COA No. 46425-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SOY OEUNG,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY

The Honorable Thomas J. Felnagle

APPELLANT'S OPENING BRIEF

OLIVER R. DAVIS
Attorney for Appellant Soy Oeung

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

CONSTITUTIONAL PROVISIONS

UNITED STATES SUPREME COURT CASES

UNITED STATES COURT OF APPEALS CASES

STATUTES AND COURT RULES

A. SUMMARY OF APPEAL

Soy Oeung was wrongly convicted and sentenced to 417 months in prison following a trial on charges of conspiracy, burglary, two counts robbery, two counts assault, two counts unlawful imprisonment, theft of a firearm, and trafficking in stolen property. At the urging of her boyfriend, co-appellant Azias Ross, and his compatriots, Ms Oeung had knocked on the door of a home in the Tacoma area and spoke briefly with a homeowner; some time later, two male perpetrators entered the home and committed the serious crimes listed above, victimizing the man and also a second person, his wife, who was discovered to be inside. However, there was insufficient proof that Soy Oeung had agreed to any criminal conspiracy, or any conspiracy to commit anything more than residential burglary. The proof was also inadequate to establish that Soy Oeung was guilty of the offenses by accomplice liability, much less that she knew of another person inside that would support the *second* counts of robbery, imprisonment and assault, or that she had any knowledge the perpetrators were bringing a firearm with them. In addition, by evidence and argument, the State secured verdicts on the first degree offenses of burglary and robbery (elevated by a firearm), the theft of a firearm,

and the firearm enhancements, by offering the jurors several different possible firearm-like devices to choose from and upon which to base their verdicts, including two supposed guns from inside the home itself -- one that was missing after the burglary, and another that was found inside its case moved to a different area of the home after the burglary. There was no unanimity instruction, nor any election in closing argument. Further, the evidence on at least one of the three alleged "firearms" – regarding whether they met the statutory definition at RCW 9.41.010, or whether a perpetrator(s) was "armed" with them, was not overwhelming, and in fact was highly controverted, creating constitutional error that is not harmless beyond a reasonable doubt.

B. ASSIGNMENTS OF ERROR

1. The first degree convictions for burglary and two counts robbery must be reversed for insufficient evidence, where the defendant's right to unanimity was violated.

2. The conviction for theft of a firearm must be reversed for insufficient evidence, where the defendant's right to unanimity was violated.

3. The judgments entered on the firearm enhancements must be reversed, where the evidence was insufficient and the defendant's right to unanimity was violated.

4. The convictions for conspiracy to commit burglary and robbery are not supported by sufficient evidence, including under the *corpus delicti* rule.

5. The convictions for conspiracy must be reversed for insufficient evidence, where the defendant's right to unanimity was violated.

6. The convictions for robbery, assault, unlawful imprisonment, and theft of a firearm must be reversed for insufficient evidence of accomplice liability

7. There was insufficient evidence to prove the firearm enhancements, by the absence of knowledge and nexus.

8. The jury instructions for the firearm enhancements were erroneous and were comments on the evidence, requiring reversal.

9. The trial court erred in ruling that Ms,. Oeung had presented no legally cognizable basis for an exceptional sentence.

10 .The sentencing court violated Ms. Oeung's constitutional Double Jeopardy protections.

11. The two convictions for robbery and the two convictions for unlawful imprisonment were the same criminal conduct.

12. The burglary count and the two robbery counts were the same criminal conduct.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Unanimity error is assessed based on the entire presentation of the case, including the evidence, and argument. In trial, the State introduced evidence of three devices claimed to be firearms – an alleged gun brought to the scene by one of the burglary perpetrators, and two alleged guns the burglars found inside the house, one which was missing after the incident, and the other which was moved to a different room. There was no unanimity instruction, and the prosecutor made no election in closing argument as to which firearm the jury should rely on for its verdicts on the elevating element of burglary and robbery. The evidence was insufficient, and certainly not overwhelming, and was controverted, as to whether at least one of the devices were actually "firearms" under RCW 9.41.010(1). Where the presence of evidence, even sufficient evidence, cannot cure a unanimity error,

must the first degree convictions for burglary and two counts robbery be reversed under State v. Petrich?[1]

2. For the same reasons, the conviction for theft of a firearm must be reversed for insufficient evidence, or where the defendant's right to unanimity was violated and the error was not harmless because the evidence was controverted.

3. For the same reasons, the judgments entered on the firearm enhancements must be reversed, where the evidence was insufficient and, at a minimum, the defendant's right to unanimity was violated and the errors were not harmless.

4. Are the convictions for conspiracy supported by sufficient evidence, including under the *corpus delicti* rule, which limits consideration of the defendant's post-crime statements?

5. Must the convictions for conspiracy be reversed where the defendant's right to unanimity was violated, because the prosecutor placed multiple alleged instances of agreement before the jury, and did not elect one in closing argument, and the evidence as to at least one of the claimed agreements was controverted?

6. Must the convictions for robbery, assault, unlawful imprisonment, and theft of a firearm be reversed for insufficient

---

[1] State v. Petrich, 101 Wn.2d 566, 569-70, 683 P.2d 173 (1984).

evidence of accomplice liability, where there was no evidence that Soy Oeung knowingly provided assistance to the commission of those offenses?

7. Was there was insufficient evidence to prove the enhancements, without proof of knowledge the perpetrators were armed, or proof of a nexus as to the conspiracy?

8. Were the jury instructions for the firearm enhancements erroneous, and violative of the rule prohibiting judicial comments on the evidence, as to require reversal?

9. Did the trial court err as a matter of law in ruling that Ms. Oeung had presented no legally cognizable basis for an exceptional sentence? Is reversal required where the court, several times, expressed its wish that there was a legally cognizable basis for a downward departure?

10 . Did the sentencing court violate Ms. Oeung's Double Jeopardy protections where it failed to vacate the two assault convictions after determining they violated Double Jeopardy when paired with the robbery counts, and when the second verdict for conspiracy, although not punished, was left standing?

11. Where the two convictions for robbery and the two convictions for unlawful imprisonment each shared the same victim,

time, and place, and the intent was the same, were they the same criminal conduct?

12. Where the conviction for burglary and the two convictions for unlawful imprisonment shared the same victim, time, and place, and the intent was the same, were the robberies the same criminal conduct?

D. STATEMENT OF THE CASE

1. Charging. Between January 25, 2012 and August 26, 2012, two perpetrators allegedly committed seven burglaries of residences in the Tacoma area. CP 6. The majority of the burglaries escalated into robberies and other offenses when individuals were present in the homes. CP 6-8. The Pierce County Prosecuting Attorney ultimately charged Nolan Chouap and Azariah Ross ("Azariah") with being the perpetrators, alleging several scores of counts arising from the incidents. CP 6-10 (affidavit of probable cause). CP 6-10.

Three other persons were also charged as allegedly having a range of involvement. Azariah Ross's younger brother, co-appellant Azias Ross, was alleged to have been a driver of a car in a few of the incidents, and was charged with a score of various offenses including conspiracy, burglary, robbery, assault, unlawful

imprisonment, theft of a firearm, and trafficking, most elevated to the first degree by the perpetrators having a deadly weapon(s) (firearm or knife), along with attached enhancements. CP 471-82 (information in Pierce County 12-1-03305-8).

Alicia Ngo, allegedly also a driver, was charged with similar counts arising from the burglaries of April 27, May 10, June 9, and June 29. See information in Pierce County 12-1-03301-5. According to the affidavit, Ngo drove the vehicle that transported Azariah Ross and Nolan Chouap to the residences in those incidents. In addition, from that vehicle, she allegedly communicated and coordinated with Chouap and Azariah Ross after they entered the homes, using walkie-talkies.[2] CP 6-10.

Soy Oeung, age 21, was the girlfriend of co-appellant Azias Ross. She was charged for conduct occurring on the day of the May 10 burglary by Azariah Ross and Nolan Chouap of the Fernandez home, on Ainsworth Street. CP 1-5. According to the affidavit of probable cause Ms. Oeung was paid $200 to knock on the door of the house, where she asked for "John." When a single individual, Mr. Fernandez, appeared and said there was no John

[2] The charges against Alicia Ngo were later dismissed because the State determined there was insufficient evidence to proceed. 1/10/14RP at 223-24.

there, Ms. Oeung returned to a blue sedan, which then left the area. Approximately two hours later, two men, later identified as Azariah Ross and Nolan Chouap, burgled the residence and, finding two persons inside, allegedly committed robbery, assault, unlawful imprisonment, and theft of a firearm. CP 7-9.

Ms. Oeung was charged with conspiracy to commit first degree burglary and/or first degree robbery (while armed with a deadly weapon: firearm); first degree burglary (while similarly armed with a firearm), first degree robbery of Mr. Fernandez (while armed with a firearm); first degree robbery of Mrs. Fernandez (while armed with a firearm); assault in the second degree [Mr. Fernandez] (while armed with a firearm); assault in the second degree [Mrs. Fernandez] (while armed with a firearm); unlawful imprisonment [Mr. Fernandez] (while armed with a firearm); unlawful imprisonment [Mrs. Fernandez] (while armed with a firearm); theft of a firearm; and trafficking in stolen property in the first degree (while armed with a firearm). CP 75-79 (amended information).[3]

[3] The counts of first degree burglary, two counts first degree robbery, and two counts second degree assault were charged in those degrees because they were allegedly committed while armed with, or in the case of the assaults, committed with, a deadly weapon. CP 75-79.

The charges against Azias Ross and Soy Oeung were tried together. Trial had commenced with Nolan Chouap as a co-defendant, but he plead guilty mid-trial. 2/12/14RP at 1600, 2/24/14RP at 1623-43.

2. Arrest and interrogation. Police officers investigating the string of burglaries obtained receipts indicating that Azariah Ross, Azias Ross, and Alicia Ngo had pawned numerous items of expensive jewelry and gold around the time of the incidents. CP 9. Many of the items were among those stated by the burglary victims to have been taken from their homes. CP 9. In addition, most of the victims were able to identify Nolan Chouap from photomontages; the other male perpetrator frequently wore a bandana over his face. CP 9.

All five of the named individuals, including Soy Oeung, were spotted in two cars and arrested on August 27, 2012, immediately after an August 26 burglary, which was several months removed the May 10 incident in which Soy Oeung was alleged to have been involved. CP 8. Chouap, Azariah Ross, Alicia Ngo, and Azias Ross had large amounts of cash on them. CP 8. Nolan Chouap also had large amounts of jewelry on him. CP 8. Soy Oeung had nothing.

