

NO. 47762-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

VENIAMIN G. RUSEV

Appellant.

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

The Honorable John Hickman, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove beyond a reasonable doubt that Ben committed assault in the first degree.

2. The state failed to prove beyond a reasonable doubt that Ben committed robbery in the first degree.

3. The state failed to prove that Ben intended to steal.

4. The state failed to prove that Igor and Dymtro had possessory interests in the items they handed over to Ben and Vossler.

5. The state failed to prove that Ben intended for Vossler to shoot Igor.

6. The trial court erroneously imposed a mandatory minimum sentence without making the requisite findings.

7. The state failed to prove that Ben acted as an accomplice with an overt act.

8. The trial court erroneously imposed trial costs on Ben without determining his ability to pay.

9. If the state only proved assault in the second degree and robbery in the first degree, the trial court imposed a sentence in

violation of the principles against double jeopardy.

10. The court's instructions to the jury relieved the state of its burden to prove beyond a reasonable doubt that Igor and Dymtro had possessory interests in the items they handed over to Ben and Vossler.

Issues Presented on Appeal

1. Did the state fail to prove beyond a reasonable doubt that Ben committed assault in the first degree when he did not know, arrange, encourage or request the assault?

2. Did the state fail to prove beyond a reasonable doubt that Ben committed robbery in the first degree, when Ben did not intend to deprive the victims of their property?

3. Did the state fail to prove that Ben intended to steal when he did not retain the property taken?

4. Did the state fail to prove that Igor and Dymtro had possessory interests in the items they handed over to Ben and Vossler when the state did not elicit any information on this issue?

5. Did the state fail to prove that Ben intended for Vossler to shoot Igor when he did not know, arrange, encourage or

request the shooting?

6. Did the trial court erroneously impose a mandatory minimum sentence without allowing the jury to make the requisite findings?

7. Did the state fail to prove that Ben acted as an accomplice with an overt act when there was no such overt act?

8. If the state only proved assault in the second degree and robbery in the first degree, did the trial court erroneously impose a sentence in violation of the principles against double jeopardy?

10. Did the court's instructions to the jury relieve the state of its burden to prove beyond a reasonable doubt that Igor and Dymtro had possessory interests in the items they handed over to Ben and Vossler?

11. Should this Court deny appellate costs based on Rusev's inability to pay?

B. STATEMENT OF THE CASE

a. Summary of Participants.

The Russian names in this case are complicated and many

participants share the same last name. To avoid confusion, counsel will refer to the participant's by their Anglicized first names. No disrespect is intended. Veniamin (Venya, Venka, Dema is "Ben" Rusev). Dimitiry Rusev is Ben's brother. Ben is the accused. Vossler Blesch "Vossler" is the co-defendant who was adjudicated separately. Ihor Onishschuck, also known as "Igor", and Dymtro Onishschuck are brothers. Yaheni Mikhalechuck, is also known as "Eugene", and his brother is "Oleg" Mikhalechuck. Eugene and Oleg are cousins to Igor and Dymtro. "Vitali" Alesik was another participant.

b. Procedural Facts.

Vossler pleaded guilty to two counts of robbery in the first degree against Igor and Dymtro, and one count of assault in the first degree against Igor. RP 943. Ben was tried as an accomplice and convicted of two counts of robbery in the first degree against Igor and Dymtro, and one count of assault in the first degree against Igor. CP 1-3.

Ben had no criminal history. CP 212-214. Ben was sentenced to 155 months of confinement plus 180 months of flat

time for the firearm enhancements. CP 215-229. The court imposed a 60 month mandatory minimum on the assault charge. CP 215-229. This timely appeal follows. CP 236.

c. Substantive Facts.

Igor and his younger brother Dymtro worked for Vitali in a trucking business. RP 507. Vitali bought and sold cars and on occasion used Ben to fix and sell his cars. RP 510-11. Ben worked on a Volvo for Vitali but indicated that it was beyond his ability to repair. RP 512, 604-05. Oleg, a friend of Vitali's asked Ben to look at a Mercedes he bought from Igor. RP 516. Vitali knew that Ben believed the Mercedes was unsafe, unfixable and that Igor had cheated his own cousin Oleg by selling an unfixable, unsafe car. RP 522, 567, 607-08, 667, 669, 671, 674, 688-89.

Oleg returned the Mercedes and the keys before the shooting but Igor became aggressive and refused to return Oleg's money. RP 670, 674. Igor denied any problems with the Mercedes. Oleg owed Vitali \$1000-\$2000 dollars on the day of the shooting. RP 508.

On the day of the shooting, Ben asked Vitali to retrieve his Volvo from Ben's shop. RP 1639-40. How this communication transpired differs depending on the speaker. Ben told the police that he thought Vitali was coming to get his Volvo with someone else. RP 1384. Vitali testified that he told Ben that he was coming to get his car and that he was bringing someone else with him. Vitali also testified that he told Ben he was not getting his car but sending others. RP 421, 523-524, 531-32, 619-20, 637-39, 643-51.

