

**FILED**

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Court of Appeals  
Division III  
State of Washington

No. 34093-7-III

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

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STATE OF WASHINGTON,

Respondent,

v.

BEN ALAN BURKEY,

Appellant.

---

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

The Honorable Judge John O. Cooney

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APPELLANT'S OPENING BRIEF

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## **A. SUMMARY OF ARGUMENT**

Ben Alan Burkey was charged as an actor or an accomplice to first degree felony murder, first degree kidnapping, conspiracy to commit first degree kidnapping, first degree robbery, and first degree assault, along with deadly weapon enhancements on each charge, for events that occurred in September 2005 against Rick Tiwater. Mr. Burkey was convicted as charged following a jury trial held in June 2006, but his convictions were later overturned by this Court because of a constitutional public trial right violation. In December 2015, a second jury trial was held on the charges, and Mr. Burkey was again convicted. He now appeals these convictions to this Court, arguing the trial court erred in the following ways: (1) admitting evidence that he head-butted a witness earlier on the day in question; (2) failing to give a unanimity instruction for first degree assault; (3) denying his motion for a new trial; (4) not setting aside his merged convictions for first degree kidnapping and first degree robbery; (5) imposing deadly weapon enhancements on his merged convictions for first degree kidnapping and first degree robbery; (6) imposing 36 month terms of community custody on his convictions for first degree murder and first degree assault, and an 18 month term of community custody on his conviction for first degree robbery; and (7) listing the wrong statute for his first degree murder conviction in the amended judgment and sentence. Mr. Burkey also preemptively objects to the imposition of appellate costs, should the State substantially prevail in this appeal.

## **B. ASSIGNMENTS OF ERROR**

1. The trial court erred by admitting evidence that Mr. Burkey head-butted Marlana Panessa.
2. The trial court violated Mr. Burkey's constitutional right to a unanimous jury verdict by failing to give a unanimity instruction for first degree assault (count VI).
3. The trial court erred by denying Mr. Burkey's motion for a new trial based on the State's failure to disclose its plea agreement with Patty Lascelles to defense counsel.
4. The trial court erred by not setting aside Mr. Burkey's convictions for first degree kidnapping (count II) and first degree robbery (count IV) after finding these convictions merged with his first degree murder conviction (count I).
5. The trial court erred by imposing deadly weapon enhancements on Mr. Burkey's merged convictions for first degree kidnapping (count II) and first degree robbery (count IV).
6. The trial court erred in imposing 36 month terms of community custody on Mr. Burkey's convictions for first degree murder (count I) and first degree assault (count VI), and an 18 month term of community custody on Mr. Burkey's merged first degree robbery conviction (count IV).
7. The amended judgment and sentence must be corrected to indicate that Mr. Burkey was found guilty of first degree murder (count I) under RCW 9A.32.020(1)(c), rather than under RCW 9A.32.020(1)(a).
8. An award of costs on appeal against the defendant would be improper.

## **C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Issue 1: Whether the trial court erred by admitting evidence that Mr. Burkey head-butted Marlana Panessa.

Issue 2: Whether the trial court violated Mr. Burkey's constitutional right to a unanimous jury verdict by failing to give a unanimity instruction for first degree assault (count VI).

Issue 3: Whether the trial court erred by denying Mr. Burkey's motion for a new trial based on the State's failure to disclose its plea agreement with Patty Lascelles to defense counsel.

Issue 4: Whether the trial court erred by not setting aside Mr. Burkey's convictions for first degree kidnapping (count II) and first degree robbery (count IV) after finding these convictions merged with his first degree murder conviction (count I).

Issue 5: Whether the trial court erred by imposing deadly weapon enhancements on Mr. Burkey's merged convictions for first degree kidnapping (count II) and first degree robbery (count IV).

Issue 6: Whether the trial court erred by imposing 36 month terms of community custody on Mr. Burkey's convictions for first degree murder (count I) and first degree assault (count VI), and an 18 month term of community custody on Mr. Burkey's first degree robbery conviction (count IV).

a. Whether the trial court violated the constitutional prohibition against ex post facto laws by imposing 36 month terms of community custody on Mr. Burkey's convictions for first degree murder (count I) and first degree assault (count VI).

b. Whether the trial court erred by imposing an 18 month term of community custody on Mr. Burkey's merged first degree robbery conviction (count IV).

Issue 7: Whether the amended judgment and sentence must be corrected to indicate that Mr. Burkey was found guilty of first degree murder (count I) under RCW 9A.32.020(1)(c), rather than under RCW 9A.32.020(1)(a).

Issue 8: Whether this Court should refuse to impose costs on appeal.

#### **D. STATEMENT OF THE CASE**

Ben Alan Burkey met Rick Tiwater in August 2005. (Pl.'s Ex. 136, pg. 782-783). Mr. Burkey heard Mr. Tiwater was a "snitch." (RP 461, 475, 500-501; Pl.'s Ex. 136, pg. 783-784). One of the people Mr. Burkey heard this from was an individual he knew, James Tesch. (Pl.'s Ex. 136, pg. 778-779, 781-782, 784). According to Mr. Burkey, he was trying to help Mr. Tiwater deal with some pending criminal charges. (RP 461-462, 509-515; Pl.'s Ex. 133, pg. 594-595, 604; Pl.'s Ex. 136, pg. 790-792).

Mr. Tiwater was at Mr. Burkey's house on the evening of September 4, 2005. (RP 299, 465; Pl.'s Ex. 133, pg. 530-533; Pl.'s Ex. 134, pg. 492-495, 502; Pl.'s Ex. 136, pg. 796). Mr. Burkey sent an individual who was living with him at the time, Patty Lascelles, to ask Mr. Tesch to come over. (RP 486-487; Pl.'s Ex. 133, pg. 525, 533-536, 622, 624; Pl.'s Ex. 134, pg. 498-499; Pl.'s Ex. 136, pg. 805-807; Pl.'s Ex. 137, pg. 17, 54-55, 58-59).

Mr. Tesch came over to Mr. Burkey's house. (RP 465; Pl.'s Ex. 133, pg. 544-545; Pl.'s Ex. 137, pg. 18-19). He hit Mr. Tiwater in the head with a ball-peen hammer. (RP 300, 312; Pl.'s Ex. 133, pg. 547, 551, 553, 563-564, 607; Pl.'s Ex. 137, pg. 20-21). Mr. Burkey told Mr. Tesch to stop. (Pl.'s Ex. 133, pg. 545-548, 605-608; Pl.'s Ex. 137, pg. 18-21, 61-

62). After this altercation, Mr. Burkey took Mr. Tiwater's motorcycle and moved it from his house to the home of his ex-wife. (RP 484-486, 535; Pl.'s Ex. 133, pg. 551-552, 612; Pl.'s Ex. 137, pg. 24-25).

