

68906-1

68906-1

H  
1:15

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON,  
RESPONDENT,  
vs.  
JEREMIAH WINCHESTER,  
APPELLANT,

CASE NO: 68906-1-I  
STATEMENT OF ADDITIONAL  
GROUNDS FOR REVIEW.  
PURSUANT TO RAP 10.10

I. IDENTITY OF PARTY: Comes now the appellant, Jeremiah Winchester, (herein Winchester) pro se, to submit his statement of additional grounds for review.

II. RELIEF REQUESTED: Appellant has identified additional grounds that he believes have not been adequately addressed by his appellant attorney. Appellant respectfully asks this Court to review the following issues for violations of his constitutionally protected rights. That this Court should grant reversal of his convictions, or to remand with instructions to hold a factual hearing in the interest of justice.

III. RELEVANT FACTS: For purposes of this motion, Winchester adopts the clerks papers, transcripts and reference to the trial record as submitted by his appellant counsel.

IV. ARGUMENTS AND AUTHORITIES: The following arguments are made by a pro se defendant with no legal education and diminished mental capacity due to unretrievable bullet and head trauma and will require additional briefing by appellant counsel pursuant to RAP 10.10 (f).

ADDITIONAL GROUND #1: The trial court abused it's discretion when it denied Winchester his right to impeach the states star witness with independent evidence of bias.

"We first note that a defendant has a constitutional right to impeach a prosecution witness with bias evidence. Davis v. Alaska, 415 U.S. 308, 316-18, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). It is reversible error to deny a defendant the right to establish the chief prosecutions witness's bias by an independent witness. State v. Jones, 25 Wn.App. 764, 751, 610 P.2d 934 (1980)" (See: State v. Spencer, 111 Wn.App. 401, 408, 45 P.3d 209 (Div.2 2002)).

The states case rested squarely on the testimony of Gavin Glyzinski. Glyzinski's statement and cooperation were secured by Detective Lee Beld when Glen Winchester delivered Glyzinski to the Detective just days after the incident to be interrogated at the Bellingham police department. See 5RP 349-53.

Glyzinski's motive for testifying was brought into question by the defense and Glyzinski testified as to his state of mind due to coercive police conduct during the interrogation. That he had been deprived of sleep for days and was under the influence of "a bunch of drugs" 5RP 350. That he was concerned the Detective would "twist" his word all up. 5RP 351. He was led to a room under the assurance that the door would remain open for him to leave at any time. 5RP 351. The Detective stopped the recorded interrogation and told Glyzinski "We know Jeremiah had the gun. We know you fired the gun, and if you don't cooperate, that door is not going to open tonite." 5RP 352.

Glyzinski testified that from being free to leave "I don't feel free to leave at all." 5RP 532. That it was a pretty coercive thing to have happen, that the Detective was explicit in saying "cooperate" meant confirming what he was just told, he understood that if he said anything other than Jeremiah had the gun and that he had fired it he would not leave "That's to my understanding. That's basically it." and that at that point "I did feel stuck." 5RP 352. That his thought was "these guys are about to put me away forever, and now they're going to think that I murdered somebody." 5RP 353.

The state rehabilitated Glyzinski to the jury when it had him state to the jury that his sole responsibility in the agreement with the state is "To tell the truth." "to tell the truth." "I believe I have told the truth." 5RP 388.

The state then went further to rehabilitate their witness by the implication by Detective Beld that Glyzinski's testimony as to his state of mind and feeling coerced was recently fabricated as the Detective testified that although there were parts of the interview that were not recorded that Glyzinski's version of the coercive interrogation was "Absolutely not true." and as to Glyzinski's version "That would be incorrect." 5RP 532. The Detective testified "I wanted him to tell me the truth." and "I told him he was absolutely leaving regardless." 5RP 533.

Under ER 801(d)(1)(B) A statement is NOT hearsay if the statement is consistent with the declarants testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it.

Glen Winchester was then called to testify as to what he witnessed from Glyzinski immediately after his release from Detective Beld for two reasons, to rebut the implied charge by the state that Glyzinski's state of mind testimony was recently fabricated, and to offer evidence of bias.

Glen Winchester started to testify "He was scared to death. He was, he was white in color. He was scared. He said, 'We came out of there and we were heading the wrong direction. I knew he was correcting me. I couldn't get out. The doors were locked. The doors were locked. I couldn't get out.'" At this point the state interrupted with an objection to hearsay and moved to strike to which the court sustained. 5RP 769.

The jury was excused and defense argued in their absence that the statements were admissible as excited utterances. 5RP 769-75. Defense described the required factors to an excited utterance and then explained "I believe that the statement that Mister -- I expect Mr. Winchester to be testifying to exactly meets all three of those" 5RP 771. Even in the absence of the jury the court declined to hear what testimony was expected and ruled without hearing that whatever it could be would be hearsay. 5RP 775.

It is unreasonable for a court to make such a ruling without even hearing the evidence it is ruling on in the absence of the jury. How can an informed decision be made regarding testimony that has not been heard and there is no knowledge of what evidence may come or in what context? The court stopped it's ears to what may have come and made it's rulling on what it assumed could have been testified to next.

Due to the courts abuse of discretion the record is void of what testimony was expected from Glen Winchester but even the testimony that did make it in to the record would have been admissible not only under the excited utterance exception but also under 803(a)(1) "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately there after." The event would be attempting to jump from a moving vehicle and the condition would be the fearful state of mind that would compel someone to attempt such a thing. Once the vehicle stopped and the door was opened for Glyzinski to be released to Glen Winchester would be "immediately there after".

This statement and what was to come would also be admissible under 803 (a)(3) "A statement of the declarants then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health)." That someone was in the emotional state of mind to attempt to jump from a moving vehicle as well as whatever circumstances brought on these feelings could be offered for no other reason but to show their fearful and confused state of mind and that they had experienced some form of emotional trauma.

"Testimony would not be hearsay because it was not being offered for the truth of the matter asserted. ER 801 (c); see also Betts v. Betts 3 Wash.App. 53, 59, 473 P.2d 403 (statements offered to show mental state rather than the truth of the assertions made, are not hearsay), review denied, 78 Wash.2d 994 (1970)".( See. Spencer supra at 408)

Statements that a person was attempting to jump from a moving vehicle but could not because the doors were locked are not offered to prove the truth of the assertions made (that the doors were locked) but to offer evidence of a fearful state of mind (that his fear of Detective Beld and locked doors were greater than his fear of moving pavement) and any testimony that may have followed would be offered to show Glyzinski was in the fearful state of mind that he had testified to and be offered for evidence of a motive to testify for reasons other than conveying the truth due to coercion and thus establish bias.

