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Court of Appeals
Division I
State of Washington

Supreme Court No.: ________
Court of Appeals No.: 73263-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAARSO ABDI,

Petitioner.

PETITION FOR REVIEW

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

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Jaarso Abdi, petitioner here and appellant below, asks this Court to grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals in *State v. Abdi & Said*, No. 73263-3-I, filed July 31, 2017. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Whether the Court should grant review and hold a mistrial should have been declared when the State dismissed a count after the admission of extensive unfairly prejudicial evidence about codefendants' physical assault on a neighborhood gardener that related only to that dismissed count? RAP 13.4(b)(4).

2. Whether the Court should grant review of the improperly admitted in-custody lineup evidence because Abdi was denied an attorney after his request and the appellate court's hearsay ruling expands the scope of out-of-court statements admissible as identifications? RAP 13.4(b)(2), (4).

3. Whether the Court should grant review where no reasonable juror could find Abdi actually had dominion and control over a firearm? RAP 13.4(b)(3), (4).

4. Whether the Court should grant review to interpret the effect of conflicting to-convict instructions under the law of the case doctrine? RAP 13.4(b)(1), (3), (4).

5. Whether the Court should grant review where a lesser included offense instruction was denied although everyone agrees it was legally aligned with the charged offense and affirmative evidence showed only the lesser offense occurred? RAP 13.4(b)(1), (3).

6. Whether the Court should grant review of the significant constitutional question whether the rapid recidivism aggravator is vague? RAP 13.4(b)(3), (4).

7. Whether this Court should grant review to consider whether any LFOs, including those sometimes deemed to be "mandatory," can be imposed without consideration of ability to pay. RAP 13.4(b)(1), (4).

C. STATEMENT OF THE CASE

Two callers from the Yesler Terrace area in Seattle reported young men and a possible gun to 911 on a December night in 2013. Exs. 14, 15, 59, 60; RP 1521. The first caller heard a verbal argument from his home, saw about six men out his window, and later viewed one man walking on the sidewalk, shouting "Come out of the house," with an object in his arm about the size of a rifle. RP 1511-21, 1536-38, 1543-44. It was dark and

dimly lit; he could not describe any of the men or their clothing. RP 1377, 1524-26, 1528, 1531, 1764-65.

The second caller called on behalf of her father, for whom English was a second language. RP 1886, 2115. The Dalmar-Ali family heard loud knocking on their front door and two or three men asking for money. RP 2096-98, 2101, 2209-11, 2216. The men left and went to a car. RP 2101-03, 2211-12. Dalmar thought they took something out but did not see what it was. RP 2212-13. Ali later testified the man he knew as Antonio got a gun: "Because I was seeing them, they opening the back of the car trunk and getting the weapon, and that's what my attention went to them . . . the only person I can explain who was Antonio, and I do remember, it was a -- he was a pistol called Clipper." RP 2103; *see* RP 2104 ("Only weapon I remember is the one Antonio carried.").

Three men returned to the Dalmar-Ali's front door, asking for "$40" and "$400." RP 2107-08, 2213-15. But the men left and went around back to another area. RP 2108, 2153. Two daughters watching from upstairs and Ali saw at least two of the men physically "attack" and demand money from the gentleman who cut grass in the neighborhood. RP 1872-79, 2108, 2307-12. The two men were identified as Said and Antonio. RP 2110, 2319-22. It was dark and daughter R.A. did not get a good look at the men. RP 1873, 1874-75, 1876-77. Ali testified Antonio

was using a "pistol" to hit the grasscutter. RP 2109. R.A. and daughter M.A. saw a shiny or silver object but could not decipher what it was. RP 1883, 1906, 2338, 2375.

Dalmar left to drive her son to work. RP 2110-11, 2216, 2313. Two men came to Dalmar's window and asked for money again. RP 1604-08, 2112-14. Dalmar did not see these men with a gun and could not say what they were wearing. RP 1608, 1625, 2233-34. Ali and Dalmar said Antonio stood removed from the other men and pointed a gun at the Dalmar-Ali house. RP 1608, 1625, 2112-13, 2196-97, 2217-18. He was wearing a black or gray jacket and a gray or white shirt. RP 1611, 1627-28, 2323-25; *see* 2378-79. Ali opened the front door and the men moved towards the house, while Dalmar drove away with her son. RP 2114-15, 2221-22. Her daughter, meanwhile, called 911 from inside the house on her father's behalf. RP 2115.

Arriving to the scene, the police encountered three black men on a sidewalk across the street who turned and ran when the police shined their lights and drew their weapons at them. RP 1367-71, 1442-45, 1575-78, 1745-46, 1767, 1932-39. When Jaarso Abdi tripped and fell moments later, the police seized him. RP 1380-81, 1994-96. He was wearing a multi-colored, patterned white, silver, and dark gray jacket. Ex. 51, 56; RP 2297-2301. Police also seized a second man, Abdunasir Said, who had

on a black jacket. RP 1380-81, 1383-84; Ex. 66-B. The third man, Antonio, escaped. RP 1384, 1581.

Neither Abdi nor Said had a gun on his person. RP 1460-61, 1579-80, 1774-75. Officers searched the area and found two guns in a plastic recycling bin, a small lavender revolver buried under trash and a rusty shortened shotgun. RP 1384-90, 1457, 1753-57, 1945-46; Ex. 2-R. The police did not see the men drop anything and were not certain these guns were from the men. RP 1483-84, 1587, 1768, 1785, 1973-77, 2198.

At post-arrest lineups, Dalmar and Ali identified Said and Abdi. RP 1681-82, 2118-20, 2133-36, 2138, 2223-25, 2472-83. Dalmar confirmed she did not see either Said or Abdi with a gun. RP 2225. Antonio Forbes was later arrested and identified as the man pointing the rifle at the house. RP 1975-76, 2013, 2485-88. The three were charged with three counts of attempted first degree robbery with a firearm, one count each as to Dalmar, Ali and the grasscutter. CP 183-85. Said and Abdi were also charged with first degree unlawful possession of a firearm. CP 185-86.

