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Division III
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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.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

1. Was there sufficient evidence to support Lee's conviction for first degree robbery?
2. Was there sufficient evidence to support each finding that Lee was armed with a firearm?
3. Has Lee failed to prove that his trial counsel was ineffective by waiving a motion to sever the unlawful possession of firearm count from the other two counts?
4. Was the trial court correct in sentencing Lee to both first degree robbery and attempted first degree robbery because each count involved a separate victim?
5. Was the court correct in imposing two mandatory firearm enhancements when Lee was convicted of two enhancement-eligible offenses?
6. Was there sufficient evidence to support Lee's conviction for first degree unlawful possession of a firearm?

II. STATEMENT OF THE CASE

The defendant, Jared Lee, was convicted of first degree robbery, attempted first degree robbery, and first degree unlawful possession of a firearm. CP 186. The charges stemmed from the following facts elicited at trial:

On February 24, 2017, 24-year-old Roger Salazar withdrew \$3,400 from his Banner Bank account so that he could buy a car. RP 194-5. Bank records confirmed this. SE 16. Roger testified that in March he

saw a BMW on Craigslist that he wanted to purchase. RP 187-9. He texted the seller's phone number asking for photos of the car and inquiring about the car's condition. RP 207-8, 213, 215. The seller was asking \$3,500 for the car. RP 215. Roger told the seller that he had \$3,000 cash. RP 224. He later texted, "I have the cash in hand right now." RP 230. After some negotiating, the seller accepted \$3,000. Roger and the seller agreed to meet on March 5, 2017 at Fiesta Foods at 2:15 pm so Roger could see the car. RP 219, 234.

Roger drove to Fiesta Foods. His father, Esteban Salazar, was in the passenger seat. RP 244. Roger texted the seller that he was in a silver Jetta. RP 238, 240. Roger brought \$3,000 cash with him, which he kept in his wallet by the gearshift. RP 243. At 2:40 pm, Roger texted the seller that he was at the Fiesta Food's parking lot. RP 241. Photographs of all the text messages were admitted at trial. SE 17, 19-31. Roger and Esteban sat in the parking lot for a while. RP 245.

After waiting for the seller, an unknown male (later identified as Lee) knocked on the passenger window and asked, "are you the one who called for the Beemer?" RP 246. Roger said, "yes." *Id.* Lee said that the car was on the other end of the lot and asked Roger for a ride. RP 247. Roger agreed to give him a ride and Lee got in the rear passenger seat. *Id.* After Roger started driving, Lee pulled out a gun and told him to stop the

car. RP 248. Lee pointed the gun at Esteban's head. RP 248. He said that there was no car and he wanted money, the \$3,000. RP 248-9. Roger stopped the car, looked back at him, and told him that he did not have the money. RP 250. Esteban gave Lee \$12 and said that's all they had. RP 252. While pointing the gun at Roger, Lee said he knew that they had the money and wanted it all. RP 252.

Esteban said, "there's my brother" and distracted Lee. RP 252-3. Esteban then grabbed the gun and he and Lee started fighting for the gun. RP 253, 254. Esteban stood up on his seat during the struggle, leaving a shoe print on the car seat. RP 545, SE 39. Roger got out of the car, grabbed Lee, and pulled him out of the car. RP 255. Lee released the gun and Esteban ended up with it. RP 255. Roger chased Lee and they started fighting. RP 256. Anthony Avalos, a Fiesta Foods employee helped Roger hold onto Lee. RP 256. Esteban ran up and hit Lee with the gun. RP 256. Roger yelled at folks to call the police, and officers came and arrested Lee. RP 259, 262-3. In-court, Roger identified Lee as the male who tried to rob him. RP 263-4.

47-year-old Esteban Salazar testified that he was with his son at Fiesta Foods to see a car. RP 531. He testified that they waited 10-15 minutes and then gave the male a ride. RP 534. The male told Roger to stop and told him to give him the \$3,000. RP 535. Esteban turned back

and there was a gun to his head. RP 535. He told the male that all he had was \$12 and gave him \$12 from his pants pocket. RP 535-6. The male took the \$12 with his hand but said that he wanted \$3,000. RP 536, 548.

In order to distract the male, Esteban pointed to the back and said that his brother had the \$3,000. RP 536. The male turned and Esteban grabbed the gun. RP 536. They started fighting. *Id.* Esteban punched the male in the face and he released the gun. RP 537. Roger got out of the car and pulled the male out. RP 537. The male tried to get away but Roger grabbed him. *Id.* Esteban told a Fiesta Foods employee to call the police. RP 537. Esteban testified that he hit the male in the head because he kept trying to get away and Esteban wanted to hold him for the police. RP 538.

