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

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

GARY D. ENGELSTAD JR.,
JOSEPH L. SHOUSE,

Appellants.

AMENDED RESPONDENT'S BRIEF

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1. SUFFICIENCY OF THE EVIDENCE:

i. The State proved beyond a reasonable doubt, each and every element of Robbery in the First Degree as charged in Counts One and Three – Vacation by the Trial Court of Counts Eight and Nine did not negate an element of these offenses, and the property of Ms. Flood was taken from her person or in her presence.

ii. The State proved beyond a reasonable doubt, each and every element of Assault in the Second Degree as charged in Count Four, as to Dawn Flood, and Count Five as to Julie Curry.

iii. The State proved beyond a reasonable doubt, each and every element of Unlawful Possession of a Firearm in the First Degree as charged in Count Seven.

iv. The State proved beyond a reasonable doubt, that Joseph Lee Shouse and Gary Engelstad Jr. acted as principals or accomplices in all of the charged offenses.

v. The State proved beyond a reasonable doubt, that a real gun was involved for purposes of the firearm enhancements.

2. THE TRIAL COURT DID NOT ERROR IN ITS ADMINISTRATION OF THE TRIAL:

i. After the jury verdict in this case was returned, the trial

court did not violate the defendants' constitutional rights prohibiting double jeopardy when it ruled as a matter of law that Counts One and Two, and Counts Three and Four did not merge.

ii. Because the trial court ruled correctly on the issue of double jeopardy, the calculated offender score was correctly computed; Counts three and four, the assault second degree convictions were correctly not vacated; and the applicable firearm enhancements were properly applied.

iii. The record does establish that the jury was in fact given an oath as required by CrR 6.6; and the defendants were not denied their right of allocution.

3. **THERE WAS NO PROSECUTORIAL MISCONDUCT, BUT IF THERE WERE ANY ERRORS, SUCH ERRORS WERE HARMLESS:**

i. There was no error in the direct examination of Stephanie Van Comen or the use of her testimony in closing argument.

ii. The state did not attempt to elicit testimony from a police witness as to another witness' credibility, but the fact that such testimony occurred is harmless error.

iii. The prosecutor did not comment on Mr. Shouse' Constitutional Right to Remain Silent in closing arguments.

iv. The prosecutor did not, during closing arguments,

introduce evidence that was outside the record.

4. **THERE WAS NO CUMULATIVE ERROR REQUIRING REVERSAL OF THE APPELLANTS' CONVICTIONS AND SENTENCES.**

RESPONSES TO ISSUES RELATING TO ASSIGNMENTS OF ERROR:

The State is not further commenting on Issues related to Assignments of Error, as the State believes that the issues are sufficiently presented in the Responses noted above.

B. STATEMENT OF THE CASE:

1. Procedural History:

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

Mr. Shouse and Mr. Engelstad filed motions for severance and the trial granted the defendants' motion to sever, as to two co-defendants Mr. Hinojos and Mr. Ramirez; and denied the severance motion as to Mr. Shouse and Mr. Engelstad. (RP 4, I. 1 to RP 15, I. 10[1]) The Appellant's

[1] Counsel for Appellants did some briefing with an original set of Verbatim Report of Proceedings. These were deemed insufficient, and an amended set was produced. The State received only the second set of Verbatim Report of Proceedings and has cited

went to trial on the Second Amended Information filed on November 15, 2011 (CP 13, 24 – 28) The State alleged that all of the crimes were committed on or about October 20, 2010 at the Gerald Moccardine Residence, with respective listed victims of Gerald Moccardine, (Moccardine) Dawn Flood, (Flood) and Julie Curry (Curry). (CP 24-28; CP 256-260) (RP 20, I. 1-22)

The jury found Shouse and Engelstad guilty on all counts, and answered the special verdict form concerning the firearm enhancements: "Yes." (CP 155; CP 157; CP 219; CP 221) A sentencing hearing commenced on February 9, 2012, at which time the parties argued over sentencing possibilities, and the defendants had their opportunity for allocution. (RP 716, III. 6 to RP 733, III. 9) Written Judgment and Sentences were entered on February 14, 2012, on Counts One through Seven. (CP 179; CP 227; RP 733, III. 14 to RP 747, III. 9) Motions and Orders of Dismissal with Prejudice were entered on Counts Eight and Nine as to both defendants consistent with the Judge's ruling on February 9, 2012, determining that Count One merged with Count Eight and Count Three merged with Count Nine. (CP 300) Both defendants timely

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from that set of reports, consisting of three volumes, covering a hearing held on November 14, 2011, trial dates of November 15, 16, 17, 22, and 23, 2011, as well as sentencing hearings held on February 9, and 14, 2012, as well as a hearing on November 4, 2011.

appealed.[2] (CP 178; CP 241)

2. Trial

In October of 2010, Van Comen and Shouse were living together in a residence on Dolarway that they rented from her father Peter Van Comen. The residence where they lived together burned down on October 13, 2010, approximately a week before the events at the Moccardine residence giving rise to the charges in this case. (RP 484, III. 5-21; RP 485, III. 2-3)

Van Comen and Shouse were in a relationship for 2 years, had a child together, but were not dating at the time of trial, although she admitted that she still cared for Shouse. (RP 475, III. 22-25; RP 476, III. 1-4; RP 499, III. 5-20) Van Comen had known Engelstad for 12 – 13 years. (RP 476, III. 12 – 15) Van Comen knew Ramirez and Hinojos but only met them a couple of times through Engelstad. (RP 476, III. 24-25; RP 477, III. 1-16)

Gerald Moccardine (Moccardine) lives at 1515 Stephens Road Ellensburg, knows Shouse and Engelstad, and identified both of them during trial. (RP 280, II. 5-21) Approximately a week before the incidents on October 19-20, 2010, Moccardine had a conversation with

[2] The appeals of the two defendants, case numbers 306402 (Shouse) and 306411 (Engelstad) have been consolidated.

Shouse at the Shouse/ Van Comen property, to discusses scrapping items and clean up. (RP 282, II. 8-25; RP 283, II. 2 to RP 284, II. 12) Moccardine and Shouse reached an agreement on some items, but not as to all items. (RP 285, II. 17 to RP 286, II. 10) Moccardine, based upon the agreement went to the Shouse property about a week before, and Shouse arrived and an argument ensued over the work being done. Moccardine decided it was not worth it, they unloaded the items, and left the property with nothing. (RP 287 II. 13 to RP 289, II. 7) Katrina Willard (Willard) claimed she was with Shouse on the evening that this argument took place. (RP 558, III. 19-25) She could not say whether Moccardine had taken anything. (RP 564, III. 3-18) Willard did not hear Shouse indicate what if any property had been taken by Moccardine. (RP 565, III 24 to RP 566, III. 1) Willard did not see Moccardine take any property when he left. (RP 567, III. 11 to RP 568, III. 22)

