NO. 30640-2-III
Consolidated with 30641-1-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JOSEPH L. SHOUSE,

Defendant/Appellant.

APPELLANT'S BRIEF

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1. The State failed to prove, beyond a reasonable doubt, each and every element of first degree robbery as charged in Count Three of the Second Amended Information. (CP 24)

2. The State failed to prove, beyond a reasonable doubt, each and every element of second degree assault as charged in Count Four of the Second Amended Information.

3. The State failed to prove, beyond a reasonable doubt, each and every element of second degree assault as charged in Count Five of the Second Amended Information.

4. The State failed to prove, beyond a reasonable doubt, each and every element of unlawful possession of a firearm first degree as charged in Count Seven of the Second Amended Information.

5. The State failed to prove, beyond a reasonable doubt, that Joseph Lee Shouse was an accomplice to any of the charged offenses.

6. The State failed to prove, beyond a reasonable doubt, that a real gun was involved for purposes of the firearm enhancements.

7. Dismissal of Counts Eight and Nine with prejudice, after guilty verdicts were rendered, negates an essential element of first degree robbery as charged in Counts One and Three.

8. The record does not establish that the jury was given an oath as required by CrR 6.6.

9. Prosecutorial misconduct deprived Mr. Shouse of a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution and Const. art. I, §§ 3 and 22.

10. The trial court committed multiple sentencing errors as follows:

a). Counts One and Two merge;

b). Counts Three and Four merge;

c). Mr. Shouse's offender score was miscalculated based upon the foregoing mergers; and

d). Merger of the underlying offenses requires merger of applicable firearm enhancements.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did the State establish, beyond a reasonable doubt, that any personal property was taken from "the person or in the presence" of Dawn Flood as charged in Count Three of the Second Amended Information?

2. Did the State prove, beyond a reasonable doubt, that an assault of Dawn Flood occurred as charged in Count Four of the Second Amended Information?

3. Did the State prove, beyond a reasonable doubt, that an assault of Julie Curry occurred as charged in Count Five of the Second Amended Information?

4. Did the State prove, beyond a reasonable doubt, as charged in Count Seven of the Second Amended Information, that Mr. Shouse either had actual possession or constructive possession of a firearm?

5. Did the State establish, beyond a reasonable doubt, accomplice liability as to any of the offenses as they pertain to Mr. Shouse?

6. Did the State establish, beyond a reasonable doubt, that there was a real gun in order to impose firearm enhancements?

7. When the trial court dismissed, with prejudice, Counts Eight and Nine of the Second Amended Information, following a jury verdict of

guilty on those counts, did the dismissal negate an essential element of the offense of first degree robbery as charged in Counts One and Three?

8. Was the jury given an oath as required by CrR 6.6?

9. Did prosecutorial misconduct deprive Mr. Shouse of a fair and constitutional trial when:

a). Impeachment evidence was used as substantive evidence;

b). A comment was elicited from a police witness on another witness's credibility;

c). A witness was questioned concerning her agreement to testify truthfully at trial;

d). The prosecutor commented upon Mr. Shouse's right to remain silent in closing argument; and

e). Evidence outside the record was introduced in closing argument?

10. Do second degree assault and first degree robbery merge (Counts One and Two; Counts Three and Four), and, if so, is Mr. Shouse entitled to be re-sentenced due to a miscalculated offender score?

11. If the underlying offenses merge, do the enhancements on those offenses also merge?

STATEMENT OF CASE

Mr. Shouse, Gary D. Engelstad, Jr., Octaviano Ramirez and Ismael Hinojos were charged "as principal or accomplice" by an Information filed on October 10, 2011. The Information alleged two (2) counts of first degree robbery and two (2) counts of first degree assault. (CP 1)

A motion to sever Mr. Shouse's trial was filed on November 7, 2011. The severance motion was denied as to Mr. Engelstad and granted with regard to Mr. Ramirez and Mr. Hinojos. (CP 7; RP 13, l. 23 to RP 14, l. 2)

An Amended Information was filed on November 14, 2011 adding an additional count of first degree robbery, an additional count of first degree assault, one (1) count of first degree burglary, one (1) count of unlawful possession of a firearm first degree, one (1) count of first degree theft and one (1) count of second degree theft. Firearm enhancements were included in Counts One through Six. (CP 13)

A Second Amended Information was filed on November 15, 2011. One (1) count of first degree robbery was dropped. The first degree assault counts were now charged as second degree assault. The count of first degree theft was reduced to second degree theft. Mr. Shouse was arraigned on the Second Amended Information that date. (RP 20, ll. 12-22)

A jury trial commenced on November 15, 2011. There is no indication in the record that the jury was given an oath.

The trial involved an incident that occurred on October 20, 2010. The alleged victims were Gerald Moccardine, Dawn Flood and Julie Curry. (RP 28, ll. 4-12; RP 28, l. 24 to RP 29, l. 1; RP 41, ll. 20-22; RP 104, ll. 21-23)

Deputies from the Kittitas County Sheriff's Office arrived at 1515 Stephens Road. Deputy Hadaller observed Mr. Moccardine with dried blood on his forehead and bruising on his cheek. Mr. Moccardine appeared to be upset and scared according to Deputy Vraves. (RP 29, ll. 12-15; RP 43, l. 24 to RP 44, l. 1; RP 48, ll. 13-15)

Ms. Flood, who formerly dated Mr. Moccardine's son, was working for him on October 20, 2010. She knows Mr. Shouse. (RP 175, ll. 14-26; RP 176, ll. 3-5; RP 219, ll. 16-17)

Mr. Shouse and Mr. Engelstad came to Mr. Moccardine's scrap/junkyard prior to October 20. They were looking for property which Mr. Shouse believed that Mr. Moccardine had taken. (RP 177, l. 17 to RP 178, l. 12)

