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COA NO. 36035-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD JOHN RICHARDSON,

Appellant.

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

The Honorable Julie M. McKay, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court violated appellant's right to confront the witnesses against him under the Sixth Amendment.

2. The court erred in instructing the jury in a manner that lowered the State's burden of proof on the conspiracy charge.

3. Appellant's trial attorney provided ineffective assistance of counsel in failing to object to the jury being instructed in a manner that lowered the State's burden of proof on the conspiracy charge or in failing to propose an instruction to hold the State to its burden of proof.

4. The court erred in failing to count current offenses as "same criminal conduct" in calculating the offender score.

5. The \$200 criminal filing fee imposed as part of the sentence is unauthorized by statute.

6. The cost of supervision imposed as part of the sentence is unauthorized by statute.

7. The interest notation in the judgment and sentence is unauthorized by statute.

Issues Pertaining to Assignments of Error

1. Whether admission of out-of-court statements made by a non-testifying co-defendant implicating appellant in the crime violated appellant's right to confrontation because they were testimonial?

2. To convict appellant of conspiracy, the State needed to prove a conspiracy to commit the crime of robbery in the first degree. The jury, however, was not given instruction on the elements of first degree robbery. Instead, it was only instructed on the elements of second degree robbery. Did the court err in instructing the jury in a manner that lowered the State's burden of proof on the conspiracy charge? Alternatively, is reversal required because defense counsel was ineffective in failing to prevent the jury from being instructed in a manner that relieved the State of its burden of proof?

3. Whether the offenses of conspiracy to commit robbery and murder constitute the "same criminal conduct" in calculating the offender score because each offense involved the same time, place, victim and objective intent?

4. Where the amended statute prohibiting imposition of a criminal filing fee against indigent defendants applies to cases pending on direct appeal, whether the \$200 criminal filing fee must be vacated because appellant is indigent?

5. Where the amended statute prohibiting imposition of discretionary costs on indigent defendants applies to cases pending on direct appeal, whether the cost of community custody supervision must be stricken from the judgment and sentence because appellant is indigent?

6. Whether the notation in the judgment and sentence directing accrual of interest on all legal financial obligations must be amended to state that no interest shall accrue on non-restitution obligations, as mandated by the amended statute applicable to appellant's case?

B. STATEMENT OF THE CASE

Richardson appeals his conviction and sentence for first degree felony murder and conspiracy to commit first degree robbery. CP 319-42.

1. Investigation

Damien Stewart lived in an apartment in Spokane. 1RP¹ 105-06. He had a substance abuse problem (methamphetamine). 1RP 106-08. On January 25, 2015, a neighbor found Stewart's lifeless body in the apartment. 1RP 121-22. Police arrived and observed a pool of dried blood around the body. 1RP 148, 150, 152. There were bloody footprints on the floor. 1RP 154, 228. The apartment was in disarray, as if ransacked. 1RP 150-52, 182. Speaker boxes were knocked over. 1RP 152. A knife blade without a handle was under Stewart's hand. 1RP 153, 164, 183. A broken jewelry box was next to his body. 1RP 153, 183. A

¹ Citation to the verbatim report of proceedings is as follows: 1RP - six consecutively paginated volumes consisting of 10/27/17, 2/9/18, 3/6/18, 3/7/18, 3/8/18, 3/12/18, 3/13/18, 3/14/18, 3/15/18, 4/20/18; 2RP - 3/5/18; 3RP - 11/4/16.

bloody belt and tie, and pieces of a wooden stick, were nearby. 1RP 674-75, 677. A frying pan was on the floor of the kitchen. 1RP 678.

A neighbor described seeing frequent, short-stay vehicle and foot traffic associated with Stewart's apartment. 1RP 189-92, 198, 209. This neighbor believed drug dealing took place and recorded the license plate numbers of vehicles in a logbook. 1RP 199, 210. Police traced one plate to a woman named Carla Ward. 1RP 231. When contacted, she turned over an electronic benefit transfer (EBT) card that belonged to Chris Hall. 1RP 231, 247. Stewart had given her the card. 1RP 238, 244-45. After using it to buy groceries, she went to Stewart's apartment. 1RP 238. Hall and Cox were there. 1RP 238, 245. Richardson was not. 1RP 241. Hall was upset that he had not gotten his EBT card back from Stewart. 1RP 238. Ward described Hall saying strange, "off-the-wall," threatening things. 1RP 245, 250. There was a bad vibe in the air. 1RP 249.

After speaking with Ward, police conducted further investigation and eventually contacted Hall and Ricky Cox at the House of Charity, a facility for homeless people in downtown Spokane. 1RP 232-33, 460-61. Police located Isaiah Freeman and Richardson in the skate park. 1RP 462-63. Freeman's shoeprint matched the imprint left in the blood at the scene and was consistent with a bloody print left on Stewart's face. 1RP 469, 472. The State ultimately charged Richardson by amended information

with first degree murder under a felony murder theory and conspiracy to commit first degree robbery. CP 237-38. Freeman did not testify at Richardson's trial. Cox and Hall did.

2. Cox's Version of Events

Cox agreed to testify against Richardson in exchange for pleading guilty to second degree murder and a significantly reduced sentence. 1RP 274, 329-30. He gave his version of events at trial. Cox met Hall, Freeman and Richardson at the House of Charity. 1RP 275-76. Cox was a meth user. 1RP 277. He hung out with the other three. 1RP 276. Richardson used meth as well. 1RP 277. Cox also used to hang out with Stewart and sometimes got drugs from him. 1RP 278. Richardson did not know Stewart. 1RP 195.

Cox set up a drug deal with Stewart for an "eight ball" of meth via text message. 1RP 280-85. He asked if Stewart had Hall's EBT card; Stewart said he didn't. 1RP 281-82. Stewart said he would need to pick the card up later. 1RP 287.

Cox planned to rob Hall. 1RP 285. The four of them had run out of meth provided by Richardson. 1RP 285, 288-89. At the skate park, Cox said they could get more dope from Stewart. 1RP 288. Cox came up with a plan to rob Stewart. 1RP 288-89. Richardson was not part of the discussion and Cox did not think he heard what Cox was saying. 1RP

289-90. Cox and Hall had previously been to Stewart's apartment, where Hall and Stewart argued. 1RP 341-42. Richardson had no knowledge of the tension in their relationship. 1RP 342.

