NO. 46425-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

AZIAS ROSS,

Appellant.

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

The Honorable Linda Lee, Judge
The Honorable Thomas J. Felnagle, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

A. ISSUES IN REPLY

1. Was the State's repeated misrepresentation of the evidence in closing argument and in its corresponding visual presentation both improper and prejudicial? (Brief of Respondent (BOR) at 79-87)

2. Does the "law of the case" doctrine permit a lessening of the State's burden to prove all the elements of a charged crime? (BOR at 101)

3. Does insufficient evidence support the firearm enhancement as to Ross's conspiracy conviction? (BOR at 104-07)

4. Does the State's brief misstate the law and facts in arguing that the April robbery and unlawful imprisonment convictions could not be considered same criminal conduct? (BOR 129-32)

5. Does the State's brief misrepresent the evidence in its attempt to rebut Ross's argument as to jury unanimity on the April offense firearm enhancements? (BOR at 144-45)

B. ARGUMENTS IN REPLY

1. THE STATE'S REPEATED MISREPRESENTATION OF KEY EVIDENCE IN CLOSING ARGUMENT AND IN ITS VISUAL PRESENTATION WAS IMPROPER AND PREJUDICED ROSS.

The State appears to acknowledge that the misrepresentation of Ross's statement to police was improper. As the State grudgingly

acknowledges, these PowerPoint slides "seem to be presented as direct quotations, and the language contained within those quotations, seems to vary from the testimony in the record." BOR at 84. The State is correct in this respect. The State's brief, however, misconstrues the resulting prejudice.

First, the State argues that misquotation was merely a reasonable inference from the evidence. BOR at 83-84. But, crucially, it was not presented as such. Rather, it was—problematically—presented as a direct quote, a fact the State acknowledges.

The State also argues that the repeated misrepresentation of the evidence did not prejudice Ross, in part because, when defense counsel first objected to the misrepresentation of the evidence, the court told jurors that the parties' arguments were not evidence.[1] BOR at 85.

This non-specific "curative" instruction was insufficient to dispel the prejudice. See State v. McCreven, 170 Wn. App. 444, 470-71, 284 P.3d 793 (2012) (court's admonitions to jurors that "[t]he jury has been instructed on the law of the case" and "the jury has been instructed on the law of the case, and the jury will decide the facts of this case" insufficient

[1] The State, and the court, were already on notice that the State had the quote wrong. Defense counsel objected to the State's characterization of the quote during counsel's half-time motion to dismiss the firearm enhancements. 24RP 2209-10.

to ameliorate prosecutor's misstatement of the law and the facts), review denied, 176 Wn.2d 1015 (2013). Moreover, the generalized instruction came early in the State's presentation, 10 pages into a 30 page closing argument. 25RP 2242-72. The State went on to again misstate the evidence and to repeatedly present erroneous PowerPoint slides featuring the misrepresented quotation in various legal and factual contexts. 25RP 2260; CP 383, 385, 396, 398, 400, 405, 407, 409 (eight separate slides peppering 57-page visual presentation); see also CP 372-428 (complete PowerPoint presentation). In other words, evaluated in the context of the entire argument, the effect of the repeated misrepresentation was substantial. State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005).

Closing argument provides an opportunity to draw the jury's attention to the evidence presented, but it does not give a prosecutor the right to present altered versions of admitted evidence to support the State's theory of the case. State v. Walker, 182 Wn.2d 463, 478, 341 P.3d 976, 985 cert. denied, 135 S. Ct. 2844 (2015). Given the prestige of the prosecutor's office, it is especially important that the State take care to represent the evidence accurately in its closing argument. As our Supreme Court has admonished counsel for the State:

> [A] prosecutor's argument is likely to have significant persuasive force with the jury. Accordingly, the scope of argument must be consistent with the evidence and marked by the fairness that should characterize all of the prosecutor's conduct. Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.

