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State of Washington  
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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

ERIC NICHOLAS MAYER,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 17-1-02088-7  
The Honorable Stanley Rumbaugh, Judge

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OPENING BRIEF OF APPELLANT

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred when it denied Appellant's motion to arrest judgment on the conspiracy to commit robbery charge.
2. The State failed to present sufficient evidence to convict Appellant of conspiracy to commit robbery.
3. The State failed to present sufficient evidence to convict Appellant of a deadly weapon enhancement on the conspiracy to commit robbery charge.
4. The State failed to present sufficient evidence to prove that the flashlight used during the charged incident met the definition of "deadly weapon" for the purpose of imposing a sentence enhancement.
5. The Judgment and Sentence imposes costs and an interest provision that are no longer authorized after enactment of House Bill 1783.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Where evidence of a conspiracy was circumstantial and based only on actions of the participants, and where items taken from the victim occurred after a completed assault and either did not belong to the victim or were items the victim left in a participant's car before the incident, did the State fail

to present sufficient evidence to prove that the participants agreed and planned to commit a robbery? (Assignment of Error 1 & 2)

2. Where no evidence established that any of the participants possessed or were in proximity to a flashlight during the formation of the agreement or plan to commit a robbery, did the State fail to present sufficient evidence to support the deadly weapon enhancement on the conspiracy count? (Assignment of Error 3)
3. Where the victim was struck in the head twice with a flashlight and suffered serious but not severe injuries, but where no threats of death were made and only two blows were struck before the victim was left alone, did the State fail to present sufficient evidence to prove that the flashlight was used in a manner that could cause death, and did the State therefore fail to present sufficient evidence to support the imposition of deadly weapon sentence enhancements? (Assignment of Error 4)
4. Should Appellant's case be remanded to the trial court to amend the Judgement and Sentence to strike costs and an interest provision that are no longer authorized after

enactment of House Bill 1783? (Assignment of Error 5)

### **III. STATEMENT OF THE CASE**

#### **A. PROCEDURAL HISTORY**

The State charged Eric Nicholas Mayer with two counts of second degree assault, one count of first degree robbery, and one count of conspiracy to commit first degree robbery. (CP 4-6) The State alleged that Mayer or an accomplice was armed with a deadly weapon during the commission of the offenses, and that the offenses were domestic violence incidents. (CP 4-6) The court dismissed one count of second degree assault after the State rested. (3RP 11-12)<sup>1</sup> The jury found Mayer guilty of the remaining charges and sentence enhancements. (CP 39-45; 5RP 10-11)

Mayer moved to arrest judgment on the conspiracy charge, arguing a lack of proof of an agreement to commit the crime of robbery. The trial court denied the motion. (CP 99-139; 7RP 9-13) The court merged the assault and robbery convictions, and imposed a standard range sentence of 90 months plus two deadly weapon enhancements totaling another 36 months. (7RP 13, 37; CP161) The court also found that imposition of nonmandatory

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<sup>1</sup> The transcripts of trial labeled volumes I through VII will be referred to by their volume number (#RP). The remaining transcripts will be referred to by the date of the proceeding.

costs was not appropriate due to Mayer's reduced ability to pay. (7RP 37; CP 157-58) Mayer filed a timely Notice of Appeal. (CP 173)

#### B. SUBSTANTIVE FACTS

Kindra McMillan met Eric Mayer through their mutual friend, Christian Blair. (2RP 13, 71) They hung out and frequently ingested methamphetamine together. (2RP 13-14) According to McMillan, they also dated for two days, but only held hands and kissed a few times. (2RP 14-15)

On October 3, 2016, McMillan, Mayer and several of Mayer's friends were hanging out together and taking methamphetamine. (2RP 15-16) Sometime after dark, Mayer and McMillan and Blair got into Blair's truck to drive around. (2RP 17) McMillan rode in the back seat. (2RP 17) She had her smartphone with her and asked if she could charge it, but Mayer was using the charger so she left it on the seat next to her. (2RP 17-18)

McMillan fell asleep as they drove. (2RP 18) She eventually woke up when Blair pulled the truck into the parking lot at the Foothills Trail in rural Pierce County. (2RP 18; 3RP 34-35) Mayer's friend Robert "Bobby" Lewis and Lewis' girlfriend arrived, and they all stood outside smoking cigarettes. (2RP 18, 142) The

friends were joking about Halloween clowns hiding in the adjacent woods. (2RP 19-20) McMillan testified that Mayer had a large flashlight and was shining it into the trees pretending to look for clowns. (2RP 20, 21)

