

No. 38902-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

TOBY ANDERSON, TIMOTHY BAXTER,
RIGOBERTO J. CONTRERAS, BRIAN WINTER,
JASON L. WOODS,

Appellants.

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STATE OF WASHINGTON
BY _____
DEPUTY

COURT OF APPEALS
DIVISION II

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

The Honorable Richard D. Hicks, Judge
Cause Nos. 08-1-02090-1, 08-1-02077-4, 08-1-02091-0
08-1-02088-0, 08-1-02094-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Jury Instruction No. 15, the elements instruction for first degree robbery as charged against Toby Anderson, permitted the jury to convict Anderson if they found him to be an accomplice to theft rather than robbery.

2. Whether the State produced sufficient evidence at trial to support convictions for first degree robbery and second degree vehicle prowling.

3. Whether Jury Instruction No. 63, which required the jury to be unanimous in answering the special verdict regarding being armed with a firearm while committing first degree robbery, was incorrect.

4. Whether Baxter and Contreras received ineffective assistance of counsel because their attorneys did not propose an instruction that told the jury it could answer "no" to the firearm special verdict without unanimity.

5. Whether the State failed to prove that the gun was an operable firearm or that the defendants were armed with the gun for purposes of imposing the firearm enhancement.

6. Whether there was sufficient evidence to support Woods' conviction for first degree unlawful possession of a firearm.

7. Whether Anderson, Baxter, and Winter received ineffective assistance of counsel because their attorneys did not object to the gun, Exhibit 25, being admitted into evidence.

8. Whether Anderson received ineffective assistance of counsel because his attorney submitted a proposed instruction for a lesser included crime of third degree theft to the charge of first degree robbery, but apparently withdrew it, and did not except to the trial court's failure to give that instruction to the jury.

9. Whether the firearm enhancement added to the sentence for first degree robbery violates principles of double jeopardy.

10. Whether the accomplice liability statute requires an overt act on the part of the accomplice.

11. Whether the accomplice liability statute criminalizes constitutionally protected speech.

12. Whether the admission of the statement by Woods that someone in the back seat of the car had passed him the gun and told him to throw it out of the car violated Contreras's right to confrontation under Crawford and Bruton.

13. Whether the 2008 amendment to RCW 9.94A.500, which provides that a prosecutor's summary of a defendant's criminal history constitutes prima facie evidence of the convictions listed, violates the appellants' rights against self incrimination or unconstitutionally shifts the burden of proof at sentencing to the appellants.

14. Whether there exists an accumulation of non-reversible errors that, taken together, require reversal.

B. STATEMENT OF THE CASE.

1. Facts.

On November 18, 2008, Thurston County Sheriff's Deputy Cameron Simper responded just after 8:00 a.m. to a man-with-a-gun call at 17007 Old Highway 99 SE in Thurston County. [RP 90]¹ Present were Cary Swofford, who lived there, and Russel Molnar, a neighbor who stayed there so much he apparently thought he lived there. [RP 217, 339, 360] Swofford testified that she had just awakened and was on her way to the bathroom when she saw a

¹ Unless otherwise noted, all references to the Verbatim Report of Proceedings are to the trial transcript dated February 2 through 6, 2009.

man standing at the door to the trailer, which is directly across from the bathroom. [RP 369] This man, whom she had never seen before, had apparently come from a small blue car [RP 345] and wanted to talk to her about his mother, but she did not understand what he was trying to tell her. [RP 346-47] Shortly after she saw this man, some other people got out of the car. She became nervous and woke Molnar, who was sleeping on the couch. [RP 219, 366] Molnar described her as excited [RP 217]; Swofford testified that she was hysterical. [RP 344] She was frightened because there were “a bunch” of men, wearing caps and hoodies, who she thought looked like “gangbangers”. [RP 344-45] They reminded her of neighbors with whom she had had problems. [RP 350] Molnar thought that the men were wearing beanies. [RP 248]

Molnar joined Swofford at the door of the trailer and then returned to the living room; he saw what he thought were ten people running around the trailer and the vehicles parked in the driveway. [RP 218-19, 288-89] The vehicles included a Geo, a Ford Explorer, and a Chevrolet truck. [RP 221] The car in which the suspects arrived was backed into the driveway behind the Geo. [RP 241] Molnar did not recognize any of the men. [RP 223] Two men stood behind the man at the door, the one who wanted to discuss

his mother. [RP 224] They wanted to come in, but Molnar refused to admit them. At that time the men became “aggressive,” “ranting and raving,” tried to enter the Geo, and successfully entered the Ford Explorer. [RP 225]

At some point Molnar began unlocking the door, which had three locks on it, but before he could get them all unlocked one of the men tried to pull the door open. [RP 226-27] Molnar had planned to go outside, but although Swofford did not recall the man trying to open the door, she vetoed the idea of opening the door and relocked it. [RP 228, 354, 358] She later told Molnar to call the police, and he did. [RP 231, 348, 351]

Swofford’s residence was equipped with a surveillance camera that was mounted on the front of the garage and displayed a view of the driveway. [RP 222, 242, 244, 248, 262] Swofford instructed Molnar to turn the camera on, which he did. The view through the camera could be monitored on a television screen, but because Molnar could not find a tape, the camera did not record. [RP 222, 271] The camera was of poor quality, and anything more than 25 feet from the camera appeared blurry. [RP 235, 272, 278, 375] Clothing colors were not accurately represented by the camera—black would appear white, for example. [RP 291]

Molnar thought the suspects were at the residence between eight and ten minutes. [RP 244] During that time these people, and neither victim could accurately state how many there were, were constantly running around the property, going behind and around the trailer and another nearby trailer. [RP 220-21, 240, 244, 252, 364] Two of them got into the Ford Explorer. [RP 232, 244, 349] Neither of the victims saw that a stereo was taken out of the Explorer, only learning after the fact that it had been ripped out of the dash. [RP 234, 350]

While watching the action on the television screen, Molnar saw one of the men armed with what looked like a rifle. [RP 228] Although she testified that she did not actually see it, Swofford informed Molnar, who was on the phone with police dispatch, that “he had a shotgun.” [RP 352] Molnar testified he was scared and called 911. He further testified that he saw somebody pull something out of an unspecified car, [RP 232] “[t]hey looked like they cocked it back and it looked like they were going to blow the door in,” [RP 233] “[i]t looked like they cocked the gun and it looked like they were going to shoot at the door. Looked like they were going to shoot the doorknob off or something. I don’t know.” [RP 234] The person cocking the gun was near the bottom of the steps

leading up to the door of the trailer. [RP 247] On cross-examination, Molnar agreed with the questioner that the gun was a rifle and said it was about two and a half feet long, but also said it could have been either a single- or double-barreled shotgun, cocked by slamming it closed. [RP 275-76] He was sufficiently frightened that when he saw the gun he gave up any idea of going outside. [RP 280] He remained adamant that he saw a firearm. [RP 294]

Swofford testified that she was frightened because she thought one of the men might have a gun. [RP 345-46] Although she said she did not actually see a gun, she thought one of the men might be armed and she yelled to Molnar to call the police, [RP 351, 353] actually using the term "shotgun" because of the way the man was standing. [RP 352]

The men all left in the same blue car in which they had arrived. Although Swofford testified that she thought there were more people than left in the blue car, [RP 360] after they left she and Molnar looked around but did not see any remaining suspects. [RP 241]

At the time he received the call, Deputy Simper was within two miles of 17007 Old Highway 99 SE. He was informed that the

suspects left in a light blue compact car, possibly a Datsun, and that there were as many as ten of them. [RP 91-92] He responded on Old Highway 99; just past Melville Street he met a blue Datsun which was full of passengers, who were later identified as the defendants. [RP 93] He made a U-turn and stopped the Datsun in the 17100 block of Old Highway 99. There were five men in the car, crammed together because the car was so small. [RP96] The deputy ordered the driver, Contreras, out of the car at gunpoint and secured him in the back of the patrol car. [RP 97-98] All of the suspects were removed from the car and patted down for weapons. [RP 101]

On the passenger floorboard of the Datsun was a car stereo CD player; there was a stocking cap in the back seat. [RP 101] Anderson originally gave his name as Thomas Anderson, with a date of birth of September 16, 1986, but the police later learned that his first name was actually Toby, and his date of birth was April 23, 1983. [RP 104, 128] When backup arrived, Simper went to the victims' residence, where Swofford and Molnar appeared excited and slightly traumatized. [RP 104-05] Swofford gave him a description of the CD player that had been in the Explorer, [RP 107] and said there should be a CD by the Judds in the player. The CD

player found on the floor of the Datsun contained such a CD. [RP 107,119-21]

Simper later returned to the scene of the stop and, just west of the intersection of Old Highway 99 and Melville Street found a sawed-off, 12-gauge shotgun in the ditch. It was not loaded. [RP 108-09] Woods told Simper someone in the back seat of the Datsun had passed the gun to him in the front passenger seat and told him to throw it out. Woods did so. [RP 135-36] Woods, as well as Contreras, Baxter, and Anderson, admitted being at Swofford's residence but denied committing, or knowing about, any crimes. [RP136-38, 166-67] The shotgun was later examined for fingerprints; there were none. [RP 310] Detective Tim Arnold, the sheriff's office armorer, attempted to test fire the gun but it would not fire because the firing pin had been removed. [RP 314] The trigger housing was not inserted all the way into the shotgun, but it could be manipulated into place. [RP 314] The magazine tube was not properly attached to the barrel, and if a round were chambered, the tube would fall off. This made the gun less efficient but did not affect operability. [RP 323, 326] If a firing pin were available, Arnold estimated he could replace it in about one hour. [RP 325] He did

not attempt to repair the gun and did not know if it had other problems. [RP 321, 335]