Mr. Tesch put Mr. Tiwater into a Ford Thunderbird that was in Mr. Burkey's possession. (RP 300, 466-467, 473; Pl.'s Ex. 133, pg. 560-562, 613-614; Pl.'s Ex. 137, pg. 26-27). Mr. Burkey got into the passenger seat of this car, and Mr. Tesch drove. (RP 466-467; Pl.'s Ex. 133, pg. 613-614; Pl.'s Ex. 137, pg. 27). They ended up in the woods near Elk, Washington. (RP 183-185, 468; Pl.'s Ex. 137, pg. 30). According to Mr. Burkey, Mr. Tesch hit Mr. Tiwater in the head a couple of times with a golf club and then ran over him with the car. (RP 301, 314-315, 469-470, 477-478, 479-480; Pl.'s Ex. 133, pg. 574; Pl.'s Ex. 137, pg. 35-36). Also according to Mr. Burkey, Mr. Tesch threatened to kill Mr. Burkey's son if he told anyone what happened. (RP 301-302; Pl.'s Ex. 133, pg. 574; Pl.'s Ex. 137, pg. 37-38).

On September 5, 2005, Mr. Tiwater's body was found in the woods near Elk. (RP 183-185, 212-213, 229-230, 268). His cause of death was later identified as "homicidal violence with multiple blunt force injuries of the head, neck and torso." (RP 189-190). Mr. Tiwater sustained multiple injuries. (RP 189-190).

DNA matching Mr. Tiwater was found in blood present on four items: a dresser drawer in Mr. Burkey's house; the driveline of the Ford Thunderbird; a pool of blood near where his body was found; and on the bottom of pair of boots found in Mr. Burkey's house. (RP 258, 262, 263-266, 330, 431-433; Pl. Ex.'s 62, 63). A coat and a pair of leather motorcycle chaps belonging to Mr. Tiwater were later recovered from the Spokane River. (RP 305-306).

The State charged Mr. Burkey with the following counts, as an actor and/or an accomplice of Mr. Tesch: Count I, first degree murder, under either RCW 9A.32.030(1)(a) (premeditated first degree murder) or RCW 9A.32.030(1)(c) (first degree felony murder); Count II, first degree kidnapping; Count III, conspiracy to commit first degree kidnapping; Count IV, first degree robbery; Count V, conspiracy to commit first degree robbery; and Count VI, first degree assault. (CP 419-421). The State also alleged a deadly weapon sentencing enhancement on each count. (CP 419-421).

The case proceeded to a jury trial in June 2006. (CP 21-28, 74-84). Mr. Burkey was found guilty as charged, and the jury found he was armed with a deadly weapon on each count. (CP 9-20, 46-62, 74-84). After the verdict was entered, the trial court granted the State's motion to dismiss

the conspiracy to commit first degree robbery charge (count V). (CP 50, 63-64). Mr. Burkey appealed his convictions to this Court. (CP 66).

On appeal, in an unpublished opinion issued in May 2015, this Court reversed Mr. Burkey's convictions and remanded his case for a new trial, finding that his constitutional right to a public trial was violated during voir dire. (CP 73-84).

On remand, Mr. Burkey was represented by Bevan Maxey. (CP 69). In December 2015, a second jury trial was held, on counts I, II, III, IV, and VI. (CP 231; RP 13-660; Pl.'s Exs. 133, 134, 135, 136, 137).

Witnesses testified consistent with the facts stated above. (RP 176-537). Three law enforcement officers testified to statements made by Mr. Burkey during interviews after the date in question. (RP 296-303, 311-316, 322-329, 458-489, 499-506). Mr. Burkey stated he was present when Mr. Tiwater was killed, but that Mr. Tesch was responsible for killing him. (RP 298-299, 311-312, 329, 458-459, 499-500).

During its case-in-chief, the State sought to admit evidence, through the testimony of Mr. Tesch's girlfriend, Marlana Panessa, that Mr. Burkey had head-butted Ms. Panessa earlier on the day in question, with Mr. Tesch present. (RP 339-344). The State argued this evidence was relevant as to Mr. Burkey's fear of Mr. Tesch. (RP 339-340). The State argued Mr. Burkey, in his cross-examination of the State's preceding

witnesses, had brought out evidence that Mr. Burkey was afraid of Mr. Tesch. (RP 339-340, 342, 346).

At this point in the testimony, only two law enforcement officers had testified to statements made by Mr. Burkey. (RP 296-303, 311-316, 322-329). On direct examination, the State presented testimony that Mr. Burkey told a law enforcement officer that Mr. Tesch threatened to kill Mr. Burkey's son if he told anyone what happened. (RP 301-302). Mr. Burkey did not cross-examine these two law enforcement officers regarding these this threat. (RP 306-316, 330-333). He did cross-examine one law enforcement officer, Spokane Sheriff's Office Detective Mike Ricketts, asking whether Mr. Burkey told him "if he told you what he knew he felt he would end up in a coffin[.]" (RP 332-333). Detective Ricketts testified Mr. Burkey did make this statement to him. (RP 333).

Mr. Burkey objected to the evidence that he had head-butted Ms. Panessa under ER 403, 404, and 405, arguing the evidence was extremely prejudicial, irrelevant, and impermissible character evidence. (RP 41, 340-342, 345-346). The trial court ruled the evidence admissible, finding its probative value outweighs its prejudice, and stating: "[t]here was a lot of testimony presented yesterday through the detective that Mr. Burkey made statements about his fear of Mr. Tesch . . . [b]ecause that was raised,

I think this event, although prejudicial, is probative to show the reasonableness of his fears.” (RP 343-344, 346-347).

Ms. Panessa testified that Mr. Burkey head-butted her at Mr. Tesch’s home earlier on the day in question, while Mr. Tesch was present in the home. (RP 361-364).

In addition to the live witnesses, after deeming several witnesses unavailable to testify, the trial court allowed the State to read into evidence, during its case-in-chief, transcripts of these witnesses and Mr. Burkey himself from the June 2006 trial. (RP 16-18, 28-40, 175, 347-357, 383, 420-421, 437-441, 445-446, 456, 490-499; Pl.’s Exs. 133, 134, 135, 136, 137). The witnesses included Ms. Lascelles, Troy Fowler, Billy Shumaker. (RP 383, 420-421, 437-441, 445-446; Pl.’s Exs. 133, 134, 135, 136, 137).

According to the transcript of her testimony from the June 2006 trial, Ms. Lascelles testified Mr. Burkey sent her to Mr. Tesch’s house to ask Mr. Tesch to come over three times. (Pl.’s Ex. 133, pg. 622). She testified that on one of the trips, Mr. Burkey told her to tell Mr. Tesch, “I’m not a punk or a bitch and he needs to get down here.” (Pl.’s Ex. 133, pg. 624-625).

Ms. Lascelles testified that Mr. Burkey told Mr. Tesch to stop when Mr. Tesch was attacking Mr. Tiwater in Mr. Burkey’s house. (Pl.’s

Ex. 133, pg. 545-548, 605-608). Ms. Lascelles testified Mr. Tiwater was wearing a leather coat and chaps, and that Mr. Burkey was wearing boots. (Pl.'s Ex. 133, pg. 560, 562-563).

Ms. Lascelles testified that after they left in the Ford Thunderbird, Mr. Burkey and Mr. Tesch arrived back at Mr. Burkey's house around daylight. (Pl.'s Ex. 133, pg. 565-566). She testified Mr. Tesch had Mr. Tiwater's leather coat and chaps, and a golf club. (Pl.'s Ex. 133, pg. 566). Ms. Lascelles testified both Mr. Tesch and Mr. Burkey told her to clean the leather coat and chaps. (Pl.'s Ex. 133, pg. 567-568). She testified she eventually threw the leather coat and chaps in the river. (Pl.'s Ex. 133, pg. 570-571).