About October 17, 2010, Shouse and Engelstad came to Moccardine's property in the morning while he and Dawn Flood (Flood) were present. (RP 291 II. 21-25; RP 177, II. 22-25) Flood's first knowledge of them was when the two of them came into the trailer. (RP 179, I. 9-10) The two were looking around, going through things, and Shouse was saying things like "no, that wasn't mine". Shouse claimed that a box Flood took from a garbage pile in the yard was his, but he did

not take the box. (RP 180, I. 1-25) Shouse and Engelstad appeared upset with Moccardine. (RP 181, I. 24) Shouse was walking around with a hammer, trying to be intimidating." Shouse asked Flood if she "would freak out if he smashed Jerry's (Moccardine) hands." (RP 182, I. 3-7) The hammer had been in Shouse's hand when he walked into the trailer – It was a short fat sledgehammer. (RP 182, I. 13-21) Shouse and Engelstad were walking around the trailer picking up items and Flood was identifying who they belonged to, including items that belonged to her. (RP 183, I. 1-25) Flood saw Engelstad take an impact wrench from the trailer. They were in the trailer for about 45 minutes to an hour and on the property about 2 hours total. (RP 184, I. 19 to RP 185, I. 25; RP 248, I. 1-11) They came and left together in the same vehicle. (RP 186, I. 1-9)

Moccardine watched Shouse and Engelstad walked around outside on his property, and was with them some of the time. They were looking at various things, going into containers and talking. (RP 292, II. 6-12) Moccardine indicated that Shouse did not ask Moccardine if he had any of Shouse's property, never asked if Moccardine had taken any property, and never asked Moccardine why he took Shouse's property. Moccardine described the visit as friendly. (RP 293, II. 13 – 21, 24) Moccardine did not see them take anything, although Engelstad had put a pile of things together that Moccardine picked up and put them away. After they left he

discovered items missing. (RP 294, II. 7-15; RP 341, II. 23 to RP 342, II. 6) The two men left together in Engelstad's vehicle. The only thing that either one of them asked for was antifreeze. (RP 295, II. 2-20)

Moccardine and Flood next saw Shouse and Engelstad on October 19, 2010, after 10:30 at night. Julie Curry (Curry) was present with them on the property in the trailer at that time. (RP 296, II. 16 to RP 297, II. 2; RP 405, II. 5-7) Moccardine's dog and Curry's two dogs started barking, Curry started out to her van to get cigarettes. Curry saw 4 people standing around her van. (RP 407, II. 11-18) Curry stuck her head in the trailer and said "there is people here". (RP 408, II. 7-9) Moccardine and Flood got up and Curry backed away from the trailer door as there were 4 people now right in front of the door, basically blocking the doorway. The three of them were standing next to each other at the entrance right inside of the door. (RP 192, I. 2; RP 298, II. 4-25; RP 411, II. 10-22) Moccardine recognized Shouse and Engelstad from about 8 feet away. (RP 299, II. 8-15) Flood first saw Shouse and after that Engelstad. (RP 188, I. 10-11) Curry only recognized Engelstad (at that time). (RP 412, II. 14 -23)

Moccardine did not recall saying anything to Shouse, but did recall Engelstad complaining about a car deal. (RP 300, II. 2-19) As Moccardine was talking to Engelstad, Engelstad struck him in the face (Neither Flood nor Curry saw this blow). (RP 300, II. 24-25) Engelstad

stepped inside the trailer following this blow. (RP 304, II. 15-24) Flood does not recall if Shouse said anything as Engelstad was stepping into the trailer, but shortly after heard Shouse complain about the cops being called two days prior and wanting to know why they called the cops. (RP 188, I. 1 to RP 189, I. 22; RP 192, I. 14-22) Flood heard Engelstad telling Moccardine he was going to take (Moccardine's) alternators. (RP 193, I. 4-16) Curry described what was transpiring as being very heated. (RP 414, II. 11)

Moccardine and Curry saw Engelstad pull a gun and point it at the individuals in the trailer. Moccardine saw at least one other gun at that time. Moccardine was focused on the barrel of the gun, and described it as an older type/style of gun. (RP 310, II. 7-21; RP 311, II. 8-14; RP 311, II. 16-17; RP 314, II. 19-24) (RP 414, II. 11-14; RP 414, II. 24 to RP 415, II. 17) Curry was scared enough to try ducking under people's arms to get to the back of the trailer. Curry thought the people were pushing into the trailer, and believed that at least two came into the trailer. (RP 415, II. 22 to RP 417 II. 7)

Engelstad either threw or swung a hard object striking Moccardine in the head causing him to bleed, and causing him to be "pretty out of it". (RP 305, II. 11-16) (RP 195, I. 14 to RP 196, I. 12) Moccardine saw his billfold on the floor and bent to pick it up. (RP 308, II. 5-19; 25) It was at

this point that Flood first saw Engelstad with a gun and she attempted to intercede, tugging on Engelstad's sweat shirt saying "knock it off, come on, Junior, What's going on? Why do you got to pull a gun?" Engelstad said he thought Moccardine was reaching for something. (RP 196, I. 20 to RP 197, I. 3; RP 199, I. 4-11) Engelstad asked Moccardine what he going after, and Moccardine indicated it was just his billfold. Engelstad then took his billfold, and took his last $15.00. (RP 308, II. 5-19; 25; RP 194, I. 6-11) Flood described the gun held by Engelstad as being a grey handgun, but she could not describe a model or make. (RP 197, I. 4 -18)

A second person stuck his head and arm in and pointed the gun across the room, doing a room check, pointing the gun at each of the three victims and making sure back up was not needed. (RP 198, I. 1-3; RP 199, I. 14 to RP 200, I. 15) Flood assumed Shouse was still just outside, but was not certain because Engelstad blocked her view. (RP 194, I. 6 to RP 195, I. 12) Engelstad put his gun down and left the trailer. (RP 201, I. 4-8; RP 308, II. 24-25)

There was a conversation outside the trailer and the second guy stepped in and stood ½ way inside and ½ the way outside the door to guard them. (RP 315, II. 15-22; RP 201, I. 4-25) Someone from outside told the guy in the doorway to take their cell phone batteries, which he did, later taking their phones as well. (RP 202, I. 1-18; RP 309, II. 4-8) Curry was

able to again confirm this man had a gun while she was outside the trailer, holding the gun on Flood and Moccardine so that they had to stay in the trailer. (RP 417, II 20 – 25)

Moccardine laid down, but heard them going through everything outside, going into all the different areas on the property. Having seen the gun, he decided that they could take anything they wanted. (RP 316, II. 15-18) Flood heard them outside knocking things over, and people talking and laughing. (RP 204, I. 12 to RP 205, I. 4) Curry had been allowed to leave the trailer. She was outside when she recognized Shouse as one of the individuals present when he asked her to move her van so that they could get into a storage container, which she did. (RP 420, II. 15 -20; RP 421, II. 15-18) Curry saw people walking on top of a trailer, and she observed both Shouse and Engelstad on the property and spoke with both of them. (RP 423, II. 15 to RP 425 5) The people were talking and opening and closing doors and stuff, just basically looking around. (RP 426, II. 1-10)

While the initial events were short, the whole event took from 40 minutes to about an hour and a half. Moccardine indicated that he was scared. At one point in time, someone knocked on the door and they talked about switching places with the guy in the trailer, but that did not happen. When they had what they wanted, they retrieved the guy at the

door and loaded into two vehicles and left. (RP 205, I. 8-23; RP 317, II. 4-18; RP 318, II. 12-19)

