No. 32654-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

PHILIP PATRICK MOORE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Judge Harold D. Clarke III

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Steven Brown and Jaimie Nelson came to the home of Philip Moore. Lawrence Adams was also in the home. Mr. Adams assaulted Mr. Brown and Ms. Nelson, causing injuries. Witnesses gave varying accounts of Mr. Moore's involvement, if any, in the assaults. The State charged Mr. Moore, as a principal or an accomplice, with conspiracy to commit first degree assault, first degree assault of Mr. Brown, and attempted first degree assault of Ms. Nelson. At trial, for both the first degree assault and the attempted first degree assault counts, the trial court instructed the jury on an alternative means of committing the crimes that was not charged in the Information. The jury convicted Mr. Moore as charged. At sentencing, Mr. Moore did not waive his presence at the restitution hearing. Subsequently, the trial court entered a restitution order. The order does not contain Mr. Moore's signature or indicate he was present when the order was entered. Mr. Moore appeals, challenging the sufficiency of the evidence to find him guilty of conspiracy to commit first degree assault; the jury instructions containing uncharged alternative means of committing first degree assault and attempted first degree assault; and the trial court's imposition of restitution without his presence.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Moore guilty of conspiracy to commit first degree assault as a principal or an accomplice, where the evidence was insufficient.

2. The trial court erred in instructing the jury on an uncharged alternative means of committing first degree assault.

3. The trial court erred in instructing the jury on an uncharged alternative means of committing attempted first degree assault.

4. The trial court erred in imposing restitution without the presence of Mr. Moore.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: The trial court erred in finding Mr. Moore guilty of conspiracy to commit first degree assault as a principal or an accomplice, where the evidence was insufficient.

Issue 2: The trial court erred in instructing the jury on an uncharged alternative means of committing first degree assault and attempted first degree assault.

Issue 3: The trial court erred in imposing restitution without the presence of Mr. Moore.

D. STATEMENT OF THE CASE

On September 21, 2013, Steven Brown and Jaimie Nelson came to the home of Philip Moore. (RP 38-40, 63-65, 71, 142, 188-189). Lawrence Adams was inside of the home when Mr. Brown and Ms. Nelson arrived. (RP 41, 66, 143-144, 152, 190-191). These four individuals knew each other from buying and selling drugs. (RP 37, 62, 149-150, 186-188, 192-193, 213-214).

Mr. Moore, Mr. Brown, and Ms. Nelson were in the living room of Mr. Moore's home, and Mr. Adams was in a bedroom, out of sight. (RP 41, 195). There was some discussion between Mr. Moore, Mr. Brown, and Ms. Nelson regarding whether Mr. Brown and Ms. Nelson had committed theft from Mr. Adams. (RP 41-42, 148, 197-198). Mr. Adams then came out into the living room and assaulted Mr. Brown and Ms. Nelson. (RP 41-44, 54, 66-68, 151-152, 198, 200-201). Witness accounts differ regarding Mr. Moore's involvement, if any, in the assaults. (RP 42, 44, 54, 56, 68, 74, 144-145, 170-171, 201, 203-204, 212). Mr. Adams cut Ms. Nelson's hair during the assaults. (RP 43-44, 54-55, 156, 203-204). According to Mr. Brown and Ms. Nelson, a pipe was used during the assaults. (RP 41-44, 66-68).

Both Mr. Brown and Ms. Nelson sustained injuries from the assaults. (RP 48, 55-56, 69, 73-74, 128-138, 156-157, 206). Mr. Brown was rendered unconscious, and Ms. Nelson drove him to the hospital. (RP 43, 46-47, 68-69, 136-138, 158). Ms. Nelson left the hospital, but later returned for medical treatment. (RP 47, 129-132, 134-136, 163).

The day after the assault, a pipe with Mr. Brown's DNA on it was found in a fenced lot located next to Mr. Moore's home. (RP 94-97, 102-103, 110, 112). A piece of hair with staining on it was also collected from Mr. Moore's home. (RP 91, 94, 113-114, 158). A DNA profile consistent

with two individuals was found on this hair, with a major female contributor matching Ms. Nelson, and a minor male contributor matching Mr. Moore. (RP 113-114, 117-121).

