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Division III
State of Washington
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No. 35828-3-III

COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON

State of Washington,
Respondent

v.

Jared Steven Lee,
Appellant

Appeal from the Superior Court of Yakima County

BRIEF OF APPELLANT

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I. INTRODUCTION

The State of Washington charged Jared Steven Lee (aka "Tank") in an amended information with Count I, First Degree Robbery pursuant to RCW 9A.56.190, 9A.56.200(1)(a), 9.94A.533(3) and 9.94A.825; Count II, Attempted First Degree Robbery pursuant to RCW 9A.56.190, 9A.56.200(1)(a), 9A.28.020, 9.94A.533(3) and 9.94A.825 with weapon enhancement pursuant to RCW 9.94A.533(3) and 9.94A.825 and a persistent offender allegation by RCW 9.94A.030, RCW 9.94A.570 and RCW 9.94A.030; Count III, First Degree Unlawful Possession of a Firearm pursuant to RCW 9.41.040(1)(a); and Count IV, Second Degree Unlawful Possession of a Firearm pursuant to RCW 0.41.040(2)(a)(1). (CP 38-39). This matter proceeded to trial on January 3, 2018, before the Honorable Richard Bartheld, Yakima County Superior Court in Yakima, Washington. (RP 74).

Ultimately, the jury returned verdicts of guilty on January 9, 2018 to Count I First Degree Robbery, Count II Attempted First Degree Robbery and Count III First Degree Unlawful Possession of a Firearm. (CP 178-180). The jury also found that the defendant was armed with a firearm at the time of commission of Count I and Count II. (CP 181-182). Mr. Jared Steven Lee was sentenced on January 12, 2018 to 160 months concurrent imprisonment on Counts I, II and II, plus 60 months firearm enhancement on Count I, and 36 months firearm enhancement on Count II. (CP 188). The firearm enhancement sentences

are to run consecutive. (CP 188). Mr. Lee's total confinement on Counts I, II and III, as well as the firearm enhancements, calculated to a total sentence of 256 months. (CP 188). Fines and costs of \$812.00 were imposed and cost of incarceration of up to \$250.00 was imposed. (CP 186-192). A timely appeal was filed in Yakima County Superior Court.

II. ASSIGNMENTS OF ERROR and ISSUE STATEMENTS

- 1. Did the Court err when it sentenced the defendant for both a First Degree Robbery and Attempted Robbery which were the same criminal conduct?**
- 2. Did the Court err when it sentenced the defendant for multiple firearm enhancements for the same criminal conduct?**
- 3. Was the defendant denied due process where defense counsel failed to move to sever unlawful possession of firearm counts from other counts of robbery?**
- 4. Did the Court err in failing to dismiss the First Degree Robbery based upon the defense motion for insufficient evidence at the close of the State's case?**

III. STATEMENT OF THE CASE

The Appellant, Jared Steven Lee, was alleged on March 5, 2017 to have taken money from Esteban Salazar by use of force or threatened use of force, which is First Degree Robbery. (CP 38-39). Additionally, he was charged with Attempted First Degree Robbery of Roger Salazar for an attempt to take money from him by use or threatened use of force. (CP 35-39). Both of these charges

were enhanced by the use of a firearm. (CP 35-39). In the same information, he was charged with First Degree Unlawful Possession of a Firearm. (CP 35-39).

Jury selection began on January 3, 2018 with Superior Court Judge Richard Bartheld presiding. (CP 74-75). The jury was selected and seated on January 3, 2018. Opening statements were given on January 3, 2018. (RP 175). The prosecutor advised they intended to prove Count I First Degree Robbery for taking twelve dollars (\$12.00) in cash from Esteban Salazar. Count II Attempted First Degree Robbery was for trying to take three thousand dollars (\$3,000.00) from Roger Salazar. Count III for having a firearm in his possession when he no longer had a right to do so. (RP 175-176). The defense reserved on its opening statement. (RP 186).

