

NO. 67151-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

---

STATE OF WASHINGTON,

Respondent,

v.

SINDY TRUONG,

Appellant.

---

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

---

APPELLANT'S REPLY BRIEF

---

LINDSAY CALKINS  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2012 JAN 17 PM 4:46  
W

TABLE OF CONTENTS

A. ARGUMENT.....1

1. MS. TRUONG DID NOT USE FORCE TO OBTAIN OR RETAIN POSSESSION OF THE ZUNE, AS REQUIRED BY RCW 9A.56.190.....1

    a. Respondent concedes that force was not used to “overcome resistance to the taking.”.....2

    b. No force was used to obtain or retain possession of the Zune.....3

        i. *Handburgh* does not apply, because Ms. Truong never used force to retain property.....4

        ii. “Retain possession” in Washington’s robbery statute has the same meaning as other instances where Washington courts have interpreted the meaning of “possession.”.....6

        iii. The holding in *Johnson* controls the outcome in this case.....12

2. IN ADDITION TO THE FACT THAT THE TRIAL COURT MADE NO FINDING TO SUPPORT A CONVICTION FOR ROBBERY OF THE HEADPHONES, THERE WAS INSUFFICIENT EVIDENCE THAT THE HEADPHONES WERE EVER TAKEN FROM THEIR OWNER.....14

3. THERE IS NO AUTHORITY FOR  
RESPONDENT'S UNCITED ASSERTION  
THAT A PURPORTED "ATMOSPHERE OF  
INTIMIDATION" GIVES RISE TO  
ACCOMPLICE LIABILITY.....17

B. CONCLUSION.....20

## TABLE OF AUTHORITIES

### **Washington Supreme Court Decisions**

<u>Dep't of Ecology v. Campbell &amp; Gwinn, LLC</u> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	8
<u>In re Disciplinary Proceedings Against DeRuiz</u> , 152 Wn.2d 558, 99 P.3d 881 (2004).....	2
<u>In re Wilson</u> , 91 Wn.2d 487, 588 P.2d 1161 (1979).....	18, 20
<u>Myers v. Harter</u> , 76 Wn.2d 772, 459 P.2d 25 (1969).....	20
<u>State v. Callahan</u> , 77 Wn.2d 27, 459 P.2d 400 (1969).....	11, 12
<u>State v. Engel</u> , 166 Wn.2d 572, 210 P.3d 1007 (2009).....	9, 10
<u>State v. Handburgh</u> , 119 Wn.2d 284, 830 P.2d 641 (1992).....	4
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	8
<u>State v. Jacobs</u> , 154 Wn.2d 596, 115 P.3d 281 (2005).....	8
<u>State v. Johnson</u> , 155 Wn.2d 609, 121 P.3d 91 (2005).....	6, 12, 13
<u>State v. Kier</u> , 164 Wn.2d 798, 194 P.3d 212 (2008).....	7
<u>State v. Recuenco</u> , 163 Wn.2d 428, 180 P.3d 1276 (2008).....	7
<u>State v. Roberts</u> , 142 Wn.2d 471, 14 P.3d 713 (2001).....	17
<u>State v. Simms</u> , 171 Wn.2d 244, 250 P.3d 107 (2011).....	7, 12
<u>State v. Smith</u> , 131 Wn.2d 258, 930 P.2d 917 (1997).....	7
<u>State v. Stein</u> , 144 Wn.2d 236, 27 P.3d 184 (2001).....	5
<u>State v. Young</u> , 87 Wn.2d 129, 550 P.2d 1 (1976).....	20