When Mr. Engelstad and Mr. Shouse arrived on October 20 Ms. Curry took her dogs to her van. She remained in the van most of the time. While she was in her van Mr. Shouse introduced himself and had a con-

versation with her. (RP 192, ll. 1-6; RP 407, ll. 10-17; RP 418, l. 13 to RP 419, l. 3; RP 420, ll. 3-19; RP 423, ll. 22-24)

Mr. Moccardine did not have any conversation with Mr. Shouse that evening. He barely remembers seeing him present outside his trailer door. He asked Mr. Moccardine why the police had been called concerning his prior visit. (RP 192, ll. 14-18; RP 300, ll. 4-6; RP 357, l. 3; RP 392, ll. 22-24; RP 393, ll. 11-18)

After Mr. Shouse left Mr. Engelstad told Mr. Moccardine that he intended to take some alternators. Mr. Moccardine told Mr. Engelstad that he was not going to take the alternators. (RP 193, ll. 4-23)

Mr. Engelstad threw an object which hit Mr. Moccardine in the head. He then grabbed Mr. Moccardine's wallet and removed $15.00 from it. (RP 194, ll. 9-24; RP 195, ll. 14-15; RP 196, ll. 2-5; RP 300, l. 24 to RP 301, l. 1; RP 307, ll. 8-12; RP 308, ll. 17-19)

Ms. Flood saw Mr. Engelstad pull out a gun when Mr. Moccardine dropped his hand toward his pocket. Another person later came to the door of the trailer with what appeared to be a gun. (RP 196, ll. 20-23; RP 197, l. 4 to RP 197, l. 11; RP 199, l. 12 to RP 200, l. 8)

Ms. Flood testified that no gun was ever pointed at her. No one ever threatened her. No one ever made physical contact with her. (RP 222, ll. 8-18; RP 239, ll. 12-19)

Mr. Moccardine believed that Mr. Engelstad had a gun; but was not entirely certain. He observed an item that had an octagonal barrel. He believed it was either an old gun or some type of tool. (RP 309, l. 21 to RP 310, l. 1; RP 311, ll. 8-17; RP 359, l. 23 to RP 360, l. 1; RP 363, ll. 10-14; RP 382, ll. 2-10; RP 385, ll. 6-10)

Ms. Curry claimed that she was in the trailer when Mr. Engelstad pulled the gun. The gun was pointed mainly at Mr. Moccardine. She was standing near him. She backed away from the situation to avoid endangering herself. She left the trailer without any interference. (RP 414, ll. 9-13; ll. 21-22; RP 415, l. 17 to RP 416, l. 17; RP 417, ll. 9-11)

Neither Mr. Engelstand nor Mr. Shouse threatened her in any way. They never hit or touched Ms. Curry or Ms. Flood. (RP 371, l. 19 to RP 372, l. 5; RP 435, ll. 18-22; RP 445, l. 18 to RP 446, l. 1)

While she was sitting in her van Ms. Curry did not see anybody putting anything into any other vehicles. (RP 425, ll. 12-14)

Ms. Flood claimed that her backpack was removed from her car. It contained a Play Station, two bags of jewelry and a pair of binoculars. Mr. Shouse later apologized, stating that if anything of hers was taken he was not aware that it was occurring. (RP 207, ll. 11-17; RP 209, l. 21 to RP 210, l. 9; RP 211, ll. 7-10; RP 213, l. 18 to RP 214, l. 6)

Cpl. Nale of the Kittitas County Sheriff's Office conducted an interview of Ms. Flood. At trial he testified that she was "candid and open" and that her statement "wasn't something false …." Following a sidebar the trial court ruled that the testimony concerned the Reid technique and was inadmissible. The prosecuting attorney then asked the following question:

> Q. Is that a factor in your -- because I believe you testified that she was not being false with you that you had --
>
> MR. YOUNG: Objection. That's exactly what we were talking about?
>
> THE COURT: I'll sustain the objection.

(RP 87, ll. 18-25; RP 88, ll. 14-20; RP 88, l. 21 to RP 89, l. 16; RP 91, l. 25 to RP 92, l. 7)

Detective Clasen of the Ellensburg Police Department, and Deputies Foster and Sinclair of the Kittitas County Sheriff's Office conducted interviews of Stephanie VanCommen. Ms. VanCommen has a child in common with Mr. Shouse. (RP 112, ll. 21-22; RP 114, ll. 3-21; RP 122, ll. 24-25; RP 145, ll. 20-25; RP 156, ll. 10-11; RP 163, ll. 18-25; RP 164, ll. 19-24; RP 475, ll. 20-23)

Defense counsel argued a motion in limine concerning Ms. VanCommen's statement that Mr. Shouse was in possession of a shotgun. The trial court denied the motion. (RP 467, l. 11 to RP 469, l. 19)

Ms. VanCommen appeared at trial wearing jail clothes and handcuffs. She stated that she was testifying based upon an agreement with the State concerning her pending charges and that she was required to testify truthfully. (RP 499, l. 25 to RP 500, l. 8; RP 504, ll. 21-22; RP 512, l. 24 to RP 513, l. 3)

Ms. VanCommen admitted that she made a statement concerning Mr. Shouse's possession of a shotgun. She testified she originally lied about the shotgun. When she was interviewed on August 11 and August 16 she denied that he had a shotgun. She stated that she wanted to get Mr. Shouse in trouble because he was cheating on her. (RP 488, l. 25 to RP 489, l. 15; RP 490, ll. 21-25; RP 493, ll. 21-23; RP 494, ll. 8-14; RP 496, ll. 6-10; RP 496, l. 25 to RP 497, l. 2)

The prosecuting attorney then re-called Detective Clasen to the stand. Testimony concerning Ms. VanCommen's December 31, 2010 interview was allowed by the trial court over defense counsel's objection. Ms. VanCommen neither signed that statement nor was it made under oath. (RP 523, l. 3 to RP 526, l. 9; RP 526, l. 22 to RP 527, l. 10)

