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Supreme Court No. 94462-8
(CoA No. 47762-9-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

VENIAMIN G. RUSEV,
Petitioner.

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

The Honorable John Hickman, Judge

PETITION FOR REVIEW

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A. SUMMARY OF APPEAL

Veniamin "Ben" Rusev was found guilty following jury trial as an accomplice of assault and robbery. On appeal, Mr. Rusev challenged, *inter alia*, the sufficiency of the evidence and the manner in which the jury was instructed. Although the Court of Appeals affirmed his convictions, the opinion is inconsistent with the decisions of this Court, other Court of Appeals' opinions, and presents significant questions of constitutional law.[1]

B. IDENTITY OF PETITIONER AND THE DECISION BELOW

The petitioner, Veniamin Rusev, through the undersigned attorney, David L. Donnan, requests this Court grant review pursuant to RAP 13.3 and RAP 13.4(b)(1), (2) and (3), of the unpublished decision of the Court of Appeals, Division Two, in *State v. Rusev*, No. 47762-9-II, filed April 18, 2017. A copy of the opinion is attached hereto as an Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Constitution and case law require a jury finding, beyond a reasonable doubt, on all express and implied elements of a criminal offense. Robbery has an implied element requiring the victim have a possessory interest in the property taken. The jury was neither instructed nor did it render a verdict regarding any possessory interest of the alleged victims. Does the finding of harmless error conflict with the constitutional right to due process and jury?

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[1] The Court of Appeals reversed the sentence and remanded for resentencing because the sentencing court erred in imposing a mandatory minimum sentence on the assault charge in the absence of specific finding by the jury. Slip op at 13-14.

2. Guilt as an accomplice to a criminal offense requires more than mere presence. The decisions of this Court have held that an overt act in support of the endeavor is required. Where the jury was not instructed that an overt act, or some other action beyond mere presence and assent was required, did the instructions fail to ensure the right to jury and due process?

3. The State is required to prove all the elements of the charged offense beyond a reasonable doubt. Where Mr. Rusev was charged as an accomplice to the assault, that required proof of his understanding and intent to aid in the commission of the underlying offense. Was there insufficient evidence to support Mr. Rusev's conviction as an accomplice to assault in the first degree?

4. Robbery requires proof of theft and the victim's possessory interest in the property. There was no testimony regarding ownership of the property involved or of a material interference with the alleged victims' possession. Was the evidence sufficient to support Mr. Rusev's robbery conviction?

D. FACTS RELEVANT TO PETITION

1. Trial testimony.

Ihor Onishchuk and his younger brother Dymtro worked for Vital Alesia.[2] RP 507. Alesik bought and sold cars and on occasion used Mr. Rusev

[2] For clarity, petitioner adopts the form used by the Court of Appeals in its opinion referencing the witnesses. See Slip op at n. 2. Petitioner and defendant Veniamin Rusev, and co-defendant Vossler Blesch, are referred to by their last names. Because the alleged victims share the last name Onishchuk, they are referred to by their first names, Ihor and Dmytro. The brothers' cousins, Oleg and Yaheni Mikhalchuk, are also referred to by their first names. Vitali Alesik, is referred to by his last name.

to fix the cars for resale. RP 510-11. Mr. Rusev worked on a Volvo for Alesik but concluded it was beyond his ability to repair. RP 512, 604-05.

Oleg Mikhalchuk, a friend of Alesik's asked Mr. Rusev to look at a Mercedes he bought from Ihor. RP 516. Mr. Rusev concluded the Mercedes was unsafe and irreparable, and Ihor cheated his own cousin by selling such a dangerous car. RP 522, 567, 607-08, 667, 669, 671, 674, 688-89. Oleg returned the Mercedes and the keys, but Ihor denied there were any problems with the Mercedes, became aggressive and refused to return Oleg's money. RP 670-74.

On the day of the incident, Mr. Rusev had asked Alesik to retrieve his Volvo from Mr. Rusev's shop. RP 1639-40. Mr. Rusev told police he thought Alesik was coming to get the Volvo with someone else. RP 1384. Alesik testified he told Mr. Rusev he was coming to get the car, but also said was just sending others. RP 421, 523-32, 619-20, 637-39, 643-51.

Mr. Rusev and his friends had planned a barbeque for this same day and to go later to a shooting range to test Blesch's new .45 handgun. RP 951, 1044-45, 1051, 1322-24. While Mr. Rusev, Blesch, Dimitiry, and another friend were barbequing and drinking a little beer, they saw a BMW drive up in front of Mr. Rusev's apartment and then leave. RP 1286. Dymtro and Ihor had driven to Mr. Rusev's in a BMW, but did not know they needed to drive to the rear to access the garage until after they spoke to Alesik. RP 358-59.

When Ihor and Dymtro arrived at Mr. Rusev's garage and demanded the Volvo, Mr. Rusev told them he needed to check with Alesik before handing

over the keys and the car. RP 1384. Blesch knew that Mr. Rusev wanted him to accompany the group into the garage because Mr. Rusev did not trust Ihor. RP 962, 1040-41, 1065. Mr. Rusev never asked Blesch to bring his gun into the garage. RP 1071-73.

The situation in the garage soon became tense. RP 968-69, 977. Mr. Rusev saw the gun and asked Blesch to move his jacket aside so that Ihor and Dymtro could see the gun in Blesch's waist band. RP 962-66, 1069. Mr. Rusev was upset and according to Blesch, Mr. Rusev walked in a circle around Ihor and Dymtro. RP 977. Mr. Rusev asked Blesch to rack the gun to maintain control of the situation. RP 985-86, 1036.

Blesch speaks Serbo-Croatian and English, but not Russian. RP 936-39. As a result, Blesch did not understand the conversation in Russian between Mr. Rusev and Ihor. In any event, Dymtro and Ihor began handing over their wallets, jackets, belongings, and shoes. RP 368, 975, 981-82, 1043-44. Mr. Rusev handed the wallets and watches to Blesch who put some of them in his pocket. RP 983, 1671-72. The shoes were kicked aside and the jackets and other items were placed on the Volvo. RP 388, 982, 1671-72. Mr. Rusev just looked at Ihor's wallet for identification and put it on top of the Volvo. RP 396, 803.

