NO. 46425-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

AZIAS ROSS,

Appellant.

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

The Honorable Linda Lee, Judge
The Honorable Thomas J. Felnagle, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The procedure by which the court took peremptory challenges violated the appellant's right to a public trial and the public's right to open proceedings.

2. The trial court erred in denying the appellant's motion for a mistrial following a serious trial irregularity.

3. The State's repeated mischaracterization of a statement by the appellant in closing argument and in a corresponding visual presentation denied the appellant a fair trial.

4. The State's rebuttal argument urging the jury should render a verdict that was truthful denied the appellant a fair trial.

5. The State's concluding argument, expressing a personal belief that the appellant was guilty, was misconduct denying the appellant a fair trial.

6. Cumulative trial errors (errors 2 through 5 above) denied the appellant a fair trial.

7. The State presented insufficient evidence to convict the appellant of theft of a firearm as an accomplice to the crime.

8. The court erred when it failed to find first degree burglary and first robbery were the same criminal conduct as to the January 2012 offenses.

9. Defense counsel was ineffective for failing to argue the April 2012 charges for robbery and unlawful imprisonment were the same criminal conduct.

10. Insufficient evidence supported the firearm enhancement on the single conspiracy count.

11. The court erred in dismissing various charges without prejudice rather than vacating them and dismissing them with prejudice.

Issues Pertaining to Assignments of Error

1. During jury selection, the trial court employed a procedure that prevented the public from scrutinizing the parties' peremptory challenges. Did this procedure violate the appellant's constitutional right to a public trial and the public's right to open court proceedings?

2. As to many of the charged crimes, the State asserted the appellant was guilty via accomplice liability. The jury was mistakenly shown a picture of a gun of a type associated with the appellant's co-defendant, the alleged principal in many of the charged crimes, that was found in the appellant's home. Did the trial court err in denying the appellant's motion for a mistrial following this serious trial irregularity?

3. The State alleged the appellant was the "driver" in two home invasion robberies and was therefore guilty of various crimes via accomplice liability. Over objection, the State mischaracterized one of the

appellant's statements to police in such a way as to strongly suggest that the appellant knew the principals were armed. The State also used the mischaracterized statement to argue that the accomplices were, in fact, armed. In closing, the State showed the mischaracterized statement—which it repeatedly depicted as a direct quote—on eight separate PowerPoint slides shown during closing argument. The defense preserved the issue with a timely objection. The State, moreover, had advance notice that its version of the statement was incorrect. Where the argument was both improper and prejudicial, did the State's misconduct deprive appellant deprived of his right to a fair trial?

4. In rebuttal, and over defense objection, the prosecutor urged the jurors to reach a verdict they believed was the "truth," such that when a juror returned for jury service in the future, he or she would look back and consider the verdict to be "true." This argument undermined the presumption of innocence and diminished the State's burden to prove the guilt of the accused beyond a reasonable doubt. For this reason as well, did the State's misconduct in closing argument deprive the appellant of his right to a fair trial?

5. Did the prosecutor commit flagrant, prejudicial misconduct by expressing his personal belief in the appellant's guilt during the final portion of the State's rebuttal argument?

6. Did cumulative error, based on issues two through five identified above, deny the appellant a fair trial?

7. Did the State present insufficient evidence to convict the appellant of theft of a firearm as an accomplice to the crime?

8. Did the court err when it failed to find first degree burglary and first degree robbery were the same criminal conduct as to the January 2012 offenses, which involved the same objective criminal intent, occurred at the same time and place, and involved the same victim?

9. For similar reasons, was defense counsel ineffective for failing to argue the April charges for robbery and unlawful imprisonment were the same criminal conduct?

10. Where the State failed to prove a nexus between the prohibited act in a conspiracy conviction—the formation of the agreement or plan—and the presence of a firearm, did insufficient evidence support the firearm enhancement on the conspiracy count?

11. Did the court err in dismissing various charges without prejudice rather than vacating them and dismissing them with prejudice?

B. STATEMENT OF THE CASE[1]

1. Charges, verdicts, and sentence

The Pierce County prosecutor charged Azias Ross and four co-defendants, including Soy Oeung, the mother of Ross's child, with various counts related to seven home invasion robberies occurring in Tacoma in 2012. Ross was 19 or 20 years old at the time of the charged crimes. The State alleged Ross was the driver during two of the incidents occurring in January and April of 2012. The State also alleged he trafficked in property that was stolen during those two incidents, as well as during a third incident occurring in August 2012. The State alleged Oeung knocked on the door before a May 2012 home invasion robbery that Ross was not involved in. [2] For his involvement, Ross was charged with a number of separate crimes, with firearm or weapons enhancements alleged on all but one charge.

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[1] This brief refers to the verbatim reports as follows: 1RP – 8/19/13; 2RP – 9/16/13; 3RP – 10/15/13; 4RP – 10/24/13 morning; 5RP – 10/24/13 afternoon; 6RP – 1/10 and 1/21/14; 7RP – 1/16/14; 8RP – 1/22/14; 9RP – 1/23/14; 10RP – 1/27/14; 11RP – 1/28/14; 12RP – 1/29/14; 13RP – 1/30/14; 14RP – 2/3/14; 15RP – 2/4/14; 16RP – 2/5/14; 17RP – 2/6/14; 18RP – 2/10/14; 19RP – 2/11/14; 20RP – 2/12/14; 21RP – 2/24/14; 22RP – 2/25/14; 23RP – 2/26/14; 24RP – 2/27/14; 25RP – 3/3/14; 26RP – 3/4, 3/5 and 6/5/14; and 27RP – 6/23/14.

[2] That incident occurred while Ross was incarcerated on unrelated misdemeanor charges. CP 74-79, 625; 23RP 2092-93. Oeung was charged with multiple counts, and multiple enhancements, based on her role in that single incident.

For an incident occurring January 25, 2012, the State charged Ross with conspiracy to commit first degree robbery and/or first degree burglary (count 1), first degree burglary (count 2), first degree robbery (count 3), second degree assault (count 4), unlawful imprisonment (count 5), and first degree trafficking in stolen property (count 6). CP 471-74.

For an April 27, 2012 incident, Ross was charged with conspiracy to commit first degree robbery and/or first degree burglary (count 7), first degree burglary (count 8), first degree robbery (count 9), second degree assault (count 10), unlawful imprisonment (count 11), theft of a firearm (count 12), and first degree trafficking in stolen property (count 13). CP 474-77.

For an August 26, 2012 incident, Ross was charged with conspiracy to commit first degree robbery and/or first degree burglary (count 59) and first degree trafficking in stolen property (count 71).

The State alleged firearm enhancements for each of the January and April charges except theft of a firearm, count 12. CP 471-77. The State alleged deadly weapon enhancements for the August charges.[3] CP 477, 482.

[3] Additional charges related to the August incident were dismissed and did not go to the jury. 25RP 2279; CP 708-09.

Of the five co-defendants initially joined for trial, only the charges against Ross and Oeung went before the jury in this case. CP 231-304 (jury instructions). As for the remaining co-defendants, charges against Alicia Ngo (who refused to talk to police) were dismissed because the State determined there was insufficient evidence to proceed. 6RP 22-24. The court severed the trial of Ross's brother, Azariah Ross, an alleged principal in the home invasion robberies, based on his attorney's scheduling issue. 7RP 12. Nolan Chouap, the second alleged principal in the robberies, pleaded guilty well into the trial in this case, when the State's presentation of evidence against him was nearly complete: Multiple complainants had already testified regarding crimes in which, of the three co-defendants, only Chouap was alleged to have participated. 20RP 1600-17.[4]

The jury ultimately convicted Ross as charged, with two exceptions. CP 672-707. The jury acquitted him of the alternative underlying crime of conspiracy to commit robbery on count 7, the April 2012 conspiracy charge. CP 687. The jury found him guilty, however, of conspiracy to commit first degree burglary as to that charge. CP 688. The

[4] The court denied Ross's and Oeung's motions for a mistrial following the plea. 21RP 1623-43; CP 562-624. When the jury was next present following the plea, however, the court instructed the jury to draw no inferences from Chouap's absence. 21RP 1685.

jury also acquitted him of count 59, the August 26 conspiracy charge. CP 703-04.

Ross had no prior felony convictions. CP 743. From this starting point, the court sentenced Ross to concurrent standard ranges on each charge, the longest of which was 129 months for each first degree robbery conviction (counts 3 and 9). CP 743, 746. The court also sentenced Ross to 366 months of "hard time" firearm enhancements (counts 1, 2, 3, 6, 8, 9, 11, 13) and 12 months for a single deadly weapon enhancement (count 71), for a total sentence of 507 months. CP 746. The court found that only the April theft of a firearm and first degree burglary convictions constituted the same criminal conduct for sentencing purposes. 27RP 43.

The court dismissed various charges and their corresponding enhancements, based on merger and other theories, but it inexplicably dismissed the charges "without prejudice" rather than vacating them and dismissing them with prejudice. CP 744 (dismissing counts 4 and 6 (assault), count 7 (conspiracy to commit burglary), count 5 (unlawful imprisonment)).

2. Trial testimony

The charges in this case arose from seven in-home robberies. 11RP 612-13. The State alleged the same group of individuals committed each of the crimes, which primarily targeted individuals of Asian descent.

Ross was incarcerated on unrelated misdemeanor charges between May 9 and August 10, 2012 and was only charged with crimes occurring before and after that date. CP 625.

Fifty-nine-year-old Soeung Lem moved to the United States from Cambodia in 1985 and testified through an interpreter. On January 25, 2012, she lived in a house on the 9100 block of McKinley Avenue East with four grown children. 12RP 794-97. Around 4 p.m., while Lem's children were at work, she took out the garbage through her back door. 12RP 798. Back inside, Lem heard her dog barking, which she found strange. Suddenly, a man grabbed her arm. 12RP 799. The man held a gun against her head and said in English, "Do you know what this is?" 12RP 799-800, 857. Lem screamed. In the Cambodian language, the man asked again, "Do you know what this is, grandma?" 12RP 801. Lem answered that she did.[5] 12RP 801.

Lem initially testified the man wore a mask covering his face from the nose down, 12RP 801, 857, but she later testified that she saw his forehead and mustache and noticed he had pimples on his face. 12RP 859-60.

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[5] Through an interpreting family member, Lem told a responding officer that she saw a silver and black handgun. 13RP 886-87.

The man had Lem sit on the sofa in the family room and tied her hands with wire or cable. 12RP 802-04. The man asked Lem where the gold was. 12RP 802. Lem told the man she didn't know where the gold was and that her children were at work. 12RP 802, 804.

At some point, Lem realized there was a second man present. He was searching the home. 12RP 803. The two men spoke to each other in English. 12RP 806. Unlike other complainants who testified at the trial, Lem did not testify the men talked to a third person on walkie-talkies or a cell phone.

The first man eventually covered Lem's face with her jacket. 12RP 805. The men remained in the home about 30 minutes after that. Before leaving, they removed the jacket and told Lem to wait 15 minutes before getting up. 12RP 805.

Lem eventually freed her hands and called family members, who called the police. 12RP 808-09. After the men left, Lem discovered they had taken her purse and also $4,000 in cash belonging to Lem's daughter. 12RP 817-20, 868-70.

