71449-0

NO. 71449-0

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KEVIN HUBBARD,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE KEN SCHUBERT

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Under both constitutional provisions and the rules of evidence, witnesses must promise to tell the truth before giving testimony. There is no requirement that such promise be made on the record. Although the verbatim report of proceedings indicates that State's witness James Henderson was not sworn "on the record," the clerk's minutes unambiguously establish that Henderson was in fact sworn. Should this Court reject Hubbard's argument that his convictions should be reversed on this basis?

2. Evidence Rule 702 permits, but does not require, opinion testimony by a witness qualified as an expert if scientific, technical, or other specialized knowledge will assist the trier of fact. The State obtained records from cell phone companies that indicated when certain cell phone calls triggered certain cell towers and provided the physical addresses of each of the towers. Did the trial court correctly decide that no expert testimony was needed to convey this information?

3. "Other suspect" evidence is admissible only if the defendant can establish a train of facts or circumstances that tend clearly to point to someone other than the accused as the guilty party. Such facts and circumstances must show more than the

third party's ability to commit the crime; the defendant must establish some step taken by the other suspect that indicates an intention to act on that ability. Where the only evidence concerning the alternative suspect, "Li'l Hev," indicated that he had a corroborated alibi for the time of the shooting and no motive whatsoever, was the trial court within its discretion to exclude evidence pertaining to "Li'l Hev"?

4. It is appropriate to instruct the jury on accomplice liability when there is evidence that the defendant encouraged or aided another in committing a crime with knowledge that it would promote or facilitate the commission of that crime. The State produced evidence that Hubbard drove Henderson to the scene of the crime, supplied the AK-47 used in the shooting, hid in the bushes with Henderson until the victims approached, fired the weapon or handed the weapon to Henderson to fire, and drove Henderson away from the scene after three individuals were seriously injured by some of the 30 shots fired. Was there sufficient evidence to support an instruction on accomplice liability?

5. A defendant is not entitled to a jury instruction on a lesser included offense if it is possible to commit the greater offense without committing the lesser. It is possible to commit

Attempted Murder in the First Degree without committing the lesser offense of Assault in the First Degree. Did the trial court properly refuse to instruct the jury on Assault in the First Degree?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

By amended information, the State charged Kevin Hubbard with three counts of Attempted Murder in the First Degree with firearm enhancements.[1] CP 31-33. The State alleged that, on January 28, 2012, Hubbard attempted to kill Zealand Adams, Rommie Bone, and Daniel Wilson by shooting them multiple times with an assault rifle outside a nightclub in Seattle. CP 5-12, 31-33. Following a jury trial, Hubbard was convicted as charged, and the jury returned special verdicts finding that Hubbard was armed with a firearm during each crime. CP 179-80, 181-82, 187, 473. The court imposed a total sentence of 913.5 months, including the three consecutive 60-month firearm enhancements. CP 230-37.

2. SUBSTANTIVE FACTS

Late one night in January 2012, Seattle Police responded to 911 calls reporting approximately 30 shots fired near the Citrus

[1] The State also charged Hubbard with two counts of Unlawful Possession of a Firearm in the First Degree. CP 31-33. The trial court severed the two firearm counts, and eventually dismissed them. CP 145, 231.

Lounge, located in the South Lake Union neighborhood of Seattle. 6RP 679-80, 770; 7RP 834-35.[2] Officers encountered a chaotic scene with a large, hostile crowd. 6RP 682-84, 732, 775, 836, 850; 10RP 1116, 1119-20, 1146. No one in the crowd was willing or able to provide the police with useful information about the shooting. 7RP 830, 837, 850-51; 10RP 1121.

Three men had been shot multiple times in the parking lot of the Fred Hutchinson Cancer Research Center (FHCRC), across the street from the Citrus Lounge. 6RP 681-87, 772. The victims were later identified as Zealand Adams, Romeo (Rommie) Bone, and Daniel Wilson. 10RP 1126. Adams suffered gunshot wounds to his left thigh, upper left arm, and shoulder. 12RP 1482. Bone was shot twice in the abdomen or chest, necessitating removal of his colon. 12RP 1487; 18RP 2267, 2272. Wilson suffered gunshot wounds to the chest and both legs. 8RP 935-36; 12RP 1491. All of the injuries were serious, and Wilson and Bone would likely have died without prompt medical attention. 12RP 1498-99. All three were admitted to Harborview Medical Center. 12RP 1477. Wilson's injuries required a two-month hospital stay, several

[2] The verbatim report of proceedings consists of 25 consecutively-paginated volumes and one additional volume containing only the opening statements. The State refers to this material by volume and page number. Any reference to the opening statements will be identified by date and page (10/9/2013 RP _).

surgeries, repeated inpatient care following his release, and eventual amputation of one leg above the knee. 8RP 949, 951.

The victims were found near two vehicles, Adams' black Dodge Magnum and a white Lexus SUV. 6RP 727-28; 8RP 900; 11RP 1342. Both vehicles were riddled with gunshot holes through the sheet metal and windows. 6RP 727, 729. Crime scene investigators determined from the angle of the bullets that the shooter was above the vehicles. 15RP 1913, 1972. There was noticeable blood inside the Dodge Magnum. 15RP 1916. Also scattered about the parking lot were a large number of spent assault rifle casings and a few .9 mm casings. 6RP 688, 726; 7RP 798-99. One officer found a discarded .9 mm handgun in the bushes near the scene. 7RP 801, 811; 11RP 1323.

Officers noticed security cameras posted around the FHCRC campus, two of which captured views of the shooting. 7RP 795, 838; 9RP 1059, 1064; 20RP 2503-04; Ex. 17, 18. The videos are indistinct, and individual faces are not discernible. 23RP 2804. Police were able to identify the three victims and others in the video by their clothing. 19RP 2386; 20RP 2500-01.

One of the FHCRC security videos depicts the parking lot where the Dodge Magnum and Lexus SUV were parked, along with

a dark Mazda SUV. 9RP 1082-83; 11RP 1342; Ex. 17 (camera No. 81).[3] Directly in front of the vehicles is a retaining wall about the height of a car hood. 7RP 867. Beyond the retaining wall are a line of bushes, a sidewalk, and Yale Avenue. 7RP 868.

As the incident unfolds on the video, Bone walks toward the Dodge Magnum, unlocks it with a remote, walks back to pick something up in the middle of the parking lot, returns to the Magnum, and gets into the driver's seat. 19RP 2391; 20RP 2489; Ex. 17. The suspect vehicle, a white sedan, drives up Yale Avenue. 20RP 2489. The two shooting suspects then become visible walking back down Yale Avenue, obscured from the victims' view by the bushes on the retaining wall. 20RP 2489-90.

