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Court of Appeals
Division I
State of Washington

COA NO. 73263-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

ABDUNASIR SAID,

Appellant.

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

The Honorable Laura Inveen, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Insufficient evidence supports the conviction for first degree unlawful possession of a firearm under count 5.

2. The court erred in failing to grant the defense motion to dismiss the charge under count 5 due to insufficient evidence.

3. Appellant received ineffective assistance of counsel where counsel failed to timely object to hearsay evidence.

4. Insufficient evidence supports the conviction for attempted first degree robbery under count 1.

5. The court erred in declining to grant a mistrial after dismissing one of the charges during trial.

6. The court erred in declining to issue instructions on unlawful display of a weapon as a lesser included offense of attempted first degree robbery.

Issues Pertaining to Assignments of Error

1. Whether the State failed to prove beyond a reasonable doubt that appellant actually or constructively possessed a firearm under count 5?

2. In connection with the firearm charge, whether counsel was ineffective in failing to timely object to hearsay contained in a line-up sheet, which stated appellant pointed a gun?

3. Based on the manner in which the jury was instructed, whether the evidence was insufficient to convict appellant as a principal for attempted first degree robbery under the "law of the case" doctrine?

4. Whether the court erred in refusing to grant a mistrial after the robbery count involving one of the named victims was dismissed, but not before the jury heard evidence of an attack on that victim?

5. Whether the court erred in failing to instruct the jury on unlawful display of a weapon as a lesser offense to first degree attempted robbery where all agreed the legal prong of the test was satisfied and affirmative evidence showed the lesser offense was committed?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Abdunasir Said with (1) attempted first degree robbery with a deadly weapon against Halimo Dalmar (count 1); (2) attempted first degree robbery with a deadly weapon against Mohamed Ali (count 2); (3) attempted first degree robbery with a deadly weapon against Michael Freeman (count 3); and (4) first degree unlawful possession of a firearm (count 5). CP 183-86. Said's co-defendants on counts 1-3 were Jaarso Abdi and Antonio Forbes. CP 183-85.

During trial, the State dropped the charge involving Freeman because he was unavailable to testify. RP¹ 2531. The court denied the defense motion for mistrial. RP 2632-34. The court also denied Said's motion to dismiss the firearm possession charge due to insufficient evidence. RP 2728-31. The jury found Said guilty of attempted first degree robbery under count 1 (involving Dalmar), acquitted him of attempted first degree robbery under count 2 (involving Mr. Ali), and found him guilty of the firearm possession charge.² RP 3029; CP 373-75. The jury returned special verdicts that Said was armed with a firearm and that he committed the crimes shortly after being released from incarceration. CP 376, 378-79. The court imposed a total standard range sentence of 152 months in confinement. CP 391. Said timely appeals. CP 403-11.

¹ The verbatim report of proceedings is referenced as follows: RP - 32 consecutively paginated volumes consisting of 7/29/14, 10/17/14, 11/5/14, 11/6/14, 11/12/14, 11/13/14, 11/17/14, 11/18/14, 11/19/14, 11/20/14, 12/1/14, 12/2/14, 12/10/14, 12/11/14, 12/15/14, 12/16/14, 12/17/14, 12/18/14, 12/22/14, 12/23/14, 12/24/14, 12/29/14, 12/30/14, 1/8/15, 1/12/15, 1/13/15, 1/14/15, 1/16/15, 1/20/15, 1/22/15, 3/18/15, 4/8/15.

² The jury found Abdi guilty under count 1, was unable to reach a verdict under count 2, and found him guilty of first degree unlawful possession of a firearm under count 4. RP 3029. The jury was unable to reach a verdict for counts 1 and 2 involving Forbes. RP 3030.

2. Trial evidence

The events at issue took place at about 10 o'clock on the night of December 30, 2013 in Seattle's Yessler Terrace, outside the residence shared by Mohamed Ali, his wife, Halimo Dalmar, and their children. RP 1476, 2094-96. At that time, neighbor John Brzostowski heard a loud argument and saw six men outside. RP 1505-06, 1511-12. One of the men raised his arm with something that could have been a rifle and said something like "come out of your house" as he pointed it "towards the front." RP 1518-20, 1523-24, 1530. Brzostowski called 911. RP 1520-25. M.A., the teenage daughter of Mr. Ali and Dalmar, also called 911, reporting one of the men in a silver-gray jacket had a gun. RP 2305, 2328-30.

Police arrived on the scene and saw three males walking on a sidewalk in the area. RP 1368, 1378. When police identified themselves with guns drawn, the men ran off. RP 1379. Officers gave chase. RP 1380, 1479-82. They heard what sounded like a trash lid slamming shut during the pursuit. RP 1483, 1944-45. One male, later identified as Abdi, fell and was taken into custody. RP 1381, 1482. Another male, later identified as Said, stopped and allowed himself to be detained. RP 1381, 1383-84. Police did not catch up with the third male. RP 1381, 1384. Neither Said nor Abdi had any weapons. RP 1461, 1994-96. Police found

a shotgun and a revolver in a recycling bin that was along the path of pursuit. RP 1384, 1388, 1395, 1462, 1753-54, 1945-46; see Ex. 2-s (photo showing guns).³

At trial, Dalmar testified⁴ that two men, identified as Forbes and Abdi, came to the door of her house and knocked. RP 2210-11, 2226-27. She looked through the peephole and asked what they wanted. RP 2210. They asked for money. RP 2210. She said she did not have any. RP 2210. Said was not present during this encounter. RP 2265, 2267. The two men left and went across the street to a car. RP 2210-12, 2262-63. They opened the back of the car but she did not know what they took out. RP 2212-13. The two men returned and knocked on the door again. RP 2212-13. The men had nothing in their hands. RP 2215. They again asked for money and she again said she didn't have any. RP 2215. The men left and went behind the house. RP 2215-16.

When Dalmar thought they had left, she and her son Mustafe went to their car parked out front, preparing to take her son to work. RP 2216. The two men she saw earlier, joined by a third, came back. RP 2217. Dalmar identified the third man in court as Said. RP 2228. Forbes (referred to as "Antonio") had a long gun and pointed it at her house while

³ The shotgun and revolver were later deemed operable. RP 1687-88, 1691-92.

⁴ Dalmar used a Somali interpreter at trial. RP 2204.

standing by the sidewalk. RP 2218, 2220. She only saw one weapon, which she described as "not a small pistol, it was something that was longer." RP 2220. She initially testified the other two men said they wanted money. RP 2219, 2225. She later clarified that Said was with the other two men as they approached the car but he did not ask for money. RP 2228. Dalmar said she had no money and asked them to leave. RP 2219. She said they had never done anything to Forbes and asked why he threatened her children and what he wanted. RP 2219. Forbes apologized, saying he would not do it again and had made a mistake. RP 2219. When the door to her house opened, the men walked toward the house and she drove off. RP 2221.

Dalmar subsequently identified #3 (Abdi) and #4 (Said) from lineups.⁵ RP 2224, 2263; Ex. 23-26. Dalmar reiterated she did not see these two men with guns. RP 2225. The two men were with Forbes, the man who had the gun. RP 2225. Dalmar identified Forbes from a photomontage. RP 2229.

