

73263-3

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CCA NO. 73263-3-1

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

STATE OF WASHINGTON,

Respondent,

v.

ABDUMASIR SAID,

Appellant.

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

The Honorable Laura Inveen, Judge

APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON

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A. IDENTITY OF MOVING PARTY

I, Abdunasir Said, Appellant, Pro se, respectfully request this Honorable Court afford liberal construction to this motion keeping in accordance with Haines v. Kerner, 404 U.S. 519, S.Ct. 594 (1972), and review this Statement of Additional Grounds briefing (SAG) submitted by the case Appellant.

B. ASSIGNMENT OF ERROR

1. The court erred in giving two invalid jury instructions, No. 14 and No. 18.

2. Appellant received ineffective assistance of counsel, where counsel failed to object to jury instructions that relieved the State of the burden of proving every element of the crime.

3. Insufficient evidence to support the conviction for attempted first degree robbery under Count I.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether jury instructions No. 14 and No. 18, relieved the State of the burden of proving every element of the crime of attempted first degree robbery?

2. In connection with jury instructions No. 14 and No. 18, whether counsel was ineffective in failing to object to the wording?

3. Based on the legal standard of the elements of attempted first degree robbery as defined by Washington Statute..., whether the evidence was insufficient to convict appellant as a principle for attempted first degree robbery?

D. STATEMENT OF THE CASE

1. Procedural facts

The State charges 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 charges involving Freeman because he was unavailable to testify. RP 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. 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

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 the 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.

At trial, Dalmar testified (Dalmar used a Somali interpreter at trial. RP 2204), 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 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 (Saio) from lineups. RP 2224, 2264. 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 2228. Dalmar identified Forbes from a photo montage. RP 2229.

Regarding #4 (Saio), she testified "he only came towards the side of my window, he did not even use his hands, 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. (Mr. Ali used a Somali interpreter at trial. RP 2092), RP 2094. After hearing loud knocking on the door, he looked and saw three men standing outside. RP 2097-99. 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 2096. 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. PP 2108-10. Ali identified "Abdu" as the bald man in court. PP 2109.

His wife and son went to their car. PP 2110-11. Then men knocked on the car window and two of them said "give us money." PP 2112-14. Forbes pointed the gun toward house when confronting Dalmar. PP 2111-14, 2196-97.

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

Ali selected 13 (Abdi) from a lineup as the man who had a gun and "attacked us with it." PP 2119-20, 2132-36; Ex. 45. He selected 14 (Gaid) from another lineup as a man who asked for money and "had a gun and attacked us." PP 2139, 2491, Ex. 46. Ali testified "the fact that he had a weapon was obvious," although he was completely unable to describe it. PP 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." PP 2140. When pressed that no one actually shot a window, Ali responded "if somebody 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 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 - 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. She did not remember what Abdi wore. RP 2325. She did not see the bald guy (Saic) 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 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. 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 Mustafa in the car. RP 1891-83. 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.

Mustafa 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. His mother said "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. Dalmar herself would tell them to leave if they were drinking and there were children in the house. RP 2251. According to Officer Skomma, 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 agree 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. Mustafa said they had "not

really" talked about what happened. RP 1623.

Psychologist Dr. Geoffrey Loftus, testified 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, 2610-11. 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, 2599-2606. 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 2909-12. 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.

E. ARGUMENT

1. **JURY INSTRUCTIONS NO. 14 AND NO. 18 WERE INVALID AS THEY RELIEVED THE STATE OF THE BURDEN OF PROVING EVERY ELEMENT OF ATTEMPTED FIRST DEGREE ROBBERY**

The State submitted jury instructions No. 14 and No. 18 which relieved the State of the burden of proving that Said was guilty as a principal of the attempted first degree robbery of Dalmar. Based on jury instruction No. 18 the State needed to prove principal liability on that charge, but because jury instruction No. 14 relieved the State of the burden of proving principal liability by changing the definition of the elements of first degree robbery.