At one point during the fight, Lee asked for help from an unidentified man who was sneaking in between the cars and who also had a gun. RP 538-9. Esteban told him to stop but the man kept coming towards them. RP 539. Esteban lifted the gun and told the man that if he did not stop coming towards them, he would fire at him. *Id.* The man turned and ran away. RP 538.

Anthony Avalos, an employee at Fiesta Foods, testified that he was outside when he saw two white, light-skinned males looking around and walking around the cars. RP 327. Mr. Avalos saw them peeking through the windows of the cars. RP 327. He kept an eye on them. RP 328. A

little later on he tried to break up a fight between two Hispanic males and one light-skinned male. RP 328-9. He arrived in the middle of the fight and did not see the beginning. RP 333. He held onto the light-skinned male until the police arrived. RP 329-30. He testified that the male he was holding was one of the two males he had seen earlier in the parking lot. RP 329.

Officer Joe Scherschligt testified that he got to Fiesta Foods and identified the man being detained as Jared Lee. RP 295-6. When the officer got there, he had Mr. Avalos step away from Lee. RP 303. Roger still had a hold on Lee's right arm and shoulder. *Id.* When Mr. Avalos stepped away, Lee started struggling and it looked like he was trying to pull away. *Id.* Lee turned and put his left hand behind his back. *Id.* Officer Scherschligt pointed his gun at Lee and told him to get his hands up. *Id.* Officer Scherschligt then arrested Lee. RP 303.

A 45-caliber Smith & Wesson pistol and a black leather jacket were found lying on the ground close to all those involved. RP 297, 316, 318, 337, 425. The pistol had one bullet in the chamber and a loaded magazine. RP 317, 426, 428. The pistol was test-fired and was functional. RP 431. Also found at the scene was a bullet proof vest. RP 297, 303, 319, 337. Roger testified that when he chased and grabbed Lee by the shirt, Lee's bullet proof vest came off. RP 256.

Officer Jaime Gonzalez also responded and found a cell phone and hat in the backseat of Roger Salazar's car. RP 484-7. Neither the phone or hat belonged to the Salazars. RP 486.

In addition, Sergeant Tory Adams responded to the scene and testified that Roger Salazar showed him \$3200 cash that was brought to purchase the car. RP 500-1. The extra \$200 was brought in case there were negotiations. RP 501. The cash was photographed. RP 501. Sergeant Adams also photographed a shoe print seen on the front passenger seat of the Salazars' car. RP 506, SE 39.

Kristen Drury, the forensic lab supervisor for the Yakima Police Department, swabbed the firearm three times for DNA. RP 421, 438. The first swab was from the grips, slide, and trigger of the pistol. RP 439. The second swab was from the lips and base of the magazine. RP 439, 441. The third swab was from a red stain on the upper portion of the slide and the frame. RP 439, 442. The red-stained portion was swabbed separately from the swab of the grips and the slide. RP 439, 442.

Ms. Drury also examined the firearm for latent fingerprints but was unable to locate any. RP 433. In addition, she test-fired the firearm and it functioned as designed. RP 431.

Washington State Patrol forensic scientist Laura Kelly examined the three sets of swabs collected by Kristen Drury. RP 459, 470-3. First,

she concluded that there was staining consistent with blood. RP 470. She found that DNA obtained from the swabs of the stain matched the DNA profile of Lee. RP 470, 473. The match was 1 in 6.3 decillion. *Id.*

Second, Ms. Kelly concluded that that the DNA profile obtained from the swab of the grip and slide of the pistol came from at least three individuals. RP 471. The profile of the major component matched the DNA profile of Lee. The match was 1 in 6.3 decillion. *Id.* The scientist testified that the DNA on the grip of the pistol or slide could be consistent with someone holding a pistol in one's hand. RP 478.

Third, Ms. Kelly concluded that the swabs from the magazine lips came from at least two individuals, including one male. RP 472. However, due to limited genetic information, no comparisons could be made from the mixed profile. RP 472.

For count three, the judge read a stipulation to the jury that Lee had previously been convicted of a serious offense. RP 558, CP 45.

At the end of the State's case, Lee made a motion to dismiss, arguing insufficient evidence of first degree robbery and unlawful possession of a firearm. RP 560-1. The motion was denied. RP 561-4.