After extensive testimony about the alleged physical assault on the grasscutter, the State dismissed that count because the complaining witness did not testify. *E.g.*, RP 2435-42, 2531-32. Because graphic and lengthy testimony about the grasscutter's alleged assault had already been

admitted, Abdi moved for a mistrial. RP 2536-37. The trial court denied the motion, ruling the evidence would have been admissible for purposes of res gestae and "probably, at least in part," for identity. RP 2540-46, 2632-34. The court also denied a motion to dismiss the unlawful possession of a firearm count, noting the evidence against Abdi was "very close" to requiring dismissal and probably a case of first impression. RP 2532-33, 2643-53, 2715-31; CP 371-72.

A jury convicted Said and Abdi of attempted robbery of Dalmar with a firearm and unlawful possession of a firearm. CP 260, 262-63, 373, 375-76. The jury could not reach a verdict on attempted robbery of Ali or any of the counts against the third individual charged, Antonio Forbes. CP 261, 374; RP 3028-33, 3039. Abdi was sentenced to 152 months of confinement. CP 293, 302-03.

D. ARGUMENT

1. The Court should grant review where the jury received extensive prejudicial testimony about initially charged but subsequently withdrawn acts committed by Abdi's codefendants.

Without limitation the jury considered unsanitized evidence of Said and Antonio's physical attack on an elderly, poor neighbor. *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012) ("ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a

person's character and showing that the person acted in conformity with that character."); *State v. Foxhoven,* 161 Wn.2d 168, 175, 163 P.3d 786 (2007). Although the separate charge against Freeman was ultimately dismissed, the court denied the defense motion for a mistrial and declined to limit the jury's consideration of the evidence.

The evidence had an undoubtedly emotional tug. The evidence regarded an "old," "polite," "neighborhood yard guy," who raised money by cutting his neighbor's grass, being attacked by Said and Antonio to the point that Freeman's face was bruised. RP 1332, 1874-76, 1899, 1907-09, 2404-05. Ali testified Antonio and Said hit a pistol against the head of this neighborhood gentleman who cut lawns and did gardening. RP 2108, 2139. Freeman was allegedly punched and assaulted while the codefendants yelled and screamed at him. RP 2309-12, 2337.

Although Abdi was either not present for the attack or, at least, was not a part of the abusive acts, the evidence was admitted without limitation at his trial. RP 1874-79, 2110, 2309-12, 2364, 2377.

The State did not meet its substantial burden to show this evidence was admissible for a non-propensity purpose and that its probative value—minimal—substantially outweighed the unmistakable prejudice. *See State v. DeVincentis*, 150 Wn.2d 11, 18-19, 74 P.3d 119 (2003) (proponent of evidence has substantial burden to demonstrate admissibility); *State v.*

Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (doubtful cases should be resolved in favor of exclusion of evidence).

Although by some accounts, the contact with Freeman occurred between the contacts with the Dalmar-Ali family, the evidence was not so connected that it was necessary for a complete description. Witnesses easily could have described the alleged attempted robberies on the Dalmar-Ali family without mentioning Freeman. Any break in the action or change in the suspects' location (i.e. to the back of the Dalmar-Ali house) simply could have been described by location without reference to the actions allegedly taken or the alleged victim. Moreover, M.A. and R.A. could have testified to the physical description of the people they saw from their window at the back of the house without discussing the actions they saw the individuals take. The evidence, therefore, was not necessary to "complete the story" of the attempted robbery of Dalmar or Ali or the unlawful possession of a weapon. *See State v. Lillard*, 122 Wn. App. 422, 431-32, 93 P.3d 969 (2004). It was not "a piece in the mosaic necessarily admitted in order that a complete picture be depicted for the jury." *State v. Fish*, 99 Wn. App. 86, 94 & n.18, 992 P.2d 505 (1999) (quoting *State v. Powell,* 126 Wn.2d 244, 263, 893 P.2d 615 (1995)).

Even if the evidence would have been admissible for *res gestae* or to show identity, the evidence should have been cleansed of the prejudicial

taint resulting from the physical acts alleged against Freeman and his particularly sympathetic characterization. Because Freeman did not testify, the portrayal of Freeman went to the jury unchecked.

Instead, witnesses easily could have described the alleged attempted robberies on the Dalmar-Ali family without mentioning Freeman. Witnesses could have described any interim between events or change in the suspects' location without reference to the actions allegedly taken or the alleged victim. Moreover, M.A. and R.A. could have testified to the physical description of the people they saw from their window at the back of the house without discussing the actions they saw the individuals take. The evidence, therefore, was not necessary to "complete the story" of the remaining counts—attempted robbery of Dalmar or Ali or the unlawful possession of a weapon. *See Lillard*, 122 Wn. App. at 432.

Further, any evidence that was admitted should have been subject to a limiting instruction that carefully curtailed the matters for which the jury could consider the evidence. However, the court denied the defense request that, if admitted, the jury's consideration of the evidence be limited. *See* RP 2537, 2633-34. The evidence was particularly unrelated to Abdi because he did not participate and was not identified during this episode. *See* Resp. Br. at 4, 8 (acknowledging evidence showed only that Antonio and Said assaulted Freeman).

The evidence of Antonio and Said's physical attack on the polite, old neighborhood grasscutter appealed to the jurors' emotions and prejudices. Even with a limiting instruction, it would have been difficult for the jury to parse the evidence and apply it for a limited purpose. Without any limitation, it is reasonably probable the evidence prejudiced the defendants on the separate counts.

2. The Court should grant review because the lower court decision reaches beyond Washington law to expand the type of testimony admissible under the statements of identification exception to the exclusion of hearsay.

The Court should grant review and hold that the in-custody lineup should have been suppressed because Abdi was not afforded counsel despite his request and its feasibility and the hearsay statements made during the lineup that describe the crime should have been excluded.

