FILED
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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 28673-8-III
Respondent,	)	
v.	)	UNPUBLISHED OPINION
CHANCEY DEAN HOWARD,	)	
Appellant.	)	

Kulik, J. — A jury found Chancey Dean Howard guilty of first degree robbery with a firearm enhancement and guilty of unlawful possession of a firearm. Mr. Howard appeals his sentence. He contends that the deadly weapon enhancement should be vacated because the jury was incorrectly instructed that a unanimous decision was needed to answer "no" on the special verdict form. He also raises several other issues in his statement of additional grounds for review.

We affirm the sentence based on *State v. Guzman Nunez*, 174 Wn.2d 707, 285 P.3d 21 (2012). And we conclude that Mr. Howard's statements of additional grounds for relief are unpersuasive.

FACTS

A jury found Mr. Howard guilty of first degree robbery and unlawful possession of a firearm. As part of his robbery conviction, the jury was asked to find by special verdict that Mr. Howard was armed with a firearm when the offense was committed. The trial court gave the jury the following oral instructions for answering the special verdict form:

> [I]f you find the defendant guilty of the crime of robbery in the first degree, you must then make a decision with respect to the firearm and indicate that decision on form A-1 and whatever decision you place on form A-1 must be unanimous.

Report of Proceedings (Nov. 13, 2009) at 286.

The jury answered "yes" to the special verdict. Clerk's Papers (CP) at 50. Based on the special verdict, the trial court imposed an additional 60-month firearm enhancement on Mr. Howard's sentence for first degree robbery.

ANALYSIS

We review alleged errors of law in jury instructions de novo. *Boeing Co. v. Key*, 101 Wn. App. 629, 632, 5 P.3d 16 (2000). Failure to timely object usually waives the issue on appeal, including issues regarding instructional errors. RAP 2.5(a); *State v. Williams*, 159 Wn. App. 298, 312, 244 P.3d 1018, *review denied*, 171 Wn.2d 1025

(2011). This court has held that a trial court's failure to instruct a jury that it could be nonunanimous to acquit a defendant of an aggravating factor is not an issue of constitutional magnitude. *State v. Guzman Nunez*, 160 Wn. App. 150, 159, 162-63, 248 P.3d 103 (2011), *aff'd in part*, 174 Wn.2d 707.

Mr. Howard contends that the trial court improperly instructed the jury that a unanimous decision was needed to answer "no" on the special verdict form. Instead, he contends that trial court was required to give a nonunanimity instruction as required in *State v. Bashaw*, 169 Wn.2d 133, 146-47, 234 P.3d 195 (2010), *overruled by Guzman Nunez*, 174 Wn.2d 707.

Mr. Howard did not object to the unanimity instruction and, therefore, waives the right to raise the issue on appeal. In any case, his challenge to the jury instruction fails.

Prior to the Washington Supreme Court's recent decision in *Guzman Nunez*, the court in *Bashaw* recognized the nonunanimity rule developed in *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003), *overruled by Guzman Nunez*, 174 Wn.2d 707, that "a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence." *Bashaw*, 169 Wn.2d at 146. However, in *Guzman Nunez*, our Supreme Court reconsidered and overruled the nonunanimity rule in *Bashaw*. *Guzman Nunez*, 174

Wn.2d at 709-10. The *Guzman Nunez* court concluded that such a rule "conflicts with statutory authority, causes needless confusion, does not serve the policies that gave rise to it, and frustrates the purpose of jury unanimity." *Id.* The court concluded that the challenged jury instructions, which required a unanimous "yes" or "no" decision on the special verdict form, were correct. *Id*. at 710, 719.

Here, based on *Guzman Nunez*, the trial court did not err in instructing the jury on the special verdict form. Accordingly, we affirm Mr. Howard's sentence.

The trial court did not improperly instruct the jury that a unanimous decision was needed to answer "no" on the special verdict form.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

<u>*Amended Information.*</u> A trial court's decision to allow the State to amend the charges is reviewed for an abuse of discretion. *State v. Ziegler*, 138 Wn. App. 804, 808, 158 P.3d 647 (2007).

A charging document must include all of the essential elements of a crime, statutory or otherwise, "to afford notice to an accused of the nature and cause of the accusation against him." *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). The purpose of the rule is to enable the defendant to prepare an adequate defense. *Id*. at 101.