⁵ Detective Healy, in administering the line-up procedure, maintained he communicated with Dalmar in English with no real difficulty. RP 1679. English was not her first language but he did not think an interpreter was warranted. RP 1679. Healy did not ask Dalmar if she wanted an interpreter. RP 1716. In her interviews with police, Dalmar was never asked if she wanted an interpreter, although she acknowledged it would have been helpful. RP 2268.

Regarding #4 (Said), she testified "He only came towards the side of my window, he did not even use his hands, and he had not done anything to me. And he was not part of the other group at the beginning." RP 2264. She flatly stated #4 did not have a gun. RP 2267.

Dalmar's husband, Mohamed Ali, gave his own version of events at trial.⁶ RP 2094. After hearing loud knocking on the door, he looked and saw three men standing outside. RP 2097-98. Ali knew the men because they hung out near his house. RP 2104-06. He identified "Antonio" as Forbes in court. RP 2106. Ali recognized the other two defendants but was confused about their names. RP 2107. One of the men said "open the door." RP 2098. The three men went to a car and retrieved a weapon. RP 2101. Ali specified Forbes got a gun. RP 2103-04, 2166. He remembered Forbes with "a pistol called Clipper." RP 2103. The three men again started knocking, screaming "open the door." RP 2107. Ali did not open the door. RP 2108. They went to the backside of the house, where Antonio and "Abdu" attacked a neighbor and demanded money. RP 2108-10. Ali identified "Abdu" as the bald man in court. RP 2109.

His wife and son went to their car. RP 2110-11. The men knocked on the car window and two of them said "give us money." RP 2112-14.

⁶ Mr. Ali used a Somali interpreter at trial. RP 2092.

Forbes pointed the gun toward house when confronting Dalmar. RP 2111-14, 2196-97.

When Ali opened door to the house, the three men approached. RP 2114. He shut the door and heard them yelling for money. RP 2214-15. Ali testified "I saw them holding pistol, and then I thought he was having the other gun machine." RP 2114-15. Ali had his daughter M.A. call the police. RP 2115. The police came and the men ran away. RP 2115-16. "I saw them running and they took the weapon and they threw inside the trash." RP 2116.

Ali selected #3 (Abdi) from a lineup as the man who had a gun and "attacked us with it."⁷ RP 2119-20, 2133-36; Ex. 45. He selected #4 (Said) from another lineup as a man who asked for money and "had a gun and attacked us." RP 2138, 2481, Ex. 46. Ali testified "the fact that he had a weapon was obvious," although he was completely unable to describe it. RP 2197. When asked what he meant by "attack," Ali responded "when somebody has a weapon and they knock on your door very hard and shoot your windows, that is an attack." RP 2140. When pressed that no one actually shot a window, Ali responded "If somebody

⁷ Detective Rodgers testified that during the line-up procedure he and Mr. Ali understood each other "perfectly fine," although he had a "different, difficult accent." RP 2485.

points their gun at the window, whether they shoot or not, it's all the same." RP 2168.

Mr. Ali's teenage daughter, M.A., testified that she woke up when she heard noise outside. RP 2305, 2309. She looked out her bedroom window to the backyard and saw two guys punching another man. RP 2310. She identified the victim as the neighborhood grass-cutter. RP 2310-11. One of the men was Forbes, the other a bald man who lived behind the Ali residence. RP 2312, 2371, 2377. The interaction ended after five minutes. RP 2311-13. M.A. acknowledged she could not see outside that well. RP 2374.

M.A. then went downstairs, where she saw her mother and brother go to the car. RP 2313-14. Three guys ran up. RP 2317-19, 2371-72. She recognized them because they hung out in the neighborhood. RP 2319. She identified Forbes, Said (the "bald guy") and Abdi in court. RP 2319-21, 2377. Forbes talked to her mother but M.A. could not hear what he said. RP 2323. She could not see if Forbes was holding anything. RP 2324. Abdi was at the car; she could not remember what he was doing or whether he was holding anything. RP 2324. She did not know what Said was doing. RP 2324, 2371.

M.A. called 911 because she had a better command of the English language than her father. RP 2374. In her 911 call, M.A. described seeing

one gun — a silver handgun — held by a guy in a silver, grayish jacket. RP 2328-30. At trial, she testified the guy in the gray coat had the gun. RP 2368. When later asked to clarify whether she saw a gray jacket or a silver gray jacket, she answered "it was a gray jacket and I saw something silver." RP 2379. At one point in her testimony she said she was certain she saw a gun because "they were pointing something." RP 2360. But later, when asked to clarify, she just said she saw something silver. RP 2375. She could not say for certain that Forbes had a gun. RP 2379.

She testified that Forbes wore a gray coat. RP 2324-25, 2365, 2379. Said wore black. RP 2324.⁸ She did not remember what Abdi wore. RP 2325. She did not see the bald guy (Said) with a gun. RP 2368-69. She was uncertain whether she saw the gun when the men were at her mother's car. RP 2332. M.A. did not see any men come to the door and did not see any men point a gun at her father. RP 2370.

R.A, another teenage daughter, heard yelling and screaming from the back side of house. RP 1865-66, 1873, 1909-10. She looked outside and saw three black men harassing an old man identified as the neighborhood grass cutter. RP 1874-75. One of the men was bald. RP

⁸ Said wore a black coat at the time of arrest. RP 2296; Ex. 66-b. Abdi wore a gray coat at the time of arrest. RP 2297, 2299-01; Ex. 66-d. Police recovered a black coat from the suspect vehicle. RP 1424-27. According to Mohamed Ali, Forbes left his black jacket on the trunk of the car. RP 2166.

1875. The old man held up a chair in front of him. RP 1876. She did not see the men hit him, but maintained his face was bruised. RP 1908.⁹ One man had a "shiny object." RP 1883. She wondered if it was a gun, but could not see the object clearly. RP 1883, 1906.

From a downstairs window, she saw her mother and Mustafe in the car. RP 1881-83. The three men were around it. RP 1883. She could not hear what was being said. RP 1884. Her mother drove off. RP 1885. R.A. did not see anyone point a gun at her house. RP 1913. According to R.A., they went to a garbage can, "threw something in there," and started running. RP 1886. R.A. was unable to identify the three men. RP 1888. They wore puffy, heavier jackets. RP 1892.

Mustafe Ali testified that he went to get in the car with his mother so she could drive him to work. RP 1602. Once inside, he noticed "about three men" standing by the sidewalk. RP 1603. Two of the men asked his mother for money while the third stood behind them with a shotgun pointed at the family's house. RP 1605-06, 1608, 1625, 1637. The guy with the shotgun wore a black coat.¹⁰ RP 1610-11. His mother said

⁹ A responding officer who took Freeman's statement did not see any injuries on Freeman. RP 1560-63, 1570.

¹⁰ It was dark, and Mustafe was unable to identify anyone involved. RP 1613, 1627, 1634.

"Don't point a gun at my house" and "I have kids at the house." RP 1609. She drove off. RP 1611. It all happened very quickly. RP 1634-35, 1639.

Mohamed Ali was concerned about the group of young men loitering near his house, drinking, smoking and using drugs, and had previously complained to the Housing Authority about them. RP 2166, 2180-81, 2192. M.A. also acknowledged there had been a problem with young people hanging outside their house drinking and making noise. RP 2376. At trial, Dalmar denied being bothered by the loitering men. RP 2250. But she conceded her husband often complained about them. RP 2250. Dalmar herself would tell them to leave if they were drinking and there were children in the house. RP 2251. According to Officer Skommesa, the Housing Authority community liaison, Dalmar had complained about people hanging out on the street. RP 2418, 2421.