Ms. Lascelles testified the State requested she be present to testify, and they made sure she got to court. (Pl.'s Ex. 133, pg. 625-626).

According to the transcript of his testimony from the June 2006 trial, Mr. Burkey testified he slapped Mr. Tiwater while he was at his house on the date in question, but that he did not lay a hand on Mr. Tiwater after that.<sup>1</sup> (Pl.'s Ex. 136, pg. 798-801; Pl.'s Ex. 137, pg. 22, 45, 52-53). Mr. Burkey testified that while they were at his house, he told Mr. Tesch to stop attacking Mr. Tiwater. (Pl.'s Ex. 137, pg. 18-21). He testified that when he got into the Ford Thunderbird with Mr. Tesch, he

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<sup>1</sup> Mr. Burkey did not testify during the second jury trial. (RP 176-537).

thought they were taking Mr. Tiwater home. (Pl.'s Ex. 137, pg. 27-29).

While they were in the woods, Mr. Burkey denied striking Mr. Tiwater, or encouraging Mr. Tesch to harm Mr. Tiwater. (Pl.'s Ex. 137, pg. 35-36, 38, 45).

For first degree murder (count I), the jury was only instructed on first degree felony murder. (CP 237-238; RP 564-565).

The trial court instructed the jury that in order to find Mr. Burkey guilty of first degree assault, it had to find the following elements beyond a reasonable doubt:

- (1) That on or about between the 4th day of September, 2005, and the 5th day of September, 2005, the defendant as an actor and/or accomplice assaulted [Mr.] Tiwater.
- (2) That the assault was committed with force or means likely to produce great bodily harm or death;
- (3) That the defendant or an accomplice acted with intent to inflict great bodily harm; and
- (4) That the acts occurred in the State of Washington.

(CP 254; RP 570).

In its closing argument, the State did not elect a distinct act of assault, but rather, argued as follows:

And then you know with respect to the first degree assault charge.

.....

And so you know through your common sense and life experiences just as an observer that when you're taking multiple swings at someone with a ball-peen hammer to the head, to other parts of the body, when you're taking multiple swings at somebody with a golf club, when you're running over somebody with a vehicle multiple times, you

are communicating to Mr. Tiwater under these circumstances that they really wanted to hurt him and hurt him badly.

(RP 595-596).

The trial court did not issue a unanimity instruction. (CP 222-261; RP 556-576). The trial court gave a jury instruction defining accomplice liability. (CP 236; RP 563-564).

Mr. Burkey was found guilty on all five counts submitted to the jury, and the jury found he was armed with a deadly weapon on each count. (CP 231, 266-275).

Following the verdict, Mr. Burkey filed a motion for a new trial under CrR 7.8 (a)(2) and (8). (CP 291-292). Mr. Burkey argued, in relevant part, that the State's failure to disclose its plea agreement with Ms. Lascelles to defense counsel and the jury violated his constitutional due process rights, *Brady v. Maryland*<sup>2</sup>, and CrR 4.7(a). (CP 295-327). He alleged Ms. Lascelles was given a plea agreement that consisted of dropping her charges of first degree robbery and first degree criminal assistance in exchange for her testimony. (CP 295, 302-307). In support of this motion, defense counsel Mr. Maxey submitted an affidavit, stating:

On October 26, 2015, I went to the Spokane County prosecutor's office, sat down with [deputy prosecutor G. Mark] Cipolla, and went through all of the discoverable

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<sup>2</sup> *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

information – I believe there were four binders’ worth of materials.

....

No information or documentation regarding a plea agreement between the State and Ms. Lascelles, a key witness for the State, was ever disclosed or made available to me.

(CP 293-294).

In its response to Mr. Burkey’s motion for a new trial, the State alleged that defense counsel was aware of the plea agreement. (CP 334-335). To support this assertion, Mr. Cipolla submitted a certificate of counsel which included the following statements:

8. The State and Mr. Maxey had a discovery conference in late October or early November 2015 in which it was discussed that Ms. Lascelles testified at the first trial only because she had been charged and those charges would be dismissed after she testified.

....

12. Mr. Cruz advised that after the jury rendered its verdicts, defense counsel mentioned that the defendant had knowledge of the State's agreement with Ms. Lascelles; that this information was not disclosed, and he would raise the alleged non disclosure as the basis for a new trial.

(CP 338-340).

In response to Mr. Cipolla’s certificate, Mr. Maxey submitted an affidavit stating the following:

First of all, I did not defend Mr. Burkey in his first trial, so I was not there to witness the testimony of Ms. Lascelles firsthand. There's nothing that was contained in the transcript from the first trial that I recall that referenced a plea agreement between Ms. Lascelles and the State. I did file a motion with a specific request for discovery,

which I presume would have uncovered the plea agreement between Ms. Lascelles and the State. However, I was advised by Mr. Cipolla to come to his office instead, and I would be allowed to look through his binders, to make sure that I had all relevant reports and discoverable information. Nothing in the materials that I was shown referenced a plea agreement with Ms. Lascelles. No plea agreement between Ms. Lascelles and the State was discussed during this meeting. The State alleges that during this meeting "it was discussed that Ms. Lascelles testified at the first trial only because she had been charged and those charges would be dismissed after she testified." That is not accurate. We never had such a discussion. In fact, up to and through the conclusion of trial, the State never did disclose to me the nature and extent of any plea agreement.

(CP 360-361).

The parties waived argument on the motion for a new trial. (CP 367). The trial court denied Mr. Burkey's motion for a new trial, and entered a written order incorporating its oral ruling. (CP 368-376; RP 665-669). In its oral ruling, the trial court stated:

[I]n order for the Court to grant a new trial on this basis, the Court would have to find that the evidence would probably change the result of the trial, the evidence was discovered since the trial, the evidence could not have been discovered before trial by the exercise of due diligence, the evidence is material, and the evidence is not merely cumulative or impeaching. Here, the Court finds that there's little likelihood that that evidence would have changed the result of the trial.

...

[T]hat information could have been discovered before trial simply by either reviewing the court files or Mr. Maxey did have an opportunity to speak with Ms. Lascelles.

(CP 374; RP 668).

At sentencing, the trial court found Mr. Burkey's convictions for first degree kidnapping (count II) and first degree robbery (count IV) merged with his first degree murder conviction (count I). (CP 387; RP 687). The trial court then convicted Mr. Burkey on each count (counts I, II, III, IV, and VI). (CP 390). The trial court imposed a standard range sentence and a deadly weapon enhancement on each count. (CP 390; RP 686-688). The trial court ordered the standard range sentences on counts I, III, and VI to run consecutively, and the standard range sentences on counts II and IV to run concurrently. (CP 390; RP 687-688). The trial court ordered the deadly weapon enhancements on each count (counts I, II, III, IV, and VI) to run consecutively. (CP 390; RP 688). The sentence totaled 830 months confinement. (CP 380; RP 693). Mr. Burkey was 55 years old at the time of sentencing. (CP 384-400).

