

67307-6

67307-6

No. 67307-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

P.M. (D.O.B. 10/25/95),

Appellant.

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

JUVENILE DEPARTMENT

The Honorable Chris Washington

BRIEF OF APPELLANT

Susan F. Wilk
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 NOV 22 PM 4:58

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT 5

 ___ THE INCLUSION OF AN ALLEGATION IN THE
 INFORMATION THAT P.M. THREATENED INJURY TO A
 PERSON IN ADDITION TO THE NAMED VICTIM IMPOSED
 ON THE STATE THE BURDEN OF PROVING ADDITIONAL
 FACTS THAT IT DID NOT PROVE..... 5

 1. Under the law of the case doctrine, surplusage included in a
 “to convict” instruction becomes the law of the case and added
 elements that the State must prove to the jury 5

 2. Under *Hickman*, the same rule should apply to the information
 in a bench trial, which likewise sets forth what the State must
 prove 7

 3. The State did not prove P.M. threatened the use of force or
 injury to the person or property of any person other than Dinh8

 4. The remedy is reversal and dismissal with prejudice..... 9

E. CONCLUSION..... 9

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>State v. Byrd</u> , 125 Wn.2d 707, 887 P.2d 796 (1995).....	5
<u>State v. DeVries</u> , 149 Wn.2d 842, 72 P.3d 748 (2003)	7
<u>State v. Hardesty</u> , 129 Wn.2d 303, 915 P.2d 1080 (1996)	9
<u>State v. Heimbigner</u> , 82 Wash. 589, 144 P. 901 (1914)	6
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 900 (1998)	5-9
<u>State v. Ng</u> , 110 Wn.2d 32, 750 P.2d 632 (1988).....	6
<u>State v. Taylor</u> , 140 Wn.2d 229, 996 P.2d 571 (2000)	7
<u>State v. Vangerpen</u> , 125 Wn.2d 782, 888 P.2d 1177 (1995).....	8
<u>State v. Willis</u> , 153 Wn.2d 366, 103 P.3d 1213 (2005).....	6

Washington Court of Appeals Decisions

<u>State v. Abuan</u> , 161 Wn. App. 135, 257 P.3d 1 (2011)	6
<u>State v. Hawthorne</u> , 48 Wn. App. 23, 737 P.2d 717 (1993).....	7
<u>State v. Hobbs</u> , 71 Wn. App. 419, 859 P.2d 73 (1993)	7
<u>State v. Lillard</u> , 122 Wn. App. 422, 93 P.3d 969 (2004)	6
<u>State v. McGary</u> , 37 Wn. App. 856, 683 P.2d 1125, <u>rev. denied</u> , 102 Wn.2d 1024 (1984).....	7, 8
<u>State v. Sweany</u> , 162 Wn. App. 223, 256 P.3d 1230 (2011)	6

Washington Constitutional Provisions

Const. art. I § 3.....	5, 7
Const. art. I, § 10.....	7
Const. art. I, § 22.....	7

United States Supreme Court Decisions

<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)5	
--	--

United States Constitutional Provisions

U.S. Const. amend. XIV 5, 7

A. ASSIGNMENTS OF ERROR

1. Under the law of the case doctrine, the State failed to meet its burden of proving surplus language included in the information that acted as an additional element of the charged offense.

2. Contrary to its due process obligation to prove every element of the charged offense beyond a reasonable doubt, the State failed to prove that P.M. threatened or caused injury to the person or property of a person other than the named victim.

3. The juvenile court erred in entering conclusions of law II, II, and IV, convicting P.M. of robbery in the first degree.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

The law of the case doctrine imposes upon the State the burden of proving added elements included in a “to convict” instruction and submitted without objection to the jury. Should this Court conclude that in P.M.’s juvenile bench trial, the inclusion of surplus language in the criminal information obligated the State to prove the additional allegations at trial? Where the State failed to do so, must P.M.’s conviction be reversed?

C. STATEMENT OF THE CASE

P.M. was prosecuted in King County Juvenile Court for robbery in the first degree. CP 1. In pertinent part, the information alleged:

That respondent, [P.M.], together with another, in King County, Washington, on or about January 29, 2011, did unlawfully and with intent to commit theft take personal property of another; to wit: a backpack, from the person and in the presence of Phi Dinh, against his will, by the use or threatened use of immediate force, violence, and fear of injury to such person or his property and to the person or property of another and in the commission of and in immediate flight therefrom, the respondent displayed what appeared to be a firearm[.]

Id. (emphasis added).

This charge arose out of the following alleged incident: on January 29, 2011, 18-year-old Phi Dinh was walking to a bus stop on Rainier Avenue, in Seattle, to catch the Number 7 bus. RP 60.¹ At Rainer and South Byron Street, two young men approached him and, according to Dinh, one put what appeared to be a gun in his face. RP 61. The other young man walked around Dinh and removed his backpack from his shoulders. RP 64. Dinh thought he had seen them before on the bus and knew P.M.'s first name. RP

¹ The verbatim report of proceedings is contained in three consecutively paginated volumes from hearings on March 29, 2011, April 4, 2011, and May 11, 2011. These are cited as "RP" followed by page number.

