

NO. 47762-9

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

VENIAMIN RUSEV, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John Hickman

No. 14-1-00779-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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B. STATEMENT OF THE CASE.

1. Summary of the Participants

As described in the Brief of Appellant, the names of the participants in this case are complicated and many of them share the same names. As a result, the State will refer to each party by the following names in quotations and no disrespect is intended. Veniamin Rusev (Ben, Dema, Venya, Venka) is the "defendant." "Vossler" Blesch (Vosco) is the defendant's friend and co-defendant. "Dmitriy" Rusev is the defendant's brother, and "Anthony" Elliott is their friend. "Ihor" Onishchuk (Igor) is brothers with "Dmytro" Onishchuk who are the victims in the case. "Vitali" Alesik (Yuri) is their best friend. Yaheni Mikhalchuk ("Eugene") and Aleh Mikhalchuk ("Oleg") are brothers themselves and cousins with the Onishchuk brothers. An exhibit was also displayed throughout the

trial which described the relationship of the parties for the jury. CP 249-264¹ (Exhibit 307).

2. Procedure

On February 25, 2014, the Pierce County Prosecutor's Office charged VENIAMIN RUSEV, hereinafter "defendant", with two counts of robbery in the first degree (Counts I & II), and one count of assault in the first degree (Count III). CP 1-3. All counts included firearm sentencing enhancements. CP 1-3. The case proceeded to trial on May 18, 2015, before the Honorable John R. Hickman. RP 5.

The jury found defendant guilty of all charges and that defendant or an accomplice was armed with a firearm during the commission of each of the crimes. RP 1939-41; CP 163-74. Defendant was sentenced to 155 months, plus 180 months of flat time, for a total of 335 months of confinement. CP 215-229. Defendant filed a timely notice of appeal. CP 236.

3. Facts

In late 2013, Oleg Mikhailchuk bought a Mercedes from his cousin Igor "Ihor" Onishchuk. RP 517, 720. Oleg paid Ihor part of the payment, but was waiting on some money before he could make the rest of the payment. RP 517, 669. The Mercedes began having driving problems

¹ The State is filing a supplemental designation of clerk's papers to include the exhibit record from trial and several exhibits.

and Oleg mentioned this to his friend Vitali Alesik, RP 515-16. Vitali suggested the defendant take a look at it as he was a mechanic. RP 515-16, 671-72. The defendant told Vitali and Oleg that the thermostat was not working and there was also a problem with the transmission, suggesting that Ihor had sold Oleg a bad car. RP 516, 607-08, 686, 703-04. A couple of days before the shooting on February 23, 2014, Oleg returned the car to Ihor and asked for his money back. RP 673-74, 722. Ihor did not give him any money back at that time, but Oleg believed he would pay him later. RP 674-75, 684, 700, 723. Oleg told the defendant about this and the defendant told him that he did not like people who cheated other people. RP 674-75.

In February of 2014, Vitali also owned a Volvo with mechanical issues. RP 510-12. He lent it to the defendant to use for a while in exchange for him doing repairs on it at his shop in Tacoma. RP 510-14, 528. After a while, Vitali decided he wanted to sell the Volvo so he told the defendant he was going to take it back. RP 522. On February 23, 2014, he asked the defendant to drive the Volvo to his home in Renton, but the defendant said he could not because he was having a party. RP 522.

Because Vitali could not pick it up himself, he called his friend Dmytro Onishchuk, Ihor's brother, and asked him to pick up the Volvo for him. RP 350-51, 519, 737-38. Vitali called the defendant and informed him that Dmytro and his brother Ihor would be there to pick up the car.

RP 523-24. They did not really know the defendant and had only seen him two other times, but felt comfortable because he was a friend of Vitali's. RP 355-57, 742, 744.

When they arrived at the defendant's around 7pm, no one was at the door, so they called Vitali. RP 355-59, 745. He called the defendant who told him to tell the brothers to go to the back of the building in the alleyway. RP 359-60, 746. The brothers drove around back and saw the defendant standing in the side door entrance. RP 360, 746. They went into the garage where the Volvo was and the defendant closed and locked the door. RP 362-63. A man Dmytro had never seen before was hiding near a corner of the garage and came forward with a gun tucked in his waistband. RP 363-67. The man removed the gun and pointed it at Dmytro and Ihor. RP 378, 792-93. He racked the slide and a bullet popped out which the defendant kicked to the side. RP 391-93, 791.

The defendant started screaming and badmouthing Dmytro and Ihor while demanding their wallets and cell phones. RP 379-81, 798. When Ihor initially refused to turn over the items, the defendant made a gesture with his head to let the man with the gun know to point it closer to the brothers and the man moved closer to them. RP 799-800. The brothers testified that they were scared for their lives. RP 393, 797. They turned over the items and the defendant then demanded Dmytro's watch and keys and their jackets and shoes. RP 380-82. They turned them over

and the defendant placed some of the items on top of the Volvo, but gave Dmytro's wallet and phone to the man with the gun. RP 379-84, 388.

The defendant began screaming at Ihor about the Mercedes and ordered Dmytro and Ihor to take off their pants. RP 389-90, 810. Ihor told the defendant he was not going to do that and the man with the gun started shaking and motioning the gun at them. RP 390-91, 799, 807. The defendant asked Ihor where the Mercedes was and when Ihor told him he did not have it, the defendant became very angry. RP 393-94, 810. The defendant called Dmytro's cousin, Eugene, who is also Oleg's brother and asked him where the Mercedes was. RP 394-95, 812. Eugene told him he drove the Mercedes to Ihor Onishchuk. RP 395, 571, 813. The defendant got Ihor's wallet from the Volvo and confirmed he was the man Eugene mentioned. RP 369, 803.

