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NO. 49245-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ALEJANDRO RAMIREZ,

Appellant.

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

The Honorable F. Mark McCauley, Judge  
The Honorable Stephen Brown, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY<sup>1</sup>

1. RAMIREZ'S RIGHT TO A UNANIMOUS VERDICT WAS VIOLATED BECAUSE INSUFFICIENT EVIDENCE SUPPORTS THE FIRST DEGREE ROBBERY AND ATTEMPTED FIRST DEGREE ROBBERY CONVICTIONS.

Ramirez contends, for reasons set forth fully in the opening brief, that his right to a unanimous verdict was violated because there was insufficient evidence to support a finding that Ramirez, or an accomplice, displayed what appeared to be a firearm or other deadly weapon, during commission of the robbery or attempted robbery. Brief of Appellant (BOA) at 12-25.

In response, the State does not dispute that first degree robbery and attempted first degree robbery are alternative means crimes. Brief of Respondent (BOR) at 16-17, 23-25. The State suggests however, that Ramirez has waived this issue on appeal because he failed to raise to the issue in the trial court and has established no "'manifest' constitutional error because there is no prejudice in the record." BOR at 24. The State cites no authority for its contention that a sufficiency of alternative means argument cannot be raised for the first time on appeal. Nor could it. As explained in the opening brief, "[i]t is well established a unanimity error

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<sup>1</sup> The State's arguments regarding the improper joinder and denial of severance of Ramirez's case from his co-defendants have been sufficiently addressed in the Brief of Appellant and need not be challenged further on reply.

amounts to manifest constitutional error under RAP 2.5(a)(3) that may be raised for the first time on appeal." BOA at 14 (citing State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S. Ct. 2867, 115 L. Ed. 2d 1033 (1991); State v. Hursh, 77 Wn. App. 242, 248, 890 P.2d 1066 (1995), abrogated on other grounds, State v. Roggenkamp, 153 Wn.2d 614, 106 P.3d 196 (2005)). The State fails to address, or even cite, any of these cases.

Contrary to the State's assertion, Ramirez has also shown the error was manifest. The jury may have convicted Ramirez of first degree robbery and/or attempted first degree robbery based on insufficient evidence of the alternative means of committing either crime by "display[ing] what appeared to be a firearm or other deadly weapon". Under such circumstances, the convictions cannot be affirmed. State v. Ortega-Martinez, 124 Wn.2d 702, 708, 881 P.2d 231 (1994).

Without citing any authority, the State next argues that the jury's special verdict finding that Ramirez was not armed with a firearm during the allegedly robbery and attempted robbery demonstrates that the jury must have unanimously convicted Ramirez based only on the sufficient alternative of "inflicting bodily injury." BOR at 16-18. This argument necessarily fails for several reasons.

First, notwithstanding the special verdict findings, where as here, there is insufficient evidence of one alternate means, this Court may not assume the jury relied unanimously on the supported alternative means of "inflicting bodily injury" to support the verdict. State v. Woodlyn, 188 Wn.2d 157, 162, 392 P.3d 1062 (2017).

Second, the State's argument fails to recognize the different questions posed by the special verdict forms and the to-convict instructions given by the trial court. Ramirez was charged as an accomplice to the first degree and attempted first degree robberies. See CP 73 (instruction 6). Thus, whether he or Russell "displayed what appeared to be a firearm or other deadly weapon" during commission of either crime is not dispositive because Ramirez was liable for any conduct undertaken by himself or Russell in commission of the crimes. Moreover, to convict Ramirez of first degree robbery or attempted first degree robbery the jury was not required to find that Ramirez or Russell were actually "armed with a deadly weapon." See RCW 9A.56.200(1)(a)(i). That alternative means of committing first degree robbery was not proven, and the to-convict instructions did not present that alternative means as a basis upon which the jury could convict Ramirez or Russell. CP 78-79 (instruction 27).

In contrast however, the special verdict forms required the jury to determine the specific question of whether "...Alejandro Ramirez [was] armed with a firearm at the time of the commission[.]" of first degree robbery and/or attempted first degree robbery. CP 94, 96. Not only was the jury asked to decide a different question as part of the special verdict forms therefore, but the jury could have concluded Ramirez was an accomplice to the robbery and attempted robbery without proof that Ramirez himself was armed, as was required for the special verdict form.

Finally, the State argues that sufficient evidence exists to show that Ramirez or an accomplice displayed what appeared to be a firearm or other deadly weapon, during the robbery or attempted robbery because Morales-Gamez testified that he was hit in the head with something like metal and Leiva-Aldana testified that he saw a black object in the hands of one of the attackers that was "an arm". BOR at 19-21.