In re Glasmann, 175 Wn.2d 696, 706, 286 P.3d 673 (2012) (quoting American Bar Association Standards for Criminal Justice std. 3–5.8, cmt.) Although, as the State points out, defense counsel attempted to (again) set the record straight during its own closing argument, the defense inherently lacks the stature accorded to the prosecutor's office as well as the "fact-finding" prowess jurors attribute to a prosecuting attorney. Glasmann, 175 Wn.2d at 706. Jurors would have been likely to accept the State's version, which was subtly, but prejudicially, different from the actual statement.

It is, moreover, difficult to overstate the impact of repeated bombardment with visual information. "[V]isual arguments manipulate audiences by harnessing rapid unconscious or emotional reasoning processes and by exploiting the fact that we do not generally question the rapid conclusions we reach based on visually presented information." Glasmann, 175 Wn.2d at 708-09 (quoting Lucille A. Jewel, Through a Glass Darkly: Using Brain and Visual Rhetoric to Gain a Professional

Perspective on Visual Advocacy, 19 S. Cal. Interdisc. L.J. 237, 289 (2010). The State presented the misquotation visually, again and again, impressing its apparent truth on jurors' brains in the context of a number of legal arguments. As in Glasmann, the issues in this case were complicated and nuanced, requiring the jury to parse though the requirements of accomplice liability on underlying offenses of varying degrees as well as a subtly different standard of liability for firearm enhancements. See Glasmann, 175 Wn.2d at 710 (finding prejudice from visual presentation where jury was required to analyze the "nuanced distinctions" between different degrees of offenses).

Although the State's visual approach was, on the surface, not as inflammatory as that used in Glasmann or Walker, the misconduct was equally egregious, considering that the prosecutor was warned about the inaccuracy of the quote and apparently chose to do nothing to remedy the inaccuracy in argument or in the visual presentation. 24RP 2209-10. Because there was an objection, including an objection that warned the prosecutor well in advance of closing argument, moreover, Ross need not attain the extreme level of prejudice necessary to merit reversal in a case where there is no objection, such as Glasmann and Walker.

The State's brief also overstates the strength of the other, untainted, evidence. Evidence of real firearms during the January and

April incidents was not "virtually overwhelming," as the State asserts. BOR at 86. As argued in the opening brief, Ross admitted to being involved with the home invasion incidents in which the principals had guns. 19RP 160. But Ross's statement does not make clear *when* he became aware guns were involved. While there was evidence the principals were communicating via walkie-talkie, particularly in later robberies,[2] the State did not prove what the communication with Ross entailed, i.e., whether any such communication during the January and April incidents made it clear to Ross there were people present or that there were real guns involved at the time of the incident.

And although the State argues the jury heard evidence that gun-related items were found in Ross's bedroom, BOR at 87, the police search did not occur until months after the incidents in question. This evidence of gun accoutrements is, moreover, of dubious value in proving the presence of real firearms during the January and April incidents, especially considering that the State never alleged that Ross himself was armed. See State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993) (in prosecution for delivery, conspiracy to deliver and possession of cocaine, evidence that an unloaded rifle was found under the bed in the

[2] See, e.g., 13RP 989 (Remegio Fernandez testimony regarding use of two-way radios during May 10 incident).

bedroom, without more, is insufficient to establish Valdobinos was "armed" in the sense of having a weapon accessible and readily available for offensive or defensive purposes); see also State v. Schelin, 147 Wn.2d 562, 572, 55 P.3d 632 (2002) (for purposes of sentence enhancement, deadly weapon must be accessible and readily available, and a nexus must be established between the defendant or an accomplice, and the weapon, and the crime).