While the defendant was on the phone, Ihor whispered to Dmytro that they needed to get out of there or they were going to get killed. RP 396-98. After the phone call, Ihor grabbed the defendant and tried to hold him. RP 398, 814. Dmytro believed he helped, although Ihor thought he alone grabbed the defendant. RP 398, 858. As Dmytro was trying to open the door, the man with the gun shot Ihor. RP 399.

Ihor fell to the ground and Dmytro attempted to stop the bleeding. RP 400, 825. The defendant and the other man were talking in the back part of the garage as Dmytro begged them to call 911. RP 400-01. The gunman disappeared as the defendant came towards Dmytro and Ihor

holding a phone. RP 401-02. He was on the phone with 911 and began asking Dmytro and Ihor the same questions the 911 operator was asking him. RP 402. When he got off the phone, the defendant told Dmytro and Ihor that the other man was not supposed to fire the gun, just scare them. RP 402-03, 816, 826-27.

The 911 call made by defendant was played for the jury during the trial. RP 321. During the 911 call, someone says in Russian “he wasn’t supposed to shoot, I told you” and again, “he wasn’t supposed to shoot.” RP 1487. Officers responded to the reported shooting at 501 East 34th street in Tacoma at around 7pm. RP 216, 321, 1374. The defendant contacted the officers and led them inside the garage through the side door. RP 219-20, 322-23, 1378. Ihor was laying on the floor as Dmytro applied pressure to where Ihor had been shot. RP 222, 326-27, 1465.

Defendant told the officers he and his brother lived in the apartment attached to the garage that they used to work on cars. RP 225. He said he was meeting two people to trade the Volvo station wagon to a friend of his named Vitali². RP 225. When they arrived, the two people demanded the keys and defendant did not want to turn them over until he had spoken to Vitali. RP 225, 1348. The defendant said the two people got upset and it led to a shoving match between Ihor and one of the other men, a white guy. RP 226. Defendant said that Ihor got shot and the

² The defendant’s statements to police actually refer to this individual as “Yuri” who is Vitali, and will therefore be referred to as Vitali for purposes of clarity.

white guy fled on foot. RP 227. He also said he believed he himself had been shot in the ear. RP 230.

After being somewhat hesitant, defendant admitted to the police he knew the shooter and identified him as Vossler Blesch. RP 229. Defendant did not tell the police anything about taking Dmytro or Ihor's cell phones, wallet, pants or jacket. RP 228. Bloody footprints in the garage led to the main door that connected to the attached apartment. RP 329. Police were unable to locate Vossler on the property. RP 230, 331, 1470.

Defendant was taken to the police station to be interviewed and said that he believed Vitali was coming with Ihor to pick up the Volvo. CP 249-264³ (Exhibit 304); RP 1630. He denied seeing Vossler grab the gun before going into the garage. CP 249-264 (Exhibit 304); RP 1630. The defendant said he locked the door to the garage after they entered and then he and the brothers got into an argument about giving them the Volvo without Vitali there. CP 249-264 (Exhibit 304); RP 1630. The defendant told the police he asked them for their phones, wallets, keys and shoes in an effort to buy himself some time and passed most of the items to Vossler. CP 249-264 (Exhibit 304); RP 1630. He also said he was trying

³ The interview was recorded on a CD which was admitted and played for the jury during trial and referred to as Exhibit 304. There was also a transcript of the interview that was provided to the jurors while the CD played, but taken back after its conclusion and never admitted. It is referred to as Exhibit 283 and designated for the record on appeal simply to follow along with the recording.

to intimidate the brothers because he had heard a story about them screwing another friend over. CP 249-264 (Exhibit 304); RP 1630.

The defendant stated that when he asked Ihor to take off his pants, Ihor pushed him a little and they began wrestling. CP 249-264 (Exhibit 304); RP 1630. They continued wrestling when he heard the gunshot and Ihor fell to the ground. CP 249-264 (Exhibit 304); RP 1630. He told police he called 911 and did not have a chance to talk to Vossler who ran towards the house. CP 249-264 (Exhibit 304); RP 1630. The defendant admitted that he initially left out the part about the wallets because he did not want to seem like the aggressor in the situation. CP 249-264 (Exhibit 304); RP 1630.

Ihor was transported to the hospital with a gunshot wound to his neck, chest and arm. RP 758. He spent two months in hospitals after the shooting and is permanently in a wheelchair as he is unable to walk, but can move his hands slightly. RP 347, 412, 776, 832. Dmytro stopped going to school and is now Ihor's full time caregiver. RP 346-48, 412.

During trial, Dmytro testified that the defendant never demanded money for the Volvo as he had claimed to the police was the reason for the dispute. RP 485. Ihor's father paid Oleg the remainder of the money owed on the Mercedes a few months after the shooting. RP 677. During trial, Oleg denied any involvement in the shooting. RP 677.

Vossler testified during the trial that he, defendant, the defendant's brother named Dmitriy Rusev and another friend named Anthony Elliott

had planned to go to the shooting range the day of the incident. RP 946-951. They were hanging out at the defendant's home playing videogames when the defendant learned Ihor and Dymtro were supposed to pick up the Volvo. RP 956-57. Vossler said that the defendant told him that the Onishchuk brothers were not going about their business right as they were selling broken-down cars to people and did not care that it could cause someone to lose their life if they were in a crash. RP 958. The defendant believed it was screwing with people who were legitimately trying to make a living selling cars like himself. RP 959.