Deputies Foster and Sinclair were then re-called to the stand by the prosecuting attorney. Deputy Foster testified that in his August 11, 2011 interview with Ms. VanCommen she now claimed that Mr. Shouse did not have a shotgun. Deputy Sinclair testified that in his August 16, 2011 interview Ms. VanCommen again stated that Mr. Shouse did not have a gun. (RP 528, l. 1 to RP 531, l. 15; RP 532, l. 10 to RP 534, l. 24)

Defense counsel's motion to dismiss all charges against Mr. Shouse was denied. (RP 547, l. 18 to RP 549, l. 2)

Defense counsel renewed his severance motion and the dismissal motion after the defense rested. Both motions were again denied. (RP 576, ll. 5-24)

The trial court gave a limiting instruction with regard to Ms. VanCommen's testimony. Instruction 8 states:

> Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of the out-of-court statements made by witness Stephanie VanComen. The out-of-court statements made by Ms. VanComen may only be considered by you when determining Ms. VanComen's credibility. You may not consider these out-of-court statements for any other purpose. Any discussions of these statements during your deliberations must be consistent with this limitation.

(CP 109)

During closing argument the prosecuting attorney used the impeachment testimony involving Ms. VanCommen as substantive evidence. He also commented on Mr. Shouse's silence over defense counsel's objection. The trial court did not rule on that objection. (RP 645, ll. 20-23; RP 646, ll. 9-18)

The prosecuting attorney interjected testimony not in evidence. The first time defense counsel's objection was overruled. After that defense counsel objected and was told it was argumentative. (RP 648, l. 2 to RP 649, l. 1; RP 660, ll. 5-8; RP 662, ll. 3-20; RP 664, ll. 18-21)

A jury found Mr. Shouse guilty on all counts. It answered the special verdict form concerning the firearm enhancements: "Yes." (CP 155; CP 157)

Defense counsel filed a motion for a new trial and/or arrest of judgment on December 2, 2011. No supporting affidavits were included. (CP 159)

Judgment and Sentence was entered on February 14, 2012. An order of dismissal with prejudice was entered on Counts Eight and Nine. The order was presented by the State. The trial court then calculated Mr. Shouse's offender score as twenty-one (21). (CP 179; CP 240)

Mr. Shouse had filed his Notice of Appeal on February 13, 2012. (CP 178)

SUMMARY OF ARGUMENT

The testimony and evidence introduced by the State at trial was insufficient to prove, beyond a reasonable doubt, each and every element of first degree robbery as charged in Count Three.

The testimony and evidence introduced by the State at trial was insufficient to prove, beyond a reasonable doubt, each and every element of second degree assault as charged in Counts Four and Five.

The testimony and evidence introduced by the State at trial was insufficient to prove, beyond a reasonable doubt, that Mr. Shouse either actually or constructively possessed a firearm.

The testimony and evidence introduced by the State at trial was insufficient to prove, beyond a reasonable doubt, that Mr. Shouse was an accomplice as to any offense.

The testimony and evidence introduced by the State at trial was insufficient to prove, beyond a reasonable doubt, that any weapon/firearm observed was a "real gun."

Dismissal of Counts Eight and Nine negated an essential element required to establish first degree robbery as set forth in Counts One and Three.

Cumulative error consisting of the lack of a jury oath, prosecutorial misconduct and deprivation of the right of allocution deprived Mr. Shouse of a fair trial.

Multiple sentencing errors resulted in a miscalculated offender score and an erroneous sentence.

ARGUMENT

I. SUFFICIENCY OF THE EVIDENCE

Whenever there is a challenge to the sufficiency of the evidence

> "… the relevant question is 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.*" *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979).

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Proof beyond a reasonable doubt is required by RCW 9A.04.100(1). It provides:

> Every person charged with the commission of a crime is presumed innocent unless proved guilty. No person may be convicted of a crime unless each element of such crime is proved by competent evidence beyond a reasonable doubt.

A. COUNT THREE

Count Three of the Second Amended Information states, in part:

> They, the said, GARY D. ENGELSTAD JR. and JOSEPH L. SHOUSE, in the State of Washington, as principal or accomplice on or about October 20, 2010, **with intent to commit theft did unlawfully take personal property** that the Defendant did not own **from the person or in the presence of Dawn Flood,** against such person's will, by use or threatened use of immediate force, violence, or fear of injury to said person or the property of said person or the person or property of another, and in the commission of said crime and in immediate flight therefrom, the Defendant was armed with a deadly weapon and/or displayed what appeared to be a firearm or other deadly weapon and/or inflicted bodily injury upon Dawn Flood; thereby committing the felony crime of **ROBBERY IN THE FIRST DEGREE** ….

Dawn Flood was not injured.

No personal property was taken from the person of Dawn Flood.

No personal property of Dawn Flood's was taken in her presence.

> Personal property is within a victim's presence when it is "'within [the victim's] reach, inspection, observation or control, that [she]

> could, if not overcome with violence or prevented by fear, retain [her] possession of it.'" *State v. Manchester*, 57 Wn. App. 765, 769-69, 790 P.2d 217 (1990) (first alteration in original) (quoting 4 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 473 (14th ed. 1981)), *review denied*, 115 Wn.2d 1019 (1990).
>
> … The literal interpretation of taking something from another's person would be to take something on the person's body or directly attached to someone's physical body or clothing. That is consistent with one legal scholar's definition. 3 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 20.3(c) at 179 (2nd ed. 2003) ("Property is on the victim's person if it is in [her] hand, a pocket of the clothing [she] wears, or is otherwise attached to [her] body or [her] clothing.").

State v. Chamroeum Nam, 136 Wn. App. 698, 705, 150 P.3d 617 (2007).

Ms. Flood's personal property was in her car. Ms. Flood was in Mr. Moccardine's trailer. She was not anywhere near her car when anything was removed from it.

