

NO. 39128-7-II
[39128-7-II consolidated]

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID FRASQUILLO AND JOSEPH FRASQUILLO,

Appellants.

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ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court Nos. 08-1-00695-4 & 08-1-00694-6

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES iv

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....2

 A. PROCEDURAL HISTORY.....2

 B. FACTS3

III. Argument16

 A. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE FRASQUILLOS’ CONVICTIONS OF THE ATTEMPTED SECOND-DEGREE ASSAULT OF JACOB KNOWLTON WHERE THE EVIDENCE SHOWED AN INTENT TO PUT ALL THE OCCUPANTS OF THE HOUSE IN FEAR OF HARM, AND THE TAKING OF A SUBSTANTIAL STEP IN THE COMMISSION OF THE CRIME: ACTUALLY SHOOTING INTO THE HOUSE. [JOSEPH’S CLAIM 2, DAVID’S CLAIM 3]16

 B. THE ACCOMPLICE LIABILITY INSTRUCTION GIVEN BELOW PROPERLY INFORMED THE JURY THAT IT HAD TO FIND THAT DAVID AND JOSEPH KNEW THAT THEY WERE AIDING IN THE COMMISSION OF AN ASSAULT TO FIND THEM GUILTY AS ACCOMPLICES TO THE CRIMES OF FIRST- AND SECOND-DEGREE ASSAULT AND ATTEMPTED SECOND-DEGREE ASSAULT. [JOSEPH’S CLAIM 5, DAVID’S CLAIM 2]23

 C. THE ADMISSION OF JOSEPH’S STATEMENT TO THE POLICE THAT THE GUN IN THE TRUNK OF THEIR CAR WAS DAVID’S DID NOT VIOLATE THE SIXTH AMENDMENT UNDER EITHER *BRUTON* OR *CRAWFORD* BECAUSE THE STATEMENT WAS NOT ADMITTED FOR

THE TRUTH OF THE MATTER ASSERTED, BUT INSTEAD TO SHOW JOSEPH’S KNOWLEDGE OF THE GUN. [DAVID’S CLAIM 1]	28
1. Bruton v. United States	30
a. Any purported <i>Bruton</i> error is invited	30
b. Joseph’s statement did not incriminate David.	32
c. <i>Bruton</i> does not apply where the non-testifying codefendant’s statement is not used for the truth of the matter asserted.	35
2. Crawford v. Washington	37
3. Harmless Error	39
D. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE EFFECT OF THE TRANSFERRED INTENT DOCTRINE AS INCORPORATED INTO THE ASSAULT STATUTES. [JOSEPH’S CLAIM 1]	40
E. THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT JOSEPH WAS, AT THE VERY LEAST, AN ACCOMPLICE IN THE SHOOTING. [JOSEPH’S CLAIM 3].	42
F. JOSEPH FAILS TO SHOW THAT THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO SEVER THE COUNT OF UNLAWFUL POSSESSION OF A FIREARM WHERE THE ESSENTIAL FACTS OF HIS DEFENSE WERE PUT BEFORE THE JURY AND THERE IS NO EVIDENCE THAT DAVID WOULD HAVE TESTIFIED IF SEVERANCE WERE GRANTED OR WHAT THE SUBSTANCE OF HIS TESTIMONY WOULD HAVE BEEN. [JOSEPH’S CLAIM 4]	44
G. RETRIAL OF JOSEPH ON THE FIRST-DEGREE ASSAULT CHARGES WOULD NOT VIOLATE	

	HIS DOUBLE-JEOPARDY RIGHTS BECAUSE THE JURY WAS EXPLICITLY UNABLE TO REACH A UNANIMOUS VERDICT ON THE CHARGES. [JOSEPH’S CLAIM 6].....	46
H.	THE SUPREME COURT HAS REJECTED JOSEPH’S CLAIM THAT THE IMPOSITION OF A FIREARM ENHANCEMENT WHERE THE USE OF A FIREARM IS AN ELEMENT OF THE CRIME VIOLATES DOUBLE JEOPARDY PROTECTIONS. [JOSEPH’S CLAIM 7]	49
IV.	CONCLUSION	49

TABLE OF AUTHORITIES
CASES

Anderson v. United States,
417 U.S. 211, 94 S. Ct. 2253, 41 L. Ed. 2d 20 (1974).....35

In re Borrero,
161 Wn. 2d 532, 167 P.3d 1106 (2007).....22

Bruton v. United States,
391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).....28, 32

Crawford v. Washington,
541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)...28, 37, 38

Richardson v. Marsh,
481 U.S. 200, 107 S. Ct. 1702 (1987).....32, 33

Sarasaud v. Porter,
479 F.3d 671 (9th Cir. 2007)24

In re Sarausad,
109 Wn. App. 824, 39 P.3d 308 (2001)24, 25

Seattle v. Patu,
147 Wn. 2d 717, 58 P.3d 273 (2002).....31

State v. Basford,
76 Wn. 2d 522, 457 P.2d 1010 (1969).....16, 17

State v. Bencivenga,
137 Wash. 2d 703, 974 P.2d 832 (1999).....22

State v. Brown,
147 Wn. 2d 330, 58 P.3d 889 (2002).....26, 27

State v. Bui,
80 Wn. App. 1027, 1996 WL 1062367 (1996).....25

<i>State v. Campbell,</i> 78 Wn. App. 813, 901 P.2d 1050 (1995).....	30, 34
<i>State v. Carter,</i> 154 Wn. 2d 71, 109 P.3d 823 (2005).....	25, 26
<i>State v. Cotton,</i> 75 Wn. App. 669, 879 P.2d 971 (1994).....	45
<i>State v. Cronin,</i> 142 Wn. 2d 568, 14 P.3d 752 (2000).....	23, 24, 25
<i>State v. Davis,</i> 154 Wn. 2d 291, 111 P.3d 844 (2005).....	38
<i>State v. Dent,</i> 123 Wn. 2d 467, 869 P.2d 392 (1994).....	33, 34
<i>State v. Elmi,</i> 166 Wn. 2d 209, 207 P.3d 439 (2009).....	18, 20, 21
<i>State v. Ervin,</i> 158 Wn. 2d 746, 147 P.3d 567 (2006).....	16, 46, 47, 48
<i>State v. Ferguson,</i> 3 Wn. App. 898, 479 P.2d 114 (1970).....	33
<i>State v. Ferreira,</i> 69 Wn. App. 465, 850 P.2d 541 (1993).....	18, 19
<i>State v. Green,</i> 94 Wn. 2d 216, 616 P.2d 628 (1980).....	17
<i>State v. Hernandez,</i> 85 Wn. App. 672, 935 P.2d 623 (1997).....	17
<i>State v. Kelly,</i> 168 Wn. 2d 72, 226 P.3d 773 (2010).....	49
<i>State v. Luther,</i> 157 Wn. 2d 63, 134 P.3d 205 (2006).....	22

<i>State v. Mason,</i> 160 Wn. 2d 910, 162 P.3d 396 (2007).....	39
<i>State v. Medina,</i> 112 Wn. App. 40, 48 P.3d 1005 (2002).....	33
<i>State v. Momah,</i> 167 Wn. 2d 140, 217 P.3d 321 (2009).....	31
<i>State v. Myers,</i> 133 Wn. 2d 26, 941 P.2d 1102 (1997).....	17, 32
<i>State v. Price,</i> 103 Wn. App. 845, 14 P.3d 841 (2000).....	22
<i>State v. Roberts,</i> 142 Wn. 2d 471, 14 P.3d 713 (2000).....	23
<i>State v. Russell,</i> 125 Wn. 2d 24, 882 P.2d 747 (1994).....	44, 45
<i>State v. Salamanca,</i> 69 Wn. App. 817, 851 P.2d 1242 (1993).....	17
<i>State v. Studd,</i> 137 Wn. 2d 533, 973 P.2d 1049 (1999).....	31, 32
<i>State v. Theroff,</i> 25 Wn. App. 590, 608 P.2d 1254 (1980).....	17
<i>State v. Wilson,</i> 125 Wn. 2d 212, 883 P.2d 320 (1994).....	17, 18, 21
<i>In re Theders,</i> 130 Wn. App. 422, 123 P.3d 489 (2005).....	35, 38
<i>United States v. Reyes-Alvarado,</i> 963 F.2d 1184 (9th Cir. 1992).....	31

Waddington v. Sarausad,
129 S. Ct. 823, 172 L. Ed. 2d 532 (2009).....24

STATUTES

RCW 9A.28.020(1).....22

RCW 9A.36.01120, 21

RCW 9A.36.011(1).....20

RCW 9A.36.021(1).....18

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the evidence was sufficient to support the Frasquillos' convictions of the attempted second-degree assault of Jacob Knowlton where the evidence showed an intent to put all the occupants of the house in fear of harm, and the taking of a substantial step in the commission of the crime: actually shooting into the house?

