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Court of Appeals
Division I
State of Washington

NO. 74262-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RYAN JOHNSON,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

When Anthony Williams won a large jackpot at the Tulalip Casino, his roommate Tashina Kona created a plan to rob him of the money. She invited her cousin Billy Arnold to come over to the house she shared with Mr. Williams to take the money from him. When Mr. Arnold came over as asked, he used force to take and retain the property, injuring Mr. Williams with a wooden 2 x 2. At trial, Mr. Johnson was implicated by Mr. Arnold as his co-conspirator.

Despite the clear invitation by Ms. Kona to come into the shared residence, the State charged Mr. Johnson with burglary. Because unlawful entry or unlawful remaining is an essential element of burglary, this charge must be dismissed.

The Tulalip Tribal Court lacked jurisdiction to issue the search warrant used to access Mr. Johnson's phone records because he is not a native. The records the detective testified about at trial, including Facebook posts and database searches, were improperly authenticated, requiring a new trial.

Resentencing is also required as the court failed to apply double jeopardy and same course of conduct rules, instead imposing an unconstitutional and legislatively unauthorized sentence.

B. ASSIGNMENTS OF ERROR

1. The State failed to prove an essential element of the crime of burglary in the first degree, by failing to prove unlawful entry or unlawfully remaining within the building.

2. Tulalip Tribal Court did not have jurisdiction to authorize a search warrant of Mr. Johnson's phone records.

3. The State failed to properly authenticate social media posts introduced in their case-in-chief.

4. The State failed to authenticate the results of database searches conducted by the police.

5. The court found the robbery was "long over" before the assault took place in determining the convictions did not merge.

6. Merger for sentencing purposes was required for the robbery in the first degree and assault in the second degree convictions.

7. Same course of conduct rules were misapplied resulting in an unlawful sentence.

8. The court imposed an exceptional sentence without a jury finding or other justification.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Unlawfully entering or remaining in a building is an essential element of burglary in the first degree. Dismissal of the charge is required where the State fails to prove an essential element. Where the evidence established the assailants were invited into the building where the robbery occurred and where no limitations were placed upon their entry, is dismissal required for failure to establish this essential element?

2. Tribal courts do not have jurisdiction over crimes committed by non-Indians. The warrantless search of Mr. Johnson's phone records violated his right to privacy under article I, section 7 of the Washington Constitution and his right to be free from unreasonable search and seizure under the Fourth Amendment. Is remand for a new trial required where the State relied on those unconstitutionally seized records and the use of which was not harmless?

3. The ease in which electronic communication may be created through falsehood or fraud requires courts to carefully review authorship prior to admitting an electronic message. Authentication is a threshold requirement designed to assure the evidence is what it purports to be. Is remand for a new trial required where the State relied

upon electronic media posts found on a Facebook page which was not properly authenticated?

4. Database search evidence is only admissible upon a showing the process produces an accurate result. The State relied upon a database search to imply Mr. Johnson's phone was used in the course of the crimes committed. Is remand for a new trial required where the State was unable to establish the database search conducted by the police produced an accurate result?

5. Double jeopardy principles prohibit multiple punishments for the same offense. An assault in the second degree which is committed in the furtherance of a robbery in the first degree requires merger of the charges. Is a new sentencing hearing required because of the failure of the court to merge the assault in the second degree and the robbery in the first degree convictions?

6. Crimes which constitute the same course of conduct must be scored as one crime. Is a new sentencing hearing required where the court misapplied the same course of conduct rules?

7. Consecutive sentences may only be imposed for crimes which constitute the same course of conduct where the court finds justification for an exceptional sentence. Is resentencing required where

the court imposed an exceptional sentence without a jury finding or other justification?

D. STATEMENT OF THE CASE

Anthony Williams was robbed on January 1, 2015 in a home located on the Tulalip Reservation. Mr. Williams had won a jackpot while gambling at the casino. RP 54. His cousin and roommate, Tashina Kona notified her friend Billy Arnold that Mr. Williams had come home with a large amount of money. RP 198. Ms. Kona did not like her cousin and asked Mr. Arnold to come and take his money. RP 194, 198. Mr. Arnold agreed. RP 198.

Sometime later that night, Mr. Arnold arrived at the house with another person. RP 270. Mr. Arnold armed himself with a 2 x 2 piece of wood. RP 272. He entered the house, ultimately coming into Mr. Williams's bedroom. RP 273. He demanded Mr. Williams give him the money and hit him with the stick as he was fleeing the room. RP 274. Mr. Williams suffered a serious cut to his head, which required medical attention. RP 275.