Vossler testified that the defendant told him he wanted to get back at the Onishchuk brothers and get revenge for the incident with the Mercedes. RP 659-660. He asked Vossler to be in the room with him with his gun to intimidate the brothers, but the defendant never planned on anyone being shot, and there was no discussion about robbing anyone beforehand. RP 962-63, 1046. Anthony and Dymtro remained in the apartment and were unaware of what was going on. RP 964-65, 1240-43. Vossler testified he was supposed to stand there and show his gun, which he did when the Onishchuk brothers entered the garage. RP 966-69. Vossler does not speak Russian and did not understand what the defendant and the brothers were saying, but he testified that as the conversation went on, the defendant got more upset than Vossler had ever seen him. RP 975-77. Vossler said the defendant walked circles around the brothers like a

predator stalking prey and Dymtro was radiating fear, but Ihor did not seem as worried. RP 977.

Vossler recalled the defendant making a phone call and then said that everything went “haywire”. RP 978-81. Vossler described shoes being thrown off and wallets, jackets and watches being handed over after the defendant made orders, but he could not understand what anyone was saying. RP 981-83. The defendant handed him a wallet and when Vossler asked him “what the hell”, the defendant told him to trust him. RP 983-85. Vossler racked a bullet in the gun at the direction of the defendant and the defendant continued to hand him the brothers’ things. RP 984-88. When the defendant told the brothers to take off their pants and Ihor refused, they all got into a shoving match and Ihor grabbed the defendant. RP 990-94. When the defendant yelled for help, Vossler testified that he fired one shot and hit Ihor in his neck. RP 995. The defendant told Vossler to get out of the house, so he left. RP 996.

Vossler’s friend Anthony drove him home, but he turned himself in the next day and cooperated with the police. RP 998-1004. He said he wakes up every day disgusted by what happened, has tried to forget about it, lost 57 lbs and gone through a depression. RP 984. Vossler pleaded guilty to crimes associated with the shooting, but did not receive any leniency in those pleas in exchange for testifying against the defendant. RP 943.

Vitali testified the defendant never contacted him saying he was not willing to give the Volvo to Dmytro and Igor, and he never told the defendant he was going to be with them to pick up the car. RP 537-38. Defendant chose not to testify during the trial. RP 1711-12.

C. ARGUMENT.

1. THE EVIDENCE WAS SUFFICIENT FOR A RATIONAL TRIER OF FACT TO FIND DEFENDANT COMMITTED THE CRIMES OF FIRST DEGREE ASSAULT AND FIRST DEGREE ROBBERY.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988)(*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted

most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are considered equally reliable. *Id.*; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)). The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said “[G]reat deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.” *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)(citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

- a. The evidence was sufficient for a rational trier of fact to find defendant or an accomplice committed the crime of assault in the first degree.

To prove the defendant guilty of assault in the first degree, the State had to prove that with intent to inflict great bodily harm, the defendant or a person to whom he was acting as an accomplice, assaulted another with a firearm. CP 123-162 (Inst. No. 20); RCW 9A.36.011. A person acts as an accomplice if with knowledge that it will promote or facilitate the commission of the crime, he or she “(i) Solicits, commands, encourages, or requests such other person to commit it; or (ii) Aids or agrees to aid such other person in planning or committing it”. CP 123-162 (Inst. No. 5); RCW 9A.08.020.

Mere presence at the scene with knowledge of criminal activity does not support a finding of accomplice liability. *See State v. Truong*, 168 Wn. App. 529, 540, 277 P.3d 74, *review denied*, 175 Wn.2d 1020, 290 P.3d 994 (2012). Accomplice liability is premised on the accomplice’s general knowledge that he or she is assisting a principal in committing a crime, not upon his specific knowledge of the elements of the principal’s crime. *State v. Davis*, 101 Wn.2d 654, 658-59, 682 P.2d 883 (1984). In other words, the State must prove only that the accomplice had general knowledge of his coparticipant’s substantive crime, not that the accomplice had specific knowledge of the elements of the coparticipant’s

crime. *State v. Truong*, 168 Wn. App. 529, 540, 277 P.3d 74, review denied, 175 Wn.2d 1020, 290 P.3d 994 (2012)((citing *State v. Rice*, 102 Wn.2d 120, 125, 683 P.2d 199 (1984)).

An accused who is charged with first degree assault or second degree assault, 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. *Sarausad v. State*, 109 Wn. App. 824, 836, 39 P.3d 308 (2001). An assault is defined as “an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.” CP 123-162 (Inst. No. 22); WPIC 35.05.

Defendant in the present case argues that although he knew Vossler was armed, he did not direct him to use his gun or know he was going to commit an assault. Brief of Appellant, 10-14. But this ignores the majority of the evidence that was presented to the jury and views the evidence in the light most favorable to the defendant, not the State. In a challenge to the sufficiency of the evidence, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). As described above in *Sarausad*, *supra*, the State is

only required to prove the underlying substantive crime occurred, in this case an assault. When the evidence in the present case is reviewed in the light most favorable to the State, there is an overwhelming amount that shows the defendant was aware of, planned and even directed an assault to occur. Thus, although defendant may not have intended to commit the crime of assault in the first degree, the evidence shows he intended to commit an assault and is therefore liable for the assault in the first degree that did occur.