"It is fundamental that a defendant charged with the commission of a crime should be given great latitude in the cross-examination of prosecuting witnesses to show motive or credibility..... This policy reflects the constitutional requirement that the defendant be able to impeach witness credibility... The constitutional requirement serves as broad backdrop, against which the rule requiring foundation is best viewed as an exception... Therefore, when the policy of laying a foundation for prior inconsistent statements does not apply, as it does not here, the defendant should be afforded broad latitude in showing the bias of apposing witnesses." (See Spencer supra at 410-11 quoting State v. Wilder, 4 Wn.App. 850, 854, 486 P.2d 319 (1971) and citing Davis supra 415 U.S. 308, 316-18, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)). cf. also State v. Huynh, 107 Wn.App. 68, 74, 26 P.3d 290 (Div.1 2001) also State v. Chamroeum Nam, 136 Wn.App. 698, 150 P.3d 617 (2007).-Also State v. Johnson, 90 Wn.App. 54, 950 P.2d 981 (1998).

Glen Winchester's testimony of his conversations with Glyzinski as were expected by the defense as well as his visible emotional state of mind and expressions of fear and what he was willing to do to escape his fears at all cost would have been offered for the same reason a party would offer extrinsic evidence of bias conduct; to show that Glyzinski may have had motives and biases for making statements that didn't involve conveying the truth.

Without Glen Winchesters testimony the jury was left to weigh the testimony of a criminal defendant as to coercion and a fearful state of mind against the Detectives testimony that the criminal defendant's version of events were "absolutely not true" and that he was told he was "absolutely leaving regardless." 5RP 532-33.

The court clearly viewed the Detectives testimony more credible as it assumed all the surrounding circumstances of the interrogation would not produce the state of mind Glyzinski had testified he was experiencing. The court viewed it as nothing more than an "unpleasant moment" 5RP 773. The court even clarified this view "he may or may not have been -- Detective Beld didn't say he told him that. He denied that" 5RP 775. The court, as the jury may have, without Glen Winchesters testimony, believed if the Detective denied it then it did not happen.

Glyzinski's testimony was crucial to the states case. Glyzinski put the gun he fired and disposed of in Winchesters hands, he stated it was not a bond recovery and agreed with every thing the prosecution asked of him 5RP 385. He was also the only one that testified there was an intent to take something of value. 5RP 299.

The only testimony the court refers to in determining there was a robbery was that of Glyzinski and the gun. 5RP 823. The court then expressed "there is not a lot of evidence. There is not very much... I agree it is not much evidence, not much at all, but it is enough to get it to the jury." 5RP 824.

With "not much evidence, not much at all" put before the jury it would be vital that the jury be convinced beyond all doubt that the states star witness testified free from coercion and fear and had no motive to testify other than to convey the truth with no biases. With not much evidence it would take not much motive for bias to tip the scales in weighing testimony.

If the jury had been allowed to hear the testimony of a credible law abiding member of the community as to what he witnessed immediately after Glyzinski was released to him by the Detective regarding Glyzinskis state of mind during the interrogation in question it is unlikely that the jury would be convinced that both Glyzinski and Glen Winchester's testimony's were "absolutely not true" simply because Detective Beld denied it.

It is unclear what testimony was expected from Glen Winchester due to the fact the court decided it would be hearsay without hearing it. However, if the jury had been allowed to hear all the evidence regarding Glyzinski's state of mind and determine for themselves whether it was nothing more than an "unpleasant moment" or if Glyzinski experienced the fearful, emotional state of mind that would serve as a motive for bias the outcome may have been different.

ADDITIONAL GROUND #2: Detective Lee Beld, while assisting the prosecutor deceived the court and jurors by presenting known false evidence of fabricated confessions of the required elements needed to secure a conviction.

It has long been held that deliberate deception of the court and jurors by the presentation of known false evidence is incompatible with the rudimentary demands of justice. Mooney v. Holohan, 294 U.S. 103, 112, 79 L.Ed. 791, 794, 55 S.Ct. 340, 98 ALR 406 (1935). reaffirmed in Pyle v. Kansas 317 U.S. 213, 87 L.Ed. 214, 63 S.Ct. 177 (1942).

A claim that a conviction was based on perjured testimony is analyzed under the Due Process Clause. Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). A conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury. Personal Restraint of Benn, 134 Wn.2d 868, 936-37, 952 P.2d 116 (1998)(quoting United States v. Argurs, 427 U.S. 97 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976).

A Due Process analysis is triggered when there has been a knowing use of perjured testimony. Benn supra id. 937 (quoting In re Rice, 118 Wn.2d at 887 n.2, 828 P.2d 1086) The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. Napue v. Illinois, *id.* at 269, 3 L.Ed.2d at 1221. Thereafter Brady v. Maryland, 373 U.S. 83, 87, 10 L.Ed.2d 215, 83 S.Ct.1194 (1963).

The standard for evaluating perjured testimony is the reasonable likelihood that it could have affected the jury. U.S. v. Endicott, 869 F.2d 452 (9th Cir 1989).

(A) Detective Beld Presented a fabricated confession of a motive to take something of value. Beld testified that during the recorded interrogation Winchester confessed to him that Salvador Rodriguez owed "him" and friends and "he owed us money" 5RP 474. and again "he said that Chuko owed him money". 5RP 479. There was no statement anywhere in the recorded interrogations by Winchester stating that either Chuko or anyone associated with him owed Winchester anything at all let alone a debt of "money" that would show a motive to collect or take something of value. This confession was a fabrication by Detective Beld.

(B) In order for Winchester to attempt to take something of value there has to be evidence that Winchester believed there was something of value to attempt to take. The state asked "did he indicate what he believed where those drugs came from?" and Beld answered "The Rodriguez side" presenting the jury with a confession of a belief or knowledge that the Rodriguezes possessed drugs to attempt to take. 5RP 476. There was no other testimony that anyone had seen the Rodriguezes with drugs or that they believed they had brought drugs into the house. Winchester never stated any knowledge or "belief" of who owned the drugs found at the house after the events. This confession was fabricated by Detective Beld.

(C) To even present to the jury that there was an attempted robbery the state has to produce a victim. A robbery is not a victimless crime. The Rodriguezes were in Mexico and did not testify. Detective Beld then attempted to have Winchester agree with his question "Okay. So you think

that maybe he thought you - you were gonna take their shit?" Exhibit 160 lines 287-88. Winchester responded at line 298 "I wasn't gonna take their shit." Beld did not get the confession he needed for a conviction so at trial he testified after referring to his notes to assure the jury he is accurately reading what was recorded "He said that it all went bad because I think they were going to take my -- 'I think they thought we were going to take their drugs.'" 5RP 480. This fabrication presented the jury with the state of mind of witnesses that were not available to testify that they believed or perceived they were about to be robbed. These statements were never made by Winchester or anyone else at trial with the exception of the Detective.

