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COURT OF APPEALS  
DIVISION II

NO. 37591-5

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STATE OF WASHINGTON  
BY \_\_\_\_\_

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

COREY JEROME IRISH, APPELLANT

Appeal from the Superior Court of Pierce County  
The Honorable Kitty-Ann Van Doorninck, Judge

No. 07-1-02193-2

**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should the unlawful possession of a controlled substance charge be vacated when unlawful possession of a controlled substance is illegal regardless of how it was obtained?
2. Was there sufficient evidence for a trier of fact to find defendant guilty of the assault in the second degree counts against Ms. O'Dell and Mr. Staten when there was evidence defendant was an accomplice?
3. Should this court remand for resentencing on counts V and VI when the standard ranges on the judgment and sentence are incorrect?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged defendant, Corey Irish, on April 24, 2007, with one count of robbery in the first degree, three counts of assault in the second degree, one count of unlawful possession of a controlled substance with intent to deliver, one count of unlawful possession of a firearm in the first degree and one count of possession of a stolen firearm. CP 1-4. The robbery, assault and controlled substance charges all were charged with a firearm enhancement. CP 1-4. The State amended the charges on March 10, 2008, to dismiss the possession of a stolen firearm charge and reduce the possession charge to attempted unlawful possession of a controlled substance with intent to deliver. CP 68-71, RP 3-4.

Trial commenced on March 10, 2008, in front of the Honorable Kitty-Ann van Doorninck. RP 4. On March 17, 2008, the jury found defendant guilty of all six counts as charged, as well as firearm enhancements on counts one through five. RP 184-186. CP 168-178.

Sentencing was held on April 4, 2008. 4/4/08 RP 3. The parties agreed that the assault in count three (against victim Garibay) merged with the robbery in count one. 4/4/08 RP 6. The court found that there was no evidence of intent to deliver, but found there was sufficient evidence for an unlawful possession charge and changed the conviction to the latter charge. 4/4/08 RP 12. Defendant's offender score was determined to be a 9+ on the robbery and two assault counts. 4/4/08 RP 19, CP 207-219. His offender score was determined to be an 8 on the unlawful possession of a controlled substance charge and the unlawful possession of a firearm. 4/4/08 RP 19, 22, CP 207-219. Defendant was sentenced to the high end of 171 months, with all the counts to run concurrent, plus 150 months of flat time for the firearm enhancements, for a total of 231 months. 4/4/08 RP 34, CP 207-219. Defendant filed this timely appeal. CP 220-221 <sup>1</sup>

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<sup>1</sup> Defendant is not appealing his convictions for robbery or unlawful possession of a firearm.

## 2. Facts

On April 23, 2007, Jeanelle O'Dell, Walter "Mike" Staten and Daniel Garibay were working the graveyard shift at the Walgreen's on 6<sup>th</sup> avenue. RP 26-27, 79-80<sup>2</sup>. Around 3am, Ms. O'Dell was in the stockroom, and when she walked out, she saw Mr. Staten coming down the aisle with an unknown man. RP 28. The unknown man had come in to the store with defendant. RP 81, Ex. 1. The unknown man pulled out a gun and told Mr. Staten not to panic. RP 81. He asked Mr. Staten how many people were in the store and where they were. RP 81. The man kept the gun to Mr. Staten's back and directed him to the stockroom. RP 82.

When Ms. O'Dell came into contact with them, the unknown man said he was sorry he had to do this, showed her a gun and told both her and Mr. Staten to go into the stockroom. RP 29, 83. The man told them to kneel down, put their heads down and not to look at him. RP 31, 83. When Ms. O'Dell looked at him, the man cocked the gun and told her he wasn't kidding. RP 83. He also told them to be quiet, and again told them he was sorry he had to do this. RP 31, 83.

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<sup>2</sup> The verbatim report of proceeding will be referred to as "RP" for the volumes that are paginated sequentially. The only volume that is not, 4/4/08, will be referred to as "4/4/08 RP".

After several minutes, the man told them to get up and follow him. RP 32, 84. He took them to the pharmacy, had them sit down and sat between them. RP 32. He got up and asked defendant if he was done yet. RP 32. Defendant said he would be done in a minute. RP 32. The unknown man came back, said he was really sorry and told them to keep their heads down. RP 32. The unknown man had the gun on Ms. O'Dell and Mr. Staten, and took them back to the stockroom. RP 34. Again, he made them sit down with their heads down and kept apologizing. RP 34.

Mr. Garibay was behind the pharmacy counter when defendant and the other man walked in. Defendant jumped over the counter and threatened Mr. Garibay in order to get him to open the cases and give him certain drugs. RP 98. Defendant called out the names of specific drugs including Percocet, Oxycodone, Vicodin, Xanax, Valium, and Viagra. RP 99-102. Defendant had two white garbage bags with him, and once he filled those with drugs, he asked Mr. Garibay for a third bag. RP 101-102. Defendant told Mr. Garibay to stop looking at him. RP 103. Eventually, defendant had the other man take Mr. Garibay to the stockroom where the other two employees were. RP 104.