M.A. testified that she spoke with her family after the incident and all agreed on what happened. RP 2339-40. On the stand, Mohamed Ali denied talking about the incident with M.A. or the other children. RP 2191-92. Mustafe said they had "not really" talked about what happened. RP 1623.

Psychologist Dr. Geoffrey Loftus, testifying as an expert witness for the defense, informed the jury that the brain does not record events like a video camera. RP 2589-90. Instead, events are experienced through

fragments of information that become mingled with post-event information, i.e. information relevant to an event that can be integrated into the memory. RP 2562-65, 25610-11. If inaccurate post-event information is integrated, the memory may be certain but also false. RP 2568-69. For example, post-event information may "reconstruct" a memory that the person seen was an acquaintance rather than a stranger, leading to misidentification. RP 2588-89, 2607, 2609-10. General expectations affect perceptions of what is seen and wind up in a person's memory. RP 2594, 2608. Other factors, including inadequate attention, poor lighting, lack of time to observe, and stress, may cause a person to misperceive a stranger as someone they already know. 2584-87, 2590-2606. A person can be confident of a memory and yet be wrong about it where circumstances forming the original event are poor and false post-event information is integrated into memory. RP 2612-13.

As argued to the jury, the defense theory was that the State did not prove Said attempted to commit first degree robbery against Dalmar because, according to her testimony, he did not have a gun and did not ask for money. RP 2908-12. Mr. Ali's version of events conflicted with his wife's testimony and was exaggerated. RP 2910, 2915. Said's presence at the scene was insufficient to show accomplice liability for the attempted robberies. RP 2912. Nor did the State prove Said possessed a firearm.

RP 2912-14. Counsel also referenced Dr. Loftus's testimony that memories can be inaccurately reconstructed through post-event information. RP 2917.

C. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTIONS FOR UNLAWFUL FIREARM POSSESSION AND ATTEMPTED FIRST DEGREE ROBBERY.

The State failed to prove the "possession" element of the firearm possession charge because the properly admitted evidence at most showed momentary handling of a firearm. Further, defense counsel was ineffective in failing to timely object to hearsay evidence on the issue. The evidence was also insufficient to prove Said was guilty as a principal of the attempted first degree robbery of Dalmar. Based on the jury instructions, the State needed to prove principal liability on that charge but failed to do so. The convictions must be reversed.

a. As a matter of due process, the State must prove each element of the offense beyond a reasonable doubt, and such proof must rise above speculation for facts necessary to conviction.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); U.S. Const. amend. XIV; Wash. Const. art. I, § 3.

Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). Further, "inferences based on circumstantial evidence must be reasonable and cannot be based on speculation." State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016) (quoting State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013)). "A 'modicum' of evidence does not meet this standard." Id. (quoting Jackson v. Virginia, 443 U.S. 307, 320, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

Said's counsel made a half-time motion to dismiss the unlawful possession of a firearm charge on the theory that the State failed to prove the possession element. RP 2532. The court ruled there was sufficient evidence. RP 2728-31. According to the court, the evidence clearly showed Forbes had the long gun, so the question was which one of the other two men had the smaller gun. RP 2739. Testimony showed all three went to the car, they came back, and two guns were in the possession of the three people. RP 2729. The jury could infer "two guns were removed

by one of the three men." RP 2730. The judge thought Ali testified "Abdu" had the pistol and the other had the "gun machine." RP 2730. "The question is who actually was holding it at any given time." RP 2729.

The sufficiency of the evidence is a question of constitutional law reviewed de novo. Rich, 184 Wn.2d at 903. As set forth below, the State filed to prove the possession element and the trial court erred in failing to grant the half-time motion.

b. The evidence is insufficient to convict Said of unlawful firearm possession because the State failed to prove the possession element of the offense.

A person is guilty of first degree unlawful possession of a firearm if the person knowingly has in his possession or control a firearm after having previously been convicted of a serious offense as defined by chapter 9.41 RCW. RCW 9.41.040(1)(a); State v. Hartzell, 156 Wn. App. 918, 944, 237 P.3d 928 (2010). Possession is the challenged element on appeal.¹¹ Possession can be actual or constructive. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Actual possession requires personal, physical custody. State v. George, 146 Wn. App. 906, 919-20, 193 P.3d 693 (2008). Constructive possession means the defendant has dominion

¹¹ Said stipulated he had been convicted of a serious offense as defined in RCW 9.41.010. RP 2530.

and control over the firearm. State v. Chouinard, 169 Wn. App. 895, 899, 282 P.3d 117 (2012), review denied, 176 Wn.2d 1003, 297 P.3d 67 (2013).

Looked at in the light most favorable to the State, the evidence does not establish Said possessed a firearm. The State must establish "actual control." State v. Staley, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Momentary handling or passing control of a firearm is insufficient to establish actual possession. State v. Davis, 182 Wn.2d 222, 237, 340 P.3d 820 (2014) (Stephens, J., dissenting).¹² Dalmar did not see Said with a gun. RP 2225, 2267. M.A. did not see Said with a gun. RP 2368-69.¹³ Neither R.A. nor Mustafe Ali identified Said as the man with a gun. RP 1605-06, 1608, 1625, 1637, 1881-86.

Mohamed Ali was the only witness who testified he saw Said with a gun. But his testimony does not establish something more than momentary handling or passing control. Ali testified with reference to #4 from the lineup (Said) that "He had a gun and attacked us." RP 2138. On cross, Ali testified "the fact that he had a weapon was obvious," although

¹² The dissenting opinion in Davis, which garnered five votes, is actually the majority decision on the sufficiency of evidence issue. Davis, 182 Wn.2d at 224.

¹³ In opposing the halftime motion, the State maintained M.A. testified that she saw a gun ("something silver") in Said's hand when he was attacking Freeman in the backyard. RP 2545-47. This is inaccurate. M.A. expressly testified that Said, the bald man, did not have a gun. RP 2368-69. The State again misrepresented M.A.'s testimony on this point in closing argument. RP 2883, 2897.

Ali was unable to describe the weapon. RP 2197. Ali did not specify in his testimony how long Said had the gun in his possession. Ali's testimony does not establish actual possession because it does not show something beyond momentary handling.

Mr. Ali testified three men went to the car and a gun was taken from the trunk. RP 2101, 2144-45. But he clarified that Antonio Forbes was the one who took the gun from the car. RP 2103-04, 2166. He remembered one gun, the one Forbes pointed at the window. RP 2103-04, 2193-94. At one point Ali testified that when the men returned to the front door after his wife left, "I saw them holding pistol, and then I thought he was having the other gun machine." RP 2114-15. He did not specify who had the pistol and who had the "gun machine." He elsewhere testified that Forbes had the pistol. RP 2103. Mr. Ali further testified, with reference to Freeman, "they was hitting the pistol in his head and they putting their hand in his pocket and say, Give us money." RP 2109. But Ali did not specify that Said was one of the men who had the gun.

The line-up sheet contains a statement that #4 "pointed guns at me & threatened to shoot me & robbed my neighbor at gunpoint, Mr. Michael Freeman." Ex. 46. But Mr. Ali did not write this statement. The detective wrote it down, and it was not a verbatim statement of what Ali told him. RP 2482. Ali never testified Said pointed a gun at him. Ali

never confirmed at trial whether the statement attributed to him was accurate.