While the five suspects were still at the scene of the stop on Old Highway 99, Deputy Kyle Kempke contacted Swofford and Molnar at their residence; Molnar was nervous and shaking, but Swofford was borderline hysterical and expressed concern that the suspects would return and kill her. [RP 187-88] She was uncooperative because of her fear, but she reluctantly agreed to accompany Kempke and Molnar to the scene of the stop to view the suspects. Both victims rode in the back of the patrol car as Kempke drove by the Datsun where Woods, Baxter, and Anderson were outside the car. He turned around and drove by again so the victims could look at Winter and Contreras. [RP 190-91] Both of the victims identified Woods as the person holding the shotgun and they both recognized Winter and Contreras. [RP 192-94]

2. Procedure.

The five defendants were tried together, all on the third amended information. [RP 5-8] Woods filed a motion to suppress his statements as well as his identification by the victims, on the

basis of an illegal Terry² stop. The other four joined in his motion, [RP 11-13] which was denied. [RP 24] The trial began on February 2, 2009, and concluded on February 6, 2009. All five of the defendants were charged with first degree robbery, attempted first degree burglary, first degree unlawful possession of a firearm, and second degree vehicle prowling. Anderson was also charged with identity theft. All five were found guilty of first degree robbery and second degree vehicle prowling; all five were found to have been armed with a firearm while committing the robbery for purposes of the firearm enhancement. In addition, Anderson was found guilty of first degree criminal impersonation, a lesser included offense of identity theft, and Woods was found guilty of first degree unlawful possession of a firearm. [RP 599-607]

C. ARGUMENT.

1. Jury Instruction No. 15 properly instructed the jury that before it could convict Anderson of first degree robbery it had to find that he was either a principal or an accomplice to robbery rather than solely a theft.

Anderson argues that Instruction No. 15 permitted the jury to convict him if it found that he intended to commit a theft but not a

² Terry v. Ohio, 392 U. S. 1, 88 S.Ct. 1868, 20 L. Ed. 2d 889 (1968).

robbery. This is a complete misreading of the instruction. The instruction reads:

To convict the defendant, TOBY K. ANDERSON, 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 the 18th day of November, 2008, the defendant, or an accomplice, unlawfully took personal property from the person or in the presence of another;

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

(3) That the taking was against the person's will by the defendant's or accomplice'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 or accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

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

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

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

If you find from the evidence that elements (1), (2), (3), (4), and (6), and any of the alternative elements (5)(a), or (5)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury

need not be unanimous as to which of alternatives (5)(a) or (5)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), (5), or (6), then it will be your duty to return a verdict of not guilty.

[Anderson's CP 72-73]

Also at issue in Anderson's argument is Jury Instruction No.

9, which reads as follows:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

[Anderson's CP 66]

Anderson did not except to either of these instructions at trial, [RP 446-47] and he does not claim ineffective assistance of counsel for the failure to do so. Generally, when there is no objection below, an appellate court will not review a claim of instructional error unless the appellant demonstrates that a “manifest error affecting a constitutional error” occurred. State v. Gerdts, 136 Wn. App. 720, 726, 150 P.3d 627 (2007), RAP 2.5(a)(3); see also State v. Keend, 140 Wn. App. 858, 864, 166 P.3d 1268 (2007). In both Gerdts and Keend, the court accepted review because the appellants also argued that their trial attorneys were ineffective for failing to object to the instructions. Gerdts, 136 Wn. App. at 726, Keend, 140 Wn. App. at 864. In State v. Goble, 131 Wn. App. 194, 126 P.3d 821 (2005), however, the court accepted review of a challenge to the knowledge instruction even though there was no exception below and no claim of ineffective assistance of counsel. The Goble court noted that if Goble could show that the instructional error relieved the State of the burden to prove the knowledge element of third degree assault, he would necessarily show an error of constitutional magnitude which will be reviewed even without an objection below. Id., at 203. Because

Anderson claims a constitutional error, the State presumes that this court will review his claim.

A challenged jury instruction is reviewed de novo. The instructions are read as a whole and the challenged portion is considered in the context of all the instructions given. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). In a criminal trial, the jury must be instructed that the State has the burden of proving each essential element of the crime beyond a reasonable doubt. Id., at 656. That was done in this case. [Jury Instruction No. 2, Anderson's CP 59]

Instruction No. 9 satisfies the requirements of accomplice liability as set forth in State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000) and State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000). The jury was instructed that the accomplice must not only be an accomplice, as defined in the instruction, but must have knowledge of *the* crime, which, they were told in Instruction No. 15, was first degree robbery. The State does not dispute that it was required to prove that Anderson was either a principal or an accomplice to robbery. He is correct that he could be convicted of robbery if he did not know the principal had a gun, as long as he knew that in general the principal or principals intended to take

property by force and without permission. State v. Davis, 39 Wn. App. 916, 920, 696 P.2d 627 (1985) (citing to State v. Davis, 101 Wn.2d 654, 682 P.2d 883 (1984)).

Anderson argues that the second element of Instruction 15 permitted the jury to convict him if they found that he only intended to steal. This is a misreading of the instruction. An intent to steal is an essential element of robbery. State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991). The “to convict” instruction must contain all of the elements of the crime. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (citing to State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)). It would be error to omit that element from the instruction.

Anderson argues that he could be convicted of robbery as an accomplice even if his intent was that the principal commit only theft. However, there is no intent requirement to accomplice liability other than knowledge. The State was required to prove beyond a reasonable doubt that, as an accomplice, he had knowledge that the principal intended to commit robbery, which includes an intent by the principal to commit theft. There is no requirement that the accomplice intend for any crime to be committed; the accomplice must only have knowledge of the general crime to be committed

and to “solicit, command, encourage, request, aid, or agree to aid another person” in committing the crime. Anderson takes one element of the offense of first degree robbery out of context, completely ignoring five other elements as well as the accomplice instruction that told the jury an accomplice must have knowledge of *the* crime charged, which was robbery.

Robbery was defined for the jury in Instruction No. 12:

A person commits the crime of robbery when he or she unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another against that person’s will by the 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 anyone. The 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.

[Anderson’s CP 69]

There is no intent requirement, other than the intent to steal, for the crime of robbery. There is no specific mental state attached to the use of force, only the requirement that force actually be used. By focusing on the intent to steal, Anderson attempts to make the instruction say something it does not.

Anderson cites to State v. Grendahl, 110 Wn. App. 905, 43 P.3d 76 (2002), as authority for his argument that the jury

instruction is incorrect. While this Division 3 case does hold that a similar instruction violated Roberts, a careful reading of that case shows that the court rather loosely applied the distinction of being an accomplice to “a crime” as opposed to “the crime” to the elements instruction for robbery. The analysis in Grendahl shows that the court was more accurately finding that there was insufficient evidence that the defendant knew the principal was going to commit a robbery as opposed to a theft. It cited to Roberts for this language: “[K]nowledge by the accomplice that the principal intends to commit ‘a crime’ does not impose strict liability for any and all offenses that follow.” Grendahl, 110 Wn. App. at 910-11. The accomplice liability instruction given in Grendahl was correct. Id., at 909. However, the State there produced no evidence that Grendahl knew that his principal was going to commit a robbery and the prosecutor argued that it wasn’t necessary to prove that he did know there was going to be a robbery. In that case, both the prosecutor and the court misinterpreted the instructions, and the Court of Appeals apparently didn’t see the distinction either. The State does not disagree with the result in Grendahl, but that result was more properly based on a lack of evidence and incorrect argument, not improper instructions.

Anderson compares the prosecutor in his case to that in Grendahl, claiming he “argued repeatedly” that the intent of the defendants was merely to steal. [Anderson’s brief 18] He cites to one instance where the prosecutor said, “They were there to steal, and they did steal.” This remark, in the final paragraph of the State’s rebuttal argument, hardly constitutes repeated arguments. Nor is it incorrect. In order to prove robbery, the State had to prove that at least one person intended to steal. That one sentence does not tell the jury that it can disregard the instructions and convict Anderson of robbery even if he had no knowledge that a robbery was to be committed or was being committed. Anderson also objects to the prosecutor’s characterization of accomplice liability as a partnership, arguing that the State must prove more than mere presence coupled with knowledge. [Anderson’s brief 18] The State maintains that most people would understand a partnership to be a joint enterprise, clearly more than presence and knowledge alone. Instruction No. 9 told the jury that accomplice liability required more than presence and knowledge. [Anderson’s CP 66]

Because there was no error here, a harmless error analysis is unnecessary.

2. The State produced sufficient evidence at trial to support convictions of all five defendants for first degree robbery and second degree vehicle prowling.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 p.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt, but only that substantial evidence supports the State’s case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

a. Toby Anderson.

Anderson maintains that there was insufficient evidence to support his conviction as an accomplice to first degree robbery. He is correct that the State's theory of the case was that all five of the defendants arrived and left together in a small car, because the car was so small none of them could have been ignorant of the gun, and they acted together in concert while at the victim residence, and therefore the circumstantial evidence supported a finding that all five of them were accomplices to each other. He is also correct that because the jury acquitted him of unlawful possession of a firearm it concluded he did not actually or constructively possess the shotgun. However, that has nothing to do with the proof of his accomplice liability. Knowledge and possession are not the same thing. As argued above in the first section of this brief, it was not necessary that Anderson even knew that any one of the group was armed, only that he had knowledge that a robbery was occurring or going to occur, and that he aided that enterprise with more than his presence and assent. The evidence was that he took some action at the victim residence. The testimony was that the defendants virtually swarmed over the property, running around the various structures and two or more of them entering the Ford and

attempting to enter the Geo. According to the testimony of the two victims, every one of the group took some action that indicated a joint endeavor to deprive them of property by force or fear. The victims knew that some of the defendants got into the Ford. It would not be a huge leap to conclude they were there to steal property. However, because Molnar and Swofford were afraid to leave the trailer until after the defendants were gone, they had no way of knowing what, if anything, was taken.

