Supreme Court No. 100223-8
Court of Appeals No. 81254-8-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRANDON RASHAD SULLIVAN,

Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Cases

Statutes

Other Authorities

Rules

A. IDENTITY OF PETITIONER/DECISION BELOW

Brandon Rashad Sullivan requests this Court grant review pursuant to RAP 13.4 of the published decision of the Court of Appeals in State v. Sullivan, No. 81254-8-I, filed on July 6, 2021. A copy of the Court of Appeals' opinion is attached as Appendix A. A copy of the Court of Appeals' order denying Mr. Sullivan's motion for reconsideration is attached as Appendix B.

B. ISSUES PRESENTED FOR REVIEW

1. The State did not present sufficient evidence to prove beyond a reasonable doubt that Mr. Sullivan was "armed" with a firearm at the time of the crime. The Court of Appeals' opinion to the contrary conflicts with this Court's case law requiring proof of a nexus among the defendant, the weapon, and the crime. RAP 13.4(b)(1), (4).

2. The State did not prove beyond a reasonable doubt that Mr. Sullivan was guilty as an accomplice, in violation of due process. RAP 13.4(b)(1), (3), (4).

3. The trial court erred in admitting unfairly prejudicial evidence of an unrelated homicide as *res gestae* of the charged crime. The Court of Appeals' conclusion that the trial court was not required to engage in a full ER 404(b) analysis conflicts with case law from this Court and the Court of Appeals, warranting review. RAP 13.4(b)(1), (2), (4).

4. The trial judge violated the appearance of fairness doctrine, in violation of due process. RAP 13.4(b)(1), (3), (4).

5. The trial judge violated ER 402 in admitting evidence of the unrelated homicides because admission of the evidence violated Mr. Sullivan's constitutional rights. RAP 13.4(b)(3), (4).

C. STATEMENT OF THE CASE

One night in August 2017, police officers responded to a call of shots fired at Skyway Park Bowl in South Seattle. RP 1245-46. When they arrived, they found Dennis Robinson lying dead in the smoking area outside the lounge of the bowling alley. RP 1248, 1681. He had been shot in the head with a

handgun. RP 1248, 1919-24, 1972-79. Another man, Kenneth Gantz, had also been shot. RP 1385, 1691. He was taken to the hospital and died soon afterwards. RP 1391, 1690.

The police reviewed surveillance videos from several security cameras located at the bowling alley. RP 1753-55, 1767. No camera captured the events occurring in the smoking area and no witness to the shootings ever came forward. RP 1378, 1392-93, 1403, 2419-20.

While reviewing the surveillance videos, a detective happened by chance to see an apparent robbery taking place outside the front entrance of the bowling alley several minutes before the shootings. RP 1794-95, 1846. In addition, on the day after the shootings, a bystander contacted the police and provided them with a video he had taken on his cell phone of the alleged robbery. RP 1851-52; Exhibit 106.

The videos show Mr. Robinson, Mr. Sullivan, and another man men standing together outside the front entrance of the bowling alley shortly after midnight. RP 1881-84, 1937-39,

2307—08, 2335-38; Exhibit 104. A fourth man approaches the Robinson group. RP 1843, 2339; Exhibit 104. Mr. Robinson suddenly punches the man with his fist and knocks him to the ground. RP 1843, 2340; Exhibit 104. Mr. Robinson strikes and kicks the man, then bends down, takes the man's wallet, and removes something from it. RP 1844-45, 2342; Exhibit 104, 106. During the entire incident, Mr. Sullivan stands silently nearby watching, with his hands crossed in front of his waist. RP 1845, 2341-44; Exhibit 104, 106. He does not participate in the robbery.

The videos from the cameras inside the bowling alley show that after Mr. Robinson and Mr. Sullivan enter the bowling alley, they walk through it and enter the lounge. RP 1847, 2354; Exhibit 104. Eventually, they enter the smoking area in the back where they can no longer be seen. RP 1847, 2356-57, 2366-67; Exhibit 104. After some minutes, the bartender suddenly ducks behind the bar and the other patrons quickly exit the lounge. RP 1848, 1932; Exhibit 104. Mr.

Sullivan re-enters the lounge from the smoking area with his right arm extended. RP 1849, 2368-69, 2442-46; Exhibit 104. He walks quickly through the bowling alley, exits through the front door, and walks through the parking lot and out of view. RP 2370-71; Exhibit 104.

The State charged Mr. Sullivan with one count of first degree robbery by two alternative means: (1) while armed with a firearm, and (2) inflicting bodily injury. CP 535. The charge contained a firearm enhancement allegation. CP 535. The State also charged Mr. Sullivan with one count of first degree unlawful possession of a firearm. CP 536.

At trial, the court admitted, over strenuous objection, evidence of the unrelated homicides as *res gestae* of the robbery. RP 222-39, 266, 276-79, 177-78; CP 150-51. The court reasoned the evidence was relevant and admissible to prove that both Mr. Robinson and Mr. Sullivan were "armed" at the time of the robbery. RP 240, 276-79.

The jury received an instruction on accomplice liability. CP 163. The jury found Mr. Sullivan guilty as charged of first degree robbery, by general verdict. CP 193. The jury did not enter a verdict on the firearm enhancement allegation but left the special verdict form blank. CP 198. Following a separate bifurcated trial, the jury found Sullivan guilty as charged of first degree unlawful possession of a firearm. CP 226.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The Court of Appeals' opinion conflicts with this Court's case law requiring proof of a nexus among the defendant, the weapon, and the crime.

The jury was instructed that in order to convict Mr. Sullivan of first degree robbery, they must find that he or an accomplice either (a) "was armed with a deadly weapon" or (b) "inflicted bodily injury." CP 167.

The State did not present sufficient evidence to prove beyond a reasonable doubt that either Mr. Sullivan or Mr. Robinson was "armed" with a firearm at the time of the

robbery. The facts did not establish a nexus between any firearms they might have possessed and the crime.

To prove Mr. Sullivan or his alleged accomplice were "armed," the State was required to prove that (1) a firearm was easily accessible and readily available for offensive or defensive purposes during the commission of the crime and (2) a nexus existed among the defendant, the weapon, and the crime. State v. Van Elsloo, 191 Wn.2d 798, 826, 425 P.3d 807 (2018); CP 183.

"[A] person is not armed merely by virtue of owning or even possessing a weapon." State v. Eckenrode, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007). Actual possession of a firearm during the commission of a crime is insufficient by itself to establish a nexus between the weapon and the crime. State v. Brown, 162 Wn.2d 422, 432, 173 P.3d 422 (2007). The firearm must be handled or used in a manner that connects the firearm with the crime. Id.

The State must prove not only a nexus between the defendant and the firearm, but also a nexus between the firearm and *the crime*. State v. Schelin, 147 Wn.2d 562, 570, 55 P.3d 632 (2002).

The nexus requirement serves to place parameters on the determination of when a defendant is armed. State v. Gurske, 155 Wn.2d 134, 140-41, 118 P.3d 333 (2005). Without a nexus between the defendant, the crime, and the weapon, courts run the risk of punishing a defendant "for having a weapon unrelated to the crime." Id. (internal quotation marks and citation omitted).

