No. 100185-1
COA #37988-4-III
(transferred from Division II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

VERNAL G. GARVEY,

Petitioner.

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ON REVIEW FROM
THE COURT OF APPEALS OF
THE STATE OF WASHINGTON,
DIVISION III

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# PETITION FOR REVIEW

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TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## WASHINGTON SUPREME COURT



## WASHINGTON COURT OF APPEALS

FEDERAL CASELAW

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

## A. INTRODUCTION

At trial, Petitioner Vernal Garvey, III, chose not to testify or present evidence on his behalf.

In closing argument, the prosecutor suggested that Mr. Garvey had to be able to "explain" certain parts of the state's case. The prosecutor then repeatedly told the jurors that the only evidence they had heard was the testimony from the codefendants turned State's witnesses, and that jurors should find Mr. Garvey guilty because there was "no evidence" in the record of anything *other* than that version of events.

When do a prosecutor's repeated claims that there was "no evidence" to rebut its case slip from permissible comment into improperly shifting a burden to the accused? Further, if the only person who could dispute the testimony of the State's witnesses about his involvement in the crime is the accused, does a State's attorney improperly comment on his decision not to testify - and thus the exercise of his Fifth

Amendment rights - in arguing that "no evidence" disproves the State's witnesses claims?

In holding there was no error here, Division Three relied on an expansive interpretation of our state's caselaw, but failed to follow its own holding, in *State v. Messinger*, 8 Wn. App. 829, 509 P.2d 382 (1973), that it is a violation of the defendant's rights to argue that testimony presented by the state is "undenied" or "uncontradicted" when the only person who could provide the "denial" or contradict that testimony is the accused.

In addition, our caselaw is problematic. All of the cases suggesting that the arguments here might be deemed proper stem from a case decided in 1926, *State v. Litzenberger*, 140 Wash. 308, 248 P. 799 (1926), and its progeny, *State v. Ashby*, 77 Wn.2d 33, 459 P.2d 403 (1969).

Neither of these cases, however, reflect our current understanding of the scope of Fifth Amendment and due

process rights. This Court has yet to examine them with a critical eye - especially in light of those developments. Review should be granted, because the old cases upon which our modern courts continue to rely do not provide adequate protection for the rights of the accused.

Review should also be granted to clarify this Court's holding in *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000). "In for a penny, in for a pound." "In for a dime, in for a dollar." *Cronin* appeared to condemn these maxims as misstatements of the law, because in our state accomplice liability is not "strict liability."

But did *Cronin* so hold? According to Division Three in this case, it did not. Indeed, Division Three held, *no court* has found the "in for a penny, in for a pound" arguments improper, so they must not be misconduct. Division One, however, has described *Cronin* to so hold. *In re the Personal Restraint of Wilson*, 169 Wn. App. 379, 392, 279 P.3d 990

(2012), *affirmed*, 338 P.3d 275 (2013).

This Court should grant review to determine which Division is correct about *Cronin*. It is crucial that the law of accomplice liability is not stated in a way allowing the State to gain convictions unsupported by our law. The Court should affirm that *Cronin* condemned describing accomplice liability with a maxim such as "in for a penny, in for a pound" or "in for a dime, in for a dollar." It should hold such argument is a misstatement of the law and thus misconduct when argued by the State. Such clarification of the law is crucial to ensure against improper convictions like the robbery conviction here.

B. IDENTITY OF PARTY

The Petitioner, Mr. Vernal G. Garvey, was the appellant in the Court of Appeals and the accused in the trial court.

C. COURT OF APPEALS DECISION

Mr. Garvey seeks review of the decision of the court of appeals, Division Three, in *State v. Garvey*, __ Wn. App.2d ___

(2021 WL 3417608) (attached as Appendix A) (August 5, 2021).

D. ISSUES PRESENTED FOR REVIEW

1. The right to be free from self-incrimination includes the right not to testify. Further, the due process right to have the State prove its case includes the right to be free from having to disprove it.

When a prosecutor repeatedly urges jurors to rely on the fact that there was "no evidence" before them on what happened other than what the State's witnesses said, the analysis of when such argument is misconduct and violates the Fifth Amendment and due process rights of the accused all stems from *Litzenberger*, *supra*, a 1926 case, and its progeny, *Ashby*, *supra*, from 1969.

In *Messinger*, Division Three held that it was error for a prosecutor to argue that the State's testimony was "undenied" when the only person who could have provided those denials was the accused, because "[s]uch argument draws unfavored attention to the defendant's failure to testify and exceeds" permissible authority of *Litzenberger* and *Ashby.*

Should this Court grant review because Division Three's decision here is in conflict with *Messinger*?

Should this Court grant review to address whether *Litzenberger* and *Ashby* remain good law in our modern times despite the huge changes in

our understanding of Fifth Amendment and due process rights?

2. Is the maxim "in for a penny, in for a pound" a misstatement of the law of accomplice liability in this state?

   Did this Court so hold in *Cronin*, *supra*, as Mr. Garvey argued below and as Division One suggested in *Wilson*, *supra*, or is Division Three correct that "no court" has ever condemned such an argument so it is not misconduct for a State's attorney to use in arguing guilt?

## E. RELEVANT FACTS

Petitioner Vernal G. Garvey was accused by Thurston County prosecutors of being the mastermind behind criminal conduct committed by a woman named Moriah Whittaker and a man named Jonta'h Wesley in November of 2017. CP 63-64; 3RP 586.[1]

The victim was Ms. Whittaker's former fiancé, Harrison Nichols. 3RP 147-48, 187, 281. Ms. Whittaker lured him into

[1]The volumes of transcript are not all chronologically paginated. As relevant here, the volumes containing the trial court proceedings of June 24-27, 2019 are referred to as "3RP." Further explanation of the references is contained in Appellant's Opening Brief ("AOB") at 3 n. 2.

getting "stoned" in her car after work one night, then Mr. Wesley jumped in the back of the car, pointed a gun at Mr. Nichols' head, demanded Mr. Nichols' "stuff," threatened to kill him if he did not comply, took the backpack, and got out of the car, running away. 3RP 163-69, 250-68.

In the backpack was, *inter alia*, a cell phone, some cash,"pot" and a debit card. 3RP 165-182-83. Security video from a nearby grocery store showed Mr. Wesley with a second man, later identified as Petitioner Garvey, going through the backpack in the parking lot, and Mr. Garvey then trying to use Mr. Nichols' debit card in the store. 3RP 230-41, 359-68.

The night of the incident, Mr. Nichols and police were already suspicious that Ms. Whittaker was involved in Mr. Wesley's crime. 3RP 425-27. She vehemently denied it, told Mr. Nichols she would never do anything like that to him, and gave a sworn statement to police saying she did not know Mr. Wesley and had never seen him before. 3RP 218, 240-42.

Eventually, however, she changed her story and admitted she knew Mr. Wesley and had been involved in the crime. 3RP 425-27. Ms. Whittaker also implicated Mr. Garvey not just in possessing the stolen property later at the store but also in the robbery itself. 3RP 425-27. Mr. Wesley, too, swore he was not involved, then that he was involved but no gun was used, then that a gun was used but not by him, to then admitting he had used the gun and committed the crime. RP 343, 371, 380-85. Ultimately, Mr. Wesley incriminated Mr. Garvey, too, although he changed his version of events, at one point claiming that Mr. Garvey had grabbed the backpack from the car during the robbery. RP 343, 371, 380-85.[2]

Ms. Whittaker and Mr. Wesley testified that Mr. Garvey lived with them in her apartment and that the motive for the robbery was that Ms. Whittaker was having trouble paying

[2]Both got a "deal" in exchange for their testimony at trial. 3RP 297-98, 371-72.

rent. 3RP 343-44, 425-27.

Mr. Wesley testified that he was not involved in the planning but claimed Mr. Garvey was. 3RP 343-44. According to Mr. Wesley, he felt "threatened" into being involved in the crime, because Mr. Garvey made it clear that Mr. Welsey was not pulling his weight financially around the home. 3RP 343-45. But Mr. Wesley admitted that Mr. Garvey made no verbal threats, and at trial Mr. Wesley affirmed that he had never been afraid of Mr. Garvey "at any level." 3RP 370.

Ms. Whittaker conceded that she was the one who identified Mr. Nichols as an "easy target." 3RP 427. Although Mr. Nichols was homeless, Ms. Whittaker was aware that Mr. Nichols had about $1,000 saved up. 3RP 427.

Ms. Whittaker claimed that it was Mr. Garvey, however, who knew the personal identification number for Mr. Nichols' debit card, which was essential for the way they were planning to commit the crime. 3RP 262, 311-12, 427. That plan

changed suddenly just before Ms. Whittaker went to pick up Mr. Nichols, because Mr. Nichols told Ms. Whittaker he had already gotten the "smokes." 3RP 343-45.

According to Mr. Wesley and Ms. Whittaker, they were in the car with Mr. Garvey and went to regroup at a local park. 3RP 346. Mr. Wesley would say that Ms. Whittaker suggested that the two men put on masks and rob Mr. Nichols after she somehow got them to the dark park, but Ms. Whittaker claimed that plan came from Mr. Garvey. 3RP 267-69, 343.

Ms. Whittaker testified that, after she left the two men at the park to go get Mr. Nichols, she "texted" back and forth with Mr. Garvey. 3RP 246-52. She said Mr. Garvey and Mr. Wesley ran over to where her car was parked when the location changed again, and that Mr. Garvey was there when Mr. Wesley jumped in with the gun. 3RP 346-52.

