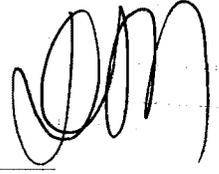


NO. 41059-1-II  
COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,  
Respondent,  
vs.  
JESSUP B. TILLMON,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COURT  
The Honorable Pro Tem Richard A Strophy, Judge  
Cause No. 09-1-01930-8

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BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR .....	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	2
C. STATEMENT OF THE CASE .....	2
D. ARGUMENT .....	5
01.    THERE WAS INSUFFICIENT EVIDENCE TO UPHOLD TILLMON’S CRIMINAL CONVICTIONS FOR ROBBERY IN THE FIRST DEGREE IN COUNTS VI, VII AND VIII .....	5
02.    THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT MUST BE UNANIMOUS BEFORE RETURNING A VERDICT ON THE SPECIAL VERDICT FORMS FINDING THAT TILLMON WAS ARMED WITH A FIREARM AT THE TIME OF THE COMMISSION OF THE EIGHT CRIMES, COUNTS I-VIII, FOR WHICH HE WAS CONVICTED .....	8
03.    TILLMON WAS PREJUDICED BY HIS COUNSEL’S FAILURE TO OBJECT TO THE COURT’S INSTRUCTION 50 THAT THE JURY MUST BE UNANIMOUS BEFORE RETURNING A VERDICT ON THE SPECIAL VERDICT FORM AND BY FAILING TO PROPOSE AN ACCURATE INSTRUCTION AND SPECIAL VERDICT FORM.....	9
E. CONCLUSION .....	11

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>State of Washington</u>	
<u>State v. Bashaw</u> , 169 Wn.2d 133, 234 P.3d 195 (2010) .....	9, 11
<u>State v. Craven</u> , 67 Wn. App. 921, 841 P.2d 774 (1992) .....	5, 6
<u>State v. Delmarter</u> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	6
<u>State v. Doogan</u> , 82 Wn. App. 185, 917 P.2d 155 (1996) .....	10
<u>State v. Early</u> , 70 Wn. App. 452, 4853 P.2d 964 (1993), <u>review denied</u> , 123 Wn.2d 1004 (1994) .....	10
<u>State v. Gentry</u> , 125 Wn.2d 570, 888 P.2d 1105 (1995).....	10
<u>State v. Gilmore</u> , 76 Wn.2d 293, 456 P.2d 344 (1969).....	10
<u>State v. Graham</u> , 78 Wn. App. 44, 896 P.2d 704 (1995) .....	10
<u>State v. Grant</u> , 77 Wn.2d 47, 459 P.2d 639 (1969).....	7
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 900 (1998) .....	7
<u>State v. Henderson</u> , 114 Wn.2d 867, 792 P.2d 514 (1990).....	10
<u>State v. Nam</u> , 136 Wn. App. 698, 150 P.3d 617 (2007) .....	8
<u>State v. Ng</u> , 110 Wn.2d 32, 750 P.2d 632 (1988).....	7
<u>State v. Roche</u> , 75 Wn. App. 500, 878 P.2d 497 (1994).....	7
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992) .....	5, 6
<u>State v. Tarica</u> , 59 Wn. App. 368, 798 P.2d 296 (1990).....	10
<u>State v. White</u> , 81 Wn.2d 223, 500 P.2d 1242 (1972) .....	10

Statutes

RCW 9A.40.020.....	2
RCW 9A.52.020.....	2
RCW 9A.56.190.....	7
RCW 9A.56.200.....	2
RCW 9.94A.533.....	2
RCW 9.94A.602.....	2

Rules

WPIC 37.02.....	7
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A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking count VI, robbery in the first degree, from the jury for lack of sufficiency of the evidence that Tillmon or an accomplice took personal property from the person of another, Nicholas Thomas Oatfield, where the State assumed the burden of proving this element.
02. The trial court erred in not taking count VII, robbery in the first degree, from the jury for lack of sufficiency of the evidence that Tillmon or an accomplice took personal property from the person of another, Aaron Francis Ormrod, where the State assumed the burden of proving this element.
03. The trial court erred in not taking count VIII, robbery in the first degree, from the jury for lack of sufficiency of the evidence that Tillmon or an accomplice took personal property from the person of another, Nicholas George Ormrod, where the State assumed the burden of proving this element.
04. The trial court erred in instructing the jury that it must be unanimous before returning a verdict on the special verdict forms finding that Tillmon was armed with a firearm at the time of the commission of the eight crimes, counts I-VIII, for which he was convicted.
05. The trial court erred in permitting Tillmon to be represented by counsel who provided ineffective assistance by failing to object to the court's instruction 50 that the jury must be unanimous before returning a verdict on the special verdict form and by failing to propose an accurate instruction and special verdict form.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred in not taking counts VI, VII and VIII, robbery in the first degree, from the jury for lack of sufficiency of the evidence that Tillmon or an accomplice took personal property from the person of another in each count where the State assumed the burden of proving this element?  
[Assignments of Error Nos. 1-3].
02. Whether the trial court erred in instructing the jury that it must be unanimous before returning a verdict on the special verdict forms finding that Tillmon was armed with a firearm at the time of the commission of the eight crimes, counts I-VIII, for which he was convicted?  
[Assignment of Error No. 4].
03. Whether the trial court erred in permitting Tillmon to be represented by counsel who provided ineffective assistance by failing to object to the court's instruction 50 that it must be unanimous before returning a verdict on the special verdict form and by failing to propose an accurate instruction and special verdict form?  
[Assignment of Error No. 5].