The State called Roger Salazar, age 24, to the stand. (RP 187). Roger Salazar testified his father is Esteban Salazar and he doesn't speak English, only Spanish. (RP 187). Roger Salazar was wanting to purchase a BMW car, which was found on Craigslist. (RP 188). He communicated through text messages about the car. (RP 189). The person he communicated with claimed to be "Stacey" and he was sent a picture of the car. (RP 190). Ultimately, the two agreed on a price of \$3,000.00 which he took out of his bank account. (RP 191).

An agreement was made to meet at Fiesta Foods in Yakima at around 3:30. (RP 192). The State introduced photos of a series of phone texts arranging the purchase of the BMW. (RP 206). He advised Stacey he would be arriving in

a Jetta. (RP 238). He then texted that he was at the Sun Dome in the Fiesta Foods parking lot. (RP 241). He parked in the lot close to Fair Avenue and they had \$3,000.00 with them. (RP 243). The money was in his wallet by the gearshift. (RP 244).

A man approached the car wearing a hooded sweatshirt with a hat that looked like a Seahawks hat. (RP 246). The man got into the car in the rear passenger seat. (RP 247). They drove to another location in the Fiesta Foods parking lot. (RP 218). The man pointed a gun at Esteban Salazar's head and said that there was no car, he wanted money. (RP 248). He also told them to stop the car and raise their hands. (RP 249). Roger Salazar testified he was afraid. (RP 249). He told the man that he did not have the money. (RP 250). The gun would move to point at him or his father depending on who was talking. (RP 251).

Roger's father, Esteban, threw twelve dollars (\$12.00) at the man and told him that was all they had. (RP 252). The man with the gun told them they had the money and he wanted all of it. (RP 252). The man pointed the gun at Roger Salazar and told him that he wanted all the money. (RP 253). Roger's father said something about his brother and grabbed the gun and started fighting. (RP 253). Roger turned off the car and went around to the back seat to open the door and grabbed the man with the gun. (RP 254). He pulled the man out by the neck and he let go of the gun and tried to run away. (RP 255). His father got out of the car and had the gun. (RP 255).

Roger grabbed the man by his vest and a bullet proof vest came off. (RP 256). As they struggled an employee from Fiesta Foods came over and helped hold the man. (RP 256). He kicked the man twice after he fell to the ground. (RP 257). His father hit the man with the gun on the head. (RP 259). He hit him on the head with the butt of the gun. (RP 260). A second man approached them and his father pointed the gun at him. (RP 261). The other man then ran away. (RP 262).

The police came and placed the man in handcuffs who he identified as the defendant, Jared Steven Lee. (RP 263). The police took pictures of the \$3,000.00 that they had with them. (RP 264). The plate of the silver Jetta Volkswagen was introduced as evidence. (RP 267). A number of photos were admitted of the auto and the scene after the police arrived at Fiesta Foods. (RP 273). In exhibit #44, Roger Salazar points out a bullet-proof vest from Mr. Lee. (RP 279-280). Mr. Roger Salazar gave a DNA sample to the police. (RP 283). On cross-examination, Roger Salazar testified that his father threw the \$12.00 to Mr. Lee. (RP 287). Roger Salazar's father hit Mr. Lee in the head with the butt of the gun. (RP 288).

The prosecution called Joe Scherschligt, Yakima P.D. (RP 292). Officer Scherschligt was dispatched to Fiesta Foods for a fight involving a weapon. (RP 293-294). He pulled into the store parking lot where two males were holding a third male subject. (PR 295). The officer saw a .45 caliber gun and a bullet-proof

vest lying on the ground. (RP 296). Pistol was silver in color and it was a semi-automatic. (RP 297). Roger Salazar and a man named Alejandro were holding on to Mr. Lee. (RP 297). He identifies COBAN on his car recording device. (RP300). When he approached, he drew his weapon, a semi-automatic weapon. (RP 302). Mr. Jared Lee had blood on his forehead. (RP 304). COBAN in-car video was admitted to show Mr. Lee in the police vehicle. (RP 305). The court later reversed and ruled the video of Mr. Lee in the back of the police vehicle was inadmissible until Mr. Lee testified. (RP 310). The court allowed the video until Mr. Lee was in the back of the squad car. (RP 317-318). A number of the photos of evidence including the firearm were admitted. (RP 322).