Both Ms. Whittaker and Mr. Wesley claimed that Mr. Garvey supplied that gun. 3RP 348, 432. According to Mr.

Wesley, there had been no prior discussion of using a gun but when they were at the park that evening Mr. Garvey shoved the gun at him "kind of abruptly" and would not take it back. 3RP 348-54.

In contrast, Ms. Whittaker testified that, while at the park, Mr. Garvey pulled out two guns and told Mr. Wesley to pick one. 3RP 432. She saw Mr. Wesley chose and heard no complaint. 3RP 348.

Guns were found in the driver's side door pocket of Ms. Whittaker's car and next to her bed in her apartment. 3RP 228, 447, 456-67. She testified that they belonged to Mr. Garvey. 3RP 287.

Mr. Garvey chose to exercise his rights not to testify. 3RP 588-90. He also chose not to call witnesses or present testimony on his behalf. 3RP 591.

In closing argument, the prosecutor said jurors could consider only the evidence presented at trial and that there

were "a lot of issues that really aren't subject to much confrontation." 3RP 619. The State's attorney then used the theme that jurors had been presented with "no evidence" other than what Ms. Whittaker and Mr. Wesley had said, so they should convict. 3RP 620, 628-29, 631-32, 635-36, 637-38, 645, 647-48.

This included the State's attorney declaring

-that jurors had heard "no evidence" other than the testimony from Ms. Whittaker and Mr. Wesley, about whether Mr. Garvey was involved in planning the crime in the apartment the three shared (3RP 628, 647),

-that jurors had heard "no evidence" other than Ms. Whittaker's testimony about whether Mr. Garvey had Mr. Nichols' PIN number, a crucial part of the planned crime (3RP 631-32, 648),

-that jurors had "no evidence" other than the testimony from Ms. Whittaker and Mr. Wesley that Mr. Garvey supplied the gun (3RP 635-36, 641-42, 645, 648), and

-that there was "no evidence" of anything other than that Mr. Garvey owned the guns in Ms. Whittaker's car and home, because the only evidence before them was her testimony they

were his (3RP 629-30, 672).

The prosecutor also told jurors things were going to get "interesting" when counsel argued, because the defendant could not explain why he was at the grocery store with Mr. Wesley. 3RP 642 ("how's he gonna explain that?").

The prosecutor then called reasonable doubt "the lawyer's either crutch or stick," and declared that accomplice liability applied because when Ms. Whittaker, Mr. Wesley, and Mr. Garvey were "acting in concert, **in for a penny, in for a pound**, you are responsible for what the other person does as long as you're acting in concert." 3RP 654-55 (emphasis added).

On review, Division Three held that the argument "in for a penny, in for a pound" was *not* a misstatement of accomplice liability - and thus could not be misconduct for the prosecutor to use. App. A at 12-13. The court held that this Court's decision in *Cronin* had **not** rejected the maxim as a description

of our state's law. App. A at 13. Indeed, Division Three declared, neither *Cronin* nor any other court had held that it was a "misstatement of the law" or misconduct to argue that jurors should apply the theory of accomplice liability as "in for a penny, in for a pound." App. A at 13.

Division Three also held that the Fifth Amendment and due process are not violated when the State's attorney repeatedly tells jurors that they should convict because there was "no evidence" other than that presented by the State, or suggests that the accused has to "explain" away part of the State's case. App. A at 8-11. The lower appellate court found that such arguments were "within the permissible limits of argument," based on current law of *Litzenberger* and *Ashby*. *Id*.

F. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. THIS COURT SHOULD GRANT REVIEW BECAUSE DIVISION THREE'S DECISION HERE CONFLICTS WITH ITS DECISION IN *MESSINGER* AND BECAUSE IT IS TIME FOR THIS COURT TO SQUARELY ADDRESS THE CONTINUING CURRENCY OF *LITZENBERGER* AND *ASHBY* TO ENSURE OUR COURTS PROTECT THE FIFTH AMENDMENT AND DUE PROCESS RIGHTS OF THE ACCUSED

State and federal due process requires the government in a criminal case to bear the burden of proving "every fact necessary" beyond a reasonable doubt in order to prove its case. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. W.R., Jr.*, 181 Wn.2d 757, 761-62, 336 P.3d 1134 (2014); Fourteenth Amend.; Art. 1, § 3. It is a "corollary rule" that the state "cannot require the defendant to disprove any fact which constitutes the crime charged." *W.R., Jr.*, 181 Wn.2d at 762.

As a result, it is prosecutorial misconduct and a violation of due process rights for a State's attorney to imply that the

defense bears a burden of disproving the state's case or has a duty to present evidence. *State v. Fleming*, 83 Wn. App. 209, 213-14, 921P.2d 1076 (1996), *review denied*, 131 Wn.2d 1018 (1997).

The state and federal right to remain silent also limit state arguments at trial. *See State v. Easter,* 130 Wn.2d 228, 238, 922 P.2d 1285 (1996); *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); Fifth Amend.; Art. 1, §9. As part of those rights, the accused is not required to take the stand on his own behalf. *See State v. Ramirez,* 49 Wn. App. 332, 336, 742 P.2d 726 (1987). It is misconduct for the prosecutor draw a negative inference from this decision. *Id.*

It is not always improper for a prosecutor to argue that the State's evidence is "undisputed," but such comments violate the Fifth Amendment if jurors would "naturally and necessarily" would take them as comments on the defendant's failure to take the stand. *State v. Sargeant,* 40

Wn. App. 340, 346, 698 P.2d 598 (1985); *see Lockett v. Ohio*, 438 U.S. 586, 595, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978). Further, such comments violate the due process right to a fair trial. *See Doyle*, 426 U.S. at 619.

In affirming here, Division Three recognized that "[d]uring closing argument, the prosecuting attorney sometimes referred to the evidence presented and commented that no rebutting evidence existed[.]" App. A at 10-11. But Division Three found that the arguments here were nevertheless proper and not in violation of Mr. Garvey's due process or Fifth Amendment rights. App. A at 9-11. The lower appellate court reached its conclusion based on *Litzenberger*, *supra*, the 1926 case which controls on this issue, its progeny, *Ashby*, *supra*, and court of appeals cases following those two cases. App. A at 9 (*citing Sargent*, 40 Wn. App. at 346, and *State v. Jackson*, 150 Wn. App. 877, 887-88, 209 P.3d 553 (2009)).

This Court should grant review. In *Messigner*, *supra*, Division Three recognized that it was misconduct for a prosecutor to repeatedly argue that there was no testimony to dispute the testimony of state's witnesses, because "[c]alling attention to [the] defendant's failure to contradict or deny" the state's evidence is an improper comment on the failure of the accused to testify when the accused is the only one whose testimony could provide such contradiction. 8 Wn. App. at 840.

In *Messigner*, as here, the two state's witnesses incriminated the accused based on conversations they said they had with him when all three were at dinner. *Id*. By definition, in that situation, the "[d]efendant was the only other person who could deny the conversations." *Id*. Here, Mr. Garvey was the only one who could have testified to deny the claims of Mr. Wesley and Ms. Whittaker about the conversations they said they had with him alone - indeed,

about whether he was involved in the robbery at all. The decision here is in conflict with *Messinger*.

Further, in concluding that the comments here were permissible comments and did not infringe upon the non-testifying defendant's Fifth Amendment rights, Division Three relied on and quoted *Litzenberger* at length. App. A at 9. In that case, the prosecutor argued that "certain testimony on behalf of the state was undenied" and that only the accused could have provided that denial. *Litzenberger*, 140 Wash. at 311. The accused, however, had not taken the stand. *Id*.

On review, Mr. Litzenberger argued that the prosecutor had improperly commented on his failure to testify. *Id*. Without discussing either the federal or state constitution, the *Litzenberger* Court declared:

> Surely the prosecutor may comment upon the fact that certain testimony is undenied, without reference to who may or may not be in a position to deny it, and, if that results in an inference unfavorable to the accused he must accept the burden, because the choice to testify or not was wholly his.

140 Wash. at 311.

Thus, *Litzenberger* relied on a belief that it was proper to allow an unfavorable inference against the accused based on his decision not to testify or not, i.e., his exercise of his Fifth Amendment rights.

This quote from *Litzenberger* is the quote that Division Three relied on in holding the prosecutor's arguments proper here. App. A at 9. And it is the quote which our state's courts have parroted throughout the years, including in 1969 in *Ashby*. *Ashby*, 77 Wn.2d at 38; *see e.g.*, *State v. Morris*, 150 Wn. App. 927, 931, 210 P.3d 1025 (2009) (including the quote from *Litzenberger*); *State v. Crawford*, 21 Wn. App. 146, 153, 584 P.2d 442 (1978) (same).

In *Ashby*, the prosecutor declared, twice, that it was "not disputed" that the stolen items had been sold to the accused. 77 Wn.2d at 37. The Court found this was not improper, because the defendant was the only one who could

have refuted the evidence under the facts of that case. *Id.*

But the *Ashby* Court went further, relying on the "surely" quote from *Litzenberger* as controlling, i.e., the "rule enunciated by this court in *State v. Litzenberger*." *Ashby*, 77 Wn.2d at 38. Like *Litzenberger*, *Ashby* was unencumbered by any meaningful discussion of the constitutional rights in question. *Ashby*, 77 Wn.2d at 37-38. But in following *Litzenberger*, *Ashby* thus extended *Litzenberger*'s reach, so that cases on this topic which do not cite or quote *Litzenberger* rely on *Ashby* as defining when the prosecutor's arguments about "no evidence" are proper. *See, e.g.*, *Jackson*, 150 Wn. App. at 887-88; *Sargent*, 40 Wn. App. at 346; *see also*, *State v. Brett*, 126 Wn.2d 136, 892 P.2d 29 (1995), *reversed on collateral review on other grounds sub nom In re Brett*, 142 Wn.2d 868, 16 P.3d 601 (2001).