The four men walked from the skate park to Stewart's apartment. 1RP 287. As they walked, there was more talk of getting dope from Stewart and robbing him. 1RP 290. Richardson was privy to the discussion. 1RP 290. Cox heard Freeman say, "we're all gonna rob Damien and kill him." 1RP 290-91. The three others "got scared, like, what? You're not gonna . . . no, you're not gonna do that. And, you know, it just -- it just things just went out of hand and it went to the extreme to where it shouldn't have went." 1RP 291. Freeman said he was going to hurt Stewart really bad, "I'm going to beat the crap out of this dude," and "I want him dead." 1RP 291. Cox thought Freeman was joking. 1RP 291-93. "We all felt the same way." 1RP 293. There was, though, a serious plan to rob Stewart. 1RP 293.

When they arrived at Stewart's apartment, Hall knocked on the door. 1RP 297. Stewart opened it and was mad that two additional people had come over. 1RP 297, 349-50. A fight broke out and Hall hit Stewart.² 1RP 297-98, 353. Freeman grabbed a chain around Stewart's neck and

² Cox said in a pre-trial interview that Stewart threw the first punch and Freeman defended himself. 1RP 353-54.

dragged him inside. 1RP 315, 353. The door was shut and locked. 1RP 354.

Cox and Richardson waited outside. 1RP 298. According to Cox, "[w]e were just outside keeping watch, make sure everything was cool" and to make sure "there wasn't too much damage." 1RP 298. Moments after the door was shut, a neighbor came out and asked if everything was okay. 1RP 298, 354. They said everything was fine. 1RP 298-300. From outside, they could hear "banging noises, like somebody get, like, thrown around and stuff like that." 1RP 299. They waited a while longer and then Cox knocked on the door. 1RP 298. Hall opened it. 1RP 301. Cox and Richardson went inside. 1RP 301-02. Freeman held Stewart's face down to the ground. 1RP 302. Cox and Richardson started looking for the dope, "turning things over." 1RP 301-02. They couldn't find any. 1RP 302-03. Stewart went in and out of consciousness. 1RP 304. He struggled and tried to fight back. 1RP 309. Freeman asked him where the dope was. 1RP 309. Richardson was doing nothing at this point. 1RP 309.

Cox kicked Stewart. 1RP 304, 356. After that, Cox saw Richardson kick Stewart once in the face while Freeman held him down. 1RP 304-05, 356-57. Freeman asked them to hand him a frying pan, a knife, and speaker boxes. 1RP 305. Whatever Freeman pointed to, Cox

grabbed it and gave it to him. 1RP 305. Richardson handed Freeman the frying pan at his request. 1RP 307. Freeman beat Stewart with the frying pan. 1RP 306-07.

At some point Hall struck Stewart in the face with a stick. 1RP 308-09. Cox grabbed a belt for Stewart's wrists and a tie to keep his mouth shut. 1RP 310-11. Cox handed Freeman the speakers, which were thrown onto Stewart's face. 1RP 311. Freeman struck Stewart in the face with a jewelry box. 1RP 311-12. Freeman poked Stewart in the neck and face with a knife, which was too dull, so he asked for a sharper one. 1RP 312-14. Freeman choked Stewart with the chain he wore around his neck. 1RP 315-16. Cox was surprised by Freeman's extreme actions. 1RP 376. The plan was to rob Stewart, not kill him. 1RP 376.

When they left the apartment, Cox took his sleeping bags.³ 1RP 316. Freeman took Stewart's wallet and phone. 1RP 316-17. Richardson took nothing. 1RP 367. The plan was to use cards from the wallet to get some money and buy more dope. 1RP 317. Richardson was part of this plan. 1RP 317. They went to a 7-Eleven store to see if they could extract money. 1RP 318. Freeman later disposed of the phone. 1RP 317-18.

³ A small plastic baggie containing a crystalline substance with visual characteristics consistent with methamphetamine was on the dresser. 1RP 166-73. Cox testified he did not take it because there was not enough meth inside to smoke. 1RP 365-66, 372.

"After the fact," Freeman threatened "if anyone knows about this, tells somebody about this, all of us were gonna get it just like Damien." 1RP 358. He had a knife in his hand at the time. 1RP 358.

In three pre-trial interviews with the police and attorneys, Cox never indicated that Richardson had a plan to steal dope. 1RP 335. It wasn't until the fourth interview that he made the claim. 1RP 335. In a previous interview with defense counsel, Cox said he and Hall had a plan to rob Stewart of his dope, and Richardson was not part of the plan. 1RP 335-36.

Cox also maintained in a pre-trial interview that Richardson was not fully informed on the way to Stewart's apartment.⁴ 1RP 336. Richardson was told the plan was to get Hall's EBT card and Cox's personal items. 1RP 336-38. Cox asked Richardson if he would like to join them: "Would you like to come with me to get my stuff or whatever in case this guy acts crazy or something, you know, because I don't know what his intentions are, you know. So he was, like, sure, I'll go." 1RP 344.

⁴ Cox did not know Richardson's name in a pre-trial interview with police, calling him "the white guy." 1RP 340. In speaking to police, Cox said the first time they met was at the skate park on the day of Stewart's death. 1RP 340. Cox testified on direct examination that he met Richardson about a month before the event. 1RP 275-76. On cross examination, Cox said he met Richardson and Freeman for the first time in the skate park, the night before the attack. 1RP 343-44.

Cox acknowledged telling a different version of events at trial. 1RP 337, 345.

On cross examination, when asked if Richardson heard Freeman's statement about wanting to kill Stewart, Cox answered "Probably. I don't think he did" and "I don't know. I don't know for sure but I'm assuming he probably heard them." 1RP 347-48. Richardson was walking behind about 5-10 feet. 1RP 347. In a pre-trial interview, Cox had simply answered "I don't think so" to the question of whether Richardson overheard the statement. 1RP 348.

3. Hall's Version of Events

Hall agreed to testify against Richardson in exchange for pleading guilty to second degree murder and a significantly reduced sentence. 1RP 384, 428, 432. He gave his version of events at trial. Hall was homeless and a meth user. 1RP 384, 429-30. He met Freeman and Richardson for the first time on the night of Stewart's death. 1RP 385-86, 441, 443-44. Hall had earlier given Stewart his EBT card in exchange for drugs. 1RP 390. He later went over to Stewart's apartment to find out why Stewart had not returned his card. 1RP 393. Richardson did not know Stewart. 1RP 441.