The trial court also imposed 36 month terms of community custody on Mr. Burkey's convictions for first degree murder (count I) and first degree assault (count VI), and an 18 month term of community custody on Mr. Burkey's first degree robbery conviction (count IV). (CP 391; RP 688).

The amended judgment and sentence reflects that Mr. Burkey was found guilty of first degree murder under RCW 9A.32.030(1)(a). (CP 384). It also includes the following language: "[a]n award of costs on

appeal against the defendant may be added to the total legal financial obligations.” (CP 395).

Mr. Burkey timely appealed. (CP 407). The State did not cross-appeal. (CP 1-410). The trial court entered an Order of Indigency, granting Mr. Burkey a right to review at public expense. (CP 405-406). Subsequently<sup>3</sup>, Mr. Burkey filed a Report as to Continued Indigency with this Court.

### **E. ARGUMENT**

#### **Issue 1: Whether the trial court erred by admitting evidence that Mr. Burkey head-butted Marlana Panessa.**

Under ER 404(a):

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except . . . Evidence of a pertinent trait of character offered by an accused, *or by the prosecution to rebut the same*[.]

ER 404(a)(1) (emphasis added).

“While ER 404(a) prohibits evidence of a person's character to prove ‘conformity,’ the rule provides an exception when the accused offers evidence of his character.” *State v. Warren*, 134 Wn. App. 44, 64, 138 P.3d 1081 (2006), *aff'd*, 165 Wash. 2d 17, 195 P.3d 940 (2008).

“The long-standing rule in this state is that a criminal defendant who

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<sup>3</sup> The undersigned counsel filed, with service on the State, Mr. Burkey’s Report as to Continued Indigency, dated July 11, 2016, on the same day this opening brief was filed.

places his character in issue by testifying as to his own past good behavior, may be cross-examined as to specific acts of misconduct unrelated to the crime charged.” *Id.* at 64-65 (quoting *State v. Brush*, 32 Wn. App. 445, 448, 648 P.2d 897 (1982)).

To open the door to such evidence of specific acts of misconduct by the defendant, “the defendant, or a witness brought forward by the defendant, must first testify to a trait of character.” *State v. Avendano-Lopez*, 79 Wn. App. 706, 716, 904 P.2d 324 (1995) (quoting *Brush*, 32 Wn. App. at 450). Under the open door policy, the initial question is whether the defendant’s case-in-chief placed his character in issue. *Brush*, 32 Wn. App. at 451.

A trial court’s determination that a party opened the door to evidence of a defendant’s character is reviewed for an abuse of discretion. *Warren*, 134 Wn. App. at 65. “The trial court has discretion to admit evidence that might otherwise be inadmissible if the defendant opens the door to the evidence.” *Id.*

Here, during its case-in-chief, the State sought to admit evidence, through the testimony of Ms. Panessa, that Mr. Burkey had head-butted her earlier on the day in question, with Mr. Tesch present. (RP 339-344). The State argued this evidence was relevant as to Mr. Burkey’s fear of Mr. Tesch. (RP 339-340). The State argued Mr. Burkey, in his cross-

examination of the State's preceding witnesses, had brought out evidence that Mr. Burkey was afraid of Mr. Tesch. (RP 339-340, 342, 346).

The trial court ruled the evidence admissible, finding its probative value outweighs its prejudice, and stating: "[t]here was a lot of testimony presented yesterday through the detective that Mr. Burkey made statements about his fear of Mr. Tesch . . . [b]ecause that was raised, I think this event, although prejudicial, is probative to show the reasonableness of his fears." (RP 343-344, 346-347).

The trial court erred in admitting the evidence that Mr. Burkey had head-butted Ms. Panessa. Mr. Burkey had not yet put his character in issue. *See Avendano-Lopez*, 79 Wn. App. at 716 (quoting *Brush*, 32 Wn. App. at 450). The challenged evidence was admitted during the State's case-in-chief; at this point, neither Mr. Burkey nor a witness presented by Mr. Burkey had testified to a trait of his character, that would open the door to evidence of the specific act of misconduct, head-butting Ms. Panessa. *See id*; *cf. State v. Rennenberg*, 83 Wn.2d 735, 736-38, 522 P.2d 835 (1974) (State was permitted to admit evidence of the defendant's drug addiction, after she put her general character before the jury during her testimony); *Brush*, 32 Wn. App. at 448-53 (State was permitted to use the defendant's 14 year old conviction for second degree burglary, after he put his general character before the jury during his testimony and through the

testimony of other defense witnesses). Because Mr. Burkey had not opened the door to the admission of this evidence, the trial court abused its discretion by admitting it. *See Warren*, 134 Wn. App. at 65.

At this point in the testimony where the testimony by Ms. Panessa was offered, the only cross-examination conducted by Mr. Burkey that related to his fears was of Detective Ricketts, asking whether Mr. Burkey told him “if he told you what he knew he felt he would end up in a coffin[.]” (RP 332-333). However, this testimony was a generalized fear; it did not specify that Mr. Burkey’s fear was of Mr. Tesch. In addition, this cross-examination did not portray Mr. Burkey as peaceful, and therefore did not open the door to rebuttal evidence of his alleged assaultive conduct against Ms. Panessa.

In addition to violating ER 404(a) and the open door policy, the evidence that Mr. Burkey head-butted Ms. Panessa was irrelevant, and more prejudicial than probative.

“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. The evidence that Mr. Burkey head-butted Ms. Panessa earlier on the day in question was irrelevant because it had no

bearing on whether or not Mr. Burkey was an actor or an accomplice to the charged crimes against Mr. Tiwater.

In addition, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . .” ER 403. Any probative value of the evidence that Mr. Burkey head-butted Ms. Panessa was substantially outweighed by the danger that the jury would conclude Mr. Burkey was involved with the offenses against Mr. Tiwater because of this earlier alleged conduct against Ms. Panessa.

In order to warrant reversal, the improperly admitted evidence must be prejudicial. *See Avendano-Lopez*, 79 Wn. App. at 716-17; *see also State v. Barry*, 184 Wn. App. 790, 802, 339 P.3d 200 (2014). The evidence that Mr. Burkey head-butted Ms. Panessa was prejudicial. The key question for the jury was whether Mr. Burkey acted as an accomplice to Mr. Tesch on the day in question.

There was not substantial evidence of Mr. Burkey’s guilt as an accomplice. (CP 236; RP 563-564); *see also* RCW 9A.08.020(3) (defining accomplice). According to both Mr. Burkey and Ms. Lascelles, Mr. Burkey told Mr. Tesch to stop when Mr. Tesch was assaulting Mr. Tiwater at Mr. Burkey’s house. (Pl.’s Ex. 133, pg. 545-548, 605-608; Pl.’s Ex. 137, pg. 18-21, 61-62). No witnesses testified to the contrary. (RP 176-537). In addition, although Mr. Burkey acknowledged he was

present when Mr. Tiwater was killed, he maintained that Mr. Tesch was responsible for killing him. (RP 298-299, 311-312, 329, 458-59, 499-500). Other than Mr. Burkey's accounts, there was no direct evidence presented of Mr. Burkey's specific level of involvement at the scene where Mr. Tiwater was murdered.