For weeks, Ben, Dimitiry, Vossler, a work friend Anthony Elliott and Ben's friends, had planned to have a barbeque and to go to a shooting range to test Vossler's new .45 gun. RP 951, 1044-45, 1051, 1322-24. Ben's friends were stuck in the snow and could not make it to Ben's house. RP 1051.

While Ben, Dimitiry, Vossler, and Elliott were having a barbeque, drinking very little beer, they saw a BMW drive up in front of Ben's apartment and then leave. RP1286. Dymtro and Igor drove to Ben's in a BMW, but did not know they needed to drive to the rear to access the garage until after they spoke to Vitali. RP 358-59. Ben knew Igor but not Dymtro. RP1384.

When Igor and Dymtro arrived at Ben's garage and demanded the Volvo, Ben said that he needed to first check with the owner Vitali before handing over the keys and the car. RP 1384.

Vossler is 6'4", muscular and weighs 240 pounds. RP 938-39. Vossler speaks Serbo-Croatian and English but not Russian. RP 936. Vossler knew that Ben wanted Vossler to accompany Ben into the garage because Ben did not trust Igor. RP 962, 1040-41, 1065. Ben never asked Vossler to bring his gun into the garage. RP 1071-73. Once inside the garage, Ben saw the gun, he asked Vossler to move his jacket aside so that Igor and Dymtro could see the gun in Vossler's waist band. RP 962-66, 1069.

The situation in the garage immediately became tense. RP 968-69, 77. Ben became upset and according to Vossler, Ben looked like a predator stalking Igor and Dymtro by walking around them in a circle. RP 977. During this moment, Igor appeared calm, but Dymtro seemed worried. RP 977.

Ben asked Vossler to rack the gun to maintain control of the situation and to intimidate Igor and Dymtro. RP 985-86, 1036.

Vossler did not understand the Russian language conversation between Ben and Igor, but saw Dymtro and Igor handing over their wallets, jackets, belongings, and shoes. RP 368, 975, 981-82, 043-44. Ben handed the wallets and watches to Vossler who put some of the articles in his pocket. RP 983, 1671-72. The shoes were kicked aside and the jackets and some of the items placed on top of the Volvo in the garage. RP 388, 982, 1671-72.

Ben and Vossler never discussed a plan to steal anything. RP 1044-45, 1659, 1683-44. Ben just looked at Igor's wallet for identification and put it on top of the Volvo. RP 396, 803. None of Igor's money was taken from his wallet. RP 875, 1218-19.

Vossler understood that Ben just wanted to scare Igor and Dymtro, but Ben never said he wanted to teach Igor and Dymtro a lesson or beat them up. Ben just said, "let's let them know that we know what they're doing. RP 985-986, 1044-46. Ben just wanted Igor to know that it was not acceptable to sell unsafe cars that could crash and hurt innocent people. RP 957-59, 963.

Ben and Vossler never made a plan to shoot or steal. RP 957-59, 963. Vossler did not understand that Ben asked Igor and

Dymtro to take off their pants. RP 1121-22. Vossler just saw Dymtro grab for his waistband at the same time that Igor and then Dymtro, both big, strong, fit guys, much larger in size than Ben, start fighting Ben and grabbing him in a body lock. RP 454, 463, 484, 994, 1023-24, 1121-22, 1170. Igor grabbed Ben first. RP 847, 851, 896, 1021.

Igor testified that he refused to take off his pants off. RP 813-22, 989-90, 993. Igor told Dymtro they needed to attack Ben together and use Ben as a shield to get out of the garage. RP 397-98. Vossler believed that Ben was fighting for his life and when Ben yelled "Vossler, Vossler", or "help me", Vossler in a panic removed the safety on his gun and shot both Ben and Igor. RP 995, 1055-60, 1625.

No one said anything before the shot rang out. RP 398-99. D never said shoot or did anything to indicate that he wanted Vossler to shoot. RP 1060, 1118, 1158-60. If Vossler had understood the language, he would not have fired his gun. RP 1050. Vossler's shot paralyzed Igor and tore off part of Ben's ear.

RP 769, 1385, 93, 1650. Igor has a chance of recovery but that is not guaranteed. RP 766.

Ben was in shock after Vossler fired his gun but called 911 to get help for Igor. RP 995, 1057-58, 1246, 1308. Both Ben and Vossler were cooperative and called the police and told them what had transpired. RP 1046,1379-81, 1571, 1625-26.

C. ARGUMENTS

1. THE EVIDENCE IS INSUFFICIENT TO CONVICT RUSEV OF THE CRIME OF FIRST DEGREE ASSAULT.

In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). The record lacks substantial evidence establishing Ben knew Vossler was going to assault Igor. Due to insufficient evidence, reversal of the conviction for first degree assault is required.