Finally, the robbers took pains to *suggest*, verbally, to the victims of the January and April incidents that there was a real gun involved. But these incidents occurred before a number of real, operable guns were taken in the April incident, and before the incidents in which victims began providing very specific accounts of being shown, for example, real magazines and bullets. 13RP 986 (May 10); 14RP 38-39 (June 9); 15RP 36 (June 17); 16RP 1158 (June 29). There was no similar testimony regarding the earlier incidents. Rather, the robbers appeared to rely on verbal threats, i.e., telling, not showing, unlike in the later incidents.

As argued in the opening brief, the prosecutor's repeated misstatements of the evidence were prejudicial as to the underlying convictions as well as the enhancements related to the January and April incidents. In closing, the State argued the use of real guns was linked to the expectation that the homeowners would be present. 25RP 2253, 2256.

The misconduct therefore affected the robbery, assault, and unlawful imprisonment convictions because the misstatement encouraged jurors to find Ross (charged as an accomplice) *knew* there would be people inside the homes, and that therefore a robbery, and other crimes, would be committed against the occupants, rather than a simple burglary.

The State also used the misstated evidence to suggest that the principals were armed with real guns before entering the homes. The misconduct therefore affected the burglary convictions, because in order to convict Ross of first degree burglary, the State was required to prove he, or an accomplice, was armed with a deadly weapon.

The misquotation was used to suggest Ross knew the principals were using real, not toy, guns and therefore the firearm enhancements applied. See, e.g., CP 385 (slide entitled "Are they using a real gun?" including the challenged misquotation, as well as statements asserting "They had access to real guns" and "Zero evidence of fake guns."). The misconduct therefore also affected the firearm enhancements on each of the foregoing crimes.

The misconduct also affected the firearm enhancements as to conspiracy and trafficking. As for conspiracy, the misstatement was used to argue the principals were in fact armed with firearms during the January and April incidents. E.g., CP 385. As for trafficking, because, as the State

argued, the trafficking began at the moment the items were taken, 25RP 2267, the misquotation suggested that the principals were armed with real weapons when the trafficking was committed.

Based on the foregoing misconduct alone, this Court should reverse of each conviction except the April conviction for theft of a firearm and the August conviction for trafficking.

2. AN INSTRUCTION MISSTATING THE LAW OF ACCOMPLICE LIABILITY AS TO THEFT OF A FIREARM CANNOT LOWER THE STATE'S BURDEN UNDER A "LAW OF THE CASE" THEORY.

The State next argues it was not required to present evidence Ross had knowledge the crime "theft of a firearm" would be committed because "the jury was instructed that '[t]he State is not required to prove an accomplice had knowledge a firearm would be taken during the theft.' Because [Ross] did not object to this instruction, it was the law of the case, and the evidence [Ross] now argues is insufficient was unnecessary." BOR at 101.

A criminal defendant may always challenge the sufficiency of the evidence supporting a conviction for the first time on appeal. State v. Hickman, 135 Wn.2d 97, 103 n. 3, 954 P.2d 900 (1998). An accused may assign error to elements added under the "law of the case" doctrine, and that assignment "may include a challenge to the sufficiency of evidence of

the added element." Id. at 102. In Hickman, the trial court's to-convict instruction included venue as an element. Because the State did not object, venue became an element that the State had to prove "even though it really is not an element." Id. at 99. Because the State did not prove venue, the court reversed the conviction for insufficiency of the evidence and dismissed with prejudice. Id. at 106.

The State cites no authority, however, for the proposition that it may, under the "law of the case" theory, lessen its burden to prove an offense via improper jury instruction. Indeed, due process requires the State to bear the "burden of persuasion beyond a reasonable doubt of every essential element of a crime." State v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996 (1996). Accomplice liability requires knowledge that one is facilitating *the crime* in question. State v. Cronin, 142 Wn.2d 568, 578-79, 12 P.3d 752 (2000). Ross's conviction for theft of a firearm cannot stand because it was based on proof he was an accomplice to the different, much less serious crime of theft. Compare 25RP 2290-91 (closing argument that Ross was guilty of theft of a firearm as an accomplice because he admitted was on board with burglary) with BOR at 102 (State's argument, without citation to authority, that after-the-fact knowledge guns were taken was sufficient to prove theft).