Anthony Avela is called as a government's witness. (RP 325). Mr. Anthony Avela works at Fiesta Foods. (RP 327). He saw a light-skinned guy held by two Hispanic males. He saw one of the Hispanic males pull-out a gun and start striking the white guy on the head. He told the Hispanic male to put down the gun. Then he waits for the police to arrive. (RP 328). When the police officer arrived the officer drew his gun; that was when Mr. Avela released the white man he was holding onto. (RP 329). He did see the Hispanic male hitting Mr. Lee with the gun. (RP 332). The Hispanic man struck the white man three times with the gun. (RP 333).

Officer Jim Wolcott of the Yakima Police Department testified he has been on the department for 30 years and 8 months. (RP 334). He arrived at the

Fiesta Foods parking lot where he observed a number of people fighting. (RP 335). He observed a firearm on the ground in the parking lot, a silver colored automatic handgun. (RP 337). The evidence was collected from the scene. (RP 339). He collected a jacket, mask, gloves and Legends Casino receipt. (RP 342). The body armor was admitted into evidence. (RP 349). The weapon was admitted into evidence. (RP 352). A Seahawks stocking cap was admitted into evidence. (RP 356). A cell phone was taken from the back seat of the Salazars' car. (RP 358). The officers located an identification for a "Brandon Lee" and it was admitted into evidence. (RP 371). He collected no money from the scene. (RP 380).

Rebecca Rasmusson was called to testify. (RP 381). She is the office assistant for Sun Comm 911 Communications. (RP 382). She took a 911 call from the case and put it on a disc. (RP 383-384). The 911 call was admitted into evidence. (RP 385).

Maria De La Luz Nino Sierra is called, who worked at Fiesta Foods. (RP 385-386). She was in the parking lot and heard yelling. (RP 387). She saw two Hispanic males holding a white guy. (RP 388). She saw that one of the Hispanic guys had a gun. (RP 388). The men were wrestling. (RP 388). She saw another employee help the Hispanic men hold the white guy. (RP 390). She made the 911 call to the police. (RP 392).

The State called Officer Kasey Hampton of the Yakima Police Department. (RP 409). Officer Hampton had been with the Yakima Police Department for 17 ½ years in March 2017, and she was assigned to the Detective division (RP 410). She worked the robbery investigation in the Fiesta Foods parking lot. (RP 411) She obtained DNA samples from Roger and Esteban Salazar. Additionally, she took a DNA sample from Mr. Lee. (RP 412) She forwarded the samples to the Washington State Patrol lab. (RP 413) Along with the samples taken from the gun by Ms. Drury of the Yakima City Crime lab. (RP 413) Identifies exhibit 14 as DNA swab from the grips of the gun. (RP 414) Exhibits 10, 11, 12, 13, 14, and 15 were admitted (RP 415-420)

Krista Drury of Yakima Police Department forensic lab called. (RP 420) Trained in forensic science from Central Washington University and Masters University of New Haven. (RP421) She examined a .45 caliber Smith and Wesson semi-automatic weapon capable of holding 8 rounds in the magazine and one bullet in the weapon. (RP 429-430)

The firearm was tested and it would fire a bullet. (RP 431) The weapon was fingerprinted, but no usable fingerprints were found on the weapon. (RP 434) DNA evidence was used to obtain DNA from the grips of the firearm. (RP 438) She observed a red stain on the firearm grips that she swabbed believing it to be blood. (RP 438-439)