This Court should grant review. If Division Three is correct and the argument in this case was not improper

comment on Mr. Garvey's failure to disprove the state's case and his failure to testify to rebut the testimony about what the state said occurred under *Litzenberger* (and by extension, *Ashby*), then those cases no longer provide protection from violation of Fifth Amendment due process rights.

This is not surprising, because *Litzenberger* was decided years before the U.S. Supreme Court recognized that the Fifth Amendment applied to state court proceedings. *See Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964); *Litzenberger*, 140 Wash. at 308. It was only in 1965 that the Court decided, in *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed.2d 106 (1965), that the Fifth Amendment right also bars the prosecution from commenting on the defendant's failure to testify.

And it was only in *Griffin* that the high Court disapproved of states using a common practice of allowing jurors to draw an unfavorable inference against the defendant

for failing to testify to deny or explain the evidence or facts against him when he "can reasonably be expected to deny or explain because of facts within his knowledge[.]" 380 U.S. at 610.

Only three people were present when Mr. Wesley and Ms. Whittaker testified that the robbery was planned, and the third was the accused. Only three people were around when Mr. Wesley acquired the gun. The only person who could dispute that he was involved in those conversations, or that he had given Mr. Wesley, or that he had communicated with Ms. Whittaker during the robbery, or that he had the PIN for Mr. Nichols' debit car, or that he was the owner of the guns found in Ms. Whittaker's apartment as Ms. Whittaker claimed, was Mr. Garvey. And he had a Fifth Amendment right not to testify, and, under *Griffith*, to be free from the prosecutor drawing a negative inference from that decision, and a due process right not to have to be forced to disprove the State's.

Division Three erred in concluding otherwise and this Court should grant review.

2. REVIEW SHOULD BE GRANTED TO ANSWER WHETHER "IN FOR A PENNY, IN FOR A POUND" IS A MISSTATEMENT OF ACCOMPLICE LIABILITY UNDER *CRONIN* AND WHETHER ARGUING SUCH A MAXIM IS MISCONDUCT

The robbery conviction depended on accomplice liability of Mr. Garvey as the alleged "mastermind" of the criminal conduct which Mr. Wesley and Ms. Whittaker had committed. In initial closing, the prosecutor told jurors the defense was asking them to ignore the law on accomplice liability, then went on:

> There's varying degrees of who did what, sure. **But when you break down the elements of robbery, when the three are acting in concert, *in for a penny, in for a pound*, you are responsible for what the other person does as long as you're acting in concert.** The three were acting in concert[.]

3RP 654 (emphasis added). In rebuttal closing, the prosecutor also said that someone is an "accomplice to everything that happened" if he was involved after the fact by "getting the

spoils of the robbery" and trying to use the debit card. 3RP 672-74.

In finding that these arguments were not misconduct because they were not a misstatement of accomplice liability law, Division Three held that neither this Court nor any other has ever condemned the "in for a penny, in for a pound," or "in for a dime, in for a dollar" description of accomplice liability in this state. App. A at 12-14. And it specifically said that this Court's decision in *Cronin* did not so hold. App. A at 12.

In *Cronin*, this Court rejected the idea that our accomplice liability statute, RCW 9A.08.020, provides for "strict liability" for an accomplice for all crimes committed by a principal. 142 Wn.2d at 577; *see State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000). Jurors were given an improper jury instruction and the prosecutor in one of the consolidated cases had argued that accomplice liability meant "in for a penny, in for a pound," and "in for a dime, in for a dollar."

*Cronin*, 142 Wn.2d at 577. This Court held that this theory of accomplice liability was flawed, because, in our state, "the fact that a purported accomplice know that the principal intends to commit 'a crime' does not necessarily mean that accomplice liability attaches for any and all offenses ultimately commited by the principal." *Roberts*, 142 Wn.2d at 510-11.

Contrary to Division Three's decision here, Division One has recognized that *Cronin* rejected the "in for a penny, in for a pound" argument as a misstatement of the law, citing *Cronin* for the proposition that such argument about accomplice liability was "now-discredited." *Wilson*, 169 Wn. App. at 392.

This Court has similarly cited *Cronin* in describing the "in for a dime, in for a dollar" theory of accomplice liability as providing for liability "for any and all crimes committed by the principal so long as the putative accomplice knowingly aided in *any* one of the crimes" - and then rejected the idea that the theory is a proper reflection of our state's law, either before or

after *Cronin*. *In re Domingo*, 155 Wn.2d 356, 365, 119 P.3d 816 (2005).

This Court should grant review. Division Three's declaration that no court has ever condemned the "in for a penny, in for a pound" theory of accomplice liability is in conflict with the interpretation of *Cronin* that this Court and Division One have applied. Further, this Court has noted that such argument misstates the law of accomplice liability. Crucially, here, the prosecutor relied on the maxim in arguing that jurors should find guilt for participation *after the crime*. The court of appeals decision holding that the maxim used below was proper and not misconduct was error, and this Court should grant review.

## G. CONCLUSION

This Court has not hesitated to grant review to address when and whether a prosecutor has committed misconduct in a criminal case, mindful of the importance of ensuring the due process right to a fair trial. This is just such a case. The prosecutor's arguments were misconduct and Division Three's decision to the contrary conflict with decisions of this Court. To the extent they do not, our caselaw requires review to ensure the rights of the accused. Further, this Court should ensure that *Cronin* is properly interpreted to condemn the "in for a penny, in for a pound" maxim, by granting review.

DATED this 7th day of September, 2021.

Pursuant to RAP 18.17(b), the word count is 4601.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to Petitioner by depositing the same in the United States Mail, first class postage pre-paid, as follows, to Mr. Vernal Garvey, III, DOC 417766, Stafford Creek CC, 191 Constantine Way, Aberdeen, WA. 98520, and to the Thurston County prosecutor's office via efiling this date.

DATED this 7th day of September, 2021.

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NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 3.

STATE of Washington, Respondent,
v.
Vernal George GARVEY, Appellant.

No. 37988-4-III
|
FILED August 5, 2021

Appeal from Thurston Superior Court, Docket No: 17-1-01991-1, Honorable James J. Dixon, Judge

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UNPUBLISHED OPINION

Fearing, J.

***1** Vernal Garvey appeals his convictions for robbery in the first degree, possession of stolen property, and bail jumping. He contends that the prosecuting attorney committed misconduct at least four times during the closing statement. We disagree and affirm his convictions.

FACTS

This prosecution arises from the robbery of Harrison Nichols by a companion of defendant, Vernal Garvey. We lift our facts from trial testimony.

  

Moriah Whittaker, an acquaintance of Harrison Nichols, was implicated in the robbery. In mid-October 2017, Whittaker lost her job and expressed worry to Nichols about losing her apartment. On November 4, Whittaker received a "three-day pay or vacate" notice. She could not afford to pay the rent by the deadline. Report of Proceedings (RP) (June 26, 2019) at 425-26. Whittaker demanded that Nichols pay her rent money in exchange for a prior, two-week stay in her apartment. Nichols refused Whittaker's demand.

Moriah Whittaker and Vernal Garvey engaged in an intimate relationship. The two lived in the same apartment with Alison and Jonta'h Wesley. Victim Harrison Nichols mingled with Garvey on eight occasions. Garvey knew Nichols' PIN number to his debit card, based on Garvey's previous use of the card. Whittaker and Wesley did not know Nichols' PIN.

Vernal Garvey conceived of a plan to steal from Harrison Nichols. Moriah Whittaker believed Nichols to be an easy target. Under Garvey's plan, Whittaker would ask Nichols for his debit card to purchase cigarettes, since Nichols was under eighteen years old. Whittaker would then convey the card to Garvey and Jonta'h Wesley.

Moriah Whittaker contacted Harrison Nichols on November 4, 2017 in order to execute the scheme to steal Nichols' debit card. Whittaker apologized for taking Nichols for granted and asked to meet in person. The two first planned for Whittaker to retrieve Nichols from his work and then talk in Whittaker's vehicle.

Before the meeting of Moriah Whittaker and Harrison Nichols, the latter purchased cigarettes. Nichols' early purchase of cigarettes foiled the trio's initial plan. At some unidentified time, Whittaker learned that Nichols already purchased the cigarettes.

According to Moriah Whittaker, Vernal Garvey devised a new plan, while Jonta'h Wesley averred that Whittaker conceived of a second plan. The trio's new plan required Whittaker to convince Harrison Nichols to meet her in a nearby park. Vernal Garvey planned to commit what would appear to be a random robbery there. Before meeting Nichols, Whittaker drove Garvey and Jonta'h Wesley to the park. When she left the duo at the park, Garvey carried two firearms. According to Jonta'h Wesley, Garvey handed him a firearm and said: " 'Use the gun.' " RP (June 25, 2019) at 351. Wesley maintained that he believed he could not refuse Garvey's direction.

When Moriah Whittaker retrieved Harrison Nichols from his employment, she suggested that the two smoke at a nearby park. Nichols refused and proposed that they smoke in a veterinary clinic parking lot close to a McDonald's restaurant. The duo parked in the nearby lot and smoked marijuana.