65. The young men shouted, "Dale Block," which Dinh believed referred to a gang, and then ran away towards a nearby car wash. RP 67, 70. Dinh subsequently saw them drive off. RP 70. Dinh claimed that he had \$300 in his backpack. RP 86-87, 119.

Although he had just been robbed, Dinh did not call the police. Instead he telephoned his friend Tam, who told him to come to his house. RP 71, 73. Tam called a local police officer, Patrick Chang, who had acted as a mentor to both him and his brother. RP 13-14. Chang spoke to Dinh and advised him to report the incident to 9-1-1. RP 14. Dinh subsequently called Chang to tell him he believed he had found the two young men who he alleged had robbed him on Facebook. RP 15. Dinh identified P.M. as one of his assailants in a photo montage. RP 20.

At a bench trial before the Honorable Chris Washington, P.M.'s co-defendant, J.H., testified that he and P.M. encountered Dinh on the bus. RP 146. Dinh approached them and tried to sell them marijuana. RP 148. They declined but asked to see his drugs. RP 149. Dinh pulled out a pickle jar containing "a big nug" of marijuana. RP 150. When they saw the marijuana, J.H. and P.M. offered to "hot box" it with Dinh (smoke it with him inside a closed car). Id. Dinh became excited at this prospect and said if

they had a car he would smoke with them in exchange for a ride downtown. Id.

Once in the car, Dinh realized that they did not have anything with which to smoke the marijuana. RP 153. He jumped out of the car to buy rolling papers, leaving his backpack, and the marijuana, in the back seat. Id. J.H. said to P.M., “he’s slipping,” meaning that Dinh had left his things behind. RP 153. They looked at one another and then P.M. drove off with the backpack. Id.

Judge Washington ruled that J.H. was not credible and stated that he believed Dinh’s testimony. He concluded the State had proven the elements of robbery in the first degree beyond a reasonable doubt. RP 186-90; CP 31-35.

At sentencing, P.M. requested a manifest injustice disposition downwards. RP 191-205. His co-respondent J.H. had received a manifest injustice disposition downwards, and P.M. argued it would violate equal protection for him not to receive one also. RP 195-205. The court disagreed and imposed a standard range disposition of 103-129 weeks. RP 224-27; CP 28-30. P.M. has timely appealed from the disposition order. CP 36-48.

D. ARGUMENT

THE INCLUSION OF AN ALLEGATION IN THE INFORMATION THAT P.M. THREATENED INJURY TO A PERSON IN ADDITION TO THE NAMED VICTIM IMPOSED ON THE STATE THE BURDEN OF PROVING ADDITIONAL FACTS THAT IT DID NOT PROVE.

1. Under the law of the case doctrine, surplusage included in a “to convict” instruction becomes the law of the case and added elements that the State must prove to the jury. The State bears the burden of proving the elements of a criminal charge beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 796 (1995); U.S. Const. amend. XIV; Const. art. I § 3. The law of the case doctrine is an established doctrine reaching back to the earliest days of statehood. State v. Hickman, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998) (citing cases). Under the doctrine, when the State includes unnecessary language in a “to convict” instruction, that “to convict” instruction becomes the law of the case and the additional language an added element that the State must prove at trial. Id.

On appeal, an accused person may assign error to elements added under the law of the case doctrine and to the sufficiency of

the evidence adduced to prove these additional elements. Id. at 102 (citing, inter alia, State v. Ng, 110 Wn.2d 32, 39, 750 P.2d 632 (1988) and State v. Heimbigner, 82 Wash. 589, 144 P. 901 (1914)).

In Hickman, the Court concluded the State assumed the burden of proving an offense had occurred in Snohomish County when such language was included in the “to convict” instruction. Id. at 102-03. Since Hickman, Washington appellate courts have utilized the doctrine to strictly construe jury instructions proposed by the State and given without objection. See e.g. State v. Willis, 153 Wn.2d 366, 374-75, 103 P.3d 1213 (2005) (omission of “or an accomplice” language in firearm enhancement instruction required State to prove that Willis himself was armed); State v. Abuan, 161 Wn. App. 135, 156, 257 P.3d 1 (2011) (identification of victim by name in “to convict” instruction required State to prove defendant specifically intended to assault that victim); State v. Sweany, 162 Wn. App. 223, 228-29, 256 P.3d 1230 (2011) (inclusion of alternative means in “to convict” instruction required the State to present sufficient proof of each alternative means); State v. Lillard, 122 Wn. App. 422, 434-35, 93 P.3d 969 (2004) (same).