First, the trial court erred in denying Abdi's motion to suppress the post-arrest lineup identification by Ali and Dalmar because Abdi was denied counsel. CP 101-02, 149-62, 172-79, 425-28; RP 986-90, 1028-36. Criminal Rule 3.1(b)(1) provides the right to counsel immediately upon arrest. *State v. Templeton*, 148 Wn.2d 193, 218, 59 P.3d 632 (2002). Abdi requested an attorney shortly after his December 30th arrest but was not provided an attorney until after the January 2nd lineup. CP 426 (findings H, K, L); RP 476, 1021-25. The failure to provide Abdi with an

attorney at the lineup tainted the lineup and, within reasonable probabilities, affected the outcome of the trial. *State v. Copeland*, 130 Wn.2d 244, 282-83, 922 P.2d 1304 (1996) (evidence tainted by the rule violation must be suppressed); *Templeton*, 148 Wn.2d at 220 (without tainted evidence, violation of the rule is prejudicial if within reasonable probabilities the outcome of the trial would have been different). Once appointed, counsel objected to the lineup as unnecessarily suggestive. CP 101-02, 149-62. Counsel also would have asked that the witnesses be provided Somali interpreters. RP 746-47. Dalmar acknowledged an interpreter would have been helpful. RP 2267-68. And both Dalmar and Ali testified at trial with the assistance of an interpreter. RP 2087-90, 2204.

Second, the Court of Appeals expanded the hearsay exception for statements of identification by ruling counsel was not ineffective for failing to object to admission of Dalmar and Ali's lineup statements discussing the details of the crime. Slip Op. at 13. The statements the detective wrote on the lineup forms for each witness—"Pointed guns at me & threatened to shoot me & robbed my neighbor at gunpoint, Mr. Michael Freeman." and "tried to rob me when I was going to my car. He was telling me 'Give me money.' He also was banging on my house front door – saying 'give me money'"—were admitted at trial without objection

and admission was approved by the Court of Appeals. Exhibits 26, 45. However, the decision exceeds *State v. Stratton*, 139 Wn. App. 511, 517, 161 P.3d 448 (2007). In *Stratton*, the court affirmed the trial court's admission of a police officer's identification of the defendant "as the person wearing the yellow t-shirt." 139 Wn. App. at 516-17. This description of the defendant's clothing was part of the identification and admissible under the hearsay exception for identifications. *Id.*

On the other hand, here, the statements on the lineup sheet, — "Pointed guns at me & threatened to shoot me & robbed my neighbor at gunpoint, Mr. Michael Freeman." and "tried to rob me when I was going to my car. He was telling me 'Give me money.' He also was banging on my house front door – saying 'give me money'"—were not part of the identification or necessary to make the identification understandable to the jury. *See Stratton*, 139 Wn. App. at 517 (quoting *Harley v. United States*, 471 A.2d 1013, 1015 (D.C. Ct. App. 1984)). The statements ascribed to Ali and written on the form by law enforcement did not distinguish among the suspects or otherwise make the identification understandable to the jury. *See* Slip Op. at 13 (relying on *Porter v. United States*, 826 A.2d 398, 410 (D.C. Ct. App. 2003)). The statements were a general description of the offense. *See* Ex. 45; RP 2135-36. Admitting the double hearsay was not part of the identification nor was it necessary to make the

identification understandable to the jury. The Court should grant review to determine the breadth of the exception relating to out of-court statements of identification.

3. The Court should grant review because the evidence was insufficient to show Abdi actually possessed a gun.

The evidence did not show Abdi actually possessed a gun. *See State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); U.S. Const. amend. VI. The State conceded it was only relying on a theory of actual possession. Resp. Br. at 9. Thus, it was required to prove Abdi had actual, physical custody of a gun; momentary handling is insufficient. *State v. Davis*, 182 Wn.2d 222, 237, 340 P.3d 820 (2014); RCW 9.41.040. The trial court found the evidence as to Abdi "very close." RP 2728-31 (court's ruling); *see* RP 2544-46 (after reviewing notes, prosecutor does not believe any evidence places a gun in Abdi's hand). An examination of the record shows the evidence does not support a finding that Abdi actually possessed a gun.

Dalmar testified she did not see Abdi with a gun. RP 2225. M.A. also testified she did not see Abdi with a gun. RP 2324. No weapons were found on Abdi when he was apprehended. RP 1994-96. The officers who pursued Abdi did not see any weapons. E.g., RP 1481. No

fingerprint or other physical evidence linked Abdi to the recovered firearms Abdi did not confess to possessing a firearm.

Witnesses on occasion described the person with the gun as wearing black or gray. RP 1608-11; see RP 1625 (testimony of Mustafe that only one had a gun and he was wearing black jacket); RP 2368, 2378-79 (man holding gun was wearing gray). Said wore a black jacket; Antonio wore a gray or black jacket and a gray or white shirt; and Abdi wore a patterned white, silver, and gray jacket. RP 1424-28, 2365, 2368; Ex. 51, 56.

M.A. clearly referred to Antonio, not Abdi, as holding a gun when she called 911. *But see* Slip Op. at 7 (relying on M.A.'s 911 call). Because the person she described not only wore a gray jacket, but also attacked Michael Freeman. Abdi was not present during the attack on Michael Freeman, but Antonio was. RP 2311-12, 2319-22, 2324-25, 2332, 2377-79. M.A. also knew Abdi by name and knew his family. RP 2322-23. Thus, had M.A. been describing Abdi in her 911 call she would have so stated during the call or at trial rather than simply describe the coloring of clothing that matched Antonio, an individual clearly identified as having a gun.