In Brown, burglars moved a rifle from a closet to the bed during a burglary. 162 Wn.2d at 431. Although Brown or his accomplice, or both, had actual possession of the rifle during the burglary, no evidence existed to show they handled it "in a manner indicative of an intent or willingness to use it in furtherance of the crime." Id. Thus, the evidence was

insufficient to establish a nexus between the firearm and the crime. Id. at 432.

Here, as in Brown, the evidence was insufficient to establish a nexus between the robbery and any firearm that Mr. Sullivan or Mr. Robinson might have possessed. The only evidence of the robbery are the contents of the videos. Exhibit 104, 106. The videos do not show that either Mr. Sullivan or Mr. Robinson wielded, displayed, or used a firearm during the robbery. No firearm is visible at all on the videos. The only force used was Robinson's punching and kicking the victim and knocking him to the ground. Exhibit 104, 106. Even if one of the men, or both of them, was in actual possession of a firearm, no evidence exists that either of them handled a firearm "in a manner indicative of an intent or willingness to use it in furtherance of the crime." Brown, 162 Wn.2d at 432.

The State's theory at trial was that both Mr. Robinson and Mr. Sullivan were "armed" during the robbery because "they both had guns on them." RP 2587. The prosecutor

acknowledged in closing argument that the men did not "pull them out and point them at the victim." RP 2587. But the prosecutor argued, "the law doesn't require that. The element is simply that you are armed with a deadly weapon." RP 2587.

The prosecutor's theory was contrary to the law. The law *does* require more than that Mr. Sullivan and Mr. Robinson "had guns on them." RP 2587; Brown, 162 Wn.2d at 432. The law requires a *nexus* between the guns and the crime. Eckenrode, 159 Wn.2d at 493; Gurske, 155 Wn.2d at 140-41; Schelin, 147 Wn.2d at 570.

The State failed to prove one of the alternative means of first degree robbery because it did not prove a nexus between a firearm and the crime. CP 167. This violated Mr. Sullivan's constitutional right to due process because the record contains no "particularized expression of jury unanimity" as to the other charged alternative means. See State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014); State v. Woodlyn, 188 Wn.2d 157, 164, 392 P.3d 1062 (2017); Const. art. I, §§ 3, 21; U.S. Const.

amends. VI, XIV. The conviction must be reversed. Woodlyn, 188 Wn.2d at 166-67.

2. The State did not prove accomplice liability beyond a reasonable doubt.

The State presented no evidence to prove Mr. Sullivan was guilty of robbery as a principal. The videos of the robbery plainly show Mr. Sullivan took no personal property and used no force, violence or fear of injury. Exhibit 104, 106. Instead, Mr. Robinson acted as the principal. He punched and kicked the victim, knocked him to the ground, and took his personal property. Exhibit 104, 106.

The State also failed to prove Mr. Sullivan was guilty as an accomplice because he took no active role in the robbery.

A person is guilty of a crime as an accomplice if "with knowledge that it will promote or facilitate the commission of the crime, he or she either: (1) solicits, commands, encourages, or requests another person to commit the crime; or (2) aids or agrees to aid another person in planning or committing the crime." CP 163; RCW 9A.08.020(3).

The State bears the burden to prove accomplice liability beyond a reasonable doubt. State v. Cronin, 142 Wn.2d 568, 581, 14 P.3d 752 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

A person is not guilty as an accomplice unless he "associates himself with the venture and takes some action to help make it successful." State v. Truong, 168 Wn. App. 529, 539, 277 P.3d 74 (2012). "Mere presence of the defendant without aiding the principal—despite knowledge of the ongoing criminal activity—is not sufficient to establish accomplice liability." Id. at 540.

Even if the defendant knew his presence at the scene would aid the principal in committing the crime, that is not sufficient to establish accomplish liability. "Washington case law has consistently stated that physical presence and assent alone are insufficient to constitute aiding and abetting." In re Welfare of Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979).

"One does not aid and abet unless, in some way, he associates himself with the undertaking, participates in it as in something he desires to bring about, and seeks by his action to make it succeed." Id.

In Wilson, a juvenile was part of a group which had stolen weatherstripping, tied it into a rope, and strung the rope across a road. Id. Wilson was never actually seen holding the rope nor participating in the theft. Id. The Court reversed Wilson's conviction as an accomplice, explaining, "even though a bystander's presence alone may, in fact, encourage the principal actor in his criminal or delinquent conduct, that does not in itself make the bystander a participant in the guilt. It is not the circumstance of 'encouragement' in itself that is determinative, rather it is encouragement plus the intent of the bystander to encourage that constitutes abetting." Id. at 491-92.

Here, Mr. Sullivan was merely present at the scene of the robbery and took no active part in it. Exhibit 104, 106. Throughout the incident, he stood silently nearby, watching.

Exhibit 104, 106. Even if he knew his presence would encourage Robinson in his criminal conduct, that is not sufficient to establish accomplice liability. Wilson, 91 Wn.2d at 491; Truong, 168 Wn. App. at 539-40. Mr. Sullivan took no action "to help make [the robbery] successful." Truong, 168 Wn. App. at 539. He was therefore not guilty of robbery as either a principal or an accomplice. The first degree robbery conviction must be reversed and the charge dismissed.

3. The court erred in admitting unfairly prejudicial evidence of two unrelated homicides.

The trial court erred in admitting evidence of the unrelated homicides as *res gestae* of the robbery. Any relevance of the evidence was outweighed by the substantial danger of unfair prejudice. The jury might naturally conclude they should find Sullivan guilty of robbery in order to punish him for one of the uncharged homicides.

The Court of Appeals' conclusion that the trial court was not required to engage in a full ER 404(b) analysis regarding

the evidence conflicts with case law from this Court and the Court of Appeals and warrants review.

Generally, a defendant's other acts, unrelated to the crime charged, are inadmissible in a criminal trial. ER 404(b).[1] Other act evidence is admissible only if it is "relevant and necessary to prove an essential ingredient of the crime charged." State v. Powell, 126 Wn.2d 244, 258-59, 893 P.2d 615 (1995). The State's burden to show that other act evidence is admissible for a proper purpose is "substantial." State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

Even if other act evidence is relevant for a proper purpose, the State must also show the probative value of the evidence outweighs the potential for unfair prejudice. State v.

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[1] ER 404(b) provides:

> **(b) Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent,

Saltarelli, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982); ER 403. "The Rules of Evidence strictly confine the use of a defendant's [other] bad acts because such evidence has a great capacity to arouse prejudice." State v. Kelly, 102 Wn.2d 188, 199, 685 P.2d 564 (1984).

Evidence of a defendant's other acts may be admissible in some cases as *res gestae* of the crime charged. *Res gestae* evidence characterizes acts occurring prior to the crime charged or immediately after that explain the context of the crime. State v. Dillon, 12 Wn. App.2d 133, 151, 456 P.3d 1199, review denied, 195 Wn.2d 1022, 464 P.3d 198 (2020). The evidence must complete the story of the crime or provide the immediate context for events close in both time and place to the charged crime. State v. Lillard, 122 Wn. App. 422, 432, 93 P.3d 969 (2004).

> preparation, plan, knowledge, identity, or absence of mistake or accident.