Lee did not put on any witnesses or evidence. Lee was convicted of all three counts and the jury answered "yes" to each of the two firearm enhancements. CP 178-82. Lee was sentenced to 160 months on the first

degree robbery, plus 60 months for the enhancement, 84 months on the attempted first degree robbery, plus 36 months for the enhancement, and 116 months on the first degree unlawful possession of a firearm. CP 188.

III. ARGUMENT

A. There was sufficient evidence to support Lee's conviction for first degree robbery.

In reviewing a challenge to the sufficiency of the evidence, courts review the evidence in the light most favorable to the State to determine whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). The verdict will be upheld unless no reasonable jury could have found each element proved beyond a reasonable doubt. *State v. Gentry*, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. *State v. Theroff*, 25 Wn. App. 590, 599, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). The evidence is interpreted most strongly against the defendant. *Id.* Evidentiary inferences favoring the

defendant are not considered in a sufficiency of the evidence analysis.

State v. Jackson, 62 Wn. App. 53, 58 n.2, 813 P.2d 156 (1991).

Circumstantial evidence may be used to prove any element of a crime. *State v. Garcia*, 20 Wn. App. 401, 405, 579 P.2d 1034 (1978). “In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Here, the State had to prove these elements of first degree robbery:

- (1) That on or about (date), the defendant unlawfully took personal property from the person or in the presence of another;
- (2) That the person owned or was in possession of the property taken;
- (3) That the defendant intended to commit theft of the property;
- (4) That the taking was against the person’s will by the defendant’s use or threatened use of immediate force, violence, or fear of injury to that person or to the person of another;
- (5) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
- (6) That in the commission of these acts or in immediate flight therefrom the defendant was armed with a deadly weapon; and
- (7) That any of these acts occurred in the State of Washington.

WPIC 37.02.

As to the first element, Lee argues that there is insufficient evidence that he stole \$12.00 from Esteban Salazar. App. Br. at 14, 23. At trial, both Roger and Esteban Salazar testified that when the demand for money was made, Esteban gave Lee \$12.00 cash. Roger testified that Esteban gave Lee \$12 and said that's all they had. RP 252. Esteban testified that after the demand for money was made, he told the suspect that all he had was \$12 and that he gave the male \$12 from his pants pocket. RP 535-6. He testified that the male took the \$12 with his hand, but said he wanted more money. RP 536, 548.

Lee argues that the State could not "prove that \$12.00 had been located anywhere near the crime scene when police arrived and processed it." App. Br. at 22. However, the State does not have to prove the location of the \$12.00 in order to prove that Lee robbed Esteban Salazar of \$12.00. The testimony of the two eyewitnesses was enough to show that Lee unlawfully took personal property (cash) from Esteban in his presence and that Esteban owned or was in possession of the \$12.

Both parties questioned officers about their efforts to find the \$12. Officer Scherschligt testified that he did not look for the \$12 because the scene was chaotic, and it was not their main concern. RP 524. Similarly, Officer Gonzalez testified that he did not look for the \$12. RP 487-8. Sgt.

Adams testified that he did not recall seeing \$12 in Esteban's car but also was not aware of the \$12 at the time. RP 507.

As far as the missing \$12, there are many explanations. It is possible the cash was unrecovered because it was not the focus of the officers at the time they responded to the scene. It is possible the money was lost somewhere between the Salazars' car and the point where Lee was caught. Or perhaps a customer picked up the cash or it blew away in the wind. It is also possible that Lee ditched the cash. The fact that the cash was unrecovered, however, does not negate the sufficiency of the evidence where there was uncontroverted eyewitness testimony that Lee took \$12.00 from Esteban Salazar.

There was also sufficient evidence that Lee intended to commit theft of the property. After agreeing to sell a car to Roger, Lee told the Salazars that there was no car and that he wanted money. RP 248-9. He then proceeded to take \$12 from Esteban by force. RP 252. He continued to demand cash after taking the \$12. RP 252. He did not bring a car to the parking lot to be sold. As such, by Lee's own actions and words, there was sufficient evidence of his intent to commit theft of the cash.

In addition, there was sufficient evidence of the fourth element, that Lee took the \$12 from Esteban by his threatened use of immediate force, violence or fear of injury to Esteban. Regarding this element, Lee

argues that there was insufficient evidence he displayed a firearm. App. Br. at 23. However, both Salazar testified that Lee had a firearm pointed at Esteban's head and that he demanded money. Esteban was scared. RP 535. In response, Esteban gave Lee \$12.00. The gun was later recovered in the parking lot and Lee's DNA was found in multiple places on the gun. As such, there was sufficient evidence that Lee, by his threat to use force, took \$12 from Esteban.