Taking into consideration that two firearms (the shotgun and the revolver) were recovered from the recycling bin following the foot chase, a reasonable inference is that two guns were taken from the trunk. But who possessed those two guns? Witness testimony puts Forbes with the shotgun. Who had the revolver? No witness puts the revolver or the shotgun in Said's actual or constructive possession. It is conjecture that Said took either gun from the trunk. Speculation is insufficient to establish a fact necessary for conviction. Colquitt, 133 Wn. App. at 796; see, e.g., State v. Jones, 140 Wn. App. 431, 437-48, 166 P.3d 782 (2007) ("Enough uncertainties remain after the officer's testimony to foreclose a rational conclusion beyond a reasonable doubt that the offenses took place within 1,000 feet of a school bus stop.").

There is evidence that Said was near Forbes and Abdi.¹⁴ "While the ability to immediately take actual possession of an item can establish dominion and control, mere proximity to contraband is insufficient to show possession. Davis, 182 Wn.2d at 234; Chouinard, 169 Wn. App. at 899. Even mere proximity combined with evidence of momentary

¹⁴ The prosecutor argued to the jury that Abdi was the one in the silver-gray jacket who had a handgun. RP 2898.

handling is insufficient to show constructive possession. State v. Spruell, 57 Wn. App. 383, 388-89, 788 P.2d 21 (1990) (sitting next to cocaine and momentary handling of cocaine insufficient to show possession); State v. Cote, 123 Wn. App. 546, 549, 96 P.3d 410 (2004) (passenger in vehicle where drugs found and fingerprints on jar containing drugs insufficient to show possession); Callahan, 77 Wn.2d at 30-31 (sitting next to drugs, earlier handling of drugs, and admitted possession of drug paraphernalia insufficient to show possession of drugs).

Even if the evidence shows Said knew of the presence of a firearm, the State's proof still fails. Proximity to contraband and knowledge of its presence is insufficient to establish constructive possession. George, 146 Wn. App. at 923. In Chouinard, the evidence was insufficient to convict for firearm possession because the State demonstrated only the defendant's proximity to the weapon and his knowledge of its presence. Chouinard, 169 Wn. App. at 899, 903.

Convictions must be reversed for insufficient evidence where, viewing the evidence in a light most favorable to the State, no rational trier of fact could have found the elements of the crime established beyond a reasonable doubt. Hundley, 126 Wn.2d at 421-22. Said's conviction must therefore be reversed and the charge dismissed with prejudice. State v.

DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003) (setting forth remedy where insufficient evidence supports conviction).

c. Defense counsel was ineffective in failing to timely object to hearsay evidence contained in the line-up sheet.

If there is sufficient evidence to support conviction on the firearm possession count because the jury was allowed to consider the hearsay statement of Mr. Ali contained in the line-up sheet, then counsel was ineffective in failing to timely object to the admission of that statement. Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Defense counsel is ineffective where (1) the attorney's performance is deficient and (2) the deficiency prejudices the defendant. Strickland, 466 U.S. at 687.

Again, Exhibit 46, the line-up identification sheet, shows Mr. Ali picked #4 (Said) out of the line-up. This exhibit contains the following out-of-court statement: "I identify the above number as the person(s) who *pointed guns at me & threatened to shoot me & robbed my neighbor at gunpoint, Mr. Michael Freeman.*" (handwritten portion in italics). When

Exhibit 46 was admitted during Mr. Ali's testimony, defense counsel raised no objection. RP 2135. The State returned to the line-up sheet in examining Detective Rodgers later on. RP 2481-82. Referencing Exhibit 66-k, which is the same as Exhibit 46, the State elicited Rodgers's testimony that Ali identified Said from the lineup as #4. RP 2481. The detective then started to testify as to the contents of 66-k, i.e., that Ali said #4 "pointed guns at me and threatened..." RP 2482. At this point, Said's counsel lodged a hearsay objection. RP 2482. The court's response was "the document speaks for itself." RP 2482. Exhibit 66 had already been admitted in its totality without objection during an earlier juncture of Rodgers's testimony. RP 2464.

Counsel's hearsay objection came too late. Because Exhibit 66 had already been admitted without objection, the later objection to Ali's statement contained in 66-k was untimely. See State v. Gray, 134 Wn. App. 547, 557, 138 P.3d 1123 (2006) (for an objection to be timely, the party must make the objection at the earliest possible opportunity after the basis for the objection becomes apparent). Indeed, Exhibit 46, which is identical to 66-k and contains the same objectionable hearsay statement, had been admitted even earlier without objection. RP 2135. Counsel's objection was untimely twice over.

The hearsay objection, had it been timely, would have been proper. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). Unless an exception or exclusion applies, hearsay is inadmissible. ER 802. Exhibits 46 and 66-k contain double hearsay. The first level of hearsay is what Mr. Ali orally told Detective Rodgers, summarized as #4 "pointed guns at me & threatened to shoot me & robbed my neighbor at gunpoint, Mr. Michael Freeman." Ali did not write this statement himself. The detective did. RP 2482. The second level of hearsay is the detective's written paraphrase of what Ali told him. This is double hearsay because the court admitted Ali's out-of-court statement through the detective's out-of-court statement. "In instances of multiple hearsay, each level of hearsay must be independently admissible." State v. Alvarez-Abrego, 154 Wn. App. 351, 366, 225 P.3d 396 (2010) (citing ER 805). Neither level of hearsay is independently admissible.

A statement is not hearsay if "the declarant testifies at the trial . . . and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving the person." ER 801(d)(1)(iii). Under this rule, Ali's statement identifying Said is not hearsay. But the out-of-court statement describing what Said did is hearsay. The complaining witness's "description of the offense itself is admissible . . . *only as to the extent necessary to make the identification*

understandable to the jury." State v. Stratton, 139 Wn. App. 511, 517, 161 P.3d 448 (2007) (quoting Porter v. United States, 826 A.2d 398, 409-10 (D.C. App. 2003)), review denied, 163 Wn.2d 1054, 187 P.3d 753 (2008). Thus, for example, it is permissible to admit a statement identifying a defendant by his clothing when the witness does not know his name. Stratton, 139 Wn. App. at 516-17. But details of the complainant's descriptions of the offense are not admissible under ER 801(d)(1)(iii). See Battle v. United States, 630 A.2d 211, 215 (D.C. App. 1993) (construing similar federal rule). Ali's account of the offenses — that #4 "pointed guns at me & threatened to shoot me & robbed my neighbor at gunpoint, Mr. Michael Freeman" — was unnecessary to make his identification understandable. Ali testified about his line-up identification of Said without any reference to his statement contained in the line-up sheet. RP 2138. Ali told the jury what he saw through his in-court testimony. There is no reason to exclude his prior statement describing Said's acts from the hearsay rule. A hearsay objection, had it been timely, would have been proper.

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Kylo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). The record in this case rebuts

the presumption of reasonable performance. The untimely objection to the statement in Exhibit 66-k illustrates counsel's deficiency in failing to earlier object to the same statement contained in Exhibit 46. Through his hearsay objection, counsel sought to keep evidence of Ali's out-of-court statement contained in the line-up sheet out of evidence. No legitimate tactical consideration explains why counsel waited to lodge that objection. At that point the objection was futile because the exhibit itself containing the objectionable hearsay statement had already been admitted twice over. The damage was already done. Counsel did not seek to use that statement to his client's advantage, nor could he have, as there was no advantage to be gained. No reasonable strategy justified the lack of timely objection. Counsel should have objected to the statement contained in the line-up sheet before Exhibit 46 was admitted and again before Exhibit 66 was admitted.