Significant evidence showed it was the defendant's plan to scare the Onishchuk brothers using Vossler and his gun. The defendant had previously told Oleg and Vossler about his dislike for the Onishchuk brothers and his desire to get back at them for how they cheated people. RP 659-60, 674-75, 958-59. He specifically asked Vossler to be in the garage with him with Vossler's gun to intimidate the brothers. RP 962-63. Anthony Elliott testified that just before the incident in the garage, he observed the defendant and Vossler having a conversation, and Vossler's demeanor changed to become unusually serious and not like himself. RP 1331-33. Vossler testified that the defendant told him to stand in the garage and show his gun when the brothers entered. RP 966-67. Part of the plan was also that Anthony and Dmitriy were not to know that the brothers were coming over. RP 965. If the meeting was benign, there would be no reason to specifically keep the Onishchuk brothers' appearance a secret and take them to the isolated garage and lock the door.

Evidence also showed it was at the defendant's direction that Vossler racked the gun to eject a bullet and pointed the gun at the brothers. Vossler testified he racked the gun after defendant told him to do it. RP 985-86. Ihor also testified that the defendant made a gesture with his head that let the gunman know he was supposed to point the gun closer to the brothers. RP 799. Dymtro testified that when the defendant would demand stuff from them, the man with the gun would look at the defendant and then make a gesture shaking movement to scare them. RP 391. The defendant himself admitted he was trying to scare and intimidate them. CP 249-264 (Exhibit 304). After Ihor was shot, the defendant told him and Dymtro that the other man was not supposed to fire the gun, just scare them. RP 402-03. During the 911 call, a man, presumably the defendant, also says "he wasn't supposed to shoot, I told you" and "he wasn't supposed to shoot." RP 1487.

When the inferences from this evidence are drawn in favor of the State, it is apparent that the defendant planned and directed Vossler to use his gun and point it at the brothers to scare them. While defendant may not have intended for anyone to be shot, the evidence and inferences from that evidence show that it was the defendant's intent that Vossler use the gun to scare the brothers. That action is an assault, the underlying substantive crime for the actual assault in the first degree which occurred.

As a result, under the case law discussed above, there was sufficient evidence for a rational trier of fact to find defendant guilty of assault in the first degree.

- b. The evidence was sufficient for a rational trier of fact to find defendant or an accomplice committed the crime of robbery in the first degree.

To prove the defendant guilty of robbery in the first degree, the State had to prove that with intent to commit theft, the defendant or an accomplice took personal property from the person by the use or threatened use of immediate force, violence or fear of injury. CP 123-162 (Instruction No. 9); RCW 9A.56.190. Theft means “to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services.” CP 123-162 (Instruction No. 11); WPIC 79.01; RCW 9A.56.020(1)(a).

The intent to deprive no longer includes the common law element to “permanently” deprive. *State v. Crittenden*, 146 Wn. App. 361, 370, 189 P.3d 849, *review denied*, 165 Wn.2d 1042, 205 P.3d 132 (2008). It has been purposefully omitted by the legislature and is no longer required. *Id.* The Washington Supreme Court has held that under the statute, “deprive” retains its common meaning: 1) to take something away from;

2) to keep from having or enjoying. *State v. Komok*, 113 Wn.2d 810, 814-15, 783 P.2d 1061 (1989).

Defendant in the present case contends that there was insufficient evidence to convict him of robbery in the first degree. He argues there was no evidence that he intended to deprive the Onishchuk brothers of their property because he and Vossler intended to give it back, and did not knowingly take it from the scene. Brief of Appellant at 14-17. But again, defendant's analysis ignores much of the evidence and fails to view it in the light most favorable to the State. A proper review of the evidence shows that the defendant and Vossler deprived the Onishchuk brothers of their property by intending to and in fact taking their items away from them.

The defendant brought the brothers into the garage where a man was hiding and waiting with a gun. RP 362-67. The defendant locked the door and began screaming and swearing at the brothers while the man with the gun racked the slide and pointed the gun at them. RP 362-63, 379-81, 391-93. The defendant then forced Dmytro and Ihor to turn over their wallets, cell phones, jackets, shoes and keys while the man with the gun made threatening gestures with the gun at them. RP 379-81, 390-91. The defendant then ordered the brothers to take off their pants. RP 389-90. The defendant never told them why he was taking the items or that he was going to return them. RP 889. All inferences suggest this event was a robbery, the defendant intended to deprive the victims of their property

and the evidence shows that he did in fact do so. Under the common meaning of the term, the brothers were deprived of their property and the defendant's actions were intentional.

It is only after everything falls apart and Ihor gets shot that the defendant claims to police that he never intended to keep the items, he was merely buying time and it was all a joke. RP 873-75; CP 249-264 (Exhibit 304). That claim lacks credibility as the defendant made it after he was in trouble in an attempt to minimize the situation. This Court should not consider defendant's claim regarding what his intent was with the items as credible evidence. The trier of fact rejected it through their verdict and such a credibility determination is not reviewable on appeal.

Whether the defendant chose to return the items later, does not change the fact that he temporarily deprived the brothers of their property by the use of force. Similarly, the fact that the defendant did not take any of the items from the scene, and Vossler unintentionally took the items does not negate the fact that they did deprive the brothers of their property while they were in the garage and intended to do so during that time. The jury rejected defendant's claim that he intended to return the items and the reasonable inference from all the other evidence presented was that defendant intended to deprive the victims of their property and did in fact do so. As a result, there was sufficient evidence for the trier of fact to find defendant guilty of robbery in the first degree.

2. THE OMISSION OF AN IMPLIED ELEMENT IN THE ROBBERY TO-CONVICT INSTRUCTIONS WAS HARMLESS AS THE EVIDENCE WAS UNCONTROVERTED THAT THE ONISHCHUK BROTHERS OWNED OR HAD A POSSESSORY INTEREST IN THE ITEMS THAT WERE TAKEN FROM THEM.

