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STATE OF WASHINGTON
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Court of Appeals No. 38902-9-II
Thurston County No. 08-1-02090-1

STATE OF WASHINGTON,

Respondent,

vs.

TOBY ANDERSON

Appellant.

BRIEF OF APPELLANT

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P.M. 8-4-2009

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A. ASSIGNMENTS OF ERROR

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II. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION FOR ROBBERY IN THE FIRST DEGREE.

III. THE SPECIAL VERDICT MUST BE REVERSED WHERE THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT THEY MUST BE UNANIMOUS TO ANSWER "NO."

IV. THE FIREARM ENHANCEMENT CANNOT BE SUSTAINED WHERE THE STATE PRESENTED INSUFFICIENT EVIDENCE THAT AN OPERABLE FIREARM WAS USED IN THE CRIME.

V. MR. ANDERSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

VI. THE FIREARM ENHANCEMENT MUST BE REVERSED WHERE ITS IMPOSITION VIOLATES THE PROHIBITION ON DOUBLE JEOPARDY.

VII. THE COURT'S ACCOMPLICE LIABILITY INSTRUCTION RELIEVED THE STATE OF ITS BURDEN TO PROVE THAT MR. ANDERSON COMMITTED AN OVERT ACT.

VIII. MR. ANDERSON WAS DENIED HIS RIGHT TO DUE PROCESS AND HIS RIGHT TO REMAIN SILENT AT SENTENCING BY OPERATION OF THE SRA, AS AMENDED IN 2008.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED IN GIVING INSTRUCTION NUMBER 15, WHICH ALLOWED THE JURY TO

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IV. THERE WAS INSUFFICIENT EVIDENCE THAT MR. ANDERSON OR AN ACCOMPLICE WAS ARMED WITH AN OPERABLE FIREARM FOR PURPOSES OF THE SPECIAL VERDICT.¹

V. MR. ANDERSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO OBJECT TO THE ADMISSION OF EXHIBIT 25.

VI. THE IMPOSITION OF A 60 MONTH FIREARM ENHANCEMENT ON THE ROBBERY FIRST DEGREE CONVICTION VIOLATES THE PROHIBITION ON DOUBLE JEOPARDY.

VII. MR. ANDERSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY WITHDREW HIS PROPOSED INSTRUCTION OF THEFT IN THE THIRD DEGREE.

VIII. THE COURT'S ACCOMPLICE LIABILITY INSTRUCTION RELIEVED THE STATE OF ITS BURDEN

¹ The text under Issue VI has been adopted from the brief of co-counsel for Mr. Winters with permission.

TO PROVE THAT MR. ANDERSON COMMITTED AN OVERT ACT.²

IX. THE SRA, AS AMENDED IN 2008, VIOLATES THE FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND THE PRIVILEGE AGAINST SELF-INCRIMINATION BY SHIFTING THE BURDEN OF PROOF AT SENTENCING.

C. STATEMENT OF THE CASE

On November 18, 2008, Cary Swofford and Russel Molnar were living in a trailer at 17007 Old Highway 99 in Thurston County. Trial RP 216-217. On the morning of November 18 Mr. Molnar, who had been sleeping on the couch, was awakened by Ms. Swofford who was very excited. Trial RP 217. He looked outside through a surveillance camera and saw ten men in the yard running around. Trial RP 219-22. There were three cars on the property: A Geo, a Chevy truck, and a Ford Explorer. Trial RP 221. When he went to the front door, which had a glass panel, he saw one young man standing at the door. Trial RP 223-24. The man wanted to talk about his mother. Trial RP 223. Molnar testified there were two other men standing behind him, but it was not clear where these two men were actually standing since only one man was at the door. Trial RP 224. Molnar testified that there were actually only five men at his home that morning, but admitted that he believed there were ten and

² The text under this assignment of error was adopted from the brief of co-counsel for Mr. Winter with permission.

only testified there were five because the police informed him there were only five. Trial RP 239-40. The prosecutor asked Molnar if any of the men were armed, and he replied “yes,” but then said he didn’t really know if any of them were armed and had based his answer on what Ms.

Swofford had told him. Trial RP 226. Initially, Molnar told the young man he couldn’t come in to talk, but later Molnar tried to go outside to talk to them only to be stopped by Ms. Swofford, who didn’t want him to open the door. Trial RP 225-26. Molnar testified that after he initially told the young man he couldn’t come in, all of the men (which, again, he believed to number ten) became “aggressive,” and “ranting and raving” out front.

Trial RP 225. At the same time Molnar was trying to open the door to go outside, the young man on the porch also tried to open the door. Trial RP 227. At this same time two men were going through the Ford Explorer, and two men were “running back and forth,” and one man was just standing there. Trial RP 227, 244, 289, 290. Mr. Molnar couldn’t identify the two men who were running back and forth. Trial RP 244 (lines 8-10).

Later, when Mr. Molnar was taken to where these five men had been arrested by the side of the road, he could only identify three of the five men. The two he could not identify were Mr. Anderson and Mr. Baxter. Trial RP 193. When the two men were going through the Explorer the gun had not yet been pulled out. Trial RP 245.