The men also took jewelry. Lem and her daughter later identified various items on photos kept by "Gold & Silver Traders," a Tacoma precious metal dealer. 12RP 821-23; 14RP 13; 20RP 1572-73; 23RP 2037-38, 2041-42. Six months later, Lem picked Chouap out of a

photomontage as the man who tied her hands. 12RP 826-27; 23RP 2038-39 (testimony of Detective Robert Baker).

Bora Kuch, 58 years old, was a more recent immigrant from Cambodia and also required an interpreter at trial. 11RP 626. She lived in a house at the 8200 block of South "G" Street in Tacoma with her daughter, son-in-law, and two-year-old grandson. 11RP 626-29; 13RP 897. On April 27, 2012, at around 5:30 p.m., she was upstairs in her home with her grandson while the others were at work. 11RP 630-31. Kuch heard a pounding noise from downstairs but thought the sound came from her neighbor's home. After a period of quiet, she heard the sound again. 11RP 631-32. Kuch headed downstairs to investigate but encountered two men before she got to the bottom of the stairs. 11RP 632. One of the men pushed Kuch back up the stairs and into her bedroom. There was a second man behind him. 11RP 633-34.

Kuch saw the first man's face before he covered it with one of Kuch's shirts. 11RP 634, 658. She described the man as "over 20 years old, long hair, with mustache." 11RP 635. He spoke to Kuch in Cambodian, although he did not speak the language fluently. 11RP 635-36. The man wore bluish or greenish gloves. 11RP 636; 13RP 910.

Kuch did not get a good look at the second man, who spent his time searching the home. She noticed, however, that he was taller than the

first man. 11RP 636. Kuch heard the taller man talking on the phone during the incident and heard a woman's voice on the other end. 11RP 659.

Kuch and her grandson sat in Kuch's bedroom while the men went up and down the stairs looking for an implement to open a gun safe they had discovered. 11RP 637-38. The grandson watched television in that room throughout most of the incident. 11RP 645. The first man tied Kuch's hands, but Kuch tried to open a window to get help. 11RP 638, 642-43. When the first man discovered Kuch trying to open the window, he yelled, "You want to die?" and pointed a black gun at Kuch. 11RP 642. Kuch later untied her hands and went to her daughter's room, which had been ransacked. 11RP 644. The man who tied her hands the first time took her back to her bedroom and tied her hands again.[6] 11RP 645.

The men spent about 90 minutes at Kuch's residence. 11RP 638. Kuch gave the men $500 in cash as well as jewelry belonging to Kuch's daughter and grandson. 11RP 649-50, 652-54.

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[6] Kuch also testified that, at one point, one of the men carried the grandson from Kuch's room to the daughter's room to be with Kuch. The man also asked if Kuch was hungry. After the man left, the grandson wandered back into Kuch's room and resumed watching television. 11RP 657.

The men eventually opened the gun safe using tools from Kuch's garage.[7] 11RP 648, 651, 657. One of the men showed Kuch a rifle that had been in the safe and said, "This is a nice gun, grandma." 11RP 652. The men put the handguns from the safe in the grandson's diaper bag and carried out the rifle in its case, although they left an older rifle. 11RP 653-54.

Kuch was sitting on the stairs as the men left. 11RP 656. After they left, Kuch called her daughter. 11RP 660. Kuch's son-in-law was contacted, and he called the police. 11RP 664.

A few weeks after the incident, police showed Kuch a photomontage. Kuch told the police officer that the first man looked similar to the photo of Chouap.[8] 11RP 673-74. Kuch, her daughter, and her son-in-law also identified jewelry from photographs kept by Gold & Silver Traders. 11RP 683-87, 734-38; 20RP 1585-86; 23RP 2043-44.

Kuch's son-in-law, Fred Van Camp, learned of the incident around 6:30 or 7:00 that evening and called the police. 12RP 715. The house,

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[7] Kuch heard the taller man tell the person on the other end of the phone that they were "almost finished" when the safe was nearly open. 11RP 659.

[8] According to Kuch, the police officer told her she picked the wrong person. 11RP 673-74; 23RP 2042-43.

which had been orderly when Van Camp left for work, was in disarray when he returned. 12RP 723-24.

Van Camp's gun safe was open and lay on its side. 12RP 724-25. There had been 10 guns in the safe, including six that belonged to Van Camp's friend, Sidoung Sok. Most were missing after the robbery, as was a .357-caliber revolver that had been stored in the closet. 12RP 727-29. Van Camp also noticed jewelry and a "gold bar" were missing from Sok's fire safe, which Van Camp had also been storing for his friend. 12RP 725-27.

Van Camp later identified various guns from a photograph police obtained during a search of Ross's cell phone.[9] 12RP 737-40. Van Camp testified his guns and Sok's guns were all operable. 12RP 744, 748-49;[10] see also 19RP 15-25 (Sok testimony).

The afternoon of August 26, 2012, forty-seven-year-old Hoang Danh and his two sons returned to their home on the 600 block of East 51st

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[9] 23RP 2045-46 (testimony of Detective Baker).

[10] Van Camp testified that two of the semiautomatic handguns taken, including one that belonged to Sok, had laser sights. 12RP 729. Sok testified, however, the laser sight on his gun did not work. 19RP 20. Various complainants as to the May 10, June 9, and June 29, 2012 robberies—robberies Ross was not charged with—testified about seeing a gun with a laser sight or red light. See 13RP 984-87 (Remegio Fernandez); 13RP 1032, 1039 (Norma Fernandez); 14RP 23-24 (Duoc Nguyen); 14RP 57-59, 65 (Thanh Vu); 16RP 1088 (Rany Eng); 16RP 1158 (Hing Yu).

Street. Danh was confronted by two men already in the home. 17RP 1191-93. The men threatened Danh with a knife from Danh's kitchen. 17RP 1204. Fearful, Danh opened his safe on the robbers' orders. 17RP 1200. Danh's wife, Sophea, arrived home an hour after Danh. 17RP 1207. Sophea testified the two men took about twenty thousand dollars in fresh $100 bills from the family's safe, and jewelry and a camera from the home. 17RP 1268-71.

Hoang and Sophea selected Chouap from a photomontage, but neither was certain he was one of the robbers. 17RP 1224-25, 1273; 23RP 2063. Their older son was, however, more certain as to his selection of Chouap. 17RP 1292; 23PR 2063. Sophea also identified various items of jewelry from a photo the police showed to her. 17RP 1272.

On August 27, the day after the Danh robbery, police surveilled Chouap's apartment, and they followed when Chouap got into a minivan that drove to the South Hill Mall in Puyallup. 20RP 1450-52. The van pulled in near a Dodge Stratus in the parking lot of a sporting goods store. 20RP 1452, 1464. Police arrested Chouap. Ross, Azariah, Ngo, and Oeung, who were driving in the Stratus, were also arrested. 20RP 1455.

The photos that police showed to Sophea Danh included items removed from the co-defendants, but not Ross, when they were arrested the day after the Danh robbery. 17RP 1272; 20RP 1467; 23RP 2065-66,

2074. Ross was, however, found in possession of $5,100 in $100 bills. 23RP 2074-75.

Following Chouap's arrest, police found various guns at his apartment. 20RP 1458, 1494; 21RP 1700. Ross's family's home was also searched. 21RP 1708-13, 1729-36, 1746-51. Items found in the search, including a photo of a gun that was admitted inadvertently, are discussed under heading "2" of the argument section below.

The day of the arrests and the early morning hours of the next day, Detectives Robert Baker and Timothy Griffith interviewed Ross, Oeung, Chouap, Azariah Ross, and Ngo. 19RP 84; Ex. 73 (redacted police report, not admitted into evidence, but forming the basis for Detective Baker's testimony). At trial, Baker recounted Chouap's interview, which included a number of admissions. 19RP 108-49. For example, Chouap was asked if he carried a gun during various crimes. Chouap admitted to carrying a .38 caliber snub-nosed revolver on various occasions. 19RP 147-48.

After Baker recounted the three co-defendants' partially redacted statements, the court instructed the jury that each co-defendant's statement was admissible only against that co-defendant. 20RP 1447-48; CP 238. Following Chouap's plea and removal from trial, therefore, Chouap's interview was inadmissible for any purpose.

During Ross's interview, he was told that the detectives were investigating a series of home invasion robberies. Baker and Griffith asked how many times Ross was outside in the car during the robberies. 19RP 151. Ross said that only occurred one time. Ross then described a house Baker believed was associated with a burglary, as it had been unoccupied when burglarized. 19RP 152-53.

Baker then told Ross the police believed he was the driver during several "home invasion robberies." 19RP 154. Ross at first denied involvement but later said he was the driver for two such incidents. 19RP 154. The first incident, according to Ross, occurred at a residence on McKinley Avenue located south of 84th Street. 19RP 155. According to Baker, he believed that address was associated with the January 25 Lem robbery. 19RP 155, 223. Ross told Baker he drove his brother Azariah and, per the redacted statement, "the other individual" to a location near the residence and waited in the car while a robbery occurred. 19RP 155. Azariah and the other person called Ross, and he picked them up. 19RP 155.

Ross told the detectives Azariah and the "other person" obtained two or three thousand dollars in cash and gold. 19RP 155. When asked what happened to the gold, Ross said, "We sold it." 19RP 156. Ross explained further, "I sold gold sometimes . . . . Any time they get jewelry,

I never keep it[.] I took them to sell it." 19RP 156. Ross explained he took Azariah and Alicia Ngo to sell gold and was paid $200-300 to do so. 19RP 157, 159. He also sold gold himself at a business near the South Hill Mall and at another business near the "B&I," a Tacoma strip mall. 19RP 158-59. Ross estimated received total of five to ten thousand dollars for selling gold for the others. 19RP 167.

As for cash, Ross told Baker that the others would share approximately $400 with him when they "came up on." 19RP 157. Baker testified that in his experience "came up on" meant to obtain money via robbery or burglary. 19RP 224.

Asked what his role in the robberies was, Ross said he sat in the car. 19RP 159. He said he sat in the car during two robberies in which he knew of "where they had guns." 19RP 160.

Ross also described another incident during which the others took guns from a home. 19RP 161. He described a location that, according to Baker, matched the location of the April 2012 "G" Street incident. 19RP 161. Ross told detectives he knew the others were going to steal items from the residence. 19RP 162. He drove Azariah and "another person" near the residence. 19RP 162. Ngo knocked on the door of the residence to see if anyone was home. No one answered, so they believed no one was home. 19RP 161-62, 227.

Azariah and "the other person" later told Ross they confronted someone in the residence. 19RP 163, 227-28. Ross did not specify when he learned this. 19RP 163, 227-28. Ross told the detectives he was told what happened in the houses after the incidents. 19RP 237-38.

Ross also told the detectives those in the residence communicated with Alicia Ngo via walkie-talkie. 19RP 163. Ross communicated with them as well. 19RP 164. Ross explained walkie-talkies were used because "if anybody went to the house, he could contact the people inside much quicker on a walkie-talkie than a cell phone." 19RP 163-64. Moreover, "if there was a shooting inside the residence, Azariah . . . and the other individual could call him quicker on a walkie-talkie than a cell phone." 19RP 164.