Mr. Garibay was able to activate the silent alarm. RP 105. Officers arrived soon after the alarm was activated. RP 41. Defendant was observed by officers exiting the store. RP 43-44. Defendant was carrying large white garbage bags with him. RP 44, 63, 115. When he

saw the officers, defendant yelled, "Oh fuck," dropped the bags and ran back into the store. RP 45, 64, 116. Defendant was apprehended after running into an officer in one of the store aisles. RP 48. Defendant was wearing latex gloves. RP 117. A firearm was located on top of the end of the aisle where defendant was apprehended. RP 51, 68, 118, 125.

C. ARGUMENT.

1. THE UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE COUNT SHOULD NOT BE VACATED AS THE UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE IS ILLEGAL REGARDLESS OF HOW THE SUBSTANCE WAS OBTAINED.

Case law indicates that a person cannot be convicted of taking and possessing the same stolen property. See *State v. Melick*, 131 Wn. App. 835, 129 P.3d 816 (2006), *State v. Hancock*, 44 Wn. App. 297, 721, P.2d 1006 (1986). However, the purpose behind this holding was that theft and possession of stolen property were a violation of the same statute. In *Milanovich v. United States*, 365 U.S. 551, 552, 81 S. Ct. 728, 5 L.Ed.2d 773 (1961), the defendant was convicted of stealing several thousands of dollars in currency from a naval base, and convicted of receiving and concealing the same property, which were subsections of the same statute. The Court held that when the legislature passed the receiving part of the statute, "Congress was trying to reach a new group of wrongdoers, not to

multiply the offense of the . . . robbers themselves." *Milanovich*, 365 U.S. at 554 (quoting *Heflin v. United States*, 358 U.S. 415, 420, 79 S. Ct. 451, 3 L.Ed.2d 407 (1959)). Similarly, in *United States v. Gaddis*, 424 U.S. 544, 547, 96 S. Ct. 1023, 47 L.Ed.2d 222 (1976), the Court held that a person convicted of robbing a bank cannot also be convicted of receiving or possessing the proceeds of that robbery because both of the crimes were subsections of the same statute. Washington case law relies on these holdings and states "that one cannot be both the principal thief and the receiver of stolen goods." *Hancock*, 44 Wn. App. at 301.

However, the facts of the instant case are distinguishable.

Defendant took three bags of prescription drugs from the Walgreen's pharmacy. RP 43-44. Defendant made it out of the store with the three bags of prescription drugs that he had not obtained through a prescription. RP 44, 63, 115. Unlawful possession of a controlled substance is illegal regardless of how the drugs were obtained. RCW 69.50.4013 states,

It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

The substance does not have to be obtained by theft to be illegal. Whether or not defendant had obtained the drugs by theft, the drugs that defendant possessed were illegal for him to have. By contrast, possession of stolen property contemplates that possession of the items in question is only

illegal because they were obtained by theft. *See* RCW 9A.56.140.

Further, the crimes of theft, robbery and possession of stolen property are all contained under the same chapter of the RCW. *See* RCW 9A.56.

While possessing stolen goods is similar in nature to theft, possessing a controlled substance is clearly a different focus. The person who is deprived of the property is the victim in both the theft and possession of stolen property. However, the victim in an unlawful possession of controlled substance case is the State. The statutes each focus on two very different courses of conduct and the unlawful possession of drugs is punishable regardless of how the drugs were obtained. *See Hayes v. Commonwealth Ky.*, 625 S.W.2d 575, 576 (1981). These two charges are factually different and are intended to punish two very different courses of conduct. The unlawful possession of a controlled substance charge should not be vacated. This court should uphold the conviction for unlawful possession of a controlled substance.

2. THERE WAS SUFFICIENT EVIDENCE FOR A TRIER OF FACT TO FIND DEFENDANT GUILTY OF THE ASSAULT IN THE SECOND DEGREE COUNTS AGAINST MS. O'DELL AND MR. STATEN AS DEFENDANT WAS AN ACCOMPLICE.

When reviewing sufficiency of the evidence, the court must view the evidence in the light most favorable to the prosecution and determine if any rational trier of fact could find the essential elements of the crime

beyond a reasonable doubt. *State v. Rangel-Reyes*, 119 Wn. App. 494, 499, 81 P.3d 157 (2003), *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Challenging the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from the evidence. *State v. Gerber*, 28 Wn. App. 214, 217, 622 P.2d 888 (1981), *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). All reasonable inferences from the evidence must favor the State and must be interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Both circumstantial and direct evidence are equally reliable. *State v. Lubers*, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996). In the case of conflicting evidence or evidence where reasonable minds might differ, the jury is the one to weigh the evidence, determine credibility of witnesses and decide disputed questions of fact. *Theroff*, 25 Wn. App. at 593. Credibility determinations are for the trier of fact and not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Sufficient evidence was presented for the jury to find defendant guilty under accomplice liability. RCW 9A.08.020(3) addresses accomplice liability and in relevant part:

“A person is an accomplice of another person in the commission of a crime if: (a) With knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it.”

