

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN NICHOLAS RUSSELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable F. Mark McCauley

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
tom@washapp.org

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

D. STATEMENT OF THE CASE..... 3

E. ARGUMENT 10

 1. Admission of the results of the testing of the cellphone and expert certification following the testing in the absence of the testimony of the expert who engaged in the testing violated Mr. Russell’s right to confrontation. 10

 a. *The Confrontation Clause prohibits the prosecution from relying on results of an investigation without calling the person who performed the investigation as a witness. .. 10*

 b. *Admission of the report generated by Mr. Matthews following his testing the phone without an ability to cross-examine Mr. Matthews violated Mr. Russell’s right to confrontation. 13*

 c. *The violation of Mr. Russell’s right to confront witnesses against him requires reversal. 17*

 2. The Merger Doctrine Requires Striking Mr. Russell’s Convictions for Fourth Degree Assault..... 18

 a. *The Double Jeopardy Clauses of the United States and Washington Constitutions bar multiple punishments for the same offense. 19*

 b. *The merger doctrine bars imposition of convictions for first degree robbery and fourth degree assault. 22*

i. <i>The assault conviction merged with the first degree robbery.....</i>	23
ii. <i>The assault merged with the attempted first degree robbery.....</i>	25
c. <i>The State did not prove the simple assaults had an independent purpose or effect.....</i>	27
3. The jury acquitted Mr. Russell of being armed with a firearm in Counts 1 and 2 and the court’s imposition of the enhancements of those counts violates his rights to a jury trial and due process.....	28
F. CONCLUSION	30

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS	
U.S. Const. amend XIV	28
U.S. Const. amend. V	19
U.S. Const. amend. VI.....	passim
WASHINGTON CONSTITUTIONAL PROVISIONS	
Article I, section 22.....	10
Article I, section 9.....	19
FEDERAL CASES	
<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).....	28
<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).....	29
<i>Blockburger v. United States</i> , 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).....	20, 21, 22
<i>Bullcoming v. New Mexico</i> , 564 U.S. 647, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011).....	passim
<i>Chapman v. California</i> , 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).....	17
<i>Crawford v. Washington</i> , 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).....	10, 13, 15
<i>Davis v. Washington</i> , 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).....	10
<i>Delaware v. Van Arsdall</i> , 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).....	17

<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	28
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).....	28
<i>Melendez-Diaz v. Massachusetts</i> , 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009).....	11, 14
<i>Missouri v. Hunter</i> , 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).....	20, 21
<i>North Carolina v. Pearce</i> , 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).....	20
<i>United States v. Alvarado-Valdez</i> , 521 F.3d 337 (5 th Cir. 2008).....	17
WASHINGTON CASES	
<i>In re Francis</i> , 170 Wn.2d 517, 242 P.3d 866, 870 (2010)	26, 27
<i>In re Jackson</i> , 175 Wn.2d 155, 283 P.3d 1089 (2012).....	28, 29
<i>In re Pers. Restraint of Borrero</i> , 161 Wn.2d 532, 167 P.3d 1106 (2007).....	19
<i>In re Pers. Restraint of Fletcher</i> , 113 Wn.2d 42, 776 P.2d 114 (1989).....	23
<i>In re Pers. Restraint of Orange</i> , 152 Wn.2d 795, 100 P.3d 291 (2004).....	25
<i>State v. Calle</i> , 125 Wn.2d 769, 888 P.2d 155 (1995).....	21
<i>State v. Chesnokov</i> , 175 Wn.App. 345, 305 P.3d 1103 (2013)	22
<i>State v. Esparza</i> , 135 Wn.App. 54, 143 P.3d 612 (2006).....	26
<i>State v. Freeman</i> , 153 Wn.2d 765, 108 P.3d 753 (2005)	passim
<i>State v. Hennessey</i> , 80 Wn.App. 190, 907 P.2d 331 (1995).....	29

<i>State v. Hughes</i> , 166 Wn.2d 675, 212 P.3d 558 (2009).....	22
<i>State v. Jasper</i> , 174 Wn.2d 96, 271 P.3d 876 (2012)	13
<i>State v. Kier</i> , 164 Wn.2d 798, 194 P.3d 212 (2008).....	20, 21, 24
<i>State v. Michielli</i> , 132 Wn.2d 229, 937 P.2d 587 (1997)	19
<i>State v. Parmelee</i> , 108 Wn.App. 702, 32 P.3d 1029 (2001).....	22
<i>State v. Prater</i> , 30 Wn.App. 512, 635 P.2d 1104 (1981)	28
<i>State v. Recuenco</i> , 163 Wn.2d 428, 180 P.3d 1276 (2008)	29
<i>State v. Vladovic</i> , 99 Wn.2d 413, 662 P.2d 853 (1983).....	23
<i>State v. Weber</i> , 159 Wn.2d 252, 149 P.3d 646 (2006)	19
<i>State v. Williams-Walker</i> , 167 Wn.2d 889, 225 P.3d 913 (2010).....	29
OTHER STATE CASES	
<i>Fields v. United States</i> , 952 A.2d 859 (D.C. 2008).....	17
STATUTES	
RCW 9A.56.200	25, 26