Regarding the gun, Molnar initially testified he never saw a gun. Trial RP 226. Later, he testified that on the camera he saw one of the men holding what appeared to be a rifle. Trial RP 228. This did not scare Mr. Molnar at all, and it wasn't his idea to call 911 but Ms. Swofford's. Trial RP 229, 246. Although Molnar specifically used the word rifle, the prosecutor, without objection from any defense counsel, referred to the gun as a shotgun. Trial RP 229. Molnar reiterated that it was only after the two men went through the Explorer that he saw "somebody pull something out of the car." Trial RP 232. The prosecutor asked "Didn't you say that's when they pulled the shotgun?" Trial RP 232. Molnar replied "I wasn't sure what it was until *she verified* it what she thought it was. She was really--." Trial RP 232 (emphasis added). Not content to allow the witness to provide the testimony, the prosecutor persisted "Well, you told the police that that's when they pulled the shotgun; is that correct?" Mr. Molnar replied "That's when they pulled *something* out of the car, yeah." Trial RP 232 (emphasis added). Molnar couldn't see which person pulled this "something" out of the car because the camera was fuzzy. Trial RP 235. Later, Molnar testified that he saw what appeared to be a rifle. Trial RP 246. Molnar said it appeared to be two and a half feet long. Trial RP 276.

Prior to testifying, Swofford read Mr. Molnar's statement to the police and the transcript of the 911 call at the request of the prosecutor, and confirmed that her actual memory of the event was poor. Trial RP 376-77. Swofford testified that on the morning of November 18th she saw a little blue car arrive at her house and a bunch of men jump out of the car, and it alarmed her. Trial RP 345. One of the young men came to the door and she spoke to him, and he said he wanted to come in and talk about his mom. Trial RP 346. She only saw one man at the door. Trial RP 361. She said the young man looked like a "gangbanger," and she declined to let him in. Trial RP 348. She then went to wake up Mr. Molnar and asked him to turn their surveillance camera on. Trial RP 348. She saw two men enter the Ford Explorer, but didn't see them remove anything from it. Trial RP 349-50. At the point she saw the two men going through the Explorer she hadn't yet seen anything that appeared to be a firearm. Trial RP 381. Swofford also saw ten men that morning. Trial RP 359.

When asked if she saw a firearm, she said she didn't actually see a firearm but thought she had seen one based upon the way that the young man was standing. Trial RP 351. She reiterated several times that she didn't actually see a firearm and merely assumed she saw a firearm. Trial RP 352-53, 379, 385, 388. Swofford's testimony differed from Deputy Kempke's in that she testified she only identified one of the young men

when she did the identification drive-by. Trial RP 355. She testified the young man she identified was the one who she believed at the time to have been holding a firearm. Trial RP 355.

Molnar called 911 at Ms. Swofford's request and reported the incident. Trial RP 229. Molnar told dispatch that all ten of the men looked Mexican, that they all wore beanie caps, and they all piled into a 1966 or 1967 Impala. Trial RP 246, 248, 252-53. Responding to the 911 call Deputy Simper saw a light blue compact car heading in the opposite direction. Trial RP 90-93. He stopped the car, which was driven by defendant Rigoberto Contreras. Trial RP 94, 98. Jason Woods was in the front passenger seat, and Timothy Baxter, Toby Anderson and Brian Winter were in the back seat. RP 99-101. Deputy Simper found a CD player on the floorboard where Woods had been, but did not find a gun. Trial RP 101, 105. There were two hats in the car, one red and one black. Trial RP 155. Simper later searched along the road for a gun, and found a black 12-gauge sawed-off shotgun. Trial RP 108. The gun was unloaded and lacked a firing pin, and its trigger housing had been tampered with. Trial RP 313-14. Simper did not find a firing pin or ammunition, either in the car or along the road. Trial RP 314-16. Nor did Simper find any additional hats along the road. Trial RP 156, 164.

Another sheriff's deputy drove Swofford and Molnar by the area where the car was stopped. Trial RP 110, 162. Deputy Simper arranged each of the five men along the road, and they were each in handcuffs. Trial RP 162. Both Molnar and Swofford were in the back of Deputy Kempke's car, seated next to one another, when they identified Jason Woods as the person who had been holding what appeared to be a shotgun. Trial RP 156, 163, 190, 192. Molnar and Swofford were unable to identify Anderson and Baxter. Trial RP 193. Molnar and Swofford identified Winter and Contreras as having been at the residence, but they weren't able to say what part they played in the incident. Trial RP 194-95. Neither Molnar nor Swofford could identify any of the five defendants at trial. Trial RP 236, 355-356.

All five occupants of the car were arrested and charged. Trial RP 140. Mr. Anderson was charged with Robbery in the First Degree while armed with a firearm, Attempted Burglary in the First Degree while armed with a firearm, Unlawful Possession of a Firearm in the First Degree, Identity Theft in the Second Degree (a charge which pertained only to Mr. Anderson), and Vehicle Prowling in the Second Degree. CP 7-8. All defendants were tried together.

At trial, the State introduced into evidence the gun found at the side of the road as exhibit 25. Trial RP 310. Mr. Molnar was shown

exhibit 25 and testified it was *not* the gun he had seen. Trial RP 283, 287, 294. Ms. Swofford was never asked to identify or even look at exhibit 25. Trial RP 338-88. Although Mr. Woods admitted that exhibit 25 was a gun that he had thrown out of the front passenger car window that morning, such evidence was inadmissible against any other defendant but Mr. Woods. Trial RP 130, CP 62 (Instruction No. 4). Nevertheless, counsel for Mr. Anderson did not object to the admission of exhibit 25. Trial RP 310.

No prints were found on exhibit 25. Trial RP 310. The gun could not be test fired because it lacked a firing pin and because the trigger housing had been tampered with. Trial RP 313-14. The State's firearms expert testified that it would take an hour to put in a new firing pin, that the manufacturer likely no longer made firing pins for this gun, and that it would take weeks or months to obtain a used one. Trial RP 325, 335. He also said that the trigger was not in place, and that if a bullet was chambered it would simply fall out. Trial RP 326-30. Since he didn't attempt to repair the gun, he didn't know if it had additional problems that would prevent it from firing. Trial RP 335.

