SUPREME COURT NO. _____

NO. 46921-9-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRANDON ENGLISH,

Petitioner.

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

The Honorable Barbara Johnson, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Brandon English asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

The petitioner seeks review of the Court of Appeals' unpublished decision in State v. Brandon English and Calvin Quichocho, filed March 21, 2017 ("Opinion" or "Op."). It is attached to this petition as Appendix A. On May 30, 2017, the Court of Appeals denied English and Quichocho's joint motion for reconsideration. The motion (absent its appendix, the Opinion itself) and the Court's order denying reconsideration are attached as Appendices B and C.[1]

C. ISSUES PRESENTED FOR REVIEW

1. For a robbery to occur, as a matter of law, the person from whom or from whose presence the property is taken must have an

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[1] In the parties' joint motion for reconsideration, English and Quichocho raised the primary issue raised in this petition. An abbreviated version of the saga of their attempts to raise the issue in the Court of Appeals can be found in that motion. App. B at 1-3.

In its ruling on the motion, the Court of Appeals again refused to address the issue, claiming, in contradictory fashion, that (1) the supplemental briefs in which the appellants attempted to raise the issue had been rejected because they did not raise any new issues, and (2) that the motion for reconsideration was being rejected because it raised a new issue. App. C (order on motion for reconsideration). Both cannot be true.

Although the Court of Appeals refused to consider the issue, this Court should exercise its discretion to grant review on this issue based on the authority set forth on pages 4-6 of the motion for reconsideration. App. B at 4-6.

ownership, representative, or possessory interest in the property. As Division Two held in State v. Richie, 191 Wn. App. 916, 924, 365 P.3d 770 (2015), this is an essential, implied element of robbery.

Where an information omits this essential element of robbery, in violation of an accused's right to due process, should his robbery conviction be reversed?

2. Should this Court also grant review for the reasons set forth in co-appellant Calvin Quichocho's petition for review, which English adopts and incorporates by reference?[2]

D. STATEMENT OF THE CASE[3]

1. Charges, verdicts, and sentences

The State charged appellant English and co-defendant Quichocho with two counts of first degree robbery (counts 1 and 2), two counts of first degree kidnapping (counts 3 and 4), and two counts of second degree assault

[2] RAP 10.1(g)(2). Specifically, English adopts Quichocho's arguments that (1) there was insufficient evidence to support the firearm enhancements, (2) the prosecutor committed misconduct via improper vouching, and (3) counsel provided ineffective assistance based on failure to object to improper vouching and failure to challenge two jurors.

[3] This petition refers to the verbatim reports as follows: 1RP – 10/8, 10/10, and 10/17/14; 2RP – 10/13/14; 3RP – 10/14/14 (morning); 4RP – 10/14/14 (afternoon); 5RP – 10/15/14 (morning); 6RP – 10/15/14 (afternoon); 7RP – 10/16/14 (morning); 8RP – 10/16/14 (afternoon); 9RP – 10/20/14 (morning); 10RP – 10/20/14 (afternoon); 11RP – 10/21/14 (morning); 12RP – 10/21/14 (afternoon); and 13RP – 10/22, 10/23, and 11/20/14. Except for 1RP, the volumes are consecutively and chronologically paginated.

with a deadly weapon (counts 5 and 6). The State also alleged firearm enhancements as to each count. The complainants as to each pair of charges were Austin Bondy and Brittany Horn, who were at the apartment of their friend Colby Haugen at the time of the charged incident. CP 9-11. A jury convicted English and Quichocho as charged. CP 135-46; 13RP 1633-41.

The court sentenced English to concurrent standard range terms of incarceration on counts 1-3 and, under RCW 9.94A.589(1)(b), ran the count 4 base sentence consecutively to those terms, for a total of 216 months. The court added 240 months corresponding to the firearm enhancements on counts 1-4 only, for a total of 456 months. CP 298.

2. Trial testimony

Haugen lived at the Prairie View apartments in Clark County and sold marijuana by the ounce from his apartment. 3RP 363; 4RP 403. Haugen was at work the afternoon of December 4, 2013 when he began receiving phone calls. 4RP 411. When he finally answered, his friend, 17-year-old Brittany Horn reported that she and Austin Bondy, a friend of Haugen's, had been at Haugen's apartment when two men entered, robbed them at gunpoint, tied them up, and placed them in a closet. 3RP 365.

Haugen testified the robbers took an X-Box video game console; associated games; a change jar; Horn's purse, wallet and phone; Bondy's

wallet; and other items. 3RP 366-67; 4RP 447, 483 (Bondy testimony). The robbers also took marijuana and a small scale. 3RP 366-67.

Haugen returned home after work. 4RP 411. Haugen, Bondy, and Horn discussed whether to call the police considering Haugen's marijuana-related activities. 3RP 366. They ultimately agreed to contact the police but not to mention marijuana. 3RP 368; 4RP 414.

Haugen testified John Lujan, Juan Alfaro, and a young African-American man had come to his apartment the evening before, December 3. Bondy, who had spent the night at the apartment, was present. 4RP 417-19. Alfaro paid Haugen for some marijuana Alfaro had previously purchased, and the men bought a small additional amount. 3RP 371. Haugen knew Lujan and Alfaro from the apartment complex and from school. 3RP 369-70. Haugen did not know the African-American man but described him as approximately six feet tall and stocky, with acne scarring on his face. 3RP 371-72.

Based on Horn and Bondy's descriptions, Haugen told them he thought one of the robbers could have been the African-American man. 4RP 428-29. Haugen was unable to pick English out of a photomontage but said he recognized English at trial. 3RP 373-74; 4RP 393-94, 424.

Bondy testified he was waiting for Haugen when he heard a knock at the door. 4RP 434, 436. It was Lujan wanting to buy marijuana. He was

with the African-American man from the night before, as well as a third, shorter, man whom Bondy had never seen. 4RP 436-37, 497.

Bondy went to the kitchen to weigh out some marijuana. 4RP 443. As he was doing so, the shorter man, whom Bondy later identified as co-defendant Quichocho, pulled out a revolver. 4RP 444. Bondy could see a metal "bullet" in the revolving chamber of the weapon. 4RP 445. The man later identified as Quichocho told Bondy the bullet was for him. 4RP 445. Quichocho told Bondy to give him "the money." Bondy told Quichocho there was no money. 4RP 446.

Bondy was made to lie face down on the kitchen floor. Eventually, the robbers sent him to Haugen's bedroom to obtain the rest of Haugen's marijuana, about three ounces. 4RP 448, 474. The gunman ordered Lujan to tie up Bondy and Horn. 4RP 448. Lujan used a hair clipper cord and a set of headphones to tie them. 4RP 456. Bondy and Horn were placed in a closet, where they remained for 10-15 minutes, until Lujan arrived to untie them. 4RP 457, 466.

Bondy was unable to identify English from a photomontage, but, like Haugen, he claimed he could identify him at trial. 4RP 435, 515.

Horn provided an account of events similar to that of Bondy. 5RP 552-63. Horn described the bigger man as having a short "Afro" hairstyle as well as "skin problems." 5RP 568. The day after the incident, detectives

showed her a photomontage including English. She identified English as the bigger man to only 50 percent certainty, 5RP 572, reporting that she "wasn't positive at all" as to her identification. 5RP 603. At the trial nearly a year later, however, she too was able to identify English. 5RP 573. Four months after the robbery, Horn picked Quichocho out of a photomontage. 5RP 574.

Lujan, the third robber, testified at English and Quichocho's trial pursuant to plea agreement. In December of 2013, he lived at the Prairie View apartments with his family, and he knew Haugen, Horn, Bondy, and Alfaro. 7RP 819, 824.

The afternoon of December 4, Lujan went to Alfaro's apartment so Alfaro could work on a tattoo for Lujan. 7RP 831. Lujan left Alfaro's apartment and met up with English, who was hanging out outside. 7RP 831, 833. English was friend of Lujan's sister's boyfriend, and he also hung out with Lujan's brother. 6RP 721; 7RP 832. A few days earlier, Lujan and English had spoken about a plan to rob Haugen. 7RP 834.

Lujan went inside for a while to "kill[] time." 7RP 834. When he emerged around 3:00, English was still outside, but a man who introduced himself as "Vince" had joined English. 7RP 836, 874. Lujan later identified "Vince" as Quichocho. 7RP 837-38; 8RP 964. Without explicitly discussing a plan, the three men went to Haugen's. 7RP 839.

Lujan chatted with Horn while English and "Vince" transacted with Bondy. 7RP 839. At some point, English approached Lujan and whispered, "Just go with this." 7RP 839. Quichocho then emerged from the bathroom with a gun and told Horn, Bondy, and Lujan to get on the floor. 7RP 840. English pushed Lujan. 7RP 841. Quichocho pointed the gun at Lujan and told him to tie up Horn and Bondy. 7RP 843.

Lujan had previously seen significant quantities of money and marijuana in the apartment, but the robbers found relatively little of either on December 4. 7RP 842-43. After the others left, Lujan searched for Horn and Bondy and eventually found them in a closet. 7RP 844. Lujan claimed he had to leave, so he was not involved in calling the police. 7RP 847-48.

Lujan spoke with police that night, however, after his family sent him texts that the police were looking for him. Lujan initially denied knowing the two men, but he eventually gave up English and provided a description of "Vince" and an associated car. 7RP 849; 8RP 935, 941-42, 965.

Lujan was initially charged with the same crimes as English and Quichocho. But he ultimately pled guilty to a significantly reduced charge of second degree robbery. He testified on direct examination that he did so in exchange for "testify[ing] truthfully." 7RP 855. The prosecutor then asked, "[a]nd so, to the best of your recollection, your story hasn't changed

just because you got this offer to testify truthfully, has it?" 7RP 856. Lujan responded it had not changed. 7RP 856. The defense did not object. 7RP 755-56.

Lujan's family members knew English. 6RP 713, 733, 738-39. Lujan's brother Anthony saw English outside his family's apartment on December 3. English showed Anthony what appeared to be a "six cylinder" gun and said he was planning to "hit a lick." 6RP 730, 734.

English and Quichocho presented testimony by Dr. Daniel Reisberg, an expert on eyewitness identification. 11RP 1416. Reisberg testified various factors may diminish the accuracy of such identifications, including the difficulty of cross-racial identification. 12RP 1429-32, 1452, 1455. He testified in-court identifications are of little value and "troubling" based on the inherently suggestive circumstances. 11RP 1434.