Detective David Sallee was assigned to investigate the robbery. RP 130. He spoke with Ms. Kona, whom he believed to be involved. RP 132. The detective searched Ms. Kona's phone records and

discovered traffic on her phone which revealed she had used it shortly after the robbery to call two different numbers. CP 327. Through a search engine search, Det. Sallee discovered one of the numbers was associated with a Facebook page titled “Ryan Johnson.” CP 188. Det. Sallee then applied to the Tulalip Tribal Court for a search warrant related to the phone number associated with Mr. Johnson. CP 188. Although this is a tribal court, the warrant did not allege Mr. Johnson was Native American and therefore subject to the court’s jurisdiction. No other evidence was ever introduced at trial to indicate Mr. Johnson is a Native American. The Tulalip Tribal Court issued a search warrant for Mr. Johnson’s phone records, which Det. Sallee executed in Texas. CP 185.

The detective confronted Ms. Kona again. This time she confessed to her involvement in the robbery, implicating Mr. Arnold and saying she had called him on two phone numbers just after the robbery had occurred. RP 203. Ms. Kona received approximately six months for her involvement in the robbery in tribal court. RP 158.

Det. Sallee did not preserve the results of the internet searches he conducted, relying only upon his memory of what he saw. RP 167. He was also unable to recreate the searches later in time. RP 151. At

trial, the detective testified the page he searched had a picture of a red truck similar to the one described by witnesses as having been seen leaving Mr. Williams' home after the robbery. RP 151.

Det. Sallee applied to Tulalip Tribal Court for a search warrant for one of the two phone numbers which he believed belonged to Mr. Johnson. CP 186. Before trial, Mr. Johnson moved to suppress the cellphone records because the Tulalip Tribal Court lacked jurisdiction to subpoena Sprint's offices in Texas. CP 316.

At trial, the only witness who could identify Mr. Johnson as one of the assailants was Billy Arnold, who had previously been convicted of the robbery. RP 274. In exchange for his testimony, Mr. Arnold was able to plea bargain approximately five years from his sentence, which was more than half of the sentence he was facing and what Mr. Johnson would ultimately receive. RP 289. The other witnesses at trial included Ms. Kona, who did not identify Mr. Johnson as one of the assailants and Mr. Arnold's ex-girlfriend, who was also unable to identify Mr. Johnson as one of the robbers. RP 200, 314. Mr. Williams was not able to identify either of the men who robbed him. RP 61.

The State relied heavily at trial upon electronic evidence. In order to establish Mr. Johnson owned the phone number called by Ms.

Kona, Det. Sallee testified regarding his online searches which resulted in him finding a Facebook page with Mr. Johnson's name on it. RP 140. The only testimony regarding the ownership of the Facebook page came from Det. Sallee. RP 140. The detective did not preserve his search results. RP 168. Mr. Johnson objected to the authentication of this information. RP 141.

Det. Sallee also testified about his use of an online database run by LexisNexis to establish Mr. Johnson owned the phone. Det. Sallee testified he entered the phone number into the database and was able to further connect it to Mr. Johnson. RP 152. The detective admitted he had only been using the database for a short period of time, had received no training on the use of the database, and did not know how data was collected or sorted. RP 145. There was no other evidence introduced regarding the authenticity of the results of his searches. The detective also did not preserve these search results.

The State also called Desiree Hannen, a records custodian with Sprint, to testify regarding the phone records retrieved for the phone number Detective Sallee used in the Google and Lexis Nexis searches, which he believed belonged to Mr. Johnson. RP 246. She authenticated the Sprint records, and explained the contents of the records, including

the timing of calls and text messages, the difference between calls and text messages in the record, and cell tower locations. RP 249, 257.

The jury found Mr. Johnson guilty of burglary in the first degree, robbery in the first degree and assault in the second degree while armed with a deadly weapon. RP 409, CP 122-24.

At sentencing, the court applied the anti-merger doctrine to sentence the burglary separately. The court also found the robbery and assault were separate courses of conduct. RP 441. The court believed it was obligated to run the robbery and assault sentences consecutive to each other, scoring the robbery with ten points and the assault with zero points. RP 443. Mr. Johnson was sentenced to 135 months, including a 12 month deadly weapon enhancement on the assault conviction. CP 14.

E. ARGUMENT

1. THE STATE FAILED TO PROVE AN ESSENTIAL ELEMENT OF BURGLARY IN THE FIRST DEGREE.

a. Due Process requires the State to prove each element of an offense beyond a reasonable doubt.

The Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction “except upon proof beyond a reasonable doubt of every fact necessary to constitute the

crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). “*Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.” *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 2787, 61 L. Ed. 2d 560 (1979).

The purpose of the sufficiency inquiry is to ensure the fact finder rationally applies the constitutional standard required by due process, which allows for conviction of a criminal offense only upon proof beyond a reasonable doubt. *State v. Phuong*, 174 Wn.App. 494, 502, 299 P.3d 37 (2013). “In other words, the *Jackson* standard is designed to ensure that the defendant’s due process right in the trial court was properly observed.” *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310, 314 (2014).

b. Burglary in the first degree requires proof of unlawful entry

Entering or remaining unlawfully in a building is an essential element of burglary in the first degree. RCW 9A.52.020(1); *State v. Miller*, 90 Wn.App. 720, 725, 954 P.2d 925, 928 (1998). Entry is

unlawful if made without invitation, license, or privilege. *State v. Gohl*, 109 Wn.App. 817, 823, 37 P.3d 293, 296 (2001). Unlawful remaining occurs when (1) a person has lawfully entered a building pursuant to invitation, license or privilege; (2) the invitation, license or privilege is expressly or impliedly limited; (3) the person's conduct violates such limits; and (4) the person's conduct is accompanied by intent to commit a crime in the building. *State v. Thomson*, 71 Wn.App. 634, 640-41, 861 P.2d 492 (1993).

