NO. 100831-7
COA NO. 81762-1-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARIAH BOUDRIEAU,

Petitioner.

FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

PETITION FOR REVIEW

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A. INTRODUCTION

As laypeople, the jurors in Mariah Boudrieau's case needed clear, consistent instructions. Instead, the to-convict instructions they received referred to "the Defendant, or Co-Defendant," in one element, but only to "the Defendant" in others. The necessary implication was the jury could look only to Ms. Boudrieau's conduct for at least some elements. The prosecution failed to prove Ms. Boudrieau satisfied these elements through her own conduct as required by the law of the case.

The Legislature overhauled the criminal code in 1975. The new code provides a jury may not split the elements to convict as an accomplice. This Court, however, followed past interpretations of the statute's predecessor rather than apply the new text. This Court should recognize the Legislature's break from the past and interpret the new criminal code on its own terms.

B. IDENTITY OF PETITIONER

Petitioner Mariah Boudrieau asks for review of the decision affirming her convictions.

C. COURT OF APPEALS DECISION

Ms. Boudrieau seeks review of the unpublished decision in *State v. Boudrieau*, No. 81762-1-I (Wash. Ct. App. Mar. 28, 2022).

D. ISSUES PRESENTED FOR REVIEW

1. The prosecution must prove all elements in the to-convict instruction. For first-degree assault, the instruction required that "the Defendant, or Co-Defendant," committed assault, but only that "the Defendant" intended great bodily harm. The first-degree robbery instruction referred only to "the defendant." The only reasonable way to read these instructions was to require the prosecution to prove Ms. Boudrieau fulfilled some elements personally, rather than as an accomplice. The prosecution failed to

do so. The Court of Appeals contravened this Court's precedent in reading the instructions to allow the jury to find all elements met on an accomplice theory.

2. By statute, a person may be held liable as an accomplice only for a crime "committed by the conduct of another person." The prosecution did not prove any person fulfilled all elements of first-degree robbery, and therefore did not prove Ms. Boudrieau is guilty of first-degree robbery as an accomplice. The Court of Appeals's holding the jury was permitted to split the elements contradicts plain statutory language.

3. The prosecution must allege each element of an offense in the information. This Court's precedent required the prosecution to prove Ms. Boudrieau used force or fear to obtain or retain property in order to convict her of first-degree robbery. The information omitted this fact. The Court of Appeals violated this

Court's precedent in holding the information alleged all essential elements. This Court should defer ruling on this petition until it decides an identical issue raised in *State v. Derri*, No. 100,038-3 (argued Feb. 15, 2022).

E. STATEMENT OF THE CASE

Darrick Caudill testified Mariah Boudrieau wanted to buy heroin from him for her friend Dennis Peltier. RP 529–30. When Mr. Caudill arrived at the agreed address, he found Ms. Boudrieau and Mr. Peltier in the living room. RP 532–33. He placed the heroin on a small table. RP 535. Mr. Peltier went into the kitchen to look for money. RP 537, 540.

Mr. Caudill saw a hand holding a pistol reach through the front door. RP 541–42. Soon afterward, Ms. Boudrieau moved toward him with her hands held out and grabbed him. RP 542. The person with the gun shot Mr. Caudill in the back. RP 542–43; RP 769–70.

According to Mr. Caudill, Ms. Boudrieau took his cell phone and some cash from his pockets. RP 545–46. The shooter left, and Ms. Boudrieau went with him. RP 547. The heroin was no longer on the table—Mr. Caudill did not see who took it. RP 547, 585. Mr. Peltier left soon afterward. RP 548.

Mr. Peltier said his role was to lure Mr. Caudill to the house. RP 609. Shortly after Mr. Caudill arrived, Mr. Peltier pretended to look for money in the kitchen. RP 619–20, 622. He heard a gunshot and saw Ms. Boudrieau going through Mr. Caudill's pockets in the living room. RP 623–24. Ms. Boudrieau gave Mr. Peltier "a piece of heroin" as she left. RP 626–27.

The prosecution charged Ms. Boudrieau with one count each of first-degree assault and first-degree robbery. CP 282. The trial court provided standard accomplice liability instructions. CP 81, 91.

The to-convict instruction for first-degree assault required the jury to find "the Defendant, or Co-Defendant, assaulted Darrick Caudill." CP 78. Ms. Boudrieau was not tried with a co-defendant. In a different element, the same instruction required proof "the Defendant"—with no mention of an accomplice—"acted with intent to inflict bodily harm." CP 78. The to-convict instruction for robbery referred only to "the defendant" in each element. CP 86.

The jury found Ms. Boudrieau guilty. CP 65, 67. The Court of Appeals affirmed. Slip op. at 1.

F. WHY THIS COURT SHOULD ACCEPT REVIEW

1. **The Court of Appeals acted contrary to this Court's precedent when it held the jury would read the to-convict instructions to allow proof of all elements on an accomplice theory.**

"The State bears the burden of proving all the elements of an offense beyond a reasonable doubt." *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016)

(citing, e.g., Const. art. I, § 3). Under the law of the case doctrine, the prosecution assumes the burden to prove elements in the to-convict instruction to which it does not object. *State v. Johnson*, 188 Wn.2d 742, 756, 399 P.3d 507 (2017).

By referring to "the Defendant, or Co-Defendant," in one element and only "the Defendant" in another, the to-convict instruction for assault conveyed to the jury the prosecution had to prove certain elements through Ms. Boudrieau's own conduct and not an accomplice's. The jury would carry this reading to the robbery to-convict instruction, which mentioned only "the defendant" in each element. In holding to the contrary, the Court of Appeals failed to presume the jury assigned meaning to all parts of the instructions, as this Court's precedent requires.

a. The to-convict instruction for first-degree assault obligated the prosecution to prove Ms. Boudrieau intended to inflict great bodily harm personally, not as an accomplice.

A to-convict instruction that does not mention an accomplice is permissible if the court explains accomplice liability to the jury in a separate instruction. *State v. Teal*, 152 Wn.2d 333, 339, 96 P.3d 974 (2004). This is because accomplice liability is not an element of any offense. *Id.* at 338–39.

An inconsistency in the to-convict instruction, however, may require the prosecution to prove the defendant satisfied all elements by her own conduct, and not as an accomplice, under the law of the case. *See State v. Willis*, 153 Wn.2d 366, 374–375, 103 P.3d 1213 (2005). In *Willis*, the prosecution charged the defendant with a firearm enhancement, which allowed the jury to find "the accused or an accomplice was armed." *Id.* at 369, 371 (quoting RCW 9.94A.602). The

instruction for the enhancement, however, omitted "the phrase 'or an accomplice.'" *Id.* at 374–75. Under the law of the case, the instruction required proof "that Willis himself was armed." *Id.*

As contemplated in *Teal*, the trial court provided Ms. Boudrieau's jury a to-convict instruction on first-degree assault and a separate accomplice liability instruction. CP 78, 81. The to-convict instruction, however, created an inconsistency that imposed on the prosecution the burden to prove Ms. Boudrieau's own conduct fulfilled some elements of the crime. *Willis*, 153 Wn.2d at 374–375.

