NO. 45155-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

HAROLD LANG, JR., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 12-1-03984-6

Brief of Respondent

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Table of Contents

Table of Authorities

State Cases

Federal And Other Jurisdictions

Statutes

Rules and Regulations

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exclude defendant's statements as they were inadmissible under the rules of evidence?

2. Did the trial court properly allow the State to refresh Mr. Kristiansen's recollection?

3. Should this Court uphold the jury's verdict when it is supported by sufficient evidence?

B. STATEMENT OF THE CASE.

1. Procedure

On October 22nd, 2012, the Pierce County Prosecutor's Office charged HAROLD LANG, JR., hereinafter "defendant" with one count of robbery in the second degree (count I) and one count of robbery in the first degree (count II). CP 1-2. The case proceeded to trial on July 17th, 2013, in front of the Honorable James Orlando. 1RP[1] 2.

During motions in limine, the court granted the State's motion to exclude self serving hearsay statements. 1RP 17; CP 26-30. On July 18th, 2013, the State filed an amended information amending count I to robbery

[1] The verbatim record of proceedings contains two volumes which are paginated consecutively and will be referred to as "1RP" and "2RP" followed by the page number.

in the first degree. 1RP 23; CP 53-54. Count II was dismissed with prejudice at the request of the State as the victim was unavailable for trial. CP 93.

A CrR 3.5 hearing was held. 2RP 112-160; CP 90-92. The court admitted defendant's statements to the officers as statements against interest, but sustained the State's motion to exclude certain statements as self serving hearsay. 2RP 156-160. At the conclusion of the State's case, defendant moved to dismiss arguing the State failed to meet the element that there was a display of a firearm. 2RP 217. The court denied the motion. 2RP 220-221. Defendant was found guilty of robbery in the first degree on July 23rd, 2013. CP 55; 2RP 263. Two days later, defendant was sentenced to 150 months. CP 96-109; 2RP 271.

Defendant filed a timely notice of appeal. CP 110-125.

2. Facts

In October of 2012, Ian Kristiansen placed an ad on Craigslist to sell his iPhone 5 for $700. 2RP 180. Mr. Kristiansen wanted to meet at a Sprint store to ease the transition of switching phones. 2RP 181. However, on October 15, 2012, an individual responded to the ad suggesting they meet when Mr. Kristiansen finished his work that night at the University of Puget Sound campus. 2RP 181.

Around 9:30 pm, defendant met Mr. Kristiansen at the UPS campus. 2RP 182. Mr. Kristiansen brought along a friend whom he worked with and they met defendant inside a building by a firepit. 2RP 182. Mr. Kristiansen showed defendant the phone. 2RP 183. Defendant left and went outside for five minutes before returning and asking to see the phone out of the case. 2RP 183. Mr. Kristiansen did not want to take the phone out of the case because it was brand new and he did not want to drop it. 2RP 183. Mr. Kristiansen also did not want to give defendant the phone until defendant had given Mr. Kristiansen the money. 2RP 184. However, Mr. Kristiansen did remove the phone to show defendant. 2RP 183. Defendant snatched the phone from Mr. Kristiansen's hand as Mr. Kristiansen tried to hold onto it. 2RP 184.

Defendant ran away with the phone as Mr. Kristiansen chased him. 2RP 186. As Mr. Kristiansen started to lose defendant, a third party came up behind Mr. Kristiansen and said "do you want to get shot? keep running." 2RP 186. Mr. Kristiansen observed the man had his right hand in his sweater acting like it was a gun so Mr. Kristiansen stopped running. 2RP 187, 201. Mr. Kristiansen was scared and did not want to be shot over a phone so he immediately went inside and called police. 2RP 188, 202. He never got his phone back. 2RP 188.

Mr. Kristiansen was shown a photo montage containing six individuals and identified defendant as the individual who stole his phone.

2RP 173. He said he was one hundred percent sure defendant was the individual who stole his phone. 2RP 189. Mr. Kristiansen was also shown another photo montage, but was unable to identify anyone as the third party who threatened him with the gun. 2RP 196.