Testimony is admissible as *res gestae* evidence only "'if it is so connected in time, place, circumstances, or means employed that proof of such other misconduct is necessary for a complete description of the crime charged, or constitutes proof of the history of the crime charged.'" State v. Schaffer, 63 Wn. App. 761, 769, 822 P.2d 292 (1991) (quoting 5 Karl B. Tegland, Washington Practice: Evidence § 115, at 398 (3d ed. 1989)), aff'd 120 Wn.2d 616, 845 P.2d 281 (1993); accord State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997) ("Where another offense constitutes a link in the chain of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible in order that a complete picture be depicted for the jury.") (internal quotation marks and citation omitted); State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995) (*res gestae* evidence "complete[s] the story of the crime on trial by proving its immediate context of happenings near in time and place") (internal quotation marks and citation omitted).

In State v. Dillon, the trial court erred in characterizing Dillon's conduct shortly after the incident as *res gestae* of the charged crimes of third degree assault, harassment, and unlawful imprisonment. Dillon, 12 Wn. App.2d at 151. At the hospital following his arrest, Dillon exhibited mood swings and made threatening statements to hospital staff. Id. at 138. The Court of Appeals held Dillon's conduct was not *res gestae* evidence because it "d[id] not complete the story or provide context for the crimes charged." Id. at 151. The evidence of Dillon's demeanor at the hospital "occurred after Dillon completed the crimes and his arrest," and "did not 'set the stage' or provide additional context about the crimes charged." Id. (quoting Grier, 168 Wn. App. at 648).

Similarly, in State v. Mutchler, 53 Wn. App. 898, 899-900, 771 P.2d 1168 (1989), a case of assault with intent to rape, the State offered evidence that earlier on the day of the attack on the complainant, the defendant had followed another woman through the same park while carrying a knife and had sat down

on a bench with her and stared at her crotch. The Court of Appeals held this evidence did not qualify as *res gestae* of the charged crime because Mutchler's encounter with the other woman was not part of the attack on the complainant and "d[id] not describe events which help explain the circumstances of the attack." Id. at 901-02. The story of the attack on the complainant was complete without the other woman's testimony. Id.

Here, as in Dillon and Mutchler, evidence of the uncharged homicides was not properly characterized as *res gestae* evidence because it did not complete the story of the charged crime. The homicides occurred *after* the robbery and involved different victims and unrelated circumstances. The story of the robbery was complete without the homicides. The homicides "did not 'set the stage' or provide additional context about the crime[] charged." Dillon, 12 Wn. App.2d at 151. They "d[id] not describe events which help explain the

circumstances of the [robbery]." Mutchler, 53 Wn. App. at 901-02.

The Court of Appeals held that evidence of the unrelated homicides was not subject to a full ER 404(b) analysis and was admissible simply because it was *relevant* to the robbery. Slip Op. at 8-10. This was error.

Allowing a court to admit evidence of an accused's other bad acts simply because it is *relevant* to the charged crime does not sufficiently protect the accused. In fact, evidence of an accused's other bad acts is almost always relevant. Such evidence is generally excluded not because it is deemed irrelevant, but because it may carry *too much* weight with the jury. State v. Kelly, 102 Wn.2d 188, 199-200, 685 P.2d 564 (1984) (citing Michelson v. United States, 335 U.S. 469, 475-76, 69 S. Ct. 213, 93 L. d. 168 (1948)).

Engaging in a full ER 404(b) analysis when evidence of the accused's other bad acts is introduced is necessary to guard against the danger of unfair prejudice that arises. The potential

unfair prejudice is that the jury will infer the defendant must have committed the current crime simply because he committed another crime on a different occasion. State v. Burkins, 94 Wn. App. 677, 687, 973 P.2d 15 (1999). Or, the jury might find the defendant guilty "because they believe the defendant deserves to be punished for a series of immoral actions." State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987), abrogated on other grounds by State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995). The restrictions on using evidence of a defendant's other bad acts are "a recognition of the axiom that a defendant should be tried only for the offense charged." Kelly, 102 Wn.2d at199-200.

The purpose of engaging in a full ER 404(b) analysis is to make sure evidence of a defendant's other bad acts is excluded unless it is truly necessary. State v. Lough, 70 Wn. App. 302, 312-13, 853 P.2d 920 (1993), aff'd, 125 Wn.2d 847, 889 P.2d 487 (1995).

In order to minimize the danger of unfair prejudice that arises, trial courts must apply ER 404(b) whenever evidence of a defendant's other bad acts is offered. See DeVincentis, 150 Wn.2d at 17. The rule provides a set of strict requirements the court must follow before it may admit such evidence. Id.

First, the court must presume that evidence of other bad acts is inadmissible. Id. Second, the court must consider whether the other bad act evidence is relevant only to prove the defendant's character and show he acted in conformity with that character. See State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). The evidence must be logically relevant to a material issue other than propensity. State v. Saltarelli, 98 Wn.2d 358, 361-62, 655 P.2d 697 (1982).

Finally, even if the State establishes the evidence is relevant for a proper purpose, it must also show the probative value outweighs the potential for prejudice. Id. In determining whether the probative value outweighs the potential for

prejudice, the court must consider the availability of other means of proof and other factors. Powell, 126 Wn.2d at 264.

Any doubt as to admissibility of other bad act evidence must be resolved in favor of exclusion. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

Contrary to the Court of Appeals' conclusion, this Court routinely characterizes *res gestae* evidence as ER 404(b) evidence—subject to a full ER 404(b) analysis—when the evidence involves an accused's other bad acts. See, e.g., State v. Brown, 132 Wn.2d 529, 570-71, 940 P.2d 546 (1997) ("In addition to the non-exhaustive list of exceptions identified in Rule 404(b) itself, this court has recognized a *res gestae* or 'same transaction' exception to the rule. Under this exception, evidence of other crimes or misconduct is admissible to complete the story of the crime by establishing the immediate time and place of its occurrence."); Lane, 125 Wn.2d at 831 ("In addition to the exceptions identified in ER 404(b), our courts have previously recognized a 'res gestae' or 'same

transaction' exception, in which 'evidence of other crimes is admissible "[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place."'") (citation omitted).

Moreover, the Court of Appeals' opinion conflicts with other decisions from the Court of Appeals characterizing *res gestae* evidence as other bad act evidence subject to ER 404(b). See, e.g., State v. Sublett, 156 Wn. App. 160, 196, 231 P.3d 231 (2010) ("Under the res gestae exception to ER 404(b), 'evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime.'") (citation omitted); State v. Lillard, 122 Wn. App. 422, 432, 93 P.3d 969 (2004) ("Under the res gestae or 'same transaction' exception to ER 404(b), evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime."); State v. Hughes, 118 Wn. App. 713, 725, 77

P.3d 681 (2003) ("In addition to the nonexhaustive list of exceptions identified in ER 404(b) itself, our Supreme Court has recognized a res gestae or 'same transaction' exception to the rule."); Mutchler, 53 Wn. App. at 901 ("when evidence of res gestae involves other crimes or acts, the evidence must meet the requirements of ER 404(b)").