Anderson cites to State v. J-R Distributors Co., 82 Wn.2d 584, 512 P.2d 1049 (1973) and several other cases from 1974 and earlier for various principles of accomplice liability. However, those cases applied the standard for liability as an “aider or abettor” under prior law. The accomplice liability statute, which formerly was codified as RCW 9.01.030, was repealed by Laws of 1975, 1st Ex. Sess., ch. 260. In 1975 the Washington legislature adopted the current accomplice liability statute, RCW 9A.08.020. Id. Under this statute, the accomplice “need not participate in each element of the crime, nor need he share the same mental state that is required of the principal.” State v. Galisia, 63 Wn. App. 833, 840, 822 P.2d 303 (1992).

Contrary to Anderson's argument, the State did prove more than "mere presence, knowledge, and assent to a robbery." [Anderson's brief 24] The evidence established that everyone in the blue Datsun got out of the car and engaged in some activity at the scene of the robbery that would support an inference that they were acting as a group, in concert, to bring about a result, and that result was robbery. The evidence was not overwhelming, and a reasonable jury could have concluded that one or more of the five were not accomplices. But the standard is whether or not a reasonable jury could have reached the result that it did, and here the evidence, along with the reasonable inferences from it, support a finding of accomplice liability to first degree robbery.

b. Rigoberto Contreras.

Contreras argues that there was insufficient evidence to support a finding that he was guilty of either first degree robbery or vehicle prowling. The same response, above, applies as well to him as to Anderson.

Contreras argues that the State must demonstrate some nexus between the principal and the accomplice to demonstrate accomplice liability. He cites to State v. Wilson, 95 Wn.2d 828, 631 P.2d 362 (1981) for this proposition. The language that he refers

to, however, came from State v. Gladstone, 78 Wn.2d 306, 474 P.2d 274 (1970), a case interpreting accomplice liability under the repealed statute. The Wilson court found that case to be of “little aid” in its analysis. Wilson, 95 Wn.2d at 832. The facts in Gladstone were that an agent of the police had gone to Gladstone’s home and asked to buy some marijuana. Gladstone said he didn’t have any, but he knew someone who did, and he gave the agent directions to that person’s home, including drawing him a map. The Gladstone court found there was no accomplice liability because there was no nexus between Gladstone and the other seller, Wilson, 95 Wn.2d at 831-32, which is another way of saying there was no evidence that he did anything to solicit, command, encourage, request, aid, or agree to aid that person in committing the crime.

The facts here, as they were in Wilson, are much different. Contreras arrived and departed with the other four defendants, and since the conduct of every one of them indicated a group effort to rob the victims, the nexus requirement was met. Here again, the jury could reasonably have been persuaded that Contreras was not an accomplice, but there was sufficient evidence that it could reasonably have reached the result it did reach. It is not for an

appellate court to determine witness credibility or what weight the jury should give the evidence.

Contreras compares his situation to the facts in State v. Robinson, 73 Wn. App. 851, 897 P.2d 43 (1994). In Robinson, the juvenile respondent had been driving a car with four friends as passengers. While the car was stopped at an intersection, one of the passengers leaped out, forcibly took a purse from a young woman, and got back in the car with the purse. Robinson drove off, ordered the passenger to get rid of the purse—he threw it out the window—and took his friends home without reporting the incident to the police. The court there found that Robinson was not an accomplice because he had no knowledge that the robbery was going to occur, and the statute does not criminalize assistance after the crime is complete. The only similarity between Robinson's and Contrera's cases is that they both drove a car. Contreras got out of the car with everybody else and took some part in the robbery. He argues that there is no evidence he knew there was a gun, that he knew there was a robbery, that he entered the Ford Explorer, etc., but it is a reasonable inference from the evidence that was presented that he was an accomplice to both the robbery and the car prowl.

c. Jason Woods.

Woods argues that there was no robbery because there was no proof that the force or fear was used for the purpose of keeping Swofford and Molnar from learning that the CD player was being stolen from the Ford. It is undisputed that while both victims knew that two of the defendants got into the Ford, neither knew the CD player had been taken until after the defendants left and the police arrived.

A robbery can occur even if the victim is not aware at the time that his or her property has been taken if he or she is prevented from knowing that by the use of force or fear. State v. Stearns, 61 Wn. App. 224, 228, 810 P.2d 41 (1991) (citing to State v. Blewitt, 37 Wn. App. 397, 398-99, 680 P.2d 457 (1984)). In Stearns, the defendant had attacked a woman walking on the street at night. He attempted to rape her, and during the struggle she dropped her briefcase and her purse. The struggle covered about a block and a half, and after she escaped from him, Stearns returned to the dropped items and took her business card case and address book. She did not know it until some time later. He was convicted of first degree robbery and second degree attempted

rape. He made the same argument, that the force was not used for the purpose of taking the victim's property. The Stearns court said:

A trier of fact certainly could have agreed with Stearns that the evidence did not show the use of force in connection with an intent to rob. However, that is not our standard of review. . . . [A] rational trier of fact could have found beyond a reasonable doubt that the taking occurred "in the presence" of Ms. Hoyt, since she had been removed and prevented from approaching the place of the taking by the force and fear imposed by Stearns; that Stearns had an intent to permanently deprive her of her property at the time he used force against her; and that one of his purposes in using the force was to obtain her property.

Stearns, 61 Wn. App. at 229-30.

The same rationale applies to Woods. The jury could reasonably have concluded that he was not an accomplice; it could reasonably have concluded that he was. An appellate court does not substitute its judgment for that of the jury.

3. Jury Instruction No. 63 was not incorrect, but even if it were, none of the appellants has demonstrated prejudice.

Anderson, Baxter, and Contreras all challenge the special verdict finding that they were armed with a firearm because of a portion of Jury Instruction No. 63, which reads:

You will also be given special verdict forms for the crimes charged in Counts I and II. If you find a defendant not guilty of these crimes, do not use the special verdict form. If you find a defendant guilty of these crimes, Robbery in the First Degree or

Attempted Burglary in the First Degree, you will then use the special verdict form and fill in the blank with the answer “yes” or “no” according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms “yes” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer “no”.

[Anderson’s CP 95-96]

The challenge to this instruction is based upon State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003). The appellants cite to this case for the proposition that the jurors must be unanimous only to answer yes to the special verdict, but not to answer no. In Goldberg, the jury convicted the defendant of first degree murder. There was a special verdict form asking whether the jury found that the crime was committed because the victim was a witness in an adjudicative proceeding; the jury responded, “no.” However, when the jury was polled it was determined that only three jurors had actually voted “no.” The trial court treated the special verdict as if the jury were deadlocked, and sent it back to deliberate further. After additional deliberations, the jury returned with an answer of “yes.” The Court of Appeals affirmed the conviction as well as the special verdict, but the Supreme Court reversed the latter. Citing to no authority, it held that a jury need

not be unanimous to answer “no” to a special verdict regarding an aggravating factor. Id., at 893-94. At issue here, of course, is a firearm enhancement rather than an aggravating factor for an exceptional sentence, but the State presumes the analysis is the same, having found no authority to the contrary.

The holding in Goldberg was specifically that the trial court erred by treating a “no” answer on the special verdict form as if it were no answer at all, and sending the jury back for further deliberations. Id., at 892. The Court of Appeals has not found this case to be as clear as the appellants do.

In State v. Bashaw, 144 Wn. App. 196, 182 P.3d 451 (2008), Division Three considered a case where the defendant was convicted of three counts of delivery of methamphetamine with a special verdict that the offenses occurred within 1000 feet of a school bus stop. The jury was instructed, as was the jury here, that it must be unanimous to return either a “yes” or “no” answer to the special verdict. There, as here, the jury was polled, and each juror confirmed that the written verdict reflected the individual verdicts. Bashaw appealed, citing to Goldberg, but the Bashaw court did not believe that it applied.

“We do not believe that the court intended to hold that special verdicts were to have unanimity requirements different from general verdicts. There is no discussion in *Goldberg* of the pattern instructions. There is no discussion of special verdicts in general or the policy of permitting one juror to acquit on a special verdict. In short, there is simply no indication that either the pattern instructions or the policy of unanimous special verdicts were at issue in *Goldberg*.

There is also no discussion of legislative intent on the topic. The Legislature has authorized numerous special findings and sometimes has directed that affirmative findings unanimously be proven beyond a reasonable doubt. *E.g.*, RCW 9.94A.605(2) (manufacturing methamphetamine with child on premises). Nothing in *Goldberg* addresses legislative history or intent in this regard. In short, appellant’s construction of *Goldberg* extends the principle of that case beyond what the opinion itself appears to do. We will not extend that opinion to all special verdicts.

Bashaw, 144 Wn. App. at 202.

The Bashaw court further noted that interpreting Goldberg as Bashaw wished, and as these appellants argue, would conflict with State v. Mak, 105 Wn.2d 692, 757, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986), *overruled on other grounds by State v. Hill*, 123 Wn.2d 641, 645, 870 P.2d 313 (1994). In that case the Washington Supreme Court approved an instruction that specifically required a unanimous response to the question of an aggravating factor.