Despite searching English and Quichocho's residences, police never found any gun. 5RP 653-54; 7RP 796.

3. Appeal

English and Quichocho appealed, raising the issues identified in Quichocho's petition for review. The Court rejected all the arguments

except that the second degree assault convictions merged with first degree robbery.[4] Opinion at 10.

As set forth in the motion for reconsideration, App. B, English and Quichocho attempted, unsuccessfully, to raise the primary issue raised in English's petition. English now asks this Court to accept review on this issue—as well as the issues identified in Quichocho's petition—and reverse the Court of Appeals.

E. REASONS REVIEW SHOULD BE ACCEPTED

1. THIS COURT SHOULD ACCEPT REVIEW OF THE RICHIE ISSUE UNDER RAP 13.4(b)(3) AND (4) BECAUSE THIS CASE PRESENTS A SIGNIFICANT QUESTION OF LAW AND AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

This Court should exercise its discretion under the Rules of Appellate Procedure and prior case law and accept review of this issue under RAP 13.4(b)(3) and (4).[5] Following Richie decision, this Court should weigh in on whether a charging document such as the one in this case omits an essential element of robbery. Because the charging document

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[4] That result did not affect the overall sentence, however, because the trial court effectively "merged" the offenses by ostensibly treating the assault charges as "same criminal conduct" but then declining to impose consecutive firearm enhancements. CP 298; 13RP 1651.

[5] Although the Court of Appeals refused to address this issue, its failure to do so violated the RAPs as well as prior decisions by this Court. See App. C at 1-6; see also footnote 1, supra.

failed to set forth all essential elements of robbery, this Court should grant review and reverse the Court of Appeals.

a. Robbery includes a non-statutory element that the victim has an ownership, representative, or possessory interest in the property taken.

As Division Two recognized in its recent Richie decision, robbery includes a non-statutory element that the victim of the robbery has an ownership, representative, or possessory interest in the property taken. Richie, 191 Wn. App. at 924.

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). In determining the essential elements, this Court first looks to the relevant statute. State v. Mason, 170 Wn. App. 375, 379, 285 P.3d 154 (2012). RCW 9A.56.190 defines robbery as follows:

> A person commits robbery when [he] 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.

With regard to taking property from a person's presence, the language of the statute does not require that the person have an ownership, representative, or possessory interest in the property. However, a criminal

statute is not always conclusive regarding all the elements of a crime. Courts may find non-statutory, implied elements. State v. Miller, 156 Wn.2d 23, 28, 123 P.3d 827 (2005). Robbery is an example of a crime with non-statutory elements that are implied by "a near eternity of common law and the common understanding of robbery." Id.

In 1909, this Court established that robbery includes an element that "the property must be taken from the person of the owner, or from his immediate presence, or 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). This Court held that an information alleging robbery was defective because it alleged the taking of property belonging to an entity from the immediate presence of a particular person, without alleging any connection between the person and the property. Id.

Division One adopted the requirement of ownership, representative capacity, or possession in State v. Latham, 35 Wn. App. 862, 670 P.2d 689 (1983). The Court stated that for the taking of property in the presence of a person to constitute a robbery under RCW 9A.56.190, that person must have (1) an ownership interest in the property taken, or (2) some representative capacity with respect to the owner of the property taken, or (3) actual possession of the property. Latham, 35 Wn. App. at 864-65.

In Latham, two defendants assaulted a car owner and a passenger as they stood beside the car, and then the defendants stole the car. Id. at 863-64. The defendants were charged with, and convicted of, two counts of robbery, one relating to the owner and one relating to the passenger. Id. The Court held that the passenger could not be the victim of robbery because he was not the owner of the car, had no authority from the owner to act regarding the car, and was not in possession of the car at the time of the robbery. Id. at 866. Accordingly, the Court reversed each defendant's robbery conviction relating to the passenger. Id.

In State v. Tvedt, 153 Wn.2d 705, 107 P.3d 728 (2005), this Court approved of the characterization of the robbery element as described in Hall and Latham. This Court stated:

> Nearly a century ago this court held that a conviction for robbery requires that the person from whom or in whose presence the property is taken have an ownership or representative interest in the property or have dominion and control over it. [Hall, 54 Wash. at 143-44]. The court rejected the argument that a conviction could be upheld where "title was not alleged in the person robbed, nor is any connection shown or alleged between the person robbed and the property taken." [Id. at 143] . . . . Thus, . . . 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. [Id. at 143-44]; see also [Latham, 35 Wn. App. at 864-66].

Tvedt, 153 Wn.2d at 714.

As Division Two held in Richie, "Hall, Latham, and Tvedt all make it clear that a defendant cannot be convicted of robbery unless the victim has an ownership, representative, or possessory interest in the property taken. Accordingly, we hold that this requirement is an essential, implied element of robbery." Richie, 191 Wn. App. at 924. Richie held the to-convict instruction was erroneous because it did not include this essential element of the crime of first degree robbery, and the error was not harmless. Id. at 929-30.

b. The charging document omitted an essential element of robbery, and reversal is therefore required.

Here, the charging document omitted this essential element of robbery. Like the to-convict instruction discussed in Richie, a charging document must include all essential elements of a crime. U.S. CONST. amend. VI; CONST. art. I, § 22 (amend. 10); State v. Kjorsvik, 117 Wn.2d 93, 108, 812 P.2d 86 (1991). An "essential element is one whose specification is necessary to establish the very illegality of the behavior[.]" State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992) (citing United States v. Cina, 699 F.2d 853, 859 (7th Cir.), cert. denied, 64 U.S. 991 (1983)). Essential elements may derive from statutes, common law, or the constitution. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

Where, as here, the adequacy of an information is challenged for the first time on appeal, a court engages in a two-pronged inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced . . . ?" Kjorsvik, 117 Wn.2d at 105-06. If the necessary elements are neither found nor fairly implied in the charging document, this Court presumes prejudice and reverses without further inquiry as to prejudice. McCarty, 140 Wn.2d at 425, 428 (in prosecution for conspiracy to deliver methamphetamine, charging document, "liberally construed and subject to the Kjorsvik two-prong test, fails on its face to set forth the essential common law element of involvement of a third person outside the agreement to deliver drugs.").

The charging document in this case does not contain or imply all necessary elements. English and Quichocho were each accused of

> [w]ith intent to commit theft, . . . unlawfully tak[ing] personal property *that the Defendant did not own* from the person or in the presence of [Bondy (count 1) / Horn (count 2)], against such person's will, by use or threatened use of immediate force, violence, or fear of injury . . . .

CP 9-10 (emphasis added).

The information thus omitted the element that the person from whom the property was taken have an ownership, representative, or possessory interest in the property. See Hall, 54 Wash. at 143 (reversing

based on inadequate charging document where information charged only that "the property of the Spokane Merchants' Association . . . was taken by [Hall] from the immediate presence of" an individual).

i. *An allegation that an accused took "from the person and in the presence of" another does not provide notice of the essential element, even under a liberal reading.*

An allegation that an accused took "from the person and in the presence of" another does not provide notice of the essential element, even under a liberal reading of a charging document.

Admittedly, Hall predates the Kjorsvik test, which permits charging documents to be construed liberally when an omission is pointed out for the first time on appeal. Thus, one could attempt to argue that the information was adequate under a liberal reading, in that it suggested that a possessory interest ("tak[ing] . . . from the person . . . of") might be required. CP 9-10. See State v. Graham, 64 Wn. App. 305, 307-08, 824 P.2d 502 (1992) (holding that allegation that taking "from the person and in the presence of" satisfied element that some person other than the accused owned the property)).

Such an assertion would be incorrect. One could just as easily surmise from the information that it was *not* necessary that Bondy or Horn have any possessory interest in any property taken. Indeed, based on the

information, any property not owned by English or Quichocho, taken from *presence* of the named complainants, would suffice. See State v. Dixon, 78 Wn.2d 796, 802, 479 P.2d 931 (1971) ("[w]here, under a penal statute, a single offense can be committed in different ways or by different means and the several ways or means charged in a single count are not repugnant to each other, a conviction may rest on proof that the crime was committed by any one of the means charged," i.e., State may charge in the conjunctive, yet prove in the disjunctive).

With this in mind, the missing essential element, acknowledged in Richie, cannot be implied from such misleading and/or incomplete language. This Court's decision in State v. Zillyette, 178 Wn.2d 153, 307 P.3d 712 (2013) is instructive. Delivery of only certain substances supports charge of controlled substances homicide. Thus, an information alleging delivery of a controlled substance in violation of RCW 69.50.401 was inadequate because it alleged both prohibited and "noncriminal" behavior. Zillyette, 178 Wn.2d at 160, 163.

Here, if taking from the "person [of]" was enough to show possessory interest, taking from the "presence of" must also indicate possessory interest. It does not. Thus, the information was, likewise, deficient.

State v. Naillieux is also instructive in this respect. 158 Wn. App. 630, 241 P.3d 1280 (2010). There, the accused was charged with attempting to elude a pursuing police vehicle by:

> fail[ing] or refus[ing] to immediately bring his . . . motor vehicle to a stop and dr[iving] his . . . vehicle in a manner indicating a wanton or willful disregard for the lives or property of others while attempting to elude a pursuing police vehicle appropriately marked after being given visual or audible signal by a uniformed police officer.

Id. at 644.

The attempt to elude statute had been amended, however, and the charging document reflected pre-amendment language. For example, the words "reckless manner" had replaced the phrase "manner indicating a wanton or willful disregard for the lives or property of others." Id. (citing Laws of 2003, ch. 101, § 1). And "'[r]eckless manner' does not mean a 'willful or wanton disregard for the lives or property of others.'" Naillieux, 158 Wn. App. at 644 (citing State v. Ratliff, 140 Wn. App. 12, 14, 164 P.3d 516 (2007)). Rather, it meant means "'a rash or heedless manner, with indifference to the consequences.'" Naillieux, 158 Wn. App. at 644 (citing Ratliff, 140 Wn. App. at 16) (quotation marks and citations omitted). "We, then, cannot infer 'reckless' from 'willful and wanton.'" Naillieux, 158 Wn. App. at 644.