Engaging in a full ER 404(b) analysis was especially important in this case. As defense counsel argued, the two homicides were unrelated to the robbery and would likely prejudice the jury against Sullivan unfairly. RP 222-30. The evidence would "incite the emotions of the jury to fill in the discrepancies and the weakness of the State's case." RP 231-32. The jury might unfairly conclude Mr. Sullivan was responsible for one of the homicides and find him guilty of robbery in order not "to let a killer off the hook." RP 237-39.

The trial court recognized the danger that the jury might unfairly find Mr. Sullivan guilty of robbery in order to prevent him from getting away with murder. RP 266. The court's

limiting instruction was not alone sufficient to guard against this danger. When other bad act evidence is admitted for an improper purpose, a limiting instruction does not cure the error because "[i]t is difficult for the jury to erase the notion that a person who has once committed a crime is more likely to do it again." State v. Jones, 101 Wn.2d 113, 120, 677 P.2d 131 (1984), overruled on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989).

The court was required to engage in a full ER 404(b) analysis. The court erred in admitting the evidence.

4. The trial judge violated the appearance of fairness doctrine.

Criminal defendants have a due process right to a fair trial by an impartial judge. U.S. Const. amends. V, VI, XIV; Const. art. I, § 22. "Pursuant to the appearance of fairness doctrine, a judicial proceeding is valid if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing." State v. Solis-Diaz, 187 Wn.2d 535, 540, 387 P.3d 03 (2017). "The law requires more

than an impartial judge; it requires that the judge also appear to be impartial." Id. "The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes a reasonable observer knows and understands all the relevant facts." Id.

Here, the trial judge violated the appearance of fairness doctrine during a pretrial hearing on Mr. Sullivan's motion to exclude certain evidence by expressing an apparent opinion about whether Mr. Sullivan was guilty of discharging a weapon.

5. Evidence of the unrelated homicides was not admissible under ER 402 because admission of the evidence violated Mr. Sullivan's constitutional rights.

ER 402 provides "All relevant evidence is admissible, except as limited by constitutional requirements . . . ."

Accused persons have a constitutional right to know the charges against them. U.S. Const. amend. VI; Const. art. I, § 22. "Pursuant to this right, '[t]he accused, in criminal prosecutions, has a constitutional right to be apprised of the nature and cause of the accusation against him.'" State v.

Gehrke, 193 Wn.2d 1, 6, 434 P.3d 522 (2019) (quoting State v. Ackles, 8 Wash. 462, 464-65, 36 P. 597 (1894)). Here, Mr. Sullivan was not given proper notice of the *res gestae* evidence, rendering the evidence inadmissible under ER 402.

Admission of the evidence also violated Mr. Sullivan's constitutional right against compelled self-incrimination. "The right against self-incrimination is liberally construed." State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996); Hoffman v. United States, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118 (1951); U.S. Const. amend. V.

The evidence suggested that Mr. Sullivan was involved in an unrelated shootout that resulted in someone's death. But the State could not prove Mr. Sullivan did not act in self-defense. The trial judge gave no instructions to protect Mr. Sullivan's rights against self-incrimination when he ruled the evidence was admissible. The conviction must be reversed.

E. CONCLUSION

For the reasons provided, this Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 16th day of September, 2021. I certify this brief complies with RAP 18.17 and contains 4,770 words.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BRANDON RASHAD SULLIVAN, Appellant.	DIVISION ONE No. 81254-8-I PUBLISHED OPINION

DWYER, J. — Brandon Sullivan appeals from his convictions of robbery in the first degree and unlawful possession of a firearm in the first degree. Sullivan asserts that the trial court erred by admitting certain evidence in violation of ER 404(b) and ER 403. Additionally, Sullivan contends that sufficient evidence does not support a finding that (1) he or an accomplice was armed with a deadly weapon during the robbery, or (2) he was an accomplice to the robbery. Further, in his statement of additional grounds, Sullivan asserts that the trial court violated the appearance of fairness doctrine. Because Sullivan fails to establish an entitlement to relief on any of these claims, we affirm his convictions.

Sullivan also contends that he is entitled to be resentenced because the superior court included two convictions of unlawful possession of a controlled substance in his offender score. Because a recent decision of our Supreme Court indicates that Sullivan is entitled to be resentenced, we remand the cause to the superior court for such action.

I

On August 18, 2017, at approximately 12:45 a.m., King County Sheriff's deputies responded to multiple 911 reports indicating that gun shots had been fired at Skyway Park Bowl. After the deputies arrived at the bowling alley, they found the body of Dennis Robinson in an outdoor smoking area. The smoking area, located at the exterior of the building, was accessible by way of the bar lounge inside the bowling alley. Robinson had been shot in the head by a 9 mm bullet.

Deputies found a 9 mm pistol under Robinson's body and a 9 mm magazine cartridge inside a pocket of his sweatpants. The pistol did not have a magazine cartridge inserted inside. Moreover, a single round was located in the chamber of the handgun.

Another individual, Kenneth Gantz, was also found lying in the smoking area. Gantz had also been shot. Medics arrived at Skyway Park Bowl and transported Gantz to Harborview Medical Center. He did not survive. Gantz had been shot by a .40 caliber bullet. A forensic scientist testified that the bullet appeared to be manufactured by Hornady.

Deputies found another 9 mm pistol in the smoking area, located under a chair. Inside the pocket of Gantz's jeans, deputies found a magazine cartridge for a 9 mm pistol.

Numerous bullet casings were also located around both the smoking area and inside the bar lounge of the bowling alley. Several of these bullet casings were 9 mm bullet casings. However, six of these bullet casings were .40 caliber

bullet casings, manufactured by Hornady. The police did not find a .40 caliber firearm at the scene of the shootings.

Detective Mike Mellis retrieved video surveillance footage from cameras that were located both inside the bowling alley and outside the entrance to the bowling alley. No video camera captured the events that occurred in the smoking area. Additionally, no witnesses to the shootings provided a statement to the police. Accordingly, the police were not able to determine how, exactly, the shootings in the smoking area had transpired.

However, while reviewing the video footage that captured the exterior of the entrance to the bowling alley, Detective Aaron Thompson observed an incident, which occurred approximately 25 minutes before the shootings, involving Robinson and three other men. In this video footage, Robinson and the defendant, Brandon Sullivan, walked together from the parking lot toward the entrance of the bowling alley. Robinson and Sullivan greeted a man who was wearing a striped shirt. The man in the striped shirt was never identified.

After several minutes, a fourth man exited the bowling alley and approached Robinson, Sullivan, and the man in the striped shirt. This fourth man was also never identified. After exiting the bowling alley, he conversed with Sullivan for approximately 30 seconds.

Robinson then punched the fourth man to the ground. While the man was on the ground, Sullivan walked toward the man and stood at his feet. Robinson then kicked and punched the man. A video recorded by a bystander captured Robinson reaching into the man's pocket. The man on the ground stated, "You

got my wallet dog, for real?" Robinson then took something from the wallet, put it in his pocket, and tossed the wallet to the ground.