Due process under the Fourteenth Amendment of the United States Constitution requires the State to prove all necessary facts of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Smith*,

155 Wn.2d 496, 502, 120 P.3d 559 (2005). Evidence is insufficient to support a conviction, unless viewed in the light most favorable to the State, a rational trier of fact could find each essential element of the crime beyond a reasonable doubt. *State v. Chapin*, 118 Wn.2d 681, 691, 826 P.2d 194 (1992); *State v. Green*, 94 Wn.2d 216, 222, 616 P.2d 628 (1980).

(1) A person is guilty of assault in the first degree if he, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or

(b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or

(c) Assaults another and inflicts great bodily harm.

RCW 9A.36.011.

Because Ben was charged as an accomplice, RCW 9A.08.020 applies. This statute provides that a person is guilty of the crime if he is an accomplice of the person that committed the crime. A person is an accomplice under the statute if, with

knowledge that it will promote or facilitate the commission of the crime, he aids another person in committing it. RCW 9A.08.020.

General knowledge by an accomplice that a principal intends to commit “a crime” does not impose strict liability for any and all offenses that follow. *State v. Roberts*, 142 Wn.2d 471, 513, 14 P.3d 713 (2000). However, an accomplice need not have knowledge of each element of the principal's crime to be convicted under RCW 9A.08.020; general knowledge of “the crime” is sufficient. *Roberts*, 142 Wn.2d at 513.

“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 Pers. Restraint of Sarausad*, 109 Wn.App. 824, 836, 39 P.3d 308 (2001).

The accomplice need not have the same intent as the principal, as long as the defendant has “‘knowledge that [his or her acts] will promote or facilitate the commission of a crime,’ ” *State v. Hoffman*, 116 Wn.2d 51, 104, 804 P.2d 577 (1991) (quoting, *State*

v. Guloy, 104 Wn.2d 412, 431, 705 P.2d 1182 (1985)).

This means that a jury could convict Ben only if he had knowledge of “the crime” to be committed and that he acted with knowledge that his conduct would promote or facilitate that crime. *Roberts*, 142 Wn.2d at 510-11; *State v. State v. Cronin*, 142 Wn.2d 568, 579, 752 (2000)(conviction reversed); *Sarausad*, 109 Wn.App. at 835-36.

Here the crimes are robbery and assault. Ben did not have knowledge of the crime of assault. Ben did not trust Igor and wanted Vossler present to feel safer. RP 962, 1156, 1298. There was no evidence that Ben asked Vossler to bring his gun in to the garage and there was no evidence that Ben asked or knew that Vossler pointed his gun at Igor and Dymtro. RP 1617-18, 1071. Ben only knew that Vossler was behind him with the gun in his waist band when Igor and Dymtro handed over some of their belongings. RP 1648-49.

The record lacks substantial evidence establishing Ben knew Vossler was going to commit an assault. Vossler’s mere presence as a 6’4” four man does not create the actus reas or mens reas of

assault. Here, Ben knew that Vossler was armed but he did not direct Vossler to use his gun to commit an assault. Ben just wanted Vossler present for safety which is insufficient to establish accomplice liability. *Everybodytalksabout*, 145 Wn.2d 456, 472, 39 P.3d 294 (2002); RP 938.

The state failed to prove Ben was an accomplice to any degree of assault. Accordingly, due to insufficient evidence, reversal of the conviction for first degree assault.

2. THE EVIDENCE IS INSUFFICIENT TO CONVICT RUSEV OF THE CRIME OF FIRST DEGREE ROBBERY.

Intent to deprive is an implied element of Robbery. CP 1-3; *State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991); *State v. Richie*, 191 Wn.App. 916, 920-22, 365 P.3d 770 (2015); *State v. Ralph*, 175 Wn.App. 814, 824-25, 308 P.3d 729 (2013) (citing, *State v. Sublett*, 176 Wn.2d 58, 88, 292 P.3d 175 (2012) (citing *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 252, 111 P.3d 837 (2005), review denied, 179 Wn.2d 1017, 318 P.3d 280 (2013)).

Robbery also has a non-statutory element that requires the victim have an ownership, representative, or possessory interest in

the property stolen. *Richie*, 191 Wn.App. at 922, 924. Ben was charged with Robbery as follows:

did unlawfully and feloniously take personal property belonging to another with **intent to steal** from the person or in the presence of I. Onishschuk, the owner thereof or a person **having dominion and control over said property**, against such person's will by use or threatened use of immediate force, violence, or fear of injury to I. Onishchuk, said force or fear being used to obtain or retain possession of the property or to overcome resistance to the taking, and in the commission thereof, or in immediate flight therefrom, the defendant or an accomplice **displayed what appeared to be a firearm or other deadly weapon**, to-wit: a firearm, contrary to RCW 9A.56.190 and 9A.56.200(l)(a)(ii), and in the commission thereof the **defendant, or an accomplice, was armed with a firearm**, to-wit: a firearm, that being a firearm as defined in RCW 9.41.010, and invoking the provisions of RCW 9.94A.530, and adding additional time to the presumptive sentence as provided in RCW 9.94A.533, and against the peace and dignity of the State of Washington.

CP 1-3 (emphasis added).