After the second incident described, "they" called Ross on walkie-talkies and asked him to retrieve them. 19RP 164. Ross picked them up around the corner from the residence and drove them to his and Azariah's home. 19RP 164, 226. Ross was present when the others looked through the stolen items. Ross took a picture of the stolen guns and emailed to "another individual." 19RP 165-66; Ex. 73.

Detective Baker acknowledged the detectives often recorded the "crux" of the questions they asked Ross rather than the verbatim

questions. 19RP 228-29. Baker also acknowledged that Ross never admitted to planning any home-invasion robbery in advance. 19RP 229.

Over defense objection, the State introduced a number of calls made using Ross's personal identification number originating from the Pierce County Jail, where Ross was incarcerated between May 9 and August 10, 2012 on an unrelated misdemeanor. 23RP 2102, 2144; see also 23RP 2109-26 (calls played for jury). The State sought to admit the calls under a theory that the calls comprised statements of co-conspirators made in furtherance of the conspiracy.[11] Exs 118-132 (transcripts); Exs. 133-147 (audio recordings)[12] In a few of the calls, under the State's theory, a female call recipient, alleged to be Oeung, describes her involvement in a May 10 robbery. Exs. 119, 120, 121, 122; 23RP 2104-05. However, in many of the calls, the male voice, alleged to be Ross, discourages the woman from participating in criminal activity; at other times, he urges other individuals to stop using drugs and stop engaging in criminal activity. Exs. 126, 127, 128, 129, 131, 132.

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[11] Police listened to the calls after another inmate told a detective that Ross was interested in a July 2012 newspaper article and that he overheard Ross discuss the article with someone on the phone. 21RP 1765-71; 23RP 2098-102; see also Ex. 107A (redacted article admitted only as to Ross's reaction to the article); CP 241 (limiting instruction).

[12] The transcripts were admitted as listening aids only. 23RP 2112-13. For the convenience of this Court, however, Ross has designated them.

C. ARGUMENT

1. THIS COURT SHOULD REVERSE EACH OF ROSS'S CONVICTIONS BECAUSE THE EXERCISE OF PEREMPTORY CHALLENGES VIOLATED HIS CONSTITUTIONAL RIGHTS TO PUBLIC JURY SELECTION AND THE PUBLIC'S RIGHT TO OPEN COURT PROCEEDINGS.

a. Related facts

During jury selection, the court explained it would take peremptory challenged by having the parties pass a sheet of paper back and forth. 8RP 224. The court explained that normally it did not conduct peremptory challenges in that manner. But it did so in cases involving co-defendants, so the co-defendants did not appear to be working together. 8RP 224; 10RP 532-33. The court later conducted peremptory challenges as previously announced. 10RP 548. A sheet listing each side's peremptory challenges was filed in the court file at some point that day. CP 765-66.

In making the peremptory challenges opaque to the jury panel, however, the court also shielded the process from public view. The procedure employed by the trial court, imposed without consideration of the necessary closure factors, violated the appellant's right to a public trial and the public's right to open proceedings.

b. The trial court violated Ross's right to public jury selection and the right of the public to open court proceedings because peremptory challenge are part of the voir dire process.

The Sixth Amendment and article I, section 22 guarantee the accused a public trial by an impartial jury. Presley v. Georgia, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 629 (1995). Additionally, article I, section 10 provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." The latter provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

While the right to a public trial is not absolute, a trial court may restrict the right only "under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. Before a judge can close any part of a trial, therefore, he or she must first apply on the record the five factors set forth in Bone-Club. In re Personal Restraint of Orange, 152 Wn.2d 795, 806-07, 809, 100 P.3d 291 (2004). A violation of the right to a public trial is presumed prejudicial on a direct appeal and is not subject to harmless error analysis. State v. Wise, 176 Wn.2d 1, 16-19, 288 P.3d 1113 (2012); State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006).

Jury selection in a criminal case is subject to the public trial right and is typically open to the public. Strode, 167 Wn.2d at 227 (lead opinion); Strode, 167 Wn.2d at 236 (concurrence). Strode supports the conclusion that the public trial right attaches to parties' challenges of jurors. In Strode, jurors were questioned, and "for-cause" challenges conducted, in chambers. The Supreme Court treated the "for-cause" challenges in the same manner as individual questioning and held exercise in chambers violated the right to a public trial. Strode, 167 Wn.2d at 224, 227, 231 (lead opinion); Strode, 167 Wn.2d at 236 (concurrence).

This Court's opinion in State v. Wilson supports a conclusion that the public trial right attaches not only to "for-cause," but also to peremptory challenges. 174 Wn. App. 328, 335-37, 298 P.3d 148 (2013). There, this Court applied the "experience and logic" test adopted by the court in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012), to find that the administrative excusal of two jurors for illness did not violate Wilson's public trial rights. The Court noted that, historically, the public trial right has not extended to excusals for hardship before voir dire begins. But in doing so, this Court expressly differentiated between those excusals and "for-cause" and peremptory challenges, which must occur openly. Wilson, 174 Wn. App. at 342 (unlike potential juror excusals governed by

CrR 6.3, exercise of peremptory challenges, governed by CrR 6.4, constitutes part of "voir dire," to which the public trial right attaches).

Thus, in Wilson, this Court appeared to recognize, correctly, that "for-cause" and peremptory challenges are part of voir dire, which must be conducted openly, to be distinguished from the broader concept of "jury selection," which may encompass proceedings that need not. Wilson, 139 Wn. App. at 339-40. Because preemptory challenges were not conducted openly, and because the court here failed to consider the necessary factors before employing its procedure, the trial court violated Ross's public trial rights.

In response, the State may point to State v. Marks, ___ Wn. App. ___, 339 P.3d 196, 199 (2014),[13] in which this Court appeared to reverse course and hold that peremptory challenges are not part of voir dire. But this Court's attempt in Marks to reframe its prior consideration of the matter makes little sense. There, this Court observes that CrR 6.4(b) refers to "voir dire examination," apparently excluding of the exercise of challenges from "voir dire." Marks, 339 P.3d at 199. But, contrary to that reasoning, the court rule's inclusion of the term "examination" instead indicates that the "examination" portion should be differentiated from

[13] A petition for review is pending in that case under Supreme Court case no. 91148-7.

"voir dire" as a whole. Court rules are interpreted in the same manner as statutes, Jafar v. Webb, 177 Wn.2d 520, 526, 303 P.3d 1042 (2013), and courts presume statutes do not include superfluous language. State v. Roggenkamp, 153 Wn.2d 614, 624-25, 106 P. 106 P.3d 196 (2005). This Court's reframing of its discussion of the matter in Wilson violates this principle.

Moreover, if "voir dire examination" enables the intelligent exercise of peremptory challenges, then it follows that peremptory challenges themselves are an integral part of "voir dire." Contrary to Marks, and consistent with Wilson, such challenges are part of that portion of jury selection that must be conducted openly, and are subject to existing law clearly establishing that the public trial right applies.

c. The "experience and logic" test also supports the need for open exercise of peremptory challenges.

Assuming for the sake of argument that the exercise of preemptory challenges is not an integral part of "voir dire," however, it would be necessary to apply the "experience and logic" test to determine whether the public trial right applies to a portion of the trial process. This Court examines (1) whether the place and process have historically been open and (2) whether public access plays a significant positive role in the functioning of the process. Sublett, 176 Wn.2d at 73 (citing Press-

Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)).

The result of analysis under the experience and logic test is no different than the result dictated by Strode and Wilson. First, Ross can satisfy the "logic" prong because meaningful public scrutiny plays a significant positive role in the exercise of peremptory challenges. The right of an accused to a public trial "keep[s] his triers keenly alive to a sense of their responsibility" and "encourages witnesses to come forward and discourages perjury." Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). "[J]udges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings." Estes v. Texas, 381 U.S. 532, 588, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965) (Harlan, J., concurring). The openness of jury selection (including which side exercises which challenge) enhances core values of the public trial right, "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Sublett, 176 Wn.2d at 75; see Orange, 152 Wn.2d at 804 (process of jury selection "is itself a matter of importance, not simply to the adversaries but to the criminal justice system").

While peremptory challenges may be made for almost any reason, openness still fosters core values of the public trial right to ensure that

there is no inappropriate discrimination. This protection can only be accomplished if peremptory challenges are made in open court in a manner allowing the public to determine whether a party is targeting and eliminating jurors for impermissible reasons. See State v. Sadler, 147 Wn. App. 97, 107, 109-118, 193 P.3d 1108 (2008) (private Batson[14] hearing following State's use of peremptory challenges to remove only African-American jurors from panel denied defendant his right to public trial), review denied, 176 Wn.2d 1032 (2013), overruled on other grounds, Sublett, 176 Wn.2d at 71-73; see also State v. Saintcalle, 178 Wn.2d 34, 46, 88-95, 118-19, 309 P.3d 326 (2013) (opinions highlighting difficulty of obtaining appellate relief for discriminatory acts even where discriminatory exercise of peremptory challenges may have occurred).

Although the court identified a competing consideration in this case, to avoid any appearance that alleged co-conspirators were collaborating, the Court was entitled to conduct a simple Bone-Club analysis. It did not. The failure to conduct such an analysis on the record constitutes error.

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[14] Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

Regarding the historic practice, State v. Love,[15] a Division Three case later relied on by this Court to reject a public trial challenge,[16] appears to have reached an incorrect conclusion based on the available evidence. Love cites to one case, State v. Thomas, 16 Wn. App. 1, 553 P.2d 1357 (1976), as "strong evidence that peremptory challenges can be conducted in private." Love, 176 Wn. App. at 918. Thomas rejected the argument that "Kitsap County's use of secret—written—peremptory jury challenges" violated the defendant's right to a fair and public trial where the defendant had failed to cite to any supporting authority. Thomas, 16 Wn. App. at 13. Notably, Thomas predates Bone-Club by nearly 20 years. But most significantly, the fact that the Thomas appellant challenged the practice suggests it was atypical even at the time. In addition, the court here stated that it was altering its standard, open, practice. But, again, it did so without considering the necessary factors.

In summary, both prongs of the experience and logic test support that the public trial right was implicated in this case.

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[15] State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), review granted, ___ Wn.2d ___ (Jan. 07, 2015).

[16] E.g. State v. Dunn, 180 Wn. App. 570, 321 P.3d 1283 (2014), review denied, ___ Wn.2d ___ (Jan. 07, 2015). Mr. Dunn passed away while the petition for review was pending. See Supreme Court case no. 90238-1.

d. The filing of a written record after the fact does not cure the error.

In response, the State may argue the opportunity to find out, sometime after the process, which side eliminated which jurors satisfies the pubic trial right. In other words, the State may argue that the filing of a sheet listing each side's peremptory challenges renders the proceedings open.

Any such argument should be rejected. Even if members of the public could recall which juror name or number was associated with which individual, they also would have to recall the identity, gender, and race of those individuals to determine whether protected group members had been improperly targeted. In Ross's case, this would have required members of the public to recall the specific features of 15 individuals, as the parties exercised 15 total peremptory challenges. This is not realistic. Cf. State v. Filitaula, ___ Wn. App. ___, 339 P.3d 221, 223 (2014) (opinion of this Court holding it is sufficient to file written form containing names and numbers of the prospective jurors who were removed by peremptory challenge, listing the order in which the challenges were made, and identifying the party who made them).