Another witness, Ali simply testified to "guns." RP 2193-94. He did not say all three men had guns. *See id.* At one point, Ali testified

about a possible second weapon; this was ascribed to Said. Ali testified that when the men came up to his door, he did see "them holding pistol" and that he "thought" he saw an unspecified person, "he[,] was having the other gun machine." RP 2114-15. Ali clarified this other person that he "thought" had a gun was Said. RP 2197; *see* RP 1678 (lineup 1 was of Said). Ali's conclusory lineup statement, which is contradicted by his own in depth testimony and the testimony of his family members, is insufficient to connect Abdi to actual possession of a firearm. *Compare State v. Zamora*, 6 Wn. App. 130, 135, 491 P.2d 1342 (1971) ("lay conclusionary statements" constitute merely a "scintilla" of evidence) *with* Slip Op. at 6-7 (finding Ali's lineup statements sufficient evidence).

4. The Court should grant review and hold that conflicting language in the to-convict instructions required the State to prove Abdi acted as the principal in the attempted robbery at count one.

As this Court recently reaffirmed, the to-convict instruction is the law of the case and the measure by which sufficiency of the evidence must be made. *State v. Johnson*, No. 93453-3, Slip Op. at 12-14 (Jul. 13, 2017). The to-convict instruction for first degree attempted robbery against Ali referred to "the defendant or an accomplice." CP 250. However, the to-

convict instruction for first degree attempted robbery against Dalmar referred only to "the defendant." CP 249.

The opinion below treats the instruction on count one (as to Dalmar) as isolated from contrary language contained in count two (as to Ali). Slip Op. at 5. But this Court has counseled that it reviews jury instructions in the same manner as an average, reasonable juror. *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) (jury instruction must make the applicable legal standard "manifestly apparent to the average juror"). A reasonable juror, faced with one to-convict instruction specifying "the defendant or an accomplice" for one victim and another to-convict instruction that refers only to "the defendant," would conclude that the former permits conviction based on accomplice liability and the latter does not. This reasonable reading also gives meaning to each instruction. *See State v. Hutchinson*, 135 Wn.2d 863, 884, 959 P.2d 1061 (1998) (jurors entitled to presume that each instruction has meaning).

Contrary to the Court of Appeals opinion, the presence of an accomplice liability instruction in the jury instruction packet does not resolve the issue because nothing informed the jury that the instruction applied to both count one and count two. *See* Slip Op. at 5. A reasonable juror would simply use that instruction when interpreting liability under

count two, where the to-convict instruction explicitly incorporated accomplice liability.

5. The Court should grant review and hold the requested lesser included unlawful display of a weapon instruction should have been provided.

It is a violation of due process not to give a requested lesser offense instruction whenever the evidence would support a conviction on the lesser offense. *Fenazza v. Mintzes*, 735 F.2d 967, 968 (6th Cir. 1984); U.S. Const. amend XIV.

For the attempted first degree robbery charges, the defense proposed pattern instructions on unlawful display of a weapon as a lesser included offense. CP 350-52. Under RCW 9.41.270(1), it is unlawful "for any person to carry, exhibit, display, or draw any firearm . . . in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons." All agree unlawful display of a weapon is legally a lesser included offense of first degree robbery. Slip Op. at 11; RP 2653, 2732; *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

To meet the factual prong, "the evidence must affirmatively establish the defendant's theory of the case." *State v. Porter*, 150 Wn.2d 732, 737, 82 P.3d 234 (2004). The evidence is viewed in the light most favorable to the requesting party, Abdi. *State v. Femandez-Medina*, 141

Wn.2d 448, 455-56, 6 P.3d 1150 (2000). M.A.'s 911 call and testimony and Brzostowski's 911 call and testimony were affirmative factual evidence that the lesser offense of unlawful display was committed. RP 1506, 1512-15, 1518-19, 1527, 2655, 2735.

6. The Court should grant review and hold the recent recidivism aggravator is unconstitutionally vague.

The Due Process Clause requires that statutes give citizens fair warning of prohibited conduct and protect them from "arbitrary, ad hoc, or discriminatory law enforcement." *State v. Halstien*, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993); U.S. Const. amend. XIV. "A statute is void for vagueness if it fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or it does not provide standards sufficiently specific to prevent arbitrary enforcement." *State v. Duncalf*, 177 Wn.2d 289, 296-97, 300 P.3d 352 (2013) (internal quotation omitted). If a person of reasonable understanding is required to guess at the meaning of the statute, it is vague. *Id.* at 297.

The recent recidivism aggravator is impermissibly vague because it is impossible to know what the term "shortly after being released from incarceration" means. *See* RCW 9.94A.535(3)(t). Here, the jury learned Said had committed the instant offenses six hours after being released from King County Jail whereas Abdi had been released four days before.

RP 3060, 3073. The jury was provided no basis on which to distinguish among Abdi and Said or to otherwise determine what "shortly after" meant. *See* CP 277-85 (court's instructions for aggravator). This statutory provision is vague and ripe for arbitrary enforcement.

7. The Court should grant review and hold it violates the trial court's statutory authority and the constitution to impose any LFOs without considering an individual's ability to pay.

A sentencing court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). This Court has held "a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015); *accord State v. Duncan*, 185 Wn.2d 430, 374 P.3d 83 (2016) (remanding to trial court for resentencing with "proper consideration" of defendant's ability to pay). Abdi was found indigent and appointed counsel; he is serving a 12-year prison sentence; and the trial court waived all LFOs except a $500 victim penalty assessment (RCW 7.68.035) and a $100 DNA collection fee (RCW 43.43.7541), believing imposition of these LFOs was required. RP 3110; CP 292.

The Court should grant review and hold that *Blazina* applies to all LFOs, even those that have been proclaimed to be "mandatory." The

appearance of mandatory language in the statutes authorizing the costs imposed here does not override the requirement that the costs be imposed only if the defendant has the ability to pay. The statutes must be read in tandem with RCW 10.01.160, which requires courts to inquire about a defendant's financial status and refrain from imposing costs on those who cannot pay. RCW 10.01.160(3); *Blazina*, 182 Wn.2d at 830, 838.