The to-convict instruction required the prosecution to prove

> (1) That on or about the [sic] February 6th, 2019, *the Defendant, or Co-Defendant*, assaulted Darrick Caudill;
>
> (2) That the assault was committed with a firearm;

> (3) That *the Defendant* acted with intent to inflict great bodily harm; and
>
> (4) That this act occurred in the State of Washington.

CP 78 (emphasis added).

In short, the instructions allowed the prosecution to show "the Defendant" or "Co-Defendant" committed the assault, but required proof "the Defendant" alone "acted with intent to inflict great bodily harm." CP 78. The prosecution did not object, making the instruction the law of the case. RP 873–77; *Johnson*, 188 Wn.2d at 756; *Willis*, 153 Wn.2d at 374–75.

A rational juror would assume the court included the phrase "or Co-Defendant" in element (1) and omitted it from element (3) deliberately. CP 78. From there, the only rational conclusion is the jury had to find Ms. Boudrieau personally acted with intent to cause Mr. Caudill great bodily harm.

In rejecting this straightforward conclusion, the Court of Appeals observed Ms. "Boudrieau was tried alone" and "[t]here was no co-defendant." Slip op. at 4. Because "it was obvious to everyone the trial involved a single defendant," the Court appeared to reason the jury would disregard the phrase "or Co-Defendant" in element (1). *Id.* at 7. This reasoning contravenes this Court's binding precedent.

Courts presume jurors read the instructions as a whole, in a way that gives meaning to all of them in their entirety. *State v. Studd*, 137 Wn.2d 533, 549, 973 P.2d 1049 (1999). The Court of Appeals acknowledged the trial court instructed the jury that all of the instructions are "important." Slip op. at 7. Where the phrase "or Co-Defendant" was present in one element and absent from another, the Court of Appeals was

required to assume the jury would believe the difference was intentional.

As laypeople, the jurors would not necessarily understand the nuances of legal terms like "defendant" and "co-defendant." *State v. Irons*, 101 Wn. App. 544, 550, 4 P.3d 174 (2000). What the jurors *would* understand is the prosecution's theory that Ms. Boudrieau worked with another individual—the person who shot Mr. Caudill. RP 882–86.

When the to-convict instruction mentioned "the Defendant, or Co-Defendant," in element (1), the jury would assume it referred to Ms. Boudrieau and the shooter. And when element (3) then referred to "the Defendant" alone, the only rational conclusion available to the jury was it could look to Ms. Boudrieau's conduct alone.

The Court of Appeals also reasoned the to-convict instruction could not impose an extra burden under the law of the case because accomplice liability is not an element. Slip op. at 6. Citing *Teal*, it concluded the separate accomplice liability instruction was enough to convey to the jury it could rely on an accomplice as to all elements, despite the inconsistency in the to-convict instruction. *Id.* at 6–7.

The Court of Appeals's reasoning contradicts the holding in *Willis*—a case decided after *Teal*—that an error in a to-convict instruction may require proof of the crime by the defendant's own conduct. *Willis*, 153 Wn.2d at 374–375. Unlike in *Teal*, the to-convict instruction for first-degree assault included the phrase "or Co-Defendant" in one element and excluded it from another. CP 78. This discrepancy would lead the jury to believe it could look to an accomplice as to one element

but had to consider Ms. Boudrieau's conduct alone as to the other. *Willis*, 153 Wn.2d at 374–375.

The Court of Appeals's reasoning the jury would find the phrase "or Co-Defendant" superfluous violated this Court's clear direction that jurors be presumed to give meaning to all parts of the instructions. *Studd*, 137 Wn.2d at 549. Likewise, the Court's reasoning the law of the case doctrine can never impose on the prosecution the burden to prove a crime through the defendant's own conduct contravened this Court's clear holding to the contrary. *Willis*, 153 Wn.2d at 374–375. This Court should grant review. RAP 13.4(b)(1).

b. The to-convict instruction for first-degree robbery obligated the prosecution to prove Ms. Boudrieau inflicted bodily injury personally rather than as an accomplice.

Unlike the instruction for first-degree assault, the to-convict instruction for first-degree robbery referred only to "the defendant" in every element:

> (1) That on or about the [sic] February 6th, 2019, *the defendant*, [sic] unlawfully took personal property from the person 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;
>
> (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;
>
> (5) That in the commission of these acts or in the immediate flight therefrom *the defendant* inflicted bodily injury; and
>
> (6) That any of these acts occurred in the State of Washington.

CP 86 (emphasis added). The court also included a separate instruction on accomplice liability for the robbery count. CP 91.

If this were the only to-convict instruction the jury received, the accomplice liability instruction would

be enough to inform the jury it could look to another person's actions to satisfy the elements of first-degree robbery. *Teal*, 152 Wn.2d at 339.

In fact, the to-convict instruction for first-degree robbery was not the only one the jury received. The jury presumably considered the instruction alongside all the others as a whole, including the to-convict instruction for first-degree assault. CP 78. And the jury presumably read the two to-convict instructions in a way that gave consistent meaning to each of them. *Studd*, 137 Wn.2d at 549.

Accordingly, just as the jury would conclude the court purposely omitted the phrase "or Co-Defendant" from one element in the assault instruction, so would the jury assume the omission of the same phrase from each element of first-degree robbery was intentional. The only rational conclusion is the jury was required to

find Ms. Boudrieau met each of the elements personally, by her own conduct. The alternative would be to assume the phrase "the defendant" had different meanings in the two instructions, which is inconsistent with the presumption the jury reads the instructions as a consistent whole. *Studd*, 137 Wn.2d at 549.

The prosecution did not object to the instruction. RP 873–77. The instruction therefore became the law of the case. *Johnson*, 188 Wn.2d at 756; *Willis*, 153 Wn.2d at 374–75. The prosecution assumed the burden of proving beyond a reasonable doubt that Ms. Boudrieau personally satisfied each of the elements of first-degree robbery, including that Ms. Boudrieau "inflicted bodily injury" on Mr. Caudill. CP 86.

The Court of Appeals did not address the robbery to-convict instruction separately from the assault instruction. Slip op. at 6–7. Instead, for both to-convict

instructions, it relied on its erroneous reasoning that (1) the phrase "or Co-Defendant" was superfluous and (2) an error in the to-convict instruction can never require the prosecution to prove the crime through the defendant's own conduct. *Id.* This reasoning contravenes this Court's precedent. *Supra* at 11–14; *Studd*, 137 Wn.2d at 549; *Willis*, 153 Wn.2d at 374–375. This Court should grant review. RAP 13.4(b)(1).

c. The prosecution did not prove that Ms. Boudrieau either acted with intent to inflict great bodily harm or inflicted bodily injury.

To convict Ms. Boudrieau of first-degree assault, the prosecution bore the burden of proving she "acted with intent to inflict great bodily harm." CP 78. To convict her of first-degree robbery, the prosecution had to prove she "inflicted bodily injury." CP 86. As noted, under the law of the case, the prosecution was required to prove both elements through Ms. Boudrieau's own

conduct. *Supra* at 10, 16–17. The prosecution presented no such evidence. Br. of App. at 17–18, 19–20.