As to the fifth element, there was substantial evidence that force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking. Lee obtained the property, \$12, through the show of force, a gun.

Regarding the sixth element, there was overwhelming evidence admitted at trial to show that Lee was armed with a deadly weapon at the time he committed the other elements. Both Salazars testified that Lee had a firearm. The police recovered that firearm and Lee's DNA was found in multiple places on the firearm. Lastly, as to the seventh element, the State proved that the acts occurred in the State of Washington. *See* RP 480.

Because there was overwhelming evidence of all the elements of first degree robbery, the trial court correctly denied Lee's motion to dismiss at the end of the State's case.

B. There was sufficient evidence to support each finding that Lee was armed with a firearm.

Lee argues that there was insufficient evidence to support a finding that Lee was armed with a firearm. App. Br. at 17. However, he fails to provide any analysis or reasoning for this conclusion. Elsewhere in his brief, he states that “There was no evidence put on *other than the testimony from the alleged victims* that Mr. Lee ever had the firearm in his possession.” App. Br. at 22 (emphasis added).

RCW 9.94A.533, pertaining to sentencing enhancements, requires the State to prove that the defendant was armed with a firearm at the time of the commission of the crime. In this case, the jury was instructed as follows:

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crimes in Counts 1 and 2. A “firearm” is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

CP 177. Here, Lee used and displayed a firearm during the commission of both counts one and two.

As for count one, first degree robbery, there was sufficient evidence that Lee was armed with a firearm during the commission of the crime. Esteban Salazar testified that after Lee demanded the cash, he

turned and saw that Lee was pointing a pistol at his head. RP 535. Esteban told Lee that all he had was \$12 and gave him \$12. RP 535-6. Lee took the \$12 from his hand. RP 536, 548. Roger Salazar corroborated that testimony. RP 248. Furthermore, the gun was found on the ground in the parking lot close to all those involved. RP 318.

Lee claims that “There was no DNA or fingerprint evidence on the firearm to prove Mr. Lee ever had possession of it.” App. Br. at 20. This completely ignores the conclusions of the forensic scientist who testified. RP 471-3. DNA from Mr. Lee was found in two places on the gun – it was found on the swab of the blood stain, RP 473, and on the swab of the slide, grips, and trigger. RP 471. The odds were 1 in 6.3 decillion that it was Lee’s DNA. RP 471. This evidence was sufficient to support the jury’s findings that Lee was armed with a firearm at the time he committed count one.

As for count two, the attempted robbery, Roger testified that when Lee got in the car, Lee told him to stop and give him the \$3,000. RP 354. Lee knew that Roger had \$3,000 because when texting about the purchase of the car, Roger texted that he had \$3,000 cash and added, “I have the cash in hand right now.” RP 230. In fact, \$3,200 was in Roger’s wallet by the gearshift. RP 243. After Lee took \$12 from Roger’s dad, Lee said that wanted the \$3,000 cash. RP 536, 548. Lee still had the gun at this

point because he did not release the gun until Esteban distracted Lee and took the gun from him. RP 252-55. In addition to the eyewitness testimony that Lee had a gun, Lee's DNA was found on the gun. RP 471, 473. This was overwhelming evidence that Lee was armed with a firearm at the time he committed the attempted robbery.

C. Lee has failed to prove that his trial counsel was ineffective in waiving a motion to sever the unlawful possession of firearm count.

CrR 4.4(a)(1) provides:

(1) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. **Severance is waived if the motion is not made at the appropriate time.**

(emphasis added). Lee never moved to sever the firearm count from the other counts. As such, the issue was waived by Lee's trial counsel. *See State v. McDaniel*, 155 Wash. App. 829, 859, 230 P.3d 245, 261 (2010).

On appeal, Lee argues his attorney was ineffective by not moving to sever the firearm count. When a defendant argues ineffective assistance of counsel, he must show that his counsel's performance was deficient and resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). "To show deficient representation, the

defendant must show that it fell below an objective standard of reasonableness based on all the circumstances.” *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). He must overcome the strong presumption that his counsel represented him adequately and effectively, possibly by showing the absence of a legitimate strategic or tactical basis for the challenged conduct. *See id.* at 8; *McFarland*, 127 Wn.2d at 335-36. “In assessing performance, ‘the court must make every effort to eliminate the distorting effects of hindsight.’ ” *Nichols*, 161 Wn.2d at 8 (quoting *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992)). To demonstrate prejudice, the defendant must establish “a reasonable probability that, but for counsel’s unprofessional errors, the outcome of the proceeding would have been different.” *Id.* at 8.