In addition, Wise holds individual questioning of jurors in chambers, even when questioning was recorded and transcribed, violates

the public trial right. 176 Wn.2d 1. By analogy, filing a record of which party exercised which challenge after-the-fact is inadequate as well.

In summary, Ross's right to a public trial and the public's right to open proceedings were violated by the manner in which the court took peremptory challenges. This Court should, accordingly, reverse each of Ross's convictions.

2. THE TRIAL COURT ERRED IN DENYING ROSS'S MOTION FOR A MISTRIAL FOLLOWING A SERIOUS TRIAL IRREGULARITY.

a. Related facts

The State moved to admit various items found in a search of the Ross family home, where Ross and brother Azariah lived at the time of the charged crimes, and where the other co-defendants were frequent visitors. 21RP 1689-95. The State told the court it wanted to introduce evidence of a .357 caliber revolver found in a living room cabinet, as well as a gun lock and an ammunition magazine for a Taurus semiautomatic handgun found in the bedroom Ross and Oeung shared. 21RP 1673-74. The State informed the court it also wished to introduce black gloves, bandanas, and a "Safecrackers Manual" found in the home. 21RP 1673.

Defense counsel argued in part that there was an insufficient nexus between the guns and the charged crimes, given that no witness testified about seeing a revolver in any of the incidents. 21RP 1674-75.

The court was at first skeptical that the revolver should be admitted. State acknowledged no witness identified a revolver during any robbery, but pointed out that Chouap had confessed to using such a weapon.[17] 21RP 1678. The court found the gun was admissible based on Chouap's confession, although Chouap was no longer part of the trial at that point. 21RP 1679.

Detective William Muse testified he participated in a search of the Ross home on August 29, 2012. 21RP 1709. Ross and Azariah, the youngest of a number of siblings, lived in the home with their parents during the charging period. 21RP 1685-95 (Ross's father's testimony). The court admitted photographs related to the search. Ex. 103 (multiple pages); 21RP 1729. Muse found two ammunition magazines and a gun lock, corresponding to the same type of gun as one of the magazines, in a downstairs bedroom where Ross and Oeung slept. 21RP 1733, 1735, 1749-50. In the living room upstairs, Muse found a .38 caliber revolver in the drawer of a cabinet. 21RP 1736.

The defense objected, and the jury was sent out. 21RP 1737. After a discussion, the parties determined that the weapon found at the Ross home, as well as the gun Chouap confessed to using, were both .38-caliber

[17] The parties later realized that both the gun found in the Ross cabinet, and the gun Chouap admitted to using, were .38 caliber. 21RP 1738-39.

revolvers, and the parties' previous discussion of a .357-caliber had been in error. 21RP 1738-39. But Ross's attorney also pointed out that because Chouap was no longer on trial, his statement was no longer admissible for any purpose, and therefore the State was unable to show a connection between the gun and the crimes. 21RP 1739. The court agreed, and it ruled the evidence of the discovery of the revolver was inadmissible. 21RP 1739; Ex. 103A (pages removed from exhibit following ruling).

At that point, Ross's counsel moved for a mistrial, pointing out that the jury was provided a limiting instruction on the co-defendants' statement only *after* the statements were introduced, and therefore the jury might have difficulty "compartmentalizing" their notes regarding the co-defendants' confessions. Because the jury was unlikely to be able to ignore Chouap's confession that he used a .38 caliber revolver, the evidence of the .38 caliber revolver in the home was particularly prejudicial. 21RP 1742.

The court denied the mistrial motion. 21RP 1744. It instructed the jury to disregard the photo of the .38 and related testimony. 21RP 1746. The State then presented evidence that a pair of black gloves and a "Safecracker's Manual" were found in the same cabinet. 21RP 1747. Other police officers testified they found bandanas, gloves, and boxes of ammunition of various calibers in other locations in the home. 21RP 1754-55.

b. The court erred in denying Ross's motion for a mistrial after the jury was mistakenly shown a picture of a gun of a type associated with Chouap that was found in the Ross home.

This Court reviews the trial court's denial of a motion for mistrial for abuse of discretion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). A trial court abuses its discretion when it fails to apply the correct rule of law. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). In considering whether a mistrial is warranted, moreover, this Court considers (1) the seriousness of the claimed irregularity; (2) whether it was cumulative of other properly admitted evidence, and (3) whether it could be cured by an instruction to disregard the irregularity. State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190 (1987). When a defendant's constitutional right to a fair trial has been violated and he moves for mistrial, the motion should be granted. State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983).

Here, the court erred in denying the mistrial motion. First, the irregularity was serious. The defense theory was that Ross was not told what occurred in the Lem and Kuch homes until after the crimes were complete. 25RP 2282-86 (defense closing argument). Moreover, the defense theorized, Kuch and Lem described seeing what looked like a gun, but they were not familiar with guns. 25RP 2284-85. Although witnesses

in later crimes recounted additional details about the purported firearms, there were no similar details associated with the Lem and Kuch crimes. Therefore, Ross argued, the State failed to prove beyond a reasonable doubt real firearms were taken into the homes. 25RP 2285. Photos of a gun found in Ross's home (in a cabinet with gloves and a book on "safecracking," no less) seriously undermined that theory. Although Chouap's statement was eventually stricken, the jury was exposed to his confession that he used a .38-caliber revolver in committing various crimes. 19RP 147-48. And although the State presented evidence of items connected with real guns in Ross's bedroom, the State never alleged Ross himself used a gun to commit any of the crimes. Rather, the State's theory was that *Chouap* had a gun. Evidence of a gun of a type associated with Chouap was potentially devastating to the defense.

For similar reasons, the court's curative instruction was incapable of erasing the prejudicial effect of seeing a photo of a gun in Ross's home. Escalona, 49 Wn. App. at 255 (citing State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)). Jurors could not be expected to fully erase from their minds (1) Chouap's admission he used such a gun and (2) the fact that such a gun was found in Ross's home.

Finally, the evidence was not cumulative. Again, although various gun-related items were found in Ross's bedroom, no gun was found.

Moreover, as stated above, the State never asserted Ross himself was armed. Rather the State primarily asserted Chouap was armed with a real gun. Accordingly, this factor also weighs in favor of a mistrial.

All three of the Escalona factors enumerated above support that a mistrial was necessarily to protect Ross's due process rights. A new trial is required based on the serious trial irregularity.

3. THE PROSECUTOR'S SERIOUS, REPEATED MISCHARACTERIZATION OF A KEY STATEMENT BY ROSS IN CLOSING ARGUMENT AND IN A CORRESPONDING POWERPOINT PRESENTATION DENIED ROSS A FAIR TRIAL.

a. Related facts

Detective Baker testified Ross told him Alicia Ngo talked to Azariah and "the other guy" (whom the jury could easily infer was Chouap) on walkie-talkies while the latter two were inside a home. According to Baker, Ross said they used walkie-talkies rather than a cell phone, because "*if there was a shooting* in the residence, Azariah . . . and [Chouap] could contact Ross more quickly. 19RP 164.

But in closing argument, the State mischaracterized this evidence, changing the statement in such a way as to make it far more incriminating. The prosecutor argued Ross knew real guns were being used in commission of the crime. In support of this claim, he argued the Ross interview occurred as follows:

> Why did you use walkie-talkies? We used walkie-talkies for safety reasons. What do you mean safety reasons? Well, I had to be able to get ahold of them on a moment's notice, quicker than a cellphone. Well, why is that important? *Because if they shot someone in the home, I needed to be there ASAP*. That's what Azias Ross tells the detectives. *Were they real guns? His own words tell you that they were real guns.*

25RP 2252-53 (emphasis added).

The prosecutor also showed jurors eight separate PowerPoint slides repeating those words in quotation marks. CP 383, 385, 396, 398, 400, 405, 407, 409 (copies of the eight slides are attached as Appendix A).

When the State first made the argument, defense counsel immediately objected that the State had mischaracterized the evidence. 25RP 2253.

Notably, defense counsel had previously objected to a similar misstatement of the evidence: Counsel objected to the State's characterization of the quote during counsel's half-time motion to dismiss the firearm enhancements, warning the prosecutor well in advance of closing argument that he had the statement wrong. 24RP 2209-10. Moreover, although the evidence admitted at trial came in only through the detective, the version of the statement on the written police report was also inconsistent with the State's version. Ex. 73.

The court did not overrule or sustain the objection, but only told the jury that it should disregard remarks inconsistent with the evidence. 25RP 2253.

The State later repeated the argument as follows, again mischaracterizing the evidence:

> When they go in the home and they are using walkie-talkies at some point, Azias Ross would have realized, this is a home invasion, it's not just a burglary, that's why they have the walkie-talkies, *in case they have to shoot someone* to give each other updates about what is going on.

25RP 2260 (emphasis added).

Ross moved for a mistrial after the prosecutor finished his initial argument, arguing:

> I have just one issue, and I objected at the time. I counted at least four slides where there were quotation marks, and they indicated that my client said that, they used walkie-talkies for safety in case they shot someone inside. That was not the testimony. That is not the statement. The statement is, . . . Ross also mentioned that if there was shooting inside the house, the suspects inside could call him more quickly with the walkie-talkies. There could be a variety of reasons for a shooting inside a home that doesn't involve any actors associated with Mr. Ross firing a weapon.
>
> And I think it's inflammatory. I think it misrepresents the statement. It happened over and over and over again, and then when the Court gave an instruction to the jury to rely on their own memories, [the State] said, of course, rely on your own memories . . . . [But t]hat wasn't the testimony . . . . It's a gross misrepresentation of the statement, and I would also move for mistrial based on those grounds.

24RP 2274-75.

In response, the prosecutor denied misrepresenting the statement. In doing so, however, he summarized his argument in a manner that was more consistent with the defense's representation—and the evidence—than the actual argument and PowerPoint presentation. 25RP 2276.

The court "preliminarily" denied a mistrial on additional grounds urged by Oeung's counsel, stating more legal research was necessary as to Oeung's argument. 25RP 2277-79. Skeptical that the prosecutor had misstated the evidence, the court denied Ross's mistrial motion as well, but stated it wanted to see the PowerPoint. 25RP 2277. The State did not offer to show the court he PowerPoint but told the court it would file the PowerPoint the next day. 25RP 2363; 26RP 2374; CP 371 (cover sheet for PowerPoint filed 3/4/2014).

In the closing that followed, defense counsel correctly recounted the statement and argued jurors could not extrapolate from the statement that Ross knew the principals had guns. 25RP 2285.

The following day the court gave a final ruling on the defense motion for a mistrial on other grounds raised by defense counsel.[18] The

[18] Counsel for Ross and Oeung had also objected to the repeated use of the word "guilty" in the PowerPoint presentation. 26RP 2374-87 (defense arguments based on In re Pers. Restraint of Glasmann, 175 Wn.2d 696,

court provided no analysis on the misstatement claim, instead focusing on the use of the word "guilty" in the PowerPoint. 26RP 2388-90.

b. The State's repeated mischaracterization of key evidence, including a misquotation employed in eight separate PowerPoint slides, denied Ross a fair trial.