The State charged Mr. Moore, as a principal or an accomplice, with one count of conspiracy to commit first degree assault, one count of first degree assault against Mr. Brown, and one count of attempted first degree assault against Ms. Nelson. (CP 2-3).

For the first degree assault count, the Information alleged:

> That the defendants, LAWRENCE W. ADAMS and PHILIP PATRICK MOORE, as actors and/or accomplices, in the State of Washington, on or about September 21, 2013, did, with intent to inflict great bodily harm, intentionally assault STEVEN R. BROWN and did inflict great bodily harm, and the defendant being at said time armed with a deadly weapon other than a firearm under the provisions of RCW 9.94A.602 and RCW 9.94A.533(4). . . .

(CP 2) (emphasis in original).

For the attempted first degree assault count, the Information alleged:

> That the defendants, LAWRENCE W. ADAMS and PHILIP PATRICK MOORE, as actors and/or accomplices, in the State of Washington, on or about September 21, 2013, with intent to commit the crime of First Degree Assault as set out in RCW 9A.36.011, committed an act which was a substantial step toward that crime, by attempting, with intent to inflict great bodily harm, to intentionally assault JAIMIE R. NELSON and did inflict great bodily harm, and the defendant being at said time armed with a deadly weapon other than a firearm under the provisions of RCW 9.94A.602 and 9.94A.533(4)[.]

(CP 3) (emphasis in original).

The case proceeded to a jury trial. (RP 36-284). Ms. Nelson testified that on September 21, 2013, Mr. Moore called her and then texted here, asking her to pick him up at his house and give him a ride to Spokane Valley. (RP 38, 48-49). She testified she and Mr. Brown agreed. (RP 39-40). Ms. Nelson testified that after they arrived and went inside Mr. Moore's house, Mr. Moore brought up that Mr. Adams believed she and Mr. Brown stole from Mr. Adams. (RP 41-42).

Ms. Nelson testified that during the assaults, Mr. Moore handed Mr. Adams a pair of scissors, which Mr. Adams used to cut her hair. (RP 43, 54). Ms. Nelson also testified that Mr. Moore walked through the living room as the assaults were occurring. (RP 43-44, 56).

Mr. Brown testified that on September 21, 2013, Mr. Moore texted him for a ride, so he and Ms. Nelson went to Mr. Moore's house. (RP 64, 71). Mr. Brown did not recall any specific conversations before Mr. Adams came into the living room and assaulted him. (RP 66-67). He testified that Mr. Moore "joined in on the attack. . . ." (RP 68, 74).

Mr. Brown testified that at one point he believed Ms. Nelson was being unfaithful with Mr. Adams. (RP 75). He testified he recalls saying he thought Ms. Nelson set him up because she had been sleeping with Mr. Adams. (RP 75).

City of Spokane Police Detective Benjamin Estes testified that he interviewed Mr. Moore after the assaults occurred. (RP 140-159). Detective Estes testified that Mr. Moore confirmed the assaults occurred. (RP 142). He testified Mr. Moore told him that Mr. Brown and Ms. Nelson were coming to his house to give him a ride. (RP 142). Detective Estes testified that Mr. Moore:

> Told me that after he knew they were coming to his residence, he said he called a person he knows as "Black."[1] He said he only knew him as "Black." Said he didn't know his name. Said that he asked Black. He said, I asked him can I come by and see you. [Mr.] Moore says that Black asked him how he was going to get there. [Mr.] Moore advised Black that [Ms. Nelson] and [Mr. Brown] were going to give him a ride. Moore said the next thing he knew is this guy Black is knocking on his door. . . . He said it was obvious to him that Black wanted to talk to [Ms.] Nelson and [Mr.] Brown.

(RP 142-143, 152).