(D) Beld then further presents the Rodriguezes as victims of a robbery to the jury by fabricating a confession that they were in fearful flight as they were chased down and approached by Winchester, presenting the required substantial step needed for a conviction of an attempted robbery. Directly after the false testimony just discussed in (C) still at 5RP 480 the testimony continues as follows:

Q. "Then if you could follow with what he said?"

A. "Yes they ran out, ran out of the room after Mr. Medina recognized him for whatever reason, ran out of the room, and he approached Chuko, approached Oscar."

Detective Beld presented this fabricated chase scene to the jury at 5RP 474 also "He immediately spun and ran out the door followed by the other two." Beld knew after referring to his notes 5RP 480. that these words.

at no time "follow with what he said." in fact the one and only statement Winchester made during any of the recorded interrogations that described the manner in which the Rodriguezes left the room was found in EX. 159 at line 54 "He(unintelligible) walk away." and Beld confirmed that was the words he heard at line 60. However there could be no substantial step if the Rodriguezes were allowed to "walk away" unhindered with not one movement or word from Winchester. The fabricated confession that the Rodriguezes "thought we were going to take their drugs" and "immediately spun and ran" "ran out, ran out of the room...ran out of the room" but could not escape as Winchester chased them down "and he approached Chuko, approached Oscar." 5RP 474, 480. This painted a vivid picture for the jury.

When Detective Beld's testimony as to Winchester's statements made during these recorded interrogations is compared with either the actual recordings of these interrogations or the transcripts of the recordings Exhibits 159, 160. Not one of the Detective's fabrications can be found and it can not be denied that the Detective's testimony is false. Not one of these statements were ever made by Winchester in any form or context.

Next Winchester must show that the prosecution knew of the false testimony. "We have held that a due process analysis is triggered only if there has been a knowing use of perjured testimony" Benn supra id at 937. "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment" Napue v. Illinois supra id. at 296.

As to Detective Beld being a representative of the state; he was the lead Detective on the case from the start, and the prosecutor had appointed him as his assistant. "MR. MCEACHRAN: I should mention I have Detective Beld assisting me through this case. THE COURT: I assumed that since he was sitting at counsel table." 5RP 19. As they worked together on trial strategy the prosecutor should have been well aware of the facts of the recorded statements that his assistant would testify about.

Detective Beld was well aware that none of these statements were ever made by Winchester. Beld was the interrogating officer for these recorded statements. He also testified that he went over the transcript "line by line" comparing them to the actual recordings and found them to be accurate. 5RP 522. He then assisted the prosecutor in extracting "snippits" that they wanted the jury to focus on. 5RP 556. These snippits were given to the jury while the majority of the "full" transcripts were substituted with the Detectives testimony as he had a "full" copy in his hands to refer to for accuracy as he testified. 5RP 569. The jury had no reason to doubt that Detective Beld would accurately read Winchesters statements as they would be found in "the full transcript of that which you had used when you testified" 5RP 569.

It cannot be assumed that Detective Beld assisting the prosecutor actually believed that these fabricated confessions were what he was reading from the transcripts he had gone over "line by line" and held in his hands to "refer to" 5RP 480. The state knew the testimony was false or at the least it was known to Detective Beld assisting the prosecutor.

The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. Napue, 360 U.S. at 269 supra.

Counsel for Winchesters co-defendant brought attention to the part of these fabrications that affected his client out of the presence of the jury. "I wasn't expecting that...I didn't see that because the transcript actually says, actually says..."5RP 488. At this point it was shown that when Detective Beld's testimony was compared to the full transcripts and tested it proved to be false. "So at this point, I'm frankly not sure if the jury caught that or not."5RP 488. The court in it's discretion decided not to correct the false statements "So I think at this point in time, I think it will be worse if we highlight it" and held that false testimony is covered in the jury instructions. "I think at this point, we're just going to have to let it go by. I don't think we can undo that." 5RP 489. The court was correct false testimony cannot just be undone once it has been presented to the jury and just letting it go by does not correct it when it appears. The record is clear. The prosecution knew of the false testimony and did not correct it when it appeared.

The standard for evaluating perjured testimony is the reasonable likelihood that false testimony could have affected the jury. U.S. v. Endicott, 869 F.2d 452 (9th Cir. 1989); U.S. v. Agurs, 427 U.S. at 103; Giglio v. U.S. 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). also Personal Restraint of Benn, 134 Wn.2d at 937.

A conviction based in part on false evidence, even false evidence presented in good faith, hardly comports with fundamental fairness. Thus, even if the government unwittingly presents false evidence, a defendant is entitled to a new trial if there is a reasonable probability that without the evidence the result of the proceeding would have been different. U.S. v. Young, 17 F.3d 1201, 1203, 1204 (9th Cir.1994)(citing Endicott, 869 F.2d at 455 and United States v. Bagely, 473 U.S. 667, 678-80, 87 L.Ed.2d 481, 105 S.Ct. 3375 (1985)).

Winchester did not testify and Detective Beld's testimony of the fabricated confessions were left as fact to the jury uncorrected. The Detective was the only state witness that testified to the events that was not a felon, a drug addict, who testified without receiving a deal for his testimony from the state and as such was the state's most credible witness testifying as to the events leading up to and during the actual crime charged. Jury's tend to find officers testimony highly credible "An officers testimony that another officer told him where certain evidence was found is highly credible, almost as credible as testimony that the officer himself found the items" Young 17 F.3d at 1205 supra.

The fact that the Detective presented the false testimony as being read from a recorded confession of Winchester makes it all the more damaging as Winchester did not testify. A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. See Arizona v. Fulminante, 499 U.S. 279, 296, 111 S.Ct. 1246 (1991)(quoting Bruton v. U.S. 391 U.S. 123, 139, 88 S.Ct. 1620 (1968))

The Detectives fabricated confessions affected the jury. In (A) the Detective presented a motive for Winchester to take something of value from persons who "owed him money" personally. There was no other testimony as to any motive at all. See motive 5RP 857.

In (B) Beld presented the jury with the only testimony that there was any knowledge or belief that the rodriguezses possessed anything of value to attempt to take. There was no other testimony that anyone in the house believed the Rodriguezes brought anything into the house or that they possessed drugs. No one in the house had seen them with the bag found and there was no talk of drugs in the house once Rodriguez arrived.

In (C) The Detective presented the jury with the state of mind of the alleged victims of the crime who were not present to testify that they had the belief and percieved that they were about to be robbed. That they were the owners of the drugs. There was no other testimony that anyone believed or perceived a robbery was to be attempted. Wilson testified that she had "no inkling" that anything was wrong and did not "believe" anything was about to happen.5RP 430-33. Glyzinski had testified that no one believed or thought that a drug deal or robbery was about to happen 5RP 355-59. Also that no one had that intention 5RP 372-73. It is clear that Beld's fabrication of a confession is the only testimony that anyone knows why "it all went bad" all the other testimony seems unsure as to why the Rodriguezes left the room then stopped down the hall to ready weapons and come back. This fabrication tipped the scales to show a clear intent was percieved.