Because it was cold and McMillan was wearing short sleeves, Lewis' girlfriend loaned McMillan a sweater to wear. (2RP 21-22) McMillan then finished her cigarette and turned to flick it away, when she felt a blow to the back of her head from a heavy object. (2RP 22, 23) She did not see who hit her, but Lewis was standing behind her at that moment. (2RP 22, 142) McMillan fell to her knees and looked to Mayer for help. (2RP 23) But Mayer hit her in the face with a flashlight. (2RP 23, 142) McMillan stood up and asked "why?" but was tased in the neck by Lewis' girlfriend. (2RP 23-24) McMillan fell to the ground. (RP 24) As she lay there, Lewis' girlfriend took her sweater back, and Mayer pulled off the shoes that McMillan was wearing, which his mother had loaned her earlier that day. (2RP 24-25, 55)

McMillan heard someone say, "This is what you get for stealing from my family." (2RP 26) McMillan told investigators that they accused her of stealing \$100.00 from Mayer's friend Ashley. (2RP 20) Mayer and Blair then left in Blair's truck, and Lewis and

his girlfriend left in a separate vehicle. (2RP 24-25, 29) McMillan's belongings, including her phone and purse, were still in the truck and were not returned to her before they drove away. (2RP 25, 30)

McMillan eventually stood up and walked to a nearby house for help. (2RP 31-32) The residents let her in and called the police. (2RP 33-34) McMillan was bleeding from her head, so she was transported to the hospital for treatment. (2RP 35; 3RP 39-40) McMillan received five staples and five sutures to close the lacerations on her head, and was diagnosed with a mild concussion. (2RP 35' 3RP 73, 76-77, 78) But her neurological examination results were otherwise normal. (3RP 74-75) She still has a small scar from one of the lacerations, and suffers from occasional migraines. (2RP 35-36)

McMillan was homeless at the time. (2RP 30) She claimed that she had several bags containing her belongings in the back of Blair's truck and that she never got them back. (2RP 30, 31, 37) But she also testified that she kept a bag of her personal belongings at Mayer's mother's house and retrieved it a few days after the incident. (2RP 85-86) Mayer's mother and his roommate testified that McMillan retrieved several bags of personal belongings a few days after the incident. (3RP 89-90, 94, 131, 132-

33)

#### IV. ARGUMENT & AUTHORITIES

A. THE STATE FAILED TO MEET ITS CONSTITUTIONAL BURDEN OF PROVING EVERY ELEMENT OF THE CHARGED CRIMES AND ENHANCEMENTS BEYOND A REASONABLE DOUBT.

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” *City of Tacoma v. Luvone*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)); U.S. Const. amend. 14. Evidence is sufficient to support a conviction or sentence enhancement only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime or enhancement beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201.

The State failed to meet this burden in relation to the conspiracy conviction, the deadly weapon enhancement for the conspiracy conviction specifically, and the deadly weapon enhancements in general.

1. The State failed to present sufficient evidence to prove that Mayer or his accomplices conspired to commit robbery.

The State alleged that Mayer and the other participants conspired to commit a robbery. (CP 6) But the evidence does not establish an agreement or plan to commit a robbery. At most, the evidence showed an agreement or plan to commit an assault.

A person is guilty of criminal conspiracy if, “with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.” RCW 9A.28.040(1).

It is not necessary to show a formal agreement in order to prove a conspiracy to commit a crime. *State v. Barnes*, 85 Wn. App. 638, 664, 932 P.2d 669 (1997). Instead, the agreement may be proved by evidence of a “concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose.” *Barnes*, 85 Wn. App. at 664 (quoting *State v. Casarez–Gastelum*, 48 Wn. App. 112, 116, 738 P.2d 303 (1987)).

One of the essential elements of robbery is an intent to commit theft. RCW 9A.56.200(1); *State v. Mathews*, 38 Wn. App.

180, 184, 685 P.2d 605 (1984). But there was no evidence that Mayer and his accomplices ever planned or agreed to commit a theft.

The State's evidence of a conspiracy in this case was entirely circumstantial. The State asserted that the participants must have agreed and planned to rob McMillan because they met in a remote location late at night, and no one seemed surprised or upset when the assault began. This evidence, viewed in the light most favorable to the State, is likely sufficient to establish an agreement to assault McMillan. But there is nothing in these facts that indicates they also agreed to rob McMillan. The fact that Mayer and Lewis' girlfriend retrieved property that did not belong to McMillan after the assault, and drove away without returning property that McMillan had herself left in the truck, does not establish that there was a plan and agreement to commit a theft of these items.