The night of Stewart's death, the four men smoked meth that Richardson provided at the skate park. 1RP 387-88. Afterwards,

Richardson wanted reimbursement. 1RP 388. There was talk about getting additional drugs from Stewart to repay Richardson. 1RP 389. Earlier that day, Hall had arranged a deal with Stewart to pick up drugs that night. 1RP 389. The idea came up that they would rob Stewart of his drugs so that Hall could get the drugs he was owed and Richardson could be repaid. 1RP 389. Richardson was part of this discussion. 1RP 389. Cox texted Stewart to get a larger quantity of drugs, so that the extra amount could be used to pay Richardson. 1RP 394-95. The plan was to obtain the drugs through violent methods; to rob or beat Stewart. 1RP 395. Hall also testified the purpose for going to Stewart's apartment was to retrieve Hall's EBT card and Cox's personal belongings. 1RP 445-46.

While they walked to Stewart's apartment, "[t]here was a rough layout plan of how to attack and take what we wanted." 1RP 396-97. Richardson was privy to the planning. 1RP 397. Freeman said he was going to kill Stewart. 1RP 417. Hall assumed it was "street speech" and did not take him seriously. 1RP 417, 445. They were all under the influence of drugs; at worst Hall expected a fight. 1RP 417. They all knew violence would be involved, but not murder. 1RP 454. Richardson had never been to Stewart's apartment before and did not know the way. 1RP 431.

When they arrived at Stewart's apartment, Hall asked for his EBT card and his drugs. 1RP 397. Stewart was angry that others had come and hit Hall. 1RP 397, 447. Hall hit him back. 1RP 397. Stewart stumbled back and Freeman tackled him into the apartment. 1RP 398. A noisy fight ensued inside. 1RP 399. A neighbor asked if everything was alright. 1RP 399. Richardson, who was standing inside the apartment and holding the door, said everything was fine and closed the door. 1RP 399. Richardson ransacked the apartment looking for drugs. 1RP 399, 448.

Freeman and Cox restrained Stewart on the floor. 1RP 400. Hall kicked Stewart in the ribs. 1RP 400. Freeman kicked Stewart in the face. 1RP 450-51. Cox assaulted Stewart with a stick. 1RP 413-14. Freeman struck Stewart in the face with speaker boxes. 1RP 414. Richardson passed Freeman a frying pan, which Freeman used to strike Stewart's face and head. 1RP 411-13. Freeman tried to bind Stewart's hands with a belt. 1RP 414. Cox used a tie to gag Stewart. 1RP 415. Hall took Stewart's wallet and phone and handed it to Freeman. 1RP 419.

When they left the apartment, Stewart was barely alive. 1RP 423. Freeman's actions, in trying to kill Stewart, were unexpected. 1RP 451. After Stewart was killed, Freeman made a vague threat, "this can happen to any one of us." 1RP 451. There was talk about withdrawing money from a cash machine using a card from the wallet. 1RP 418-19. There

was a plan to split up the proceeds. 1RP 419. Richardson was part of the discussion. 1RP 419. Richardson gave the phone to his girlfriend. 1RP 420-21. The phone was given to him as a "down payment." 1RP 421-22.

4. Richardson's Interrogation

Detective Lesser interviewed Richardson. 1RP 473. Richardson was homeless. 1RP 473. He denied using drugs. 1RP 648. Richardson said he knew the three others for about two to three weeks. 1RP 474. He admitted being at Stewart's apartment the night he died. 1RP 475. Richardson believed they were going there to retrieve the EBT card and some personal belongings of Cox and Hall. 1RP 475.

Richardson talked about a conversation that happened on January 21. 1RP 476. Hall, Cox and Freeman were coming up with a plan to rob Stewart of dope and other items of value. 1RP 476-77. Richardson wasn't part of the conversation. 1RP 476; Ex. 117 at 64.

On January 23, the four men were at the skate park, where Richardson overheard the others talking, and then went to Stewart's apartment. 1RP 477-78; Ex. 117 at 41-42. Richardson thought they were going over there to get Cox's "stuff," including his drugs. Ex. 117 at 13, 31.⁵ He kind of knew their plan, but the others kept him out of the loop.

⁵ Exhibit 117 is a transcript of the interrogation.

1RP 648; Ex. 117 at 42, 76. The others did not talk about what they were going to do if Stewart did not produce what they wanted. Ex. 117 at 31.

When they arrived, Stewart was upset that four men had come. 1RP 479. Hall threw the first punch. 1RP 479. Freeman bull rushed them into the apartment. 1RP 480. A neighbor asked what was going on and Richardson responded everything was okay. 1RP 481.

Richardson initially told the detective that he never entered the apartment, but instead waited outside and departed after Freeman and Hall left. 1RP 480. Later in the interrogation, Richardson said he saw Stewart lying in the apartment with blood all over when Freeman and Hall opened the door and left. 1RP 586-88. Hall had taken Stewart's telephone and wallet, which were handed off to Freeman as they walked back to the skate park. 1RP 583-85. Freeman went through Stewart's wallet. 1RP 482-83.

Richardson eventually told the detective that, after waiting outside, he and Cox opened the door. 1RP 594; Ex. 117 at 53. Richardson saw Freeman straddling Stewart, choking him. 1RP 594-95. Cox jabbed Stewart with a stick. 1RP 595. Freeman cut at Stewart's throat with a knife. 1RP 595-96. The three others were trying to hold Stewart down. 1RP 597. Freeman struck Stewart in the head with a frying pan. 1RP 597; Ex. 117 at 55. Freeman later told Richardson to retrieve the frying pan.

1RP 598. Richardson gave the frying pan to Freeman, who struck Stewart with it again. 1RP 598; Ex. 117 at 55-58, 64. At that point, Stewart was "already gone." Ex. 117 at 56, 58. Upon leaving, Richardson saw Stewart move. Ex. 117 at 57.

According to Richardson, it was not his plan. 1RP 648. When asked if this was a preplanned thing, Richardson answered "They did. I didn't." Ex. 117 at 17. He was threatened by Freeman not to say anything, both before and after they went over to Stewart's apartment. 1RP 648; Ex. 117 at 15, 17-18, 60 ("he said if I said anything . . . I would be next"), 72.

5. Forensic Evidence

Sally Aiken, a forensic pathologist, conducted the autopsy on Stewart. 1RP 489, 493. She identified the cause of death as asphyxia due to mechanical compression of the neck. 1RP 528, 552, 566. Some of the facial injuries were possibly consistent with use of a frying pan. 1RP 547. Stewart had bled a great deal from his facial injuries. 1RP 554.