C. STATEMENT OF THE CASE

01. Procedural Facts

Jessup B. Tillmon (Tillmon) was charged by Third amended information filed in Thurston County Superior Court on February 23, 2010, with burglary in the first degree while armed with a firearm, count one, three counts of kidnapping in the first degree while

armed with a firearm, counts II-IV, and four counts of robbery in the first degree while armed with a firearm, counts V-VIII, contrary to RCWs 9A.40.020, 9A.52.020(1), 9A.56.200, 9.94A.533(3) and 9.94A.602. [CP 21-23]. The information further alleged the aggravating factor of unpunished offenses under RCW 9.94A.533(2)(c). [CP 23].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 13-28]. Trial to a jury commenced on April 1, the Honorable Pro Tem Richard A. Strophy presiding.<sup>1</sup>

The jury returned verdicts of guilty as charged, including enhancements, Tillmon was sentenced to an exceptional sentence below the standard range, and timely notice of this appeal followed. [CP 176-190].

## 02. Substantive Facts

On December 27, 2009, at approximately 4:00 in the morning, police were dispatched to the scene of a reported robbery in progress at a residence in Thurston County. [RP 261-62, 374-75, 384].<sup>2</sup> Upon arrival, two suspects were observed running from a vehicle close to the crime scene. [RP 389-392]. A K-9 unit apprehended one of the fleeing suspects, John L. Burns [RP 349-352], while the other suspect,

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<sup>1</sup> Tillmon was tried with his codefendants John L. Burns and Deshone V. Herbin.

<sup>2</sup> All references to the Report of Proceedings are to the transcripts entitled Trial – Volumes I-V.

Tillmon, who had been a recent guest at the residence, was taken into custody after he called the police and admitted his involvement in the robbery. [RP 408-09, 411-12, 606]. Deshone Herbin was contacted later that day after he was observed in a vehicle driven by his father. [RP 571, 647, 669].

Individually and collectively, the seven victims inside the residence related what had happened. Malcolm Moore and Casey Jones were in the living room when they heard a knock on the front door. [RP 39-40, 110]. When the door was eventually pushed open, three people barged into the residence. [RP 43, 112, 115]. Moore and Jones were ordered to lay down on the floor and then directed into the dining room area, where they were guarded by one of the intruders with a shotgun while the other two began a search of the house. [RP 44-46, 49, 112, 114-15, 117].

Zachary Dodge and Brittany Burgess were accosted in their bedroom by one of the armed intruders, later identified as Tillmon, who grabbed Dodge's laptop computer and \$150 handed to him by Dodge before directing the two at gun point into the kitchen. [RP 86-90, 289-91, 297-98]. Similarly, Nicholas Oatfield and Aaron Ormrod were confronted in Ormrod's bedroom and forced at gunpoint to crawl to the kitchen/dinning room area. [RP 152-55]. After the assailants left the

premises, cash in Oatfield's and Ormond's respective wallets left in their respective bedrooms was discovered missing. [RP 155-58, 188, 197]. Likewise, Nicholas Ormrod, Aaron's twin brother, was located in his bedroom and ordered at gunpoint into the same area as the others. [RP 217, 224]. It was later determined that the television in his room was missing, as was his paintball gun from the living room. [RP 229-232].

D. ARGUMENT

01. THERE WAS INSUFFICIENT EVIDENCE TO UPHOLD TILLMON'S CRIMINAL CONVICTIONS FOR ROBBERY IN THE FIRST DEGREE IN COUNTS VI, VII AND VIII.<sup>3</sup>

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated

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<sup>3</sup> As the argument is the same for each count, the counts are addressed collectively for the purpose of avoiding needless duplication.

as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

The pertinent facts are not in dispute. Regarding counts VI and VII, it was only after the assailants had left the residence that Nicholas Oatfield (count VI) and Aaron Ormrod (count VII) discovered that cash in their respective wallets left in their respect bedrooms was missing. [RP 155-58, 188, 197]. Similarly, the television in Nicholas Ormrod’s bedroom was found missing after the assailants had exited the premises. [RP 229-232]. The State conceded this scenario during closing argument:

(B)ut while all of the victims were assembled in this particular area, Nicholas Oatfield discovered later that he was missing money in his wallet in his bedroom. Likewise, Aaron Ormrod discovered his money was missing from his wallet in his bedroom, and Nicholas Ormrod discovered that his television was taken.