2. Whether the accomplice liability instruction given below properly informed the jury that it had to find that David and Joseph knew that they were aiding in the commission of an assault to find them guilty as accomplices to the crimes of first- and second-degree assault and attempted second-degree assault?

3. Whether the admission of Joseph's statement to the police that the gun in the trunk of their car was David's was proper under both *Bruton* and *Crawford* because the statement was not admitted for the truth of the matter asserted, but instead to show Joseph's knowledge of the gun?

4. Whether the trial court properly instructed the jury on the effect of the transferred intent doctrine as incorporated into the assault statutes?

5. Whether the evidence was sufficient to establish that Joseph was, at the very least, an accomplice in the shooting?

6. Whether Joseph fails to show that the trial court abused its discretion in refusing to sever the count of unlawful possession of a firearm where the essential facts of his defense were put before the jury and there is no evidence that David would have testified if severance were granted or what the substance of his testimony would have been?

7. Whether retrial of Joseph on the first-degree assault charges would not violate his double-jeopardy rights because the jury was explicitly unable to reach a unanimous verdict on the charges?

8. Whether Joseph's claim that the imposition of a firearm enhancement where the use of a firearm is an element of the crime violates double jeopardy protections is directly contrary to recent Supreme Court precedent?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Joseph and David Frasquillo were charged in separate informations filed in Kitsap County Superior Court with the first- and second-degree assault with a firearm of Shaelyn Luzik and Matthew Knowlton (Counts I-IV), and the attempted second-degree assault with a firearm of Keith, Linda, and Jacob Knowlton (Counts V-VII). All counts also alleged the use of a

firearm for sentencing enhancement purposes. Joseph¹ was also charged in an eighth count with the unlawful possession of a firearm. CP 33-43, 438-47.

The jury was unable to reach a unanimous verdict on the first-degree assault charges (Counts I and III). CP 365, 554. It also failed to reach a verdict on the counts involving Keith and Linda. (Counts V-VI). CP 366, 555.

The jury found the brothers guilty of the second-degree assault of Luzik and Matthew (Counts II and IV) and of the attempted second-degree assault of Jacob (Count VII). CP 366-68, 555-57. In special verdicts, it found that all offenses involved the use of a firearm. CP 369-71, 558-60. It also found Joseph guilty of the unlawful possession of a firearm (Count VIII). CP 366.

B. FACTS

This case involves an episode of “trash-talking” that escalated into the shooting out of the two windows of the Knowlton home in which five people were in bed. Although some of the details differed, both sides in the dispute related consistent accounts of what occurred before the defendants, Joseph and David Frasquillo became involved.

Linda and Keith Knowlton lived with their two sons Jacob and

¹ Both the appellants and the Knowltons will be referred to herein by their first names to avoid confusion. No disrespect is intended.

Matthew, and Matthew's girlfriend Shaelyn Luzik. 4RP 413-14. Matthew and Andrew Treacher were formerly close friends but had had a falling out. 4RP 454-95, 472. Luzik had dated Treacher for several years before she became Matthew's girlfriend. 4RP 472, 528, 541. Treacher lived nearby, and worked at the Taco Bell on Wheaton Way in East Bremerton, a few minutes from the Knowlton house. 4RP 478.

A dispute of uncertain origin arose between Luzik and Treacher. 4RP 453, 529. The dispute grew more heated during the late afternoon of June 23, 2008. Treacher's friends Dustin Williams and Aaronessa Devin went by Luzik's place of work, gestured at her and left a nasty note on her car. 4RP 472, 477, 540-41; 5RP 660; 6RP 927.

Shortly before or after that, Matthew, and his friends Mike Lawrence and Jessilyn Atkins went to K-mart. 4RP 476. They may have exchanged words with Treacher and Devin outside the K-mart. 4RP 495.

Later, Jacob and Lawrence went to the Taco Bell to get some food. 4RP 445-56, 463. They may or may not have exchanged words with Treacher, who was working at the time. 4RP 456, 466.

As the evening wore on, threatening texts and calls began to go back and forth between Luzik, Lawrence and Matthew on one hand, and Treacher and his friends on the other. 4RP 458, 465, 469, 477, 544-45.

Shortly after Jacob got back from the Taco Bell, they saw Devin's car drive by, followed by another friend of Treacher's, Reggie Johnson; both cars went slowly by with their lights off. 4RP 457, 458, 462, 465, 473, 478. The residents were all home when the cars drove by the first time. 4RP 467. Lawrence and Atkins were there as well. 4RP 467. The lights were on in the bedrooms and on the porch. 4RP 467. Devin acknowledged that the lights were on the last time they drove by. 5RP 675.

Williams called Luzik and asked to speak with Matthew. 4RP 477. Johnson and Williams wanted them to go to the Taco Bell to fight. 4RP 545. Matthew did not want to, so he told them to they would meet them at the Taco Bell in Silverdale, just to get them away from the house. 4RP 478, 545. No one at the Knowlton residence went there, however. 4RP 545.

Treacher's friends met him at the East Bremerton Taco Bell when he got off work around 1:30. 5RP 545, 692; 6RP 930; 7RP 1012. . Devin, Williams and Johnson were there along with two other friends, Troy Moore and Zach Gibbs-Churchley. 5RP 667, 669. Moore arrived with Gibbs-Churchley in the minivan. 7RP 1013. Williams was upset about the texting. 5RP 667. He and Gibbs-Churchley became very angry during the course of the phone calls. 5RP 691, 7RP 963.

They went up to the Silverdale Taco Bell to meet the Knowlton group, but no one was there. 5RP 669. They went to Silverdale in Devin and Johnson's cars, leaving Gibbs-Churchley's blue minivan in the Payless parking lot, which was across the street from the Bremerton Taco Bell. 5RP 670, 685-86.

Before going to Taco Bell, they went by Treacher's house, where he changed. 6RP 836. Then they drove by the Knowlton house a final time. 6RP 836. Treacher assumed the parents were home. 6RP 836. Williams made it clear to Gibbs-Churchley that it was the Knowltons' house when they drove by. 6RP 837.

After the cars drove by a second time, they called the police. 4RP 522, 462, 482. A deputy drove by and then called and told Matthew that he had not seen anything. 4RP 482; 6RP 766.

Luzik and Matthew went to bed, but he was unable to sleep. 4RP 483.

In Silverdale, no one from the Knowlton residence showed up. 5RP 671. Williams called Matthew from Silverdale, and Matthew said he had seen them drive by his house. 6RP 933. Williams related to his friends that Matthew had told him that if they drove by again they would be shot at. 6RP 839. Gibbs-Churchley became very aggressive on hearing this. 6RP 839.

Treacher and Devin told him they really did not see any need to continue.
6RP 882.

Gibbs-Churchley called a couple friends, the Frasquillo brothers, for
“backup.” 5RP 672, 6RP 841, 6RP 880, 7RP 963, 1011. He actually said
they were going to pick up Charlie and Burt. 6RP 880.

Williams then told the group that he was going to call it a night. 6RP
933. Williams, Johnson, and his girlfriend went back to the Jack in the Box.
5RP 683, 686; 6RP 839, 933. Gibbs-Churchley called while they were on
the way and told him where they were going. 6RP 933. Williams told Gibbs-
Churchley that Matthew was at home when he was on his way to the
Frasquillos’ house. 7RP 962.

Devin drove Treacher, Gibbs-Churchley, and Moore to the
Frasquillos’ house. 5RP 677-78, 6RP 840. The brothers were friends of
Gibbs-Churchley. 5RP 679; 6RP 856.

The Frasquillos arrived after they did. 6RP 840.

Joseph retrieved two shotguns from the trunk of the car they arrived in
and said they (the guns) were Charlie and Burt. 5RP 680; 6RP 812, 816,
6RP 840, 846. The shotguns were pump action and single barrelled. 6RP
843. One of them had a nylon cloth holder on the stock for extra shells. 6RP
844. There were two red shells in it. 6RP 844.

They went inside for a bit, and while there both brothers handled the guns. 5RP 683. One of the guns had a pistol grip on it that he replaced with a regular stock. 6RP 840.