Moccardine went out after a bit and started to see what was missing. (RP 320, II. 6-16) Flood also went out to check on all of her valuables that she had in a backpack in her car because she assumed they (Junior and Shouse) were coming back. When she went to her vehicle, everything but her clothes which were lying on the ground, were missing. (RP 207, I. 14-17; RP 211, I. 17 to RP 212, I. 16) She and Moccardine were a bit concerned about calling the police because they were afraid of retaliation. (RP 208, I. 1-17)

Moccardine spoke with Detective Jerry Shuart and Deputy Foster to create a list of items taken. (RP 324, II. 6-17) The actual document and values were later introduced into evidence. (RP 326, II. 15-25; RP 327, II. 1 to RP 328, II. 6) Flood spoke with Corporal Nale and Deputy Foster about missing property. The document that reflected the items and values was admitted into evidence. (RP 209, I. 1 to RP 211, I. 16) Additionally, Flood identified one of the stolen items that had been recovered by Deputy Foster from Hinojos as being her son's PSP. Flood later had a conversation with Shouse who told her that he didn't know that anything of hers was taken and that the whole situation had gotten out of control but that Moccardine had it coming. (RP 213, I. 1 to RP 214, I. 1)

Moccardine indicated that he owed no debt to Engelstad or Shouse and they had no claim of ownership on any of the items taken. (RP 328, II. 12-21) Flood had no personal knowledge of Moccardine having taken anything from Shouse. (RP 258, I. 6-8) Moccardine and Flood testified that his property is not open to the public, there are no trespassing signs posted, and neither Shouse or Engelstad had permission to come to his property and remove anything. ((RP 255, I. 11 to RP 257, I. 8; RP 332, II. 20-25; RP 333, II. 1-7) Flood had no doubt that Engelstad caused the injuries to Moccardine; that what Engelstad had in his hands was a gun; and no doubt that what was held in the hands of the other person was a gun. (RP 263, I. 1 – 13)

Van Comen was called to testify for the state of Washington under the provisions of a plea agreement which she discussed. She indicated that she was getting a break on a burglary, and was promised assistance with CPS. She was asked what the assistance to her was conditioned upon, and like much of her anticipated testimony, it did not go exactly according to plans, as she testified that the assistance was premised upon her telling the truth. (RP 499, III. 7-11; RP 499, III. 21 to RP 500, III. 8)

Among some of the surprises for the State, was Van Comen's testimony that:

While she was at Moccardine's that night, she did not see Engelstad or Ramirez. (RP 477, III. 22 to RP 478, III. 5)

Shouse had her call Moccardine in advance to see if it was okay for Shouse to come out and get his property. (RP 479, III. 12 – 25)

She saw Moccardine come out of his trailer, meet Shouse, have a pleasant conversation, and watched Moccardine load things up in Shouse's vehicle. (RP 481, III. 6-22; 24-25; RP 482, III. 1-3)

She did not see any weapons at Moccardine's, but indicated that she did see weapons later at her and Shouse's Dolarway property. (RP 483, III. 9-14)

Van Comen was somewhat helpful to the state, testifying that while Engelstad and Ramirez were not present at Moccardine's, they did show up together at the Shouse/Van Comen property, at which time she observed Shouse unloading tires, and saw Engelstad, Ramirez, and Hinojos looking at and discussing a couple bags of jewelry. (RP 483, III. 9-14; RP 485, III, 4-11; RP 486, III. 11-25. Van Comen later backtracked on the guns possessed by Mr. Engelstad and Ramirez – only one gun and maybe not a real gun. (RP 485, III. 12-17; RP 486, III. 2-8)

Van Comen was then asked about prior statements to law enforcement for purposes of placing her credibility into question, was asked about her deal with the state, and made the statement about "telling the truth". (RP 488, III 1 to RP 500, III. 8) While the prosecutor did not

follow up on her statement about telling the truth, either on direct, cross or in closing argument, counsel for Shouse followed up on that line of inquiry in his cross examination, with differing results. (RP 512, III. 24 to RP 513, III. 8)

Various law enforcement officers testified during the trial as to their role in the investigation; to corroborate evidence provided by the witnesses, including Van Comen; and to impeach Van Comen's testimony. Officer Cory Baird had a conversation with Shouse about 6 days after the incident. Shouse was questioned about property being stolen from his landlord. Shouse mentioned Moccardine as a likely suspect, but was unwilling to say why Shouse believed that to be true, choosing not to provide any information to Officer Baird. (RP 543 III. 1 to RP 545, III. 11)

C. ARGUMENT:

1. SUFFICIENCY OF THE EVIDENCE:

When reviewing a challenge to the sufficiency of evidence, the court must assume the truth of the state's evidence and view it most strongly against the defendant and in a light most favorable to the state. *State v. Tinajero*, 154 Wash.App. 745, 228 P.3d 1282 (2009). An appellate court may only determine whether there was substantial evidence tending to support all necessary elements of the

crime. It is not required of the court to reach an opinion of a defendant's guilt beyond a reasonable doubt. Rather, regardless of the court's opinion, the only requirement is that the court be satisfied that there is substantial evidence to support the state's case or to support proof as to a particular element of a crime that has been challenged. *Tinajero* at 750-752, 228 P.3d 1282 (2009).

Courts must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness in determining if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Reichert*, 158 Wash.App. 374, 389-390, 242 P.3d 44 (2010)

i. The State proved, beyond a reasonable doubt, each and every element of Robbery in the First Degree as charged in Counts One and Three- Vacation by the Trial Court of Counts Eight and Nine did not negate an element of these offenses, and the property of Ms. Flood was taken from her person or in her presence.

a. Insufficient evidence – dismissal of charges.

It is incorrect to state that the record does not reflect a basis for the dismissal of Counts Eight and Nine by the trial court. This argument fails because the record is NOT silent as to the basis for dismissal of Counts Eight and Nine, Theft in the Second Degree involving Gerald Moccardine and Dawn Flood.

Following acceptance of the jury verdict, the Court dismissed Counts Eight and Nine with prejudice as to both defendants. (CP 240) The basis for dismissal appears several places in the record. The basis appears in the Motion and Affidavit for Order of Dismissal with Prejudice – a prior judicial ruling on merger. (CP 30) The basis also appears in the transcript of proceedings from February 9, 2012 and February 14, 2012 (RP 717, III. 1 to RP 718, III. 25)

The argument that the court arrested judgment based upon a lack of evidence also unsupported by the record. Shouse, post-verdict, filed a Motion for Arrest of Judgment and New Trial on December 2, 2011. The basis provided for Arrest of Judgment was insufficient evidence as to all nine (9) counts under CrR 7.4. The basis cited for a new trial under CrR 7.5 was errors of law, a verdict contrary to law and evidence, and all other bases set forth under CrR 7.5(a). (CP 159) The Court denied this motion on February 9, 2012 (RP 716, III. 9-10) Counsels' argument that the Court arrested judgment based upon insufficient evidence (value of property stolen) is not supported by the entry of restitution to Gerald Moccardine in the amount of $2,833.00 and to Dawn Flood in the amount of $1,910.00 in the Defendants' Judgment and Sentences. (CP 179; CP 227)

It is clear from the record that the Court denied the motion to

arrest their judgments. The Court did make a finding, with the agreement of all parties that the Robbery and Theft charges merged for double jeopardy purposes. This ruling by the Court did not negate any element as found by the jury as to Counts One and Three, and the convictions of the Appellants on these counts should be upheld.

a. Insufficient evidence – property not taken from person or in presence of Flood.