The prosecutor made the following argument during rebuttal closing argument:

Why didn't a burglary happen, I suggest, ladies and gentlemen, the answer to the question is that a burglary didn't happen because these defendants wanted to do inside that residence what they ended up doing to those premises, what they ended up doing to that Explorer. They went to that house and they were refused entry. They were strangers. They had no business being there. They wanted to talk about a mother who was slapped around? Five people? Now, why do five people show up at a residence looking for trouble, to intimidate, and in this instance, ladies and gentleman, to steal? They couldn't get in the house. They did get away. They couldn't get in the house to do what they were going to do, and they ended up getting into the Explorer and they stole what they could and got away.

They were there to steal, and they did steal. A burglary was not completed, but a robbery occurred. A vehicle prowl occurred, and given the facts that they're all convicted of serious offenses and were in possession of a firearm in that automobile, they're guilty of that count as well.

Trial RP 594.

The trial court instructed the jury on the elements of Robbery in the First Degree, found at instruction number 15:

To convict the defendant, TOBY K. ANDERSON, of the crime of robbery in the first degree, each of the following six elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about 18th day of November, 2009, the defendant, or an accomplice, unlawfully took personal property from the person or in the presence of another;

(2) That the defendant or accomplice intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's or accomplice's use or threatened use of immediate force, violence, or fear of injury to that person or to that person's property or to the person or property of another;

(4) That force or fear was used by the defendant or accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5) (a) That in the commission of these acts or in immediate flight therefrom the defendant or accomplice was armed with a deadly weapon, or

(b) That in the commission of these acts or in immediate flight therefrom the defendant or accomplice displayed what appeared to be a firearm or other deadly weapon; and

(6) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements (1), (2), (3), (4), and (6) and any of the alternative elements (5) (a) or (5) (b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (5) (a) or (5) (b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the elements (1), (2), (3), (4), (5), or (6), then it will be your duty to return a verdict of not guilty.

CP 73.

Mr. Anderson did not object to this instruction. Trial RP 446. The trial court also gave the following instruction regarding the special verdict:

You will also be given special verdict forms for the crimes charged in Counts I and II. If you find a defendant not guilty of these crimes, do not use the special verdict form. If you find a defendant guilty of these crimes, Robbery in the First Degree or Attempted Burglary in the First Degree, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict form "yes" you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."³

CP 127-28.

³ This above portion was taken from Instruction No. 63, found at CP 125-128.

Mr. Anderson originally proposed a lesser included instruction on theft in the third degree as to the robbery count. CP 22-25. For inexplicable reasons, defense counsel abandoned this request, as evidenced by the fact that the lesser included instruction was not included in the Court's Instructions to the jury and defense counsel did not object to the court's instructions or take exception to the court's failure to give any instructions. Trial RP 446.⁴

The jury returned verdicts of guilty on the charges of robbery, vehicle prowling, and the lesser-included offense of criminal impersonation in the first degree, and was found to have been armed with a firearm during the commission of the robbery. CP 130, 132, 134, 138. He was acquitted of attempted burglary in the first degree, as well as the lesser-included charge of attempted criminal trespass in the first degree, unlawful possession of a firearm in the first degree, and the primary charge of identity theft in the second degree. CP 135, 136, 137, 139.

Mr. Anderson was given a standard range sentence of 210 months in prison, 150 of which was attributable to the Robbery in the First Degree

⁴ Thurston County, like so many others, practices the frustrating and bizarre practice of discussing jury instructions (one of the most critical stages of the proceeding) off the record and in private. The court then failed to make a record of what was discussed, beyond merely asking for exceptions and objections. Appellate counsel is forced to assume that defense counsel withdrew his proposed instructions on theft third degree.

and 60 of which was attributable to the firearm enhancement. CP 145.

This timely appeal followed. CP 140.

D. ARGUMENT

I. THE TRIAL COURT ERRED IN GIVING INSTRUCTION NUMBER 15, WHICH ALLOWED THE JURY TO CONVICT MR. ANDERSON AS AN ACCOMPLICE TO A DIFFERENT CRIME (THEFT) THAN THE ONE HE WAS CHARGED WITH (ROBBERY) AND THEREBY RELIEVED THE STATE OF ITS BURDEN OF PROOF.

The history of accomplice liability jurisprudence over the last two and a half decades is somewhat tortured. In *State v. Davis*, 101 Wn.2d 654, 682 P.2d 883 (1984), The Washington Supreme Court held that the principle of accomplice liability in Washington was in for a dime, in for a dollar: “As to the substantive crime, the law has long recognized that an accomplice, having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality.” *Davis* at 658. The words “in for a dime, in for a dollar” would emanate from the mouths of countless prosecutors over the ensuing sixteen years until the Washington Supreme Court decided *State v. Roberts*, 142 Wn.2d 471, 511, 14 P.3d 713 (2000) and *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000).

The Supreme Court held in *Roberts* and *Cronin* that for accomplice liability to attach, “General knowledge of ‘the crime’ is sufficient.

Nevertheless, knowledge by the accomplice that the principal intends to commit ‘a crime’ does not impose strict liability for any and all offenses that follow. Such an interpretation is contrary to the statute’s plain language, its legislative history and supporting case law.” *Roberts* at 513.

In *In re Personal Restraint of Smith*, 117 Wn.App. 846, 856, 73 P.3d 386 (2003), Division One of the Court Appeals held that the decisions in *Roberts* and *Cronin* represented a significant change in the law of accomplice liability, despite the Supreme Court’s insistence in *Roberts* that it never endorsed “in for a dime, in for a dollar” in *Davis*, but that reviewing courts had merely misunderstood the *Davis* holding. See *Smith* at 856-57, *Roberts* at 511.