During interrogation, Azariah Ross allegedly admitted to committing robbery on January 25, April 27, and August 26, 2012; he did not state anything about any involvement of Soy Oeung. CP 9. Nolan Chouap stated he had gone into three or four houses, and said that he chose them at random, but some of the burglaries were "failures" because the homeowners had come home. CP 9; 2/11/14RP at 120, 122, 125-26. A woman compatriot, Alicia Ngo, would talk on walkie-talkies with the other perpetrator, Azariah Ross, who was with Chouap, including in an incident where Ngo went to a Jack-in-the-Box restaurant during the burglary. 2/11/14RP at 147. Chouap occasionally, but not always, carried a snub-nose .38 revolver, he did not own any handgun with a "laser sight" as some of the victims stated they had seen. 2/11/14RP at 147-48. Nolan Chouap did not say anything about any involvement of Soy Oeung. 2/11/14RP at 120-49.

Azias Ross, Soy Oeung's boyfriend, allegedly confessed to committing robbery on various dates; he also stated he had driven the main perpetrators, sometimes also with Alicia Ngo, in other robberies, and said that he later sold some gold and other property they had obtained. 2/11/14RP at 153-59. In one incident, Alicia Ngo knocked on the door before the burglary. 2/11/14RP at 160-

61. Chouap and Azariah Ross later told Azias and Ngo that they had confronted somebody in a residence. 2/11/14RP at 163.

Beginning on May 9, 2012, Azias Ross was in jail on misdemeanor charges; he and Soy Oeung spoke on the telephone. 2/26/14RP at 2092-93.

3. Trial. Tacoma police detective Robert Baker testified regarding his interrogation of Soy Oeung, after she was swept up in the arrests of the perpetrators. Ms. Oeung initially denied being involved with Azariah Ross and Alicia Ngo, but then admitted she had been "requested" by other individuals to knock on a house's door on May 10. She stated the individuals said they would "give her money" for doing so. 2/11/14RP at 89-91. Prior to the May 10 incident, Ms. Oeung had been at her mother's home on 76th Street. Then, with Alicia Ngo driving, she, Azariah, and another person left in a blue Dodge Stratus owned by Azariah's mother. The group then asked Ms. Oeung to knock on the door of a house and ask for someone. An elderly man answered and said the person was not there, and Ms. Oeung returned to the back seat of the vehicle. 2/11/14RP at 91-95. They then drove around for about half an hour, and after that time had passed, Alicia Ngo parked about 6 blocks away, and Azariah and the other man exited, telling them to

wait because "they were going to check out a couple houses." 2/11/14RP at 93-95.

As far as what the two men were going to do, Oeung stated, "They said they were going to get something, or whatever;" Oeung later said to the detective that this meant "they were going to take stuff." 2/11/14RP at 95. The two women drove to a Jack-in-the-Box restaurant for a burger, and then sometime after, they drove back near the house, and sat in the car while Alicia Ngo was texting some unknown person and also communicating with Azariah Ross and the other man via a walkie-talkie. 2/11/14RP at 96-97.

The two women seemed to be waiting in the car a long time, and Alicia Ngo said on the walkie-talkie, "What are you guys doing?," and then drove to pick them up. 2/11/14RP at 97-99. The men were carrying backpacks. Alicia Ngo drove the car to Azariah Ross's mother's home, and Ms. Oeung was given $200 dollars, which she thought came from the backpacks. Although she did not see the men going through the backpacks, it looked like they had jewelry and cash. 2/11/14RP at 99-102.

Ms. Oeung was not involved in any other incidents. 2/11/14RP at 102. She stated that she "had heard Azariah Ross and the other individual state that they had come up several times."

2/11/14RP at 102. Detective Baker asserted that the slang phrase "come up" meant that one "obtained either money or property through a robbery or a burglary." 2/11/14RP at 103. The detective admitted that Soy Oeung did not state she had any knowledge of guns, or that there was going to be a robbery in the Ainsworth Street house. 2/11/14RP at 233.

Mr. and Mrs. Fernandez, the couple that owned the Ainsworth Street home, did not identify Ms. Oeung in court. Mr. Remegio Fernandez stated that a woman knocked on the door of his home on May 10, and asked for someone named "John." 1/30/14RP at 944. 949-53. When Mr. Fernandez told her through the nearby window that John did not live there, the woman left the property and entered the front passenger seat of a blue car, which may have been a Nissan Altima. The car then drove away. 1/30/14RP at 953-56. Norma Fernandez did not go to the window. 1/30/14RP at 1031.

Approximately an hour later, two men entered the home by bursting through a glass sliding door; one of the men had a gun pointed at Mr. Fernandez and his wife, Norma. 1/30/14RP at 956-57 (testimony of Remegio Fernandez), 1032, 1039 (testimony of Norma Fernandez). Mr. Fernandez described the gun as a 9mm

handgun/pistol, black in color, with a red "laser in it." 1/30/14RP at 985. He stated that the man took out a magazine in the gun, and the magazine had bullets in it. 1/30/14RP at 985-86. The men were looking for money, and took Mr. and Mrs. Fernandez upstairs while they searched the bedroom. 1/30/14RP at 987. The men would eventually take jewelry and cash that they located, and other property. 1/30/14RP at 987-91, 996-99. They used backpacks and pillowcases they found in the house to carry the property. 1/30/14RP at 1022.

According to Mr. Fernandez, the men found storage cases, and said they were looking for guns, but Mr. Fernandez told them those were used for something else. 1/30/14RP at 992. The men told the couple that they had friends, or "big guys," at the nearby Jack-in-the-Box who would come beat them up if they did anything. 1/30/14RP at 990-91. At some point Mr. Fernandez tried to run from the bedroom, and run downstairs and out the back door, but the men caught him. 1/30/14RP at 992-93. The men kicked him, the one with the gun put it in his mouth and said all he had to do was pull the trigger, and then the men tied him up and put him in the bathroom, with his wife. The bathroom door was left open, but one of the perpetrators guarded it. 1/30/14RP at 994-97.

Among the property missing after the incident was an item described as a pistol that had belonged to Mr. Fernandez's father, who had returned to Guam; Mr. Fernandez described it as a .22 caliber Jennings pistol. 1/30/14RP at 1010. However, Mr. Fernandez had never seen the device fired, and he had never fired it; when asked if it "worked or not," he stated, "I don't know." 1/30/14RP at 1010-11.

In addition, the men had also briefly taken what Mr. Fernandez described as a .22 caliber Marlin rifle from Mr. Fernandez's bedroom closet. 1/30/14RP at 1012-13. The police officers who responded to Mr. Fernandez's 911 call found this item in the bathtub, in its case. Mr. Fernandez had stored it in its case unloaded, and ammunition was stored elsewhere. 1/30/14RP at 1012-14.

During trial, the State introduced Pierce County Jail telephone calls made by Azias Ross to Soy Oeung, following Azias's being taken into custody on May 9, on unrelated misdemeanor charges. On May 10, Azias spoke with Ms. Oeung in the mid-afternoon, who stated she needed money so she could put money on Azias's jail account, and said "if you guys come up I need some money for what's up[.]" Supp. CP ___ (Exhibit record,

exhibit 118). Later that day, Oeung told Azias in a call, "I'm with Azzi [Azariah Ross] and Lisa, they tryin's to come up right now but I'm outside." She states that she "told 'em that I would go with them and just knock on the door if they give me some money so I can just put money on your books and they said 'yeah.'" In the call, when Azias tells Oeung to be safe, Oeung responds, "They're doing it how they used to and stuff." Exhibit 119. In a subsequent call later on May 10, Oeung stated that the two men had not come back yet, and responded to Azias' inquiries by saying she was trying to put money on his jail account. Exhibit 120.

In other telephone calls between Azias and Ms. Oeung in the several days after May 10, Oeung refers to selling gold and "other shit." Exhibit 122. At one point she referred to having an expensive necklace that the pawn shop said was worth 25 dollars. Exhibit 124. However, Oeung begins to express concern about Azariah Ross, whose house she was living in, and Azariah's girlfriend Alicia Ngo, stating she did not want to sleep near where they were. Exhibits 126-127. Oeung begins to agree with Azias Ross's repeated statements of concern that Azariah, Nolan, and Chouap are "moving too fast," and are not thinking about what they are doing, which will bring the cops to their home for "some shit I

didn't do." Oeung appears to refer to the people who are "doing it" as "them three." Referring to a home that they looked at together, Oeung tells Azias that they "didn't do it," and Azias tells Oeung not to do it, and to realize who her friends are and are not. Exhibits 127-128.

As Azias Ross's regrets, and concerns about the police mount, he says that his and Soy's priority should be their young daughter, Alyanna. Oeung appears to tell Azias that she was doing this to answer his requests for money, and remarks: "When you did it you said it was okay." When she refers to the others doing "HI" or that "H thing," she notes to Azias that she is not going along with them. Exhibits 129-132. The jail telephone calls in June and July continue with Azias saying he had read the Bible, and repeatedly telling Oeung that Chouap and Ngo cannot be living at his home when he gets out of jail. Soy Oeung tells Azias over the course of several calls that those people must leave the house, because by doing crime they were "not flying right," and also because of the woman's addiction to pills. Exhibits 129-132; Supp. CP ___ (Exhibit record, exhibits 133-147 (CD discs of recorded calls).

4. Verdicts and sentencing. The jury convicted Ms. Oeung of conspiracy,[4] burglary, two counts each of robbery, assault, and unlawful imprisonment, theft of a firearm, and trafficking in stolen property, with the associated special firearm verdicts. CP 305-26.

The State and the sentencing court agreed that Ms. Oeung's two convictions for second degree assault violated Double Jeopardy when paired with the convictions for first degree robbery, which properly resulted in the court not entering punishment on the two firearm enhancements that had been attached to those assaults. CP 329-33, CP 357-68; 6/23/14RP at 23-24. However, the trial court stated in the judgment and sentence that it was dismissing the two assault counts "without prejudice;" a similar entry was placed in the judgment and sentence of co-appellant Azias Ross. CP 359.

Ms. Oeung echoed the legal points in Azias Ross's motion to vacate his conspiracy conviction, arguing for dismissal of Ms. Oeung's conspiracies (based on insufficiency of the evidence, and the *corpus delicti* rule he had also raised at trial) and dismissal of the enhancements (on ground of no proof that a person was armed

[4] The charges submitted to the jury included two verdict forms for count XIV, which had been charged as a single conspiracy to commit first degree burglary "and/or" first degree robbery. CP 75 (amended information), CP 315, 316 (verdict forms for count XIV).

with a firearm). 6/23/14RP at 3-9, and 9-12. These motions were denied. 6/23/14RP at 21-22

Ms. Oeung also argued that the two robbery and two unlawful imprisonment counts were the same criminal conduct, CP 334-36, that the two robbery counts and the two burglary counts were the same criminal conduct (particularly considering the conspiracy charge), and that the burglary and theft of a firearm counts were the same criminal conduct. CP 334-36, 6/23/14RP at 39-42. The court held that burglary and theft of a firearm were the same criminal conduct. 6/24/13RP at 43. Following the court's imposition of a total term of 417 months, Ms. Oeung timely appealed. CP 369-70.