## Washington Court of Appeals Decisions

<u>State v. Armenta</u> , 134 Wn.2d 1, 948 P.2d 1280 (1997).....	15
<u>State v. Asaelj</u> , 150 Wn. App. 543, 208 P.3d 1136 (2009).....	15, 17, 18
<u>State v. Bertrand</u> , ___ P.3d ___, 2011 WL 6097718 (Div. 2 Dec. 8, 2011).....	8
<u>State v. Blewitt</u> , 37 Wn. App. 397, 680 P.2d 457 (1984).....	10
<u>State v. Cantabrana</u> , 83 Wn. App. 204, 921 P.2d 572 (1996).....	12
<u>State v. Clay</u> , 7 Wn. App. 631, 501 P.2d 603 (1972).....	12
<u>State v. Collinworth</u> , 90 Wn. App. 546, 966 P.2d 905 (1997), <u>rev. denied</u> , 135 Wn.2d 1002 (1998).....	3
<u>State v. Cote</u> , 123 Wn. App. 546, 96 P.3d 410 (2004).....	12
<u>State v. Deer</u> , 158 Wn. App. 854, 244 P.3d 965 (2010), <u>rev. granted</u> , 171 Wn.2d 1012 (2011).....	3
<u>State v. Enlow</u> , 143 Wn. App. 463, 178 P.3d 366 (2008).....	3, 16
<u>State v. O'Connell</u> , 137 Wn. App. 81, 152 P.3d 349 (2007).....	1
<u>State v. O'Donnell</u> , 142 Wn. App. 314, 174 P.3d 1205 (2007).....	7
<u>State v. Robinson</u> , 73 Wn. App. 851, 872 P.2d 43 (1994).....	20
<u>State v. Saunders</u> , 120 Wn. App. 800, 86 P.3d 232 (2004).....	1
<u>State v. Ward</u> , 125 Wn. App. 138, 104 P.3d 61 (2005).....	2
<u>State v. Zillyette</u> , 163 Wn. App. 124, 256 P.3d 1288 (2011).....	16

**Other Jurisdictions**

Bradley v. State, 533 S.E.2d 727 (Ga. 2000).....10

Lightner v. State, 535 S.W.2d 176 (Tex. Cr. App. 1976).....5

Patterson v. Sheriff, 562 P.2d 1134 (Nev. 1977).....5

People v. Anderson, 414 P.2d 366 (Cal. 1966).....5

People v. Kennedy, 294 N.E.2d 788 (Ill. App. 1973).....5

State v. Mirault, 457 A.2d 455 (N.J. 1983).....5

State v. DeCourcy, 580 P.2d 86 (Kan. 1978).....11

State v. Henry, 881 A.2d 442 (Conn. App. 2005).....10

Winborne v. State, 455 A.2d 357 (Del. 1982).....5

**Statutes**

RCW 9.41.040.....9, 10

RCW 9A.20.021.....9

RCW 9A.56.190.....1, 6, 7, 10, 12

RCW 9A.56.200.....9, 10

RCW 69.50.4011.....9

A. ARGUMENT

Sindy Truong was convicted of one count of robbery in the first degree and one count of robbery in the second degree. CP 38. These counts comprise the alleged taking of three items: a pair of headphones, a Zune MP3 player, and a pack of cigarettes. CP 17–18. Ms. Truong was convicted as a principal for the first–degree robbery of either the headphones or the Zune, and as an accomplice for the second–degree robbery of the cigarettes. CP Id; CP 37–38. Ms. Truong argues that there is not sufficient evidence to sustain either conviction: on count I, she did not use force to “obtain or retain possession” of the Zune or the headphones, and she did not have the requisite mens rea to constitute accomplice liability on count II. AOB 7–22.

1. MS. TRUONG DID NOT USE FORCE  
TO OBTAIN OR RETAIN POSSESSION  
OF THE ZUNE, AS REQUIRED BY RCW  
9A.56.190.

A conviction for robbery requires that a defendant use “force or fear” “to obtain or retain possession of [another’s] property, or to prevent or overcome resistance to the taking.” RCW 9A.56.190; State v. O’Connell, 137 Wn. App. 81, 95, 152 P.3d 349 (2007); State v. Saunders, 120 Wn. App. 800, 814, 86 P.3d 232 (2004).