Blesch believed Mr. Rusev wanted him to scare Ihor and Dymtro, "let them know that we know what they're doing." RP 985-86, 1044-46. Mr. Rusev wanted Ihor to know that it was not acceptable to sell unsafe cars that could

crash and hurt people. RP 957-63. To that end, Mr. Rusev asked Ihor and Dymtro to take off their pants. RP 1121-22. Ihor refused. RP 813-22, 989-93.

Ihor told Dymtro they needed to attack Mr. Rusev together and use Mr. Rusev as a shield to get out of the garage. RP 397-98. Ihor grabbed Mr. Rusev first. RP 847, 851, 896, 1021. Blesch saw Dymtro grab for his waistband at the same time that Ihor and then Dymtro started fighting Mr. Rusev, grabbing him in a body lock. RP 454-63, 484, 994, 1023-24, 1121-22, 1170.

Blesch believed that Mr. Rusev was fighting for his life and when Mr. Rusev yelled "Vossler, Vossler", or "help me", Blesch in a panicked and shot both Mr. Rusev and Ihor. RP 995, 1055-60, 1625. Blesch's shot paralyzed Ihor and tore off part of Mr. Rusev's ear. RP 769, 993, 1385, 1650. No one said anything before the shot rang out. RP 398-99. Mr. Rusev never said shoot or did anything to indicated that he wanted Blesch to shoot. RP 1060, 1118, 1158-60.

Mr. Rusev was in shock after Blesch fired the gun, but he called 9-1-1 to get help for Ihor. RP 995, 1057-58, 1246, 1308. Both Mr. Rusev and Blesch were cooperative and told police what had transpired. RP 1046, 1379-81, 1571, 1625-26.

2. <u>Procedural history</u>.

Mr. Rusev was charged as an accomplice and convicted of one count of assault in the first degree against Ihor and two counts of robbery in the first degree against Ihor and Dymtro. CP 1-3.

Despite a lack of criminal history, Mr. Rusev was sentenced to 155 months' confinement plus 180 months' confinement based on three 60-month firearm enhancements. CP 215-29. Mr. Rusev appealed his conviction and sentence. CP 236.

The Court of Appeals reversed a mandatory minimum 60-month sentence ordered on the assault charge and remanded for resentencing. Slip op at 13-15. The Court also found the jury was not properly instructed as to the robbery offenses, but concluded the error was harmless. Slip op at 10-12. The Court otherwise affirmed and found the evidence sufficient to sustain the convictions. CP 6-9.

Mr. Rusev now seeks review in the Court pursuant to RAP 13.4(a).

E. ARGUMENT FOR REVIEW

1. The omission of an essential element from the to-convict instruction was not harmless and precludes conviction for robbery because the defendant was denied his constructional right to a unanimous jury verdict on all the elements of the charged offense

a. Having a possessory interest in property allegedly taken is an essential element of robbery.

RCW 9A.56.190- defines robbery:

> A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial.

Although the statute does not expressly require that the person have an ownership, representative, or possessory interest in the property, Washington courts have found nonstatutory, implied elements. State v. Miller, 156 Wn.2d 23, 28, 123 P.3d 827 (2005). Robbery is an example of a crime with nonstatutory elements that have been implied by "a near eternity of common law and the common understanding of robbery." Id. The intent to commit theft is an implied, but essential, element of robbery. State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991).

The nonstatutory requirement that the victim has an ownership, representative, or possessory interest in the property was traced as far back as 1909 when this Court found that robbery included an element that "the property must be taken from the person of the owner, or from his immediate presence, for from some person, or from the immediate presence of some person, having control and dominion over it." State v. Hall, 54 Wash. 142, 143-44, 102 P. 888 (1909). As a result, an information alleging robbery was defective because it alleged the taking without alleging any connection between the person and the property. 54 Wash. at 143-44; State v. Latham, 35 Wn.App. 862, 670 P.2d 689 (1983).

Having a possessory interest in the property taken in a robbery charge, therefore, is an essential element of robbery. State v. Richie, 191 Wn.App. 916, 928, 365 P.3d 770 (2015); State v. Tvedt, 153 Wn.2d 705, 714, 107 P.3d 728 (2005) ("in order for a robbery to occur, the person from whom or from whose

presence the property is taken must have an ownership, representative, or possessory interest in the property"). Mr. Rusev argued below these essential elements of robbery required proving the victim had a possessory interest in the property taken.

b. To-convict instructions should contain all essential elements and the verdict so reflect.

The Sixth Amendment right to jury, the Fourteenth Amendment Due Process Clause and Washington's Art I, secs. 3, 21, 22 due process and jury guarantees, all require a determination of every element of an offense based on proof beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.E.2d 435 (2000); State v. Cronin, 143 Wn.2d 568, 580, 14 P.3d 752 (2000). As a result, a court's ability to impose a sentence is limited to the maximum permitted by the jury verdict alone. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

The essential elements of a crime are those the government must prove to sustain a verdict and conviction. State v. Peterson, 168 Wn.2d 763, 772, 230 P.3d 588 (2010). In Washington, the "to-convict" instruction must contain all essential elements of the offense, both express and implied. State v. DeRyke, 149 Wn.2d 906, 910-11, 73 P.3d 1000 (2003); Richie, 191 Wn.App. at 922.

c. The robbery to-convict instructions omitted an essential element.

The robbery to-convict instructions in Mr. Rusev's case provided:[3]

[3] The instructions were identical for both counts other than the names of the

> To convict the defendant of the crime of robbery in the first degree as charged in count IA [or II-A], each of the following six elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 23rd day of February, 2014, the defendant or a person to whom the defendant was acting as an accomplice, unlawfully took personal property from Ihor Onishchuk [or Dymtro Onishchuk];
>
> (2) That the defendant or a person to whom the defendant was acting an accomplice, intend to commit theft of property;
>
> (3) That the taking was against Ihor Onishchuk's [or Dymtro Onishchuk] will by the defendant's or a person to whom the defendant was acting as an accomplice, use or threatened use of immediate force, violence or fear of injury to that person, or to the person or property of another;
>
> (4) That the force or fear was used by the defendant or a person to whom the defendant was an accomplice, to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
>
> (5)(a) That in the commission of these acts or in the immediate flight therefrom the defendant or a person to whom the defendant was acting as an accomplice, was armed with a deadly weapon or
>
> (b) That in the commission of these acts or in the immediate flight therefrom the defendant or a person to whom the defendant was acting as an accomplice, displayed what appeared to be a firearm or deadly weapon;
>
> (6) That any of these acts occurred in the State of Washington....

