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No. 70148-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

RONALD RICHARD BROWN,

Appellant.

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

APPELLANT'S OPENING BRIEF

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 DEC 23 PM 4:56

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A. SUMMARY OF ARGUMENT

Ethan Mattox and Jeff Brinkley, who lived on the property of Louis and Susan Munson in Marysville, robbed Kenny Easley and stole cash and other personal property Mr. Easley was carrying that belonged to Ronald Brown. That evening, Mr. Brown and several other individuals entered the Munsons' home at gunpoint and waited there, with the Munsons, for Mr. Mattox and Mr. Brinkley to return so that they could retrieve Mr. Brown's property. During the incident, several of the participants stole items belonging to the Munsons, despite Mr. Brown's repeated instructions not to take anything belonging to them.

Mr. Brown's convictions for first degree kidnapping and first degree robbery of the Munsons must be reversed because the jury was instructed on alternative means of committing the crimes that were not alleged in the information. In addition, the convictions for second degree assault must be vacated because they merged into the convictions for first degree kidnapping and first degree robbery. Finally, the State did not prove Mr. Brown committed robbery of the Munsons because the State did not present any evidence that he intended to steal from them.

B. ASSIGNMENTS OF ERROR

1. Mr. Brown's constitutional right to notice was violated when the jury was instructed on alternative means of committing first degree kidnapping that were not alleged in the information.

2. Mr. Brown's constitutional right to notice was violated when the jury was instructed on an alternative means of committing first degree robbery that was not alleged in the information.

3. To the extent the error in the robbery "to convict" instruction was invited by defense counsel, Mr. Brown received ineffective assistance of counsel.

4. The court erred in finding the assaults, robberies, and kidnappings were all separate offenses.

5. The two convictions for assault violated Mr. Brown's constitutional right to be free from double jeopardy.

6. The State did not prove the elements of first degree robbery, in violation of constitutional due process.

7. The deputy prosecutor committed prejudicial misconduct by arguing the discredited theory of accomplice liability, "in for a penny, in for a pound," in closing argument.

8. To the extent Mr. Brown's right to challenge the prosecutor's improper argument was waived by defense counsel's failure to object, Mr. Brown received ineffective assistance of counsel.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In a criminal trial, a defendant's constitutional right to notice is violated if the jury is instructed on a statutory alternative means of committing the crime that is not alleged in the information. Was Mr. Brown's constitutional right to notice violated when the jury was instructed on alternative means of committing first degree kidnapping and first degree robbery that were not alleged in the information?

2. A defendant receives ineffective assistance of counsel if his attorney proposes, and the trial court provides, a "to convict" jury instruction that contains an uncharged alternative means. Did Mr. Brown receive ineffective assistance of counsel when his attorney proposed, and the trial court provided, a "to convict" jury instruction for first degree robbery that contained an uncharged alternative means?

3. An assault conviction "merges" into a first degree kidnapping or first degree robbery conviction if the purpose of the assault was to effectuate the other crime. Did Mr. Brown's assault convictions merge into the first degree kidnapping and first degree

robbery convictions where the purpose of the assaults was to effectuate the other crimes?

4. A defendant may be found guilty of a crime under an accomplice liability theory only if the State proves beyond a reasonable doubt that the defendant was ready to assist the principal in the crime and shared in the criminal intent of the principal. Did the State fail to prove Mr. Brown was guilty of first degree robbery as an accomplice, where he was not ready to assist in the crime and did not share the criminal intent of the principals?

5. The "in for a penny, in for a pound" theory of accomplice liability has been discredited in Washington courts and it is improper for a prosecutor to argue that theory before the jury. Did the prosecutor commit misconduct by arguing the "in for a penny, in for a pound" theory in closing argument?

6. A defendant's right to challenge prosecutorial misconduct in closing argument may be waived if defense counsel did not object to the improper argument. Did Mr. Brown receive ineffective assistance of counsel when his attorney failed to object to the prosecutor's improper argument about accomplice liability?

D. STATEMENT OF THE CASE

In December 2011, Louis "Chuck" Munson and his wife Susan Munson were living in a house in Marysville. 1/10/13RP 60. Mr. Munson's friend Ethan Mattox was also living on the property, in a trailer behind the house with his girlfriend. 1/10/13RP 61. In addition, Mr. Munson's friend Jeff Brinkley was staying at the house for a couple of days with his girlfriend. 1/10/13RP 61.

Both Mr. Mattox and Mr. Brinkley were engaged in selling methamphetamine. 1/10/13RP 75. People would come to the property to buy drugs from Mr. Mattox at all hours of the day or night. 1/10/13RP 75. This bothered Mr. Munson and he and Mr. Mattox argued about it. 1/10/13RP 77. Mr. Munson established a rule with Mr. Mattox that no one was to come to the property without telephoning first. 1/10/13RP 77.

Kenny Easley had been supplying methamphetamine to Mr. Mattox and Mr. Brinkley for months. 1/14/13RP 423. Sometimes he would provide them with methamphetamine and they would pay him back later, after they sold the drugs. 1/14/13RP 426. On December 1, 2011, Mr. Mattox and Mr. Brinkley called Mr. Easley and told him they had some money that they owed him. 1/14/13RP 428-29. Mr.

Easley placed some methamphetamine, cash and a gun in a safe in the trunk of his car and drove to the Munsons' house in Marysville that afternoon to collect the money. 1/14/13RP 429.