In (D) Beld presented his most damaging fabrication. That of the substantial step required for a conviction of attempted robbery. As the court stated there would be no attempt "if they all were allowed to walk out of the house." 5RP 822. This is exactly what all the other states witnesses testified.

After Winchester shook hands with Mr. Medina and the Rodriguezes and introduced himself "Then all three Mexicans went out" Wilson at 5RP 411, 456. "They just walked right back out of the room" Glyzinski at 5RP 307. And Lara testified nothing more was said as they "walked out of the room" and "He just walked out of the room" 5RP 137. The Rodriguez brothers "sat there for a second and then followed him out" "Andrew walked, went down the stairs." 5RP 138. "And he walked right out of the room" 5RP 186. "He walked out of the room, like just walked out, just completely walked out right away, and then Chuko and Scrappy followed out of the room" 5RP 193. Winchester was "still on the crate" sitting down as "Chuko and them, everybody walked out of the room" as Winchester and "everybody else stayed back" 5RP 194. Andrew Medina "was down stairs" 5RP 195. "Andrew was already gone" 5RP 196. And most importantly Winchester's actual statement was "he (unintelligible) walk away." Ex 159 line 54-60.

Not only was there no running away or anyone being chased but "they all were allowed to walk out of the house" 5RP 822. Just as Andrew Medina did. The testimony of Ashley Fischer was that the only reason Medina gave as to why he left was "he said because I don't have a gun." 5RP 229. The Rodriguezes did not follow Medina all the way out of the house. They stopped walking at the end of the hall and readied their guns to fire.

This evidence could not support a conviction of attempted robbery in the first degree. Detective Beld sitting at the prosecutions table as the states assistant was in a position to hear what necessary elements were missing for a conviction and as an officer who's testimony would be seen as more "credible" than other testimony. see Young 17 F.3d at 1205. he fabricated a "confession".see Fulminante 499 U.S. at 296.that would present the jury with all the missing elements to convict.

"Q...did he indicate why he thought this all went bad? A. May I refer to my notes?....A. he said it all went bad because...'I think they thought we were going to take their drugs.' Q. Then if you could follow with what he said? A. Yes. They ran out, ran out of the room after Mr.Medina recognized Jeremiah for whatever reason, ran out of the room, and he approached Chuko, approached Oscar" 5RP 480.

This fabricated and false testimony was discussed and Mr. Munson said "I'm frankly not sure if the jury caught that or not."5RP 488. The court stated "I think at this point, we're just going to have to let it go by. I don't think that we can undo that." and "let Detective Beld know about that, so there's not any others of that --" 5RP 489. This was left "uncorrected when it appeared" Napue, 360 U.S. at 269. and this was the only testimony that presents the substantial step required to convict.

The court held "There is not alot of evidence. There is not very much, but they might say we believe that was when the robbery was attempted based on everything we heard.... I agree it is not much evidence, not much at all, but it is enough to get it to the jury" 5RP 824.When there is not much evidence at all getting false evidence to the jury is prejudicial.

ADDITIONAL GROUND #3: The evidence at trial was insufficient to convict Winchester of either (A) Attempted possession of a controlled substance to wit heroin and (B) Attempted robbery in the first degree by attempting to take something of value from Salvador Rodriguez to wit heroin. The state produced no evidence of the required substantial step of an attempted crime

In assessing whether the evidence was sufficient to support a conviction, we view the evidence in the light most favorable to the state and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. See State v. Johnson, 173 Wn.2d 895, 898, 270 P.3d 591 (2012) Quoting State v. Luther 157 Wn.2d 63, 77, 134 P.3d 205 (2006). See also Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560 (1979).

A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime. RCW 9A.28.020 (1). The intent required is the intent to accomplish the criminal result of the base crime. We look to the definition of the base crime for the requisite criminal result. A substantial step is an act that is strongly corroborative of the actors criminal purpose. Johnson, 173 Wn.2d at 899, 270 P.3d 591. citing State v. DeRyke, 149 Wn.2d 906, 913, 73 P.3d 1000 (2003) and Luther, 157 Wn.2d at 78, 134 P.3d 205.

(A) The evidence of intent to possess heroin offered by the state was not unequivocal in nature. The testimony as to Winchester's feelings about drugs "he didn't like drugs around Jesse" and "I don't think anyone knew we were going to a drug deal" 5RP 355. "Jeremiah never let Jesse around drugs... he was very against that" 5RP 176. Winchester's feelings

about heroin "he hated it... he always came down really hard on it" 5RP 695. Winchester had no use for heroin.

Eric Arps (owner of lucky bail bonds) testified that Winchester had kept people from jumping bail and had brought some in personally. He used Winchester because "he knows how to track them down, how to find them" and although Arps was not personally aware of Salvador "Chuko" Rodriguezes plans to jump bail and run to Mexico he did confirm that he was on bond with Lucky Bail. 5RP 662-64. Also that Jesse Winchester had taken interest in becoming a licensed bond recovery agent.

Peterson (a licensed recovery agent working for Lucky bail) described many bond recovery's Winchester had been involved in with his son Jesse. See 5RP 732-44. Peterson testified that Winchester obtained information unknown to him and that the ruse of a phony drug deal is what is known as "pretext stuff" and "we all use pretext stuff to get people to come" and "that's what the law calls it. I, essentially it's lying. It's telling somebody something they want to believe is true to get them to come somewhere or believe something" 5RP 745. Also that a bond can be pulled at any time either the signer or company has reason to believe the bondee may plan to run. 5RP 745-55.

The state attempted to silence Lara's testimony for fear it would "ring the bell" 5RP 169-75. Lara testified that Chuko had specifically told him that "Wendy Hansen" would bail him out of jail and "he would go on the run... is what he told me" 5RP 175-76. That Winchester had asked "who is this guy you know that sells heroin?" 5RP 179. Winchester then

questioned Lara not about drugs but in regards to Chuko's crime he was on bond for, his temperment, if he was armed, and when it was confirmed his girlfriend was "Wendy Hansen it rang a bell who Chuko was" at that point Winchester stated he knew Chuko to be "Salvidor Rodriguez" and stated his intent was "to sit down and talk to him" 5RP 180-81, 130. Lara testified that it was after this that Winchester asked him to call Chuko on the pretext of a drug deal. 5RP 210-11. Glyzinski testified he thought it may be a bond recovery as Jesse had made references before leaving the house 5RP 360. Jess made references as he put on the vest. 5RP 303. Jesse "specifically" told him that's what he was using when he was doing recovery work. 5RP 354.

