NO. 30640-2-III
Consolidated with 30641-1-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JOSEPH L. SHOUSE,

Defendant/Appellant.

APPELLANT'S REPLY BRIEF,

Dennis W. Morgan WSBA #5286
Attorney for Appellant
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Republic, Washington 99166
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES

STATUTES

OTHER AUTHORITIES

ARGUMENT

The State's brief is somewhat confusing. It is not surprising since the transcripts had to be reformatted and a revised Appellant's brief was necessary.

The State indicates that it did not receive the revised Appellant's brief. However, it was sent by e-mail on February 13, 2013 as indicated in the transmittal document acknowledging receipt by the Court of Appeals. (Appendix "A")

MERGER

Mr. Shouse takes issue with a number of the arguments presented by the State. Initially, the State wants its cake and wants to eat it too. It argues the apprehension prong of the assault definition in WPIC 35.50 in support of the first degree robbery convictions. Then, it argues that second degree assault does not merge with the first degree robbery because it only charged the deadly weapon alternative set forth in RCW 9A.36.021(1)(c).

The first degree robbery counts included the following language: "was armed with a deadly weapon and/or displayed what appeared to be a firearm or other deadly weapon and/or inflicted bodily injury …."

It is thus clear that second degree assault as charged in Counts Two and Four is necessarily included in Counts One and Three. The State can have it either one way or the other; but not both.

The State also misstates the holding in *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005) when it claims that the Court did not rule that second degree assault merged with first degree robbery as to defendant Zumwalt. The *Freeman* Court stated:

> … [W]e conclude the merger doctrine applies to merge Zumwalt's first degree robbery and second degree assault convictions, but not Freeman's first degree assault and robbery convictions.

State v. Freeman, supra, 778.

Finally, the *Freeman* Court stated at 780: "Generally, it appears that these two crimes [first degree robbery and second degree assault] will merge unless they have an independent purpose or effect." Here, the alleged assaults facilitated the alleged robberies and were integral to proof of the latter offenses.

PROSECUTORIAL MISCONDUCT

The State claims that Mr. Shouse's defense attorney cross-examined Ms. VanCommen as to the "tell the truth" testimony. Mr. Shouse cannot locate anything in the record to support the State's position.

UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE

The State then takes a quote out of context from *State v. Reichert,* 158 Wn. App. 374, 242 P.3d 44 (2010). Mr. Shouse does not argue with the fact that constructive possession need not be exclusive. However, the State ignores the factual predicates of the *Reichert* case.

Under any theory of constructive possession dominion and control must be established to the extent that the individual charged with the offense can immediately convert the contraband item to his/her possession.

Moreover, the State fails to address the clear explication of the law as set forth in *State v. Embry,* 171 Wn. App. 714, 746-48 (2012). Mr. Shouse contends that the *Embry* case controls. The State's attempt to argue common scheme and plan to establish dominion and control over a firearm is without precedent and makes no sense. The State failed to establish, beyond a reasonable doubt, that Mr. Shouse possessed any firearm on the date in question.

The State's accomplice liability argument that Mr. Shouse had dominion and control over the individuals who actually possessed the guns is both unconscionable and facetious. It should be disregarded by the Court.

ENHANCEMENT

Insofar as the firearm enhancement is concerned the State argues that the special verdict instruction satisfies the requirements of *State v.*

Tongate, 93 Wn.2d 751, 613 P.2d 121 (1980). (CP 144; Appendix "B")

The instruction does not satisfy the *Tongate* requirements. The instruction does not tell the jury that it needs to find that a real gun was used. In the absence of such proof no enhancement can be imposed.

CONCESSIONS

Mr. Shouse points out to the Court that in the revised Appellant's brief he conceded that he was given the right of allocution. Based upon additional records supplied in a Supplemental Designation of Clerk's Papers Mr. Shouse now concedes that the jury received an oath.

This case is a prime example of the deficiencies in record keeping and transcription occurring in Kittitas County. Mr. Shouse cannot be expected to discover information not included in the transcript. If Clerk's minutes are going to be ordered in every single case in order to justify the reliability/veracity of transcripts, the onus should be placed upon the Court Clerks, transcriptionists and prosecutors of the State; not the defendant.

DATED this 5th day of July, 2013.

Respectfully submitted,

s/Dennis W. Morgan

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APPENDIX “A”

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APPENDIX “B”

INSTRUCTION NO. 42

For purposes of special verdicts One, Two, Three, Four, Five and Six, the State must prove beyond a reasonable doubt that the defendant or an accomplice was armed with a firearm at the commission of the corresponding crime in Counts One, Two, Three, Four, Five, and Six.

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DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	KITTITAS COUNTY
Plaintiff,	)	NO. 11 1 00220 8
Respondent,	)	
	)	**CERTIFICATE OF SERVICE**
v.	)	
	)	
JOSEPH L. SHOUSE,	)	
	)	
Defendant,	)	
Appellant.	)	
	)	

I certify under penalty of perjury under the laws of the State of Washington that on this 5th day of July, 2013, I caused a true and correct copy of the *APPELLANT'S REPLY BRIEF* to be served on:

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