As discussed fully in the opening brief however, Morales-Gamez explicitly denied that anyone had a gun, knife, or any other weapon during the alleged robbery incident. BOA at 20 (citing 9RP 95, 100, 127-28). Whether Morales-Gamez was hit in the head with "something" that was metal is of no consequence when there is no evidence this metal object was either a firearm, what appeared to be a firearm, or any other object

that satisfied the legal definition of "deadly weapon" under RCW 9A.04.110(6).

The State also points to Morales-Gamez's testimony that four people had a gun, but only one of them had a gun in their hands. BOR at 21 (citing 10RP 106). This argument mischaracterizes the record. This testimony was given in response to questioning about the separate incident that gave rise to the first degree assault charges. See 10RP 105-07. Ramirez was not charged with this incident because he was in the hospital at the time. Whatever happened during the first degree assault incident is of no moment to the first degree robbery and attempted first degree robbery charges and cannot satisfy the State's burden of proof on the alternative means of "display[ing] what appeared to be a firearm or other deadly weapon".

Similarly, pointing to Leiva-Aldana's testimony about seeing "an arm" in the hands of one of the attackers misses the mark. The State's assertion that Leiva-Aldana must have "meant that the assailants were armed" rests entirely on speculation. Leiva-Aldana did not testify that "an arm" meant "armed". The State nonetheless extrapolates:

Having an arm in one's hand makes no sense. What is imminently more likely is that Mr. Leiva meant that the assailants were armed with a metal object that was used to *putazo* his compadre, and that object was a pistol, as Mr.

Morales and Mr. Leiva excitedly said to Ms. Smith on the night of the incident.

BOR at 21.

This is not proof but post hoc conjecture. In fact, Leiva-Aldana explicitly testified that based on what he saw, he could not say that the attackers had a knife or that he "saw a - a firearm or a gun." 10RP 95-96, 149-50.

In short, while the evidence arguably showed that Leiva-Aldana saw "an arm" or something "dark" in either the hand of Russell or Ramirez during the robbery incidents, this evidence was insufficient to prove beyond a reasonable doubt that the "arm" or "dark" object was a firearm, what appeared to be a firearm, or any other object that satisfied the legal definition of "deadly weapon." Reversal is required.

2. IMPOSITION OF SENTENCES FOR FOURTH DEGREE ASSAULT, FIRST DEGREE ROBBERY, AND ATTEMPTED FIRST DEGREE ROBBERY VIOLATE DOUBLE JEOPARDY BECAUSE THERE WAS NO INDEPENDENT PURPOSE

Where the State uses an assault to elevate a robbery charge to the first degree, the offenses generally merge and are the same for double jeopardy purposes unless they have an independent purpose or effect. In re Francis, 170 Wn.2d 517, 525, 532, 242 P.3d 866 (2010); State v. Kier, 164 Wn.2d 798, 806, 194 P.3d 212 (2008); State v. Freeman, 153 Wn.2d

765, 780, 108 P.3d 753 (2005). Such is the case here. Ramirez's hitting of Morales-Gamez was the means of assaulting (inflicting bodily injury) Morales-Gamez in order to further the robbery, i.e., to forcibly take property from Morales-Gomez against his will. Similarly, the fourth degree assault conviction against Leiva-Aldana merged with the attempted first degree robbery conviction against Leiva-Aldana, as it also provided the force necessary to elevate the attempted robbery to first degree.

The State's response brief fails to address In re Francis, and ignores Ramirez's argument that the assaults constituted the force necessary to accomplish the robberies. See BOA at 65-74. Where, as here, the State fails to respond to arguments made by Ramirez, the State concedes those issues. See In re Det. of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("Indeed, by failing to argue this point, respondents appear to concede it.").

Instead, relying on State v. Frohs, 83 Wn. App. 803, 924 P.2d 384 (1996), the State suggests the assaults and robberies do not merge because "[a]lthough robbery requires the use of force, it does not require an intentional battery." BOR at 25-26. This argument fails for several reasons.

First, Frohs is a Court of Appeals case decided before Francis, Kier, and Freeman were decided by the Supreme Court. The State does

not explain why this Court should reject those more recent Supreme Court cases on point in favor of continued application of Frohs.

Second, Frohs is distinguishable. Frohs was convicted of unlawful imprisonment and fourth degree assault. On appeal, Frohs argued the two crimes should merge because the crimes were contemporaneous in time, the assault was incidental to the unlawful imprisonment, and the assault resulted in no greater injury. Frohs, 83 Wn. App. at 805. Significantly, unlike Ramirez's argument here, Frohs did not address merger from the standpoint of one offense elevating the degree of another offense.