Mr. Easley knocked on the front door of the house and Ms. Munson answered. 1/14/13RP 284. Mr. Munson was in the basement with Mr. Mattox and Mr. Brinkley, cleaning some tools, and Ms. Munson told him that Kenny Easley was there. 1/10/13RP 80. Mr. Munson was angry that Mr. Easley had come to the house without calling first. 1/10/13RP 80-82. He and Mr. Mattox and Mr. Brinkley confronted Mr. Easley in the driveway. 1/10/13RP 82-83. They took him down to the basement, where they pointed a gun at him and took his car keys. Using the keys, they opened the trunk of his car and removed the safe. 1/14/13RP 434-36, 486-89. They opened the safe and removed $4,000 in cash, four ounces of methamphetamine, some heroin, and the gun. They also took $700 from Mr. Easley's wallet. 1/14/13RP 488-89.

Mr. Mattox and Mr. Brinkley drove Mr. Easley in his car to the house of a friend of his. 1/14/13RP 437, 494-95. They left him there but took his car, as well as the other items they had taken from him. 1/14/13RP 438.

The methamphetamine that was taken from Mr. Easley's safe belonged to Ronald Brown, who was Mr. Easley's regular methamphetamine supplier. 1/14/13RP 421-22, 440. Mr. Easley called Mr. Brown and told him what happened. He also called another friend of his, Mr. Johnson. 1/14/13RP 439. Mr. Easley told Mr. Brown and Mr. Johnson to gather some men and firearms and meet him at his father's house. 1/14/13RP 441-42. When everyone gathered at the house, they decided to return to the Munsons' with the firearms and try to get the money, drugs and Mr. Easley's car back. 1/14/13RP 442-43. They agreed that they needed to get the drugs and money back so that Mr. Easley would not become an easy "mark," which would be bad for business. 1/14/13RP 440, 445. They did not intend to harm the Munsons. 1/14/13RP 532. They called Mr. Mattox and Mr. Brinkley, who agreed to meet them at the Munsons' house. 1/14/13RP 444.

Meanwhile, Mr. Brinkley told Mr. Munson that he and Mr. Mattox had robbed Mr. Easley. 1/10/13RP 93. Mr. Munson was afraid because he knew Mr. Easley had friends and might decide to retaliate. 1/10/13RP 94.

Mr. Munson was home alone that night, as Ms. Munson had gone to a dinner party. 1/10/13RP 95-96. He was sitting in the living

room watching television when three cars containing several individuals drove into the driveway. 1/10/13RP 99-100. Mr. Munson saw that many of the individuals had guns and he did not want a confrontation, so he opened the door and allowed them to enter. 1/10/13RP 102-03. According to Mr. Munson, Mr. Brown was the first person to enter, carrying a shotgun. 1/10/13RP 105-06. Mr. Munson said Mr. Brown pointed the gun at him and had him walk backwards into the living room and sit down on the couch. 1/10/13RP 108. Mr. Munson did not feel that he could get up and leave. 1/10/13RP 108-09. Mr. Brown handed the shotgun to someone else and then sat down on the edge of the couch. 1/10/13RP 109.

All together, nine people entered the house or remained in the yard; many of them had guns. 1/10/13RP 114-16; 1/11/13RP 249. Mr. Brown and Mr. Easley seemed to be the leaders, as the others would periodically report to them as the evening wore on. 1/10/13RP 113-14; 1/14/13RP 317. Mr. Brown remained in the living room, perched on the edge of the couch, throughout the incident. 1/10/13RP 109; 1/14/13RP 307, 317. He did not have a gun. 1/14/13RP 308.

Mr. Brown repeatedly assured Mr. Munson that they were not there to hurt him but merely wanted Mr. Mattox and Mr. Brinkley to

return the property they had taken from Mr. Easley. 1/10/13RP 109, 114. Mr. Brown explained that some of the property was his. 1/10/13RP 114. Mr. Munson was told that if he could persuade Mr. Mattox and Mr. Brinkley to return to the house, the situation would be over. 1/10/13RP 118. Mr. Munson called Mr. Mattox and Mr. Brinkley several times, and they agreed to come to the house. 1/10/13RP 121-23; 1/14/13RP 451. Mr. Brown told Mr. Mattox and Mr. Brinkley on the phone that if they came to the house, the Munsons would be let go. 1/10/13RP 128. But Mr. Mattox and Mr. Brinkley never came to the house that night. 1/10/13RP 123, 133.

Soon, Ms. Munson returned home. 1/10/13RP 119-20. Mr. Easley went out to greet her, brought her into the house, and had her sit on the love seat in the living room. 1/10/13RP 119-20; 1/14/13RP 306. Mr. Brown told her they were not there to hurt her or Mr. Munson but merely wanted Mr. Mattox and Mr. Brinkley to return the items stolen from Mr. Easley. 1/10/13RP 120; 1/14/13RP 309, 455. Ms. Munson did not feel she could leave. 1/14/13RP 309.

During the incident, two of the participants took Mr. Munson's wallet, his watch, and the money in his pocket. 1/10/13RP 118. Other individuals rummaged through the Munsons' belongings in the back

rooms and took several items, including jewelry from Ms. Munson's jewelry box. 1/11/13RP 216, 220; 1/14/13RP 314. When Mr. Brown saw that the others were taking the Munsons' belongings, he told them to stop. He repeatedly reminded the others that they were not there to take anything from the Munsons but rather to recover the items that had been taken from Mr. Easley. 1/11/13RP 225, 228; 1/14/13RP 314. Mr. Brown himself did not take anything. 1/11/13RP 228. After the incident, he told the others to return the Munsons' belongings to them, although that was never done. 1/10/13RP 118; 1/16/13RP 775.

One of the participants, Mr. Fordham, was armed with an assault rifle. He pointed the gun at the Munsons several times and yelled at them. 1/10/13RP 116; 1/14/13RP 319. Mr. Fordham took Ms. Munson's address book and her daughter's picture from the wall and told the Munsons that if they ever told the police about the incident, their family would be killed. 1/10/13RP 122. Mr. Brown told the Munsons not to be afraid of Mr. Fordham. 1/10/13RP 122. No one else pointed a gun at the Munsons. 1/14/13RP 317-18.