Washington law disfavors separate trials. *State v. Medina*, 112 Wn. App. 40, 52, 48 P.3d 1005 (2002). Offenses properly joined under CrR 4.3(a) may be severed if “the court determines that severance will promote a fair determination of the defendant’s guilt or innocence of each offense.” CrR 4.4(b); *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). The defendant has the “burden of demonstrating that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy.” *Bythrow*, 114 Wn.2d at 718.

When weighing potential prejudice from joinder, the court must consider whether (1) the State's evidence is strong on each count, (2) the defenses are clear on each count, (3) the trial court instructs the jury to consider each count separately, and (4) the evidence of each count is admissible on the other count even if not joined for trial. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994).

Lee argues that the stipulation prejudiced his defenses to counts one and two. App. Br. at 19. However, he provides no specific analysis of *how* the stipulation prejudiced his defenses. He also does not address the strength of the State's evidence on each count, or the jury instructions the trial court gave that protect against possible prejudice.

In support of his argument, Lee relies on a federal case, *United State v. Nguyen*, in which the defendant was convicted of conspiracy to transfer an unregistered shotgun, aiding and abetting the transfer of the shotgun, and being a felon in possession of a firearm. 88 F.3d 812, 814 (9th Cir. 1996). The Ninth Circuit concluded that the district court did not abuse its discretion by consolidating Nguyen's cases and ordering that the felon in possession of a firearm charge be tried with the other charges. *Id.* at 818. As the court explained, this was based on the following factors:

In sum, we have consistently relied upon two factors in determining whether a defendant has been prejudiced by the

consolidation of a felon in possession charge with other, unrelated felon charges: **the strength of the evidence against the defendant and the nature and efficacy of the methods employed to guard against prejudice.**

Id. at 816-17 (emphasis added). These factors are similar to Washington's factors, which include the strength of the evidence and the instructions given to the jury to safeguard against prejudice.

Based on Washington's four factors, as outlined in *Russell*, Lee fails to show that the court would have granted a severance motion if one had been made. As to the first factor, the State's evidence on all three counts was strong. This is a case where Lee was caught and detained immediately after the robbery. He was also identified in court by Roger Salazar as the male who tried to rob him. RP 263-4. Both victims described in detail the facts supporting the completed robbery and attempted robbery. Their testimony was consistent. Not far from where Lee was detained, officers found the firearm he used to commit the crime. On top of that, his DNA was found in multiple places on the firearm. The evidence was equally strong on the firearm count. As such, the evidence was strong on all three counts.

As to the second factor, Lee's defenses to the charges were clear and consistent with each other. At trial Lee argued he did not rob the

Salazars and did not possess a firearm. Regarding the third factor, the trial court instructed the jury to decide each count separately. CP 156. The trial court also provided separate to-convict instructions and instructed the jury that it needed to find each element beyond a reasonable doubt. CP 160, 167, 170.

Analyzing the last factor, evidence showing that Lee possessed the firearm would have been cross-admissible in separate trials. The possession of the firearm was necessary to prove the essential elements of first degree robbery. The State had to prove that property was taken from the victim by the threatened use of force (in this case, displaying a firearm), and that Lee was armed with a deadly weapon (a firearm) during the commission of the crime. Each of these elements would have required introducing evidence that Lee possessed a firearm.

The only additional evidence that the jury heard about count three was the stipulation to a prior conviction. That stipulation was that on July 30, 1999, Lee was previously convicted of a serious offense. RP 558. The jury was not told the nature of the prior conviction. *Id.* While Lee's stipulation would have been inadmissible on counts one and two, the court need not grant a severance motion just because evidence is not cross-admissible. *State v. McDaniel*, 155 Wn. App. 829, 860, 230 P.3d 245 (2010). Instead, the primary concern is whether the jury can reasonably be

expected to compartmentalize the evidence. *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990).

Finally, Lee has not shown specific prejudice, or that there was a reasonable probability that he would have been acquitted of either charge at separate trials. *See State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012). The evidence on both charges was strong and essentially unrefuted. There is no indication that a jury would have acquitted Lee of either robbery count if it had been unaware of the firearm charge, or vice versa. Because Lee has not shown specific prejudice or that the trial court would have granted a severance motion had it been made, his ineffective assistance of counsel claim fails.

D. The trial court did not error in sentencing Lee to both first degree robbery and attempted first degree robbery because each count involved a different victim.