CrR 2.1(d) provides that a trial court may permit the State to amend an information

any time before a verdict if substantial rights of the defendant are not prejudiced. A mid-trial amendment is allowed where the amendment merely specifies a different manner of committing the crime originally charged. *State v. Pelkey*, 109 Wn.2d 484, 490, 745 P.2d 854 (1987). Washington case law adds that the State may not amend an information to charge a different crime after resting its case unless the amended charge is a lesser degree of the same charge or a lesser included offense. *Id.* at 491. "Anything else is a violation of the defendant's article 1, section 22 right to demand the nature and cause of the accusation." *Id.*

"Where the principal element in the new charge is inherent in the previous charge and no other prejudice is demonstrated, it is not an abuse of discretion to allow amendment on the day of trial." *State v. Gosser*, 33 Wn. App. 428, 435, 656 P.2d 514 (1982).

In Mr. Howard's situation, the trial court allowed the State to amend the information twice before trial. Mr. Howard contends that the amendments prejudiced him because he was unable to prepare an adequate defense. He was forced to choose between his right to a speedy trial and his right to be represented by prepared, effective counsel.

Neither amendment prejudiced Mr. Howard or forced him to choose between his

constitutional rights. For the first amended information, Mr. Howard was aware that the information would be amended to add a count of unlawful possession of a firearm and a firearm enhancement. The State sent a letter to Mr. Howard two months before trial telling him that if he did not plead, the State would add the firearm enhancement and count of unlawful possession. He should have been prepared to defend against the new charges. Also, he should have been prepared to defend against the use of a firearm because his count of first degree robbery accused him of being armed with a deadly weapon. The trial court did not abuse its discretion in allowing the first amended information.

Another amended information entered before trial added the alternative methods of committing first degree robbery. The State was still required to prove the robbery took place. The court did not abuse its discretion by allowing the amendment as the amendment merely specified a different manner of committing the crime originally charged.[1]

The trial court did not abuse its discretion in allowing the State to amend the charges against Mr. Howard.

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[1] A document entitled "second amended information" was also entered before trial but made no substantive changes to the information. The changes corrected a heading only. The trial court also granted a third motion to amend after the State rested. However, testimony suggests that the State decided against amending the information.

<u>Motion to Dismiss.</u> We review a trial court's power to dismiss charges under the manifest abuse of discretion standard. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). "Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

Mr. Howard contends that governmental misconduct occurred when the State withheld information regarding witness contact information until the day before trial. He contends that this prejudiced him because he was forced to go to trial unprepared or waive his right to a speedy trial. Essentially, this is the same argument he raised at trial in his CrR 8.3(b) motion to dismiss. To address this contention, we will review whether the trial court abused its discretion by denying his CrR 8.3(b) motion.

The record does not contain written findings by the trial court addressing its reasoning in denying the motion to dismiss. However, the transcript of the hearing on the CrR 8.3(b) motion allows us to adequately address this issue.

Under CrR 8.3(b), the court may, in the furtherance of justice, "dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." The purpose of this rule is to see that a defendant is fairly treated. *State v.*

Whitney, 96 Wn.2d 578, 580, 637 P.2d 956 (1981). Nevertheless, dismissal of charges is an extraordinary remedy. *Blackwell*, 120 Wn.2d at 830 (quoting *City of Spokane v. Kruger*, 116 Wn.2d 135, 144, 803 P.2d 305 (1991)). "[T]he question of whether dismissal is an appropriate remedy is a fact-specific determination that must be resolved on a case-by-case basis." *State v. Sherman*, 59 Wn. App. 763, 770-71, 801 P.2d 274 (1990).

A defendant must show two things before a trial court may dismiss the charges under CrR 8.3(b). *Michielli*, 132 Wn.2d at 239. First, he must show arbitrary action or governmental misconduct. *Id.* Governmental misconduct "need not be of an evil or dishonest nature; simple mismanagement is sufficient." *Blackwell*, 120 Wn.2d at 831.

Second, a defendant must show prejudice affecting his right to a fair trial. *Michielli*, 132 Wn.2d at 240. A defendant's right to a fair trial may be impermissibly prejudiced when he is forced to choose between his right to a speedy trial or his right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his or her defense. *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980). Furthermore, a defendant must establish "by a preponderance of the evidence that interjection of new facts into the case when the State has not acted with due diligence [compelled] him to choose between prejudicing either of these rights." *Id*.