Not every crime which occurs within a building qualifies as a burglary. *State v. Wilson*, 136 Wn.App. 596, 604, 150 P.3d 144 (2007). Evidence establishing a person enters with the intent to commit a crime is insufficient to establish unlawful entry or unlawful remaining. *State v. Collins*, 110 Wn.2d 253, 255, 751 P.2d 837 (1988); *Wilson*, 135 Wn.App at 604. Instead, it is essential for the State to prove either an unlawful entry or unlawful remaining. *State v. Cantu*, 156 Wn.2d 819, 829, 132 P.3d 725 (2006), *as amended* (May 26, 2006). The State presents insufficient evidence of burglary where it fails to establish proof of this essential element. *Thomson*, 71 Wn.App at 640-41.

c. *The assailants were invited into the home and did not exceed the scope of the invitation.*

The uncontested evidence at trial established Ms. Kona and Mr. Williams lived in the same house as roommates. RP 53. No evidence was introduced at trial that Mr. Williams slept in a part of the house Ms. Kona did not have access to. When Ms. Kona discovered Mr. Williams had won a large amount of money, she invited the assailants to her home. RP 198, 268. Ms. Kona was present when the assailants came to the house and she let them in. RP 198, 271. Ms. Kona was present in the home during and after the robbery occurred. RP 202.

There was no evidence presented Mr. Williams lived in a part of the house Ms. Kona did not have access to or that any express limitations were placed upon her ability to enter or allow guests to enter the room where he was sleeping. No evidence was introduced to suggest Ms. Kona lacked the ability to invite persons into any part of the house.

While substantial evidence was presented the assailants intended to commit a crime within a building, this is insufficient to prove unlawful entry or unlawful remaining. *Wilson*, 136 Wn.App. at 604. Because the assailants were expressly invited into the building and there were no apparent restrictions upon that entry, the State failed to

prove the essential element of unlawful entry or unlawful remaining.

Id. This Court should order dismissal of this count.

2. TULALIP TRIBAL COURT DID NOT HAVE JURISDICTION TO AUTHORIZE A SEARCH WARRANT OF MR. JOHNSON’S PHONE RECORDS.

Tribal court jurisdiction is limited to its inherent, sovereign authority to regulate its own tribal members, and to the additional authority statutorily granted to it by Congress. Because Congress has not granted criminal jurisdiction over non-Indians to tribal courts, the Tulalip Tribal Court lacked jurisdiction and authority to issue a warrant for Mr. Johnson’s phone records.

a. Tulalip Tribal Court lacked the authority to issue a warrant authorizing an invasion of Mr. Johnson’s privacy.

Warrants issued without authority of law are inherently void and cannot authorize a search. *State v. Clark*, 178 Wn.2d 19, 24, 208 P.3d 590 (2013) (citing *Bosteder v. City of Renton*, 155 Wn.2d 18, 29, 117 P.3d 316 (2005)), *superseded by statute on other grounds*, *Wright v. Terrell*, 162 Wn.2d 192, 170 P.3d 570 (2007)). Searches conducted without authorization by warrant generally violate the Fourth Amendment. *Clark*, 178 Wn.2d at 24, (citing *State v. Garcia-Salgado*, 170 Wn.2d 176, 184, 240 P.3d 153 (2010)). Article I, Section 7 of

Washington's constitution requires that no person shall be disturbed in his private affairs without authority of law. *State v. Hinton*, 179 Wn.2d 862, 868, 319 P.3d 9 (2014). Citizens have a privacy interest in their phone records protected by Washington's constitution. Const. art. I, §7; *State v. Gunwall*, 106 Wn.2d 54, 68, 720 P.2d 808 (1986). The authority of law required to satisfy Washington's constitution is a valid warrant or an exception to the warrant requirement. *Hinton*, 179 Wn.2d at 868-69; Const. art. I, §7.

A court without jurisdiction does not have the authority necessary to authorize a search. *See Clark*, 178 Wn.2d at 24. Tribal courts lack criminal jurisdiction over non-members. *Nevada v. Hicks*, 533 U.S. 353, 358, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001) (citing *Montana v. United States*, 450 U.S. 544, 565, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), citing *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1972)), *see also* 25 USC §1304 (granting limited criminal jurisdiction over non-Indians to tribal courts). The Tulalip Tribal Code does not purport to extend the jurisdiction of its court outside the bounds of federal law. Tulalip Tribal Code 2.05.020(1), *see also* 25 USC §1301(2) (granting tribal courts criminal jurisdiction over all Indians).

b. Mr. Johnson is a non-Indian not subject to the jurisdiction of Tulalip Tribal Court.