- 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 convict. Jury instruction No. 14 relieves the State of that burden.**

The Due Process Clause of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he or she is charged. In re Winship, 397 U.S.

359, 364, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970); see e.g., Solis v. Garcia, 219 F.3d 922, 926-27 (9th Cir. 2000); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); U.S. Const. amend. XIV, Wash. Const. art. I, §3.

The Sixth Amendment to the United States Constitution (U.S. Const. amend. VI) and article I, section 22 of the Washington Constitution (Wash. Const. art. I§22) require that a jury in a criminal trial be instructed on all elements of a charged crime. State v. Richie, 191 Wn.App. 916, 365 P.3d 770 (2015).

Whether a jury instruction correctly states the applicable law is a question of law that we review *de novo*. See State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Before addressing whether an instruction fairly allowed the parties to argue the case, the court must first determine whether the instruction accurately states the law without misleading the jury. State v. Acosta, 101 Wn.2d 612, 619-20, 683 P.2d 1069 (1984). Jury instruction must be relevant to the evidence presented. State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). Instructing a jury so as to relieve the State of its burden to prove all of the elements of the case is reversible error. State v. Scott, 110 Wn.2d 682, 690, 757 P.2d 492 (1988). A constitutional error is harmless only if we are convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). (quoting State v. Linchan, 147 Wn.2d 638 (May 9, 2002)).

Jury instructions that relieve the State of its burden to prove every element of the crime charges may be considered for the first time on review. State v. Walker, 182 Wn.2d 463, 341 P.3d 967 (2015).

In reviewing an ambiguous instruction, the inquiry is not how reasonable jurors could or would have understood the instruction as a whole; rather, the court must inquire whether there is a "reasonable likelihood" that the jury has applied the challenged instruction in a way that violates the Constitution. See Estelle v. McGuire, 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed. 2d 385 (1991); Boyd v. California, 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). In order to show due process violation, the petitioner must show both ambiguity and a "reasonable likelihood" that the jury applied the instruction in a way that violates the Constitution, such as relieving the State of its burden of proving every element beyond a reasonable doubt. Waddington v. Saraused, 555 U.S. 179, 190-91, 129 S.Ct. 823, 172 L.Ed.2d 532 (2009). (internal quotations and citations omitted).

The court begins its analysis of the constitutionality of jury instructions with the basic principles found in In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), where the Court held that the prosecution must prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [the defendant] is charged." *Id.* at 364. An

instruction that shifts the burden of disproving any element of a criminal offense violates due process. Mullaney v. Wilbur, 421 U.S. 684, 701, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).

Jury instruction No. 14 is ambiguous and violated Said's constitutional right to due process by relieve that State of the burden of proving every element of the crime of attempted first degree robbery of Dalmar.

Jury instruction No. 14 defines that the elements of Robbery in the First Degree are:

(1) That on or about a given date, a defendant unlawfully took personal property from the person or in the presence of another;

(2) That a defendant intended to commit theft of the property;

(3) That the taking was against the person's will by a defendant's use or threatened use of immediate force, violence or immediate force, violence of fear of injury to that person or to that person's property or to the person or property of another;

(4) That force of fear was used by a defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5) That in the commission of these acts or in immediate flight therefrom a defendant or an accomplice was armed with a deadly weapon; and

(6) That any of these acts occurred in the State of Washington.

This clearly relieved the State of having to prove that the defendant intended to commit the crime of Robbery in the first degree. As the Prosecutor changed the wording of the definition of Robbery in the first degree.

Ms. Voorhees, (Prosecutor) stated: The only thing that I noticed in re-looking at that is--and I -- it's just to be consistent, and I had changed it in a couple places and not in others, whether or not we want to refer to it as the defendant or a defendant. I caught it in the first couple of paragraphs, but not further down. But I can certainly fix that so that they all say "that a defendant." And I think that just makes it more generic. RP 2765 Lines 4-11.