E. ARGUMENT

1. THE CONVICTIONS FOR THE BURGLARY AND THE TWO COUNTS OF ROBBERY THAT WERE ELEVATED TO THE FIRST DEGREE, THE CONVICTION FOR THEFT OF A FIREARM, AND THE VERDICTS ON THE MULTIPLE FIREARM ALLEGATIONS MUST BE REVERSED FOR INSUFFICIENCY, AND BECAUSE OF THE ABSENCE OF ASSURANCES OF JURY UNANIMITY UNDER WASH. CONST. ARTICLE 1, § 22 AND STATE V. PETRICH.

During the presentation of evidence and argument, the prosecutor placed three devices alleged to be "firearms" before the jury, but there was no unanimity instruction, and the State chose

not to elect, in closing argument, a particular firearm on which the jury should rely for its determination that a perpetrator who entered the Fernandez home was "armed" with a "firearm." This is unanimity error, which cannot be rendered harmless by the presence of merely "sufficient" evidence. The errors require reversal of the first degree burglary and robbery convictions, the theft of a firearm conviction, and all of the firearm enhancements.

a. Conviction on the first degree burglary count and the two robbery counts in the first degree, conviction on the theft of a firearm count, and conviction on the multiple firearm enhancements, required proof that a perpetrator was armed with a deadly weapon, armed with a firearm, and exerted unauthorized control over a firearm.

i. First degree burglary and robbery; deadly weapon; theft of a firearm, "armed." A significant number of counts and enhancements in Soy Oeung's criminal proceeding depended on proof of the RCW 9.41.010 statutory definition of "firearm," and related requirements. First, 12 jurors had to find that Oeung was complicit in the commission of first degree burglary, and in two counts first degree robbery (of Mr., and Mrs., Fernandez). CP 258, CP 274-75.

Burglary is committed in the first degree where a burglar, when entering or remaining in a dwelling with intent to commit a crime, or in immediate flight from the building, is "armed with a deadly weapon." CP 258. First degree robbery is committed when an actor accomplishing a forceful taking of property from a person with intent to commit theft is, in the commission of these acts or in immediate flight therefrom, "armed with a deadly weapon." CP 274-75. The jury was instructed that a firearm whether loaded or unloaded is a deadly weapon. CP 250; see 9A.04.110(6); In re Pers. Restraint of Martinez, 171 Wn.2d 354, 365, 256 P.3d 277 (2011) (whether loaded or unloaded, is a deadly weapon *per se*).

Next, the offense of theft of a firearm required proof that Ms. Oeung was an accomplice to the crime of theft of a firearm committed by one of the men who entered the Fernandez home. CP 295. Theft was defined for the jury as the act of wrongfully obtaining, or exerting unauthorized control over, the property of another person, with intent to deprive the person of the property. CP 297.

Further, for purposes of the firearm enhancements, the jury was instructed that it was required to find that a perpetrator was

armed with a deadly weapon at the time of the commission of the counts to which the special allegation was attached, that a pistol, revolver, "or other firearm" was a deadly weapon, and that the deadly weapon was a "firearm." CP 302, 305-06, 308-14.

ii. Firearm definition, requirement of proof beyond a reasonable doubt. The jury was instructed that a "firearm" is

> a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

CP 251. None of the foregoing propositions were proved. The Due Process guarantee requires jury proof beyond a reasonable doubt of the crimes alleged against Ms. Oeung, and of any aggravating or special allegations. U.S. Const. amends. 6, 14; Wash. Const. art. 1, § 21; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1995); Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

The Petrich rule of jury unanimity emanates from this requirement. State v. Petrich, 101 Wn.2d 566, 570, 683 P.2d 173 (1984) (citing State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911) ("[W]here the evidence tends to show two separate commissions of the crime, unless there is an election it would be

impossible to know that either offense was proved to the satisfaction of all of the jurors beyond a reasonable doubt)).

b. The state constitution guarantees expressly unanimous jury verdicts. Criminal defendants in Washington have the right to an expressly unanimous verdict in a jury trial. Wash. Const. art. 1, § 22;[5] State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); State v. Lobe, 140 Wn. App. 897, 903, 167 P.3d 627 (2007). Therefore, a jury must express unanimous agreement on the facts supporting the elements of the conviction. State v. Petrich, 101 Wn.2d at 569-70.

Where multiple facts are presented, any of which might stand as the proof of an element of the crime, the trial court must instruct the jury that its verdict has to be based on a unanimous finding as to the particular fact, or the prosecutor must specify, i.e., "elect" in closing argument which particular fact the jury should rely on to base that finding. Petrich, 101 Wn.2d at 572; State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing Petrich). In such multiple acts cases, a mere verdict of guilt, along with the

[5] The unanimity issue in multiple acts cases is one of constitutional magnitude that Ms. Oeung may raise for the first time on appeal, as manifest constitutional error. RAP 2.5(a)(3); State v. Love, 80 Wn. App. 357, 360 and n. 2, 908 P.2d 395 (1996); State v. Holland, 77 Wn. App. 420, 424, 891 P.2d 49 (1995).

general instruction on jury agreement for conviction, is not enough. State v. Hanson, 59 Wn. App. 651, 657, 800 P.2d 1124 (1990) (a general verdict finding guilt beyond a reasonable doubt will necessarily reflect unanimous agreement solely where only one possible fact was offered in satisfaction of proof that the criminal violation occurred).

When the Petrich rule is violated there is a "lack of unanimity on all of the elements necessary for a valid conviction." State v. Kitchen, 110 Wn.2d at 411; see, e.g., State v. King, 75 Wn. App. 899, 878 P.2d 466 (1994), review denied, 125 Wn.2d 1021 (1995) (unanimity error occurred where the jury could have deliberated, following lack of jury unanimity instruction, to find the defendant was guilty of possession of a controlled substance based on the cocaine found in a car, or the cocaine found in a backpack).

The same standards of proof also apply to special enhancements, just as they do to the elements of substantive criminal offenses. See State v. Stubbs, 170 Wn.2d 117, 123, 240 P.3d 143 (2010) (same standard of review applies to aggravating factors supporting exceptional sentence); State v. Brown, 162 Wn.2d 422, 173 P.3d 245 (2007) (applying same standard of review to determine sufficiency of the evidence for underlying crime

and sufficiency of the evidence for firearm enhancement); State v. Nunez, 174 Wn.2d 707, 721-26, 285 P.3d 21 (2012) (a jury must unanimously agree that the State has proved beyond a reasonable doubt the facts required to prove a firearm enhancement) (citing RCW 9.94A.537(3); and 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 151.00 (3d ed. 2008)).

c. *Petrich* error occurred, and none of the errors were harmless beyond a reasonable doubt. Significantly at issue in the evidence phase of trial, and later in closing argument, was whether the various devices, put forth in the State's evidence as involved in the burglary of the Ainsworth Street home, were actual firearms under the statutory definition at RCW 9.41.010(1).

In the evidence phase and in closing argument, in satisfaction of the requirement of proving that a perpetrator(s) who entered the Fernandez home and took property by force was armed with a firearm, for purposes of first degree burglary and the two counts robbery in the first degree (all elevated on the basis of an alleged firearm), the prosecutor in Soy Oeung's trial offered up three potential firearms, and then never elected one of them in closing argument. 3/3/14RP at 2245, 2252-56.

This dispute extended to the question of whether the devices were firearms for purposes of the special allegations, and the charge of theft of a firearm.[6] 3/3/14RP at 2256, 2259, 2310-13, 2321-26, 2337.

In addition, the evidence and argument placed in issue whether, as to the particular devices, a perpetrator was "armed" with a gun(s) found in a house, for purposes of the elevating elements, and the enhancements. 3/3/14RP at 2256, 2259-60, 2291, 2310-11, 2321-26, 2337.

The State first urged the jury to conclude that the apparent handgun wielded by one of the perpetrators, which Mr. Fernandez described as having a red laser "in it," was a real gun, as shown by the description given by the witnesses, including the perpetrator's apparent manipulation of a loaded magazine in the device, and his threats to cause harm with it. 3/3/14RP at 2254-55; see 1/30/14RP at 956-57, 985-86, 994-97 (trial testimony).

---

[6] RCW 9A.56.010(19)(b) defines the "exerts unauthorized control" way of committing theft as applicable to one "[h]aving any property or services in one's possession, custody or control as bailee, factor, lessee, pledgee, renter," etc. However, because the State chose not to give any instruction to the jury in this regard, the "exerts unauthorized control" language of the jury instructions for theft takes on its common lay meaning. See State v. Edwards, 84 Wn. App. 5, 10, 924 P.2d 397 (1996); State v. Holt, 119 Wn. App. 712, 720, 82 P.3d 668 (2004), reversed on other grounds by State v. Easterlin, 126 Wn. App. 170, 173, 107 P.3d 773 (2005); CP 267. The jury was therefore permitted to rely on the perpetrators' act of briefly taking unauthorized control of the alleged rifle as one of the multiple possible acts in satisfaction of the theft of a firearm count.

But the statutory definition of a firearm requires proof that the device in question was an operable firearm capable of firing a bullet. In re Pers. Restraint of Rivera, 152 Wn. App. 794, 803 and n. 22, 218 P.3d 638 (2009), aff'd sub nom. In re Pers. Restraint of Jackson, 175 Wn.2d 155, 283 P.3d 1089 (2012); State v. Pierce, 155 Wn. App. 701, 705, 714 n. 2, 230 P.3d 237 (2010); In re Pers. Restraint of Delgado, 149 Wn. App. 223, 237, 204 P.3d 936 (2009).

Ms. Oeung argues that to prove this type of operability of the device, there must be evidence of gunshots heard, bullets found, or muzzle flashes seen.[7] State v. Pierce, 155 Wn. App. at 705, 714 n. 11; cf. State v. Mathe, 35 Wn. App. 572, 581-82, 668 P.2d 599 (1983) (State proved the defendant used a real and operable gun because eyewitnesses described the guns and the defendant's express or implied threat to use them), affirmed, 102 Wn.2d 537, 688 P.2d 859 (1984). The defense vigorously controverted the proposition that this was an actual gun. 3/3/14RP at 2310-11.