Then they left, and Moore and Gibbs-Churchley rode with the brothers. 5RP 683. Devin was really scared and asked Treacher to drive her car. 5RP 683. As they were leaving, Treacher noticed that the Frasquillos' car had writing all over the seats. 7RP 1069. They drove to the Payless in East Bremerton. 5RP 683.

Gibbs-Churchley called Williams again and he and Johnson they met him at Payless. 6RP 934. When they got there, the Frasquillos' Thunderbird and the minivan were already there. 6RP 934. Gibbs-Churchley and the brothers were there. 6RP 935. Williams had met the Frasquillos a few times before the incident at parties, and said "hi" to the brothers. . 6RP 926, 936.

The brothers were behind their car, and Gibbs-Churchley was in the driver's seat of his van. 6RP 935. The brothers got into the van. 6RP 93, 57RP 985, 7RP 1020.

When Treacher and Devin got back, Treacher got out and was approached Gibbs-Churchley, who was in his minivan. 5RP 684, 6888. The brothers were in the van also; one was in the passenger seat and one was in the middle seat. 5RP 688, 6RP 847,849; 6RP 937. They each had a shotgun

and they each had paint-ball mask on, but not covering their faces yet. 6RP 849, 936-37, 7RP 985, 1028. One mask was red and the other was black. 6RP 901, 936.

Treacher told them not to go through with it. 6RP 795, 845. The brothers asked whether there were any little kids in the house. 7RP 1006. Treacher told Gibbs-Churchley four times not to do it. 6RP 891. Gibbs-Churchley was persistent and they drove off. 6RP 845, 938. The brothers pulled down the masks before the van left. 7RP 986. It was around 3:00 a.m. when the van left the parking lot. 5RP 691.

Treacher and Moore got back in Devin's car and went to the Chevron and put gas in her car and then to the neighboring Jack in the Box, where Moore got them some food. 5RP 692-93. Part of purpose of Chevron was to create an alibi. 6RP 781. She knew what the van was going to do when it left and wanted to distance herself from it. 6RP 806.

Also around 3:00 a.m., Matthew noticed a Mercury Villager van drive by. 4RP 483. The van slowed down as it approached the house. 4RP 524. It went up the hill, then turned around and came back. 4RP 484. Matthew got back in bed, "and then the window came flying in at" him. 4RP 484.

Matthew did not hear the gunshot before the window blew in; he assumed it was a rock. 4RP 489. Luzik screamed. 4RP 552. He hit the

floor and then crawled out of the room and called 911. 4RP 489. The glass landed on the bed, on Luzik, and on Matthew's legs. 4RP 491. Matthew was not injured, but Luzik had a cut. 4RP 491. He did not look out the window; he was too scared. 4RP 491, 532. Luzik crawled out of the room and went to the kitchen, where she waited on the floor until the police arrived because she was scared. 4RP 452-55.

Matthew, screaming and "freaking out," woke up Jacob. 4RP 460. They called 911. 4RP 459, 491. After that Matthew woke up his parents. 4RP 491. The deputy was dispatched at 3:12 a.m. 6RP 768.

The windows were broken out both in Matthew's room and in the unoccupied room next to it. 4RP 492.

In the empty bedroom, the pellets from the shot embedded in the opposite wall. 4RP 533.

At the time of the incident, all the lights except the porch light were off. 4RP 467, 483. A Chevrolet pickup was parked in front of the house. 4RP 432. Keith's and Jacob's trucks were parked in the driveway. 4RP 434. Matthew's Blazer was to the side. 4RP 434.

Treacher, Devin, and Moore were still at the Jack in the Box when Gibbs-Churchley came up and knocked on the car window. 5RP 693. The brothers were not there. 5RP 694. Churchley-Gibbs said it was done. 6RP

785, 898. . He said that two windows had been shot out. 6RP 800, 916.

The Frasquillos' car had still been in the Payless parking lot when they drove into the drive-thru at Jack in the Box. 6RP 853. By the time they had circled around and talked to Gibbs-Churchley it was gone. 6RP 853.

The windows were at most 25 yards from the far side of the road. 9RP 1290. A shotgun can kill a duck at 40 yards. 9RP 1292. Based on the size of the blast hole, the detective believed that both shots were fired at a distance of less than 40 yards. 9RP 1302.

During the day on June 24, deputies stopped Churchley-Gibbs in the blue Mercury Villager minivan. 5RP 623-24. The middle bench seat in the van was folded down. 5RP 626. The police arrested Gibbs-Churchley for drive-by shooting after speaking with him. 7RP 1040.

That evening, deputies executed a search warrant at the Frasquillo's house. 6RP 757; 7RP 1043. There was a black gun case on the floor in the living room. 7RP 1045. Inside was a 12-gauge shotgun. 7RP 1046. There were also shotgun cleaning rods. 7RP 1046. There was a second black shotgun case with a pump shotgun in it. 7RP 1049. It also contained a pistol grip that was not installed on the gun. 7RP 1049. This latter gun (a Mossberg) appeared to have been recently cleaned. 9RP 1264.

During execution of warrant, the brothers drove by in their Thunderbird. 6RP 760. It slowed as it approached the home, and then accelerated away. 6RP 760. Joseph was the registered owner of the Thunderbird. 7RP 1052. There was writing on the seats of the vehicle. 7RP 1069; Exh. 43.

A deputy pursued them and effected an arrest. 6RP 760. A search of the car turned up a Jack in the Box receipt between the seats of the car. 7RP 1053. It was dated June 24, 2008, at 1:48 a.m. Exh. 1. They found two cell phones in the car. 7RP 1069; 8RP 1157. There were two texts on the cell phones from the Frasier car: "Zach B" and "Zach Stud Muffin." 10RP 1381. They came in around 5:00 p.m. on June 24. 10RP 1382. They also found Joseph's license in the car. 7RP 1074.

In the trunk, they found a red and a black paintball mask, and a bandolier with some red shotgun shells in it. 7RP 1071. There was also a shotgun case with a padlock on it. 7RP 1071. There was a receipt with Joseph's name on it under the shotgun case in the trunk. 7RP 1073. The masks were on top of the bandolier and next to the gun case. 7RP 1075. The shells were red. 7RP 1076. They found a third shotgun in the case in the trunk (Exh. 47). 7RP 1078. It was a 12-gauge pump action with a nylon ammo sleeve over the butt. 7RP 1078. There were two rounds in the sleeve on the gun. 9RP 1277.

Before he opened the trunk, Joseph told the detective that the shotgun in the trunk belonged to David. 7RP 1084. He also stated that he was at his friend Tiffany Weir's house and stayed there until daylight on the morning of June 24. 7RP 1084; 9RP 1266. Joseph denied any knowledge of the shooting, and denied participating in any way. 7RP 1084. Joseph denied speaking on the phone to Williams. 9RP 1266. He said he had spoken briefly to Gibbs-Churchley, but that he had not seen him. 9RP 1266. He became upset and swore at the detective. 7RP 1084.

David also asserted that the gun was his. 7RP 1086. He denied that Joseph had anything to do with it, and denied that he ever let anyone borrow it. 7RP 1086. David said the red paintball mask was Joseph's and the black one was his own. 7RP 1086. David denied knowing anything about the shooting. 7RP 1086. David also asserted that he had spend the night at Tiffany Weir's house, and they had not left the house at all. 7RP 1086; 9RP 1267. David did not recall speaking to Gibbs-Churchley. 9RP 1267. Like Joseph, David was cooperative at first, but became agitated at the conversation progressed. 7RP 1086. The detective arrested David for drive-by shooting, and Joseph for unlawful possession of a firearm and drive-by shooting. 7RP 1087.

Both brothers stated that they had been at Weir's all night. 7RP 1127. However, Weir told the detective that they had left at 1:30 or 2:00 a.m. 7RP

1128. Weir also recalled Joseph talking to Gibbs-Churchley. 7RP 1128. She said they had been texting and making phone calls before they left. 8RP 1157.

Devin identified Joseph in a photo montage, but not David. 6RP 812, 816; 7RP 1037-38. Treacher likewise could identify Joseph but not David. 7RP 1037-38.

The brothers' father testified that David drove the car more than Joseph. 11RP 1493-94. He also testified that David and Joseph were friends with Gibbs-Churchley. 11RP 1498. The brothers had been very good friends with Weir for eight or nine years. 11RP 1499. They spend almost all their time at her house. 11RP 1500.