Furthermore, to construe the relevant statutes as precluding consideration of ability to pay would raise constitutional concerns under the Equal Protection Clause, Due Process, and the fundamental right to travel. U.S. Const. amend. XIV; Const. art. I, § 3; *Saenz v. Roe*, 526 U.S. 489, 505, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999); *Fuller v. Oregon*, 417 U.S. 40, 45-46, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974); *see Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013) (citing substantive due process test).

E. CONCLUSION

The Court should grant review of these important issues.

DATED this 28th day of August, 2017.

Respectfully submitted,

s/ Marla L. Zink
Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Petitioner

APPENDIX

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JAARSO AHMED ABDI, Appellant.	No. 73263-3-I (Consolidated with No. 73460-1-I) DIVISION ONE
STATE OF WASHINGTON, Respondent, v. ABDUNASIR SAID, Appellant.	UNPUBLISHED OPINION FILED: July 31, 2017

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2017 JUL 31 AM 9: 25

LEACH, J. — In this consolidated appeal, Jaarso Abdi and Abdunasir Said appeal their convictions for first degree attempted robbery against Halimo Dalmar and first degree unlawful possession of a firearm. Abdi and Said challenge the sufficiency of the evidence to support their convictions, the admission of evidence about a dismissed charge without a limiting instruction, the admission of evidence about postarrest lineup identifications made without counsel present, and the trial court's refusal to give a lesser included instruction on unlawful display of a weapon. Finally, the defendants contend the recent recidivism sentencing factor is impermissibly vague and the legal financial obligations should be stricken.

Said also filed a statement of additional grounds for review, but he asserts the same grounds as those presented by his attorney.

Finding no merit to defendants' arguments, we affirm.

Background

On December 30, 2013, Mohamed Ali and his wife, Halimo Dalmar, were at home with seven of their eight children. Abdi, Said, and Antonio Forbes knocked on the door and loudly demanded money. The family refused to open the door. They continued to watch from their home.

Ali saw the three men go to a car parked nearby. The men removed weapons from the trunk of the car. They then returned to the family's apartment and again loudly banged on the door while demanding money. When the family did not open the door, the men went around the house and starting attacking Michael Freeman, a nearby neighbor.

Dalmar, thinking the coast was clear, left the apartment to drive her son Mustafe to work. When both Dalmar and Mustafe were in the car, the men "attacked the car," demanding money. At the same time, Forbes pointed a gun at the window of the family's home where the children were.

A neighbor, roused by the noise, saw a man holding a gun and called 911. Muna, Ali and Dalmar's daughter, also called the police when the three men surrounded her mother's car. Seattle police responded within minutes of the 911 calls. The police

saw the three suspects matching the descriptions given on the 911 calls. The suspects fled. Abdi and Said were quickly caught and taken into custody. Forbes escaped.

Witnesses saw the men toss something into the trash can. The police later retrieved two guns from a recycling bin.

Both Ali and Dalmar identified Abdi and Said in separate lineups and explained their roles in the crimes. At a later date, Dalmar identified Forbes in a photo montage. Ali, Dalmar, and Muna all identified the three defendants in court as the attackers.

The State also charged Abdi, Said, and Forbes with two additional counts of first degree attempted robbery against Ali and Freeman. When Freeman did not appear to testify, the court granted the State's request to dismiss the count involving Freeman.

The jury convicted Abdi and Said of first degree attempted robbery against Dalmar and first degree unlawful possession of a firearm. The jury acquitted Said of the second count of first degree attempted robbery against Ali but could not reach a decision as to Abdi on that count. The jury could not reach a decision about Forbes's guilt on any count.[1]

In a bifurcated hearing, the jury decided that Abdi and Said had committed the crimes shortly after being released from incarceration. The court sentenced each to a standard range of 152 months in prison and imposed mandatory financial obligations.

Abdi and Said timely appeal.

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[1] An inappropriate footnote in the State's brief on page 3 states that Forbes later pleaded guilty to attempted first degree robbery against Dalmar, admitting that he did so along with Abdi and Said. Because the record does not contain this information, this panel did not consider it.

Analysis

Attempted First Degree Robbery

Accomplice liability is not an element of or an alternative means of committing first degree robbery.[2] Thus, a "to convict" instruction for this crime that refers only to the conduct of the "defendant" and not that of the "defendant or an accomplice" does not require a jury to convict a defendant as a principal when the trial court also gives a general accomplice liability instruction.[3] Defendants acknowledge this general rule but claim that it does not apply in this case because of a difference in the wording of the "to convict" instructions for the two counts of first degree attempted robbery submitted to the jury. They contend that this difference required the State to present sufficient evidence to convict each of them as a principal for the count charging first degree attempted robbery against Dalmar.

The "to convict" instruction for first degree attempted robbery against Ali referred to "the defendant or an accomplice." The "to convict" instruction for first degree attempted robbery against Dalmar referred only to "the defendant." Abdi and Said contend that this difference would necessarily cause the jury to believe that they had to convict each as a principal in the crime against Dalmar. They reason that

> [a]n ordinary juror would ascribe significance to the difference in language, and consistent with that distinction, apply the general accomplice liability instruction to the count where the accomplice language was included in the "to convict" instruction (count 2 involving Mr. Ali) and not to the count where that language was omitted (count 1 involving Dalmar).

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[2] State v. Teal, 152 Wn.2d 333, 338-39, 96 P.3d 974 (2004).
[3] Teal, 152 Wn.2d at 338-39.

And because the State presented insufficient evidence to convict either as a principal on the Dalmar count, they claim that this court must reverse those convictions. We disagree.