  

***2** While Harrison Nichols and Moriah Whittaker reposed in Whittaker's car, Jonta'h Wesley entered the right rear passenger seat of the automobile. Nichols recognized Wesley, because Wesley, Vernal Garvey, and a female associate drove Nichols to work two or three weeks before the November 4 robbery. Wesley leveled a gun to Nichols' head and demanded that Nichols surrender his possessions. Nichols complied and handed Wesley his backpack containing a marijuana pipe, $80 cash, his cellphone, and his debit card. Wesley bolted from Whittaker's car. Wesley claimed that he did not threaten to shoot Nichols. Vernal Garvey hid in bushes across the street during the robbery.

A Safeway grocery store's surveillance footage taken on the night of November 4 showed Jonta'h Wesley and another male, later identified as Vernal Garvey, toting a backpack inside the store after the theft of Harrison Nichols' possessions. The backpack matched the description of Nichols' stolen backpack. The surveillance video showed Garvey removing Nichols' debit card from the backpack. Garvey then unsuccessfully attempted to use the card to withdraw money from an ATM. The Safeway security footage subsequently showed Wesley and Garvey changing their clothes and exiting the grocery store.

After the theft of Harrison Nichols' personal property, Moriah Whittaker drove Nichols to the McDonald's restaurant, where Nichols worked. Nichols called law enforcement from the restaurant. Lacey Patrol Officer Jocelyn Uria responded at 9:48 p.m. Nichols suggested to Officer Uria the involvement of his companion, Whittaker, in the robbery. According to Nichols, Whittaker's rent was late, and she knew that Nichols possessed $1,000.

Officer Jocelyn Uria interviewed Moriah Whittaker. Whittaker denied that she knew Jonta'h Wesley and denied any involvement in the robbery. The fact that the gunman did not utter any demands or threats toward Whittaker seemed suspicious to Uria. During this time, Whittaker texted Vernal Garvey: " 'Hey, I'm stuck talking to them [law enforcement].' " Garvey responded, "Delete all the messages." RP (June 25, 2019) at 287.

Officer Jocelyn Uria watched the Safeway surveillance footage. She did not recognize either of the men shown in the video. She prepared a flier that posted photos of each male, and she distributed the flier among law enforcement.

Harold Nichols later used a tracking application from a computer to determine the locations where his robber took his phone. The application registered the phone as having been at the Safeway store.

The Lacey Police Department assigned the robbery case to Officer Jessie Hadley to investigate. On November 7, 2017, Officer Hadley visited Moriah Whittaker's apartment in Olympia. On arriving at the apartment, he saw a male standing on Whittaker's balcony. Hadley recognized the individual from Officer Jocelyn Uria's flier. He called for assistance before approaching Whittaker.

  

On the arrival of additional officers, law enforcement knocked on Moriah Whittaker's door. Whittaker answered the door and identified herself. When Whittaker opened the door, a male stood behind her. Officer Jessie Hadley recognized this second man as one of the suspects depicted in Officer Uria's flier, but he concluded that the man was not the same person he earlier saw standing on the balcony. Officer Hadley eventually identified the man standing behind Whittaker as Vernal Garvey.

Moriah Whittaker and Vernal Garvey went to the Lacey Police Department headquarters to speak with law enforcement. During an interview with Whittaker, Officer Jessie Hadley warned her that officers had already started "to connect the dots." RP (June 26, 2019) at 420. Officer Hadley also informed her that law enforcement officers possessed a flier of the potential suspects, both of whom he spotted in Whittaker's apartment. Whittaker then adjusted her narrative and confessed to her involvement in the robbery of Harrison Nichols.

***3** Based on Moriah Whittaker's statement, Officer Jessie Hadley detained Vernal Garvey. Officer Hadley released Whittaker so that she could help locate Jonta'h Wesley. Whittaker later met with Wesley and informed police of his whereabouts. Officer Hadley detained Wesley and interviewed the suspect. Wesley admitted to taking Harrison Nichols' backpack and giving it to Garvey, but denied using a firearm during the crime. After Wesley gave his statement, law enforcement arrested him.

Officer Jessie Hadley presented a photo lineup to Harrison Nichols, which lineup included photos of Vernal Garvey and Jonta'h Wesley. Nichols identified both men. He pinpointed Wesley as the gunman.

Law enforcement executed a search warrant for Moriah Whittaker's apartment and the car she drove on the night of the robbery. In the nightstand by Whittaker's bed, police found a black .22 caliber handgun. In Whittaker's vehicle, next to the driver's seat, officers found a second firearm, a .9 mm handgun. At trial, Whittaker averred that both handguns belonged to Vernal Garvey. Whittaker testified that Jonta'h Wesley used the firearms during the robbery.

While in custody, Jonta'h Wesley and Vernal Garvey shared a cell block. Garvey frequently came to Wesley's cell, although Wesley does not recall anything said by Garvey. Wesley understood that Garvey violated a no contact order by speaking to him, but he did not report Garvey. In exchange for reduced charges of second degree robbery and felony harassment, Wesley pled guilty.

## PROCEDURE

  

The State of Washington charged Vernal Garvey, by second amended information, with one count each of robbery in the first degree while armed with a firearm, possessing stolen property in the second degree, bail jumping, and intimidating a witness. Before closing arguments, the State moved to dismiss the intimidating a witness charge. The trial court dismissed the charge with prejudice.

At trial, Deputy Prosecuting Attorney Joseph Wheeler testified that Vernal Garvey failed to appear for a required hearing following his release on bail. Garvey had received proper notice for the hearing. Garvey's absence formed the basis of Garvey's bail jumping charge.

At the beginning of closing argument, the State's attorney read verbatim the jury instruction on accomplice liability:

> Jury No. 8. It's up here on the screen if you want to follow. The language is "a person is an accomplice in the commission of a crime if with knowledge that it will promote or facilitate the commission of the crime he either ... solicits, commands, encourages or requests another person to commit the crime, or ... aids or agrees to aid another person in planning or committing the crime."

RP (June 27, 2019) at 625.

During closing argument, the prosecuting attorney sometimes referred to the evidence presented and commented that no rebutting evidence existed or that scant evidence supported Vernal Garvey's defense theory:

> *You have evidence of nothing else* except the defendant was in her [Moriah Whittaker's] bedroom with her as a [sic] apartment tenant and that Jonta'h was sleeping on the couch.

RP (June 27, 2019) at 628 (emphasis added). The State's attorney argued about the gun that law enforcement seized in Moriah Whittaker's bedroom:

> It was the bedroom that both the defendant and Moriah shared. And you have evidence from both Harrison and Jonta'h that that's where he [Vernal Garvey] slept. *You have no evidence that Moriah ever possessed that gun, none.* It was in her bedroom in her nightstand exactly where she said the defendant kept it.

  

***4** RP (June 27, 2019) at 629 (emphasis added).

During closing, the State's counsel addressed Vernal Garvey's knowledge of Harrison Nichols' debit card PIN:

> *But there is no other evidence that's been presented to you* that Harrison did give the defendant his debit card and his PIN number so he could go into the dispensary and legally purchase marijuana. So that's—the defendant is the only person who had that information. *That's the only evidence before you.* Nobody else. He'd never given it to Moriah. Definitely hadn't given it to Jonta'h.

RP (June 27, 2019) at 631 (emphasis added). As to the gun used in the robbery and the marijuana Whittaker and Nichols smoked, the prosecuting attorney commented:

> *There is no evidence that's been presented to you* other than the firearm that Jonta'h used to rob Harrison Nichols came from the defendant. That's the only evidence you have. "Use it. You need to pull your weight" is what Jonta'h's testimony was.
>
> ....
>
> *There is no other evidence in front of you* except the defendant provided both the gun and the marijuana.

RP (June 27, 2019) at 635-36 (emphasis added). The State's attorney added:

> So there is no question a robbery occurred. There is no question. And a firearm was used.... That's—there's no evidence to suggest anything but that. That is way beyond a reasonable doubt, ladies and gentlemen, because you have everybody testify to it.

RP (June 27, 2019) at 637-38.

During closing statement, the State's counsel emphasized that the State entered no plea deal with Moriah Whittaker:

  

> There were no deals from the state prior to her [Moriah Whittaker] providing that testimony, ladies and gentlemen. *There is no evidence to suggest anything otherwise to you, none, because there was none.* That's the point. She gave that statement freely and voluntarily because it was time to be honest within three days of the crime.

RP (June 27, 2019) at 640-41 (emphasis added).

The prosecuting attorney commented, during closing, that Vernal Garvey could not explain why he and Jonta'h Wesley met at Safeway after the alleged robbery:

> Jonta'h robs Harrison Nichols November 4th, 2017, about 9:45. There was no question. He runs away and meets up with the defendant at Safeway. Now, this is going to get interesting. *How are they going to explain that?* The defendant just happened to be on a jog at the same time and ran across his buddy at Safeway in November at 9:50? No. Because you saw the video. And we'll show it again. He says "I gave the defendant the backpack. I did my part. I got the backpack." Now gives it to the defendant. *How are they going to explain that?*

RP (June 27, 2019) at 642 (emphasis added). Counsel again referenced Garvey's knowledge of Harrison Nichols' PIN number:

> He knew. It doesn't matter how he knew. He knew. He was the only one that knew Harrison's PIN number to his debit card, ladies and gentlemen. *There is no other evidence before you than that.*

RP (June 27, 2019) at 648 (emphasis added).