The Court of Appeals did not address whether the prosecution presented sufficient evidence to show Ms. Boudrieau's own actions satisfied either element. Slip op. at 7–8. Instead, it relied on its erroneous holding the jury would ignore the phrase "or Co-Defendant" and apply accomplice liability to all elements of both offenses.[1] *Id.* This Court should grant review, reverse the Court of Appeals, and order Ms. Boudrieau's convictions dismissed with prejudice.

[1] The prosecution also did not argue Ms. Boudrieau's conduct satisfied the "intent to inflict great bodily harm" element of first-degree assault or the "inflicted bodily injury" element of first-degree robbery. Br. of Resp. at 7–16. Any such argument is therefore waived. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

2. The Court of Appeals erred in reading the Washington Criminal Code to permit the jury to split the elements of an offense among a principal and an accomplice.

The criminal code provides that a person may be guilty as an accomplice for another person's crime. RCW 9A.08.020(2)(c). Under the statute's plain terms, however, the crime itself must actually have been "committed by the conduct of another person" for accomplice liability to attach. RCW 9A.08.020(1). In other words, a person cannot be guilty as an accomplice unless at least one other person satisfied all the elements of the crime.

Differences between RCW 9A.08.020 and the section of the Model Penal Code on which it is based confirm this reading. *See* Legislative Council's Judiciary Committee, Revised Washington Criminal Code at 43–44 (Dec. 3, 1970) (noting RCW 9A.08.020, then RCW 9A.08.060, "closely follows MPC 2.06");

App'x B. RCW 9A.08.020(1) provides, "A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable."

On the other hand, the model statute provides, "A person is guilty of an offense if it is committed *by his own conduct* or by the conduct of another person for which he is legally accountable, *or both*." Model Penal Code § 2.06(1) (Am. L. Inst. 1962) (emphasis added). In short, the model statute expressly allows the elements of the offense to be spread among multiple actors, while Washington's statute expressly does not.

When the Legislature bases a statute on a model code, courts assume departures from the model are deliberate. For example, this Court reasoned the Legislature deliberately excluded the model statute's provision for accomplice liability based on inaction.

State v. Jackson, 137 Wn.2d 712, 722–23, 976 P.2d 1229 (1999). And the Court held the Legislature purposely provided for strict liability by eliminating the phrase "knowingly or intentionally" from the uniform controlled substances act. *State v. Bradshaw*, 152 Wn.2d 528, 532–33, 98 P.3d 1190 (2004).

By eliminating crimes committed by "both" the defendant's conduct and another's, the Legislature intended accomplice liability to lie only where at least one other person fulfilled all elements of the crime.

The Court of Appeals overlooked the plain text of RCW 9A.08.020(1). Slip op. at 10. Instead, it cited past opinions of this Court holding the statute permits "splitting the elements" of an offense among a principal and an accomplice. *Id.* at 8, 10; *State v. Dreewes*, 192 Wn.2d 812, 824, 432 P.3d 795 (2019) (quoting *State v. Walker*, 182 Wn.2d 463, 483, 341 P.3d 976 (2015)).

These opinions, however, also do not address RCW 9A.08.020(1)'s reference only to the "conduct of another person." Instead, they trace to the Supreme Court's opinion in *State v. Carothers*, 84 Wn.2d 256, 525 P.2d 731 (1974). *See Dreewes*, 192 Wn.2d at 824 (citing *Walker*, 182 Wn.2d at 483 (citing *State v. Haack*, 88 Wn. App. 423, 429, 958 P.2d 1001 (1997) (citing *Carothers*, 84 Wn.2d at 264))).

Carothers was decided before the Legislature revised the criminal code. Laws of 1975, 1st Ex. Sess., ch. 260, § 9A.08.020; *Jackson*, 137 Wn.2d at 721. It relied on former RCW 9.01.030, *Carothers*, 84 Wn.2d at 261–62, which the new criminal code repealed, Laws of 1975, 1st Ex. Sess., ch. 260, § 9A.92.010(3).

The Court of Appeals also reasoned the Legislature did not intend RCW 9A.08.020 to differ in substance from its predecessor, former RCW 9.01.030.

Slip op. at 10. It noted courts presume "amendments" to a statute are "consistent with previous judicial decisions." *Id.* (quoting *State v. Ervin*, 169 Wn.2d 815, 825, 239 P.3d 354 (2010)).

On the contrary, RCW 9A.08.020 was no mere "amendment" to former RCW 9.01.030. The new statute replaced and expressly repealed the old one. Laws of 1975, 1st Ex. Sess., ch. 260, § 9A.92.010(3).

The old and new statutes describe incompatible versions of accomplice liability. As noted, the current statute provides a person is an accomplice only if a crime was "committed by the conduct of another person." RCW 9A.08.020(1). Former RCW 9.01.030 is broader—"[e]very person concerned in the commission of a felony" was guilty. Laws of 1909, ch. 249, § 8.

The old and new statutes' plain language alone signals a dramatic shift in accomplice liability. It is

unreasonable to assume RCW 9A.08.020(1) is "consistent with previous judicial decisions" interpreting former RCW 9.01.030. Slip op. at 10.

Carothers was a correct statement of accomplice liability in 1974, when it was decided. After the Legislature's overhaul of the criminal code, however, *Carothers's* analysis is obsolete. In continuing to rely on *Carothers*, this Court cast a net of accomplice liability much wider than the new criminal code's plain language allows. *Walker*, *Dreewes*, and other opinions relying on *Carothers* rather than RCW 9A.08.020(1)'s plain language are incorrect and harmful, and this Court should overrule them.

Here, the prosecution did not present sufficient evidence any one person fulfilled all elements of first-degree robbery. The prosecution had to prove (1) an unlawful taking of property from Mr. Caudill; (2) intent

to commit theft; (3) use of force or fear to take the property against Mr. Caudill's will; (4) use of force or fear to obtain possession or overcome resistance; and (5) infliction of bodily injury. CP 86.

As already noted, the prosecution presented no evidence Ms. Boudrieau inflicted bodily injury on Mr. Caudill, as element (5) requires. *Supra* at 18–19. The prosecution also presented no evidence the shooter took any property from Mr. Caudill, as element (1) requires. Instead, that Ms. Boudrieau tossed Mr. Peltier a small amount of heroin suggests she was also the one who picked up the drugs. RP 585, 626–27. And Mr. Peltier did nothing but act as a lure and then hide in the kitchen. RP 540–41, 609, 619–20, 622, 640.

Because no one person's conduct fulfills all elements of first-degree robbery, Ms. Boudrieau is not

guilty of the crime either as a principal or an accomplice. RCW 9A.08.020(1).

The circumstances under which courts may hold a person liable for crimes committed in part or in whole by another are a matter of substantial public importance. Past cases expand the scope of this liability beyond what the Legislature intended by relying on an old interpretation of an obsolete statute rather than the current statute's plain text. This Court should grant review. RAP 13.4(b)(4).

3. The Court of Appeals contravened this Court's precedent in holding use of force or fear to obtain or retain property is not an essential element of first-degree robbery.