The defendants rely on State v. Willis.[4] There, our Supreme Court held that under the law of the case doctrine, the failure to include the phrase "or an accomplice" in the "to convict" instruction required the State to prove that Willis was guilty as a principal.[5] However, the Supreme Court opinion gives no indication that the jury received a separate general accomplice liability instruction. It also makes no mention of State v. Teal,[6] decided only four months earlier, where the same court held that a "to convict" instruction for first degree robbery that refers only to the conduct of the "defendant" and not that of the "defendant or an accomplice" does not require a jury to convict a defendant as a principal when the trial court also gives a general accomplice liability instruction.[7] Teal controls the result in this case.

Here, the court instructed the jury that they should consider each charged crime separately.[8] Additionally, the State charged the defendants as accomplices, and the trial court gave a general instruction defining accomplice liability. Neither defendant challenges the sufficiency of the evidence to prove accomplice liability.

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[4] 153 Wn.2d 366, 103 P.3d 1213 (2005).
[5] Willis, 153 Wn.2d at 374-75.
[6] 152 Wn.2d 333, 338-39, 96 P.3d 974 (2004).
[7] Teal, 152 Wn.2d at 338-39.
[8] Jury instruction 7 provided in part, "A separate crime is charged in each count. You must separately decide each count charged against each defendant."

The jury instructions here are sufficient because when read as a whole, they are not misleading, accurately state the law, and allow each party to argue its theory of the case.

Sufficiency of the Evidence for Possession of a Firearm

A person commits first degree unlawful possession of a firearm by possessing or controlling a firearm after having been convicted of a serious offense.[9] Both Abdi and Said stipulated that they had previously been convicted of a serious crime.

To uphold a criminal conviction, this court must find sufficient evidence for a reasonable person to find the State has proved every element of the crime beyond a reasonable doubt.[10] We view the evidence in the light most favorable to the State.[11] A party challenging sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from the evidence.[12] We defer to the trier of fact about conflicting testimony, witness credibility, and the persuasiveness of evidence.[13]

Here, sufficient evidence supports the jury's decision. Ali testified that he saw Abdi, Said, and Forbes retrieve weapons from the trunk of the car parked nearby. He testified that he saw weapons in their hands, pointing guns at his wife and son. Dalmar testified that she was afraid because the men at the car had guns. Testimony also placed Forbes standing apart by the window pointing a gun at her home. Ali identified

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[9] RCW 9.41.040(1)(a).
[10] State v. Hartzell, 156 Wn. App. 918, 945, 237 P.3d 928 (2010).
[11] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).
[12] State v. Edwards, 171 Wn. App. 379, 401, 294 P.3d 708 (2012).
[13] State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Abdi as #3 in the lineup and testified that he saw him holding a weapon. Ali also identified Said as #4 in the lineup and testified that he had a gun. When the police arrived, Ali saw the men running away, tossing the weapons into the trash.

Further, during the 911 call, Muna described a black man in his twenties with a silver gun wearing "a big silver kind of grayish jacket" and jeans. Abdi was arrested wearing a gray jacket. Forbes had no jacket, having left it on the car while Said, bald, was wearing a black jacket.

The neighbor who called 911 indicated that he saw three men, one of whom he thought was carrying a gun. In court, he testified that he could not say with certainty that what he saw was in fact a rifle, but the manner in which it was displayed and its size was compatible with a rifle. Various witnesses placed firearms with each of the defendants. Sufficient evidence supports the jury's firearm decisions.

Admissibility of Evidence

The defendants argue that they were entitled to a mistrial because the evidence presented about the assault on victim Freeman was unfairly prejudicial. Alternatively, they argue that the trial court should have granted their request for a limiting instruction telling the jury to disregard the evidence about Freeman's assault. The trial court found this evidence admissible both as res gestae and, in part, to establish identity.

This court reviews the trial court's decision to admit or exclude evidence for abuse of discretion.[14] A trial court abuses its discretion when it makes a manifestly

[14] State v. Gunderson, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014).

unreasonable decision or bases its decision on untenable grounds or reasons.[15] This court reviews the trial court's interpretation of an evidentiary rule de novo as a question of law.[16]

The defendants argue that the trial court should have excluded the testimony under ER 404(b). ER 404(b) bars the admission of evidence of prior bad acts for the purpose of showing a person's character or that the person acted in conformity with that character.[17] This evidence is admissible, however, if it is relevant and the court balances the danger of unfair prejudice with its probative value.[18]

Evidence is relevant to show the "res gestae" of a crime if it provides needed context for the jury to understand the sequence of events surrounding the crime.[19] In other words, this evidence "'is admissible [to] complete the story of the crime.'"[20] Washington courts characterize res gestae as an exception to ER 404(b)'s prohibition of prior misconduct evidence.[21] Evidence of prior misconduct is admissible as res gestae "'if it is so connected in time, place, circumstances, or means employed that proof of

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[15] Gunderson, 181 Wn.2d at 922 (quoting State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997)).
[16] Gunderson, 181 Wn.2d at 922.
[17] Gunderson, 181 Wn.2d at 922.
[18] ER 402, 403, 404(b).
[19] State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995).
[20] Lane, 125 Wn.2d at 831 (alteration in original) (internal quotation marks omitted) (quoting State v. Tharp, 27 Wn. App. 198, 204, 616 P.2d 693 (1980)).
[21] See Lane, 125 Wn.2d at 831; Tharp, 27 Wn. App. at 204.

such other misconduct is necessary for a complete description of the crime charged, or constitutes proof of the history of the crime charged.'"[22]

Here, the challenged evidence is relevant as res gestae and thus admissible under ER 402. The identity of the defendants and possession of weapons were critical issues at trial. From the upstairs window, Muna saw Forbes and Said assault Freeman, whom she described as "the neighborhood grass-cutter." She saw Said with a shiny object that she thought was a gun. When Muna went downstairs, she saw three men run up to her mother's car. She recognized two of those men, Forbes and Said, as the same men who had attacked Freeman just before. Muna called 911 because she felt her mother was in danger of being shot. During that 911 call, Muna described one of the men at her mother's car as a black man in his twenties with a silver gun wearing "a big silver kind of grayish jacket" and jeans. Abdi was arrested wearing a gray jacket. Muna's testimony described a continuing course of events and placed guns in both Said's and Abdi's hands. It was relevant to prove identity for the charged crimes.