Bashaw, 144 Wn. App. at 203.

The Bashaw court held that in any event, the defendant had no basis for challenge because the jury in her case had unanimously answered “yes” to the special verdict, and when polled, each juror had confirmed the written verdict. Thus there was no basis for believing that the unanimity instruction worked to her disadvantage. Id., at 203. The appellants here are in the same position. The jury answered the special verdict “yes” and when polled, each juror confirmed the verdict. [RP 607-10] There was no indication of a non-unanimous verdict, the trial court did not treat it as if the jury had hung, and there was no additional deliberation. The issue addressed in Goldberg did not exist. Therefore, even if the jury instruction was erroneous, it was harmless error. A harmless error analysis is appropriate where the error affects the process of a trial but not its fundamental structure or framework. See State v. Frost. 160 Wn.2d 765, 779-83, 161 P.3d 361 (2007), for a comprehensive discussion of harmless error analysis.

Baxter and Contreras further argue that the verdict might not have been a unanimous “yes” if the jury understood it did not have to be unanimous to answer “no”. This is sheer speculation, without even a hint that such was the case. A jury verdict may not be impeached by reaching into the mental process of the jurors. Even

evidence that “a juror misunderstood or failed to follow the court’s instructions inheres in the verdict and may not be considered.” State v. Rooth, 129 Wn. App. 761, 772, 121 P.3d 755 (2005), *citing to Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 769, 818 P.2d 1337 (1991). Even if the jurors’ deliberations did not inhere in the verdict, polling the jury in open court validates a verdict. Ayers, 117 Wn.2d at 770.

Immediately following the portion of Instruction No. 63 quoted above was this language:

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision.

[Anderson’s CP 96] Earlier in the same instruction the jury was told that if it could not agree on a verdict, it was to leave the form blank.

[Anderson’s CP 94-95] The jury therefore knew that if it could not be unanimous, it did not have to return a verdict at all. While “no verdict” is not the same result as answering “no” to the question, the jury was still informed it did not have to answer either “yes” or “no.”

The law regarding unanimity of special verdicts is not as clear as the appellant's argue that it is. However, even if the instruction was in error, it was harmless in this case.

4. Defense counsel was not ineffective for failing to propose a unanimity instruction that informed the jury it could answer "no" to the firearm special verdict even if the panel was not unanimous.

Baxter and Contreras argue that they received ineffective assistance because their attorneys did not propose an instruction that specified the jury could return a "no" special verdict without being unanimous.

To prevail on a claim of ineffective assistance of counsel, a defendant must show both deficient performance and prejudice resulting from it. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Prejudice occurs when but for the deficient performance, the outcome would have been different. In the Matter of the Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487,

of the Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995).

"The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

For all the reasons argued in the previous section, the jury instruction was not incorrect. Even following Goldberg, the Pattern Jury Instruction, WPIC 160.00, remains the same as given in this case. The current version has been modified to conform to Bashaw. See comment to WPIC 160.00, 11A Washington Pattern Jury Instructions, Criminal (3d ed. 2008). A defense attorney considering the pattern instruction, and deciding to accept it, cannot be found to be performing at a sub-standard level where a committee writing the instructions considered it to be correct. Further, as argued above, there was no prejudice, and therefore

the appellants cannot satisfy either prong of the test for ineffective assistance of counsel.

5. The State established that the gun met the definition of an operable firearm, and that the defendants were all armed for the purpose of imposing the firearm enhancement.

All of the appellants argue that they should not have received the firearm enhancement because there was insufficient evidence that the gun was operable or that it was readily accessible and available for use.

a. Operability of the shotgun.

RCW 9.94A.530(3) provides for additional time to be added to the sentence for the underlying crime when “the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010.” RCW 9.41.010(7) defines a firearm as “a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder.”

All of the appellants cite to State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008), for the proposition that the weapon must be operable before it will support a firearm enhancement. That opinion, which was deciding whether there was error because the jury verdict found that Recuenco was armed with a deadly weapon but the court imposed the longer firearm enhancement,

included this sentence when addressing the dissenting opinion: “We have held that a jury must be presented with sufficient evidence to find a firearm operable under this definition in order to uphold the enhancement. State v. Pam, 98 Wn.2d 748, 754-55, 659 P.2d 454 (1983), *overruled in part on other grounds by* State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988).” Recuenco, 163 Wn.2d at 437. The question, then, is what State v. Pam says about operability.

In Pam, the defendant robbed an auto supply store in Seattle. He carried a gun, which he pointed at a victim but did not fire, and as he ran away, the gun fell apart. A wooden forestock was recovered but no other parts of the weapon were produced at trial. Pam, 98 Wn.2d at 751. The jury found that he was armed with a firearm and the trial court imposed the firearm enhancement, which the Supreme Court vacated because the jury was not instructed that the State must prove the enhancement beyond a reasonable doubt. Id., at 760. The court said this about operability, citing to statutes which have since been recodified:

Under RCW 9.95.040, the State must prove the presence of a deadly weapon *in fact* in order to permit a special finding that the defendant was armed with a deadly weapon. A defendant’s penalty cannot be enhanced if the evidence establishes only that he was

armed with a gun-like, but nondeadly, object. *State v. Tongate*, [93 Wn.2d 751, 613 P.2d 121 (1980)]. Under RCW 9.41.025, the State must prove the presence of a “firearm,” which is defined under WPIC 2.10 as a “weapon from which a projectile may be fired by an explosive such as gun powder”. A gun-like object incapable of being fired is not a “firearm” under this definition.

Pam, 98 Wn.2d at 753, emphasis in original. The firearm at issue in this case was a real gun, not a toy or a “gun-like object.”

Division II of the Court of Appeals addressed the identical issue in State v. Faust, 93 Wn. App. 373, 967 P.2d 1284 (1998). There the defendant assaulted his wife with a firearm. The police who tested the gun could not get it to fire because the round jammed and would not go into the chamber. Faust argued that the since the gun would not fire, it did not meet the definition of a firearm in RCW 9.41.010. The Court of Appeals found the definition of firearm to be ambiguous, but:

The language “a weapon or device from which a projectile or projectiles *may be fired*” clearly indicates that a firearm must be capable of firing a projectile at some point in time.

Id., ay 376, emphasis in original. The court went on to apply principles of statutory construction and compare this definition to other statutory definitions of a firearm, and to discuss the decision in State v Tongate, 93 Wn.2d 751, 613 P.2d 121 (1980), (which

held that the gun must be a real gun, not a “gun-like but nondeadly object,” *Id.*, at 755). The *Faust* court concluded that *Pam* “did not limit the definition of a firearm to one capable of being fired during the crime. Rather, the distinction was between a toy gun and a gun ‘in fact.’” *Faust*, 93 Wn. App. at 380. Referring to *Tongate*, the court found that it “made clear that an unloaded gun, or one incapable of being fired, was still a deadly weapon within the meaning of the statute.” *Id.* The court went on to say:

[W]hen the Legislature adopted the definition of a firearm in 1983, the Washington Supreme Court had clearly set out the definition of firearm in both *Tongate* and *Pam*. And the definition did not limit firearms to only those guns capable of being fired during the commission of the crime. Rather, the court characterized a firearm as a gun in fact, not a toy gun, and the real gun need not be loaded or even capable of being fired to be a firearm.

. . . .

In addition, we noted two policy considerations: (1) a loaded or unloaded gun creates the same apprehension in the victim; and (2) an unloaded gun can be loaded during the commission of the crime and, therefore, has the same potential to inflict violence. . . . Further, the potential to inflict violence also exists with a malfunctioning gun. If an unloaded gun can be loaded, a malfunctioning gun can be fixed.

Id., at 380-81. See also *State v. Anderson*, 94 Wn. App. 151, 162, 971 P.2d 585 (1999), *reversed on other grounds*, 141 Wn.2d 357, 5 P.3d 1247 (2000).

It is not even necessary that the gun be produced into evidence. Eyewitness testimony about a real gun that is neither discharged nor recovered is sufficient to support firearm enhancements. Id., at 380 (citing to State v. Bowman, 36 Wn. App. 798, 803-04, 678 P.2d 1273 (1984)).

It is apparent, then, that “operable” means a real gun, whether or not it is capable of being fired at the time the crime is committed, as opposed to a toy gun or some other object that a defendant pretends is a gun. A disassembled firearm that can be made operational with reasonable effort in a reasonable time is a firearm. State v. Padilla, 95 Wn. App. 531, 535, 978 P.2d 1113 (1999). The shotgun in this case was a real gun, not a gun-like object or a toy gun, and sufficient to support the firearm enhancement.

The appellants overstate the testimony of the armorer about the condition of the weapon. Their briefs are largely identical regarding this issue, and the State will respond to them as a whole rather than identifying specific appellants. They are correct that the gun lacked a firing pin and could not be fired as it was at the time it was recovered. [RP 314] The armorer testified that while he did not check for other abnormalities, he believed the missing firing pin was

the primary reason it would not fire. [RP 316] If he had the necessary parts, he could repair and shoot the gun. [RP 317] He did not know how long it would take to obtain a firing pin, but once he had one he could replace it in about an hour. [RP 325] The appellants argue that finding a firing pin could take weeks or months, but the testimony was that it could also take as little as an hour. [RP 335] The appellants stress the age of the gun, but that has no relevance to its operability.

The appellants claim that the trigger housing had been tampered with, which is true, in such a manner as to make the gun inoperable, which is not. The armorer testified that he was able to manipulate it back inside, [RP 314] that the assembly was working properly but it just wasn't inserted all the way into the weapon, and anybody could have fixed that problem. [RP 333] If the weapon had been fired it would likely have been more dangerous to the shooter than to the target, [RP 331] but that does not make it inoperable.