A. SUMMARY OF ARGUMENT

In a largely circumstantial case, Steven Russell was connected to a series of offenses through his cellphone found at the scene. The phone was sent to an independent facility where an expert extracted the data from the phone and generated a report. This expert did not testify at trial, rather a surrogate witness who never saw the phone or assisted in the testing testified about the results of tests run by the expert. As a result, Mr. Russell's right to confrontation was violated requiring reversal of his convictions.

B. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Russell's right to confront the witnesses against him as required by the Sixth Amendment and Article I, section 22.

2. Imposition of convictions for fourth degree assault, first degree robbery and attempted first degree robbery violated double jeopardy.

3. The imposition of the firearm sentence enhancements on Counts 1 and 2 where the jury acquitted Mr. Russell of being armed with a firearm violated his right to due process and right to a jury trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Confrontation Clause requires the prosecution offer an accused person the opportunity to cross-examine a witness who created incriminating testimonial evidence. Here, the prosecution failed to call the person who conducted the actual testing on the cellphone to testify at trial, but instead relied on a surrogate witness who had never seen the phone and had nothing to do with the testing. The witness could only relate the testing and conclusions reached by the expert who actually conducted the testing. Was Mr. Russell's right to confront the witnesses against him violated requiring reversal of his convictions?

2. A defendant has the constitutional right to be free from being placed twice in jeopardy as a result of multiple sentences for multiple convictions. The merger doctrine is a derivative of double jeopardy and provides that where one offense elevates the degree of another offense, imposing convictions for both violates double jeopardy. Here, the assault convictions provided the force to elevate the robbery allegation to first degree. Did the court violate double jeopardy when it imposed convictions for fourth degree assault and first degree robbery for the same act?

1. Due process and the right to a jury trial require the State to prove a sentence enhancement beyond a reasonable doubt prior to the court imposing the enhancement. Here, the trial court imposed firearm sentence enhancements on Counts 1 and 2 despite the jury finding Mr. Russell was not armed with a firearm on those counts. Is Mr. Russell entitled to reversal of his sentence and remand for resentencing without the firearm sentence enhancements?

D. STATEMENT OF THE CASE

This case arises out of two related incidents which occurred in the late evening of October 24, 2015, and the early morning hours of October 25, 2015. Jose Leiva-Aldana and Augustin Morales-Gamez were walking to their Aberdeen apartment when they were accosted by several men. 6/29/2016RP 92; 6/30/2016RP 94. The men demanded money, unsuccessfully tried to get to Mr. Leiva-Aldana's wallet and took Mr. Morales-Gamez's cellphone. 6/29/2016RP 95; 6/30/2016RP 95. The men physically assaulted Mr. Morales-Gamez and struck Mr. Leiva-Aldana in the head with a metal object. 6/29/2016RP 92-94; 6/30/2016RP 94. Mr. Morales-Gamez fought back, using a small knife he carried to strike out. 6/29/2016RP96. The attackers ran away. 6/30/2016RP 96. Mr. Morales-Gamez and Mr. Leiva-Aldana reported

the incident to the police and were taken to the Aberdeen Police Department to be interviewed. 6/29/2016RP 101-05.

Several people witnessed the incident and called the police. 6/29/2016RP 18-19, 47-50. While speaking to the police, Nichol Smith discovered a cellphone on the ground and gave it to the police. 6/29/2016RP 23, 54; 7/1/2016RP 249.

While the police were investigating the incident, a two men later identified as Steven Russell and Daniel Galeana-Ramirez dropped Alejandro Ramirez off at the Grays Harbor Community Hospital in Aberdeen. 6/30/2016RP 159-60. Alejandro had been stabbed and was examined in the emergency room. 6/30/2016RP 161-63.

After completing their interviews with the police, Mr. Leiva-Aldana and Mr. Morales-Gamez walked back to their apartment. 6/29/2016RP 105; 6/30/2016RP 101-102. As the men approached the apartment, two men with guns were waiting and opened fire. 6/29/2016RP 106. Mr. Leiva-Aldana was shot in the abdomen and Mr. Morales-Galeana was shot in the foot. 6/29/2016RP 106; 6/30/2016RP 102. Mr. Leiva-Aldana identified Daniel Galeana-Ramirez as the person who shot him. 6/30/2016RP 104.