Because the testimony had substantial probative value, the trial court did not abuse its discretion in declining to exclude the testimony under ER 403. The testimony helped to complete the picture of events happening that night. All adverse evidence is prejudicial; ER 403 addresses unfair prejudice, which "is caused by evidence likely to arouse an emotional response rather than a rational decision among the jurors."[23] The

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[22] State v. Schaffer, 63 Wn. App. 761, 769, 822 P.2d 292 (1991) (quoting 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 115, at 398 (3d ed. 1989)), aff'd, 120 Wn.2d 616, 845 P.2d 281 (1993).

[23] Carson v. Fine, 123 Wn.2d 206, 223, 867 P.2d 610 (1994).

defendants' argument that the witnesses' characterization of Freeman as a sympathetic community member evoked such an emotional response that the jury could not disassociate it from the other victims is not well taken. The descriptions of Freeman as the neighborhood "yard guy" or an "old man" who cut the neighborhood grass do not evoke such an emotional response. These descriptions are not so incendiary that they would be "likely to arouse an emotional response" from the jury.[24]

Here, the challenged evidence was necessary to prove possession and identity, as well as to explain the sequence of events to the jurors. It was not unfairly prejudicial. The trial court did not abuse its discretion in admitting this evidence or by refusing to give a limiting instruction or declare a mistrial.

Lesser Included Offense Instruction

The defendants argue that they were entitled to an instruction on unlawful display of a weapon as a lesser included offense of attempted robbery. The trial court rejected the proposed instruction because the evidence did not suggest that any of the defendants were guilty of only the lesser offense.

In State v Workman,[25] our Supreme Court established a two pronged test to analyze whether a lesser included offense instruction should be given. A defendant is entitled to have a jury instructed on a lesser included offense when both the elements of the lesser offense are necessary elements of the offense charged and the evidence

[24] Carson, 123 Wn.2d at 223.
[25] 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

supports an inference that the lesser crime was committed.[26] Both prongs are necessary. In addition, "the evidence must affirmatively establish the defendant's theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt."[27]

No one disputes that the legal prong is met here.[28] Under the factual prong of Workman, there must be particularized, affirmative evidence permitting a rational juror to find that the defendant committed only the lesser offense. The trial court decided there was no basis to find that an unlawful display of weapons occurred. Unrebutted evidence shows that the defendants demanded money at the same time guns were shown. The defense theory of the case was that the State failed to prove that they touched a gun or attempted to rob anyone. The trial court did not err in refusing a lesser included offense instruction.

Postarrest Lineup Identifications

The defendants challenge the admission of postarrest lineup identification evidence because neither defendant had counsel present at the lineup. Abdi requested counsel shortly after his arrest, while Said had not asked for a lawyer.

Three days after the robbery the police had two witnesses, Ali and Dalmar, attend a lineup at which both identified Said and Abdi as the perpetrators and later gave

[26] Workman, 90 Wn.2d at 447-48.

[27] State v. Fernandez-Medina, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000).

[28] RCW 9.41.270 provides that it is a gross misdemeanor to unlawfully carry or display a weapon in a manner that "manifests an intent to intimidate another or that warrants alarm for the safety of other persons." Carrying a weapon is a necessary element of the greater crime of first degree robbery.

statements about the roles the defendants played in the incident. Experienced detectives testified that they complied with all the protocols involved in a lineup and that nothing unusual occurred. A public defender attended the lineup to advise an unrelated suspect who had been placed in the lineup next to Said for a witness in a different case. That public defender testified in pretrial that he saw nothing inappropriate in the lineup. The trial court found no irregularities or anything impermissibly suggestive about the lineups.

Because the police conducted the lineups before the State filed an information or started formal court proceedings, the defendants had no constitutional right to counsel at the lineups.[29] However, CrR 3.1(b)(1) provides for a lawyer at an in-custody lineup. Any error here results from a violation of a court rule, not a constitutional violation.[30] Thus, we apply a less stringent harmless error analysis.[31]

To succeed on this claim, the defendants must show that the lineup was unduly prejudicial. They have not. The testimony of the detectives and the other lawyer present at the lineup supports the trial court's ruling that the lineup was not unduly suggestive. Thus, any error in not having counsel there was harmless.

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[29] State v. Woods, 34 Wn. App. 750, 760, 665 P.2d 895 (1983) ("The right to counsel at a lineup attaches only at or after the initiation of judicial proceedings. Moore v. Illinois, 434 U.S. 220, 227, 54 L. Ed. 2d 424, 98 S. Ct. 458 (1977); Kirby v. Illinois, 406 U.S. 682, 689, 32 L. Ed. 2d 411, 92 S. Ct. 1877 (1972). This right does not attach until charges have been formally filed. State v. Lewis, 19 Wn. App. 35, 46, 573 P.2d 1347 (1978); State v. Knapp, 8 Wn. App. 825, 827, 509 P.2d 410 (1973)" (quoting State v. Haskins, 33 Wn. App. 185, 188, 654 P.2d 1208 (1982))).

[30] State v. Templeton, 148 Wn.2d 193, 217-19, 59 P.3d 632 (2002).

[31] State v. Robinson, 153 Wn.2d 689, 697, 107 P.3d 90 (2005).