CP 39, 141 (Instr. 13, 14).

The robbery "to-convict" instructions in Mr. Rusev's case omitted the same essential element identified in Richie, i.e. that the victims must have a possessory interest in the objects taken. 191 Wn.App. at 928. As in Richie, the

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victims.

Court of Appeals in Mr. Rusev's case found the to-convict instruction omitted this essential implied element. Slip op at 10-11, citing Richie, at 928-29.

d. The conclusion that the error was harmless conflicts with the decisions of this Court, other opinions of the Court of Appeals, and presenting a significant question of constitutional law.

At the outset, Mr. Rusev contends the Court of Appeals erred in finding that the error was harmless. Slip op at 11-12. The error was not harmless, however, because the evidence was insufficient to establish that Ihor and Dymtro had a possessory interest in the cell phones, wallets, watches and clothes. See Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). There was no direct testimony the items were theirs and not their parents or someone else's. Because the State did not elicit any evidence of a possessory or representative ownership interest, it is not possible for a reviewing court to determine whether the jury determined they had an interest in the items allegedly taken. As a result, the error was not harmless and the remedy is reversal and remand for a new trial. Richie, 191 Wn.App. at 930.

Furthermore, the specific and detailed guarantees of the right to jury trial and due process of law in the Washington Constitution have historically required reversal whenever the jury was instructed in a manner relieving the prosecution of its burden to prove all the elements of an offense. State v. Emmanuel, 42 Wn.2d 799, 259 P.2d 845 (1953). Article I, sec. 21 provides that "the right to trial by jury shall remain inviolate...." This provision preserves the right as it existed at common law in the territory at the time of its

adoption. Pasco v. Mace, 98 Wn.2d 87, 96, 653 P.2d 618 (1982). The "inviolate" right to trial by jury under the Washington Constitution is broader than that defined by the federal constitution because the state constitution preserved the right as it had developed during the time between the adoption of the federal constitution in 1789 and the state constitution 100 years later. State v. Strasburg, 60 Wash. 106, 118, 110 P.1020 (1910); Mace, 98 Wn.2d at 99.[4] Given this unique history of the state right to jury guaranteed by Art. I, sec. 21, the continued rigid enforcement of the requirement that the jury return a verdict on every element precludes the application of harmless error.

The interplay between the inviolate right to jury trial and state guarantee of due process is also implicated by the failure to present all the elements to the jury.

> [T]his right of trial by jury which our constitution declares shall remain inviolate must mean something more than the preservation of the mere form of trial by jury; else the legislature could, by a process of elimination in defining crime or criminal procedure, entirely destroy the substance of the right by limiting the questions of fact to be submitted to the jury.

[4] The structure of the state constitution limits the otherwise plenary power of the state to do anything not expressly forbidden, and supports the rigorous enforcement of the jury guarantee against encroachment. State v. Gunwall, 106 Wn.2d 54, 66, 720 P.2d 808 (1986). The conduct of criminal trials in state courts are matters of particularly state or local concern which do not warrant adherence to a national standard. Gunwall, 106 Wn.2d at 62; State v. Young, 123 Wn.2d 173, 180, 867 P.2d 593 (1994). Given the history of the state right to jury, the continued rigid enforcement of the requirement that the jury return a verdict on every element, express and implied, precludes the application of harmless error.

Strasburg, 60 Wash. at 116. The state constitutional and common law history of the right to jury trial in Washington reflects it extension to every significant fact upon which guilt is determined. 60 Wash. at 117-18. This Court has noted:

> The right of trial by jury must mean that the accused has the right to have the jury pass upon every substantive fact going to the question of his guilt or innocence. Otherwise this provision ... would be rendered void and utterly fail in the purpose which our people have always believed it was intended to accomplish.

60 Wash. at 118. Failing to obtain the jury's verdict on any fact or element necessary for determining guilt, "has the effect of depriving the appellant of liberty without due process of law, especially in that it deprives him of the right of trial by jury." 60 Wash. at 123-24.

The jury trial right is so ingrained in Washington, that Article I, sec. 22 (amend. 10) contains a separate provision guaranteeing the right to jury in criminal trials in conjunction with the rights of the accused "to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed...." When read in conjunction with the guarantee the accused "shall have the right ... to demand the nature and cause of the accusation against him [and] to have a copy thereof ....," this provision defines a specific right to jury verdict on the elements of the crime charged. See e.g. City of Seattle v. Nordby, 88 Wn.App. 545, 561, 945 P.2d 269 (1997).

In light of the way in which the right to a proper determination by the jury on each element of an offense arises from two separate provisions of the state constitution, the right warrants the most rigorous enforcement. The

integrity of the process and the reliability of the result are cast into doubt when the jury is not required to return a verdict that touches on every element, express and implied, of an offense. The protections of the state constitution require a rule of reversal for the denial of the right to jury. While this Court has applied a harmless error test, that decision does not dictate the result here because it did not address the application of the broader jury trial right in Washington. Cf. State v. Brown, 147 Wn.2d 330, 340, 58 P.3d 889 (2002).

2. The accomplice liability instructions relieved the State of its burden to prove Mr. Rusev committed the offense in the absence of some overt act.

As noted already, the failure to instruct a jury on every element of a charged crime is an error of constitutional magnitude. State v. Gordon, 172 Wn.2d 671, 677, 260 P.3d 884 (2011); RAP 2.5(a).

a. Accomplice liability requires more than mere presence and assent.

In Washington, an accomplice need not be aware of the exact elements of the crime. The defendant must, however, engage in conduct that is in support of "the crime" in order to be found guilty. State v. Berube, 150 Wn.2d 498, 508-09, 79 P.3d 1144 (2003). Physical presence and assent alone are not sufficient to sustain a conviction as an accomplice. State v. Everybodytalksabout, 145 Wn.2d 456, 472, 39 P.3d 294 (2002).

> To assent to an act implies neither contribution nor an expressed concurrence. It is merely a mental attitude which, however culpable from a moral standpoint, does not constitute a crime, since the law cannot reach opinion or sentiment however harmonious it may be with a criminal act.

