was clear that it would not argue the missing witness doctrine in opening and had not decided if it would request the instruction. 3RP 217-19. Hassan opposed a missing witness instruction on the grounds that the missing witnesses had a privilege against self incrimination. 3RP 219-21. The trial court stated that there was no way to know whether the "cousins" had valid Fifth Amendment concerns because Hassan had not disclosed their identity. 3RP 221-22. There was a general agreement to address the issue at the end of the case. 3RP 222.

Toward the close of the case, the State requested a missing witness instruction. 10RP 129-38. After argument, the trial court made a detailed oral ruling on this issue, stating:

And I do find that based on the evidence that I have before me that these two gentlemen were friends, one was a potential relative, cousin, and I don't know what extent of relationship, but they clearly were close to the defendant, brought them to his apartment, so the inference is that he knew these people. It's totally a reasonable inference that he knew them and would have information to assist in locating them, and that information -- and I'll allow the defense to go find what information was given. But just based on the recollection of the State, the only thing that was given was a name which is in relatively common use and no other information that would assist in locating them.

So had the defense disclosed to the State all of the information that they knew about these witnesses, and neither side had been able to locate them, I think that might be different, but that does not appear to be the case here. And the conclusory statements by the defense attorney that he was unable to locate them I don't think meets the sufficiency that's established by the case law. And especially, I'm darned if I can remember the case because I read about seven or eight when I was back there on the break, and one of them particularly references when it's not just a witness who is peculiarly available to the other side, but it also references the familial relationship and commitment of people together, which in this case where they would be friend or family would seem to increase the peculiar availability, that they're peculiarly available to the defendant.

So I will say that it does appear to me from what I have before me that the missing witness instruction is proper, that the defense has not sufficiently established and met its responsibility to explain the

witnesses' absence and -- but once you get back to review some of these things that were done prior to you coming on the case and the information given to the State, if you want to seek to have me revise my decision, I will consider it.

10RP 137-38. The court emphasized that it was open to revisiting this issue upon receiving additional information from defense counsel about its efforts to locate the witnesses and what information had been communicated to the State. 10RP 138.

The next day, when Hassan was unable to provide any more information about efforts to contact the missing witnesses, the court approved the missing witness instruction. 11RP 140-41. CP 66.

3. The missing witness instruction was proper.

The trial court did not err in concluding that the missing witness instruction was proper. As the trial court found, the two witnesses were individuals who were either close friends or relatives of Hassan's and had previously been seen in his company.¹⁶ As such, these witnesses were peculiarly available to Hassan.

¹⁶ The testimony at trial supported this conclusion. The victims did not know these individuals and referred to them as either friends or cousins of Hassan. Defense witness Brian Williams, who knew Hassan, described these two individuals as cousins or friends of Hassan's. 11RP 91-92. During a post-arrest interview, Hassan told police that after he heard loud "booms" while inside the apartment his "cousins" had left the apartment. 8RP 29.

Moreover, other than a general assertion that he had been unable to locate the witnesses, Hassan provided no specific evidence to the court concerning his efforts to do so or anything other than basic first name information about the identity of these individuals. As the court emphasized, in these circumstances it would be impossible for the State even to begin to identify or locate these witnesses. Moreover, it is reasonable to infer that if the witnesses had information that was favorable to Hassan he would have produced the witnesses or at the very least made their identity known to the State so it could attempt to locate them. Having failed to do either, the missing witness instruction was proper.

On appeal, Hassan raises three objections to the missing witness instruction. First, Hassan argues that the missing witness instruction should not have been given because the missing witnesses had self-incrimination concerns. However, as the Supreme Court in Blair emphasized, the fact that a witness might potentially have a Fifth Amendment privilege is not dispositive of whether a missing witness instruction is proper:

. . . it is possible that a witness's testimony, if favorable to the party who failed to call the witness, would necessarily be self-incriminatory. Some courts therefore hold that the inference is not available if the witness's testimony would necessarily be self-

incriminatory if favorable to the party who could have called the witness; however, the fact that the testimony might be self-incriminatory if *adverse to the party not calling the witness* does not preclude use of the missing witness inference. . . . Here, there is no indication that any of the uncalled witness's testimony, if *favorable* to the defense, would be self-incriminatory.

Blair, 117 Wn.2d at 489-90 (citation omitted, emphasis in original).

Applying this standard, it is clear that Hassan is only arguing that the witnesses' testimony might be adverse to the State (i.e., by exonerating Hassan) and also self-incriminatory. As Blair makes clear, this is not sufficient to preclude a missing witness instruction. The import of this rule is that it is not proper to simply speculate as to whether a witness's testimony is self-incriminatory and then to use this speculation as a means to circumvent the missing witness doctrine.¹⁷

Significantly, in this case the defense theory below did not necessarily implicate either of the missing witnesses. Indeed, during closing argument defense counsel emphasized that there were "more than three" black males in the area at the time of the

¹⁷ Note that this rule is party neutral and binds the State as well as the defense. If there is a witness who is peculiarly available to the State, it is not sufficient for the State to simply assert that the witness has a Fifth Amendment privilege. The witness must still be located – or appropriate efforts to do so undertaken – or the State runs the risk of a missing witness instruction being used against it.

shooting. Hassan's counsel suggested that it was one of these individuals who committed the crime. 12RP 52-53. Under this theory, the missing witnesses would have little concerns about self-incrimination.

Finally, in contrast to Hassan's claim on appeal, the trial court did not conclude that in order to negate the missing witness instruction, Hassan was required to call the witnesses and have them assert the privilege on appeal. Other alternatives were clearly open. As one example, it is possible the State would have offered the witnesses immunity while testifying. Alternatively, they might be charged and pled out to relevant criminal activity and no longer have a right against self-incrimination. The point is that it is impossible to determine whether or not a witness has a privilege against self-incrimination until they have been identified and located.

Hassan also argues that State v. Gregory, 158 Wn.2d 759, 845, 147 P.3d 1201 (2006), stands for the position that a defendant need only show that a missing witness's testimony might be potentially self-incriminating to preclude a missing witness instruction. This is not correct. In Gregory, the prosecutor commented on the defense's failure to call the individual that the

defendant had actually claimed committed the murder. The Supreme Court – relying on Blair – simply pointed out that, in this circumstance, the missing witness’s testimony would necessarily be self-incriminating since he would have to admit to the murder.