When concluding the closing argument, the State's attorney explained reasonable doubt and accomplice liability:

> ***5** Ladies and gentlemen, I didn't spend a lot of time on reasonable doubt. That's the lawyer's either crutch or stick, reasonable doubt. How hard is it for us to even define reasonable doubt during jury selection? It could be this. It could be that. A doubt for which a reason exists. There is none here.... But when you break down to the elements of robbery, when the three are acting in concert, *in for a*

  

> *penny, in for a pound*, you are responsible for what the other person does as long as you're acting in concert. The three were acting in concert all day long and finally stumbled, I would argue, into a plan that was successful in at least getting Harrison's card. It wasn't successful in draining his bank account thankfully, but they finally did what they had set out to do.

RP (June 27, 2019) at 654-55 (emphasis added). Vernal Garvey did not object to any of the State's closing argument.

The jury found Vernal Garvey guilty of robbery in the first degree, possessing stolen property in the second degree, and bail jumping. The jury also found that Garvey, or an accomplice, was armed with a firearm while committing first degree robbery. The trial court sentenced Garvey to 101 months' confinement.

## LAW AND ANALYSIS

On appeal, Vernal Garvey challenges numerous comments by the State's attorney during summation. Garvey assigns prosecutorial misconduct to the State's counsel repeatedly mentioning the lack of evidence to rebut the State's evidence, the State's counsel's definition of "reasonable doubt," and the prosecutor's use of the saying "in for a penny, in for a pound."

### Burden of Proof and Right to Remain Silent

Vernal Garvey argues that the prosecutor committed misconduct by shifting the burden of proof to him and repeatedly uttering comments that incriminated Garvey for choosing not to testify at trial. The State denies the error and posits that the prosecuting attorney only highlighted the lack of evidence to support Garvey's defense.

The Fourteenth Amendment to the United States Constitution guarantees that "No state shall ... deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The United States Supreme Court has interpreted the due process guaranty as requiring the State to prove beyond a reasonable doubt every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. W.R., Jr.*, 181 Wn.2d 757, 761-62, 336 P.3d 1134 (2014). Stated differently, the State, not the defendant, bears the burden of proving the elements of the crime beyond a reasonable doubt. *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996).

  

An accused has a Fifth Amendment right not to testify. *State v. Chervenell*, 99 Wn.2d 309, 312, 662 P.2d 836 (1983). In turn, the State may not employ the accused's silence against him. *State v. Barry*, 183 Wn.2d 297, 306, 352 P.3d 161 (2015). This court determines whether a prosecutor improperly comments on a defendant's silence by considering two factors: (1) whether the prosecutor manifestly intended the remarks to be a comment on the defendant's exercise of his right not to testify and (2) whether the jury would naturally and necessarily interpret the statement as a comment on the defendant's silence. *State v. Barry*, 183 Wn.2d at 307. The prosecutor, however, may state that certain State's evidence is undenied without reference to who could have denied the evidence or without comment that the evidence is undisputed. *State v. Sargent*, 40 Wn. App. 340, 346, 698 P.2d 598 (1985).

> Surely the prosecutor may comment upon the fact that certain testimony is undenied, without reference to who may or may not be in a position to deny it and, if that results in an inference unfavorable to the accused, he must accept the burden, because the choice to testify or not was wholly his.

***6** *State v. Litzenberger*, 140 Wash. 308, 311, 248 P. 799 (1926). The prosecuting attorney's mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense. *State v. Jackson*, 150 Wn. App. 877, 885-86, 209 P.3d 553 (2009).

Vernal Garvey challenges the following remarks by the prosecutor and highlights that only he could have provided the evidence to defeat the State's arguments:

> You have evidence of nothing else except the defendant was in her bedroom.

RP (June 27, 2019) at 628.

> You have no evidence that Moriah ever possessed that gun, none.

RP (June 27, 2019) at 629.

  

> But there is no other evidence that's been presented to you that Harrison did give the defendant his debit card and his PIN number.

RP (June 27, 2019) at 631.

> There is no evidence that's been presented to you other than the firearm that Jonta'h used to rob Harrison Nichols came from the defendant.

RP (June 27, 2019) at 635.

> There is no other evidence in front of you except the defendant provided both the gun and the marijuana.

RP (June 27, 2019) at 636.

> So there is no question a robbery occurred. There is no question. And a firearm was used.... That's—there's no evidence to suggest anything but that.

RP (June 27, 2019) at 638.

> There were no deals from the state prior to her [Moriah Whittaker] providing that testimony, ladies and gentlemen. There is no evidence to suggest anything otherwise to you, none, because there was none.

RP (June 27, 2019) at 640-41.

  

> Jonta'h robs Harrison Nichols November 4th, 2017, about 9:45. There was no question. He runs away and meets up with the defendant at Safeway. Now, this is going to get interesting. How are they going to explain that?

RP (June 27, 2019) at 642.

> He was the only one that knew Harrison's PIN number to his debit card, ladies and gentlemen. *There is no other evidence before you than that.*

RP (June 27, 2019) at 648 (emphasis added).

> *A doubt for which a reason exists. There is none here.*

RP (June 27, 2019) at 654 (emphasis added).

Vernal Garvey relies on *State v. Fiallo-Lopez*, 78 Wn. App. 717, 899 P.2d 1294 (1995). In *Fiallo-Lopez*, the State charged defendant Jose Fiallo-Lopez with delivery and possession of cocaine. During closing argument, the State commented that "there was 'absolutely' no evidence to explain why Fiallo-Lopez was present at the restaurant and at Safeway precisely when Lima and Cooper were there for the drug transaction or why he had contact with Lima at both places." *State v. Fiallo-Lopez*, 78 Wn. App. at 729. The State argued that the defendant never attempted to rebut the prosecution's evidence regarding his involvement in the drug deal. This court observed that no one other than Fiallo-Lopez himself could have offered the explanation the State demanded. Accordingly, this court held that the State improperly commented on Fiallo-Lopez's right not to testify and shifted the burden of proof onto him. This court, nonetheless, ruled that the prosecutor's error was harmless beyond a reasonable doubt.

We readily distinguish *State v. Fiallo-Lopez* because counsel prosecuting Vernal Garvey never remarked that Garvey failed to rebut the State's evidence. The State's attorney consistently stayed within the permissible limits of argument according to *State v. Jackson*, 150 Wn. App. 877 (2009). Counsel framed the comments in terms of there being an absence of evidence, without suggesting that Garvey needed to supply that evidence.

  

Reasonable Doubt

***7** Vernal Garvey challenges the State's definition of reasonable doubt, "[a] doubt for which a reason exists." RP (June 27, 2019) at 654. Garvey cites *State v. Kalebaugh*, 183 Wn.2d 578, 584, 355 P.3d 253 (2015), in which the state high court held that the trial court improperly instructed the jury that a reasonable doubt "is a doubt for which a reason can be given." Nevertheless, *State v. Kalebaugh* contradicts Garvey's contention. The *Kalebaugh* court held that the proper instruction would have defined reasonable doubt as "a doubt for which a reason exists." *State v. Kalebaugh*, 183 Wn.2d at 584.

The State gave a correct definition of reasonable doubt to the jury. The State defined reasonable doubt as "a doubt for which a reason exists," the exact definition our high court used in *State v. Kalebaugh. State v. Kalebaugh*, 183 Wn.2d at 584. Unlike the improper trial court instruction in *Kalebaugh*, the State here did not indicate to the jury that it must find a reason for its doubt.

In for a Penny, In for a Pound

Vernal Garvey contends that the prosecutor committed misconduct by misstating the law on accomplice liability during closing argument. Garvey challenges the State's use of the "in for a penny, in for a pound" theory of accomplice liability, which he maintains Washington courts have rejected. RP (June 27, 2019) at 654.

RCW 9A.08.020 governs accomplice liability. The statutory language requires that the putative accomplice must have acted with knowledge that his or her conduct would promote or facilitate *the* crime for which he or she is eventually charged. *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). An individual may only be guilty as an accomplice when he or she has actual knowledge of the crimes the principal commits. *State v. Cronin*, 142 Wn.2d at 579.

Vernal Garvey challenges the following remarks from the State's closing argument:

> But when you break down to the elements of robbery, when the three are acting in concert, *in for a penny, in for a pound*, you are responsible for what the other person does as long as you're acting in concert. The three were acting in concert all day long and finally stumbled, I would argue, into a plan that was successful in at least getting Harrison's card. It wasn't successful in draining his bank account thankfully, but they finally did what they had set out to do.

  

RP (June 27, 2019) at 654-55 (emphasis added).

Vernal Garvey relies on *State v. Cronin*, 142 Wn.2d 568 (2000). In one of the consolidated cases, the prosecutor argued that Timothy Cronin was guilty of premeditated murder as an accomplice. The prosecutor remarked:

> A person who is an accomplice to a crime is guilty of that crime. We've all heard the phrase "in for a penny, in for a pound," "in for a dime, in for a dollar." This is the principle, this is the policy underlying accomplice-liability.

*State v. Cronin*, 142 Wn.2d at 577. Garvey asserts that the *Cronin* court rejected this metaphorical description of accomplice liability.