Adams and Daniel Wilson then come into view of the camera, walking toward the Dodge Magnum. 19RP 2392. Once they reach the rear of the car, the first shot is fired. 19RP 2392. Visible in the video is the spark made when the bullet hit the ground directly behind Wilson and Adams. 19RP 2392. Adams ducks and

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[3] Video from two FHCRC security cameras, Nos. 27 and 81, were admitted as Exhibits 17 and 18. There is some discrepancy in the record about which exhibit contains which camera view. Compare 9RP 1079, 1082-83 (FHCRC security supervisor identifying Ex. 17 as video from camera No. 27 and Ex. 18 as video from camera No. 81) with 20RP 2485 (prosecutor identifying Ex. 17 as video from camera No. 81). The exhibits themselves resolve the discrepancy: Ex. 17 is the video from Camera No. 81. To view these videos, the Court will need to use the proprietary Archive Player, which is included on the exhibit discs.

runs to the passenger side of the Magnum, taking cover between it and the Lexus SUV. 19RP 2393.

Wilson tries to take cover on the other side of the Lexus SUV, but the shooter moves around the car and continues shooting at him. 19RP 2394. The suspect without the rifle then runs out of the frame, back toward the suspect vehicle. 20RP 2490. Bullets strike the ground around Wilson, and he falls to the ground. 19RP 2394. Legs shattered by the bullets, Wilson drags himself behind the Lexus SUV and then between the Lexus SUV and the Magnum. 8RP 949-50; 19RP 2394. As Wilson tries to get away, the shooter also changes position and continues shooting at him. 19RP 2394. Wilson eventually crawls all the way to the driver's side of the Magnum. 19RP 2394.

About 40 seconds after the rifle fire ends, the video shows two additional muzzle flashes coming from between the Magnum and the Lexus SUV. 20RP 2490, 2493. Soon after these shots, the video shows Bone emerge from the Magnum, sit on its rear bumper briefly, wander out into the middle of the parking lot, and collapse. 19RP 2395; 20RP 2494-95. Adams also reappears, with people attending to his wounds. 19RP 2393.

The other FHCRC security camera was positioned to show Yale Avenue, which borders the parking lot. 9RP 1079; Ex. 18 (camera #27). The video shows the suspect vehicle, a white sedan with a sun roof, drive up Yale and back into a parking spot. 20RP 2499. The passenger emerges first and waits for the driver, who pauses to reach into the car for something. 20RP 2500; Ex. 18. Both appear to be adult men. Ex. 18. The passenger wears a black top with white sleeves. 20RP 2500. The driver wears all dark clothing. 20RP 2500-01. The passenger swings his arms as he walks; the driver does not. Ex. 18. The two walk down Yale and stand in the bushes. 20RP 2500. The video then skips forward about four minutes to a point where the suspect vehicle is no longer there. 20RP 2502-03; 9RP 1081-82.

The AK-47-type assault rifle and associated 30-round magazine used in this case were recovered on January 31, 2012, three days after the shooting, as part of a separate operation jointly conducted by the Seattle Police Department and the Bureau of Alcohol, Tobacco and Firearms (ATF). 12RP 1458-59, 1466; 13RP 1648-50. James Henderson was arrested and federally charged as part of the ATF investigation, but was not connected to the weapon

involved in this case. 12RP 1470. DNA testing of the weapon indicated that Hubbard could not be excluded. 13RP 1618.

In February 2012, a confidential informant (CI) provided information that the suspects in the Citrus Lounge shooting were James Henderson and Kevin Hubbard.[4] 13RP 1663; CP 10. Detective Hughey obtained a search warrant for cell phone records for these suspects, from which he could determine that both men's cell phones used a series of cell phone towers beginning very near the Citrus Lounge just before the shooting and then continuing in a general southbound direction in the hours that followed. 20RP 2507-33; CP 10.

Detective Hughey arranged for the CI to meet with Henderson and record a conversation. 21RP 2564, 2571. Henderson described the shooting to the CI. 15RP 1878-81; 21RP 2576-80; Ex. 57A. Based on the content of that conversation, Hughey determined that Henderson was present at the shooting but had not been the shooter. 21RP 2571.

[4] Initially, the CI reported that Henderson was the shooter. 23RP 2753. Later, the CI attributed the information about Henderson to "word on the street." 23RP 2758.

Detective Hughey interviewed Henderson following his arrest in the ATF operation. 21RP 2619-20; Ex. 60. Hughey told Henderson that there was strong evidence tying him to the Citrus Lounge shooting, and Henderson eventually gave a statement detailing his involvement. 21RP 2631-42. Henderson said that he was with Hubbard and saw Hubbard fire the AK-47. 21RP 2639, 2640-42.

Hubbard was arrested and interviewed. 23RP 2760; Ex. 105. He admitted that he drove to the club with Henderson in a car owned by Jenessa Hora. 23RP 2763. He described participating in a fight inside the Citrus Lounge and being punched on his way out of the club, but denied shooting anyone and stated that he had left the club alone before the shooting to attend the birth of his child. 23RP 2763-67. Police searched Hora's white Lexus sedan, finding evidence that a relatively low-velocity bullet struck the rear bumper of the vehicle at a low angle, consistent with someone shooting from below. 16RP 2011, 2014, 2016, 2018.

Henderson testified against Hubbard at trial consistently with his statement to police. 14RP 1717. He stated that he drove to the Citrus Lounge with Hubbard in a white Lexus that Hubbard had

borrowed from Hora.[5] 14RP 1730-31. Henderson described the altercation in the bar. 14RP 1745. After bouncers broke up the fight, he and Hubbard started to leave the club. 14RP 1750. On their way out, an unknown person tried to punch Hubbard. 14RP 1752. Henderson and Hubbard left the club and got into the Lexus sedan. 14RP 1754, 1757. As the security video shows, Hubbard and Henderson then drove across the street and backed into a parking place. 14RP 1754, 1757. When they got out of the car, Hubbard retrieved the assault rifle and they walked toward the bushes. 14RP 1758-60, 1762. They stood in the bushes for a few seconds, waiting for some of the people who had been involved in the altercation inside the bar to approach. 14RP 1764. Hubbard started shooting, and Henderson went back to the car. 14RP 1766-67. Hubbard returned to the car after he finished shooting and the two drove away. 14RP 1771. Hubbard drove south and dropped Henderson off in Skyway. 14RP 1774. Henderson and Hubbard never spoke of the shooting. 14RP 1775-76.

Detective Hughey also attempted to interview all of the victims. Bone declined to answer any questions. 18RP 2257-58;

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[5] Hubbard states that he and Henderson drove to the Citrus in a white Lexus SUV. Brief of Appellant at 7. That is not supported by the evidence. Rather, the vehicle Hubbard drove was Hora's white Lexus sedan with a sunroof. 15RP 1872; 16RP 2011-21.

CP 8. Adams was able to describe the fight inside the Citrus Lounge, but did not know who shot him. CP 8. Wilson did not remember who shot him. CP 9.

In subsequent interviews, Adams told Hughey that he had heard "on the street" that a person going by the moniker "Li'l Hev" was the shooter. CP 9. Hughey knew "Li'l Hev" to be Daunte Williams. CP 9. He showed Adams a single picture of Williams. CP 9. Adams eventually said he thought he recognized the person as one of the shooters. CP 9.