"A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law." State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011) (citing State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956) (quoting People v. Fielding, 158 N.Y. 542, 547, 53 N.E. 497 (1899))). At the same time, a prosecutor "functions as the representative of the people in a quasijudicial capacity in a search for justice." Id. A prosecutor fulfills neither role by securing a conviction based on proceedings that violate a defendant's right to a fair trial. Rather, such convictions undermine the integrity of the criminal justice system as a whole. State v. Walker, ___ Wn.2d ___, ___ P.3d ___, 2015 WL 276363, *4 (Jan. 22, 2015).

Where counsel timely objects or timely moves for a mistrial based on prosecutorial misconduct, the issue is preserved for appellate review. State v. Lindsay, 180 Wn.2d 423, 430-31, 326 P.3d 125 (2014). This Court's prosecutorial misconduct inquiry therefore consists of two prongs:

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286 P.3d 673 (2012) and State v. Hecht, 179 Wn. App. 497, 508-09, 319 P.3d 836 (2014)). Ross does not raise this issue on appeal.

(1) whether the prosecutor's comments were improper; and (2) if so, whether the improper comments caused prejudice. Id. at 431.

Closing argument provides an opportunity to draw the jury's attention to the evidence presented, but it does not give the State the right to present altered versions of admitted evidence to support the State's theory of the case. Walker, 2015 WL 276363 at *5 (citing In re Personal Restraint of Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012)).

The prosecutor committed misconduct by repeatedly misrepresenting the evidence as to what Ross said, and by doing so in visual aid that used the misquotation to make a variety of points regarding the elements of the charged crimes and the enhancements. The argument, combined with the use of visual aids repeatedly reinforcing the misstatement, was prejudicial. The defense argument, and the court's admonition to rely on the evidence, could do little to dispel the prejudice of the misconduct.

The State's version of the statement, which was, presented on each occasion as a direct quote from Ross, suggested Ross knew the two principals had real guns before going into the houses, a point that the defense strongly, and reasonably, disputed given what Ross actually told Baker. See, e.g., 25RP 2282 (defense argument that Ross learned what went on inside homes only after incidents). Ross's purported knowledge

was, in turn, used by the State to argue real guns were used in the January and April incidents. But although Ross admitted being involved with home invasion robberies in which the principals had guns, 19RP 160, Ross's statement does not make clear *when* he became aware guns were involved. While there was evidence the principals were communicating via walkie-talkie, particularly in later robberies,[19] the State did not prove what the communication with Ross entailed, i.e., whether any such communication during the January and April incidents made it clear to Ross *at the time of the incident* there were people present or that there were real guns involved. Both incidents were relatively brief compared to some of the later incidents. See, e.g., 13RP 956 (describing three-hour May robbery); 17RP 1286 (August robbery occurred over the course of more than two hours). While the jury could have inferred certain information was exchanged, it was not *required* to draw that inference.

The State argued there was more specific evidence regarding real working guns in later crimes, such as the removal of ammunition magazines or showing of bullet.[20] But that occurred in later incidents only. 13RP 986 (May 10); 14RP 38-39 (June 9); 15RP 36 (June 17);

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[19] See, e.g., 13RP 989 (Remegio Fernandez testimony regarding use of two-way radios during May 10 incident).

[20] See, e.g. CP 383 (PowerPoint slide).

16RP 1158 (June 29). Notably, the State presented evidence real guns were taken in the April incident, making it plausible that that was a turning point in the crimes. After all, at least one gun with a laser sight was stolen in that incident, and witnesses only described seeing a gun with a laser sight or red light after April. 13RP 984-87; 13RP 1032, 1039; 14RP 23-24; 14RP 57-59, 65; 16RP 1088; 16RP 1158.

Perhaps most significantly, however, analysis of prejudice does not rely on a review of sufficiency of the evidence. Walker, 2015 WL 276363, at *6. I

The prosecutor's repeated misstatement of the evidence affected convictions and enhancements related to both January and April incidents.

The State argued the use of real guns was linked to the expectation that the homeowners would be present. 25RP 2253, 2256. The misconduct therefore affected the robbery, assault, and unlawful imprisonment convictions because the misstatement suggested Ross knew there would be people inside the homes, and that therefore a robbery, and other crimes, would be committed against the occupants.

The State used the misstated evidence to suggest that the principals were armed with real guns before entering the homes. 25RP 2252; CP 383, 385. The misconduct therefore affected the burglary convictions, because in order to convict Ross of first degree burglary, the State was

required to prove he, or an accomplice, was armed with a deadly weapon. CP 256-57 (first degree burglary to-conviction instructions).

The misstated evidence was used to suggest Ross knew the principals were using real, not toy, guns and therefore the firearm enhancements applied. See, e.g., CP 385 (slide entitled "Are they using a real gun?" including the challenged misquotation, as well as statements asserting "They had access to real guns" and "Zero evidence of fake guns."). The misconduct therefore also affected the firearm enhancements on each of the foregoing crimes.

The misconduct also affected the firearm enhancements as to conspiracy and trafficking. As for conspiracy, the misstatement was used to argue the principals were in fact armed with firearms during the January and April incidents. E.g., CP 385. As for trafficking, because, as the State argued, the trafficking began the instant the items were taken, 25RP 2267, the misquotation suggested that the principals were armed with real weapons when the trafficking was committed.

Once again: Ross's knowledge the principals had guns was not necessarily required to prove some of the crimes, or the firearm enhancements. But the State repeatedly used the misquotation to argue Ross had such knowledge and therefore the principals were, in fact, armed.

In summary, the prosecutor's repeated misstatement of the evidence was prejudicial as to the vast majority of the crimes for which Ross was convicted. Based on the foregoing misconduct alone, this Court should reverse of each conviction except for the April conviction for theft of a firearm and the August conviction for trafficking.

4. THE PROSECUTOR'S ARGUMENT IN REBUTTAL URGING THE JURY TO RENDER A TRUTHFUL VERDICT DENIED ROSS A FAIR TRIAL.

a. Related facts

The prosecutor also argued in rebuttal that, as he had pointed out during jury selection, "truth" formed the basis for the justice system. The prosecutor reminded jurors that without truth, there could be no justice. 25RP 2348.[21] The prosecutor went on to argue that the State must prove the "truth" of the elements of the crime. 25RP 2349.

The prosecutor also reminded jurors that during jury selection, he had asked prospective jurors who had previously served on juries whether they were still satisfied with the "truth" of their previous decisions.[22] He argued the prospective jurors were generally satisfied with the "truth" of

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[21] A relevant excerpt of the State's argument is attached as Appendix B.

[22] See, e.g., 9RP 358-60, 363 (inquiring of prospective jurors as to the importance of "truth" in the criminal justice system); 9RP 371 (telling prospective jurors, "I want you to think back to the case or cases you have decided in the past, and as you sit here today, are you still satisfied in the truth, so to speak, of your verdict?").

their previous verdicts. 25RP 2349. He then told jurors the verdict in this case should be one jurors "had an abiding belief in the truth of," such that when a juror returned for jury service, he or she would still look back and consider the verdict to be "true." 25RP 2351.

Defense counsel objected. 25RP 2351. The court overruled the objection but reminded jurors that the "abiding belief" concept addressed the State's burden only and the defense was not obligated to prove anything. 25RP 2351.

The State continued, "Getting back on track, and now I've somewhat lost it but it's an abiding belief, again down the road." 25RP 2352. The prosecutor then urged jurors to reach a verdict based on the facts and the law, but then expressed his personal belief in the defendants' guilt. 25RP 2352. (The expression of personal belief is addressed separately under heading "5 "below.)

Following the closing arguments, defense counsel moved for a mistrial based on prosecutorial misconduct. As discussed above, however, the mistrial motion, and the court's corresponding ruling, focused on the prosecutor's use of the word "guilty" in the PowerPoint presentation. 26RP 2374-90.

b. The State's "truth" argument diminished its burden, undermined the presumption of innocence, and denied Ross a fair trial.

Arguments by the prosecution that shift or misstate the State's burden to prove the defendant's guilt beyond a reasonable doubt constitute misconduct. State v. Gregory, 158 Wn.2d 759, 859-60, 147 P.3d 1201 (2006). Telling the jury that its job is to "speak the truth," or some variation thereof, misstates the burden of proof and is improper. Lindsay, 180 Wn.2d at 437. In State v. Anderson, this Court found that a prosecutor's repeated requests that the jury "declare the truth" were improper. 153 Wn. App. 417, 431, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010). "A jury's job is not to 'solve' a case. . . . Rather, the jury's duty is to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt." Id. at 429 (cited with approval in Lindsay, 180 Wn.2d at 437). In State v. McCreven, this Court held that argument that jurors must "determine if [they] have an abiding belief in the truth of the charge . . . truth in what each of these defendants did" was improper. 170 Wn. App. 444, 473, 284 P.3d 793 (2012), review denied, 176 Wn.2d 1015 (2013).

Ross preserved his claim with a contemporaneous objection, which the court overruled. Lindsay, 180 Wn. App. at 430-31 (listing means by which objection may be preserved). Reversal is required because the

prosecutor's rebuttal arguments were both improper and prejudicial. Id. at 431.

First, the prosecutor's argument—continuing a theme begun during jury selection—equated justice with "truth" and informed the jury one of its role was to determine the truth. Moreover, truth was the litmus test for future assessment of whether a juror had fulfilled his or her role. This is harmful for the same reasons set forth in Anderson and cases following the Anderson rationale, because the argument misrepresents the jury's role and undermines the State's burden to prove the elements of the crime.

The argument was also prejudicial because it misled the jury as to the State's burden of proof and the presumption of innocence. "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of our criminal law." Coffin v. United States, 156 U.S. 432, 453, 15 S. Ct. 394, 403, 39 L. Ed. 481 (1895). This presumption "is a basic component of a fair trial," Estelle v. Williams, 425 U.S. 501, 503, 96 S Ct. 1691, 48 L. Ed .2d 126 (1976), and derives from the Due Process Clauses of the Fifth and Fourteenth Amendments, Taylor v. Kentucky, 436 U.S. 478, 485-86 n. 13, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978). The jury's role is not to decide whether they feel in their hearts the allegations are *true*. Despite the State's argument here, the jurors' consciences should

not be assuaged in the future if they believe they have solved the case. Rather, the jury's role is to dispassionately evaluate the evidence and to presume innocence until that presumption is surmounted by the State's evidence. State v. Venegas, 155 Wn. App. 507, 524, 228 P.3d 813, review denied, 170 Wn.2d 1003 (2010). Under the law, a juror has fulfilled his or her function if he has presumed an accused innocent in the face of strong evidence that does not establish guilt beyond a reasonable doubt. The State's argument informed jurors that truth-seeking, rather than the presumption of innocence, was of paramount importance.

The argument was, moreover, particularly prejudicial when taken in combination with the misstatement of evidence described above. Again, assuming for the sake of argument there was sufficient evidence to convict Ross despite his comparatively limited role, analysis of "prejudicial impact" does not rely on a review of sufficiency of the evidence. Walker, 2015 WL 276363 at *6.