Robbery requires (1) taking (2) personal property (3) from another person or from another's immediate presence having an ownership, representative, or possessory interest in the property. (4) against his or her will (5) by force or threatened force (6) with

the specific intent to steal. RCW 9A.56.200; *Sublett*, 176 Wn.2d at 88; *Richie*, 191 Wn.App. at 924. *Ralph*, 175 Wn.App. at 824-25.

Intent to steal means to take property from someone with a property interest in the item without an intent to return the item. Collins COBUILD English Usage © HarperCollins Publishers 1992, 2004, 2011, 2012; RCW 9A.56.010(7) (to deprive).

Both Igor and Ben testified consistently that Ben wanted to look at Igor's driver's license in his wallet. RP 396, 803. Ben was not comfortable with Igor and needed to 'buy time' to find out from Vitali if he should give Igor the Volvo. RP 1618-19. Igor was also moving too close to Ben and Ben felt uncomfortable and kept telling Igor and Dymtro to hand things over to protect this physical space. RP 1659, 1671-72, 1676.

Ben did not take property with an intent to steal but rather with an intent to gain control of the tense situation. RP 986. Ben also did not retain possession of any of the items and Vossler left without realizing that he had Igor and Dymtro's belongings. RP 983, 987, 1339-42.

Equally, the state did not present evidence that Vossler had an intent to steal. RP 983, 1356. The only evidence of Vossler's intent was his explanation that he did not understand what was being said in Russian and did not understand why Igor and Dymtro were handing over their belongings. RP 982-83, 1043-44, 1121-22. Vossler was unaware of the items in his pocket and threw them out as soon as he realized he left with them in his pocket.

The state did not present sufficient evidence that Ben or Vossler intended to retain possession of the items. Ben handed some of the items back to Vossler to get them out of the way, kicked the shoes aside, put the jackets and Igor's wallet on the Volvo. Ben did not take money from Igor's wallet or retain the watches or cell phones. RP 396, 803, 875, 1218-19. Here there was a taking but without an intent to steal or to deprive.

These facts, viewed in the light most favorable to the state do not establish an intent to deprive. Accordingly, this Court must reverse and remand for dismissal of the robbery charges with prejudice.

3. THE ROBBERY TO-CONVICT JURY INSTRUCTIONS RELIEVED THE STATE OF PROVING THE ESSENTIAL ELEMENT THAT THE PROPERTY WAS TAKEN FROM A PERSON HAVING AN OWNERSHIP, REPRESENTATIVE OR POSSESSORY INTEREST IN THE PROPERTY.

As previously stated, having a possessory interest in the property taken in a robbery charge is an essential element of robbery. *Richie*, 191 Wn.App. at 928. To-convict instructions must contain all essential elements, express and implied. *Id.* This is so even when the court follows the WPIC pattern instructions. *Richie*, 191 Wn.App. at 929 (citing, *Cronin*, 142 Wn.2d at 579).

In the instant case, the robbery to-convict instruction provided as follows:

To convict the defendant of the crime of Robbery in the first degree as charged in count I [and II], each of the following six elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of February, 2014, the defendant or a person to whom the defendant was acting as an accomplice, unlawfully took personal property from Ihor Onishchuk [and Dymtro];

(2) That the defendant or a person to whom the defendant was acting as an accomplice, intended to commit theft of the property;

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

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

(5)(a) That in the commission of these acts or in the immediate flight therefrom the defendant or a person to whom the defendant was acting as an accomplice, was armed with a deadly weapon; or;

(b) That in the commission of these acts or in the immediate flight therefrom the defendant or a person to whom the defendant was acting as an accomplice, displayed what appeared to be a firearm or deadly weapon;

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

CP 123-162 (emphasis added).

This instruction like the instruction in *Richie* did not contain the essential element that the victims must have had possessory interests in the items taken. *Richie*, 191 Wn.App. at 928. In *Richie*, this Court reversed *Richie's* conviction where the state basically used the same flawed to-conviction instruction used in this case.

(Emphasis added to display identical language in the to-convict instruction in *Richie*) *Richie*, 191 Wn.App. at 929.

a. Error Not Harmless.

The omission of an essential element is harmless error when it is clear that the omission did not contribute to the verdict. *Id.* For example, “when uncontroverted evidence supports the omitted element. *Id.* However, “error is not harmless when the evidence and instructions leave it ambiguous as to whether the jury could have convicted on improper grounds.” *Id.* In *Richie*, this Court reversed the conviction for robbery where the defendant took property from Walgreens in the presence of an off-duty employee. *Richie*, 191 Wn.App. at 929. This Court explained that the evidence created an ambiguity as to whether the state proved that the employee had possessory interest as a representative.

Here, there was insufficient evidence that Igor and Dymtro had a possessory interest in the cell phones, wallets, watches and clothes. There was no testimony that the items were theirs and not their parents or others. Because the state did not elicit evidence of a possessory or representative ownership, as in *Richie*, it is not

possible for this Court to determine whether the jury determined that Igor and Dymtro had a possessory or representative ownership in the items they handed over.