State v. Peasley, 80 Wash. 99, 100, 141 P. 316 (1914).

> One does not aid and abet unless, in some way, he associates himself with the undertaking, participates in it as in something he desires to bring about, and seeks by his action to make it succeed.

In re Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979); State v. Renneberg, 83 Wn.2d 735, 739, 522 P.2d 835 (1974) ("to aid and abet may consist of words spoken or acts done...."). The Court noted that an accomplice instruction is proper if it requires some form of overt act in the doing or saying of something that either directly or indirectly contributes to the criminal offense. Id.; State v. Redden, 71 Wn.2d 147, 150, 426 P.2d 854 (1967).

b. The jury instructions failed to require the jury find an overt act or other meaningful contribution.

The jury below was instructed as follows:

> A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another when he or she is an accomplice of such other person in the commission of the crime.
>
> A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
>
> (1) solicits, commands, encourages, or requests another person to commit the crime; or
>
> (2) aids or agrees to aid another person in the planning or committing the crime.

CP 131 (Instr. 5).

The Court of Appeals concluded the instruction did not relieve the State of its burden because it made clear Mr. Rusev needed to do more than

passively assent to Blesch's actions. Slip op at 12-13 citing State v. Berube, 150 Wn.2d 498, 508-09, 79 F.3d 1144 (2003); Brown, 147 Wn.2d at 338. The Court looked at language which provided "more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice." Slip op at 12, citing CP 131 (Instr. 5). This portion of the jury's charge failed, however, to convey the degree of support of the criminal enterprise that is required to sustain a conviction.

Saying that more is required, without affirmatively defining the threshold for criminal conduct, fails to provide the jury with the clear guidance that is constitutionally required. The "more than mere presence" language fails to account for circumstances where the defendant is present and assents, silently or otherwise, but takes no further action in support of the criminal enterprise. "It is not the circumstance of 'encouragement' in itself that is determinative, rather it is encouragement plus the intent of the bystander to encourage that constitutes abetting." State v. Rotunno, 95 Wn.2d 931, 934, 631 P.2d 951 (1981); Wilson, 91 Wn.2d at 492.

The Court of Appeals' opinion finding the instruction adequate and the verdict proper is inconsistent with the decisions of this Court describing a material level assistance to convict as an accomplice.

3. The Court of Appeals' opinion is inconsistent with the decisions of this Court and other opinions of the Court of Appeals where it found sufficient evidence to convict Mr. Rusev of first degree assault, presenting a significant question of constitutional law.

a. Constitutional due process and the decisions of this Court require the State prove all the essential elements beyond a reasonable doubt.

The constitutional guarantee of due process of law in the Fourteenth Amendment requires the government prove all the necessary facts to establish a crime beyond a reasonable doubt.[5] In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005).[6] The evidence is sufficient to support a conviction only if a rational trier of fact could find every essential element of the crime beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992); State v. Green, 94 Wn.2d 216, 222, 616 P.2d 628 (1980).

b. Mr. Rusev was charged as an accomplice to assault in the first degree.

Mr. Rusev was charged, *inter alia*, with assault in the first degree. CP 1-3. The statute defining assault in the first degree provides in pertinent part:

> (1) A person is guilty of assault in the first degree if he, with intent to inflict great bodily harm:
> (a) assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or

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[5] The due process clause of the Fourteenth Amendment provides that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[6] The Washington Constitution contains a similar provision:

> No person shall be deprived of life, liberty, or property, without due process of law.

Const. Art. I, sec. 3.

....

(c) Assaults another and inflicts great bodily harm.

RCW 9A.36.011.

Mr. Rusev was specifically charged as an accomplice. RCW 9A.08.020. The accomplice liability statute provides that a person is guilty of a crime if he is an "accomplice" to the person that committed the crime. A person is an "accomplice" if with knowledge that it will promote or facilitate the commission of the crime, he aids another person committing it. RCW 9A.08.020.

Accomplice liability requires at least a general knowledge that the principle intends to commit a crime. State v. Roberts, 142 Wn.2d 471, 513, 14 P.3d 713 (2000). An accomplice need not have knowledge of each element of the principal's crime to be convicted under RCW 9A.08.020; general knowledge of "the crime" is sufficient. Roberts, 142 Wn.2d at 513; In re Restraint of Sarausad, 109 Wn.App. 824, 836, 39 P.3d 308 (2001).

c. The evidence was insufficient to establish guilt beyond a reasonable doubt.

The evidence failed to establish Mr. Rusev had knowledge of Blesch's intention to commit an assault. Because he was suspicious of Ihor and Dymtro he asked Blesch to be present. RP 962, 1156, 1298. There was no evidence that Mr. Rusev asked Blesch to bring a gun into the garage or that he asked or knew that Blesch would point the gun at Ihor or Dymtro. RP 1617-18, 1071.

The record lacks substantial evidence establishing Mr. Rusev knew Blesch intended to commit an assault. Blesch's mere presence as an imposing

man does not create the actus reas or mens rea of assault. In this case, Mr. Rusev knew Blesch was armed but did not direct Blesch to use his gun to commit an assault. He just wanted Blesch present for safety and security. RP 938. This was insufficient to establish accomplice liability for Blesch's subsequent assault. Cf. Everybodytalksabout, 145 Wn.2d at 472. The Court of Appeals opinion is, therefore, inconsistent with the decisions of this Court and other opinions of the Court of Appeals, warranting further review.

4. The Court of Appeals' opinion is conflicts with the decisions of this Court where it found sufficient evidence to convict Mr. Rusev of first degree robbery, presenting a significant question of constitutional law.

a. Mr. Rusev was charged with robbery in the first degree.

Mr. Rusev was charged with two counts of robbery in the first degree, contrary to RCW 9A.56.200(1). CP 1-3. Robbery is defined as:

> A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial....

RCW 9A.56.190.

> A person is guilty of robbery in the first degree if (a) in the commission of a robbery or of immediate flight therefrom, he or she: ... (ii) displays what appears to be a firearm or other deadly weapon.

RCW 9A.56.200(1).