Detective Estes further testified that Mr. Moore:

> [T]old me that it seemed like it was probably 15 or 20 minutes later that [Ms.] Nelson and [Mr.] Brown showed up at his residence. He said that it was obvious to him that Black was upset with [Ms.] Nelson and [Mr.] Brown. And [Mr.] Moore told me, he said, I knew it's about to go down. [Mr.] Moore told me that he had heard rumors that there was a problem between Black and [Ms.] Nelson and [Mr.] Brown. And the rumors were that [Ms.] Nelson and [Mr.] Brown had ripped Black off, meaning they had stolen from him. He reiterated that -- he said verbatim, he "knew something was going to go down from the way Black was

[1] At trial, Mr. Moore identified "Black" as Lawrence Adams. (RP 186).

> acting." He reiterated that Black didn't want [Ms.] Nelson and Moore [sic] to know that he was waiting for them at his residence. . . .

(RP 144, 152).

Detective Estes testified Mr. Moore told him Mr. Adams came into the living room and immediately punched Mr. Brown. (RP 144). He testified Mr. Moore told him he went outside during the assaults, coming back inside only for cigarettes. (RP 145-147). Detective Estes testified Mr. Moore "said his impression was that Black was accusing [Ms.] Nelson and [Mr.] Brown of having his money." (RP 145).

Detective Estes testified that Mr. Moore told him he "got [Ms. Nelson and Mr. Brown] into a conversation when Black was out of sight, he engaged them, initiated a conversation about Black." (RP 148). He further testified Mr. Moore "told him that his intent was to have [Ms. Nelson and Mr. Brown] give him a ride to Black's house to pick up some more cocaine. . . ." (RP 150).

On cross-examination, Detective Estes testified as follows regarding Mr. Moore's statements about the assaults:

> [Defense counsel:] During this conversation, if I understand your testimony this afternoon, Mr. Moore indicated that this came as a surprise to him; correct?
> [Detective Estes:] He didn't indicate that.
> [Defense counsel:] He admitted that he set it up?
> [Detective Estes:] No, he didn't admit he set it up. He reiterated to me that, to use his terminology, I knew it was about to go down. He was not surprised.

> . . . .
> [Defense counsel:] Did he say that he knew that Mr. Black -- Mr. Adams was going to do what specifically was done?
> [Detective Estes:] He didn't say anything about specifics.
> [Defense counsel:] Okay. And he didn't actually say when he knew an assault would happen?
> [Detective Estes:] No.

(RP 169-170).

Detective Estes testified that Mr. Moore did not think the pipe came from his residence, "[s]o he believed Black must have brought it with him." (RP 157).

Mr. Moore testified in his own defense. (RP 183-231). He testified that on September 21, 2013, Ms. Nelson called him because she wanted to come get some drugs from him. (RP 188). Mr. Moore testified he told Ms. Nelson that if she came to pick him up, he might be able to make some arrangements. (RP 189, 228).

Mr. Moore testified he was aware Mr. Adams was accusing Ms. Nelson and Mr. Brown of the theft. (RP 215). He testified Ms. Nelson told him that at the time of the theft from Mr. Adams, she was out of town. (RP 188, 229-230).

Mr. Moore testified he called Mr. Adams to order drugs and that Mr. Adams arrived at his house before Ms. Nelson and Mr. Brown arrived. (RP 190-191, 215-217, 229). He testified that he called Mr. Adams for drugs for other people, not Ms. Nelson and Mr. Brown, because he did not

think they were going to show up. (RP 229-230). Mr. Moore testified that when Ms. Nelson and Mr. Brown eventually arrived, Mr. Adams went into one of his bedrooms, and told him to "let them in, smoke some drugs with them." (RP 195).

Mr. Moore testified that when Mr. Adams arrived at his house, he did not see him with any sort of weapon. (RP 199, 225-226, 231). He testified he did not supply Mr. Adams with the pipe, and he had not seen it before. (RP 225-226, 230-231).

Mr. Moore testified he was trying to get Ms. Nelson and Mr. Brown to talk about the theft incident: "I'm thinking, maybe Black got it wrong . . . I get them talking about what happened, he may be - - he'll realize they were out of town and couldn't have did it." (RP 197-198). He testified he tried to get them to say something that would change Mr. Adams' mind. (RP 198).