Turning to the argument of Ms. Flood having nothing removed from her person, the record shows that the jury was properly instructed on the definition of what acts are necessary to be shown to prove the crime of Robbery. (CP 118) Counsel argues that if a person cannot reach their property or does not know what is being stolen, that they have not had anything taken from their person or in their presence.

The State believes the case of *State v. Nam,* 136 Wash.App. 698, 150 P.3d 617 (2007) is most instructive. In *Nam*, the state chose not to charge in the alternative, and thus were stuck with only the alternative that they chose. The result was a finding of insufficient facts to prove that the victim's purse was taken from her person, when it was removed from the back seat of her car, and she was not aware of the theft until after the fact. The Court indicated that personal property is taken in the presence of a victim if …, **or if they are**

precluded from exercising such control (possession/retention) because their ability to do so is **overcome with violence or prevented by fear**. *State v. Nam,* 705, 150 P.3d 617 (2007)

That is exactly the case presented by the facts in this case, especially given the highly deferential treatment given to the jury on issues of evidence and the credibility of witnesses. Flood suspected that her items were being gone through and possibly stolen This is reasonable because she heard the people going through everything on the property; she had to verbally prevent theft of her items by Engelstad and Shouse two days earlier; and because she had suspected they would return, she had packed up all of her valuables and placed them into her car.

It was reasonable for her to feel trapped and unable to leave the trailer because they had left an individual with a gun to guard the door. She and others had already been assaulted before the individuals left the trailer, and they subsequently posted a guard to keep them inside the trailer.

Under the facts and circumstances of this case, given the inferences that can be drawn from the evidence, and giving deference to the jury, there is sufficient evidence to support a conviction premised upon the taking of property in the presence of Dawn Flood.

pointed at her by the second individual, unlike with Engelstad, she testified to being clearly apprehensive about her safety from this individual, and it can be inferred from her actions, or lack thereof after his appearance, that she was reasonably afraid of imminent harm. After the gun was pointed at her by the second individual, she did not continue to argue; she was not willing to try and leave the trailer, and she was no longer willing to challenge them on their actions.

Given the testimony and reasonable inferences, and properly deferring to the opinion of the jury, there was sufficient evidence for the jury to reasonably find that it was the intent of those involved to create apprehension and fear of imminent bodily injury and it was reasonable to find that such acts did in fact create such fear in Flood. The convictions for Assault in the Second Degree as to Flood should be upheld.

iii. The State proved, beyond a reasonable doubt, each and every element of Unlawful Possession of a Firearm in the First Degree as charged in Count Seven.

Appellant Shouse claims there is insufficient evidence to convict him of this crime based upon a lack of showing of actual or constructive possession of a firearm. It is claimed by Shouse that no one testified to seeing him with a firearm. Shouse's arguments were

ii. The State proved, beyond a reasonable doubt, each and every element of Assault in the Second Degree as charged in Count Four, as to Dawn Flood, and Count Five as to Julie Curry.

The Jury was properly instructed on the definitions and elements related to the assault charges. (CP 120; CP 121) The State alleged and there was sufficient evidence to prove that there was an act:

> with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury. (CP 121)

Engelstad pointed his gun at Curry: She was scared, and apprehensive of imminent harm. Curry immediately began to shrink and duck under arms to push to the back of the trailer. Utilizing the deferential standard for sufficiency challenges, there is substantial evidence to support the jury verdict as to Count Five relative to Curry. It is reasonable to infer that if you point a gun at someone your intent is to create apprehension and fear of imminent bodily injury, and in fact, that is what Curry experienced.

Flood downplayed her fears as to the gun possessed by Engelstad as to her, although she was certainly fearful of imminent bodily injury to Moccardine. However, as to the gun possessed and

joined by Engelstad, but he cannot make the same claim, as all three victims claimed to see a firearm in his hands. The only argument that appears available to Engelstad, is that the state failed to prove that he possessed a real gun, which we will address later.

Appellant Shouse maintains that the only evidence that he may have had a gun came from the improper use of impeachment testimony as to Van Comen, using her testimony to place a shotgun in Shouse's hands. It is clear from a full review of the record, that the State never alleged as proof of this crime that Shouse had a shotgun – in fact, all of the evidence the state produced was contrary to a shotgun ever being seen by the victims, which is why it was used as impeachment evidence.

The State's theory for possession of a firearm, as to Shouse, was constructive possession. The State disagrees that one cannot be in constructive possession while another is in actual possession. It is clear that this argument is not even supported by the case cited by counsel for this proposition. The Court in *State v. Reichert,* 158 Wash.App. 374, 390, 242 P.3d 44 (2010), affirmed that "constructive possession need not be exclusive."

The State agrees that actual possession is proven when a defendant has physical custody of an item, and that constructive possession occurs when a defendant has the ability to exercise dominion and control over an

item. The State also agrees that dominion and control occurs if an individual is shown to have the immediate ability to convert the item to their actual possession. The resolution of "possession" as to Shouse hinges on his liability under theories of principal and accomplice. In other words, were Shouse, Engelstad, Ramirez, Hinojos, and Van Comen acting in concert in committing crimes with sufficient knowledge to find them accountable as a principal or an accomplice?

Shouse contends that the evidence only showed that he was in mere proximity to others who were in possession of a firearm. That he was not present in the trailer when Engelstad pulled out the gun; that he was not present when the 3rd individual pulled out a gun, and that we have shown no evidence of a plan or scheme to commit these crimes.

The State contends the opposite is true. The evidence demonstrated that:

> Shouse claimed to be a victim of a theft by Moccardine.
> Shouse was upset when he found Moccardine at his house a week earlier.
> Shouse and Engelstad went to Moccardine's on the 17th of October, and on that date Engelstad rummaged through the trailer pulling out items showing them to Shouse, who directed the answers of yes or no as to ownership.

The evidence demonstrated they were working together on the 17th. The evidence showed that Shouse was in control on the 17th. The evidence showed that they arrived and departed together on the 17th.

And what about Shouse's comment about whether Flood would freak out if he bashed Moccardine's hands with a sledgehammer? While such an act did not occur on the 17th, two days later, Moccardine is struck with a heavy object in the head by Engelstad. On the 19th, 5 individuals were present together on the property at the same time. They all came together, they all left together, and they all rode together in two vehicles, and they all returned to the same meeting point later. Was this merely coincidence? No. A jury could properly infer a common scheme and/or plan.

Shouse claims that he was not present for the assault upon Moccardine or the pulling of the gun by the individuals – but the evidence, and inferences properly drawn support an opposite conclusion. The amount of time that passed was minimal. Shouse was the first seen at the trailer, and there was no testimony that he left the area. Immediately after the assaults with the two weapons, there was a conversation outside of the trailer door. Then the second gentleman stationed himself in the doorway with a gun, which he put in a holster. Then, and only then did the witnesses start to hear people opening and closing items. Shouse was the one who directed Curry to move her van so they could get into a trailer. It is a reasonable inference, that these five individuals had knowledge that their actions would facilitate the crimes that were being committed.