Mr. Johnson was the named subject of the search warrant issued by the Tulalip Tribal Court. CP 329. While the search warrant included an affidavit detailing Det. Sallee's investigation, it does not address whether Mr. Johnson is a tribal member. CP 330-31. The fact this matter was tried in Washington's court clearly establishes he is not.¹

Federal law does not grant tribal courts criminal jurisdiction over non-Indians. Mr. Johnson is not an Indian. Therefore, Tulalip Tribal Court lacked jurisdiction to authorize a warrant invading his private affairs. 25 USC §1301(2). Because the tribal court could not authorize the warrant, it was inherently void and could not be used to authorize the search of the phone records.

c. Because Tulalip Tribal Court lacked jurisdiction to adjudicate Mr. Johnson's right to privacy and right to be free from unreasonable searches and seizures, the cellphone records must be suppressed.

The remedy for an unconstitutional search is the exclusion of the illegally obtained evidence. *Clark*, 178 Wn.2d at 24, (citing *State v. Eserjose*, 171 Wn.2d 907, 913, n.5, 259 P3d 172 (2011)). Because the

¹ Had Mr. Johnson been a tribal member like Ms. Kona, he would have been tried in tribal court or by the federal government. 25 USC §1301(2). 18 USC §1153(a) gives the federal government exclusive jurisdiction over robbery by Indians in Indian Country.

warrant was inherently void, the evidence from the phone records must be suppressed. *See e.g., State v. Winterstein*, 167 Wn.2d 620, 624, 220 P.3d 1226, 1227 (2009) (inevitable discovery rule incompatible with article 1, section 7 of the Washington constitution).

d. The error was not harmless.

The State introduced the phone records seized with the unconstitutional warrant at trial, through the testimony of Sprint's records custodian, Desiree Hannen. RP 249-259. The records introduced included the time and duration of calls and text messages to Ms. Kona, who had confessed to robbing Mr. Williams and included cell tower information. RP 257. These records tied Mr. Johnson's phone to a woman who had helped to rob Mr. Williams and to the time and place where the crime occurred. Tying a phone that was called immediately after the robbery by one of the assailants not harmless.

3. THE STATE INTRODUCED STATEMENTS MADE ON A FACEBOOK PAGE ALLEGED TO HAVE BEEN USED BY MR. JOHNSON WITHOUT PROPER AUTHENTICATION.

As online communication replaces more traditional forms, courts are forced to grapple with applying traditional rules of authentication to modern technology. The ease in which electronic communication may be created through falsehood or fraud requires

courts to carefully review authorship prior to admitting an electronic message.

a. Authentication is required to prevent fraud and to assure the evidence is what it purports to be.

“Authentication is a threshold requirement designed to assure that evidence is what it purports to be.” *State v. Payne*, 117 Wn. App. 99, 106, 69 P.3d 889 (2003). In order to satisfy the requirements for authentication under ER 901, the State must introduce sufficient proof to permit a reasonable fact-finder to find in favor of authenticity or identification. *Id.* Thus, the evidence must support a finding that the evidence in question is what the proponent claims it to be. *Id.* A court’s admission of evidence is reviewed for abuse of discretion. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

While ER 901 does not address social media, it does examine email messages, which is a similar form of electronic communication. ER 901(b) (10). For email messages, it requires:

Testimony by a person with knowledge that (i) the e-mail purports to be authored or created by the particular sender or the sender’s agent; (ii) the e-mail purports to be sent from an e-mail address associated with the particular sender or the sender’s agent; and (iii) the appearance, contents, substance, internal patterns, or other distinctive characteristics of the e-mail, taken in conjunction with the circumstances, are sufficient to support a finding that the e-mail in question is what the proponent claims.

ER 901 (b) (10).

Because social media and electronic messaging are relatively new forms of communication, few courts have examined how they should be authenticated. *See e.g., In re Detention of H.N.*, 188 Wn.App. 744, 751, 355 P.3d 294 (2015). However, electronic communications are in their essence documents and should be subject to the same requirements for authenticity as non-electronic documents. Documents may be authenticated by direct proof, such as the testimony of a witness who saw the author sign the document, acknowledgment of execution by the signer, admission of authenticity by an adverse party, or proof that the document or its signature is in the purported author's handwriting. *See Com. v. Koch*, 2011 PA Super 201, 39 A.3d 996, 1004 (2011) (*citing* McCormick on Evidence, §§ 219–221 (E. Cleary 2d Ed.1972)).