a. Respondent concedes that force was not used to overcome resistance to the taking.” As indicated in Appellant’s Opening Brief, the record does not support that there was resistance to the actual taking of the Zune. AOB 12–13. Rather, Jason Decoste, who was holding the Zune, testified that “I was holding the Zune, and then the Zune was out of my hand.” RP 68; see Ex. 3 at 18:44:34-35.<sup>1</sup> The State does not respond to Appellant’s argument that there was no resistance to the taking of the Zune and that therefore force could not have been used to overcome the resistance. See Resp. Br. 6–12. Because the State does not respond, the issue is conceded. State v. Ward, 125 Wn. App. 138, 143–44, 104 P.3d 61 (2005) (“Next, Ward argues . . . he may not be charged, tried, or sentenced for second degree murder because he was found not guilty by the jury of intentional murder. The State does not respond and thus, concedes this point.”); see In re Disciplinary Proceedings Against DeRuiz, 152 Wn.2d 558, 580, 99 P.3d 881 (2004) (“DeRuiz essentially concedes this issue by failing to assign error and failing to argue the issue.”).

---

<sup>1</sup> All citations to Exhibit 3 refer to camera angle 4.

b. No force was used to obtain or retain possession of the Zune. In addition to not using force to overcome resistance to the taking of the Zune, Ms. Truong never used force to obtain or retain possession of the item. See AOB 13–17. Thus, an essential element of the crime of robbery was not satisfied, and there was insufficient evidence to convict Ms. Truong of robbery in the first degree. See id; State v. Deer, 158 Wn. App. 854, 865, 244 P.3d 965 (2010), rev. granted, 171 Wn.2d 1012 (2011) (“Due process requires the State to prove beyond a reasonable doubt all elements of a crime.”); State v. Enlow, 143 Wn. App. 463, 467, 178 P.3d 366 (2008) (requiring reviewing court to examine whether sufficient evidence supported findings of fact and conclusions of law).

First, Respondent uses only one sentence to assert that Ms. Truong “used a level of force or intimidation” to obtain possession of the Zune. Resp. Br. 9. Respondent cites State v. Collinsworth, in which a man demanded money from several bank tellers but did not overtly threaten violence. 90 Wn. App. 546, 548–550, 966 P.2d 905 (1997), rev. denied, 135 Wn.2d 1002 (1998). But in that case, there was substantial evidence on the record that the bank tellers could not tell whether Collinsworth was armed, and perceived his demand as a threat or ultimatum. 90 Wn. App. at 548–550. None of

that evidence is present here. In contrast, Mr. Decoste merely stated, “I was holding the Zune, and then the Zune was out of my hand.” 1RP 68. There is not evidence that Ms. Truong used any force or threat of force to obtain possession of the Zune.

Respondent also contends that Ms. Truong used fear or force to retain possession of the Zune. Resp. Br. 8. This is also incorrect. As established by the record and in Appellant’s Opening Brief, Ms. Truong only had possession of the Zune for two seconds; she never used force during those two seconds and could never have used force or fear to “retain possession” after her possession ended. Ex. 3 at 18:44:34-36; AOB 13–17.

i. Handburgh does not apply, because Ms. Truong never used force to retain property. Respondent contends that this case is like State v. Handburgh, in which the Washington Supreme Court affirmed a conviction for robbery after a defendant peacefully took a girl’s bicycle, and then used force to retain the property. 119 Wn.2d 284, 293, 830 P.2d 641 (1992); Resp. Br. 8–9. But in Handburgh, the individual who took the bicycle also retained possession of the bicycle while using force. Handburgh, 199 Wn.2d at 285–86, 294. There is no case that stands for the Respondent’s proposition: that a robbery conviction may be sustained where an

individual other than the original taker retains the property. Resp. Br. 8. To the contrary, the cases the Washington Supreme Court cites in Handburgh all show the original taker of the property retaining the property when force is used. Id. at 292; State v. Mirault, 457 A.2d 455, 456 (N.J. 1983); Winborne v. State, 455 A.2d 357, 359–60 (Del. 1982); Patterson v. Sheriff, 562 P.2d 1134 (Nev. 1977); People v. Anderson, 414 P.2d 366, 368 (Cal. 1966); Lightner v. State, 535 S.W.2d 176, 178 (Tex. Cr. App. 1976); People v. Kennedy, 294 N.E.2d 788, 788 (Ill. App. 1973).