The appellants argue that there might have been additional problems with the gun. [RP , 316, 335] However, the armorer also testified that he believed the primary problem was the missing firing pin, and if he had the parts he could repair and shoot the gun. [RP 316-17] It is up to the jury to decide what weight to give the

evidence and what credibility to give the witnesses. The evidence put before it to establish operability satisfied the above authorities. Under the standard for evaluating the sufficiency of the evidence, as set forth in detail in an earlier section of this brief, there was sufficient evidence to support the jury finding that the defendants were armed with an operable firearm.

b. The accessibility of the shotgun.

The appellants recast the operability argument in terms of whether or not the gun was readily available and accessible for offensive or defensive purposes. State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). The State does not disagree that the weapon must be available and accessible. However, the gun here was either operable or it wasn't, and if it wasn't, the accessibility question is superfluous. As argued above, the gun met the statutory requirements of a firearm.

The evidence was that one of the defendants was holding a shotgun, pointed it at the trailer, and cocked it. Molnar testified he thought they were going to shoot at the door. [RP 233-34] Woods testified that he threw the shotgun out of the window of the car as it drove away from the scene of the crime. There is no question that the gun was in the hands of one or more of the five defendants at

the time the robbery was committed. Further, even if it was inoperable, or unloaded, it could still be used to frighten or threaten a victim; a gun does not have to be fired to achieve results. Here the gun was not fired, but it produced the desired result of frightening Molnar and Swofford sufficiently that they were afraid to leave the trailer until law enforcement arrived. That seems to clearly fall into the category of “offensive purpose,” such to satisfy the requirement of Valdobinos.

6. The evidence was sufficient to support Woods’ conviction for first degree unlawful possession of a firearm.

The only element of the crime of first degree unlawful possession of a firearm that Woods challenges is that the object he possessed was actually a firearm, and he relies on the same argument set forth above that the gun was not operable and therefore wasn’t a firearm, so he could not unlawfully possess a firearm.

The definition of firearm is the same for purposes of the unlawful possession statutes as it is for the firearm enhancement. RCW 9.41.010(7). He cites to State v. Padilla, 95 Wn. App. 531, 535, 978 P.2d 1113 (1999), for the proposition that a firearm rendered permanently inoperable is not a firearm. The State does

not disagree that this is the holding of Padilla. Woods then asserts that the firearm at issue in his case is permanently inoperable. However, that is not what the armorer said. The testimony was that the gun could be made to function. [RP 317, 331] “[W]e hold that a disassembled firearm that can be rendered operational with reasonable effort and within a reasonable time period is a firearm within the meaning of RCW 9.41.010(1).”³ Padilla, 95 Wn. App. at 532.

The jury heard the testimony about the condition of the gun and the armorer’s opinion as to its operability. It could reasonably have found that the gun was a weapon under this definition.

7. Anderson, Baxter, and Winter did not receive ineffective assistance of counsel because their attorneys chose not to object to the admission of the gun, Exhibit 25, into evidence. The gun was clearly relevant and their arguments regarding the gun go to weight rather than admissibility of the evidence.

The standard for reviewing a claim of ineffective assistance of counsel is set forth above in Section 4. Generally speaking, if a defendant did not object to the admission of evidence at the trial level, he cannot challenge that evidence on appeal. RAP 2.5. He can, however, raise constitutional issues, so these defendants couch their issue in terms of ineffective assistance of counsel.

³ This section has since been recodified as RCW 9.41.010(7).

Anderson, Baxter, and Winter all argue that their attorneys should have objected to the admission of the gun, Exhibit 25, into evidence, claiming that because Molnar did not identify it as the gun he saw one of the defendants holding, it was irrelevant to the issues before the jury and provided the only evidence that the gun was operable.

As noted in the earlier argument, “operability” means something much broader than the appellants argue. The State was not required to prove that the gun would fire at the time the crime was committed. The State does not have to introduce a gun at all; “it is sufficient if a witness to the crime has testified to the presence of such a weapon.” Tongate, 93 Wn.2d at 754.

Exhibit 25 was relevant. It was found in the ditch between the location of the crimes and the location the suspects’ car was stopped. It had not been there for long. Woods admitted to throwing it out the window of the car. It does not matter that Woods’ statement could not be used against the other defendants. Putting the gun in the car was enough to make it relevant. A gun had just been used at the victims’ residence. The victims identified some of the defendants as having been at their place, and all but

Winter admitted to having been there. No other gun was found in the vehicle, at the crime scene, or anywhere in between.

The appellants make much of the fact that Molnar did not identify Exhibit 25 as the gun he saw at the scene. [RP 283, 294] He was positive that there was a gun. [RP 233, 294] This testimony came after he had been questioned by the prosecutor and five defense attorneys. The trial judge in this case noted: “. . . Mr. Molnar is very hard to understand even when he speaks up, also seems to have difficulty with comprehension and appears to be very uncooperative, . . .” [RP 237] The jury could very reasonably have concluded that Molnar was confused about the gun he saw, and that Exhibit 25 was indeed the firearm at issue. One of the reasons we do not second-guess the jury when it comes to credibility and weight of the evidence is because it was present and saw the witnesses; the reviewing court was not.

The arguments raised by the appellants go to the weight of the evidence, not the admissibility. They argued to the jury that the gun was not a firearm (e.g., Woods’ closing argument, RP 569). But the jury assigns to the witnesses the credibility it chooses, and gives the evidence the weight that it chooses, and those choices are beyond the review of an appellate court.

Because the gun was relevant, trial counsel were not ineffective for failing to make an objection that would certainly, and correctly, have been overruled. Even if they considered objecting to the gun, it would be a good tactic to allow the jury to see it. The gun was in terrible shape and allowed defense counsel to argue it wasn't an operable firearm. Without having the actual gun in evidence, the testimony regarding its condition would have much less impact. A tactical decision that doesn't bring the desired result is still a tactical decision, and a tactical decision cannot support a finding of ineffective assistance of counsel.

8. Anderson did not receive ineffective assistance of counsel because of counsel's failure to except to the court's failure to give his proposed instruction for a lesser included charge of third degree theft to the crime of first degree robbery. The evidence did not support the giving of the lesser included instruction.

Anderson's attorney submitted an instruction for third degree theft as a lesser included offense of first degree robbery. [Anderson's CP 23-26] The court did not give that instruction, and there were no exceptions made on the record. [RP 446-47] Anderson concludes on appeal that his counsel withdrew the instruction, although the record is silent about what happened. Generally speaking, when a defendant relies on information outside the record to establish ineffective assistance of counsel, he must

file a personal restraint petition. State v. Hassan, 151 Wn. App. 209, 217 n. 4, 211 P.3d 441 (2009) (citing to McFarland, 127 Wn.2d at 338). Here Anderson is arguing both that he was entitled to a lesser included instruction for third degree theft and that his attorney was ineffective for failing to except to the court's failure to give such an instruction. The State disagrees on both counts.

A defendant is entitled to a jury instruction for a lesser included offense if (1) each of the elements of the lesser offense is a necessary element of the charged offense (the legal test), and (2) the evidence supports an inference that the defendant committed the lesser offense (the factual test). State v. Workman, 90 Wn.2s 443, 447-48, 584 P.2d 382 (1978). The State agrees that third degree theft meets the legal test, and therefore the question is whether it meets the factual test. To satisfy that test, the evidence must support an inference that the defendant committed only the lesser offense. State v. Warden, 133 Wn.2d 559, 564, 947 P.2d 708 (1997); State v. Berlin, 133 Wn.2d 541, 551, 947 P.2d 700 (1997). In other words, if the evidence is such that a rational trier of fact could find that the defendant committed the lesser offense instead of the greater one, the court must allow the defendant to present that theory to the jury. State v. Charles, 126 Wn.2d 353,

355, 894 P.2d 558 (1995). However, “it is not enough that the jury could simply disbelieve the State’s evidence.” State v. Pastrana, 94 Wn. App. 463, 470, 972 P.2d 557 (quoting Berlin, 133 Wn.2d at 546), review denied, 138 Wn.2d 1007 (1999). “Instead, some evidence must be presented which affirmatively establishes the defendant’s theory on the lesser included offense before an instruction will be given.” Pastrana, 94 Wn. App. at 470 (quoting Berlin, 133 Wn.2d at 546).

Here the only evidence before the jury was evidence of a robbery. Anderson repeats his misreading of the accomplice instruction to reason that the jury could have convicted him of robbery if it concluded he had the intent to steal. As argued above in Section I, an accomplice’s intent is irrelevant; the only relevant mental state is knowledge of the principal’s crime. He further argues that the jury concluded he did not possess a firearm because he was acquitted of unlawful possession of a firearm and therefore could have found that he was an accomplice to no more than a theft. However, the jury did find that he or an accomplice was armed for purposes of imposing the firearm enhancement. [Anderson’s CP 129] His argument is nothing more than that the jury could have disbelieved the State’s evidence, but that is not the

standard. There must be some affirmative evidence presented that supports his theory of the case, and there was none. The only evidence before the jury was that at least one person was brandishing a firearm, frightening the victims into remaining inside their residence. There was not one bit of evidence that only a third degree theft occurred. Anderson was not entitled to an instruction for third degree theft, and if his attorney did in fact withdraw his request for that lesser included instruction, then it is likely he was persuaded of that fact. The instruction would have been submitted before all of the evidence was presented, and a party's strategy can change as the evidence unfolds.