The evidence support a conclusion that Shouse was soliciting, commanding or encouraging the others to get his property back in any fashion possible. The evidence shows, that they came together, searched buildings together, held folks captive in the trailer after a joint conversation, and left together. This is sufficient to find that they did, with knowledge, aid each other in the commission of these crimes.

The evidence showed that Shouse exercised dominion and control over the items taken from Moccardine's property, as well as the actions taken by all while they were there. Shouse was the first person to the door that night, after having been in control two days earlier. The items taken that night were loaded up into the vehicle that Shouse drove to the location. The items stolen and the individuals involved all returned to Shouse's property, where they began the process of dividing the spoils of their actions.

Based upon reasonable inferences drawn from the direct and circumstantial evidence, a rationale trier of fact could reach the logical conclusion that Shouse and the others were principals and accomplices in these crimes, that they knew what crimes they were committing, and that Shouse did exercise dominion and control over the weapons, the people in actual control of the weapons, and how the weapons were used. The evidence supports a rational trier of fact determining that Shouse was

much more than merely present at this location. Given the proper review of the evidence, there was sufficient evidence to find Shouse and Engelstad guilty of count Seven, Unlawful Possession of a Firearm.

iv. The State proved, beyond a reasonable doubt, that Joseph Lee Shouse and Gary Engelstad Jr. acted as principals or accomplices in all of the charged offenses.

This issue was sufficiently addressed above.

v. The State proved, beyond a reasonable doubt, that a real gun was involved for purposes of the firearm enhancements.

In this case the jury was properly instructed on the applicable definitions of a firearm, and there is no argument as to improper jury instructions. (CP 114; CP 115) The jury was also instructed that for purposes of the special verdicts, the State had the burden of proving beyond a reasonable doubt that the defendant(s) or an accomplice was armed with a firearm at the commission of the corresponding crime. (CP 144)

Under the instructions provided to this jury, the problem that was addressed in *State v. Tongate,* 93 Wash.2d 751, 613 P.2d 121 (1980) is not present. This jury was instructed of the need for proof beyond a reasonable doubt - that the firearm was not just something that resembled a firearm, but that they in fact believed that the

evidence showed beyond a reasonable doubt that a firearm was used in the commission of these crimes.

The Court in *Tongate* indicated that evidence (to prove the presence of a firearm in the commission of a crime) is sufficient if there is a witness who has testified that during the commission of the crime such a weapon was present. The Court further indicated that such evidence could be circumstantial and that it was not necessary for the state to produce such a weapon. Id at 754, 613 P.2d 121 (1980).

In our case, three witnesses testified to seeing a firearm in the hands of Engelstad and the 2nd person to enter the trailer. Flood had absolutely no hesitancy in indicating that Mr. Engelstad was armed with a firearm, nor did she have any hesitancy that Ramirez, the person who entered behind Engelstad, had a firearm. In *Tongate,* a single witness was sufficient for a rationale trier of fact to reach a conclusion that a firearm was present during the commission of a crime, even if no firearm, as in this case, is located by law enforcement. Flood's testimony is bolstered by that of Moccardine and Curry, as well as Van Comen. There was sufficient evidence for a rationale trier of fact to have found the appellants to have been armed with a firearm during the commission of these crimes beyond a reasonable doubt.

2. THE TRIAL COURT DID NOT ERR IN ITS ADMINISTRATION OF THE TRIAL:

i. After the jury verdict in this case was returned, the trial court did not violate the defendants' constitutional rights prohibiting double jeopardy when it ruled as a matter of law that Counts One and Two, and Counts Three and Four did not merge.

Article I, section 9 of the Washington State Constitution provides that no person shall be ... twice put in jeopardy for the same offense, which is in accord with similar protections provided by the United States Constitution. It is clear that the State may bring and a jury may consider multiple charges arising from the same criminal conduct in a single proceeding. *State v Freeman*, 153 Wash.2d 765, 108 P.3d 753 (2005) (dealt with the question of whether a conviction for Robbery in the First Degree could be punished separately from an Assault in the First Degree and whether a Robbery in the First Degree could be punished separately from an Assault in the second degree). The question, as to double jeopardy analysis, according to the *Freeman* Court, was whether in light of legislative intent, the crimes constitute the same offense. *Freeman* at 771, 108 P.3d 753 (2005). The Court then went on to discuss the tests to be applied.

The first consideration is whether or not there is express or implicit legislative intent that can be determined by the court as to whether the

legislature intended to punish both crimes separately. An example of an explicit statement of legislative intent is the Burglary Anti-Merger statute found in RCW 9A.52.050. However, in most instances, the question is not so clear, and must be discerned by the courts. *Freeman* at 771-772, 108 P.3d 753 (2005).

If the legislative intent is not clear, Courts will then apply the *Blockburger* test, also known as the "same evidence" or "same elements" test. Under this test, if each crime contains an element that the other does not, courts will presume that the crimes are not the same offense for double jeopardy purposes. Put another way, does proof of one offense require proof of a fact that the other does not. Freeman at 772, 108 P.3d 753 (2005).

The third consideration relates to the Merger Doctrine. Under this doctrine, if the degree of one offense is raised by conduct that is also categorized as a crime by the legislature, it is presumed that the legislature intended to provide punishment for both crimes through a higher punishment for the one crime. *Freeman* at 772-773, 108 P.3d 753 (2005).

Finally, there is an exception to merger, if there is an independent purpose or effect to each crime. *Freeman* at 773 108 P.3d 753 (2005). Nor is it sufficient that the crimes are incidental to or even possibly an aid to committing the other – it must form the basis of an element of the other

crime. *State v. Atkins*, 130 Wash.App 395, 398, 123 P.3d 126 (2005) (Evidence was sufficient to support conviction for unlawful imprisonment as a separate crime from rape)

In *Freeman,* the Court indicated that Robbery and Assault convictions in general, as a matter of law, are not the same, but that each case must be analyzed on an individual basis. *Freeman* at 774-775, 108 P.3d 753 (2005). The Court then, in considering the sentencing schemes for Robbery in the First Degree and Assault in the First Degree, determined that there was evidence of legislative intent to punish these crimes differently. *Freeman* at 775-778 108 P.3d 753 (2005).

Because the parties agreed that under the *Blockburger* test the crimes of Robbery in the First Degree and Assault in the Second Degree were not the same in law or in fact, the Court did not reach a decision as to that issue, other than to provide some guidance that would indicate that the mere fact that the same conduct is used to prove each crime is not dispositive. *Freeman* at 776-777, 108 P.3d 753 (2005).

The State would submit that Robbery in the First Degree and Assault in the Second Degree, **as charged and proved** in this case, **are not the same in law and in fact**. The Assault charges were predicated upon the use of a handgun to commit an assault. The Robbery charges were charged utilizing all three potential prongs for the jury to consider:

Defendants were armed with a deadly weapon; or displayed what appeared to be a firearm or other deadly weapon; or inflicted bodily injury. The jury in this case had to have determined that a firearm was used to commit the Assault. However, the jury was free to apply any of the three prongs in reaching a verdict as to the Robbery.