Although the defendant must have general knowledge of the specific crime, he or she need not have specific knowledge of every element of that crime. *Roberts* at 512. This means that the defendant must be aware of the type of crime involved, but not necessarily the degree of that crime. *State v. Trout*, 125 Wn.App. 403, 410, 105 P.3d 69 (2005). For example, if the principal and an accomplice intend to assault another, the accomplice will be liable for any degree of assault even if he only intended that the principal inflict no actual injury on the victim. However, “[W]hile an accomplice may be convicted of a higher degree of the general crime he sought to facilitate, he may not be convicted of a

separate crime absent specific knowledge of that general crime.” *Trout* at 410, citing *State v. King* 113 Wn.App. 243, 288, 54 P.3d 1218 (2002). The “culpability of an accomplice cannot extend beyond the crimes of which the accomplice actually has knowledge.” *Trout* at 410; *State v. Bolar*, 118 Wn.App. 490, 502, 78 P.3d 1012 (2003), *review denied* 151 Wn.2d 1027 (2004) ; *Roberts* at 511.

Applying these principles specifically to the crime of robbery, a person who agrees to aid a robbery, without knowledge of the specific degree of force the principal intends to use, can be convicted of first degree robbery if the principal uses a gun without his knowledge. *Davis* at 657-58. However, a defendant cannot be convicted of robbery as an accomplice if he intends merely that the principal commit theft. *State v. Grendahl*, 110 Wn.App. 905, 43 P.3d76 (2002); *Trout* at 410; *State v. Evans*, 154 Wn.2d 438, 453, 114 P.3d 627 (2005).

In *State v. Grendahl*, the defendant was charged with robbery in the first degree as an accomplice. The trial court gave a “To convict” instruction that mirrored the one given in Mr. Anderson’s case nearly word for word (see Instruction 15). *Grendahl* at 908. At issue in *Grendahl* was element number two in the “To convict” instruction, which read as follows: “(2) That the defendant or Richard E. Nauditt intended to commit *theft* of the property.” (Emphasis added). The Court of

Appeals held that this instruction, coupled with the accomplice instruction⁵ allowed the jury to convict Mr. Grendahl for being an accomplice to a different crime (theft) than the one with which he was charged (robbery). The court said:

Roberts is directly on point. Instruction 5 permitted the jury to convict Mr. Grendahl of robbery as an accomplice if he assisted in the unlawful taking of Ms. Lindhag's wallet, even if he or Mr. Nauditt merely intended to commit theft. Instruction 4 (the "to convict" instruction) impose accomplice liability for a crime (robbery) when the defendant's intent was to commit a different crime (theft). Instruction 4 thus impermissibly relieved the State of the burden of proving an element of the crime of robbery.

Grendahl at 911.

The Court further held that the error is presumed prejudicial and requires reversal " 'unless it affirmatively appears to be harmless.' "

Grendahl at 911, citing *State v. Stein*, 144 Wn.2d 236, 246, 27 P.3d 184 (2001). In *Grendahl*, the Court looked not only at the erroneous instruction but to the closing argument of the prosecutor, in which the prosecutor led the jury to believe that it was enough for them to conclude that Mr. Grendahl intended to commit theft only, so long as his accomplice committed the completed crime of robbery by brandishing a weapon. The Court thus concluded that the error was not harmless because "...[I]n light of the prosecutor's repeated argument that Mr.

⁵ The accomplice instruction (instruction 5) given in *Grendahl*, complied with the holding in *State v. Roberts*, supra, regarding "a crime" versus "the crime."

Grendahl was guilty of robbery if he merely intended that Mr. Nauditt commit a theft.” *Grendahl* at 911.

In *State v. Evans*, the State went further and sought to convict an accomplice of felony murder where his only intent was that the principal commit a theft. *Evans* at 449. In order to be convicted of felony murder, the State had to prove that the defendant had been an accomplice to robbery. As in *Grendahl*, the trial court in *Evans* instructed the jury that in order to find that the defendant was an accomplice to robbery it had to find that the defendant or an accomplice intended to commit theft, a crime that wasn’t charged. *Evans* at 451 and 454. In *Evans*, the prosecutor also repeatedly argued “in for a dime, in for a dollar.” *Evans* at 452. The Supreme Court reversed, stating:

Washington courts have already held that, if evidence of an uncharged crime is before the jury and the State argues that the defendant’s participation in the uncharged crime triggered liability for the crime charged, there may be actual and substantial prejudice.

Evans at 454.⁶

The prosecutor’s closing argument is a “...key consideration in determining whether an erroneous accomplice liability instruction prejudiced a defendant.” *In re the Personal Restraint of Sims*, 118

⁶ The *Evans* Court cited with approval *Grendahl*’s holding that it is reversible error to instruct the jury it could find defendant guilty as an accomplice to robbery on the basis of intent to assist a theft. *Evans* at 454.

Wn.App. 471, 479, 73 P.3d 398 (2003); *State v. Stovall*, 115 Wn.App. 650, 657, 63 P.3d 192 (2003). The closing argument is to be considered in conjunction with the evidence that was admitted to the jury in order to determine the likelihood that the erroneous instruction prejudiced the defendant. *Sims* at 479.