"Accused persons have the constitutional right to know the charges against them." *State v. Pry*, 194 Wn.2d 745, 751, 452 P.3d 536 (2019) (citing U.S. Const. amend. VI; Const. art. I, § 22). The charging document must "adequately identify[]" each offense charged and

allege facts supporting each essential element. *State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991) (quoting *State v. Leach*, 113 Wn.2d 679, 689, 782 P.2d 552 (1989)). The remedy for a deficient information is dismissal without prejudice. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

A crime's essential elements are the facts the prosecution must prove "to establish the very illegality" of the defendant's conduct. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). If the prosecution must prove a fact to obtain a conviction, that fact is an element of the crime, regardless of how the statutory scheme classifies it. *Pry*, 194 Wn.2d at 755–56.

As alleged here, first-degree robbery requires proof that a person "[i]nflict[ed] bodily injury" in "the commission of a robbery" or "flight therefrom." RCW 9A.56.200(1)(a); CP 86, 282. A separate section

provides that "[a] person commits robbery" when she uses "force or fear . . . to obtain or retain possession" of another's property "or to prevent or overcome resistance to the taking." RCW 9A.56.190.

Because the prosecution must prove the facts contained in RCW 9A.56.190 to win a conviction of first-degree robbery, they are essential elements of the offense. *Zillyette*, 178 Wn.2d at 158. This includes the fact that the defendant used force or fear "to obtain or retain possession of the property, or to prevent or overcome resistance to the taking." RCW 9A.56.190.

This Court's precedent confirms that use of force or fear to obtain or retain property is an essential element of first-degree robbery. *See State v. Johnson*, 155 Wn.2d 609, 610–11, 121 P.3d 91 (2005). In *Johnson*, the defendant pushed a shopping cart containing merchandise out of a store, then abandoned

the cart when confronted by security guards. *Id.* at 610. One of the guards grabbed the defendant, who "punched the guard in the nose and ran away." *Id.*

The Supreme Court held the defendant did not commit first-degree robbery. *Id.* at 610–11. Because the defendant used force to escape only after abandoning the merchandise, he did not use force "to obtain or retain possession of the property, or to prevent or overcome resistance to the taking." *Id.* (emphasis omitted). Use of force or fear for this purpose is a fact necessary to establish robbery occurred, and an element of the offense of first-degree robbery. *Id.*; *Zillyette*, 178 Wn.2d at 158.

Despite this Court's clear holding in *Johnson*, the Court of Appeals held use of force of fear to obtain or retain property is not an element of first-degree robbery. Slip op. at 13–14. It did so based on its

decision in *State v. Phillips*, 9 Wn. App. 2d 368, 444 P.3d 51 (2019), in which it held the reason for the use of force was a definition of an element, not an element itself. Slip op. at 13–14.

Contrary to the Court of Appeals's reasoning, a fact the prosecution must prove is an element, regardless of whether the fact is "definitional" in the statutory scheme. *Pry*, 194 Wn.2d at 755–56. Because this Court held in *Johnson* that use of force or fear to obtain or retain property is a fact the prosecution must prove, that fact is an element. 155 Wn.2d at 610–11.

The Court of Appeals distinguished *Johnson* by noting this Court's reasoning relied on the fact Washington's robbery statute adopts a "transactional" form of the crime. Slip op. at 14–15. This is as true as it is irrelevant. That the prosecution must prove use of force or fear to obtain or retain property makes it an

element, regardless of the Legislature's reason for requiring proof of that fact. *Zillyette*, 178 Wn.2d at 158.

In concluding use of force or fear to obtain or retain property is not an essential element of first-degree robbery, the Court of Appeals contradicted this Court's precedent. *Johnson*, 155 Wn.2d at 610–11. This Court should grant review. RAP 13.4(b)(1).

This Court is considering this issue in *State v. Derri*, No. 100,038-3. This Court should defer ruling on Ms. Boudrieau's petition until it issues a decision in *Derri*.

G. CONCLUSION

This Court should grant Ms. Boudrieau's petition for review.

Pursuant to RAP 18.17(c)(10), the undersigned certifies this petition for review contains 4,517 words.

DATED this 13th day of April, 2022.

Christopher Petroni, WSBA #46966
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Attorney for Mariah Boudrieau

Petitioner's Appendices

A. *State v. Boudrieau*, No. 81762-1-I (Wash. Ct. App. Mar. 28, 2022)

B. Legislative Council's Judiciary Committee, Revised Washington Criminal Code (Dec. 3, 1970)

APPENDIX A

FILED
3/28/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISON ONE

STATE OF WASHINGTON, Respondent, v. MARIAH JOLEENE BOUDRIEAU, Appellant.	No. 81762-1-I DIVISION ONE UNPUBLISHED OPINION

COBURN, J. — Mariah Boudrieau and two other people were involved in a planned robbery that ended with the victim shot and paralyzed. She appeals her convictions of robbery in the first degree and assault in the first degree contending that the State failed to prove that she, personally, satisfied each of the elements of the crimes. The jury instructions allowed the State to prove and the jury to convict Boudrieau as an accomplice. We also reject her contention that the information charging robbery in the first degree was deficient. While we affirm her convictions, we remand for resentencing to correct her offender score under State v. Blake[1], to correct the judgment and sentence by noting that the same criminal conduct supported both convictions, and to strike her community custody supervision fees.

[1] In State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021), our Supreme Court held Washington's simple drug possession statute (RCW 69.50.4013) is unconstitutional.

FACTS

Mariah Boudrieau asked her friend, Dennis Peltier, for help with a "lick," which Peltier understood to mean that she wanted his help in "some sort of plan to get drugs." Peltier eventually agreed to go along with her plan. Boudrieau texted Peltier, "What's your address? Strap's on the way, so we can do this lick." Peltier testified at trial that he understood "Strap" as a nickname for a person, and that the term "strapped" usually means someone has a gun.

Peltier understood the plan was for Boudrieau to lure Darrick Caudill to Peltier's house under the pretense of selling heroin to Peltier. Peltier did not actually have any money to buy heroin at that time, and Peltier knew Boudrieau also did not have money to pay for the heroin. Peltier testified that he did not know "Strap" would have a gun, but he did know he would be the "muscle," and that he and Boudrieau were somehow "just going to take it" from Caudill. Boudrieau referred to Caudill as a "Jake," meaning he was an easy target. When Boudrieau got to Peltier's house, she called Caudill and said Peltier wanted an ounce of heroin. Caudill expected a $1,200 payment.

When Caudill entered the house, he pulled out the heroin and put it on a scale. Peltier asked if he could sample it. When Peltier went to sample a piece of the heroin, Caudill asked if he could see the money first. Peltier proceeded into the kitchen and started going through the cupboards, pretending to look for the money. Boudrieau remained seated on the couch.

Caudill noticed someone entering the house gun-first through the door. Caudill initially froze, but he then threw his body into the back of the door

smashing the gunman's arm in between the door and the door jamb. Boudrieau then got up off the couch and came at Caudill "with her hands out like claws," grabbing him. Boudrieau did not seem surprised to see a third person there. As Boudrieau and Caudill grappled for about 10 to 15 seconds, the gunman shot Caudill in the back. The gunman's head was covered by a bandana and t-shirt wrapped around it.