Moreover, Ms. Flood was not threatened. She did not feel threatened. In fact, she intervened in the confrontation between Mr. Engelstad and Mr. Moccardine. (RP 197, ll. 21-23; RP 199, ll. 4-6; RP 222, ll. 8-18)

As recently noted in *State v. Shcherenkov*, 146 Wn. App. 619, 624-25, 191 P.3d 99 (2008):

> Robbery encompasses any "taking of … property [that is] attended with such *circumstances of terror*, or such threatening by *menace, word or gesture* as in common experience is likely to create apprehension of danger and induce a man to party with property for the safety of his person." *State v. Redmond*, 122 Wash. 392, 393, 10 P. 772 (1922) (emphasis added; *see also* 67 AM. JUR. 2D *Robbery* § 89 at 114, (2003) "The determination of whether intimidation was used is based on an objective test whether an ordinary person in … [that person's] position could reasonably infer a threat of bodily harm from the defendant's acts.").

The State failed to prove, beyond a reasonable doubt, each and every element of the offense of first degree robbery as set forth in Instruction 25. (CP 126; Appendix "A")

No property was taken from the person of Dawn Flood. Any taking which occurred was outside her presence. She was unaware of any taking until after events had unfolded.

Neither force nor fear was used in the taking of any of her property.

The State's case as to Count Three does not satisfy the test announced in *State v. Green, supra.*

B. COUNT FOUR

Count Four of the Second Amended Information states, in part:

> They, the said, GARY D. ENGELSTAD JR. and JOSEPH L. SHOUSE, in the State of Washington, as principal or accomplice on or about October 20, 2010, did intentionally assault another person, to wit: Dawn Flood with a deadly weapon, to wit: handgun; thereby committing the felony crime of **ASSAULT IN THE SECOND DEGREE** ….

The trial court instructed the jury on all three (3) alternatives of WPIC 35.50. (Appendix "B") The alternatives derive from the common law. They were adopted in *State v. Krup,* 36 Wn. App. 454, 457, 676 P.2d 507 (1984) and *Peasley v. Puget Sound Tug & Barge Co.,* 13 Wn.2d 485, 504, 125 P.2d 681 (1942).

Ms. Flood was never touched, struck, cut or shot. The first alternative is inapplicable as to her.

There was no evidence introduced that Mr. Engelstad or Mr. Shouse intended to inflict bodily injury upon Ms. Flood. No attempt was made to inflict bodily injury upon her. The second alternative is inapplicable.

Finally, the third alternative, "intent to create in another apprehension and fear of bodily injury" is inapplicable. Ms. Flood directly testified that she was not afraid. Her actions at the time indicate her lack of fear.

The State's proof as to any assault on Ms. Flood fails miserably.

C. COUNT FIVE

Count Five of the Second Amended Information states, in part:

> They, the said, GARY D. ENGELSTAD JR. and JOSEPH L. SHOUSE, in the State of Washington, as principal or accomplice on or about October 20, 2010, did intentionally assault another person, to wit: Julie A. Curry, with a deadly weapon, to with: handgun; thereby committing the felony crime of assault in the second degree ….

No one touched Ms. Curry. No one struck her. No one cut her. No one shot her. No one attempted to or intended to inflict bodily injury upon her.

Again, the first two (2) definitions of assault are inapplicable to this count.

As to the third alternative, Ms. Curry testified that she was scared. However, the critical portion of Ms. Curry's testimony follows:

> Q. And what action did Mr. Engelstad take with the gun? When I guess I am trying to get to the point you testified that he pointed it at the three of you but mostly at Jerry what do you mean?
>
> A. Because we were all just huddling together I don't know sort of in that small

area and I don't -- I think it was directed more at Jerry but because we were all close and there was some jostling going on.

Q. Did you feel threatened by it?

A. Yeah, because mostly because I felt not so much that it was -- I mean I don't want to believe anybody was going to get shot or anything but it was just getting -- **it was getting scary because the jostling and everything I thought perhaps it would go off accidentally**, yeah, **I was a little worried**.

Q. Were you scared for your safety?

A. Yeah, I was at that point just trying to back out I was like trying to duck out under people's arms and stuff and get back.

(RP 415, l. 17 to RP 416, l. 10) (Emphasis supplied.)

During this time period Mr. Engelstad advised her that he had "no beef" with her. (RP 423, l. 25 to RP 424, l. 1)

It is clear that nothing was directed at Ms. Curry. She was a bystander.

"Assault by attempt to cause fear and apprehension requires specific intent to create reasonable fear and apprehension of bodily injury." *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995)

The State failed to present any evidence that either Mr. Engelstad or Mr. Shouse specifically intended to inflict bodily injury upon Ms. Curry. The evidence dictates otherwise.

D. COUNT SEVEN

Count Seven of the Second Amended Information provides, in part:

> They, the said, GARY D. ENGELSTAD JR. and JOSEPH L. SHOUSE, in the State of Washington, as principal or accomplice on or about October 20, 2010, having previously been convicted in this state or elsewhere of a serious offense … did knowingly own or have in his possession or under his control a firearm, to wit: Black Hand Gun; thereby committing the felony crime of **UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE** ….

Mr. Moccardine did not see Mr. Shouse with any type of firearm.

Ms. Flood did not see Mr. Shouse with any type of firearm.

Ms. Curry did not see Mr. Shouse with any type of firearm.

The only evidence that Mr. Shouse may have possessed a firearm came through the impeachment testimony of Ms. VanCommen. The State used it as substantive evidence of guilt.

Testimony reflected that Mr. Engelstad may have had a gun. One of the other individuals present also may have had a gun.

Mr. Shouse concedes that he was previously convicted of a serious offense. A stipulation was entered to that effect. (CP 93)

> A felon may not lawfully possess a firearm. *See* RCW 9.41.040. Possession may be actual or constructive. [Citation omitted.] The State may establish constructive possession by showing the defendant had dominion and control over the firearm. *State v. Murphy*, 98 Wn. App. 42, 46, 988 P.2d 1018 (1999), *review denied*, 140 Wn.2d 1018 (2000). Mere proximity to the firearm is insufficient to show dominion and control. [Citation omitted.] "[T]he ability to reduce an object to actual possession" is an aspect of dominion and control, but "other aspects such as physical proximity" should be considered as well. *State v. Hagen*, 55 Wn. App. 484, 499, 781 P.2d 892 (1989). And knowledge of the presence of contraband, without more, is insufficient to show dominion and control to establish constructive possession. *State v. Hystad*, 36 Wn. App. 42, 49, 671 P.2d 793 (1983).