Because the trial court erred by admitting evidence that Mr. Burkey head-butted Marlana Panessa, and the admission of this evidence was prejudicial, Mr. Burkey's convictions should be reversed and remanded for a new trial.

**Issue 2: Whether the trial court violated Mr. Burkey's constitutional right to a unanimous jury verdict by failing to give a unanimity instruction for first degree assault (count VI).**

Criminal defendants in Washington have a right to a unanimous jury verdict. Const. art. 1, § 21; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). “[T]he right to a unanimous verdict is derived from the fundamental constitutional right to a trial by jury and thus may be raised for the first time on appeal.” *State v. Handyside*, 42 Wn. App. 412, 415, 711 P.2d 379 (1985).

In order to convict a defendant of a criminal charge, the jury must be unanimous that the criminal act charged has been committed. *State v. Camarillo*, 115 Wn.2d 60, 63, 794 P.2d 850 (1990); *see also State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), *modified in part by*

*State v. Kitchen*, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988). In cases where multiple acts are alleged, any one of which could constitute the crime charged, the jury must unanimously agree on the act or incident that constitutes the crime. *Kitchen*, 110 Wn.2d at 411; *see also Petrich*, 101 Wn.2d at 572. In such a multiple acts case, the State must either “elect which of such acts is relied upon for a conviction or the court must instruct the jury to agree on a specific criminal act.” *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007).

A trial court’s failure to give a necessary unanimity instruction is constitutional error. *State v. Bobenhouse*, 166 Wn.2d 881, 893, 214 P.3d 907 (2009). Therefore, the constitutional harmless error analysis applies. *Id.* In order to find a constitutional error harmless, the appellate court must find the error harmless beyond a reasonable doubt. *Camarillo*, 115 Wn.2d at 65. Prejudice is presumed. *Coleman*, 159 Wn.2d at 512. “The presumption of error is overcome only if no rational juror could have a reasonable doubt as to any of the incidents alleged. *Id.* (citing *Kitchen*, 110 Wn.2d at 411-12); *see also Camarillo*, 115 Wn.2d at 65.

Here, the State charged Mr. Burkey, as an actor or accomplice, with first degree assault (count VI) of Mr. Tiwater. (CP 254, 420-421; RP 570). The State alleged Mr. Burkey committed first degree assault in several distinct ways, at two different locations (Mr. Burkey’s house and

in the woods near Elk): “taking multiple swings at someone with a ball-peen hammer to the head, to other parts of the body, when you’re taking multiple swings at somebody with a golf-club, when you’re running over somebody with a vehicle multiple times . . . .” (RP 595-596). The State did not elect one act upon which to seek a conviction, but relied upon these several distinct ways. (RP 595-596). Furthermore, the State did not issue a unanimity instruction. (CP 222-261; RP 556-576).

Under these facts, a unanimity instruction was required. *See Kitchen*, 110 Wn.2d at 411; *see also Petrich*, 101 Wn.2d at 572; *Coleman*, 159 Wn.2d at 511. The trial court’s failure to instruct the jury on unanimity was a constitutional error. *See Bobenhouse*, 166 Wn.2d at 893.

This error was not harmless. A rational juror could have had reasonable doubt as to whether Mr. Burkey was an actor or an accomplice to the alleged assault of Mr. Tiwater with the ball-peen hammer at Mr. Burkey’s house. *See Coleman*, 159 Wn.2d at 512 (citing *Kitchen*, 110 Wn.2d at 411-12) (setting forth the constitutional harmless error analysis). The testimony at trial established that Mr. Tesch, rather than Mr. Burkey, hit Mr. Tiwater in the head with a ball-peen hammer. (RP 300, 312; Pl.’s Ex. 133, pg. 547, 551, 553, 563-564, 607; Pl.’s Ex. 137, pg. 20-21). Because the actor in this alleged assault was Mr. Tesch, not Mr. Burkey, Mr. Burkey could only be found guilty as an accomplice.

A rational juror could have had reasonable doubt as to whether Mr. Burkey was an accomplice to Mr. Tesch hitting Mr. Tiwater with a ball-peen hammer. In order for the jury to find that Mr. Burkey was an accomplice, it had to find that he, with knowledge that it would promote the first degree assault, 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, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime.

However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

(CP 236; RP 563-564); *see also* RCW 9A.08.020(3) (defining accomplice).

Further, “[a]ccomplice liability requires an overt act.” *State v. McCreven*, 170 Wn. App. 444, 477, 284 P.3d 793, 810 (2012). “Mere presence is insufficient to prove complicity in a crime.” *Id.* at 477-48.

First, Mr. Burkey did not solicit, command, encourage, or request Mr. Tesch hit Mr. Tiwater with a ball-peen hammer. There was no evidence presented at trial that Mr. Burkey asked or encouraged Mr. Tesch to take this action. Although Mr. Burkey sent Ms. Lascelles to ask Mr. Tesch to come over to his house, the record does not show that Mr.

Burkey took this action so that Mr. Tesch could come over and assault Mr. Tiwater. (RP 486-487; Pl.'s Ex. 133, pg. 525, 533-536, 622, 624-625; Pl.'s Ex. 134, pg. 498-499; Pl.'s Ex. 136, pg. 805-807; Pl.'s Ex. 137, pg. 17, 54-55, 58-59).

Second, Mr. Burkey did not aid, or agree to aid, Mr. Tesch in planning or committing the assault of Mr. Tiwater with the ball-peen hammer. Although Mr. Burkey was present in his house when Mr. Tesch hit Mr. Tiwater with the ball-peen hammer, Mr. Burkey was not “ready to assist by his . . . presence . . . .” (CP 236; RP 563-564). According to both Mr. Burkey and Ms. Lascelles, Mr. Burkey told Mr. Tesch to stop. (Pl.'s Ex. 133, pg. 545-548, 605-608; Pl.'s Ex. 137, pg. 18-21, 61-62). No witnesses testified to the contrary. (RP 176-537). Rather than being ready to assist Mr. Tesch, Mr. Burkey was actively trying to prevent the assault from occurring. All that was established was Mr. Burkey's mere presence at the scene and knowledge of criminal activity by Mr. Tesch, which is not enough to establish that Mr. Burkey was an accomplice. *See* CP 236; RP 563-564; *see also* *McCreven*, 170 Wn. App. at 477-78.

Under the facts presented at trial here, it cannot be said that no rational juror could have a reasonable doubt as to whether Mr. Burkey was an actor or an accomplice to the alleged assault of Mr. Tiwater with the ball-peen hammer. *See* *Coleman*, 159 Wn.2d at 512 (citing *Kitchen*,

110 Wn.2d at 411-12). The trial court erred as its failure to give a unanimity instruction for first degree assault (count VI) was not harmless beyond a reasonable doubt. *See Coleman*, 159 Wn.2d at 512 (citing *Kitchen*, 110 Wn.2d at 411-12). This court should reverse Ms. Burkey's conviction for first degree assault and order a new trial before a properly instructed jury.