There was evidence presented that the defendants were armed with a firearm, and there was evidence that the defendants displayed a firearm. As to the third prong, relating to Count One and Three, a jury could say that there was evidence that bodily injury was inflicted, if they chose to use the theft of Moccardine's $15.00 by Engelstad in the trailer with the striking of him with a fist, blunt object, or use of the firearm. However, that was not the specific theory presented to the jury. The acts alleged were the thefts of property outside the trailer. Because the jury was not presented evidence of bodily injury in that context, they had to rely upon either, the alternative of being armed with a firearm, or the alternative of displaying a Firearm, both of which are factually different from assaulting an individual with a firearm. Therefore, the crimes are not the same in law or factually, and therefore the *Blockburger* test would not preclude punishment for different crimes.

This, however, does not conclude the analysis, as we must still consider the merger doctrine. The merger doctrine is utilized only if one

crime is elevated to a higher degree by proof of another crime proscribed elsewhere in the criminal code. *State v. Atkins*, 130 Wash.App 395, 398, 123 P.3d 126 (2005)

It is clear from the *Freeman* case, that if the state, in order to prove the First Degree Robberies as charged and proved by the state, the state had to prove the defendants committed an assault in furtherance of the robbery, then merger would apply and the crimes could not be punished separately. In that case, given the charges and proof, the Court held that merger applied, because without the assault, the state would only have been able to prove a robbery in the second degree. **The key to the answer lies in how the state charged each crime and the facts as proven to the jury.** In this instance, First Degree Robbery charges could, and were proven without using the Second Degree Assaults as the basis for increasing the severity of the robberies.

This is so because of the way the robberies were charged, three alternatives presented for consideration, and the facts of the case. As noted above, the jury was not presented with evidence of bodily injury as the theory for the robberies taking place outside of the trailer, as was the case in both consolidated cases under review in *Freeman.* Therefore, the only evidence presented in support of the robberies was that the defendants were armed with a firearm or displayed a firearm in

committing the offenses. Therefore, legally, the crimes do not merge, as the assaults were not the basis for the increase in the degree of the robbery.

In terms of the facts, the defendants were only charged with two robberies against Moccardine and Flood. Both defendants however were charged with assaulting all three victims: Moccardine, Flood, and Curry. This is so factually for two reasons: One, Curry did not have anything taken from her; and two, after the assault committed upon Curry, she was allowed to depart the residence and remain in her vehicle.

The robberies of Moccardine and Flood, according to the state's theory and the evidence presented, took place after the assaults were committed against all three victims, after Curry was allowed to leave and after the trailer was vacated by all but the guard left in place. After the actual physical assault upon Moccardine took place, and after the guns were no longer being used to assault anyone, the robberies against Moccardine and Flood took place. And, while they were being held in the trailer while their items were being stolen, the defendants were armed with a firearm or displayed a firearm. There was a distinct separation of acts, legally and factually, although it can be argued that the crimes were incidental to one another. There was no violation of the double jeopardy provisions, and because there is no violation of the double jeopardy

provisions, there was no error committed by the trial court and the convictions and sentences should stand.

ii. Because the trial court ruled correctly on the issue of double jeopardy, the calculated offender score was correctly computed; Counts three and four, the assault second degree convictions were correctly not vacated; and the applicable firearm enhancements were properly applied.

Because the State believes that the Court correctly interpreted the law relating to merger of offenses/convictions, the State believes that there was no error in calculating the offender score. The State concedes, however, that if this Court reaches a different conclusion as to the issue of merger, then the sentences in these matters would have to be revisited.

The State would concede should this Court disagree with the trial Court's ruling on double jeopardy and merger, that the proper remedy would be a remand to the trial court for vacation of convictions. *State v. League,* 167 Wash.2d 671, 223 P.3d 493 (2009); *State v. Womac,* 160 Wash.2d 643, 160 P.3d 40 (2007) The State would also concede that if any crimes were to be vacated based upon double jeopardy violations as to the Appellants that the firearm enhancements for such vacated convictions would also need to be vacated.

However, given the state's belief that the trial court correctly reviewed the facts of this case and correctly applied the law on merger to the counts as charged in the information, the state believes that no vacation of either charges or weapon enhancements are necessary or proper, given the method of charging the crimes and the facts produced at trial.

iii. The record does establish that the jury was in fact given an oath as required by CrR 6.6; and the defendants were not denied their right of allocution.

The Kittitas County Superior Court Clerk's minutes of proceedings, (CP 282) indicate that commencing at 9:57a.m. on November 15, 2011, the "Court commenced and addressed the jury panel regarding process of juror selection and gave the jury panel their oath. (CP 282) Later in the proceedings, according to that same document, at 12:45a.m., the jury panel had been selected and the jurors were sworn and impaneled (CP 283) A Clerk's minute entry is a public record relied upon by courts and parties to prove the existence of facts. Such entries have been characterized as a public record that memorializes facts as they occurred in court. *State v. Hubbard*, 169 Wn.App. 182, 279 P.3d 521 (2012). Because the jury was properly sworn in this case, and because the record supports such a finding, there was no error undermining the rights of the Appellants, Shouse and Engelstad.

Counsel for Shouse indicates that Shouse was denied his right of allocution, and this denial of a fundamental right deprived him of a fair trial. This is simply false and not supported by the record. It is clear that both Appellants were given the opportunity on February 9, 2012 to address the Court at sentencing to offer any allocution that they desired. This is reflected in the Clerk's minutes (CP 305-306). In addition, it is clear from the transcript of proceedings that both Appellants were given the opportunity to address the court at their sentencing. (RP 726, III. 23 to RP 727, III. 11; RP 728, III. 22 to RP 729, III. 19)

This argument fails as it is not supported by the regard – the record supports that both defendants were given the opportunity for allocution. The convictions of the Appellants should not be overturned, nor should they should be granted a new sentencing hearing.

3. **THERE WAS NO PROSECUTORIAL MISCONDUCT, BUT IF THERE WERE ANY ERRORS, SUCH ERRORS WERE HARMLESS:**

   i. **The trial court correctly allowed impeachment testimony to be elicited by law enforcement officers; the trial court properly instructed the jury on the limitations of such testimony; the impeachment testimony was not used as substantive evidence; and the prosecutor did not elicit testimony about the witness testifying truthfully and did not exploit such answer in closing.**

Appellants allege that the State improperly impeached Van

Comen after calling her as a witness. They allege that the improper impeachment consisted of testimony from the officers who had previously interviewed her, with the sole intention of using such impeachment as substantive evidence – to place a shotgun in the hands of Shouse. This misstates the testimony of Van Comen, as well as the arguments of the State.