After about four or five hours of waiting with no sign of Mr. Mattox or Mr. Brinkley, Mr. Easley's friend Patrick Buckmaster arrived at the house and apologized for being late. 1/10/13RP 138;

1/14/13RP 457. A few minutes later, a loud shotgun blast was heard in the hallway. 1/10/13RP 139; 1/14/13RP 459-60. One of the participants had accidentally shot Mr. Buckmaster in the head, killing him. 1/15/13RP 640-41. Upon hearing the shotgun blast, everyone but the Munsons fled from the house. 1/10/13RP 139. Mr. Fordham, who was the last to leave, pointed a gun at the Munsons on the way out and told them that if they moved or called the police, he would come back and kill them. 1/10/13RP 139.

Mr. Brown and Mr. Easley returned to the house that night, removed Mr. Buckmaster's body and buried it in a remote wooded area. 1/10/13RP 143; 1/14/13RP 463, 466-67. Over the next two days, they cleaned and remodeled the house to remove traces of the killing. 1/10/13RP 143, 146, 150-51; 1/14/13RP 469-72.

About one month later, Mr. Easley was stopped by police for an unrelated incident and told them what had happened at the Munsons'. 1/10/13RP 159-60. Eventually, eight people were arrested and charged, including Mr. Brown. 1/14/13RP 414. Mr. Brown was charged with two counts of first degree kidnapping, RCW 9A.40.020; two counts of first degree robbery, RCW 9A.56.200; two counts of second degree assault, RCW 9A.36.021(1)(c); and one count of first

degree burglary, RCW 9A.52.020, all with firearm enhancements. CP 925-26.

After a trial at which Mr. Brown was the only defendant, the jury found him guilty of all the substantive counts as well as the firearm enhancements. CP 92-107.

Additional facts are set forth in the relevant argument sections below.

E. ARGUMENT

1. **Mr. Brown's constitutional right to notice was violated when the jury was instructed on statutory alternative means of kidnapping and robbery that were not charged in the information**

It is a fundamental principle of criminal procedure, embodied in the state and federal constitutions, that a defendant in a criminal case must receive adequate notice of the nature and cause of the accusation. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); Const. art. I, § 22 ("[i]n criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him"); U.S. Const. amend. VI ("[i]n all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation").

In Washington, the well-established means of ensuring adequate notice is through application of the "essential elements rule." The essential elements rule requires that "[a]ll essential elements of a crime, statutory or otherwise, . . . be included in a charging document." Kjorsvik, 117 Wn.2d at 97. "The primary goal of the 'essential elements' rule is to give notice to an accused of the nature of the crime that he or she must be prepared to defend against." Id. at 101.

A necessary corollary to the constitutional requirement that an accused receive advance notice of the charge is the requirement that he be tried only for the offense charged. State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988) ("It is fundamental that under our state constitution an accused person must be informed of the criminal charge he or she is to meet at trial, and cannot be tried for an offense not charged.").

The constitutional right to advance notice of the charge includes the right to notice of the alleged means of committing the crime. In re Pers. Restraint of Brockie, 178 Wn.2d 532, 309 P.3d 498, 501 (2013). The Washington Supreme Court has "long held that it is error for a trial court to instruct the jury on uncharged alternative means." Id.; State v. Severns, 13 Wn.2d 542, 548, 125 P.2d 659 (1942). It is constitutional

error to instruct the jury on uncharged alternatives, regardless of the range of evidence admitted at trial. Severns, 13 Wn.2d at 548; State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988).

A jury instruction that includes a statutory alternative not charged in the information is a "manifest error affecting a constitutional right" that may be challenged for the first time on appeal. State v. Chino, 117 Wn. App. 531, 538, 72 P.3d 256 (2003); RAP 2.5(a)(3).

a. The jury was instructed on uncharged alternative means of first degree kidnapping, requiring reversal of those convictions

"Kidnapping in the first degree is a multiple means crime that may be proved in five alternative ways."[1] State v. Kosewicz, 174 Wn.2d 683, 688 n.1, 278 P.3d 184 (2012). The State may charge a defendant with one or more of the alternative means outlined in the

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[1] RCW 9A.40.020 provides:

> (1) A person is guilty of kidnapping in the first degree if he or she intentionally abducts another person with intent:
>
> (a) To hold him or her for ransom or reward, or as a shield or hostage; or
>
> (b) To facilitate commission of any felony or flight thereafter; or
>
> (c) To inflict bodily injury on him or her; or
>
> (d) To inflict extreme mental distress on him, her, or a third person; or
>
> (e) To interfere with the performance of any governmental function.

statute, but if the information lists only one alternative, it is error to instruct the jury that it may consider any of the other alternatives. Id.

Here, the information alleged two statutory alternative means of committing first degree kidnapping. Count I alleged in regard to Louis Munson:

> That the defendant, on or about the 1st day of December, 2011, did intentionally abduct a person, to-wit: L.M. (DOB 4/4/1961), **with intent to facilitate the commission of a felony and flight thereafter and inflict extreme mental distress on that person or a third person**.

CP 925 (emphasis added). Count II alleged the same two statutory alternatives in regard to Susan Munson. CP 925.

Yet the jury instructions allowed the jury to consider *three* alternative means of kidnapping, only one of which was alleged in the information. The "to convict" instruction for count I contained the following elements:

> (1) That on or about the 1st day of December, 2011, the defendant or an accomplice intentionally abducted Louis (Chuck) Munson,
>
> (2) That the defendant or an accomplice abducted that person with intent
>
> **(a) to hold the person for ransom or reward, or**
>
> **(b) to hold the person as a shield or hostage, or**
>
> **(c) to inflict extreme mental distress on that person or a third person,**
>
> (3) That any of these acts occurred in the State of Washington. . . .