**Issue 3: Whether the trial court erred by denying Mr. Burkey's motion for a new trial based on the State's failure to disclose its plea agreement with Patty Lascelles to defense counsel.**

The trial court may grant a defendant's motion for a new trial, "when it affirmatively appears that a substantial right of the defendant was materially affected[,]" for the following reasons, in relevant part: "(2) [m]isconduct of the prosecution or jury. . .[or] (8) [t]hat substantial justice has not been done." CrR 7.8(a)(2), (8). A trial court's ruling on a motion for a new trial is reviewed under an abuse of discretion standard. *State v. McKenzie*, 157 Wn.2d 44, 51, 134 P.3d 221 (2006). "The trial court's decision will be disturbed only for a clear abuse of that discretion or when it is predicated on an erroneous interpretation of the law." *State v. Carlson*, 61 Wn. App. 865, 871, 812 P.2d 536 (1991).

"In every criminal trial, the State faces the well established discovery obligation to turn over to the defense evidence in its possession or knowledge both favorable to the defendant and material to guilt or

punishment.” *In re Personal Restraint of Pirtle*, 136 Wn.2d 467, 477, 965 P.2d 593 (1998) (citing *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed .2d 215 (1963)). “Therefore, the State must disclose any favorable treatment accorded witnesses for their testimony and may not permit a false view of that treatment to go before the jury.” *Id.* at 477-78. A defendant’s claim that the State failed to disclose such favorable treatment is subject to a harmless error analysis. *Id.* at 478; *see also State v. Dunivin*, 65 Wn. App. 728, 734, 829 P.2d 799 (1992).

Here, Mr. Burkey filed a motion for a new trial under CrR 7.5(a)(2) and (8), arguing, in relevant part, that the State’s failure to disclose its plea agreement with Ms. Lascelles to defense counsel and the jury violated his constitutional due process rights, *Brady*, and CrR 4.7(a). (CP 291-292, 295-327); *see also Brady*, 373 U.S. at 83. The State alleged defense counsel was made aware of the plea agreement, and defense counsel disagreed. (CP 338-340, 360-361). The trial court denied Mr. Burkey’s motion. (CP 368-376; RP 665-669).

The trial court erred by denying Mr. Burkey’s motion for a new trial based on the State’s failure to disclose its plea agreement with Ms. Lascelles to defense counsel. The State was obligated to disclose to defense counsel its plea agreement with Ms. Lascelles. *See Pirtle*, 136 Wn.2d at 477-78. Although the State claimed it had made such a

disclosure, defense counsel stated in an affidavit that he had not received the information. (CP 338-340, 360-361).

The error was not harmless. Ms. Lascelles testified to two key pieces of evidence that were not testified to by Mr. Burkey or any other witness. (Pl.'s Ex. 133, pg. 567-568, 624, 625). First, Ms. Lascelles testified that on one of her trips to ask Mr. Tesch to come over to Mr. Burkey's house on the day in question, Mr. Burkey told her to tell Mr. Tesch, "I'm not a punk or a bitch and he needs to get down here." (Pl.'s Ex. 133, pg. 624, 625). Second, Ms. Lascelles testified that after Mr. Burkey and Mr. Tesch arrived back at Mr. Burkey's house around daylight, both Mr. Tesch and Mr. Burkey told her to clean the leather coat and chaps. (Pl.'s Ex. 133, pg. 567-568). Both of these pieces of evidence implicate Mr. Burkey as having a greater involvement in the crimes against Mr. Tiwater, then testified to by the other witnesses. It cannot be said that the jury would have returned the same verdicts if Ms. Lascelles' testimony could have been impeached by the existence of her plea agreement with the State. *See Dunivin*, 65 Wn. App. at 734.

Because the trial court erred by denying Mr. Burkey's motion for a new trial, and the error was not harmless, his convictions should be reversed and remanded for a new trial.

**Issue 4: Whether the trial court erred by not setting aside Mr. Burkey’s convictions for first degree kidnapping (count II) and first degree robbery (count IV) after finding these convictions merged with his first degree murder conviction (count I).**

The double jeopardy clauses of the United States and Washington Constitutions prohibit multiple punishments for the same offense. *See, e.g., State v. Adel*, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). “Courts use the merger doctrine as a tool of statutory construction to determine when the legislature intends multiple punishments to apply to particular offenses.” *State v. Saunders*, 120 Wn. App. 800, 820, 86 P.3d 232 (2004). “[T]wo offenses merge if to prove a particular degree of crime, the State must prove that the crime ‘was accompanied by an act which is defined as a crime elsewhere in the criminal statutes.’” *State v. Williams*, 131 Wn. App. 488, 498, 128 P.3d 98 (2006) (quoting *State v. Vladovic*, 99 Wash.2d 413, 419 & n. 2, 662 P.2d 853 (1983)). “If, in order to prove a particular degree of a crime, the State must prove the elements of that crime and also that the defendant committed an act that is defined as a separate crime elsewhere in the criminal statutes, the second crime merges with the first.” *State v. Zumwalt*, 119 Wn. App. 126, 131, 82 P.3d 672 (2003).

When a conviction merges with another conviction, the conviction on the lesser charge must be set aside. *Id.* at 132-133. “[T]he double jeopardy problem cannot be avoided by imposing concurrent sentences for the two crimes and characterizing them as the “same criminal conduct.”

*Id.* at 132. “The punitive aspects of multiple convictions—stigma and impeachment value—go beyond the loss of freedom.” *Id.*

Here, at sentencing, the trial court found Mr. Burkey’s convictions for first degree kidnapping (count II) and first degree robbery (count IV) merged with his first degree murder conviction (count I). (CP 387; RP 687). The State did not cross-appeal. (CP 1-410).

Because the trial court found the first degree kidnapping and first degree robbery convictions merged with the first degree murder conviction, the convictions for first degree kidnapping (count II) and first degree robbery (count IV) should have been set aside by the trial court. *See Zumwalt*, 119 Wn. App. at 132-133. The fact that the trial court ordered the sentences on the first degree kidnapping and first degree robbery convictions to run concurrently to the first degree murder sentence does not change this required result. *See Zumwalt*, 119 Wn. App. at 132; *see also* CP 390; RP 687-688.

Therefore, this case should be remanded for resentencing for the trial court to set aside Mr. Burkey’s merged convictions for first degree kidnapping (count II) and first degree robbery (count IV).

**Issue 5: Whether the trial court erred by imposing deadly weapon enhancements on Mr. Burkey’s merged convictions for first degree kidnapping (count II) and first degree robbery (count IV).**

Here, the trial court imposed a deadly weapon enhancement on each count, including on Mr. Burkey’s merged convictions for first degree kidnapping (count II) and first degree robbery (count IV). (CP 387, 390; RP 686-688). The trial court ordered the deadly weapon enhancements on each count, including counts II and IV, to run consecutively. (CP 390; RP 688).

The trial court erred by imposing deadly weapon enhancements on Mr. Burkey’s merged convictions for first degree kidnapping (count II) and first degree robbery (count IV). Imposing deadly weapon enhancements on the first degree kidnapping and first degree robbery convictions violated Mr. Burkey’s constitutional protections against double jeopardy. *See Zumwalt*, 119 Wn. App. at 132-33; *Adel*, 136 Wn.2d at 632; *cf. State v. Mandanas*, 168 Wn.2d 84, 90, 228 P.3d 13 (2010) (holding that “a sentencing court must impose multiple firearm enhancements where a defendant is convicted of multiple enhancement-eligible offenses that amount to the same criminal conduct under the sentencing statute.”).