State v. Chouinard, 169 Wn. App. 895, 899 (2012)..

Mr. Shouse contends that he could not constructively possess what someone else actually possesses. Actual possession negates dominion and control.

The trial testimony clearly established that Mr. Shouse was in mere proximity to other individuals who possessed firearms.

> Actual possession occurs when a defendant has physical custody of the item, and constructive possession occurs if the defendant has dominion and control over the item. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). **Dominion and control means that the defendant can immediately convert the item to their actual possession**. *Jones*, 146 Wn.2d at 333.

State v. Reichert, 158 Wn. App. 374, 390, 242 P.3d 44 (2010). (Emphasis supplied.); *See also: State v. Embry, slip opinion* 40984-4 (October 30, 2012) (Insufficient evidence re: constructive possession by co-defendants who did not actually possess the firearm).

No evidence was presented as to Mr. Shouse's ability to exercise dominion and control over the items in the possession of Mr. Engelstad or any other individual.

Furthermore, neither Mr. Moccardine, Ms. Flood nor Ms. Curry ever saw Mr. Shouse with a shotgun. The testimony of Ms. VanCommen, along with the impeachment testimony from the officers, is the only evidence pertaining to possession by Mr. Shouse.

Additionally, as argued in the next section of this brief, Mr. Shouse contends that accomplice liability is inapplicable to the crime of unlawful possession of a firearm first degree.

> Accomplice liability … is not an element of the crime charged. Nor is it an alternative means of committing a crime. *State v.*

> *Haack*, 88 Wn. App. [423, 958 P.2d 1001 (1997)] at 428. The elements of the crime are the same for both a principal and an accomplice.

State v. Teal, 117 Wn. App. 831, 838, 73 P.3d 402 (2003), *affirmed* 152 Wn.2d 333, 96 P.3d 974 (2005).

Mr. Shouse understands the nature of accomplice liability. It is his position that the State failed to prove, beyond a reasonable doubt, any aspect of accomplice liability as defined in RCW 9A.08.020(3). The statute states:

> A person is an accomplice of another person in the commission of a crime if:
>
> (a) with knowledge that it would promote or facilitate the commission of the crime, he
> (i) solicits, commands, encourages, or requests such other person to commit it; or
> (ii) aids or agrees to aid such other person in planning or committing it; or
> (b) his conduct is expressly declared by law to establish his complicity.

There is no evidence of a statute expressly declaring that Mr. Shouse's conduct on October 20, 2010 establishes complicity in the actions of Mr. Engelstad or any other individual present that evening.

The State tries to bootstrap Mr. Shouse's prior confrontation with Mr. Moccardine to the events of October 20, 2010.

Mr. Moccardine was removing scrap items from a garage on Mr. Shouse's property. Mr. Shouse confronted him. Mr. Moccardine returned the items. Mr. Shouse and Mr. Engelstad later went to Mr. Moccardine's to determine whether or not he had any other items belonging to Mr. Shouse. (RP 284, ll. 13-21; RP 285, l. 25 to RP 286, l. 10; RP 287, l. 13 to RP 288, l. 21; RP 293, ll. 13-21)

The State did not present any evidence that Mr. Shouse solicited anyone to commit a crime.

The State did not present any evidence that Mr. Shouse commanded anyone to commit a crime.

The State did not present any evidence that Mr. Shouse encouraged anyone to commit a crime.

The State did not present any evidence that Mr. Shouse requested another person to commit a crime.

At most, the State established that Mr. Shouse was present when a crime and/or crimes occurred.

There was no evidence of any plan or agreement.

> … [T]he plain language of the complicity statute does not support the State's argument that accomplice liability attaches so long as the defendant knows that he or she is aiding in the commission of *any* crime. On the contrary, the statutory language requires that the putative accomplice must have acted

> with knowledge that his or her conduct would promote or facilitate *the* crime for which he or she is eventually charged. … [T]he legislative history of RCW 9A.08.020 supports a conclusion that the legislature "intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has 'knowledge[.]'" *Roberts* [*State v. Roberts,* 142 Wn.2d 471, 14 P.3d 713 (2000)] at 511. …
>
> We adhere to our decision in *Roberts* and conclude … that the fact that a purported accomplice knows that the principal intends to commit "'a crime'" does not necessarily mean that accomplice liability attaches for any and all offenses ultimately committed by the principal. *See Roberts,* 142 Wn.2d 513.

State v. Cronin, 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000).

The State, if it established anything, was an intent to commit theft by Mr. Englestad.

Unlawful possession of a firearm, robbery, and assault do not fall within the evidentiary parameters presented to the jury insofar as accomplice liability is concerned.

> … [T]he prosecution bears the burden to prove a defendant's knowledge of the weapon's presence before he can be subjected to accomplice liability for armed [aggravated] robbery. *United States v. Short,* 493 F.2d 1170 (9th Cir. 1974); *United States v. Sanborn,* 563 F.2d 488 (1st Cir. 1977). *Accord, Commonwealth v. Ferguson,* 361 Mass. 1, 309 N.E.2d 182 (1974). … **Gen-**

> **erally, an accomplice should be held liable only for the degree or grade of crime which is consistent with his own mental culpability**. *See: 1 C. Torcia, Whorton on Criminal Law § 35,* at 180 (1978).

State v. Plakke, 31 Wn. App. 262, 266-67, 639 P.2d 796 (1982). (Emphasis supplied.)

Mr. Shouse was not in the trailer when Mr. Engelstad displayed what appeared to be a gun.