Respondent repeatedly alleges that Ms. Truong continued to retain possession of the Zune because she passed it to Ms. Wea, “her accomplice[ ].” Resp. Br. 8, 10. This is inaccurate and misleading. Respondent includes no citations to the record or authority for this contention, and neither the record nor the trial court’s findings indicate that Ms. Wea was Ms. Truong’s “accomplice” in taking the Zune. “Accomplice” is a legal term of art, and requires specific mens rea of the crime to be committed. See, e.g., State v. Stein, 144 Wn.2d 236, 246, 27 P.3d 184 (2001) (“the accomplice liability statute . . . requires knowledge of ‘the’ specific crime, and not merely any foreseeable crime committed as a result of the complicity.”). The court did not adjudicate Ms. Truong guilty

as an “accomplice,” or find that the prosecution proved accomplice liability. In addition, no evidence shows that Ms. Wea had the requisite mental state to be Ms. Truong’s accomplice. Moreover, once the property is abandoned, force can no longer be used to retain it; the robbery is over as a matter of law. See RCW 9a.56.190; State v. Johnson, 155 Wn.2d 609, 611, 121 P.3d 91 (2005).

ii. “Retain possession” in Washington’s robbery statute has the same meaning as other instances where Washington courts have interpreted the meaning of “possession.”

Respondent contends that “Unlike the drug and firearm-possession cases cited by Truong, possession is not an element of robbery . . . . Consequently, Truong’s discussion of actual and constructive possession is irrelevant to the question of whether sufficient evidence supports her conviction for robbery.” Resp. Br. 10, n. 9. This is wrong for several reasons. First, the robbery statute itself requires possession of the stolen property:

A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such

force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking.

RCW 9A.56.190. Second, and accordingly, the Washington Supreme Court explicitly included this second sentence—and indeed, possession—as an element of robbery, writing: “The elements to the crime of robbery are as follows: . . . force or fear must be used to obtain or retain possession of the property.” State v. Simms, 171 Wn.2d 244, 250 n. 7, 250 P.3d 107 (2011). Furthermore, the Simms Court indicated that obtaining or retaining possession was an “essential element” of robbery, or one that must have supporting facts alleged in the information. Id at 250 & n. 7; see State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008).

Possession is also included in the “to convict” instructions in robbery trials. E.g., State v. Kier, 164 Wn.2d 798, 808–09, 194 P.3d 212 (2008); State v. O’Donnell, 142 Wn. App. 314, 320, 174 P.3d 1205 (2007). The “to convict” instruction must include all elements of the offense, and the State assumes the burden of proving any unnecessary, uncontested allegation in the “to convict” instruction beyond a reasonable doubt. E.g. State v. Smith, 131 Wn.2d 258, 265, 930 P.2d 917 (1997) (holding that the to convict instruction

must include the essential elements of a crime); State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (indicating that the State must prove any unnecessary elements included in the “to convict” instruction). Finally, in this very case, the trial court made two adjudications of guilt for robbery by writing “[t]he following elements of Count One, Robbery in the First Degree, have been proven by the State beyond a reasonable doubt . . . (4) That force or fear was used by the respondent to obtain or retain possession of the property or to prevent or overcome resistance to the taking” and “the State has proven the following elements of the lesser degree charge of Robbery in the Second Degree . . . (4) That force or fear was used by the respondent to obtain or retain possession of the property . . . .” CP 37–38 (emphasis added).