A defendant demonstrates prejudice by showing a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. Ali's out-of-court statement from the line-up sheet should not have been available to be considered as evidence that Said possessed a firearm. A timely hearsay objection would have kept it out. Said's firearm possession conviction must be reversed and the charge dismissed with prejudice because there is insufficient

evidence to prove the possession element once the hearsay evidence is excluded. See State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (dismissing case where there was insufficient evidence to convict after inadmissible hearsay report was properly excluded from consideration); State v. Ermert, 94 Wn.2d 839, 850-51, 621 P.2d 121 (1980) (dismissing case where ineffective assistance allowed the client to be convicted of a crime for which there was a failure of proof).

Even if the charge is not dismissed, the conviction should still be reversed because there is a reasonable probability the jury would not have returned a guilty verdict in the absence of the hearsay evidence. Properly admitted testimony on whether Said possessed a gun was conflicting. Even Mr. Ali, who vaguely testified Said had a gun and it was "obvious" he had a weapon, was completely unable to describe the weapon he said he saw. That is the stuff of reasonable doubt. The jury apparently had trouble with Ali's credibility because it acquitted Said on the attempted robbery charge involving Ali. Whether the State showed Said more than momentarily handled a firearm was at the very least questionable. Said shows counsel's deficient performance undermines confidence in the outcome. See State v. Hendrickson, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007) (counsel was ineffective for failing to object to the admission of hearsay evidence where there was a reasonable probability the State

could not have convicted the defendant but for admission of the hearsay), affd., 165 Wn.2d 474, 198 P.3d 1029 (2009).

- d. Under the "law of the case" doctrine, the evidence is insufficient to prove an attempted robbery of Dalmar with a deadly weapon because the State needed to prove principal liability for that count but failed to do so.**

To convict for attempted first degree robbery, the State needed to prove intent to commit first degree robbery and a substantial step towards the commission of that crime. RCW 9A.56.190 (robbery); RCW 9A.56.200(1)(a)(i) (robbery in the first degree with deadly weapon); RCW 9A.28.020(1) (attempt). As charged here, first degree robbery is robbery while armed with a deadly weapon. RCW 9A.56.200(1)(a)(i); CP 183.

The jury was given a general accomplice liability instruction. CP 240 (Instruction 9). The "to convict" instruction involving Mr. Ali under count 2 required the State to prove "the defendant or an accomplice did an act that was a substantial step toward the commission of Robbery in the First Degree against Mohamad Ali." CP 250 (Instruction 19). The "to convict" instruction involving Dalmar under count 1 required the State to prove "the defendant did an act that was a substantial step toward the commission of Robbery in the First Degree against Halimo Dalmar." CP 249 (Instruction 18). The State proposed these instructions. CP 438-39.

The "law of the case" doctrine frames this issue. Unlike the "to convict" instruction for involving Mr. Ali, the "to convict" instruction involving Dalmar does not contain the "or an accomplice" language. The difference in wording is significant. Reading the instructions in the context of one another as an ordinary juror would, the State was required to prove Said acted as a principal or an accomplice for the Ali count. In contrast, the State was required to prove Said acted as a principal, not an accomplice, for the attempted robbery of Dalmar. The conviction must be reversed because the State failed to do so.

"The law of the case is an established doctrine with roots reaching back to the earliest days of statehood." State v. Hickman, 135 Wn.2d 97, 101, 954 P.2d 900 (1998). This doctrine refers to the "rule that the instructions given to the jury by the trial court, if not objected to, shall be treated as the properly applicable law." Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 113, 829 P.2d 746 (1992) (quoting 15 L. Orland & K. Tegland, Wash.Prac., Judgments § 380, at 56 (4th ed. 1986)). In that instance, the parties are bound by the law laid down by the court in its instructions. Tonkovich v. Dep't of Labor & Indus., 31 Wn.2d 220, 225, 195 P.2d 638 (1948). Whether an instruction is rightfully or wrongfully given, it is binding and conclusive upon the jury. Hickman, 135 Wn.2d at 102 n.2.

Where a party challenges the sufficiency of evidence on appeal, "[t]he sufficiency of the evidence to sustain the verdict is to be determined by the application of the instructions." Tonkovich, 31 Wn.2d at 225; accord Hickman, 135 Wn.2d at 102 ("to convict" instruction was law of the case). The basic function of the "law of the case" doctrine "ensure[s] that the appellate courts review a case under the same law considered by the jury." State v. Calvin, 176 Wn. App. 1, 316 P.3d 496, 506 (2013), remanded on other grounds, 183 Wn.2d 1013, 353 P.3d 640 (2015).

In considering what the State must prove under "the law of the case" doctrine, each instruction is evaluated in the context of the instructions as a whole. State v. France, 180 Wn.2d 809, 816, 329 P.3d 864 (2014). Appellate courts review the instructions in the same manner as an ordinary, reasonable juror would. State v. Hanna, 123 Wn.2d 704, 719, 871 P.2d 135 (1994); State v. Killingsworth, 166 Wn. App. 283, 288, 269 P.3d 1064 (2012).

A reasonable juror, faced with one "to convict" instruction specifying "the defendant or an accomplice" for one victim and another "to convict" instruction that omits the "or an accomplice" language for another victim, would conclude that the former permits conviction based on accomplice liability and the latter does not. The difference in language signals a difference in meaning to an ordinary juror. Otherwise, there is

no reason why the "or an accomplice" language is included in one instruction and not the other. The presence of the "or an accomplice" language in the "to convict" instruction for count 2 cannot be considered superfluous. See France, 180 Wn.2d at 818 n.6 (no instruction superfluous where each went to the charged crimes under "law of the case" doctrine).

Under these circumstances, a reasonable juror would not interpret the boilerplate accomplice liability instruction to apply to the attempted robbery count involving Dalmar. CP 240. The effect of a particular phrase in an instruction is determined by reading the instructions as a whole, with each instruction read in the context of all others given. State v. Brown, 132 Wn.2d 529, 605, 940 P.2d 546 (1997); State v. Castle, 86 Wn. App. 48, 52, 935 P.2d 656 (1997). This means the general accomplice instruction must be read in the context of the "to convict" instructions involving attempted robbery. One "to convict" instruction involving one victim specifies the State must prove "the defendant or an accomplice" committed the act. CP 250. The other instruction involving the other victim does not include the "or an accomplice" language. CP 249. An 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).

State v. Teal, 152 Wn.2d 333, 96 P.3d 974 (2004) is distinguishable because that case involved a different matrix of instructions. In that case, Teal argued under the "law of the case" doctrine that the State failed to prove the elements listed in the "to convict" instruction because it only referred to the acts of the "defendant" and not to the acts of the "defendant or an accomplice," and the evidence was insufficient to show Teal was the principal in the robbery. Teal, 152 Wn.2d at 337. The Supreme Court disagreed because the jury was given a general accomplice liability instruction, which meant "the elements of a crime are considered the same for a principal and an accomplice." Id. In reading the jury instructions "as a whole," including the accomplice liability instruction, "the jury could decide Teal's guilt or innocence as an accomplice to first degree robbery." Id. at 339.