After Caudill was shot and lying on the ground, Boudrieau started going through his pockets, taking his money and phone. Caudill asked Boudrieau to call an ambulance because he thought he was dying, but Caudill testified that Boudrieau responded, "I don't give a fuck," and continued to rob him. Peltier heard Boudrieau ask Caudill where the rest of the drugs were. Boudrieau gave Peltier a piece of the heroin on her way out the door. When the gunman declared he was leaving, Boudrieau responded that she was going with him. Caudill then testified that either the gunman or Boudrieau picked up the heroin and left. Caudill could not move his legs or stand up because he was paralyzed from the chest down.

The State charged Boudrieau with assault in the first degree and robbery in the first degree under the theory of accomplice liability. A jury convicted her on both counts. Additional facts are provided where relevant below.

DISCUSSION

Sufficiency of the Evidence

Boudrieau first contends that the evidence was insufficient to support the convictions because the State was required to prove that she personally satisfied

all the elements of the crimes based on the to-convict jury instructions. We disagree.

"A sufficiency challenge admits the truth of the State's evidence and accepts the reasonable inferences to be made from it." State v. O'Neal, 159 Wn.2d 500, 505, 150 P.3d 1121 (2007). We will reverse a conviction "only where no rational trier of fact could find that all elements of the crime were proved beyond a reasonable doubt." State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005). Further, "[a] reviewing court will reverse a conviction for insufficient evidence only if no rational trier of fact could find that the State met its burden." State v. Teal, 152 Wn.2d 333, 337, 96 P.3d 974 (2004).

Central to Boudrieau's argument are the to-convict instructions for both counts. The court instructed the jury that to convict Boudrieau of assault in the first degree, each of the following elements must be proved beyond a reasonable doubt:

> (1) That on or about the [sic] February 6th, 2019, the *Defendant, or Co-Defendant*, assaulted Darrick Caudill;
>
> (2) That the assault was committed with a firearm;
>
> (3) That the *Defendant* acted with intent to inflict great bodily harm; and
>
> (4) That this act occurred in the State of Washington.

(Emphasis added.) Although other people were involved in the crimes, Boudrieau was tried alone. There was no co-defendant at trial.

Further, the court instructed the jury that to convict Boudrieau of robbery in the first degree, each of the following elements must be proved beyond a reasonable doubt:

> (1) That on or about the [sic] February 6th, 2019, the defendant, unlawfully took personal property from the person 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;
>
> (4) That the 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;
>
> (5) That in the commission of these acts or in the immediate flight therefrom *the defendant* inflicted bodily injury; and
>
> (6) That any of these acts occurred in the State of Washington.

(Emphasis added.)

Boudrieau argues that including "Co-Defendant" in only one element of the to-convict instruction for assault left the State with the burden to prove that Boudrieau, through her own conduct, personally acted with intent to inflict great bodily harm under the assault charge, and that Boudrieau personally inflicted bodily injury under the robbery charge. Thus, because the State did not prove Boudrieau personally intended to inflict great bodily harm or caused bodily injury, her convictions must be reversed. We disagree.

To support her argument, Boudrieau relies on the "law of the case" doctrine but ignores Teal. 152 Wn.2d at 339. Washington's "law of the case" doctrine requires the State to prove every element in the to-convict instruction beyond a reasonable doubt. State v. Johnson, 188 Wn.2d 742, 762, 399 P.3d 507 (2017). Our Supreme Court in Teal discussed to-convict instructions in the context of accomplice liability.

In Teal, the defendant argued that the State did not prove the elements of robbery because the to-convict instruction referred only to "acts of the 'defendant' and not to the acts of the 'defendant or an accomplice,'" and the State did not provide evidence that the defendant was the principal in the robbery. 152 Wn.2d at 336. Our Supreme Court distinguished "law of the case" circumstances where the to-convict instruction actually *added* an element to the charge. Id. at 337-38 (discussing the added venue element in State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998)). It explained that accomplice liability is not an element of the crime charged. Id. at 338. It further stated that the rule requiring that all elements of a crime be listed in a single instruction is not violated when accomplice liability is described in a separate instruction. Id. at 339. That court held that a to-convict instruction omitting the phrase "defendant or an accomplice" was sufficient when read in conjunction with an accomplice liability instruction. Id.

Jury instructions are sufficient when, read as a whole, they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005); Teal, 152 Wn.2d at 339.

In the instant case, the trial court also instructed the jury on accomplice liability for both charges. Instruction 11 stated:

> A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when she is an accomplice of such other person in the commission of the crime.

> A person is an accomplice in the commission of assault, if, with knowledge that it will promote or facilitate the commission of the crime, 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.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.
>
> A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

Instruction 21 similarly instructed on accomplice liability, but for the crime of robbery.

The to-convict instruction for assault in the first degree may have mistakenly referred to a "Co-Defendant" when it was obvious to everyone the trial involved a single defendant. However, read as a whole, the instructions still permitted the jury to consider whether the defendant was guilty as a principal or an accomplice as the jury did in Teal. Moreover, the instructions accurately stated the law, did not mislead the jury, and permitted each party to argue its theory of the case. Additionally, the jurors were instructed to consider all of the instructions: "The order of these instructions has no significance as to their relative importance. They are all important."

Boudrieau does not otherwise maintain that the evidence was insufficient beyond her arguments that she did not personally act with intent to inflict great bodily harm, and that she did not personally inflict bodily injury. A rational trier of

fact could find that the State met its burden proving Boudrieau guilty of assault in the first degree and robbery in the first degree as an accomplice.

Split Elements

Boudrieau next contends that the State failed to prove she was guilty of robbery in the first degree as an accomplice because it did not prove another person's conduct satisfied all elements of the offense, which is required under RCW 9A.08.020. We disagree.

Our Supreme Court and this court have held that juries can split elements between multiple participants, or accomplices, in criminal cases. State v. Dreewes, 192 Wn.2d 812, 824, 432 P.3d 795 (2019) (holding that, in an assault in the second degree case, all the State needed to prove for accomplice liability to attach is that a co-participant assaulted the victim with a deadly weapon and that Dreewes solicited and aided in the assault); State v. Walker, 182 Wn.2d 463, 484, 341 P.3d 976 (2015) (holding that Walker's conviction for premeditated murder could be based on a finding that he or an accomplice acted with premeditated intent to cause the victim's death); State v. Hoffman, 116 Wn.2d 51, 105, 804 P.2d 577 (1991) (concluding the jury did not need to decide who actually shot and killed a police officer so long as both participated in the crime); State v. Haack, 88 Wn. App. 423, 427, 958 P.2d 1001 (1997) (recognizing that a jury may convict a defendant of the crime of assault in the first degree based on splitting the elements between the defendant and another under accomplice liability).