The day after his phone was stolen, Mr. Kristiansen posted an ad on Craigslist to warn other people about someone stealing iPhones. 2RP 188. Police contacted Mr. Kristiansen and asked him to take down the Craigslist warning to ensure the investigation was not compromised in any way. 2RP 178.

Defendant ran from the officers when they attempted to contact him, but he was eventually apprehended. 2RP 176. Detectives spoke with the defendant after he was advised of his rights. 2RP 208. Defendant told officers he had gone to UPS with a driver and another man named Arsenio Jackson. 2RP 210. He admitted to the detectives that he had stolen the iPhone from Mr. Kristiansen while Arsenio waited nearby as back-up in case something went wrong. 2RP 210, 216. Defendant also told detectives after he got back into the vehicle, Arsenio got in and was laughing. 2RP 211. When defendant asked what was funny, Arsenio said that he had just threatened to beat up the victims. 2RP 211. Later in the interview, defendant admitted that he had contacted Arsenio after seeing the Craigslist warning and Arsenio had admitted to defendant that he had made threats to shoot the victims. 2RP 211-212.

Defendant chose not to testify during the trial. 2RP 221.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXCLUDED DEFENDANT'S STATEMENTS AS THEY WERE INADMISSIBLE UNDER THE RULES OF EVIDENCE.

This Court reviews a trial court's ruling on the admissibility of evidence for an abuse of discretion. ***State v. Powell***, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); ***State v. Larry***, 108 Wn. App. 894, 910, 34 P.3d 241 (2001); ***State v. Stubsjoen***, 48 Wn. App. 139, 147, 738 P.2d 306 (1987) ("The decision whether to admit or refuse evidence is within the sound discretion of the trial court and will not be reversed in the absence of manifest abuse."). A trial court abuses its discretion when its decision is based on manifestly unreasonable or untenable grounds. ***Powell***, 126 Wn.2d at 258.

a. Defendant's Statements were Inadmissible as "Self Serving" Hearsay under ER 801(d)(2)(i)

Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is inadmissible unless it qualifies as an exception under the rules of evidence, court rules, or by statute. ER 802. Although a defendant's out-of-court statements are non-hearsay admissions of a party opponent when offered against him by the

State, *see* ER 801(d)(2), a party's *own* out-of-court statement *offered by the party itself* is hearsay when offered to prove the truth of the matter asserted. ***State v. Sanchez-Guillen***, 135 Wn. App. 636, 645, 145 P.3d 406 (2006).

In ***Sanchez-Guillen,*** the defendant had been arrested for murder and subsequently made several remarks to the arresting officers. *Id.* at 640. When the State refused to introduce the statements at trial, the defendant sought to introduce them through the officers as part of his own defense. *Id.* The trial court, however, refused the offer. *Id.* The reviewing court held that the trial court had not abused its discretion because the statements were inadmissible hearsay where the defendant himself was seeking to introduce them. *Id.* at 645–46.

During a CrR 3.5 hearing in the present case, the court ruled defendant's recorded and transcribed statements made to officers after his arrest were admissible as defendant had made a knowing and intelligent waiver of his ***Miranda*** rights. 2RP 153-155. The State moved to clarify and exclude certain statements, essentially stating the State would not be offering them in their case and defendant should be precluded from offering them on cross examination of the officers. 2RP 157. The prosecutor stated:

> For purposes of this trial, Your Honor the defendant made statements during the interview in which he indicated that the cell phone was laid on the table and that he took it from the table and just ran with it. I would ask that those

> statements be excluded now. The defendant does have a right to testify, but those are self-serving statements, and there is no exception, hearsay exception that it falls under Your Honor. So I would ask that that statement be excluded, unless the defendant testifies.

2RP 157[2].

The prosecutor recognized that defendant's statement about the cell phone being laid on the table before he grabbed it was hearsay, and if offered by the defendant, argued it would have to come through defendant's testimony. The court agreed and excluded the statement saying, "it's self-serving hearsay, so I would sustain that objection. If Mr. Lang wishes to testify in what he intended or how the phone got taken from there, he can certainly do that, but I don't think he can do that by way of interview without taking the stand." 2RP 159.