If this Court finds that Winchester's request to call Chuko was unequivocally with the intent to attempt to possess a controlled substance that is not a substantial step. There was not one more word about Chuko's heroin and there was never any money produced or any paraphernalia that could be associated with a drug deal. No preparations were ever made. The call Lara placed to Chuko was third party. There was no evidence produced that Winchester had ever entered into negotiations with Chuko about drugs at all.

Negotiations of a drug deal do not constitute an attempt to possess. Solicitation, in the sense of enticing someone to commit a crime, does not constitute the overt act... that is a necessary element of the crime of attempt. State v. Grundy, 76 Wn.App. 335, 337, 886 P.2d 208 (1994). quoting State v. Gay, 4 Wn.App. 834, 839-40, 486 P.2d 341, review denied, 79 Wn.2d 1006 (1971).

Quoting the Ninth Cir. "He merely initiated the transaction by indicating his desire to purchase heroin and scheduling a meeting... to negotiate a deal. When key elements of the drug deal are incomplete, making an appointment with a known drug supplier,... is analogous to the situation in Harper: Making an appointment... is not of itself such a commitment to an intended crime as to constitute an attempt, even though it may make a later attempt possible." U.S. v. Yossunthorn, 167 F.3d 1267 at 1272-73 (9th Cir 1999)(quoting U.S. v. Harper, 33 F.3d 1143, at 1148 (9th Cir. 1994).

(B) The evidence offered by the state of Winchester's intent to commit robbery in the first degree was weak at best. The state hung the intent on the testimony of Gavin Glyzinski who testified "Jeremiah said something to the fact of, well they're not going to take, we're not going to let them take your money. We're going to shake them down for their money and take what they owe, kind of, you know, turn-about-is-fair play type deal." 5RP 299. This was in response to Lara's fear of being robbed and would be in response to an attempt by Chuko to "take" money from Lara. If this was attempted a "turn-about-is-fair-play type deal" would be the reaction.

There was no other testimony that confirmed this version of events infact all the other testimony contradicts Glyzinski's. Even Glyzinski directly contradicted this statement "I don't think anybody knew we were going to a drug deal, sir... Nobody, I don't think anybody knew we were going to a drug robbery." 5RP 355. Glyzinski further confirmed there was

no intent to commit a robbery at 5RP 357 the testimony was as follows:

Q. ...So even as the night went on, you had no belief that you were, you were about to engage in some robbery?

A. No I didn't.

Q. And there's nothing that led you to believe that Jeremiah thought you were going to engage in a robbery?

A. No.

A. I thought they were going over to Melindas to pick up some money, and she asked Jeremiah if he would hang out, and he was supposed to talk with these Mexicans because she thought that they were going to intimidate Robbie somehow.

Prior to Chuko's arrival no one was lying in wait or hiding but all were lying down, relaxed, in the open. see 5RP 136, 192, 305-07. Wilson testified "no one was acting strange" 5RP 431. That she did not expect trouble and had "no inkling" anything would happen, also "if something was planned to be happening, people wouldn't be sitting on the floor." 5RP 432-33.

The state presented the fact that there was a gun "Glyzinski clearly stated there was a gun" 5RP 823. and protective vests as preparations of a robbery. As the prosecution stated "Now, that is also a critical factor in this case" 5RP 857. The testimony was that Jesse "specifically" told Glyzinski the vests were for bail recovery work. 5RP 354. Also the facts that Chuko was "hot headed" that he was on bond for shooting at people and he would be armed. 5RP 180. Jesse stated the vests were a safety

precaution "Well if these guys are coming over with guns... better to be safe than sorry." 5RP 302. If this Court finds that the evidence proves that Winchester unequivocally intended to commit robbery in the first degree and the vests were preparations in furtherance of this intent that is not sufficient to convict.

When defendants drove to the scene of the crime twice, exited their vehicle in disguise, armed, with their attention focused on the bank the Ninth Cir. held "The above constitutes little more than a summary of the evidence: it does not answer the question whether the requisite elements of the offense were shown to exist beyond a reasonable doubt." explaining "For conduct to be 'strongly corroborative of the firmness of the defendant's criminal intent,' preparation alone is not enough, there must be some appreciable fragment of the crime committed, it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter, and the act must not be equivocal in nature." U.S. v. Buffington, 815 F.2d 1292, 1302 (9th Cir. 1987) (Citing U.S. v. Mandujano, 499 F.2d 370, 376 (5th Cir. 1974), Cert. denied, 419 U.S. 1114, 95 S.Ct. 792, 42 L.Ed.2d 812 (1975). There after U.S. v. Still, 850 F.2d 607 (1988) Where the defendant was found in the parking lot in front of the bank, putting on a disguise, with a robbery note, a "hoax bomb" and confessed "I was going to rob a bank" holding that clear intent and preparations are not sufficient to convict. And again U.S. v. Harper, 33 F.3d 1143, 1148, (9th Cir. 1990) Where defendant's were caught lying in wait, armed, and had the ATM card that was used to

cause a "bill trap" that summoned a technician to open the ATM. These actions did not constitute an attempt.

"A person does not take a substantial step unless his conduct is 'strongly corroborative of the actors criminal purpose... Mere preparation to commit a crime is not a substantial step.'" State v. Townsend, 147 Wn.2d 666, 679, 57 P.3d 255 (2002) (quoting State v. Aumick, 126 Wn.2d 422, 427, 894 P.2d 1325 (1995); State v. Workman, 90 Wn.2d 443, 451, 584 P.2d 382 (1978)).

(C) The state presented that the intent to possess heroin was the same intent as the attempted robbery and that the substantial step would be the same for both. "This really is very, very important, because it tells you what is going to happen. This isn't going to be a purchase of drugs. This is going to be a rip-off. That's what this is going to be. There's no indication that these people had \$1800 to be buying the drugs;" 5RP 856-57. "This was not an effort to buy the drugs. This was an effort to take the drugs" 5RP 868. "This was a robbery. It was an attempt to steal the drugs, attempt to humiliate these people, perhaps, who knows, but it was an attempt to steal. It was an attempted robbery, and to get possess of those drugs. That's what this was." 5RP 890-891.

Winchester can not attempt to take possession of drugs if he has no knowledge of any drugs to take. There was no evidence that anyone ever saw the Rodriguezes with any drugs. The drugs in question were not even discovered until after the Rodriguezes had left the scene. No one in the house ever saw the Rodriguezes with any bag or backpack. There was never any discussion of drugs once the Rodriguezes arrived.

There was not one bit of evidence offered that Winchester or anyone in the house had any knowledge that Chuko had brought any drugs with him in to the house for Winchester to attempt to take possession of.