Daniel Wilson and his brother Khris Wilson had also heard from friends that "Li'l Hev" was the shooter. CP 9. Detective Hughey showed them a montage that included Williams' photo. CP 9. Daniel Wilson believed that Williams had been at the Citrus Lounge on the night of the shooting. CP 9. Khris Wilson did not recognize anyone in the montage. CP 9.

Detective Hughey investigated Daunte Williams. CP 10. Williams denied having been at the Citrus Lounge on the night of the shooting, provided contact information for an alibi witness, and invited the detective to check his cell phone records to confirm the alibi. CP 10. The cell phone records indicated that Williams' phone was in Tukwila at the time of the shooting. CP 10.

Additional facts are included in the argument sections to which they pertain.

C. ARGUMENT

1. WITNESS JAMES HENDERSON WAS SWORN BEFORE TESTIFYING.

Hubbard contends that his convictions must be reversed because James Henderson, a witness for the State, was not sworn to tell the truth at trial. Hubbard's claim is belied by the clerk's minutes of the proceedings and should be rejected.

Due process requires that witnesses promise to tell the truth before they testify. U.S. Const. amend. 14; Wash. Const. art. I, §§ 3, 6; ER 603. There is no requirement that this promise must be made on the record, and the promise to tell the truth can be made in any form "calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." ER 603.

Hubbard argues that the trial court violated the state and federal constitutions and ER 603 by failing to obtain an oath from Henderson. His claim is based upon a notation in the verbatim report of proceedings of October 22, 2013, which states "(The witness was not sworn in *on the record*)". 14RP 1717 (emphasis added). From this notation, Hubbard leaps to the unjustified

conclusion that Henderson was not sworn *at all.* In fact, the clerk's minutes of this trial unambiguously establish that "James Henderson [was] sworn and examined on behalf of State" at 9:36 a.m. on October 22, 2013.[6] CP 455 (attached). Because the error Hubbard complains of never actually occurred, his claim must be rejected.

2. EVIDENCE PERTAINING TO THE LOCATION OF CELL PHONE TOWERS DID NOT REQUIRE EXPERT TESTIMONY.

Hubbard contends that evidence related to his and Henderson's cell phone records was improperly admitted because it required expert testimony. Specifically, Hubbard claims that an expert witness was required to testify about the locations of the cell phone towers that Hubbard's and Henderson's phones used in the hours following the shooting. Hubbard argues that this evidence

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[6] A likely explanation for Henderson's oath not being on the record emerges from the events preceding Henderson's testimony. Among other things, Henderson would testify about a conversation he had with a confidential informant who had taped the interaction. In advance of that testimony, and outside the jury's presence, the State wished to have Henderson confirm that he could identify his own voice and that of the CI on the recording. 14RP 1707, 1714. This occurred during a recess, after which the prosecutor reported, "We are ready, Your Honor. And we were actually able to take care of playing the exhibit – a snip of Exhibit 57 for Mr. Henderson just now for him to make the identification necessary outside the presence of the jury, so we can bring the jury out now." 14RP 1716. Henderson's testimony began immediately. 14RP 1717. Given the clerk's official minutes that Henderson had been sworn, it appears likely that Henderson was sworn in during the recess before stating whether he recognized the voices on the recording. Henderson confirmed his identification of the voices during his testimony. 14RP 1786.

was too scientific for Detective Hughey to relate as a lay witness and Hughey was not qualified to give an expert opinion. Because the information conveyed required no more specialized knowledge than the ability to read a map, and because Hughey did not use this information to express an opinion about where Henderson's and Hubbard's phones were actually located at any particular time, this Court should reject the claim.

a. Standard of Review.

A trial court's evidentiary rulings are reviewed for abuse of discretion. State v. Ellis, 136 Wn.2d 498, 504, 963 P.2d 843 (1998). An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 94 (1997).

Evidentiary error is grounds for reversal only if it results in prejudice. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Such error is prejudicial if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. Id.

b. The Evidence Admitted.

During Detective Hughey's investigation, he obtained phone numbers for three suspects: Henderson, Hubbard, and Daunte

Williams ("Li'l Hev"). CP 10. Hughey served search warrants for the cell phone records associated with each of these numbers. CP 10; 20RP 2507-08. The cell phone companies provided records of call logs, numbers called, ingoing and outgoing calls, duration, time/date stamp of the call, and the cell phone towers that were activated at the beginning and end of each call.[7] 20RP 2507-08, 2518-19. Records from Sprint designated each cell phone tower by number and provided a "decipher key" containing an exact physical address of each tower. 20RP 2511. The T-Mobile records provided the same information, including a decipher key, in a slightly different format. 20RP 2519; Ex. 92, 93.

Detective Hughey created Excel spreadsheets to summarize the relevant information from the cell phone records. 20RP 2514-15. He annotated this information by supplying the names associated with the phone numbers in the call log, which he obtained from the contact list in Hubbard's phone, and the exact

[7] Hubbard objected to admission of the cell phone records on grounds that are unclear from the record. 20RP 2515. On appeal, he asserts without analysis or citation to authority that "[m]uch of the information [Hughey] related to the jury was without foundation as hearsay, and thus inadmissible under ER 801 and 802." Brief of Appellant at 25. However, Hubbard did not clearly object on hearsay grounds and does not assign error to admission of these business records. "A party may assign evidentiary error on appeal only on a specific ground made at trial." State v. Bradford, 175 Wn. App. 912, 928 n.8, 308 P.3d 736 (2013) (quoting State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007)). Challenges on any other basis are not preserved. Id.

addresses of the towers, which were provided by the cell phone companies. 20RP 2514-15, 2749. Hughey then plotted the addresses of those towers on a Google map to visually depict their locations and the time they were activated by Hubbard's or Henderson's phone. 20RP 2524; Ex. 74. Hughey explained that a blue or purple line appearing to connect each of the towers on the map was automatically generated by Google and did not indicate the route taken by the phones or have any other meaning. 20RP 2526, 2531.

Hubbard's cell phone records indicated that his phone hit a cell tower near the Citrus Lounge four minutes before the shooting. 20RP 2527. Minutes after the shooting, Hubbard's phone hit a tower in the SoDo area, south of Seattle's downtown. 20RP 2528. Minutes after that, the phone hit a tower farther south, near Tukwila. 20RP 2528. The next three cell phone towers activated by Hubbard's phone were all in Renton. 20RP 2528-29. Hubbard's phone continued to activate towers every few minutes, with each tower located farther south than the one before it, until the phone finally hit a tower in Tacoma at 2:53 a.m. 20RP 2529.