Mr. Moore testified Mr. Adams came into the living room, and he was talking about Ms. Nelson and Mr. Brown committing the theft. (RP 199-200, 220-221).

Mr. Moore testified he did not touch Ms. Nelson or Mr. Brown. (RP 201-202, 204, 212). He testified Mr. Adams grabbed the scissors himself and cut Ms. Nelson's hair. (RP 203-204, 226).

Mr. Moore testified he did not have any agreement with Mr. Adams to "set this up to where he could attack these people[.]" (RP 212). He testified "[t]he only agreement me and Black made was, he asked me if they ever showed up, to call him. That was it. Like I said, they never showed up." (RP 212). Mr. Moore testified that when he called Mr. Adams to bring him drugs on the day in question, Mr. Adams thought Ms. Nelson and Mr. Brown were already there. (RP 213). He testified that he did not bring everyone together, but rather, "[i]t's just circumstances, situations and issues brought everyone together." (RP 227).

The trial court instructed the jury that in order to find Mr. Moore guilty of conspiracy to commit first degree assault, it had to find:

> (1) That on or about the 21st day of September, 2013, the defendant agreed with one or more persons to engage in or cause the performance of conduct constituting the crime of first degree assault;
> (2) That the defendant made the agreement with the intent that such conduct be performed;
> (3) That anyone of the persons involved in the agreement took a substantial step in pursuance of the agreement; and
> (4) That the acts occurred in the State of Washington.

(CP 142; RP 248-249).

The trial court instructed the jury that in order to find Mr. Moore guilty of first degree assault, it had to find:

> (1) That on or about the 21st day of September, 2013, the defendant assaulted STEVEN BROWN;

> (2) That the assault was committed with a deadly weapon or by a force or means likely to produce great bodily harm or death;
> (3) That the defendant acted with intent to inflict great bodily harm; and
> (4) That the acts occurred in the State of Washington.

(CP 136; RP 245-246).

The trial court instructed the jury that in order to find Mr. Moore guilty of attempted first degree assault, it had to find:

> (1) That on or about the 21st day of September, 2013 the defendant did an act that was a substantial step toward the commission of first degree assault against Jamie Nelson;
> (2) That the act was done with the intent to commit first degree assault, and;
> (3) That the act occurred in the State of Washington.

(CP 144; RP 249).

The trial court defined first degree assault for the jury as follows:

> A person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he or she assaults another with any deadly weapon or by any force or means likely to produce great bodily harm or death.

(CP 135; RP 245).

The trial court instructed the jury on accomplice liability. (CP 146; RP 250). During its deliberations, the jury submitted an inquiry regarding the applicability of the accomplice liability instruction. (CP 157; RP 287-290). The trial court informed the jury the accomplice liability instruction applies to all three counts. (CP 157; RP 287-290).

The jury found Mr. Moore guilty as charged. (CP 152-154; RP 292). The jury also returned special verdicts finding that Mr. Moore was armed with a deadly weapon at the time of the commission of the first degree assault and the attempted first degree assault counts. (CP 155-156; RP 292-293). Mr. Moore was sentenced as a persistent offender, to life in prison without the possibility of early release. (CP 184; RP 315-316).

At sentencing, defense counsel agreed to leave restitution open for up to 180 days. (RP 312). Defense counsel informed the trial court Mr. Moore did not waive his right to be present at the restitution hearing. (RP 320). Subsequently, the trial court entered an order setting restitution. (CP 212). Mr. Moore did not sign this order, and the order does not indicate that he was present when the order was entered, or that he waived his right to be present. (CP 212).

Mr. Moore timely appealed. (CP 192-204).

E. ARGUMENT

Issue 1: The trial court erred in finding Mr. Moore guilty of conspiracy to commit first degree assault as a principal or an accomplice, where the evidence was insufficient.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the

evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)). Sufficient means more than a mere scintilla of evidence; there must be that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved. *State v. Fateley*, 18 Wn. App. 99, 102, 566 P.2d 959 (1977). The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

> A person is guilty of conspiracy when:
>
> [W]ith intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.

RCW 9A.28.040(1).