1. Counts 1 and 2 do not encompass the same criminal conduct because they involve different victims.

Appellate courts generally defer to the discretion of the sentencing court and will reverse a sentencing court's determination of same criminal conduct only on a "clear abuse of discretion or misapplication of the law." *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). If the record supports a single conclusion about whether the crimes constitute the same criminal conduct, the sentencing court abuses its discretion if it arrives at a

contrary result. *State v. Aldana Graciano*, 176 Wn.2d 531, 537-8, 295 P.3d 219 (2013). But if the record supports different conclusions, the issue lies in the court’s discretion. *Id.* at 538.

A trial court abuses its discretion where the court: (1) adopts a view no reasonable person would take and is manifestly unreasonable; (2) rests on facts unsupported in the record and is therefore based on untenable grounds; or (3) was reached by applying the wrong legal standard and is made for untenable reasons. *State v. Johnson*, 180 Wn. App. 92, 100, 320 P.3d 197 (2014). In this case, Lee has not shown an abuse of discretion.

Under the Sentencing Reform Act (SRA), “when calculating an offender’s score, a court must count all convictions separately except offenses which encompass the same criminal conduct.” RCW 9.94A.525(5)(a)(i), .589(1)(a). Offenses which constitute the same criminal conduct are counted as one offense. RCW 9.94A.525(5)(a)(i). “‘Same criminal conduct ...’ means two or more crimes that require the same criminal intent, are committed at the same time and place, *and involve the same victim.*” RCW 9.94A.589(1)(a) (emphasis added). If any element of the same criminal conduct analysis is missing, a trial court must count the offenses separately when calculating the offender score. *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000); *State v. Garza-*

Villarreal, 123 Wn.2d 42, 864 P.2d 1378 (1993). Thus, same criminal conduct cannot occur where there are multiple victims. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987).

The same criminal conduct statute is “construed narrowly to disallow most claims that multiple offenses constitute the same criminal act.” *Aldana Graciano*, 176 Wn.2d at 540 (quoting *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997)). The defendant bears the burden of proving current offenses encompass the same criminal conduct. *Id.*

In *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987), our State Supreme Court held that “Convictions of crimes involving multiple victims must be treated separately.” The Court overruled the portion of *State v. Edwards*, 45 Wn. App. 378, 380-82, 725 P.2d 442 (1986), that held that crimes involving two victims could constitute “the same course of conduct.” *Id.* The Supreme Court reasoned:

To hold otherwise would ignore two of the purposes expressed in the SRA: ensuring that punishment is proportionate to the seriousness of the offense, and protecting the public. RCW 9.94A.010(1), (4). As one commentator has noted, “to victimize more than one person clearly constitutes more serious conduct” and, therefore, such crimes should be treated separately. D. Boerner, *Sentencing in Washington* § 5.8(a), at 5-18 (1985). Additionally, treating such crimes separately, thereby lengthening the term of incarceration, will better protect the public

by increasing the deterrence of the commission of these crimes. For these reasons, we conclude that crimes involving multiple victims must be treated separately.

Dunaway, 109 Wn.2d at 215.

Here, the second amended information identified Esteban Salazar as the victim in count 1, first degree robbery. CP 38. And in count 2, attempted first degree robbery, the victim was identified as Roger Salazar. RP 39.

In opening statement, the prosecutor told the jury, “The state will produce evidence that will prove beyond a reasonable doubt these three crimes. Count 1 is first degree robbery for taking the \$12 cash from Esteban Salazar. Count 2, attempted first degree robbery for trying to take \$3,000 cash from Roger Salazar. Count 3, having a firearm in his possession...” RP 176. The prosecutor explained that there were two victims: “The first witness to testify will be Roger Salazar. Probably the second witness to testify will be Esteban Salazar, the two named victims in this case.” RP 177. At the end of his opening, the prosecutor stated:

At the conclusion of all the evidence, I will have an opportunity to come back before you and make a closing statement. At that time I will ask you to find Mr. Lee guilty of all three counts, first degree robbery of Esteban Salazar, attempted first degree robbery of Roger Salazar and first degree unlawful possession of a firearm.

RP 186.

Prior to closing arguments, the judge instructed the jury that “A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.” CP 156.