The father had been out of town for several days when the incident occurred. 11RP 1502. The third brother and their mother was with him on vacation. 11RP 1503.

The third Frasquillo brother, Darren, also testified. He testified that Exh. 47 (the Charles Daly shotgun) , as well as Exh. 49 (the Mossberg shotgun with the removable pistol grip) were both David's. 11RP 1566. David purchased the shotguns in the Summer of 2007. 11RP 1611. The Samsung cell phone was David's and the LG was Joseph's. 11RP 1585-86. **J:** He bought the guns in the Summer of 2007. 11RP 1611.

David drove Joseph's Thunderbird more often than not. 11RP 1567.

According to Darren, Gibbs-Churchley was good friends with the brothers and came over sometimes several times a week, sometimes once a month. 11RP 1569, 1577-78. Gibbs-Churchley did not own any guns. 11RP 1578.

The brothers hung out at Weir's house quite a bit. 11RP 1570. They "pretty much" lived at Weir's they were there so much. 11RP 1580.

Robert TenEyck, Jon Anderson, and Tiffany Weir all purported to provide alibis for the brothers. TenEyck and Anderson, however, both testified that they went to bed well before the incident, and that the brothers were gone when they woke up. 11RP 1614-16, 1627-29.

Weir asserted that she went to bed around four or five o'clock in the morning, and that the brothers were still there playing video games. 11RP 1641. She also claimed they they did not leave together during the night. 11RP 1645.

III. ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE FRASQUILLOS' CONVICTIONS OF THE ATTEMPTED SECOND-DEGREE ASSAULT OF JACOB KNOWLTON WHERE THE EVIDENCE SHOWED AN INTENT TO PUT ALL THE OCCUPANTS OF THE HOUSE IN FEAR OF HARM, AND THE TAKING OF A SUBSTANTIAL STEP IN THE COMMISSION OF THE CRIME: ACTUALLY SHOOTING INTO THE HOUSE. [JOSEPH'S CLAIM 2, DAVID'S CLAIM 3]

Both brothers claim that the evidence was insufficient to support their convictions of the attempted second-degree assault of Jacob.² This claim is without merit because the evidence showed an intent to put all the occupants of the house in fear of harm, and the taking of a substantial step in the commission of the crime: actually shooting into the house.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh

² Joseph additionally contends the evidence was insufficient to convict him of the attempted second-degree assaults of Linda and Keith. Since the jury was unable to reach a verdict on these counts, the point is somewhat moot. The State assumes that he is presenting this argument to forestall any retrial on those charges. Although not raised by Joseph, the State notes that such a retrial would not be barred by double jeopardy, because the jury clearly indicated that it was unable to reach a verdict by following its instructions and leaving the verdict form blank. See 17RP 2144-51, and *State v. Ervin*, 158 Wn.2d 746, ¶ 17, 147 P.3d 567 (2006); see also Point G, *infra*. In any event, the analysis of the charges with regard to Linda and Keith is the same as for the charge regarding Jacob.

the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

Joseph relies solely on *State v. Wilson*, 125 Wn.2d 212, 883 P.2d 320 (1994). Joseph Brief at 21. In addition to *Wilson*, David also relies on *State v. Salamanca*, 69 Wn. App. 817, 851 P.2d 1242 (1993). David Brief at 24. Finally, both brothers argue that the doctrine of transferred intent does not apply. In this regard Joseph relies on his Claim 1, which in turn depends on

his interpretation of *State v. Ferreira*, 69 Wn. App. 465, 850 P.2d 541 (1993), and David relies on *State v. Elmi*, 166 Wn.2d 209, 207 P.3d 439 (2009). Joseph Brief at 19, 21; David Brief at 25-26. The State generally agrees that these cases are controlling. It disagrees, however, with the conclusions the brothers draw from the cited authority.

The attempted assault against Jacob was charged only under RCW 9A.36.021(1)(c), which provides:

A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: ... Assaults another with a deadly weapon.

Three definitions of assault are recognized in Washington:

(1) an attempt, with unlawful force, to inflict bodily injury upon another [attempted battery]; (2) an unlawful touching with criminal intent [actual battery]; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm [common law assault].

Wilson, 125 Wn.2d at 218 (brackets in the original); *accord Elmi*, 166 Wn.2d at ¶ 11.

Following these definitions, the brothers would have been guilty of a completed second-degree assault if they, by use of a deadly weapon, put Jacob in apprehension of harm, regardless of whether or not they intended to inflict or were capable of inflicting that harm.

This is made clear in *Ferreira*, a case with a very similar fact pattern. There the defendant and his accomplices shot into an occupied house. He was convicted of five counts of first-degree assault. The Court vacated the first-degree assault convictions, because the evidence was insufficient to establish the shooters' intent to inflict great bodily harm on any of the occupants in the house. This conclusion was based on the trial court's refusal to find that the shooters actually saw anyone inside the house. Instead, the court entered a finding that it was only "likely apparent" the house was occupied. *Ferreira*, 69 Wn. App. at 468-69.

Nevertheless, the Court also concluded that the evidence was sufficient to establish five counts of second-degree assault:

As to the number of counts for which the shooters, and hence Mr. Ferreira, can be convicted, a person who commits an act of violence with intent to place more than one person in fear of serious bodily injury may be found guilty of multiple offenses under the same criminal statute. ... Since the State proved five people were inside the house at the time of the shootings and each feared serious bodily injury, the State proved five counts of second degree assault.

Ferreira, 69 Wn. App. at 470-71.

In *Elmi*, the defendant shot into a house occupied by his estranged wife and three small children. Elmi was convicted of the attempted first-degree murder of his wife, and three counts of first-degree assault with regard to the children. In the Supreme Court, Elmi asserted that the evidence was

insufficient as to the assault convictions because there was no evidence of any specific intent to assault the children. *Elmi*, 166 Wn.2d at ¶¶ 3-5, 8.

The Court reiterated its holding in *Wilson*, that while first-degree assault required specific intent to produce the intended result, it did not in all circumstances require that intent to match a specific victim. *Elmi*, 166 Wn.2d at ¶ 14. Although *Wilson* contained reference to specific unintended victims, the Court in *Elmi* declined to read that reference as limiting “intent to that which was aimed at a person wounded as a result of the assault.” *Id.* Because under the assault statute the common law definitions of assault are treated equally, the Court concluded that the type of common-law assault suffered by the victims was “irrelevant for purposes of determining whether an assault occurred.” *Elmi*, 166 Wn.2d at ¶ 15. Thus, once the mens rea is established, *any* unintended victim falls within the statute:

This conclusion is supported by the plain language of RCW 9A.36.011(1)(a): “A person is guilty of assault in the first degree if he or she, with *intent to inflict* great bodily harm: ... [a]ssaults *another* with a firearm” (emphasis added). In so reasoning, we hold in accord with *Wilson*, that once the intent to inflict great bodily harm is established, usually by proving that the defendant intended to inflict great bodily harm on a specific person, the mens rea is transferred under RCW 9A.36.011 to any unintended victim.

Elmi, 166 Wn.2d at ¶ 16.

The brothers attempt to distinguish *Elmi*, *Wilson*, and *Ferreira* on the grounds that the victims in each case were actually injured or put in fear. But

they cite no legal or logical basis in those cases for such a limitation. The Courts' reasoning in these cases is not premised on there being an injury, but on the language of the statute: "assaults another," which is divorced from the specific intent specified in the statute.

Arguably, if the cases were decided under the transferred intent doctrine, rather than as a matter of a plain reading of the statute, the brothers' contentions might have more weight. The holdings in these case is explicitly *not* based on that doctrine, however:

We hold the doctrine of transferred intent is unnecessary to convict Wilson of assaulting Hensley and Hurles in the first degree. Under a literal interpretation of RCW 9A.36.011, once the mens rea is established, RCW 9A.36.011, not the doctrine of transferred intent, provides that any unintended victim is assaulted if they fall within the terms and conditions of the statute. Transferred intent is only required when a criminal statute matches specific intent with a specific victim. RCW 9A.36.011 does not include such a rigid requirement.

Wilson, 125 Wn.2d at 219; *accord Elmi*, 166 Wn.2d at ¶ 10, 17.

Based on the reasoning in *Ferreira and Elmi*, had Keith, Linda and Jacob (in addition to Matthew and Luzik) been put in fear, the evidence would have supported convictions for five completed second-degree assaults. It follows, then, where the defendants shot two shotgun rounds into an single-family dwelling containing five occupants and two were put in fear and three were not, the evidence supports two convictions of second-degree assault and three convictions of attempted second-degree assault.