Henderson's cell phone records indicated that his phone also hit a cell tower near the Citrus Lounge shortly before the

shooting. 20RP 2530-31. Minutes after the shooting, Henderson's phone hit a tower in downtown Seattle. 20RP 2531. A few minutes later, Henderson's phone hit a tower in SoDo. 20RP 2531. Henderson's phone then hit towers in White Center, Tukwila, and Renton. 20RP 1532. Thus, like Hubbard's phone, Henderson's phone activated towers close to the Citrus Lounge just before the shooting, and then activated towers farther and farther south in the period following the shooting. 20RP 2533.

Although the clear inference from this evidence is that Henderson's and Hubbard's phones were traveling southward together immediately after the shooting, Detective Hughey was careful to explain that the cell phone records could not show where the cell phones actually were at any point:

> Q: Okay. Now, to be clear, a cell tower location, what information is that really giving you about the location of the cell phone?
>
> A: It does not give you an exact address of a cell phone. This isn't GPS pinging, as the movies might try to make you believe. It just means that the cell phone is within the cellular footprint of that tower, and as you move from one footprint to the next, you move between cell towers.
>
> Q: Okay. So it can't tell you where within the reception range of that cell tower that cell phone is standing?

A: No.

Q: Just that it's in the range of that cell tower?

A: Correct.

20RP 2523. Contrary to assertions in the Brief of Appellant, Detective Hughey did not testify that he performed any "analysis," that he "electronically determine[d] that certain towers picked up phone signals," or that he was able to "assess that Henderson's and Hubbard's cell phones were at certain locations at certain times." Brief of Appellant at 22. Nor did the detective claim that he could use "calculations of the reception range of various cell towers" to "determine the cell telephone locations at pertinent times." Brief of Appellant at 22, 23.

Detective Hughey also testified about the cell phone records with respect to Hubbard's interview with police about the night of the shooting. Hubbard admitted that he was at the Citrus Lounge on the night of the shooting, and that he had driven there with Henderson. 23RP 2762-63. Hubbard claimed, however, that he left the lounge after the fight in the bar and before the shooting, when his child's mother reported that she was in labor in Tacoma. 23RP 2764-67. Hubbard said he drove straight to Tacoma by himself and made no stops. 23RP 2765, 2770. When Detective

Hughey confronted Hubbard with the cell phone records, which he told Hubbard was evidence that Hubbard and Henderson traveled south from Citrus together, Hubbard suggested that Henderson probably just left his phone in the car Henderson was driving. 23RP 2770-71.

After relating Hubbard's statements, Detective Hughey testified that the cell phone records indicated that Henderson's phone was being used for both incoming and outgoing calls during the time that the records indicated that Hubbard's phone was moving south. 23RP 2771-72. Although the inference that Hubbard's statement to police was false is clear, Hughey did not "assert that Kevin [Hubbard] was lying," as Hubbard claims. Brief of Appellant at 27.

Defense counsel objected in advance to Detective Hughey's testimony about the cell phone records on grounds that Hughey was not a qualified expert on these matters. 16RP 1995-2010. Following the State's offer of proof, the trial court repeatedly attempted to elicit from defense counsel exactly what testimony required expertise. 16RP 1998, 2000, 2774. Defense counsel argued that an expert was required to testify about "how pings work and their accuracy." 16RP 2000. The State clarified that it was not

offering any evidence about "pinging," which is "real time GPS cell phone stuff. That's not what's happening here." 16RP 2001. Rather, the State explained, the evidence to be adduced was "literally the cell phone data from the cell phone data company ... which gives you the cell site that the phone hit at a specific time and then the location of all those cell sites." 16RP 2001. Given the cell phone records and a map, the jury could do the same thing on its own. 16RP 2002. The State further pointed out that defense counsel "is welcome to cross-examine Detective Hughey that this data doesn't tell him how close to the tower that person was, how far from the tower that person was, just that that is the tower that the person was hitting, and all other things being equal, you hit the closest tower within eyesight to your phone." 16RP 2001. Though somewhat concerned about the blue or purple lines that Google automatically generated on the maps, the trial court agreed that expert testimony was unnecessary:

> Well, as to the locations of those towers, that's clearly shown on what I think are marked Exhibits 75 and 76, which I – and so simply typing that into a map feature or ... something like Google maps is something that anyone can do and I don't think takes expertise. And simply reflecting what time those towers were used in relation to a cell phone call again I don't think takes any expertise.

> It's just based on – not to diminish Detective Hughey's role in creating that, but that's just data entry is really all I see that as. And so I'm concerned about the purple line, but if that line can be simply explained as, hey, that's the only way that I could create this map on Google maps, and if there's not an objection to that specifically, then I don't think I have a problem with the exhibits.

16RP 2007-08. Defense counsel reiterated his objection to "all of it" and was overruled. 16RP 2008-10.

Defense counsel objected again when Detective Hughey was asked how the cell phone records compared to Henderson's version of events. 23RP 2772. The State responded that Hughey would simply be pointing out places on the map, including the Citrus Lounge, the apartments at which Henderson said Hubbard had dropped him off, and Tacoma. 23RP 2773. Defense counsel argued that the maps already included "all sorts of things," like Federal Way, Kent, Burien, White Center, and Rainier Beach, and the jury did not need Detective Hughey to point anything else out on the map. 23RP 2774. Counsel argued that the State was improperly attempting to elicit testimony about where Hubbard and Henderson were based on the cell phone towers their phones activated. 23RP 2774-75. The State explained:

> [N]ow that Mr. Hubbard's statement has been offered in and where he said he was at particular

> times, I'm going to have the detective point out on those maps where the defendant indicated he was, through his statement to police, at particular times, in conjunction with the cell tower records.
>
> And still, Detective Hughey is not going to be able to say, "This is where Mr. Hubbard was according to the phone tower records," but certainly the jury should be able to take a look at the cell tower records in conjunction with the defendant's statements and make that determination on their own, whether or not they believe Mr. Hubbard.

23RP 2776. In response to the trial court's concern whether the records, which did not establish Hubbard's exact location, were really relevant to impeach Hubbard's statement about where he was, the State further explained:

> Because the cell tower records, while they can't tell you where someone specifically is, they can tell you where someone likely was not. And that's exactly what we're doing here with Mr. Hubbard. Hubbard is saying that he left the Citrus Club and drove straight to Tacoma. And on the same maps that the jury has [for] context, I would like Detective Hughey to point out where Tacoma is and what time [Hubbard] said he got there, so that they can judge for themselves, based on the circumstantial evidence of the cell tower records, whether or not they believe the defendant.

23RP 2777. The trial court again concluded that no expert testimony was necessary, stating, "I don't think that takes any expertise, other than just a familiarity of addresses and locations, to mark those on a map. And so I'll allow it." 23RP 2783.

Following that discussion, Detective Hughey used the maps to point out Henderson's apartment, the Citrus Lounge, and Tacoma. 23RP 2783-84. Defense counsel did not cross examine Detective Hughey about the cell phone records.

c. No Evidence Required Expert Testimony.

Hubbard relies on ER 701 and 702 to argue that Detective Hughey was improperly permitted to give opinion testimony. Because the testimony of which Hubbard complains called for neither opinion nor expert explanation, this Court should reject the claim.