There was testimony that Freeman was already bleeding from the face and head when Richardson kicked him and when Freeman hit Stewart with the frying pan. 1RP 356-57, 449-50. But no blood was detected on Richardson's boots. 1RP 645, 790-91. No blood was detected on the frying pan. 1RP 646-47, 772.

Cheresterene Cwiklik, a forensic scientist, testified for the defense. 1RP 843. She found no physical evidence that the frying pan was used as a weapon; it did not contain blood, tissue or other trace evidence that would have been there if it had been used to bludgeon Stewart. 1RP 875-76, 886. Based on her forensic examination, she opined the pan was not used to strike Stewart. 1RP 886.

6. Outcome and Sentencing

The jury was instructed on the affirmative defense to felony murder. CP 257. The jury, however, found Richardson guilty as charged and returned a special verdict that he was armed with a deadly weapon on the murder count. CP 276-78. The jury did not return a special verdict on the deliberate cruelty aggravator, leaving the verdict form blank. CP 279.

The defense argued for an exceptional sentence downward based on various mitigating factors, including that Richardson did not have a predisposition to commit the crime and the offense was principally accomplished by another. CP 288-90; 1RP 1035-40. The defense also argued a standard range punishment with a 20-year mandatory minimum was cruel and unusual punishment under the Eighth Amendment, and that the mandatory minimum statute was unconstitutionally vague. CP 290-91; 1RP 1040-42.

The court denied the exceptional down request. 1RP 1047-50. Instead, the court imposed a minimum standard range sentence of 285 months in confinement on Richardson, who had no criminal history. CP 299, 301-02; 1RP 1050-51. It did not find the mandatory minimum statute vague. 1RP 1049-50. It rejected the defense argument that the offenses constituted the same criminal conduct for scoring purposes. 1RP 1046-47. As part of the sentence, the court ordered Richardson to pay a \$200 criminal filing fee and the costs of community custody supervision. CP 302, 304. Richardson appeals. CP 319-42.

C. ARGUMENT

1. THE COURT VIOLATED RICHARDSON'S RIGHT TO CONFRONTATION BY ALLOWING A CO-DEFENDANT'S OUT-OF-COURT STATEMENTS INTO EVIDENCE.

Richardson challenges admission of Freeman's out-of-court statements that were used as part of the State's effort to convict him. Their admission violated Richardson's Sixth Amendment right to confront the witnesses against him.

a. The defense challenged the admission of Freeman's out-of-court statements, but the court ultimately ruled in favor of the State.

The defense moved to prohibit admission of Freeman's statements made while the group walked to Stewart's residence, arguing their

admission would violate Richardson's right to confront the witnesses against him. CP 162-66; 1RP 54-55; 2RP 7-10, 18-20. Counsel summed up the statements at issue: "on the walk from the skate park, downtown, to Mr. Stewart's residence on Hatch Street, Isaiah Freeman blurted out he was going to do serious harm or in fact kill Mr. Stewart." CP 164. The defense also argued the statements were inadmissible hearsay and did not qualify as a co-conspirator statement under ER 801(d)(2)(v). CP 167-68; 2RP 10-12. The State took a contrary position, arguing the statements were not testimonial and therefore not barred by the confrontation clause. CP 386-87; 2RP 16-18. The State also contended the statements were admissible under the co-conspirator provision of ER 801(d)(2)(v). CP 384-86; 2RP 14-16.

The court ruled the statements were not hearsay under ER 801(d)(2)(v). 2RP 25-26. Turning to the confrontation issue, the court initially ruled the statements regarding harm to Stewart were testimonial and therefore barred by the confrontation clause. 2RP 26-29; CP 239. The court reasoned "co-defendants could potentially think that statements made amongst each other would be used in a prosecutorial situation." 2RP 28. The court distinguished statements of intent to harm, which were inadmissible, from those made as part of the conspiracy to commit robbery, which were admissible. 2RP 29.

The State moved for reconsideration, arguing statements made between co-conspirators were not testimonial. CP 389-94; 1RP 255-60, 263-65. Defense counsel requested the court to deny the motion. 1RP 260-63. The court granted the motion to reconsider and allowed testimony regarding co-conspirator statements of Freeman, ruling his statements made at the skate park and on the way to Stewart's residence were not testimonial and therefore admissible. CP 243; 1RP 265-69. The court said the statements were not statements of fact but rather a proposal for a future course of action and were not made to law enforcement but rather to "the co-defendant's themselves." 1RP 268.

b. Freeman's out-of-court statements were testimonial and violated Richardson's right to confrontation.

A person accused of a criminal offense has the right to confront the witnesses against him. U.S. Const. amend. VI; Wash. Const. art. I, § 22. The confrontation clause bars admission of testimonial statements of a witness who does not appear at trial, unless the witness is unable to testify and the accused had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). "Witnesses" in this context are "those who bear testimony" against a defendant. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) (internal quotation marks

omitted) (quoting Crawford, 541 U.S. at 51). Testimonial statements thus fall within the scope of the confrontation clause. State v. Wilcoxon, 185 Wn.2d 324, 331, 373 P.3d 224, cert. denied, 137 S. Ct. 580, 196 L. Ed. 2d 455 (2016). The State bears the burden of proving a statement is nontestimonial. State v. Hurtado, 173 Wn. App. 592, 600, 294 P.3d 838, review denied, 177 Wn.2d 1021, 304 P.3d 115 (2013). Claimed confrontation clause violations are reviewed de novo. State v. Jasper, 174 Wn.2d 96, 108, 271 P.3d 876 (2012).

A defendant is deprived of his confrontation rights under the Sixth Amendment when he is incriminated by a pretrial statement of a co-defendant who did not take the stand at trial. Bruton v. United States, 391 U.S. 123, 124-26, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). The State argued below that Bruton applies only when several co-defendants are tried together. 2RP 17-18. The court said Bruton does not apply because the co-defendants pleaded guilty. 1RP 266. This is incorrect. "Although the non-testifying witness in Bruton was a codefendant in a joint trial, Bruton applies equally to the testimonial and incriminating statements of non-testifying accomplices tried separately." Orlando v. Nassau Cty. Dist. Attorney's Office, 915 F.3d 113, 122 (2d Cir. 2019).