Mr. Russell was subsequently charged with a count of first degree robbery and a count of attempted first degree robbery, each count with an accompanying firearm enhancement. CP 224-25. In addition, Mr. Russell was charged with two counts of first degree assault and two counts of fourth degree assault. CP 225-27. All of the counts arose out of the two related incidents described above. The one item that linked Mr. Russell to the two related incidents was his cellphone, located at the scene.

Prior to trial, the State sought to admit the results of testing of the cellphone found at the scene of the robbery by an expert following the extraction of data without having the expert testify. The State argued this process did not violate Mr. Russell's rights to confrontation under the Sixth Amendment and Article I, section 22. CP 59-60; 6/22/2016RP 4-11. Instead, the State sought to admit the expert's written conclusions through the testimony of the lead investigating detective. CP 56-60. Alternatively, the State sought to substitute the testimony of a surrogate witness from the testing institution to testify about the testing and conclusions of the testing expert. 6/22/2016RP 5.

In testifying at the pretrial hearing on the admissibility of the testing results, Joan Runs Through, the assistant director of the

Computer Crime Institute at Dixie State University in Utah, and a lab examiner at its forensics laboratory, admitted she did not test Mr. Russell's phone, did not witness the testing and relied solely on the reports of the testing done by Mr. Matthews. 6/22/2016RP 43-44, 60-61. Ms. Runs Through testified extensively about the extraction and testing process

We take the memory chip out. This takes quite a bit of heat because we have to not just melt the solder, but there's also epoxy around it.

Chips are rated to about 500 degrees Fahrenheit -. We have to stay below that heat. We take the chip off, we put it into an adapter, connect it to a program and use the program in a read only mode to transfer a bit-for-bit copy, a binary copy, of that chip.

We then take that binary image, put it into software such as Cell Bright's physical analyzer and the software will parse that binary information into human readable user data.

...

Q Now, when the -- you mentioned removing the chip. You said there was epoxy that had to be softened up with heat; is that right?

A Yes.

Q And now if somebody uses an incorrect heat setting, what's going to happen?

A It's going to destroy the data.

...

Q So throughout this entire process how many

discretionary decisions does the operator really have to make?

A Discretionary, I would -- two. You choose the size of the chip, the software, and the second one is you are choosing the scripts that are to be run.

6/22/2016RP 39-40, 42-48.

The trial court ruled Mr. Russell's right to confrontation required the surrogate witness to testify in person and be subject to cross-examination in order to admit the results of the data extraction by the testing expert.¹

Here's my ruling. As I already indicated I believe that the defense has the right to confront a witness on this situation. Because I -- I don't know of any case that would allow me just to say, the data comes to Detective Cox, who is not an expert at all in computers, and that he can just go forward with the data and lay some sort of foundation and have it admitted. So we do need an expert.

My number one preference would be to get the expert that did it. I think that's what the commentators recommend, number one. And it's kind of a very hotly-debated area of the law, as you can see from reading the Lui decision and other decisions.

6/22/2016RP 58-59.

¹ Initially, the State sought to have this witness testify via *SKYPE*. Following the pretrial hearing where the expert testified via *SKYPE*, the trial court ruled this process was insufficient and ordered the witness to testify in person. 6/22/2016RP 58-61.

At trial, Ms. Runs Through testified regarding the extraction of the data on the cellphone and preparation of the certification listing the results of the testing and the expert's conclusion. 6/30/2016RP 24-73. The director of the Institute and the person who had engaged in the testing of the cellphone, William Matthews, had been fired by the Institute and Ms. Runs Through was testifying regarding his testing and results of that testing in his stead. 6/30/2016RP 42, 73-74. According to Ms. Runs Through, Mr. Matthews was fired for misusing the Institute's funds by funding other areas without the University's permission. 6/30/2016RP 74.

Ms. Runs Through testified consistent with her pretrial testimony regarding the process purported to be used by Mr. Matthews in extracting the data from the phone and generating a report regarding the results. The report was subsequently admitted at trial. 6/30/2016RP 70.

The results of the cellphone testing became the centerpiece of the State's circumstantial case against Mr. Russell. During closing argument, the prosecutor stressed the importance of this data in the prosecution:

Now, different evidence has different amounts of weight. Some of it has great value, like that cell phone. Cell

phone told us all kinds of things. Okay. Until the cell phone, we had witness - three eyewitness ID's, three separate people saying Steven Russell was one of the attackers. After the cell phone we know it was his phone . . . There's no question it's his. Three eyewitnesses and a cell phone puts him as one of the robbers.

...

Now, the cell phone itself doesn't tell you anything, right? It's just a phone. It's broken. It's had the chips ripped out of it. It's in a puddle. It's fried. It has to be in evidence, but this itself doesn't tell you anything. What tells you something is the cell phone records. And I've already talked about those and you can look at them to your heart's content. Detective Cox has pretty much explained what he found in there. Three eyewitnesses and the cell phone make Russell out as the larger of the two attackers.