In rejecting Frohs' arguments, the Court of Appeals also viewed the elements of the two crimes as hypothetical abstractions, not how they were charged and proved at trial. Frohs, 83 Wn. App. at 813-14. This type of analysis has subsequently been expressly repudiated. See In re Pers. Restraint of Orange, 152 Wn.2d 795, 817-18, 100 P.3d 291 (2004) (“Purporting to apply the [Blockburger] test, the Court of Appeals did nothing more than compare the statutory elements at their most abstract level”). The Court of Appeals also concluded that because the crimes appeared in different chapters of the criminal code, this was indicative of an intent for multiple punishments. Frohs, 83 Wn. App. at 814. Again, this analysis has been disapproved by the Supreme Court. See Freeman, 153 Wn.2d at 773-74.

Finally, even if the Frohs Court line of reasoning had not been repudiated, Ramirez does not rely on Blockburger's<sup>2</sup> "same evidence" test as a basis for finding a double jeopardy violation. See State v. S.S.Y., 150 Wn. App. 325, 329 n.1, 207 P.3d 1273 (2009) (declining to consider whether two crimes are the "same offense" under Blockburger where appellant did not raise that issue), aff'd, 170 Wash.2d 322, 241 P.3d 781 (2010). Moreover, whether elements are identical "in law" for purposes of the "same evidence test" is not dispositive when considering merger. Freeman, 153 Wn.2d at 777; see S.S.Y., 150 Wn. App. at 329 n.1 (recognizing "the merger-by-elevation doctrine is a wholly different double jeopardy consideration than that discussed in Blockburger").

The State next argues that the assaults had an independent purpose because the assaults exceeded the amount of force needed to accomplish the robberies. BOR at 25-27. Such an argument ignores the prosecutor's own statements at trial concerning the basis for the assault charges. See 1RP 29-30; 10RP 641, 645, 649. Nonetheless, the State points to the trial court's remarks that it was imposing consecutive sentences "...because you found out you couldn't get anything on your robbery, you just kept beating on him rather than leaving." BOR at 27 (citing 11RP 14). But,

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<sup>2</sup> Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

this comment shows why the assaults had no purpose other than to force the relinquishment of property. The assaults continued precisely because Morales-Gamez and Leiva-Aldana did not immediately relinquish their property. Moreover, the number of strikes against Morales-Gamez and Leiva-Aldana is of no consequence because "[t]he grievousness of the harm is not the question" in determining independent purpose or effect. Freeman, 153 Wn.2d at 779 (citing State v. Read, 100 Wn. App. 776, 791-92, 998 P.2d 897 (2000)). The assault had no purpose and effect other than to force Morales-Gamez to relinquish his property. The State presented no evidence to support a conclusion that Ramirez used more force than necessary to commit the first degree robbery.

Finally, in an effort to defeat the merger analysis, the State speculates on what the jury *could* have found, rather than what it *did* find based on the charges and evidence at trial. The State contends the infliction of bodily injury elevated the robbery to first degree but that fourth degree assault does not require infliction of bodily injury. BOR at 28. That may be true in the abstract. But, when determining merger, courts review the offenses as charged and proven, not how they could have been charged or proven in the abstract. Freeman, 153 Wn.2d at 777; Orange, 152 Wn.2d at 817-18. Here, bodily injury was inflicted. Thus,

the two assault counts merged with the robbery and attempted robbery counts and the assault convictions must be stricken.

3. ADMISSION OF THE CELLPHONE DATA AND TESTING REPORT WERE TESTIMONIAL AND ADMITTED IN VIOLATION OF RAMIREZ'S CONFRONTATION RIGHTS.

The State contends the admission of the cellphone data was not testimonial since there was no "testimony" by Matthews, the person who performed the forensic "chip off" and generated the report regarding the testing results. BOR at 10-15. The State also contends the data from the cellphone was not incriminating, and the data was not created in anticipation of litigation. Id. By so arguing, the State ignores the fact that Matthews did not just extract data from the cellphone but also gave meaning to it by translating the binary information into "human readable user data" in the form of a report that was admitted into evidence. BOA at 45 (citing 5RP 40; 10RP 26); Ex. 42, 64-65. Because admission of the testing and generated report in the absence of Matthews' testimony violated Ramirez's right to confrontation, reversal of his convictions is required.

Citing State v. Lui, 179 Wn.2d 457, 315 P.3d 493 (2014), the State first argues that Matthews was not a "witness against" Ramirez. BOR at 11-13. As discussed fully in the opening brief however, Lui made clear

that a "witness's statements [that] help to identify or inculcate the defendant" necessarily makes that witness a "witness against" the defendant. BOA at 56-62 (citing Lui, 179 Wn.2d at 482). Matthews results from the cellphone forensic "chip off" and his subsequent report were used to "help to identify or inculcate" Ramirez, and therefore Matthews was a witness against Ramirez and the testing results and report were admitted in violation of his confrontation rights.