The issue here is almost identical to the issue decided by the court in ***Sanchez-Guillen***. Defendant here sought to offer his own statement into testimony through another witness (Detective Coulter) to prove the truth of the matter asserted (he took the phone off of the table without force). The rules of evidence are clear that such a statement is hearsay. Moreover,

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[2] A recent case, ***State v. Pavlik*** 165, Wn. App. 645, 653, 268 P.3d 986 (2011) held that "there is no 'self-serving hearsay' bar that excludes *an otherwise admissible statement.*" (emphasis added). The prosecutor, defense attorney and the court in the present case refer to defendant's statements as self-serving hearsay while discussing them, but understand they are discussing the statements' admissibility in the context of ER 801(d)(2), not a separate self serving hearsay exclusion ***Pavlik*** discusses. This is evident by the prosecutor's statements where he references the distinction ***Pavlik*** stood for. *See* 2RP 156-157.

defendant makes no showing that the statement is otherwise admissible under any of the hearsay exceptions. The trial court thus properly excluded the statement because it was inadmissible hearsay.

b. The Trial Court's Decision to Exclude Defendant's Statements should be Affirmed as Defendant is Unable to Show the Trial Court Abused its Discretion.

ER 106 reads:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

However, the evidence must be relevant to the issues in the case, and "the trial judge need only admit the remaining portions of the statement which are needed to clarify or explain the portion already received." ***Larry***, 108 Wn. App. at 910 (citing ***United States v. Velasco***, 953 F.2d 1467, 1475 (7th Cir., 1992)).

In addition, the right to present testimony in one's defense is guaranteed by both the United States and the Washington Constitutions. ***State v. Hudlow***, 99 Wn.2d 1, 14 659 P.2d 514 (1983). But the right is not absolute; a defendant does not have the right to introduce evidence that is irrelevant or otherwise inadmissible. ***State v. Rehak***, 67 Wn. App. 157, 162, 834 P.2d 651 (1992).

During the CrR 3.5 hearing, the transcript of the recorded interview between Detective Coulter and defendant was admitted as evidence for purposes of that hearing only. 2RP 121, 136. The trial court had the ability to review the statements made by defendant in the context of the entire conversation between Detective Coulter and defendant. However, that transcript has not been designated part of the record on this appeal.

Under RAP 9.2(b), defendant has the burden of perfecting the record so that the appellate court has before it all of the evidence relevant to the issue. ***State v. Sisouvanh***, 175 Wn.2d 607, 619, 290 P.3d 942 (2012). In such a situation, a trial court's judgment is presumed to be correct and should be sustained absent an affirmative showing of error. ***State v. Wade***, 138 Wn.2d 460, 464, 979 P.2d 850 (1999).

Given that defendant is arguing his statements should have been admitted under ER 106, also known as "the rule of completeness," viewing defendant's statements in the context they were given is a particularly important and relevant inquiry. Without viewing the transcript as a whole, the court is unable to consider the factors defendant has outlined in his brief from ***State v. Larry***, 108 Wn. App. 894, 910 P.3d 241 (2001), pertaining to whether defendant's statements are relevant under ER 106. *See* Brief of Appellant, 10. Because of this omission of relevant information in the record, defendant is unable to affirmatively show the trial court abused its discretion in excluding defendant's

statements under ER 106. As a result, this Court must presume the decision of the trial court was correct.

2. THE TRIAL COURT PROPERLY ALLOWED MR. KRISTIANSEN'S MEMORY TO BE REFRESHED BY THE WARNING AD WHEN THE PROSECUTOR COMPLIED WITH ER 612.

This Court reviews a trial court's ruling on the admissibility of evidence for an abuse of discretion. ***State v. Powell***, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); ***State v. Larry***, 108 Wn. App. 894, 910, 34 P.3d 241 (2001); ***State v. Stubsjoen***, 48 Wn. App. 139, 147, 738 P.2d 306 (1987) ("The decision whether to admit or refuse evidence is within the sound discretion of the trial court and will not be reversed in the absence of manifest abuse."). A trial court abuses its discretion when its decision is based on manifestly unreasonable or untenable grounds. ***Powell***, 126 Wn.2d at 258.