Here, two of the main witnesses to the assault were both illegal immigrants whose location was not known. The State attempted to locate the witnesses over two months before trial. Right before trial, one witness, Cindy Laborin, became available after immigration officials finally granted permission for her to come back into the country from Mexico. The other witness, Antonio Sanchez Lopez, became available a few days before trial was scheduled because he was discovered illegally in the country and arrested on a material witness warrant. The State testified that it had not had an opportunity to interview either witness. The State said that the evidence and witness list had not changed.

Based on these facts, the trial court did not abuse its discretion in denying the motion to dismiss. First, the trial court recognized the unavailability of the witnesses and found that there was no mismanagement on the part of the State. The court stated that it is hard for an attorney to control witnesses, and that the witnesses in Mr. Howard's case seemed particularly hard to control because of their immigration status and living out of the country.

Also, the trial court found that the State did not have an advantage over Mr. Howard because the State had not had an opportunity to interview the newly acquired witnesses. The trial court also stated that it did not believe that Mr. Howard's situation

was one where the State had extensive information that was withheld for months. Thus, there is no evidence of prejudice to Mr. Howard. The reasoning of the trial court does not indicate an abuse of discretion.

In addition, Mr. Howard does not show that new facts were going to be introduced by the witnesses. Before the witnesses became available, the State and Mr. Howard both admitted that they were willing to go to trial without the witnesses. Mr. Howard has not shown additional facts that were discovered as a result of the testimony of the witnesses.

In sum, Mr. Howard was confronted with a situation where hard-to-find witnesses were suddenly acquired before trial. The State disclosed the availability of the witnesses to Mr. Howard as soon as the information was known. Mr. Howard has not shown that the State mismanaged its case or intentionally withheld information about the witnesses. The trial court did not abuse its discretion in denying Mr. Howard's motion to dismiss.

<u>*Sufficient Evidence of a Firearm.*</u> To review a challenge for sufficiency of the evidence, this court determines "'whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*.'" *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). "An appellant claiming insufficiency of the evidence admits the

truth of the State's evidence and all inferences reasonably drawn from it." *State v. Raleigh*, 157 Wn. App. 728, 736, 238 P.3d 1211 (2010), *review denied*, 170 Wn.2d 1029 (2011). "Circumstantial and direct evidence are equally reliable, and we defer to the trier of fact on conflicting testimony, witness credibility, and the persuasiveness of the evidence." *Id*. at 736-37.

Mr. Howard contends the firearm enhancement and unlawful possession conviction cannot stand because the evidence was not sufficient to prove that he was armed with a "firearm" as defined by the jury instructions.

The jury instructions defined "firearm" as a weapon or device from which a projectile may be fired by an explosive such as gunpowder. CP at 42. This instruction is consistent with the firearm definition found in former RCW 9.41.010(1) (2001).

The authenticity of an alleged firearm may be inferred from circumstantial evidence, which is no less reliable than direct evidence. *State v. Mathe*, 35 Wn. App. 572, 582, 668 P.2d 599 (1983) (quoting *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 991 (1980)), *aff'd*, 102 Wn.2d 537, 688 P.2d 859 (1984). The State need not produce the actual weapon at trial. *State v. Bowman*, 36 Wn. App. 798, 803, 678 P.2d 1273 (1984). The evidence is sufficient if a witness to the crime testified to the presence of such a weapon. *State v. Faust*, 93 Wn. App. 373, 381 n.6, 967 P.2d 1284 (1998).

In *Bowman*, the court found sufficient evidence to prove the existence of a real gun, noting that the defendant threatened to use a gun, the victim described the gun in detail, and the victim was certain the gun was "real." *Bowman*, 36 Wn. App. at 803. In *Mathe*, the court found sufficient evidence where the guns used in the robberies were described by the victims in detail. *Mathe*, 35 Wn. App. at 581-83. In *Goforth*, sufficient evidence was found where the witnesses, who were familiar with shotguns, said the defendant used a real shotgun. *State v. Goforth*, 33 Wn. App. 405, 412, 655 P.2d 714 (1982).

Ms. Laborin testified Mr. Howard hit Mr. Sanchez Lopez with a black gun. She testified that she knew it was a gun because it looked like a gun. Mr. Sanchez Lopez also testified that Mr. Howard hit him over the head with a gun. Mr. Sanchez Lopez said that he had a good look at the gun when Mr. Howard pointed it at him. He described the gun as having a brown grip. Kenneth Rowell, who aided Mr. Howard in the alleged robbery, also testified that Mr. Howard had a gun. Mr. Rowell said that he was three feet away from the gun and was able to recognize it as such.