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d

900 (1998). No rational trier of fact could have found proof that Mayer and his co-conspirators agreed and planned to commit a robbery. Mayer's conspiracy conviction must be reversed and dismissed.

2. The State failed to present sufficient evidence to prove that Mayer was armed with a deadly weapon during the commission of the conspiracy.

The State alleged that Mayer was armed with a deadly weapon when he committed the conspiracy offense. (CP 6, 44) If this Court finds that the State proved the existence of a conspiracy to commit robbery, the deadly weapon enhancement connected to this count should be vacated because the State did not prove that Mayer was armed when the agreement or plan was made.

Defendants "armed" with a deadly weapon or firearm at the time of the commission of their crimes receive an enhancement to their standard range sentence. RCW 9.94A.825; RCW 9.94A.533(3), (4). "A person is 'armed' if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes." *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993).

Although the State need not establish "with mathematical precision the specific time and place that a weapon was readily

available and easily accessible,” it must establish a nexus between the defendant and the weapon by presenting evidence that the weapon was easily accessible and readily available at the time of the crime. *State v. O’Neal*, 159 Wn.2d 500, 504-05, 150 P.3d 1121 (2007). The State must also show a nexus between the weapon and the crime, which requires proof that the defendant used the weapon in connection with the crime. *State v. Schelin*, 147 Wn.2d 562, 567-68, 55 P.3d 632 (2002).

A person is guilty of conspiracy “when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.” RCW 9A.28.040(1). Conspiracy is an inchoate crime that focuses on “the conspiratorial agreement, not the specific criminal object or objects.” *State v. Bobic*, 140 Wn.2d 250, 265, 996 P.2d 610 (2000). The conspiracy exists independent of any crimes actually committed pursuant to the agreement or conspiracy. *State v. Varnell*, 162 Wn.2d 165, 170, 170 P.3d 24 (2007). Thus, the “nature of the crime” of conspiracy is the agreement, or the meeting of the minds, not the crime discussed or agreed upon.

The punishable aspect of a conspiracy is the agreement. And here, the State presented no evidence that Mayer was armed when and where he agreed to a plan to rob McMillan. *Cf. United States v. Hansley*, 54 F.3d 709, 715-16 (11th Cir. 1995) (upholding enhancement where “the government showed that the agents found a firearm and other drug-related items in Hansley’s residence, where he engaged in conspiratorial conversations”).

There is no indication that the flashlights were in the possession of or in proximity to Mayer at the time that an agreement occurred. The State therefore did not show the required nexus between Mayer, the weapon, and the crime. *State v. Eckenrode*, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007). Accordingly, there was insufficient evidence to support the deadly weapon enhancement.

The State did not show that any deadly weapon was “accessible and readily available for offensive or defensive purposes” at the time the conspiracy was formed. *Valdobinos*, 122 Wn.2d at 282. Because the enhancement is not supported by sufficient evidence, the remedy is to vacate the deadly weapon enhancement. *Valdobinos*, 122 Wn.2d at 282.

3. The State failed to present sufficient evidence to prove that the flashlight was a deadly weapon.

The facts do not support a finding that the flashlight met the definition of “deadly weapon” contained in the sentencing statute, RCW 9.94A.825. That statute provides:

For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

RCW 9.94A.825 (emphasis added). A flashlight is not included in the list of per se deadly weapons. Accordingly, the State bore the burden of proving, beyond a reasonable doubt, that the flashlight met the statutory definition of “deadly weapon.” RCW 9.94A.825; *State v. Tongate*, 93 Wn.2d 751, 754-56, 613 P.2d 121 (1980); WPIC 2.07.

Whether an item is a deadly weapon is a question of fact to be determined by the item’s capacity to inflict death by the manner in which it was used. RCW 9.94A.825; *State v. Thompson*, 88

Wn.2d 546, 548, 564 P.2d 323 (1977) (quoting *State v. Sorenson*, 6 Wn. App. 269, 273, 492 P.2d 233 (1972) (interpreting former RCW 9.95.040)). Factors relevant to determining whether the object constituted a deadly weapon include the area of the victim's body targeted, the degree of force used, the defendant's stated intent, and the injuries actually inflicted. *State v. Shilling*, 77 Wn. App. 166, 171-72, 889 P.2d 948 (1995); *State v. Barragan*, 102 Wn. App. 754, 9 P.3d 942 (2000).