Lui is instructive in a number of ways applicable here. Another review of the facts of Lui demonstrates why the State's attempt to distinguish it necessarily fails here. There, the Court noted that "an expert witness may not parrot the conclusions of others and circumvent the confrontation clause." Lui, 179 Wn.2d at 484. In addition, if scientific or technical evidence "is used in court, the confrontation clause is implicated". Id. Further, the Lui Court noted that cross-examination of an expert witness is required where that witness gives meaning to raw data. Id. at 485.

Lui concluded that mere extraction and initial testing of a DNA sample that was testified to by a witness who did not perform these task did not implicate the confrontation clause. Id. at 487-88. But, once an expert is required to translate this raw data into a profile, then the confrontation clause is implicated and the witness who performed that

translation was required to testify. Id. at 488-89. Thus, in Lui, the Supreme Court ruled that admission of a nontestifying witness's conclusion regarding toxicology test results following an autopsy and the conclusions drawn therefrom, were admitted in violation of the confrontation clause. Id. at 494-95. In both instances, the testifying witness merely parroted the conclusions of the nontestifying expert, thus implicating and violating the confrontation clause. Id.

Like Lui, here Runs Through merely parroted the conclusions of Matthews. She never examined the cellphone or engaged in any independent testing. Rather, she relied solely on the testing done by Matthews and recited the testing results and conclusions that he reached. BOA at 60.

Similarly, Detective Cox provided no independent analysis of his own and did nothing more than read Matthews' report to conclude that the cellphone belonged to Russell:

- Q: And based on the last -- last couple of exhibits,<sup>3</sup> did you come to a conclusion about whose phone that might be?  
A: Yes  
Q: What is it?  
A: Steven Russell's

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<sup>3</sup> The "exhibits" referenced were excerpts of Matthews' report. See Ex. 65.

10RP 378. Thus, like Runs Through, Cox simply relied on the documents Matthews' testing produced and parroted the conclusions that Matthews' report reached.

Next, in an effort to circumvent the confrontation clause, the State creates a hypothetical scenario involving an audio cassette which it tries to analogize to the highly unique and specialized "chip off" testing performed in this case. BOR at 13-14. In the State's hypothetical an audio engineer repairs a smashed audio cassette and sends it back to police. Police then listen to the audio "determines it has evidentiary value, and testifies about his determination at trial." BOR at 13. Significantly, in this hypothetical "nothing" the audio engineer does or says "identifies or inculcates the defendant[.]"

Unlike the State's hypothetical, here Matthews did not just extract data from the cellphone; he also created a report for litigation that translated the raw cellphone data into a "human readable" profile that implicated Ramirez. BOA at 45 (citing 5RP 40; 10RP 26); Ex. 42, 64-65. The State's attempt to analogize the extraction of the cellphone data to the collection of the fire department's camera systems which were also used in litigation fails for similar reasons. Like the State's hypothetical audio cassette scenario, collection of the surveillance video is not analogous. Collection of the surveillance video did not require specialized forensic extraction, and most

importantly, did not involve creation of a report that was admitted into evidence. The surveillance video and audio cassette hypothetical at best involves a chain of custody issue. Here, Matthew's report was admitted into evidence, and its conclusions parroted by other witnesses, thereby implicating the confrontation clause.

Finally, the State contends the data on the cellphone was not created in anticipation of litigation. BOR at 14. Such an argument misses the mark. Ramirez does not argue that the cellphone data was created for purposes of litigation. Rather, what is clear is that Matthews' extraction of the data and analysis of it was created for purposes of litigation. The State's attempt to argue otherwise ignores Runs Through own admission that cellphone testing done by Dixie State is "done in preparation for litigation" and the reports produced are "sent to primarily law enforcement agencies." BOA at 52 (citing 10RP 52-56).

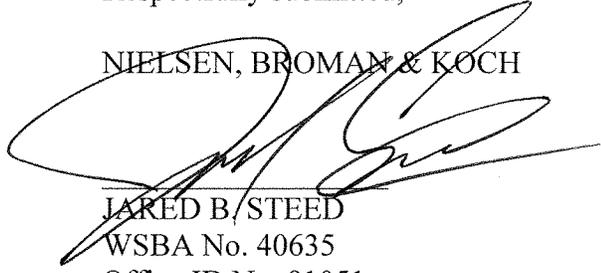
B. CONCLUSION

For the reasons discussed above and in the opening brief, this court should reverse Ramirez's convictions and remand for a new trial.

DATED this 17<sup>th</sup> day of January, 2018.

Respectfully submitted,

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A large, stylized handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over the printed name and partially over the date.

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