Gregory, 158 Wn.2d at 845.

Second, Hassan argues that the missing witness instruction was improper because the defense theory did not imply that the witnesses had highly relevant testimony. This is not correct. The defense theory was that Hassan had been mistakenly identified by the individuals in the two vehicles. This argument centered on a claim that there was not enough time for Hassan to have left the apartment (after punching Eduardo Nicio in the stairwell) and arrived at the driveway to fire the shotgun. 12RP 26-29. Further, as noted above, Hassan argued in closing that other black males in the area did the shooting. 12RP 52-53. In this context, what the missing witnesses who last saw Hassan in the apartment had to say was highly – perhaps even crucially – relevant. Their testimony could have provided considerable support for Hassan’s theory of the case (or, of course, could ultimately have undermined it).

These facts are remarkably similar to Blair. In Blair, the defendant had a list of first names on sheets of paper that he

claimed owed him money for gambling debts. Here, Hassan knows the two individuals who, he asserts, would prove his theory of the case. 10RP 132-33. In both cases, only the defendant can confirm the identity of these individuals. His decision not to do so justifies the missing witness instruction.

Third, Hassan also makes some general assertions that the missing witness rule should be overturned because it infringed on his constitutional rights. These arguments were considered and rejected in Blair.

Specifically, Hassan's claim that a missing witness instruction is improper because it shifts the burden of proof or comments on the defendant's right to silence was rejected in Blair:

We do not agree, however, that any comment referring to a defendant's failure to produce witnesses is an impermissible shifting of the burden of proof. To the extent State v. Traweek. . . indicates that the State may never comment on the defendant's failure to call witnesses or produce evidence, it is overly broad. It is disapproved to the extent it is inconsistent with our analysis herein. Here, nothing in the prosecutor's comments said that the defendant had to present any proof on the question of his innocence. The prosecutor was entitled to argue the reasonable inference from the evidence presented.

Blair, 117 Wn.2d 491-92 (citations omitted).

Finally, Hassan asserts that the missing witness instruction was an impermissible comment on the evidence and violated due process. In addition to being inconsistent with Blair, these claims are not supported by citation to authority and should be rejected. State v. Brune, 45 Wn. App. 354, 363, 725 P.2d 454 (1986).

4. Any error in giving the instruction was harmless.

The giving of an improper jury instruction may be harmless error so long as the jury is properly instructed on the State's burden. State v. Frost, 160 Wn.2d 765, 780, 161 P.3d 361 (2007). "An erroneous instruction is harmless if, from the record in [the] case, it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' Whether a flawed jury instruction is harmless error depends on the facts of a particular case." State v. Carter, 154 Wn.2d 71, 81, 109 P.3d 823 (2005) (alteration in original) (quoting State v. Brown, 147 Wn.2d 330, 332, 58 P.3d 889 (2002)); see also State v. Montgomery, 163 Wn.2d at 600.

In the present case, the jury was properly instructed on the burden of proof and the prosecutor emphasized the proper burden of proof during closing argument. CP 61; 12RP 6-7. The prosecutor's reference to the missing witness instruction was brief

and made after an extensive discussion of the facts of the case.

The prosecutor's reference to the instruction in its entirety stated:

The defense called two witnesses. They called the civilians who were at the scene, but they didn't call the cousins or friends or whatever their relationship to the defendant is. These are people he knows. They are either family members or close friends, people who would have been at the scene at the time of the shooting.

None of the other witnesses remembered their names, and they were able to effectuate an escape first into the woods or another area of the complex and then eventually to Brian's apartment.

No opportunity for the police to find out who these people were. The defendant knows who these people are. They are not here.

12RP 18-19. This is not a case (for example Montgomery), where the prosecutor repeatedly relied on the missing witness instruction and made it the centerpiece of closing argument.

Finally, independent of the missing witness instruction, the evidence that the defendant was guilty of two counts of assault in the first degree was overwhelming. Without repeating the factual background in its entirety, this was a case in which many of the victims knew Hassan. They had been with him moments before the shooting. All six victims testified that they saw Hassan shoot at them from close range. One victim identified Hassan to police officers by name before the show-up identification. The victims

identified Hassan at the scene despite the fact that he had changed clothes. Finally, independent witnesses, while not able to specifically identify Hassan, identified an individual matching his description heading toward the scene with a shotgun. The evidence established Hassan's guilt beyond a reasonable doubt.

C. THE TRIAL COURT DID NOT ERR IN LIMITING THE TESTIMONY OF TWO DEFENSE EXPERTS.

Hassan asserts that the trial court erred in limiting the testimony of two defense experts, Kay Sweeney and Geoffrey Loftus. Hassan spends no time on appeal discussing the extensive testimony of these two witnesses, nor does he ever attempt to apply the generic legal assertions in his brief to the facts of this case. In contrast, the trial court carefully considered both experts' testimony, generally allowing it except when the proposed testimony was clearly beyond the expert's area of expertise or simply with common knowledge of the average juror. These rulings were within the trial court's discretion and do not constitute error.

1. Legal standard: admissibility of expert testimony.

The admissibility of evidence is within the sound discretion of the trial court and will not be disturbed unless no reasonable person would adopt the trial court's view. State v. Atsbeha, 142 Wn.2d

904, 913-14, 16 P.3d 626 (2001); State v. Kalakosky, 121 Wn.2d 525, 541, 852 P.2d 1064 (1993). While a defendant has the right to present a defense, he or she does not have the right to introduce evidence that is irrelevant or otherwise inadmissible. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). Admissibility of expert testimony is governed by ER 702.¹⁸

ER 702 requires that: (1) the witness is qualified as an expert, and (2) the testimony would be helpful to the trier of fact. State v. Farr-Lenzini, 93 Wn. App. 453, 461, 970 P.2d 313 (1999). Expert testimony is helpful if it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury. Id.; see also State v. Thomas, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004); State v. Cheatam, 150 Wn.2d 626, 644-45, 81 P.3d 830 (2003) (citing State v. Allery, 101 Wn.2d 591, 596, 682 P.2d 312 (1984); State v. Moon, 45 Wn. App. 692, 696, 726 P.2d 1263 (1986)). Of course, expert testimony, like all testimony, must be relevant. State v. Atsbeha, 142 Wn.2d 904, 917-18, 16 P.3d 626 (2001).