Because robbery requires the intent to commit a theft, the trial court so instructed the jury. Theft is defined as wrongfully obtaining or exerting unauthorized control over the property of another with intent to deprive the person of such property. RCW 9A.56.020; State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991); In re Restraint of Lavery, 154 Wn.2d 249, 252, 111 P.3d 837 (2005); State v. Sublett, 176 Wn.2d 58, 88, 292 P.3d 175 (2012). Finally, robbery includes an implied non-statutory element that requires the victim have an ownership, representative, or possessory interest in the property taken. Richie, 191 Wn.App. at 922-23; Latham, 35 Wn.App. at 864-65.

b. The evidence was insufficient to establish guilt beyond a reasonable doubt.

Ihor and Mr. Rusev both indicated Mr. Rusev wanted to look at Ihor's driver's license because he was not comfortable with Ihor and wanted to confirm with Vitali Alesik whether he should give Ihor the Volvo. RP 396, 803, 1618-19. Ihor was also moving closer to Mr. Rusev, heightening tension. He only told Ihor and Dymtro to hand things over to protect his physical space. RP 1659, 1671-72, 1676.

Mr. Rusev did not take any property with an intent to meaningfully interfere with the individual ownership interests. Instead, his intent was to maintain some control over a very tense situation. RP 986. Mr. Rusev did not retain possession of the items and Belsch left without realizing he had Ihor and Dymtro's belongings. RP 983, 987, 1339-42. Similarly, the evidence failed to establish that Blesch had an intent to steal. RP 983, 1356. The only evidence of

Blesch's intent was his explanation that he did not understand what was being said in Russian. RP 982-83, 1043-44, 1121-22.

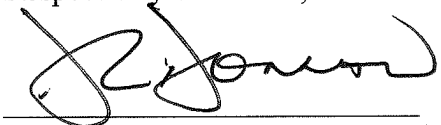
The State did not present sufficient evidence that Mr. Rusev and Blesch intended to retain possession or to otherwise deprive Ihor and Dymtro of their property. Mr. Rusev handed some of the items back to Blesch to get them out of the way, kicked some shoes aside, put the jackets and Ihor's wallet on the Volvo. Mr. Rusev did not take money from Ihor's wallet or retain the watches or cell phones. RP 396, 803, 875, 1218-19. Any taking was fleeting and without an intent to deprive. The Court of Appeals' opinion finding sufficient evidence on these facts is inconsistent with the decisions of this Court.

F. CONCLUSION

Mr. Rusev requests this Court grant review and reverse his convictions. The matter should then be remanded further proceedings as appropriate.

DATED this 18th day of May, 2017.

Respectfully submitted,



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Filed
Washington State
Court of Appeals
Division Two

April 18, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. VENIAMIN GEORGE RUSEV, Appellant.	No. 47762-9-II UNPUBLISHED OPINION

MELNICK, J. — Veniamin George Rusev appeals his conviction and sentence for assault in the first degree and two counts of robbery in the first degree.[1] We conclude that sufficient evidence supports Rusev's convictions and that the trial court properly instructed the jury on accomplice liability. We also conclude that the trial court gave the jury an improper "to convict" instruction on robbery; however, the error was harmless. The court further erred by imposing a mandatory minimum sentence on the assault charge. Based on our resolution of the case, we do not reach the double jeopardy issue, and because of newly amended RAP 14.2, we do not reach the issue of appellate costs.

We affirm, but remand for resentencing and order the trial court to strike the mandatory minimum sentence.

[1] Rusev assigns error to the trial court's imposition of trial costs without an inquiry into his ability to pay. However, because Rusev fails to provide us with any argument on the issue or citation to legal authority, we do not consider the issue. *State v. Harris*, 164 Wn. App. 377, 389 n.7, 263 P.3d 1276 (2011); RAP 10.3(a)(4).

APPENDIX

FACTS[2]

Ihor Onishchuk sold a Mercedes-Benz to his cousin, Oleg Mikhalchuk. Oleg and his brother, Yaheni, were cousins of Ihor and his brother, Dmytro. The Mikhalchuk brothers also knew Rusev. Oleg told Rusev about some issues with the Mercedes not working properly. Rusev said he "doesn't like people who are cheating the other people." 7 Report of Proceedings (RP) at 675.

Alesik, a close friend of Ihor and Dmytro, also knew Rusev. Rusev worked on Alesik's Volvo. Alesik loaned Rusev his Volvo to drive for a few months while Rusev fixed it.

On February 23, 2014, Alesik called Ihor and Dmytro, and asked them to pick up the Volvo from Rusev. The brothers planned to go together, so Ihor could drive his own car, and Dmytro could drive the Volvo to Alesik. Alesik told Rusev over the phone that Ihor and Dmytro would pick up the car, and reminded Rusev that he had previously met Ihor.

Before the brothers went to pick up the Volvo, Rusev told Vossler Blesch that he did not like that Ihor sold Oleg a broken car. Rusev told Blesch that he wanted to rob the brothers and scare them because they cheated their own family. Rusev said he did not trust the brothers and asked Blesch to stay. Blesch carried a firearm in his waistband and Rusev told Blesch to reveal it when the brothers arrived, so they would see it and be intimidated.[3]

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[2] As the parties note in their briefs, the names of people involved in the case may be confusing and often have alternate spellings. For ease of reading, Veniamin Rusev and Vossler Blesch, the defendant and co-defendant, will be referred to by their last names. Because the victims shared the last name Onishchuk, they are referred to by their first names, Ihor and Dmytro. The brothers' cousins, Oleg and Yaheni Mikhalchuk, will also be referred to by their first names. Finally, Vitali Alesik, will be referred to by his last name. We intend no disrespect.

[3] Later, Blesch testified that Rusev did not instruct him to bring the firearm, Blesch planned to bring it along. Yet, Rusev clearly knew that Blesch had his gun with him.

When the brothers arrived at Rusev's, they drove into the alleyway behind his garage. Rusev waited for them, standing in the doorway to the garage. Rusev asked them if they were picking up the Volvo. He acted normal and smiled at them. Rusev shook the brothers' hands.

When Dmytro entered the garage, he saw a stranger, Blesch, with a gun in his waistband. After Ihor entered the garage, Rusev closed and locked the door. Within seconds, Blesch pulled the gun out of his waistband and pointed it at the brothers.