...

Now, Ramirez. The common thread in this case is Russell, but he's connected to Ramirez . . . The cell phone records come back - and you've got them here.

7/15/2016RP 636-37, 65-52, 655-56.

At the conclusion of the trial, the jury found Mr. Russell guilty as charged, but the jury refused to find that he used a firearm in committing the robbery and attempted robbery in Counts 1 and 2. CP 211-20. In imposing the sentence, the trial court imposed the firearm enhancements of Counts 1 and 2 despite the special verdicts on those counts. CP 185.

E. ARGUMENT

1. **Admission of the results of the testing of the cellphone and expert certification following the testing in the absence of the testimony of the expert who engaged in the testing violated Mr. Russell's right to confrontation.**

- a. *The Confrontation Clause prohibits the prosecution from relying on results of an investigation without calling the person who performed the investigation as a witness.*

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to confront and cross-examine witnesses. The Confrontation Clause “applies to ‘witnesses’ against the accused - in other words, those who ‘bear testimony.’” *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (citation omitted). It also “bars ‘admission of testimonial statements of a witness who did not appear at trial unless [the declarant] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.’” *Davis v. Washington*, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), quoting *Crawford*, 541 U.S. at 53-54.

In *Melendez-Diaz v. Massachusetts*, the United States Supreme Court ruled that a lab technician's certification prepared in connection with a criminal prosecution was “testimonial” and its admission at trial

by another technician violated the Confrontation Clause. 557 U.S. 305, 319-24, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). “A document created solely for ‘an evidentiary purpose,’ made in aid of a police investigation ranks as testimonial.” *Bullcoming v. New Mexico*, 564 U.S. 647, 664, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011), quoting *Melendez-Diaz*, 557 U.S. at 317-20.

When a forensic analyst tests evidence and prepares a report for use in a criminal investigation, the substance of that report is “‘testimonial,’ and therefore within the compass of the Confrontation Clause.” *Bullcoming*, at 658-59, quoting *Melendez-Diaz*, 557 U.S. at 317-21. The Confrontation Clause guarantees the defendant the opportunity to test through cross-examination the “honesty, proficiency, and methodology” of the analyst who actually performed the forensic analysis. *Melendez-Diaz*, 557 U.S. at 317-20. Accordingly, an analyst’s report may not be introduced into evidence by another witness who did not personally observe the testing of the substance. *Bullcoming*, 564 U.S. at 665.

In *Bullcoming*, another scientist employed by the same crime laboratory testified because the scientist who analyzed the blood alcohol sample at issue had taken a leave of absence. The state court

ruled that this surrogate testimony satisfied the Sixth Amendment because the accused had the opportunity to cross-examine a live witness from the same laboratory about the procedures used to obtain relatively straightforward machine-generated results. *Id.* at 659-60. The United States Supreme Court reversed and held that the “opportunity to confront a substitute witness” does not satisfy the constitutional right to confrontation. *Id.* at 663.

The *Bullcoming* Court explained that the Confrontation Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another’s testimonial statements provides a fair enough opportunity for cross-examination. *Id.* Furthermore, substituting a witness who can comment on work done by someone else but who did not personally test the substance or observe the testing as it occurred does not serve the purpose of confrontation. *Id.* Surrogate testimony cannot convey what the analyst knew or observed about the events her report concerned, and cannot “expose any lapse or lies” by the analyst. *Id.* at 661-62.

In an analogous scenario, our Supreme Court reaffirmed the testimonial significance of reports generated out of court and “the need to cross-examine the government agents who prepare them.” *State v.*

Jasper, 174 Wn.2d 96, 116, 271 P.3d 876 (2012), *citing Bullcoming*, 131 S.Ct. at 2715. Even when written reports are obviously reliable, the Confrontation Clause dictates that the accused person must have the right “to raise before a jury questions concerning [the scientist’s] proficiency, the care he took in performing his work, and his veracity.” *Id.*, *quoting Bullcoming*, 131 S.Ct. at 2715 n.7.

The report generated by Dixie State regarding the cellphone alleged to belong to Mr. Russell was testimonial as it was requested by Aberdeen Police to aid in their investigation and for the purposes of this litigation. *Bullcoming*, 564 U.S. at 664.

- b. *Admission of the report generated by Mr. Matthews following his testing the phone without an ability to cross-examine Mr. Matthews violated Mr. Russell’s right to confrontation.*

The surrogate witness, Ms. Runs Through, testified about the results of testing Mr. Russell’s phone, even though she had nothing to do with the testing and had never seen the phone until contacted by the Aberdeen Police.