Mr. Shouse was not at the trailer when another individual appeared in the doorway with what may have been a gun.

Ms. Curry, who was in her van, did not see Mr. Shouse with a gun.

There is a complete lack of evidence as to Mr. Shouse's knowledge of the presence of any gun on October 20, 2010.

The statement made in *State v. Rotunno,* 94 Wn.2d 931, 933, 631 P.2d 951 (1981) holds true:

> This court has repeatedly stated that one's presence at the commission of a crime, even coupled with the knowledge that one's presence would aid in the commission of the crime, will not subject an accused to accomplice liability. To prove that one present is an aider, it must be established that one is "'ready to assist'" in the commission of the crime. *In re Wilson,* 91 Wn.2d 487, 491, 588 P.2d 1161 (1979).

The State did not prove its case against Mr. Shouse beyond a reasonable doubt. No reasonable juror could have found the essential elements for accomplice liability.

E. FIREARM ENHANCEMENT(S)

> Our cases involving … enhanced punishment statutes uniformly require proof beyond a reasonable doubt to establish facts which, if proved, will increase a defendant's penalty.

State v. Tongate, 93 Wn.2d 751, 754, 613 P.2d 121 (1980).

Mr. Shouse contends that the State failed to prove, beyond a reasonable doubt, that anyone was armed with a real gun.

Mr. Moccardine was unsure whether the object in Mr. Engelstad's hand was a gun. He described an octagonal barrel. He believed it may have been an old gun or a tool.

The other individual who supposedly had a gun stayed in the doorway. No one gave a description of the gun other than it was a handgun.

No guns were ever recovered. The State's evidence does not establish whether any gun which was seen was a real gun.

As the *Tongate* Court noted at 755, (discussing a prior enhancement statute):

> RCW 9.95.040 … appears to require the presence of a deadly weapon *in fact* in order for the sentence enhancement provision to operate. Without proper instruction on the standard of proof, a jury might very well enter an enhanced punishment special verdict … if it finds beyond a reasonable doubt that an accused was armed with a gun-like but nondeadly object. This is sufficient for first-degree robbery …, but does not meet the requirements … for the imposition of enhanced punishment.

In the absence of physical evidence, and in the absence of a definitive acknowledgement that what was observed was a real gun, the State's proof on the firearm enhancement fails.

II. DISMISSAL WITH PREJUDICE

After the jury returned guilty verdicts on Counts Eight and Nine the trial court dismissed those counts with prejudice. The dismissal paperwork was prepared by the prosecuting attorney. The record does not reflect the reason(s) for the dismissal.

As a matter of law, insufficient evidence requires dismissal with prejudice. *See: State v. Stanton,* 68 Wn. App. 855, 867, 845 P.2d 1365 (1993).

It can be inferred from the record that the reason for the dismissal was insufficient evidence concerning either valuation and/or actual theft.

> In analyzing [a] trial court's decision to vacate a jury verdict, a trial court "may only

> determine whether there was 'substantial evidence' tending to support all necessary elements of the crime." *State v. Stiltner,* 80 Wn.2d 47, 55, 491 P.2d 1043 (1971). "'[W]hether the evidence is sufficient to submit the issue to the jury is a question of law for the court and no element of discretion is involved.'" *State v. Basford,* 76 Wn.2d 522, 530, 457 P.2d 1016 (1969) (quoting *State v. Zorich,* 72 Wn.2d 31, 34, 431 P.2d 584 (1967)). …
>
> … It is necessary only for the court to be "satisfied that there is 'substantial evidence' to support either the State's case, or the particular element in question."

State v. Ramirez-Tinajero, 154 Wn. App. 745, 750-51, 228 P.3d 1282 (2010), quoting *State v. Randecker,* 79 Wn.2d 512, 517, 487 P.2d 1295 (1971).

Since the dismissal order was actually prepared by the prosecuting attorney, it appears from the record that the State believed Counts Eight and Nine should be dismissed for insufficient evidence.

A trial court properly arrests judgment if the State fails to prove a material element of the crime charged. *See: State v. Byrd, supra.*

Mr. Shouse contends that dismissal of Counts Eight and Nine (theft), which constitute an essential element of Counts One and Three, removed the proof of that element from the State's case-in-chief. As such,

in the absence of an essential element of the offense, the convictions should be reversed and dismissed.

"'[An] essential element is one whose specification is necessary to establish the very illegality of the behavior.'" *State v. Leyda,* 157 Wn.2d 335, 341, 138 P.3d 610 (2006), quoting *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992) (citing *United States v. Cina,* 699 F.2d 853, 859 (7th Cir. 1983)).

Counts One and Three of the Second Amended Information specifically base the offense of first degree robbery on "intent to commit theft." The two (2) counts then go on to require that personal property be taken from the person of or in the presence of the owner and/or possessor of that property.

If no theft occurred, then no robbery occurred.

> The "elements of a crime" are commonly defined as "'[t]he constituent parts of a crime - [usually] consisting of the *actus reus, mens rea,* and causation - that the prosecution must prove to sustain a conviction.'" *State v. Fisher,* 165 Wn.2d 727, 754, 202 P.3d 937 (2009) (quoting BLACK'S LAW DICTIONARY 559 (8th ed. 2004)).

State v. Peterson, 168 Wn.2d 763, 772, 230 P.3d 588 (2010).

The *mens rea* of first degree robbery is intent. The intent must be directed at the act contemplated. The act contemplated was theft.

An intent plus the act must then yield the commission of the offense (causation). The absence of any one of the three (3) constituent parts negates the fact that an offense occurred.

RCW 9A.56.190 defines robbery as follows:

> A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking ….

Mr. Shouse relies on the argument presented in the prior sections of this brief to support his argument on this issue.

III. JURY OATH

CrR 6.6 states: "The jury shall be sworn or affirmed well and truly to try the issue between the State and the defendant, according to the evidence and the instructions of the court."