The trial court was in the best position to view the evidence and after viewing all the evidence determined: "If they all were allowed to walk out of the house," there could be no robbery "but when everyone in the bedroom steps out into the hallway, and they're shouting about guns and show us your hands, the reason -- there could be a reasonable inference from that for the jury that that was the point at which the robbery began. All right, you guys. Stop. Show us your hands. we're going to take what you got. That's a reasonable inference I think for the jury to draw from this that the robbery didn't start in the bedroom. It started in the hallway," 5RP 822. This speculation is favorable to the state as the court described at the start. 5RP 821. "If there was an -- a jury determines there was a robbery, that's when it allegedly began and would have, and attempted by stopping the Rodriguez brothers and Mr. Medina and attempting to take things from them." 5RP 823. "That means to me that these people came out of the room. Somebody is carrying a gun, and they're yelling, and that is, I think, enough for a jury to conceivably-- they don't have to, they may not, there is not a lot of evidence. There is not very much, but they might say we believe that was when the robbery was attempted based on everything we heard... Is it beyond reasonable doubt? I think that is for the jury to decide... I agree it is not much evidence, not much at all, but it is enough to get it to the jury." 5RP 823-24. This is "favorable to the state" 5RP 821.

The evidence produced at trial was clear. Winchester intended to sit down and talk. "A. Talk to 'em... Q. You just were gonna talk to 'em" Exhibit 160 lines 105-07. "he was supposed to talk with these Mexicans" 5RP 357. "he wanted to talk to him" 5RP 130. "he said he wanted to sit down and talk" 5RP 181.

Winchester was preparing to do just as he intended when Chuko came in to the room. "Jeremiah was sitting on the crate" 5RP 136. "he was sitting down the whole time" 5RP 186. "still on the crate" and "Everybody stayed where they were at" 5RP 194. Jeremiah "stayed seated on the milk crate... everybody else stayed seated where they were" 5RP 456. "If something was planned to be happening, people wouldn't be sitting on the floor" 5RP 433. "Jeremiah was sitting on that milk crate" 5RP 305.

Winchester never had the chance to "talk" as intended. The only exchange was a hand shake and a name. "Chuko and his brother came in and shook his hand. They didn't say anything." 5RP 440. "He shook Jeremiahs hand... he says, hi Josh... Jeremiah said, I'm not Josh. I'm Jeremiah... There was no other exchange other than that." 5RP 411. "He said something in Spanish and all three of them went out in the hallway" 5RP 456.

The court determined that " If they all were just allowed to walk out of the house" there would be no attempted robbery 5RP 822. But the jury could infer that when Winchester came out into the hallway and said "All right, you guys. Stop. Show us your hands. Were going to take what you got." 5RP 822. There is simply no evidence this is what happened. The evidence is clear as to what happened in the hallway.

The Rodriguezes "all were just allowed to walk out" 5RP 822. With not one word from Winchester and unhindered in any way. No one moved from their lounging positions as the Rodriguezes just walked away. "they just walked right back out of the room" 5RP 307. "he walked right out the room" 5RP 186. "Andrew... walked out of the room... he just walked out the room" 5RP 137. "He walked out of the room, like just walked out, just completely walked out right away, and then Chuko and Scrappy followed out of the room" 5RP 193. The Rodriguezes "they sat there for a second and then followed him out" 5RP 138.

All three walked to the end of the hall and at the stairs there was a discussion in spanish then Andrew Medina chose to walk out of the house. "they walked down the hallway" 5RP 195. "then all three Mexicans went out to the top of the stairs in the hallway" 5RP 411. "they said something in Spanish when they were out in the walkway" 5RP 186. "Andrew walked, went down the stairs" 5RP 138. "he was down stairs" 5RP 195. "Andrew was allready gone" 5RP 196. and the reason Andrew told his driver as to why he chose to walk out of the house, unhindered was "because I don't have a gun" 5RP 229. As this was happening Winchester's group made no movement from their lounging positions to stop them. "Every body else stayed back" 5RP 194.

At this point it is clear there was no attempt to take anything of value and Winchester had no knowledge that Chuko had any drugs that he could attempt to possess. The Rodriguezes "all were just allowed to walk out of the house" 5RP 822. However Andrew Medina was the only one

who chose to leave. The Rodriguez brothers chose to ready weapons to fire and come back instead of following Andrew Medina out of the house. No one knows what was said in Spanish at the end of the hall that caused the Rodriguezes to turn around but the evidence is clear they chose not to "walk out of the house" there is no evidence that they were stopped or hindered in any way from leaving. The state failed to prove any step at all substantial or otherwise.

The chance to possess a controlled substance by attempting to take any drugs Chuko may or may not have brought into the house had just walked out the door unhindered in any way with not even a word from Winchester. In the hallway the evidence is that the scene changed "They walked down the hallway...Chuko turned back towards the stairs, and that's when I saw the hand motion and heard the cock, heard the sound of the cocked gun" it was loud 5RP 195. "that's when we noticed that they turned their backs to us and cocked the gun" 5RP 139. "Chuko, he had a gun, and he was cocking it" 5RP 412. Only the Rodriguezes knew what Medina said in Spanish before he chose to walk out of the house that caused the Rodriguezes to load their guns instead of following Medina. "They turned their backs to us, and we heard guns cock, and that's when Melinda asked Chuko, what's that for?" 5RP 186, 139. Wilson questioned these actions of the Rodriguezes "And I asked him, I was like, why are you doing that? You don't need to do that." 5RP 413. "What are you doing? Like why are you, what are you doing, you know," 5RP 195. Chuko then told her that readying the guns to fire were simply for protection.

The evidence did not infer that Winchester stepped into the hallway to attempt to stop anyone from leaving or to attempt to take possession of any drugs that were not seen or discussed. The evidence was clear as to what compelled Winchester to get up and step into the hallway. "it was definitely the sound of a cocked gun" "Yeah, I was right there in the hallway, it got everybody's attention" 5RP 186. it was loud "and that's when everybody else came out" "after they heard that" 5RP 195. "and then Jeremiah and everybody came out of the room" 5RP 139. "Then after that Jeremiah came out" 5RP 413. The state offered no other evidence from the witnesses in the hallway as to why Winchester came out besides the sound of the guns being readied to fire that "got everybody's attention."

The only evidence of what was happening in the room after the three walked out unhindered came from the states star witness Gavin Glyzinski. "Jeremiah said, that guy recognized me" "I heard some conversation in the hallway" 5RP 307. Melinda said "It's okay. Everything's okay, and then as she was saying that, I heard a couple of slides rack back on some pistols very distinct sound... and I'm thinking in my mind it's not okay" 5RP 308 "after we heard the slides rack back on these guns... I heard her say, it's okay. It's all right. You know if somebody is racking them back, the slide on their gun, it doesn't seem too all right with me" 5RP 359. "it seemed like we got led there to get shot at" 5RP 359.