Although the State may argue the court gave an oral curative instruction, the court's statement was ineffective at remedying the harm caused by the improper argument. Although the court reminded the jury the State had the burden of proof, the court also overruled the objection in the same breath, informing jurors the argument was proper.

Finally, comments at the end of a prosecutor's rebuttal closing are more likely to cause prejudice. Lindsay, 180 Wn.2d at 443 (citing United States v. Sanchez, 659 F.3d 1252, 1259 (9th Cir.2011) (finding it significant that prosecutor made improper statement "at the end of his closing rebuttal argument, after which the jury commenced its deliberations"); United States v. Carter, 236 F.3d 777, 788 (6th Cir.2001) (significant that "prosecutor's improper comments occurred during his rebuttal argument and therefore were the last words from an attorney that were heard by the jury before deliberations").

Here, the State cannot show that the misconduct was harmless. Because, as in previous cases, the State's "truth" argument denied Ross a fair trial, this Court should reverse each of his convictions.

5. THE PROSECUTOR'S EXPRESSION OF PERSONAL BELIEF IN ROSS'S GUILT DENIED ROSS A FAIR TRIAL.

Here, the prosecutor's final statement in rebuttal was that "the State is confident that based on the evidence in this case, and the law, these defendants are all guilty of all crimes charged." 25RP 2352.

Closing argument provides an opportunity to draw the jury's attention to the evidence presented, but the State is prohibited from expressing personal opinions on the defendant's guilt. Walker, 2015 WL 276363 at *5 (citing Glasmann, 175 Wn.2d at 706-07); State v. Reed, 102

Wn.2d 140, 145, 684 P.2d 699 (1984)). RPC 3.4(e) also prohibits a lawyer from vouching for any witness's credibility or stating a personal opinion "on the guilt or innocence of an accused."

The prosecutor gave lip service to the idea that the jury should rely on the evidence, not the prosecutor's opinion. But in the same breath, the prosecutor expressed a personal opinion that Ross was guilty. While there was no objection to this misconduct, taken in the context of the other misconduct described above at headings "3" and "4," the prosecutor's argument was both improper and incurably prejudicial. Despite the lack of objection, the misconduct was so incurably prejudicial that it denied Ross his right to a fair trial. Walker, 2015 WL 276363, at *7.

6. THE CUMULATIVE EFFECT OF THE ERRORS IDENTIFIED AT HEADINGS 2 THROUGH 5 ABOVE DENIED ROSS A FAIR TRIAL.

Under Article 1, section 3 and the Fifth and Fourteenth Amendments, the accused has the due process right to a fair trial. State v. Boyd, 160 Wn.2d 424, 434, 158 P.3d 54 (2007); State v. Braun, 82 Wn.2d 157, 166, 509 P.2d 742 (1973). This Court should reverse a conviction when the combined effect of trial errors effectively denies the defendant his right to a fair trial, even if each error standing alone may not itself warrant a new trial. Venegas, 155 Wn. App. at 520. Once the appellant establishes error, a reviewing court may then measure the errors'

cumulative effect. State v. Clark, 143 Wn.2d 731, 771-72, 24 P.3d 1006 (2001).

Here, even if the trial errors asserted under headings 2 through 5 do not individually warrant reversal, their combined effect does. Taken in combination, there is a reasonable likelihood these trial errors affected the verdict and denied Ross a fair trial. This Court should order a new trial. Venegas, 155 Wn. App. at 527.

7. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT ROSS OF THEFT OF A FIREARM AS AN ACCOMPLICE TO THE CRIME.

A person is liable as an accomplice, if, "[w]ith knowledge that it will promote or facilitate the commission of *the crime*," he encourages or aids another in commission of the crime. RCW 9A.08.020 (emphasis added). Thus, accomplice liability requires knowledge that one is facilitating *the crime* in question. State v. Cronin, 142 Wn.2d 568, 578-79, 12 P.3d 752 (2000). "[K]nowledge by the accomplice that the principal intends to commit 'a crime' does not impose strict liability for any and all offenses that follow." State v. Roberts, 142 Wn.2d 471, 513, 14 P.3d 713 (2000).

The Supreme Court clarified the law of accomplice liability in Roberts and Cronin. Timothy Cronin was convicted of murder as Michael Roberts's accomplice. Cronin, 142 Wn.2d at 581. Cronin had argued at

trial that he was not guilty of murder because he did not know the principal was going to kill the victim but thought they were only going to tie him up and take his vehicle. Id. at 576. But the jury was instructed that a person is liable as an accomplice if he knowingly facilitates "a crime," and the State told the jury an accomplice is "in for a dime, in for a dollar." Id. at 576-77. The Supreme Court reversed, explaining:

> [T]he plain language of the complicity statute does not support the State's argument that accomplice liability attaches so long as the defendant knows that he or she is aiding in the commission of *any* crime. On the contrary, the statutory language requires that the putative accomplice must have acted with knowledge that his or her conduct would promote or facilitate *the* crime for which he or she is eventually charged. . . . [T]he legislature intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has knowledge.

Id. at 578-79.

It is unnecessary to prove a defendant knowingly facilitated *a particular degree* of a crime in order to support a conviction as an accomplice. For example, in Cronin, the Court said, "In order to convict Cronin as an accomplice to premeditated [first degree] murder, the State had to prove beyond a reasonable doubt that Cronin had general knowledge that he was aiding in the commission of the crime of murder." Id. at 581-82. And in Roberts, the Court explained that a person could be guilty as an accomplice to first degree robbery if he knowingly facilitated

the crime of robbery, even if he lacked specific knowledge of the element that raised it to first degree robbery. Roberts, 142 Wn.2d at 512 (explaining State v. Davis, 101 Wn.2d 654, 682 P.2d 883 (1984)). However, general knowledge of *the crime* is still required. Roberts, 142 Wn.2d at 513.

Theft of a firearm is not a degree of theft, but rather a separate crime. RCW 9A.56.300. It has a much higher seriousness level than any degree of theft, because it punishes individuals for special harms caused by armed crime. RCW 9.94A.530; State v. Miller, 92 Wn. App. 693, 699-702, 964 P.2d 1196 (1998). The fact that the statute is in the same chapter as theft does not mean the State can simply prove theft and thereby obtain a conviction for the separate crime of theft of a firearm. Robbery is also in the same chapter as theft, but proof that a person knowingly facilitated theft is insufficient to support a conviction as an accomplice to robbery. State v. Grendhahl, 110 Wn. App. 905, 910-11, 43 P.3d 76 (2002); accord State v. Evans, 154 Wn.2d 438, 454, 114 P.3d 627 (2005).

Here, the State's theory of liability was solely that Ross was guilty because he was an accomplice to theft. 25RP 2290-91. On this record, Ross's conviction for theft of a firearm is improper because it was based on proof he was an accomplice to the different, less serious crime of theft.

Where the State presents insufficient evidence to support a conviction, the remedy is reversal and remand for vacation of the conviction and dismissal of the charge with prejudice. State v. Engel, 166 Wn.2d 572, 581, 210 P.3d 1007 (2009). This Court should, accordingly, reverse the conviction for theft of a firearem and remand for vacation and dismissal of the charge. Id.

8. THE COURT ERRED WHEN IT FAILED TO FIND FIRST DEGREE BURGLARY AND FIRST ROBBERY WERE THE SAME CRIMINAL CONDUCT AS TO THE JANUARY OFFENSES.[23]

Here, the court ruled the January robbery and burglary were not the same criminal conduct, stating only that burglary and robbery are not "separate offenses." 27RP 43. Notably, the court did not invoke the burglary antimerger statute in making its ruling. RCW 9A.52.050.[24]

For each crime of conviction, the sentencing court calculates an offender score by adding points for current offenses and prior convictions. RCW 9.94A.589(1)(a). The offender score for each current offense

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[23] Ross does not raise this issue as to the April offense because an additional person was present in the home. See State v. Davison, 56 Wn. App. 554, 559-60, 784 P.2d 1268 (1990) ("victims" of a burglary include those president in the residence at time of the burglary).

[24] The burglary antimerger statute is discretionary with the sentencing judge and permits separate punishment for burglary and other crimes simultaneously committed. State v. Lessley, 118 Wn.2d 773, 781, 827 P.2d 996 (1992).

includes all other current offenses unless the trial court finds "that some or all of the current offenses encompass the same criminal conduct." Id. Where the court makes such a finding, those current offenses are counted as one crime for sentencing purposes. Id.

Offenses constitute the same criminal conduct if they are (1) committed with the same criminal intent, (2) committed at the same time and place, and (3) involve the same victim. Id.; State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). "Intent, in this context, is not the particular mens rea element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime." State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990).

This Court will reverse a sentencing court's determination of same criminal conduct where the court abuses its discretion or misapplies the law. State v. Graciano, 176 Wn.2d 531, 536, 295 P.3d 219, 222 (2013). Similarly, this Court should find a sentencing court has abused its discretion when it fails to apply the correct rule of law. Quismundo, 164 Wn.2d at 504.

The January robbery and burglary occurred at the same time and place and involved the same single victim, Soeung Lem. CP 256, 272 (burglary and robbery to-convict instructions); 12RP 798 (Lem testimony that she was alone in her home when the men intruded).

The next question is whether the crimes involved the same objective criminal intent. Multiple factors inform the objective intent determination, including: (1) how intimately related the crimes are; (2) whether the criminal objective substantially changed between the crimes; (3) whether one crime furthered another; and (4) whether both crimes were part of the same scheme or plan. State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990); State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005 (1996). Crimes may involve the same intent if they were part of a continuous transaction or involved a single, uninterrupted criminal episode. State v. Deharo, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998). "[I]f one crime furthered another, and if the time and place of the crimes remained the same, then the defendant's criminal purpose or intent did not change and the offenses encompass the same criminal conduct." State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992).

As the court instructed the jury in this case, "A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he . . . enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon . . . . " RCW 9A.52.020(1); CP 256-57 (Instructions 21

and 22). In general, the objective criminal purpose of robbery, as determined by the courts, is to "acquire property." State v. Dunaway, 109 Wn.2d 207, 216, 743 P.2d 1237, 749 P.2d 160 (1987).

Here, citing State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995), the State argued the crimes did not constitute same criminal conduct. 27RP 42-43. The court appeared to agree and stated the case law indicated the crimes were "separate offenses." 27RP 43. This finding, however, represents a misapplication of the law. Quismundo, 164 Wn.2d at 504.

First, Brett does not stand for the proposition that burglary and robbery can never be found to be the same criminal conduct. Rather, Brett cites cases involving other crimes or cases were found to have separate victims. 126 Wn.2d at 170-71. Moreover, Brett involved a "same criminal conduct" argument as to aggravating factors, to which the concept plainly did not apply, and therefore any additional discussion was dicta. Id. at 170.

Moreover, intent is not the particular mens rea of a crime, but rather the offender's objective criminal purpose in committing the crime. Adame, 56 Wn. App. at 811. The analysis of "objective criminal purpose" turns on whether the crimes are linked, whether the objective substantially changed between the crimes, whether one crime furthered another; and whether both crimes were part of the same scheme or plan. Burns, 114

Wn.2d at 318. Here, the intent was to steal valuables. According to the State's theory, the purpose of entering Lem's home was to steal valuables from the presence of Lem. This was consistent with the manner of entry. The robbers came through an open back door and confronted Lem almost immediately. This manner of commission was consistent with the State's theory of the case, which was that, in general, the object of the conspiracy was to find people home so they would have a chance to locate more valuable property. See, e.g., 25RP 2256 (State's closing argument); CP 388 (PowerPoint slide stating, "They Wanted Home Invasions: You get the best stuff when people are home").

