

68936-3

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No. 68936-3-I

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

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STATE OF WASHINGTON,

Respondent,

v.

VICTOR CERVANTES,

Appellant.

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COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SKAGIT COUNTY

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT

**1. The State presented insufficient evidence to convict Mr. Cervantes of first-degree burglary, and, contrary to the State's argument, *Brown* controls.**

As explained in Mr. Cervantes's opening brief, the State failed to prove first-degree burglary because there was no evidence that Mr. Cervantes or an accomplice handled a weapon "in a manner indicative of an intent or willingness to use it in furtherance of the crime." App. Br. at 4-9 (quoting *State v. Brown*, 162 Wn.2d 422, 432, 173 P.3d 245 (2007)). Instead, just as in *Brown*, "the facts suggest that the weapon was merely loot." *Id.* at 434. Thus, reversal and remand for entry of a conviction on the lesser-included offense is the appropriate remedy.

The State concedes it did not prove Mr. Cervantes or an accomplice handled a gun with intent or willingness to use it in furtherance of the crime. Resp. Br. at 10. But it asks this Court to rule it was not required to do so, even though *Brown* holds to the contrary. The State faults the Supreme Court for resting its analysis "solely on enhancement cases," and urges this Court to apply *Brown* only to sentence enhancements and not to first-degree burglaries. Resp. Br. at 8. This option is not available. "Once the Washington Supreme Court has decided an issue of state law, its conclusion is binding on lower courts." *State v. Zimmerman*, 130 Wn. App. 170, 182, 121 P.3d 1216 (2005) (citing *State*

*v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984)); *see also In re Heidari*, 174 Wn. 2d 288, 293, 274 P.3d 366 (2012) (“even if we had not cited authority for our holding, the Court of Appeals is not relieved from the requirement to adhere to it”).<sup>1</sup>

In *Brown*, the Supreme Court did not simply vacate the firearm enhancement. It also reversed the first-degree burglary conviction because the State did not prove an intent or willingness to use the weapon in furtherance of the crime. *Brown*, 162 Wn.2d at 435. The Court addressed both issues using the same analysis – which makes sense given the parallel statutory language. *See* RCW 9A.52.020(1)(a) (“the actor or another participant is armed”); RCW 9.94A.533 (“the offender or an accomplice was armed”). The Court began by stating, “Mr. Brown... contends that the Court of Appeals failed to correctly apply the ‘nexus test’ to determine whether he was armed **for purposes of both his conviction for first degree burglary** and the firearm sentence enhancement.” *Brown*, 162 Wn.2d at 430 (emphasis added). Rather than disapproving the defendant’s application of the nexus test to both the conviction and the enhancement, the Court adopted his argument. The Court did not separate the analysis

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<sup>1</sup> Because Division Two violated this principle in *Hernandez*, the State’s reliance on it is misplaced. Resp. Br. at 9 (citing *State v. Hernandez*, \_\_\_ Wn. App. \_\_\_, 290 P.3d 1052 (2012)).

or apply different standards to the burglary statute and the enhancement statute. Rather, it vacated both the conviction and the enhancement because of the failure to prove an intent or willingness to use the weapon in furtherance of the crime. *Id.* at 431-35.

Nor is it relevant that Mr. Cervantes's accomplices removed the gun from the home while in *Brown* the defendants moved the gun within the home. Resp. Br. at 10. If a person "is armed" at any point during a burglary – "in entering or while in the building or in immediate flight therefrom" – he is guilty of burglary in the first degree. RCW 9A.52.020. The point is that merely possessing a gun at any of these times does not satisfy the nexus requirement; it does not mean a person "is armed" for purposes of the statute. *Brown*, 162 Wn.2d at 431. The State must prove an intent or willingness to use the weapon in furtherance of the crime, not merely an intent to steal it. *Id.* at 432.

In sum, under *Brown*, Mr. Cervantes's conviction for first-degree burglary cannot stand. Because the jury was instructed on the lesser offense of second-degree burglary, on remand a conviction may be entered for that crime. *Heidari*, 174 Wn.2d at 293-94. See App. Br. at 4-9.

**2. The State presented insufficient evidence to convict Mr. Cervantes as an accomplice to theft of a firearm, and the State's theory that it only had to prove he was an accomplice to theft in order to support a conviction for theft of a firearm is incorrect under *Roberts* and *Cronin*.**

In his opening brief, Mr. Cervantes argued that the conviction for theft of a firearm must be reversed because the State failed to prove he was an accomplice to that crime. Under settled Supreme Court precedent, a person is not guilty as an accomplice unless he knowingly facilitated *the crime* charged. App. Br. at 9-15 (citing *State v. Roberts*, 142 Wn.2d 471, 14 P.13d 713 (2000); *State v. Cronin*, 142 Wn.2d 568, 12 P.3d 752 (2000)). Thus, the trial court was wrong in adopting the State's argument that so long as it proved Mr. Cervantes was an accomplice to *theft*, he could be convicted of *theft of a firearm*. App. Br. at 10 (citing RP 173-75).