In Wilcoxon, 185 Wn.2d 324, 332-33, 337-38, 373 P.3d 224 (2016), a majority of the justices agreed the Bruton rule does not apply to

non-testimonial statements, and that confrontation clause protection is triggered only by admission of a testimonial statement. Wilcoxon, 185 Wn.2d at 332-33 (lead opinion), 337-38 (concurrence). Richardson thus turns to whether Freeman's out-of-court statements are testimonial.

Testimonial statements include those that the declarant "would reasonably expect to be used prosecutorially" or "that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Melendez-Diaz, 557 U.S. at 309-10 (quoting Crawford, 541 U.S. at 51-52).

Freeman's statements implicated Richardson as a guilty party in agreeing to commit the crime of robbery and carrying through with the agreement by committing the crime of felony murder. The trial court's initial ruling, that "co-defendants could potentially think that statements made amongst each other would be used in a prosecutorial situation," was sound. 2RP 28. The statements were made under circumstances that would lead to the objectively reasonable belief that they would be available for later use at trial. Upon apprehension by law enforcement, the statements would certainly be used against the participants, and in fact they were here. Instead of presenting Freeman's testimony on the stand, the State substituted his in-court testimony by relaying his out-of-court statements through other witnesses. In that manner, Freeman served as witness

against Richardson, and Richardson's right to confront Freeman was violated.

A "casual remark to an acquaintance" is not testimonial. Wilcoxon, 185 Wn.2d at 335 (quoting Crawford, 541 U.S. at 51). Freeman's statements are qualitatively different. Wilcoxon is distinguishable. In Wilcoxon, a co-defendant in a burglary case (Nollette) confided to a friend (Solem), after the burglary, that he and another friend (referring to Wilcoxon) had discussed burgling a business and that this friend had called him during the burglary. Id. "The statements were not designed to establish or prove some past fact, nor were they a weaker substitute for live testimony at trial; rather, Nollette was casually confiding in a friend. Nollette would not have reasonably expected that statement to his friend to be used prosecutorially." Id.

Statements made by a co-conspirator in planning a crime do not fall within the category of a casual remark to an acquaintance. One of the circumstances at issue is the identity of the person to whom the statement is directed. Co-conspirators are not casual acquaintances. There is no casual confidence being given here. Planning a crime is serious business and, from an objective standpoint, it is reasonable to believe a statement made in furtherance of a conspiracy would be used against all those

involved at trial if any one of the conspirators is subsequently apprehended and questioned about what was said.

In its submission to the trial court, the State erroneously described Wilcoxon as holding "statements made by coconspirators in the course of a conspiracy were nontestimonial statements that were not subject to the Confrontation Clause." CP 391-92. Wilcoxon did not hold this. Wilcoxon did not treat the statement at issue as a co-conspirator statement because it involved a third party who was not a co-conspirator and who had no connection with the crime. Wilcoxon at no time addressed whether statements made by one co-conspirator to another could qualify as testimonial, as the issue was simply not present in that case.

In State v. Williams, 131 Wn. App. 488, 494, 128 P.3d 98 (2006), review granted, cause remanded on other grounds, 158 Wn.2d 1006, 143 P.3d 596 (2006), the court held statements made by a co-conspirator were admissible ER 801(d)(2)(v) and therefore did not violate the confrontation clause. The court treated admissibility under and evidentiary rule as coterminous with admissibility under the confrontation clause.

That is an analytical mistake. "To survive a hearsay challenge is not, per se, to survive a confrontation clause challenge." State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007), cert. denied, 553 U.S. 1035, 128 S. Ct. 2430, 171 L. Ed. 2d 235 (2008); see Melendez-Diaz, 557 U.S.

at 321-22 (statements contained in business records are testimonial if they constitute "the production of evidence for use at trial.").

c. Reversal is required because prejudice is presumed and the State cannot show this constitutional error is harmless beyond a reasonable doubt.

Violation of the right to confront witnesses is constitutional error. State v. Guloy, 104 Wn.2d 412, 423, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986). Confrontation clause violations are subject to constitutional harmless error analysis. State v. Davis, 154 Wn.2d 291, 304, 111 P.3d 844 (2005), aff'd, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Under this standard, "constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." State v. Franklin, 180 Wn.2d 371, 382, 325 P.3d 159 (2014) (quoting State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007)). "A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." State v. Burke, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

The State cannot overcome the presumption of prejudice and meet its burden of proving the constitutional error was harmless beyond a reasonable doubt as to both convictions. Freeman's statements were

damaging. Richardson overheard them and continued walking to the residence where the crime ultimately occurred, thereby implicating himself in the conspiracy to commit robbery and the felony murder of Stewart. The point was not lost on the State, which argued in closing: "On the way up there, Mr. Freeman is talking about how he's going to harm Mr. Stewart, how he's gonna kill Mr. Stewart. Now, Mr. Cox says that he thought it was just kind of bold talk till afterwards. But all of this shows that this wasn't just a social call, this wasn't just a call to retrieve property, this was a plan to go and hurt someone and to rob them. They may not have intended to kill him but it doesn't matter if that's the end result." 1RP 939-40. The prosecutor made this argument in telling the jury why it should not find Richardson satisfied the affirmative defense criteria for felony murder.⁶ 1RP 939. In rebuttal argument, the State returned to Freeman's statements to refute the defense argument that Richardson "really had no reasonable grounds to believe anybody would harm Mr.

⁶ The affirmative defense instruction required Richardson to prove by a preponderance of the evidence that he: "(1) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission, thereof; and (2) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and (3) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and (4)Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury." CP 257.

Stewart." IRP 982. Freeman's out-of-court statements aided the prosecution effort and undermined the affirmative defense. The convictions should be reversed due to their erroneous admission.

2. THE JURY WAS INSTRUCTED IN A MANNER THAT LOWERED ITS BURDEN OF PROOF ON THE CONSPIRACY CHARGE, REQUIRING REVERSAL UNDER A TRIAL COURT ERROR OR INEFFECTIVE ASSISTANCE THEORY.

The to-convict instruction required the State to prove Richardson conspired to commit the crime of first degree robbery. The jury was instructed on the definition of the crime of robbery, but not on the crime of first degree robbery. The jury, then, was left to assume the definition of the crime presented constituted first degree robbery when in fact the definitional instruction failed to include an element that elevates the crime to robbery in the first degree. The court erred in failing to instruct the jury on the elements of first degree robbery. Alternatively, defense counsel was ineffective in failing to object to the instructions, which relieved the State of its burden of proof on the conspiracy charge.

a. The court committed constitutional error in instructing the jury in a manner that relieved the State of its burden of proof.