Like the prosecutor in *Grendahl*, the deputy prosecutor in this case, Mr. Bruneau, argued repeatedly to the jury that the intent of these men was merely to steal. Trial RP 594. The prosecutor also referred to the principal of accomplice liability as a “partnership.” This is not entirely true, because the State must prove more than mere presence coupled with knowledge and assent to establish that one acted as an accomplice. One can be present at the crime, have had knowledge of the crime before it takes place, and assent to its commission without acting as an accomplice. *State v. Amezola*, 49 Wn.App. 78, 89-90, 741 P.2d 1024 (1987). Here, the State did not even suggest that Mr. Anderson knew or intended that two of his accomplices were going to enter the Explorer and steal a car stereo, or that another of his accomplices was going to pull a gun in an effort to coerce Ms. Swofford and Mr. Molnar to open their door. The State merely suggested that because all of these men were there together then they all must have knowingly acted in concert with one another’s actions, as though no other possibility existed.

The State clearly felt that because it couldn't establish who did what, largely due to the recalcitrance of its two victims, then it just shouldn't *have* to prove who did what. The problem with that approach is that there were two men who clearly played almost no role in these crimes beyond merely being present. Both Swofford and Molnar said that two men got into the Explorer and two men were just running around, or "bouncing around." Not surprisingly, there were two men who Molnar and Swofford absolutely could not identify and one of those two was Mr. Anderson.

Even assuming the State presented sufficient evidence that Mr. Anderson intended, or knew that an accomplice intended to commit a theft (which Mr. Anderson does not concede), Mr. Anderson could not be convicted as an accomplice to robbery merely on a finding that he or an accomplice intended to commit theft. However, the jury was instructed in Instruction 15, element two, that it could find Mr. Anderson guilty as an accomplice to robbery if he or an accomplice merely intended to commit a theft, which was not charged. This is precisely the instruction that was found to be error in *Grendahl* and *Evans*. Mr. Anderson did not object to this instruction. However, an instruction that misrepresents the elements of an offense violates due process and may be challenged for the first time on appeal. *Stein* at 623. An ambiguous jury instruction that is subject to a

construction that “permits an erroneous interpretation of the law” requires reversal. *State v. LeFaber*, 128 Wn.2d 896, 902, 913 P.2d 369 (1996).

Further, the State in this case argued in its closing, un-rebutted comments to the jury that Mr. Anderson and the other defendants went to Swofford’s residence to commit a theft.

A reviewing court need not reverse a conviction based on instructional error if it is convinced beyond a reasonable doubt that the error was harmless. *Evans* at 453-54. The error is “presumed to be prejudicial and requires reversal ‘unless it affirmatively appears to be harmless.’” *Grendahl* at 911, citing *Stein* at 246. The error here is not harmless because the evidence that Mr. Anderson participated as an accomplice in *any* crime, much less the crime of robbery, was markedly weak. Mr. Anderson’s conviction for robbery should be reversed and remanded for a new trial.

II. THE EVIDENCE WAS INSUFFICIENT TO PROVE MR. ANDERSON WAS AN ACCOMPLICE TO ROBBERY IN THE FIRST DEGREE.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The same is true for sentencing enhancements. *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008).

Evidence is insufficient unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). The criminal law may not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. *State v. DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). The reasonable doubt standard is indispensable, because it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue. *DeVries* at 849.

Although a claim of insufficiency admits the truth of the state's evidence and all inferences that can reasonably be drawn from it, *DeVries*, at 849, this does not mean that the smallest piece of evidence will support proof beyond a reasonable doubt. On review, the appellate court must find the proof to be more than mere substantial evidence, which is described as evidence sufficient to persuade a fair-minded, rational person of the truth of the matter. *Rogers Potato v. Countrywide Potato*, 152 Wn.2d 387, 391, 97 P.3d 745 (2004); *State v. Carlson*, 130 Wn. App. 589, 592, 123 P.3d 891 (2005). The evidence must also be more than clear, cogent and convincing evidence, which is described as evidence "substantial enough to allow the [reviewing] court to conclude that the allegations are 'highly

probable.”” *In re A.V.D.*, 62 Wn.App. 562, 568, 815 P.2d 277 (1991),
citation omitted.

The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986); *Colquitt, supra.*

Here, the State’s theory of the crime is that these men showed up at Swofford’s residence that morning to steal things. When they were prevented from stealing things from inside the house, according to the State’s theory, they resorted to stealing the car stereo out of the Explorer. One of the defendants, identified as Mr. Woods by both Swofford and Molnar, brandished a gun. According to the State’s theory of the case, each of the defendants was an accomplice to the robbery because each of the defendants knew that one of the five was going to employ force (e.g., the gun). In order to support this theory, the State argued that each of the defendants must have known about the presence of the gun (before it was used) because the car was so small. The jury, however, clearly rejected this proposition when they acquitted Mr. Anderson of unlawful possession of a firearm, finding that he did not actually or constructively possess the shotgun.

As noted in part II, a defendant can be present at the scene of the crime, have knowledge of the crime, and assent to its commission without

aiding or being ready to assist in the crime. While one is liable for any degree of robbery actually committed if he or an accomplice intends to commit robbery, noted above in part II, one is not liable as an accomplice to robbery if he merely intends a theft.