During this time, Sullivan stood near the man's feet, crossing his hands at his waist. An enlarged image of Sullivan from the video captured by the bystander depicts Sullivan pressing an object, located on the exterior of his shirt, against his stomach and under his hands. At trial, in referring to the video footage captured by the bystander, Detective Thompson testified that, in his opinion, this object was a firearm:

> [DETECTIVE THOMPSON:] So you can see the flat, square shape of what I believe to be a gun here in his waist.
> [THE STATE:] And could you describe for the record where it is that you are pointing?
> [DETECTIVE THOMPSON:] It is not easy to see in this size but on the computer you can blow it up so it's larger but it is right kind of where his arms are crossed. Just above that, you can see the flat part of what I believe to be the handle of a handgun.

After discarding the wallet to the ground, Robinson again punched and kicked the man on the ground. The man in the striped shirt then entered the bowling alley and walked to the bar lounge.

The man on the ground eventually stood up and walked away from the bowling alley. Robinson followed along the right side of the man as he walked away. At the same time, Sullivan walked into the parking lot and positioned himself in a location with an unobstructed view of the man. Sullivan watched the man walk away.

Sullivan and Robinson then entered the bowling alley. Approximately one minute after the robbery, video surveillance footage from inside the bowling alley

captured the outline of an object located underneath Sullivan's shirt and at his right hip.[1]

Sullivan and Robinson then entered the bar lounge and exited to the smoking area. Nearly 10 minutes after Sullivan and Robinson entered the smoking area, the man who was robbed returned to Skyway Park Bowl and entered the bowling alley. The man walked through the bar lounge and exited to the smoking area.

Shortly thereafter, the man who had been robbed, followed by Sullivan and the man in the striped shirt, re-entered the bar lounge and walked to the entrance of the bowling alley. The man who had been robbed then left the bowling alley. Sullivan and the man in the striped shirt followed the other man outside and watched him as he walked away. Sullivan and the man in the striped shirt then re-entered the bowling alley.

Sullivan returned to the bar lounge. After Sullivan entered the bar lounge, the video camera located therein did not capture any footage for approximately 10 seconds. Sullivan was not located in the bar lounge after the camera again began capturing footage, indicating that he had exited to the smoking area.

Several minutes later, the bartender and several patrons suddenly ducked for cover. Sullivan then ran into the bar lounge from the smoking area. His right arm was extended and, in his right hand, he held an object, which resembled a pistol. Sullivan subsequently walked back to the smoking area, holding the object in his right hand. Approximately one minute later, Sullivan exited the

[1] Sullivan appears to have moved the object that he was pressing against his stomach on the exterior of his shirt during the robbery to a location underneath his shirt and at his right hip.

smoking area and ran toward the entrance of the bowling alley. He exited the bowling alley and ran into the parking lot.

Five days later, on August 23, 2017, police officers searched an apartment inhabited by Sullivan's girlfriend as authorized by a search warrant. Inside the apartment, police officers located a garbage bag, which contained mail addressed to Sullivan, an empty box of ammunition, and three .40 caliber bullets that were manufactured by Hornady.

As a result of the incident near the entrance to the bowling alley, the State charged Sullivan with one count of robbery in the first degree and one count of unlawful possession of a firearm. The robbery charge alleged that "the defendant was armed with a deadly weapon, to-wit: a firearm, and displayed what appeared to be a firearm, to-wit: a pistol, and inflicted bodily injury on" the victim. Prior to trial, Sullivan moved to bifurcate the trial proceeding with regard to each crime charged. The trial court granted the motion to bifurcate. The case proceeded to a jury trial.

At the conclusion of the proceeding on the robbery charge, the jury found Sullivan guilty of robbery in the first degree. The verdict form did not provide an expression of jury unanimity as to either of the alternative means charged. Additionally, the jury did not enter a verdict on the firearm enhancement special verdict form, leaving the form blank. Several days later, the same jury found Sullivan guilty of unlawful possession of a firearm in the first degree. The trial court imposed a sentence of 129 months of incarceration for the robbery

conviction and 116 months of incarceration for the unlawful possession of a firearm conviction, to run concurrently.

Sullivan appeals.

II

Sullivan contends that the trial court erred by admitting certain evidence tending to prove that he participated in a shooting approximately 25 minutes after the robbery occurred. According to Sullivan, the trial court should have excluded this evidence pursuant to ER 404(b) because (1) the evidence was unrelated to the charge of first degree robbery, and (2) any relevance of the evidence was outweighed by its prejudicial effect. Because the evidence was material to elements of both crimes charged, we disagree.[2]

A

When the admissibility of evidence is challenged by invocation of ER 404(b), we review a trial court's ruling to admit or exclude the evidence for abuse of discretion. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. State v. Taylor, 193 Wn.2d 691, 697, 444 P.3d 1194 (2019).

[2] The trial proceeding was bifurcated with regard to the robbery and unlawful possession of a firearm charges. The only evidence admitted during the proceeding on the unlawful possession of a firearm charge was a stipulation that Sullivan had previously been convicted of a serious offense. Moreover, prior to deliberating on the unlawful possession of a firearm charge, the trial court instructed the jury that "[t]he evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations and the exhibits that I have admitted during the trial." Jury Instruction 1. Thus, when determining whether Sullivan was guilty of unlawful possession of a firearm, the jury was to consider the evidence admitted during the proceeding on the robbery charge. Accordingly, we consider the disputed evidence with regard to both crimes charged.

B

As a general rule, "[a]ll relevant evidence is admissible." ER 402. One exception to this general rule is provided by ER 404(b), which states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake.

In determining whether evidence of other misconduct is admissible under ER 404(b),

> the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

"This analysis must be conducted on the record, and if the evidence is admitted, a limiting instruction is required." State v. Arredondo, 188 Wn.2d 244, 257, 394 P.3d 348 (2017).

However, not all evidence tending to prove that a defendant engaged in misconduct falls within the ambit of ER 404(b). As a noted scholar has explained, ER 404(b) does not restrict evidence of acts that are closely associated with the crime charged:

> Under ER 404(b), a defendant's *prior* misconduct is inadmissible to show propensity but may be admissible for some other limited purpose, such as showing motive or a common scheme or plan.
>
> By time-honored tradition and case law, the rule does *not* bar evidence of misconduct that is close in time to the crime presently charged and directly relevant to proving the crime presently charged.

> One way of looking at this aspect of the rule is to say that misconduct closely associated with the crime charged is simply not *prior* misconduct at all, so ER 404(b) is out of the picture. Another way of looking at the rule is to give it a Latin name—the res gestae *theory*—and refer to it as another exception to the general rule that prior misconduct is inadmissible. Either way, the evidence is admissible unless it is barred by some other rule.

5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 404.18, at 527 (6th ed. 2016).

Our cases are consistent with this analysis. Indeed, we have previously explained that "[a] defendant cannot insulate himself by committing a string of connected offenses and then argue that the evidence of the other uncharged crimes is inadmissible because it shows the defendant's bad character, thus forcing the State to present a fragmented version of the events." State v. Lillard, 122 Wn. App. 422, 431, 93 P.3d 969 (2004).

In Lillard, we described evidence of this sort as being admissible as an exception to ER 404(b): "Under the res gestae or 'same transaction' exception to ER 404(b), evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime." 122 Wn. App. at 432.