¹⁸ ER 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill experience, training or education, may testify thereto in the form of an opinion or otherwise."

In Cheatam, the Washington Supreme Court upheld the trial court's decision to completely exclude the testimony of Geoffrey Loftus (one of the experts in the present case) on issues of memory, cross-racial identification, and weapon focus in a rape case in which the victim saw the face of her assailant for about five seconds. Recognizing that the admissibility of such expert testimony was to be decided on a case-by-case basis, the Supreme Court articulated the standard to be applied as follows:

[W]here eyewitness identification of the defendant is a key element of the State's case, the trial court must carefully consider whether expert testimony on the reliability of eyewitness identification would assist the jury in assessing the reliability of eyewitness testimony. In making this determination the court should consider the proposed testimony and the specific subjects involved in the identification to which the testimony relates, such as whether the victim and the defendant are of the same race, whether the defendant displayed a weapon, the effect of stress, etc. This approach corresponds with the rules for admissibility of relevant evidence in general and admissibility of expert testimony under ER 702 in particular.

Cheatam, 150 Wn.2d at 649 (footnote omitted).

2. Court properly limited testimony of Kay Sweeney.

The trial court spent considerable time evaluating the testimony of defense expert Kay Sweeney. Ultimately, the court allowed Sweeney to testify on the following issues: gunshot

residue, whether latent prints could be lifted from the spent shotgun shells, and the type of ammunition fired from the shotgun. The court precluded testimony relating to lighting and color hue because it was outside Sweeney's area of expertise and because the photographs that Sweeney was relying on were not taken at the location where the shots were fired.

Kay Sweeney was a firearms expert offered by Hassan. 1RP 28-29. Hassan also proposed that Sweeney be allowed to testify about witnesses' nighttime perception of color based on the lighting at the scene of the shooting. Sweeney reached his conclusions by taking photographs of the area at night. 1RP 30-34. The State objected on the grounds that Sweeney was not an expert on color perception and that the photographs that he took were not in the location where the defendant was standing and did not reflect the fact Hassan would have been illuminated by the headlights of the oncoming vehicles. 1RP 34-35. There was considerable discussion of this issue, with active questioning by the court concerning the scope of Sweeney's proposed testimony. 1RP 36-51. The trial court ruled that Sweeney could not testify concerning "color hue" because the photographs he was relying on were taken from a different area than where the shots were fired

(and thus were not relevant) and because the defense had not established that Sweeney was an expert on this topic. 1RP 50-52.

Evaluation of the rest of Sweeney's proposed testimony was hampered by the fact that he had not provided a report concerning his investigation and findings. 1RP 53-65; 4RP 199-210. When Sweeney did provide a report the trial court criticized it for being conclusory and that it was difficult to tell how he reached his opinions. 7RP 144-45. After reviewing Sweeney's report, the court requested that the defendant establish whether Sweeney had background expertise to testify on the topics of fingerprints and DNA sampling techniques, and whether gunshot residue analysis was standard practice. 7RP 147-50.

The following day, defense counsel outlined Sweeney's background as a firearms examiner. 8RP 4-6. Counsel then specifically withdrew Sweeney's proposed testimony concerning the "distance and spread (of the shotgun shots) with regard to the vehicles or garage doors." 8RP 6. Counsel also withdrew Sweeney's proposed testimony about obtaining DNA from the spent shotgun shell casings. 8RP 8-9.

Over the State's objection, the trial court allowed Sweeney to testify as a fingerprint expert and whether prints could have been

recovered from the spent shell casings on the ground. 10RP 119-24. Defense counsel then stipulated that he would not be asking Sweeney whether an actual comparison print could have been lifted from the shell, only that it was possible and should have been attempted. 10RP 125-26. Counsel also stipulated that he was not going to have Sweeney testify whether the shells at the scene should have been compared to see if they were from the same weapon. 10RP 127.

The court again summarized the scope of Sweeney's testimony, including: the condition of the vehicles, that the vehicles sustained gunfire damage directed from back to front, no damage on the sides. Defense counsel interrupted and stated that Hassan was satisfied with Sweeney being able to testify about three areas: gunshot residue, with whether latent prints could be lifted from the spent shells, and the nature of the ammunition fired from the shotgun, and that he would not go into other areas. 10RP 128.

The court then held a hearing outside the presence of the jury at which Sweeney testified concerning his expertise and qualifications. 11RP 3-32. At the conclusion of the hearing the trial court agreed that Sweeney could testify concerning fingerprints and

gunshot residue. 11RP 33-38. Sweeney then testified as allowed by the court to the jury. 11RP 45-86.

In sum, the trial court conducted the sort of careful inquiry into Sweeney's qualifications required by Cheatam. The court did so despite the fact that Sweeney's report was provided late and the evaluation of his testimony effectively delayed the trial. With one exception, the trial court allowed Sweeney to testify on all the topics requested by the defense. Contrary to Hassan's claim on appeal, at trial Hassan specifically withdrew his request to have Sweeney testify about the distance at which the shotgun was fired. Finally, the trial court determined that Sweeney was not an expert on lighting and thus could not opine as to the "color hue" of the lighting in the vicinity where the shots were fired. The court also correctly determined that Sweeney's proposed testimony in this area was based on photos not taken in the vicinity of where the shots were fired and thus was not relevant. These decisions were appropriate based on the evidence presented and were not an abuse of the trial court's discretion.

3. Court properly limited testimony of Geoffrey Loftus.

As with Kay Sweeney, the court's review of the testimony of Dr. Geoffrey Loftus was hampered because the court and the State

were not provided a copy of Loftus's expert report until the middle of the trial. 1RP 66; 2RP 4-6.

Defense counsel made a general offer of proof concerning the scope of Loftus's proposed testimony. 3RP 227-35. The trial court, after receiving Loftus's report (4RP 106-07), ruled as to the scope of his testimony. The court indicated that Loftus could testify as to cross-racial identification issues (3RP 236; 4RP 4-5, 192), weapon focus issues (4RP 192), and to how memory works and his theory that memory is fluid (4RP 191-93). The court ruled that Loftus would not be allowed to testify as to lighting issues because it was common knowledge that lighting has an effect on what you can perceive. 3RP 237-38; 4RP 192-93. He could also not testify on whether witnesses should have said that there were numbers or a logo on the suspect's shirt because that would be a comment on the credibility of the witness, because there was no need for expert testimony on this question, and because the witnesses were simply asked by officers what color the suspect's shirt was and they answered that question. 4RP 193. The court subsequently clarified that it would allow Loftus to talk about the effect of stress on memory. 9RP 116-17; see also 3RP 227-38; 4RP 191-94; 9RP 116-18.