The omission of an element of a charged crime is a manifest error affecting a constitutional right that can be considered for the first time on appeal under RAP 2.5(a)(3). *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). Alleged errors of law in jury instructions are reviewed de novo. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). A to-convict instruction must contain all elements of a crime. *State v. DeRyke*, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003). The omission of an essential implied element is erroneous as it relieves the State of its burden to prove every element of the crime. *Id.*

The trial court's to-convict instruction for the first degree robbery counts in the present case read as follows:

To convict the defendant of the crime of robbery in the first degree as charged in Count [I-A]⁴ [II-A], 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] [Dmytro Onishchuk];**

⁴ The to-convict instructions for each count were the same except where brackets appear. The first set of bracketed information reflects the language in Count I-A and the second set of bracketed information reflects the language in Count II-A.

(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] [Dmytro Onishchuk]’s will** by the defendant’s or a person to whom the defendant was acting as an accomplice, 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 or a person to whom the defendant was acting as an accomplice, to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5)(a) That in the commission of these acts or in immediate flight therefrom the defendant or 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 other deadly weapon; and

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

CP 123-162 (emphasis added). This language mirrors what is currently reflected in WPIC 37.02 and what this Court recently discussed in *State v. Richie*⁵. 191 Wn. App. 916, 365 P.3d 770 (2015). In that case, this Court held that “whether the victim of a robbery has an ownership, representative or possessory interest in the property taken is an essential,

⁵ In *Richie*, the language did not specifically name the victims as in this case, but it has no impact on the substantive issue.

implied element of first degree robbery.” *Id.* at 928. Because that ownership element was absent from the instruction and WPIC 37.02, this Court found the instruction in *Richie* and current version of WPIC 37.02 were erroneous. *Id.*

Because the language in the present case mirrored that in *Richie* and WPIC 37.02, the State concedes it was an error. However, the omission of an essential element of a crime is harmless when it is clear that it did not contribute to the verdict. *Richie*, 191 Wn. App. at 929 (citing *State v. Schaler*, 169 Wn.2d 274, 288, 236 P.3d 858 (2010)). An example of this is when uncontroverted evidence in the case supports the omitted element. *Id.* Such is what exists in the present case where there was no ambiguity about the ownership of the items the defendant took and thus, the error in omitting the implied element was harmless.

The evidence was clear and undisputed that the items taken from the Onishchuk brothers belonged to them. When discussing the taking of the items, they were all referred to in terms indicating a possessory interest. For example, when asked what happened when the defendant took the cell phones, Dymtro stated “My phone probably went to the same place where my wallet was already” and “I think that my phone and my wallet he gave away to the person with gun.” RP 379, 388. Dymtro identified a photograph of the watch defendant took from him as being his watch and even clarified that the car key defendant took was his car key, not Ihor’s. RP 381-82. Dymtro also specifically identified whose jacket

was whose in the photographs, and discussed having the receipt for his jacket inside the jacket pocket. RP 382-84.

Similarly, during Ihor's testimony, his references to the items that were taken were all in terms indicating a possessory interest. He referred to the items saying things like "[the defendant] was gathering our stuff" and testified that he drove his brother's car to the defendant's shop. RP 738, 815. He identified in photos the two jackets that were taken as his and Dymtro's, and the shoes as Dymtro's. RP 804-05. He also identified in a photograph one of the wallets the defendant took as his own and the photograph showed it contained his license inside. RP 803-04.

During the trial, a Tacoma police officer testified that inside the wallet found in the garage was Ihor Onishchuk's Washington state driver's license. RP 288. Defendant's statements to police also reflected that he took the items directly from the brothers and he even referred to them as "personal items" at one point during the interview. CP 249-264 (Exhibit 304); RP 1630.

Nothing in the record reflects or suggests that anyone other than the two brothers owned or had a possessory interest in any of the items that were taken from them. In *Richie*, this Court found the evidence was ambiguous as there was evidence from which a jury could have found the victim was acting as a representative of her employer as well as evidence from which a jury could have found the victim was acting as a customer of her employer. *Richie*, 191 Wn. App. at 929-30. Without a finding on that

issue, her possessory interest in an item that was taken off a shelf in the store was questionable. Here in contrast, no ambiguity exists and the evidence is uncontroverted that the brothers were the owners of and had possessory interests in the items that were taken. As such, the error in omitting the implied element was harmless.

3. THE ACCOMPLICE LIABILITY INSTRUCTION DID NOT RELIEVE THE STATE OF ITS BURDEN OF PROVING THE DEFENDANT COMMITTED AN OVERT ACT AS IT CORRECTLY INFORMED THE JURY THAT MORE WAS REQUIRED THAN PASSIVE ASSENT BY DEFENDANT.

To be an accomplice in the commission of a crime, the defendant must associate himself with the undertaking, participate in it as something he or she desires to bring about, and seek by action to make it succeed. *State v. J-R Distributors Co.*, 82 Wn.2d 584, 592-93, 512 P.2d 1049 (1973), *cert. denied*, 418 U.S. 949, 94 S. Ct. 3217, 41 L. Ed. 2d 1166 (1974). Mere knowledge or presence at the scene of the crime is insufficient to establish accomplice liability. *In re Wilson*, 91 Wn.2d 487, 491-92, 588 P.2d 1161 (1979).

Along these lines, the Washington Supreme Court has held that some form of an overt act is required to prove accomplice liability as:

[t]o 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. 99, 100, 141 P.3d 316 (1914).