Contrary to the false dichotomy that the State proposes between the robbery statute and other instances of “possession” in the criminal law, fundamental rules of statutory construction indicate that this Court should look to those other instances for guidance. When interpreting a statute, a Court must attempt to discern the legislature’s intent. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). If the meaning of a statute is plain on its face, the Court must “give effect to that plain meaning.” Dep’t of

Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). “To determine the plain meaning of a statute, an appellate court looks to the text, as well as the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” State v. Bertrand, \_\_\_ P.3d \_\_\_, 2011 WL 6097718 at \*9 (Div. 2 Dec. 8, 2011) (citing State v. Engel, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009)) (internal quotation marks omitted).

“Related provisions” and “the statutory scheme as a whole” include the statutory prohibitions against firearm and drug possession. See, e.g., RCW 69.50.401, 401(d) (prohibiting possession of controlled substances with intent to manufacture/deliver, and referring to RCW 9A.20 for penalties); RCW 69.50.4011 (prohibiting possession of counterfeit substances and referring to RCW 9A.20 for penalties); RCW 9.41.040 (prohibiting unlawful possession of a firearm and referring to RCW 9A.20 for penalties); RCW 9A.56.200 (referring to robbery in the first degree as a “class A felony”); RCW 9A.20.021 (designating maximum penalty for class A felonies). The Uniformed Controlled Substances Act and the firearm statute—in addition to the robbery statute—all refer to RCW 9A.20 for penalties; they are related provisions and are part of the same scheme. See RCW

69.50.4011; RCW 9.41.040; RCW 9A.56.200. It is therefore appropriate to look to the interpretation of “possession” in one part of Washington’s penalty scheme to elucidate the meaning of “possession” in another part of the scheme. Engel, 166 Wn.2d at 578.

Finally, past Washington courts have used the constructive possession framework to determine whether a person from whom property was taken had possession of that property before the crime. See, e.g., State v. Blewitt, 37 Wn. App. 397, 399, 680 P.2d 457 (1984). Thus the notion of constructive possession, as established by dominion and control, is impliedly present in the robbery statute itself. See id.; RCW 9A.56.190. Accordingly, many other state courts have indicated that robbery was effectively a transfer of possession from one party to another through force. E.g., State v. Henry, 881 A.2d 442, 450 (Conn. App. 2005) (“[R]obbery is defined as larceny committed by the use of force for the purpose of overcoming resistance to the taking of property . . . . Because taking is not defined in the Penal Code, we consider the ordinary usage of that term . . . . A criminal taking is the act of seizing an article, with or without removing it, but with an implicit transfer of possession or control.”) (internal quotation marks and

alterations omitted); Bradley v. State, 533 S.E.2d 727, 730 (Ga. 2000) (holding that armed robbery occurred when victim transferred constructive possession of car to defendants); State v. DeCourcy, 580 P.2d 86, 88 (Kan. 1978).

Contrary to Respondent's assertion, the cases cited by Appellant in her Opening Brief are on point. See AOB 14–17; Resp. Br. 10 n. 9. The record shows that Ms. Truong neither had actual nor constructive possession of the Zune when any force was used. AOB 16–17; Ex. 3 at 18:44:34-36; 1RP 35, 68; 2RP 9–12. No physical interaction with Ms. Redmon-Beckstead occurred until well after Ms. Truong had transferred possession of the Zune to Ms. Wea. 1RP 38; Ex. 3 at 18:45:26; 2RP 14. Under Washington law, actual possession means that the defendant had personal custody of an item, while constructive possession means that the defendant did not have physical custody of the item, but had dominion and control over it. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969); AOB 15–16. There is no evidence or contention that Ms. Truong had actual possession of the Zune during the time the scuffle occurred. See 1RP 38; Ex. 3 at 18:45:26; 2RP 14. Neither did Ms. Truong have constructive possession, because Ms. Wea had possession of the Zune. CP 36 ¶5. Passing or temporary