The Confrontation Clause does not allow the prosecution to present one person’s testimonial statements through the trial testimony of another. *Crawford*, 541 U.S. at 68. So long as the expert’s testimonial statements were presented for their truth, regardless of the

conduit, the expert became a witness that Mr. Russell had a right to confront. *Bullcoming*, 131 S. Ct. 2716.

Here, the testing was done by Mr. Matthews who also generated the report regarding the results of the testing. Yet, Mr. Matthews did not appear and testify. Instead a person who had never seen the phone and did not assist in the testing was allowed to testify about the process used and the results reached. This was no different than what happened in *Melendez-Diaz* and *Bullcoming*. The resulting report was generated solely for admission at Mr. Russell's trial and was admitted for the truth of the matter asserted in the report. The fact that Mr. Russell was allowed to cross-examine a surrogate witness regarding the process and results does not solve the error here.

The State argued that Mr. Matthews did nothing more than turn the phone on and plug it in to a computer program to determine its contents. 6/22/2016RP 11-12. The trial court dismissed this argument as this Court should, ruling that if the process was so easy, the Aberdeen Police would have done it instead of sending it to an expert. *Id.*

This is no different than what happened in *Bullcoming*. *Bullcoming* involved a challenge to the testing of a blood sample in a

DUI case where the analyst who did the testing and reached the results did not testify at trial. *Id.* at 653. The test was run on a gas chromatograph machine, the operation of which requires specialized knowledge and training. *Id.* The New Mexico Supreme Court stated that the number registered by the gas chromatograph machine called for no interpretation or exercise of independent judgment on the expert's part and the analyst's role was that of a "mere scrivener." *Id.* at 659-61. The United States Supreme Court made clear this did not make any difference for the purposes of confrontation:

In any event, the comparative reliability of an analyst's testimonial report drawn from machine-produced data does not overcome the Sixth Amendment bar. This Court settled in *Crawford* that the "obviou[s] reliab[ility]" of a testimonial statement does not dispense with the Confrontation Clause. 541 U.S., at 62, 124 S.Ct. 1354; see *id.*, at 61, 124 S.Ct. 1354 (Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing [the evidence] in the crucible of cross-examination"). Accordingly, *the analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess "the scientific acumen of Mme. Curie and the veracity of Mother Teresa."* *Melendez-Diaz*, 557 U.S., at —, n. 6, 129 S.Ct., at 2537, n. 6.

Bullcoming, 564 U.S. at 661 (emphasis added).

In *Bullcoming*, the Court emphasized that questioning of the State's "surrogate" witness—another technician who testified to the

practices at the laboratory where the testing took place—could not have exposed lapses or lies on the part of the technician who actually performed the analysis at issue. *Bullcoming*, 131 S.Ct. at 2715–16. This is precisely the point the trial court made as well in at least requiring

Ms. Runs Through to testify at trial:

Can the contents be altered? Can things be added to the contents? I mean, I imagine there's a lot of cross-examination questions where they can try to raise -- you know how defense is. They're going to try to come up with all possibilities of what could happen.

Maybe the report could come out -- maybe there's a way to change that program where Aberdeen police could say, well, add this text into it because it will strengthen our case. I'm not saying they'd do it, but I mean cross-examining is cross-examining.

6/22/2016RP 21.

The trial court here was correct in ruling that cross-examination regarding the testing and results was required to meet confrontation.

The court erred however, when it allowed a surrogate to testify instead of the person who actually engaged in the testing, here Mr. Matthews.

As a result, Mr. Russell's right to confrontation was violated.

c. *The violation of Mr. Russell's right to confront witnesses against him requires reversal.*

The State has the burden of demonstrating beyond a reasonable doubt that a confrontation violation did not contribute to the verdict. *Chapman v. California*, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *see also Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (“The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt”); *United States v. Alvarado-Valdez*, 521 F.3d 337, 342 (5th Cir. 2008) (harmless error analysis following confrontation violation requires court to assess whether jury possibly relied on testimonial statement when reaching verdict); *Fields v. United States*, 952 A.2d 859 (D.C. 2008) (finding improperly admitted drug analysis not harmless when government could not prove it did not contribute to the verdict obtained).

Mr. Russell was never identified as either one of the people involved in the robbery or the assault. Thus, the case against him was circumstantial and relied heavily on the results of the cellphone testing to put him in the area of the robbery and the assault, and to tie him in with the others involved. Given the State's emphasis on the testing

results of the cellphone in its case-in-chief as evidenced by the emphasis placed in closing argument on this evidence, this Court cannot say with any confidence that the error was harmless. Mr. Russell is entitled to reversal of his convictions and remand for a new trial.