Claimed errors of law in jury instructions are reviewed de novo. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Analysis begins with what the State needed to prove in order to obtain a conviction.

"A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement." RCW 9A.28.040(1). As the plain language of the statute shows, a conspiracy charge requires an agreement to commit an underlying crime along with a substantial step towards committing that crime. In re Pers. Restraint of Sandoval, 189 Wn.2d 811, 826-27, 408 P.3d 675 (2018).

The pattern instructions for conspiracy accordingly state "An instruction must be given defining the crime alleged to be the subject of the conspiracy. Use the definition instruction for the crime involved." WPIC 110.02 Criminal Conspiracy—Elements, 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 110.02 (4th Ed); WPIC 110.01 Criminal Conspiracy—Definition, 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 110.01 (4th Ed).

In Richardson's case, the crime that is the subject of the conspiracy is first degree robbery. The State charged Richardson with conspiracy to commit first degree robbery. CP 237-38. The to-convict instruction required the State to prove Richardson conspired to commit first degree robbery. CP 262. But the definitional instruction on the underlying crime is for second degree robbery, not first degree. CP 260. In this manner, the

jury instructions allowed the State to obtain a conviction by only proving a conspiracy to commit second degree robbery.

"A person is guilty of robbery in the second degree if he or she commits robbery." RCW 9A.56.210(1). The jury was instructed on the definition of robbery, based on RCW 9A.56.190, as follows:

A person commits the crime of robbery when he or she unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another who is the owner of the property and the taking was against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person. A threat to use immediate force or violence may be either expressed or implied. The 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. The taking constitutes robbery, even if death precedes the taking, whenever the taking and a homicide are part of the same transaction. CP 260.

First degree robbery carries a heightened burden of proof. Under RCW 9A.56.200(1), a person is guilty of first degree robbery if "(a) In the commission of a robbery or of immediate flight therefrom, he or she: (i) Is armed with a deadly weapon; or (ii) Displays what appears to be a firearm or other deadly weapon; or (iii) Inflicts bodily injury[.]" These elements are what elevate the crime of second degree robbery to first degree robbery.

Defense counsel did not object to the instructional error below, but the error may be raised for the first time on appeal under RAP 2.5(a)(3). Due process requires the prosecution to prove every fact necessary to sustain a conviction beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. Amend. XIV. Instructing the jury in a manner that relieves the State of its burden of proof is an error of constitutional magnitude that a defendant can raise for the first time on appeal because it violates the right to due process. State v. Peters, 163 Wn. App. 836, 847, 261 P.3d 199 (2011), abrogated on other grounds by State v. Johnson, 180 Wn.2d 295, 306, 325 P.3d 135 (2014).

The jury was given an instruction that defined robbery without incorporating the elements of first degree robbery. The jury was not given any instruction that informed the jury of the elements of first degree robbery. This allowed the State to obtain a conviction for conspiracy to commit first degree robbery without actually having to prove it. Based on the manner in which the jury was instructed, the State was able to obtain this conviction only by proving Richardson conspired to commit second degree robbery.

A constitutional error is manifest if there is a "plausible showing that the error resulted in actual prejudice, which means that the claimed

error had practical and identifiable consequences in the trial." State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). The error here is manifest because it had the practical and identifiable consequence of relieving the State of its burden of proof. The reviewing court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error. Id. If an instructional error was apparent at the time it occurred and correctable, it is manifest. Lamar, 180 Wn.2d at 586; State v. Kalebaugh, 183 Wn.2d 578, 584-85, 355 P.3d 253 (2015).

Here, the trial court only instructed the jury on the definition of second degree robbery and did not give an instruction that included the definition of first degree robbery as the target crime of the conspiracy. Given the State's burden of proving an agreement to commit first degree robbery, not second degree robbery, the jury instructions on conspiracy misstated the law and the trial court should have known it. The mistake is manifest from the record.

The State originally proposed an instruction defining first degree robbery as part of its instructional packet. CP 362. For some reason, most likely due to oversight, that instruction was not included the State's amended proposed instructions. CP 395-431. And the first degree robbery instruction never got incorporated into the final instructions given

to the jury. No one noticed its absence at the jury instruction conference. 1RP 896-907.

"An instructional error is presumed to [be] prejudicial unless it affirmatively appears that it was harmless." State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). The conviction must be reversed unless the State proves the error was harmless beyond a reasonable doubt. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 15, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). "From the record, it must appear beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Brown, 147 Wn.2d at 344.

The State cannot overcome the presumption of prejudice here. There was no evidence that the agreement to rob Stewart involved use of deadly weapon or what appeared to be a deadly weapon, two ways in which the crime of first degree robbery is committed. 1RP 289-93, 388-89, 394-97, 417, 454. No one had a weapon when they walked over to Stewart's apartment. 1RP 296, 348-49, 444-45. Further, there was conflicting evidence on whether Richardson agreed to inflict injury on Stewart in robbing him. Hall testified Richardson knew the plan involved violence. 1RP 389, 395-97, 454. Cox's testimony on the issue conflicted with what he said pre-trial. 1RP 290, 335-36347-48. Richardson told the

detective that he did not know what the others planned to do to Stewart in the process of robbing him, and nothing in his description of the plan involved injury to Stewart. Ex. 117 at 13, 31, 42, 64, 76; 1RP 475-78, 648. Had the jury been correctly instructed, it may not have returned a guilty verdict on the conspiracy charge. Reversal of the conspiracy conviction is therefore required.

b. Alternatively, defense counsel was ineffective in failing to object to a jury instruction that lowered the State's burden of proof on the conspiracy charge.

Every defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Defense counsel is ineffective where (1) the attorney's performance is deficient and (2) the deficiency prejudices the defendant. Strickland, 466 U.S. at 687. "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Counsel performed deficiently in acquiescing to instructions that lessened the State's burden of proof or in not proposing an instruction that would have held the State to its burden. Deficient performance is that

which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Counsel has a duty to know the relevant law so that he or she can propose a proper instruction applicable to the facts of a given case. Kyllo, 166 Wn.2d at 861; Thomas, 109 Wn.2d at 227.

The presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The failure to object to jury instructions that relieve the State of its burden of proof cannot be characterized as a legitimate tactic. Competent counsel does not make it easier for the State to secure a conviction. Competent counsel need only have looked to the to-convict instruction, the pattern instructions, or the plain language of the relevant statutes, to know that the jury needed to be instructed on the elements of the target crime of the conspiracy.