Said's case is different due to the different wording of the two "to convict" instructions at issue. In Teal, reading the instructions as a whole and in context did not require the State to prove principal liability because there was only one crime at issue, one victim, and one "to convict" instruction. The general accomplice instruction had no place to attach but

to the crime specified in that "to convict" instruction. The different combination of instructions in Said's case sends a different signal to jurors on how to interpret the instructions and requires a different outcome.

Under the "law of the case" doctrine, the evidence is insufficient to convict Said as a principal to attempted first degree robbery. This was charged an attempted robbery because no property was actually taken from Dalmar. RP 2890. The evidence does not show Said was personally armed with a deadly weapon in attempting the robbery of Dalmar. The evidence is therefore insufficient to show Said took a substantial step with the intent to commit first degree robbery; i.e. robbery with a deadly weapon. "We do not infer criminal intent from evidence that is patently equivocal." Vasquez, 178 Wn.2d at 14. "Rather, inferences of intent may be drawn only 'from conduct that plainly indicates such intent as a matter of logical probability.'" Id. (quoting State v. Bergeron, 105 Wn.2d 1, 20, 711 P.2d 1000 (1985)). Under a principal theory of liability, the intent to commit robbery with a deadly weapon cannot be established in the absence of sufficient evidence putting a gun in his possession during the encounter with Dalmar.

On a principal theory of liability, the evidence at most showed Said attempted second degree robbery, which does not involve a deadly weapon. Dalmar did not see Said with a gun. RP 2225, 2267. M.A. did

see not Said with a gun. RP 2368-69. R.A. gave no testimony that anyone was armed with a gun during the encounter with her mother. RP 1881-86. Mustafe Ali did not identify Said as the man with a gun. RP 1605-06, 1608, 1625, 1637. Mohamed Ali testified in vague terms that Said had a gun, but his testimony does not show Said had a gun at the time Dalmar was confronted. The timing is important. Nowhere in his testimony is it established that Said was armed with the gun during the attempted robbery of Dalmar. RP 2110-14. A fact necessary for conviction cannot be based on guess, speculation, or conjecture. Colquitt, 133 Wn. App. at 796. The attempted robbery conviction must be reversed and the case dismissed with prejudice due to insufficient evidence. Hickman, 135 Wn.2d at 103.

2. THE COURT ERRED IN DECLINING TO GRANT A MISTRIAL AFTER THE CHARGE INVOLVING FREEMAN WAS DISMISSED.

Criminal defendants are guaranteed the right to a fair trial by article I, sections 3 and 22 of the Washington Constitution as well as the Sixth and Fourteenth amendments of the U.S. Constitution. State v. Mullin-Coston, 115 Wn. App. 679, 692, 64 P.3d 40 (2003), aff'd, 152 Wn.2d 107 (2004). The erroneous denial of a motion for mistrial violates that right. State v. Weber, 99 Wn.2d 158, 164, 659 P.2d 1102 (1983). In this case, the jury heard evidence that the defendants attacked Freeman in the backyard of the Ali residence. Deep into trial, it became apparent

Freeman would not testify and so the State dropped the attempted robbery charge associated with him. The court abused its discretion in refusing to grant a mistrial at that point because evidence of the Freeman attack should not have been admitted in the absence of his testimony. This irregularity denied Said a fair trial.

a. The court refused to grant a mistrial on the ground that the evidence would have been admitted anyway.

Before the start of trial, the court read the charges to the jury, including the charge of first degree attempted robbery against Freeman. RP 1063. In opening statement, the prosecutor told jurors about what the evidence would show, including what the defendants did to Freeman:

As they moved away from their house, they came across a man named Michael Freeman. And you'll meet Michael Freeman. He's kind of a character. He lives up in the Yesler Terrace, he's lived there for years. His sort of sideline job and income is that he mows everybody's lawn in the Terrace. He's the yard guy.

And he too was confronted by these three individuals, and they pointed guns at him and they hit him and they demanded money from him. And this is a man who lives in Section 8 housing, who, to make a little extra pocket change, mows people's lawns. And remember, grass doesn't grow much in the middle of December. He's not a guy with a lot of money on him. He stood up for himself. He said, No, I'm not going to give you any money. And eventually the three relented. RP 1332.

The prosecutor also told the jury that Detective Rogers brought a photomontage to Freeman "to see if he could identify any of the

individuals who had set upon him, pointing weapons at him, assaulting him and demanding his money. And he was able to pick out of a photo montage Mr. Said's photograph. And he said, That's the man who tried to rob me at gunpoint. He too provided a statement to the police about what had happened." RP 1343.

Three State witnesses testified about what they had seen of the Freeman encounter. M.A. looked out her bedroom window to the backyard and saw two men (Forbes and a bald man) punching Freeman, who she described as an old, gray haired man. RP 2310-12, 2377. R.A. described seeing three men harassing the neighborhood grass cutter — an "old man" — in the backyard. RP 1873-78, 1909-10. Mr. Ali testified to seeing two men (Forbes and "Abdu," identified as the bald man in court), go around back and attack a neighbor, demanding money. RP 2108-10.

On December 22, 2014, shortly before the State rested its case-in-chief, the prosecutor told the court that Freeman was the victim of another assault unrelated to the present case and currently lived in a rehabilitation facility. RP 2283. Forbes did not wish to travel. RP 2381. The prosecutor decided not to call Freeman to testify. RP 2381. Said's counsel mentioned the possibility of a curative or limiting instruction. RP 2438. Forbes's counsel requested the court instruct the jury to disregard the evidence relating to Freeman because allowing the jury to consider this

evidence "poisons the water," i.e., they attacked the older man and so "must be guilty." RP 2440. The court responded the evidence was likely cross-admissible. RP 2440-41. In this regard, the parties cited ER 404(b) and res gestae. RP 2442, 2536-37.

The next day, the State moved to dismiss the charge involving Freeman (count 3). RP 2531. No defendant objected and the court granted the motion. RP 2531. Said's counsel moved for a mistrial on the remaining counts. RP 2536. The State's position was that a mistrial was unwarranted because the evidence involving Freeman would have been admissible as res gestae. RP 2442, 2536-37.

The court ruled the jury could find the Freeman incident was sandwiched in between the contact at the front door of the house and the contact at the car. RP 2632. ER 404(b) did not apply to direct evidence of the crime charged. RP 2632-33. The evidence pertaining to Freeman was admissible as res gestae and to show identity. RP 2633. The court therefore refused to instruct the jury to disregard the evidence and denied the mistrial motion. RP 2633-34. In closing argument, the State described Freeman as "aggressively assaulted by the defendants" and "attacked." RP 2882, 2884.

- b. The court erred in refusing to grant a mistrial because the admission of evidence involving Freeman constituted a trial irregularity once the charge was dismissed.**

A trial court's decision whether to grant a mistrial is reviewed for abuse of discretion, as are its evidentiary rulings. State v. Escalona, 49 Wn. App. 251, 254-55, 742 P.2d 190 (1987); State v. Larry, 108 Wn. App. 894, 910, 34 P.3d 241 (2001).