2. The Merger Doctrine Requires Striking Mr. Russell's Convictions for Fourth Degree Assault.

At a pretrial hearing, the State moved to amend the Information to add two counts of fourth degree assault as alternative offenses to the robbery counts:

It also adds two counts of simple assault, fourth degree misdemeanor assault for the same incident, and that is because there's no lesser included of robbery one that would apply here. And if the jury - the jury could theoretically find that force was used, but nothing was taken or nothing was attempted to be taken.

So the assault in the fourth degree is just sort of an alternative - again, it's just a misdemeanor. I don't think there's an objection to it from Mr. Russell's attorney.

6/17/2016RP 29-30.

During closing arguments, the State emphasized the two simple assault counts were part and parcel with the robbery:

Assault in the fourth degree, unquestionable. Because this is no ordinary robbery, they hit him over and over and over again.

7/7/2016RP 659.

In imposing its sentence, the trial court understood the simple assault counts were intimately associated with the robbery:

Counts 5 and 6 were assault fourth degree. *Those are gross misdemeanor offenses arising out of the same incident as the assaults - assaults first degrees - excuse me. No, they're arising out of the same incident as the robberies.* Counts 1 and 2, maximum sentence is 364 days in jail.

7/15/2016RP 19 (emphasis added).

- a. *The Double Jeopardy Clauses of the United States and Washington Constitutions bar multiple punishments for the same offense.*

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that “[n]o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb.” Article I, section 9 of the Washington State Constitution provides that “[n]o person shall ... be twice put in jeopardy for the same offense.” The two clauses provide the same protection. *In re Pers. Restraint of Borrero*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007); *State v. Weber*, 159 Wn.2d 252, 265, 149 P.3d 646 (2006). The State may bring multiple charges arising from the same criminal conduct in a single proceeding. *State v. Michielli*, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997). However, the double jeopardy provisions of the United States and Washington Constitutions bar multiple punishments for the same offense. *North*

Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *State v. Kier*, 164 Wn.2d 798, 803, 194 P.3d 212 (2008).

The Legislature can enact statutes imposing multiple punishments for the same conduct. “With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). If the Legislature intended to impose multiple punishments, their imposition does not violate the double jeopardy clause. *Id.* at 368.

If, however, such clear legislative intent is absent, then courts apply the *Blockburger* test. *Id.*; see *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Under this test, “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” *Id.* If application of the *Blockburger* test results in a determination that there is only one offense, then imposing two punishments is a double jeopardy violation. The assumption underlying the *Blockburger* rule is that the Legislature

ordinarily does not intend to punish the same conduct under two different statutes; the *Blockburger* test is a rule of statutory construction applied to discern legislative purpose *in the absence of clear indications of contrary legislative intent*. *Hunter*, 459 U.S. at 368.

In short, when a single trial and multiple punishments for the same act or conduct are at issue, the initial and often dispositive question is whether the legislature intended that multiple punishments be imposed. *Id.*; *Kier*, 164 Wn.2d at 804. If there is *clear* legislative intent to impose multiple punishments for the same act or conduct, this is the end of the inquiry and no double jeopardy violation exists. If such clear intent is absent, then the court applies the *Blockburger* “same evidence” test to determine whether the crimes are the same in fact and law. *State v. Calle*, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995).

This Court uses a three-part test in determining whether convictions violate double jeopardy. *State v. Freeman*, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005). First, the Court determines whether there is express or implicit legislative intent based on the criminal statutes at issue. *Kier*, 164 Wn.2d at 804. Second, if legislative intent is unclear, the Court turns to the *Blockburger* “same evidence” test, which asks if the crimes are the same in law and fact. *Kier*, 164 Wn.2d at 804.

Finally, the Court determines whether the merger doctrine is applicable. *Kier*, 164 Wn.2d at 804.

Double jeopardy challenges are reviewed *de novo*. *Freeman*, 153 Wn.2d at 770. The remedy for violations of double jeopardy is to vacate the lesser offense. *State v. Hughes*, 166 Wn.2d 675, 686 n. 13, 212 P.3d 558 (2009); *State v. Chesnokov*, 175 Wn.App. 345, 349, 305 P.3d 1103 (2013).

Here, the relevant statutes do not explicitly authorize separate punishments. Additionally, the offenses are not the same under the *Blockburger* same evidence test. Thus, the issue is whether the offenses merge for the purposes of double jeopardy.

b. *The merger doctrine bars imposition of convictions for first degree robbery and fourth degree assault.*

The merger doctrine applies at the time of sentencing and is designed to correct violations of double jeopardy. *State v. Parmelee*, 108 Wn.App. 702, 711, 32 P.3d 1029 (2001). The benchmark for determining the appropriate remedy is legislative intent. *Freeman*, 153 Wn.2d at 771-72. Merger is a doctrine of statutory interpretation used to determine whether the legislature intended to impose multiple punishments for a single act that violates several statutory provisions.