RCW 9A.28.020(1) provides:

A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

Criminal intent “may be inferred from all the facts and circumstances.” *State v. Bencivenga*, 137 Wash.2d 703, 709, 974 P.2d 832 (1999). “A ‘substantial step’ is conduct strongly corroborative of the actor’s criminal purpose.” *In re Borrero*, 161 Wn.2d 532, 539, 167 P.3d 1106 (2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 1098 (2008) (*quoting State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002) (internal quotation marks omitted by the Court)). It must be more than mere preparation to commit a crime. *Townsend*, 147 Wn.2d at 679. But “[a]ny slight act done in furtherance of a crime constitutes an attempt if it clearly shows the design of the individual to commit the crime.” *State v. Price*, 103 Wn. App. 845, 852, 14 P.3d 841 (2000). “[A]n attempt conviction does not depend on the ultimate harm that results or on whether the crime was actually completed.” *State v. Luther*, 157 Wn.2d 63, 73, 134 P.3d 205 (2006). Moreover, RCW 9A.28.020 (2) further provides that impossibility is not a defense:

If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission.

Here the evidence showed that the brothers or their accomplice Gibbs-Churchley fired two shotgun blasts into a house they had reason to believe was occupied. Under *Ferreira*, the proper number of victims in the number of occupants. That three of them were not put in fear as a result does not mean that no crime occurred. Instead it shows that the brothers had the intent to put the occupants of the house in fear of harm, and by arming themselves, donning masks and actually shooting two windows out, made a substantial step toward the completion of the offenses. Their conviction for attempting to assault Jacob should stand.

B. THE ACCOMPLICE LIABILITY INSTRUCTION GIVEN BELOW PROPERLY INFORMED THE JURY THAT IT HAD TO FIND THAT DAVID AND JOSEPH KNEW THAT THEY WERE AIDING IN THE COMMISSION OF AN ASSAULT TO FIND THEM GUILTY AS ACCOMPLICES TO THE CRIMES OF FIRST- AND SECOND-DEGREE ASSAULT AND ATTEMPTED SECOND-DEGREE ASSAULT. [JOSEPH'S CLAIM 5, DAVID'S CLAIM 2]

The brothers next both claim that the trial court's accomplice liability instruction violated *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000), and *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). This claim is without merit because an accomplice instruction need only specify the crime charged, not the degree. The instruction here properly informed the jury that it had to find that David and Joseph knew that they were aiding in the

commission of an assault.

David faults the trial court's accomplice liability instruction for failing to require the jury find that he had knowledge of the particular degree of assault charged: "His convictions could not be sustained by a general knowledge he was aiding in other types of assault." David Brief at 19. Joseph likewise argues that "Jury instruction number 24 was not a proper jury instruction because the document relieved the State of proving that Mr. Frasquillo possessed knowledge that he was aiding in the specific crime of assault in the second degree." Joseph Brief at 30.

Both contentions are incorrect. It is well-established that an accomplice must have knowledge only of the general offense, not its degree:

[A]n accused who is charged with assault in the first or second degree as an accomplice must have known generally that he was facilitating an assault, even if only a simple, misdemeanor-level assault, and need not have known that the principal was going to use deadly force or that the principal was armed.

In re Sarausad, 109 Wn. App. 824, 836, 39 P.3d 308 (2001).³ *Sarausad* is based on the holdings in *Roberts* and *Cronin*:

"The crime" means the charged crime, but because only general knowledge is required, even if the charged crime is aggravated, premeditated first degree murder as it was in

³ Joseph cites to *Sarasaud v. Porter*, 479 F.3d 671 (9th Cir. 2007), in which the federal court ruled that the accomplice instructions in Sarausad's case were inadequate. The Supreme Court reversed that holding and reinstated Sarausad's conviction. *Waddington v. Sarausad*, 129 S. Ct. 823, 172 L. Ed. 2d 532 (2009).

Roberts, “the crime” for purposes of accomplice liability is murder, regardless of degree. This is made clear in *Cronin*, 142 Wn.2d at 581-82, wherein the court said that the State had to prove beyond a reasonable doubt that Cronin, who was charged with premeditated first degree murder, had knowledge that he was aiding in the commission of the crime of murder. And in *State v. Bui*, 80 Wn. App. 1027, 1996 WL 1062367 (1996), consolidated with *Cronin*, the charge was assault in the first degree and it was charged additionally that “firearms and deadly weapons” were used in committing the crime. [*Cronin*,] 142 Wn.2d at 571-72. The court said that in order to show that Bui was an accomplice to these charged crimes the State had to prove beyond a reasonable doubt that he possessed general knowledge that the crime he was facilitating was assault. *Id.* at 580.

Sarausad, 109 Wn. App. at 835.

Here, the instructions informed the jury that to find the brothers guilty as accomplices to first- or second-degree assault, the State had to prove that they knew an assault was going to occur. CP 344, 539. This was a correct statement of the law. No error occurred.

Even if the instruction were flawed, however, an erroneous accomplice liability instruction is subject to harmless error analysis. *State v. Carter*, 154 Wn.2d 71, ¶ 22, 109 P.3d 823 (2005). An erroneous instruction is harmless if, from the record in the case, it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Id.* The giving of an erroneous accomplice liability instruction may be found to be harmless even where it is clearly evident that the defendant was convicted as an accomplice based only on his or her knowledge of the crime

charged. *Carter*, 154 Wn.2d at ¶ 23 (citing *State v. Berube*, 150 Wn.2d 498, 509, 79 P.3d 1144 (2003)). However, where a defendant is charged with only one crime, a flawed accomplice liability instruction may not be harmless where evidence of uncharged crimes is presented to the jury. *Carter*, 154 Wn.2d at ¶ 23. If evidence of an uncharged crime is before the jury and the State argues that the defendant’s participation in ‘any’ crime triggered liability for the specific crime charged, reversal is appropriate.” *Id.* But, where the prosecution neither presents evidence of uncharged crimes nor argues that the jury may base accomplice liability on the defendant’s knowledge of any crime other than the one charged, the erroneous accomplice instruction may be harmless. *Id.*

Here there was simply no evidence that the brothers were aware of or participated in or otherwise aided any assaults other than those charged. Joseph generally asserts that the jury was misled by the instruction, but fails to explain how, other than to reiterate his contention that the evidence connecting him to the crime was “minimal at best.” Joseph Brief at 30. As discussed at Point E, *infra*, that contention is utterly baseless.

David asserts that the harmless error analysis set forth in *State v. Brown*, 147 Wn.2d 330, 58 P.3d 889 (2002), requires the Court to determine whether the jury might have considered the defendant to be an accomplice rather than a principal, and if the jury could have found that the defendant

was an accomplice, then reversal was required. David Brief at 20. While the majority in *Brown* did undertake such an examination of the record, its discussion must be considered in the context of that case.

Brown, involved the consolidated cases of three defendants. Two had group had been convicted of rape, robbery and assault, and in an unrelated case, the third was convicted of attempted murder, robbery, kidnapping, and burglary. *Brown*, 147 Wn.2d at 341-The accomplice instructions in both cases merely required that they have knowledge of “a crime.” *Brown*, 147 Wn.2d at 338. The analysis David cites was necessitated by the fact that the defendants were charged with multiple crimes and therefore the instruction would have permitted convictions on all counts based solely on knowledge of one of the crimes. While the specific facts in *Brown* required this analysis, the correct test is that subsequently set forth in *Carter*, as discussed above.

Applying his misreading of *Brown*, David’s sole contention is that the alleged error is not harmless because the evidence fails to show that he was the principal in the assaults. David Brief at 20. Here, unlike in *Brown*, the jury was told that David had to have knowledge of an assault, and no other crime was charged or proved. As such the Court need to not be convinced that he was a principal to be satisfied that the alleged error did not contribute to the verdict.

David, like Joseph, also suggests that the evidence was insufficient to show that he was aware of what was intended. As discussed both with regard to Joseph's sufficiency claim, and with regard to David's claim relating to Joseph's statement, *see* Point C, *infra*, there was ample evidence from which it could be concluded that the brothers were at the very least accomplices to the assaults.