Where, as here, the State presents insufficient evidence to support a conviction, the remedy is reversal and remand for vacation of the conviction and dismissal of the charge with prejudice. State v. Engel, 166 Wn.2d 572, 581, 210 P.3d 1007 (2009).

3. INSUFFICIENT EVIDENCE SUPPORTS THE FIREARM ENHANCEMENT AS TO ROSS'S CONSPIRACY CONVICTION.

The State argues there was sufficient evidence to show a nexus between a firearm and the conspiracy because the conspiracy must have been formed at the house where Ross lived with parents, his brother and Soy Oeung, or in the alternative, in the car on the way to the crime in question. BOR at 107 (citing 19RP 159-60, 226-27 and 21RP 1733-35, 1748-55).

Conspiracy is an inchoate crime. State v. Bobic, 140 Wn.2d 250, 265, 996 P.2d 610, 617 (2000). The nature and extent of the conspiracy lies in "'the agreement which embraces and defines its objects.'" Id. (quoting Braverman v. United States, 317 U.S. 49, 53, 63 S. Ct. 99, 87 L. Ed. 23 (1942)).

For purposes of firearm enhancements under the Sentencing Reform Act, "[a] person is 'armed' if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes." Valdobinos, 122 Wn.2d at 282; see also RCW 9.94A.825; RCW

9.94A.533(3), (4). "[A] person is not armed merely by virtue of owning or even possessing a weapon; there must be some nexus between the defendant, the weapon, and the crime." State v. Eckenrode, 159 Wn.2d 488, 493, 150 P.3d 1116, 1118 (2007). Although the State need not establish "with mathematical precision the specific time and place that a weapon was readily available and easily accessible," State v. O'Neal, 159 Wn.2d 500, 504-05, 150 P.3d 1121 (2007), it must establish the required nexus between the defendant and the weapon by presenting evidence that the weapon was easily accessible and readily available at the time of the crime. Id. at 504.

Again, the crime in question is the agreement itself, not the execution of any agreed upon criminal activity. The State argues one can infer some agreement was reached at Ross's home or in a car, and one can infer there were guns in the home or in the car. BOR at 107. Thus, the State argues, there was sufficient evidence of the required nexus.

The State is mistaken. A magazine and other gun accoutrements were found at Ross's home months after the charged conspiracy ended, CP 741, but there was no admissible evidence that a gun was found in the house. 21RP 1739. Although Ross told police that he was in the car during two robberies during which the robbers used guns, 19RP 159-60, this provides no information about whether any agreement was formed

during that time. The State seems to be arguing that because there was evidence indicating Ross and/or other co-conspirators were around guns and/or gun accoutrements in 2012, there was sufficient evidence of a nexus between a firearm and the conspiracy. Thus asks too much. The existence of a fact cannot rest upon guess, speculation or conjecture. State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). The State did not show that any firearm was "accessible and readily available for offensive or defensive purposes" at the time the conspiracy was formed or elaborated upon. Valdobinos, 122 Wn.2d at 282. Because the enhancement is supported by insufficient evidence, the remedy is vacation of the firearm enhancement. Id.

4. THE STATE MISSTATES THE LAW AND THE EVIDENCE IN ALLEGING THE APRIL ROBBERY AND UNLAWFUL IMPRISONMENT CHARGES COULD NOT BE THE SAME CRIMINAL CONDUCT.

The State attempts to rebut Ross's ineffective assistance argument by asserting there were multiple victims of the April robbery and unlawful imprisonment counts. The State spins a convoluted theory that appears to suggest that the entire *house* in question was robbed. BOR at 129-32.