By the State changing the definition of Robbery in the first degree (By changing the word "the defendant" to "a defendant"), relieved the State of having to prove that the defendant (Said) intended to commit first degree robbery, and made it so that Said could be convicted if any of the defendants intended to commit first degree robbery, even though there is not any accomplice liability instruction on Count 1. (See jury instruction 18).

Ms. Dalmar clearly stated "He only came toward 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 line 7-10. So if it was not for the invalid jury instructions the jury could not have found Said guilty of robbery in the first degree as charged in count 1, as there was not accomplice language in count 1.

Even the trial judge stated: "And I will acknowledge that your involvement in this particular incident was certainly not -- did not appear to be the instigator and I don't think the

jury felt that it was, either. I'm fairly certain that they found, with regards to the attempted robbery, that through the accomplice, and it doesn't take much to be an accomplice, as I'm sure it was explained to you and the law provides."

However there was no accomplice liability in the to-convict instruction on count 1. See instruction No. 18.

This shows both that the instruction was ambiguous and that there is a reasonable likelihood that the jury only found said guilty to the attempted first degree robbery in count 1 because of the ambiguous jury instruction given in No. 14.

b. As a matter of due process, the to-convict instruction must contain all essential elements of a crime.

"A trial court's failure to instruct the jury as to every element of the crime charged violates due process." State v. Hassan, 184 Wn.App. 140, 148, 336 P.3d 99 (2014); U.S. Const. amend. XIV. A "'To convict [jury] instruction must contain all of the elements of the crime,'" and "'must make the relevant legal standard manifestly apparent to the average juror.'" State v. Kylio, 166 Wn.2d at 864 (quoting State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)).

"We review alleged errors of law in jury instructions de novo." State v. Fehr, 185 Wn.App. 505, 514, 341 P.3d 363 (2015). A jury instruction is erroneous if it relieves the State of its burden to prove every element of a crime. State v. Deryke, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003). A to-convict instruction must contain all essential elements of

a crime because it serves as a yardstick by which the jury measures the evidence to determine the defendant's guilt or innocence. *Id.* at 910. The fact that another instruction contains the missing essential element will not cure the damage caused by the element's absence from the to-convict instruction. *Id.* (quoting State v. Richie, 191 Wn.App. 916, 365 P.3d 770 (2015)).

Said contends that, because it is impossible to know what effect inconsistent instructions may have on a verdict, prejudice is presumed in instances where the trial court gives irreconcilable instructions. However, this is true only where the contradictory instructions pertain to a material issue in the case. See Hall v. Corp. of Catholic Archbishop of Seattle, 80 Wn.2d 797, 804, 498 P.2d 844 (1972).

The to-convict instruction on Count I, Instruction No. 18 stated:

To convict a defendant of the crime of attempted Robbery in the First Degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about December 30, 2013, the defendant did an act that was a substantial step toward the commission of Robbery in the First Degree against Halimo Dalmar;

(2) That the act was done with the intent to commit Robbery in the First Degree; and

(3) That the act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count I.

This instruction does not list the elements of attempted first degree robbery.

WPIC 37.02 lists that Robbery - First Degree - Elements are:

To convict the defendant of the crime of robbery in the first degree, each of the following six elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about (date), the defendant unlawfully took personal property from the person [or in the presence] of another;

(2) That the defendant intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person [or to that person's property] [or to the person or property of another]:

(4) That force or fear was used by the defendant [to obtain or retain possession of the property] [or] [to prevent or overcome resistance to the taking] [or] [to prevent knowledge of the taking];

(5) [(a) That in the commission of these acts [or in the immediate flight therefrom] the defendant [was armed with a deadly weapon]] [or]

[(b) That in the commission of these acts [or in immediate flight therefrom] the defendant displayed what appeared to be a firearm or other deadly weapon;] [or]

[(c) That in the commission of these acts [or in the immediate flight therefrom] the defendant inflicted bodily injury;] [or]

[(d) That the defendant committed the robbery within and against a financial institution;] and

(6) That any of these acts occurred in the State of Washington.