The Court also held the requirement that the pursuing police vehicle be equipped with "lights and sirens" could not be inferred from the charging document, even though it included a requirement that the vehicle be "appropriately marked showing it to be an official police vehicle." Id. at 645. The Court therefore reversed the attempt to elude conviction. Id.

Naillieux establishes that, even under a liberal reading, misleading or inaccurate language, even if it is arguably related to a missing essential element, provides insufficient notice.

Based on the foregoing, any argument that the missing element may be inferred from the over-inclusive (in this context) "person [or] presence of" language should be rejected.

In summary, an "essential element is one whose specification is necessary to establish the very illegality of the behavior[.]" Johnson, 119 Wn.2d at 147 (emphasis added). Even under a liberal reading, the charging document failed to apprise English of all the essential elements of robbery. Because the information fails the first Kjorsvik test, it is not necessary to reach the second, and reversal is required.

ii. *Kjorsvik itself does not preclude relief.*

Kjorsvik itself does not preclude relief here because it does not answer the question English asks this Court to answer. The petitioner is aware that Kjorsvik itself considered and rejected an assertion that a

charging document omitted an element of robbery. The Kjorsvik Court found that "intent to steal," an essential element of robbery, could be inferred from an information that charged that Kjorsvik unlawfully, with force, and against the named complainant's will, took money while armed with a deadly weapon. This Court observed that "[i]t is hard to perceive how the defendant in this case could have unlawfully taken the money from the cash register, against the will of the shopkeeper, by use (or threatened use) of force, violence and fear while displaying a deadly weapon and yet not have intended to steal the money." Kjorsvik, 117 Wn.2d at 110. But that case, while involving a robbery charge, involved a different omitted element. Thus, it does not control the outcome in this case. See In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("[Courts] do not rely on cases that fail to specifically raise or decide an issue.").[6] Kjorsvik does not dictate the result here.

2. THIS COURT SHOULD GRANT REVIEW OF THE ISSUES RELATED TO INSUFFICIENCY OF THE EVIDENCE OF THE FIREARM ENHANCEMENTS, IMPROPER VOUCHING BY THE PROSECUTOR, AND INEFFECTIVE ASSISTANCE OF COUNSEL.

English incorporates by reference the issues and arguments set forth in Quichocho's petition for review. Specifically, English adopts the

[6] Similarly, Tvedt, despite a discussion of the sufficiency of the charging document, did not address the present issue. 153 Wn.2d at 719.

arguments that (1) this Court should grant review on the issue of insufficiency of the evidence supporting the firearm enhancements, (2) this Court should grant review as to the issue of improper vouching by the prosecutor, and (3) this Court should grant review of the issues related to ineffective assistance of counsel, including the claims that counsel was ineffective for failing to object to the prosecutor's improper vouching and for failing to challenge two jurors.

F. CONCLUSION

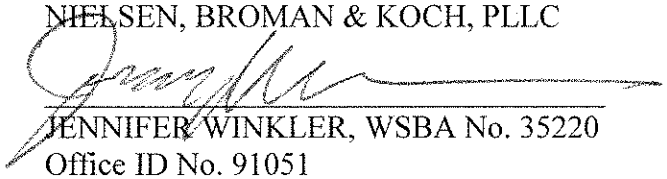
This Court should exercise its discretion, accept review under RAP 13.4(b)(3) and (4), and address the issue the Court of Appeals refused to consider in violation of the RAPs and prior case law from this Court. App. B at 4-6.

This Court should also accept review for the reasons stated in Quichocho's petition for review, which English adopts.

DATED this 28TH day of June, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

March 21, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRANDON MICHAEL ENGLISH, Appellant.	No. 46921-9-II Consolidated with:
STATE OF WASHINGTON, Respondent, v. CALVIN JAMES QUICHOCHO, Appellant.	No. 47001-2-II UNPUBLISHED OPINION

LEE, J. — Brandon Michael English and Calvin James Quichocho were convicted of two counts of first degree robbery, two counts of first degree kidnapping, and two counts of second degree assault, all while armed with a firearm. They appeal, arguing: (1) the trial court erred by omitting an essential element from the jury instruction for robbery, (2) their convictions for first degree robbery should have merged with second degree assault, (3) their right to a public trial was violated when the parties exercised peremptory challenges in writing, (4) the State committed prosecutorial misconduct when the prosecutor elicited testimony that a witness received a plea bargain in exchange for his truthful testimony, (5) the State failed to present sufficient evidence of

the firearm enhancements because it failed to prove that the firearm was operable, and (6) they received ineffective assistance of counsel when (a) counsel failed to object to the alleged prosecutorial misconduct, and (b) counsel agreed to the State playing a redacted recording of Quichocho's police interview. Quichocho raises additional claims in a Statement of Additional Grounds (SAG). We affirm.

FACTS

A. THE CRIME

Colby Haugen lived alone in an apartment in Vancouver, Washington, and sold marijuana from his apartment. On December 3, 2013, Austin Bondy was with Haugen at his apartment. John Lujan, Juan Alfaro, and Brandon English went to Haugen's apartment to smoke marijuana and to gather information about Haugen's apartment as a part of their plan to rob Haugen the next day.

On December 4, Lujan, English, and Calvin Quichocho met to carry out the robbery. Bondy and Brittany Horn were waiting in Haugen's apartment while Haugen was at work. When there was a knock at the door, Bondy opened it to find Lujan, English, and Quichocho. After asking to purchase marijuana, Quichocho drew a revolver and ordered Bondy to give them money. Quichocho ordered Lujan to tie up Bondy and Horn, and Lujan complied by wrapping a cord around their wrists. Bondy and Horn were then put into the bedroom closet and ordered to stay there or they would be killed. Lujan, English, and Quichocho took Haugen's marijuana, Xbox gaming system, iPod, video games, and change jar; Bondy's wallet; and Horn's purse and phone.

Afterwards, Alfaro asked Lujan whether they completed the robbery and what they obtained. Lujan responded that they had taken an Xbox 360 and $20 worth of marijuana.

During the police investigation, Lujan identified English and Quichocho as being involved in the robbery. Bondy and Horn identified Quichocho from a photo montage. Horn also identified English from a photo montage. Lujan reported that Quichocho was driving a dark gray Chevrolet Impala with a Guam sticker on the rear window. Police later located an Impala with a Guam sticker at Quichocho's residence.

The State charged English and Quichocho with two counts of first degree robbery,[1] two counts of first degree kidnapping,[2] and two counts of second degree assault,[3] alleging that they "and/or an accomplice"[4] were armed with a firearm during the commission of all six crimes.[5] Clerk's Papers (CP) (English) at 14-15.

B. VOIR DIRE

During voir dire, juror 7 reported: "[M]y home was robbed while we were in it in the middle of the night," but that there was no contact with whomever broke in. 2 Verbatim Report of Proceedings (VRP) at 196-97. Juror 8 reported that her ex-husband kidnapped her at gunpoint in 1979, and that the experience "could affect [her]." 2 VRP at 199. The State asked, "Now, are you saying that you don't think you could be impartial or you're just not sure?" and juror 8 responded: "I'm just not sure." 2 VRP at 199-200. English and Quichocho did not challenge these jurors.

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[1] RCW 9A.56.200.

[2] RCW 9A.40.020.

[3] RCW 9A.36.021.

[4] RCW 9A.08.020.

[5] RCW 9.94A.825, or as an accomplice under RCW 9.94A.533(3).

The parties exercised four peremptory challenges on the record outside the presence of the jury panel. After the jury panel returned to the courtroom, the parties exercised further peremptory challenges in writing at the sidebar. English and Quichocho were not present at the sidebar, but were in the courtroom when the peremptory challenges were exercised.

C. TRIAL TESTIMONY

Haugen, Bondy, Horn, Alfaro, and Lujan testified. Neither English nor Quichocho testified. The photo montages signed by Horn, Bondy, and Lujan were admitted into evidence. Lujan testified against English and Quichocho as part of a plea deal. The State questioned Lujan on direct examination about his obligation under the plea agreement to tell the truth.

Detective Tim Martin testified that before the investigation in this case, Quichocho admitted to using or having used the nickname "Huss" or "Lil Hustler." 7 VRP at 810. Detective Martin also testified that he has not met anyone else in the community who uses that same nickname.

The State moved to introduce English's cell phone records through Detective Jason Granneman's testimony. Quichocho objected, arguing that the State presented insufficient evidence tying Quichocho to the phone and the "Lil Huss" contact entry on the phone. 9 VRP at 1110-112. The trial court overruled Quichocho's objections, finding that Quichocho's arguments go to the weight of the evidence, not the admissibility, and that the references to "Lil Huss" were "simply a part of the evidence." 8 VRP at 994. The trial court further noted that the phone records were "substantially reduced to certain entries that counsel have had a chance to examine." 9 VRP at 1118. Detective Granneman testified that English's cell phone records revealed multiple

outgoing calls to a number identified as "Lil Huss." 10 VRP at 1157, 1162. Detective Granneman also testified that records from a cell phone found on Quichocho's person, which was later determined to belong to his girlfriend, revealed an outgoing text message to English's cell phone on December 3. The phone had also received e-mails addressed to "Huss." 11 VRP at 1326-27.

Bondy testified that Quichocho pulled out a gun with a "revolving chamber." 4 VRP at 444. Bondy acknowledged that he was "[n]ot very" familiar with guns, but that he knew a revolver was used. 4 VRP at 444. Bondy also testified that Quichocho told Bondy that "that bullet was for [him]" and that he was scared. 4 VRP at 445.

Horn testified that the "shorter guy" pointed a gun at her, and she thought to herself, "I'm going to die." 5 VRP at 560. Horn identified the "shorter person" as Quichocho. 5 VRP at 574-75. Horn also testified that she was not very familiar with guns, but this gun had a "round cylinder" where the bullets are loaded. 5 VRP at 562. Horn further testified that she and Bondy were directed to stay in the bedroom closet or they would be killed.

Lujan testified that Quichocho drew a gun on Bondy, and then pointed the gun at him and directed him to tie up Bondy and Horn. Lujan also testified that Quichocho ordered him to lay down on the floor, and he thought, "I'm dead." 7 VRP at 845.

The State moved to introduce a redacted recording of Quichocho's police interview, along with a transcript, during Detective Jared Steven's testimony. Quichocho's counsel agreed to have the redacted recording played.