The State placed Van Comen on their witness list based upon reaching an agreement with her concerning certain benefits that would come to her for testifying. (RP 499, III. 21 to RP 500, III. 8) Counsel for Shouse may have had more insight into the testimony that Van Comen was going to provide, as he brought a motion in limine relative to her testimony. Counsel for Shouse indicated that it would be improper to use the impeachment evidence as substantive evidence of possession of a firearm and requested that such impeachment not be allowed. (RP 467, III. 20-25; RP 468, III. 1-14) The State disagreed, as the relief requested was to broad. (RP 468, III. 20-25) The Court declined at that time to enter a motion limiting impeachment. (RP 469, III. 1-19)

Van Comen then testified and provided substantive evidence that was both helpful to the State, and not so helpful to the State. She provided evidence that was helpful to the defendants, and not so

helpful to the defendants. She was impeached to a certain extent by all three counsel, through her own testimony and that of the officers, and all three counsel sought substantive evidence that was believed helpful to their respective cases.

The State, rather than using the impeachment to prove Shouse was guilty of being a felon in possession of a firearm, in essence treated her statements, that he did not possess the shotgun as true, and utilized the fact that after that first false statement that she corrected, she did not subsequently change her testimony until trial.

Van Comen acknowledged that she still cared for Shouse, had regretted going to law enforcement and that she was offered something by the state to testify, indicating that what was offered was "To resolve my burglary charges help me get my kids back." And she was asked by the State, "And it was conditioned upon your doing what in court? To which she responded, "Telling the truth." (RP 499, II. 5 to 500 8)

Counsel for Shouse on cross examination inquired as to a dependency action involving her children and if someone said they would help with her case if she testified, to which she responded "They said they would help me resolve my burglary charge and help me with CPS." (RP 512, II. 16 to 513, II. 22) At the conclusion of

the impeachment witnesses, the jury was excused for lunch and the Court indicated that they would craft a limiting instruction utilizing WPIC 55.30. (RP 538, II. 1 – 5) The Court did in fact give a limiting instruction, instruction number 8, (CP 109).

Appellants infer that the State, by having conversations about the shotgun, used that evidence to place a gun in Shouse's hands. Counsel partially quotes from a passage of argument about Van Comen's credibility, but leaves details out that put the conversation in its true context – not talking about a/the shotgun, but rather talking about jewelry. (RP 646 III, 6-17)

This argument has nothing to do with using impeachment evidence improperly as substantive evidence. It is an argument about pinning down whether or not the arguments about Shouse and Engelstad being victims were supported by any credible evidence. This was in reference to the strategy of Counsel to paint their clients as the victims. How this argument places a shotgun in Mr. Shouse's hands is a mystery.

It is true that the statements made to law enforcement about the shotgun's existence were used to impeach the credibility of Van Comen, but only in the context that she had the opportunity to correct

her prior statements, and did so as to the shotgun – she did not change her other prior statements until trial. That was the basis of impeachment, along with showing other discrepancies as to her trial testimony. And it was not used as substantive evidence, but to put her credibility into question after her trial testimony turned out not to be what was expected, as it was different from what she had previously told law enforcement.

All parties were allowed to use her direct testimony to support their theory of the case. The State used her testimony that was corroborated by other witnesses to support its theory of the case. Defendants used her testimony to make their arguments that supported their theory of the case. The impeachment evidence was limited by an instruction, and the State clearly limited the impeachment evidence to the purpose of her credibility, not as substantive evidence. At no time did the State in their closing argument refer to the shotgun, or infer that it was a proven fact that Shouse had a shotgun or that this supported a finding of felon in possession of a firearm.

A witness may be impeached with a prior out-of-court statement of a material fact that is inconsistent with her testimony in court, even if such a statement would otherwise be inadmissible as hearsay. *State v. Clinkenbeard*, 130 Wash.App. 552, 569, 123 P.3d

872 (2005) Where prior inconsistent statements are admitted as impeachment evidence, an instruction cautioning the jury to limit its consideration of the statement to its intended purpose is necessary and proper. *State v. Johnson*, 40 Wash.App. 371, 377, 699 P.2d 221 (1985).

The Court in Clinkenbeard indicated that in that case there were two questions presented to be answered concerning the issue of impeachment testimony:

> First, did the State improperly use impeachment evidence as substantive evidence of guilt?
> Second, if the impeachment statements were improperly used, was the remaining evidence sufficient to support the conviction?

In that case, the Court found that the state had used impeachment testimony/evidence as substantive evidence of guilt (only reason to illicit out of court child declarant's statement about rape was to prove she was raped). They also found that such evidence was the only evidence of the essential element of sexual intercourse. Therefore, the Court vacated the conviction based upon the improper use of such evidence, finding that without the improper evidence there was insufficient evidence to convict the defendant.

It is clear from the full context of the questions and answers presented on this issue, that the state did not simply call Van Comen to

the stand to impeach her statement about a shotgun. The State did not argue the impeachment evidence as substantive evidence to claim that Shouse had a shotgun and was therefore guilty of unlawful possession of a firearm. The use of this witness, and the testimony sought to corroborate evidence for the State's theory of the case is more akin to the factual pattern deemed appropriate in *State v. Lavaris*, 106 Wash.2d 340, 721 P.2d 515 (1986). Even if this Court were to find that the state had improperly utilized impeachment testimony improperly, there was sufficient other evidence to support the convictions, as previously discussed.

The secondary issue had to do with the answer provided by Van Comen as to telling the truth. The cases dealing with the issue of vouching for a witness discuss the improper impact of lending the full faith and credit of the state to the witnesses credibility, and discussing the impression that somehow the state had an ability to have witnesses testify truthfully, or to know when they are not testifying truthfully. See, for example, *State v. Ish,* 170 Wash.2d 189, 241 P.3d 389 (2010). It should be very clear from the questioning of Van Comen, and the arguments made by the state, that a representative of the state was not vouching for the credibility of the witness.

ii. The state did not intentionally elicit testimony from

a police witness as to another witness' credibility, but the fact that such testimony occurred is harmless error.

Appellants allege that Corporal Nale impermissibly commented on the credibility of Ms. Flood indicating this his testimony was that she appeared truthful and was not falsifying anything she was stating to him . Appellants further allege that the prosecuting attorney persisted in questions concerning Ms. Flood's credibility, even after a sidebar. Appellants correctly note that there was an objection which was sustained, but complain that the jury was not instructed to disregard the testimony.

A review of the questioning could support appellants' statements about the prosecutor's further questioning, but it is also possible that the state intended to clarify the earlier unsolicited testimony about Ms. Flood being open and candid. Appellants also fail to mention that neither counsel requested the Court to instruct the jury to disregard the testimony and that neither counsel requested that the testimony be stricken. (RP 87, I. 10 to RP 92, I, 7) Appellants also fail to mention that the jury was properly instructed on their role in determining the credibility of witnesses. (CP 100-103) Finally, appellants' fail to mention that the state did not use or seek to exploit the testimony in any fashion in closing argument.

The state does not disagree with the general discussion of the law in appellants' briefs. However, there is an overreliance upon *State v. Barr,* 123 Wash.App. 373, 98 P.3d 518 (2004), which dealt with statements by a police officer as to his opinion regarding the manifestations of the defendant's guilt. The court in *Barr* articulated a four-step process for determining whether an error is a manifest constitutional error: (1) we first determine whether the alleged error is in fact a constitutional issue; (2) next, we determine whether the error is manifest, that is, whether it had "practical and identifiable consequences"; (3) we then address the merits of the constitutional issue; and (4) finally, we pass upon whether the error was harmless. *State v. Barr,* 123 Wash.App. 373, 380, 98 P.3d 518 (2004).