In re Pers. Restraint of Fletcher, 113 Wn.2d 42, 50-51, 776 P.2d 114 (1989).

Under the merger doctrine, when the degree of one offense is raised by conduct that the legislature has separately criminalized, courts presume that the legislature intended to punish both offenses once through a greater sentence for the greater crime. *Freeman*, 153 Wn.2d at 772-73. Two offenses merge under the merger doctrine if, “to prove a particular degree of crime (*e.g.*, first degree rape) the State must prove not only, that a defendant committed that crime (*e.g.*, rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (*e.g.*, assault or kidnapping).”

Freeman, 153 Wn.2d at 777-78, quoting *State v. Vladovic*, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983). Thus, where a predicate offense is an underlying element of another crime, generally the predicate offense will merge into the second, more serious crime and the court may not punish it separately. *Vladovic*, 99 Wn.2d at 421.

i. The assault conviction merged with the first degree robbery.

When a second degree assault is the force that elevates a robbery to the first degree, there is “no evidence that the legislature intended to punish second degree assault separately from first degree

robbery when the assault facilitates the robbery.” *Freeman*, 153 Wn.2d at 776. Such second degree assault committed in furtherance of a robbery merges with the robbery unless a merger exception applies. *Id.* at 778.

In *Kier*, Qualgine Hudson was driving home with his cousin in the passenger seat. 164 Wn.2d at 802. Three men in another car honked their horn at Hudson. *Id.* Mr. Hudson pulled over, got out of the car, and began talking to one of the men. *Id.* Mr. Kier got out of the other car and pointed a gun at Mr. Hudson. *Id.* Mr. Hudson ran away, and Mr. Kier then approached the cousin, who was still in Mr. Hudson’s car, and pointed the gun at him. *Id.* Mr. Kier ordered the cousin out of the car. *Id.* After the cousin got out, Mr. Kier and his two accomplices drove away with both cars. *Id.* at 803. Mr. Kier was found guilty of second degree assault and first degree robbery. *Id.*

The Supreme Court concluded that “the completed assault was necessary to elevate the completed robbery to first degree.” *Id.* at 807. The Court further explained, “The 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.” *Id.* at 806.

Here the two assaults provided the force necessary to elevate the robbery to first degree, since it provided the force which inflicted the bodily injury, a necessary element of first degree robbery for which Mr. Russell was charged. RCW 9A.56.200. Accordingly, the assaults should have merged with the robbery.

The fact Mr. Russell was also charged with the alternative means of committing the robbery, that he was armed with a firearm is no moment. CP 224-25. That is because the jury ultimately found that a firearm was not used in the robberies. CP 217, 219.

ii. The assault merged with the attempted first degree robbery.

This argument applies to the attempted first degree robbery as well. It is important to note at the outset that the offenses are not considered in the abstract but rather, how the offenses were actually charged. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 817, 100 P.3d 291 (2004).

In *In re Francis*, the Supreme Court determined that second degree assault merged with first degree *attempted* robbery as charged under a straight *Freeman* analysis. 170 Wn.2d 517, 525, 242 P.3d 866,

870 (2010). Here, the sole purpose of the second degree assault was to facilitate the attempted robbery. The assault was not ‘separate and distinct’ from the attempted robbery; it was incidental to it.” *Id.*

It may be argued that an attempted first degree robbery is different and the same analysis as a completed robbery does not apply. *See State v. Esparza*, 135 Wn.App. 54, 61-64, 143 P.3d 612 (2006) (holding that when the State charges a defendant with an attempt crime but does not specify what the substantial step is, for double jeopardy analysis, the court need not assume the assault conduct is the substantial step when other conduct would also satisfy that requirement). But the decision in *Francis* distinguished this argument and the *Esparaza* decision by pointing out that the State charged Francis with *specific* conduct - inflicting bodily injury on the victim - to satisfy the statutory element to raise the attempted robbery to the first degree. *See* RCW 9A.56.200(1)(a)(iii). The second degree assault conduct was inseparable from the attempted first degree robbery *as it was charged*. The convictions are thus the same for the purposes of double jeopardy and must merge. *Francis*, 170 Wn.2d 526, n.5, *citing Freeman*, 153 Wn2d at 772-73.

The same is true here. Mr. Russell was charged with the same specific conduct here as was Mr. Francis: inflicting bodily injury, a statutory element of attempted first degree robbery. The fourth degree assault should have merged with the attempted first degree robbery.

c. *The State did not prove the simple assaults had an independent purpose or effect.*

“If there is an independent purpose or effect to each [offense], they may be punished separately.” *Freeman*, 153 Wn.2d at 773. “This exception is less focused on abstract legislative intent and more focused on the facts of the individual case.” *Id.* at 779.

The State argued in closing argument: “Assault in the fourth degree, unquestionable. Because this is no ordinary robbery, they hit him over and over and over again.” 7/15/2016RP 659.