The trial court instructed the jury that in order to convict English and Quichocho of first degree robbery, the State must prove the following six elements beyond a reasonable doubt:

> (1) That on or about December 4, 2013, the defendant or an accomplice unlawfully took personal property from the person or in the presence of [Bondy and Horn];
>
> (2) That the defendant or an accomplice intended to commit theft of the property;
>
> (3) That the taking was against the person's will by the defendant's or an accomplice's use or threatened use of immediate force, violence, or fear of injury to that person or to that person's property;
>
> (4) That force or fear was used by the defendant or an accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
>
> (5) That in the commission of these acts or in the immediate flight therefrom the defendant or 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 (English) at 116.

D. VERDICT AND SENTENCING

The jury convicted English and Quichocho as charged. At sentencing, the trial court found: "Counts 5 and 6, the assault charges, would merge with the—I want to use the correct word whether we use merger or constitute same criminal conduct. In any event, we will not impose sentence as to those two, so we are proceeding as to two counts of robbery in the first degree and two counts of kidnapping in the first degree." 13 VRP at 1651. The felony judgment and sentence

show that English and Quichocho were sentenced for all six counts charged.[6] English and Quichocho appeal.

ANALYSIS

A. ROBBERY

English and Quichocho argue that the to-convict instruction for robbery omitted the essential element that the victim must have an interest in the property taken and allowed the jury to convict on improper grounds. We agree.

"The essential elements of the crime are those that the prosecution must prove to sustain a conviction." *State v. Richie*, 191 Wn. App. 916, 921, 365 P.3d 770 (2015); *State v. Peterson*, 168 Wn.2d 763, 772, 230 P.3d 588 (2010). We first look to the statute to determine the essential elements. *Richie*, 191 Wn. App. at 921.

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.

Additionally, robbery includes an essential, implied element that the victim has "an ownership, representative, or possessory interest in the property taken." *Richie*, 191 Wn. App. at 924; *accord State v. Tvedt*, 153 Wn.2d 705, 714, 107 P.3d 728 (2005) ("[I]n order for a robbery to occur, the

[6] The judgment and sentence noted that counts 5 and 6 did not affect English and Quichocho's offender score because they encompassed the same criminal conduct.

person from whom or from whose presence the property is taken must have an ownership, representative, or possessory interest in the property.").

1. The To-Convict Jury Instruction for Robbery

"We review alleged errors of law in jury instructions de novo."[7] *Richie*, 191 Wn. App. at 927 (quoting *State v. Fehr*, 185 Wn. App. 505, 514, 341 P.3d 363 (2015)). "A jury instruction is erroneous if it relieves the State of its burden to prove every element of a crime." *Id.* "A to-convict instruction must contain all essential elements of a crime because it serves as a yardstick by which the jury measures the evidence to determine the defendant's guilt or innocence." *Id.*; *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

Richie resolved the precise argument raised here. In *Richie*, the trial court's to-convict instruction for robbery mirrored the language of 11 *Washington Practice: Pattern Jury Instruction Criminal*: 37.02, at 667 (3d ed. 2008) (WPIC), and omitted the element of whether the victim had an ownership, representative, or possessory interest in the property taken. 191 Wn. App. at 928. *Richie* held that the to-convict instruction was erroneous because it omitted an essential implied element—the element of whether the victim had an ownership, representative, or possessory interest in the property taken—and, therefore, relieved the State of its burden to prove every element of the crime. *Id.* The court noted that "the fact that the trial court's instruction was patterned after a Washington pattern instruction does not change our conclusion." *Id.* at 929.

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[7] English and Quichocho did not object to the instruction and raise the issue for the first time on appeal. Generally, we are not required to consider issues that were not objected to below. RAP 2.5. However, we review the omission of an essential element in jury instructions for the first time on appeal because it is a manifest error affecting a constitutional right. *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005); *Richie*, 191 Wn. App. at 927.

Here, the trial court's to-convict instructions for robbery also tracked the language of WPIC 37.02 and similarly omitted the essential implied element for first degree robbery of whether the victim had an ownership, representative, or possessory interest in the property taken. Therefore, we hold that *Richie* controls, and the trial court's to-convict instructions for robbery were erroneous because they omitted an essential element of the crime, relieving the State of its burden to prove every element of the crime.

2. Harmless Error

"Under certain circumstances, the omission of an essential element of a crime from the to-convict jury instructions may be subject to a harmless error analysis." *Id.*; *see State v. Schaler*, 169 Wn.2d 274, 288, 236 P.3d 858 (2010). An omission of an essential element of a crime is harmless when, for example, uncontroverted evidence supports the omitted element. *Richie*, 191 Wn. App. at 929. "However, 'error is not harmless when the evidence and instructions leave it ambiguous as to whether the jury could have convicted on improper grounds.'" *Id.* (quoting *Schaler*, 169 Wn.2d at 288).

Here, while the to-convict instruction for robbery omitted the essential element that the victim have an ownership, representative, or possessory interest in the stolen property, the evidence was not ambiguous on this issue. The State presented evidence that Bondy and Horn had property stolen from them. Specifically, the State presented testimony that Bondy's wallet and Horn's purse and phone were stolen during the robbery. It is uncontroverted that Bondy and Horn had an ownership, representative, or possessory interest in their personal property and that their personal property was stolen. As a result, the evidence does not lead to any ambiguity for the jury

as to whether Bondy and Horn had an ownership, representative, or possessory interest in the stolen property. Because the uncontroverted evidence supported the omitted element, the instructional error was harmless.

We hold that the to-convict instructions for robbery improperly omitted an essential element of the crime of burglary—that the victim have an ownership, representative, or possessory interest in the stolen property. But, we also hold that this error was harmless.

3. Merger

English and Quichocho argue, and the State concedes, that the two convictions of first degree robbery merged with the two counts of second degree assault, and the assault convictions should have been vacated.[8] We agree.

When an assault offense elevates a robbery offense, the two offenses merge and are the considered the same offense for double jeopardy purposes. *State v. Kier*, 164 Wn.2d 798, 803-06, 194 P.3d 212 (2008); *State v. Freeman*, 153 Wn.2d 765, 777-78, 108 P.3d 753 (2005). In such situations, the conviction for the lesser offense should be vacated. *State v. Hughes*, 166 Wn.2d 675, 686 n.13, 212 P.3d 558 (2009).

Here, the second degree assault offenses merged with the first degree robbery offenses because the assault offenses elevated the robbery offenses to the first degree. As a result, the second degree assault convictions, as the lesser offenses, should have been vacated. Therefore, we accept the State's concession and hold that English and Quichocho's convictions for second degree assault should be vacated.

[8] The State argued below that the trial court should apply the same criminal conduct analysis.

B. RIGHT TO PUBLIC TRIAL AND TO BE PRESENT

English and Quichocho argue that the trial court improperly handled peremptory challenges, violating their rights to a public trial and to be present.[9] We disagree.

The parties exercised four peremptory challenges on the record "in open court," before the jury panel reentered the courtroom. After the jury panel returned, the parties exercised further peremptory challenges in writing at sidebar. English and Quichocho were not present at sidebar, but they were in the courtroom. English and Quichocho note that "written notes" were filed in the trial court, and the public could determine which jurors had been excluded by which party by requesting to view those notes in the trial court file. Br. of Appellant (English) at 15.

English and Quichocho contend that this process violated their right to a public trial, and their convictions must be reversed. They also argue that their right to be present was violated when they were not present at sidebar when counsel exercised peremptory challenges in writing.

To determine whether a defendant's public trial right has been violated, we must determine (1) whether the public trial right attaches to the proceeding at issue; (2) if the right attaches, whether the courtroom was closed; and (3) if the courtroom was closed, whether the closure was justified. *State v. Love*, 183 Wn.2d 598, 605, 354 P.3d 841 (2015), *cert. denied*, 136 S. Ct. 1524 (2016). The public trial right attaches to jury selection, including for cause and peremptory challenges. *Id.* at 605-06. "[W]ritten peremptory challenges are consistent with the public trial

[9] English and Quichocho acknowledge that the Washington State Supreme Court rejected these arguments in *State v. Love*, 183 Wn.2d 598, 608, 354 P.3d 841 (2015), but raised the issue to preserve them in the event that the United States Supreme Court reviews *Love*. The U.S. Supreme Court denied certiorari on April 4, 2016. 136 S. Ct. 1524 (2016).

right so long as they are filed in the public record," made in open court, and subject to public scrutiny. *Id.* at 607.

Here, the public trial right attached to the jury selection process, but the courtroom was not closed. Although the parties exercised peremptory challenges in writing at sidebar, this was done in open court, where the public could evaluate each step of the jury selection process by listening to the questions and answers during voir dire and observing counsel exercise challenges on paper. And English and Quichocho acknowledge that the written challenges were filed in the public record. Therefore, their argument fails.

As for the right to be present, while defendants have the right to be present during jury selection under both the state and federal constitutions, the record does not indicate that English's or Quichocho's right to be present was violated. English and Quichocho acknowledge that they were present in the courtroom during jury selection and that the challenges were exercised in open court. Furthermore, neither English nor Quichocho demonstrate that they could not consult with their attorneys about the challenges or participate in the process. Accordingly, this argument also fails.

C. PROSECUTORIAL MISCONDUCT

English and Quichocho argue that the prosecutor committed misconduct when he elicited on direct examination that Lujan received a plea bargain offer in exchange for his truthful testimony against English. We hold that because the appellants did not object in the trial court and fail to establish prejudice here, their argument fails.

To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). First, we determine whether the prosecutor's conduct was improper. *Id.* at 759. If the prosecutor's conduct was improper, the question turns to whether the prosecutor's improper conduct resulted in prejudice. *Id.* at 760. Prejudice is established by showing a substantial likelihood that the prosecutor's misconduct affected the verdict. *Id.* at 761.

1. Improper Vouching

A prosecutor commits misconduct by personally vouching for a witness's credibility or veracity. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). "Improper vouching generally occurs (1) if the prosecutor expresses his or her personal belief as to the veracity of the witness or (2) if the prosecutor indicates that evidence not presented at trial supports the witness's testimony." *Id.*

In *Ish*, the trial court admitted evidence of a plea agreement between the State and Ish's cellmate, and allowed the State to question the cellmate about the agreement. *Id.* at 193-94, 196-97. Under the plea agreement, the cellmate "agree[d] to provide 'a complete and *truthful* statement,' to 'testify *truthfully*,' and to 'have told the *truth*, to the best of his knowledge.'" *Id.* at 193. On direct and redirect examination, the prosecutor's questions established that the plea agreement required "[t]ruthful testimony" and the prosecutor elicited testimony from the cellmate that he agreed to testify truthfully. *Id.* at 194.