The State's response contradicts itself. It acknowledges that accomplice liability requires knowledge of the "specific crime," and that this means knowledge of the crime charged or a different degree of *the same crime*. Resp. Br. at 12. But it fails to apply that rule here, instead reverting to the "in for a dime, in for a dollar" theory rejected by the Supreme Court. The State claims:

Here, there was sufficient evidence that Cervantes acted as a principal or an accomplice in the burglary and that the intent of that burglary was to commit the crime of theft.

An ordinary person would know that in committing a theft and burglary, if the burglar comes upon a firearm, the burglar would likely steal it. Thus, a rational trier of fact could find that the knowing facilitation of a burglary and theft thereby knowingly facilitates the theft of any firearm that is present.

Resp. Br. at 13.

Not only is this argument contrary to *Roberts* and *Cronin*, it is foreclosed by *State v. Stein*, 144 Wn.2d 236, 27 P.3d 184 (2001). In *Stein*, our supreme court rejected the “reasonable foreseeability” doctrine invoked by the State here. Stein was convicted of three counts of attempted murder after the jury had been instructed that it could hold the defendant liable for reasonably foreseeable acts committed by coconspirators. *Id.* at 243. The Supreme Court reversed, holding the convictions were contrary to *Roberts* and *Cronin*. *Id.* at 245-46.

[T]he instructions here, taken as a whole, enabled the jury to convict Stein of conspiratorial liability for attempted murder without finding the necessary element of knowledge that his coconspirators intended to murder the victim. Further, since liability under [federal law] requires no such knowledge, it is directly contrary to the holding of *Roberts* and *Cronin* and is therefore incompatible with Washington law.

*Id.* at 246. Thus, the State’s argument that Mr. Cervantes’s conviction is proper because it is reasonably foreseeable that “if a burglar comes upon a firearm, the burglar would likely steal it” is wrong as a matter of law.

*Stein*, 144 Wn.2d at 245-46.

The State finally attempts to argue that the crime of “theft of a firearm” is simply a different degree of the crime of theft, and that “[b]ecause the evidence was sufficient to establish that Cervantes was at least an accomplice to the general crime of theft, the evidence was sufficient to establish Cervantes’s complicity in the Theft of a Firearm charge.” Resp. Br. at 14. But as explained in the opening brief, “theft of a firearm” is a separate crime, not a degree of theft. RCW 9A.56.300. It has a much higher seriousness level than any degree of theft, because it punishes individuals for special harms caused by armed crime. RCW 9.94A.530; *State v. Miller*, 92 Wn. App. 693, 699-702, 964 P.2d 1196 (1998). The fact that the statute is in the same chapter as theft does not mean the State can simply prove theft and thereby obtain a conviction for the separate crime of theft of a firearm. Robbery is also in the same chapter as theft, but proof that a person knowingly facilitated theft is insufficient to support a conviction as an accomplice to robbery. *State v. Grendhahl*, 110 Wn. App. 905, 910-11, 43 P.3d 76 (2002); *accord State v. Evans*, 154 Wn.2d 438, 454, 114 P.3d 627 (2005).

Theft in the first degree is theft of property or services worth over \$5,000, or theft of property of any value taken from the person of another, or theft of a search-and-rescue dog on duty, or theft of metal wire from a public service company. RCW 9A.56.030. As shown by the fact that

metal wire and search-and-rescue dogs are specifically listed in the first-degree theft statute, the legislature knew how to include firearms in this statute if it wanted to. *See State v. Slattum*, 2013 WL 600250 at \*7 (No. 67708-0-I, February 19, 2013). Instead, it explicitly *excluded* them and created a separate crime for theft of a firearm. RCW 9A.56.030; RCW 9A.56.300. Because theft of a firearm is not simply a different degree of the crime of theft, proof that a person knowingly facilitated theft does *not* create liability for theft of a firearm. *Roberts*, 142 Wn.2d at 512; *Cronin*, 142 Wn.2d at 581-82.<sup>2</sup> This Court should reverse.

**3. The trial court erred in overruling Mr. Cervantes’s objection to the reasonable-doubt instruction, because the Supreme Court has held the jury’s job is not to find the truth but to determine whether the State proved its case.**

As explained in the opening brief, the trial court erred in instructing the jury, over Mr. Cervantes’s objection, that it could find the State proved its case beyond a reasonable doubt if the jury had “an abiding belief in the truth of the charge.” A jury’s role is not to find the truth, and

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<sup>2</sup> The State makes a half-hearted attempt to argue that it proved Mr. Cervantes “shared in a specific intent to steal a firearm.” Resp. Br. at 14; 2 RP 61-62. The argument is two sentences and is unpersuasive. The record shows that the basis for the denial of the motion to dismiss and the basis for the jury’s conviction was a mistaken belief that proof of knowingly facilitating a theft was sufficient to support a conviction for theft of a firearm. 1 RP 171-75; 2 RP 16-18, 23, 60-61. As explained above and in the opening brief, this is incorrect as a matter of law.

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STATE OF WASHINGTON,	)	
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Respondent,	)	
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	)	
VICTOR CERVANTES,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18<sup>TH</sup> DAY OF MARCH, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| [X] VICTOR CERVANTES<br>358766<br>WASHINGTON STATE REFORMATORY<br>PO BOX 777<br>MONROE, WA 98272                                   | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 18<sup>TH</sup> DAY OF MARCH, 2013.

X \_\_\_\_\_ 

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