The State, in the evidence phase and in closing argument, expressly offered other devices in satisfaction of the "firearm" issue, in case some jurors were not convinced beyond a reasonable doubt

[7] Robbery may be elevated to the first degree under subsection (1)(a)(ii) of RCW 9A.56.200, by a robber who "[d]isplays what appears to be a firearm or other deadly weapon;" however, this is not the alternative of first degree robbery that was charged in this case. (Emphasis added.); see CP 76-77, CP 274-75.

that the alleged laser-equipped device was a statutory firearm. After arguing it was a real gun, the prosecutor stated to the jury that, "setting that aside for a moment," the jury could pretend that this was not a real gun, but

> [w]hen you go into a burglary in a home invasion robbery, and you find guns inside the home, you are arming yourself.

3/3/14RP at 2255. Offering these as "firearm" theories for purposes of the counts and special allegations alleged against Azias Ross, and for the same purposes regarding the Ainsworth Street home burglary as to which Soy Oeung was a defendant, the prosecutor continued by specifically arguing that even if the first device the perpetrators entered the house with on May 10 was not a real gun, the burglars

> armed themselves during the May 10th home invasion when they stole Remegio Fernandez's pistol.

3/3/14RP at 2256. This of course was a reference to what was described as a .22 caliber Jennings pistol that was described as missing after the burglary, and had belonged to Mr. Fernandez's father, who had returned to Guam. 1/30/14RP at 1010.

However, Mr. Fernandez affirmatively testified that he had never seen this item fired, and had never fired it, and he did not

know if it worked. 1/30/14RP at 1010-11. The evidence did not establish that this was a firearm. In re Pers. Restraint of Rivera, 152 Wn. App. at 803 and n.22; Pierce, 155 Wn. App. 701, 714 n. 11, 230 P.3d 237 (2010); see also State v. Pam, 98 Wn.2d 748, 754, 659 P.2d 454 (1983) (a gun-like object incapable of being fired is not a firearm). The evidence was insufficient to support the first degree counts, the theft of a firearm, or the enhancements. U.S. Const. amend. 14.

Second, more importantly for Petrich purposes, even if the evidence that this was a statutory "firearm" was sufficient, that evidence was not overwhelming, but rather, was plainly controverted. A Petrich error is constitutional, and is presumed to be prejudicial. In Petrich cases, sufficiency of the evidence on the multiple facts does not render the error constitutionally harmless. Rather, the presumption of reversible prejudice can be overcome only

> if no rational juror could have a reasonable doubt as to any one of the incidents alleged.

(Emphasis added.) Kitchen, 110 Wn.2d at 411 (clarifying Petrich constitutional harmless error analysis) (citing State v. Loehner, 42 Wn. App. 408, 411-12, 711 P.2d 377 (1985) (Scholfield, A.C.J.,

concurring), review denied, 105 Wn.2d 1011 (1986)). For example, in Kitchen,

> the prosecution placed testimony and circumstantial proof of multiple acts in evidence. There was conflicting testimony as to each of those acts and a rational juror could have entertained reasonable doubt as to whether one or more of them actually occurred.

Kitchen, at 412. Because the trial evidence conflicted as to whether even a single one of the multiple acts was a commission of the statutory crime, the Kitchen Court had to reverse. For further example, in State v. Brooks, 77 Wn. App. 516, 892 P.2d 1099 (1995), the State's evidence indicated that Mr. Brooks allegedly burgled several structures, and because there was no unanimity instruction or election, Petrich error occurred. Reversal for that error was required, because the evidence as to one of the multiple acts was controverted – there was evidence that a person named Dave, and not the defendant, was the person responsible for burglarizing one of those structures. State v. Brooks, 77 Wn. App. at 52.

In this case, only the presence of overwhelming, uncontroverted evidence – on each and every one of the claimed "firearms" – can avoid reversal. Though Ms. Oeung need only

show that the evidence as to a single "firearm" was controverted in order to obtain reversal, the evidence was controverted as to all three firearms.[8]

Further, the deputy prosecutor never urged the jury that it had to unanimously agree on a particular firearm that the perpetrators were "armed" with, instead, the prosecutor placed all three before the jury by presentation of evidence, and/or in closing argument. The lack of overwhelming, uncontroverted evidence on even one factual theory that the perpetrator(s) was armed requires reversal on the elevated offenses, and the enhancements.

For purposes of first degree burglary, defendants are armed with a deadly weapon if a firearm is easily accessible and readily available for use by the defendants for either offensive or defensive purposes. State v. Brown, 162 Wn.2d 422, 431, 173 P.3d 245 (2007). A perpetrator can be "armed" for purposes of elevating crimes to the first degree even where the perpetrator did not bring the firearm to the scene. Thus in this Court of Appeals' decision in State v. Hernandez, the defendants committed residential

---

[8] The Petrich rule of reversal stands in contrast to the rule under "alternative means" doctrine, where the existence of sufficient evidence on each of multiple alternative means presented to the jury without election *will* avoid reversal. State v. Alien, 127 Wn. App. 125, 137, 110 P.3d 849 (2005); see also State v. Witherspoon, 171 Wn. App. 271, 285-87, 286 P.3d 996 (2012).

burglaries while armed with deadly weapon, as required to support their conviction for first-degree burglary, even if the firearms were part of the "loot" acquired during the burglary, where one of defendants carried victim's stolen, fully operational shotgun to a waiting vehicle. State v. Hernandez, 172 Wn. App. 537, 290 P.3d 1052, review denied, 177 Wn.2d 1022, 303 P.3d 1064 (2012).

But in Brown, the Supreme Court stated that, both for purposes of elevating crimes to a higher degree, and for purposes of firearm enhancements, a gun that was discovered, and moved by the perpetrators, during the course of the crime, does not establish that the perpetrators were armed. Brown, at 431-32; see Hernandez, 172 Wn. App. at 544 (noting that Brown involved both an elevator and an enhancement) (citing Brown, 162 Wn.2d at 434 n. 4).

The facts of Brown were similar to this case, regarding the missing alleged pistol and the alleged rifle taken to the upstairs bathroom. Mr. Fernandez also thought that the men had taken a .22 caliber Marlin rifle from his bedroom closet, but the police found it in the bathtub, in its case. Mr. Fernandez stored the gun in its case unloaded, and ammunition was stored elsewhere. 1/30/14RP at 1012-14. In Brown, the Court stated that

> the circumstance under which the weapon was found does not support a conclusion that Brown was "armed" as intended by the legislature. Specifically, when the homeowner arrived, the rifle was found on the bed after Brown and his accomplice had left the scene. Also, Brown and/or his accomplice evidently had removed property from under the bed but left a pistol in that same location untouched. No evidence exists that Brown or his accomplice handled the rifle on the bed at any time during the crime in a manner indicative of an intent or willingness to use it in furtherance of the crime. In fact, Hill's testimony indicates that the weapon here was regarded as nothing more than valuable property.

(Footnote omitted). State v. Brown, at 431-33 (stating that "it is not determinative that the defendant or his accomplice merely touched a weapon in the course of a crime.").

Here also, reversal is required for the Petrich error when the error is not harmless beyond a reasonable doubt because it cannot be said that the evidence as to every one of the fact patterns offered in satisfaction of the "armed" requirement was overwhelming and uncontroverted. State v. Coleman, 159 Wn.2d 509, 513, 150 P.3d 1126 (2007). Thus in Coleman, where the evidence phase involved witness testimony regarding multiple incidents of improper touching that the jury could find in satisfaction of the count of sexual abuse, but one witness stated, in contrast to others, that the defendant did not engage in any touching when

they were at the theater watching the "Snow Dogs" movie, the error required reversal because it could not be said that the evidence on every possible incident was uncontroverted. Coleman, 159 Wn.2d at 514.

This 'pick a card, any card' manner of argument, where the circumstances of the trial evidence and argument, and the lack of either a unanimity instruction or election in closing, results in the prosecutor securing guilty verdicts and yes answers on special allegations that carry no assurances that some jurors did not rest their determination on one fact, and others another, while others may have believed yet another. This is exactly what the unanimity guarantee and the Petrich rule are designed protect against.

In determining whether unanimity was placed at risk by a State offering of multiple facts as possible alternative satisfaction of the crime, the reviewing court considers the whole record of trial, including the evidence, information, argument and instructions. State v. Bland, 71 Wn. App. 345, 351–52, 860 P.2d 1046 (1993); State v. Corbett, 158 Wn. App. 576, 593, 242 P.3d 52 (2010) (considering instructions, evidence and closing arguments, any reasonable jury would have known that it must find separate and distinct acts for each of four guilty verdicts); cf. State v. Moss, 73

Wash. 430, 432, 131 P. 1132 (1913) (multiple possible acts of adultery were admitted as to one count charged, but no unanimity instruction necessary because State tried the defendant "from the beginning to the conclusion of the case" only for the specified first incident). In these circumstances of trial, given the foregoing evidence and argument, the verdicts and the yes answers issued by the jury would not be inaccurately described as expressly non-unanimous. This is a full two orders of magnitude divorced from what Soy Oeung is entitled to under Wash. Const. art 1, § 22 – which is a verdict that is unanimous, and expressly so. State v. Lobe, 140 Wn. App. at 903. The constitutional errors are not harmless, and reversal is required as argued.

2. THE CONVICTIONS FOR CONSPIRACY TO COMMIT FIRST DEGREE ROBBERY, AND BURGLARY, ARE NOT SUPPORTED BY SUFFICIENT EVIDENCE, INCLUDING UNDER THE *CORPUS DELICTI* RULE WHICH PRECLUDES CONSIDERATION OF MS. OEUNG'S STATEMENTS ABSENT INDEPENDENT EVIDENCE OF A CONSPIRATORIAL AGREEMENT, AND MUST ALSO BE REVERSED FOR UNANIMITY ERROR.

a. The evidence must be sufficient. A conviction for a crime in the absence of sufficient evidence violates a defendant's rights under the Due Process clause, which guarantees entry of judgment only upon proof beyond a reasonable doubt. U.S. Const.

amend. 14; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The evidence in a case will be deemed sufficient to support a guilty verdict if, when viewing the evidence in the light most favorable to the prosecution, it can be said that "any rational trier of fact could have found the [necessary facts] beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); Wash. Const. art. 1, § 21; State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

b. Conspiracy requires an agreement to commit the crime in question. Under RCW 9A.28.040, a person is guilty of conspiracy to commit a crime if she agrees with another to commit that crime, and a conspirator takes a substantial step toward the offense. State v. Boswell, 340 P.3d 971, 975 (Wash. Ct. App. Div. 2., Dec. 30, 2014). By the statute,

> [a] person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.