Courts have imposed a heavier burden of authentication on messaging and social network postings because of the increased dangers of falsehood and fraud. Judge Alan Pendleton, *Admissibility of Electronic Evidence A New Evidentiary Frontier*, Bench & B. Minn., October 2013, at 14, 16. In fact, courts have been wary of allowing social network messages to be entered in to evidence, recognizing the

potential for access by hackers. *See State v. Eleck*, 130 Conn. App. 632, 638-39, 23 A.3d 818, 822 (2011) *aff'd on other grounds*, 314 Conn. 123, 100 A.3d 817 (2014) (The need for authentication arises because an electronic communication, such as a Facebook message, an e-mail or a cell phone text message, could be generated by someone other than the named sender). Proving only that a message came from a particular account, without further authenticating evidence, is inadequate proof of authorship. *See, e.g., Commonwealth v. Williams*, 456 Mass. 857, 869, 926 N.E.2d 1162 (2010) (admission of message was error where proponent advanced no circumstantial evidence as to security of page or purported author's exclusive access).

Maryland has suggested that authentication may be perfected when the proponent of a document is able to search the device owned by the purported author for history and stored documents or by seeking authenticating information from the commercial host of the e-mail, cell phone messaging or social networking account. *Griffin v. State*, 419 Md. 343, 363–64, 19 A.3d 415 (2011). New York has found messages to be authenticated where the police retrieved the records from the victim's hard drive and had an employee of the company which owned the messaging service verify the defendant had created the sending

account. *People v. Clevestine*, 68 A.D.3d 1448, 1450–51, 891 N.Y.S.2d 511 (2009) *appeal denied*, 14 N.Y.3d 799, 899 N.Y.S.2d 133, 925 N.E.2d 937 (2010).

In other cases in which a message has been held to be authenticated, the identifying characteristics have been distinctive of the purported author and corroborated by other events or with forensic computer evidence. *See, e.g., State v. John L.*, 85 Conn. App. 291, 298–302, 856 A.2d 1032 (2004); *see also United States v. Siddiqui*, 235 F.3d 1318, 1322–23 (11th Cir.2000), *cert. denied*, 533 U.S. 940, 121 S.Ct. 2573, 150 L.Ed.2d 737 (2001) (e-mails authenticated not only by defendant’s e-mail address but also by inclusion of factual details known to defendant that were corroborated by telephone conversations); *United States v. Tank*, 200 F.3d 627, 630–31 (9th Cir. 2000) (author of chat room message identified when he showed up at arranged meeting); *United States v. Safavian*, 435 F. Supp.2d 36, 40 (D.D.C.2006) (e-mail messages authenticated by distinctive content including discussions of various identifiable personal and professional matters); *Dickens v. State*, 175 Md.App. 231, 237–41, 927 A.2d 32 (2007) (threatening text messages received by victim on cell phone contained details few people would know and were sent from phone in

defendant's possession at the time); *State v. Taylor*, 178 N.C.App. 395, 412–15, 632 S.E.2d 218 (2006) (text messages authenticated by expert testimony about logistics for text message receipt and storage and messages contained distinctive content, including description of car victim was driving); *In re F.P.*, 2005 PA Super 220, 878 A.2d 91, 93-95 (2005) (instant electronic messages authenticated by distinctive content including author's reference to self by name, reference to surrounding circumstances and threats contained in messages that were corroborated by subsequent actions); *Massimo v. State*, 144 S.W.3d 210, 215–17 (Tex.App.2004) (e-mails authenticated where e-mails discussed things only victim, defendant, and few others knew and written in way defendant would communicate). *Compare Griffin*, 419 Md. at 347–48 (admission of MySpace pages was reversible error where proponent advanced no circumstantial evidence of authorship).

For electronic communication like text messaging, Washington has followed the heightened requirements for authentication. *See State v. Bradford*, 175 Wn. App. 912, 929-30, 308 P.3d 736 (2013). In *Bradford*, the court found sufficient authentication only where the witnesses testified they had received the text messages and where the State established sufficient corroborating evidence to connect the

defendant to the messages, which included corroboration of the content and the ability of the defendant to send the text messages. *Id.* In *In Re Det. of H.N.*, the court acknowledged the significance of the sender's admission that the text messages had been sent by her, the identifying information in the text message, the content of the text messages and that the text messages were consistent with the time line of certain events in H.N.'s life. *H.N.*, 188 Wn.App. at 758.²

b. The State failed to authenticate the Facebook posts offered against Mr. Johnson.

After searching Tashina Kona's phone records, Det. Sallee discovered she had sent text messages to two phone numbers immediately after the robbery. RP 137, 139. Det. Sallee testified he conducted an online search on one of these numbers and was directed to a Facebook page titled "Ryan Johnson." RP 140. He did not preserve these results. RP 168. The State did not attempt to subpoena Facebook for ownership records for the page or conduct any other type of investigation to determine ownership. RP 141.

² The only other case to address electronic communication in Washington appears to be *State v. Young*, 192 Wn. App. 850, 369 P.3d 205, 209 (2016), where the trial court was found to have not abused its discretion in finding text messages were authenticated.

Mr. Johnson objected to the authentication of the Facebook page. RP 141. Mr. Johnson argued that creating a false persona online is easy, and can be created with only a little information about the subject. RP 141. Additionally, “Ryan Johnson” is an extremely common name which is likely to be associated with many Facebook profiles. The State argued it had met its prima facie burden for authentication. RP 143.