To be an accomplice in the commission of a crime, the defendant must associate himself with the undertaking, participate in it as something he or she desires to bring about, and seek by action to make it succeed. *State v. J-R Distributors Co.*, 82 Wn.2d 584, 592-93, 512 P.2d 1049 (1973), *cert. denied*, 418 U.S. 949, 94 S.Ct. 3217 (1974); *State v. Gladstone*, 78 Wn.2d 306, 474 P.2d 274 (1970). Mere assent to the commission of the crime is not enough to make someone an accomplice. *State v. Rennenburg*, 83 Wn.2d 735, 739, 522 P.2d 835 (1974); *State v. Peasley*, 80 Wash. 99, 141 P. 316 (1914). Neither is presence at the scene of a crime sufficient, even when coupled with knowledge that the presence aids in the crime's commission. *State v. Rotunno*, 95 Wn.2d 931, 933, 631 P.2d 951 (1981). For presence to rise to the level of complicity, the defendant must be ready to assist in the commission of the crime. *State v. Robinson*, 35 Wn.App. 898, 903, 671 P.2d 256 (1983); *In re Wilson*, 91 Wn.2d 487, 588 P.2d 1161 (1979). Failure to act does not establish complicity. *State v. Jackson*, 137 Wn.2d 712, 720-26, 976 P.2d 1229 (1999).

Here, the State simply did not prove more than Mr. Anderson's mere presence, knowledge, and assent to a robbery. To the extent that the State proved that Mr. Anderson acted as an accomplice to anything, it was to vehicle prowling and theft in the third degree. Mr. Anderson's conviction for robbery in the first degree should be reversed and dismissed due to insufficient evidence that he acted as an accomplice to robbery.

III. THE TRIAL COURT ERRED WHEN IT INSTRUCTED THE JURY THAT IT HAD TO BE UNANIMOUS TO RETURN AN ANSWER OF "NO" AS TO THE SPECIAL VERDICT ON THE QUESTION OF WHETHER MR. ANDERSON WAS ARMED WITH A FIREARM DURING THE COURSE OF THE ROBBERY.

The trial court, in its concluding instruction to the jury, instructed the jury that it could only answer "no" on the special verdict form if they *unanimously* agreed beyond a reasonable doubt that "no" was the correct answer. CP 128. This was error. Defense counsel for Mr. Anderson, it is worth noting, proposed a concluding instruction on the special verdict which stated "If any one of you has a reasonable doubt as to this question, you must answer 'no.'" CP 51. This is a correct statement of the law. But again, because Thurston County chooses to conduct the discussion on jury instructions as though it were a top-secret Pentagon briefing, as opposed to a critical stage of an open trial, we don't know why the parties

passed on this correct statement of the law and opted for the incorrect statement of the law contained within Court's Instruction No. 63.

Instructing a jury that it must be unanimous to return *any* answer on a special verdict is a misstatement of the law. *State v. Goldberg*, 149 Wn.2d 888, 72 P.2d 1083 (2003) is the controlling case on this point. In *Goldberg*, the defendant was charged with aggravated murder in the first degree. The jury returned a general verdict of guilty to the murder charge, but answered "no" on the special verdict form which pertained to the aggravator. *Goldberg* at 891. The court polled the jury by a show of hands on how many had voted "no," and only one juror raised his hand. (Evidently, three jurors voted "no," but the opinion is silent as to how this information came out and why the other two jurors did not raise their hands when polled by the court). The court concluded that the jury's answer of "no" did not actually mean "no," and that the jury was deadlocked on the special verdict. *Goldberg* at 891. The court then instructed the jury to continue deliberating. The next day, they returned an answer of "yes" on the special verdict. *Goldberg* at 891-92.

The Supreme Court, in reversing the special verdict finding, ruled that a jury must only be unanimous to return an answer of "yes" on a special verdict. *Goldberg* at 893. The Court noted that when the jury returned an answer of "no" on the special verdict, the judge erroneously

concluded the jury was deadlocked on the special verdict and ordered continued deliberations. *Goldberg* at 893. The Supreme Court held that unanimity is not required to answer “no” on a special verdict, and is only required to answer “yes.” *Id.* This is in contrast to general verdicts, which require unanimity in order to return either of the only two verdicts recognized in the law: Guilty or not guilty. *Goldberg* at 894. “When a jury is deadlocked on a general verdict, the trial court has the authority, within limits, to instruct the jury to continue deliberations... That authority does not exist with respect to a jury’s answer to a special finding as given in this case.” *Goldberg* at 894 (internal citations omitted).

In *Goldberg*, the jury had been instructed, with regard to the special verdict, that if “you have a reasonable doubt as to the question, you must answer ‘no.’” *Goldberg* at 893. The Supreme Court held that when the jury answered “no” on the special verdict form, in spite of the fact that there was a split among the jurors as to how this question should be answered, the jury was not deadlocked and had properly answered the question.

Here, the jury performed as it was instructed. It returned a verdict of guilty as to the crime, for which unanimity was required, and it answered “no” to the special verdict form, where under instruction 16, unanimity is not required in order for the verdict to be final. We find no error in the jury’s initial verdict in this case which would require continued deliberations. As instructed in this case, when the verdict was returned, the jury’s responsibilities were

completed and the jury's judgment should have been accepted. We hold that it was error for the trial court to order continued deliberations and we vacate the finding on the aggravating factor.

Unlike the jury in *Goldberg*, which had been given a correct instruction initially, the jury here was instructed that it had to "unanimously" have a reasonable doubt that the answer to the special verdict was "no" in order to answer "no." This error prejudiced Mr. Anderson because the jury obviously did not believe that he was personally armed with a firearm given their "not guilty" verdict to the charge of unlawful possession of a firearm. If any one of the jurors wanted to answer the question "no," but was not joined in that opinion by the other eleven jurors, he or she was falsely led to believe that an answer of "no" was not available unless the remaining eleven joined in that answer. That is incorrect. If one juror out of twelve wishes to answer "no," then the verdict of the jury on the special verdict is "no." The holding in *Goldberg* is clear: Unanimity was only required if they intended to answer "yes." The special verdict in this case should be vacated and Mr. Anderson must be resentenced.