RCW 9A.28.040(1). To prove a conspiracy, the State need not show an express agreement. State v. Wappenstein, 67 Wash. 502, 509–10, 121 P. 989 (1912); State v. Barnes, 85 Wn. App. 638, 664,

932 P.2d 669 (1997). But the existence of an agreement must be proved, although evidence of a concert of action in which the parties work together with an implicit agreement toward a common purpose, can contribute to proof of the necessary agreement. State v. Casarez–Gastelum, 48 Wn. App. 112, 116, 738 P.2d 303 (1987) (citing Marino v. United States, 91 F.2d 691, 694 (9th Cir.1937)).

c. The corpus delicti rule. The phrase "*corpus delicti*" means "body of the crime." State v. Aten, 130 Wn.2d 640, 655, 927 P.2d 210 (1996) (quoting 1 MCCORMICK ON EVIDENCE § 145, at 227 (4th ed.1992)). Under the *corpus delicti* rule, a defendant's incriminating statements alone are not sufficient to make the necessary showing that the crime of conspiracy took place. State v. Brockob, 159 Wn.2d 311, 328, 150 P.3d 59 (2006). Rather, the State must present independent evidence to corroborate that the crime described did occur. Brockob, 159 Wn.2d at 328. Thus the *corpus delicti* rule "tests the sufficiency or adequacy of evidence," independent of the defendant's incriminating statements. State v. Dow, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010).

In this case, the body of the crimes of conspiracy to commit first degree burglary and conspiracy to commit first degree robbery had to be proved with adequate evidence independent of Soy

Oeung's statements made in custodial interrogation by Detective Baker. Brockob, at 328; State v. Aten, 130 Wn.2d at 660. "The independent evidence need not be sufficient to support a conviction, but it must provide *prima facie* corroboration of the crime." State v. Smith, 115 Wn.2d 775, 780–81, 801 P.2d 975 (1990).

d. The independent evidence is inadequate to prove the existence of an agreement. The State's evidence does not meet these standards of adequacy. In her responses to Detective Baker, Ms. Oeung stated she had been requested by other individuals to knock on a house's door on May 10, and it was offered that they would give her money for having doing so. 2/11/14RP at 89-91. But these statements are not considered under the *corpus delicti* rule, absent independent *prima facie* evidence of a conspiratorial agreement.

First, the co-defendants Nolan Chouap and Azias Ross did not make any statements about Soy Oeung to police, much less about any agreement. In any event, statements made by those co-defendants, per the Bruton[9]-related rulings of the trial court, were

[9] See Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

not admitted as against Soy Oeung, and the jury was so instructed.[10] 2/12/14RP at 1447-48. Mr. Fernandez, the owner of the Ainsworth Street home, did not identify Soy Oeung, and merely testified that a woman knocked on the door of his house and asked for "John."

Second, the statements made by Ms. Oeung during the jail phone calls with Azias Ross after the May 10 incident may not be considered. The *corpus delicti* rule applies to statements a defendant makes after the crime occurs, and does not apply to statements made before or during the commission of a crime. State v. Witherspoon, 171 Wn. App. 271, 296–97, 286 P.3d 996 (2012). All post-crime statements contain the inherent weaknesses that undergird the *corpus* prohibition, and therefore the jail calls after the May 10 incident, which fall into this category, may not be considered. See State v. Pietrzak, 110 Wn. App. 670, 681, 41 P.3d 1240 (2002).

However, even if the *corpus delicti* rule allows consideration of all of the jail calls, the independent evidence is still inadequate to show that Ms. Oeung agreed to a conspiracy as that crime was

---

[10] Original co-defendant Nolan Chouap entered a guilty plea mid-trial; the jury was told to not place any meaning on his sudden absence from the courtroom. 2/12/14RP at 1600-17; 2/24/14RP at 1685-86.

charged. The crimes charged to the jury in the instructions were an agreement to commit the crime of first degree burglary, and agreement to commit first degree robbery. Ms. Oeung cannot be found guilty of conspiracy to commit robbery, or conspiracy to commit burglary or robbery in the *first degree* – elevated here by a deadly weapon -- absent proof of agreement to the specific crime. State v. Stein, 144 Wn.2d 236, 238, 243-46, 27 P.3d 184, 185 (2001).

In Stein, the Supreme Court held that guilt to the crime of conspiracy under the conspiracy statute requires agreement to the specific crime. State v. Stein, 144 Wn. 2d at 245-46 ("In contrast, the instructions here, taken as a whole, enabled the jury to convict Stein of conspiratorial liability for attempted murder without finding the necessary element of knowledge that his coconspirators intended to murder the victim"). When Ms. Oeung's statements to Detective Baker are excised from the equation (and in fact, even if they were not), the evidence, even when including the calls, fails to show that Ms. Oeung agreed to a scheme of burglary with a deadly weapon or robbery with a deadly weapon, or even robbery of a person. State v. Williams, 131 Wn. App. 488, 495, 128 P.3d 98 ("For the conviction on count II (conspiracy to commit first degree

burglary) to stand, the evidence must additionally establish a plan to enter or remain unlawfully in Mr. Cole's hotel room with intent to commit a crime there, either while armed with a deadly weapon or by assaulting him [RCW 9A.52.020]."), review granted, cause remanded, 158 Wn.2d 1006 (2006).[11] Reversal of the conspiracy convictions is required on all three of these bases.

e. Lack of *Petrich* unanimity. Finally, the prosecutor's argument in closing placed multiple possible 'agreements' and 'agreements by conduct' before the jury. The State first argued that there was an agreement by Soy Oeung to commit burglary or robbery by virtue of Nolan Chouap and Azariah Ross saying to Soy Oeung, "let's go commit that home invasion," and contended that if Soy Oeung then got in the car with those persons, "that's an express agreement." 3/3/14RP at 2246. The prosecutor next argued,

> You don't even have to say it. It can be understood. If Azariah Ross and Nolan Chouap say to Azias Ross or Soy Oeung, hey, let's go

[11] Remand was ordered in Williams because the Court of Appeals had also held that the sentencing enhancement procedure that violated the jury trial rule of Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), could not be harmless; the Supreme Court subsequently remanded the case to the Court of Appeals based on the subsequently-decided case of Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

> commit a burglary, and they say, yeah, I'm down, that's an agreement to commit a burglary.

3/3/14RP at 2246. The prosecutor argued that an agreement could also be found on the basis of conduct in the form of the women in the car hearing on the walkie-talkies that "there are people in the home" and then, if they "stick around," this is a tacit agreement to robbery. 3/3/14RP at 2246-47.

This created a multiple acts scenario in which the jury should have been told, by instruction or by prosecutor's election by the prosecutor in closing, to rely unanimously on one particular agreement for purposes of the conspiracy conviction. Petrich, 101 Wn.2d at 572; Kitchen, 110 Wn.2d at 409. The jury was not so told, and Petrich error occurred in violation of Wash. Const. art. 1, § 22.

Reversal is required because the Petrich error is not harmless beyond a reasonable doubt, and Petrich error is not rendered harmless merely by the existence of sufficient evidence. See Part E.1.(b), supra (discussion of constitutional harmless error analysis in Petrich cases). The evidence was not overwhelming, or uncontroverted, as to at least one or more of these claimed conspiratorial agreements. There was no overwhelming evidence that Soy Oeung entered the car in question after making some

express or implied agreement with Azariah Ross or Nolan Chouap that the group would commit a robbery, or a first degree burglary or robbery. At trial, counsel followed up on Detective Baker's direct testimony that Soy Oeung merely told him she believed the men were going to the house in order "to take stuff," and significantly elicited from the detective that Oeung "never said anything about having any knowledge of any guns" and never stated "that she knew that there was going to be a robbery inside that house." 2/11/14RP at 95, 233. In closing, Ms. Oeung's counsel argued that the evidence from her statements to police showed as a factual matter that the perpetrators who were in the car she was riding in waited a substantial period of time before getting out to enter the Ainsworth Street house, because they did not want anybody to be there -- Oeung, he argued was not agreeing to a robbery plan, or a burglary or robbery with a weapon. 3/3/14RP at 2304-05, 2306-9.

Then, in rebuttal closing argument, the prosecutor argued both (a) that the conspiratorial agreement occurred at some unspecified point in the past, before one of the perpetrators acted to obtain a firearm, which was the substantial step required to complete the proof of guilt on the conspiracy, and (b) that the agreement was the very commission of the crime itself. 3/3/14RP

at 2337-38. But there was certainly no evidence of an agreement made by Soy Oeung before the point in time at which any perpetrator obtained a firearm, and the crime of conspiracy, as defense counsel argued, requires an agreement, not just the mere act of Ms. Oeung going along for the ride to the crime. 3/3/14RP at 2307.

This is thorough controversion of the multiple factual theories that the State offered to attempt to prove up sufficient evidence of a conspiratorial agreement. The Petrich error of not instructing the jury on the need for unanimity as to the facts found in satisfaction of the conspiracy charges, nor the State electing a particular theory, was not harmless beyond a reasonable doubt. Reversal of the conspiracy verdicts and the conviction entered is required, because it cannot be said that the evidence on every possible 'agreement' placed before the jury by the prosecution was overwhelming and uncontroverted. Coleman, 159 Wn.2d at 514.

3. THE CONVICTIONS FOR COMPLICITY TO ROBBERY, ASSAULT, UNLAWFUL IMPRISONMENT, AND THEFT OF A FIREARM MUST BE REVERSED AND DISMISSED FOR INSUFFICIENCY OF THE EVIDENCE.

a. Accomplice liability requires knowing assistance in the commission of "the" crime. Under State v. Roberts, 142 Wn.2d 471, 510–11, 14 P.3d 713 (2000), and State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000), Soy Oeung could not be convicted as an accomplice to first degree robbery, second degree assault, unlawful imprisonment, or theft of a firearm. A person is guilty as an accomplice to a crime only if she "solicits, commands, encourages . . . or aids" another in committing the crime, [and] does so "[w]ith knowledge that it will promote or facilitate the commission of the crime." RCW 9A.08.020(3)(a)(i)(ii).[12] Thus, in order to be

---

[12] Washington's accomplice liability statute, RCW 9A.08.020, provides as follows:

> **RCW 9A.08.020. Liability for conduct of another--Complicity**
>
> (1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.
>
> (2) A person is legally accountable for the conduct of another person when:...
>
> (c) He is an accomplice of such other person in the commission of the crime.
>
> (3) A person is an accomplice of another person in the commission of a crime if:
>
> (a) With knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it;

liable as an accomplice, a defendant must knowingly aid in the commission of the crime committed. State v. Brown, 147 Wn.2d 330, 338, 58 P.3d 889 (2002); see State v. Cronin, 142 Wn.2d at 578. The evidence must be sufficient to convict. U.S. Const. amend. 14; In re Winship, 397 U.S. at 364; Jackson v. Virginia, 443 U.S. at 318.

b. Ms. Oeung's convictions for two counts robbery, two counts assault, two counts unlawful imprisonment, and theft of a firearm must be reversed and dismissed under *Cronin* and *Roberts*. There is no evidence that Ms. Oeung gave assistance to a perpetrator(s) knowing of any other crimes, beyond burglarious entry into the Ainsworth Street home to take property, including any plan to commit robbery, assault, unlawful imprisonment, or theft of a firearm. Here, the evidence from Mr. Fernandez's testimony allowed the jury to find that Ms. Oeung knocked on the door of his house, then walked away; later, two perpetrators entered. This does not prove knowing assistance in crimes beyond "the" crime of burglary. Burglary as charged under RCW 9A.52.020 is a wholly different crime than robbery, assault, unlawful imprisonment, and

---

> or (ii) aids or agrees to aid such other person in planning or committing it[.]