As stated above under Issue 4, when a conviction merges with another conviction, the conviction on the lesser charge must be set aside in

order to avoid a double jeopardy problem. *See Zumwalt*, 119 Wn. App. at 132-33. Therefore, because the merged first degree kidnapping and first degree robbery convictions should have been set aside, the trial court should not have sentenced Mr. Burkey on these two offenses. It follows that because the trial court should not have sentenced Mr. Burkey on the merged first degree kidnapping and first degree robbery offenses, it should not have imposed deadly weapon sentence enhancements based on these two convictions.

Therefore, this case should be remanded for resentencing for the trial court to vacate the deadly weapon enhancements on the merged first degree kidnapping (count II) and first degree robbery (count IV) convictions.

**Issue 6: Whether the trial court erred by imposing 36 month terms of community custody on Mr. Burkey’s convictions for first degree murder (count I) and first degree assault (count VI), and an 18 month term of community custody on Mr. Burkey’s merged first degree robbery conviction (count IV).**

The trial court imposed 36 month terms of community custody on Mr. Burkey’s convictions for first degree murder (count I) and first degree assault (count VI), and an 18 month term of community custody on Mr. Burkey’s merged first degree robbery conviction (count IV). (CP 391; RP 688). Mr. Burkey challenges these terms of community custody for the first time on appeal. (CP 391; RP 688). “[E]stablished case law holds that

illegal or erroneous sentences may be challenged for the first time on appeal.” *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (citations omitted).

The trial court erred by imposing these 36 and 18 month terms of community custody. Each argument is addressed in turn below.

**a. Whether the trial court violated the constitutional prohibition against ex post facto laws by imposing 36 month terms of community custody on Mr. Burkey’s convictions for first degree murder (count I) and first degree assault (count VI).**

Mr. Burkey was sentenced to 36 month terms of community custody on his convictions for first degree murder (count I) and first degree assault (count VI). (CP 391; RP 688). These terms of community custody violated the constitutional prohibition against ex post facto laws. *See State v. Coombes*, 191 Wn. App. 241, 249-53, 361 P.3d 270 (2015) (finding the trial court erred in imposing a 36 month term of community custody, where the law in effect at the time of the offense set forth a 24-48 month term of community custody).

An alleged violation of the prohibitions on ex post facto laws is a question of law, reviewed de novo. *State v. Pillatos*, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007). Mr. Burkey bears the burden of proving that the applying the statutory provision imposing 36 month terms of community

custody on him is unconstitutional beyond a reasonable doubt. *See State v. Enquist*, 163 Wn. App. 41, 45, 256 P.3d 1277 (2011).

In general, a sentence imposed under the Sentencing Reform Act (SRA) is “determined in accordance with the law in effect when the current offense was committed.” RCW 9.94A.345. Mr. Burkey’s offenses were committed on, about, or between September 4, 2005 and September 5, 2005. (CP 238, 240, 245, 248, 254, 266-270, 419-421). At that time, the SRA imposed a discretionary range of community custody of 24 to 48 months for his convictions for first degree murder (count I) and first degree assault (count VI). *See* former RCW 9.94A.505(2)(a)(iii) (2005); former RCW 9.94A.715(1) (2005); former RCW 9.94A.850(5) (2005); former WAC 437-20-010 (2005); former RCW 9.94A.411(2) (2005); former RCW 9.94A.030(37)(a)(i), (v) (2005).

In 2009, the legislature amended the applicable community custody provision of the SRA. Laws of 2009, ch. 375, § 5. The amended statute imposed a mandatory 36 month term of community custody for Mr. Burkey’s first degree murder and first degree assault offenses. *See* RCW 9.94A.701(1)(b). The legislature expressly stated that this statute applies retroactively:

The act applies retroactively and prospectively regardless of whether the offender is currently on community custody or probation with the [Department of Corrections], currently incarcerated with a term of community custody or

probation with the department, or sentenced after the effective date of this section.

Laws of 2009, ch. 375, § 20.

The legislature may explicitly provide for retroactive application of a statute. *In re Personal Restraint of Flint*, 174 Wn.2d 539, 546, 277 P.3d 657 (2012). However, the United States and Washington Constitutions both prohibit ex post facto laws. U.S. Const. art. I, § 10; Wash. Const. art. I, § 23. ““A law that imposes punishment for an act that was not punishable when committed or increases the quantum of punishment violates the ex post facto prohibition.”” *Flint*, 174 Wn.2d at 545 (quoting *In re Personal Restraint of Hinton*, 152 Wn.2d 853, 861, 100 P.3d 801 (2004)). Accordingly, a defendant is properly subject to the punishment in effect at the time he committed the crime and the State cannot increase the amount of punishment thereafter. *Pillatos*, 159 Wn.2d at 475.

In order to bring a successful ex post facto claim, Mr. Burkey must show that the law (1) is operating retroactively and (2) increases the level of punishment from the level he was subject to on the date of the crime. *See Flint*, 174 Wn.2d at 545.

Both prongs of this test are met here. First, the statute expressly states that it applies retroactively. *See* Laws of 2009, ch. 375, § 20. Also, because the legislature amended the statute after Mr. Burkey committed the offenses, the statute applied retroactively to him.

Second, the SRA increased the level of punishment applicable to Mr. Burkey, from a discretionary range of 24 to 48 months of community custody, to a mandatory term of 36 months of community custody. *See* former RCW 9.94A.505(2)(a)(iii) (2005); former RCW 9.94A.715(1) (2005); former RCW 9.94A.850(5) (2005); former WAC 437-20-010 (2005); former RCW 9.94A.411(2) (2005); former RCW 9.94A.030(37)(a)(i), (v) (2005); RCW 9.94A.701(1)(b). The applicable level of punishment increases when a statute makes a formerly discretionary punishment mandatory. *Lindsey v. Washington*, 301 U.S. 397, 401-02, 57 S. Ct. 797, 81 L. Ed. 2d 1182 (1937); *see also Flint*, 174 Wn.2d at 550-51.

The 36 month terms of community custody imposed on Mr. Burkey are barred by the constitutional prohibitions against ex post facto laws. *See Lindsey*, 301 U.S. at 401-02; *Flint*, 174 Wn.2d at 545, 550-52; *Coombes*, 191 Wn. App. at 249-53. The 36 month terms of community custody should be stricken, and the case remanded for imposition of 24 to 48 month terms of community custody on Mr. Burkey's convictions for first degree murder (count I) and first degree assault (count VI).

**b. Whether the trial court erred by imposing an 18 month term of community custody on Mr. Burkey's merged first degree robbery conviction (count IV).**

Here, the trial court imposed an 18 month term of community custody on Mr. Burkey's merged conviction for first degree robbery (count IV). (CP 387, 391; RP 687-688).