control is not enough to establish the dominion necessary for constructive possession. E.g., Callahan 77 Wn.2d at 29; State v. Cote, 123 Wn. App. 546, 550, 96 P.3d 410 (2004). Ms. Truong did not own the premises where the Zune was when force was used; this also counts against finding constructive possession. E.g., State v. Cantabrana, 83 Wn. App. 204, 208, 921 P.2d 572 (1996). The fact that another person has exclusive possession also weighs against a finding of constructive possession. State v. Clay, 7 Wn. App. 631, 639, 501 P.2d 603 (1972) (citing Callahan, 77 Wn.2d 27). Under the plain language of the robbery statute and Washington courts' interpretation of the essential elements contained in that statute, there was insufficient evidence to convict Ms. Truong of robbery in the first degree because she never used force or fear to "retain possession" of the Zune. RCW 9A.56.190; see, e.g., Simms, 171 Wn.2d at 250 n. 7.

iii. The holding in Johnson controls the outcome in this case. In Johnson, the Washington Supreme Court clearly articulated that the robbery statute only penalizes force or fear employed during the direct taking or retention of property. 155 Wn.2d at 611. In Johnson, the case where a defendant had taken a TV/VCR from a Wal-Mart, left it in a parking lot and then punched a

security guard who pursued him, the Court explained that “[t]he force must relate to the taking or retention of the property . . . as force used directly in the taking or retention . . . Johnson was not attempting to retain the property when he punched the guard but was attempting to escape after abandoning it.” Id. The Court held that the evidence was insufficient to sustain a robbery conviction. Id. As asserted in Appellant’s Opening Brief, the facts in Johnson mirror the case here: Ms. Truong abandoned the Zune by giving it to another person; any later force could not have been used to “retain possession” of the Zune. AOB 16–17.

Respondent attempts to distinguish Johnson from this case by asserting that “the Wal-Mart security officers could have retrieved the television without risking any assault[;] Redmon-Beckstead could not similarly retrieve her Zune.” Resp. Br. at 10. The Respondent cites no authority for this contention, and the facts of Johnson and the evidence in this case demonstrate that this distinction both muddled and irrelevant. First, the facts in Johnson show that the defendant had turned back toward the TV when physical force was used. 155 Wn.2d at 610. Thus, any bald assertion that the officers “could have retrieved the television without risking any assault” (emphasis added) is mere speculation.

But the trial court's finding in that case was that the defendant had abandoned the property, and that finding went unchallenged. *Id.* at 611. That is different from this case. Here, Respondent asserts "the trial court also concluded that Truong used force or fear to retain possession of property." Resp. Br. 10. But Appellant assigns error to this finding, and asks this Court to hold that the trial court's finding (in the form of a conclusion of law) was not supported by sufficient evidence. (AOB 1 ¶1; 7–9). There is simply not evidence here that Ms. Truong threatened or assaulted Ms. Redmon-Beckstead during the short time that Ms. Truong actually held the Zune.

2. IN ADDITION TO THE FACT THAT THE TRIAL COURT MADE NO FINDING TO SUPPORT A CONVICTION FOR ROBBERY OF THE HEADPHONES, THERE WAS INSUFFICIENT EVIDENCE THAT THE HEADPHONES WERE EVER TAKEN FROM THEIR OWNER.

In reference to count I, Respondent claims "There is sufficient evidence that [Ms.] Truong was an accomplice to the taking of the headphones . . . [E]ven if [Ms.] Truong never touched the headphones, she clearly acted as [Ms.] Wea's accomplice." Resp. Br. 11. But the Conclusions of Law show that the court found Ms. Truong guilty on count I as a principal, writing: "the respondent

unlawfully took personal property . . . .” CP 37. This is in contrast to the finding in count II, where the court wrote: “the respondent or an accomplice unlawfully took personal property . . . .” CP 38 (emphasis added).