RCW 9A.08.020.

theft of a firearm. See RCW 9A.56.200; RCW 9A.36.011; RCW 9A.40.040; RCW 9A.56.300. Beyond burglary, Ms. Oeung is not legally liable for the offenses that the perpetrators committed after entry into the house. State v. Roberts, 142 Wn.2d at 513 ("knowledge by the accomplice that the principal intends to commit 'a crime' does not impose strict liability for any and all offenses that follow"). Knowing assistance in a planned obtaining of property by theft does not equate to complicity to robbery, State v. Grendhahl, 110 Wn. App. 905, 910-11, 43 P.3d 76 (2002), much less knowing assistance in the assaults, and unlawful imprisonments that the perpetrators committed.

Further, in fact, theft of a firearm is not a degree of theft, it is a wholly different crime, defined by RCW 9A.56.300, which has a far higher seriousness level for offender scoring purposes than ordinary theft. RCW 9.94A.530; State v. Miller, 92 Wn. App. 693, 699-702, 964 P.2d 1196 (1998).

Even if Ms. Oeung knew Mr. Fernandez would be present in the home, this does not equate to knowing complicity to a robbery, because although robbery can be accomplished by taking property from another in that person's presence (thus the taking need not be from their person), all takings for purposes of robbery must be

accomplished by force or threat of force. RCW 9A.56.190; see State v. McDonald, 74 Wn.2d 141, 144, 443 P.2d 651 (1968); State v. Blewitt, 37 Wn. App. 397, 398, 680 P.2d 457, 458 (1984). This requires reversal. An accomplice must give knowing assistance to the commission of "the" crime. State v. Trout, 125 Wn. App. 403, 410, 105 P.3d 69 (2005) (stating that "it is also clear now that the culpability of an accomplice cannot extend beyond the crimes of which the accomplice actually has knowledge").

Finally, at a bare minimum (argued only in the alternative to the foregoing), the second counts of the robbery, assault, and unlawful imprisonment crimes -- as to Mrs. Fernandez -- must be reversed, along with their attached firearm enhancements. Although both the Fernandezes testified that one of perpetrators, during the incident, was talking to someone using walkie-talkies, their testimony on this point reveals no statements about a person, much less two persons, being present in the home; rather, the communications were limited to things like the perpetrator "talking with a lady" on the walkie-talkie who was asking what the men were doing, and a perpetrator stating, "just wait, we [are] still finding things." 1/30/14RP at 988-90 (testimony of Remegio Fernandez), 1040-42 (testimony of Norma Fernandez).

Although Ms. Oeung has argued that knowledge of Mr. Fernandez being in the house does not establish knowing assistance in a robbery of him, or in the commission of the perpetrators' other offenses, certainly, no evidence shows Ms. Oeung had knowledge of any second individual in the house. Not even the jail calls, some of which were made during the time that Ms. Oeung was allegedly a passenger in the car at the Jack-in-the-Box restaurant near the Ainsworth house, show any knowledge of any robbery, assault, or unlawful imprisonment of any person, particularly some unknown second individual in the house. Reversal of the specified convictions with prejudice, and vacation and dismissal of their enhancements, is required. U.S. Const. amend. 14.

4. THERE WAS INSUFFICIENT EVIDENCE TO PROVE THE FIREARM ENHANCEMENTS.

a. Knowledge is required. Soy Oeung did not have knowledge that a perpetrator was armed with a firearm, requiring reversal for the enhancements that were imposed on the basis of the jury answers on the special verdict forms. On appeal, the evidence is insufficient on an enhancement if, "after viewing the evidence in the light most favorable to the prosecution, any rational

trier of fact could have found the [facts] beyond a reasonable doubt." See Jackson v. Virginia, 443 U.S. at 318; U.S. Const. amend. 14; Stubbs, 170 Wn.2d at 123; Brown, 162 Wn.2d at 422.

The relevant statutory scheme provides that enhancement terms must be added to a defendant's sentence "if the offender or an accomplice was armed with a firearm." RCW 9.94A.533. But before a sentence may be enhanced pursuant to this section, "the evidence must support the conclusion that the accused was armed or that he knew an accomplice was armed." (Emphasis added.) State v. Barnes, 153 Wn.2d 378, 386 n. 7, 103 P.3d 1219 (2005) (discussing State v. McKim, 98 Wn.2d 111, 653 P.2d 1040 (1982)). This is made clear from Barnes, in which the Court stated:

> Urging the same rationale as the trial court used in [State v. Woolfolk, 95 Wn. App. 541, 550–51, 977 P.2d 1 (1999)], the State argues that knowledge is irrelevant to the question of whether the defendant is "armed," citing State v. Bilal, 54 Wn. App. 778, 782, 776 P.2d 153 (1989). In Bilal the Court of Appeals held that this court's decision in State v. McKim, 98 Wn.2d 111, 653 P.2d 1040 (1982), requiring that before a sentence could be enhanced under former RCW 9.95.040 (1975) the evidence must support the conclusion that the accused was armed or that he knew an accomplice was armed, was superseded by the legislature's enactment of RCW 9.94A.125 as part of the Sentencing Reform Act in 1981. We disagree. In State v. Davis, 101 Wn.2d 654, 682 P.2d 883 (1984), decided after adoption of RCW 9.94A.125 and relied on by the court in Bilal as showing that McKim

> was overruled by statute, this court reaffirmed a distinction between accomplice liability for a substantive crime and accomplice liability for enhancement statutes. Davis, 101 Wn.2d at 658, 682 P.2d 883. As this court recognized in Davis, the issue before it was entirely different from that addressed in McKim. Davis, 101 Wn.2d at 658–59, 682 P.2d 883. Although we said in State v. Silva–Baltazar, 125 Wn.2d 472, 481, 886 P.2d 138 (1994) that McKim had been superseded by statute with regard to knowledge that an accomplice was armed, and cited Bilal, Silva–Baltazar did not involve a firearm enhancement statute and the discussion about McKim was dicta. Former RCW 9.94A.125 has been amended several times and recodified, but the language relevant here has remained the same.

Barnes, 153 Wn.2d at 386 n. 7;[13] see also State v. Hayes, ___ Wn.2d ___ (Wash. Supreme Court, No. 89742-5, Feb. 5, 2015) (2015 WL 481023) (liability for an aggravator requires knowledge).

Further, as to the conspiracy conviction, there was no nexus between any agreement made by Soy Oeung, and a firearm. To apply the requirement that a person be armed, the reviewing court examines the nature of the crime, the type of weapon, and the circumstances in which it is found." State v. Schelin, 147 Wn.2d 562, 570, 55 P.3d 632 (2002). Here, there was no evidence that

[13] As Justice Sanders noted in his Barnes dissent, "Under the majority's rationale, a defendant who possesses drugs in a car owned and driven by someone else could have her sentence enhanced if the driver keeps a weapon in the glove box, even if the passenger had no reason to know of the weapon." State v. Barnes, 153 Wn. 2d at 388 (dissenting opinion of Sanders, J., joined by Alexander, C.J., and Chambers. J.).

Ms. Oeung was subject to liability for being armed at the time that any agreement was made. Compare United States v. Hansley, 54 F.3d 709, 715-16 (11th Cir. 1995) (person was armed for purposes of conspiracy where he possessed guns at the time and location where the conspiratorial agreement was formed).

b. Insufficient evidence, reversal and dismissal required. As noted, at trial, counsel in cross-examination expanded upon the interrogating detective's testimony that Soy Oeung merely thought the perpetrators were going to "to take stuff," and elicited that Oeung never stated knowledge of any robbery, or any guns. 2/11/14RP at 95, 233. There was no sufficient evidence adequate to contradict this statement. No evidence was presented that Ms. Oeung had any knowledge that the perpetrator(s) who entered the Fernandez home were armed.

5. THE JURY INSTRUCTIONS FOR THE FIREARM ENHANCEMENTS WERE ERRONEOUS.

a. Soy Oeung's jury was not properly instructed on returning a "no" answer on the firearm enhancements. In the general jury instruction for Soy Oeung's charges and firearm enhancements, the final two paragraphs of Instruction 59 provided:

> You will also be given special verdict forms for certain counts. If you find the defendant not guilty

> of a particular count, do not use the corresponding special verdict form for that count. If you find the defendant guilty of a particular count, you will then use the special verdict form for that particular count. In order to answer a special verdict form "yes," all twelve of you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you do not unanimously agree that the answer is "yes" then the presiding juror should sign the section of the special verdict form indicating that the answer has been intentionally left blank.
> Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror must sign the verdict forms and notify the judicial assistant. The judicial assistant will bring you into court to declare your verdict.

CP 300-01. Although the instruction's previous language properly allowed for either a "guilty" or "not guilty" verdict on the crimes, it did not properly instruct the jury on the requirements for returning a "no" answer on the enhancements. CP 300-01. Exacerbating the error, the individual special verdict forms themselves suffered from similar deficiency. The special verdict forms read as follows, exampled by the burglary special verdict form:

> We, the jury, having found the defendant, Soy Oeung, guilty of the crime of burglary in the first degree, as charged in Count XV, return a special verdict by answering as follows:
> QUESTION ONE: Was the defendant or an accomplice armed with a deadly weapon at the time of the commission of the crime in Count XV?

ANSWER: _____ (Write "yes" or "no")
QUESTION TWO: Was the deadly weapon a firearm?
ANSWER: _____ (Write "yes" or "no")

_____
PRESIDING JUROR

CP 306; see also CP 305, 308, 309, 310, 311, 312, 313, 314.