More than physical presence and knowledge of the criminal activity of another must be shown to establish a person is an accomplice. *In re Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979). Defendant must give aid in order to be considered an accomplice. Aid is defined as any assistance given by words, acts, encouragement, support or presence. *State v. Galista*, 63 Wn. App. 833, 839, 822 P.2d 303 (1992). “A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime.” *Id.* “The State need not show that the principal and accomplice share the same mental state.” *State v. Bockman*, 37 Wn. App. 474, 491, 682 P.2d 925, *review denied*, 102 Wn.2d 1002 (1984). As long as the jury is unanimous that the defendant was a participant, it is not necessary that the jury be unanimous as to whether the defendant was a principal or an accomplice where there is evidence of both manners of participation. *State v. Carothers*, 84 Wn.2d 256, 262, 525 P.2d 731 (1974), *overruled on other grounds in State v. Harris*, 102 Wn.2d 148, 685 P.2d 584 (1984), *see also, State v. Munden*, 81 Wn. App. 192, 196, 913 P.2d 421 (1996). The jury was given instructions consistent with the statute and case law. CP 118-167.

There was sufficient evidence for the jury to determine that defendant was acting as an accomplice in the assaults of both Ms. O’Dell and Ms. Staten, who were the employees in the backroom. There was evidence that defendant was more than just merely present. Defendant and his friend both walked into the store together. RP 81, Ex. 1. Both

were armed. RP 81, 125, Ex. 1. The other man went up to Mr. Staten, pulled out his gun and ordered Mr. Staten back to the stockroom, while defendant went to the pharmacist and demanded drugs. RP 81-81, 98. Rather than the two committing acts completely separate from each other, there was evidence defendant and the other man were acting together. The other man forced Ms. O'Dell and Mr. Staten to come with him while he went to the pharmacy to talk to defendant to see how much longer defendant was going to take. RP 32. Defendant was armed and arguably ready to assist.

These were not two individuals who were operating individually as evidenced by the way they came into the store, their conversations with each other, and the common plan they were executing. The other man kept apologizing for what he had to do, further indicating that this plan was not all his idea. RP 29, 32, 34, 83. Defendant was armed, and was obtaining the drugs while the other man kept the rest of the employees away. Further, both defendant and the other man repeatedly told the employees not to look at them. RP 31, 32, 83, 103. The two men were acting together and it was clear they were acting according to a common plan that was devised prior to entering the store. The jury had sufficient evidence to conclude that defendant was an accomplice in the assaults of Ms. O'Dell and Mr. Staten.

3. AS THE STANDARD RANGES FOR COUNTS V AND VI ARE LISTED INCORRECTLY ON THE JUDGMENT AND SENTENCE, THIS COURT SHOULD REMAND TO CORRECT THE STANDARD RANGE AND RESENTENCE DEFENDANT ON THOSE COUNTS.

The State concedes that the judgment and sentence entered in this case reflects an incorrect standard range for count VI, unlawful possession of a firearm in the first degree. CP 207-219. The parties were all in agreement that defendant had an offender score of eight for that charge. 4/4/08 RP 19, 22. Unlawful possession of a firearm in the first degree has a seriousness level of seven. RCW 9.94A.515. As such, defendant's range should have been 77-102 months, and he should have been sentenced to 102 months. RCW 9.94A.510.

In addition, there is an error as to the standard range on count V, unlawful possession of a controlled substance. The court reduced the attempted unlawful possession of a controlled substance with intent to deliver to unlawful possession of a controlled substance. 4/4/08 RP 12. However, it does not appear that the standard range was corrected on the judgment and sentence. CP 207-219. As defendant was also convicted of a firearm enhancement on this count, the seriousness level becomes a three. RCW 9.94A.518. As defendant's offender score is an eight, his standard range becomes 100+-120 months. RCW 9.94A.517. However,

since unlawful possession of a controlled substance is a class C felony, the maximum sentence is 5 years. RCW 9A.20.021. As such, defendant should have been sentenced to 42 months, plus 18 months for the firearm enhancement, for a total of 60 months.

This court should remand for resentencing on counts V and VI only.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm defendant's convictions below. The State also asks this court to affirm defendant's sentence with the exception of count V and VI which should be remanded for resentencing.

DATED: January 28, 2009.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1-28-09 *Theresa Kar*  
Date Signature