The court found the information the State had provided to authenticate the Facebook page “doesn’t necessarily show that it’s Mr. Johnson who posted any of the information that may be found on his page.” RP 144. The court excluded the evidence “for the purpose of showing that this is information that Mr. Johnson posted to his Facebook page.” RP 144. The court did not strike the testimony the jury had already heard regarding pictures of Mr. Johnson seen on the Facebook page or of the vehicle alleged to have been used in the robbery, which had been posted to the contested Facebook page. RP 144.

c. The court erred in allowing testimony regarding the ownership of the Facebook page.

Authentication of digital media requires more than testimony from a police officer that he looked at a page and saw a person’s

photograph or other personal information on it. At a minimum, there should be corroboration from a witness familiar with the Facebook page who can testify regarding ownership. *See, e.g., Bradford*, 175 Wn. App. at 929-30. Additionally, a page can be authenticated through statements made by the owner of the page, which are corroborated by real time events. *See H.N.*, 188 Wn.App. at 758.

Here, the corroboration of the Facebook page is insufficient. The court erred in allowing testimony regarding the ownership of the page and photographs found on the page, including one of a red truck, which witnesses alleged was similar to the one used in the robbery. RP

d. The error was not harmless.

The error in allowing testimony regarding the Facebook page was not harmless. This testimony tied Mr. Johnson to the phone number used by one of the assailants immediately after the robbery. RP 139. It also tied Mr. Johnson to the truck which witnesses said they saw involved in the robbery. RP 269. The evidence of a truck which was similar to the one used in the robbery was highly incriminating and a key factor tying Mr. Johnson to the robbery.

Mr. Johnson was only identified as an assailant by Billy Arnold, who was an incentivized witness, having been offered a plea bargain

which would reduce his potential sentence by approximately five years in exchange for his testimony. RP 272, 289. The other witnesses who had knowledge of the robbery could not identify Mr. Johnson as having been involved in the robbery. RP 61, 199, 317. Testimony tying Mr. Johnson to the phone number used by one of the assailants was a critical connection, because Ms. Kona admitted she had called two numbers on the night of the robbery, although she could not recall the number which did not belong to Mr. Arnold. RP 203.

Because the error in allowing the jury to hear the testimony regarding the contents of the Facebook page was not harmless, remand for a new trial is required.

4. THE STATE INTRODUCED STATEMENTS MADE IN A LEXISNEXIS DATABASE WITHOUT PROPER AUTHENTICATION.

- a. Data base evidence is only admissible upon a showing that the process produces an accurate result.*

ER 901(9) provides for authentication of information produced from a data base. Evidence “describing a process or system used to produce a result” is admissible upon a “showing that the process or system produces an accurate result.” ER 901(9). The proponent of proffered evidence must make a prima facie showing that the evidence

is authentic and that it is what it purports to be. *Rice v. Offshore Systems, Inc.*, 167 Wn.App. 77, 86, 272 P.3d 865 (2012), *review denied*, 174 Wn.2d 1016, 281 P.3d 687.

b. The State failed to establish the LexisNexis search was capable of producing an accurate result.

The State relied upon Det. Sallee to authenticate the results of his LexisNexis search. The detective stated LexisNexis is a search engine tool to locate people. RP 146. Det. Sallee stated he had only been using the data base for a few months. RP 145. He did not know who had access to the data base, but believed that only subscribers who were in law enforcement could use it. RP 146. The detective did not know what process LexisNexis used to collect the data or how a name and phone number ended up in the data base. RP 147. The detective also did not conduct any independent investigation to determine the accuracy of the results he received in this case. RP 147. Additionally, the detective did not preserve these searches for review and was only able to testify as to the results of his searches by memory. He stated he had created “screen shots” of his results, but lost them. RP 168.

The detective also testified the telephone was connected to an AT&T account. RP 186. Mr. Johnson’s name was not actually

registered to the telephone. RP 186. Instead, it was registered to TracFone. RP 186.

Mr. Johnson objected to the introduction of the LexisNexis search results for foundational reasons. RP 148. The court allowed the detective to testify regarding the results of his search, finding that the LexisNexis information could be introduced to show a link between Mr. Johnson and the investigation the detective had conducted. RP 150-51.

The LexisNexis results were offered for the truth of the matter asserted. ER 801(c). They were offered to establish a link between the phone number called by Ms. Kona and Mr. Johnson and are relevant for no other reason. RP 396. Because the State failed to properly authenticate the records, their admission was in error.

c. The error was not harmless.

The failure to properly authenticate the LexisNexis search results was not harmless. These records were used to establish Mr. Johnson's connection to the phone number which Ms. Kona had called immediately after the robbery. This connection was critical to the State's case, as the only eyewitness testimony which established Mr. Johnson participated in the robbery came from an incentivized witness,

who had negotiated a plea bargain which would reduce his sentence by approximately five years. RP 272, 289.³

**5. DOUBLE JEOPARDY PRINCIPLES REQUIRED
DISMISSAL OF THE ASSAULT IN THE SECOND
DEGREE CONVICTION WHEN MR. JOHNSON WAS
SENTENCED FOR ROBBERY IN THE FIRST
DEGREE.**

Merger is required for Mr. Johnson's convictions for robbery in the first degree and assault in the second degree. The trial court's error in punishing Mr. Johnson multiple times for the same offense, by sentencing Mr. Johnson on both the robbery in the first degree and assault in the second degree charges, requires resentencing.

a. Double jeopardy prohibits multiple punishments for the same offense.