CP 121 (emphasis added). The instruction was the same for count II, in regard to Susan Munson. CP 127.

Thus, a constitutional error occurred because the jury was instructed on alternative means of committing the crime that were not alleged in the information. Brockie, 309 P.3d at 501; Severns, 13 Wn.2d at 548.

The error is presumed prejudicial and the State bears the burden of proving it was harmless beyond a reasonable doubt. Brockie, 309 P.3d at 502; Bray, 52 Wn. App. at 34-36. An error in offering an uncharged alternative means as a basis for conviction is prejudicial and requires reversal if it is possible the jury convicted the defendant under the uncharged alternative. Severns, 13 Wn.2d at 549; State v. Laramie, 141 Wn. App. 332, 343, 169 P.3d 859 (2007).

Here, it is not only possible but likely that the jury convicted Mr. Brown under the uncharged alternatives. As stated, the "to convict" instructions informed the jury they could rely on the two uncharged alternatives. CP 121, 127. In addition, in closing argument, the deputy prosecutor urged the jury to find Mr. Brown guilty under any of the three alternatives contained in the "to convict" instruction. The prosecutor stated Mr. Brown and the other participants

> were holding Susan and Chuck ransom for their stuff. They were using them with the intent to use the fact that they were there to get Ethan and Jeff to come back and give them their stuff. You can use that and say that's a ransom, you can say it's a hostage situation. Either way. If you want to say, oh, it was their stuff, is it really a ransom? It's splitting hairs. They're both there.

1/18/13RP 984. The prosecutor also told the jury they could find Mr. Brown committed the crime with the intent "to inflict extreme mental distress on the person or a third person." 1/18/13RP 984-85. The prosecutor said the jury could "look at the impact on Chuck Munson, knowing that his wife is coming back and that he can't do anything about it because he's restrained from calling her and stopping her and the inflicting of mental distress on him in that situation." 1/18/13RP 984-85. The prosecutor said the jury could also "look at it from the perspective of Susan Munson as she's watching her husband going through the beginning stages of having yet another heart attack because of the craziness and everything that's going on, and she can't do anything about it without asking permission." 1/18/13RP 985.

Thus, because the jury probably relied on uncharged alternative means in convicting Mr. Brown of first degree kidnapping, those convictions must be reversed. Severns, 13 Wn.2d at 549; Laramie, 141 Wn. App. at 343. On remand, the "mandatory joinder rule" precludes

the State from amending the information to include the alternative means that were not originally charged, if Mr. Brown moves to dismiss the amended charge.[2] State v. Russell, 101 Wn.2d 349, 352-53, 678 P.2d 332 (1984); CrR 4.3.1(b)(3).

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[2] CrR 4.3.1(b)(3) provides:

> A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for consolidation of these offenses was previously denied or the right of consolidation was waived as provided in this rule. The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

Two offense are "related offenses" for purposes of the rule "if they are within the jurisdiction and venue of the same court and are based on the same conduct." CrR 4.3.1(b)(1). Statutory alternative means of committing the same crime are "related offenses" for purposes of the rule. Russell, 101 Wn.2d at 352.

b. The jury was instructed on an uncharged alternative means of first degree robbery, requiring reversal of those convictions

Like the crime of first degree kidnapping, first degree robbery is a multiple means crime that may be proved in several alternative ways.[3] Brockie, 309 P.3d at 500-01.

Here, the information alleged two alternative means of committing the crime. Count III, in regard to Mr. Munson, alleged:

> That the defendant, on or about the 1st day of December, 2011, with intent to commit theft, did unlawfully take personal property of another, to-wit: personal property including an address book and firearm, from the person or in the presence of L.M. (DOB 4/4/1961), against such person's will, by use or threatened use of immediate force, violence, and fear of injury to L.M., and **in the commission of said crime and in immediate flight therefrom, the defendant was armed with a deadly weapon and displayed what appeared to be a firearm or other deadly weapon.**

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[3] RCW 9A.56.200 provides:

(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; or

(ii) Displays what appears to be a firearm or other deadly weapon; or

(iii) Inflicts bodily injury; or

(b) He or she commits a robbery within and against a financial institution as defined in RCW 7.88.010 or 35.38.060.

CP 925 (emphasis added). Count IV, in regard to Susan Munson, was identical. CP 926.

Yet the jury was instructed it could find Mr. Brown guilty of the crime under any one of *three* alternative means. The "to convict" instruction contained the following elements:

> (1) That on or about the 1st day of December, 2011, the defendant or an accomplice unlawfully took personal property from the person or in the presence of Louis (Chuck) Munson;
>
> (2) That the defendant or an accomplice intended to commit theft of the property;
>
> (3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person;
>
> (4) That the force or fear was used by the defendant or an accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
>
> (5)(a) **That in the commission of these acts or in immediate flight therefrom the defendant or an accomplice was armed with a deadly weapon or**
>
> **(b) That in the commission of these acts or in the immediate flight therefrom the defendant displayed what appeared to be a firearm or other deadly weapon; or**
>
> **(c) That in the commission of these acts or in the immediate flight therefrom the defendant or an accomplice inflicted bodily injury**;
>
> (6) That any of these acts occurred in the State of Washington. . . .

CP 133-34 (emphasis added). The instruction in regard to count IV was identical. CP 135-36.

Thus, again, a constitutional error occurred because the jury was instructed on an alternative means that was not alleged in the information. Brockie, 309 P.3d at 501; Severns, 13 Wn.2d at 548.

Even though defense counsel proposed a "to convict" instruction for the robbery counts that contained the uncharged alternative means, CP 159-62, the invited error doctrine does not preclude review of this issue. Generally, the invited error doctrine precludes review of an instructional error, even one of constitutional magnitude, if the challenged instruction was proposed by the defendant. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996). The purpose of the doctrine is to prohibit a party from setting up an error at trial and then complaining about it on appeal. State v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002).