Vernal Garvey misinterprets *State v. Cronin*. The Washington Supreme Court did not find the prosecutor's use of the phrase "in for a penny, in for a pound" a misstatement of the law. Rather, the high court reversed Timothy Cronin's conviction because of an erroneous jury instruction regarding accomplice liability. In Cronin's prosecution, the jury instruction read:

> A person is an accomplice in the commission of *a* crime if, with knowledge that it will promote or facilitate the commission of *a* crime, he either:
>
> ***8** (1) solicits, commands, encourages or requests another person to commit the crime; or
>
> (2) aids or agrees to aid another person in committing a crime.

*State v. Cronin*, 142 Wn.2d at 576-77 (emphasis added). The jury instruction incorrectly inserted the indefinite article "a," rather than the definite article "the."

Both parties suggest that the Washington Supreme Court, in *State v. Cronin*, criticized the phrase, "in for a penny, in for a pound." We disagree, although one later decision referred to the adage as "now-discredited argument." *In re Personal Restraint of Wilson*, 169 Wn. App. 379, 392, 279 P.3d 990 (2012). Still, no court has found the axiom to constitute prosecutorial misconduct.

## Cumulative Error

Vernal Garvey asserts that the cumulative effect of the State's multiple improper arguments during closing argument prejudiced him. The cumulative error doctrine may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). Since we find no error, we do find no cumulative error.

  

## Ineffective Assistance of Counsel

Vernal Garvey alternatively contends that his trial counsel performed ineffectively when failing to object to the State's improper arguments. Since the prosecuting attorney did not commit misconduct during closing statement, we need not address this challenge.

## STATEMENT OF ADDITIONAL GROUNDS

In a statement of additional grounds (SAG), Vernal Garvey argues that the trial court denied him his federal constitutional right to a grand jury. Garvey asserts that this violation requires this court to reverse all his convictions and order his immediate release. We disagree.

Under the United States Constitution: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." U.S. CONST. amend. V. The United Supreme Court holds that the Fifth Amendment's grand jury provision does not apply to state prosecutions. *Hurtado v. California*, 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884); *State v. Ng*, 104 Wn.2d 763, 774, 713 P.2d 63 (1985).

Vernal Garvey contends that *Hurtado v. California* is outdated and erroneous. He highlights that, in the time period when the federal Supreme Court decided *Hurtado*, the Court approved Jim Crow laws in *Plessy v. Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), *overruled by Brown v. Board of Education of Topeka*, 347 U.S. 686, 74 S. Ct. 686, 98 L. Ed 873 (1954). He maintains that *Timbs v. Indiana*, 139 S. Ct. 682, 203 L. Ed. 2d 11 (2019) overrules *Hurtado v. California*. Garvey asserts that the *Timbs* court held that *all* the Bill of Rights guarantees are enforceable against the states.

In *Timbs v. Indiana*, the U.S. Supreme Court stated that, "if a Bill of Rights protection *is incorporated*, there is no daylight between the federal and state conduct it prohibits or requires." *Timbs v. Indian*, 139 S. Ct. at 687 (emphasis added). Garvey interprets *Timbs* too broadly. As held in *Hurtado v. California*, the grand jury provision of the Fifth Amendment is not incorporated through the Fourteenth Amendment.

## CONCLUSION

***9** We affirm Vernal Garvey's convictions.

  

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR:

Lawrence-Berrey, J.

Staab, J.

**All Citations**

Not Reported in Pac. Rptr., 2021 WL 3417608

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

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|---|---|---|
| STATE OF WASHINGTON, | ) | |
| | ) | |
| Plaintiff, | ) | No. 17-1-01991-34 |
| | ) | |
| vs. | ) | Appeal No. 53599-8-II |
| | ) | |
| VERNAL GEORGE GARVEY, III, | ) | |
| | ) | |
| Defendant. | ) | |

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TRANSCRIPT OF RECORDED PROCEEDINGS

SENTENCING HEARING

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BE IT REMEMBERED that on the 17th day of July, 2019, the above-entitled and numbered cause came on for hearing before the Honorable James J. Dixon, Judge, Thurston County Superior Court, Olympia, Washington.

Kathryn A. Beehler, CCR No. 2448
Official Court Reporter
Thurston County Superior Court
2000 Lakeridge Drive S.W.
Family and Juvenile Court
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## I N D E X

July 17, 2019 Olympia, Washington

MORNING SESSION

The Honorable Judge James J. Dixon, Presiding

APPEARANCES:

The Defendant, Vernal George Garvey, III, with his Counsel Jerry M. Gray, Attorney at Law; Wayne Graham, Deputy Prosecuting Attorney, representing the State of Washington.

(Transcript of Recorded Proceedings:)

--oOo--

THE COURT: Please be seated. Good morning. The Court is on the record in the matter of State of Washington versus Clyde -- excuse me, versus Vernal George Garvey, III, Cause Number 17-1-1991-34. Mr. Garvey is before the court for sentencing after having been convicted on June 28, 2019, by a jury verdict of one count of Robbery in the First Degree While Armed With a Firearm, one count of bail jumping, one count of possession of stolen property in the second degree.

The State is being represented this morning by Mr. Graham. Good morning, Mr. Graham.

MR. GRAHAM: Good morning, Your Honor.

THE COURT: Mr. Garvey being represented by Mr. Gray. Good morning, Mr. Gray.

MR. GRAY: Good morning, Your Honor.

THE COURT: Good morning, Mr. Garvey.

THE DEFENDANT: Good morning, Your Honor.

THE COURT: I'll hear first from the State, please.

MR. GRAHAM: Your Honor, I'm handing forward score sheets in light of the jury's verdict, as well as Mr. Garvey's criminal history, which the court will see he had no prior convictions before this incident. And the standard range, Your Honor, given the jury verdict on Count 1, is 101 to 114 months for the robbery while armed with a firearm. The midpoint on that, Your Honor, is 107-and-a-half months, so 107.5.

With two points, the bail jumping charge, Your Honor, has a standard range of 13 to 17 months. And the possession of stolen property in the second degree has a standard range of two to five months. Obviously, Your Honor, the focal point here is the robbery.

It's interesting, Your Honor. The court can see this is an older case. This was when our office had begun our First Look efforts in trying to look at cases potentially in a different way. And we tried that here, and it did not work. I have no doubt that but for Mr. Garvey, Ms. Whitaker doesn't go to

prison; Mr. Wesley doesn't go to prison. It's because of Mr. Garvey that an 18 and 19 year old are now saddled with felony convictions that resulted in prison sentences.

You were obviously sitting through the jury -- the trial, and a lot of information came to me as this case went on. I think the court had probably seen, there were a lot of efforts made for Mr. Wesley to not come testify.

He had received threats in the community and had -- basically had to be escorted here by the law enforcement. He was very afraid. And obviously none of that information was conveyed to the jury. But that's indicative, I think, of who was really in charge here. And it was Mr. Garvey. He was the one that was able to procure a release pending trial. As to the other two, he just left them. Ms. Whitaker and Mr. Wesley stayed in custody the entire time until they resolved their cases.

He supplied the firearms, Your Honor. He came up with the plan to rob Harrison Nichols of his credit card, with the idea that the -- and it's interesting. I don't know how well thought out it was, and it wasn't. I'll be candid. It was not well thought out. ATMs have a limit on how much money you can

pull out at any particular time. They could not have gotten $1,000 even if it was in that credit card or in that account, because the banks wouldn't have allowed it.

The idea was that Mr. Nichols -- or Mr. Nichols would say, hey, I was robbed, that was fraudulent transfers, and they would just give him his money back and everybody would go on their way. It just was a very -- just a not well-thought-out plan, Your Honor. And the introduction of a firearm, putting it into a young man's hands, and then instructing that young man to go and use it -- Harrison would have told the court, had he been able to be here today, Your Honor, that he's not been the same since this incident, not only because of the trauma of having a gun pointed in your face and items taken from you, but being set up by somebody that he cared very deeply for, and again, who was intimately involved with the Defendant at the time.

All of that, Your Honor, I know the Court is aware of pretty much. And it is frustrating to me – this court knows me well enough – that this is not where I wanted to be. And unfortunately, it is where Mr. Garvey chose to be.

And so with that, Your Honor, I am going to be

asking for a mid-range sentence of 107.5 months on Count 1. I would ask for 17 months on Count 2 and five months on Count 3. It really wraps in. And I know the Court knows how that's operated.

There would be 36 months of community custody associated with Count 1. And I think that's important. Mr. Garvey, Your Honor, is not unknown to law enforcement. Neither is a bunch of the people that he runs with. So when he gets back into our community, I believe that the community custody component would be integral in making sure he understands his obligations to those around him when he comes back from the Department.

I would ask that he not have any contact with Harrison Nichols, Dante Wesley, and Mariah Whitaker for the -- for really the maximum period, which would be life in regards to this. He should not have any contact with those three individuals. Mr. Nichols has absolutely no interest. Neither does Ms. Whitaker. Mr. Wesley is afraid. And so I know that he would not want to have any contact with Mr. Garvey, either.

The $500 crime victim fund, Your Honor, is required, and the $100 DNA collection fee is also required. And I appreciate Mr. Gray and Mr. Garvey

agreeing to -- Mr. Nichols is only asking for $200 in restitution, Your Honor. It's the amount of money that he paid for his phone of $120 and $80 for his backpack. We had to have a very candid conversation that I'm not certain when he'll ever see that money, but I think that's indicative of the young man that you saw on the stand. He never wanted to be here. He's not looking to get anything back except what was taken from him. And so I would ask that the court order that $200 restitution back to Mr. Nichols, and that's agreed upon.