There was no evidence offered to infer Winchester stepped into the hallway for the purpose of attempting to take possession of any drugs not yet known to be in anyones possession. There was however, substantial and clear evidence as to why Winchester stepped into the hallway. As all

this was happening in the hallway, Winchester never moved at all "he was sitting down the whole time" 5RP 186. The state failed to produce any evidence that Winchester got up from his seated position for any purpose but self preservation. Glyzinski testified that only after the loud distinct sound of guns being readied to fire did Winchester make any movement "I believe I said something to the fact of, I'm not getting shot in no bedroom. Jeremiah got up, started walking out the bedroom door into the hallway." 5RP 308. The step out of the room was to "see what was going on and what was happening" clearly testifying the step was not "with the intention to take property from anybody" and the step was not "with the intention of basically robbing anybody" 5RP 373. "I went out there to -- because I wanted to get out of that house" 5RP 373.

The state in closing stated the evidence was that Winchester "came out with a gun pointed towards these people" 5RP 866. but failed to produce such evidence. The evidence was "No, actually, when I walked out the gun was pointed to the ground." 5RP 313.

The state failed to produce any evidence that Winchester confronted the Rodriguez brothers for any purpose aside from self preservation. The only state of mind testimony came from Glyzinski "I was watching them both very closely... I mean we just heard a couple of slides on some guns getting rached back. I believe that they went out in the hallway, chambered, chambered a round in their guns and put them back in their pants" 5RP 314, "it seemed like we got led up there to get shot at" 5RP 359

The court speculated that the jury could infer from the evidence that Winchester had said "all right, you guys. Stop. Show us your hands.

Were going to take what you got" 5RP 822. However, the state failed to produce any evidence that could infer these statements were made by Winchester at all. The statement "show us your hands" was not made by Winchester and it was made only in response to the fear of being shot from guns in the hands of persons who had been bailed out for the crimes of gang related shootings, who were known to be "hot headed". What the evidence clearly shows is that everyone who came out of that room felt as Glyzinski did "it seemed like we got led up there to get shot at" 5RP 359.

The court was wrong. The jury can not infer something was said when there is evidence as to what was actually said. The state failed to produce any evidence that Winchester said "were going to take what you got" Winchesters actual words could only infer a fear of the guns he had heard "Jeremiah asked, why are you guys pulling guns out?" 5RP 139

The state failed to produce any evidence that Winchester made any movement towards Chuko who would have been the only one of the group that would have the unseen and unknown drugs. The evidence shows clearly that Winchesters only concern was with the man who was about to shoot him, not with the one who may or may not have any drugs to attempt to take possession of. Glyzinski testified that it was Chuko's brother that Winchester approached and clearly stated the reason why. "it looked like he was trying to get something out of his pants, and he didn't want us to see it... and Jeremiah grabbed him by his shoulder and said, where are you going? And the guy turned around and shot Jeremiah in his face" 5RP 312.

The state failed to produce any evidence that Winchester took a step to stop the Rodriguezes from walking out the room, from following Medina out of the house instead of choosing to stop and ready guns to fire and come back. There was no evidence that Winchester rose from his seated position for any other reason than to investigate the deadly sound of guns cocking down the hall. There was no evidence Winchester stepped out into the hall to attempt to take possession of drugs. There was no evidence Winchester had any knowledge drugs were present or if they had been that they did not leave with Medina. There was not any evidence that Winchester approached Chuko, the one that may or may not have the suspected drugs. There was no evidence that Winchester said any of the statements that the court speculated could have been made that could be inferred as the required step. There is simply no evidence that Winchester entered the hallway for any reason other than as the evidence clearly showed for fear of being shot by hot headed gang members who were running from charges of gang related shootings and had just readied their guns to fire instead of leaving with their friend. As Glysinki testified the step into the hallway was unequivocally for the purpose of "not getting shot in no bedroom" 5RP 308.

The state failed to produce evidence that proved beyond a reasonable doubt that Winchester's words and actions in the hallway were unequivocal in nature and constituted a substantial step towards both the commission of attempted possession of a controlled substance by the attempted taking of drugs by force or threatened use of force from Salvador Rodriguez in an attempted first degree robbery.

The totality of judicial consideration of attempt-based crime supports this reading of 8 U.S.C. 1326. It is well settled that as mere preparation is not sufficient to constitute an attempt to commit a crime, the accused must have taken a substantial step beyond mere preparation, by doing something directly moving toward, and bringing him nearer, to the crime he intends to commit, or, as sometimes stated, there must be some appreciable fragment of the crime committed. The substantial step required to establish an attempt may be as much, or less than, the actual commission of the crime, **but it must be unequivocal in nature and strongly corroborative of the accused's alleged criminal purpose.** 22 C.J.S. Criminal Law 120 (1989) (footnotes omitted)(emphasis added).

"there must be some appreciable fragment of the crime committed, it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter, and the act must not be equivocal in nature." United States v. Still, 850 F.2d 607, 609 (9th Cir. 1988)(quoting United States v. Buffington, 815 F.2d 1292, 1302 (9th Cir. 1987) citing United States v. Mandujano, 499 F.2d 370, 376 (5th Cir. 1974), cert. denied, 419 U.S. 1114, 42 L.Ed.2d 812, 95 S.Ct. 792 (1975)).

The state failed to produce evidence that was unequivocal and strongly corroborated that Winchester did not exit the room into the hallway out of fear from gang members who have shot people choosing to cock their guns at the end of the hallway instead of leaving with their friend but that he was attempting to take possession of drugs he had no actual knowledge of. Not for the purpose of "not getting shot in no bedroom"

ADDITIONAL GROUND #4: The state placed Winchester in Double Jeopardy when it charged Winchester with three crimes arising out of a single act. U.S Constitution Fifth Amendment.

Washington State Court of Appeals Division One discussed the standard of review for claims of Double Jeopardy in State v. Chesnokov, \_\_\_ Wn.App. \_\_\_ (Div.1 2013) "The State may bring multiple charges arising from the same criminal conduct in a single proceeding. State v. Michielli, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997). However, state and federal constitutional protections against double jeopardy prohibit multiple punishments for the same offense. State v. Kier, 164 Wn.2d 798, 803, 194 P.3d 212 (2008). Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense. State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005). The court engages in a three part test to determine whether the legislature intended multiple punishments in a particular situation. Kier, 164 Wn.2d at 804. First, the court searches the criminal statutes involved for any express or implicit legislative intent. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). Second, if the legislative intent is unclear, the court turns to the "same evidence" Blockburger test which asks if the crimes are the same in law and fact. *id.* at 777-78 (citing Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed.2d 306 (1932)). Third, the merger doctrine may be an aid in determining legislative intent. Freeman, 153 Wn.2d at 772-73. Even if two convictions would appear to merge on an abstract level under this analysis

they may be punished separately if the defendant's particular conduct demonstrates an independent purpose or effect of each. Kier, 164 Wn.2d at 804. The usual remedy for violations of the prohibition of double jeopardy is to vacate the lesser offense. State v. Hughes, 166 Wn.2d 675, 686, n.13 212 P.3d 558 (2009). The court's review is de novo. Freeman, 153 Wn.2d at 770.'