More recently, however, we have clarified that "res gestae evidence 'more appropriately falls within ER 401's definition of "relevant" evidence, which is generally admissible under ER 402,' rather than an exception to propensity evidence under ER 404(b)." State v. Dillon, 12 Wn. App. 2d 133, 148, 456 P.3d 1199 (quoting State v. Grier, 168 Wn. App. 635, 646-47, 278 P.3d 225 (2012)), review denied, 195 Wn.2d 1022 (2020).

In Grier, the court explained that "characterizing the 'res gestae' rule as an exception to ER 404(b) is indefinite, is prone to abuse, and 'tends merely to obscure' ER 404(b) analysis." 168 Wn. App. at 645 n.19 (quoting United States v. Krezdorn, 639 F.2d 1327, 1332 (5th Cir. 1981)). The court also noted that the "judicially created 'res gestae' exception bears little or no resemblance to the specific exceptions that ER 404(b) enumerates, inviting contemplation of the ejusdem generis rule of statutory construction." Grier, 168 Wn. App. at 645 (footnote omitted). This rule of statutory construction provides that "'[w]hen a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed.'" Grier, 168 Wn. App. at 645-46 (quoting BLACK'S LAW DICTIONARY 556 (8th ed. 2004)). In the context of ER 404(b),

> [e]xcept for identity, the[] enumerated exceptions concern the defendant's state of mind or thought process. In contrast, "res gestae" evidence pertains to the factual context of the crime, not to the defendant's mindset. In our view, "res gestae" evidence is so unlike the expressly listed ER 404(b) exceptions that considering "res gestae" evidence to be an ER 404(b) exception contravenes the ejusdem generis doctrine.

Grier, 168 Wn. App. at 646.

In sum, evidence that completes the story of the crime charged or provides immediate context for events close in both time and place to that crime is not subject to the requirements of ER 404(b). Such evidence is not of *other* misconduct of the type addressed in ER 404(b).[3] See Grier, 168 Wn. App. at 647.

[3] We note that "Rule 404(b) restricts evidence of prior misconduct regardless of whether it occurred before or after the conduct for which the defendant is presently charged." 5 TEGLAND,

C

Turning to the evidentiary challenge at issue, ER 404(b) does not apply to the evidence in question. Prior to trial, Sullivan moved to exclude certain evidence tending to prove that he was involved in a shooting that occurred roughly 25 minutes after the robbery. His motion requested that the trial court "exclude any evidence of the murder, which includes but is not limited to the shell casings, the autopsy reports of both of the deceased and any mention of any person being shot or murdered at the Skyway Bowling Alley on the date of this incident."

During a pretrial hearing on Sullivan's request, the trial court denied the motion to exclude, reasoning that the evidence was admissible as being material to elements of both crimes charged and as res gestae evidence:

> THE COURT: . . . I think the presence of the bullets -- not just the shell casing but the bullets -- is evidence that arguably supports an essential element of the State's case both as to the robbery in the first-degree prongs. Certainly as to the firearm enhancement and then also to the unlawful possession count. And so there is going to be factual questions in this case about the presence of one or more guns during the robbery, the presence of one or more guns during the alleged shootout in the smoking area, and maybe the presence of guns in between that span and where they might have come from and their origins, and so forth. And Mr. Sullivan, my understanding of his defense is that he denies possessing a gun. He denies possessing a firearm and that the objects that we may see in those videos -- either he has nothing in his hand or they weren't guns. And the burden is going to be on the State to prove that they were, and that they weren't just gun-like objects but that they were guns.

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supra, § 404.11, at 498; accord State v. Bradford, 56 Wn. App. 464, 467, 783 P.2d 1133 (1989) ("ER 404(b) applies to evidence of other crimes or acts regardless of whether they occurred before or after the alleged crime for which the defendant is being tried." (footnote omitted)). To avoid any ambiguity arising from the term "prior misconduct"—and because ER 404(b) uses the term "other," rather than the term "prior," when referencing the type of evidence that falls within its ambit—we use the term "other misconduct."

> And so I agree with the State that the shell casings, while they are evidence that supports -- arguably supports the State's case, there is alternative theories as to why they might be there. And so the bullets are also direct or circumstantial evidence that are probative of whether Mr. Sullivan had a firearm. And I don't see ER 403 as a basis for excluding evidence of the shell casings, evidence of the bullets, and frankly unless there is a stipulation about where those bullets came from and the chain of custody, then I don't see a way that those bullets could be introduced into evidence without discussing the fact that they came from an autopsy. And frankly, I agree with the *res gestae* argument of the State that the events of that evening, early morning, whenever it was, are between three maybe four individuals who were at the Skyway Bowl and had these interactions over the course of that period during that day. The alleged robbery, Mr. Gantz leaving, allegedly coming back, whether he leaves and gets it done or comes back, whether there is an altercation, and then the resulting deaths are all part of the body of evidence in this case, all part of the story of this case. And to come up with a ruling that somehow excises Mr. Gantz from the story or what Mr. Sullivan is allegedly doing in the video when he is coming back into the bar from the smoking area, you know, telling that, explaining that without Mr. Gantz or the bullets or the shell casing I just think is not plausible. I don't see a way to do that without requiring that not just the State but also the Defense completely butcher up the facts of the case and tell it in snippets that are awkward and potentially incomprehensible and confusing to the jury. So I'm denying the Defense's motion to exclude.

The trial court did not abuse its discretion by denying Sullivan's motion to exclude. Robbery in the first degree may be proved by demonstrating that the defendant was armed with a deadly weapon during the robbery:

> (1) A person is guilty of robbery in the first degree if:
> (a) In the commission of a robbery or of immediate flight therefrom, he or she:
> (i) Is armed with a deadly weapon.

RCW 9A.56.200.

"[A] firearm is considered a deadly weapon whether loaded or unloaded." State v. Schelin, 147 Wn.2d 562, 567 n.2, 55 P.3d 632 (2002) (plurality opinion).

Additionally, unlawful possession of a firearm in the first degree requires a showing that the defendant "owns, has in his or her possession, or has in his or her control any firearm." RCW 9.41.040(1)(a). "'Firearm' means a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(11).

The bullet casings and bullets were evidence that was material to elements of both crimes charged. This evidence tended to prove that Sullivan possessed a firearm during the times in question. Indeed, the bullet casings and bullets were directly relevant to whether Sullivan possessed "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(11).

This evidence was also material to whether Sullivan was armed with a deadly weapon during the robbery. In the enlarged image from the video captured by the bystander, Sullivan is seen pressing an object, located on the exterior of his shirt, against his stomach and under his crossed hands. The bullet casings and bullets, along with the video surveillance footage of Sullivan in the bar lounge at the time surrounding the shooting, tend to prove that this object was a firearm. Additionally, the evidence tending to prove that Robinson and Gantz died from gunshot wounds was necessary to provide context for the evidence of bullet casings, bullets, and video footage of Sullivan inside the bar lounge at the time surrounding the shooting.

The evidence was material to an element of both crimes charged. It was not evidence of *other* misconduct. As such, ER 404(b) did not apply.

Sullivan's assignment of error fails.[4]

III

Sullivan next asserts that sufficient evidence does not support a finding that either he or Robinson was armed with a deadly weapon during the robbery. Accordingly, Sullivan avers, the State failed prove one of the alternative means of robbery in the first degree and the verdict cannot be sustained. We disagree.