Thus, the trial court instructed the jury that in order to find Mr. Moore guilty of conspiracy to commit first degree assault, it had to find:

> (1) That on or about the 21st day of September, 2013, the defendant agreed with one or more persons to engage in or cause the performance of conduct constituting the crime of first degree assault;
> (2) That the defendant made the agreement with the intent that such conduct be performed;
> (3) That anyone of the persons involved in the agreement took a substantial step in pursuance of the agreement; and
> (4) That the acts occurred in the State of Washington.

(CP 142; RP 248-249).

First degree assault is defined here as follows:

> A person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he or she assaults another with any deadly weapon or by any force or means likely to produce great bodily harm or death.

(CP 135; RP 245); *see also* RCW 9A.36.011(1)(a); *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) ("[J]ury instructions not objected to become the law of the case.").

"[A]n agreement to commit a crime is an essential part of a conspiracy." *State v. Miller*, 131 Wn.2d 78, 87, 929 P.2d 372 (1997). In order to prove a conspiracy, a formal agreement is not necessary. *State v. Israel*, 113 Wn. App. 243, 284, 54 P.3d 1218 (2002). However, "[t]he State must show an actual, rather than feigned agreement with at least one other person to prove conspiracy." *State v. Stark*, 158 Wn. App. 952, 962, 244 P.3d 433 (2010) (citing *State v. Pacheco*, 125 Wn.2d 150, 159, 882

P.2d 183 (1994)). "A conspiracy may be proven by a concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose." *Israel*, 113 Wn. App. at 284 (internal quotation marks omitted) (quoting *State v. Casarez-Gastelum*, 48 Wn. App. 112, 116, 738 P.2d 303 (1987)).

"Washington implicitly recognizes that the subject crime of the conspiracy is an element." *Stark*, 158 Wn. App. at 962 (citing *State v. Smith*, 131 Wn.2d 258, 262-63, 930 P.2d 917 (1997)).

Here, in order to prove Mr. Moore was guilty of conspiracy to commit first degree assault as a principal, the State had to prove that he agreed with one or more persons to cause conduct constituting first degree assault, that he made the agreement with the intent that such conduct be performed, and that a person involved in the agreement took a substantial step in pursuance of the agreement. *See* RCW 9A.28.040(1); *see also Israel*, 113 Wn. App. at 284 (setting forth this required elements).

The only testimony presented at trial addressing any agreement between Mr. Moore and Mr. Adams came from Detective Estes and Mr. Moore himself. (RP 142-149, 168-170, 183-231). And, to the contrary, Mr. Brown testified that at one point he thought Ms. Nelson set him up. (RP 75).

There was insufficient evidence presented at trial that Mr. Moore agreed with Mr. Adams, or any other person, to engage in or cause the performance of first degree assault. *See* RCW 9A.28.040(1) (conspiracy); RCW 9A.36.011(1)(a) (first degree assault). There was no evidence that Mr. Moore was aware that Mr. Adams was going to commit first degree assault against Mr. Brown or Ms. Nelson. (RP 142-144, 148, 152, 157, 169-170, 199, 212, 225-227, 230-231). Mr. Moore testified he did not see Mr. Adams enter his home with a weapon, and he testified he did not provide Mr. Adams with a weapon. (RP 199, 225-226, 230-231). Detective Estes' testimony regarding Mr. Moore's statements concerning the weapon does not conflict with this testimony. (RP 157).

In addition, the evidence that Mr. Moore knew about the potential conflict between Mr. Adams and Mr. Brown and Ms. Nelson regarding the alleged theft from Mr. Adams is not enough to show Mr. Moore agreed with Mr. Adams to engage in or cause the performance of first degree assault. (RP 142-144, 152, 188, 197-198, 215, 229-230). Evidence that Mr. Moore "knew something was going to go down" between Mr. Adams and Mr. Brown and Ms. Nelson is insufficient to show an agreement between Mr. Moore and Mr. Adams to engage in or cause the performance of first degree assault. (RP 144, 152); *see also Stark*, 158 Wn. App. at 962 (citing *Pacheco*, 125 Wn.2d at 159) (the State must show an actual

agreement to prove conspiracy). Detective Estes acknowledged Mr. Moore did not admit to setting up the assaults. (RP 169). He stated Mr. Moore did not say anything about specifics, or when he knew an assault would happen. (RP 170).