Accordingly, the error was not harmless and the remedy is reversal and remand for a new trial. *Richie*, 191 Wn.App. at 930.

4. INSTRUCTION NO. 5, THE ACCOMPLICE LIABILITY INSTRUCTION, RELIEVED THE STATE OF ITS BURDEN TO PROVE RUSEV COMMITTED AN OVERT ACT.

Accomplice liability requires an overt act. *State v. Matthews*, 28 Wn. App. 198, 203, 624 P.2d 720 (1981). It is not sufficient for a defendant to approve or assent to a crime; instead, he must say or do something that carries the crime forward. *State v. Peasley*, 80 Wn. 99, 100, 141 P.2d 316 (1914). In *Peasley*, the Supreme Court distinguished between silent assent and an over act as follows:

To assent to an act implies neither contribution nor an expressed concurrence. It is merely a mental attitude which, however culpable from a moral standpoint, does not constitute a crime, since the law cannot reach opinion or sentiment however harmonious it may be with a criminal act.

State v. Peasley, 80 Wn. At 100; *see also State v. Everybodytalksabout*, 145 Wn.2d at 472 (physical presence and

assent alone are insufficient for conviction as an accomplice).

Similarly, in *Renneberg*, the State Supreme Court approved the following language: “to aid and abet may consist of **words spoken or acts done....**” [Emphasis added]. *State v. Renneberg*, 83 Wn.2d 735, 739, 522 P.2d 835 (1974). The court noted that an instruction is proper if it requires “some form of overt act in the doing or saying of something that either directly or indirectly contributes to the criminal offense.” *Renneberg*, 83 Wn.2d at 739-40, quoting *State v. Redden*, 71 Wn.2d 147, 150, 426 P.2d 854 (1967).

Here, the court instructed the jury in Instruction No. 5 on accomplice liability as follows:

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

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

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or aggress to aid another person in the planning or committing the crime.

The word “aid” means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice. CP 123-162.

This instruction, No. 5, was fatally flawed because it allowed conviction without proof of an overt act. Under this instruction, the jury was permitted to convict if Ben was present and assented to Vossler’s shooting Igor, even if he committed no overt act contrary to the mandates of *State v. Peasley, supra*, and *State v. Renneberg, supra*.

The final two sentences of Instruction No. 5 do not cure this problem. The penultimate sentence—“A person who is present at

the scene and ready to assist by his or her presence is aiding in the commission of the crime”—does not exclude other situations such as a person who is present and **unwilling** to assist, but approves of the crime may still be convicted as an accomplice if he knows his presence will promote or facilitate the crime.

Similarly, the final sentence fails to save the instruction as a whole. Although the final sentence—“more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person is an accomplice”—excludes presence coupled with silent assent or silent approval. Thus, according to this sentence, a person who is present and unwilling to assist, but who silently approves of the crime could be convicted. Because the instructions allowed conviction as an accomplice in the absence of an overt act, Ben’s convictions must be reversed.

State v. Peasley, supra, and State v. Renneberg, supra.

5. THE TRIAL COURT DENIED RUSEV HIS RIGHT TO A TRIAL BY IMPOSING A MANDATORY MINIMUM SENTENCE.

The court violated Ben’s Sixth Amendment rights by checking the “mandatory minimum” box on his judgment and

sentence thus implicitly finding at sentencing the facts necessary to warrant imposing a mandatory minimum sentence of five years for the first degree assault conviction. *State v. Dyson*, 189 Wn.App. 215, 223-24, 360 P.3d 25 (2015) (citing *Alleyne v. United States*, __ U.S. __, 133 S. Ct. 2151, 2155, __ L.Ed. 2d __ (2013)).

Beyond increasing the floor of the proscribed sentencing range, the finding requires that during the first 60 months of Ben's confinement, he is not eligible for earned early release time on his assault charge. RCW 9.94A.540(2).

The government must submit to a jury and prove beyond a reasonable doubt any "fact" upon which it seeks to rely to increase punishment. *Alleyne*, 133 S. Ct. at 2158. Any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury. *Alleyne*, 133 S. Ct. at 2155, 2157; *Dyson*, 189 Wn. App. at 225.

Errors implicating a criminal defendant's Sixth Amendment right to a jury trial may be raised for the first time on appeal. *Dyson*, 189 Wn.App. at 224 (citing *State v. Hughes*, 154 Wn.2d 118, 143, 110 P.3d 192 (2005), *abrogated on other grounds by Washington v.*

Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed2d 466 (2006). Whether a sentence is legally erroneous is reviewed de novo. *In re Pers. Restraint Petition of Brooks*, 166 Wn.2d 664, 667, 211 P.3d 1023 (2009) (superseded by statute on other grounds by RCW 9.94A.701(9)).