Boudrieau invites us to disregard this line of cases because their holdings trace back to State v. Carothers, 84 Wn.2d 256, 525 P.2d 731 (1974), which was decided under the former accomplice liability statute, former RCW 9.01.030 (1974).[2] See Dreewes, 192 Wn.2d at 824 (quoting Walker, 182 Wn.2d at 483 (citing Haack, 88 Wn. App. at 429); Hoffman, 116 Wn.2d at 104 (citing Carothers, 84 Wn.2d at 264)). Boudrieau contends former RCW 9.01.030 (1974) reached "[e]very person concerned in the commission of a felony," whereas the current accomplice liability statute, RCW 9A.08.020(1), provides liability "only for 'the conduct of another person.'" Boudrieau contends the plain text and legislative history of RCW 9A.08.020[3] make clear that a person may be liable as an accomplice only if another person committed the offense.

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[2] Former RCW 9.01.030 (1974) provided:

> Every person concerned in the commission of a felony, gross misdemeanor, or misdemeanor, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who directly or indirectly counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor, or misdemeanor, is a principal, and shall be proceeded against and punished as such. The fact that the person aided, abetted, counseled, encouraged, hired, commanded, induced or procured, could not or did not entertain criminal intent, shall not be a defense to any person aiding, abetting, counseling, encouraging, hiring, commanding, inducing, or procuring him.

[3] The current statute provides in relevant part, that "[a] person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable," and that "[a] person is legally accountable for the conduct of another person when . . . [h]e or she is an accomplice of such other person in the commission of a crime." RCW 9A.08.020(1),(2)(c). The statute then explains that

> "[a] person is an accomplice of another person in the commission of a crime if:

We reject Boudrieau's invitation to conduct a statutory construction analysis. Hoffman, Walker, and Dreewes have already applied the current accomplice liability statute, RCW 9A.08.020. Decisions of the Supreme Court are binding on lower courts. State v. Brown, 13 Wn. App. 2d 288, 291, 466 P.3d 244 (2020). The fact that our Supreme Court continues to apply the same principles from older cases indicates that those principles are still applicable under the current statute.

"'Accomplice liability represents a legislative decision that one who participates in a crime is guilty as a principal, regardless of the degree of the participation.'" Dreewes, 192 Wn.2d at 824 (quoting Hoffman, 116 Wn.2d at 104). We presume the legislature is "'familiar with judicial interpretations of statutes and, absent an indication it intended to overrule a particular interpretation, amendments are presumed to be consistent with previous judicial decisions.'" State v. Ervin, 169 Wn.2d 815, 825, 239 P.3d 354 (2010) (quoting State v. Bobic, 140 Wn.2d 250, 264, 996 P.2d 610 (2000)).

In the instant case, Boudrieau contends she cannot be liable as an accomplice to robbery because the State failed to prove the gunman took property from or in the presence of Caudill. Under RCW 9A.08.020 and the

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> (a) With knowledge that it will promote or facilitate the commission of the crime, he or she:
>
> (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."

RCW 9A.08.020(3).

authority set out in Hoffman, Walker, and Dreewes, the State needed only to prove a co-participant shot Caudill and that Boudrieau solicited and aided in the robbery. "[T]he accomplice liability statute predicates criminal liability on general knowledge of the crime and not on specific knowledge of the elements of the participant's crime." Dreewes, 192 Wn.2d at 824 (alteration in original) (quoting Hoffman, 116 Wn.2d at 104). The jury could have found that Boudrieau planned to rob Caudill with the help of the gunman. When Caudill tried to stop the gunman from entering, Boudrieau jumped to the gunman's aid by attacking Caudill. This allowed the gunman to shoot Caudill, rendering him helpless and allowing Boudrieau to take Caudill's money, phone and heroin. The State was not required to prove the gunman took the heroin in order for the jury to convict Boudrieau of robbery in the first degree.

Information

Boudrieau next contends, for the first time on appeal, that the information failed to contain all the essential elements for the crime of robbery in the first degree. We disagree.

Boudrieau has a constitutional right to be informed of each criminal charge alleged so that she is able to adequately prepare and mount a defense for trial. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22 (amend. 10). The State must provide an information that sets forth every material element of each charge made, along with essential supporting facts. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). An essential element is "one whose specification is necessary to establish the very illegality of the behavior" charged. State v.

Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992). The information does not need to include definitions of elements. State v. Johnson, 180 Wn.2d 295, 302, 325 P.3d 135 (2014).

When a defendant challenges the sufficiency of the charging document prior to a verdict, the charging language must be strictly construed. State v. Taylor, 140 Wn.2d 237, 237, 996 P.2d 571 (2000). However, if the defendant challenges the sufficiency of the charging document following a verdict, then the charging language must be construed liberally in favor of validity. Id.

Because a challenge to the sufficiency of a charging document involves a question of constitutional due process, Boudrieau can raise it for the first time on appeal. State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). When an appellant raises such a challenge, the proper standard of review is the two-pronged test. First, the court asks whether the necessary elements appear in any form, or by fair construction can they be found, in the information. Second, if so, the court asks if the defendant can show he or she was actually prejudiced by the inartful language that caused the lack of notice. McCarty, 140 Wn.2d at 425.

The first prong of this test is satisfied when a charging document sets forth all of the essential elements of the crime charged. Id. If the required elements are set forth, even if only in vague terms, then the charging document also satisfies the second prong of the test if the terms used did not result in any actual prejudice to the defendant. Id.

In the instant case, the State charged Boudrieau with robbery in the first degree and alleged in the information that she "did unlawfully take personal

property of another, to wit: drugs and/or US Currency, from the person or in the presence of" Caudill "against such person's will, by use or threatened use of immediate force, violence, and fear of injury" to Caudill.

> The statutory definition of robbery is 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*; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190 (emphasis added). Boudrieau contends the second sentence of the statute defining robbery is an essential element that was missing in the information.

We have twice considered and rejected this premise. See State v. Derri, 17 Wn. App. 2d 376, 391, 486 P.3d 901, review granted in part, 198 Wn.2d 1017, 497 P.3d 389 (2021);[4] State v. Phillips, 9 Wn. App. 2d 368, 377, 444 P.3d 51, review denied, 194 Wn.2d 1007 (2019). We have held that the first sentence of RCW 9A.56.190 contains the statutory elements of robbery whereas the second sentence merely defines certain terms contained in that first sentence:

> The first sentence, which sets forth the statutory elements of robbery, includes the element of "the use or threatened use of immediate force, violence, or fear of injury." The second sentence defines "force" and "fear" as used in sentence one. "*Such force or*

[4] We note that our Supreme Court has granted petition for review on "whether the charging document was deficient." State v. Derri, 198 Wn.2d 1017, 497 P.3d 389 (2021).

> *fear* must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial." (Emphasis added.) It also defines to "obtain" or "retain" as a form of "take," as used in sentence one.

Phillips, 9 Wn. App. 2d at 377 (quoting RCW 9A.56.190).

In support of her claim, Boudrieau relies on State v. Pry, 194 Wn.2d 745, 751, 452 P.3d 536 (2019) and State v. Johnson, 155 Wn.2d 609, 610–11, 121 P.3d 91 (2005). This is not a new argument we have not previously considered.