Loftus testified consistently with the court's rulings. 10RP 30-70. During Loftus's testimony, the trial court allowed him to briefly mention that factors such as light, time, and distance do in fact play a role in forming an accurate memory.¹⁹ 10RP 43-44. After his direct examination, the Court again summarized its ruling as to the scope of his testimony, this time with reference to his own report. 10RP 74-78. On cross-examination, Loftus conceded that he could not say whether any of the witnesses in the present case correctly or incorrectly identified Hassan as the shooter. 10RP 92.

Again, the court carefully considered Loftus's proposed testimony and did not abuse its discretion in excluding him from testifying about issues that were within the common knowledge of the jury. In any event, Loftus was allowed by the court to reference these factors, albeit briefly, in his discussion of the effect of the environment on memory. In these circumstances, the trial court's rulings did not constitute an abuse of discretion and did not deprive Hassan of the right to present a defense.

¹⁹ In a footnote Hassan suggests that the trial court disparaged Loftus's testimony. However, the court's statement "this is exciting" was reference to State's request for a sidebar, not to Loftus's testimony. 10RP 65-66. The second reference by Hassan appears incorrect and the State has not located the remark. In any event, Hassan has not assigned errors to these remarks and they do not present an issue on appeal.

D. THE FIREARM ENHANCEMENT INSTRUCTION WAS LEGALLY SUFFICIENT.

For the first time on appeal, Hassan argues that the firearm enhancement is an element of the crime that should have been included in the “to convict” instruction. Hassan also argues that the firearm special verdict instruction was flawed because it did not include definitions of “nexus” and operability.” These arguments are all without merit. Assuming *arguendo* that there was an error in the firearm special verdict instruction, it was harmless beyond a reasonable doubt.

1. Relevant facts: special verdict instruction

Jury instruction 18 set forth the standard for the jury to find that Hassan was armed with a firearm during the commission of the two underlying crimes:

For the purposes of the 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 and II.

A firearm is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

CP 78. Significantly, Instruction 18 *was proposed by Hassan* and was used by the court in preference to the instruction proposed by

the State. 8RP 50; CP 27 (Defendant's proposed instructions);
CP 45 (Defendant's corrected instructions).

2. Hassan has waived right to raise lack of a "nexus" requirement in firearm enhancement on appeal.

Hassan asserts on appeal that the firearm enhancement instruction was fatally flawed because it did not contain a "nexus" requirement connecting him, the weapon, and the crime. Leaving aside the question of whether such an instruction is necessary, Hassan's claim fails because the Supreme Court has unequivocally held that this issue may not be raised for the first time on appeal.

In State v. Eckenrode, 159 Wn.2d 488, 490-91, 150 P.3d 1116 (2007), the Supreme Court stated:

Our constitution also guarantees the right to bear arms. . . . Over the years we have tried to harmonize both legal commands to ensure that people are not punished merely for exercising this constitutional right. To this end, to establish that a defendant was armed for purposes of the sentencing enhancement, the State must prove that a weapon was easily accessible and readily available for use and that there was a nexus or connection between the defendant, the crime, and the weapon. . . .

But we have not vacated sentencing enhancements merely because a jury was not instructed that there had to be such a nexus. There is another principle that bears on our review: whether any alleged instructional error could have been cured at trial. *We have found that the defendant's failure to ask for the*

nexus instruction generally bars relief on review on the ground of instructional error. . . .

In this case, the defendant did not seek a nexus instruction. We have reviewed the record, and there was sufficient evidence to find a connection between the crime, the defendant, and the gun, and to find that the gun was readily available and easily accessible for offensive and defensive use. Accordingly, we affirm the imposition of the firearms enhancement.

Eckenrode, 159 Wn.2d at 490-91 (citations omitted, emphasis added); see also State v. Willis, 153 Wn.2d 366, 374, 103 P.3d 1213 (2005) (lack of the word “nexus” does not render the generally used enhancement instructions per se inadequate).

In the present case, not only did Hassan not object to the firearm enhancement instruction, *he proposed the identical instruction*. 8RP 50; CP 27 (Defendant’s proposed instructions); CP 45 (Defendant’s corrected instructions). Under these circumstances, Hassan cannot object to the alleged instructional error because it was within his power to cure the error at trial.

3. The firearm enhancement did not need to establish that the firearm was “operable.”

Hassan also asserts that the firearm enhancement instruction was flawed because it did not require the State to prove that the firearm was “operable.” This argument fails because operability is not a requirement for proving that a weapon was a

firearm either as an element of the crime or as a sentencing enhancement.

A firearm is “a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder.” RCW 9.41.010(7). A sentence may be enhanced under RCW 9.94A.533 even if the prosecution does not prove that the firearm was “operable.” See State v. Faust, 93 Wn. App. 373, 380, 967 P.2d 1284 (1998) (holding that the definition of firearm was written to distinguish between a “toy gun” and a gun “in fact” and that when defendant aimed a technically inoperable gun at his wife it was a “firearm” for sentence enhancements); see also State v. Berrier, 110 Wn. App. 639, 645, 41 P.3d 1198 (2002); State v. Padilla, 95 Wn. App. 531, 535, 978 P.2d 1113 (1999) (“‘may be fired’ indicates legislative intent that a gun rendered permanently inoperable is not a firearm under the statutory definition here at issue because it is not ever capable of being fired. . . a disassembled firearm that can be rendered operational with reasonable effort and within a reasonable time period is a firearm within the meaning of RCW 9.41.010(1).”).

Hassan’s reliance on State v. Pam, 98 Wn.2d 748, 752, 659 P.2d 454 (1983), overruled on other grounds by State v.

Brown, 111 Wn.2d 124, 761 P.2d 588 (1988), is misplaced. In Pam, the trial court failed to instruct the jury that the firearm enhancement finding must be proved beyond a reasonable doubt. Id. at 752. The Court emphasized that (under the sentence enhancement provisions in effect at that time) the State must prove “the presence of a ‘firearm,’ which is defined under WPIC 2.10 as a ‘weapon from which a projectile may be fired by an explosive such as gun powder.’ Accordingly, a gun-like object incapable of being fired is not a ‘firearm’ under this definition.” Id. at 754.