IV. THERE WAS INSUFFICIENT EVIDENCE THAT MR. ANDERSON OR AN ACCOMPLICE WAS ARMED WITH AN OPERABLE FIREARM FOR PURPOSES OF THE SPECIAL VERDICT.⁷

⁷ The text under Issue VI has been adopted from the brief of co-counsel for Mr. Winters with permission.

The language pertaining to the standard of review on a claim of insufficiency of the evidence from Part II above is hereby adopted for Part VI herein. The standard applies with equal force to sentencing enhancements. *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008).

1. The state failed to prove beyond a reasonable doubt that Exhibit 25 was a firearm.

A firearm enhancement may be imposed if the defendant or an accomplice was armed with a firearm. RCW 9.94A.533. Before a firearm enhancement may be imposed, the state must prove “beyond a reasonable doubt [that] the weapon in question falls under the definition of a ‘firearm:’ ‘a weapon or device from which a projectile may be fired by an explosive such as gunpowder.’” *State v. Recuenco*, at 437 (quoting 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 2.10.01 (Supp.2005) (WPIC)).⁸ The Supreme Court has held that the firearm enhancement applies only to working firearms:

We have held that a jury must be presented with sufficient evidence to find a firearm operable under this definition in order to uphold the enhancement.

⁸ This is in contrast to the substantive crime (Robbery in the First Degree), which requires only that the “defendant or accomplice displayed what appeared to be a firearm...” Instruction No. 15, Court’s Instructions to the Jury, CP 72-73.

Recuenco, at 437 (citing *State v. Pam*, 98 Wn.2d 748, 754-55, 659 P.2d 454 (1983), *overruled in part on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988)).⁹

In this case, the gun introduced at trial as Exhibit 25 was not operable, and thus did not qualify as a firearm for purpose of the enhancement.¹⁰ First, it lacked a firing pin. The gun was more than 40 years old, and the state's expert opined that the firing pin for this gun was no longer being manufactured. Trial RP 314, 324-25. Finding a used firing pin could take weeks or months. Trial RP 334-35. Even if a firing pin were available, it would take an hour to install it. Trial RP 325.

Second, the trigger housing had been tampered with, in such a way as to make the gun inoperable. Trial RP 314. No opinion was offered on how long it would take to repair the damage, or if repairs were even possible. Trial RP 334-35.

Third, the state's expert opined that the gun might have additional problems. Trial RP 335. No effort was made to restore it to working

⁹ Published cases decided by the Court of Appeals after *Pam* but prior to *Recuenco* took the position that *Pam* allowed the enhancement even in the case of an inoperable gun, as long as it was a "real" gun. *See, e.g., State v. Faust*, 93 Wn.App. 373, 967 P.2d 1284 (1998); *State v. Berrier*, 110 Wn.App. 639, 41 P.3d 1198 (2002). But *Recuenco* made clear that *Pam* prohibited the enhancement unless the state established that the gun was operable. *Recuenco*, at 437.

¹⁰ The gun may not have been the weapon allegedly used during the crime, as argued elsewhere in this brief.

condition and test fire it; thus, any other problems were not known at the time of trial.

Under these circumstances, the state failed to prove that the gun qualified as a firearm. The firearm enhancement must be stricken, and the case remanded to the trial court for resentencing without the enhancement.

Pam, supra.

2. The state failed to prove beyond a reasonable doubt that Exhibit 25 was readily available for use.

The firearm enhancement applies whenever a person is “armed” with a deadly weapon during the commission of a crime. RCW 9.94A.533(3). A person is “armed” if the firearm is “easily accessible and readily available for use, either for offensive or defensive purposes.” *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). Proximity and/or possession are insufficient to establish that a person is “armed” under the statute. For example, evidence that an unloaded gun was found under the defendant’s bed is insufficient to prove that he was “armed” for purpose of an enhancement. *Valdobinos* at 282. Whether a gun is loaded or unloaded is not determinative, but is one factor to be considered in determining whether or not a person is “armed” within the meaning of the statute. *State v. Simonson*, 91 Wn.App. 874, 960 P.2d 955 (1998). Under

the same reasoning, a gun's operability must be considered in determining whether or not a person is armed.

Here, even if the state proved that the gun was easily accessible, the record does not establish that it was "readily available for use, either for offensive or defensive purposes." *Valdobinos*, at 282. First, the gun was unloaded, and no ammunition was found. Trial RP 156, 164. Second, the gun was missing its firing pin. If a replacement firing pin was on hand—and there is no indication that one was—the defendants would have needed an hour to restore the gun to working condition. Trial RP 325. If a replacement firing pin was not on hand, finding a used part could take weeks or months. Trial RP 334-35. Third, the trigger housing had been tampered with. Trial RP 314-35. The state did not provide any evidence that the trigger housing could be repaired or how long it could take. Trial RP 314-335. Fourth, the gun may have had additional problems that prevented it from functioning. Trial RP 335. Whether or not these additional problems could have been fixed is an open question.

Under these circumstances, the gun was not readily available for offensive or defensive use. Accordingly, the defendants were not "armed" with a firearm for purposes of the enhancement. The enhancement must be stricken, and the case remanded for resentencing. *Valdobinos, supra*.

V. MR. ANDERSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO OBJECT TO THE ADMISSION OF EXHIBIT 25.

Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 186 (1995). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must establish that (1) his counsel's performance was deficient; and (2) the deficient performance was prejudicial. *Strickland* at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251(1995). A legitimate tactical decision will not be found deficient. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have

differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland*); see also *State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance; however, this presumption is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, at 130. Any trial strategy “must be based on reasoned decision-making...” *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

The trial court admitted exhibit 25, a sawed-off shotgun found on Old Highway 99, without objection from defense counsel. Exhibit 25 had no relevance to the case against Mr. Anderson because Ms. Swofford never identified it as the gun she saw (indeed, she was never even asked to look at it), and Mr. Molnar specifically denied that exhibit 25 was the gun used during the crime. The only fact which tended to make this exhibit relevant was Mr. Woods’ admission that he threw exhibit 25 out of the front passenger window. However, this fact was only relevant to Mr.