Likewise, the fact that Mr. Moore engaged Mr. Brown and Ms. Nelson in a conversation about Mr. Adams is insufficient to show an agreement between Mr. Moore and Mr. Adams to engage in or cause the performance of first degree assault. (RP 148, 197-198). Mr. Moore clarified that he engaged them in a conversation so maybe they would say something that would change Mr. Adams' mind that they committed theft from him. (RP 197-198).

Mr. Moore testified he did not have any agreement with Mr. Adams to set up an attack. (RP 212). Mr. Moore testified the only agreement he had with Mr. Adams was to call him if Mr. Brown and Ms. Nelson ever showed up. (RP 212). And, Mr. Moore testified he did not follow through with this agreement on the day in question, because Mr. Brown and Ms. Nelson had not shown up at this house at the time he called Mr. Adams in order to procure drugs for some other people. (RP 190-191, 212, 215-217, 229-230).

There was also insufficient evidence that Mr. Moore made any agreement with Mr. Adams with intent that first degree assault be performed. *See* RCW 9A.28.040(1).

In addition, there was insufficient evidence presented for the jury to find Mr. Moore guilty of conspiracy to commit first degree assault as an accomplice. (CP 146, 157; RP 250, 287-290). The only people allegedly involved in the conspiracy are Mr. Moore and Mr. Adams. If Mr. Moore was an accomplice to the conspiracy, rather than a principal, the conspiracy would only involve one person, Mr. Adams. "A conspiratorial agreement necessarily requires more than one to agree because it is impossible to conspire with oneself." *Pacheco*, 125 Wn.2d at 155 (citing *Morrison v. California*, 291 U.S. 82, 92, 54 S. Ct. 281, 78 L. Ed. 664 (1934)). The conspiracy statute "retain[s] the requirement of a genuine or bilateral agreement." *Id*. Thus, there is insufficient evidence to find Mr. Moore guilty of conspiracy to commit first degree assault as an accomplice, where the jury would have to find Mr. Moore was an accomplice to Mr. Adams alone.

A rational trier of fact could not have found Mr. Moore guilty, beyond a reasonable doubt, of conspiracy to commit first degree assault as a principal or an accomplice. *See Salinas*, 119 Wn.2d at 201 (*citing Green*, 94 Wn.2d at 220-22). His conviction for conspiracy to commit

first degree assault should be reversed and the charge dismissed with prejudice. *See Smith*, 155 Wn.2d at 505 (setting forth this remedy).

Issue 2: The trial court erred in instructing the jury on an uncharged alternative means of committing first degree assault and attempted first degree assault.

In general, a defendant cannot be tried for an uncharged offense. *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1998); *State v. Chino*, 117 Wn. App. 531, 539-40, 72 P.3d 256 (2003). Our State Supreme Court "ha[s] long held that it is error for a trial court to instruct the jury on uncharged alternative means." *In re Pers. Restraint of Brockie*, 178 Wn.2d 532, 536, 309 P.3d 498 (2013) (citing *State v. Severns*, 13 Wn.2d 542, 548, 125 P.2d 659 (1942)). "Where the information alleges solely one statutory alternative means of committing a crime, it is error for the trial court to instruct the jury on uncharged alternatives, regardless of the strength of the trial evidence." *Chino*, 117 Wn. App. at 540; *see also State v. Brewczynski*, 173 Wn. App. 541, 549, 294 P.3d 825 (2013) ("It is error to instruct the jury on alternative means that are not contained in the charging document.").

Whether a jury instruction accurately states the law without misleading the jury is an issue subject to de novo review. *Id*. at 538. The sufficiency of a to-convict jury instruction is reviewed *de novo*. *State v.*

Williams, 162 Wn.2d 177, 182, 170 P.3d 30 (2007); *see also* *State v. Aguilar*, 153 Wn. App. 265, 278-79, 223 P.3d 1158 (2009).