Criminal defendants have a right to a unanimous jury verdict. WASH. CONST. art. I, § 21. However, our Supreme Court has explained that, "[i]n alternative means cases, where the criminal offense can be committed in more than one way, . . . an expression of jury unanimity is not required provided each alternative means presented to the jury is supported by sufficient evidence." State v. Sandholm, 184 Wn.2d 726, 732, 364 P.3d 87 (2015). When there is no particularized expression of jury unanimity and "insufficient evidence supports one or more of the alternative means presented to the jury, the conviction will not be affirmed." Sandholm, 184 Wn.2d at 732.

In reviewing the sufficiency of the evidence for a conviction, we view the evidence in the light most favorable to the State, draw all reasonable inferences from the evidence in the State's favor, and interpret the evidence most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of both the State's evidence and

[4] Sullivan also asserts that the trial court erred by admitting the evidence under ER 403. "We review a trial court's ruling under ER 403 for abuse of discretion." Taylor, 193 Wn.2d at 697. Because the evidence was material to elements of both crimes charged, the evidence had substantial probative value. There was virtually no *unfair* prejudice to Sullivan's defense that arose from its admission.

all reasonable inferences from the evidence. Salinas, 119 Wn.2d at 201. Evidence is sufficient when "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

A person commits robbery in the first degree when, among other things, the defendant or an accomplice was armed with a deadly weapon or the defendant or an accomplice inflicted bodily injury. See RCW 9A.56.200; State v. Davis, 35 Wn. App. 506, 509, 667 P.2d 1117 (1983), aff'd, 101 Wn.2d 654, 682 P.2d 883 (1984). Sullivan does not contest that sufficient evidence supports a finding that Robinson inflicted bodily injury on the robbery victim. Thus, we must determine whether sufficient evidence was adduced to support a jury determination that either Sullivan or Robinson was armed with a deadly weapon during the robbery.

"To prove that a defendant is 'armed,' the State must show that 'he or she is within proximity of an easily and readily available deadly weapon for offensive or defensive purposes and [that] a nexus is established between the defendant, the weapon, and the crime.'" State v. Houston-Sconiers, 188 Wn.2d 1, 17, 391 P.3d 409 (2017) (alteration in original) (internal quotation marks omitted) (quoting State v. O'Neal, 159 Wn.2d 500, 503-04, 150 P.3d 1121 (2007)). "Such a nexus exists when the defendant and the weapon are 'in close proximity' at the relevant time." Houston-Sconiers, 188 Wn.2d at 17 (quoting State v. Gurske, 155 Wn.2d 134, 141, 118 P.3d 333 (2005)). "Sufficient evidence of nexus exists '[s]o long as the facts and circumstances support an inference of a connection between the

weapon, the crime, and the defendant.'" Houston-Sconiers, 188 Wn.2d at 17 (alteration in original) (quoting State v. Easterlin, 159 Wn.2d 203, 210, 149 P.3d 366 (2006)). "One should examine the nature of the crime, the type of weapon, and the circumstances under which the weapon is found (e.g., whether in the open, in a locked or unlocked container, in a closet on a shelf, or in a drawer)."[5] Schelin, 147 Wn.2d at 570.

Sufficient evidence supports a finding that Sullivan was armed with a deadly weapon during the robbery. First, a rational trier of fact could infer that, during the robbery, Sullivan had a firearm located on the exterior of his shirt and pressed against his stomach under his crossed hands. An enlarged image from the video captured by the bystander depicts Sullivan pressing an object, located on the exterior of his shirt, against his stomach and under his crossed hands. Detective Thompson testified that, in his opinion, this object was a firearm:

> [DETECTIVE THOMPSON:] So you can see the flat, square shape of what I believe to be a gun here in his waist.
> [THE STATE:] And could you describe for the record where it is that you are pointing?
> [DETECTIVE THOMPSON:] It is not easy to see in this size but on the computer you can blow it up so it's larger but it is right kind of where his arms are crossed. Just above that, you can see the flat part of what I believe to be the handle of a handgun.

[5] The trial court properly instructed the jury as to when a person is armed with a firearm:

> A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant or an accomplice. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the weapon at the time of the crime.

Jury Instruction 27.

Additionally, approximately one minute after the robbery, video footage from inside the bowling alley captured the outline of an object that was underneath Sullivan's shirt and located at his right hip. Then, approximately 25 minutes after the robbery, video footage from inside the bar lounge at the time surrounding the shooting captured Sullivan, with his right arm extended forward, holding an object, which resembled a pistol, in his right hand.

In addition, six .40 caliber bullet casings, which were manufactured by Hornady, were recovered from the scene of the shooting. Gantz was killed by a .40 caliber bullet, which, according to a forensic scientist, appeared to be manufactured by Hornady. Yet no .40 caliber firearm was recovered from the scene of the shootings. Five days after the shooting, police officers found, inside a garbage bag at an apartment inhabited by Sullivan's girlfriend, three .40 caliber Hornady bullets, an empty box of ammunition, and mail addressed to Sullivan.

In light of all of this evidence, a rational trier of fact could have concluded that the object located under Sullivan's crossed hands during the robbery was a firearm, which was also a deadly weapon.

Second, sufficient evidence was adduced to establish a nexus between the weapon and the robbery. Based on the location of the firearm during the robbery, a rational trier of fact could have concluded that the firearm was used by Sullivan to (1) induce fear in the victim while he was being robbed, (2) encourage Robinson in committing the robbery, or (3) prepare Sullivan in the event that Robinson needed further assistance in consummating the robbery.

Sullivan's assignment of error fails.

IV

Sullivan also contends that sufficient evidence does not support a jury determination that he committed robbery in the first degree as either a principal or an accomplice. We disagree.

Under RCW 9A.08.020, a person is an accomplice to a crime if he or she knowingly "[s]olicits, commands, encourages, or requests" the commission of the crime or "[a]ids or agrees to aid" in the planning or commission thereof. "Mere presence of the defendant without aiding the principal—despite knowledge of the ongoing criminal activity—is not sufficient to establish accomplice liability." State v. Truong, 168 Wn. App. 529, 540, 277 P.3d 74 (2012). However, "[a]id can be accomplished by being present and ready to assist." State v. Collins, 76 Wn. App. 496, 501-02, 886 P.2d 243 (1995). Additionally, "it is encouragement plus the intent of the bystander to encourage that constitutes abetting." In re Welfare of Wilson, 91 Wn.2d 487, 492, 588 P.2d 1161 (1979).

Here, sufficient evidence supports a jury determination that Sullivan was present and either ready to assist or intended to encourage Robinson in committing the robbery. As already explained, sufficient evidence supports a finding that Sullivan was armed with a deadly weapon during the robbery. Moreover, the evidence was that Sullivan moved to a position whereby—standing at the victim's feet—he loomed over the victim as and after Robinson beat the victim while on the ground. A rational trier of fact could infer that, by being so armed and positioned, Sullivan either was ready to assist or intended to encourage Robinson in using force to take property from the victim's wallet.

Accordingly, sufficient evidence supported a jury determination that Sullivan was an accomplice to the robbery.