The jury was not given adequate and comprehensive instruction for answering "no" to the questions whether Soy Oeung or an accomplice was armed with a deadly weapon (firearm) during the crimes.

b. The instructions are contrary to current and prior case law and current and prior pattern instructions. In the case of State v. Bashaw, the Supreme Court held that if the jury did not unanimously agree that the State had proved a special finding beyond a reasonable doubt, it must answer "no" on the relevant verdict form. State v. Bashaw, 169 Wn.2d 133, 146-47, 234 P.3d 195 (2010). But the Court subsequently overruled Bashaw and held that, as with "guilty" or "not guilty" verdicts on the substantive charge, the jury must unanimously agree in order to return either a "yes," or a "no" verdict. State v. Nunez, 174 Wn.2d 707, 285 P.3d 21 (2012). The Court approved the jury instruction given in Nunez, which was as follows:

> Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer, "no."

Nunez, 174 Wn.2d at 710. Although the unanimity rule changed with Bashaw and again with Nunez, the jury was always to be told it could (and must, in certain circumstances) answer "no" on a special verdict form. The pattern instruction following Bashaw was:

> In order to answer the special verdict form[s] "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously agree that the answer to the question is "no," or if after full and fair consideration of the evidence you are not in agreement as to the answer, you must fill in the blank with the answer "no."

WPIC 160.00 (2011). The pattern instruction before Bashaw, which is again proper after Nunez, is:

> In order to answer the special verdict form[s] "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."

WPIC 160.00 (2008); see Nunez, 174 Wn.2d at 710. Contrary to both versions of the WPIC, the concluding instruction here told the jury it must answer "yes" if it found the State had proved the special

allegation, but did not properly describe the procedure for a "no" answer.

In addition to violating case law and the WPICs, the instructions violated Ms. Oeung's right to Due Process and constituted an unconstitutional comment on the evidence. A party may raise a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3). A jury instruction that lowers the State's burden of proof is a manifest error affecting a constitutional right – the right to Due Process. State v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996 (1996); State v. McCullum, 98 Wn.2d 484, 487-88, 656 P.2d 1064 (1983); U.S. Const. amend. 14. Similarly, "[s]ince a comment on the evidence violates a constitutional prohibition, a failure to object or move for a mistrial does not foreclose [a defendant] from raising this issue on appeal." State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997) (quoting State v. Lampshire, 74 Wn.2d 888, 893, 447 P.2d 727 (1968)).

By inadequately telling the jury how to answer "no," the court violated Soy Oeung's Fourteenth Amendment right to Due Process and commented on the evidence in violation of article 4, § 16 of the Washington Constitution. The state constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment

thereon, but shall declare the law." Wash. Const. art. 4, § 16. This provision "prohibits a judge from conveying to the jury his or her personal attitudes toward the merits of the case." Becker, 132 Wn.2d at 64. Additionally, "the court's personal feelings on an element of the offense need not be expressly conveyed to the jury; it is sufficient if they are merely implied." State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). "[A]ny remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment" in violation of article 4, section 16. Levy, at 721.

The concluding instruction here did not properly instruct the jury how to rule for the defendant. This violated her rights under article 4, § 16. It also violated her rights under the Due Process clause, which guarantees a presumption of innocence and proof beyond a reasonable doubt. U.S. Const. amend. 14; Cool v. United States, 409 U.S. 100, 104, 93 S.Ct. 354, 34 L.Ed.2d 335 (1972); In re Winship, 397 U.S. at 364.

To overcome the presumption of innocence, the State must prove every element of the charged offense beyond a reasonable doubt, including sentencing enhancements. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435

(2000). Here, the concluding instruction turned the presumption of innocence into a presumption of guilt by not properly allowing the jury to make a finding other than guilty. Cf. State v. Pam, 98 Wn.2d at 760 (reversing special verdicts where instructions failed to state that deadly weapon and firearm findings must be proved beyond a reasonable doubt).

The State must show that Soy Oeung was not prejudiced by the state and federal constitutional violations. State v. Peters, 163 Wn. App. 836, 850, 261 P.3d 199 (2011). As argued, the State presented insufficient evidence that a perpetrator to whom Ms. Oeung was an accomplice was armed, as to all the firearms. Accordingly, the State cannot prove beyond a reasonable doubt that the errors were harmless. Soy Oeung asks this Court to vacate the enhancements and remand for resentencing. See State v. Eaker, 113 Wn. App. 111, 121, 53 P.3d 37 (2002) (reversing where jury instruction constituted improper comment on the evidence and State could not prove prejudice); In re Detention of R.W., 98 Wn. App. 140, 145-46, 988 P.2d 1034 (1999) (same).

6. THE TRIAL COURT ERRED AS A MATTER OF LAW IN RULING THAT NO LEGAL BASIS HAD BEEN PRESENTED TO JUSTIFY AN EXCEPTIONAL SENTENCE.

a. Appeal of the standard range sentence is permissible.

As a general rule, under the rule of RCW 9.94A.585, when the sentence imposed on a convicted defendant is within the standard range there is no right to appeal the sentence. State v. Ammons, 105 Wn.2d 175, 182-83, 713 P.2d 719, 718 P.2d 796 (1986); see RCW 9.94A.585. Thus, if a trial court has contemplated an exceptional sentence, concluded correctly that there is no legally applicable basis for an exceptional term, or that there is no factual basis adequate to satisfy the legal requirements of the mitigating factor(s), the court has exercised its discretion, and the defendant may not appeal. State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002).

However, review may be granted where the sentencing judge has refused to exercise discretion (i.e., has simply refused to review proffered factual grounds). State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). In addition, RCW 9.94A.585's prohibition on appeal of standard range terms will not preclude appeal where the court has relied on an incorrect legal

basis that the factors offered in support of the downward departure are not legally viable. State v. Schloredt, 97 Wn. App. 789, 801-02, 987 P.2d 647 (1999); State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989); Ammons, 105 Wn.2d at 183.

b. Ms. Oeung sought an exceptional sentence of 288 months on several grounds; the trial court ruled that none of them were legally available bases for a downward departure. For her knock on the Fernandez's door, Ms. Oeung was sentenced to 417 months prison. Prior to sentencing, seeking to mitigate the harshness of the expected term, Ms. Oeung presented a motion for an exceptional sentence below the standard range, asking that the court order that Ms. Oeung serve only the mandatory consecutive firearm enhancements. CP 338-54, CP 328-337; 6/23/14RP at 46-67. The motion was accompanied by an extensive pre-sentencing mitigation report. CP 343-54.[14]

Ms. Oeung presented the following statutory bases for an exceptional sentence, briefly described:

[14] The mitigation report explained how Ms. Oeung had become addicted to prescription medication, following a painful child birth and the contemporaneous death of her father. Mitigation report, at pp. 343, 347-48. At sentencing, counsel stated how the sentencing investigators believed Ms. Oeung's capacity to appreciate the wrongfulness of her conduct of knocking on the Fernandez's door appeared to be affected, but properly noted that voluntary intoxication is not a legal basis for a mitigated sentence under RCW 9.94A.535(1)(e). CP 340; 6/23/14RP at 49-51.

> • Ms. Oeung had no criminal history and no predisposition to commit the crimes, and was induced by her boyfriend Azias Ross, and by Nolan Chouap, to knock on a door, and received $200. This was money she believed she needed to care for her child in the absence of her boyfriend Azias Ross who had just been sent to jail. CP 339-40; 6/23/14RP at 47; see mitigation report, at pp. 343, 347, 349, 351; see RCW 9.94A.535(1)(c) and (d).
> • Ms. Oeung's participation in the offense was significantly less than what would be ordinary for crimes of this sort, and she did not personally threaten persons with harm. CP 340; 6/23/14RP at 46, 50-52; see RCW 9.94A.535(1)(f).
> • The presumptive sentence was clearly excessive, in light of Ms. Oeung's involvement. CP 340-41; see RCW 9.94A.535(1)(g).

In addition, counsel argued to the court that it could consider 21 year-old Oeung's history of being a victim of domestic violence, and how that abuse led her into the company of a group of males that, although severe wrongdoers, were a tightly knit group and gave Soy the false feeling of a semblance of a family unit. CP 345, 349; 6/23/14RP at 342.

Counsel's presentation to the court also noted that the court was entitled, under the SRA's guidelines, to impose a downward departure based on any factor mitigating the crimes, that would be legally valid under the SRA's policies and guidelines. 6/23/14RP at 48-49, 57.

The court desired to impose a downward departure. The court stated, "I think probably 288 months is enough, but I don't think I have the authority based on the reasons given, and the reasons given are based on the facts of the case, to declare an exceptional sentence." 6/23/14RP at 65-66.[15]

Ultimately, before imposing the standard term, the court stated that,

> if I felt I had the authority based on any of the reasons that have been identified to grant an exceptional sentence, I would consider it.

6/23/14RP at 67. The court also stated that the sentence was out of proportion; it was not minimizing the trauma experienced by the victims inside the house, but rather, the court's thought on departing downward from the presumptive sentence was because "of where these crimes fall in relation to other crimes that make it seem out of whack at times to me." 6/23/14RP at 67.[16]

---

[15] The court's description of the mitigated sentence report, as making, in part, the argument that a "terrible background" justified an exceptional sentence for reasons pertaining to the defendant herself, was understandable given the lay report's extensive discussion of Ms. Oeung's history of physical and sexual abuse in her family. However, this was not the only basis for the report's recommendation, CP 343-54, and counsel specifically noted he was raising issues of mitigation pertaining to the crimes. 6/23/14RP at 49-51.

[16] The court, in the course of sentencing Mr. Ross, again reiterated that it would have exercised its discretion to impose an exceptional sentence in Ms. Oeung's case. 6/23/14RP at 76.

c. The trial court did possess the authority it desired to wield. RCW 9.94A.535(1) includes a list of "illustrative," not exclusive, factors that may mitigate in favor of a lesser sentence. The SRA allows "variations from the presumptive sentence range where factors exist which distinguish the blameworthiness of a particular defendant's conduct from that normally present in that crime." State v. Hutsell, 120 Wn.2d 913, 921, 845 P.2d 1325 (1993) (citing with approval, D. Boerner, Sentencing in Washington, § 9-23 (1985)). Factors favoring the mitigation of the standard range need be established only by a preponderance of evidence. RCW 9.94A.535(1).