A person commits first degree assault in three alternative ways:

> (1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:
> (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or
> (b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or
> (c) Assaults another and inflicts great bodily harm.

RCW 9A.36.011(1).

The State charged Mr. Moore with committing first degree assault by the third alternative means, "[a]ssaults another and inflicts great bodily harm." (CP 2); *see also* RCW 9A.36.011(1)(c). However, the to-convict jury instruction included only the first alternative means of committing first degree assault, "the assault was committed with a deadly weapon or by a force or means likely to produce great bodily harm or death[.]" (CP 136; RP 245-246); *see also* RCW 9A.36.011(1)(a).

In addition, the State charged Mr. Moore with committing attempted first degree assault by the third alternative means, "[a]ssaults another and inflicts great bodily harm." (CP 3); *see also* RCW 9A.36.011(1)(c). However, jury instructions for attempted first degree assault included only the first alternative means of committing first degree

assault, "assaults another with any deadly weapon or by any force or means likely to produce great bodily harm or death." (CP 135, 144; RP 245, 249); *see also* RCW 9A.36.011(1)(a). The to-convict instruction required the jury to find that Mr. Moore, as a principal or an accomplice, "did an act that was a substantial step toward the commission of first degree assault against [Ms.] Nelson[,]" and the jury defined first degree assault for the jury as "assault[ing] another with any deadly weapon or by any force or means likely to produce great bodily harm or death." (CP 135, 144, 146; RP 245, 249, 250).

Here, for both first degree assault and attempted first degree assault the trial court erred in instructing the jury on the uncharged alternative means in RCW 9A.36.011(1)(a), "[a]ssaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death[.]" RCW 9A.36.011(1)(a); *see also* CP 2-3, 135-136, 144; RP 245-246, 249; *Chino*, 117 Wn. App. at 540; *Brewczynski*, 173 Wn. App. at 549.

"In uncharged alternative means cases on direct appeal, Washington courts have held that instructing the jury on uncharged alternative means is presumed to be prejudicial unless the State can show that the error was harmless." *In re Brockie*, 178 Wn.2d at 538-39; *see also Chino*, 117 Wn. App. at 540. "An error in instructing the jury on an

uncharged method of committing a crime may be harmless if 'in subsequent instructions the crime charged was clearly and specifically defined to the jury.'" *Bray*, 52 Wn. App. at 35 (quoting *Severns*, 13 Wn.2d at 549); *see also Chino*, 117 Wn. App. at 540. For the error to be harmless, the other jury instructions must "clearly limit the crime to the charged alternative." *Brewczynski*, 173 Wn. App. at 549.

Here, none of the remaining jury instructions limited the jury to consider only the "[a]ssaults another and inflicts great bodily harm" alternative of committing first degree assault or attempted first degree assault. RCW 9A.36.011(1)(c); *see also* CP 124-151; RP 238-253; *Chino*, 117 Wn. App. at 540; *Brewczynski*, 173 Wn. App. at 549. As recognized above, the definition of first degree assault given to the jury contained only the first alternative means for first degree assault. (CP 135; RP 245); *see also* RCW 9A.36.011(1)(a).

Therefore, because it is possible that the jury convicted Mr. Moore on the basis of the uncharged alternative means for both the first degree assault and attempted first degree assault counts, "[a]ssaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death[,]" the error is not harmless. RCW 9A.36.011(1)(a); *see also Chino*, 117 Wn. App. at 540-41; *Brewczynski*, 173 Wn. App. at 550.

Mr. Moore challenges the first degree assault and attempted first degree assault jury instruction for the first time on appeal. "The constitution requires the jury be instructed on all essential elements of the crime charged." *Chino*, 117 Wn. App. at 538 (*citing State v. Linehan*, 147 Wn.2d 638, 653, 56 P.3d 542 (2002); U.S. Const. Amend. VI; Const. Art. I, § 22). A party may raise a "manifest error affecting a constitutional right" for the first time on appeal. RAP 2.5(a)(3). To establish that the error was manifest, a defendant must make a plausible showing that the error had a practical and identifiable consequence in the trial of his case. *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Because it is possible that the jury convicted Mr. Moore on the basis of the uncharged alternative means of committing first degree assault and attempted first degree assault, the error meets this standard. *See Chino*, 117 Wn. App. at 538 (find this standard was met and allowing review of a similar issue involving inconsistencies in the charging document and the jury instructions).