Winchester was convicted of three crimes, attempted possession of a controlled substance, to wit heroin, count I. Attempted robbery in the first degree, count III. And Unlawful possession of a firearm in the second degree, count IV.

The state did not make a distinction in the charging document as to what Winchester attempted to take from Salvador Rodriguez. The two crimes of attempted possession of a controlled substance and attempted robbery in the first degree both require proof of the "same elements" and the state relied on the "same evidence" to prove both crimes. First that Winchester possessed the required intent to possess heroin by the taking possession of the heroin from Salvador Rodriguez by the use of force.

The evidence presented by the state was that the only "personal property" that was intended for Rodriguez to bring was heroin as Lara testified at 5RP 126. The fact that the jury found Winchester not guilty of count II Methamphetamine shows that this evidence weighed against the decision of the jury. There was no evidence that Rodriguez was expected to bring anything else of value to attempt to take.

The prosecution further confirmed that the attempted possession was attempted through the attempted robbery, taking possession of the

heroin by the use of force. The state confirmed Winchester had no cash to purchase heroin. 5RP 130. The state further confirmed it was their intention to use this same evidence to support both convictions of the attempted crimes in its closing argument. "This really is very, very important, because it tells you what is going to happen. This isn't going to be a purchase of drugs. This is going to be a rip-off. That's what this is going to be. There's no indication that these people had \$1800 to be buying the drugs" 5RP 856-57. "This was not an effort to buy the drugs. This was an effort to take the drugs" 5RP 868. "This was a robbery. It was an attempt to steal the drugs, attempt to humiliate these people, perhaps, who knows, but it was an attempt to steal. It was an attempted robbery, and to get possess of those drugs. That's what this was." 5RP 890-91.

"the evidence, jury instructions, and closing argument all supported the election of a specific criminal act" See Kier, 164 Wn.2d at 813 (citing State v. Bland, 71 Wn.App. 345, 352, 860 P.2d 1046 (1993)). The rule of leiniency discussed in Kier should apply here.

The second element of attempt crimes is the substantial step. The substantial step required for both crimes charged is the same step and would have to be found that Winchester took a step to attempt to take possession of a controlled substance by attempting to take the heroin from Salvador Rodriguez against his will with the use of force also the substantial step needed for the attempted robbery.

Both crimes are attempts and require proof of the same elements, intent and a substantial step. The intent required for both and as the

evidence showed and the state elected was the attempted possession of Salvador Rodriguezes heroin by attempting to take possession in an attempted robbery. Two crimes for the taking of one item. When robbery of cash from two employees at one store ended in the conviction of two robberies it violated double jeopardy because the state relied on same fact, the single taking, to prove both crimes. See State v. Molina, 83 Wn.App 144, 920 P.2d 1228 (1996).

The predicate for applying the Blockburger same elements test is that the same act or transaction constitutes a violation of two distinct statutory provisions. See State v. Jones, 117 Wn.App. 721, 727, 72 P.3d 1110 (Div.1 2003)

The possession of heroin could not be attempted with no money for the purchase. The robbery could not be attempted without at least an assumption that Rodriguez possessed something of value to attempt to take. The only property of value discussed and could be expected was the heroin. The charging documents are not clear what the property was. The evidence only produced drugs as property of value possibly owned by Rodriguez. The state clearly elected that the heroin was infact the property that was intended for Winchester to attempt to possess by the attempted robbery. The crimes are both attempt crimes and require the same elements to convict. Both crimes require the evidence of the heroin.

"To use Rieff terminology, the charged crimes were the same "in fact" even if not the same "in law"" Quoting State v. Nysta, 168 Wn.App. 30, 47, 275 P.3d 1162 (Div.1 2012)

Div.2 Held even when "two convictions are not the same in law because their statutory elements differ. Nevertheless... Absent clear legislative intent to the contrary, two convictions constitute double jeopardy when the evidence required to support a conviction for one charge is also sufficient to support a conviction for the other charge, even if the more serious charge has additional elements." State v. Ralph, 175 Wn.App. 814, 823, (2013)(citing Freeman, 153 Wn.2d at 772, 777, 108 P.3d 753 (2005)). Referring to Div. 1 "As Division One of our court has explained: The merger doctrine precludes conviction for one or more offenses based on acts which are so much a part of another substantive crime that the substantive crime could not have been committed without such acts that independent criminal responsibility may not be attributed to them. If such acts have no independent purpose or effect, they become merged into the completed substantive crime." Ralph, 175 Wn.App. at 824 fn.4.(citations omitted).

The Ralph court is on point to the case at hand in that both jury's found defendant's not guilty on one of the crimes charged showing a clear election that the attempted "taking" was focused on and limited to one "item". Winchester was found not guilty on count II "methamphetamine" which was found together with the heroin, showing the jury believed the intent was for the heroin alone as the only thing of value Lara requested in the call to Chuko. This creates ambiguity in the jury's verdict, which, under the rule of lenity, must be resolved in the defendant's favor. See Kier, 164 Wn.2d at 808-14, 194 P.3d 212 (2008). The heroin could not have been possessed without the taking, without the heroin there was nothing expected to be brought that could be taken.

November 5 2013

Mr. Richard Johnson, Clerk  
Court of Appeals Division I

This is the last page of the statement of additional grounds that was mailed on Nov 4th 2013. CASE # 68906-1-I In the appeal of Jeremiah Winchester.

I was in a rush to make copies to send to the court and in my rush it was my error that this page was not attached.

If I have to at this point file a motion or send this page in some formal manner please advise me of the required form to have this last page attached with my statement of additional grounds. If, however, this is recieved close enough in time (the next day) to my (SAG) and it can simply be stapled to the back where it goes please do so and notify me that it was done.

As you can see by the page number this is the very last page of the (SAG) and would only need to be attached as the last page of the last argument.

Please notify me either way and thank you.

Sincerely Jeremiah Winchester

D.O.C. # 716971 C - 614

P.O. BOX 888 MCC / TRU

Monroe Washington 98272

STATE OF WASHINGTON  
NOV 5 2013 11:24 AM  
COURT OF APPEALS - DIVISION I