The Sixth Amendment guarantees a criminal defendant the right to an impartial jury. Article 1, section 21 of the Washington Constitution similarly provides, in relevant part, that “[t]he right of trial by jury shall remain inviolate.” The jury serves a significant role as check and balance between the State, the state judge, and the criminal defendant. *United States v. Gaudin*, 515 U.S. 506, 510-11, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

The Due Process Clause and right to a jury trial together guarantee the right to have a jury find, beyond a reasonable doubt, every fact essential to punishment-whether or not the fact is labeled an "element." U.S. Const. amends.VI, XIV; *Blakely v. Washington*, 542 U.S. 296, 298, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.

Ct. 2348, 147 L. Ed.2d 435 (2000); *In re Winship*, 397 U.S. at 364.

The constitution is violated when a legislature removes from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. *Apprendi*, 530 U.S. at 490.

RCW 9.94A.540(l)(b) provides that “[a]n offender convicted of the crime of assault in the first degree where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years. *Id.*

In *Alleyne*, the United States Supreme Court held that the Sixth Amendment required a jury to find beyond a reasonable doubt all of the facts necessary for a trial court to impose a mandatory minimum sentence on Alleyne for brandishing a firearm in relation to a crime of violence. Although the jury found that Alleyne used a firearm during the crime, it made no finding that he brandished the weapon. *Alleyne*, 133 S.Ct. at 2160.

The Supreme Court reversed the trial court clarifying that the principle announced in *Apprendi* applies with equal force to facts increasing the mandatory minimum. *Alleyne*, 133 S.Ct. at 2160. Accordingly, a jury must find beyond a reasonable doubt those facts that trigger a mandatory minimum sentence. *Alleyne*, 133 S.Ct. at 2161.

In *Dyson*, Division Three applied *Alleyne* and reversed the trial court's imposition of the mandatory minimum based on the trial court's finding, rather than the jury's finding the facts necessary to impose a mandatory five-year minimum sentence. The Court held that the mandatory minimum sentence of five years triggered by trial court's finding that defendant used force or means likely to result in death or intended to kill victim violated defendant's right to jury trial. *Dyson*, 189 Wn.App. at 227-29

The jury convicted Ben of assault in the first degree as an accomplice. Whether Ben or Vossler used force or means likely to result in death or intended to kill was not submitted to the jury and not decided by the judge. RP 1948-1972; CP 215-229. In convicting Ben, the jury found that he assaulted another with a

deadly weapon or by force or means likely to produce great bodily harm or death. CP 123-162.

The jury verdict does not specify among the alternative means of committing first degree assault. CP 163-74. The jury not the judge was required to make this finding. Even though the judge did not make an explicit finding, the implicit finding by the judge is prohibited under *Alleyne* because it violates the Sixth Amendment and Ben's Fourteenth Amendment right to due process. *Alleyne* 133 S. Ct. at 2155, 2158, 2164; *Dyson*, 189 Wn.App. at 225-25.

Under *Alleyne*, the trial court should have submitted a separate instruction to the jury regarding the applicability of the five-year mandatory minimum to Ben's first degree assault conviction. Because the error was not harmless, this Court must remand for resentencing without the mandatory minimum. *Dyson*, 189 Wn.App., at 227-29.

6. THE TRIAL COURT VIOLATED THE PROHIBITION AGAINST DOUBLE JEOPARDY BY PUNISHING RUSEV FOR BOTH ASSAULT AND ROBBERY.

Ben should not have been convicted of assault in the first degree. If this Court remands for imposition of assault in the second degree, that charge should merge with the robbery in the first degree charge.

The State may bring multiple charges arising from the same criminal conduct in a single proceeding, but state and federal constitutional protections against double jeopardy prohibit multiple punishments for the same offense. *State v. Kier*, 164 Wn.2d 798, 803, 194 P.3d 212 (2008); *State v. Michelli*, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997).

Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense. *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005). The court uses a three-part test to determine whether the legislature intended multiple punishments in specific situations. *Kier*, 164 Wn.2d at 804.

First, the court reviews the criminal statutes for any express or implicit legislative intent. *State v. Calle*, 125 Wn.2d 769, 776, 888

P.2d 155 (1995). Second, if the legislative intent is unclear, the court turns to the “same evidence” *Blockburger* test, which considers if the crimes are the same in law and in fact. *Blockburger v. United States*, 284 U.S.299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Third, the courts may utilize the merger doctrine to assist in determining legislative intent. *Freeman*, 153 Wn.2d at 772-73. The key in analyzing merger is to determine if the defendant’s conduct demonstrates an independent purpose or effect of each. *Kier*, 164 Wn.2d at 804.

The remedy for placing a defendant in double jeopardy is to vacate the lesser offense. *State v. Hughes*, 166 Wn.2d 675, 686 n. 13, 212 P.3d 558 (2009). The court’s review is de novo. *Freeman*, 153 Wn.2d at 770.

a. Merger Doctrine

Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, the court presumes the legislature intended to punish both offenses through a greater sentence for the greater crime. *Freeman*, 153 Wn.2d at 772-73.

While there is no per se rule that assault in the second degree merges into robbery in the first degree, the Supreme Court has repeatedly determined that second degree assault merges into first degree robbery when there is no independent purpose for each crime. *Freeman*, 153 Wn.2d at 772-74.