The jury in the present case was given an instruction on accomplice liability which read as follows:

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

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

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

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

The word "aid" means all assistance whether given by words, acts or encouragement, support or presence. A person who is present at the scene and ready to assist by his 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 (Instruction No. 5).

Defendant argues that this instruction relieved the State of its burden of proving that he committed an overt act as discussed in *Peasley*, *supra*. But in *State v. Renneberg*, the Washington Supreme Court

dismissed a similar claim that the trial court should have instructed the jury on the necessity of an overt act. 83 Wn.2d 735, 522 P.2d 835 (1974). They held that such an instruction was unnecessary as the statute and subsequent instruction set out the conduct that directly or indirectly contributes to the criminal offenses. *Renneberg*, 83 Wn.2d at 739-40. In its holding, the Court quoted an older case, *State v. Redden*, 71 Wn.2d 147, 150, 426 P.2d 854 (1967), saying:

A separate instruction, requiring the finding of an overt act, was unnecessary; since the instruction, as given, details what acts constitute aiding and abetting under the statute; which acts themselves signify 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 740.

Similarly, the accomplice liability instruction in the present case relayed to the jury that more is required than passive assent. The instruction specifically detailed, “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 (Instruction No. 5). The jury could only find that the defendant was an accomplice if it found that he directly or indirectly assisted in the criminal actions of Vossler. Defendant claims that this instruction could allow someone who was present and unwilling to assist, or someone who was present and silently approving of the crime to be convicted. But that is exactly what the final two sentences in the instruction prevent and tell the jury will not suffice to

establish accomplice liability. The accomplice liability instruction did not relieve the State of its burden of proving an overt act.

4. THIS COURT SHOULD REMAND THE CASE WITH AN ORDER TO STRIKE THE FIVE-YEAR MANDATORY MINIMUM SENTENCE FOR COUNT III AS IT VIOLATES THE SIXTH AMENDMENT.

Errors alleging a violation of a criminal defendant's Sixth Amendment right to a jury trial may be raised for the first time on appeal. *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. Ed. 2d 466 (2006). Whether a sentence is legally erroneous is reviewed de novo. *In re Pers. Restraint of Brooks*, 166 Wn.2d 664, 667, 211 P.3d 1023 (2009).

The Sixth Amendment guarantees a criminal defendant the right to an impartial jury, and when coupled with the due process clause of the Fourteenth Amendment demands that an impartial jury find beyond a reasonable doubt all elements of the charged offense for a defendant to be convicted. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Other than a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490.

Because “facts increasing the legally prescribed floor *aggravate* the punishment ... the fact necessarily forms a constituent part of a new offense and must be submitted to the jury.” *Alleyne v. United States*, -- U.S. --, 133 S. Ct. 2151, 2161-62, 186 L. Ed. 2d 314 (2013). In other words, a jury must find beyond a reasonable doubt those facts that trigger a mandatory minimum sentence. *Alleyne*, 133 S. Ct. at 2161.

RCW 9.94A.540(1)(b), Washington’s mandatory minimum sentencing statute, details that a five-year mandatory minimum sentence applies to offenders convicted of first degree assault in only two of the alternative means of committing the crime. This sentencing statute “indicates that the legislature intended to increase the punitive requirement for certain assaults that are characterized by unusually (within the world of assault) violent acts or a particularly sinister intent.” *In re Pers. Restraint of Tran*, 154 Wn.2d 323, 329-30, 111 P.3d 1168 (2005). Those two circumstances are where the offender 1) used force or means likely to result in death, or 2) intended to kill the victim. RCW 9.94A.540(1)(b). In order to impose a mandatory minimum in such a case, the jury must find beyond a reasonable doubt that either of those circumstances existed. *State v. Dyson*, 189 Wn. App. 215, 228, 360 P.3d 25 (2015), *review denied*, __ P.3d __ (WL 4392595) (2016).

In the present case, the jury convicted defendant of one count of assault in the first degree as an accomplice and the court imposed a mandatory minimum term of 60 months on this count. CP 167, 215-229.

However, no special verdict form was submitted to the jury asking whether the defendant used a force or means likely to result in death, or intended to kill the victim. CP 163-74. The jury verdict itself found that with intent to inflict great bodily harm, the defendant or an accomplice assaulted another with a firearm. CP 123-162 (Instruction No. 24); RCW 9A.36.011.

Because the jury never made an explicit finding that the defendant used a force or means likely to result in death, or intended to kill the victim, imposing a mandatory minimum sentence on that count does violate his Sixth Amendment right. The State concedes the imposition of the 60 month mandatory minimum term on Count III in the present case was an error. This Court should remand to the trial court with an order to strike the following language from the judgment and sentence in section 4.5 “[x] The confinement time on Count(s) III contain(s) a mandatory minimum term of 60 months.” CP 221.

5. DEFENDANT’S CLAIM THAT THE TRIAL COURT VIOLATED THE PROHIBITION AGAINST DOUBLE JEOPARDY IS NOT RIPE FOR REVIEW.

The double jeopardy clause of the Fifth Amendment to the United States Constitution provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. Amend. V. It applies to the states through the due process clause of the Fourteenth

Amendment. *State v. Wright*, 165 Wn.2d 783, 801, 203 P.3d 1027 (2009) (citing *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)). The Washington State Constitution similarly mandates that no person shall “be twice put in jeopardy for the same offense.” Wash. Const. Art. I, Sec. 9. “Washington’s double jeopardy clause is coextensive with the federal double jeopardy clause and ‘is given the same interpretation the [United States] Supreme Court gives to the Fifth Amendment.’” *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010); *State v. Adel*, 136 Wn.2d 629, 632, 632, 965 P.2d 1072 (1998) (citing *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)).