After discussing the events of the robbery, the prosecutor asked Mr. Kristiansen about the warning ad he placed on Craigslist the day after the robbery to warn other individuals about people stealing iPhones. 2RP 187-189. When asked if he remembered the ad, Mr. Kristiansen replied "I've seen it, I recognize it, but I don't even remember the ad as to detail." 2RP 189. The prosecutor asked Mr. Kristiansen about meeting with an officer and discussing the ad with him. 2RP 189. Defense counsel objected when the prosecutor attempted to hand the ad to Mr. Kristiansen

arguing it was not the proper procedure for refreshing recollection and the court overruled the objection. 2RP 189.

Afterwards, the following exchange discussing the ad took place and appears to be what defendant is assigning error to in his appellate brief:

Prosecutor:	Did you specify where [the iPhone] was taken from?
Kristiansen:	No.
Prosecutor:	I'm going to show you again what you wrote. Why don't you --
Defense Counsel:	Your Honor, this --
Prosecutor:	I'm just refreshing his recollection, Your Honor, if it's true.
Prosecutor:	Does looking at that refresh your recollection as to where you indicated your phone was taken from?
Kristiansen:	No.
Prosecutor:	On where the phone was when it was taken from you?
Kristiansen:	I know where the phone was taken.
Prosecutor:	Where was it taken from?
Kristiansen:	My job.
Prosecutor:	On you personally, where did you have the phone?
Kristiansen:	In my hand.

Prosecutor: Did you state that in your ad?

Kristiansen: No.

Prosecutor: Did you put it in the ad that the phone was taken from your hands?

Defense Counsel: Asked and Answered.

The Court: Hold on. Ask the question again.

Prosecutor: Okay. The reason I'm showing you is to refresh your recollection about what you specifically wrote, because that's important and the jurors need to hear that. Did you write in your ad your phone was snatched from your hand?

Kristiansen: Yes.

2RP 190-191.

a. The Craigslist Warning Ad was Not Evidence and thus, was Not Admitted Improperly as Hearsay Evidence.

ER 612 governs the use of a writing or some other evidence used to refresh the memory of a witness. It describes what is commonly referred to as "present recollection refreshed" and allows a witness to use a writing to refresh his or her memory for the purpose of testifying so long as the adverse party has had an opportunity to review the writing. ER 612. Under the rule, "[t]he writing is used only to refresh the witness's memory to enable him or her to testify; the writing itself is not evidence. Because the writing itself is not evidence, it need not satisfy the hearsay and best

evidence rules." 5D Karl B. Tegland, Wash. Prac.: Courtroom Handbook on Washington Evidence author's cmts. § 612:1 (2013-14 ed.).

The State never moved to admit the contents of the ad or have Mr. Kristiansen read verbatim what it stated. Rather, the ad was used to refresh his recollection about what he had posted in his warning. Therefore, because the writing itself was not admissible, it is not necessary to satisfy any hearsay rule.

b. The State Properly Refreshed Mr. Kristiansen's Recollection with the Craigslist Warning Ad in accordance with ER 612.

A writing may be used to refresh a witness's memory when (1) the witness's memory needs refreshing, (2) opposing counsel has had an opportunity to examine the writing, and (3) the trial court is satisfied that the witness is not being coached. *See* ***State v. Little***, 57 Wn.2d 516, 521, 358 P.2d 120 (1961).

When asked about the Craigslist warning ad, Mr. Kristiansen said he remembered the ad, but could not recall specifically what the warning said. 2RP 189. After reviewing the ad, the prosecutor asked Mr. Kristiansen a series of questions concerning the details of what he posted in the ad. When looking at the exchange between the prosecutor and Mr. Kristiansen as a whole, it is apparent there was some confusion about what the prosecutor's question was asking. The prosecutor meant to ask Mr.

Kristiansen if he described in the ad where the phone was on his body, if it was at all. Mr. Kristiansen appeared to believe the prosecutor was asking where as in location on the campus was the phone taken from.