Because Ross demonstrated the offenses were committed with the same objective criminal intent, committed at the same time and place, and involved the same single victim, the Court abused its discretion when it found the crimes could not be considered the same criminal conduct. This Court should remand for resentencing based on a corrected offender score reflecting that the January robbery and burglary were the same criminal conduct.

9. COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THE APRIL CHARGES FOR ROBBERY AND UNLAWFUL IMPRISONMENT WERE THE SAME CRIMINAL CONDUCT.

Whether two crimes constitute the same criminal conduct involves a determination of fact as well as the exercise of trial court discretion. State v. Nitsch, 100 Wn. App. 512, 519-20, 997 P.2d 1000, review denied, 141 Wn.2d 1030 (2000). Defense counsel waived a direct challenge to the same criminal conduct determination by not raising the argument below. Id. at 519-20. But a defendant may raise the issue of same criminal conduct for the first time on appeal in the context of an ineffective assistance of counsel claim. State v. Saunders, 120 Wn. App. 800, 825, 86 P.3d 232 (2004); see also State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal).

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and Article I, Section 22. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Defense counsel is ineffective where (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland,

466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. A failure to argue same criminal conduct when such an argument is warranted constitutes ineffective assistance. Saunders, 120 Wn. App. at 824-25.

Only legitimate trial strategy or tactics constitute reasonable performance. Kyllo, 166 Wn.2d at 869. Defense counsel's performance fell below an objective standard of reasonableness because, under the circumstances, there was no legitimate reason not to ask the court to find the offenses were the same criminal conduct, as an alternative to counsel's argument that the unlawful imprisonment was subsumed by the robbery.[25] Brooks would have only benefited from such a request. Lowering Ross's offender score could have lowered his standard sentencing range for each offense. See former RCW 9.94A.510 (2002) (sentencing grid); former RCW 9.94A.515 (2010) (seriousness level of current offenses); former RCW 9.94A.525 (2011) (offender score); RCW 9.94A.589(1)(a) (sentence range for each current offense determined by using other current convictions as if they were prior convictions for offender score). In addition, "[r]easonable conduct for an attorney includes carrying out the duty to research the relevant law." In re Personal Restraint of Wilson, 169 Wn. App. 379, 390, 279 P.3d 990 (2012).

[25] See footnote 26, infra.

Prejudice exists where there is a reasonable probability that the result would have been different but for counsel's performance. Thomas, 109 Wn.2d at 226.

Here, there is a reasonable likelihood the court would have found same criminal conduct had counsel made the argument below. The crimes involved the same victim, Bora Kuch. CP 273 (Instruction 33, first degree burglary to-convict instruction for count 9); CP 285 (Instruction 45, unlawful imprisonment to-convict for count 11). The crimes also occurred at the same place and time.

The final question is whether the offenses involved the same intent. In making this determination, a court's focus is on the extent to which the defendant's criminal intent, objectively viewed, changed from one crime to the next. See Dunaway, 109 Wn.2d at 215. Again, the analysis of what constitutes the "objective criminal intent" turns on whether the crimes are linked, whether the objective substantially changed between the crimes, whether one crime furthered another; and whether both crimes were part of the same scheme or plan. Burns, 114 Wn.2d at 318. Here, the evidence supported that the unlawful imprisonment and robbery had the same objective criminal intent. The unlawful imprisonment clearly was for the purpose of furthering the robbery of Bora Kuch. See Dunaway, 109 Wn.2d at 217 (kidnapping and robbery

involved the same objective intent of robbery, and the kidnapping furthered the robbery).

There was at least a reasonable probability that the sentencing court would have found these offenses constituted the same criminal conduct had the argument been made below. Remand for resentencing is therefore required. Saunders, 120 Wn. App. at 824-25.

10. THE COURT ERRED IN IMPOSING A FIREARM ENHANCEMENT ON THE SINGLE CONSPIRACY COUNT BECAUSE THERE WAS INSUFFICIENT EVIDENCE OF A NEXUS BETWEEN THE PROHIBITED ACT AND THE FIREARM.

This Court reviews a jury's special verdict that a defendant was armed to determine whether any rational trier of fact could so find. State v. Eckenrode, 159 Wn.2d 488, 494, 150 P.3d 1116 (2007). A claim that the evidence is insufficient admits the truth of the State's evidence and all reasonable inferences drawn from that evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Defendants "armed" with a deadly weapon or firearm at the time of the commission of their crimes receive an enhancement to their standard range sentence. RCW 9.94A.825; RCW 9.94A.533(3), (4). "A person is 'armed' if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes." State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993)). "But a person is not armed merely

by virtue of owning or even possessing a weapon; there must be some nexus between the defendant, the weapon, and the crime." Eckenrode, 159 Wn.2d at 493. To apply the nexus requirement, this Court examines the "nature of the crime, the type of weapon, and the circumstances under which the weapon is found." State v. Schelin, 147 Wn.2d 562, 570, 55 P.3d 632 (2002). Although the State need not establish "with mathematical precision the specific time and place that a weapon was readily available and easily accessible," State v. O'Neal, 159 Wn.2d 500, 504-05, 150 P.3d 1121 (2007), it must establish the required nexus between the defendant and the weapon by presenting evidence that the weapon was easily accessible and readily available at the time of the crime. Id. at 504.

Under RCW 9A.28.040(1),

> 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.

Conspiracy is an inchoate crime, not a completed crime. State v. Bobic, 140 Wn.2d 250, 265, 996 P.2d 610, 617 (2000). The punishable criminal conduct is the plan: one plan, one conspiracy. It does not matter how many statutory violations the conspirators considered in the course of devising the plan. Id. at 264-65. The nature and extent of the conspiracy

lies in "'the agreement which embraces and defines its objects.'" Id. (quoting Braverman v. United States, 317 U.S. 49, 53, 63 S. Ct. 99, 87 L. Ed. 23 (1942)); see also State v. Dent, 123 Wn.2d 467, 475, 869 P.2d 392 (1994) ("A conspiracy has been defined as 'a partnership in criminal purposes. The gist of the crime is the confederation or combination of minds.'") (quoting State v. Casarez-Gastelum, 48 Wn. App. 112, 116, 738 P.2d 303 (1987)).

Here, the jury convicted of Ross of conspiracy to commit burglary and robbery for events occurring in January, as well as conspiracy to commit burglary for events occurring in April. CP 471, 474 (Amended Information, charging January 25 and April 27, 2012 counts); CP 680-81, 687-88 (verdict forms). But, consistent with Bobic and other cases, the State conceded, and the court found, that Ross violated a single unit of prosecution. CP 741; 27RP 22-23.

The punishable aspect of a conspiracy is the agreement. And here, the State presented no evidence Ross was armed when, and where, the plan was formulated or furthered. Cf. United States v. Hansley, 54 F.3d 709, 715-16 (11th Cir. 1995) (upholding enhancement where "the government showed that the agents found a firearm and other drug-related items in Hansley's residence, where he engaged in conspiratorial conversations").

State v. Williams is instructive because, unlike this case, it presents circumstances in which a firearm enhancement to a conspiracy conviction was warranted. 131 Wn. App. 488, 493, 128 P.3d 98, review granted on other grounds, cause remanded, 158 Wn.2d 1006 (2006). There, the defendant, Dione Williams, was convicted of three counts of conspiracy and a corresponding firearm enhancement on one of the conspiracy counts. Id. at 493. On appeal, Division Three of this Court reversed two of three conspiracy counts based on a unit of prosecution analysis. Id. at 497. The firearm enhancement as to that count was not challenged. However, an examination of the facts of that case makes it clear Williams was armed at the time the agreement was formed.

Williams was one of a group of people who socialized together. A woman in the group, Alyssa Knight, met Arren Cole, who was visiting Spokane from Los Angeles. Id. at 492.

Between a Tuesday and the Thursday that followed, the group gathered at their usual hangouts, including the home of one of the group members and a tavern in Post Falls, Idaho. Knight told Williams and others that Cole was carrying money, jewelry, and drugs. They decided to "do a lick," i.e., to take his valuables by any available means. Id.

They first planned to rob Cole on Tuesday night. This fell through when Knight reported that Cole might be carrying a gun. Another group

member, Ervin said he would get a gun so Williams could rob Cole the following night. On Wednesday, Knight, Williams, and Ervin discussed the impending "lick" and considered various strategies and tactics while driving from Post Falls to Spokane. But the crime had to be postponed again. Id.

On Thursday, Williams's co-conspirator Knight met Cole by arrangement at a downtown Spokane bar. Williams was also in the bar. Knight told Williams Cole was carrying a lot of money and jewelry. Knight then went with Cole to his hotel room. Some time later, Cole accompanied Knight to the alley behind his hotel to wait for her ride. As planned, Williams arrived in a car driven by another group member. Knight got in the car and Williams got out. As Williams approached Cole, Williams put his hand in his pocket and said something to Cole. Cole backed away. Williams then pulled the gun from his pocket. When Cole turned and ran, Williams shot him in the back. Williams and the others drove away and threw the gun into the Spokane River. The police later recovered the gun. Id. at 492-93.

The facts of Williams stand in stark contrast to the facts of this case. In Williams, there was concrete evidence the co-conspirators possessed a gun while forming the agreement. The co-conspirators discussed the need for a gun on a Tuesday and Ervin planned to obtain

one. The following night, presumably armed, they planned to do the "lick" but had to postpone it, and in the process, discussed the plan further. The following night, additional discussions occurred between Knight and Williams, who would have been armed at that point, given the impending "lick."

Here, however, Ross was convicted of a conspiracy covering nearly four months, between January 25 and May 10, 2014. CP 741 (judgment and sentence listing dates); cf. CP 471, 474 (charging separate counts occurring on or about January 25 and April 27, 2012 counts). Agreement is the essence of the crime of conspiracy. But there is no indication when or where the agreement or agreements occurred and whether Ross, or a co-conspirator, was armed at that date and time. The State therefore did not show the required nexus between the defendant, the weapon, and the crime. Eckenrode, 159 Wn.2d at 493. Accordingly, there was insufficient evidence to support the firearm enhancement.

In summary, the State did not show that any firearm was "accessible and readily available for offensive or defensive purposes" at the time the conspiracy was formed or elaborated upon. Valdobinos, 122 Wn.2d at 282. Because the enhancement is supported by insufficient evidence, the remedy is therefore vacation of the firearm enhancement. Id.

11. THE COURT ERRED IN ORDERING DISMISSAL WITHOUT PREJUDICE OF VARIOUS CHARGES RATHER THAN VACATION OF THE CHARGES.

Here, the sentencing court determined the second assault charges merged with robbery charges. CP 744. The court determined there was insufficient evidence supporting one of the unlawful imprisonment charges. 27RP 38; CP 744. The Court also ruled one of the conspiracy charges should be dismissed because the State had proved on only a single unit of prosecution. 27RP 22-23 (State's concession that one charge should be dismissed); CP 744.