Both clauses have been interpreted to protect against the same triumvirate of constitutional evils: “being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after conviction, and (3) *punished multiple times for the same offense*.”

Turner, 169 Wn.2d at 454 (emphasis added).

However, the legislature may constitutionally authorize multiple punishments for a single course of conduct. *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). Washington courts use a three-step analysis to determine whether the legislature authorized multiple punishments for one course of conduct. *In re Pers. Restraint of Burchfield*, 111 Wn. App. 892, 895, 46 P.3d 840 (2002). An appellate court first considers express or implicit legislative intent based on the criminal statutes involved. *Calle*, 125 Wn.2d at 776. If the statutory

language is silent, the courts turn to the “same evidence” test, also known as the “*Blockburger*⁶ test”, which asks if the crimes are the same in law and fact. *Id.* at 777-78. In other words, whether as charged, each offense includes elements not included in the other and whether proof of one offense would also prove the other. *Id.* at 777 (citing *State v. Vladovic*, 99 Wn.2d 413, 423, 662 P.2d 853 (1983)). Third, if applicable, the merger doctrine may help determine legislative intent, where the degree of one offense is elevated by conduct constituting a separate offense. *State v. Kier*, 164 Wn. 2d 798, 804, 194 P.3d 212 (2008). But even if two convictions would appear to merge on an abstract level under this analysis, they may be punished separately if the defendant’s particular conduct demonstrates an independent purpose or effect of each. *Id.*

Defendant in the present case argues if this court were to remand his conviction for first degree assault and order he be sentenced on second degree assault, that offense would merge with his first degree robbery conviction. Brief of Appellant at 29-36. The State is unsure how this remedy would even occur. If this Court were to find there was insufficient evidence to convict defendant of first degree assault because there was no evidence the defendant knew his accomplice was going to commit an assault, the remedy would be to vacate the first degree assault conviction entirely. The State is unsure how a second degree assault conviction

⁶ *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

would result from defendant's insufficiency of the evidence argument in the first place. However, if somehow the proper remedy resulted in a second degree assault conviction, any analysis of a violation of double jeopardy for failure to apply the merger doctrine issue is premature and not ripe for review.

The ripeness doctrine aids in identifying cases where review would be premature. *State v. Bahl*, 164 Wn.2d 739, 751, 193 P.3d 678 (2008). "Three requirements compose a claim fit for judicial determination: if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Id.* (quoting *First United Methodist Church v. Hr'g Exam'r*, 129 Wn.2d 238, 255-56, 916 P.2d 374 (1996)). The court should also consider "the hardship of the parties of withholding court consideration." *Id.*

Defendant's double jeopardy claim is not fit for judicial determination at this time. It attempts to analyze a trial court action which has not yet taken place. It is also predicated on the assumption that this Court will find insufficient evidence existed to convict defendant of assault in the first degree and the appropriate remedy in such a situation would be to remand for imposition of assault in the second degree. If this Court were to order that, any determination of whether the assault in the second degree conviction merged with the first degree robbery conviction involves not only a legal analysis, but a factual one as well. In analyzing the merger doctrine's applicability to this particular case, "even if two

convictions would appear to merge on an abstract level under this analysis, they may be punished separately if the defendant's particular conduct demonstrates an independent purpose or effect of each." *Kier*, 164 Wn. 2d at 804. The trial court has not yet undertaken this analysis and the challenged action defendant seeks review of is not yet final, let alone even an "action" at this point.

There will also be no hardship to either party in the court withholding consideration of the issue. This may never even be an issue for one, but even if all of the things above were discussed and the trial court found the defendant's convictions were not the same for double jeopardy purposes, that decision would be subject to review. This Court's decision to not review this premature issue will not cause any hardship to either party. Defendant's double jeopardy claim involves several actions which have not yet taken place, an analysis by the trial court which has not yet occurred, and a decision by the trial court which is not yet final or even in existence. This Court should decline to review this issue as it is premature and not ripe for review.

6. APPELLATE COSTS MAY BE APPROPRIATE IN THIS CASE IF THE COURT AFFIRMS THE JUDGMENT OF THE TRIAL COURT AND SHOULD BE ADDRESSED IF THE STATE WERE TO PREVAIL AND WERE TO SEEK ENFORCEMENT OF COSTS.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wn. App. 342, 989 P.2d 583 (1999). The award of appellate costs to a prevailing party is within the discretion of the appellate court. RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000).

In *Nolan*, as in most of other cases discussing the award of appellate costs, the defendant began review of the issue by filing an objection to the State's cost bill. *Id.*, at 622. As suggested by the Supreme Court in *Blank*, 131 Wn.2d at 244, this is an appropriate manner in which to raise the issue. The procedure invented by Division I in *State v. Sinclair*, 192 Wn. App. 380, 389-390, 367 P. 3d 612 (2016), prematurely raises an issue that is not before the Court. If the defendant does not prevail, and if the State files a cost bill, the defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill. If appellate costs are imposed, the Legislature has provided a remedy in the same statute that authorizes the imposition of costs. RCW 10.73.160(4) provides:

A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment may at any time petition the court that sentenced the defendant or juvenile offender for remission of the payment of costs or of any unpaid portion. If it appears to the satisfaction of the sentencing court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the sentencing court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

The defendant argues that the Court should not impose costs on indigent defendants. Brief of Appellant at 36-41. However, through the language and provisions of RCW 10.73.160, the Legislature has demonstrated its intent that indigent defendants contribute to the cost of their appeal. This is not a new policy.