State called Laura Kelly (RP 445) working with Washington State Crime Lab in Vancouver, Washington. (RP 446) The method of DNA testing used was the STR, or short tandem repeats. (RP 452) A mixed DNA profile includes DNA from more than one individual. (RP 455) Blood was found in the swabs from the grip and slide of the weapon. (RP 470-471) The profile from the DNA matched Jared Lee, 1 in 6.3 decillion. (RP 471) That would be 6.3 followed by 32 zeros. (RC 471) Jared Lee was the major mixture and no comparisons could be made for the minor component of the mixture. (RP 471) The profile from the magazine could not be identified. (RP 472) The blood on the gun could be consistent with a person being hit in the head or with a person holding the gun. (RP 478)

Officer Jaime Gonzalez is called as a witness. (RP 479) He is fluent in both English and Spanish. (RP 479) Responded to call at Fiesta Foods in Yakima. (RP 480) Esteban Salazar was present and he appeared excited and scared. (RP 482) He collected a Seahawk stocking cap from the vehicle owned by Salazar. (RP 484) A white-colored cell phone that was found in the back seat of Salazar's vehicle. (RP 485) Additionally, black gloves and sunglasses that were found were admitted into evidence. (RP 486) There was no \$12.00 that was recovered, but it was reportedly offered to person that had the gun. (RP 488) He does not remember anyone saying the money was taken, but that it was offered to Mr. Lee. (RP 488) The \$3,000.00 was documented as being in the car. (RP 488) The police would have looked for the \$12.00 if the victim had told them it was

given to the suspect. (RP 489) He remembered that the \$12.00 was offered to Mr. Lee, but it had not been taken. (RP 490, lines 11-14) Officer Gonzalez's report documents that Esteben Salazar said he offered the \$12.00 from his pocket to the suspect. (RP 491, line 24 to RP 492, line 6) and the suspect yelled he wanted \$3,000.00. Sergeant Tory Adams of the Yakima Police Department was called to the stand (RP 492) He responded to the Fiesta Foods parking lot and drove into the lot. (RP 493) Body armor, a black coat or sweatshirt, a firearm, and a wallet were found. (RP 493) The two pieces of body armor were approximately eight-feet apart. (RP 494) The firearm was found on top of the coat in the parking lot. (RP 494) The firearm, wallet, and jacket were all found close together. (RP 494) The wallet had Brandon Lee's identification inside it. (RP 495) He looked in the back seat but found nothing more of interest. (RP 495) A photo of the back seat was admitted as exhibits 68 and 69, and there was a bottle and papers but no money. (RP 496) Another photo of the floor board of the car was admitted as exhibit 70. (RP 497) A third and fourth photo of the back seat of the car were admitted as exhibits 71 and 72. The prosecutor published photos 68-73 showing the back seat of the car. (RP 499) The Salazars showed \$3200.00 they brought for the car purchase. (RP 500) He photographed the \$3200.00, which they, Salazars, had with them. (RP 502)

Sergeant Troy Adams remembers Roger Salazar was emotional and quivering. (RP 505) Esteban was more consoling towards his son. (RP 505-506)

He never saw twelve dollars in the car. (RP 507) He never heard anyone say that twelve dollars was taken. (RP508)

The state calls Julie Jacobs. She works at Yakima Police Department in police services processing police reports. (RP 518) The system is called NIBRing, National Incident Base Reporting System. (RP 518) She found that the police report mentions \$12.00 given to the suspect but that \$12.00 was not recorded. (RP 521)

Officer Scherschligt was recalled by the state. (RP 522) Mr. Esteban Salazar said that he gave Mr. Lee \$12.00. (RP 523) Mr. Lee was not found with the \$12.00 by him. (RP 525) The report documents that Roger Salazar said he gave Mr. Lee \$12.00 from his front pocket. (RP 526)