However, this exception does not apply merely because the defendant used *more* violence than necessary to accomplish the crime. The test is not whether the defendant used the least amount of force to accomplish the crime. The test is whether the unnecessary force had a purpose or effect independent of the crime.

Id. (emphasis in original).

There is no evidence in the record to support a conclusion that the violence used by Mr. Russell in committing the robbery and attempted robbery was “gratuitous,” or done with an independent

purpose or effect. Using force to intimidate a victim into yielding property is often incidental to the robbery. *State v. Prater*, 30 Wn.App. 512, 516, 635 P.2d 1104 (1981). The grievousness of the harm is not the question. Further, the jury was not asked to make, nor did it make, a finding that the assaults constituted more violence than necessary to complete the robbery. Based on the crime as charged and proved, this exception would not apply.

3. The jury acquitted Mr. Russell of being armed with a firearm in Counts 1 and 2 and the court's imposition of the enhancements of those counts violates his rights to a jury trial and due process.

The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

All factual findings necessary to the imposition of a sentence enhancement must be submitted to the jury and proved beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 301-05, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *In re Jackson*, 175 Wn.2d 155, 159, 283 P.3d 1089 (2012). The State bears the burden of proving the elements of a sentencing enhancement beyond a reasonable doubt. *State v. Recuenco*, 163 Wn.2d 428, 435-37, 180 P.3d 1276 (2008); *State v. Hennessey*, 80 Wn.App. 190, 194, 907 P.2d 331 (1995).

The jury was asked whether Mr. Russell or an accomplice used a firearm in Counts 1 and 2 and issued special verdicts saying “No.” CP 217, 219. In completing the Judgment and Sentence, the court noted that the jury had found that the jury had issued a special verdict stating that a firearm was used in Counts 1 and 2. CP 185. The court’s action ignored the jury’s refusal to find Mr. Russell used a firearm. Thus, the enhancements on Counts 1 and 2 must be reversed based upon the jury’s finding.

The remedy for insufficient evidence to support a firearm special verdict is to reverse the sentence enhancements and remand for resentencing without the enhancements. *State v. Williams-Walker*, 167 Wn.2d 889, 902, 225 P.3d 913 (2010); *Hennessey*, 80 Wn.App. at 195.

As a consequence, Mr. Russell is entitled to reversal of his sentence and remand for resentencing without the firearm enhancements on Counts 1 and 2.

F. CONCLUSION

For the reasons stated, Mr. Russell asks this Court to reverse his convictions and remand for a new trial. Alternatively, he asks this Court to find the assault convictions merged with the robbery and attempted robbery convictions requiring reversal of his sentence and remand for resentencing.

DATED this 26th day of April 2017.

Respectfully submitted,

s/Thomas M. Kummerow

THOMAS M. KUMMEROW (WSBA 21518)

Washington Appellate Project – 91052

1511 Third Avenue, Suite 701

Seattle, WA. 98101

(206) 587-2711

Fax (206) 587-2710

tom@washapp.org

Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 49245-8-II
)	
STEVEN RUSSELL,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF APRIL, 2017, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
|--|-------------------|---|
| [X] JASON WALKER, DPA
[jwalker@co.grays-harbor.wa.us]
GRAYS HARBOR CO. PROSECUTOR'S OFFICE
102 W. BROADWAY AVENUE, ROOM 102
MONTESANO, WA 98563-3621 | ()
()
(X) | U.S. MAIL
HAND DELIVERY
E-SERVICE VIA
COA PORTAL |
| [X] JOHN HAYS
[jahays@3equitycourt.com]
1402 BROADWAY ST
LONGVIEW, WA 98632-3714 | ()
()
(X) | U.S. MAIL
HAND DELIVERY
E-SERVICE VIA
COA PORTAL |
| [X] JARED STEED
NIELSEN BROMAN KOCH PLLC
[SloaneJ@nwattorney.net]
1908 E MADISON ST
SEATTLE, WA 98122 | ()
()
(X) | U.S. MAIL
HAND DELIVERY
E-SERVICE VIA
COA PORTAL |
| [X] STEVEN RUSSELL
350124
WASHINGTON STATE PENITENTIARY
1313 N 13 TH AVE
WALLA WALLA, WA 99362 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF APRIL, 2017.

X _____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT
April 26, 2017 - 4:26 PM
Transmittal Letter

Document Uploaded: 3-492458-Appellant's Brief.pdf

Case Name: STATE V. STEVEN RUSSELL

Court of Appeals Case Number: 49245-8

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: maria@washapp.org

A copy of this document has been emailed to the following addresses:

jwalker@co.grays-harbor.wa.us

jahays@3equitycourt.com

SloaneJ@nwattorney.net