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976, the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. *Id.*, .160(2). In *State v. Barklind*, 82 Wn.2d 814, 557 P.2d 314 (1977), the Supreme Court held that requiring a defendant to contribute toward paying for appointed counsel under this statute did not violate, or even “chill” the right to counsel. *Id.*, at 818. In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In *Blank, supra*, at 239, the Supreme Court held this

statute constitutional, affirming this Court's holding in *State v. Blank*, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996).

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to alter the statutes.

In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Supreme Court interpreted the meaning of RCW 10.01.160(3). As *Blazina* instructed, trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, *Blazina* does not apply to appellate costs. As *Sinclair* points out at 389, the Legislature did not include the "individual financial circumstances" provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." See RCW 10.73.160(4).

The Legislature's intent that indigent defendants contribute to the cost of representation is also demonstrated in RCW 10.73.160(4), above, which permits a defendant to petition for remission of part or all of the appellate costs ordered. In *Blank*, *supra*, at 242, the Supreme Court found

that this relief provision prevented RCW 10.73.160 from being unconstitutional.

Not only does the Legislature intend indigent defendants to contribute to the costs of their litigation, the Legislature has decided that the defendants should pay interest on the debt. RCW 10.82.090(1) provides that such legal debts shall bear interest at the rate applicable to civil judgments, which is found in RCW 4.56.110. This can be as much as 12%. *Id.* RCW 10.82.090(2) establishes a means for defendants to obtain some relief from the interest, much as the cost remission procedure in RCW 10.73.160(4). But, the limits included in statutory scheme show that the Legislature intends that even judgments on defendants serving prison sentences accrue interest:

(2) The court may, on motion by the offender, following the offender's release from total confinement, reduce or waive the interest on legal financial obligations levied as a result of a criminal conviction...

RCW 10.82.090 (emphasis added). The rest of the “relief” is equally limited and demonstrative of the Legislature’s intent and presumption that the debts be paid:

(a) The court shall waive all interest on the portions of the legal financial obligations that are not restitution that accrued during the term of total confinement for the conviction giving rise to the financial obligations, *provided the offender shows that the interest creates a hardship for the offender or his or her immediate family;*

(b) The court may reduce interest on the restitution portion of the legal financial obligations only if the principal has been paid in full;

(c) The court may otherwise reduce or waive the interest on the portions of the legal financial obligations that are not restitution *if the offender shows that he or she has personally made a good faith effort to pay and that the interest accrual is causing a significant hardship. For purposes of this section, “good faith effort” means that the offender has either (i) paid the principal amount in full; or (ii) made at least fifteen monthly payments within an eighteen-month period, excluding any payments mandatorily deducted by the department of corrections;*

(d) For purposes of (a) through (c) of this subsection, the court may reduce or waive interest on legal financial obligations *only as an incentive for the offender to meet his or her legal financial obligations.* The court may grant the motion, establish a payment schedule, and retain jurisdiction over the offender for purposes of reviewing and revising the reduction or waiver of interest.

RCW 10.82.090(2) (emphasis added). This is not some legislative relic of the past. It was enacted in 1989, after RCW 9.94A, the Sentencing Reform Act, and most recently amended in 2015.

The unfortunate fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes “recoupment of fees for court-appointed counsel.” Obviously, all these defendants have been found indigent by the court. If the Court decided on a policy to excuse every indigent defendant from

payment of costs, such a policy would, in effect, nullify RCW 10.73.160(3).

Parties and the courts can criticize this legislation, its purpose and result, and that the debts accumulated by indigent defendants under RCW 10.73.160(3) (and 10.01.160) and the interest that accrues on it under RCW 10.82.090 and RCW 4.56.110 are onerous. The parties may even be in agreement in their criticism. In *Blazina* the Supreme Court was likewise critical of these statutes and their result. *See* 182 Wn.2d at 835-836. Yet, the Court did not find the statutes illegal or unconstitutional.

The question for this Court is not whether the Legislative intent or result of these laws is wise or even fair. The question is: are these laws legal or constitutional? Those questions were settled in the affirmative by the Supreme Court in *Blank*, and what the Court did not do in *Blazina*. It is for the Legislature to change the statute if it so desires.

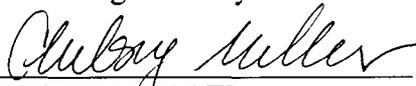
The State concedes that the trial court below entered an Order of Indigency. CP 243-246. In this case, however, the State has yet to “substantially prevail.” It has also not submitted a cost bill. This Court should wait until the cost issue is ripe before exploring such legally and substantively. In this instance, if a cost bill is submitted, the court may find that the defendant has the ability to pay the cost of his appeal. Any ruling regarding such costs at this time would be merely speculative regarding the defendant’s future ability to pay for appellate costs at the time that a cost bill is submitted, if one even is submitted.

D. CONCLUSION.

The State respectfully requests this Court affirm defendant's conviction and sentence, but remand to the trial court with an order to strike the following language from the judgment and sentence in section 4.5 "[x] The confinement time on Count(s) III contain(s) a mandatory minimum term of 60 months" in accordance with the arguments above.

DATED: August 30, 2016.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



CHELSEY MILLER
Deputy Prosecuting Attorney
WSB # 42892

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~US~~ Rmail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8-30-16 Theresa Kar
Date Signature

PIERCE COUNTY PROSECUTOR

August 30, 2016 - 3:14 PM

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