Ihor and Dmytro stood approximately five to seven feet away from Blesch and Rusev. The brothers spoke in Russian with Rusev. Rusev spoke aggressively and cursed. Blesch did not understand Russian, and could not follow the conversation.

Rusev walked back and forth in front of the brothers. Blesch described Rusev as circling them "kind of like a predator stalking his prey." 10 RP at 977. Based on instruction from Rusev, Blesch "rack[ed] the slide" and ejected a bullet out of the chamber of the gun to intimidate the brothers; Rusev kicked it out of the way. 5 RP at 392.

Rusev demanded the brothers' wallets and cell phones, and Dmytro's watch. Ihor tried to talk to Rusev in a friendly manner, but Rusev told him to be quiet or he would kill them. Rusev gestured with his head to Blesch to come closer with the gun. Blesch moved closer to them and gestured with the gun for the brothers to hand the items over. The brothers obeyed.

Rusev took one wallet and put it on top of the Volvo and gave the other wallet to Blesch. Rusev then demanded the brothers take off their jackets and shoes. They again obeyed. Rusev also demanded their car keys; Ihor handed them to Rusev. Rusev handed their phones and the keys to Blesch, and Blesch put them in his jacket pocket.[4] Blesch said to Rusev, "What the hell?"

[4] Rusev never returned any of the items to Ihor or Dmytro.

10 RP at 984. Rusev said something along the lines of "trust me." 10 RP at 985. Rusev finally ordered the brothers to take off their pants. Ihor refused.

Rusev then asked Ihor, "[A]re you the owner of the Mercedes?" 9 RP at 810. Ihor agreed that he was the owner. Rusev picked up the wallet off the Volvo, looked at Ihor's driver's license, and placed it back. Rusev phoned Yaheni and asked Yaheni the name of his cousin. Yaheni responded, "I[h]or Onishchuk." 7 RP at 571.

Ihor told Dmytro that they would not "leave this place alive," and that they would need to get out of there at "any price." 5 RP at 397-98. When Rusev hung up the phone, he began to walk behind the brothers. Ihor grabbed Rusev and held him. Dmytro grabbed Rusev from behind and tried to push the group towards the door to escape. Rusev cried out, "Voss, help me." 10 RP at 995. While Dmytro tried to open the door, Blesch fired the gun, striking and injuring Ihor.

Rusev seemed surprised that Blesch shot the gun and he told Blesch to leave. Rusev told Dmytro that Blesch was not supposed to fire the gun, he was only supposed to scare them. Ihor suffered a gunshot wound to the neck, chest, and arm that caused a significant spinal cord injury, rendering him a partial quadriplegic. He could move his hands, but nothing else from the neck down.

Blesch turned himself into the police shortly thereafter. Blesch claimed that he followed Rusev's lead throughout the incident. Blesch pled guilty to assault in the first degree and two counts of robbery in the first degree.

After the shooting, law enforcement arrested Rusev. Rusev identified Blesch as the shooter and stated that Blesch fled after shooting Ihor. An officer noticed that when Rusev left the scene to receive medical attention for an injury to his ear, he took a wallet out of his pocket, said that it

was not his, and dropped it on the ground. A forensic specialist found Ihor's wallet on top of the Volvo in the garage.

The State charged Rusev as an accomplice to one count of assault in the first degree and two counts of robbery in the first degree, each with firearm enhancements.[5]

The trial court instructed the jury on accomplice liability:

> A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of the crime.
>
> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he either:
>
> (1) Solicits, commands, encourages, or requests another person to commit the crime: or
>
> (2) Aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support or presence. A person who is present at the scene and ready to assist by his presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

Clerk's Papers (CP) at 131 (Instr. 5). Rusev did not object to this instruction.

The trial court instructed the jury on the elements of robbery in the first degree:[6]

> To convict the defendant of the crime of robbery in the first degree as charged in Count IA [and II-A], each of the following six elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 23rd day of February, 2014, the defendant or a person to whom the defendant was acting as an accomplice; unlawfully took personal property from Ihor Onishchuk [or Dmytro Onishchuk];
>
> (2) That the defendant or a person to whom the defendant was acting as an accomplice, intended to commit theft of the property;
>
> (3) That the taking was against Ihor Onishchuk's [or Dmytro Onishchuk's] will by the defendant's or a person to whom the defendant was acting as an accomplice, use or threatened use of immediate force, violence, or fear of injury to that person or to the person or property of another;

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[5] RCW 9A.56.190; RCW 9A.56.200(1)(a)(ii); RCW 9.41.010; RCW 9A.36.011(1)(a).

[6] The instructions were identical for both counts other than the name of the victim.

> (4) That force or fear was used by the defendant or a person to whom the defendant was acting as an accomplice, to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
>
> (5)(a) That in the commission of these acts or in immediate flight therefrom the defendant or a person to whom the defendant was acting as an accomplice, was armed with a deadly weapon or
>
> (b) That in the commission of these acts or in the immediate flight therefrom the defendant or a person to whom the defendant was acting as an accomplice, displayed what appeared to be a firearm or other deadly weapon; and
>
> (6) That any of these acts occurred in the State of Washington.

CP at 139, 141 (Instr. 13, 14). Rusev took exception to these instructions because he argued that the court should include a theft instruction that stated there must have been an intent to permanently deprive the owner of the property as an element.

The jury found Rusev guilty of one count of assault in the first degree and two counts of robbery in the first degree. By special verdict, the jury found Rusev or the person to whom he acted as an accomplice, was armed with a firearm at the time of each of the three counts.

The trial court sentenced Rusev to 335 months of confinement. The trial court noted that the "confinement time on Count(s) III [assault] contain(s) a mandatory minimum term of 60 months." CP at 221. The trial court also entered an order of indigency. Rusev appeals.

ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE

Rusev argues insufficient evidence supports his convictions for all counts. He argues that he did not know Blesch would assault Ihor. Rusev also argues that he did not take the property with an intent to steal and he did not retain possession of any of the property, and thus, insufficient evidence supports his convictions for robbery in the first degree. We disagree.

A. STANDARD OF REVIEW

To determine whether sufficient evidence supports a conviction, we view the evidence in the light most favorable to the State and determine whether any rational fact finder could have

found the elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). "'Substantial evidence' is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise." *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014).