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The fact that the to-convict instructions contained in jury instruction No. 18 did not contain the essential element required to prove attempted robbery in the first degree, this court needs to vacate the conviction. See State v. Richie, 191 Wn.App. 916, 365 P.3d 770 (2015).

Its easy to see that because the to-convict instruction on Count I did not have the essential element listed in it, that is why the jury was able to convict Said of attempted first degree robbery (as an accomplice. See Judge's statement at PP 3128 lines 15-22). Even though the victim (Halimo Dalmar) stated that: "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." And there is not any type of accomplice language in the to-conviction jury instruction No. 18, on Count 1.

However the same jury was unable to reach a verdict for Antonio Forbes who was the principle in the attempted robbery and Dalmar said that he had a gun and asked her for money. This just goes to show how the jury misunderstood the jury instructions.

The united States Supreme Court has held that it is a fundamental due process violation to convict and incarcerate a person for a crime without proof of all the elements of the crime. Fiore v. White, 531 U.S. 225, 228-29, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001).

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2. TRIAL COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO OBJECT TO JURY INSTRUCTION NO. 14 and NO. 18

Trial counsel was ineffective when he allowed the State to submit jury instructions that had the definition of the crime of first degree robbery changed, (jury instruction No. 14), and then did not list the elements of the charged crime of attempted first degree robbery, (jury instruction No. 18). The conviction must be reversed.

- a. Both the United States Constitution and the Washington State Constitution guarantees the right to effective assistance of counsel.

A criminal defendant is guaranteed the right to effective assistance of counsel. U.S. Const. amend. VI; Const. art. 1, §22; State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). Washington has adopted the Strickland two-pronged test to determine whether a defendant had constitutionally sufficient counsel. Strickland v. Washington, 466 U.S. 663, 687, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984); Grier, 171 Wn.2d at 32. Under Strickland, the defendant carries the burden of showing (1) that counsel's performance fell below an objective standard of reasonableness and (2) that this deficient performance prejudiced the defense. Strickland, 466 U.S. at 687-88. We defer to the decisions of defense counsel in the course of representation and strongly presume that counsel's performance was reasonable. Grier, 171 Wn.2d at 33. A defendant can rebut the presumption of reasonable performance by showing that there is no conceivable legitimate tactic or

strategy to explain counsel's conduct. *Id.* See State v. Reichenbench, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (quoting State v. Brewczinski, 173 Wn.App. 541 (2012)).

It is easy to see that there was no legitimate tactic or strategy to allow the State to change the definition of what a robbery is from (the defendant) to (a defendant) RP 2765, when there are three defendants. This allowed the State to convict Said of attempted first degree robbery as an accomplice even though there was not accomplice language in the to-convict jury instruction for Count I.

And then to allow the State to submit a jury instruction that did not even list the elements of attempted robbery in the first degree in the to-convict instruction, jury instruction No. 18 was also ineffective.

It is clearly ineffective assistance of counsel to allow the State to submit two jury instructions that relieve the State of the burden of proving every element of the crime charged.

3. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT SAID OF ATTEMPTED FIRST DEGREE ROBBERY

The State failed to prove the "substantial step" element of attempted first degree robbery as charged in count I. 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 instruction, the State needed to prove principal liability on that charge but failed to do so. The

conviction 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 convict.

When a defendant challenges the sufficiency of the evidence supporting his conviction, we examine the record to decide whether any rational fact finder could have found that the State proved each element of the offense beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979)). In a sufficiency of the evidence challenge, the defendant admits the truth of all the State's evidence, therefore, we consider the evidence and all reasonable inferences from it in the light most favorable to the State. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Further, direct evidence and circumstantial evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The term "robbery" is defined in RCW 9A.56.190.

RCW 9A.56.190 states:

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; in either of which cases the degree of force is immaterial. (Emphasis added.)