The invited error doctrine is not a bar to review of a claim of ineffective assistance of counsel. Doogan, 82 Wn. App. at 188. To prevail on a claim of ineffective assistance of counsel, Mr. Brown must show that counsel's conduct was deficient and that the conduct resulted in actual prejudice. State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722 (1986); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The Court presumes counsel's conduct

was not deficient. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The Court may not sustain a claim of ineffective assistance if there was a legitimate tactical reason for the allegedly incompetent act. Doogan, 82 Wn. App. at 189.

In Doogan, a similar error occurred. Defense counsel proposed a jury instruction containing an uncharged alternative means. Id. at 188. The Court concluded counsel's conduct was not tactical. The Court noted "the State had the opportunity to review the court's proposed instructions and could have pointed out the error before the instructions went to the jury." Id. There was no reason "to suppose that defense counsel's proposal of inadequate instructions was anything but inadvertent." Id.

The same conclusion applies here. The State proposed an instruction that was identical to the one proposed by defense counsel. Compare Sub #131 at 16-19 with CP 159-62. The court provided that instruction to the jury, after adding accomplice liability language. CP 133-36. As in Doogan, there is no reason to suppose counsel's conduct in proposing the inadequate instruction was anything but inadvertent.

To show prejudice, Mr. Brown must show there is a reasonable probability that, but for counsel's error, the result of the proceeding

would have been different. Doogan, 82 Wn. App. at 189. A reasonable probability is a probability sufficient to undermine confidence in the outcome. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987); Strickland, 466 U.S. at 694.

The error of offering an uncharged means as a basis for conviction is prejudicial for purposes of an ineffective assistance of counsel claim if it is possible the jury convicted the defendant under the uncharged alternative. Doogan, 82 Wn. App. at 189. Here, it is possible the jury relied on the uncharged alternative. Again, the uncharged alternative was contained in the "to convict" instruction, which stated the jury could find Mr. Brown guilty if they found he or an accomplice "inflicted bodily injury" in commission of the robbery or in the immediate flight therefrom. CP 133-36. In closing argument, the prosecutor argued the evidence supported the uncharged alternative because the shooting of Mr. Buckmaster "constitutes bodily injury." 1/18/13RP 987.

Under these circumstances, the Court cannot be confident that the error did not affect the outcome of the trial. Doogan, 82 Wn. App. at 190. The robbery convictions must be reversed. On remand, the

State may not amend the information to add the uncharged alternative if Mr. Brown objects. Russell, 101 Wn.2d at 352-53; CrR 4.3.1(b)(3).

2. Convicting Mr. Brown of two counts of second degree assault violated his constitutional right to be free from double jeopardy because the assaults "merged" into the kidnapping and robbery counts

State and federal constitutional protections against double jeopardy prohibit multiple punishments for the same offense. State v. Vladovic, 99 Wn.2d 413, 422, 662 P.2d 852 (1983); Albernaz v. United States, 450 U.S. 333, 343-44, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981); Const. art. I, § 9; U.S. Const. amend V. A court entering multiple convictions for the same offense violates double jeopardy. State v. Freeman, 153 Wn.2d 765, 770-71, 108 P.3d 753 (2005). The Legislature has the power to define offenses and thus whether two offenses are separate offenses hinges upon whether the Legislature intended them to be separate. See id. at 771-72.

In deciding whether two offenses are separate offenses, the Court views the offenses as they were charged. In re Pers. Restraint of Francis, 170 Wn.2d 517, 523-24, 242 P.3d 866 (2010). The Court does not consider the elements of the offenses in the abstract; that is, the Court does not consider all the ways in which the State could have

charged an element of an offense, but rather how the State actually charged the offense. Id. "The State has great latitude and discretion when it chooses what it will charge a defendant. But once the State has charged the defendant, short of a timely amendment, the State is stuck with what it chose." Id. at 527.

The proper interpretation and application of the Double Jeopardy Clause is a question of law reviewed de novo. Id. at 523.

a. The second degree assault and first degree robbery of each victim was a single offense

In Freeman, the Washington Supreme Court concluded the Legislature did not intend to punish second degree assault separately from first degree robbery when the assault facilitated the robbery. Freeman, 153 Wn.2d at 776. This was affirmed in State v. Kier, 164 Wn.2d 798, 805, 194 P.3d 212 (2008) ("we are persuaded that Freeman correctly analyzed the robbery and assault statutes at issue to conclude that second degree assault merges into first degree robbery").

Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the Legislature, the Court presumes the Legislature intended to punish both offenses through a greater sentence for the greater crime. Freeman, 153 Wn.2d at 772-73.

Thus, if an assault elevates the degree of robbery, the two offenses are the same for double jeopardy purposes. Id. at 774. "Under the merger rule, assault committed in furtherance of a robbery merges with robbery." Id. at 778.

The general definition of robbery requires the taking of property by the use or threatened use of immediate force, violence, or fear of injury to a person or his property, or the person or property of anyone. RCW 9A.56.190. A person is guilty of first degree robbery if he is armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon during the commission of the robbery or in immediate flight therefrom. RCW 9A.56.200(1)(a)(i), (ii).

A person commits the crime of second degree assault if he assaults another with a deadly weapon. RCW 9A.36.021(1)(c). One common law definition of assault involves putting another in apprehension or fear of harm, regardless of whether the actor intended to inflict or was incapable of inflicting such harm. Kier, 164 Wn.2d at 806.