This confusion when it came to what "where" was referencing is what caused the multiple attempts at what defendant argues is the same question. The question was asked multiple times because it was important for the State to illicit that Mr. Kristiansen did describe in the warning ad that the phone was taken from his hand. The question was not being asked multiple times to repeat or change the answer; rather, it was asked what appeared to be multiple times to clarify what was actually being asked. This is evident in a review of the entire exchange of the parties. As such, despite the confusion surrounding some of the questions, the State did properly refresh Mr. Kristiansen's recollection about what he wrote in the warning ad during this exchange.

c. Defendant is Not Entitled to Relief Under the Cumulative Error Doctrine.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional

error was harmless beyond a reasonable doubt." ***Rose v. Clark***, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." ***Neder v. United States***, 527 U.S 1, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). A defendant is entitled to a fair trial but not a perfect one, for "there are no perfect trials." ***Brown v. United States***, 411 U.S. 223, 232 (1973). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. ***Rose***, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also* ***State v. Kitchen***, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) ("The harmless error rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.").

The doctrine of cumulative error, however, recognizes the reality that sometime numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect

trial, but also a fair trial. ***In re Lord***, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); ***State v. Coe***, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also* ***State v. Johnson***, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) ("although none of the errors discussed above alone mandate reversal...."). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court's weighing those errors. ***State v. Russell***, 125 Wn.2d 24, 93 94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

There are two dichotomies of harmless errors that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test, and therefore they will weigh more on the scale when accumulated. *See, Id.* Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *See, Id.* Second, there are errors that are harmless because of the strength of the untainted evidence, and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See*, e.g., ***Johnson***, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal, because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See*, e.g.,

State v. Stevens, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990) ("Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.").

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare ***State v. Whalon***, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (holding that three errors amounted to cumulative error and required reversal), with ***State v. Wall***, 52 Wn. App. 665, 679, 763 P.2d 462 (1988) (holding that three errors did not amount to cumulative error), and ***State v. Kinard***, 21 Wn. App. 587, 592 93, 585 P.2d 836 (1979) (holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see*, e.g., ***State v. Badda***, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the state was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, *see*,

e.g., ***State v. Coe***, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant's credibility, combined with two errors relating to credibility of state witnesses, amounted to cumulative error because credibility was central to the State's and defendant's case); ***State v. Alexander***, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated, some so many times that a curative instruction lost all effect, *see*, e.g., ***State v. Torres***, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. *See* ***Stevens***, 58 Wn. App. at 498.

In this case, for the reasons set forth in the preceding sections, defendant has failed to establish any error, much less an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

3. THIS COURT SHOULD UPHOLD THE JURY'S VERDICT FINDING DEFENDANT GUILTY OF ROBBERY IN THE FIRST DEGREE AS IT IS SUPPORTED BY SUFFICIENT EVIDENCE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. ***State v. McCullum***, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also* ***Seattle v. Gellein***, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); ***State v. Mabry***, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State met the essential elements of the crime beyond a reasonable doubt. ***State v. Joy***, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. ***State v. Barrington***, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988)(*citing* ***State v. Holbrook***, 66 Wn.2d 278, 401 P.2d 971 (1965)); ***State v. Turner***, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted

most strongly against the defendant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are considered equally reliable. *Id.*; ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (*citing* ***State v. Casbeer***, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)). The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

> great deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)(citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

In the present case, the jury was instructed that to convict defendant of robbery in the first degree, the following six elements had to be proven beyond a reasonable doubt:

(1) That on or about October 15, 2012, 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 or an accomplice's use or threatened use of immediate force, violence, or fear of injury to that person or to that person's property;

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

(5) That in the commission of these acts the defendant or an accomplice displayed what appeared to be a firearm or other deadly weapon; and

(6) That any of these acts occurred in the State of Washington.

CP 66-88. Jury Instruction No. 13.; 2RP 237-238.

a. Sufficient Evidence Existed to Prove Defendant's Accomplice Displayed What Appeared to be a Firearm.

The court also instructed the jury "to display what appears to be a firearm means to exhibit or show what appears to be a firearm to the view of the victim or to otherwise manifest by words and actions the apparent presence of a firearm even though it is not actually seen by the victim." CP 66-88. Jury Instruction No. 7.; 2RP 233. The State is not required to