Here, in particular, Soy Oeung's dramatically less extensive, and less venal participation that rendered her guilty by complicity to the offenses of violence committed by the principals, is a legally tenable basis for a downward departure. State v. Evans, 80 Wn. App. 806, 811-13, 911 P.2d 1344 (1996). Minor involvement -- a defendant's "lesser degree of participation" may be considered as a mitigating factor only if the defendant's participation is "significantly out of the ordinary for the crime in question." State v. Nelson, 108 Wn.2d 491, 501, 740 P.2d 835 (1987).

That is the situation here. For example, in State v. Moore, 73 Wn. App. 789, 871 P.2d 642 (1994), this Division of the Court of Appeals affirmed an exceptional sentence downward based on the trial court's finding that the defendant's participation was "merely incidental to the overall criminal enterprise." Moore, 73 Wn. App. at 796. Moore was convicted of a total of 14 counts of various violations of the Uniform Controlled Substances Act and trafficking in stolen property, and the charges were based on a series of drug and stolen property transactions arising out of a fairly sophisticated operation orchestrated by Moore's codefendant. In affirming the trial court's findings supporting the exceptional sentence downward, the appellate court focused on Moore's involvement as compared to that of the codefendant. Moore, at 796; see also State v. Alexander, 125 Wn.2d 717, 731 and n. 25, 888 P.2d 1169 (1995) (noting that the focus of such an inquiry is on the defendant's role as compared to other parties who participated in the same crime). Emphasizing that Moore was not involved with the overall planning of the operation and assisted the codefendant only from " 'time to time,' " this appellate court agreed with the trial court that involvement which is so significantly not as great as that of the codefendant, compared to the convictions and presumptive

sentence, is a legally viable - and in that case, also factually supported -- basis for an exceptional sentence below the standard range. Moore, 73 Wn. App. at 796-97. See also RCW 9.94A.535(1)(g) (an exceptional sentence can be imposed where the operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of the SRA).

Here also, the trial court's determination of lesser participation would also be supported in this case, and affirmed because not clearly erroneous. State v. Allert, 117 Wn.2d 156, 163, 815 P.2d 752 (1991); see State v. Grewe, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991) (where substantial evidence supports the court's finding, it will not be disturbed). And the 288 months the trial court desired to impose on Soy Oeung would not be deemed "clearly too lenient." See RCW 9.94A.585(4); State v. Alexander, 125 Wn.2d at 722.

d. This Court should remand for re-sentencing. In this case, the trial court erred when it rejected the defense argument regarding viable mitigating factors. In these circumstances, the trial court's refusal to impose an exceptional sentence below the standard range requires reversal because the court relied on an

untenable legal basis for refusing to consider and impose an exceptional sentence. State v. Schloredt, 97 Wn. App. at 801-02; State v. Herzog, 112 Wn.2d at 423; Ammons, 105 Wn.2d at 183; see also State v. Khanteechit, 101 Wn. App. 137, 138, 5 P.3d 727 (2000); RCW 9.94A.585. The sentencing court also could be said to have abused its discretion by using the wrong legal standard, and not exercising discretion. See State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). This Court should reverse the sentence and remand the case for factual appraisal of the sentencing arguments that the trial court desired to consider in mitigation.

7. THE SENTENCING COURT VIOLATED MS. OEUNG'S DOUBLE JEOPARDY PROTECTIONS.

a. Duplicative conspiracy convictions; dismissal of assault convictions "without prejudice." As noted, the jury convicted Ms. Oeung of conspiracy, burglary, two counts each of robbery, assault, and unlawful imprisonment, theft of a firearm, and trafficking in stolen property. CP 305-26.

The charges submitted to the jury included two verdict forms for count XIV, which count was charged as a single conspiracy to commit first degree burglary "and/or" first degree robbery. CP 75

(amended information), CP 315, 316 (verdict forms for count XIV). The sentencing court imposed punishment for a single conspiracy, as count XIV, CP 362; however, the jury's duplicative verdict was not vacated.

Also at sentencing, the State and the sentencing court agreed that Ms. Oeung's two convictions for second degree assault violated Double Jeopardy when paired with the convictions for first degree robbery. CP 329-33, CP 357-68; 6/23/14RP at 23-24. However, the trial court stated in the judgment and sentence that it was dismissing the two assault counts "without prejudice." CP 359.

b. Conviction or punishment in violation of the double jeopardy guarantee is prohibited. The double jeopardy clause of the federal constitution provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense, and the Washington Constitution provides that no individual shall "be twice put in jeopardy for the same offense." U.S. Const. Amend. 5; Wash. Const. Art. 1, § 9. The Fifth Amendment's double jeopardy protection is applicable to the States via the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); U.S. Const. Amend. 14. The Washington courts interpret Article 1, § 9's provision coextensively

with the United States Supreme Court's reading of the Fifth Amendment. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

First, where convictions are deemed to violate Double Jeopardy, the duplicative convictions must be vacated. State v. Womac, 160 Wn.2d 643, 649-51, 160 P.3d 40 (2007). This Court should order that the assault convictions be vacated.

Second, the twin convictions for conspiracy violate Double Jeopardy, in that the unit of prosecution for conspiracy is the single agreement. State v. Bobic, 140 Wn.2d 250, 265–66, 996 P.2d 610 (2000); State v. Williams, 131 Wn. App. 488, 493, 128 P.3d 98, review granted on other grounds and cause remanded, 158 Wn.2d 1006 (2006); Braverman v. United States, 317 U.S. 49, 53, 63 S.Ct. 99, 87 L.Ed. 23 (1942). The verdict of guilt to conspiracy to commit burglary must be vacated. State v. Knight, 162 Wh. 2d 806, 809, 174 P.3d 1167, 1169 (2008); State v. Westling, 145 Wn.2d 607, 612, 40 P.3d 669 (2002).

8. THE CONVICTIONS FOR BURGLARY AND TWO COUNTS ROBBERY, AND FOR TWO COUNTS EACH OF ROBBERY AND UNLAWFUL IMPRISONMENT, WERE THE "SAME CRIMINAL CONDUCT."

Regarding same criminal conduct, Ms. Oeung argued that the two convictions for robbery and the two convictions for unlawful imprisonment were the same criminal conduct. CP 334-36. Ms. Oeung also argued that the two robbery counts and the burglary count were the same criminal conduct, and in ruling, the court did not invoke the burglary anti-merger statute, RCW 9A.52.050. CP 334-36, 6/23/14RP at 24-42.

Both arguments should have prevailed. Crimes constitute the same criminal conduct for sentencing purposes if they involve each of three elements: "(1) the same criminal intent, (2) the same time and place, and (3) the same victim." State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994); RCW 9.94A.589(1)(a) ("same criminal conduct" means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim)."

As to burglary and the robberies, the victim of the crimes here were the owners of the home, who were present, and subjected to robbery. State v. Davison, 56 Wn. App. 554, 559-60,

784 P.2d 1268 (1990); State v. Webb, 112 Wn. App. 618, 624, 50 P.3d 654 (2002). The offenses were committed in the same place, i.e., the Fernandez home. The place is the same. And the same time element is satisfied. The "same time" element may be satisfied if, but does not require that, the two crimes occur simultaneously. State v. Porter, 133 Wn.2d 177, 185-86, 942 P.2d 974 (1997); State v. Dolen, 83 Wn. App. 361, 365, 921 P.2d 590 (1996). Individual crimes may be considered the same criminal conduct if they occur during an uninterrupted incident. Porter, 133 Wn.2d at 185-86; Dolen, 83 Wn. App. at 365. Here, the perpetrators entered and remained in the Fernandez home while they took property from them by force. 1/30/14RP at 956-57, 987-1022.

Finally, the "same criminal intent" element is determined by looking at whether the defendant's objective intent changed from one crime to the next. Dolen, 83 Wn. App. at 364-65; State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997); see State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994) (standard for determining the same intent prong is the extent to which the criminal intent, viewed objectively, changed from one crime to the next). In this case, the purpose of the crimes was to take property.

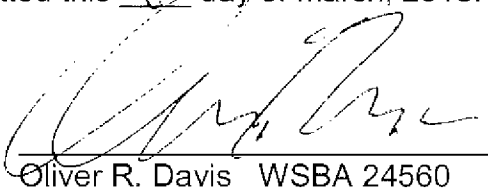
The fact that one crime furthered commission of the other may, and in this case does, indicate the presence of the same intent. Vike, 125 Wn.2d at 411; State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). The crimes were the same criminal conduct.

Under these same principles, the robbery and the unlawful imprisonment were the same criminal conduct. The victims of the crimes of robbery were the Fernandezes. State v. Webb, 112 Wn. App. at 624. They were also the victims of the unlawful imprisonment. State v. Phuong, 174 Wn. App. 494, 548, 299 P.3d 37 (2013). The offenses were committed at the same time and place. See Vike, 125 Wn.2d at 410. And the perpetrators' "objective criminal purpose" in committing each offense was to take property by force -- holding the Fernandezes in their bathroom, with the door guarded, was done in order to further that purpose. Burns, 114 Wn.2d at 318; cf. State v. Wilson, 136 Wn. App. 596, 615, 150 P.3d 144 (2007) (where defendant had time to complete assault and then form new intent to threaten victim, crimes of assault and harassment had different objective intents and were not same criminal conduct). The crimes were the same criminal conduct.

F. CONCLUSION

Based on the foregoing, Soy Oeung requests that this Court reverse her judgment and sentence.

Respectfully submitted this 6 day of March, 2015.



Oliver R. Davis WSBA 24560
Washington Appellate Project - 9105
Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, v. SOY OEUNG, Appellant.	)	NO. 46425-0-II

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF MARCH, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KATHLEEN PROCTOR, DPA [PCpatcecf@co.pierce.wa.us] PIERCE COUNTY PROSECUTOR'S OFFICE 930 TACOMA AVENUE S, ROOM 946 TACOMA, WA 98402-2171	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT OF PARTIES
[X] JENNIFER WINKLER, DPA [SloaneJ@nwattorney.net] NIELSEN BROMAN KOCH, PLLC 1908 E MADISON ST SEATTLE, WA 98122	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT OF PARTIES
[X] SOY OEUNG 375419 WACC FOR WOMEN 9601 BUJACICH RD NW GIG HARBOR, WA 98332-8300	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 6TH DAY OF MARCH, 2015.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

March 06, 2015 - 3:58 PM

Transmittal Letter

Document Uploaded: 3-464250-Appellant's Brief~2.pdf

Case Name: STATE V. SOY OEUNG

Court of Appeals Case Number: 46425-0

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Appellant's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: maria@washapp.org

A copy of this document has been emailed to the following addresses:

SloaneJ@nwattorney.net
PCpatcecf@co.pierce.wa.us