Moreover, there is no finding of fact that supports Ms. Truong’s involvement as an accomplice; the trial court merely states: “Jessica took the headphones from Jason and struggled with Wea over them. Wea pulled the headphones away from Jessica, and then threw a punch at Jessica, at which point Truong immediately started punching Jessica as well.” CP 36. To prove accomplice liability, the State must show that a defendant 1) knew her actions would promote or facilitate a specific crime 2) that she was present and ready to assist in some manner, and that 3) that she was not merely present with some knowledge of potential criminal activity. State v. Asaeli, 150 Wn. App. 543, 568, 208 P.3d 1136 (2009). Here, the trial court never found that Ms. Truong had any of the mens rea necessary to sustain accomplice liability. See CP 35–37. If a trial court does not make a finding of fact, the reviewing court must presume that the fact went unproven by the burdened party. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). In turn, there was not a sufficient finding of fact to support a

conclusion of law that Ms. Truong was an accomplice to robbery of the headphones. Enlow, 143 Wn. App. at 467.

In addition, significant evidence shows that the headphones were never taken from Mr. Decoste in the first place. AOB 9–11. The video shows Ms. Wea making a throwing motion after struggling over the headphones. Ex. 3 at 18:45:07. Ms. Redmon-Beckstead testified that she believed that Ms. Wea had thrown the headphones to Ms. Truong. 1RP 37–38. But she later testified that she “thought” that Ms. Wea threw the headphones, but that she could not see the headphones on the video, and did not know what was in Ms. Wea’s hands. 1RP 65–66. Later in the video, Mr. Decoste holds a pair of white headphones in his left hand. Ex. 3 at 18:45:12; 2RP 74. When there was no actual loss suffered, the corpus delicti rule states that a conviction may not be sustained. State v. Zillyette, 163 Wn. App. 124, 128–29, 256 P.3d 1288 (2011). Here, there is insufficient evidence to support Ms. Truong of robbery of the headphones under an accomplice theory both because the trial court’s findings were insufficient and because the headphones were likely not ultimately taken from Mr. Decoste.

3. THERE IS NO AUTHORITY FOR  
RESPONDENT'S UNCITED ASSERTION  
THAT A PURPORTED "ATMOSPHERE OF  
INTIMIDATION" GIVES RISE TO  
ACCOMPLICE LIABILITY.

Ms. Truong was convicted of being an accomplice to the robbery of Mr. Decoste's cigarettes. CP 38. As asserted in Appellant's Opening Brief, there is insufficient evidence of the requisite mental state—or indeed, any action to constitute the necessary assistance—to convict Ms. Truong of robbery in the second degree under an accomplice theory of liability. AOB 17–22; see Asaeli, 150 Wn. App. at 568.

The record shows that Ms. Wea took cigarettes out of Mr. Decoste's pockets while Ms. Truong stood passively by. Ex. 3 at 18:45:58. She did not aid or assist Ms. Wea in the taking. Id. Only after Ms. Wea successfully removed the cigarettes from Mr. Decoste did Ms. Truong reach into Mr. Decoste's pockets. Ex. 3 at 18:46:05.

This action cannot constitute accomplice liability, for two reasons. First, accomplice liability requires evidence that the defendant intended to commit the specific crime that was committed, and not merely knowledge of general criminal activity. State v. Roberts, 142 Wn.2d 471, 512, 14 P.3d 713 (2001). We

have no indication from the record that Ms. Truong knew of a plan to take cigarettes or property from Mr. Decoste. AOB 18–20. Mere association with a person who commits a crime does not rise to the mens rea necessary for accomplice liability. Asaeli, 150 Wn. App. at 569 n. 31. Respondent acknowledges that there is no direct evidence to support the mens rea for accomplice liability, but states that “circumstantial evidence” indicates that Ms. Truong knew of Ms. Wea’s plan to rob. Resp. Br. 14. To support this assertion, Respondent states, “Truong and Wea had just robbed Redmon-Beckstead; it is reasonable to infer that they would move on to Decoste.” Resp. Br. 14.