Evidence Rule 702 establishes when expert testimony is admissible:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702. The rule says nothing about when expert testimony is required.

Hubbard contends that expert testimony was necessary with respect to "the highly technical matter of cellular tower location analysis," and asserts that Detective Hughey was not qualified to

testify about whether or why a cell phone's signal would hit certain cell towers and not others. Brief of Appellant at 25. But there is no evidence that Hughey performed any kind of "analysis." Rather, all the detective did was plot the information from the cell phone records on a map. The properly-admitted records contained all of the information Hughey conveyed to the jury – when the call was placed, the cell tower it used upon the initiation of the call, the duration of the call, the cell tower used upon completion of the call, and the location of each cell tower. 20RP 2507-08, 2511, 2518-19. The fact that Hughey used Google to create a map to depict some of the same information visually does not require the testimony of an expert. And since all the information used to create the demonstrative exhibit was contained in the phone records previously admitted, the accuracy of the map was completely verifiable.

Hubbard asserts that Detective Hughey's testimony "consisted of conclusory and speculative lay opinions, which were lacking an adequate foundation and should not have been admitted." Brief of Appellant at 26. But Hubbard does not identify any such conclusory or speculative opinion. Presumably, Hubbard is referring to testimony he claims Hughey gave about where

Hubbard's and Henderson's cell phones were located at certain times. But Hughey was clear that the records could not show the phones' locations at all. 20RP 2523. Hubbard may also be referring to his assertion that Hughey "used the cell tower analysis to assert that Kevin [Hubbard] was lying." Brief of Appellant at 27 (citing 23RP 2772, 2780-84). But Hughey never opined that Hubbard was lying, and although the State so argued in closing, that inference was supported by both the cell phone records and by Henderson's testimony.

Hubbard cites United States v. Harrell, 751 F.3d 1235 (11th Cir. 2014) for the proposition that cell tower evidence "has generally been viewed as" requiring expert testimony. Brief of Appellant at 26. But the Harrell court expressly declined to address that issue, and cited just two decisions that came to contradictory conclusions on it. Id. at 1243 ("We need not, in this case, decide whether a witness who is going to testify as Detective Jacobs did must qualify as an expert"). Rather, the issue was whether, having tendered the detective as an expert witness, the government adequately established by a preponderance of the evidence that the detective was indeed qualified as an expert. Id. Because the government had not carried that burden, the trial court abused its discretion in

allowing the detective to testify as an expert. Id. Nevertheless, the court determined that the error was harmless in light of a co-defendant's testimony that Harrell participated in the crimes and the co-defendant's identification of Harrell in videos taken during the crimes. 751 F.3d at 1243-44.

Hubbard also cites United States v. Yeley-Davis, 632 F.3d 673 (10th Cir. 2011), for the proposition that a law enforcement officer's testimony about how cell towers work constitutes expert testimony. Careful reading of that case reveals that the testimony at issue there differs substantially from the testimony presented in this case. In Yeley-Davis, the agent testified that cell phone towers sometimes assign phones different telephone numbers for out-of-area calls to explain an apparent discrepancy in the records. Id. at 683-84. The court held that this was expert testimony because it involved specialized knowledge not readily accessible to any ordinary person. Id. at 684. The trial court abused its discretion because it failed to make necessary findings on the record about whether the agent was qualified as an expert. Id. at 685.

Unlike the agent in Yeley-Davis, Detective Hughey did not testify about how cell towers work. He merely plotted the location of the towers on a map along with the time each tower was

activated. The Yeley-Davis court implicitly acknowledged that this sort of data may be conveyed without expert testimony. In concluding that the error was harmless in that case, the court noted that the expert testimony about how towers change telephone numbers pertained to only three of 87 calls the agent had compiled. Id. at 685. Presumably, the error was harmless because records of the other 84 calls were properly admitted without expert testimony.

More similar is United States v. Feliciano, 300 Fed. Appx. 795 (11th Cir. 2008). There, a detective was permitted to testify about the location of cell towers in order to establish that one person's call to another did not originate at a point near the arrest location. Id. at 801. The court rejected the claim that such evidence requires expert testimony where the detective "simply reviewed the cellular telephone records and a summary of those calls, which identified cellular towers for each call, and based on his personal knowledge concerning the locations of certain cellular towers, testified that, at the time of the call, Manny Ortega's cellular telephone was nowhere near the arrest location." Id. See also Perez v. State, 980 So.2d 1126 (Fla. App. 3d Dist.) ("This testimony constituted general background information interpreting the cell phone records which did not require expert testimony...[the

information in the record also was] sufficient for each juror to determine the location of the tower without the need for expert testimony"), rev. denied, 994 So.2d 305 (2008), cert. denied, 556 U.S. 1132 (2009).

Here, the evidence related by Detective Hughey was similar to that approved in Feliciano. Unlike in Feliciano, however, Hughey did not give his opinion about where Hubbard's cell phone was or was not at any particular time.

Although ER 702 may have permitted expert testimony about cell tower locations in this case, the question is whether the nature of this evidence required that an expert testify. The trial court repeatedly ruled that an expert was not required. Under the facts here, the defendant cannot show that no reasonable judge would have so ruled. There was no abuse of discretion.

3. THE TRIAL COURT PROPERLY EXCLUDED "OTHER SUSPECT" EVIDENCE.

Hubbard contends that the trial court erred by precluding him from presenting evidence of another suspect, Daunte Williams ("Li'l Hev"). Because Hubbard failed to demonstrate facts and circumstances that clearly point to Williams as the guilty party, the trial court was within its discretion to exclude the evidence.

a. Standard of Review.

The decision to admit or refuse evidence lies within the trial court's sound discretion, and its decision will not be reversed absent an abuse of discretion. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). "An abuse of discretion exists only where no reasonable person would take the position adopted by the trial court." Id. (citing State v. Huelett, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979)).

Evidentiary error is grounds for reversal only if it results in prejudice. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Such error is prejudicial if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. Id.

b. Evidence Concerning "Li'l Hev" Williams.

During his first interview with Detective Hughey, victim Zealand Adams described the events leading up to the shooting and stated that he was unsure who shot him. CP 8. In a later interview, Adams informed Hughey that he had subsequently heard "on the street" that the shooter was someone who went by the name "Li'l Hev." CP 9. Hughey knew Li'l Hev to be Daunte Williams and showed Adams a single photo of Williams (not a

montage). CP 9. Adams stated, "after some thought, he thought that he recognized this suspect as one of the two shooters and that the person was 'Lil Hev.'" CP 9.