Prejudice is demonstrated by showing a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. Richardson "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Strickland, 466 U.S. at 693. By relieving the State of its burden of proof, the flawed definitional instruction prejudiced the outcome. As noted above, evidence of an agreement to commit first degree robbery by use of

a weapon is lacking. And there is a conflict in the evidence about whether Richardson knew of a plan to injure Stewart during the course of the robbery. This is enough to "undermine confidence in the outcome." Id. at 694. The conspiracy conviction should be reversed.

3. THE COURT ERRED IN FAILING TO COUNT OFFENSES AS THE SAME CRIMINAL CONDUCT IN COMPUTING THE OFFENDER SCORE.

The conspiracy to commit robbery is the same criminal conduct as the murder offense because they occurred at the same time and place, involved the same victim, and share the same objective intent. The court misapplied the law or abused its discretion in ruling otherwise. Remand is required to resentence Richardson with a lower offender score.

The offender score establishes the standard range term of confinement for a felony offense. RCW 9.94A.525; RCW 9.94A.530(1). The sentencing court calculates an offender score by adding current offenses and prior convictions. RCW 9.94A.589(1)(a). Offenses that encompass "the same criminal conduct" are counted as one crime for sentencing purposes. RCW 9.94A.589(1)(a). "Same criminal conduct" is defined as 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).

Defense counsel argued the conspiracy to commit robbery and murder convictions constituted the same criminal conduct. 1RP 1035; CP 286-88. The State agreed the two offenses had the same victim. 1RP 1020. It argued the crime of conspiracy to commit robbery was completed before the felony murder took place and, from this premise, concluded the crimes did not take place at the same time or in the same location. 1RP 1020; CP 489-92.

Tracking the State's argument, the court ruled the two offenses were not the same criminal conduct. 1RP 1047. The court agreed the victim was the same. 1RP 1046. But the court explained "a conspiracy is a substantial step in pursuance of an agreement or an agreement between parties to undertake an event. Does not require a step towards the criminal activity. And at that time, case law indicates to me the conspiracy is complete when that agreement is reached. And based upon the facts as put forth in this trial, I do find that the conspiracy was committed and completed at the time the -- you all agreed to commit the robbery." 1RP 1046-47.

Appellate courts review determinations of same criminal conduct for abuse of discretion or misapplication of law. State v. Graciano, 176 Wn.2d 531, 535-36, 295 P.3d 219 (2013). The court here abused its discretion because it misunderstood the law on conspiracy. Conspiracy is

an ongoing crime. It was ongoing when the murder took place. The two offenses therefore occurred at the same time and place. And, as further argued below, the two crimes had the same objective intent.

"Conspiracy is an inchoate crime, not a completed crime." Williams, 131 Wn. App. at 497. To obtain a conviction for conspiracy, the State need only prove the conspirators agreed to undertake a criminal scheme and took a substantial step in furtherance of the conspiracy. State v. Bobic, 140 Wn.2d 250, 265, 996 P.2d 610 (2000). No underlying crime need actually be committed. Id.

But that does not mean the crime of conspiracy ends when a substantial step is taken. Conspiracy is a course of conduct crime, not a single act. State v. Jensen, 164 Wn.2d 943, 957, 195 P.3d 512 (2008) (citing Braverman v. United States, 317 U.S. 49, 53-54, 63 S. Ct. 99, 87 L. Ed. 23 (1942)). "A conspiracy ends when its objectives have either failed or been achieved." State v. Bernard, 197 Wn. App. 1040 (2017) (unpublished),⁷ review denied, 188 Wn.2d 1007, 393 P.3d 347 (2017). As a continuing crime, conspiracy is deemed to encompass the last overt act.

⁷ GR 14.1(a) provides: "Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports. Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate."

State v. Carroll, 81 Wn.2d 95, 110, 500 P.2d 115 (1972); see also Bobic, 140 Wn.2d at 264 (Washington statute defining criminal offense of conspiracy "carries the same construction as the federal law and the same interpretation as federal case law"). For example, in Guloy, 104 Wn.2d at 423, the conspiracy to commit murder started before the murders occurred and did not end with the killing itself. The conspiracy was in existence at least until one of its participants asked another person for money in furtherance of the conspiracy. Id.

Applying the course of conduct reasoning to Richardson's case yields the conclusion that the offenses took place at the same time and place. Although the conspiracy started before the murder, it also encompassed the time and place of the murder because conspiracy is an ongoing crime that does not end until its objectives are met. The conspiracy was carried out when the robbery took place in Stewart's apartment and Stewart died. The conspiracy did not end until Stewart's belongings were divvied up. The time and place of the murder overlapped with the ongoing conspiracy. Those two elements are therefore satisfied.

Notably, the State charged Richardson with a conspiracy occurring "[o]n or about between January 23, 2015 and January 24, 2015." CP 237. It charged him with committing felony murder "[o]n or about between January 23, 2015 and January 24, 2015." CP 237. The to-convict

instruction for both charges uses the same date range, which goes beyond the day on which the agreement was entered and an initial substantial step taken. CP 256, 262. The overlapping charging period for both crimes renders its objection to the time and place elements circumspect.

The State cited State v. Embry, 171 Wn. App. 714, 287 P.3d 648 (2012), review denied, 177 Wn.2d 1005, 300 P.3d 416 (2013) in support of its position. CP 491. In that case, Division Two upheld the trial court's ruling that the conspiracy and attempted first degree murder charges were not the same criminal conduct. Embry, 171 Wn. App. at 765-66. The trial court ruled there was separate intent, relying on the idea that "the conspiracy could have occurred without the attempted murder occurring; the conspiracy all that required was that there be an agreement between the principals to undertake the event." Id. at 765. Division Two offered no meaningful analysis in upholding the decision.⁸

In determining same intent, there is no requirement that one crime necessarily entails the commission of another crime. And, as argued, the fact of agreement does not mean the conspiracy has ended. Embry did not address the ongoing course of conduct argument advanced here. "In cases

⁸ This argument was only raised in Embry's Statement of Additional Grounds with no analysis to back up the claim. See SAG, available at <https://www.courts.wa.gov/content/Briefs/A02/409844%20Statement%20of%20Additional%20Grounds%20Embry.pdf>

where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994).