Turning first to the identity rationale, "[e]vidence of other crimes is relevant on the issue of identity only if the method employed in the commission of both crimes is 'so unique' that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes with which he is charged." State v. Russell, 125 Wn.2d 24, 66-67, 882 P.2d 747 (1994) (quoting State v. Hernandez, 58 Wn. App. 793, 799, 794 P.2d 1327 (1990)). The record does not support the court's ruling that the Freeman evidence was admissible to prove identity. The altercation with Freeman, when compared with those involving Dalmar and Mr. Ali, does not demonstrate the presence of a unique means of committing a crime. Beating up someone in an attempt to get money is an ordinary incident of attempted robbery, and the encounters with Dalmar and Mr. Ali did not even involve a physical assault. Evidence of other misconduct is inadmissible on the issue of

identity when it does not demonstrate a unique modus operandi. State v. Thang, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002). The modus operandi used to prove identity "must be so unusual and distinctive as to be like a signature." State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984). There is no such showing here. The court abused its discretion in failing to adhere to the requirements of the evidentiary rule. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

Further, even "[i]f evidence is relevant to show identity, it is admissible if its probative value is greater than the likelihood of unfair prejudice under ER 403." State v. Pam, 98 Wn.2d 748, 760, 659 P.2d 454 (1983), overruled on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988). No witness testified their observation of the Freeman altercation allowed them to make an identification of one or more defendants that would not otherwise have been made. At best the evidence was cumulative on the issue of identity. At most the evidence was only of marginal relevance. It was outweighed by its unfair prejudice. The evidence showed the defendants beating up a poor old man. Evidence that the defendants accosted a vulnerable and sympathetic victim is inflammatory.

The trial court also erred in ruling the Freeman evidence was admissible as res gestae. The res gestae rationale permits the admission of

evidence of other crimes or misconduct where it is "a link in the chain of an unbroken sequence of events surrounding the charged offense . . . in order that a complete picture be depicted for the jury." State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981). "[W]hen evidence of res gestae involves other crimes or acts, the evidence must meet the requirements of ER 404(b)." State v. Mutchler, 53 Wn. App. 898, 901, 771 P.2d 1168 (1989). The court thus erred in ruling the Freeman evidence was not ER 404(b) evidence. RP 2632-33.¹⁵

When determining admissibility under ER 404(b), the trial court must (1) find the alleged misconduct occurred by a preponderance of the evidence; (2) identify the purpose for admission; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against its prejudicial effect. Foxhoven, 161 Wn.2d at 175. "ER 404(b) is only the starting point for an inquiry into the admissibility of evidence of other crimes; it should not be read in isolation,

¹⁵ Division Two has taken the view that res gestae evidence is not ER 404(b) evidence. See State v. Briejer, 172 Wn. App. 209, 224-25, 289 P.3d 698 (2012) (citing State v. Grier, 168 Wn. App. 635, 645, 278 P.3d 225 (2012)). But the Supreme Court treats res gestae evidence as subject to ER 404(b). Brown, 132 Wn.2d at 571; State v. Powell, 126 Wn.2d 244, 263-64, 893 P.2d 615 (1995); State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). The Supreme Court's decisions on the matter are binding on the lower courts. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

but in conjunction with other rules of evidence, in particular ER 402 and 403." State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982).

Evidence admitted under a *res gestae* rationale must be necessary to depict a complete picture for the jury. Tharp, 96 Wn.2d at 594. "The other acts should be inseparable parts of the whole deed or criminal scheme." Mutchler, 53 Wn. App. at 901. The attack on Freeman was not an inseparable part of the alleged criminal acts perpetrated on Dalmar and Mr. Ali. The complete story on the remaining counts could have been told without reference to what happened with Freeman. The altercations with Dalmar and Mr. Ali took place in the front of the house. The Freeman altercation took place behind the house. All of the witnesses to what happened between the defendants and Dalmar and Ali could describe those interactions without reference to Freeman. The Freeman attack can be separated from the other encounters. See Mutchler, 53 Wn. App. 898, 902, 771 P.2d 1168, 1170 (1989) (evidence not admissible as *res gestae* where encounter with one person was not part of attack on another and the story was complete without reference to the other encounter).

Even if the Freeman evidence retained relevance to the remaining charges, it was still inadmissible under ER 403. Evidence causes unfair prejudice when it is more likely to arouse an emotional response than a rational decision by the jury, or an undue tendency to suggest a decision

on an improper basis, commonly an emotional one. State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000). Evidence related to Freeman falls under this category. Freeman is a particularly sympathetic figure because of his old age and his status as a poor grass cutter. The attack on him depicts the accused as particularly immoral ruffians. That evidence could not help but arouse an emotional response rather than a rational decision by the jury.

Because evidence pertaining to Freeman was inadmissible once the charge involving him was dismissed, the problem must be analyzed as a trial irregularity. A court must grant a mistrial where a trial irregularity may have affected the outcome of the trial, thereby denying an accused his right to a fair trial. Escalona, 49 Wn. App. at 254. In deciding whether a trial irregularity had this impact, courts examine (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given capable of curing the irregularity. Id.

State v. Babcock, 145 Wn. App. 157, 158, 185 P.3d 1213 (2008) is instructive. In that case, the defendant was originally charged with sexually abusing two girls, M.B. and A.T. Babcock, 145 Wn. App. at 158. Before trial, hearsay testimony regarding A.T.'s allegations was ruled admissible. Id. But the molestation charge involving A.T. was dismissed mid-trial after A.T. refused to testify. Id. The defendant moved for a

mistrial because the hearsay evidence related to A.T. had already been admitted. Id. The trial court denied the request for a mistrial and instructed the jury to disregard the testimony concerning A.T.'s allegations. Id. The Court of Appeals treated the hearsay testimony as a trial irregularity, as it became inadmissible once A.T. refused to testify. Id. at 163-65. The Court of Appeals reversed because the acts relating to A.T. were so similar to those relating to M.B. that it would be inherently difficult for the jury to disregard the testimony. Id. at 165-66.

The irregularity in Said's case follows a similar dynamic: multiple charges involving more than one victim, the admission of evidence pertaining to one of the victims, the subsequent unavailability of that witness to testify, the dismissal of the charge pertaining to that witness, and the denial of a mistrial. The admission of other "bad acts" is "extremely serious." Babcock, 145 Wn. App. at 164. The evidence related to the attack on Freeman qualifies as such. The Freeman evidence was not cumulative of other evidence properly admitted. The jury was not told to disregard the evidence and so the irregularity remained uncured. The trial court refused to instruct the jury to disregard. RP 2633-34. The irregularity factors all weigh in favor of mistrial.

Jurors could not be expected to disregard the Freeman evidence on their own in deliberating on the remaining counts. The jury knew the

defendants were charged with attempting to rob Freeman. The prosecutor introduced the evidence in opening statement as one of the cornerstones of its case. Three State witnesses provided direct testimony on the Freeman altercation. The State returned to the subject in closing argument in urging the jury to convict.

Evidence of guilt was not so overwhelming that the irregularity had no effect on the verdicts. State witnesses provided inconsistent testimony on the extent of Said's involvement in the attempted robbery of Dalmar. Dalmar testified Said was present with the other two men at her car but she did not see him with a gun or hear him demanding money. RP 2225, 2228, 2267. No testimony established that Said actually saw the gun that Forbes pointed at the house during the encounter with Dalmar. Forbes was standing behind Said at the time. RP 1625. Under an accomplice liability theory, the State needed to prove Said knew he was aiding in the commission of attempted first degree robbery with a firearm. See State v. Israel, 113 Wn. App. 243, 288, 54 P.3d 1218 (2002) (an accomplice must have specific knowledge of the general crime charged and aid in the planning or commission of that crime), review denied, 149 Wn.2d 1013, 69 P.3d 874 (2003). Even assuming accomplice liability was an option under the jury instructions, the evidence was not overwhelming on the issue. Further, as argued in section C.1.b. supra, evidence of Said's

gun possession was thin. Under the circumstances, the trial irregularity involving admission of the Freeman evidence likely affected the outcome. The convictions should be reversed.