2. Under *Hickman*, the same rule should apply to the information in a bench trial, which likewise sets forth what the State must prove. Washington courts have held that the “law of the case” requirement that the State prove additional elements in jury instructions is inapplicable in bench trials. See e.g., *State v. Hawthorne*, 48 Wn. App. 23, 27, 737 P.2d 717 (1993); *State v. Hobbs*, 71 Wn. App. 419, 423, 859 P.2d 73 (1993); *State v. McGary*, 37 Wn. App. 856, 860, 683 P.2d 1125, rev. denied, 102 Wn.2d 1024 (1984).

However, no case has carefully examined this question in light of *Hickman*. The Supreme Court has not foreclosed such an argument. See *State v. DeVries*, 149 Wn.2d 842, 850 n. 4, 72 P.3d 748 (2003). Further, such a result is at odds with the fact that the notice requirement is constitutionally mandated. U.S. Const. amend. XIV; Const. art. I, §§ 3, 10, 22; see *State v. Taylor*, 140 Wn.2d 229, 236, 996 P.2d 571 (2000).

The animating principle behind the law of the case doctrine is that the jury has been charged with what elements to find by instructions that were proposed by the prosecuting authority. In a bench trial, the information – containing the substance of the State’s accusation – serves the same function. The information

sets forth the essential elements that must be proven in order for the State to obtain a conviction.

Sometimes errors made in charging documents are oversights in omitting an element of the crime, but for sound policy reasons founded in our state and federal constitutions, this court has nonetheless consistently adhered to the essential elements rule.

State v. Vangerpen, 125 Wn.2d 782, 790, 888 P.2d 1177 (1995).

To the extent that surplusage included in a criminal information may be corrected by the time the charge is submitted to a jury, the rule stated in McGary makes sense. But where a judge must determine what the State has proven, the information serves as a charge sheet and “to convict” instruction, and added elements should be proven under the “law of the case” doctrine.

3. The State did not prove P.M. threatened the use of force or injury to the person or property of any person other than Dinh.

The information filed in this case included language requiring the State to prove that P.M. took property from Phi Dinh through the use or threatened use of force or injury to him or his property “and to the person or property of another.” CP 1. There was no other person threatened, nor was there another person involved. The State did not prove this added element of the robbery charge.

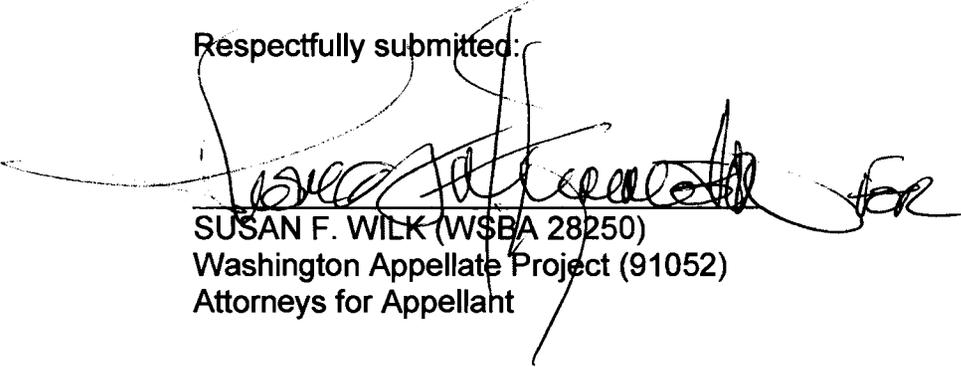
4. The remedy is reversal and dismissal with prejudice. If insufficient evidence is adduced to prove an element added under the “law of the case” doctrine, the remedy is reversal and dismissal with prejudice. Hickman, 135 Wn.2d at 903. “The double jeopardy clause of the Fifth Amendment to the U.S. Constitution protects against a second prosecution for the same offense, after acquittal, conviction, or a reversal for lack of sufficient evidence.” State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996). P.M.’s robbery conviction must be reversed and dismissed.

E. CONCLUSION

This Court should conclude that under the “law of the case” doctrine, the State assumed the burden of proving P.M. threatened force to another person besides Phi Dinh. Because the State did not prove this added element, P.M.’s conviction must be reversed and dismissed.

DATED this 22nd day of November, 2011.

Respectfully submitted:



SUSAN F. WILK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67307-6-I
v.)	
)	
PATRICK M.,)	
)	
Juvenile Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF NOVEMBER, 2011, I REQUESTED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION ONE AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 NOV 22 PM 4:58

- | | | |
|--------------------------------------|-----|---------------|
| [X] KING COUNTY PROSECUTING ATTORNEY | (X) | U.S. MAIL |
| APPELLATE UNIT | () | HAND DELIVERY |
| KING COUNTY COURTHOUSE | () | _____ |
| 516 THIRD AVENUE, W-554 | | |
| SEATTLE, WA 98104 | | |
|
 | | |
| [X] PATRICK M. | (X) | U.S. MAIL |
| ECHO GLENN CHILDREN'S CENTER | () | HAND DELIVERY |
| 33010 SE 99 TH ST | () | _____ |
| SNOQUALMIE, WA 98065 | | |

SIGNED IN SEATTLE, WASHINGTON THIS 2ND DAY OF NOVEMBER, 2011.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710