A robbery conviction can be supported by evidence of any threat that induces an owner to part with his property. State v. Handburgh, 119 Wn.2d 284, 293, 830 P.2d 641 (1992). The Criminal Code defines a threat to include any direct or indirect communication of intent to cause bodily injury, to damage property, or to physically confine or restrain another person. RCW 9A.04.110(28)(a)-(c).

All evidence must be considered in the light most favorable to the prosecution. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979); Jones v. Wood, 114 F.3d 1002, 1008 (9th Cir. 1997). It is the trier of fact's responsibility to resolve conflicting testimony, weigh evidence, and draw reasonable inferences from the facts. It must be assumed the the trier resolved all conflicts in a manner that supports the verdict. Jackson v. Virginia, 443 U.S. at 319; Jones, 114 F.3d at 1008. The relevant inquiry is not whether the evidence excludes every hypothesis except guilt, but rather whether the jury could reasonably arrive at this verdict. United States v. Mares, 940 F.2d 455, 458 (9th Cir. 1991). Circumstantial evidence and the inferences reasonably drawn therefrom can be sufficient to prove any fact and to sustain a conviction, although mere suspicion or speculation does not rise to the level of sufficient evidence. United States v. Stauffer, 922 F.2d 508, 514 (9th Cir. 1990); See Jones v. Wood, 207 F.3d at 563. The court must base its determination of the sufficiency of the evidence from a review

of the record. Jackson, at 324.

The Jackson standard must be applied with reference to the substantive elements of the criminal offense as defined by state law. Jackson, 443 U.S. at 324 n.16; Windham v. Merkle, 163 F.3d 1092, 1101 (9th Cir. 1998). However, the minimum amount of evidence Due Process Clause requires to prove an offense is purely a matter of federal law. Coleman v. Johnson, ___ U.S. ___, 132 S.Ct. 2060, 2064, 182 L.Ed. 2d 978 (2012) (per curiam). For example, under Jackson, juries have a broad discretion to decide what inferences to draw and are required only to draw reasonable inferences from basic facts to ultimate facts. Id.

The only evidence the State presented in connection to the attempted first degree robbery of Halimo Dalmar, was her testimony. Ms. Dalmar testified that "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." She does not even say that Said asked for anything. This does not constitute an attempted first degree robbery as the jury instruction don't have an accomplice language and he would have to have been the principle Count I.

This clearly shows that there was insufficient evidence to convict Said of Attempted First Degree Robbery in Count I.

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F. CONCLUSION

For the reasons stated above, the Appellant respectfully requests this Honorable Court to reverse his conviction.

RESPECTFULLY Submitted this 7 day of July, 2016.



Adbunahir Said, Pro se

PROOF OF SERVICE BY MAILING
BY A PERSON IN STATE CUSTODY
Fed.R.Civ.P.5, 28 U.S.C. §1746)

I, Abdunasir Said, declare: I am over the age of 21-years, and a party to this action. I am a resident of the Clallam Bay Corrections Center in the County of Clallam, State of Washington. My Prison address is 1830 Eagle Crest Way, Clallam Bay, WA 98326

On the 7 day of July, 2016, I served a copy of APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS: on the Parties herein by placing true and correct copies thereof, enclosed in a sealed envelope, into United States Mail (postage pre-paid) in a deposit box as provided at the above named correctional institution which I am presently confined. The envelope's were addresses as follows:

THE COURT OF APPEALS
DIVISION I
600 University Street
Seattle, WA 98101-4170

Prosecuting Atty. King County
King Co. Pros/App Unit Superior
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

Casey Grannis
Nielsen Broman & Koch, PLLC
1908 E. Madison St.
Seattle, WA 98122-2842

I certify, state and declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

EXECUTED ON: 7-7-16

SIGNATURE: *A. Said*

FILED
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STATE OF WASHINGTON
2016 JUL 11 AM 11:34