Thus, when the State charges first degree robbery and second degree assault under these two definitions, the State must prove for both crimes that the defendant created a reasonable apprehension or

fear of harm. Id. at 807. If the means of creating that apprehension or fear was the defendant's being armed with or displaying a deadly weapon, then the assault will merge into the robbery because the assault is necessary to elevate the robbery to the first degree. Id. "The merger doctrine is triggered when second degree assault with a deadly weapon elevates robbery to the first degree because being armed with or displaying a firearm or deadly weapon to take property through force or fear is essential to the elevation." Kier, 164 Wn.2d at 806.

An exception to the merger doctrine applies when "there is a separate injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element." Freeman, 153 Wn.2d at 778 (internal quotation marks and citation omitted). For example, if the defendant struck the victim *after* completing a robbery, there was a separate injury and intent justifying a separate assault conviction, especially since the assault did not further the robbery. Id. But this exception does not apply merely because the defendant used *more* violence than was necessary to accomplish the crime. Id. at 779. The test is whether the unnecessary force had a purpose or effect independent of the crime. Id. Whether violence used to complete a robbery had some other and

independent purpose or effect is often incidental to a robbery and may not support an additional charge unless the jury expressly found the assault had a separate purpose. Id.

The determination of whether two offenses are the same is made on a case by case basis. Id. at 780.

In State v. Kier, Kier pointed his gun at a driver and passenger in a car and had them get out of the car; he and his accomplices then drove away with the car. 164 Wn.2d at 802-03. Kier was convicted of first degree robbery under RCW 9A.56.200(1)(a)(i)-(ii), which required proof that he was armed with a deadly weapon or displayed what appeared to be a deadly weapon during commission of the robbery. Id. at 805. He was also convicted of second degree assault under RCW 9A.36.021(1)(c), which required proof that he assaulted another with a deadly weapon. Id. at 806. The jury was instructed on the common law definition of assault that involves putting another in apprehension or fear of harm, regardless of whether the actor intends to inflict or is incapable of inflicting such harm. Id. The court concluded the assault merged into the robbery because "the completed assault was necessary to elevate the completed robbery to first degree." Id. at 807. The

assault had no purpose or effect other than to effectuate the carjacking. Id. at 814.

As in Kier, Mr. Brown was charged with first degree robbery under RCW 9A.56.200(1)(a)(i)-(ii), which required proof that he was armed with a deadly weapon or displayed what appeared to be a deadly weapon during commission of a robbery. Id. at 805; CP 925-26. Also as in Kier, Mr. Brown was charged with second degree assault under RCW 9A.36.021(1)(c), which required proof that he assaulted another with a deadly weapon. Kier, 164 Wn.2d at 806; CP 925-26. The jury was instructed on the common law definition of assault that involves putting another in apprehension or fear of harm, regardless of whether the actor intends to inflict or is incapable of inflicting such harm. Id.; CP 139.

As in Kier, the assaults merged into the robberies because "the completed assault was necessary to elevate the completed robbery to first degree." Id. at 807. The assaults, which were committed when Mr. Brown or his accomplices displayed what appeared to be firearms to the Munsons during the incident, had no purpose or effect other than to effectuate the robberies and the kidnappings.

At sentencing, the trial court found the assault occurred when Mr. Fordham pointed his gun at the Munsons as he was leaving the house and told them that he would kill them if they called the police. 3/12/13RP 10. The court found the robbery was already completed by that time because it "occurred in a relatively short period of time when the wallet and the jewelry were taken." 3/12/13RP 11. The court found the assault was separate from the robbery because the purpose of the assault was "to prevent the Munsons from reporting the crimes to the police." 3/12/13RP 10.

The court's conclusion is erroneous because it contradicts the transactional theory of robbery that governs in this state. Washington courts apply the "transactional" analysis of robbery, which provides that the force or threat of force used to accomplish a robbery need not precisely coincide with the taking. State v. Truong, 168 Wn. App. 529, 277 P.3d 74, 77, review denied, 175 Wn.2d 1020, 277 P.3d 74 (2012). The taking is ongoing until the assailant has effected an escape. Id. "[R]egardless of whether force was used to obtain property, force used to retain the stolen property or to effect an escape can satisfy the force element of robbery." Id. The definition of robbery thus includes violence during flight following the taking. Id.

Here, Mr. Fordham pointed his gun at the Munsons as he was leaving the house in order to effect an escape. The robbery was not completed until everyone had fled from the house. Id. Therefore, the force Mr. Fordham used when he pointed his gun at the Munsons was part of the force used to commit the robbery and did not amount to a separate offense. Id.

Moreover, there was no jury finding that the assaults had a separate purpose or effect from the robberies, which would be necessary in order to avoid merger of the offenses. Freeman, 153 Wn.2d at 779. Under the rule of lenity, any ambiguity in the jury's verdict must be resolved in favor of Mr. Brown. Kier, 164 Wn.2d at 811. This Court must assume the jury found the force used to effectuate the assaults was the same as the force used to effectuate the robberies.

The remedy for a double jeopardy violation is to vacate the offending conviction. Francis, 170 Wn.2d at 531. The two assault convictions must be vacated.

b. The second degree assault and first degree kidnapping of each victim was a single offense

Like the crime of first degree robbery, the crime of kidnapping involves the use or threatened use of deadly force. To prove the crime of kidnapping—whether in the first or second degree—the State must prove the defendant "intentionally abduct[ed] another person." RCW 9A.40.020, .030. "Abduct" means "to restrain a person by either (a) secreting or holding him or her in a place where he or she is not likely to be found, or (b) using or threatening to use deadly force." RCW 9A.40.010(1). "Restrain" means "to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty." RCW 9A.40.010(6). Thus, one means of abducting a person, and thereby committing the crime of kidnapping, is to restrain the person by "using or threatening to use deadly force." RCW 9A.40.010(1).