Contrary testimony was given at trial. Mr. Rowell's attorney testified that when she interviewed Mr. Sanchez Lopez, he said that he only thought it was a gun and did not say that he saw the gun. Mr. Howard testified that he was armed with a pepper spray gun

that was designed to look like a pistol. He described the pepper spray gun as brown hard plastic, able to split in half, and having a container of pepper spray where the barrel is located.

The evidence was sufficient to convince the jury that Mr. Howard was armed with a firearm and not a pepper spray gun. All three witnesses testified that they recognized Mr. Howard's weapon as a gun. Mr. Sanchez Lopez and Mr. Howard were close enough to the gun to identify it as such. Neither of the witnesses described the characteristics of a pepper spray gun, such as the ability of the gun to split in half or that the gun could spray a liquid instead of shooting a projectile. After viewing the evidence in the light most favorable to the State, it was possible for the jury to find beyond a reasonable doubt that Mr. Howard used a firearm in the commission of the crime.

Sufficient evidence existed to support Mr. Howard's firearm enhancement and his conviction for unlawful possession of a firearm.

Jury Instruction on Accomplice Liability. Mr. Howard contends the jury was improperly instructed on the proper level of intent needed for accomplice liability.

Under Washington law, a person found guilty based on accomplice liability must have knowledge that he or she was promoting or facilitating the crime charged, as opposed to any general crime. *State v. Cronin*, 142 Wn.2d 568, 578-79, 14 P.3d 752

(2000).

In Mr. Howard's trial, the jury instructions for accomplice liability stated:

> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
> (1) solicits, commands, encourages, or requests another person to commit the crime; or
> (2) aids or agrees to aid another person in planning or committing the crime.

CP at 34.

Thus, in order to find Mr. Howard guilty under an accomplice liability theory, the jury needed to find that Mr. Howard had knowledge of *the* crime charged. *See Cronin*, 142 Wn.2d at 579. The jury instructions properly informed the jury of the correct level of culpability needed under accomplice liability. The jury instructions were not deficient.

The jury instructions included the proper level of culpability needed for accomplice liability.

Double Jeopardy. Mr. Howard contends that convictions for first degree robbery and the unlawful possession of a firearm violate the double jeopardy clause of the Washington Constitution. He maintains that the two crimes are the same under the same evidence test because the crime of unlawful possession a firearm is the functional equivalent of the firearm element in first degree robbery.

We review claims of double jeopardy de novo. *State v. Larson*, 160 Wn. App. 577, 592, 249 P.3d 669, *review denied*, 172 Wn.2d 1002 (2011). Article I, section 9 of the Washington Constitution provides that "[n]o person shall . . . be twice put in jeopardy for the same offense."

A legislature can enact statutes imposing cumulative punishments for the same conduct in a single proceeding. *State v. Kelley*, 168 Wn.2d 72, 77, 226 P.3d 773 (2010). The imposition of multiple punishments, if clearly intended by the legislature, does not violate double jeopardy. *Id*. If the legislature clearly intended to authorize cumulative punishments under two different statutes, the court's double jeopardy analysis is at an end. *State v. Simms*, 151 Wn. App. 677, 690, 214 P.3d 919 (2009) (quoting *State v. Freeman* 153 Wn.2d 765, 771, 108 P.3d 753 (2005)), *aff'd*, 171 Wn.2d 244, 250 P.3d 107 (2011). In situations where the intent of the legislature is not clear, the "same evidence" test is used to determine whether the crimes are the same in law and fact. *Kelley*, 168 Wn.2d at 77.

The legislature clearly intended to authorize multiple punishments for the crimes of unlawful possession of a firearm, RCW 9.41.040, and first degree robbery, RCW 9A.56.200(1)(a). The legislature created two different statutes to address each crime. The fact that both crimes required the State to prove that Mr. Howard possessed a

firearm does not make the two offenses the same. Mr. Howard's contention fails.

Mr. Howard's convictions for first degree robbery and for unlawful possession of a firearm do not violate double jeopardy.