But Respondent cites no authority for the contention that mere speculation is evidence of mens rea. Resp. Br. 14. Respondent next contends that “by going through Decoste’s pockets at nearly the same time as Wea, Truong demonstrated knowledge of Wea’s intentions.” Resp. Br. 14. But the video clearly shows that Ms. Truong only reached into Mr. Decoste’s pocket after Ms. Wea’s action was complete. Ex. 3 at 18:45:58-18:46:05. The fact that Ms. Truong saw the taking happen and then reacted is not sufficient evidence that Ms. Truong knew of a plan to take the cigarettes. See Asaeli, 150 Wn. App. at 569 n. 31.

Finally, there is insufficient evidence that Ms. Turong actually aided in the alleged robbery of Mr. Decoste. Mere presence, even if it encourages another to commit a crime, is not enough to constitute accomplice liability. In re Wilson, 91 Wn.2d 487, 492, 588 P.2d 1161 (1979). In Wilson, for example, the Court examined a case in which a juvenile had stayed at the scene where others were pulling a rope taut across a road, with knowledge of that an ongoing crime. Id. at 488. The court of appeals reasoned that “once he has knowledge of the theft and the stretching of the rope across the road, his continued presence at the scene of the ongoing crime can be reasonably inferred to ‘encourage’ the crime.” Id. at 491. The Supreme Court rejected this argument, stating that there was insufficient evidence of the defendant’s “readiness to assist.” Id. at 491.

Such is the case here. The video shows that Ms. Truong was a small, juvenile girl. While Respondent asserts that Ms. Truong had created an “atmosphere of intimidation where [Mr. Decoste] was unlikely to resist the taking,” Respondent cites no authority to support the contention that an “atmosphere of intimidation”—if there were one—was equivalent to the action of being present and ready to assist, as required by law. Resp. Br. 13;

Wilson, 91 Wn.2d at 492; see State v. Robinson, 73 Wn. App. 851, 857–58, 872 P.2d 43 (1994). As the Washington Supreme Court has long explained, when a party cites no authority for a proposition it is assumed that none exists. State v. Young, 87 Wn.2d 129, 136, 550 P.2d 1 (1976); see Myers v. Harter, 76 Wn.2d 772, 782, 459 P.2d 25 (1969). There was insufficient evidence to convict Ms. Truong of robbery in the second degree.

B. CONCLUSION

For the foregoing reasons and for the reasons stated in her Opening Brief, Ms. Truong respectfully requests that this Court reverse her adjudications of guilt for robbery in the first degree and robbery in the second degree.

DATED this 17<sup>th</sup> day of JANUARY, 2012.

Respectfully submitted,



LINDSAY CALKINS (WSBA No. 44127)  
Washington Appellate Project (91052)  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 ) NO. 67151-1-I  
 v. )  
 )  
 SINDY T. , )  
 )  
 Juvenile Appellant. )

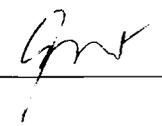
**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 17<sup>TH</sup> DAY OF JANUARY, 2012, CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2012 JAN 17 PM 4:47

- |   |   |
|---|---|
| <input checked="" type="checkbox"/> BRIDGETTE MARYMAN, DPA<br>KING COUNTY PROSECUTOR'S OFFICE<br>APPELLATE UNIT<br>516 THIRD AVENUE, W-554<br>SEATTLE, WA 98104 | <input checked="" type="checkbox"/> U.S. MAIL<br><input type="checkbox"/> HAND DELIVERY<br><input type="checkbox"/> _____ |
| <input checked="" type="checkbox"/> SINDY T.<br>ECHO GLENN CHILDREN'S CENTER<br>33010 SE 99 <sup>TH</sup> ST.<br>SNOQUALMIE, WA 98065                           | <input checked="" type="checkbox"/> U.S. MAIL<br><input type="checkbox"/> HAND DELIVERY<br><input type="checkbox"/> _____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 17<sup>TH</sup> DAY OF JANUARY, 2012.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710