3. SAID WAS ENTITLED TO INSTRUCTION ON UNLAWFUL DISPLAY OF A WEAPON AS A LESSER OFFENSE TO ATTEMPTED ROBBERY AND THE COURT COMMITTED REVERSIBLE ERROR IN FAILING TO GIVE IT.

The court erred in failing to give defense counsel's proposed instruction on unlawful display of a weapon as a lesser included offense of attempted first degree robbery. Both the legal and factual prongs of the test for giving such instruction were met. The error requires reversal of the attempted robbery conviction.

a. Overview of the law on lesser offense instruction and the court's ruling.

Defendants in Washington are entitled to have juries instructed not only on the charged offense, but also on all lesser included offenses. RCW 10.61.006. 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. Ferrazza v. Mintzes, 735 F.2d 967, 968 (6th Cir. 1984); U.S. Const. amend XIV.

A defendant is entitled to a lesser offense instruction if (1) each of the elements of the lesser offense is a necessary element of the charged

offense; and (2) the evidence supports an inference that the defendant committed the lesser offense. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The first requirement is the "legal prong;" the second requirement is the "factual prong." State v. Berlin, 133 Wn.2d 541, 546, 947 P.2d 700 (1997).

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." There was no dispute that the legal prong was met. RP 2653, 2732; see Workman, 90 Wn.2d at 448 (legal prong met for attempted first degree robbery and unlawful carrying of a weapon under RCW 9.41.270).

The dispute centered on the factual prong, with the State contending no affirmative evidence showed only the crime of unlawful display was committed. CP 323-24, 467-71; RP 2653-59, 2732-37. Citing Workman, Said's counsel argued M.A.'s 911 call/testimony and Brzostowski's 911 call/testimony was affirmative evidence that the lesser offense of unlawful display was committed. RP 2655, 2735. The trial court ruled the factual prong was unmet, opining "the evidence is

unrebutted that there were demands for money as the gun -- in conjunction with the gun being shown." RP 2738. Said's counsel took exception. RP 2861. The trial court's refusal to give a lesser instruction based upon the factual prong is reviewed for abuse of discretion. State v. LaPlant, 157 Wn. App. 685, 687, 239 P.3d 366 (2010).

b. The court erred in refusing to give lesser offense instruction because affirmative evidence, looked at in the light most favorable to Said, established the crime of unlawful display of a weapon was committed.

To meet the factual prong, "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." State v. Porter, 150 Wn.2d 732, 737, 82 P.3d 234 (2004) (quoting State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000)). "Stated somewhat differently, '[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater, a lesser included offense instruction should be given.'" In re Pers. Restraint of Andress, 147 Wn.2d 602, 613, 56 P.3d 981 (2002) (quoting Berlin, 133 Wn.2d at 551). When determining if the evidence was sufficient to support the giving of a lesser instruction, the appellate court must view the supporting evidence in the light most favorable to the requesting party. Fernandez-Medina, 141 Wn.2d at 455-56.

Brzostowski's 911 call and testimony showed he heard a group of men loudly arguing, he looked out the window and saw the men, and after additional argument, saw a man on the sidewalk carrying a rifle. RP 1506, 1512-15, 1518-19, 1527. The man with the rifle raised his arm and said something like "come out of your house." RP 1523-24. M.A., meanwhile, saw her mother surrounded. RP 2324. Forbes said something to her mother but M.A. could not hear what he said. RP 2323. Forbes, the man in the gray jacket, had a gun. RP 2324-25, 2328-30, 2368. That gun was pointed. RP 2328, 2360. M.A. was not 100 percent certain that she saw the gun when the men were at her mother's car. RP 2332, 2371. She felt her mother and other family members were in danger. RP 2334.

Looked at in the light most favorable to Said, the facts as recited above constitute affirmative evidence that the crime of unlawful display was committed. "We have explained the factual prong of Workman by stating: It is not enough that the jury might simply disbelieve the State's evidence. Instead, some evidence must be presented which affirmatively establishes the defendant's theory on the lesser included offense before an instruction will be given." Berlin, 133 Wn.2d at 546 (quoting State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990)). Evidence from M.A. and Brzostowski affirmatively established Said's theory that the lesser crime of unlawful display was committed. There was affirmative

evidence that a firearm was displayed in an alarming manner. While neither witness heard what precisely was said (except for Brzostowski hearing the man say "come out of the house"), neither witness testified that any of the assailants demanded money in conjunction with the weapon's display.

Whether the jury credited the version of events given by M.A. and Brzostowski was a matter for the jury to decide. The jury's ability to "separate the wheat from the chaff" deserves deference, and appellate courts are "loathe to allow expansion of the trial judge's authority into the fact-finding province of the jury." Fernandez-Medina, 141 Wn.2d at 461. Reversal is required when a defendant is entitled to instruction on a lesser charge and the trial court fails to give it. State v. Condon, 182 Wn.2d 307, 326, 343 P.3d 357 (2015) (citing State v. Parker, 102 Wn.2d 161, 163-64, 166, 683 P.2d 189 (1984)). Said's conviction for attempted robbery must be reversed.

4. IN THE EVENT THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, ANY REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.

If the State substantially prevails on appeal, Said requests that no costs of appeal be authorized under title 14 of the Rules of Appellate Procedure. The Court of Appeals has discretion to deny a cost bill even where the State is the substantially prevailing party. State v. Sinclair, 192

Wn. App. 380, 367 P.3d 612, 615 (2016); RCW 10.73.160(1) (the "court of appeals . . . *may* require an adult . . . to pay appellate costs."). The imposition of costs against indigent defendants raises serious concerns well documented in State v. Blazina: "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." State v. Blazina, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). Sinclair recognized the concerns expressed in Blazina were applicable to appellate costs and it is appropriate for appellate courts to be mindful of them in exercising discretion. Sinclair, 367 P.3d at 617.

At sentencing, defense counsel asked the court to waive all discretionary costs and the trial court did so. RP 3123, 3131; CP 390. Said qualified for indigent defense services in the trial court and continued to qualify for indigent defense services on appeal. CP 417-20, 481-85. Importantly, there is a presumption of continued indigency throughout the review process. Sinclair, 367 P.3d at 618; RAP 15.2(f). As in Sinclair, there is no trial court order finding that Said's financial condition has improved or is likely to improve. Sinclair, 367 P.3d at 618. This Court should soundly exercise its discretion by denying any request for appellate costs.

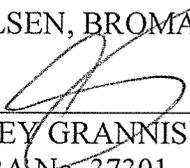
D. CONCLUSION

For the reasons set forth, Said requests reversal of the convictions.

DATED this 22nd day of April 2016

Respectfully Submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 73263-3-I
)	
ABDUNASIR SAID,)	
)	
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 22ND DAY OF APRIL, 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ABDUNASIR SAID
 DOC NO. 328788
 CLALLAM BAY CORRECTIONS CENTER
 1830 EAGLE CREST WAY
 CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF APRIL, 2016.

X *Patrick Mayovsky*