The state called Esteban Salazar to the stand. (RP527) An interpreter was interpreting his testimony. (RP 527) Mr. Salazar is 47-years-old. (RP 528) Roger Salazar is 24-years-old. (RP 528) He saw a car on Craigslist on March 4, 2017. (RP 529) He speaks very little English. (RP 530) Text messages were used to discuss the car purchase. (RP 530) An agreement was reached for the car purchase. (RP 530) A meeting was set for Fiesta Foods to purchase the car. (RP 531) They took the \$3,000.00 to purchase the car. (RP 531) The \$3,000.00 was placed between the seats near the gear shift. (RP 532) They did not take a gun with them to Fiesta Foods (RP 532) As they were seated in the car, Mr. Lee approached them. (RP 533) The man spoke English as he got into the car. (RP

534) The man demanded the \$3,000.00 (RP 535) The man pointed a gun at his head. (RP 535) He said that he pulled twelve dollars from his shirt and gave it to the man. (RP 535) The man took the twelve dollars, but said he wanted \$3,000.00. (RP 536) He told him that his brother was coming with the money. (RP 536) The man looked away for a minute and he grabbed the gun. (RP 536) He punched the man in the face and he let go of the gun. (RP 537) Roger turned off the car and grabbed the man. (RP 537). Another man then came at him as he got out of the car and he pointed the gun at the other guy. (RP539) The police were called by him. (RP 539) The police responded and arrested the man. (RP 540) He was unable to identify the man who robbed him as Mr. Lee. (RP541-542) The man that was there has a Seahawk's hat. (RP 543)

He spoke with the man although his English is limited. (RP 546) He took the gun from the man because he pointed it at his son. (RP 548) He testified that he offered Mr. Lee the twelve dollars. (RP 548) That the man in the back seat took the \$12.00 from him. (RP 548) The stipulation that on 7/30/1999, Mr. Lee was convicted of a serious offense was read into the record. The government rests. (RP 558)

The defense raised a motion to dismiss the first degree robbery charge based upon the \$12.00 that was unaccounted for after the search of the automobile. (RP 560) The twelve dollars was not in the automobile nor on Mr. Jared Lee. (RP 560) No one entered the \$12.00 into evidence. One person said

Roger had the \$12.00, and Esteben said that he had the \$12.00. Mr. Lee is not found with any money. (RP 560) Additionally, the defense sought dismissal of the firearm charges because the DNA places his blood on the gun from being struck in the head but no DNA of his on the grip or magazine well and also no fingerprints which is count 3. (RP 561)

The court ruled that it could dismiss only where there was no evidence to support the state's case. (RP 561, lines 13-16) The defense argued the \$12.00 was never found. (RP 561) All the state has is the conflicting statements about both Roger and Esteben giving the money to Mr. Lee. (561) The court found that there was "some evidence" in the conflicting statements of the Salazars. (RP 562) Esteben said that he gave the \$12.00 to Mr. Lee. (RP 562) Therefore, there is evidence to support the charge of First Degree Robbery (RP 562) As to the First Degree Possession of a Firearm, there is the DNA evidence and both Esteben and Roger testified that Jared Lee held the firearm. RP 563) In looking at whether it was an attempt or actual robbery that is a question for the jury. (RP 564, lines 7-13)

The prosecution argued because Mr. Esteben gave the \$12.00 to Jared Lee that is the First Degree Robbery in Count I. (RP 605, lines 2-6) The demand for all the money was the Attempted Robbery. (RP 606, lines 10-17) The \$3,000.00 was not obtained, but he got everything he could get. (RP 607), lines 6-13)

IV. ARGUMENT

1. The Court erred when it sentenced the defendant for both a First Degree Robbery and Attempted Robbery which were the same criminal conduct.