The *Ish* court held that admitting the plea agreement and the prosecutor's subsequent questioning constituted vouching by the prosecutor.[10] *Id.* at 201. The court reasoned:

> Evidence that a witness has promised to give "truthful testimony" in exchange for reduced charges may indicate to a jury that the prosecution has some independent means of ensuring that the witness complies with the terms of the agreement. While such evidence may help bolster the credibility of the witness among some jurors, it is generally self-serving and irrelevant, and may amount to vouching, particularly if admitted during the State's case in chief. "[P]rosecutorial remarks implying that the government is motivating the witness to testify truthfully: . . 'are prosecutorial overkill.'" We agree with the court's conclusion in *Green* that evidence that a witness has agreed to testify truthfully generally has little probative value and should not be admitted as part of the State's case in chief. Evidence is not admissible merely because it is contained in an agreement, and reference to irrelevant or prejudicial matters should be excluded or redacted.

Id. at 198 (citations omitted).

Here, the State questioned Lujan on direct examination about his obligation under the agreement to tell the truth. Under *Ish*, this constitutes improper vouching by the prosecution.

The State argues that it was entitled to engage in preemptive questioning about Lujan's agreement to testify truthfully because the cross-examination shows that the State correctly anticipated an attack on Lujan's credibility. The State cites *State v. Smith*, 162 Wn. App. 833, 850, 262 P.3d 72 (2011), *review denied*, 173 Wn.2d 1007 (2012), in support of its preemptive questioning. However, the facts in *Smith* are clearly distinguishable and its holding is inapplicable to the situation here.

[10] *Ish* was a plurality opinion, but a majority of the justices agreed that the prosecutor improperly vouched for the witness's credibility. 170 Wn.2d at 201 (plurality opinion), 206 (Sanders, J., dissenting).

In *Smith*, one appellant argued that the State had engaged in prosecutorial misconduct by eliciting on its direct examination of a co-defendant that the co-defendant's plea agreement required truthful testimony. 162 Wn. App. at 848. However, this court disagreed because the appellant had "clearly announced at the trial's outset his intent to attack [his co-defendant's] credibility based on his plea bargain with the State." *Id.* Therefore, this court held, "the State was entitled to engage in anticipatory rehabilitation of this witness." *Id.*

Here, the State has not identified acts or statements by the defense that would allow an "anticipatory rehabilitation" of Lujan. To hold an "anticipatory rehabilitation" was justified in this case, without any identified acts or statements by the defense, would contradict the law established in *Ish*. Therefore, we hold that the State engaged in improper vouching of Lujan when it questioned Lujan on direct examination about his obligation to tell the truth under the plea agreement.

2. Prejudice

If a defendant does not object at trial, he or she is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured any resulting prejudice. *Emery*, 174 Wn.2d at 760-61. Under this heightened standard of review, the defendant must show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Id.* at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). In making that determination, we "focus less on whether the

prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Id.* at 762.

Here, the appellants did not object at trial. On appeal, appellants argue that "the error . . . was not harmless" because the identifications by Bondy, Horn, and Haugen were "shaky" and were "undermined" by the defense witness who testified about the unreliability in eye-witness identifications. Br. of Appellant (English) at 27. But English and Quichocho fail to argue, and thus fail to show, how the prosecutor's improper vouching could not have been cured with an instruction.

The appellants also fail to show that any resulting prejudice "'had a substantial likelihood of affecting the jury verdict.'" *Id.* at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). Bondy and Horn identified English and Quichocho in court as the individuals involved in the robbery. Further, Detective Stevens testified that Lujan identified Quichocho during the investigation. Alfaro testified that he, Lujan, and English went to Haugen's apartment the night before to plan the robbery. Bondy testified that English was at Haugen's apartment the night before the robbery and during the robbery. Based on the other witnesses' identifications of both English and Quichocho as the individuals involved in the robbery and testimony about the events, there is not a substantial likelihood that the prosecutor's improper vouching of Lujan affected the jury verdict. Having failed to make the requisite showing of prejudice under *Emery*, 174 Wn.2d at 761, we hold that the appellants fail to show that the State's improper vouching requires reversal.

D. SUFFICIENCY OF THE EVIDENCE FOR FIREARM ENHANCEMENTS

English and Quichocho argue that the State presented insufficient evidence for each of the firearm enhancements because the State did not prove that the firearm was operable.[11] We disagree.

We review sufficiency of the evidence claims for whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A sufficiency challenge admits the truth of the State's evidence and all inferences reasonably drawn therefrom. *Id.* We defer to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Ague-Masters*, 138 Wn. App. 86, 102, 156 P.3d 265 (2007).

The premise of English's and Quichocho's argument is that the State is required to prove that the firearm was operable to meet the statutory definition of a firearm. English and Quichocho cite *State v. Recuenco*[12] and *State v. Pierce*, 155 Wn. App. 701, 230 P.3d 237 (2010), to support

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[11] English and Quichocho's arguments relate solely to the lack of evidence that the firearm was operable. Neither makes other arguments related to the sufficiency of the evidence for the firearm enhancements.

[12] In *Recuenco*, the court noted:

> The dissent appears to argue that because the only deadly weapon discussed at trial was a handgun, it was appropriate to ask for the firearm enhancement at sentencing rather than the charged and convicted deadly weapon enhancement. The dissent overlooks here that in order to prove a firearm enhancement, the State must introduce facts upon which the jury could find beyond a reasonable doubt the weapon in question falls under the definition of a "firearm:" "a weapon or device from which a projectile may be fired by an explosive such as gunpowder." 11

their argument that in order to prove a firearm enhancement, the State must present sufficient evidence to find a firearm operable. We reject this argument.

The same argument raised by English and Quichocho was addressed and rejected by our court in *State v. Raleigh*, 157 Wn. App. 728, 734-36, 238 P.3d 1211 (2010) and by Division Three of this court in *State v. Tasker*, 193 Wn. App. 575, 581–82, 373 P.3d 310, *review denied*, 186 Wn.2d 1013 (2016). Both the court in *Raleigh* and the court in *Tasker* held that the language in *Recuenco* relied on by the appellant "was not part of *Recuenco*'s holding and is nonbinding dicta." *Raleigh*, 157 Wn. App. at 735; *Tasker*, 193 Wn. App. at 592. The *Tasker* court also rejected *Pierce*, holding that "we disagree with the suggestion in *Pierce* that the State must always present evidence specific to operability at the time of the crime. And five months after *Pierce*, another panel of Division Two reached a diametrically different result in *Raleigh*." *Tasker*, 193 Wn. App. at 593-94. Thus, both Division Three in *Tasker* and this court in *Raleigh* have "characterized *Recuenco*'s statement about the requirement of 'sufficient evidence to find a firearm operable' as nonbinding dicta, pointing out that it was 'merely to point out that differences exist between a deadly weapon sentencing enhancement and a firearm sentencing enhancement.'" *Id.* at 591 (quoting *Raleigh*, 157 Wn. App. at 735-36).

WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 2.10.01 (2d ed. Supp. 2005) (WPIC). We have held that a jury must be presented with sufficient evidence to find a firearm operable under this definition in order to uphold the enhancement. *State v. Pam*, 98 Wn.2d 748, 754-55, 659 P.2d 454 (1983), *overruled in part on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988).

163 Wn.2d 428, 437, 180 P.3d 1276 (2008).

The relevant inquiry is whether the firearm was a gun in fact or a toy gun or gun-like object incapable of being fired. *State v. Faust*, 93 Wn. App. 373, 379-81, 967 P.2d 1284 (1998). Evidence that the firearm appears to be a real gun is sufficient. *Tasker*, 193 Wn. App. at 594; *Raleigh*, 157 Wn. App. at 735-36.

Here, three people testified that Quichocho was armed with a gun, that Quichocho threatened Bondy, Horn, and Lujan with the gun to effectuate the robbery, and that they believed they were going to die as a result. Bondy testified that the gun had a "revolving chamber," that Quichocho told him that "that bullet was for [him]," and that he was scared. 4 VRP at 444-45. Horn testified that the gun had a "round cylinder" where bullets are loaded and that when Quichocho pointed the gun at her she thought she was going to die. 5 VRP at 560. Lujan also testified that Quichocho drew a gun on Bondy, then pointed the gun at him and ordered him to lay down on the floor, at which point, he thought, "I'm dead." 7 VRP at 845. Collectively, the evidence was sufficient to establish that the gun used was a gun "in fact" and not a toy gun or gun-like object incapable of being fired. Thus, sufficient evidence supports the firearm enhancements.

E. INEFFECTIVE ASSISTANCE OF COUNSEL

English and Quichocho argue that they received ineffective assistance of counsel when their counsel failed to object to the prosecutor's improper vouching, and by counsel's "apparent agreement and/or failure to object to the admissibility of inadmissible evidence of guilt that implicated [them] in the charged offenses and violated [their] right of confrontation." Br. of Appellant (Quichocho) at 12 (some capitalization omitted), 21 (adopted by English). Specifically, English and Quichocho argue that their respective counsel should have objected to the playing of

a redacted recording of Quichocho's police interview because the recording allowed police to offer inadmissible opinion testimony as to their veracity and guilt. Further, English and Quichocho argues that the recording violated Quichocho's right to confrontation. We disagree.

1. Legal Principles

We review ineffective assistance of counsel claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To establish ineffective assistance of counsel, English and Quichocho must show both deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). To show prejudice, English and Quichocho must demonstrate that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *McFarland*, 127 Wn.2d at 335. If English and Quichocho fail to satisfy either prong, we need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

There is a strong presumption of effective assistance, and English and Quichocho bear the burden of demonstrating the absence of a strategic reason for the challenged conduct. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). "[C]ounsel's performance is not deficient if it can be characterized as a legitimate trial tactic." *State v. McLean*, 178 Wn. App. 236, 247, 313 P.3d 1181 (2013), *review denied*, 179 Wn.2d 1026 (2014).