Thus, Pam is entirely consistent with the case law cited above which holds that a weapon enhancement may not be predicated on a “toy gun” or “gun-like object.” This requirement, however, is addressed by the basic definition of “firearm” in WPIC 2.10 (as given in Pam and which was specifically included as part of the firearm enhancement instruction in this case) that requires that the State establish that the firearm at issue was a “weapon from which a projectile may be fired by an explosive such as gun powder.” WPIC. 2.10; CP 78.

The phrase “from which a projectile may be fired by an explosive such as gun powder” necessarily implies operability (in contrast with a toy or fake gun). Here, the jury was correctly

instructed that, for the purpose of the sentencing enhancement, the State had to prove beyond a reasonable doubt that Hassan was armed with a firearm. CP 78. The jury was correctly instructed as to the definition of firearm. CP 78. This necessarily required the jury to find that the firearm was potentially operational and not simply a gun-like object. There was no instructional error.

In sum, contrary to Hassan's claim on appeal, the lack of an "operability" requirement in the firearm enhancement instruction is not error. Further, for the same reasons as discussed in the previous section, Hassan waived this issue below. The operability issue is not of constitutional magnitude (it does not go to the constitutional right to bear arms) and thus may not be raised for the first time on appeal.

4. Firearm enhancements do not need to be in the "to convict" instruction for the underlying crime.

Hassan also asserts that it was error not to include the firearm enhancement in the "to convict" instruction for the underlying crime. But the case relied upon by Hassan, State v. Mills, 154 Wn.2d 1, 109 P.3d 415 (2005), unequivocally holds that a sentencing enhancement may be bifurcated from the "to convict" instruction for the underlying crime.

In Mills, the Court recognized that sentencing enhancements (such as firearm enhancements) may be the functional equivalent of an element of a greater offense. Mills, 154 Wn.2d at 9 (citing Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and Ring v. Arizona, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)). The Court rejected the suggestion, however, that such enhancements must necessarily be included in the “to convict” instruction for the underlying crime:

Here, it is unquestionably true that “threatening to kill” is an element of felony harassment. . . . But holding as Mills asks us to do, in light of Ring and Apprendi, **could abolish the use of special verdict forms altogether. . . .** Under Ring and Apprendi the *elements* of aggravated first degree murder are premeditated first degree murder. . . . and at least one of the aggravating circumstances. . . . Thus. . . a case involving aggravated first degree murder would require the “to convict” instruction to contain all elements of premeditated first degree murder *as well* as the aggravating factors necessary to impose the death penalty. **This would disturb the carefully crafted legislative procedure separating consideration of guilt from the penalty phase.**

Mills’ proposed rule would also put in question the use of the special verdict form used in drug cases where the defendant is charged with possession with intent to deliver in a school zone. . . . Following Mills’ proposed rule, the school zone infraction is an element of the offense (since it increases the statutory maximum) and it would have to be included in the “to convict” instruction, thereby prohibiting the current practice of bifurcating that element into a special

verdict form. This is not an approach the constitution requires. The Ring-Apprendi rule **requires only that a unanimous jury find an aggravating element (as well as all other elements) beyond a reasonable doubt.**

We hold that where the legislature has established a statutory framework which defines a base crime which is elevated to a greater crime if a certain fact is present, **a trial court may, consistent with the guaranties of due process and trial by jury, bifurcate the elevating fact into a special verdict form.** So long as the jury is instructed it must unanimously agree beyond a reasonable doubt before it may affirmatively answer the special verdict, the constitution is not offended.

Mills, 154 Wn.2d 8-9 (citations and footnotes omitted, emphasis in bold added).

Here, it is unquestionably clear that the legislature has established a framework that enhances sentences upon a finding that the defendant was armed with a firearm. See RCW 9.94A.533. Consistent with the analysis in Mills, it is appropriate – and the defendant’s due process rights are not violated – if this enhancement is placed in a special verdict form so long as the jury (and not the judge) finds that this enhancement has been proven beyond a reasonable doubt.

5. The alleged error in the firearm instruction as to “operability” or “nexus” is harmless.

A jury instruction that omits or misstates an element of a crime may be harmless if, from the record, it appears beyond a reasonable doubt that the error did not contribute to the verdict. State v. Brown, 147 Wn.2d 330, 344, 58 P.3d 889 (2002); State v. Johnston, 156 Wn.2d 355, 364, 127 P.3d 707 (2006) (instructional error involving the elements of a crime may be harmless error); In re Personal Restraint of Rivera, 152 Wn. App. 794, 804, 218 P.3d 638 (2009). Assuming for the sake of argument that the firearm enhancement is an element of the crime, and also assuming that it was error not to include either a definition of “nexus” or “operability” in the instruction, the error was harmless beyond a reasonable doubt.

Briefly, it is clear beyond a reasonable doubt that there was a nexus between the shotgun, the crime, and the defendant. Moreover, it is also clear beyond a reasonable doubt that the shotgun was operable. Most basically, the shotgun was operable because it was actually fired, hitting and causing physical injury to Yudith Carrazco, breaking out the window of the Explorer, and damaging the other vehicle. This was an operable weapon. There

was also a clear nexus between the shotgun and the crime because it was the weapon used to shoot the two vehicles. The nexus between Hassan and the shotgun was established beyond a reasonable doubt by the testimony of the six victims that it was Hassan who fired the shotgun at them. In sum, the alleged errors in the firearm enhancement instruction were harmless beyond a reasonable doubt.

E. THE FIREARM ENHANCEMENTS DID NOT VIOLATE HASSAN'S DOUBLE JEOPARDY RIGHTS.

Hassan argues that his right against double jeopardy was violated because the two firearm enhancements allowed the jury to enhance his sentence for the “use of a firearm” which was also an element of the underlying offenses. While this was arguably an open issue when Hassan filed his brief, it has since been resolved by the Washington Supreme Court. It is now clear that sentence enhancements for offenses committed with weapons do not violate double jeopardy even where the use of a weapon is an element of the crime. See State v. Kelley, ___ Wn.2d ___, 2010 WL 185947 (2010) (rejecting argument that firearm enhancement is an “element” of a greater offense and therefore creates unintended, redundant punishment); State v. Aguirre, ___ Wn.2d ___, 2010 WL

727592 (2010) (deadly weapon enhancement to sentence for second degree assault, an element of which is being armed with a deadly weapon, did not offend double jeopardy); see also State v. Nguyen, 134 Wn. App. 863, 866, 142 P.3d 1117 (2006).