The standard for reviewing the performance of an attorney is set forth above in Section 4 and will not be repeated here. Anderson argues that there could be no tactical reason for failing to fight for the lesser included offense. However, if the attorney was persuaded, correctly, that Anderson was not entitled to the instruction, it would not be substandard performance to abandon it.

Anderson argues that there is no conceivable tactical reason for failing to offer the third degree theft instruction. On the contrary, there are at least two reasons. First, Anderson denied ever entering any vehicles [RP 152] and denied everything except his

presence at the scene of the crime. By offering an instruction for theft in the third degree, he would be suggesting to the jury that he did take the CD player. If he was liable as an accomplice, it was certainly to more than theft in the third degree; there was zero evidence that only a theft occurred. He argues that the evidence suggested the person with the gun acted in a “rogue fashion, but there is nothing in the record that supports that assertion. Second, an all or nothing defense had a reasonable chance of succeeding. The two victims were inarticulate witnesses who gave confusing and occasionally conflicting accounts. It was a rational gamble that the jury would disbelieve them and acquit on all the charges. By offering a third degree theft instruction, he virtually guaranteed a conviction, if only for a gross misdemeanor. RCW 9A.56.050. If a lesser included instruction would weaken a defendant’s claim of innocence, failing to request that instruction is a reasonable strategy. Hassan, 151 Wn. App. at 220 (citing to Strickland, 466 U. S. at 691).

A defense attorney’s failure to request lesser included offense instructions can constitute deficient performance “in rare circumstances.” State v. Grier, 150 Wn. App. 619, 634, 208 P.3d 1221 (2009). Those circumstances are that the defendant must be

entitled to the lesser included instruction under both the legal and factual prongs, and the defendant must show that, “under the facts of the case, it was an objectively unreasonable tactical decision for defense counsel to force the jury to find either that the greater offense occurred or that no offense occurred (the ‘all or nothing’ tactic.)” Id., at 635. Here, because the State’s case was not overwhelming, it was a reasonable tactic to go for broke. The jury did acquit on some of the charges. Where there are legitimate trial tactics, there is no ineffective assistance of counsel. Id., at 633. A tactic that doesn’t bring the desired result is still a tactic.

To establish ineffective assistance of counsel, a defendant has the heavy burden of showing his attorney “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Strickland, 466 U.S. at 687. “Judicial scrutiny of counsel’s performance must be highly deferential.” Id., at 689. Here Anderson’s only chance of acquittal was not to ask for a lesser included instruction, and thus the all or nothing strategy, if that is what it was, was reasonable. His counsel was not ineffective.

9. Double jeopardy is not violated by the imposition of a firearm enhancement added to the sentence for first degree robbery.

Anderson, Baxter, Contreras, and Woods contend that the 60-month firearm enhancement added to their sentences for first degree armed robbery constitutes double punishment and therefore violates the prohibition against double jeopardy. They acknowledge that the firearm enhancement has previously withstood similar challenges, but argue that the analysis has changed following the decisions in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 311 (1999), Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and others listed in their briefs.

The Court of Appeals has already addressed this contention in State v. Tessema, 139 Wn. App. 483, 162 P.3d 420 (2007), *review denied*, 163 Wn.2d 1018, 180 P.3d 1292 (2008), and State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 (2006), *review denied* 163 Wn.2d 1053, 187 P.3d 752 (2008). In those cases, Tessema and Nguyen argued, as these appellants do, that in light of Blakely and State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008), the court should reconsider the rule that firearm enhancements for offenses committed with weapons do not

implicate double jeopardy. Tessema, 139 Wn. App. at 493; Nguyen, 134 Wn. App. at 866. Both of those defendants argued, as these appellants do, that the voters who approved the precursor initiative to the sentence enhancement statute either did not consider the issue of, or did not intend, a redundant punishment. Tessema, 139 Wn. App. at 493; Nguyen, 134 Wn. App. at 866-67. Both cases noted that double jeopardy is an inquiry into legislative intent unless the question involves the consequences of a prior trial. Tessema, 139 Wn. App. at 493; Nguyen, 134 Wn. App. at 867. If the legislature intends multiple punishments, double jeopardy is not implicated. State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005). Subject to constitutional constraints, the legislature has the absolute power to define criminal conduct and assign punishment. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995).

An old maxim of statutory construction is *exclusion unius est exclusion alterius*—specific inclusions exclude implication. State v. Sommerville, 111 Wn.2d 524, 535, 760 P.2d 932 (1988). The legislature was presumably aware of all the crimes which it had created, and exempted only the ones listed in RCW 9.94A.533 from being paired with a firearm enhancement.

The firearm enhancement in RCW 9.94A.533 provides for imposing sentences above the standard range where the offense was committed with a firearm. The statute recognizes several exceptions for “[p]ossession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony.” In Tessema and Nguyen, the court held that the legislative intent was “unmistakable: the use of firearms to commit crimes shall result in longer sentences unless an exemption applies.” Tessema, 139 Wn. App. at 493; see *also* Nguyen, 134 Wn. App. at 868. The court further determined that any apparent redundancy of punishment was intentional. Tessema, 139 Wn. App. at 493-94; Nguyen, 134 Wn. App. at 868. As in those cases, no exception applies to these appellants, and double jeopardy is not implicated.

Further, Blakely and Recuenco did not change the double jeopardy analysis. Blakely involved the Sixth Amendment requirement for finding facts authorizing a sentence, not double jeopardy. Nguyen, 134 Wn. App. at 868 (citing Blakely, 542 U.S. at 301). Nor did Recuenco implicate double jeopardy; rather, that case held that harmless error was inapplicable where a court

imposes a sentence for “a crime not charged, not sought at trial, and not found by a jury.” Recuenco, 163 Wn.2d at 442. Here the firearm enhancement was charged and found by the jury through a special verdict form, a procedure that satisfies Blakely and Recuenco. See Nguyen, 134 Wn. App. at 868.

A statute is presumed constitutional and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt. Courts are generally hesitant to strike a duly enacted statute unless fully convinced that the statute violates the constitution. If possible, a statute should be construed as constitutional. Tessema, 139 Wn. App. at 488. The appellants here have not provided any accurate authority supporting their argument that the firearm enhancement statute is unconstitutional. It is true that the issue is before the Supreme Court in two cases, but those cases have not yet been decided. The law as it stands now is that the firearm enhancement to first degree robbery does not constitute double jeopardy.

The appellants cite to Apprendi, Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), as well as a few other federal cases, for the proposition that the relevant determination is not the label applied—element of the crime or

sentencing enhancement—but the effect it has on the sentence. That is true, but the cases are talking about who decides the existence of the facts that support the element or enhancement, not whether punishment can be imposed for both the underlying crime and the enhancement. The cited federal cases do not support the appellants' argument.

Unless and until the Washington Supreme Court says otherwise when it issues its opinions in the cases currently pending before it, the firearm enhancement attached to first degree robbery does not constitute double jeopardy.

10. The accomplice liability statute does not require an overt act on the part of the accomplice.

Anderson,⁴ Baxter, Contreras, and Winter argue that Instruction No. 9, the accomplice liability instruction, improperly states the law of accomplice liability, and that the law requires an overt act on the part of the accomplice. That is incorrect.

The text of Jury Instruction No. 9 is set forth on page 12 of this brief and will not be reproduced here. The appellants did not except to this instruction at trial, [RP 446-47] and they do not claim ineffective assistance of counsel for the failure to do so. As in

⁴ Anderson argues on page 45 of his brief that Mr. Winter's rights were violated, but presumably he meant his own.

Section 1, the State assumes the court will review it because a constitutional violation is alleged, even though no objection was made below.

A challenged jury instruction is reviewed de novo. The instructions are read as a whole and the challenged portion is considered in the context of all the instructions given. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). In a criminal trial, the jury must be instructed that the State has the burden of proving each essential element of the crime beyond a reasonable doubt. Id., at 656. That was done in this case. [Jury Instruction No. 2, Anderson's CP 27]

The appellants assert that accomplice liability requires an overt act, and that the jury was therefore improperly instructed. They cite to State v. Matthews, 28 Wn. App. 198, 203, 624 P.2d 720 (1981), for this conclusion. In Matthews, however, the court was citing to State v. Baylor, 17 Wn. App. 616, 565 P.2d 99 (1977), for the proposition that when co-defendants are charged with a crime, the State need not "establish which defendant was the principal and which was the abettor so long as each defendant was shown to have participated in the crime and committed at least one overt act." Matthews, 28 Wn. App. at 203. In Baylor, the court held

that the overt act requirement applies under former RCW 9.01.030 as it existed in 1974, but which had been superseded by RCW 9A.08.020 for offenses committed after July 1, 1976. Baylor, 17 Wn. App. at 618. The current statute, RCW 9A.08.020, does not require an overt act.

The appellants also cite to State v. Renneberg, 83 Wn.2d 735, 522 P.2d 835 (1974), to support their contention that an accomplice must commit an overt act. Renneberg was decided in 1974 and thus was also applying an accomplice statute that has been superseded. In any event, the holding of Renneberg was simply this—“that physical presence and assent alone are not sufficient to constitute aiding and abetting.” Id., at 740. Jury Instruction No. 9 told the jury that. The appellants are incorrect that a person could be found to be an accomplice merely by giving silent assent or approval. Under the instruction, the accomplice must at a minimum, encourage or agree to aid the principal. Simple unexpressed approval would not meet this requirement, and thus State v. Peasley, 80 Wash. 99, 141 P.316 (1914), a venerable 95-year-old case, is not violated.