The trial court erred by imposing a term of community custody on Mr. Burkey's merged conviction for first degree robbery (count IV). Imposing a term of community custody on the first degree robbery conviction violated Mr. Burkey's constitutional protections against double jeopardy. *See Zumwalt*, 119 Wn. App. at 132-33; *Adel*, 136 Wn.2d at 632.

As stated above under Issues 4 and 5, when a conviction merges with another conviction, the conviction on the lesser charge must be set aside in order to avoid a double jeopardy problem. *See Zumwalt*, 119 Wn. App. at 132-33. Therefore, because the merged first degree robbery conviction should have been set aside, the trial court should not have sentenced Mr. Burkey on this offense. It follows that because the trial court should not have sentenced Mr. Burkey on the merged first degree robbery offense, it should not have imposed a term of community custody on this conviction.

Therefore, this case should be remanded for resentencing for the trial court to vacate the 18 month term of community custody on the merged first degree robbery (count IV) conviction.

**Issue 7: Whether the amended judgment and sentence must be corrected to indicate that Mr. Burkey was found guilty of first degree murder (count I) under RCW 9A.32.020(1)(c), rather than under RCW 9A.32.020(1)(a).**

The State charged Mr. Burkey with first degree murder (count I) under either RCW 9A.32.030(1)(a) (premeditated first degree murder) or RCW 9A.32.030(1)(c) (first degree felony murder). (CP 419-420).

However, the jury was only instructed on first degree felony murder. (CP 237-238; RP 564-565). Therefore, Mr. Burkey was found guilty of first degree felony murder, under RCW 9A.32.030(1)(c). (CP 266).

The amended judgment and sentence indicates Mr. Burkey was found guilty of first degree murder under RCW 9A.32.020(1)(a), rather than under RCW 9A.32.020(1)(c), as found by the jury. (CP 237-238, 266, 384; RP 565-565). Therefore, this court should remand this case for correction of the amended judgment and sentence to indicate that Mr. Burkey was found guilty of first degree murder (count I) under RCW 9A.32.020(1)(c), rather than under RCW 9A.32.020(1)(a). *See, e.g., State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.2d 1280 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, erroneously stating the defendant stipulated to an exceptional sentence);

*State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, incorrectly stating the terms of confinement imposed).

**Issue 8: Whether this Court should refuse to impose costs on appeal.**

Mr. Burkey preemptively objects to any appellate costs should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612, 618 (2016), and pursuant to this Court's General Court Order issued on June 10, 2016.

At the time of sentencing, Mr. Burkey was 55 years old and he is now serving a sentence of 830 months confinement. (CP 380, 384-400; RP 693). Based on this fact, it is unlikely he will be able to work in the future. The trial court entered an Order of Indigency, granting him a right to review at public expense. (CP 405-406).

Mr. Burkey's Report as to Continued Indigency states that he has no income and owes over \$26,000 in legal financial obligations (LFOs). Accordingly, Mr. Burkey remains indigent and unable to pay costs that may be imposed on appeal. The imposition of costs would be inconsistent with those principles enumerated in *Blazina*. See *State v. Blazina*, 182 Wn.2d 827, 835-37, 344 P.3d 680 (2015).

In *Blazina*, our Supreme Court recognized the “problematic consequences” LFOs inflict on indigent criminal defendants. *Blazina*, 182 Wn.2d at 835-37. To confront these serious problems, this Court emphasized the importance of judicial discretion: “The trial court must decide to impose LFOs and must consider the defendant’s current or future ability to pay those LFOs based on the particular facts of the defendant’s case.” *Blazina*, 182 Wn.2d at 834. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” *Id.*

The *Blazina* Court addressed LFOs imposed by trial courts, but the “problematic consequences” are every bit as problematic with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then “become[s] part of the trial court judgment and sentence.” RCW 10.73.160(3); *see also* CP 395. Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants’ ability to move on with their lives in precisely the same ways the *Blazina* court identified.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene its reasoning not to require the same particularized inquiry before imposing costs on appeal. Under

RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion that *Blazina* held was essential before including monetary obligations in the judgment and sentence. This is particularly true where, as here, Mr. Burkey's Report as to Continued Indigency demonstrates a continued inability to pay costs. Mr. Burkey qualified for indigent appellate counsel upon filing the underlying notice of appeal and remains indigent at this time. (CP 405-406).

The *Blazina* court suggested, "if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person's ability to pay LFOs." *Blazina*, 182 Wn.2d at 839. This Court receives orders of indigency "as a part of the record on review." RAP 15.2(e). "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this Court to "seriously question" an indigent appellant's ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839.

This Court has discretion to deny appellate costs. RCW 10.73.160(1) states the “supreme court . . . *may* require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” *Staats v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000).

The record demonstrates Mr. Burkey does not have the ability to pay costs on appeal. He was found indigent by the trial court and remains indigent. Mr. Burkey respectfully requests this Court exercise its discretion by denying an award of appellate costs in this case, in the event that the State substantially prevails on appeal.

#### **F. CONCLUSION**

The case should be reversed and remanded for a new trial, for the following reasons: (1) the trial court erred by admitting evidence that Mr. Burkey head-butted Ms. Panessa; (2) the trial court erred by failing to give a unanimity instruction for first degree assault (count VI); and (3) the trial court erred by denying Mr. Burkey’s motion for a new trial based on the State’s failure to disclose its plea agreement with Ms. Lascelles to defense counsel.

The case should also be remanded for resentencing, for the following reasons: (1) for the trial court to set aside Mr. Burkey’s merged convictions for first degree kidnapping (count II) and first degree robbery

(count IV); (2) for the trial court to vacate the deadly weapon enhancements on the merged first degree kidnapping (count II) and first degree robbery (count IV) convictions; (3) for the trial court to strike the 36 month terms of community custody on the first degree murder (count I) and first degree assault (count VI) convictions, and impose terms of community custody of 24 to 48 months on each of these counts; and (4) for the trial court to vacate the 18 month term of community custody on the merged first degree robbery (count IV) conviction.

In addition, the case should be remanded for correction of the amended judgment and sentence to indicate that Mr. Burkey was found guilty of first degree murder (count I) under RCW 9A.32.020(1)(c), rather than under RCW 9A.32.020(1)(a).

Mr. Burkey also objects to any appellate costs should the State prevail on appeal. The record does not reflect that Mr. Burkey has the ability to pay.

Respectfully submitted this 23rd day of September, 2016.

  
Jill S. Reuter, WSBA #38374

/s/ Kristina M. Nichols

Kristina M. Nichols, WSBA #35918

Attorney for Appellant

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON )  
Plaintiff/Respondent ) COA No. 34093-7-III  
vs. )  
BEN ALAN BURKEY )  
Defendant/Appellant )  
PROOF OF SERVICE )  
\_\_\_\_\_ )

I, Jill S. Reuter, of counsel for Nichols Law Firm, PLLC, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on September 23, 2016, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Ben Alan Burkey, DOC #275919  
Washington State Penitentiary  
1313 North 13th Avenue  
Walla Walla, WA 99362

Having obtained prior permission from the Spokane County Prosecutor's Office, I also served the Respondent State of Washington by e-mail at [scpaappeals@spokanecounty.org](mailto:scpaappeals@spokanecounty.org) using Division III's e-service feature.

Dated this 23rd day of September, 2016.



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