The record does not reflect that an oath was given to the jury. In the absence of that oath a serious question exists as to the constitutionality of that jury.

The need for the administration of an oath to a jury has long been recognized in this state. *See: Hartigan v. The Territory of Washington*, 1 Wash. Terr. 448 (1874).

Const. art. I, § 6 provides:

> The mode of administering an oath, or affirmation, shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered.

The administration of an oath to the jury is a guarantee to a criminal defendant that the jury is a fair and impartial jury as required by Const. art. I, § 22.

IV. PROSECUTORIAL MISCONDUCT

A. IMPROPER IMPEACHMENT

The State improperly impeached Ms. VanCommen after calling her as a witness. The impeachment consisted of testimony from the officers who had previously interviewed her on various occasions.

The impeachment was aimed at her statement to Detective Clasen on December 31, 2010 that Mr. Shouse had a shotgun. Ms. VanCommen consistently denied the truthfulness of that statement after that date.

The sole purpose of introducing the statement was to place a gun in Mr. Shouse's hands. No other person had done that. The effect was to in-

troduce substantive evidence of guilt on the unlawful possession of a fire-arm charge.

In closing argument the prosecuting attorney referred to Ms. VanCommen's credibility as follows:

> We did I guess with Ms. VanCommen sort of get here … But you have to put that in the context of her credibility. And I guess you have to decide did she testify for the state or did she testify for the defense. She was impeached with the inconsistency in her statement provided to law enforcement and those that were provided in court. That goes to her credibility.

(RP 646, ll. 9-17)

The statement in question was impeached by Ms. VanCommen's own testimony. The piling on of police officer testimony was for the sole purpose of establishing that Ms. VanCommen's December 31 statement was true. This statement received additional vouching by the State when it elicited testimony from Ms. VanCommen concerning her agreement to testify truthfully. *See: State v. Ish*, 170 Wn.2d 189, 196-99, 241 P.3d 389 (2010).

> In *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir. 1984), the court articulated the rationale behind this well established rule:
>
> > **[I]t would be an abuse of the rule** …, in a criminal case, **for the prosecution to call a witness** that it knew would not give it useful evidence, **just so it could introduce hearsay evidence against the defendant in the hope that the jury would miss the subtle distinction between impeachment and substantive evidence - or, if it didn't miss it, would ignore it**. The purpose would not be to impeach the witness but to put in hearsay as substantive evidence against the defendant ….
>
> Every circuit to consider this question has ruled similarly. *e.g., United States v. Webster, supra; United States v. Fay,* 668 F.2d 375, 379 (8th Cir. 1981); *United States v. DeLillo,* 620 F.2d 939, 946 (2nd Cir.), *cert. denied,* 449 U.S. 835 (1980); *United States v. Morlang,* 531 F.2d 183, 190 (4th Cir. 1975); *United States v. Coppola,* 479 F.2d 1153, 1156-58 (10th Cir. 1973); *United States v. Michener,* 152 F.2d 880, 883 n.3 (3rd Cir. 1945); *Kuhn v. United States,* 24 F.2d 910, 913 (9th Cir.), *cert denied,* 278 U.S. 605 (1928).

State v. Lavaris, 106 Wn.2d 340, 344-45, 721 P.2d 515 (1986); *see also, State v. Clinkenbeard,* 130 Wn. App. 552, 570-71, 123 P.3d 872 (2005).

(Emphasis supplied.)

B. WITNESS CREDIBILITY

The prosecuting attorney persisted in questions concerning Ms. Flood's credibility, even after a sidebar. The objections to the questions were sustained. However, the jury was not instructed to disregard the testimony.

> A witness's expression of personal belief about the veracity of another witness is inappropriate opinion testimony in criminal trials. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Admission of such testimony may be reversible error. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2000).

State v. Perez-Valdez, 172 Wn.2d 808, 817 (2011).

Cpl. Nale commented upon Ms. Flood's credibility. The comment was beneficial to the State. It enhanced Ms. Flood's credibility before the jury.

Courts have recognized that police officer testimony in the form of an opinion may readily influence a jury. *See: State v. Barr*, 123 Wn. App. 373, 384, 98 P.3d 518 (2004).

> In determining whether such statements are impermissible opinion testimony, the court will consider the circumstances of the case, including the following factors: "(1) 'the type of witness involved,' (2) 'the specific nature of the testimony,' (3) 'the nature of the charges,' (4) 'the type of defense, and'

> (5) 'the other evidence before the trier of fact.'" [Citations omitted].

State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007).

The witness testifying about the credibility of another witness was a police officer. The testimony was that she appeared truthful and was not falsifying anything she was stating to him.

The nature of the charges are serious. Mr. Shouse's defense was that he was not an accomplice. It is obvious that he was not the principal.

The other evidence before the trier-of-fact was far from overwhelming. Mr. Shouse contends that the comment on witness credibility adversely affected his case.

C. DEFENDANT'S SILENCE

The prosecuting attorney commented upon Mr. Shouse's constitutional right to remain silent. Defense counsel objected to the comment and the trial court did not rule on it. The comment is:

> Now Mr. Shouse had the opportunity to provide us with the information as to what he claimed Mr. Moccardine took did he not?

(RP 646, ll. 20-22)

> In the postarrest context, it is well-settled that it is a violation of due process for the State to comment upon or otherwise exploit a defendant's exercise of his right to remain

> silent. *See, e.g., Doyle v. Ohio,* 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L. Ed.2d 91 (1976); *State v. Fricks,* 91 Wn.2d 391, 395-96, 588 P.2d 1328 (1979).
>
> …
>
> … [I]t is unfair for the State to emphasize the defendant's silence in closing argument.

State v. Romero, 113 Wn. App. 779, 786-87, 54 P.3d 1255 (2002).

D. FACTS NOT IN EVIDENCE

The prosecuting attorney repeatedly interjected facts not in evidence in his closing argument. Defense counsel's initial objection was overruled.