Your Honor, again, we made many attempts through two attorneys to work something out with Mr. Garvey. And I would ask this court to honor the jury's verdict with a mid-range sentence, Your Honor, of 107.5 months on Count 1 with the top end on Counts 2 and 3 to obviously run concurrently. And I'll defer any other questions.

Mr. Nichols wanted to be here, Your Honor, and unfortunately through some transportation issues was not able to be. He asked me to convey what I've conveyed to the court. And I would defer if the court has any questions of me.

THE COURT: Thank you.

Mr. Gray?

MR. GRAY: Thank you, Your Honor. And apologies to Mr. Graham. In speaking with my client, he does not agree to the $200 in restitution. I just want to make a record of that, Your Honor. I think it's pretty reasonable from what Mr. Nichols is requesting. But that's my position -- my client's position.

Ms. Whitaker and Mr. Wesley were participants in this crime. They pled guilty. They went to prison. But they were involved. They weren't just bystanders that were -- that made no choices. They obviously made their own choices. Mr. Garvey made his choice. He made a choice to go to trial. He made a choice to take the risk of going to trial, even in the face of potential disaster, for lack of a better term, in terms of what he'd be looking at, as opposed to a similar deal that the two others got. But he exercised that right, and that's his right to go to trial.

In regard to the no contact part, Your Honor, Mr. Nichols is the victim here. These two other people were participants of the crime. I'd ask the court to consider to not put that no contact order on there. And for the -- the only reason is this: Is that I don't want another layer of potential problems

for Mr. Garvey once he's eventually released and enters life into the world again. That's not to say that I think he's going to contact these people, but I just don't want -- I want to lessen any further problems that he's going to have, because he's going to have a lot of issues going forward. So that would be my request of the court.

In regard to the range, Your Honor, obviously a very serious range, 101 months, 114 months. His life is absolutely changed by the outcome of this jury trial. He has no criminal history. He's been in the military before. He has obviously made some good choices in his life; otherwise, he would have had criminal history up to this point.

So I'm not exactly sure how everything happened that night. But I don't think it was Mr. Garvey absolutely driving the bus. He was involved with it. He had certain involvement with everything else. And yes, he provided the gun. I think the jury found that pretty easily. But there's other factors at play.

So I'd ask the court to consider the low end of the range, given the fact that he has no criminal history, that the other circumstances of the case. I'm sure Mr. Graham would agree with me, thankfully

nobody was injured in this. This could have been a whole other level of disaster. This could have been somebody fatally wounded because Mr. Wesley slips and pulls the trigger on that gun. That is the seriousness of what's involved here. And that's the -- that's what the chain of events that was set into play when the three individuals decided to go down this path.

I don't think society is served or Mr. Garvey will be reformed, for lack of a better term, or have a significant impact if that extra six-and-a-half months is given to him on the sentence. I think 101 months is appropriate, and I ask the court to consider that. Thank you, Your Honor.

THE COURT: Thank you. Mr. Garvey, is there anything you would like to say?

THE DEFENDANT: No, Your Honor.

THE COURT: Mr. Graham?

MR. GRAHAM: Your Honor, I just wanted to apologize. I had confirmed with -- conferred with Mr. Gray prior to the court taking the bench and was under the impression that the restitution was agreed upon, and my apologies for that if that was incorrect.

THE COURT: Okay. Restitution will be

determined at a later date. Mr. Garvey has the right to be present. Conversely, he has a right to waive his right to be present at sentencing. And I'll allow Mr. Garvey to discuss that issue with his attorney.

MR. GRAY: Your Honor, Mr. Garvey would like to be present for that restitution hearing.

THE COURT: Okay.

Well, the Court agrees with all of the comments made by both of the lawyers, all of which the Court appreciates. What a shame. There are no winners here.

The Court understands the recommendation of the State. It is a well reasoned, well supported recommendation, based in part upon the argument or position that this case could have resulted in a much more, for lack of a better word, lenient sentence for Mr. Garvey.

The Court also understands what Mr. Graham is either directly referring to or at least inferring, that the Prosecutor's Office recently has made a concerted effort to at least attempt to resolve cases in what might be referred to as a nontraditional manner, whether that be termed restorative justice or alternatives to the traditional methodology of

resolving criminal cases. And for whatever reason or reasons, Mr. Garvey either could not or would not -- could not or was not interested in what the Prosecutor's Office was "offering."

The converse of that is also true, and that is expressed by Mr. Gray. Mr. Garvey, as a citizen of this country, has a constitutional right to exercise his right to go to trial. He did. And the argument in part from the Defense is, Mr. Garvey should not be punished for exercising his constitutional right to go to trial. That is accurate. And the Court believes very firmly in that.

Mr. Garvey was, up until arguably the return of the verdicts, in charge of his destiny, at least his near-term destiny. And whether his decisions were faulty or questionable, ill advised, es frankly not something this court should or will take into consideration. Mr. Garvey is -- I don't know Mr. Garvey, but he's a young man who no doubt was fully aware of the downside risks and exercised his right to go to trial, which leads me back to my opening comment: What a shame.

We have a robbery of an innocent victim. And I use that term purposefully, "innocent victim," who was working, to his credit, trying to save up money,

to his credit. His primary goal was to save up money, to his credit. Who in this courtroom has not been in that situation as a young person, trying their best to save up money and being proud of having $1,000 in a bank account?

And then you have the differing perspectives of the other participants in this offense. And frankly, the Court's conclusion with respect to those other individuals is somewhere in between the representations made by the parties today. The State asserts that perhaps the other co-participants are not as culpable or should not have been held as responsible. And the counter argument or representation from Mr. Gray is that those other two individuals were willing and able participants, as was Mr. Garvey.

I don't know the -- I don't know the level of culpability of those other two codefendants or co-participants. What I do know, from learning through trial, is that both of those individuals pled guilty, accepted responsibility, did their time, fulfilled their obligations pursuant to their agreements.

And as I mentioned moments ago, the Court doesn't know Mr. Garvey, but he presents himself as an

enigma, a young man who has no criminal history, who jumped into things feet first and now has been convicted of a Class A felony with a firearm enhancement. It doesn't get more serious than that, because it doesn't get more serious than Class A's, as well as a bail jump and a possession of stolen property.

Mr. Garvey has a military background, evidently, so he understands how to follow orders, follow rules, conform to the expectations of "society" and the law. Certainly those expectations and requirements were placed upon him during his military career.

The court is required in every sentencing to take into consideration certain factors set forth by the Legislature and codified in RCW 9.94A.010. And in the instant case, it is perhaps even more important for the court to remind itself of what those factors are. Because again, this is a young man in a very unique situation. Everyone is unique, of course, but this is a peculiar situation of a young man with no criminal history who's now been convicted of a very serious offense with a firearm enhancement.

And so the factors that the court is required to take into consideration include but are not necessarily limited to the seven factors that are set

forth in the aforementioned statute, some of which I'll place on the record. Ensure that punishment is proportionate to the seriousness of the offense and the offender's criminal history, promote respect for the law, be commensurate with the punishment imposed on others committing similar offenses, protect the public, offer the offender an opportunity to improve himself or herself, reduce the risk of reoffending, make frugal use of the government's resources.

For all intents and purposes, subsection (1) is the factor that the Legislature takes into account in setting forth the standard range. The second factor requires the court to enter a Judgment and Sentence that is "just." Frankly, that's not very helpful. The third factor requires the court to be proportional in its sentencing, at least as it relates to other similarly situated individuals.

Number four is, protect the public. Frankly, notwithstanding what happened on this tragic incident, Mr. Garvey, at least up until this point, has not presented himself as an individual from whom the public needs protection. What he did in this instance was wrong. It was against the law. It was criminal. It was a Class A felony.

Do those conclusions necessarily support a finding

of the Court that the public needs to be protected from Mr. Garvey? That's a rhetorical question. I'll answer it. Not necessarily.

Offer the offender an opportunity to improve himself or herself. Again, frankly, the court really doesn't have much input in that regard, because in the instant case, the court is required to enter a sentence that will result in Mr. Garvey being transported to the Department of Corrections, and it is the Department of Corrections who will afford or conversely not afford Mr. Garvey an opportunity to improve himself. This is not a case where the standard sentencing range is a local jail sentence where the court would have certain options available to it.

And make frugal use of the State's resources. What that means, at least in this court's opinion, is take into account who is at the Department of Corrections, who needs to be at the Department of Corrections, and for how long. And the lawyers here in this courtroom, and perhaps others here in this courtroom, have heard this particular judge say on countless occasions, this community builds prisons and jails for a reason, and that is to protect the public from individuals against whom the public needs

to be protected, not necessarily for individuals who struggle with substance use disorders, mental health issues, people who otherwise have law abiding behavior and histories. In other words, reserve our jails and prisons for the people who need to be locked up.

Frankly, I don't see Mr. Garvey as that type of an individual. I may be wrong. And again, I don't know him. And at the risk of saying this now for the third time, this is a young man who comes into this case with no criminal history, who is now going to go to prison for an appreciable period of time.

It begs the question posed by the State, does Mr. Garvey need to go to prison for a longer period of time -- I'm not being very articulate, but does he need to go to prison for a particular period of time because he made some bad decisions, not only in his planning and committing this particular offense, but -- at least from the State's perspective, and perhaps bad decisions with respect to how his case should have been resolved. Because it is apparent now to the Court that there were other options available to Mr. Garvey. But does he need to be held accountable for that bad decision making, that latter bad decision making? No.

Frankly, the Court does not believe there is anything to be gained -- in other words, the public does not benefit, Mr. Garvey does not benefit, the victim of this crime does not benefit from Mr. Garvey doing a prison sentence, other than -- or anything other than what's being recommended by the Defense.