A person commits the lesser crime of unlawful imprisonment if he or she knowingly restrains another person. RCW 9A.40.040(1). Thus, if a person uses or threatens to use deadly force to restrain another person, he or she is guilty of kidnapping, but if the restraint is accomplished without the use of such force, the result is the lesser

crime of unlawful imprisonment. RCW 9A.40.040(1); RCW 9A.40.020, .030.

In some cases, an assault with a deadly weapon can constitute the use or threatened use of deadly force that raises unlawful imprisonment to kidnapping. State v. Davis, __ Wn. App. __, 311 P.3d 1278, 1283 (2013). In that circumstance, the defendant may not be separately convicted of second degree assault without violating the Double Jeopardy Clause. Id.

In Davis, Davis and two co-defendants, while repossessing two cars owned by the same family, forced the driver and a passenger of one of the cars to get out at gunpoint and take them to the other car. Id. at 1280. Davis was convicted of two counts of second degree kidnapping and two counts of second degree assault with a deadly weapon. Id. The Court concluded that the assaults were the same offenses as the kidnappings for double jeopardy purposes. Id. at 1282-84. In order to prove the crime of kidnapping, the State had to prove Davis restrained the individuals by means of a deadly weapon. Id. Davis's use of the deadly weapon also constituted the crime of second degree assault. Id. If the State had not proved Davis committed the crime of second degree assault with a deadly weapon, he could have

been convicted only of the lesser crime of unlawful imprisonment. Id. Therefore, under the merger doctrine as set forth in Freeman, the assaults merged into the kidnappings. Id. The firearms were used to stop the car and effectuate the kidnapping and had no independent purpose or effect. Id.

As in Davis, Mr. Brown's two second degree assault convictions merged into his kidnapping convictions. To prove first degree kidnapping as charged, the State was required to prove Mr. Brown restrained the Munsons "by using or threatening to use deadly force." RCW 9A.40.020; RCW 9A.40.010(1); CP 123. According to the evidence presented, the use or threatened use of deadly force was the display of firearms. Yet Mr. Brown's or his accomplices' display of firearms also constituted the crime of second degree assault with a deadly weapon. The use of force had no independent purpose or effect other than to effectuate the kidnappings and the robberies. Therefore, the assaults and the kidnappings were the same for double jeopardy purposes. Davis, 311 P.3d at 1282-84.

The assault convictions must be vacated. Francis, 170 Wn.2d at 531.

3. The State did not prove the elements of first degree robbery beyond a reasonable doubt

To prove the charges of first degree robbery, the State was required to prove Mr. Brown or an accomplice "unlawfully took personal property from the person or in the presence" of Louis and Susan Munson, with the intent to commit theft of the property. CP 133-36; RCW 9A.56.190. There was no evidence that Mr. Brown took any property from the Munsons. Therefore, the State bore the burden of proving Mr. Brown was guilty of the crime as an accomplice.

Constitutional due process required the State to prove every element of the charged offense beyond a reasonable doubt.[4] Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (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 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

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[4] In reviewing the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a 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); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

another person to commit the crime; or (2) aids or agrees to aid another person in planning or committing the crime." CP 120; RCW 9A.08.020(3).

It is well-established that "the crime" for purposes of the accomplice liability statute means "the charged offense." State v. Roberts, 142 Wn.2d 471, 510-11, 14 P.3d 713 (2000); see also State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). Thus, the accomplice must "have the purpose to promote or facilitate *the particular conduct that forms the basis for the charge*" and "*will not be liable for conduct that does not fall within this purpose*." Id. (internal quotation marks and citation omitted). In other words, a person cannot be liable as an accomplice "for any criminal result that occurred so long as the accomplice agreed to participate in any crime whatsoever." Roberts, 142 Wn.2d at 511. Knowledge that the principal intends to commit "a crime" does not impose strict liability on an accomplice for any and all offenses that follow. Id. at 513.

A person is not guilty as an accomplice unless he "associates himself with the venture and takes some action to help make it successful." Truong, 168 Wn. App. at 79. The State must prove "the defendant was ready to assist the principal in the crime and that he

shared in the criminal intent of the principal, thus demonstrating a community of unlawful purpose at the time the act was committed." Id. "Mere presence of the defendant without aiding the principal—despite knowledge of the ongoing criminal activity—is not sufficient to establish accomplice liability." Id.

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. "To prove that one present is an aider, it must be established that one is ready to assist in the commission of the crime." State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981); 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." Wilson, 91 Wn.2d at 491. 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 Supreme Court reversed Wilson's conviction as an accomplice, explaining that, "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 (emphasis added).

Here, in regard to the robberies, Mr. Brown was no more than a bystander who did not share the intent of the principals. He did not "share[] in the criminal intent" of those participants who stole the Munsons' belongings. Truong, 168 Wn. App. at 79. Mr. Brown had no intent to steal from the Munsons. To the contrary, he repeatedly told the others not to take their belongings. 1/11/13RP 225, 228; 1/14/13RP 314. After the incident, he instructed the others to return the Munsons' belongings to them. 1/10/13RP 118; 1/16/13RP 775. Even if Mr. Brown's presence encouraged the others to commit the robberies, that was not sufficient to establish his liability as an accomplice. Wilson, 91 Wn.2d at 491-92. Mr. Brown's agreement to participate in the kidnappings did not mean he was liable as an accomplice for any criminal result that followed. Roberts, 142 Wn.2d at 511-13. There was no evidence that he associated himself with the robberies or took action to help make them successful. Truong, 168 Wn. App. at 79.

Therefore, he could not be held liable for those crimes. The robbery convictions must be reversed and the charges dismissed.