The state and federal constitutions prohibit multiple punishments for the same offense. *State v. Kier*, 164 Wn.2d 798, 803, 194 P.3d 212, 214 (2008); *see also State v. Vladovic*, 99 Wn.2d 413, 422, 662 P.2d 853 (1983); *Albernaz v. United States*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981); U.S. Const. amend. V; Const. art. I, § 9. While the State may bring multiple charges arising from the same

³ In 15% of wrongful conviction cases overturned through DNA testing, statements from people with incentives to testify were critical evidence used to convict an innocent person. The Innocence Project, *Incentivized Informants*, found at <http://www.innocenceproject.org/causes/incentivized-informants/>.

criminal conduct in a single proceeding, the merger doctrine requires dismissal of one of the charges after trial. *State v. Freeman*, 153 Wn.2d 765, 778, 108 P.3d 753 (2005).

The question is generally resolved in Washington by resorting to the “same evidence test,” which requires the court to determine if the two offenses are the “same in fact” and the “same in law.” *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). Offenses are the same in fact if they are proved by the same evidence. *In re Fletcher*, 113 Wn.2d 42, 47–48, 776 P.2d 114 (1989). They are the same in law if proof of one crime would always prove the other. *Calle*, 125 Wn.2d at 779.

b. An assault in the second degree committed in furtherance of a robbery in the first degree merges for sentencing.

Robbery in the first degree and assault in the second degree frequently satisfy the “same evidence test.” A person is guilty of robbery in the first degree if, during the commission of a robbery or in the immediate flight therefrom, they are armed with a deadly weapon, display what appears to be a firearm or other deadly weapon, or inflicts bodily injury. RCW 9A.56.200. The definition of robbery includes violence immediately following the taking. *State v. Troung*, 168

Wn.App. 529, 535, 277 P.3d 74, *review denied*, 175 Wn.2d 102, 290 P.3d 994 (2012); *see also State v. Manchester*, 57 Wn.App. 765, 770, 790 P.2d 217 (1990) (force or threat of force need not precisely coincide with the taking).

Assault in the second degree includes an assault with a deadly weapon. RCW 9A.36.021(1)(e). A robbery in the second degree may become a robbery in the first degree charge where there is proof of assault in the second degree involving use of a deadly weapon.

Freeman, 153 Wn.2d at 778.

Under the merger rule, Washington courts have frequently found that an assault committed in the furtherance of a robbery merges with the robbery. *In re Pers. Restraint of Francis*, 170 Wn.2d 517, 527, 242 P.3d 866 (2010); *see also Kier*, 164 Wn.2d at 805; *Freeman*, 153 Wn.2d at 778. These courts have held that assault in the second degree may not be punished separately from the first degree robbery where the assault facilitates the robbery. *See Freeman*, 153 Wn.2d at 778; *see also Francis*, 170 Wn.2d at 527; *Kier*, 164 Wn.2d at 805.

c. The assault upon Mr. Williams was committed in the furtherance of the robbery.

The robbery Mr. Johnson was convicted of was facilitated by the assault committed upon Mr. Williams. When Mr. Arnold entered Mr. William's home, he was armed with the 2 x 2 piece of wood he used to complete the robbery by assaulting Mr. Williams. RP 272. Mr. Arnold entered Mr. Williams' bedroom, rattled around until he found the wallet containing Mr. Williams' winnings, took the money and then hit Mr. Williams one time on his head before departing. RP 274-275.

When Mr. Williams testified, he focused upon the 2 x 2 stick in Mr. Arnold's hand as well. RP 62. Mr. Williams described the assault as contemporaneous with the robbery stating:

They took the money out, and then that's when they dropped my wallet on the ground. And then that's when he bashed me upside the head.

RP 62.

Immediately after the assault, the assailants fled. RP 64. No evidence was offered to suggest an assault independent of the robbery or for a different purpose ever took place.

d. Dismissal of the conviction for assault in the second degree is required.

The trial court declined to merge the robbery and assault charges. The court concluded the charges should not merge because the robbery was “long over” before the assault took place. RP 441.

The facts do not bear out this conclusion. Instead, Mr. Williams was assaulted immediately after the property was seized and well before the assailants began to flee from the scene. RP 62, 724-275.

This is also not the standard required for merger. The act of robbery contemplates the use of force in the theft *or* in the immediate flight from the robbery. RCW 9A.56.200. This assault, which occurred during the robbery *and* in the immediate flight after the robbery occurred, sits squarely within this definition. *See Troung*, 168 Wn.App. at 535. Because Mr. Johnson was sentenced twice for the same offense, vacation of the assault in the second degree conviction and resentencing is required.