Daniel and Khris Wilson told Detective Hughey that they had also heard "from friends" that Li'l Hev was the shooter. CP 9. Hughey showed each of them a montage that included Williams' photo. CP 9. Khris did not recognize anyone from the montage, but Daniel believed that Williams had been at the Citrus Lounge on the night of the shooting. CP 9. Contrary to repeated assertions in the Brief of Appellant, there is no evidence that Khris stated that Li'l Hev was at the Citrus Lounge or that anyone stated that Li'l Hev was involved in the fighting there.[8]

As part of his investigation, Detective Hughey interviewed Williams. CP 10. Williams denied being in Seattle on the night of the shooting and said that he had been with his girlfriend at her home all night. CP 10. Williams provided the girlfriend's contact information so Hughey could confirm his alibi. CP 10. Williams

[8] Hubbard cites two sources in the record to support this claim. Brief of Appellant at 30. He cites to Detective Hughey's case investigation report, in which Hughey relates that Khris Wilson did not recognize a picture of Williams in a montage. CP 9. The report does not indicate that anyone said that Williams had been involved in the fight at the club. CP 9. Hubbard also cites to a portion of the pretrial discussion of the State's motion to preclude other suspect evidence in which defense counsel asserts that "one of the Wilson brothers says, 'Oh, yeah, he was here and he was fighting.'" 2RP 231. Defense counsel provides no source for that assertion, which is inconsistent with the investigation report.

gave reasons for why he remembered where he was on that specific weekend and invited Hughey to check his cell phone records. CP 10. These records, which Hughey obtained with a warrant, provided GPS data indicating that Williams' phone was in Tukwila during the time of the shooting. CP 10. A second phone belonging to Williams had no GPS data during the time of the shooting. CP 10.

In addition to this evidence, Hubbard claims that "the defense offer of proof indicated that that the confidential informant, from whom much evidence was produced at trial, had also indicated that 'Lil Hev' was the shooter. 2RP 230-31." Brief of Appellant at 32. The cited pages of the record contain no such offer of proof. Defense counsel did later state, "And you actually even have the informant talking about Little Hev. If you read the interview transcript ... which I'd provided, he's talked about it too. So it's not like there's not other evidence that can potentially come in." 2RP 232. It is unclear from this offer of proof what the CI said about Li'l Hev.

Finding no offer of proof that established that Li'l Hev had taken any step indicating an intention to commit the crime, the trial court granted the State's motion to disallow other suspect evidence.

2RP 230-34. The court invited defense counsel to raise the issue again if counsel could produce any evidence to support it. 2RP 234. Defense counsel never raised the issue again.

c. Hubbard Did Not Provide An Adequate Foundation For "Other Suspect" Evidence.

Criminal defendants have a constitutional right to present a defense consisting of relevant, admissible evidence. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). The burden is on the defendant to show that evidence implicating another suspect should be admitted. State v. Mezquia, 129 Wn. App. 118, 124, 118 P.3d 378 (2005) (citing State v. Pacheco, 107 Wn.2d 59, 67, 726 P.2d 981 (1986)). The evidence must tend to clearly point to someone besides the defendant as the guilty party. State v. Russell, 125 Wn.2d 24, 77, 882 P.2d 747 (1994); State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932). Evidence establishing nothing more than suspicion that another person might have committed the crime is inadmissible. State v. Franklin, 180 Wn.2d 371, 380, 325 P.3d 159 (2014). The evidence must establish a nexus between the other suspect and the crime. State v. Condon, 72 Wn. App. 638, 647, 865 P.2d 521 (1993). Mere opportunity to commit the crime is not enough. State v. Thomas, 150 Wn.2d 821,

857, 83 P.3d 970 (2004). Neither is motive, "unless coupled with other evidence tending to connect such other person with the actual commission of the crime charged." State v. Kwan, 174 Wash. 528, 532-33, 25 P.2d 104 (1933). Thus, "[n]ot only must there be a showing that the third party had the ability to place him or herself at the scene of the crime, there must also be some step taken by the third party that indicates an intention to act on that ability." Rehak, 67 Wn. App. at 163.

In Pacheco, the defendant sought to admit evidence about an alternative suspect who resembled Pacheco and had been questioned by police in connection with the crime. 107 Wn.2d at 61. But the evidence showed that the alternative suspect had been in a Minnesota jail when the crime occurred. Id. Our supreme court affirmed the trial court's exclusion of the other suspect evidence, which it concluded was "particularly irrelevant and immaterial to the issue of misidentification," since the look-alike could not have committed the crime. Id. at 67.

Likewise, in Mezquia, the trial court precluded the defense from presenting evidence suggesting that the victim's ex-boyfriend (Jenkins) was the guilty party, including: (1) victim Zapata was angry about Jenkins' new relationship, (2) she expressed extreme

anger and frustration toward him prior to her death, (3) she was looking for Jenkins that evening, (4) Jenkins called Zapata's roommate the next morning and when told she might be in the shower responded that the person in the shower probably wasn't Zapata, and (5) a friend of Zapata's said Zapata told her Jenkins sometimes went "crazy" and had attacked her in the past. 129 Wn. App. at 123-24. This Court held that the trial court did not abuse its discretion by excluding the evidence pointing to Jenkins because "[t]here was no physical evidence connecting Jenkins to the crime. There was no evidence that Zapata had contact with Jenkins after she left [a friend's] apartment. Nor was there any evidence that Jenkins had the opportunity or a motive to commit the crime." Id. at 125-26.

Similarly here, there is no evidence that clearly points to Williams as the shooter. Although Adams and the Wilson brothers had heard street rumors that Li'l Hev was the shooter, there was evidence that Li'l Hev had an alibi and was not in the area at the time of the shooting.[9] After being shown a single picture of Li'l Hev during his second interview, and "after some thought," Adams also

[9] Hubbard argues that the defense could explain this evidence away by suggesting that Li'l Hev's "phones had been carried by someone else." Brief of Appellant at 31. There is no evidentiary support for this speculation.

told Hughey that "he thought he recognized [Li'l Hev] as one of the two shooters." CP 9. But before he heard street rumors about Williams, Adams did not know who shot him. CP 8. In any event, since Adams did not testify at trial, his prior out-of-court statements were inadmissible hearsay. ER 801, 802.

As in Pacheco, the evidence indicated that Williams was not in the area at the time of the crime. 107 Wn.2d at 67-68. As in Mezquia, there was no physical evidence connecting Williams to the crime and no evidence that he had the motive or opportunity to commit it.[10] 129 Wn. App. at 125-26. At best, the defense proffer would establish the *possibility* that Williams committed the crime. But absent some showing that Williams was at the scene and intended to act on that ability, the theoretical possibility that he committed the crime does not meet the foundational requirements for other suspect evidence. See Rehak, 67 Wn. App. at 163. The trial court did not err in excluding the evidence.

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[10] Hubbard argues that as a minor participant in the fight at the Citrus Lounge, he "had no more apparent or explainable motive for the shootings that was any different than Mr. Williams." Brief of Appellant at 32. But of course, Hubbard was involved in the fight at the club and was punched by someone on his way out. 14RP 1752; 23RP 2764-66. In contrast, there is no evidence that Williams was involved in the fight at all (even if he was at the club, which is inconsistent with the evidence from his cell phone records). There is no factual support for the assertion that Williams had as much motive as Hubbard.

d. State v. Franklin Does Not Dictate Reversal.