prove the defendant brandished a weapon or that the victim saw the weapon. ***State v. Henderson***, 34 Wn. App. 865, 869, 664 P.2d 1291 (1983). Case law holds that some physical manifestation of the presence of a weapon is required as words alone are insufficient to constitute the "display" of what appears to be a deadly weapon. *See* ***State v. Scherz***, 107 Wn. App. 427, 27 P.3d 252 (2001) (threat of hand grenade insufficient where no witness saw physical manifestation of the threat); s*ee also* ***In re Bratz***, 101 Wn. App. 662, 5 P.3d 759 (2000) (verbal threat by defendant that he had nitroglycerin in his coat and would blow up bank was not sufficient evidence for first degree robbery absent some physical manifestation of the threat). However, only minimal physical manifestation needs to be present in order to satisfy the display element. *See* ***State v. Kennard***, 101 Wn. App. 533, 6 P.3d 38 (2000) (sufficient evidence of display where defendant demanded money, stated he had a gun, and patted his hip); *see also* ***State v. Barker***, 103 Wn. App. 893, 14 P.3d 863 (2000) (sufficient evidence to constitute the "display" of what appeared to be a deadly weapon where defendant said he would shoot store clerk and pressed a hard object into her back).

In the present case, Arsenio's, defendant's accomplice, gesture of keeping his hand in his pocket while verbally implying he had a weapon is sufficient to establish he "displayed" what appeared to be a deadly weapon. Mr. Kristiansen was chasing after defendant when Arsenio approached him from behind and said "Do you want to get shot? Keep

running." 2RP 186. Mr. Kristiansen described this encounter when questioned by the prosecutor:

Prosecutor:	What was [Arsenio] doing?
Kristiansen:	He had his right hand in his sweater, like if there was something in there or just for scare.
Prosecutor:	Did you feel he was acting like he had something?
Kristiansen:	It felt real to me.
...	
Prosecutor:	Where was [Arsenio]'s hand at when he gestured that he had a gun?
Kristiansen:	In his sweater pocket.
Prosecutor:	In his sweater pocket?
Kristiansen:	Yes.
Prosecutor:	So you were looking -- when he said that he had a gun, did you look to see if he had one?
Kristiansen:	Yes.
Prosecutor:	When you looked at him, tell the jurors what you saw?
Kristiansen:	His hand was in his sweater pocket.
Prosecutor:	What did it appear to you? What did you see, specifically?

Kristiansen: That his hands were in his sweater. I just assumed he had a gun, if he said that.

2RP 187, 196-197.

It was the combination of Arsenio verbally implying he had a weapon and the act of concealing his hand in his pocket that led Mr. Kristiansen to believe Arsenio actually had a weapon. The defining question in the analysis is what caused the victim to believe the individual had a weapon. In ***Scherz***, the court found the evidence was insufficient to establish a conviction for first degree robbery when the defendant walked into a bank and told the clerk to give him a thousand dollars because he had a hand grenade in his pocket. ***Scherz***, 107 Wn. App. at 429. The clerk asked him if he was serious and his reply "yes" made her fearful and caused her to hand over the money. *Id.* Later, the defendant admitted he had a toenail clipper in his pocket to make it appear that he had a grenade, but neither the clerk nor anyone else in the bank saw the toenail clipper *Id.*

The court distinguished the facts of ***Scherz*** with ***State v. Henderson***, 34 Wn. App. 865, 664 P.2d 1291 (1983), ***State v. Kennard***, 101 Wn. App. 533, 6 P.3d 38 (2000), and ***State v. Barker***, 103 Wn. App. 893, 14 P.3d 863 (2001). In those cases, it was the defendants' words and actions that the victims heard and witnessed which caused the victims to

believe the defendants had a weapon, not merely the words alone. ***Scherz***, 107 Wn. App. at 433-434. The ***Scherz*** court described "in both ***Henderson*** and ***Kennard***, it was the defendants' *words and actions* that exhibited a weapon to the victims' minds. Mr. Scherz's mere statement only allowed the victim to imagine a weapon..." *Id.* at 436. (emphasis in original).

Further, the ***Scherz*** court analogized the facts of their case with those in ***In re Personal Restraint of Bratz***, 101 Wn. App. 662, 5 P.3d 759 (2000), where the defendant entered a bank and told the teller he had nitroglycerin in his coat and would blow up the bank unless she gave him money. The court reasoned:

> Mr. Scherz's mere statement he had a grenade is akin to Mr. Bratz's mere verbal threat to blow up the bank with nitroglycerin. Critically not only did no witness see the silver end of the toenail clippers, but there is also no evidence in the record that anyone saw Mr. Scherz motion toward his pocket or *make any physical gesture indicating a weapon along with the verbal threats.*

Scherz, 107 Wn. App. at 436. (emphasis added).