Our Supreme Court in Pry examined whether RCW 9A.76.050, entitled "Rendering criminal assistance—Definition of term," either provided the essential elements of the offense or merely defined those elements. 194 Wn.2d at 755-56. The court concluded that the contents of that statutory provision were not merely definitional but rather set forth the essential elements of the offense of rendering criminal assistance. Id. at 763. Likewise, in Phillips, we held that the first sentence of RCW 9A.56.190, which is entitled "Robbery—Definition," contained the statutory elements of robbery. 9 Wn. App. 2d at 377. "[T]he Pry decision expressly acknowledged the principle that '[a] charging document is not required to define essential elements.'" Derri, 17 Wn. App. 2d at 389 (second alteration in original) (quoting Pry, 194 Wn.2d at 752).

> The issue in Johnson was 'whether a robbery conviction can be based upon force used to escape after peaceably-taken property has been abandoned.' The court held that a robbery conviction could not be so based because Washington law incorporates the 'transactional' view of the crime of robbery, meaning 'the force must be used to obtain or retain property, or to prevent or overcome resistance to the taking.'

Derri, 17 Wn. App. 2d at 390 (citation omitted) (quoting Johnson, 155 Wn.2d at 609-10). "In Phillips, we explained that the Johnson 'decision makes clear the relationship between the first and second sentences of RCW 9A.56.190.' Whereas the first sentence provides the essential elements of robbery, the second sentence defines certain terms contained within the first sentence to explain Washington's 'transactional' view of robbery." Derri, 17 Wn. App. 2d at 390 (citation omitted) (quoting Phillips, 9 Wn. App. 2d at 377).[5]

We continue to adhere to our decisions in Derri and Phillips, and hold that the information contained all the essential elements for the crime of robbery in the first degree.[6]

Legal Financial Obligations

Boudrieau further contends that the trial court only intended to impose mandatory legal financial obligations (LFOs) despite the boilerplate language in

[5] We previously have acknowledged that Division Three takes a contrary position in State v. Todd, 200 Wn. App. 879, 403 P.3d 867 (2017) (holding that the statutory elements of robbery include the second sentence of RCW 9A.56.190). In Derri, we explained why we disagree with Todd. Derri, 17 Wn. App. 2d at 390. The Todd court cited State v. Allen, 159 Wn.2d 1, 147 P.3d 581 (2006), which did not announce a new statutory element of robbery but was describing the State's burden of proof in determining whether sufficient evidence supported the conviction. Derri, 17 Wn. App. 2d at 390.

[6] At oral argument, the State additionally argued that even if the second sentence in RCW 9A.56.190 were to be considered an essential element, the information is still not deficient "using the liberal construction test." Wash. Court of Appeals oral argument, State v. Boudrieau, No. 81762-1-I (Mar. 4, 2022), at 11 min., 17 sec., video recording by TVW, Washington State's Public Affairs Network, https://tvw.org/watch/?eventID=2022031063. As the State's brief did not address this argument beyond stating the information shall be liberally construed when defendant raises the issue for the first time on appeal, we decline to address it. See RAP 10.3.

the judgment and sentence that ordered community custody supervision fees. We agree.

Supervision fees as a condition of community custody are a discretionary legal financial obligation because they "are waivable by the trial court." State v. Dillon, 12 Wn. App. 2d 133, 152, 456 P.3d 1199 (2020). Where the trial court indicated it intended to impose only mandatory LFOs and the record suggests the supervision fees were inadvertently imposed, it is proper to order the fee be stricken from the judgment and sentence. Id. See State v. Bowman, 198 Wn.2d 609, 629, 498 P.3d 478 (2021) (holding that the trial court committed procedural error by imposing a discretionary fee where it had otherwise agreed to waive such fees).

At sentencing, Boudrieau's counsel asked the court "to make a finding of indigency and only impose the mandatory court fees and fines in this case. . ." However, the State asked the court to impose the $500 victim penalty assessment in addition to the $200 filing fee, which may be waived. The court agreed with the defense, stating, "I will find that [Boudrieau] is indigent for the purposes of legal–financial obligations, impose *only* the $500 victim penalty assessment[7] and reserve restitution for 180 days." (Emphasis added.) The record supports that the trial court found Boudrieau indigent and ordered only mandatory LFOs. No one mentioned supervision fees. Just like the judgment and sentence form in Dillon, the judgment and sentence form here included a

[7] The $500 victim penalty assessment is a mandatory fee under RCW 7.68.035(1)(a).

lengthy boilerplate paragraph that presumes the court will order the defendant to "[p]ay supervision fees."[8] We order the community custody supervision fees be stricken from the judgment and sentence.

Offender Score

The parties agree that Boudrieau's offender score was based on two prior convictions of possession of a controlled substance that should not be included following State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021). A prior conviction that is constitutionally invalid on its face may not be included in the offender score. State v. Ammons, 105 Wn.2d 175, 187-188, 713 P.2d 719 (1986). We accept the State's concession supporting remand for resentencing to correct the offender score.

Same Criminal Conduct

Lastly, Boudrieau contends that the court should remand to correct the judgment to reflect the trial court's holding that robbery in the first degree and assault in the first degree are the same criminal conduct for sentencing purposes. At sentencing, the trial court held that robbery in the first degree and assault in the first degree were the same criminal conduct for sentencing purposes—however, the judgment and sentence fails to reflect the court's holding. Again, we accept the State's concession that the judgment and

[8] The form used was an old form that has since been updated by the Administrative Office of the Courts. The current form now provides a practical way for judges to exercise their discretion regarding supervision fees. Form WPF CR 84.0400P, Felony Judgment and Sentence — Prison (FJS/RJS) (rev. July 2021), https://www.courts.wa.gov/forms/documents/CR84.0400_FJS_Prison_nonsexoffense_2021 %2007.pdf.

sentence should correctly reflect the court's ruling. We remand for the trial court to accordingly correct the judgment and sentence.

CONCLUSION

We affirm Boudrieau's convictions but remand for resentencing to correct her offender score under Blake, to correct the judgment and sentence by noting that the same criminal conduct supported both convictions, and to strike her community custody supervision fees.

Coburn, J.

WE CONCUR:

Brennan, J.

Andrus, A.C.J.

APPENDIX B

REVISED WASHINGTON CRIMINAL CODE

Published by the Legislative Council's Judiciary

Committee, Without Prior Approval of the Contents,

and Submitted to the People of the State of Washington

for the Purpose of Obtaining Their Comments.

The preparation of this Code was aided by the Washington State Planning and Community Affairs Agency through a Federal Grant from the Law Enforcement Assistance Administration of the U.S. Department of Justice authorized under Title I, Public Law 90-351.

Olympia, December 3, 1970

CRIMINAL CODE REVISION PROJECT

Members of the Judiciary Committee of the

Washington Legislative Council

Senator Perry B. Woodall, Chairman

Senator John L. Cooney

Senator R. R. "Bob" Greive

Senator Robert W. Twigg

Representative R. Ted Bottiger

Representative Edward F. Harris

Members of the Citizens' Advisory Committee

Robert E. Schillberg, Chairman

William Bennett

John M. Darrah

Judge Blaine Hopp, Jr.