I think a low-end recommendation or low-end sentence in this particular case under these particular circumstances is appropriate. When I say "low end," I mean 41 plus 60 on the robbery. And I say that because that 60 months is, per legislative mandate, 60 months without the opportunity of earned early release or what's commonly referred to as "good time." So he will have to serve that time in closed custody, after which he'll have to do a certain percentage of the underlying 41. And depending on how the Department of Corrections awards earned early release, that -- it's my understanding that the law requires 85 percent of the underlying time. Now, I might be wrong, and who knows what Department of Corrections does. I've never been able to fully understand or appreciate what they do in any particular situation.

Now, regardless of how that arithmetic is done, Mr. Garvey is going to do five years, plus a

percentage of the 41 months, which might be 85 percent of the 41. And I suspect it will be 85 percent of the 41. So in circling back around, does the community benefit from Mr. Garvey doing six or eight more months in prison? The answer is no. Does Mr. Garvey benefit? No. Does the victim benefit? No.

The Court has an obligation to make frugal use of the State's resources. Up to this point, Mr. Garvey has not presented himself as an individual who needs to be locked up for a long, long period of time. As a result of this conviction, he's going to be locked up for a long period of time. The Court believes that period of time need not be longer than is necessary. And 41 and 60 is the appropriate sentence, in this Court's opinion.

I understand that is contrary to the State's recommendation. I also understand that it may be contrary to the recommendation of the victim. I don't know. I get the impression from hearing from Mr. Graham and just thoughts of the Court after listening to the testimony of the victim, that this victim just wants this matter to be over with, wants to put it behind him.

I didn't sense any particular ill-will towards

Mr. Garvey. I might be wrong, but I didn't pick up on that. So 41 plus 60 on Count 1, 17 on the bail jump, five months on the possession of stolen property. The latter two sentences are, for all intents and purposes, non-determinative, or I don't want to say non-issues or non-factors. They are factors, because they're taken into consideration in calculating the standard range. But by law they will run concurrently. So those numbers don't affect the amount of time Mr. Garvey will do in real time.

There will be 36 months of community custody on Count 1. The Court will impose no contact orders with the victim and the other two -- the two witnesses, co-participants, for life, notwithstanding the argument made by Mr. Garvey's counsel that, in essence, don't set him up to fail; we don't want to make life more difficult for him.

The Court doesn't want to make life more difficult for Mr. Garvey. The court wants Mr. Garvey to understand that his life will be easier by not having contact with these individuals. I'll just remove that gray area. No contact for life.

Restitution in an amount to be determined at a later date. Mr. Garvey exercises his right to be present. A $500 crime victim assessment, $200 DNA

fee. The Court does not believe, notwithstanding -- let me rephrase that. I was going to use a double negative. The Court understands that Mr. Garvey may at some point have an ability to have an income that would allow him to pay certain court costs. And the Court has discretion in this regard.

The Court's conclusion or thought is that Mr. Garvey's limited resources are best spent doing what he needs to do to get his life in order and paying restitution instead of paying money to the court. So the Court will not impose any legal-financial obligations, other than those two required by law.

I'll sign the Judgment and Sentence after it's prepared by the parties, signed by the parties, and then I will -- the Court will advise Mr. Garvey of his rights to appeal and his rights to collateral attack.

MR. GRAY: Your Honor, as we're completing that, I'd like to make a brief record about something that happened yesterday. I spoke with my client in the jail in preparation for today. And he had informed me that the alternate juror on the case had contacted him and wanted to talk to him about the case. And that's Mr. Stephen Klein. He's actually

in court today, Your Honor.

I contacted Mr. Klein afterwards just to make sure there wasn't any information that I needed to know in regard to juror misconduct or anything like that. I wanted to inform the Court that after speaking with Mr. Klein, he told me, obviously he wasn't a part of the deliberations, but the jury -- he had zero issues with how the jury interacted in chambers -- or in the room when they were awaiting the case for deliberations. So I just wanted the court to know that; I wanted to make a record of that. He had contacted Mr. Garvey for other reasons, but not in any -- as far as I understand, not any issues in terms of juror misconduct or anything of the like. So --

THE COURT: Okay. Thank you.

Well, some people in this community -- I don't want to speak out of school. People in the community care about -- I'm being purposefully obtuse.

MR. GRAY: Your Honor, that's the impression that I got from Mr. Klein.

THE COURT: Yeah. Thanks. It does not surprise me. From time to time those of us who work in the criminal justice system have a -- get a certain perspective about how the system works,

vis-a´-vis the community. And it is reassuring for us to be reminded that people in our community care about what happens to other people in our community. It's a good reminder to us, because it's our community. And sometimes it's good for people to know that even people with whom they are unfamiliar care about what happens.

The Court has signed the Judgment and Sentence in the matter of State of Washington versus Vernal George Garvey, Cause Number 17-1-01991-34.

Mr. Garvey, as a result of this conviction, it is now unlawful for you to own, possess, or have under your control any firearm. As a result -- go ahead, Mr. Graham.

MR. GRAHAM: I apologize, Your Honor. It just hit me. I should have recommended, and the Court just reminded me, that both of the firearms in this incident that were seized by law enforcement should be forfeited.

THE COURT: Granted.

MR. GRAHAM: Thank you, Your Honor.

THE COURT: That language will be included in the Judgment and Sentence.

Mr. Garvey, you were convicted by jury verdict. You have a right to appeal. If you appeal, any

notice of appeal must be filed within 30 days of today's date. In addition, any notice of appeal must be served on or a copy of the notice of appeal served on the Prosecutor's Office within 30 days of today's date. So a notice of appeal must be filed within 30 days of today, and a copy of that notice served on the Prosecutor's Office within 30 days of today's date.

If you do appeal, I will make a finding that you are indigent and qualify for an attorney to represent you for purposes of appeal. I will also sign an order that waives any requirement that you be financially responsible for any costs commonly associated with an appeal. But if you do not file your notice of appeal and serve a copy of that notice of appeal on the Prosecutor's Office within 30 days, you give up your right to appeal.

In addition, you have a right to collaterally attack the conviction. RCW 10.73.090 provides in relevant part that any petition or motion for collateral attack must be filed within one year of today's date. Collateral attack includes but is not necessarily limited to a personal restraint petition, habeas corpus petition, motion to vacate a judgment, motion for new trial, motion to arrest judgment.

That one-year time limit that I just mentioned does not apply to a petition for collateral attack based upon allegations of newly discovered evidence, that the statute or statutes upon which you are convicted were unconstitutional, that any of the convictions were barred by double jeopardy, that there is insufficient evidence to support the conviction, or that there has been a significant change in the law, either substantive or procedural, material to the conviction.

Thank you. The court is in recess.

MR. GRAY: Your Honor, I would ask just briefly. I do have a motion and proposed order for a -- to approve -- to appeal at public expense --

THE COURT: Sure.

MR. GRAY: -- if the court would entertain that.

THE COURT: Provide it to the clerk and I'll sign it.

MR. GRAY: Thank you, Your Honor.

MR. GRAHAM: Thank you, Your Honor.

THE COURT: Mr. Gray, I'll look at it and make sure that it comports with the requirements. I'll look at that in chambers. Assuming that it does, I'll sign it and get it filed with the Court. I'll

do that today. If for whatever reason I don't, I'll let you know within half an hour.

MR. GRAY: Thank you very much, Your Honor.

MR. GRAHAM: Thank you, Your Honor.

(Conclusion of the July 17, 2019, Proceedings.)

SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

Hon. James J. Dixon, Judge

| | | |
|---|---|---|
| State of Washington,<br><br>Plaintiff,<br><br>vs.<br><br>Vernal George Garvey, III,<br><br>Defendant. | ) | Case No. 17-1-01991-34<br><br>TRANSCRIBER'S CERTIFICATE |

STATE OF WASHINGTON )
) ss
COUNTY OF THURSTON )

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I received the electronic recording directly from the trial court conducting the hearing; This transcript is a true and correct transcription of the proceedings to the best of my ability; I am in no way related to or employed by any party in this matter, nor any counsel in the matter; and I have no financial interest in the litigation.

Kathryn A. Beehler

Kathryn A. Beehler, Transcriber

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

| | |
|---|---|
| Vernal George Garvey, III, | |
| Appellant, | |
| vs. | Case No. 17-1-01991-34 |
| State of Washington, | Appeal No. 53599-8-II |
| Respondent. | |

**DECLARATION**

I, Kathryn A. Beehler, court reporter, filed the Transcripts of Recorded Proceedings, Volume 1 of 1 for pretrial hearings dated: 11/08/17, 11/21/17, 12/06/17, 12/26/17, 01/24/18, 01/31/18, 02/07/18, 02/27/18, 05/16/18, 07/05/18, 08/23/18, 11/01/18, 11/15/18, 11/29/18, 02/28/19, 03/11/19, 04/11/19, 04/22/19, 05/02/19, 05/13/19, 05/23/19, and 06/13/19, the 06/28/19 verdict hearing, and the 07/17/19 sentencing hearing. I provided copies to the party who arranged for transcription. The transcript was computer generated, and a PDF transcript was filed.

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| **Appellate Court Case Number:** | 37988-4 |
| **Appellate Court Case Title:** | State of Washington, Respondent v Vernal George Garvey, III, Appellant |
| **Superior Court Case Number:** | 17-1-01991-1 |

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