Then, in closing argument, the prosecutor also explained that count one involved Esteban Salazar:

So let’s look at the elements of first degree robbery. The state must prove these things beyond a reasonable doubt: On March 5, 2017, in Washington State, Jared Lee unlawfully took personal property, which was cash, from the person or in the presence of Esteban Salazar. That’s the \$12 that Esteban and Roger testified about. Esteban Salazar owned or was in possession of the property, the cash. Mr. Lee intended to commit theft of the property, the cash, and the taking was against Esteban’s will by Mr. Lee’s use or threatened use of force, immediate force violence or fear of injury. The force or fear used was to obtain the property or overcome resistance to its taking, and that Mr. Lee was armed with a deadly weapon, which was a firearm.

RP 597-8. He went on to explain count two:

Count 2, attempted first degree robbery. The elements, again, March 5, 2017, Washington State, Mr. Lee committed an act that was a substantial step toward the commission of first degree robbery. In this count, what

we're talking about is the \$3000 or the \$3200 cash that Roger Salazar had.

RP 598. And the prosecutor explained the difference between the two counts as follows:

Basically the difference between an attempted first degree robbery and a completed first degree robbery, in a completed first degree robbery Mr. Lee actually succeeded in getting the \$12 cash from Esteban. So that robbery is completed. The attempted first degree robbery is an attempted robbery because he did not succeed in getting the \$3000 or \$3200 cash from Roger.

RP 598-9. The prosecutor then went through the evidence and throughout his closing maintained that count one involved the completed robbery of Esteban and that count two involving the attempted robbery of Roger. RP 604-7, 610.

The defense attorney, in his closing argument, agreed, stating "Count 1 is based on \$12." RP 615. He argued there's a reasonable doubt as to Count 1 because "there's no \$12." RP 618. As to Count 2, the defense stated in closings that "Count 2 is first degree attempted first degree robbery. This would be for the \$3000." RP 618.

In this case, the victims for each count were clearly identified in the second amended information and throughout the trial. On appeal, Lee agrees that count one was based on an allegation that Lee had taken

\$12.00 from Esteban Salazar and that count two was based on an attempt to take money from Roger Salazar. App. Br. at 2, 14, 22. In sum, the two counts do not encompass the same criminal conduct because they involve different victims.

2. Convictions on Counts 1 and 2 do not violate double jeopardy because the offenses harm different victims.

The constitutional guaranty against double jeopardy protects a defendant from a second trial for the same offense and against multiple punishments for the same offense. *State v. Vladovic*, 99 Wash. 2d 413, 423, 662 P.2d 853, 858 (1983). In order to be the “same offense” for purposes of double jeopardy the offenses must be the same in law and in fact. If there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses. *Id.*

When offenses harm different victims, the offenses are not factually the same for purposes of double jeopardy. *State v. Baldwin*, 150 Wash. 2d 448, 457, 78 P.3d 1005, 1010 (2003); *see also State v. Rupe*, 101 Wn.2d 664, 693, 683 P.2d 571 (1984) (finding no double jeopardy violation where defendant robbed two bank tellers, each of whom was responsible for the money in her till); *State v. Larkin*, 70 Wn. App. 349,

352-57, 853 P.2d 451 (1993) (finding no double jeopardy violation when the defendant was convicted of two counts of first degree robbery which arose out of the same conduct; the defendant took different property belonging to two victims, thus those offenses were not identical in fact).

Lee claims that the State used the same set of facts to prove counts one and two. However, counts one and two each harmed a different victim. Count one involved harm to Esteban Salazar. Count two involved harm to Roger Salazar. As such, they are not considered the same criminal act. The same evidence was not used to prove each conviction. Because the offenses were not factually identical, the two offenses were not the same offense under the “same evidence” test, and the two convictions did not violate double jeopardy.

3. Convictions on counts 1 and 2 do not violate the merger doctrine because they involved different victims and separate and distinct injuries.

Merger claims may be raised for the first time on review. *See State v. Ralph*, 175 Wn. App. 814, 823, 308 P.3d 729 (2013). The merger doctrine is a rule of statutory construction that applies only when the legislature has clearly indicated that in order to prove a particular degree of crime, the State must prove not only that a defendant committed the crime but that the crime was accompanied by an act that is defined as a crime elsewhere in the criminal statutes. *State v. Vladovic*, 99 Wn.2d 413,

420-21, 662 P.2d 853 (1983). Under the merger doctrine, courts presume that “the legislature intended to punish both offenses through a greater sentence for the greater crime.” *State v Freeman*, 153 Wn.2d 765, 773, 108 P.3d 753 (2005). There is no danger of a double jeopardy violation when offenses merge and the defendant is punished only once. *State v. Parmelee*, 108 Wn. App. 702, 711, 32.P.3d 1029 (2001). Offenses that appear to have merged under the doctrine may still be considered separate when the injury or injuries caused by the predicate offense are separate and distinct from, and not merely incidental to, the crime of which the predicate offense forms an element. *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979); *State v. Frohs*, 83 Wn. App. 803, 807, 815-16, 924 P.2d 384 (1996).