In *Zumwalt*, a companion case to *Freeman*, Zumwalt, arranged to sell drugs to a woman he met at a casino. *Freeman*, 153 Wn.2d at 770. When they met in the parking lot to conclude the transaction, Zumwalt changed his mind about selling drugs and instead punched the woman to the ground, fracturing her eye socket. *Id.* Zumwalt then robbed the woman of approximately \$300 in cash and casino chips. *Id.* Zumwalt was convicted of second degree assault and first degree robbery. *Id.* The trial court determined that the two convictions were not the same for double jeopardy purposes. *Id.*

The Court in *Freeman* applied the three part test to determine, first that the length of robbery in the first degree sentence was shorter than assault in the first degree sentence, thus there was no evidence that the legislature intended to punish these

crimes together. *Freeman*, 153 Wn.2d at 753. Rather, the disparate sentences were evidence that the legislature intended to punish first degree assault and first degree robbery separately. *Id.* Additionally, because the crimes were not the same in law, the *Blockburger* test did not apply. *Freeman*, 153 Wn.2d at 777

The Court next examined the merger doctrine which provides that, “to prove first degree robbery as charged and proved by the State, the State had to prove the defendants committed an assault in furtherance of the robbery.” *Freeman*, 153 Wn.2d at 777. “[W]ithout the conduct amounting to assault, each would be guilty of only second degree robbery.” *Id.*

The Court determined that, “[u]nder the merger rule, assault committed in furtherance of a robbery merges with robbery” unless an exception applies or there is other evidence of contrary legislative intent. *Id.* Zumwalt’s second degree assault conviction merged into his first degree robbery conviction because there was no independent purpose or effect.” *Freeman*, 153 Wn.2d at 780.

Similarly, in *Kier*, Kier while driving, honked his car at another car driven by Hudson. When Hudson stopped and got out

of his car, Kier car pointed a gun at Hudson. *Kier*, 164 Wn.2d at 802-03. After Hudson ran away, Kier pointed the gun at Hudson's passenger, Ellison. *Id.* When Ellison was removed from the car. Kier and his two accomplices drove away with both cars. *Id.* A jury found Kier guilty of second degree assault and first degree robbery and the trial court imposed sentences for each crime. *Kier*, 164 Wn.2d at 806.

Kier was convicted of first degree robbery under RCW 9A.56.200(1)(a)(ii), which provides that robbery is elevated to the first degree if the defendant is armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon in the commission of the robbery or in immediate flight from the robbery. *Kier*, 164 Wn.2d at 805.

In *Kier* and in the instant case, the robbery to convict instruction required the State to prove that in addition to using fear or force, Kier "was armed with a deadly weapon or displayed what appeared to be a deadly weapon." *Kier*, 164 Wn.2d at 808-09. CP 123-162. Assault in the second degree involves putting another in apprehension or fear of harm, regardless of whether the actor

intends to inflict or is incapable of inflicting such harm. *Kier*, 164 Wn.2d at 808-09.

The Supreme Court in *Kier*, as in *Freeman*, reiterated that “[t]he merger doctrine is triggered when second degree assault with a deadly weapon elevates robbery to the first degree because being armed with or displaying a firearm or deadly weapon to take property through force or fear is essential to the elevation.” *Kier*, 164 Wn.2d at 806.

In Ben’s case, he was charged with first degree robbery pursuant to RCW 9A.56.200(1)(a). Specifically, the trial court instructed the jury that to convict, it needed to find that in the commission of robbery or in the immediate flight therefrom, Ben or an accomplice “display[ed] what appear [ed] to be a firearm.” The court also instructed the jury that, to convict Ben of the lesser included assault in the second degree, it needed to find that he assaulted “another with a deadly weapon.” These are the same instructions used in *Kier*. *Kier*, 164 Wn.2d at 808-09In

Under the merger doctrine, as in *Freeman*, and *Kier*, even though the crimes are not the same at law, Ben’s second degree

assault conviction merged with his first degree robbery conviction because the gun used in the assault in the second degree elevated the robbery to first degree robbery: Vossler brandished a gun and pointed it at Igor and Dymtro. *Kier*, 166 Wn.2d at 806; *Freeman*, 153 Wn.2d at 777-78.

Second, the Supreme Court has determined the legislative intent to treat these crimes as the same. *Freeman*, 153 Wn.2d at 777. Third, although there is no per se rule that second degree assault merges with first degree robbery, the State did not identify any unique characteristic of this case that warrants reaching a different result.

b. Remedy

Here, if this Court finds insufficient evidence of assault in the first degree, the robbery and assault in the second degree merge. Accordingly, to correct violations of the prohibition of double jeopardy, this Court must remand for resentencing without the assault and the deadly weapon enhancement associated with the assault sentence. *Hughes*, 166 Wn.2d at 686 n. 13.