Mr. Moore's convictions for first degree assault and attempted first degree assault must be reversed and remanded for a new trial due to the error in the jury instructions. *See Chino*, 117 Wn. App. at 540-41; *Brewczynski*, 173 Wn. App. at 550.

Issue 3: The trial court erred in imposing restitution without the presence of Mr. Moore.

At sentencing, defense counsel agreed to leave restitution open for up to 180 days. (RP 312). Defense counsel informed the trial court Mr. Moore did not waive his right to be present at the restitution hearing. (RP 320). Subsequently, the trial court entered an order setting restitution. (CP 212). Mr. Moore did not sign this order, and the order does not indicate that he was present when the order was entered, or that he waived his right to be present. (CP 212).

A defendant has a right to be present at a restitution hearing. CrR 3.4(a) ("The defendant shall be present . . . at the imposition of sentence. . . .); *State v. Duvall*, 84 Wn. App. 439, 442 n. 3, 928 P.2d 459 (1996) (citing authority for constitutional right to be present at sentencing); *State v. Pollard*, 66 Wn. App. 779, 784, 834 P.2d 51 (1992) ("Setting the restitution figure is an integral part of the sentencing proceeding.").

Here, Mr. Moore did not waive his right to be present when restitution was imposed. (RP 320). The order setting restitution does not indicate Mr. Moore was present. (CP 212). Therefore, the restitution order should be vacated and remanded for a new restitution hearing where Mr. Moore is present. *See* CrR 3.4(a); *Duvall*, 84 Wn. App. at 442 n. 3; *Pollard*, 66 Wn. App. at 784.

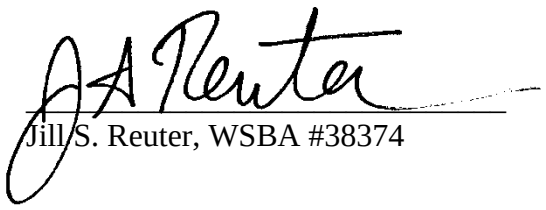
F. CONCLUSION

The evidence presented at trial was insufficient to find Mr. Moore guilty of conspiracy to commit first degree assault as a principal or an accomplice. This conviction should be reversed and the charge dismissed with prejudice.

In addition, Mr. Moore's convictions for first degree assault and attempted first degree assault should be reversed and remanded for a new trial because the trial court instructed the jury on an uncharged alternative means.

The restitution order should also be vacated and remanded for a new restitution hearing where Mr. Moore is present.

Respectfully submitted this 24th day of February, 2015.



Jill S. Reuter, WSBA #38374

/s/ Kristina M. Nichols
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Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

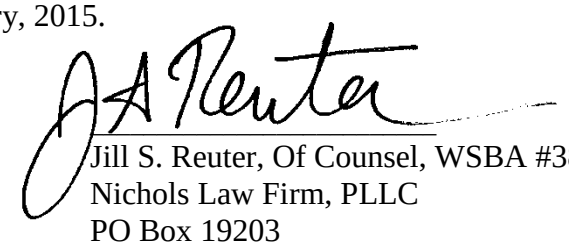
STATE OF WASHINGTON Plaintiff/Respondent vs. PHILIP PATRICK MOORE Defendant/Appellant	)	COA No. 32654-3-III PROOF OF SERVICE

I, Jill S. Reuter, of counsel for Nichols Law Firm, PLLC and Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on February 24, 2015, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Philip Patrick Moore, #68206
Spokane County Jail, 5W 37
1100 W. Mallon
Spokane, WA 99260

Having obtained prior permission from the Spokane County Prosecutor's Office, I also served Mark Erik Lindsey at scpaappeals@spokanecounty.org using Division III's e-service feature.

Dated this 24th day of February, 2015.



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