IV. CONCLUSION

For the reasons stated above, the State of Washington respectfully requests that Hassan's two convictions for assault in the first degree, each with a firearm enhancement, be affirmed.

DATED this 12th day of March, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

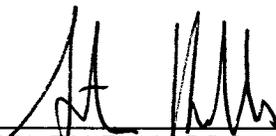
By: 
STEPHEN P. HOBBS, WSBA #18935
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Exhibit A

Original information: September 4, 2008

CP 1-2

FILED
08 SEP -4 PM 4:22
KING COUNTY
SUPERIOR COURT CLERK
KENT, WA

WARRANT ISSUED
CHARGE COUNTY \$200.00

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

7	THE STATE OF WASHINGTON,)	
)	
)	
8	v.)	No. 08-1-09739-7 KNT
)	
9	ISMAIL O. HASSAN,)	INFORMATION
)	
10)	
)	
11)	
	Defendant.)	

COUNT I

I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse ISMAIL O. HASSAN of the crime of **Assault in the First Degree**, committed as follows:

That the defendant ISMAIL O. HASSAN in King County, Washington, on or about August 31, 2008, with intent to inflict great bodily harm, did assault Luis Juarez-Castillo, Melody Anne Bruscas, Fidel Lopez-Nicio, and Yudith Fuentes with a firearm and force and means likely to produce great bodily harm or death, to-wit: a shotgun;

Contrary to RCW 9A.36.011(1)(a), and against the peace and dignity of the State of Washington.

COUNT II

And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse ISMAIL O. HASSAN of the crime of **Assault in the First Degree**, a crime of the same or similar character and based on the same conduct as another crime charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

INFORMATION - 1

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That the defendant ISMAIL O. HASSAN in King County, Washington, on or about August 31, 2008, with intent to inflict great bodily harm, did assault Martha Mercado and Oscar Juarez Castillo with a firearm and force and means likely to produce great bodily harm or death, to-wit: a shotgun;

Contrary to RCW 9A.36.011(1)(a), and against the peace and dignity of the State of Washington.

DANIEL T. SATTERBERG
Prosecuting Attorney

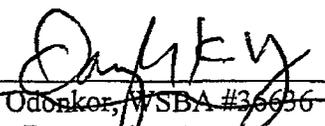
By:  23586
~~Sarah Odonkor, WSBA #36636~~
Deputy Prosecuting Attorney

Exhibit B

Omnibus Order: February 9, 2009

CP ____ (Sub. 45)

FILED
KING COUNTY, WASHINGTON

FEB 6 2009

**SUPERIOR COURT CLERK
LESLIE J. KEITH
DEPUTY**

SUPERIOR COURT OF THE STATE OF WASHINGTON COUNTY OF KING

STATE OF WASHINGTON,

vs.

Plaintiff,

Defendant

Ismail Hassan

NO. 08-1-09789-7 KNT

ORDER ON OMNIBUS HEARING

(OOR)
Charge: A 1 X 2 + FAE

Trial Date: 2/10/09

Expiration: 3/12/09

In Custody Out of Custody

An omnibus hearing was held on this date.

1. CrR 3.5:

- No custodial statements will be offered in the state's case-in-chief, or in rebuttal.
- The statements of defendant will be offered in state's rebuttal case only.
- The statements referred to in the state's omnibus application will be offered and:
 - May be admitted into evidence without a pretrial hearing, by stipulation of the parties.
 - A pretrial hearing shall be held.

2. CrR 3.6:

- No motion to suppress evidence pursuant to CrR 3.6(a) shall be made.
- Defendant will move to suppress evidence. Moving party shall comply with CrR 3.6, 8.1 and CR 6. The motion shall be heard, immediately before trial, by the trial judge.

3. CrR 4.7:

- Plaintiff has provided the defense with all discovery required by CrR 4.7(a).
- Defendant has provided the plaintiff with all discovery required by CrR 4.7(b).

- Plaintiff shall provide the defense with additional photos by the trial by _____, 2009.
- Defendant shall provide plaintiff with _____ by _____, 2009.
- Witness interviews shall be completed by _____, 2009. No party may impede opposing counsel's investigation of the case, CrR 4.7(h)(1).
- The general nature of the defense is denial.
- Discovery orders: _____

4. Plaintiff will move to amend the information to Add Firearm Enhancement Defense shall be served a copy of the proposed amended information ___ days before the trial date.
5. Motions *in limine* are reserved for the trial court.
6. Proposed jury instructions shall be served and filed when the case is called for trial, CrR 6.15(a).
7. Other motions not specifically referenced in this order shall be noted before the chief criminal judge or criminal motions judge, and shall comply with CrR 8.1, CrR 8.2, CR 6 and CR 7(b) unless expressly agreed by the parties in writing.
8. _____

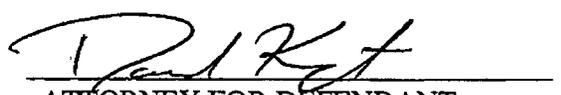
DONE IN OPEN COURT this 6th day of February, 2009.



 JUDGE

Submitted: 

 DEPUTY PROSECUTING ATTORNEY
 WSBA# 31915



 ATTORNEY FOR DEFENDANT
 WSBA# 12103

I am fluent in the _____ language. I have translated this document for the defendant into that language. I certify, under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

 Date and Place Interpreter

Exhibit C

First Amended Information: February 18, 2009

CP 11-12

FILED
KING COUNTY, WASHINGTON

FEB 18 2009

SUPERIOR COURT CLERK
LESLIE J. KEITH
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

7	THE STATE OF WASHINGTON,)	
)	
8	v.)	No. 08-1-09739-7 KNT
)	
9	ISMAIL O. HASSAN,)	AMENDED INFORMATION
)	
10	Defendant.)	

COUNT I

I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse ISMAIL O. HASSAN of the crime of **Assault in the First Degree**, committed as follows:

That the defendant ISMAIL O. HASSAN in King County, Washington, on or about August 31, 2008, with intent to inflict great bodily harm, did assault Mari Carmen Vazquez Calderon, Yudith Fuentes, Luis Juarez Castillio, and Fidel Juarez-Castillio with a firearm and force and means likely to produce great bodily harm or death; to-wit: a shotgun;

Contrary to RCW 9A.36.011(1)(a), and against the peace and dignity of the State of Washington.