Due Process Rights. The State must disclose exculpatory evidence to the defense, including impeachment evidence. *State v. Benn*, 120 Wn.2d 631, 650, 845 P.2d 289 (1993) (quoting *United States v. Bagley*, 473 U.S. 667, 678, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)). "Promises of leniency to witnesses may affect the witness' credibility and must be disclosed." *State v. Soh*, 115 Wn. App. 290, 294, 62 P.3d 900 (2003). The failure to disclose an agreement of leniency may implicate the Fourteenth Amendment's due process clause. *Id*.

Mr. Howard contends that the State failed to disclose agreements made between the State and Mr. Sanchez Lopez and Mr. Rowell. The record does not support Mr. Howard's contention. First, there is no evidence that the State entered into an agreement with Mr. Sanchez Lopez. Two months before trial, the State testified that there was no deal between Mr. Sanchez Lopez and the State. At trial, Mr. Howard questioned a police detective and Mr. Rowell's attorney about whether Mr. Sanchez Lopez received a deal, both of whom testified that the State had not made an agreement with Mr. Sanchez Lopez.

As far the agreement between the State and Mr. Rowell, the record shows that the agreement was disclosed to Mr. Howard. At trial, the State acknowledged Mr. Rowell pleaded guilty to his involvement in the events that occurred with Mr. Howard, and that the State was recommending a sentence based on the plea. During cross-examination, Mr. Howard questioned Mr. Rowell about Mr. Rowell's agreement with the State. Thus, there is no evidence that the State failed to disclose agreements offered to witnesses and no evidence of a violation of due process.

Mr. Howard failed to show that the State failed to disclose evidence of favorable agreements made between the State and key witnesses.

Ineffective Assistance of Counsel. Mr. Howard contends that his counsel acted ineffectively by failing to investigate claims that the State's witnesses recanted their testimony against him.

To satisfy the Sixth Amendment guarantee of the right to counsel, an attorney must perform to the standards of the profession; failure to live up to those standards will require a new trial when the client has been prejudiced by counsel's failure. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Ineffective assistance of counsel claims are adjudged under the standards of *Strickland v. Washington*, 466 U.S. 668, 689-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). That test is whether or not

(1) counsel's performance failed to meet a standard of reasonableness, and (2) actual prejudice resulted from counsel's failures. *Id*. at 690-92. In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions. *Id*. at 691. A strategic or tactical decision is not a basis for finding error. *Id*. at 689-91. Prejudice is shown where "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice based on information discovered after trial, the new evidence would need to convince the trial court to grant a new trial. A trial court may grant a new trial under CrR 7.5(a)(3) based on newly discovered evidence. *State v. Williams*, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981). A recantation may be newly discovered evidence. *State v. Macon*, 128 Wn.2d 784, 799-800, 911 P.2d 1004 (1996). To obtain a new trial, the defendant must prove that the recantation or other evidence will probably change the result of the trial, was discovered since the trial, could not have been discovered before trial through due diligence, is material, and is not simply cumulative or impeaching. *Id.* at 800. A defendant is not entitled to a new trial solely because a critical witness recants important testimony. *State v. Ieng*, 87 Wn. App. 873, 875, 942 P.2d 1091 (1997). Instead, a defendant must prove the recantation is material, i.e., credible. *Id.*

Recantation evidence is inherently suspect. *Macon*, 128 Wn.2d at 801.

During the sentencing hearing, defense counsel told the trial court that Mr. Howard notified her of evidence that the key witnesses were not truthful in their testimony. Mr. Howard told defense counsel that the key witnesses told other people in the jail that they lied and now wanted to tell the truth. Defense counsel reported to the trial court that she sent an investigator to question the witnesses, and requested time to investigate further. The trial court denied defense counsel's request and suggested that a post-judgment motion was appropriate if new evidence is discovered after sentencing.

Mr. Howard fails to show how this representation is defective. Defense counsel reasonably investigated the allegation. Based on this investigation, it is reasonable to conclude that defense counsel made a tactical decision not to request a new trial based on this inherently suspect evidence.

Mr. Howard also fails to show prejudice. We cannot find with reasonable probability that a different result would occur with the inclusion of the new testimony. The recanted testimony of the State's witnesses after trial merely impeached their earlier testimony; there is no evidence that the trial court would have believed the jailhouse witnesses or accepted the recantation of the State's witnesses. Thus, there is no evidence that the changed testimony would result in a new trial and no evidence of prejudice to

Mr. Howard.

Mr. Howard received effective assistance of counsel.

Affirm.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, J.

WE CONCUR:

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Brown, J.

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Siddoway, A.C.J.