The same intent element is also satisfied here. Multiple factors inform the objective intent determination, including: (1) how intimately related the crimes are; (2) whether the criminal objective substantially changed between the crimes; (3) whether one crime furthered another; and (4) whether both crimes were part of the same scheme or plan. State v. Burns, 114 Wn.2d 314, 318-19, 788 P.2d 531 (1990); State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005, 914 P.2d 65 (1996).

A single intent includes more than one offense "committed as part of a scheme or plan, with no substantial change in the nature of the criminal objective." State v. Lewis, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990). The objective intent underlying both charges against Richardson was the robbery of Stewart. The felony murder, with the underlying burglary, was done to accomplish the objective of robbery. Stewart was killed in the midst of the robbery. The offenses are intimately connected. Further, objective intent may be determined by examining whether one crime furthered the other. State v. Wilson, 136 Wn. App. 596, 613, 150 P.3d

144 (2007). The crime of conspiracy to commit robbery furthered the felony murder offense because it was the agreement to commit the robbery that led the men to commit felony murder.

Richardson's complicity in both the conspiracy and the felony murder encompassed the same criminal conduct. The court misapplied the law or otherwise abused its discretion in failing to treat the two offenses as the same criminal conduct. Resentencing is required based on a lower offender score.

4. THE COURT LACKED STATUTORY AUTHORITY TO IMPOSE DISCRETIONARY COSTS ON RICHARDSON DUE TO INDIGENCY AND ALSO LACKED AUTHORITY TO IMPOSE INTEREST ON NON-RESTITUTION LEGAL FINANCIAL OBLIGATIONS

Recent statutory amendments addressing legal financial obligations (LFOs) prohibit the imposition of discretionary costs on indigent defendants. Here, the court imposed a \$200 filing fee and supervision costs. Because Richardson is indigent, these discretionary costs must be stricken. The law on interest has changed as well, no longer applying to non-restitution costs. The interest provision in each judgment and sentence must be corrected.

- a. The record shows Richardson's indigency at the time of sentencing, and discretionary costs cannot be imposed on those who are indigent.**

RCW 10.01.160(1) authorizes the court to impose costs on a convicted defendant. This general authority is discretionary. The statute states the court "*may* require the defendant to pay costs." RCW 10.01.160(1) (emphasis added). Recent amendments to the LFO statute prohibit the imposition of costs on indigent defendants. "The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c)." RCW 10.01.160(3). This language became effective on June 7, 2018. Laws of 2018, ch. 269 § 6.

The statute defines "indigent" as a person (a) who receives certain forms of public assistance, (b) is involuntarily committed to a public mental health facility, (c) whose annual after-tax income is 125% or less than the federally established poverty guidelines, or (d) whose "available funds are insufficient to pay any amount for the retention of counsel" in the matter before the court. RCW 10.101.010(3).

Richardson's indigency at the time of sentencing is established in the record. The trial court found Richardson indigent and allowed this appeal at public expense. CP 317-18. According to the declaration in support of his indigency motion, Richardson had no income from any source and owned no real or personal property other than personal affects. CP 315; see State v. Ramirez, 191 Wn.2d 732, 747, 426 P.3d 714 (2018)

(relying on financial statement in declaration of indigency as evidence of indigency at time of sentencing). Richardson did not have an income at or above 125 percent of the federal poverty level.⁹

b. The criminal filing fee must be stricken because Richardson is indigent.

Richardson was sentenced on April 23, 2018. CP 296. The court imposed a \$200 criminal filing fee as part of the sentence. CP 304. The current, amended version of RCW 36.18.020(2)(h), effective June 7, 2018, states the \$200 criminal filing fee "shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c)." Laws of 2018, ch. 269, § 17. Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783), of which the filing fee provision is a part, applies prospectively to cases currently pending on direct appeal. Ramirez, 191 Wn.2d at 747-49. The amendment "conclusively establishes that courts do not have discretion" to impose the criminal filing fee against those who are indigent at the time of sentencing. Id. at 749. In Ramirez, the Supreme Court accordingly struck the criminal filing fee due to indigency. Id. at 749-50. The criminal filing fee must be

⁹ The current federal poverty guideline is \$12,490. See U.S. Dep't Of Health & Human Servs., Office Of The Asst. Sec'y For Planning & Evaluation, Poverty Guidelines (2019), available at <https://aspe.hhs.gov/poverty-guidelines> (last visited March 20, 2019).

stricken because Richardson is indigent and the new law applies to cases pending on appeal.

- c. **The cost of community supervision is discretionary and therefore must be stricken because Richardson is indigent.**

The court imposed community custody as part of the sentence. CP 302. The judgment and sentence states: "[w]hile on community custody, the defendant shall: . . . (7) pay supervision fees as determined by DOC." CP 302.

RCW 9.94A.703(2)(d) states "*Unless waived by the court, . . . the court shall order an offender to: . . . Pay supervision fees as determined by the Department.*" (emphasis added). Given the language authorizing the court to waive the cost, the Court of Appeals recently noted the cost of community custody is discretionary. State v. Lundstrom, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018). Discretionary costs cannot be imposed on indigent defendants. RCW 10.01.160(3). HB 1783, of which RCW 10.01.160(3) is a part, applies to all cases pending on appeal. Ramirez, 191 Wn.2d at 747-49; Laws of 2018, ch. 269 § 6. The cost of supervision must be stricken from the judgment and sentence because Richardson is indigent.

d. The notation in the judgment and sentence regarding interest on legal financial obligations is unauthorized by statute.

The judgment and sentence states: "The financial obligations imposed in this judgment shall bear interest from the date of the Judgment until payment in full, at the rate applicable to civil judgments." CP 305. This mandate does not comply with current law. The judgment and sentence must be amended to state that non-restitution legal financial obligations will not accrue interest from June 7, 2018.

The current version of RCW 10.82.090(1), effective June 7, 2018, provides in relevant part that "restitution imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments. As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations."

This statute was amended as part of HB 1783's overhaul of the LFO system. Laws of 2018, ch. 269 § 1. Again, HB 1783 applies prospectively to cases currently pending on direct appeal. Ramirez, 191 Wn.2d at 747-49. The judgment and sentence, then, must be modified to reflect that no interest shall accrue on non-restitution legal financial obligations as of June 7, 2018 in accordance with RCW 10.82.090(1).

D. CONCLUSION

For the reasons stated, Richardson requests (1) the convictions be reversed; (2) the case be remanded for resentencing based on a lower ofedner score; (3), the challenged LFOs be vacated; and (4) the interest notation in the judgment and sentence be corrected.

DATED this 25th day of March 2019

Respectfully Submitted,

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