And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant ISMAIL O. HASSAN at said time of being armed with a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.533(3).

COUNT II

And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse ISMAIL O. HASSAN of the crime of **Assault in the First Degree**, a crime of the same or similar character and based on the same conduct as another crime charged herein, which crimes were part of a

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

AMENDED INFORMATION - 1

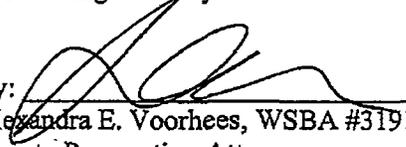
1 common scheme or plan and which crimes were so closely connected in respect to time, place
2 and occasion that it would be difficult to separate proof of one charge from proof of the other,
3 committed as follows:

4 That the defendant ISMAIL O. HASSAN in King County, Washington, on or about
5 August 31, 2008, with intent to inflict great bodily harm, did assault Martha Mercado and Oscar
6 Juarez Castillo with a firearm and force and means likely to produce great bodily harm or death,
7 to-wit: a shotgun;

8 Contrary to RCW 9A.36.011(1)(a), and against the peace and dignity of the State of
9 Washington.

10 And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the
11 authority of the State of Washington further do accuse the defendant ISMAIL O. HASSAN at
12 said time of being armed with a firearm as defined in RCW 9.41.010, under the authority of
13 RCW 9.94A.533(3).

DANIEL T. SATTERBERG
Prosecuting Attorney

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By: 
Alexandra E. Voorhees, WSBA #31915
Deputy Prosecuting Attorney

AMENDED INFORMATION - 2

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

Exhibit D

Second Amended Information: April 28, 2009

CP 49-50

FILED
KING COUNTY WASHINGTON

APR 28 2009

SUPERIOR COURT CLERK
KARLA GABRIELSON
CLERK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

7	THE STATE OF WASHINGTON,)	
)	
)	
8	v.)	No. 08-1-09739-7 KNT
)	
9	ISMAIL O. HASSAN,)	SECOND AMENDED INFORMATION
)	
)	
11	Defendant.)	

COUNT I

I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse ISMAIL O. HASSAN of the crime of **Assault in the First Degree**, committed as follows:

That the defendant ISMAIL O. HASSAN in King County, Washington, on or about August 31, 2008, with intent to inflict great bodily harm, did assault Mari Carmen Vazquez, Yudith Fuentes Carrazco, Luis Juarez Castillio, and Fidel Juarez Castillio with a firearm and force and means likely to produce great bodily harm or death, to-wit: a shotgun;

Contrary to RCW 9A.36.011(1)(a), and against the peace and dignity of the State of Washington.

And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant ISMAIL O. HASSAN at said time of being armed with a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.533(3).

COUNT II

And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse ISMAIL O. HASSAN of the crime of **Assault in the Second Degree**, a crime of the same or similar

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

SECOND AMENDED INFORMATION - 1

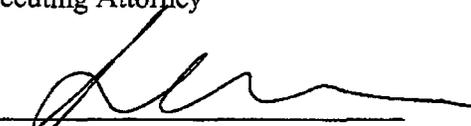
1 character and based on the same conduct as another crime charged herein, which crimes were
2 part of a common scheme or plan and which crimes were so closely connected in respect to time,
3 place and occasion that it would be difficult to separate proof of one charge from proof of the
4 other, committed as follows:

5 That the defendant ISMAIL O. HASSAN in King County, Washington, on or about
6 August 31, 2008, did intentionally assault Martha Mercado and Oscar Juarez Castillio with a
7 deadly weapon, to-wit: a shotgun;

8 Contrary to RCW 9A.36.021(1)(c), and against the peace and dignity of the State of
9 Washington.

10 And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the
11 authority of the State of Washington further do accuse the defendant ISMAIL O. HASSAN at
12 said time of being armed with a firearm as defined in RCW 9.41.010, under the authority of
13 RCW 9.94A.533(3).

14 DANIEL T. SATTERBERG
15 Prosecuting Attorney

16 By: 
17 Alexandra E. Voorhees, WSBA #31915
18 Deputy Prosecuting Attorney

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Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

Exhibit E

Third Amended Information: June 26, 2009

CP 97-98

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COUNT II

And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse ISMAIL O. HASSAN of the crime of **Assault in the First Degree**, based on a series of acts connected together with another crime charged herein, committed as follows:

That the defendant ISMAIL O. HASSAN in King County, Washington, on or about August 31, 2008, with intent to inflict great bodily harm, did assault Martha Mercado and Oscar Juarez Castillio with a firearm and a deadly weapon and force and means likely to produce great bodily harm or death, to-wit: a shotgun;

Contrary to RCW 9A.36.011(1)(a), and against the peace and dignity of the State of Washington.

And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant ISMAIL O. HASSAN at said time of being armed with a shotgun, a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.533(3).

DANIEL T. SATTERBERG
Prosecuting Attorney

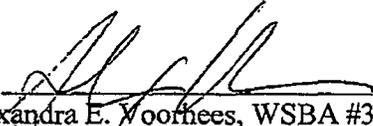
By: 
Alexandra E. Voorhees, WSBA #31915
Deputy Prosecuting Attorney

Exhibit F

“To Convict” Jury Instruction

Assault in the First Degree x 2

CP 73-74

No. 15

To convict the defendant of the crime of assault in the first degree, as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about August 31, 2008, the defendant assaulted Mari Carmen Vasquez, Yudith Fuentes Carrazco, Luis Juarez Castillo, and Fidel Juarez Castillo;

(2) That the assault was committed with a firearm or with a deadly weapon or by a force or means likely to produce great bodily harm or death;

(3) That the defendant acted with intent to inflict great bodily harm; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count I.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count I.