We view the decisions of whether and when to object as "classic example[s] of trial tactics." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002 (1989). We presume that a failure to object is a part of a legitimate trial strategy. *State v. Johnston*, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007). Where a defendant bases his ineffective assistance of counsel claim on trial counsel's failure to object, the defendant must rebut this presumption by showing that the objection would likely have succeeded and the result of the proceeding would have been different. *Id.*; *State v. Gerdts*, 136 Wn. App. 720, 726-27, 150 P.3d 627 (2007). "The absence of an objection by defense counsel strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *State v. Edvalds*, 157 Wn. App. 517, 525-26, 237 P.3d 368 (2010), *review denied*, 171 Wn.2d 1021 (2011). Also, it is a legitimate trial tactic to forego an objection in circumstances where counsel wishes to avoid highlighting certain evidence. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). "'Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal.'" *Johnston*, 143 Wn. App. at 19 (quoting *Madison*, 53 Wn. App. at 763).

2. Failure to Object to the State's Improper Vouching of Lujan

English and Quichocho argue that they received ineffective assistance of counsel when their counsel did not object to the prosecutor's improper vouching during its direct examination of Lujan. We hold that English and Quichocho fail to establish that but for their counsels' failure to object, there is a reasonable probability that the result would have been different, and therefore, their argument fails.

Here, the State questioned Lujan on direct examination about his obligation under the plea agreement to tell the truth and the defense did not object. Under *Ish*, this constitutes vouching by the prosecution. Had defense counsel objected, the trial court likely would have instructed the jury to disregard Lujan's testimony in regards to testifying truthfully under the plea agreement. *See* Section C, subsection 1, *supra*.

However, English's and Quichocho's arguments fail because they do not show a reasonable probability that, but for counsels' deficient performance, the result of the proceeding would have been different. They argue that Lujan's testimony "was of critical importance to the State's argument that Quichocho was involved in the robbery." Br. of Appellant (Quichocho) at 22. But Quichocho was also identified by Bondy and Horn as the person who pulled the gun and demanded the money. And Quichocho was linked to the robbery through circumstantial evidence like the gray Impala with a Guam sticker and the cell phone records.

Also, Bondy and Horn identified English and Quichocho in court as persons involved in the robbery. Bondy also testified that English was at Haugen's apartment the night before the robbery and during the robbery. And Detective Stevens testified that Lujan identified Quichocho during the investigation. Further, Alfaro testified that he, Lujan, and English went to Haugen's apartment the night before to plan the robbery.

With the multitude of other evidence identifying English and Quichocho, the vouching was not prejudicial, and counsel may have foregone an objection in order to avoid highlighting the evidence. Therefore, we hold that English's and Quichocho's argument fails because they do not

establish a reasonable probability that, but for their counsels' failure to object to the State's vouching, the result of the proceeding would have been different.

3. Counsel's Agreement to Play Quichocho's Recorded Police Interview

Quichocho argues that he received ineffective assistance of counsel when defense counsel agreed to the playing of a redacted version of his recorded pre-trial police interview.[13] Specifically, he argues that counsel should not have agreed to the redacted version because it included Detective Granneman's inadmissible opinion testimony as to Quichocho's veracity and guilt and it violated his right to confrontation.

Quichocho takes issue with the following statements from the redacted recording:

> DETECTIVE GRANNEMAN: And it's tough when you're going to—you're going to sit there and you say, "Well, I—I don't know how I can be involved. I don't know any of these people." I mean, you're not—you're not helping yourself out.
>
> MR. QUICHOCHO: Right.
>
> DETECTIVE GRANNEMAN: And you're not helping us disprove things. Because, to be quite honest with you, man, I don't think you're being honest with us.
>
> MR. QUICHOCHO: The situation you guys are talking about, I have no clue what you guys are talking about besides what you guys told me.

8 VRP at 907. Quichocho also argues that the following passage violated his right to confrontation and counsel should have objected.

> DETECTIVE GRANNEMAN: Okay. Brandon English knows you.
>
> MR. QUICHOCHO: I don't even know him.

[13] English adopts this argument.

DETECTIVE GRANNEMAN: Then why does he say he knows you?

8 VRP at 914.

Quichocho argues that the above exchange offers Detective Granneman's inadmissible opinion testimony regarding Quichocho's veracity and guilt. Generally, a witness may not offer testimony in the form of an opinion regarding the guilt or veracity of the defendant, because it invades the function of the jury. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). However, statements made during a pretrial interview and accompanying testimony at trial that assists in providing context to those statements are not the types of statements that carry a special aura of reliability usurping the province of the jury. *Id.* at 763-65; *State v. Notaro*, 161 Wn. App. 654, 669, 255 P.3d 774 (2011). Instead, such trial testimony is an account of tactical interrogation statements designed to challenge a defendant's initial story and is not opinion testimony. *Demery*, 144 Wn.2d at 764-65.

There is a strong presumption of effective assistance, and Quichocho bears the burden of demonstrating the absence of a strategic reason in counsel's agreement to the redacted recording. *McNeal*, 145 Wn.2d at 362. Thus, even if we assume without deciding whether Quichocho is correct that the recording included inadmissible opinion testimony and violated his right to confrontation, counsel's decision to agree to the redacted recording may have been a legitimate trial tactic. Here, counsel may have agreed to the playing of the redacted recording because it supported Quichocho's theory of the case—that he was not guilty of the charged offenses.

And even if counsel's performance was deficient, Quichocho has not demonstrated prejudice. The jury heard evidence that Quichocho sent a text message to English the night before the robbery. Quichocho was in possession of a cell phone that had an outgoing text message to English's cell phone on December 3 and it had received e-mails addressed to "Huss." 10 VRP at 1168-69; 1186. Lujan testified that English and Quichocho met him at his house before the robbery. And other witnesses testified that English and Quichocho were involved in the robbery. Therefore, the jury heard other evidence that Quichocho and English knew each other, and that they were both involved in the robbery. Quichocho fails to demonstrate that the trial's outcome would have been different if counsel had not agreed to the redacted recording of his police interview.

F. STATEMENT OF ADDITIONAL GROUNDS (SAG)[14]

Quichocho argues that (1) his counsel was ineffective for (a) "failing to bring to surface this six photomontage [sic]. And fail[ing] to object to the single photo that was admitted"; and (b) not excluding jurors 7 and 8; and (2) the State failed to prove beyond a reasonable doubt that he was the "Lil Huss" contact in English's phone. SAG at 2-3.

A SAG must adequately inform this court of the nature and occurrence of alleged errors. *State v. Gauthier*, 189 Wn. App. 30, 43-44, 354 P.3d 900 (2015), *review denied*, 185 Wn.2d 1010 (2016). Issues involving facts outside of the record are properly raised in a personal restraint

[14] English also filed a SAG raising additional claims. However, English's untimely filing, more than 30 days after his counsel served him with appellant's brief and mailed a notice advising him of the substance of RAP 10.10(d), precludes review. RAP 10.10(d).

petition, rather than a SAG. *McFarland*, 127 Wn.2d at 335. And we are "not obligated to search the record in support of claims made in a defendant's [SAG]." RAP 10.10(c).

1. Ineffective Assistance of Counsel

a. The photo montage

Quichocho argues that his counsel was ineffective for "failing to bring to surface this six photomontage [sic]. And failing to object to the single photo that was admitted." SAG at 2. Quichocho's argument is unclear. He asserts that both a photo montage and a single photo should have been admitted. However, he does not indicate what single photo or related exhibit number was admitted, nor does he include copies of the exhibits in the record on appeal. The record reveals that numerous photographs were admitted, as well as multiple photo montages. And the trial court admitted the photo montages that identified Quichocho and were signed by Horn and Bondy. Quichocho fails to adequately inform us of the nature and occurrence of any alleged error.

To the extent Quichocho's claim regarding counsel's failure to "bring to surface" a photo montage involve an allegation that counsel failed to investigate, such a claim involves facts outside the record and are not properly raised in a SAG. SAG at 2.

To the extent Quichocho claims that counsel was ineffective for failing to object to the admission of a single photograph, we do not address it. Quichocho's argument does not identify what photograph counsel should have objected to, and we are not required to scour the record to find support for this claim.

b. Juror challenges

Quichocho argues that his trial counsel was ineffective for failing to challenge jurors 7 and 8. During voir dire, juror 7 reported: "[M]y home was robbed while we were in it in the middle of the night," but that there was no contact with whomever broke in. 2 VRP at 196-97. Juror 8 reported that her ex-husband kidnapped her at gunpoint in 1979, and that the experience "could affect [her]." 2 VRP at 199. The State asked, "Now, are you saying that you don't think you could be impartial or you're just not sure?" and juror 8 responded: "I'm just not sure." 2 VRP at 199-200.

"The failure of trial counsel to challenge a juror is not deficient performance if there is a legitimate tactical or strategic decision not to do so." *Johnston*, 143 Wn. App. at 17; *State v. Alires*, 92 Wn. App. 931, 939, 966 P.2d 935 (1998). And our courts have recognized that "[i]t is a legitimate trial strategy not to pursue certain matters during voir dire in order to avoid antagonizing potential jurors." *Johnston*, 143 Wn. App. at 17. There is a strong presumption of effective assistance, and Quichocho bears the burden of demonstrating the absence of a strategic reason for the challenged conduct. *McNeal*, 145 Wn.2d at 362.

Quichocho fails to rebut the strong presumption of effective assistance. The remarks that Quichocho identifies as evidence of bias are equivocal and do not establish any probability that the jurors had an actual bias against him. *See State v. Noltie*, 116 Wn.2d 831, 839, 809 P.2d 190 (1991). Furthermore, there may have been legitimate strategic reasons for counsel's decision to avoid challenging these jurors. For example, because the evidence of bias was not established, or was equivocal at best, a challenge to the jurors would have required further questioning of the

jurors. "Excessive questioning or a failed challenge to these jurors could have caused antagonism toward" Quichocho. *Johnston*, 143 Wn. App. at 17. Therefore, defense counsel may have decided to forgo a challenge that would necessarily require further questioning of the jurors and risk inadvertently antagonizing the jurors against Quichocho. Because defense counsel's decision to not challenge jurors 7 and 8 may have been part of a legitimate trial strategy, and Quichocho fails to argue otherwise, his argument that counsel provided ineffective assistance fails.