"In claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it." *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010). Any inferences "'must be drawn in favor of the State and interpreted most strongly against the defendant.'" *Homan*, 181 Wn.2d at 106 (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). In addition, we "must defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence." *Homan*, 181 Wn.2d at 106.

B. ASSAULT IN THE FIRST DEGREE

To convict Rusev of assault in the first degree, the State had to prove that with intent to inflict great bodily harm, Rusev, or an accomplice, assaulted Ihor with a firearm or deadly weapon or by any force or means likely to produce great bodily harm or death. RCW 9A.36.011(1)(a).

Because the State charged Rusev as an accomplice, the State had to prove that Rusev "'must have known generally that he was facilitating an assault, even if only a simple, misdemeanor level assault, and need not have known that the principal was going to use deadly force or that the principal was armed.'" *State v. McChristian*, 158 Wn. App. 392, 401, 241 P.3d 468 (2010) (quoting *In re Pers. Restraint of Sarausad*, 109 Wn. App. 824, 836, 39 P.3d 308 (2001)). "In Washington, an accomplice need not be aware of the exact elements of the crime. As long as the defendant engaged in conduct that is 'the crime,' the defendant may be found guilty." *State v. Berube*, 150 Wn.2d 498, 508-09, 79 P.3d 1144 (2003) (internal citation omitted).

Here, it is undisputed that Blesch assaulted Ihor with a firearm and caused Ihor great bodily harm. Sufficient evidence shows that Rusev aided and abetted Blesch in the commission of an assault. Rusev arranged for the brothers to come to his house. He also arranged for Blesch to be present with his gun. Rusev said he wanted to scare the brothers. Rusev wanted Blesch to have the firearm and display it to the brothers as intimidation. Within seconds of the brothers entering the garage, Blesch displayed the gun and pointed it at them. After Blesch ejected a bullet, Rusev kicked it out of the way. Ihor tried to talk to Rusev in a friendly manner, but Rusev told him to be quiet or he would kill them. Rusev gestured to Blesch to get closer with the gun. Finally, Blesch intentionally shot at Ihor and severely injured him.

Based on the foregoing and the record as a whole, we conclude that sufficient evidence supports Rusev's conviction for assault in the first degree.

C. ROBBERY IN THE FIRST DEGREE

"A person is guilt of robbery in the first degree if (a) In the commission of a robbery or of immediate flight therefrom, he or she: . . . (ii) Displays what appears to be a firearm or other deadly weapon." RCW 9A.56.200(1). RCW 9A.56.190 defines robbery.

> A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial.

RCW 9A.56.190.

Robbery requires the intent to commit a theft. RCW 9A.56.190. Theft is defined as wrongfully obtaining or exerting unauthorized control over the property of another with intent to deprive the person of such property. RCW 9A.56.020. The trial court instructed the jury that the definition of robbery includes the intent to commit theft.

Rusev argues that the State had to prove an intent to permanently deprive the brothers of their property. "'The crime of theft requires as one element an 'intent to deprive.'" *State v. Crittenden*, 146 Wn. App. 361, 370, 189 P.3d 849 (2008) (quoting RCW 9A.56.202(1)(a)). The common law element of intent to permanently deprive is not required. The legislature purposefully omitted it. *State v. Komok*, 113 Wn.2d 810, 816-17, 783 P.2d 1061 (1989); *Crittenden*, 146 Wn. App. at 370. Rusev's argument fails.

Because the State charged Rusev as an accomplice, the State also had to prove that Rusev had general knowledge of the crime of robbery. Rusev had to have knowledge that Blesch would take personal property from Ihor and Dmytro against their will with the threat of force with a deadly weapon.

Before the brothers arrived, Rusev told Blesch that he wanted to rob the brothers and scare them because they cheated their own family. Rusev told Blesch to reveal the firearm in his waistband when the brothers walked in so they would see it and be intimidated. Rusev demanded the brothers' wallets and cell phones, and Dmytro's watch. Blesch gestured with the gun for them to hand the items over. Rusev also demanded that they take off their jackets and shoes. Ihor and Dmytro gave the items to Rusev. Rusev demanded their car keys, and Ihor handed them to Rusev. Rusev handed their phones and the keys to Blesch, and Blesch put them in his jacket pocket. Rusev never returned the items to Ihor or Dmytro.

When considering the evidence in the light most favorable to the State, sufficient evidence supports Rusev's convictions for both counts of robbery because Rusev and Blesch took personal items from each of the brothers by threatened force. Therefore, sufficient evidence supports all three of Rusev's convictions.

II. JURY INSTRUCTIONS

Rusev challenges two jury instructions on appeal. First, he argues that the trial court erred by instructing the jury on the to-convict instruction for robbery in the first degree because the instruction relieved the State of its burden to prove an essential element, that the brothers each had a possessory interest in the items taken from them. Rusev also argues that the trial court erred by instructing the jury on accomplice liability because the instruction relieved the State of its burden to prove that he committed an overt act.

We conclude that the trial court erred by instructing the jury on the to-convict robbery instruction, but the error was harmless. We also conclude that the trial court did not err with its accomplice liability instruction.

A. STANDARD OF REVIEW

Jury instructions are appropriate if they allow the parties to argue their theories of the case, do not mislead the jury, and do not misstate the law. *State v. Stevens*, 158 Wn.2d 304, 308, 143 P.3d 817 (2006). We review de novo whether the jury instructions adequately state the applicable law, in the context of the jury instructions as a whole. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). "[J]ury instructions read as a whole must make the relevant legal standards manifestly apparent to the average juror." *State v. Marquez*, 131 Wn. App. 566, 575, 127 P.3d 786 (2006).

B. ROBBERY TO-CONVICT INSTRUCTIONS

Rusev argues that an essential element of robbery is proving that the victim had a possessory interest in the property taken. He further argues that the robbery in the first degree to-convict instructions omitted this element and relieved the State of its burden to prove robbery.

The essential elements of a crime are those that the prosecution must prove to sustain a conviction. *State v. Peterson*, 168 Wn.2d 763, 772, 230 P.3d 588 (2010). A "to convict" instruction must provide a correct statement of all the necessary elements. *State v. DeRyke*, 149 Wn.2d 906, 911, 73 P.3d 1000 (2003). "However, a criminal statute is not always conclusive regarding the elements of a crime. Courts may find nonstatutory, implied elements." *State v. Richie*, 191 Wn. App. 916, 922, 365 P.3d 770 (2015).