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Jocelyn H. Marchisio

Edward J. Smith

Judge Charles M. Stokes

Major Anton C. Gustin

Project Staff

Timothy P. Burke, Director

Richard H. Holmquist, Reporter

Prof. John Junker, Consultant

of the effect on each such regulation or offense, a scrutiny beyond the capacity or scope of this revision.

Still, the section constitutes a fairer and less harsh approach to the issue of absolute liability than does current Washington law.

3. Comparison With Other Jurisdictions.

The section is similar to like provisions in the Michigan and New York codes. The basic approach is similar to Illinois' provision, though without Illinois' alternative dealing with punishments. Connecticut has no similar provision.

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9A.08.060. Liability for Conduct of Another; Complicity.

(1) A person is guilty of an offense if it is committed by the conduct of another person for which he is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

(a) acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct; or

(b) he is made accountable for the conduct of such other person by this title or by the law defining the offense; or

(c) he is an accomplice of such other person in the commission of the offense.

(3) A person is an accomplice of another person in the commission of an offense if:

(a) with the intent of promoting or facilitating the commission of the offense, 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.

(4) A person who is legally incapable of committing a particular offense himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity.

(5) Unless otherwise provided by this title or by the law defining the offense, a person is not an accomplice in an offense committed by another person if:

(a) he is a victim of that offense; or

(b) the offense is so defined that his conduct is inevitably incident to its commission; or

(c) he terminates his complicity prior to the commission of the offense and

(i) deprives it of effectiveness in the commission of the offense; or

(ii) gives timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the offense.

(6) An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted.

COMMENT

1. Comparison With Model Penal Code.

With two exceptions, this section closely follows MPC 2.06. MPC 2.06(3)(a)(iii) dealing with failure to meet a legal duty to prevent an offense is excluded, because: (1) as drafted, the language is over-broad and might be held to encompass situations where accessorial liability should not attach; (2) the rest of the section

will cover all situations to which the excluded subdivision was addressed without raising the above-stated objection; and (3) the other jurisdictions examined all excluded this subdivision.

MPC 2.06(4) is excluded as redundant; it was excluded from the other jurisdictions studied also.

For general discussion of this section, see Comment, MPC 2.04, Tent. Dr. #1, p. 13.

2. Comparison With Existing Washington Law.

This section deals with instances where one person is held legally accountable for the conduct of another. The section closely follows the MPC formulation which seeks to abolish the common law classification of "accessory" and it looks directly at an actor's behavior and its relation to a criminal result. Washington has long since abolished the distinction between accessories-before-the-fact and principals, and presently has two statutes on the subject--one of which is:

> RCW 9.01.030. Principal defined. Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who directly or indirectly counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor, is a principal, and shall be proceeded against and punished as such. The fact that the person aided, abetted, counseled, encouraged, hired, commanded, induced or procured, could not or did not entertain a criminal intent, shall not be a defense to any person aiding, abetting, counseling, encouraging, hiring, commanding, inducing or procuring him.

RCW 9.01.040 (relating to accessories-after-the-fact) is not affected by the new section, and will be covered in Chapter 9A.76 concerning obstructing governmental operations and escapes.

This section will replace the present statute quoted above.

Turning to the specific subsections, subsections (1) and (2) are substantially similar to present RCW 9.01.030, though expressed in different language.

Subdivision (3)(a), aside from language, varies from the present

statute only in its requirement of intent to promote or facilitate the commission of the offense. Two Washington cases on this point indicate that in spite of the lack of explicit reference to intent in the present statute, some such mental state is necessary in order to sustain a conviction under the section. In State v.Hiatt, 187 Wash. 226, 60 P.2d 71 (1936), one defendant had been convicted as an accessory to manslaughter. He had hired guards for his brewery and made dire threats in public to strikers, but in reversing his conviction, the court found no evidence that defendant had intended more than to intimidate the strikers and thus, no evidence that he intended to encourage, aid, or abet a later killing of a striker by a guard. Thus, in Hiatt, the court was saying that some intent to effect the criminal result which actually occurs must be present for accessorial liability to attach. In State v. Hinkley, 52 Wn. 2d 415,325 P.2d 889 (1958), the court held that the word "abet" in RCW 9.01.030 does include some guilty knowledge or felonious intent. (In Hinkley, in dictum, the court said that such mental elements were not present in the word "aid." For a critical attack on this dictum, see Note, 34 Wash. L. Rev. 184 (1959).)

Putting these cases together, it is apparent that the Washington court has found some required culpable mental state to be an element of the accessorial liability set out in RCW 9.01.030, and as such, the difference in wording on this point between this new subdivision and present RCW 9.01.030 is substantially reduced. The difference which is left, as stated above, is due to the consistent use of language and principles of culpability set out in earlier sections of Chapter 9A.08.

Subsection (4) is consistent with Washington case law, as set out in State v. Pickel, 116 Wash. 600, 200 Pac. 316, 200 Pac. 184 (1921), which held that a woman may be convicted as a principal in the crime of rape where she encourages and aids a man to commit the act against another woman.

Subsection (5) relates to issues not covered in present Washington law, either by statute or case. See Comment, MPC 2.04(5), Tent. Dr. #1, p. 35. Subdivision (a) needs no comment. Subdivision (b), in combination with the "Unless" provision of the subsection, relates to the question of whether accessorial liability attaches in such situations as these: (1) Should a woman be deemed an accomplice when an abortion is performed upon her? (2) Should the man who has intercourse with a prostitute be viewed as an accomplice in the act of prostitution? The rule of the section is simply that unless the substantive offense provides for liability in such cases, liability does not attach. This is a reasonable resolution of the issue, leaving for later consideration what the rule for each specific offense should be. Subdivision (5)(c) concerning termination of complicity is consistent with the general rule on the subject followed in other jurisdictions. The only Washington case at all in point involved facts wherein allegedly the purported termination of complicity came during the commission of the offense, a point in time far too late to escape liability, then or under the new rule. See State v. Naples, 51 Wn. 2d 525, 3919 P. 2d 1096 (1958). Given the fact that all four of the other jurisdictions examined either have a similar provision in their codes or, in one case, have adopted the principle by case law, this seems a proper provision for dealing with this issue.

Finally, subsection (6) is entirely consistent with Washington case law; see State v. Nikolich, 137 Wash. 62, 241 Pac. 664 (1925).

3. Comparison With Other Jurisdictions.

With the exception of some language variations, the section is similar in operation to statute or case law in the four other jurisdictions examined, namely Connecticut, Illinois, Michigan, and New York. The only exception is that the proposed Michigan code does contain MPC 2.06(3)(a)(iii)---regarding failure to prevent offenses---which was excluded from this section. See discussion of this point in item 1 above.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 81762-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: April 13, 2022

WASHINGTON APPELLATE PROJECT

April 13, 2022 - 4:40 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	81762-1
Appellate Court Case Title:	State of Washington, Respondent v. Mariah Joleene Boudrieau, Appellant
Superior Court Case Number:	19-1-00432-5

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