11. The accomplice liability statute does not criminalize constitutionally protected speech.

Winter argues that the accomplice liability statute criminalizes speech and conduct protected by the First Amendment.

The accomplice liability statute is codified as RCW 9A.08.020 and reads, in pertinent part, as follows:

(1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

(a) Acting with the kind of culpability that is sufficient for the commission of the crime, he causes an innocent or irresponsible person to engage in such conduct; or

(b) He is made accountable for the conduct of such other person by this title or by the law defining the crime; or

(c) He is an accomplice of another person in the commission of a crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he

(i) solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it; or

(b) His conduct is expressly declared by law to establish his complicity.

Winter is correct that the statute does not define “aid”. It is, however, defined in WPIC 10.51, included in this record in Jury Instruction No. 9, reproduced in Section 1, as “all assistance whether given by words, acts, encouragement, support or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.” [Anderson’s CP 34]

Winter argues that this statute is unconstitutionally overbroad by criminalizing speech or conduct that is constitutionally protected. The First Amendment, which is made binding on the states through the Fourteenth Amendment, provides that “congress shall make no law . . . abridging the freedom of speech. U.S. Const. amend. I. Washington’s constitution provides that “[e]very person may freely speak, write and publish on all subjects, being responsible for an abuse of that right.” Wash. Const. art. I, § 5. A statute is unconstitutionally overbroad if it prohibits a substantial amount of protected speech and conduct in addition to legitimately prohibited unprotected speech or conduct. City of Seattle v.

Webster, 115 Wn.2d 635, 641, 802 P.2d 1333 (1990), City of Seattle v. Huff, 111 Wn.2d 923, 925, 767 P.2d 572 (1989).

Brandenburg v. Ohio, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969), holds that a state may not “forbid or proscribe advocacy of the mere use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” Brandenburg, 395 U. S. at 447. Under both RCW 9A.08.020(3)(a) and Jury Instruction No. 14 [CP 47], a person must have knowledge that his or her actions “will promote or facilitate the commission of the crime” before there is any mention of the word “aid” or assistance. The instruction given in this case meets the Brandenburg restriction that advocacy of criminal activity alone is not criminal.

Winter produces a “parade of horrors”, situations that he maintains are constitutionally protected speech or behavior yet could be construed as acts of an accomplice. [Winter’s Brief at 17] He does not cite to any instances where such conduct has been prosecuted, let alone where convictions have resulted. The State chooses to believe that common sense has not been so extinguished in the law as to permit that result.

12. The admission of Woods' statement to the police that someone in the back seat of the car passed him the gun and told him to throw it out of the vehicle, without redaction, was improper; however, it was harmless error.

a. Crawford v. Washington and the confrontation clause.

Contreras argues that his confrontation rights were violated when Deputy Simper was allowed to testify that Woods told him that an unidentified person in the back seat of the car had passed the gun to Woods in the front seat and told him to throw it out of the car. [RP 130, 132, 136] Because Woods did not testify, Contreras could not cross examine him regarding that statement.

There are actually two out of court statements involved—one, the statement of the unidentified person in the back seat of the car to Woods, and two, the statement of Woods to Simper. The statement by the person in the back seat is easier. Since everybody who was in the back seat was on trial, it was a statement of a party opponent, ER 801(d)(2)(i), and it was a statement made in furtherance of a conspiracy, ER 801(d)(2)(v), both of which are not hearsay. Contreras maintains that this statement cannot be a statement made in furtherance of a conspiracy because there was no evidence in the record to support the existence of a conspiracy. Contreras's Brief at 11. However,

the trial court judge found that there was, [RP 135] and the record supports that finding. The fact that all of the persons at the scene of the crime arrived together, took some action that appeared to be part of an overall plan, and left together, indicates by at least a “logical and reasonable deduction” that there was a conspiracy. State v. Flores, 164 Wn.2d 1, 40, 186 P.3d 1038 (2008) (citing to State v. Barnes, 85 Wn. App. 638, 663, 932 P.2d 669 (1997)). “A concert of action, all the parties working together understandingly with a single design for the accomplishment of a common purpose, will suffice.” Barnes, 85 Wn. App. at 664. The State is not claiming that Woods’ statement to Simper was a statement made in furtherance of a conspiracy. It clearly was not. (Statements made following the arrest of an alleged co-conspirator are not made within the scope or in furtherance of the conspiracy. State v. St. Pierre, 111 Wn.2d 105, 119, 759 P.2d 383 (1988).) But the statement made by the person in the back seat to Woods was. Statements made in furtherance of a conspiracy are not testimonial, and therefore do not implicate the Sixth Amendment. Crawford v. Washington, 541 U.S. 36, 56, 124 S. Ct. 1354, 158 I. Ed. 2d 177 (2004).⁵

⁵ Contreras cites to State v. Foster, 135 Wn.2d 441, 473-74, 481-98, 957 P.2d

The stickier question is whether Simper's testimony about what Woods told him passes confrontation clause muster. Woods did not testify, and therefore Contreras had no opportunity to cross examine him as required by Crawford. "Statements taken by police officers in the course of interrogations" are testimonial. Crawford. 541 U.S. at 52. The State does not dispute that the statement was offered for the truth of the matter asserted. There does not appear to be any exception that would permit that statement to come into evidence, absent Woods' testimony, unless it was redacted so as not to implicate anyone but himself.

Alleged violations of the confrontation clause are reviewed de novo. State v. Kirkpatrick, 160 Wn.2d 873, 881, 161 P.3d 990 (2007). A confrontation clause violation is subject to harmless error analysis. State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). In this appeal, Contreras is the only defendant to challenge Simper's recital of Woods' statement. However, Contreras could not have been prejudiced by the hearsay. According to Simper, Woods said that the gun was passed to him from someone in the

712 (1998), for the proposition that the Washington constitution provides greater protection than the Sixth Amendment. However, he cites to the dissent. The majority opinion holds that "[f]or purposes of determining whether RCW 9A.44.150 comports with the confrontation clause, we view the Defendant's state right to confrontation and his Sixth Amendment right to confrontation as being identical." Id., at 466.

back seat, and someone in the back seat told him to throw it out. Contreras was driving, and was the one other defendant besides Woods who was not in the back seat. Therefore, the testimony did not harm him. Contreras argues in relation to a Bruton challenge, which will be addressed below, that because it was a small car with five people crammed in it, Woods' statement implicated Contreras also. But there was ample evidence apart from that statement that Contreras knew about the gun. The victims testified that there was a gun, they identified Woods as the person with the gun, and a gun was found in the ditch between the scene of the crime and the location of the arrest. The back windows of the car did not open. No one in such a small car could have failed to notice a gun being thrown out a front window. In addition, only Woods was convicted of unlawful possession of a firearm. All of the other defendants were acquitted of that charge, and therefore none of the defendants were prejudiced by the court's error in allowing Simper to testify about Woods' statement to the police that someone in the back seat passed the gun forward and instructed him to throw it out. His statement that he threw it out, without more, would not have been error.

b. Bruton v. United States and the confrontation clause.

Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), held that a confession by one non-testifying codefendant implicating another codefendant could not be admitted at trial, even with a limiting instruction telling the jury to consider the confession only against the defendant who made the statement, unless any references to the non-confessing codefendant were redacted. Failing to do so is a violation of the latter's confrontation clause rights.

In this case, the state concedes that the statement by Woods likely does not pass the Bruton test. While the statement by Woods did not name a specific codefendant, there were only three to which it could apply. However, Contreras was not one of them. As argued above, as applied to not only Contreras but all of the other defendants, the error was harmless.

This conclusion is supported by the fact that the jury was instructed, in Instruction No. 4:

You may consider a statement made out of court by one defendant as evidence against that defendant, but not as evidence against another defendant.

[Anderson's CP 29] While this instruction is not sufficient to satisfy Bruton, Bruton, 391 U.S. at 137, it seems apparent that the jury

followed it. They convicted Woods of unlawful possession of a firearm, but acquitted all the others. Had it used Woods' statement against the others, it likely would have convicted all of the defendants, or at least all except Contreras.

Contreras suffered no chance of prejudice by this error. The other defendants did not raise the issue except Winters, who, by way of a supplemental brief, adopted every other appellant's arguments. Because Winters was acquitted of unlawful possession of a firearm, any error was also harmless as it applied to him.

Contreras argues that the prosecutor's argument exacerbated the confrontation clause violation. A review of the portions to which he cites at pages 14 and 15 of his brief shows that the prosecutor talked about the gun coming from the backseat and being thrown out the window by Woods. Again, this does not implicate Contreras. If it "tars" [Contreras's brief at 15] any of the appellants, it wasn't Contreras. Further, the jury heard other evidence that the people in the car had been at the victim's residence, that a gun was involved, that a shotgun had been found in the ditch between the crime scene and the location of the arrest, the positions of the various defendants in the car, and that the back windows of the car didn't open. The only information added by

Woods' statement was that somebody in back passed him the gun and told him to throw it out. The only charge that could have affected was the unlawful possession of a firearm. Everybody but Woods was acquitted of that charge, and thus there was no prejudice to any of the appellants.

13. The 2008 amendment to RCW 9.94A.500, which provides that a prosecutor's summary of a defendant's criminal history constitutes prima facie evidence of that criminal history, does not violate either the appellants' right against self incrimination or their due process right to have the State prove criminal history.

Chapter 231, § 2, LAWS OF 2008, amended RCW 9.94A.500(1) to add this language:

A criminal history summary relating to the defendant from the prosecuting authority or from a state, federal, or foreign governmental agency shall be prima facie evidence of the existence and validity of the convictions listed therein.