No. 16

To convict the defendant of the crime of assault in the first degree, as charged in count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about August 31, 2008, the defendant assaulted Martha Mercado and Oscar Juarez Castillo;

(2) That the assault was committed with a firearm or with a deadly weapon or by a force or means likely to produce great bodily harm or death;

(3) That the defendant acted with intent to inflict great bodily harm; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count II.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count II.

Exhibit G

Verdict and Special Verdict Forms

CP 51-54

FILED
KING COUNTY, WASHINGTON

APR 29 2009

COURT CLERK
KARLA GABRIELSON
DEPUTY

*IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY*

STATE OF WASHINGTON,)
Plaintiff,)

v.)

ISMAIL HASSAN,)
Defendant.)

No. 08 - 1 - 09739 - 7 KNT

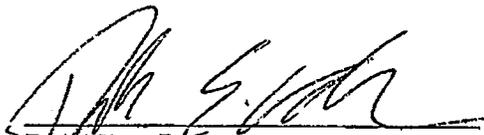
SPECIAL VERDICT FORM
COUNT 1

We, the jury, return a special verdict by answering as follows:

QUESTION: Was the defendant, Ismail Hassan, armed with a firearm at the time of the commission of the crime of assault in the first degree as charged in Count 1?

ANSWER: yes (Write "yes" or "no")

DATE: Apr. 1 29, 2009


Presiding Juror

ORIGINAL

FILED
KING COUNTY, WASHINGTON

APR 29 2009

SUPERIOR COURT CLERK
KARLA GABRIELSON
REPLY

*IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY*

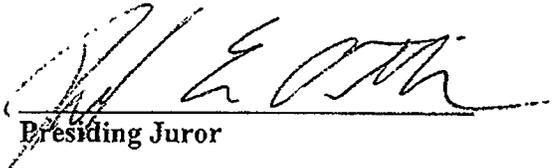
STATE OF WASHINGTON,)
Plaintiff,)
)
V.)
)
ISMAIL HASSAN,)
Defendant.)

No. 08 - 1 - 09739 - 7 KNT

VERDICT FORM A

We, the jury, find the defendant, Ismail Hassan, guilty (write in
"not guilty" or "guilty") of the crime Assault in the First Degree as charged in Count 1.

DATE: Apr. 1 29, 2009


Presiding Juror

ORIGINAL

FILED
KING COUNTY, WASHINGTON

APR 29 2009

SUPERIOR COURT CLERK
KARLA GABRIELSON

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

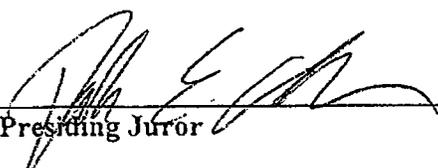
STATE OF WASHINGTON,)
Plaintiff,)
)
V.)
)
ISMAIL HASSAN,)
Defendant.)

No. 08 - 1 - 09739 - 7 KNT

VERDICT FORM B

We, the jury, find the defendant, Ismail Hassan, guilty (write in
"not guilty" or "guilty") of the crime Assault in the First Degree as charged in Count 2.

DATE: Apr. 1 29, 2009


Presiding Juror

ORIGINAL

FILED
KING COUNTY WASHINGTON

APR 29 2009

SUPERIOR COURT CLERK
KARLA GABRIELSON
DEPUTY

*IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY*

STATE OF WASHINGTON,)
Plaintiff,)
)
)
V.)
)
)
ISMAIL HASSAN,)
Defendant.)

No. 08 - 1 - 09739 - 7 KNT

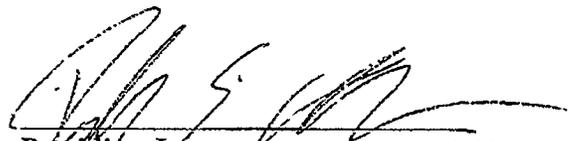
SPECIAL VERDICT FORM
COUNT 2

We, the jury, return a special verdict by answering as follows:

QUESTION: Was the defendant, Ismail Hassan, armed with a firearm at the time of the commission of the crime of assault in the first degree as charged in Count 2?

ANSWER: yes (Write "yes" or "no")

DATE: April 29, 2009



Presiding Juror

ORIGINAL

Exhibit H

Defense proposed special verdict forms

CP 42-43

FILED
KING COUNTY WASHINGTON

APR 21 2009

SUPERIOR COURT CLERK
KARLA GABRIELSON
~~ESTATE~~

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	No. 08-1-09739-7 KNT
Plaintiff,)	
)	
v.)	
)	
ISMAIL HASSAN)	
)	
Defendant.)	

DEFENDANT'S INSTRUCTIONS TO THE JURY

(With Citations)



Peter Geisness
Counsel for Defendant

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)
Plaintiff,)

No. 08 - 1 - 09739 - 7 KNT

V.)

SPECIAL VERDICT FORM
COUNT 1

ISMAIL HASSAN,)
Defendant.)

We, the jury, return a special verdict by answering as follows:

QUESTION: Was the defendant, Ismail Hassan, armed with a firearm at the time of the
commission of the crime of assault in the first degree as charged in Count 1?

ANSWER: _____ (Write "yes" or "no")

DATE: _____

Presiding Juror

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)
Plaintiff,)

No. 08 - 1 - 09739 - 7 KNT

V.)

SPECIAL VERDICT FORM
COUNT 2

ISMAIL HASSAN,)
Defendant.)

We, the jury, return a special verdict by answering as follows:

QUESTION: Was the defendant, Ismail Hassan, armed with a firearm at the time of the
commission of the crime of assault in the first degree as charged in Count 2?

ANSWER: _____ (Write "yes" or "no")

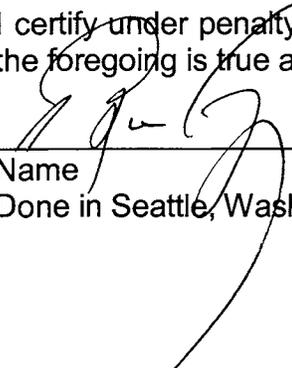
DATE: _____

Presiding Juror

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 JEFFREY ELLIS, the attorney for the appellant, at Law Offices of Ellis, Holmes, and Witchley, PLLC, 705 Second Avenue, Suite 401, Seattle, Washington, 98104, containing a copy of Brief of Respondent, in STATE v. ISMAIL HASSAN, Cause No. 63556-5-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

08 / 12 / 10

Date

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2010 MAR 12 PM 4:56