Our supreme court addressed the foundational requirements for other suspect evidence recently in State v. Franklin, 180 Wn.2d 371, 325 P.3d 159 (2014). In that case, the trial court excluded Franklin's proffered evidence that his live-in girlfriend committed the cyberstalking crimes against Franklin's other girlfriend with which he was charged. Id. at 372. There was evidence that the live-in girlfriend had the motive, means, and a prior history of sending threatening emails to the victim. Id. The trial court excluded the evidence after expressly considering both the strength of the evidence against the defendant and the foundation for the proffered other suspect evidence. Id. at 377. The Franklin court held that consideration of the strength of the State's case against the defendant in determining whether to admit other suspect evidence is unconstitutional. Id. at 378, 381-82 (relying on Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)).

Franklin does not control here because there is no indication that the trial court considered the strength of the State's case against Hubbard in deciding to exclude the other suspect evidence. Rather, the court focused on the twin foundational requirements articulated in Rehak and concluded there was no evidence to

establish that Williams took any step reflecting an intention to commit the crime. 2RP 230-32. The court invited Hubbard to raise the issue again if he could produce such evidence, but Hubbard never did.

e. Conclusion.

Because Hubbard failed to meet the foundational requirements for admitting other suspect evidence, the trial court properly excluded it. There was no abuse of discretion. This Court should affirm.

4. THE ACCOMPLICE LIABILITY INSTRUCTION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Hubbard contends that the trial court erred by instructing the jury on accomplice liability because there was insufficient evidence to convict him under that theory. Because the evidence established that Hubbard either fired the AK-47 at the three victims or aided Henderson in doing so, the accomplice liability instruction was appropriate.

a. Standard of Review.

Each party is entitled to have the jury instructed on its theory of the case if there is sufficient evidence to support that theory. State v. Williams, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997).

Appellate courts review a trial court's decision to give a particular instruction for an abuse of discretion. State v. Chase, 134 Wn. App. 792, 803, 142 P.3d 630 (2006). When determining whether the evidence was sufficient to justify the instruction, appellate courts must view the evidence in the light most favorable to the party that requested the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

b. The Accomplice Liability Instruction Was Appropriate.

A person is guilty as an accomplice to a crime only if he "solicits, commands, encourages, or requests" another person to commit the crime or "aids or agrees to aid such other person in planning or committing it" with "knowledge that it will promote or facilitate the commission of the crime." RCW 9A.08.030(3)(a)(i), (ii). Hubbard argues that there was no evidence that he aided or encouraged anyone to shoot Adams, Wilson, and Bone. Hubbard's argument relies on a misunderstanding of the evidence and should be rejected.

Hubbard focuses on the FHCRC security video of the shooting, pointing out that one of the two men ran away when the other began firing. Brief of Appellant at 34-35. He argues that if he

was the person who ran away, then there is no evidence that he aided or encouraged another in committing the shooting. Because there is no evidence to support the suggestion that Hubbard was the person who ran away, his claim fails.

As Hubbard correctly concedes, the security video shows that the shooter was the driver of the Lexus sedan and the passenger was the person who ran away. Brief of Appellant at 37; 20RP 2489-90, 2499-2500; Ex. 17. The only evidence was that Hubbard was the driver; there is no suggestion in the record that he might have been the passenger.[11] Hubbard admitted that he had driven the white Lexus both to and from the club and did not mention Henderson driving the car. 23RP 2763-64, 2766. Henderson also testified that Hubbard was the driver and the shooter. 14RP 1755, 1766. In addition, Henderson viewed the security video for the first time during trial, and identified himself getting out of the passenger side of the Lexus and Hubbard getting out of the driver's seat. 14RP 1818. Henderson also testified that he was wearing a sweater with a black body and white sleeves on the night of the shooting. 14RP 1740. The security video shows

[11] Hubbard suggests that the State's theory of accomplice liability was that Hubbard was the passenger in the security videos. Brief of Appellant at 38. That was not the State's theory. The State never deviated from its position that Hubbard was the driver in the security videos. See 24RP 2921-23.

that the passenger "clearly has white long sleeves and a black vest, or a black chest." 20RP 2500; Ex. 17. Henderson's testimony was consistent with his statements to Detective Hughey and the CI. 21RP 2639-42; 14RP 1785; Ex. 57.

Thus, even if it was Henderson who pulled the trigger, Hubbard encouraged and aided in the commission of the crime by driving Henderson to and from the scene and lying in wait with him for the victims. 15RP 1879; 17RP 1764, 20RP 2491. Further, the security video shows the passenger swinging his arms as he walks from the car to the bushes, indicating that he was not likely carrying a large, two-handed firearm. Ex. 17; 20RP 2502.[12] Since Henderson was the passenger, he was not carrying the gun from the car. Therefore, even if Henderson was the shooter, Hubbard, the driver, must have handed him the gun.

Viewed in the light most favorable to the State, the evidence established that Hubbard was either the shooter or the person who drove the shooter to and from the crime scene, supplied the weapon, and hid in the bushes with the shooter. It is not necessary to show that he directed "the number of shots fired or the aiming of the gun." Brief of Appellant at 37. The evidence was sufficient to

[12] The detective's testimony about the passenger swinging his arms was stricken, but that movement is apparent in the video. 20RP 2502; Ex. 17.

show that Hubbard, at a minimum, "associate[d] himself with the undertaking, participate[d] in it as something he desire[d] to bring about, and [sought] by his action to make it succeed." State v. Amezola, 49 Wn. App. 78, 89, 741 P.2d 1024 (1987). The trial court did not abuse its discretion by instructing the jury on the theory of accomplice liability.

5. ASSAULT IN THE FIRST DEGREE IS NOT A LESSER INCLUDED OFFENSE OF ATTEMPTED MURDER IN THE FIRST DEGREE.

Hubbard contends that the trial court erred in refusing to instruct the jury on Assault in the First Degree as a lesser offense of Attempted Murder in the First Degree. Because first degree assault is not a necessarily included offense of Attempted Murder in the First Degree, the trial court correctly concluded that Hubbard was not entitled to the instruction, but not for the right reason.