The statute then continues, as it did prior to 2008:

If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. . . .

Also of relevance to this discussion is RCW 9.94A.530(2):

In determining any sentence, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. Acknowledgement includes not objecting to information stated in the presentence reports. Where the defendant disputes

material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence. . . .

Anderson, Baxter, Contreras, and Winter claim that the 2008 amendment to RCW 9.94A.500(1), as set forth above, violates their rights against self incrimination and unconstitutionally shifts the burden of proof at sentencing to them.

a. Self incrimination.

The appellants read more into the 2008 language than is there. All it says is that the State can meet its burden of producing prima facie evidence of a defendant's criminal history by producing a list of the convictions it believes exist. The appellants' self incrimination argument isn't clear, but presumably they are claiming that if they are required to object to the list, or point out errors in it, they are being forced to incriminate themselves. It is unclear how that could be.

"Use of information regarding a defendant's conduct, including statements about crimes already punished, does not violate the Fifth Amendment." State v. Strauss, 93 Wn. App. 691, 700, 969 P.2d 529 (1999). "Statements about past offenses already punished cannot incriminate [the defendant] as to those offenses, nor increase his punishment for those offenses." Id. The

Fifth Amendment protects a person from “having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government.” State v. Sweet, 138 Wn.2d 466, 480, 980 P.2d 1223 (1999) (citing to State v. Easter, 130 Wn.2d 228, 241, 922 P.2d 1285 (1996)).

An incriminating question is defined as “one the answer to which will show, or tend to show, [the person] guilty of a crime for which he is yet liable to be punished.” State v. James, 36 Wn.2d 882, 897, 221 P.2d 482 (1950) (citing to other cases). Once a sentence is imposed, incrimination is complete. Mitchell v. United States, 526 U.S. 314, 325, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999).

The appellants here are apparently equating some presumed duty to notify the court of a missing or erroneous conviction as self incrimination. If they were being required to produce some information or evidence regarding the underlying crimes being sentenced, that would be true. But there is no authority that being required to either tell the court that the State’s summary is incorrect or being stuck with it is in any way requiring them to incriminate themselves. The fact that the offender score

determines the standard sentencing range is not the same thing as saying that they are being forced to produce evidence that increases their punishment for the crime being sentenced.

The new language, in fact, does not require the defendant to do anything. If the prosecutor's summary includes a conviction that should not be there, it is certainly in the best interest of the defendant to object to that at sentencing. The prosecutor's summary is prima facie evidence; the court is free to accept or reject it as it determines. Why a defendant would want to let a conviction count toward his criminal history, be sentenced to a longer term than he should be, and then seek a resentencing on appeal is a mystery. On the other hand, if the State has omitted a relevant conviction, the statute does not require the defendant to bring it to the court's attention. Since we are dealing here with jury convictions, not guilty pleas, there is no statutory obligation on the defendant to correct errors in his favor. All the new language says is that if a defendant does not challenge the State's summary, it becomes prima facie evidence of his criminal history. Neither of these scenarios even remotely requires a defendant to incriminate himself.

b. Shifting the burden of proof.

The 2008 amendment was the legislature's response to the opinions in In re Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005); State v. Lopez, 147 Wn.2d 515, 55 P.3d 609 (2002); State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999); and State v. McCorkle, 137 Wn.2d 490, 973 P.2d 461 (1999). Chapter 231, §§ 2-4, LAWS OF 2008. "It is the legislature's intent to ensure that offenders receive accurate sentences that are based on their actual, complete criminal history. Accurate sentences further the sentencing reform act's goals of: (1) Ensuring that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history; (2) Ensuring punishment that is just; and (3) Ensuring that sentences are commensurate with the punishment imposed on others for committing similar offenses." Id.

The appellants' briefs rely on Ford for their assertion that the rule—that failure to object to the State's identification of their prior convictions is not a waiver of a challenge—is constitutionally based. In Ford, however, the State had counted three California convictions in Ford's criminal history without producing any evidence of comparability to Washington crimes that would count

as points toward the offender score. Ford admitted the existence of the convictions, but objected that they shouldn't count because they resulted in civil commitments only. Ford, 137 Wn.2d at 475. On appeal, he challenged the trial court's classification of those three convictions because the State failed to prove that they were comparable to Washington felonies. Id., at 476.

Citing to State v. Ammons, 105 Wn.2d 175, 186, 713 P.2d 719, 718 P.2d 796 (1986), the Ford court said:

[W]e held that the use of a prior conviction as a basis for sentencing under the SRA is constitutionally permissible if the State proves the existence of the prior conviction by a preponderance of the evidence. See RCW 9.94A.110.

Id., at 479-80. The court went on to find that the State had failed to meet the preponderance standard mandated by the SRA. Id., at 481.

Since 2008, however, the "preponderance standard mandated by the SRA" is a summary provided by the prosecution. The underlying goal of sentencing is to gather an accurate criminal history. The appellants do not claim that the summaries provided by the State in their cases were not accurate. Had there been an error in their histories, and they pointed it out to the court, the State

would then have to produce the judgment and sentence or some other evidence of the existence of that conviction.

The appellants cite to this language from Ford:

Nor does failure to object to such assertions relieve the State of its evidentiary obligations. To conclude otherwise would not only obviate the plain requirements of the SRA but would result in an unconstitutional shifting of the burden of proof to the defendant.

Id., at 482. The very next sentence in the opinion is: “In concluding as we do, we emphasize we are placing no additional burden on the State not already required under the SRA.” Id.

The SRA requirements changed in 2008. The State followed them in this case. The Ford court, in referring to an unconstitutional shifting of the burden of proof, was referring to the State’s failure to do a comparability analysis of the California convictions. It is not up to the defendant to prove that the foreign convictions are not comparable to Washington felonies. At his sentencing, Ford objected to the inclusion of the California convictions, and on appeal the Supreme Court found it was error for the State to be relieved of the burden of proving the comparability to Washington felonies. Notably, Ford did not contest eight other Washington

convictions and there is no indication in the opinion that the State committed error by not producing documentary evidence of those.

The new language in RCW 9.94A.500(2) does not relieve the State of its burden of proof. It merely says that a summary of the defendant's criminal history constitutes a prima facie case. As in any litigation, a prima facie case would win unless there was evidence to the contrary. The State maintains that it is not fundamentally unfair for the court to rely on a summary uncontested by the defendant. In the guilt phase of a criminal trial, if a defendant does not present evidence, the jury decides on the basis of the State's case alone. Under the 2008 language, the court can find that the State's summary constitutes a preponderance of the evidence. The appellants have pointed to nothing that requires them to tell the court if that summary omits a conviction that should be there. It merely says that the State's summary can be accepted by the court as correct. If it is incomplete, that works to the defendant's advantage. If it contains convictions that should not be there, it is to his advantage to challenge them. The court is not required to accept the summary.

The amendment to the statute is clearly intended to save time and resources. Requiring the State to produce documents

that the defendant knows can be produced accomplishes nothing but wasting increasingly scarce time and money. The amendment effectively overruled Ford, State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009), and the other cases listed above.

Finally, the appellants do not offer any reason why it is an unconstitutional shifting of the burden of proof to the defendant to require him to object to the prosecutor's summary but not unconstitutional to require him to object to a criminal history included in a presentence investigation, as set forth in 9.94A.530(2). See State v. Atkinson, 113 Wn. App. 661, 669, 54 P.3d 702 (2002). In either case, it is a summary provided by a representative of the State. When the Ford court used the phrase "an unconstitutional shifting of the burden of proof to the defendant," it was referring to a comparability analysis of Ford's California convictions and Washington statutes. Ford., 137 Wn.2d at 482. Nothing in the 2008 amendments relieves the State of its obligation to prove comparability, or the existence of the convictions at all, as long as the defendant objects to the inclusion of those convictions in his offender score. He is not being asked to produce any evidence. He is merely being required to give the court notice of any disagreements with the prosecutor's summary at the time of

sentencing, rather than using the appellate process to do the same thing.

14. There are not cumulative, individually non-reversible errors that, taken together, require reversal.

The cumulative error doctrine is not applicable to this case for two reasons. First, as argued above, the only error was Woods' hearsay statement to Deputy Simper admitted without removing references to defendants in the back seat.

The cumulative error doctrine applies only when several trial errors occurred which, standing alone, may not be sufficient to justify a reversal, but when combined together, may deny a defendant a fair trial.

State v. Hodges, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003); see also State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

There appear to be no guidelines as to how many errors must accumulate to justify reversal, but if this court finds one error that does not require reversal, there would certainly not be cumulative error.

Secondly, if the errors claimed by the appellants had actually occurred, they would, standing alone, be sufficient to warrant reversal and the cumulative error doctrine would not be determinative. It is true that this court has applied the doctrine even where valid grounds for reversal existed, "in the hope that

such errors will not be repeated on remand.” State v. Oughton, 26 Wn. App. 74, 85, 612 P.2d 812 (1980). However, in that case the court pointed out that it could have reversed on one error alone, but listed others for purposes of guidance during retrial, as courts often discuss issues for which they are not reversing. For example, see In re pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004). In this case, either there is reversible error or there is not, but the cumulative error doctrine does not apply.

D. CONCLUSION.

Together, the appellants’ briefs raise 34 issues, many of them duplicated. The State has distilled them down to these fourteen. For all the reasons set forth above, only the Confrontation Clause issue has merit, and the error there was harmless. Therefore, the State respectfully asks this court to affirm all of the appellants’ convictions.

Respectfully submitted this 8th day of December, 2009.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 8th day of December, 2009, at Olympia, Washington.



Chong McAfee