When dealing with merger issues, the court looks at how the offenses were charged and proved, and do not look at the crimes in the abstract. The court also asks whether the State was required to prove the act constituting the merging crime to elevate the other crime. *State v. Davis*, 177 Wn. App. 454, 463, 311 P.3d 1278 (2013).

As applied to this case, the Legislature did not intend that the offenses of robbery and attempted robbery merge when the two counts involve different victims. Crimes against multiple victims are not merely incidental to each other but have “independent purpose or effect” and are

not subject to the doctrine of merger. *State v. Larkin*, 70 Wash. App. 349, 358, 853 P.2d 451, 456 (1993) (citing *State v. Hudlow*, 36 Wash. App. 630, 633, 676 P.2d 553 (1984); *State v. Clapp*, 67 Wash. App. 263, 275, 834 P.2d 1101 (1992)).

In this case, the evidence only supported a completed crime of robbery with one victim, Esteban Salazar. And it only supported an attempted crime of robbery as to Roger Salazar. The offenses do not merge because the two convictions are supported independently by evidence satisfying the elements of each crime.

In addition, there were separate and distinct injuries. The robbery charge arose when money was taken from Esteban Salazar. The attempted robbery charge arose when Lee then tried to get money from Roger Salazar. Because the injuries of the robbery and attempted robbery involved different individuals, they clearly created separate and distinct injuries. Accordingly, Lee's robbery conviction does not merge into his attempted robbery conviction.

E. The court did not error in imposing two mandatory firearm enhancements when Lee was convicted of two enhancement-eligible offenses.

Under RCW 9.94A.533(3), if the jury finds that the defendant was armed with a firearm during the commission of a felony as defined by the statute, the court must impose a consecutive term for the firearm

enhancement. *State v. Simms*, 151 Wash. App. 677, 684-85, 214 P.3d 919, 923 (2009). Firearm enhancements are mandatory, must be served in total confinement, and run consecutively to all other sentencing provisions. *Id.*

Lee argues that multiple firearm enhancements were imposed for the same criminal conduct. As explained earlier, counts one and two did not involve the same criminal conduct because they involved two separate and distinct victims. Nonetheless, our State Supreme Court has held that a sentencing court must impose multiple firearm enhancements where a defendant is convicted of multiple enhancement-eligible offenses even if the offenses amount to the same criminal conduct under the sentencing statute. *State v. Mandanas*, 168 Wn.2d 84, 90, 228 P.3d 13, 15 (2010). As such, the trial court did not error in imposing a firearm enhancement for each enhancement-eligible offense.

F. There was sufficient evidence to support Lee's conviction for first degree unlawful possession of a firearm.

To convict Lee of the crime of first degree unlawful possession of a firearm in the first degree, the following elements must be proved beyond a reasonable doubt:

- (1) That on or about (date), the defendant knowingly owned a firearm or knowingly had a firearm in his possession or control;
- (2) That the defendant had previously been convicted of a serious offense; and

(3) That the ownership or possession or control of the firearm occurred in the State of Washington.

WPIC 133.02.

Here, there was overwhelming evidence of Lee's guilt. Regarding the first element, the State established that Lee had a firearm through the testimony of two victims who described Lee holding and pointing a gun at them, the loaded .45-caliber Smith & Wesson pistol found in the parking lot, and forensic evidence showing that Lee's DNA was located on the firearm in multiple places, including on the grips and slide of the pistol, areas consistent with Lee holding the pistol in his hand. RP 471-3, 478. The second element, Lee's previous conviction for a serious offense, was stipulated to by both parties. RP 558. As to the location of the crime, the State set forth substantial evidence that Lee possessed the gun in the parking lot of Fiesta Foods in Yakima, Washington. RP 480. As such, the court correctly denied Lee's motion to dismiss at the end of the State's case because there was sufficient evidence for a jury to find all the elements of first degree unlawful possession of a firearm.

IV. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Lee's convictions and sentences.

Respectfully submitted this 16th day of January, 2019,

s/Tamara A. Hanlon
TAMARA A. HANLON WSBA 28345
Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on January 16, 2019, via the portal, I emailed a copy of BRIEF OF RESPONDENT to Douglas D. Phelps. I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 16th day of January, 2019 at Yakima, Washington.

s/Tamara A. Hanlon
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