The following excerpts from the prosecuting attorney's closing argument set forth what was not placed before the jury through testimony or exhibits:

> He showed up at the trailer, knows the gun's there. Steps forward and says, "Hey, they're going to take care of this and I am going to go get the property."

(RP 662, l. 23 to RP 663, l. 1)

> Law enforcement talked about often times when they're looking for weapons the people that bring the weapons take the weapons

> with them. Does that mean weapons weren't there? No.

(RP 664, ll. 18-21)

Mr. Shouse contends that the interjection of the non-testimonial statements by the prosecuting attorney were just a continued example of the unfairness of the trial proceedings. *Cf. State v. Warren,* 165 Wn.2d 17, 29, 195 P.3d 940 (2008).

The prosecutorial misconduct, combined with the lack of a jury oath, and in light of the minimal evidence introduced concerning Mr. Shouse's actual involvement, amounts to cumulative error.

> It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. … Constitutional error is harmless when the conviction is supported by overwhelming evidence. … Non-constitutional error requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial.

State v. Lopez, 95 Wn. App. 842, 857, 980 P.2d 224 (1999).

It is a combination of constitutional and non-constitutional error which deprived Mr. Shouse of a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution and Const. art. I, §§ 3 and 22.

The unfairness of the trial carried over into the sentencing hearing. Mr. Shouse's offender score was miscalculated and he was denied his right of allocution.

V. SENTENCING

If the Court does not reverse and dismiss Mr. Shouse's convictions, then he maintains that Counts One and Two merge. Counts Three and Four also merge.

Second degree assault merges with first degree robbery. It elevates that offense from second degree robbery.

> … [C]ourts have generally held that convictions for assault and robbery stemming from a single violent act are the same for double-jeopardy purposes and that **the conviction for assault must be vacated at sentencing**. [Citations omitted.]
>
> When an assault elevates the degree of robbery, courts have regularly concluded that the two offenses are the same for double-jeopardy purposes.

State v. Freeman, 153 Wn.2d 765, 774, 108 P.3d 753 (2005). (Emphasis supplied.)

Merger occurs under the facts and circumstances of this case. The trial court miscalculated Mr. Shouse's offender score.

Mr. Shouse is entitled to be sentenced with a correct offender score. *See: In re Personal Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997).

"An appellate court conducts a *de novo* review of a sentencing court's calculation of an offender score." *State v. Bush*, 102 Wn. App. 372, 377, 9 P.3d 219 (2000).

If Mr. Shouse's assault convictions merge with the robbery convictions as argued, then the assault convictions are vacated. It logically follows that any firearm enhancement on the assault convictions must also be vacated.

CONCLUSION

Mr. Shouse is entitled to have his convictions reversed and dismissed due to the State's failure to provide sufficient evidence of accomplice liability.

If the argument on accomplice liability does not prevail, then Mr. Shouse is entitled to have his convictions on Counts Four, Five and Seven reversed and dismissed due to the State's failure to prove, beyond a reasonable doubt, each and every element of the offenses charged in those counts.

Mr. Shouse is also entitled to have any and all firearm enhancements reversed and dismissed based upon the State's failure to establish, beyond a reasonable doubt, the presence of a real gun.

Alternatively, as to Count Seven only, the State failed to prove, beyond a reasonable doubt, that Mr. Shouse either actually or constructively possessed a firearm. The conviction must be reversed and dismissed.

When the State presented, and the trial court granted, the Order of Dismissal on Counts Eight and Nine, an essential element of Counts One and Three was removed. Mr. Shouse's convictions on those two (2) counts should be reversed and dismissed.

In the event that Mr. Shouse's convictions are not totally reversed and dismissed, then he is entitled to a new trial due to lack of a jury oath, prosecutorial misconduct, evidentiary error and cumulative error amounting to a violation of his constitutional right to a fair trial.

Finally, if the foregoing requests for relief are denied in whole, or in part, the miscalculation of his offender score due to the merger of Counts One and Two, as well as Counts Three and Four, and the firearm enhancements on those four (4) counts require resentencing.

DATED this 13th day of February, 2013.

Respectfully submitted,

___s/ Dennis W. Morgan_____
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APPENDIX “A”

INSTRUCTION NO. 25

To convict the defendant of the crime of robbery in the first degree as charged in Count 3 of the Information, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 20th day of October, 2010, the defendant unlawfully took personal property from the person to wit: Dawn Flood or in the presence of another;

(2) That the defendant intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person or to that person's property or to the person or property of another;

(4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking or to prevent knowledge of the taking;

(5) That in the commission of these acts or in immediate flight therefrom the defendant was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon or inflicted bodily injury upon Dawn Flood;

(6) 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.

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 by your duty to return a verdict of not guilty.

APPENDIX "B"

WPIC 35.50

Assault—Definition

[An assault is an intentional *[touching] [or] [striking] [or] [cutting] [or] [shooting]* of another person*[, with unlawful force,]* that is harmful or offensive *[regardless of whether any physical injury is done to the person]*. [A *[touching] [or] [striking] [or] [cutting] [or] [shooting]* is offensive if the *[touching] [or] [striking] [or]* cutting] *[or] [shooting]* would offend an ordinary person who is not unduly sensitive.]]

[An assault is *[also]* an act*[, with unlawful force,]* done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. *[It is not necessary that bodily injury be inflicted.]*]

[An assault is *[also]* an act*[, with unlawful force,]* done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.]

[An act is not an assault, if it is done with the consent of the person alleged to be assaulted.]

NO. 30640-2-III
Consolidated with 30641-1-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	KITTITAS COUNTY
Plaintiff,	)	NO. 11 1 00220 8
Respondent,	)	
	)	**CERTIFICATE OF SERVICE**
v.	)	
	)	
JOSEPH L. SHOUSE,	)	
	)	
Defendant,	)	
Appellant.	)	
	)	

I certify under penalty of perjury under the laws of the State of Washington that on this 13th day of February, 2013, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

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