A defendant is entitled to an instruction on a lesser included offense only if two conditions are met. "First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed." State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978) (internal citations omitted). "Stated differently, if it is possible to commit the greater

offense without committing the lesser offense, the latter is not an included crime." State v. Harris, 121 Wn.2d 317, 320, 849 P.2d 1216 (1993)

Here, the trial court ruled that Hubbard was not entitled to an instruction on first-degree assault because "it's not a lesser degree offense[.]" 22RP 2706. While the terms "lesser included offense" and "inferior degree offense" are often used interchangeably, they are not the same thing. State v. Tamalini, 134 Wn.2d 725, 731-32, 953 P.2d 450 (1998). The right to a lesser included offense instruction is rooted in a statute that permits a jury to find the accused guilty of a crime not charged if it is "an offense the commission of which is necessarily included within that with which he is charged in the indictment or information." RCW 10.61.006. A different statute provides that a criminal defendant may also be convicted of a crime that is an inferior degree of the crime charged. RCW 10.61.003. The tests for when instructions on lesser included or inferior degree offenses are appropriate also differ. Tamalini, 134 Wn.2d at 732. It appears that the trial court assumed that Assault in the First Degree must qualify as an inferior degree offense, and applied that test rather than the test for necessarily

included offenses.[13] Although the trial court applied the wrong test, it came to the right result. This Court may affirm a lower court's ruling on any grounds adequately supported by the record. State v. Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

In Harris, our supreme court held that assault is not a lesser included offense of attempted murder because the legal prong of the Workman test was unmet. 121 Wn.2d at 321. As charged in both that case and this one, the elements of attempted murder include: (1) intent to cause death, and (2) a substantial step toward the commission of that crime. RCW 9A.32.030(1)(a), 9A.28.020(1); CP 216-18. The elements of first degree assault include: (1) intent to inflict great bodily harm, and (2) assault of another with a weapon or by force likely to produce great bodily harm or death. RCW 9A.36.011(1)(a). The court observed that "one may take a substantial step toward committing murder – may lie in wait, for example – without ever assaulting the victim." Harris, 121 Wn.2d 321. Although Workman's factual prong was satisfied in that case, the court concluded that "[b]ecause the legal prong of the Workman

[13] A defendant is entitled to an instruction on an inferior degree offense when: (1) the statutes for both the charged offense and the proposed inferior degree offense proscribe but one offense; (2) the information charges an offense that is divided into degrees and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that only the lesser offense was committed. Tamalini, 134 Wn.2d at 732.

test is not met, assault is not a lesser included offense of attempted murder." Id.

Hubbard acknowledges Harris, and suggests the trial court adopted the same reasoning, but argues that Harris has been overruled by subsequent decisions of our supreme court. Brief of Appellant at 46. Hubbard argues that in State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997), our supreme court repudiated the test it employed in Harris as an incorrect application of Workman. He characterizes Berlin as having held that Workman's legal prong "requires that a court determine simply whether the potential assault is an included offense of attempted murder as charged and prosecuted in the case before it." Brief of Appellant at 48. Under Hubbard's reading of Berlin, first degree assault is a lesser included offense of attempted murder in this case because, by firing 30 rounds at Adams, Wilson, and Bone, Hubbard necessarily committed first degree assault.

In State v. Boswell, Division Two recently rejected the identical argument as "based on a misreading of Berlin, a misapplication of the law our Supreme Court articulated in Berlin, and a conflation of the two prongs of the Workman test." __ Wn.

App. __, 340 P.3d 971, 978 (December 30, 2014). This Court should adopt Division Two's well-reasoned analysis:

> In Berlin, the defendant was charged with second degree murder with intentional murder and felony murder charged as alternative means. 133 Wn.2d at 550, 947 P.2d 700. Our Supreme Court held that manslaughter can be a lesser included offense of second degree murder. Berlin, 133 Wn.2d at 551, 947 P.2d 700. In doing so, the court reaffirmed its adherence to the Workman test and clarified the application of the legal prong of the test. Berlin, 133 Wn.2d at 548, 550–51, 947 P.2d 700.
>
> The court explained that under the legal prong of the Workman test, the court examines the statutory elements of the crime charged, not the statute as a whole. Berlin, 133 Wn.2d at 548, 947 P.2d 700. However, this clarification is relevant only so far as the statute under which the defendant is charged presents alternative means of committing the crime. Berlin, 133 Wn.2d at 548, 947 P.2d 700. Therefore, the rule under Berlin is that when a defendant is charged with an alternative means crime, the court determines whether a lesser included offense instruction is appropriate based on the alternative means charged, not the statute as a whole. 133 Wn.2d at 550, 947 P.2d 700 ("We emphasize that both the statutory language of RCW 10.61.006 and the language of Workman necessitate that we examine the elements of the offense charged"). Attempt is not an alternative means crime. Therefore, the clarification articulated in Berlin does not apply. Berlin does not change or undermine the analysis employed by our Supreme Court in Harris.

> Furthermore, nothing in Berlin stands for the proposition that we are required to examine the elements of the offense based on the alleged facts supporting the charge. Rather, Berlin is clear—when examining the legal prong of the Workman test we look at the statutory elements of the crime to determine whether each element of the lesser offense is a necessary element of the charged offense. 133 Wn.2d at 550–51, 947 P.2d 700. We do not examine the facts underlying the charge unless we reach the factual prong of the Workman test. Berlin, 133 Wn.2d at 551, 947 P.2d 700. Accordingly, contrary to Boswell's assertion, there is nothing in Berlin that supports deviating from the rule or analysis articulated by our Supreme Court in Harris. We hold that the trial court did not err in refusing to instruct the jury on third degree assault as a lesser included offense to attempted murder.

Boswell, 340 P.3d at 978.

Harris remains good law, is indistinguishable from this case, and controls the outcome here. Because it is possible to commit Attempted Murder in the First Degree without committing an assault, Assault in the First Degree is not a lesser included offense. The trial court correctly refused to give the instruction. This Court should affirm.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Hubbard's convictions for Attempted Murder in the First Degree.

DATED this 20th day of February, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
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Deputy Prosecuting Attorney
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Appendix

The State of Washington v Kevin Hubbard
King County Cause No. 12-1-03903-4

Date: 10/22/13

Judge: Ken Schubert
Bailiff: Tikecha Pearson
Court Clerk: Suza Bone/Marcella Guzman

Digital Record: W941

Continued from: 10/21/13

MINUTE ENTRY

Defendant and respective counsel present. Jury absent.

9:14:43 Defense motion and argument to suppress hearsay testimony from witness.
State's Exhibit 57.....ID ONLY

9:28:01 Recess

9:35:09 Resume. Jury absent. Witness James Henderson present with counsel, Juanita Holmes. Exhibit 57 played for witness identification.

9:36:36 Court admonishes spectators regarding personal recording of witness testimony. James Henderson sworn and examined on behalf of State
State's Exhibit 58,59.....ADMITTED

10:40:26 Jury absent. Defense objection to State's line of questioning. Court lets previous ruling stand. Argument regarding indentification of defendant.

10:52:06 Defense Motion for Mistrial-DENIED. Recess

11:20:28 Resume. Direct examination of James Henderson continues
State's Exhibit 60.....ID ONLY
State's Exhibit 61.....ADMITTED

11:39:53 Cross examination

12:00:14 Recess

1:37:06 Resume. Jury absent. Oral argument regarding testimony of prior statements. Defense Renewed Motion for Mistrial-DENIED. Defense request

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Oliver Davis (oliver@washapp.org), the attorney for the appellant, Kevin Hubbard, containing a copy of the Brief of Respondent, in State v. Hubbard, Cause No. 71449-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name
Done in Seattle, Washington

02/20/15
Date