4. The prosecutor committed flagrant, ill-intentioned and prejudicial misconduct in closing argument by urging the jury to apply the discredited theory of accomplice liability, "in for a penny, in for a pound"

The prosecutor's improper statements in closing argument encouraged the jury to enter convictions for the robberies that were not warranted by the evidence. In addressing the lack of evidence that Mr. Brown intended to steal from the Munsons, the prosecutor told the jury that Mr. Brown was liable for the robberies as an accomplice simply because he participated in the other crimes. 1/18/13RP 990-91. The prosecutor stated that, for example, if a person and his friend commit an assault and the friend steals something from the victim during the assault, the first person is an accomplice to robbery even if he had no intent to steal. The prosecutor elaborated, "in for a penny, in for a pound." Id. The prosecutor's argument misstated the theory of accomplice liability and contravened well-established case law. It was flagrant and ill-intentioned. In addition, because the evidence supporting the robbery convictions was minimal, the argument prejudiced the outcome and warrants reversal.

In Cronin, the deputy prosecutor argued Cronin was guilty as an accomplice to murder even if he intended only to facilitate an assault. 142 Wn.2d at 577. The prosecutor argued the theory of accomplice liability could be summed up as: "in for a dime, in for a dollar." Id. The Supreme Court held the argument was improper because the State must prove beyond a reasonable doubt the accomplice intended to facilitate the particular conduct that forms the basis of the charge. Id. at 58-81; Roberts, 142 Wn.2d at 511. The statement "in for a dime, in for a dollar" is misleading because it wrongly implies that once one agrees to participate in a criminal undertaking, one is liable for any criminal result that follows. Id.

In State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), during closing argument, the prosecutor stated that in order to find the defendants not guilty of the crime, the jury had to find either that the victim lied or that she was mistaken. The Court held the comments were improper because they misrepresented both the role of the jury and the burden of proof. Id. The jury did not have to find the victim lied in order to acquit; instead, the jury "was *required* to acquit *unless* it had an abiding conviction in the truth of her testimony." Id. In other words, if the jury was unsure whether the victim was telling

the truth, or if it was unsure of her ability to recall and recount what happened, it was required to acquit. Id.

The Court held the prosecutor's comments were flagrant and ill-intentioned because they contravened established case law. Id. at 214. In frustration, the Court explained, "[t]his court has repeatedly held that it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken." Id. at 213 (citing State v. Casteneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991); State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995); State v. Barrow, 60 Wn. App. 869, 874-75, 809 P.2d 209 (1991)). The improper argument was made over two years after the Court's published opinion in Casteneda-Perez. Id. at 214. The Court "therefore deem[ed] it to be a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial." Id. In other words, the prosecutor knew better. If a prosecutor continues to engage in tactics that the Court has clearly and repeatedly held are improper, the prosecutor's conduct must be deemed flagrant and ill-intentioned. Id.

The prosecutor's improper argument here was made 13 years after the Supreme Court held in Cronin and Roberts that such argument

was improper. The prosecutor was certainly on notice and the argument was, therefore, flagrant and ill-intentioned. Fleming, 83 Wn. App. at 214.

To establish reversible prosecutorial misconduct, the defendant must show the improper comments resulted in prejudice that had a substantial likelihood of affecting the verdict. State v. Emery, 174 Wn.2d 741, 759-61, 278 P.3d 653 (2012). If the defendant did not object at trial, he is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. Id. Under this standard, the defendant must show (1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict. Id.

Here, there was no evidence that Mr. Brown took any items belonging to the Munsons or that he intended to take anything. In fact, he repeatedly told the other participants *not* to take anything of the Munsons'. 1/11/13RP 225, 228; 1/14/13P 314. The evidence that Mr. Brown was guilty of the robberies as either a principal or an accomplice was negligible. It is likely the prosecutor's improper

argument influenced the jury to find Mr. Brown was guilty of the robberies simply because he participated in the other crimes. It is likely, therefore, that the prosecutor's improper argument affected the verdict.

To the extent the State might argue that Mr. Brown waived his right to challenge the prosecutor's improper argument because defense counsel did not object at trial, Mr. Brown received ineffective assistance of counsel. To establish ineffective assistance of counsel, Mr. Brown must show that counsel's conduct was deficient and the conduct resulted in actual prejudice. Jeffries, 105 Wn.2d at 418; Strickland, 466 U.S. at 687.

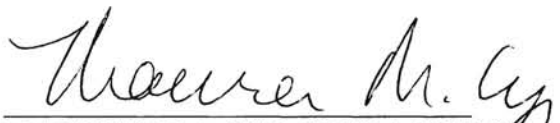
There can be no legitimate tactical reason for counsel's failure to object to the improper argument where it so broadly increased the chances of conviction on an improper theory of liability. The argument likely influenced the outcome of the case because the evidence of Mr. Brown's guilt for the robberies, either as a principal or an accomplice, was minimal. The improper argument encouraged the jury to conclude—wrongly—that Mr. Brown could be held liable for the robberies simply because he willingly participated in the other crimes.

Therefore, counsel's failure to object to the argument was deficient and prejudicial and the convictions must be reversed.

F. CONCLUSION

The jury was instructed on alternative means of committing first degree kidnapping and first degree robbery that were not charged, requiring reversal of those convictions. Also, the second degree assaults merged into the robberies and the kidnappings, requiring that the assault convictions be vacated. The State did not prove beyond a reasonable doubt that Mr. Brown committed the robberies, requiring that those convictions be vacated and the charges dismissed. In the alternative, the deputy prosecutor committed prejudicial misconduct by arguing Mr. Brown was "in for a penny, in for a pound," requiring the robbery convictions be reversed and remanded for a new trial.

Respectfully submitted this 23rd day of December, 2013.



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Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent/Cross-appellant,	)	
	)	NO. 70148-7-I
	)	
	)	
RONALD BROWN,	)	
	)	
Appellant-Cross-respondent.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF DECEMBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X]	RONALD BROWN 299428 WSP 1313 N 13TH AVE WALLA WALLA, WA 969362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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