In the present case, unlike in ***Bratz*** and ***Scherz***, it was not solely Arsenio's verbal statement that caused Mr. Kristiansen to believe there was a weapon. Rather, it was the act of Arsenio's hand in his pocket along with the statement implying he had a gun that caused Mr. Kristiansen to believe Arsenio was actually armed with a weapon. The addition of the

physical gesture of Arsenio having his hand in his pocket, that gesture being seen by Mr. Kristiansen and that gesture attributing to his belief that there was a weapon is what makes this case similar to ***Henderson***, ***Kennard***, and ***Barker***.

In his brief, defendant argues that because Mr. Kristiansen did not see a bulge or movement, there was no gesture as required by case law. Brief of Appellant, 19. But, that is not what is defining in this analysis. The issue turns on whether the physical act, whatever it was, in conjunction with the words spoken, cause the victim to believe there is a weapon. If Mr. Kristianson had said that he could tell there was no weapon because he did not see a bulge in Arsenio's pocket, that would be relevant because the act played no part in Mr. Kristiansen's belief there was a weapon. In this case however, the mere placement of Arsenio's hand being in his pocket combined with Arsenio's statement caused Mr. Kristiansen to believe there was a weapon. Whether there was a bulge or movement is not relevant; whether the physical act or gesture caused Mr. Kristiansen to believe there was a weapon is.

The trial court further understood this when it denied defendant's motion to dismiss arguing the State had failed to establish there was a display of what appeared to be a firearm. The court said:

> In ***Kinard*** and also ***Henderson*** and some of the other more recent cases, they have upheld the convictions or at least allowed the matters to go to the jury where there is both the words and what appears to display, even though someone doesn't actually see a weapon, a hand in the pocket, the subjective belief by the alleged victim that the person does, in fact, have something in his pocket he believes to be a firearm has been found to be sufficient. So I will deny the motions to dismiss on that basis.

2RP 220-221.

Thus, because Arsenio's words and placement of his hand in his pocket implied to Mr. Kristiansen that Arsenio had a weapon, there is sufficient evidence to find defendant's accomplice displayed what appeared to be a firearm.

b. Sufficient Evidence Existed to Prove Arsenio was Defendant's Accomplice

Accomplice liability is a theory of vicarious liability that makes a person accountable for the actions of others; once established, accomplice liability is indistinguishable from principle liability. ***State v. McDonald***, 138 Wn.2d 680, 688, 981 P.2d 443 (1999). To be an accomplice, an individual must act knowing his actions will promote or facilitate the commission of a crime. RCW 9A.08.020.

Accomplice liability is not an alternative means of committing a crime. ***State v. Haack***, 88 Wn. App. 423, 428, 958 P.2d 1001 (1997). The elements of the crime are the same for both a principal and an accomplice. ***State v. Carothers,*** 84 Wn.2d 256, 264, 525 P.2d 731 (1974), *overruled on*

other grounds by ***State v. Harris***, 102 Wn.2d 148, 685 P.2d 584 (1984). An information need not allege accomplice liability in order to state the nature of the charge -- charging the accused as a principal is adequate notice of the potential for accomplice liability. ***State v. Teal***, 117 Wn. App. 831, 838, 73 P.3d 402 (2003), *review granted*, 151 Wn.2d 1009, 88 P.3d 965 (2004); ***State v. Rodriguez***, 78 Wn. App. 769, 774, 898 P.2d 871 (1995), *review denied*, 128 Wn.2d 1015, 911 P.2d 1343 (1996).

In the present case, the jury was instructed that:

> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he 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.

CP 66-88. Jury Instruction No. 13.; 2RP 237-238.

Defendant was charged and the jury was instructed on first degree robbery. CP 53-54; 66-88. Jury Instruction No. 12.; 2RP 234-235. The jury was also instructed on the lesser included offense of second degree

robbery. CP 66-88. Jury Instruction No. 17.; 2RP 237-238. The elements of each of the crimes were the same except that first degree robbery included the additional element:

> (5) That in the commission of these acts the defendant or an accomplice displayed what appeared to be a firearm or other deadly weapon.