The Court in *Barr* indicated that a witness expressing an opinion as to the guilt of a defendant was a constitutional issue related to a defendant's right to a trial by an impartial jury. The Court acknowledged cases supporting a different standard for such testimony concerning such opinions by law enforcement on fact witnesses. And finally, the court differentiated between opinions relating to ultimate factual issues before the trier of fact from those that are a direct opinion on the defendant's guilt. *State v. Barr,* 123 Wash.App. 373, 380, 383, 98 P.3d 518 (2004)

In this case, we are not discussing an opinion as to the credibility of a defendant. The interplay between a jury and opinions about victims was in play in *State v. Kirkman,* 159 Wn.2d 918, 155 P.3d 125 (2007). The Court stated: "...even if there is uncontradicted testimony on a victim's credibility, the jury is not bound by it. Juries are presumed to have followed the trial court's instructions, absent evidence proving the contrary... the constitutional role of the jury requires respect for the jury's deliberations." *Kirkman 928,* 155 P.3d 125 (2007). The *Kirkman* Court noted that "...'Manifest error' requires a nearly explicit statement by the witness that the witness believes the accusing victim. Requiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with our precedent holding the manifest error exception is narrow." *Kirkman 936,* 155 P.3d 125 (2007).

In this case, like *Kirkman*, the record establishes that the jury received specific instructions that they were the sole triers of fact and the sole deciders of the credibility of witnesses. If there was error in this case, it was not "manifest". The state would ask, in considering this argument of appellants' that the final advice from *Kirkman* be considered:

Only with the greatest reluctance and with clearest cause

should judges – particularly those on appellate courts – consider second-guessing jury determinations or jury competence. As Judge Learned Hand wrote, "Juries are not leaves swayed by every breath." *Kirkman 938,* 155 P.3d 125 (2007).

iii. The prosecutor did not comment on Mr. Shouse' Constitutional Right to Remain Silent in closing arguments.

The Prosecuting Attorney did not comment, in closing argument, upon Shouse's constitutional right to remain silent. The prosecutor did comment on his choice not to provide certain details of his interactions with Moccardine while speaking with Officer Cory Baird on October 26, 2010. This argument related to whether or not Shouse was a victim of theft committed upon him by Moccardine. The Prosecuting Attorney indicated, in this argument that some witnesses had indicated that Shouse had items stolen, but did not see any items being stolen by Moccardine. The state indicated that any information about items that would have been stolen would have been generated only by the statements of Shouse to others. (RP 644, III. 1 to RP 646, III. 19)

The full context, not an abbreviated form of the complained of testimony can be found at (RP 646, III. 20 to RP 647, III. 14).

Most of the cases concerning a comment on a defendant's constitutional right to remain silent commence with analysis of a question to, or answer from, a witness concerning the invocation of the right to remain silent. *State v. Pottoroff*, 138 Wn. App. 343, 156 P.3d 955 (2007); *State v. Romero*, 113 Wn. App. 779, 786-87, 54 P.3d 1255 (2002).

In the current case, there was no question posed to, nor any answer

provided by any witness that referenced in any fashion Shouse's constitutional right to remain silent or his exercise of such right. The State in closing arguments did not make any comment concerning the appellant's constitutional right to remain silent. The state did not comment in any fashion about the appellant not taking the stand in his own defense, nor was there any discussion concerning the appellant waiving or not waiving his Miranda warnings when confronted by police.

Rather, the state pointed to a specific point in time, pre-arrest, pre-charging, and pre-trial, where Shouse had spoken to a law enforcement officer about the possibility that Moccardine had stolen property from him or his landlord. And yet, given the opportunity to explain why he thought Moccardine had stolen items from him, and what those items were, he passed on the opportunity and did not provide a listing of items. This was not error of any sort as it was not a comment upon the appellant's constitutional right to remain silent.

iv. The prosecutor did not, during closing arguments, introduce evidence that was outside the record.

It is alleged by Appellants, that the Prosecuting Attorney repeatedly interjected facts not in evidence in the State's Closing Argument. Counsel points to two specific arguments made during closing to prove their point. The Jury was that they could draw

reasonable inferences from the evidence presented in Court. Similarly, counsel is allowed, during argument, to argue inferences that can be drawn from the evidence.

The State believes that the argument concerning the thought process of Mr. Shouse was simply proper argument utilizing the admitted evidence and testimony to make inferences. If the State was not allowed to utilize statements and actions of defendants to infer "thoughts", would the state ever be able to prove a defendant's "intent"? This Court will have to determine if that was proper. The State submits, as the trial Court found, that it was proper argument.

Finally, appellate Counsel alleges that the argument concerning testimony by law enforcement about suspects who bring weapons to crimes scenes depart with such weapons was not supported by evidence that was in the record. This allegation of improper argument is not supported, as the record indicates that there was testimony to that effect from Deputy Vraves (RP 61, I. 19 to RP, 62 I. 10; RP 64 1-12)

4. THE CUMULLATIVE ERROR DOCTRINE DOES NOT APPLY.

Appellants made many allegations as to errors by the State or errors by the trial court. All of the errors alleged have been proven

inaccurate or not supported by the record. Other alleged errors, if found, have to do with sentencing and interpretations of double jeopardy principles – any such error found relative to that may be addressed under a proper remedy for re-sentencing. Because the State believes that there were no errors committed by the State or the trial court, the issue of relief based upon cumulative error is not presented. Finally, if there was an error relative to Corporal Nale's testimony as to Flood, it was harmless.

CONCLUSION:

The State feels no need to repeat or summarize the arguments that have been presented herein. The State will simply request this Court to deny any and all relief requested by appellants as not supported by the facts of this case with a proper application of the law.

DATED this 11th day of June, 2013.

Respectfully submitted,

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COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION III

	)	
	)	No. 30640-2 (Consolidated with 30641-1)
STATE OF WASHINGTON	)	
vs.	)	PROOF OF SERVICE
	)	
JOSEPH L. SHOUSE,	)	
GARY D. ENGELSTAD JR.,	)	
	)	

STATE OF WASHINGTON)
) ss.
County of Kittitas)

The undersigned being first duly sworn on oath, deposes and states:

That on the 13th day of June, 2013, affiant filed a Amended Response to Appellant Brief electronically per agreement to serve by e-mail to:

Renee S. Townsley, Clerk	Dennis W. Morgan	Christopher Gibson
Court of Appeals	Attorney at Law	Eric J. Nielsen
Division III	PO Box 1019	Nielsen Browman & Koch PLLC
500 N. Cedar St.	Republic, WA 99166	1908 E Madison Street
Spokane, WA 99210	**E-Mail**	Seattle, WA 98122
Electronic Filing		**E-Mail**

containing copies of the following documents:

(1) Amended Response to Appellant Brief
(2) Proof of Service

SIGNED AND SWORN to (or affirmed) before me on this 13th day of June, 2013 by INGRID BUTLER.

ROBIN S RAAP NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES JANUARY 15, 2017

Robin S Raap

NOTARY PUBLIC in and for the
State of Washington.
My Appointment Expires: 1/15/17