Moreover, even if counsel's performance was deficient, Quichocho nonetheless fails to establish prejudice. While jurors number 7 and 8 had both experienced similar crimes committed against them, those facts in and of themselves do not prove that they were biased against him nor does it prove that had they been excluded, the result of the proceeding would have been different. As discussed above, the evidence supporting English's and Quichocho's convictions was overwhelming. Lujan, Bondy, and Horn identified English and Quichocho as being involved in the robbery. Lujan testified that he reported Quichocho was driving a dark gray Chevrolet Impala with a Guam sticker on the rear window and police later located a matching vehicle at Quichocho's residence. Lujan, Bondy, and Horn also testified that Quichocho pointed a gun at them during the robbery. Detective Granneman testified that cell phone records from the phone found on Quichocho's person revealed an outgoing text message to English's cell phone on December 3. Therefore, even if counsel's performance was deficient, Quichocho still fails to prove prejudice. His ineffective assistance of counsel claim fails.

2. Identifying Quichocho as "Lil Huss"

Quichocho argues that trial court improperly admitted the "Lil Huss" contact entry and text messages in English's cell phone and allowed the State to argue that he was associated with the nickname because the State failed to prove that the contact entry was associated with him. SAG at 3. Quichocho's claim fails.

We review the trial court's admission of evidence for an abuse of discretion. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). A trial court abuses its discretion when its decision is based on untenable grounds or untenable reasons. *State v. Barnett*, 104 Wn. App. 191, 199, 16 P.3d 74 (2001). "Appellate courts cannot substitute their own reasoning for the trial court's reasoning, absent an abuse of discretion." *State v. Lord*, 161 Wn.2d 276, 295, 165 P.3d 1251 (2007). We will not reverse based on an error in admitting evidence if it does not result in prejudice. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Prejudice results if, within a reasonable probability, the error materially affected the outcome of the trial. *Id.*

Here, the trial court did not abuse its discretion in admitting the "Lil Huss" contact entry and text messages from English's phone. At trial, the State presented evidence that Quichocho used the nickname "Huss" and "Lil Hustler." 7 VRP at 810. The State also presented evidence that Quichocho's girlfriend's cell phone, which was found on Quichocho's person, showed an outgoing text message to English's cell phone on December 3 and received e-mails addressed to "Huss." 10 VRP at 1168-69, 1186. The State then moved to admit a contact entry and text messages that were sent between English and "Lil Huss." Given the evidence, the trial court did not abuse its discretion in admitting the evidence.

However, even if we hold that the trial court did abuse its discretion in admitting the "Lil Huss" contact entry and text messages in English's cell phone, we still hold that Quichocho's claim fails because he fails to prove the requisite prejudice as described in Section F.1.b. As discussed above, the evidence supporting Quichocho's conviction was overwhelming.

We affirm.

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.

Lee, J.

We concur:

Johanson, P.J.

Sutton, J.

APPENDIX B

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

STATE OF WASHINGTON, Respondent, vs. BRANDON ENGLISH and CALVIN QUICHOCHO, Appellants.	)	No. 46921-9-II MOTION FOR RECONSIDERATION

I. IDENTITY OF MOVING PARTIES AND RELIEF SOUGHT

Appellants Brandon English and Calvin Quichocho ask that under RAPs 1.2(a), 1.2(c), 12.3, 12.4, 18.8(a), 18.8(b), and other authorities cited herein, this Court reconsider its unpublished opinion, filed on March 21, 2017. The opinion ("Op.") is appended to this motion.

II. PERTINENT FACTS

Mr. English and Mr. Quichocho are young men facing very lengthy prison sentences on multiple counts including two convictions for robbery each. While their cases were pending, this Court issued State v. Richie, 191 Wn. App. 916, 365 P.3d 770 (2015), holding that the crime of robbery has an essential non-statutory element that the victim has an ownership, representative, or possessory interest in the property taken, and that therefore

the pattern jury to-convict instruction omitted an essential element. Id. at 929.

English moved to file a supplemental brief, and filed a corresponding brief, on December 30, 2015, eight days after Richie was issued. That brief argued that based on the new rule announced in Richie, the jury instructions omitted an essential element from the to-convict instructions. On January 4, 2016, the Court entered an order permitting the filing of the supplemental brief and ordering the State to file a response brief within 30 days.

After conducting additional research based on Richie, on January 11, 2016, English moved to file an *amended* supplemental brief challenging the sufficiency of the charging document as well, as the Richie case suggested (but did not directly address) this issue. English filed the motion on January 11, but requested until January 22 to file such a brief based on counsel's heavy caseload.

On January 12, 2016, Quichocho filed a supplemental brief raising the same issue mentioned English's January 11 motion. English immediately moved to adopt Quichocho's argument. A commissioner of this Court issued a January 12, 2016 ruling allowing English to adopt Quichocho's argument and permitting English to file an amended supplemental brief by January 29. The ruling granted the State 30 days from the date of filing of that brief to respond. English's amended supplemental

brief was filed on January 29, approximately one month after the issuance of the Richie opinion.

On February 11, 2016, rather than responding to the issue on its merits, the State moved to modify the commissioner's ruling. On March 10, 2016, this Court's chief judge modified the commissioner's ruling and struck the briefing filed six weeks earlier.

In March of 2016, both appellants' attorneys filed a motion to withdraw based on ineffective assistance for failing to raise the issue contained in English's amended supplemental brief, and Quichocho's supplemental brief, sooner. On March 25, 2016, this Court denied the motions to withdraw. The appellants moved for discretionary review in the state Supreme Court of this Court's rulings rejecting the supplemental briefing and denying the motions to withdraw. The Supreme Court denied review on June 26, 2016.

Nine months later, this Court issued an unpublished opinion denying all the appellants' claims. While this Court agreed that the jury instructions related to robbery omitted the essential element identified in Richie, this Court found the error was harmless. Op. at 7-10. Of course, this Court did not address the additional argument the appellants had first attempted to raise 14 months earlier, because this Court had previously rebuffed the appellant's attempts to raise the issue.

III. GROUNDS FOR RELIEF AND ARGUMENT

THIS COURT SHOULD RECONSIDER ITS OPINION AND REVERSE THE APPELLANTS' ROBBERY CONVICTIONS BASED ON ARGUMENTS THE APPELLANTS FIRST RAISED IN JANUARY OF 2016, FOURTEEN MONTHS BEFORE THIS COURT'S OPINION WAS ISSUED.

This Court should reconsider its opinion and reverse the appellants' robbery convictions based on the arguments the appellants first attempted to raise more than one year before this Court's opinion was issued.

A. This Court should reconsider its opinion based on the argument first raised by the parties in January of 2016.

Under RAP 12.4(c), a motion for reconsideration should "state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised."

RAP 18.8(a) provides that Washington appellate courts may "waive or alter the provisions of any of the [RAPs] and enlarge or shorten the time within which an act must be done . . . in order to serve the ends of justice." RAP 1.2(c) provides that the appellate court "may waive or alter the provisions of any of these rules," including briefing deadlines, "in order to serve the ends of justice."

RAP 1.2(a) provides that the rules of appellate procedure, including briefing deadlines and timetables, "will" be liberally interpreted to promote decisions on the merits. Moreover, under that rule, "[c]ases and issues *will not* be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b)." (Emphasis added.) The use of the word "will" in the Rules of Appellate Procedure indicates mandatory action, and removes the court's discretion as to that action. State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000).[1]

Washington courts have expressed a clear preference for resolution of cases on their merits:

> The clear language of [RAP 1.2(a)] supports the conclusion . . . and compels us to find that a technical violation of the rules . . . should normally be overlooked and the case should be decided on the merits. This result is particularly warranted where the violation is minor and results in no prejudice to the other party and no more than a minimal inconvenience to the appellate court.

State v. Olson, 126 Wn.2d 315, 318-19, 893 P.2d 629 (1995) (emphasis added); see also Delagrave v. Employment Sec. Dep't of State of Wash., 127 Wn. App. 596, 607-08, 111 P.3d 879 (2005) ("'[W]here the nature of the appeal is clear . . . there is no compelling reason for the appellate court not to

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[1] Moreover, as the appellants have previously noted, RAP 10.1(h) permits this Court to order or accept additional briefs other than those named in RAP 10.1(b).

exercise its discretion to consider the merits of the case or issue.") (citing Olson, 126 Wn.2d at 323).

This Court has discretion to consider even issues raised for the first time in a motion for reconsideration. Conner v. Universal Utilities, 105 Wn.2d 168, 171, 712 P.2d 849 (1986). In the interests of justice, this Court should reconsider its opinion and reach this issue, which the appellants have made every effort to bring to this Court's attention for the past 14 months.

B. The charging document in this case omitted an essential element of robbery. Reversal is therefore required.

Because the charging document in this case omitted an essential element of robbery, this Court should have reversed the appellants' robbery convictions on appeal.

1. *Robbery includes a non-statutory element that the victim has an ownership, representative, or possessory interest in the property taken*

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). In determining the essential elements, this Court first looks to the relevant statute. State v. Mason, 170 Wn. App. 375, 379, 285 P.3d 154 (2012). RCW 9A.56.190 defines robbery as follows:

> A person commits robbery when [he] 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.

With regard to taking property from a person's presence, the language of the statute does not require that the person have an ownership, representative, or possessory interest in the property. However, a criminal statute is not always conclusive regarding all the elements of a crime. Courts may find non-statutory, implied elements. State v. Miller, 156 Wn.2d 23, 28, 123 P.3d 827 (2005). Robbery is an example of a crime with non-statutory elements that are implied by "a near eternity of common law and the common understanding of robbery." Id.

In 1909, the state Supreme Court established that robbery includes an element that "the property must be taken from the person of the owner, or from his immediate presence, or 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). The Court held that an information alleging robbery was defective because it alleged the taking of property belonging to an entity from the immediate presence of a particular person, without alleging any connection between the person and the property. Id.

Division One of this Court adopted the requirement of ownership, representative capacity, or possession in State v. Latham, 35 Wn. App. 862, 670 P.2d 689 (1983). There, the Court stated that for the taking of property in the presence of a person to constitute a robbery under RCW 9A.56.190, that person must have (1) an ownership interest in the property taken, or (2) some representative capacity with respect to the owner of the property taken, or (3) actual possession of the property. Latham, 35 Wn. App. at 864-65.