C. THE ADMISSION OF JOSEPH'S STATEMENT TO THE POLICE THAT THE GUN IN THE TRUNK OF THEIR CAR WAS DAVID'S DID NOT VIOLATE THE SIXTH AMENDMENT UNDER EITHER *BRUTON* OR *CRAWFORD* BECAUSE THE STATEMENT WAS NOT ADMITTED FOR THE TRUTH OF THE MATTER ASSERTED, BUT INSTEAD TO SHOW JOSEPH'S KNOWLEDGE OF THE GUN. [DAVID'S CLAIM 1]

David argues that the admission of Joseph's statement to the police that shotgun in the trunk of their car violated his Sixth Amendment right to confrontation. It is not entirely clear whether he is arguing that the evidence was improper under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), or under *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), or both. Neither claim would be valid.

Bruton provides no basis for reversal. First, David explicitly informed the trial court that *Bruton* was not implicated by the statement.⁴ As

⁴ David also proposed the limiting instruction of which he complains. *See* David Brief at 13-

such, any alleged error would be invited. Second, the admission of Joseph's statement did not implicate *Bruton* because it did not directly or indirectly incriminate David in the crimes charged. Moreover, neither *Bruton* nor *Crawford* are implicated where the statement is not admitted for the truth of the matter asserted. Here the statement was not introduced to prove the matter asserted, *i.e.*, that the shotgun in fact belonged to David. Finally, any error would be harmless. Nothing in Joseph's statement directly implicated David in the crimes charged. Moreover, David also told the police the gun was his. Additionally, several witnesses testified to David's ownership of the gun, and numerous witnesses identified Joseph and testified that Joseph was with his brother the night of the shooting.

Detective Birkenfeld spoke with both brothers after their arrest following the stop of their Thunderbird. Before the detective opened the trunk of the car, Joseph told Birkenfeld that the shotgun in the trunk belonged to David. 7RP 1084. He also stated that he was at his friend Tiffany Weir's house and stayed there until the early morning hours of June 24. 7RP 1084. Joseph denied any knowledge of the shooting, and denied participating in any way. 7RP 1084. David likewise asserted that the gun was his.⁵ 7RP 1086.

14; CP 471.

⁵ Even had Joseph's statement been offered against David, *but see infra*, it would thus not have been hearsay as to David under ER 801(d)(ii), which provides that a "statement is not

He denied that Joseph had anything to do with it, and denied that he ever let anyone borrow it. 7RP 1086. David denied knowing anything about the shooting. 7RP 1086. David also asserted that he had spend the night at Weir's house. 7RP 1086.

1. *Bruton v. United States*

a. Any purported *Bruton* error is invited.

The only concern David ever expressed below with regard to being tried with his brother was the potential of “guilt by association” based on Joseph’s unlawful possession of a firearm charge, which required proof of Joseph’s prior conviction.⁶ RP (11/12) 5; 1RP 7-8, 17. At no point did David ever object to the admission of Joseph’s statement that the shotgun belonged to him. To the contrary, David asserted he had no issue with assault charges being tried together. 1RP 9. Moreover, he specifically informed the court that there was no *Bruton* issue with regard to the admission of Joseph’s statement:

Your Honor, I think that the original question was whether or not we thought there was a *Broughton* [sic] issue involved in this. And I’ll address the defense’s first statement about Joseph Frasquillo’s statement coming in that indicates that the gun is David’s, which may be a statement against

hearsay if ... [t]he statement is offered against a party and ... is a statement of which the party has manifested an adoption or belief in its truth.”

⁶ David has not challenged the joinder of the cases on that ground in this Court. This Court has found such contentions to be without merit in any event. *State v. Campbell*, 78 Wn. App. 813, 820, 901 P.2d 1050, *review denied*, 128 Wn.2d 1004 (1995).

David Frasquillo's interest. I believe there's also going to be a statement that comes in that David informed the officers that the guns were his, and so I don't think *Broughton* comes in to play based on that.

My understanding of *Broughton* is that it really centers around a confession and issues of a confession, so I'm not sure that it would actually apply to the difference in statements there. And I suppose if the defense has issues, that we could potentially address those issues in testimony.

I don't think that *Broughton* comes in to play at this point from what has been presented.

1RP 58-59.

The goal of the invited error doctrine is to prohibit a party from setting up an error at trial and then complaining of it on appeal. *Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). The doctrine applies even in cases where the error resulted from neither negligence nor bad faith. *Id.* See also *State v. Studd*, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999); *United States v. Reyes-Alvarado*, 963 F.2d 1184, 1187 (9th Cir. 1992) (applying invited error doctrine to *Bruton* claim); *State v. Momah*, 167 Wn.2d 140, 154, 217 P.3d 321 (2009) (applying invited error doctrine to claim of unconstitutional closure of a courtroom).

Here, David specifically and repeatedly assured the trial court that the admission of Joseph's statement did not present a *Bruton* issue. He thus invited any error, and may not now on appeal claim that the trial court's decision violated *Bruton*.

Likewise, David's present objections to the adequacy of the trial court's limiting instruction are either unpreserved for review or invited. The instruction given, as noted above, was proposed by David. Where the defendant proposes a jury instruction, "he is therefore precluded from claiming on appeal that it is reversible error." *Studd*, 137 Wn.2d at 546. Likewise, the failure to propose an additional limiting instruction waives the issue on appeal. *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997).

b. Joseph's statement did not incriminate David.

Ordinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness "against" a defendant if the jury is instructed to consider that testimony only against a codefendant. This accords with "the almost invariable assumption of the law that jurors follow their instructions." *Richardson v. Marsh*, 481 U.S. 200, 206, 107 S. Ct. 1702, 1707 (1987). *Bruton* creates "a narrow exception to this principle." *Marsh*, 481 U.S. at 207. In *Bruton* the Court concluded that a defendant is deprived of his Sixth Amendment right of confrontation when the "facially incriminating confession" of a nontestifying codefendant is introduced at their joint trial. *Id.* *Bruton's* holding was based on the concern that the risk is too great in this context that the jury will not follow the limiting instruction. *Bruton*, 391 U.S. at 135-136. *Marsh* distinguished *Bruton*, and held it inapplicable where "the confession was not incriminating on its face, and became so only when

linked with evidence introduced later at trial.” *Marsh*, 481 U.S. at 208. The Court explained that in such situations, the original rationale for *Bruton*’s holding no longer exists:

Where the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence. Specific testimony that “the defendant helped me commit the crime” is more vivid than inferential incrimination, and hence more difficult to thrust out of mind. Moreover, with regard to such an explicit statement the only issue is, plain and simply, whether the jury can possibly be expected to forget it in assessing the defendant’s guilt; whereas with regard to inferential incrimination the judge’s instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget. In short, while it may not always be simple for the members of a jury to obey the instruction that they disregard an incriminating inference, there does not exist the overwhelming probability of their inability to do so that is the foundation of *Bruton* ‘s exception to the general rule.

Id.

Thus, “a criminal defendant is denied the right of confrontation when a nontestifying codefendant’s confession that names the defendant *as a participant in the crime* is admitted at a joint trial, even where the court instructs the jury to consider the confession only against the codefendant.” *State v. Medina*, 112 Wn. App. 40, 48-49, 48 P.3d 1005 (2002) (emphasis supplied). However, in keeping with *Marsh* and *Bruton* itself, our Supreme Court has emphasized that *Bruton* applies “only [where] an out-of-court statement ... *incriminates*” the defendant. *State v. Dent*, 123 Wn.2d 467,

485, 869 P.2d 392 (1994) (quoting *State v. Ferguson*, 3 Wn. App. 898, 906, 479 P.2d 114 (1970), review denied, 78 Wn.2d 996 (1971)) (alterations and emphasis the Court's); see also *State v. Campbell*, 78 Wn. App. 813, 901 P.2d 1050 (1995) (no *Bruton* violation where nothing in the codefendant's statement "expressly or by direct inference incriminate[d]" the defendant). A limiting instruction will be deemed ineffective under *Bruton* only when testimony includes "powerfully incriminating extrajudicial statements of a codefendant." *Dent*, 123 Wn.2d at 486 (quoting *Bruton*, 391 U.S. at 135-36).

Here Joseph only stated that the shotgun in the trunk belonged to David. He went on to say that both he and David were at Weir's house the entire night of the shooting. David was not charged with unlawfully possessing the shotgun. Indeed, it was perfectly legal for him to own it. Moreover, the jury was specifically instructed that it could not use Joseph's statement against David. CP 525. Given that Joseph's statement only indicated that David owned of the gun (which was completely undisputed at trial) and in the same breath *exculpated* David with regard to the charged crimes, this testimony cannot be deemed the sort of "powerfully incriminating" statement that *Bruton* holds would render a limiting instruction ineffective. Rather, the general rule that the jury followed its instruction should be applied.

c. ***Bruton* does not apply where the non-testifying codefendant's statement is not used for the truth of the matter asserted.**

Even if Joseph's statement could be deemed to incriminate David, *Bruton* would still not have required its exclusion because *Bruton* does not apply where the statement is not used for the truth of the matter asserted.