6. THE COURT FAILED TO IMPOSE A SENTENCE AUTHORIZED BY THE SENTENCING REFORM ACT.

The trial court’s imposition of a consecutive sentence for assault in the second degree, when it constituted the same criminal conduct as the robbery in the first degree, failed to comport with the Sentencing

Reform Act. The court erred in its analysis of same criminal conduct, in scoring the offenses charged and in imposing a consecutive sentence for the assault charge, which is only authorized for exceptional sentences.

a. Crimes which constitute “same criminal conduct” should be scored as one crime.

“Same criminal conduct” means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94.589(1)(a). Current offenses which encompass the same criminal conduct are counted as one crime for sentencing purposes. *Id.* Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.

The test to determine whether offenses have the same criminal intent is objective and examines whether intent changes from one offense to the next. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987). “Intent, in this context is not the particular mens rea element of the particular crime, but rather is the offender’s objective criminal purpose in committing the crime.” *State v. Adame*, 56 Wn.App. 803, 811, 785 P.2d 1144, *review denied*, 114 Wn.2d 1030, 793 P.2d 976 (1990); *see also State v. Kloepper*, 179 Wn.App. 343, 356–57, 317 P.3d 1088, *review denied*, 180 Wn.2d 1017, 327 P.3d 55

(2014); *State v. Davis*, 174 Wn.App. 623, 642, 300 P.3d 465, review denied, 178 Wn.2d 1012, 311 P.3d 26 (2013).

In determining whether multiple crimes constitute the same criminal conduct, courts consider “how intimately related the crimes are,” “whether, between the crimes charged, there was any substantial change in the nature of the criminal objective,” and “whether one crime furthered the other.” *Phuong*, 174 Wn.App. at 546–47 (quoting *State v. Burns*, 114 Wn.2d 314, 318, 788 P.2d 531 (1990)).

b. Mr. Johnson’s convictions constitute the same criminal conduct.

The crimes Mr. Johnson was convicted of constitute the same criminal conduct. While the trial court was authorized to apply the anti-merger rule to punish the burglary separately, no such rule exists which authorized the court to impose separate sentences on the robbery and the assault charges. As a result, this Court must remand this matter for resentencing.

The robbery and assault constitute the same criminal conduct. When Mr. Arnold picked up the 2 x 2 stick, he did so because he intended to use it to rob Mr. Williams. RP 272. When the assailants entered Mr. Williams’ bedroom, Mr. Arnold was armed with the 2 x 2 stick, which he used to threaten and assault Mr. Williams. RP 274-275.

Mr. Williams was assaulted moments after the assailants took his wallet, while they were still in the process of robbing Mr. Williams and before they had even begun to flee. RP 62, 64. The assault on Mr. Williams was not out of some other malice towards him, but to complete the robbery.

c. Consecutive sentences for acts which constitute same criminal conduct require an exceptional sentence finding.

For crimes which arise out of the same course of conduct, consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. RCW 9.94A.589 (1)(a). The court may only impose a sentence outside the standard sentence range where it finds that there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.353. A jury is generally required for exceptional sentences, with the exception of sentences which are based upon criminal history. *Id.*; *see also Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

d. There are insufficient findings to support an exceptional sentence.

The court found the robbery and assault charges did not constitute the same criminal conduct. RP 441. Because the robbery and assault did not merge, the court determined the sentence range for the

assault charge calculated an offender score of zero, with the sentence to run consecutively to the sentence for the robbery. RP 443; CP 14.

This procedure is not authorized by statute. While the sentence the court imposed is similar to what might be imposed for a serious violent offense, no such procedure exists for the offenses Mr. Johnson was convicted of. *See* RCW 9.94A.353(b); RCW 9.94A.030(46).

e. Mr. Johnson is entitled to a new sentencing hearing.

This court should find the robbery and assault charges merge and that the imposition of sentences for both charges constitutes a double jeopardy violation. In addition, the procedure the court followed in imposing consecutive sentences for the robbery and assault violates RCW 9.94.589(1)(a). Remand is required to correct this sentencing error.

F. CONCLUSION

The failure of the State to establish the essential element of unlawful entry or unlawfully remaining in a building requires dismissal of Mr. Johnson's burglary conviction.

Because the Tulalip trial court lacked the jurisdiction to issue a search warrant against Mr. Johnson, evidence gathered from the search warrant should have been suppressed. The failure of the court to

suppress the evidence requires reversal of Mr. Johnson's convictions. The failure of the State to properly authenticate evidence introduced at trial regarding social media posts and data base searches also requires reversal.

Finally, a new sentencing hearing is required because of the Court's failure to merge Mr. Johnson's convictions for robbery in the first degree and assault in the second degree and because these offenses constitute the same course of conduct.

DATED this 1st day of June 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)
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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 74262-1-I
)	
)	
RYAN JOHNSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF JULY, 2016, I CAUSED THE ORIGINAL **OPENING 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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