There was no evidence that Mayer or the other participants intended or desired to cause McMillan's death. To the contrary, McMillan was struck twice then left alone. The only words spoken to McMillan about the purpose or intent of the beating was that it was in retaliation for her stealing from one of their friends. None of the participants threatened to kill McMillan. McMillan certainly suffered injury, but using an item in a manner that causes injury is not sufficient to establish that the item is a "deadly weapon" for the purpose of the deadly weapon enhancement—the item must be used in a manner or be capable of causing death. RCW 9.94A.825. And there was no evidence from any witnesses that Mayer's flashlight had the capacity to cause death if used in a particular manner.

There was simply no evidence in the record to support a conclusion that the manner in which the flashlight was used, threatened to be used or intended to be used made it a deadly weapon. The State failed to meet its burden of establishing that the flashlight was a deadly weapon, and the trial court erred when it imposed the two deadly weapon sentence enhancements.

**B. MAYER'S JUDGMENT AND SENTENCE CONTAINS COST PROVISIONS THAT ARE NO LONGER AUTHORIZED AFTER ENACTMENT OF HOUSE BILL 1783.**

The trial court made a finding that Mayer should not pay any nonmandatory legal financial obligations (LFOs), but then imposed several nonmandatory LFOs. (CP 159) The trial court did not have authority to impose these nonmandatory fees, or to impose a provision allowing interest to accrue immediately. These items must be stricken from the Judgment and Sentence.

Mayer was sentenced on August 20, 2018. The Judgment and Sentence states that “[t]he following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate: Defendant has a reduced ability to pay[.]”<sup>2</sup> (CP 158) But the trial court imposed a \$200.00 criminal

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<sup>2</sup> The trial court also found that Mayer did not have the financial resources to pay for his appeal and signed an Order of Indigency. (CP 148-49)

filing fee and \$200.00 for court-appointed attorney fees and defense costs. (CP 159) The Judgment and Sentence also includes a boilerplate provision stating that “[t]he financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full[.]” (CP 160)

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (House Bill 1783) amended the legal financial obligation (LFO) system in Washington State. The Bill amended several statutes related to the imposition of discretionary costs on indigent defendants and interest on such costs. Laws of 2018, ch. 269; *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). House Bill 1783’s amendments were effective as of June 7, 2018.

House Bill 1783 amended the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing. Laws of 2018, ch. 269, § 6(3). Court-appointed attorney fees are discretionary. *State v. Munoz-Rivera*, 190 Wn.App. 870, 893, 361 P.3d 182 (2015). Accordingly, the \$200.00 court-appointed attorney fee is not authorized and must be stricken.

The trial court also imposed a \$200.00 criminal filing fee.

(CP 29) But after House Bill 1783, RCW 36.18.020(2)(h) now provides: “Upon conviction or plea of guilty, . . . an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c).” See also Laws of 2018, ch. 269, § 17(2)(h). Mayer was found indigent at sentencing. (CP 148-49, 158)

Finally, the Judgment and Sentence states that interest on all costs and fines shall begin accruing immediately. (CP 160) But House Bill 1783 eliminated interest accrual on all non-restitution portions of LFOs. The portion of the amendments pertaining to interest accrual amended RCW 10.82.090. That statute now provides, in relevant part, that “[a]s of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations.” RCW 10.82.090(1). Mayer was sentenced after June 7, 2018, but the trial court failed to strike the improper interest accrual language. (CP 160)

The criminal filing fee, the court-appointed attorney fee, and the non-restitution interest accrual provision are no longer authorized under the amended LFO statutes, and must be stricken.

## V. CONCLUSION

The conspiracy charge must be dismissed because there was insufficient evidence that Mayer agreed or planned that the crime of robbery in the first degree should occur. If the Court upholds the conspiracy conviction, then its deadly weapon enhancement must be stricken because there was insufficient evidence that Mayer was armed with the flashlight when he conspired to commit the robbery. Additionally, the State failed to prove that the flashlight has the capacity to inflict death and that it was used in a manner that was likely to produce death. Both of the deadly weapon enhancements must be stricken for this reason as well. Finally, Mayer's case should be remanded to the trial court to strike the criminal filing fee, court-appointed attorney fee, and interest accrual provision from the Judgement and Sentence.

DATED: April 26, 2019



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### CERTIFICATE OF MAILING

I certify that on 04/26/2019, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Eric N. Mayer, DOC# 386751, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.



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