7. THIS COURT SHOULD NOT IMPOSE
APPELLATE COSTS ON APPEAL.

This Court has discretion not to allow an award of appellate costs if the State substantially prevails on appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, Wn. App. ___, No. 72102-0-I (Jan. 27, 2016).

The defendant's inability to pay appellate costs is an important consideration to take into account in deciding whether to disallow costs. *Sinclair*, slip op. at 9. Here, the trial court found Ben is indigent and does not have the ability to pay legal financial obligations. CP 215-229. This Court should exercise its discretion and disallow trial and appellate costs should the State substantially prevail. The Court also signed an order declaring Ben indigent for his appeal. CP 237-38.

The Rules of Appellate Procedure allow the State to request appellate costs if it substantially prevails. RAP 14.2. A “commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, *unless the appellate court directs otherwise in its decision terminating review.*” RAP 14.2 (emphasis added). In interpreting this rule, our Supreme

Court held that it allows for the appellate court itself to decide whether costs should be allowed:

Once it is determined that the State is the substantially prevailing party, *RAP 14.2 affords the appellate court latitude in determining if costs should be allowed*; use of the word “will” in the first sentence appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but *that rule allows for the appellate court to direct otherwise in its decision*.

Nolan, 141 Wn.2d at 626 (emphases added).

Likewise, the controlling statute provides that the appellate court has discretion to disallow an award of appellate costs. RCW 10.73.160(1) states, “[t]he court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs.” (emphasis added). In *Sinclair*, this Court recently affirmed that the statute provides the appellate court with discretion to deny appellate costs, which the Court should exercise in appropriate cases. *Sinclair*, slip opinion at 8. A defendant should not be forced to seek a remission hearing in the trial court, as the availability of such a hearing “cannot displace the court’s obligation to exercise discretion when properly requested to

do so.” *Id.*

Moreover, the issue of costs should be decided at the appellate court level rather than remanding to the trial court to make an individualized finding regarding the defendant’s ability to pay, as remand to the trial court not only “delegate[s] the issue of appellate costs away from the court that is assigned to exercise discretion, it would also potentially be expensive and time-consuming for courts and parties.” *Sinclair*, slip opinion at 8-9.

Thus, “it is appropriate for this Court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellate brief.” *Sinclair*, slip opinion at 9-10. Under RAP 14.2, the Court may exercise its discretion in a decision terminating review. *Sinclair*, slip opinion at 8.

The Court should deny an award of appellate costs to the State in a criminal case if the defendant is indigent and lacks the ability to pay. *Sinclair*, slip opinion at 8-11. The imposition of costs against indigent defendants raises problems that are well documented, such as increased difficulty in reentering society, the

doubtful recoupment of money by the government, and inequities in administration. Slip op. at 11 (citing *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015)). “It is entirely appropriate for an appellate court to be mindful of these concerns.” *Sinclair*, slip opinion at 11.

In *Sinclair*, the trial court entered an order authorizing Sinclair to appeal in forma pauperis and to have appointment of counsel and preparation of the record at State expense, finding Sinclair was “unable by reason of poverty to pay for any of the expenses of appellate review,” and “the defendant cannot contribute anything toward the costs of appellate review.” *Sinclair*, slip opinion 13. Given Sinclair’s poverty, combined with his advanced age and lengthy prison sentence, there was no realistic possibility he would be able to pay appellate costs. *Sinclair*, slip opinion at 14. Accordingly, the Court ordered that appellate costs not be awarded. *Id.*

Similarly here, Ben is indigent and lacks an ability to pay. During sentencing, the trial court refused to impose discretionary legal financial obligations, finding the defendant lacks the present

and future ability to pay them. CP 215-229. The court also entered an order authorizing Ben to appeal in forma pauperis, finding the “defendant lacks sufficient funds to prosecute an appeal”. CP 238-239.

This finding is supported by the record. In his declaration, appellant asserted s/he has no income and no assets, and no employment history. Supp CP Motion and Affidavit for Order of Indigency June 26, 2015). Although Ben is only 33 years old, he is sentenced to spend 335 months in prison which will hinder any future attempts to obtain gainful employment. CP 215-229. Given these factors, it is unrealistic to think Ben will be able to pay appellate costs.

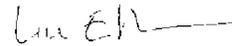
This Court should exercise its discretion to reach a just and equitable result and direct that no appellate costs be allowed should the State substantially prevail.

D. CONCLUSION

Veniamin (Ben) Ben respectfully requests this Court reverse his convictions and remand for dismissal with prejudice or in the alternative for a new trial and new sentencing.

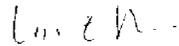
DATED this 20th day of April 2016

Respectfully submitted,



LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor – pcpatcecf@co.pierce.wa.us and Veniamin RusevDOC# 383818 **Clallam Bay Corrections Center** 1830 Eagle Crest Way Clallam Bay, WA 98326 , on April 20, 2016 a true copy of the document to which this is attached. Service was made by depositing in the mails of the United States of America, properly stamped and addressed to Mr. Jefferson and electronically to the prosecutor.



Signature

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