But the Judgment and Sentence dismisses each of these charges without prejudice. CP 744. This Court should remand for vacation and dismissal with prejudice of each of the charges.

First, the unlawful imprisonment charge, which the court ruled was subsumed by the robbery, [26] must be vacated rather then dismissed without prejudice. "The double jeopardy clause of the Fifth Amendment . . . protects against a second prosecution for the same offense, after acquittal, conviction, or a reversal for lack of sufficient evidence." State v. Hardesty, 129 Wn.2d

[26] The sentencing court made this ruling before the Supreme Court's opinion in State v. Berg, __ Wn.2d ___, 337 P.3d 310 (2014) The State, however, did not appeal the court's determination, so its decision is now the law of the case. Hale v. City of Seattle, 48 Wn. App. 451, 455, 739 P.2d 723 (1987).

303, 309, 915 P.2d 1080 (1996) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled in part on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989)). A trial court's finding of insufficient evidence is the equivalent of an acquittal. Richardson v. United States, 468 U.S. 317, 325 n.5, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984); see also Hudson v. Louisiana, 450 U.S. 40, 42-44, 101 S. Ct. 970, 67 L. Ed. 2d 30 (1981) (holding that trial court's ruling that there was insufficient evidence to sustain a verdict precludes retrial). Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and *dismissal is the remedy*." State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (emphasis added) (quoting Hardesty, 129 Wn.2d at 309). Thus, double jeopardy principles require vacation of the unlawful imprisonment charge.

Second, the court's dismissal "without prejudice" of the second degree assault counts, and failure to vacate those counts, violates double jeopardy. The Fifth Amendment and Article 1, Section 9 each prohibit multiple punishments for the same offense. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005); State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005). Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, this Court presumes the legislature intended to punish both offenses through a

greater sentence for the greater crime. Freeman, 153 Wn.2d at 773-74. Courts look to legislative intent to discern whether the underlying and elevated criminal offenses were intended to be punished separately. Id. at 771. If the legislature has authorized punishments for both crimes, the prohibition against double jeopardy is not violated. Id. Where there is doubt as to the legislature's intent, however, the rule of lenity requires merger, and the conviction for the lesser offense is vacated. State v. Kier, 164 Wn.2d 798, 814, 194 P.3d 212 (2008). Thus, the sentencing court also erred by failing to vacate the assault counts.

Third, the court ruled the April conspiracy conviction violated double jeopardy because Ross violated a single unit of prosecution of conspiracy. An accused may not be convicted more than once under the same criminal statute if only one "unit" of the crime has been committed. U.S. Const. amend. V; Const. art. I, § 9; Tvedt, 153 Wn.2d at 710. The "unit of prosecution" analysis applies when a defendant is convicted multiple times under the same statutory provision; the analysis asks "what act or course of conduct has the Legislature defined as the punishable act." State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). A count that violates double jeopardy under "unit of prosecution" principles must be vacated. State v. Westling, 145 Wn.2d 607, 612, 40 P.3d 669 (2002).

In summary, retrial on any of the charges "dismissed without prejudice" would violate double jeopardy. Accordingly, this Court should remand for the court to vacate the charges and to dismiss them with prejudice.

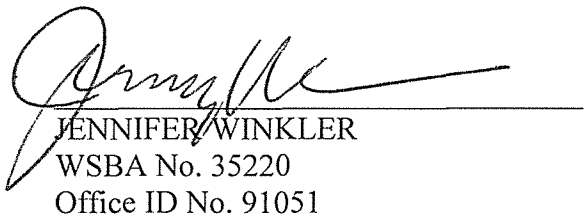
D. CONCLUSION

For the foregoing reasons, this Court should grant the relief requested.

DATED this 10TH day of February, 2015.

Respectfully submitted,

NIELSEN, BROMAN, & KOCH, PLLC



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APPENDIX A

Are they using a real gun?

- Azias: "I sat in the car during two robberies that I know of where they had guns."
- Azias: "We used walkie talkies so I could come quick in case they shot anyone."
- Extremely dangerous enterprise
- Using it like a real gun:
  - Removing magazine and showing ammo
  - "This is a real gun!" "Do you want to die?"
  - Gun to Bora Kuch's head. Gun in Remegio Fernandez's mouth.
- They had access to real guns

Are they using a real gun?

- Extremely dangerous enterprise
- Azias: "I sat in the car during two robberies that I know of where they had guns."
- Azias: "We used walkie talkies so I could come quick in case they shot anyone."
- Using it like a real gun:
  - Removing magazine and showing ammo
  - "This is a real gun!" "Do you want to die?"
  - Gun to Bora Kuch's head.
- They had access to real guns
- Zero evidence of fake guns

Were they down for home invasions?

- They wanted home invasions → more $$$
- Relationship between the parties
- Interview with Azias Ross:
  - "I was the driver for two home invasions."
  - "We used walkie talkies just for safety . . . so I could come quick in case they shot anyone."
  - "They told me all about what happened after each one."
- Azias' April 27 text messages

Were they down for home invasions?

- They wanted home invasions → more $$$
- Relationship between the parties
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  - Her interview

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APPENDIX B

this is coming from. Wow, you know, grandma dies a whole lot, remember what he said, might get this gold because your grandmother dies, and you don't want the jewelry so you bring it to me.

Well, Azias Ross is bringing gold in there, what, two, three times a month and getting thousands of dollars for it. What about the gold dealers? Remember what I'm talking about. If they have knowledge as to where this comes from or it can be proven they have knowledge as to where this comes from, they are complicit in the robberies and the burglaries. Why? Because they know about it. Circumstantially they know about this agreement as to how they get the gold. Substantial steps are obviously taken, and they're part of that. They're attached to that Conspiracy by virtue of their role. There's also an extremely strong argument that they're accomplices to it. In fact, if the State, in that scenario proved that they knew that this property was coming from robberies, et cetera, they are accomplices, because they're assisting by virtue of taking these stolen goods and doing things.

So, I failed to mention that earlier, and it applies in this case to what I'm talking about, so getting back to the August 26th incident, we know, after the fact, that Azias has 5,000 that is a portion of the 20 something

thousand dollars that the Danhs had stolen.

Now, just as in that fence, he's complicit. He knows what is happening. You can't decide what his particular role is on these facts but you know he's complicit circumstantially. He knows exactly how that money came to be. Okay, so getting then to the elements, you don't have to be convinced about every detail of things, but you do have to be convinced beyond a reasonable doubt as to the elements.

One of the first things that I asked, if you will remember, way back when when you first walked in and we got to get up and start asking you questions to choose you as jurors in this case was, you know, I want to know what you think about the truth, how important is the truth in our system? A few people talked about it. Everybody agreed, it's the basics of whether our system's effective and works fairly for everybody is an understanding of the truth. Without it, you just don't have justice, right?

As relates to the elements, again, what truth? The State doesn't have to, again, I'm just beating this, prove every single thing in these cases, but the State does have to satisfy you regarding the truth of those elements. Again, folks, back there I talked to certain jurors who have been on a jury before and asked a general question of those individuals, look back on the case or

cases that you heard. Are you still satisfied in the truth of your decision? And everybody said yes, as I recall. Somebody had some issue going on, I think I remember, but it was fleshed out, and you know, the point is, all that time removed, despite whatever issues factually in their case, they're still satisfied in the truth of their verdict.

And when you came in that door and we started asking these questions, you knew nothing about this case whatsoever. The judge talked to you a little bit about the charges, and introduced the parties, et cetera, reiterated that it's only a charge and the only evidence you are to consider comes once the trial starts and through the witnesses and admitted evidence, et cetera. So your clean slate became full. Impressions, things start happening, of course, you are not allowed to deliberate or fully discuss those or connect them until you go back there when we're all finished, but of course impressions are formed, et cetera.

So, that slate is full. And you need to carefully evaluate those feelings, those understandings that you have and how they apply to this case, what the State's proven, what happened in this case, and compare that, of course, to this legal standard of beyond a reasonable doubt.

It's a common sense standard. It's not scientific. You don't take a microscope and look at everything under a microscope, because it doesn't look the same as it would if you stood back and looked at the big picture. Of course you analyze the facts and the facts and nuances, et cetera, but you don't lose sight of the rest of the case, as well. And a common sense discussion, analysis of what the State has proven in this case.

The instruction that talks about, that the Court gave you, that's a formal instruction on what beyond a reasonable doubt means, it says that it's a -- let me read it so I don't misquote it. I want to focus on one part, and I am truly almost finished.

Okay. The last paragraph of Instruction Number 2 says a reasonable doubt is one for which a reason exists, it may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

If from such consideration you have an abiding belief in the truth of the charge, which are the elements, you are satisfied beyond a reasonable doubt. So that means just as when I talked to these other jurors, that when you come to the decision that you come to individually, when you come to the decision you come to

collectively, it has to be a decision that you have an abiding belief in the truth of. You can't change your mind 30 minutes after you render your verdict. You can't change your mind a week after, you can't change your mind two years after. You have to have an abiding belief, one that lasts over time, so that when you're called back here and if you don't dodge your subpoena to come serve as a juror next time, and someone stands up and says I want you to look back on that case or cases and think about it, when you apply those same facts, when you apply that same law, are you still satisfied to that day in the truth of your verdict based on the law --

MS. MARTIN: Your Honor, I am going to object. One, this doesn't seem like rebuttal, it seems like a second closing argument, and we are treading on dangerous territory, if we keep going down the truth highway.

THE COURT: I'm not going to sustain the objection, but I am going to direct counsel that we are reworking some ground here, and...

MR. GREER: I'm winding --

THE COURT: The concept of abiding belief is only with regard to the prosecution's burden and the defense, I remind the jury, doesn't have to prove anything. The State has to prove the case beyond a reasonable doubt. My instructions explain to you what

reasonable doubt is. Proceed.

MR. GREER: Thank you. Getting back on track, and now I've somewhat lost it but it's an abiding belief, again down the road. You've got to be still convinced, and what I was saying when I -- when there was an objection was based on the law that the Court gives you, based on the facts as you understand them, not based on nebulous feelings, et cetera, but based on the facts as applied to the law that the Court gives you. And in this case the State is confident that based on the evidence in this case, and the law, these defendants are all guilty of all crimes charged. Thank you.

THE COURT: Okay, ladies and gentlemen, I had hoped to get the case to you for a little bit of deliberation today, but obviously we don't have time for that.

When I first started practicing in the Dark Ages, we would have jurors deliberate until 9, 10 o'clock sometimes, but we are a little more humane than that now, so I am going to release you.

The first thing, though, I have to talk to you about a few things. The first thing is, we have three jurors up in our upper left-hand corner that are part of our family, if you will, but we are going to have to let them go. Alternates, I told you, if we reached this stage

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 46425-0-II
	)	
AZIAS ROSS,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 10TH DAY OF FEBRUARY, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] AZIAS ROSS
DOC NO. 375455
STAFFORD CREEK CORRECTIONS CERNTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF FEBRUARY, 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

February 10, 2015 - 3:38 PM

Transmittal Letter

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Court of Appeals Case Number: 46425-0

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