Mr. Lee was convicted and sentenced on Count I (First Degree Robbery) and Count II (Attempted First Degree Robbery). Count I First Degree Robbery is defined in RCW 9A.56.190 as follows:

A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

The basis for Mr. Lee's conviction of First Degree Robbery was an alleged theft of \$12 from Esteban Salazar. The basis for Mr. Lee's conviction for Attempted First Degree Robbery was Mr. Lee's attempted robbery of what he believed to be \$3,000 in the victim's possession. There was no evidence at trial to support an actual theft of \$12, as discussed below. In fact, Mr. Lee's actions on the day of the robbery were intended to obtain \$3,000.00, which he believed the Salazars had in their possession because they had arranged to purchase a BMW for that price. Roger Salazar testified at trial that he had the \$3,000.00 in a wallet hidden under some receipts and papers next to the gear shift in the Jetta. (RP

244). Mr. Salazar testified that Mr. Lee told him and his father to “stop the car, raise [their] hands, there’s no car and give me the money, the \$3000.” (RP 249).

The double jeopardy clause of the Fifth Amendment prohibits multiple punishments for the same offense. *Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). The double jeopardy clause also prevents convictions for two offenses when the element in each offense is the same, proof of one offense would also prove the other and the offenses are constitutionally the same. *State v. Roybal*, 82 Wash.2d 577, 512 P.2d 718 (1973). RCW 9A.28.020, criminal attempt, requires a person to do any act which is a substantial step toward the commission of a crime. RCW 9A.56.200, first degree robbery, *inter alia*, requires a person to be armed with a deadly weapon in the commission of a robbery or of immediate flight therefrom. Proof of attempted first degree robbery and first degree robbery require proving the same elements to prove each offense as both are constitutionally the same, with one exception- an attempted robbery causes no actual robbery, where a first degree robbery does in fact cause an actual robbery to occur. Either way, the State in this case used the same set of facts stemming from the same robbery to prove both a robbery and attempted robbery. Here, Mr. Lee was convicted of committing a robbery against Roger and Esteban Salazar, who were front seat occupants of a motor vehicle with Mr. Lee in the backseat, while Mr. Lee was armed with a firearm. Mr. Lee took nothing

from the robbery and instead should have been convicted only of an attempted robbery.

Also, under Washington State's merger doctrine, when one offense is used to elevate the degree of another offense, the lesser offense merges in with the greater offense and cannot be sentenced separately. See Joseph P. Bennett, Note, *The "Same Criminal Conduct" Exception of the Washington Sentencing Reform Act: Making the Punishment Fit the Crimes*, 65 Wash.L.Rev. 397, 399-400 (1990) (citing *State v. Vladovic*, 99 Wash.2d 413, 662 P.2d 853 (1983); *State v. Johnson*, 96 Wash.2d 926, 639 P.2d 1332 (1982) (*Johnson II*); *State v. Johnson*, 92 Wash.2d 671, 600 P.2d 1249 (1979) (*Johnson I*), cert. dismissed, 446 U.S. 948, 100 S.Ct. 2179, 64 L.Ed.2d 819 (1980)).

2. The Court erred when it sentenced the defendant for multiple firearm enhancements for the same criminal conduct.

Mr. Lee's prison sentence for his convictions on Count I First Degree Robbery and Count II Attempted First Degree Robbery were enhanced by 96 months of consecutive imprisonment (60 months firearm enhancement on Count I, 36 months firearm enhancement on Count II) for using a firearm in the commission of the crimes. (CP 188).

As discussed herein, the convictions for First Degree Robbery and Attempted First Degree Robbery should be vacated and thus, the firearm enhancement on one or both should likewise be vacated. Furthermore, there was

insufficient evidence to support a finding that Mr. Lee was armed with a firearm and thus the firearm enhancements are inapplicable.

3. The defendant was denied due process when defense counsel failed to move to sever unlawful possession of firearm counts from other counts of robbery.

Here, defense counsel failed to bring a motion to sever Counts I & II - First Degree Robbery and First Degree Attempted Robbery, and Count III – Unlawful Possession of a Firearm. CrR 4.4(b) provides that the trial court “shall grant a severance of offenses whenever...the court determines that severance will promote a fair determination of the defendant’s guilt or innocence of each offense.”