V

In a statement of additional grounds,[6] Sullivan contends that the trial judge violated what Washington case law has termed "the appearance of fairness doctrine."[7] In turn, Sullivan asserts, his due process right to a fair trial was violated and his convictions should be reversed. Because the trial judge did not violate the appearance of fairness doctrine, we rule against Sullivan's argument.

Criminal defendants have a due process right to a fair trial by an impartial judge. U.S. CONST. amends. V, VI, XIV; WASH. CONST. art. I, § 22. "Pursuant to the appearance of fairness doctrine, a judicial proceeding is valid if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing." State v. Solis-Diaz, 187 Wn.2d 535, 540, 387 P.3d 703 (2017). "The law requires more than an impartial judge; it requires that the judge also appear to be impartial." Solis-Diaz, 187 Wn.2d at 540. "The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes a reasonable observer knows and understands all the relevant facts." Solis-Diaz, 187 Wn.2d at 540. "A party asserting a violation of the doctrine must produce sufficient evidence demonstrating bias, such as personal or pecuniary interest on the part of the decision maker; mere

[6] On June 2, 2021, Sullivan filed (1) a motion to file a late statement of additional grounds, and (2) a statement of additional grounds. Because an order of our Supreme Court suspended the time requirements for filing certain motions under the Rules of Appellate Procedure, Order, No. 25700-B-611 In the Matter of the Suspension of RAP 18.8(b) and (c) in Response by Washington State Appellate Courts to the COVID-19 Public Health Emergency (Wash. Apr. 2, 2020), we grant Sullivan's motion to file a late statement of additional grounds.

[7] See, e.g., State v. Gamble, 168 Wn.2d 161, 187, 225 P.3d 973 (2010).

speculation is not enough." In re Pers. Restraint of Haynes, 100 Wn. App. 366, 377 n.23, 996 P.2d 637 (2000).

Sullivan asserts that the trial judge violated the appearance of fairness doctrine during a pretrial hearing on Sullivan's motion to exclude certain evidence. During the hearing, Sullivan's counsel argued that evidence tending to prove that Sullivan was involved in a shooting should be excluded with regard to the charge of unlawful possession of a firearm.

In response, the trial judge stated:

> That seems pretty extraordinary to me, Mr. Davenport, that you could argue that someone who discharges a weapon -- that the shell casings would be inadmissible in a firearm charge -- putting aside the robbery -- that the presence of shell casings would be inadmissible in a firearm possession trial because of 404(b) theory, which it sounds like you are arguing. Or a 403, that it is prejudicial because it suggests that a person is shooting into a crowded public area. I think that would need some pretty strong authority for the proposition that the shell casings are inadmissible to prove that there was a gun. And the only thing the State can rely on is grainy video or whatever. That seems pretty extraordinary.

Sullivan contends that "the trial court voiced his bias prejudice [sic] opinion by stating 'seems pretty extraordinary to me, Mr. Davenport, that you could argue that someone who discharges a weapon.'" According to Sullivan, '[t]he trial court indicated Mr. Sullivan shot or for verbatim words discharged a weapon" and, in turn, "plac[ed] guilt on Mr. Sullivan for a crime he's not charged of committing, violating the appearance of fairness doctrine and Mr. Sullivan's Due Process Rights."

To the contrary, the trial judge did not express an opinion as to whether Sullivan was guilty of any offense. Rather, the trial judge merely explained why

the 9 mm and .40 caliber bullet casings were material to whether Sullivan (1) possessed a firearm, and (2) was armed with a deadly weapon during the robbery.

The evidence suggested that either one or both of the decedents were the source of the 9 mm bullet casings. No .40 caliber firearm was found at the scene of the shootings. Yet video footage from inside the bowling alley around the time of the shooting depicts Sullivan holding an object that resembled a pistol in his right hand. Further, police officers discovered .40 caliber bullets, along with mail addressed to Sullivan, in a garbage bag at an apartment inhabited by Sullivan's girlfriend. The jury was instructed: "A 'firearm' is a weapon or device from which a projectile may be fired by an explosive such as gunpowder." Jury Instruction 12.[8] The .40 caliber bullet casings, then, tended to prove that Sullivan possessed a firearm.

Next, whether Sullivan possessed a firearm at the time of the shooting was material to whether the object located underneath his shirt and at his right hip approximately one minute after the robbery was a firearm. This, in turn, was material to whether the object under Sullivan's hands during the robbery was a firearm. Thus, the 9 mm and .40 caliber bullet casings were ultimately material to whether Sullivan was armed with a deadly weapon during the robbery.[9]

[8] This language mirrors the language from both the relevant Washington pattern jury instruction and statute. The pattern jury instruction reads: "A 'firearm' is a weapon or device from which a projectile may be fired by an explosive such as gunpowder." 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 2.10.01 (4th ed. 2016). Likewise, RCW 9.41.010(11) states: "'Firearm' means a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder."

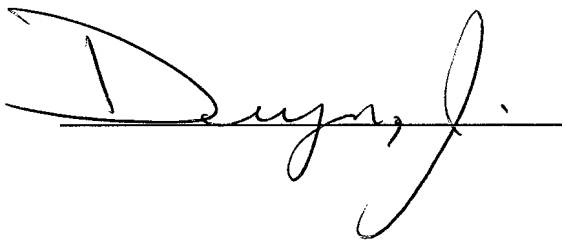
[9] The jury was instructed that "[a] firearm, whether loaded or unloaded is a deadly weapon." Jury Instruction 15.

The trial court did not violate the appearance of fairness doctrine.

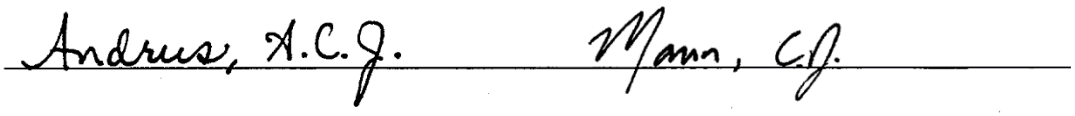
VI

Sullivan requests that we remand the matter for resentencing in light of our Supreme Court's decision in State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021). Because resentencing appears to be warranted, we remand the cause to the superior court for Sullivan to be sentenced in a manner consistent with the Blake decision.

The convictions are affirmed. The sentences are reversed. The cause is remanded to the superior court for further proceedings consistent with this opinion.



WE CONCUR:



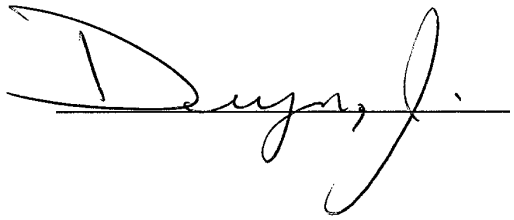
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BRANDON RASHAD SULLIVAN, Appellant.	DIVISION ONE No. 81254-8-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration is hereby denied.

FOR THE COURT:



DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 81254-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: September 16, 2021
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

September 16, 2021 - 4:38 PM

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Appellate Court Case Number:	81254-8
Appellate Court Case Title:	State of Washington, Respondent v. Brandon Sullivan, Appellant

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