Defendants next contend that counsel was ineffective for failing to timely object to hearsay that resulted in the admission of statements made after the lineup in which Ali stated that #4 (Said) "pointed guns at me & threatened to shoot me & robbed my neighbor at gunpoint, Mr. Michael Freeman." To show ineffective assistance of counsel, a defendant must show both that counsel's representation was deficient and that the deficiency prejudiced the defendant.[32]

ER 801(d)(1) provides that a "statement is not hearsay if . . . [t]he declarant testifies at the trial . . .and is subject to cross examination concerning the statement, and the statement is . . . (iii) one of identification of a person made after perceiving the person." The court in State v. Stratton[33] permitted statements that identified physical characteristics of a person perceived by a witness who testified. Stratton quoted Porter v. United States,[34] which held that details of the offense were admissible along with identification to the extent necessary to make identification understandable to the jury.[35] Here, the statements were admissible because the witnesses knew the identity of the defendants from the crime they committed. Because the statements were admissible, counsel was not deficient.

Even if we were to hold counsel deficient for failing to timely object, the claim fails. A successful ineffective assistance of counsel claim requires that the defendant show both that counsel's performance was deficient and that the defendant was

[32] State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).
[33] 139 Wn. App. 511, 517, 161 P.3d 448 (2007).
[34] 826 A.2d 398, 410 (D.C. 2003).
[35] Accord, Iowa v. Russell, 893 N.W. 2d 307, 317 (2017).

prejudiced thereby. The defendants cannot show prejudice, particularly where, as here, the witnesses testified to the same facts in open court and were subject to cross-examination.

Rapid Recidivism Aggravator

RCW 9.94A.535(3)(t) permits a court to impose a sentence outside the standard range for an offense if the jury finds beyond a reasonable doubt that a defendant committed the current offense "shortly after being released from incarceration." The defendants argue that the term "shortly after being released from incarceration" is unconstitutionally vague because it fails to define the term "shortly after being released from incarceration."

This court reviews de novo a challenge to the constitutionality of a statute. Because this challenge does not implicate the First Amendment, this court examines the statute as applied to the facts of the case to decide defendants' vagueness challenge.[36]

In State v. Williams,[37] this court held that RCW 9.94A.535(3)(t) was not vague as applied where the defendant had been released from jail 24 hours before an alleged assault. Here, Abdi had been out of jail for approximately 4 days while Said had been free for only 6 hours. The statute is not vague as applied to the particular facts here.[38]

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[36] State v. Williams, 159 Wn. App. 298, 319, 244 P.3d 1018 (2011).

[37] 159 Wn. App. 298, 320, 244 P.3d 1018 (2011).

[38] We note that our Supreme Court in State v. Baldwin, 150 Wn.2d 448, 461, 78 P.3d 1005 (2003), opined that due process considerations underlying void-for-vagueness doctrine does not apply in the context of sentencing guidelines. See, however, Johnson v. United States, ___U.S. ___, 135 S. Ct. 2551, 2557-58, 192 L. Ed.

Mandatory Legal Financial Obligations

Abdi claims, for the first time on appeal, that the mandatory DNA (deoxyribonucleic acid) fee under RCW 43.43.7541 and victim penalty assessment (VPA) under RCW 7.68.035 violate substantive due process when a court imposes them on an indigent defendant. He does not distinguish between the mandatory and discretionary fees.

This court squarely addressed these arguments in State v. Shelton,[39] holding that the defendant was procedurally barred from raising a substantive due process challenge to the DNA fees statute for the first time on appeal. This court held that the defendant's claim was not ripe until the State sought to enforce collection or sanctioned the defendant for failing to pay.[40] This court also held the defendant lacked standing because he could not show harm until the State sought to enforce the fee.[41]

As in Shelton, nothing in the record here indicates that the State has attempted to collect either fee or that it has imposed sanctions for failure to pay.[42] Thus, Abdi's as-applied substantive due process challenge is also not ripe for review.

2d 569 (2015), where the United States Supreme Court held that an increased sentence under the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B), violated a defendant's right to due process because it was unconstitutionally vague.

[39] 194 Wn. App. 660, 674, 378 P.3d 230 (2016), review denied, 187 Wn.2d 1002 (2017).

[40] Shelton, 194 Wn. App. at 672-73. This court reaffirmed this holding in State v. Lewis, 194 Wn. App. 709, 715, 379 P.3d 129, review denied, 186 Wn.2d 1025 (2016).

[41] Shelton, 194 Wn. App. at 674 n.8.

[42] See Shelton, 194 Wn. App. at 673.

Moreover, Abdi lacks standing because he cannot show harm until the State seeks to enforce collection of the fees.[43] And RAP 2.5(a)(3) prevents him from raising his challenge for the first time on appeal because the claimed error is not "manifest" "[u]ntil the State seeks to enforce collection of the DNA fee or impose a sanction for failure to pay" and because "the record contains no information about future ability to pay the mandatory $100 DNA fee."[44] The same is true of the VPA.

When a court declines to address the merits of the challenge, it must consider the risk of hardship to the parties.[45] However, "the potential risk of hardship does not justify review before the relevant facts are fully developed."[46] The record here contains no facts regarding Abdi's future ability to pay.

Appellate Costs

Finally, the defendants ask this court to deny the State appellate costs based on their indigency. We generally award appellate costs to the substantially prevailing party on review. However, when a trial court makes a finding of indigency, that finding continues throughout review "unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency."[47] Here, the trial court found Abdi and Said indigent. If the State has evidence indicating significant

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[43] Shelton, 194 Wn. App. at 674 n.8.

[44] Shelton, 194 Wn. App. at 675; see also State v. Stoddard, 192 Wn. App. 222, 228-29, 366 P.3d 474 (2016).

[45] Shelton, 194 Wn. App. at 670.

[46] Shelton, 194 Wn. App. at 672.

[47] RAP 14.2.

improvement in Abdi's ând Said's financial circumstances since the trial court's finding, it may file a motion for costs with the commissioner.

Statement of Additional Grounds for Review

Said submits a statement of additional grounds for review contending error in the jury instructions, ineffective assistance of counsel, and insufficient evidence. Counsel has already addressed these issues in his main appeal.

Conclusion

We affirm each defendant's judgment and sentence.

Leach, J.

WE CONCUR:

Mann, J.

Dwyer, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 73263-3-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: August 28, 2017

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