[RP 900].

In its “to-convict” instructions for counts VI, VII and VIII, court’s instructions 39, 42 and 45, the court instructed the jury that to convict Tillmon of the three respective counts of robbery in the first degree, it had to find that he “took personal property from the person of another....” [CP 102, 105, 108]. None of these instructions included the optional phrase,

“or in the presence of another.” See WPIC 37.02 (first degree robbery to-convict” instruction).

Because the robbery instructions omitted the phrase “or in the presence of another,” the State bore the burden of proving that Tillmon or an accomplice took property “from the person of” the victim. See State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998) (discussing well-established “law of the case” rule). Under the law of the case doctrine, jury instructions not objected to become “the law of the case.” Id. In a criminal trial, the doctrine requires that every element contained in the “to-convict” instruction be proved by the State beyond a reasonable doubt. See State v. Ng, 110 Wn.2d 32, 39, 750 P.2d 632 (1988).

Under RCW 9A.56.190, a “person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will....” [Emphasis added]. Under this provision, taking property “from the person of another” or taking property “in his presence” constitutes alternative means of committing robbery. State v. Roche, 75 Wn. App. 500, 511, 878 P.2d 497 (1994); see also, State v. Grant, 77 Wn.2d 47, 49-50, 459 P.2d 639 (1969) (“While personal property may be taken from the victim’s presence without being taken from his person, it cannot be taken from his person without being taken in his presence.”).

In State v. Nam, 136 Wn. App. 698, 150 P.3d 617 (2007), where the State similarly omitted the “presence” language from the to-convict instruction for robbery in the first degree, this court reversed because sufficient evidence, as here, did not support the jury verdict that Nam took personal property from the person of another. Nam, 136 Wn. App. at 707. Here, the State acquiesced to the court’s instructions 39, 42 and 45, which required the State to prove that Tillmon or an accomplice “took personal property from the person of another.” As there was no evidence that this occurred in counts VI, VII and VIII, Tillmon’s three convictions under these counts for robbery in the first degree must be reversed.

02. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT MUST BE UNANIMOUS BEFORE RETURNING A VERDICT ON THE SPECIAL VERDICT FORMS FINDING THAT TILLMON WAS ARMED WITH A FIREARM AT THE TIME OF THE COMMISSION OF THE EIGHT CRIMES, COUNTS I-VIII, FOR WHICH HE WAS CONVICTED.<sup>4</sup>

As instructed in court’s instruction 50, the jury was told that it had to be unanimous to return a verdict on the special verdict forms for “Counts 1 to VIII.”

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

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<sup>4</sup> As the argument is the same for each of the eight convictions, the counts are addressed collectively for the purpose of avoiding needless duplication.

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.”

[CP 113].

But this is incorrect. As explained in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), where, as here, the trial court had instructed the jury that unanimity was required to answer “no” on the special verdict, our Supreme Court vacated two school zone drug offense sentencing enhancements, holding that such an instruction is reversible error because it requires unanimity for either finding “yes” or “no.” Id. at 147. Bashaw is directly on point, with the result that the 60-month enhancement for each of the eight counts must be vacated and the matter remanded for resentencing.

03. TILLMON WAS PREJUDICED BY HIS COUNSEL’S FAILURE TO OBJECT TO THE COURT’S INSTRUCTION 50 THAT THE JURY MUST BE UNANIMOUS BEFORE RETURNING A VERDICT ON THE SPECIAL VERDICT FORM AND BY FAILING TO PROPOSE AN ACCURATE INSTRUCTION AND SPECIAL VERDICT FORM.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney’s performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that

prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)).

Should this court find that trial counsel waived the issue set forth in the preceding section of this brief relating to the trial court instructing the jury that it must be unanimous before returning a verdict on the special

verdict forms, then both elements of ineffective assistance of counsel have been established.

First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to object to court's instruction 50 and the accompanying special verdict form for the reasons set forth in the preceding section.

Second, the prejudice is self-evident. Again, as set forth in the preceding section, had counsel properly objected and/or proposed an accurate instruction and special verdict forms, there is every likelihood that the court would have upheld the objection and the jury would have been correctly instructed and would have issued a verdict on the special verdict forms that would not be subject to speculation, for "when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result." State v. Bashaw, 169 Wn.2d at 148.

E. CONCLUSION

Based on the above, Tillmon respectfully requests this court to reverse his three convictions for robbery in the first degree, counts VI, VII and VIII, and/or to remand for resentencing consistent with the arguments presented herein.

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DATED this 9<sup>th</sup> day of March 2011.

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FILED  
BY: 

CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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