Washington law “disfavors separate trials” based on concerns about judicial economy. *State v. McDaniel*, 155 Wn.App. 829, 860, 230 P.3d 245 (2010); See also, *State v. Bryant*, 89 Wn.App. 857, 864, 950 P.2d 1004 (1998). However, severance is appropriate where "there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition." *Sutherby*, 165 Wn.2d at 883.

Although severance always lies within the discretion of the court, a defendant is entitled to severance if he shows that joinder would be so manifestly prejudiced that it outweighs the dominant concern with judicial economy. *United States v. Armstrong*, 621 F. 2d 951, 954 (9th Cir. 1980).

To determine whether severance is warranted, courts consider four factors: (1) the strength of the state's evidence on each count, (2) the clarity of defenses as to each count, (3) court instructions to the jury to consider each count separately, and (4) the admissibility of evidence of the other charges even if not joined for trial." *Sutherby*, 165 Wn.2d 884-85 (quoting *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994)).

As to the strength of the state's evidence on each count, when the State presents "strong [evidence] on each count, there is no necessity for the jury to base its finding of guilt on any one count on the strength of the evidence of another." *State v. Bythrow*, 114 Wn.2d 713, 721-22, 790 P.2d 154 (1990).

As to the clarity of defenses, the failure to sever charges could possibly force defendants to present antagonistic defenses prejudicial to the defenses of each count. *State v. Grisby*, 97 Wn.2d 493, 507, 647 P.2d 6 (1982).

As to the instructions to the jury, in *Sutherby*, 165 Wn.2d at 884, the court disregarded the presumption that jurors follow instructions due to the unique nature of the offenses the defendant was charged with and the recognition that the unique charges could often lead jurors to disregard the trial court's instructions. *Sutherby*, 165 Wn.2d at 884, and *State v. Harris*, 36 Wn.App. 746, 752, 677 P.2d 202 (1984) 752 (quoting *State v. Saltarelli*, 98 Wn.2d 358, 364, 655 P.2d 697 (1982)).

And finally, whether evidence to support Count I First Degree Robbery was admissible on the other counts, specifically Count III Unlawful Possession of a Firearm. ER 402 provides that “[e]vidence which is not relevant is not admissible.” ER 403 provides that a trial court may exclude even relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” ER 404(b) forbids the admission of evidence to show a person’s propensity to act a certain way to urge a verdict based on that propensity. *State v. Phillips*, 45411-4-II. Here, the evidence relating to Mr. Lee’s prior felony would have been inadmissible at a trial on Counts I and II—the only count for which the evidence had any probative value was on the unlawful possession charge, Count III. Evidence relating to Mr. Lee’s prior felony conviction may have achieved his conviction on Count III but served only to prejudice his defenses on Counts I and II. In our federal courts, *United States v. Nguyen*, 88 F. 3d 812, 815 (9th Cir. 1996) held that “[a]ll of the Circuit Courts seem to agree that to try a felon in possession count together with other felony charges creates a very dangerous situation because the jury might improperly consider the evidence of a prior conviction when deliberating about the other felony charges.”

- 4. The Court erred in failing to dismiss the First Degree Robbery based upon the defense motion for insufficient evidence at the close of the State’s case.**

When a defendant challenges the sufficiency of the evidence underlying his conviction, a reviewing court views the evidence in the light most favorable to the State and asks whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The reviewing court considers circumstantial evidence equally reliable as direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997); *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Sufficient evidence supports a conviction if any rational trier of fact, when viewing the evidence in the light most favorable to the State, could have found the essential elements of the charged crime proved beyond a reasonable doubt. *State v. Owens*, 180 Wn.2d 90, 99, 323 P.3d 1030 (2014). A claim of insufficiency admits the truth of the State's evidence. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). This court reviews challenges to the sufficiency of the evidence by drawing all reasonable inferences in favor of the State and interpreting those inferences strongly against the defendant. *Id.* *State v. Valdez*, 48740-3-II.