This Court has suggested that *Bruton* does not apply where case dealt with statements of a co-defendant that were offered for the truth of the matter asserted. *In re Theders*, 130 Wn. App. 422, 431, 123 P.3d 489 (2005), *review denied*, 156 Wn.2d 1031 (2006); *see also Anderson v. United States*, 417 U.S. 211, 220, 94 S. Ct. 2253, 41 L. Ed. 2d 20 (1974) (distinguishing *Bruton* where statements not offered to prove the truth of the matter asserted).

The record does not explicitly disclose the purpose for which Joseph's statement was admitted. No doubt that is because its admission was not questioned at trial. The use that was made of it by its proponent, the State, is quite indicative, however.

The only argument the prosecutor made was that the statement showed *Joseph's* state of mind. The first mention of it came 60 transcript pages into the State's closing, on the second day of argument:

Joseph Frasquillo's statements to the detectives. This is crucial, especially for this unlawful possession of a firearm charge. Before the trunk was even opened he was told -- or he told the police hey, that gun in the trunk belongs to David.

Before they even opened it. That proves that he had knowledge that that gun was inside.

15RP 1979. This is the statement that David now argues shows that the State used the statement against him. David Brief at 14 n.6. Yet the argument was made in the context of the unlawful possession count, with which only *Joseph* was charged and it asserts only that the statement proved *Joseph's* knowledge. The State is at a loss as to how this argument encouraged the jury to disregard the court's instructions and consider the statement as evidence against David.

The prosecutor returned to *Joseph's* statement only once more in the remaining 20 pages of his initial closing argument. Again discussing the firearm charge, the prosecutor argued that *Joseph's* knowledge should be considered in determining whether he had dominion and control over the gun:

And again, he told police that he knew about the gun in the trunk. ... Now, the defense will surely argue that David says these are his guns. He never let's anyone else use them, and you can infer that David put this gun in there, and *Joseph* didn't have dominion and control over it. ... So David may – you may infer that David likes to keep exclusive possession of these guns, but that's simply not true, looking at the facts.

15RP 1993-94. Again, the argument is that the statement shows *Joseph's* state of mind.

The prosecutor returned to the statement once in his rebuttal argument:

Dominion and control of the firearm. The defense, Mr. Longacre essentially wants you to believe that it's David's gun. The only evidence you've heard of that is Detective Birkenfeld's statement that David said that it's his guns. Joseph says it's David guns. His family says it's his guns. David was driving the car, but it's Joseph's car.

Mr. Longacre wants you to believe that that's the absolutely [sic] defense here. That the fact that Joseph wasn't driving the car and David says it's his guns means there's no way that Joseph could also be sharing dominion and control.

Again, as I pointed out before, it doesn't need to be exclusive. David had dominion and control of this firearm in the trunk. He did. And Joseph did, too. They both did. ...

And again, he knew it was in there. He knew the gun was in there, and he knew it belonged to David. He didn't think he was in trouble, because he thought he could just say well, it's David's gun and then he's not in trouble.

15RP 2109-10. Again, the State only used the evidence to discuss Joseph's state of mind, and indeed, even suggests that the story is not to be believed. Plainly Joseph's statement was not introduced for the truth of the matter asserted, *i.e.*, that it was in fact David's gun. As such *Bruton* is not implicated.

2. *Crawford v. Washington*

In *Crawford*, the Supreme Court held that the admission of out-of-court testimonial statements violates a defendant's right under the confrontation clause unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 68. Under *Crawford*, Joseph's statement would most likely be deemed

testimonial because it was made to the police after he had been arrested. *Crawford*, 541 U.S. at 51 (“Various formulations of this core class of ‘testimonial’ statements exist ... [including] custodial examinations”).

Nevertheless, the Court in *Crawford* specifically retained the rule that the confrontation clause “does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” *Crawford*, 541 U.S. at 68 (citing *Tennessee v. Street*, 471 U.S. 409, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985)); see also *Crawford*, 541 U.S. at 59 n. 9 (“The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.”). The Washington Supreme Court, has since recognized that “even testimonial statements may be admitted if offered for purposes other than to prove the truth of the matter asserted.” *State v. Davis*, 154 Wn.2d 291, ¶ 24, 111 P.3d 844 (2005), *aff’d*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); see also, *In re Theders*, 130 Wn. App. 422, ¶ 28-29, 123 P.3d 489 (2005) (“*Crawford* ... and other post-*Crawford* cases in Washington are instructive. ... The trial court did not err in admitting the statements of the non-testifying co-defendant where the statements were not offered for their truth. The Sixth Amendment right of confrontation is not implicated.”).

As discussed with regard to the *Bruton* claim, Joseph’s statement was not admitted or used for the truth of the matter asserted. Further, as also

noted, the jury was instructed that Joseph's statement was not to be used against David. As such, no *Crawford* error occurred.

3. *Harmless Error*

Confrontation clause error may be harmless. *State v. Mason*, 160 Wn.2d 910, ¶ 32, 162 P.3d 396 (2007), *cert. denied*, 128 S. Ct. 2430 (2008).

The Washington Supreme Court has in this context adopted the "overwhelming untainted evidence" test: if the untainted evidence is overwhelming, the error is deemed harmless. *Id.* If there is no "reasonable probability that the outcome of the trial would have been different had the error not occurred," the error is harmless. *Id.*

David makes the preposterous argument that without Joseph's statement, there was "virtually no other evidence putting David Frasquillo at the scene, or putting the shotgun in his hands." David Brief at 15. The first problem with this theory is that, at most, Joseph's statement indicates that David owned the gun, a point supported by David's own statement and by the live testimony of their brother Darren. 11RP 1564.

Nothing in the statement puts David at the scene of the crime or of the events leading up to it. However, a significant amount of testimony tied David to the crime. Dustin Williams, who had met both Frasquillos before the shooting specifically placed David at the parking lot with the minivan.

Troy Moore, who had known the brothers for several years, placed them both in the van at the Payless parking lot. Aaronessa Devin and Andrew Treacher both identified Joseph from photo lineups. Although they could not pick David out of a lineup, Devin and Treacher both described two brothers being involved. Darren, the third Frasquillo brother, and their father both testified that Darren was in Idaho at the time of the crime and the brother' arrest. 11RP 1502-03; 1562. Even the supposed alibi witnesses, Weir, Anderson, and TenEyck, all said the brothers were together on the night of the shooting. There is simply no probability at all that exclusion of Joseph's statement would have resulted in a different verdict. This claim should be rejected.

D. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE EFFECT OF THE TRANSFERRED INTENT DOCTRINE AS INCORPORATED INTO THE ASSAULT STATUTES. [JOSEPH'S CLAIM 1]

Joseph argues that the trial court erred in instructing the jury on the doctrine of transferred intent. This claim is without merit because although as discussed at Point A, *supra*, transferred intent does not technically apply to the crime of assault, the instruction given was nevertheless a correct statement of the law as codified in the assault statutes. The State primarily relies on its response to the claim regarding the sufficiency of the evidence in reply to the instant contention. *See* Point A, *supra*.

The State would briefly respond to his contention, Joseph Brief at 18, that application of transferred intent to results in an overbroad sweep of the statute. While there might be some logic to the contention that the common-law doctrine, being a court-made rule, was subject to having its contours shaped by the courts. The Supreme Court has held, however, that in the context of the assault statute, the common law doctrine simply does not apply. Instead the rule is one of implementing the plain language of the statute. In such cases, absent constitutional infirmity, it is for the Legislature to set the limits of liability.⁷

Moreover, even if the common-law doctrine did apply, Joseph overstates the potential liability. Moreover, he fails to state why his failure to complete the crime should excuse his conduct. Under his argument liability for randomly firing into a home would depend on the luck of the occupants. The State would submit that in case involving the shooting into an occupied single-family home, which carries such grave potential for tragedy, that at the very least the limits of transferred intent should encompass all those actually in the home at the time of the assault.

⁷ Joseph asserts no constitutional claim with regard to transferred intent.

E. THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT JOSEPH WAS, AT THE VERY LEAST, AN ACCOMPLICE IN THE SHOOTING. [JOSEPH'S CLAIM 3].

Joseph next claims that the evidence was insufficient to establish that he acted as an accomplice in the shooting. This claim is without merit because it depends on viewing the evidence in the light most favorable to the defense, rather than the proper standard of review.

As discussed with regard to Point A, *supra*, on appeal, challenges to the sufficiency of the evidence are viewed in the light most favorable to the State. Likewise, circumstantial evidence is as good as direct evidence. Finally, issues of credibility and conflicting accounts are for the jury to weigh.

Taken in light most favorable to the State, the evidence showed that Joseph and his brother David, at the behest of Zach Gibbs-Churchley, produced two shotguns and proceeded to the Payless parking lot in East Bremerton, a short distance from the Knowlton home. There, they donned paint-ball masks and got into Gibbs-Churchley's van with their gun case. Before they left, Gibbs-Churchley was informed that Matt Knowlton had said he was home. Additionally, at least four vehicles were parked in front of the house.

Gibbs-Churchley and the Frasquillo brothers then left the parking lot in Gibbs-Churchley's teal Mercury Villager minivan. Within minutes, a teal Mercury Villager minivan drove by the Knowlton residence, turned around and drove back toward the house. Seconds later two windows were blown out. Within minutes, Gibbs-Churchley reappeared at the Payless, without the brothers.

Less than 24 hours later, one of the guns they had produced the night before was found, freshly cleaned, in the Frasquillo living room. The other was retrieved a few minutes later from the trunk of the car Frasquillo was driving along with the two paint-ball masks.

Under the standard of review that Joseph produced alibi witnesses is immaterial. Nevertheless, it is noteworthy that two of them went to bed before the time the brothers met up with Gibbs-Churchley and the others. The remaining alibi witness, Tiffany Weir, was impeached her statements to the police that the brothers had left her house early enough to have participated in the events leading up to the shooting. This claim should be rejected.

F. JOSEPH FAILS TO SHOW THAT THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO SEVER THE COUNT OF UNLAWFUL POSSESSION OF A FIREARM WHERE THE ESSENTIAL FACTS OF HIS DEFENSE WERE PUT BEFORE THE JURY AND THERE IS NO EVIDENCE THAT DAVID WOULD HAVE TESTIFIED IF SEVERANCE WERE GRANTED OR WHAT THE SUBSTANCE OF HIS TESTIMONY WOULD HAVE BEEN. [JOSEPH'S CLAIM 4]

Joseph next claims that the trial court abused its discretion in refusing to sever the unlawful possession of a firearm charge so that David could testify that Joseph was not in possession of the gun. This claim is without merit because the essential facts of this defense were put before the jury in the form of David and Joseph's statements to the police, and in testimony from their father and brother Darren. Moreover, Joseph failed to present any evidence that David would have testified if severance were granted or what the substance of his testimony would have been.

In determining whether the potential for prejudice requires severance, a trial court must consider (1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994). In addition, any residual prejudice must be weighed against the need for judicial economy. *Id.* On review, a trial court's

refusal to sever charges is reversible only where it constitutes a manifest abuse of discretion. *Id.* The defendant bears the burden of demonstrating such abuse. *Id.*

Both at trial and in this Court Joseph has argued only the second factor.⁸ 1RP 5. However, although the defenses were different, they were neither inconsistent nor lacking in clarity. Joseph asserted an alibi to the assaults and asserted that he never possessed the gun as a defense to the unlawful possession charge. There was little chance that the jury would have been “confused” as to the defenses. *Russell*, 125 Wn.2d at 64.

Moreover, where the joinder of the charges did not affect the defendant’s ability to make his defenses clear to the jury, the denial of severance will not be disturbed. *State v. Cotton*, 75 Wn. App. 669, 687, 879 P.2d 971 (1994), *review denied*, 126 Wn.2d 1004 (1995). Here, the jury heard the statements of both David and Joseph to the police that the gun belonged to David. Darren also testified that the gun was David’s. Both Darren and their father testified that they were all aware that Joseph was not allowed to possess a firearm, and that they kept their guns locked up and away from Joseph.

⁸ The jury was instructed to consider each count separately. CP 522.

Joseph failed to provide any offer of proof as what David would have added to this evidence had the count been severed and had David agreed to testify at the trial of the firearm charge. But even that begs the question of whether David would have agreed to testify on Joseph's behalf had the count been severed. There is no evidence in the record that he would have. Nor is it plausible that his counsel would have recommended such a course. As such, Joseph's allegations of prejudice are speculative at best. This claim should be rejected.

G. RETRIAL OF JOSEPH ON THE FIRST-DEGREE ASSAULT CHARGES WOULD NOT VIOLATE HIS DOUBLE-JEOPARDY RIGHTS BECAUSE THE JURY WAS EXPLICITLY UNABLE TO REACH A UNANIMOUS VERDICT ON THE CHARGES. [JOSEPH'S CLAIM 6]

Joseph next claims that his double jeopardy rights would be impaired if his convictions of second-degree assault were vacated and on remand, he were again tried for first-degree assault. This claim, while arguably premature is clearly without merit because the jury was explicitly unable to reach a unanimous verdict on the first-degree assault charges.

In *State v. Ervin*, 158 Wn.2d 746, 147 P.3d 567 (2006), a unanimous Supreme Court addressed this issue. The Court concluded that under indistinguishable circumstances no double jeopardy violation occurred.

The double jeopardy clause applies where (1) jeopardy has previously attached, (2) that jeopardy has terminated, and (3) the defendant is in jeopardy a second time for the same offense in fact and law. Where these elements have been met, the double jeopardy clause bars the State from retrying a defendant. *State v. Ervin*, 158 Wn.2d 746, ¶ 10, 147 P.3d 567 (2006).

As in *Ervin*, the question presented here is whether the second element is satisfied. *Ervin*, 158 Wn.2d 746, ¶ 11. Jeopardy may be terminated in one of three ways: (1) when the defendant is acquitted; (2) when the defendant is convicted and that conviction is final; and (3) when the court dismisses the jury without the defendant's consent and the dismissal is not in the interest of justice. *Id.* A hung jury is an unforeseeable circumstance requiring dismissal of the jury in the interest of justice. *Id.*

As noted, an acquittal terminates jeopardy. The doctrine of implied acquittal may under certain circumstances imply an acquittal were the jury returns a guilty verdict on a lesser offense. However, where a jury has not been silent as to a particular count, but where, on the contrary, a disagreement is formally entered on the record, the implied acquittal doctrine does not apply. *Ervin*, 158 Wn.2d 746, ¶ 17.

Here, on the verdict form explicitly revealed that the jury was hung on

Counts I and III:

1. We, the jury find the defendant Joseph A. Frasquillo, Jr. –
- Not Guilty** of the crime of Assault in the First Degree as charged in Count I.
 - Guilty** of the crime of Assault in the First Degree as charged in Count I.
 - Not Unanimous** of the crime of Assault in the First Degree as charged in Count I.

* * *

2. We, the jury find the defendant Joseph A. Frasquillo, Jr. –
- Not Guilty** of the crime of Assault in the First Degree as charged in Count III.
 - Guilty** of the crime of Assault in the First Degree as charged in Count III.
 - Not Unanimous** of the crime of Assault in the First Degree as charged in Count III.

CP 365. Because the jurors were unable to agree, they cannot be considered to have acquitted Joseph of the greater charges. *Ervin*, 158 Wn.2d 746, ¶ 17. Thus, Joseph has no acquittal operating to terminate jeopardy and he may be retried on first-degree assault. *Id.*

H. THE SUPREME COURT HAS REJECTED JOSEPH'S CLAIM THAT THE IMPOSITION OF A FIREARM ENHANCEMENT WHERE THE USE OF A FIREARM IS AN ELEMENT OF THE CRIME VIOLATES DOUBLE JEOPARDY PROTECTIONS. [JOSEPH'S CLAIM 7]

Joseph's final claim is that the imposition of a firearm enhancement where the use of a firearm is an element of the crime violates double jeopardy protections. As he notes, the Supreme Court accepted review of this claim last year. Since Joseph filed his brief, the Supreme Court has unanimously rejected this contention. *State v. Kelly*, 168 Wn.2d 72, 226 P.3d 773 (2010). This claim should be rejected.

IV. CONCLUSION

For the foregoing reasons, the Frasquillos' convictions and sentences should be affirmed.

DATED June 8, 2010.

Respectfully submitted,

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