There was, rather, a single named victim of each crime, Bora Kuch, removing any ambiguity as to who was the victim for purposes of the relevant analysis. CP 273 (Instruction 33, first degree burglary to-

convict instruction for count 9); CP 285 (Instruction 45, unlawful imprisonment to-convict for count 11); see State v. Kier, 164 Wn.2d 798, 812-13, 194 P.3d 212 (2008) (while jury instructions need not identify a specific robbery victim, they *may* specify an individual robbery victim, removing any ambiguity as to victim's identity in a given case).

The State also argues that the offenses involved separate criminal intent based on an apparent "division of labor" between the two robbers, neither of whom were Ross. BOR at 131. But the very phrase "division of labor" undermines the State's own argument. The term suggests cooperation of multiple individuals in smaller tasks to achieve a larger, and singular, objective.[3] This in turn, mirrors the test for same criminal intent. See State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990) (factors used to determine whether same intent include (1) how intimately related the crimes are; (2) whether the criminal objective substantially changed between the crimes; (3) whether one crime furthered another; and (4) whether both crimes were part of the same scheme or plan). And while the State strains to divide the Kuch robbery and unlawful imprisonment into artificial temporal units, the record shows substantial overlap of the two crimes. Indeed, it shows a "continuous transaction."

[3] https://en.wikipedia.org/wiki/Division_of_labour (accessed Aug. 11, 2015).

State v. Deharo, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998). Simply put, the restraint of Kuch was necessary to, and furthered, the robbery.

There was at least a reasonable probability that the sentencing court would have found these offenses constituted the same criminal conduct, had the argument been made below. Ross has shown deficient representation in this respect, as well as prejudice. Remand for resentencing is therefore required. State v. Saunders, 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004).

5. IN ATTEMPTING TO REBUT ROSS'S JURY UNANIMITY ARGUMENT, THE STATE MISREPRESENTS THE EVIDENCE AS TO THE APRIL FIREARM ENHANCEMENTS.

In his supplemental brief, Ross argued the court violated his right to a unanimous jury verdict on the charges relating to the April incident. In closing, the State argued either the stolen guns, or, alternatively, a gun already possessed by the robbers, supported the enhancements as to those charges. Because the State presented insufficient evidence as to the operability of the latter, the court violated Ross's right to jury unanimity on the enhancements.

The State, however, argues any error was harmless as to Ross, citing to testimony by Soeung Lem. BOR at 144-45. Lem was not involved in the April incident. As argued in Ross's supplemental brief,

moreover, the testimony by the April victim, Kuch, was insufficient to establish the gun's operability under State v. Pierce, 155 Wn. App. 701, 714, 230 P.3d 237 (2010).

The failure to give a unanimity instruction in a multiple acts case will be deemed harmless only if no rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. State v. Hanson, 59 Wn. App. 651, 659, 800 P.2d 1124 (1990). The gun owners testified the guns taken from Kuch's home in the April incident were operable. 12RP 744, 748-49; 19RP 15-25. But the State did not present any evidence of the sort required by this Court in Pierce to prove any apparent gun brought by the robber was a real, operable firearm. Pierce, 155 Wn. App. at 714 n.11. Kuch described only a black gun. 11RP 642.

Because, under Pierce, insufficient evidence supports one of the State's theories in support of the firearm enhancements as to the April offenses, this Court should reverse those enhancements. Hanson, 59 Wn. App. at 660.

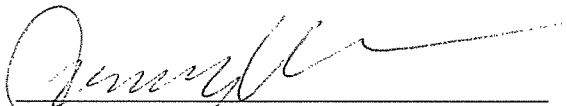
C. CONCLUSION

For the reasons stated above and in Ross's opening and supplemental briefs, this Court should grant the requested relief.

DATED this 17TH day of August, 2015

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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DIVISION TWO

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	)	
Respondent,	)	
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	)	
AZIAS ROSS,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 17TH DAY OF AUGUST, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] AZIAS ROSS
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ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF AUGUST, 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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