Recently, this court held in *Richie* that whether the victim has an ownership or possessory interest in the property taken is an essential, implied element of robbery. 191 Wn. App. at 924. The to-convict instruction challenged in *Richie* followed WPIC 37.02,[7] 191 Wn. App. at 928, as did the instructions in this case.

Richie concluded that this instruction's language omitted the essential implied element of whether the victim of a robbery has an ownership, representative, or possessory interest in the property taken. 191 Wn. App. at 928-29. Accordingly, the court held that the trial court's instruction relieved the State of its burden to prove every element of the crime. *Richie*, 191 Wn. App. at 928. The same is true in this case.

"[T]he omission of an essential element of a crime from the to-convict jury instructions may be subject to a harmless error analysis." *Richie*, 191 Wn. App. at 929. "[A] defendant is entitled to a new trial unless the error can be declared harmless beyond a reasonable doubt." *State v. Woods*, 138 Wn. App. 191, 202, 156 P.3d 309 (2007). "Such an omission is harmless when it is clear that it did not contribute to the verdict; for example, when uncontroverted evidence supports the omitted element." *Richie*, 191 Wn. App. at 929. But the error is not harmless if "'the

[7] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 37.02, at 667 (3d ed. 2008).

evidence and instructions leave it ambiguous as to whether the jury could have convicted on improper grounds.'" *Richie*, 191 Wn. App. at 929 (quoting *State v. Schaler*, 169 Wn.2d 274, 288, 236 P.3d 858 (2010)).

Here, the to-convict instruction omitted an essential implied element. But the evidence on this element was uncontroverted. Both Ihor and Dmytro testified that Rusev ordered them to hand over their items. In addition, there was testimony that one of the wallet's contained Ihor's driver's license. As a result, we conclude that the instructional error was harmless beyond a reasonable doubt because it was uncontroverted that both victims had possessory interests in the property taken.

C. ACCOMPLICE LIABILITY INSTRUCTION

Rusev argues that the trial court erred by instructing the jury on accomplice liability because the instruction relieved the State of its burden to prove that he committed an overt act.

Rusev did not object to this instruction at trial. Generally, an appellate court may refuse to entertain a claim of error not raised before the trial court. RAP 2.5(a). However, we address claims of manifest error affecting a constitutional right. *State v. Gordon*, 172 Wn.2d 671, 677, 260 P.3d 884 (2011); RAP 2.5(a). "The failure to instruct a jury on every element of a charged crime is an error of constitutional magnitude." *Gordon*, 172 Wn.2d at 677. Therefore, we address the issue.

Here, the instruction did not relieve the State of its burden because it made clear to the jury that Rusev needed more than passive assent to Blesch's acts. The instruction stated that "more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice." CP at 131 (Instr. 5). In addition, other courts have upheld

this same jury instruction. *Berube*, 150 Wn.2d at 508-09; *State v. Brown*, 147 Wn.2d 330, 338, 58 P.3d 889 (2002).

Therefore, we conclude that the trial court did not err by instructing the jury on accomplice liability because the instruction did not relieve the State of its burden.

III. MANDATORY MINIMUM SENTENCE

Rusev argues, and the State concedes, that the trial court denied his right to a jury trial by imposing a mandatory minimum sentence on the assault conviction. We agree that the trial court erred. Because the trial court may have imposed a different sentence knowing assault in the first degree did not have a mandatory minimum, we remand the case for resentencing.

Any error implicating a criminal defendant's Sixth Amendment right to a jury trial may be raised for the first time on appeal. *State v. Hughes*, 154 Wn.2d 118, 143, 110 P.3d 192 (2005), *abrogated on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). We review whether a sentence is legally erroneous de novo. *State v. Dyson*, 189 Wn. App. 215, 224, 360 P.3d 25 (2015), *review denied*, 184 Wn.2d 1038 (2016).

"[O]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Dyson*, 189 Wn. App. at 225 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). This rule also applies when a trial court imposes a mandatory minimum sentence based on facts not inherent in the guilty verdict itself.[8] *Alleyne v. United States*, ___ U.S. ___, 133 S. Ct. 2151, 2161, 186 L. Ed. 2d 314 (2013). Thus, "[a]ny fact

[8] As an example, a person convicted of murder in the first degree must be sentenced to a mandatory minimum sentence of 20 years. RCW 9.94A.540. Other than a finding of guilty, no other jury finding is required to impose this sentence.

that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Dyson*, 189 Wn. App. at 225.

In this case, in order to impose a mandatory minimum sentence of five years on the assault in the first degree charge, a jury would have to specially find that Rusev used force or means likely to result in death or that he intended to kill the victim. RCW 9.94A.540(1)(b). "Washington courts have held that RCW 9.94A.540's five-year mandatory minimum does not automatically attach to a first degree assault conviction." *Dyson*, 189 Wn. App. at 227. It "necessarily requires a separate factual finding beyond the jury's finding of guilt of first degree assault." *Dyson*, 189 Wn. App. at 227.

Here, the jury did not specially find that Rusev used force or means likely to result in death or intended to kill the victim, as required. Therefore, the trial court erred in imposing a mandatory minimum sentence.

IV. DOUBLE JEOPARDY

Rusev argues that because he should not have been convicted of assault in the first degree, and if this court remands for imposition of a sentence on assault in the second degree, that conviction should merge with the robbery in the first degree charge to avoid violating double jeopardy. Because we do not remand the case on the basis of insufficient evidence, we do not address this issue.

V. APPELLATE COSTS

Rusev asks us to not impose appellate costs, asserting that he does not have the ability to pay because he is indigent. Under *State v. Grant*, 196 Wn. App. 644, 650, 385 P.3d 184 (2016), a defendant is not required to address appellate costs in his or her briefing to preserve the ability to object to the imposition of costs after the State files a cost bill. A commissioner of this court will

consider whether to award appellate costs in due course under the newly revised provisions of RAP 14.2 if the State decides to file a cost bill and if Rusev objects to that cost bill.

We affirm, but remand for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Bjorgen, C.J.

Lee, J.

MERYHEW LAW GROUP

May 18, 2017 - 2:01 PM

Filing Petition for Review

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