Mr. Salazar testified that his father gave Mr. Lee \$12.00 and they claimed that was all the money they had, that they did not have the \$3,000 on them. (RP 252). However, in the Declaration of Probable Cause narrative filed by Officer Scherschligt, he certifies under penalty of perjury that Roger Salazar pulled out \$12.00 from his pocket and gave it to Mr. Lee. (CP 3).

After Mr. Lee was arrested by police, Mr. Salazar went to the police station and was interviewed by detectives. At the police station, detectives photographed the \$3,000 Mr. Salazar had with him at the time of the incident and photographs of the money was marked as Identification 43 at trial. (RP 265). Evidence retrieved from Mr. Lee was booked into police custody as Yakima Police Evidence Item 6, state's Identification No. 3, contained "one sealed plastic or paper bag with one coat, jacket, black leather jacket with grey hood, black mask, gloves and a Legends Casino receipt." (RP 341, 357). Also, the body armor Mr. Lee allegedly wore was identified as Item 4. (RP 348). The firearm was identified as Item 1. (RP 352). The Seahawks stocking cap worn by Mr. Lee was identified as Item 4 and was marked as Exhibit No. 6. (RP 355, 357). The cell phone was marked as Exhibit 7. (RP 358). Exhibit No. 5 is the wallet found at the scene, containing identification cards from Brandon Lee and Timothy Rowe and miscellaneous cards and plastic gift cards. (RP 360-361). Officer Jim Wolcott, the Yakima Police officer who processed the evidence at the scene, testified he did not recall having logged any currency into evidence. (RP 380). Officer Jaime Gonzalez, who assisted with setting up the crime scene inventory, did not locate \$12.00 on the scene. (RP 487). Officer Gonzalez recalled the Salazars making an offer to Mr. Lee that they would give him \$12 because that's all they had, not that \$12 was actually ever given to Mr. Lee. (RP 488). After reviewing his report, Officer Gonzalez testified that "[the] victim said he reached

into his pocket and took \$12 out and offered it to the suspect” but that the suspect did not take the money and instead “yelled he wanted the money, the \$3,000.” (RP 492). Sergeant Adams, the on-scene commander, did not recall seeing \$12.00 laying in the backseat nor did he recall Esteban Salazar alleging that Mr. Lee had stolen \$12 from him. (RP 507-508).

Count I First Degree Robbery was based on an allegation that Mr. Lee had taken \$12.00 from Esteban Salazar. Mr. Lee’s attorney made a motion to dismiss the First Degree Robbery at the conclusion of the State’s case. (RP 560). The basis for the motion was the insufficiency of the evidence. The State did not prove that \$12.00 had in fact been taken from Esteban Salazar, nor could the State prove that \$12.00 had been located anywhere near the crime scene when police arrived and processed it. Simply put, there was no evidence other than testimony from the Salazars that \$12.00 had ever been brought up during the course of the robbery and when it was brought up, the Salazars testified that Mr. Lee denied their offer and continued to demand the \$3,000 that was brought for the purchase of the car. Also, dismissal was requested for Count III Unlawful Possession of a Firearm. (RP 561). There was no DNA or fingerprint evidence on the firearm to prove Mr. Lee ever had possession of it. All of the corroborating witness testimony saw Esteban Salazar with the firearm, not Mr. Lee. There was no evidence put on other than testimony from the alleged victims that Mr. Lee ever had the firearm in his possession. Even assuming all of the evidence in the light

most favorable to the State, the State could neither prove Mr. Lee displayed a firearm and stole \$12.00 from anyone or that he had in possession the firearm recovered at the scene. Testimony from the alleged victim absent direct or circumstantial corroboration is insufficient evidence to support a conviction.

V. CONCLUSION

The case should properly be remanded for a new trial because the crimes of attempted robbery and first degree robbery were as a result of the same criminal conduct in fact and law, convictions for first degree robbery and unlawful possession of a firearm did not have sufficient evidence to survive a motion to dismiss or establish the elements for a conviction and because the defendant was deprived of his constitutional rights when the aforementioned convictions were entered.

Respectfully submitted this 24 day of September, 2018



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