CP 66-88. Jury Instruction No. 12.; 2RP 237-238.

The court instructed the jury "to convict the defendant of Robbery in the First Degree, the State is not required to prove that the defendant knew that an accomplice displayed what appeared to be a firearm." CP 66-88. Jury Instruction No. 8.; 2RP 233.

There is no dispute in the present case that a jury could find defendant guilty of robbery in the second degree. *See* Brief of Appellant, 21. Defendant contends the evidence was insufficient to find him guilty of first degree robbery because he did not know his accomplice, Arsenio, was going to display what appeared to be a firearm. However, the court's instructions to the jury make it clear that the State was not required to prove defendant had knowledge of this fact.

Rather, as long as there is sufficient evidence for the jury to find defendant had an accomplice who displayed what appeared to be a firearm, there is sufficient evidence to find defendant guilty of robbery in the first degree. In the case at hand, there was sufficient evidence to find Arsenio displayed what appeared to be a firearm as detailed above and

there was also sufficient evidence for the jury to find Arsenio was defendant's accomplice.

Defendant told police that he went to UPS to steal the phone with two other people, a driver and Arsenio. 2RP 210. Defendant said he normally works alone and did not intend for Arsenio to come with him, but since he was with him defendant asked Arsenio to get out of the car and stay close to him. 2RP 211. Defendant even admitted he brought Arsenio as backup to the officers during the interview. 2RP 216. By going to UPS with the intent of stealing the phone and having Arsenio "stay close", defendant was using Arsenio as a backup in case something were to happen.

Having another person there while he was meeting Mr. Kristiansen whom he likely believed was alone, implies a show of force to Mr. Kristiansen with two against one. It also allows for someone to step in, in the event something does go wrong. Arsenio was present at the scene and ready to assist. The fact that defendant told Arsenio to "stay close" shows Arsenio was there and not only knew what was going to happen, but was ready to step in if something did happen. These actions and statements show Arsenio was defendant's backup and thus, his accomplice under the law.

Mr. Kristiansen also testified defendant walked back outside for five minutes before coming back inside the building. 2RP 183. Defendant never reached for or made any mention of his wallet. 2RP 185. Taking all

inferences in favor of the State, it's likely defendant was walking back out to tell Arsenio what was happening and to be ready. After defendant went back inside and stole Mr. Kristiansen's iPhone, Mr. Kristiansen gave chase and Arsenio approached him from behind and said "Do you want to get shot? Keep running." 2RP 186. Arsenio had his hand in his sweater and Mr. Kristiansen believed he might have a gun. 2RO 187. Mr. Kristiansen was afraid and immediately went back inside and called the police. 2RP 187, 202. The sequence of events, defendant returning to tell Arsenio they were good to go after scoping out the situation and Arsenio approaching Mr. Kristiansen after he starts chasing after defendant, all imply there was a plan to this robbery where both individuals participated.

Further, defendant fled and got back into the same car he had arrived in with Arsenio. 2RP 211. Arsenio also ran and got inside the vehicle while laughing and telling defendant that he had just threatened to shoot the individual. 2RP 211-212. When one looks at the bigger picture, it is clear that the robbery began when defendant and his accomplices arrived on the UPS campus and it ended when defendant and his accomplices left the UPS campus. The robbery was not just the single event where defendant stole the iPhone from Mr. Kristiansen's hand; it was the plan defendant, Arsenio and the driver executed during those ten minutes on the UPS campus.

Drawing all inferences in favor of the State, it is overtly evident that Arsenio acted as defendant's accomplice that day. While defendant

may contend he did not know what Arsenio was going to do, under the law stated above, defendants are responsible for the actions of their accomplices. Because Arsenio was acting as defendant's accomplice and displayed what appeared to be a weapon, there was sufficient evidence for the jury to convict defendant of first degree robbery.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions.

DATED: March 24, 2014.

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WSB # 42892

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4.25.14 Teresa Kahn
Date Signature

PIERCE COUNTY PROSECUTOR

March 25, 2014 - 9:21 AM

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