In Latham, two defendants assaulted a car owner and a passenger as they stood beside the car, and then the defendants stole the car. Id. at 863-64. The defendants were charged with, and convicted of, two counts of robbery, one relating to the owner and one relating to the passenger. Id. The Court held that the passenger could not be the victim of robbery because he was not the owner of the car, had no authority from the owner to act regarding the car, and was not in possession of the car at the time of the robbery. Id. at 866. Accordingly, the Court reversed each defendant's robbery conviction relating to the passenger. Id.

In State v. Tvedt, 153 Wn.2d 705, 107 P.3d 728 (2005), the Supreme Court approved of the characterization of the robbery element adopted in Hall and Latham. The Court stated:

> Nearly a century ago this court held that a conviction for robbery requires that the person from whom or in whose presence the property is taken have an ownership or representative interest in the property or have dominion and control over it. [Hall, 54 Wash. at 143-44]. The court rejected the argument that a conviction could be upheld where "title was not alleged in the person robbed, nor is any connection shown or alleged between the person robbed and the property taken." [Id. at 143] . . . . Thus, . . . 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. [Id. at 143-44]; see also [Latham, 35 Wn. App. at 864-66].

Tvedt, 153 Wn.2d at 714.

As this Court held in Richie, "Hall, Latham, and Tvedt all make it clear that a defendant cannot be convicted of robbery unless the victim has an ownership, representative, or possessory interest in the property taken. Accordingly, we hold that this requirement is an essential, implied element of robbery." Richie, 191 Wn. App. at 924.

2. *The charging documents omitted an essential element of robbery, and reversal is therefore required.*

Like a to-convict instruction, a charging document must include all essential elements of a crime. U.S. CONST. amend. VI; CONST. art. I, § 22 (amend. 10); State v. Kjorsvik, 117 Wn.2d 93, 108, 812 P.2d 86 (1991). An "essential element is one whose specification is necessary to establish the very illegality of the behavior[.]" State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992) (citing United States v. Cina, 699 F.2d 853,

859 (7th Cir.), cert. denied, 64 U.S. 991 (1983)). Essential elements may derive from statutes, common law, or the constitution. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

Where, as here, the adequacy of an information is challenged for the first time on appeal, a court engages in a two-pronged inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced . . . ?" Kjorsvik, 117 Wn.2d at 105-06. If the necessary elements are neither found nor fairly implied in the charging document, this Court presumes prejudice and reverses without further inquiry as to prejudice. McCarty, 140 Wn.2d at 425, 428 (in prosecution for conspiracy to deliver methamphetamine, charging document, "liberally construed and subject to the Kjorsvik two-prong test, fails on its face to set forth the essential common law element of involvement of a third person outside the agreement to deliver drugs.").

Here, the charging document does not contain or imply all necessary elements. English and Quichocho were each accused of

> [w]ith intent to commit theft, . . . unlawfully tak[ing] personal property *that the Defendant did not own* from the person or in the presence of [Bondy (count 1) / Horn (count 2)], against such person's will, by use or threatened use of immediate force, violence, or fear of injury . . . .

CP 9-10 (emphasis added).

The information thus omitted the element that the person from whom the property was taken must have an ownership, representative, or possessory interest in the property. See Hall, 54 Wash. at 143 (reversing based on inadequate charging document where information charged only that "the property of the Spokane Merchants' Association . . . was taken by [Hall] from the immediate presence of" an individual).

Admittedly, Hall predates the Kjorsvik test, which permits charging documents to be construed liberally when an omission is pointed out for the first time on appeal. Thus, one could attempt to argue that the information was adequate under a liberal reading, in that it suggested that a possessory interest ("tak[ing] . . . from the person . . . of") might be required. CP 9-10.

Such a reading would be incorrect. In this respect, the information was actively misleading. One could just as easily surmise from the information that it was *not* necessary that Bondy or Horn have any possessory interest in any property taken. Indeed, based on the information, any property not owned by English or Quichocho, taken from presence of the named complainants, would suffice. This Court should reach this issue now and find that the missing essential element, acknowledged in Richie, cannot be implied from such misleading and/or incomplete language.

State v. Naillieux is instructive in this respect. 158 Wn. App. 630, 241 P.3d 1280 (2010). There, the accused was charged with attempting to elude a pursuing police vehicle by:

> fail[ing] or refus[ing] to immediately bring his . . . motor vehicle to a stop and dr[iving] his . . . vehicle in a manner indicating a wanton or willful disregard for the lives or property of others while attempting to elude a pursuing police vehicle appropriately marked after being given visual or audible signal by a uniformed police officer.

Id. at 644.

The attempt to elude statute had been amended, however, and the charging document reflected pre-amendment language. For example, the words "reckless manner" had replaced the phrase "manner indicating a wanton or willful disregard for the lives or property of others." Id. (citing Laws of 2003, ch. 101, § 1). And "'[r]eckless manner' does not mean a 'willful or wanton disregard for the lives or property of others.'" Naillieux, 158 Wn. App. at 644 (citing State v. Ratliff, 140 Wn. App. 12, 14, 164 P.3d 516 (2007)). Rather, it meant means "'a rash or heedless manner, with indifference to the consequences.'" Naillieux, 158 Wn. App. at 644 (citing Ratliff, 140 Wn. App. at 16) (quotation marks and citations omitted). "We, then, cannot infer 'reckless' from 'willful and wanton.'" Naillieux, 158 Wn. App. at 644.

The Court also held the requirement that the pursuing police vehicle be equipped with "lights and sirens" could not be inferred from the charging document, even though it included a requirement that the vehicle be "appropriately marked showing it to be an official police vehicle." Id. at 645. The Court therefore reversed the attempt to elude conviction. Id.

Naillieux establishes that, even under a liberal reading, misleading or inaccurate language, even if it is arguably related to a missing essential element, provides insufficient notice. See also State v. Zillyette, 178 Wn.2d 153, 160, 307 P.3d 712 (2013) (where delivery of only certain substances supports charge of controlled substances homicide, information alleging accused delivered a controlled substance in violation of RCW 69.50.401 held to be inadequate because it alleged both prohibited and "noncriminal" behavior). This Court should reject any argument that the missing element may be inferred from the misleading "person or presence of" language.

In summary, an "essential element is one whose specification is necessary to establish the very illegality of the behavior[.]" Johnson, 119 Wn.2d at 147 (emphasis added). Even under a liberal reading, the charging document failed to apprise English and Quichocho of all the essential elements of robbery. Because the information fails the first Kjorsvik test, reversal is required.

3. *Kjorsvik and Ollison do not preclude relief in this case.*

The appellants are, nonetheless, aware that Kjorsvik itself considered and rejected an assertion that a charging document omitted an element of robbery. The Kjorsvik Court found that "intent to steal," an essential element of robbery, could be inferred from an information that charged that Kjorsvik unlawfully, with force, and against the named complainant's will, took money while armed with a deadly weapon. "It is hard to perceive how the defendant in this case could have unlawfully taken the money from the cash register, against the will of the shopkeeper, by use (or threatened use) of force, violence and fear while displaying a deadly weapon and yet not have intended to steal the money." Kjorsvik, 117 Wn.2d at 110. But that case, while involving a robbery charge, involved a different omitted element. Thus, it does not control the outcome in this case. See In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("[Courts] do not rely on cases that fail to specifically raise or decide an issue.").[2]

The appellants are also aware that this Court has, since they first attempted to raise this issue, reached a contrary result in an unpublished, decision, State v. Ollison, noted at 196 Wn. App. 1002, 2016 WL 5077629

[2] Similarly, Tvedt, despite a discussion of the sufficiency of the charging document, did not address the present issue. 153 Wn.2d at 719.

(2016), review denied, 187 Wn.2d 1014 (2017).[3] The charging document in that case accused Ollison of "tak[ing] personal property from a person or in his or her presence, to-wit, Aleta Miller, against such person's will, by use or threatened use of immediate force, violence, or fear of injury . . . ." Id. at *2.

This Court held it was clear from the charging document that the property alleged to be stolen was Miller's property. Noting that it was liberally construing the information, this Court concluded that the language "reasonably apprised Ollison that the State alleged he unlawfully took property away from Miller in which she had an ownership, representative, or possessory interest. Therefore, the information adequately apprised Ollison of the charge against him." Ollison, at 2016 WL 5077629 at *6.

English and Quichocho respectfully disagree with the result in that case. But, more significantly, the charging document in this case is factually distinguishable. Based on the charging document in this case, Horn or Bondy's interest in or relation to the property is less clear than in Ollison, given that the information emphasized only that the property did

[3] Under GR 14.1, an unpublished decision may be cited nonbinding authority, to be accorded such persuasive value as this Court deems appropriate.

not belong to English and Quichocho. CP 9-10 (alleging that the appellants "[w]ith intent to commit theft, did unlawfully take personal property *that the Defendant did not own* from the person *or in the presence of*" Bondy or Horn) (emphasis added).

Kjorsvik does not dictate the result in this case. Ollison, an unpublished decision, is factually distinguishable. In the interests of justice, this Court should reconsider its decision, consider the argument that the appellants first attempted to raise over one year ago, and reverse the appellants' robbery convictions.

IV. CONCLUSION

For the foregoing reasons, the appellants respectfully request that this Court reconsider its decision and reverse their robbery convictions.

DATED this 7TH day of April, 2017.

Respectfully submitted,

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APPENDIX C

Filed
Washington State
Court of Appeals
Division Two

May 30, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRANDON MICHAEL ENGLISH, Appellant.	No. 46921-9-II Consolidated with:
STATE OF WASHINGTON, Respondent, v. CALVIN JAMES QUICHOCHO, Appellant.	No. 47001-2-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellants Brandon Michael English and Calvin James Quichocho move for reconsideration of this court's unpublished opinion filed on March 21, 2017. English and Quichocho asks us to reconsider our opinion based on the arguments raised in their January 2016 supplemental briefing. We previously rejected the January 2016 supplemental brief because the additional arguments raised in the January 2016 supplemental brief did not raise any new arguments based on *State v. Richie*, 191 Wn. App. 916, 365 P.3d 770 (2015). English and Quichocho also asks us to reconsider our opinion based on an argument raised for the first time in the motion for reconsideration. After reviewing the motion and records herein, it is hereby

ORDERED that the motion for reconsideration is denied.

For the Court: Jj. Johanson, Lee, Sutton

Lee, J.

NIELSEN, BROMAN & KOCH P.L.L.C.

June 28, 2017 - 1:30 PM

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