Woods' case, not to Mr. Anderson's. Even assuming the State had proved that exhibit 25 was operable, exhibit 25 should not have been admitted as evidence against Mr. Anderson. Without the admission of exhibit 25 in the case against Mr. Anderson, the State lacked *any* evidence that the firearm allegedly used during the commission of the crime was operable.

Under these facts, where the firearm, or the object which *appeared* to be a firearm, was not used beyond merely being displayed, the State actually needed to recover the gun and examine it to prove it was operable or could be made operable within a reasonable time. The State would have been unable to meet that burden of proof in its case against Mr. Anderson absent the admission of exhibit 25. Defense counsel for Mr. Anderson should have objected to the admission of exhibit in the case against Mr. Anderson because it was irrelevant, in that no witness, other than Mr. Woods, identified exhibit 25 as having been used in the commission of any crime at Ms. Swofford's residence. Defense counsel's incompetence in failing to object allowed the State to rely upon irrelevant evidence to prove that Mr. Anderson was armed with a firearm for purposes of the special verdict.

There was no conceivable strategic reason to allow the prosecutor to introduce Exhibit 25 as *the* gun used during the incident. Without Exhibit 25, the prosecutor would have been forced to rely solely on

Molnar's testimony to establish that there really was a gun. But Molnar did not have a clear view, and could not definitively confirm that anyone had a real working firearm. There is a reasonable possibility that the outcome of the proceeding would have been different if defense counsel had objected to the admission of Exhibit 25, because the finding of operability depended on the admission of exhibit 25.

Mr. Anderson received ineffective assistance of counsel and the finding on the special verdict should be reversed and dismissed because without exhibit 25, there is no evidence to prove that the gun used in the commission of the crime was operable, as required by *Recuenco*, supra.

VI. THE IMPOSITION OF A 60 MONTH FIREARM ENHANCEMENT ON THE ROBBERY FIRST DEGREE CONVICTION VIOLATES THE PROHIBITION ON DOUBLE JEOPARDY.

The robbery first degree conviction was predicated on the use of a firearm by Mr. Anderson or an accomplice. This same use of that firearm provided the basis for the firearm enhancement. The double jeopardy clause of the United States Constitution provides that no individual shall be twice put in jeopardy of life or limb for the same offense. U.S. Constitution, Amendment 5. The Washington State Constitution, article 1, section 9 provides that no individual shall "be twice put in jeopardy for the same offense." Washington courts give article 1, section 9 the same

interpretation as the United States Supreme Court gives the Fifth Amendment. *State v. Bobic*, 140 Wn.2d 250, 260, 996 P.2d 610 (2000). The double jeopardy clause protects against: 1) a second prosecution for the same offense after acquittal; 2) a second prosecution for the same offense after conviction; and 3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 726, 89 S.Ct. 2072 (1969), overruled on other grounds, *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201 (1989). The double jeopardy clause was designed to prevent the government from repeatedly attempting to convict an individual for an offense, thereby subjecting him to embarrassment, expense, and anxiety. *State v. Roybal*, 82 Wn.2d 577, 579, 512 P.2d 718 (1973); citing *Green v. United States*, 355 U.S. 184, 190, 78 S.Ct. 221 (1957). While the State may charge and the jury may consider multiple charges arising from the same conduct in a single proceeding, the court may not enter multiple convictions for the same criminal conduct. *State v. Freeman*, 153 Wn.2d 735, 770-71, 108 P.3d 753 (2005).

Washington appellate courts have previously rejected double jeopardy challenges to deadly weapon enhancements where the use of a deadly weapon is an element of the underlying offense. *State v. Husted*, 118 Wn.App. 92, 95-96, 74 P.3d 672 (2003), *review denied*, 151 Wn.2d 1014 (2004); *State v. Caldwell*, 47 Wn.App. 317, 319-20, 734 P.2d 542

(1987); *State v. Pentland*, 43 Wn.App. 808, 811, 719 P.2d 605 (1986).

Each of these opinions pre-dated the decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348 (2000), *Blakely v. Washington*, 542 U.S. 296, 306-07, 124 S.Ct. 2531 (2004), *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002), and *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008).

What each of the above cases establishes is that factors which increase the maximum punishment faced by a defendant must be submitted to a jury and proved beyond a reasonable doubt. This is true even when the fact is labeled a “sentencing factor” or “sentence enhancement” by the Legislature. *Blakely* at 306-07; *Apprendi* at 482-83. In light of the holdings in *Blakely* and *Apprendi*, prior holdings that deadly weapon enhancements attached to crimes which are predicated upon the use of a deadly weapon do not violate the prohibition on double jeopardy are no longer persuasive. The Washington Supreme Court has accepted review of this issue in two pending cases, *State v. Aguirre*, No. 82226-3 and *State v. Kelley*, No. 82111-9.

Under the holding in *Recuenco*, supra, which applied the principles articulated in *Blakely* and *Apprendi* to Washington’s sentence enhancement scheme, deadly weapon enhancement provisions constitute a new, greater offense for purposes of double jeopardy just as they create

elements of a greater offense for purposes of the right to a jury trial. The firearm enhancement in this case is predicated on the *very same finding* the jury made to find Mr. Anderson guilty of robbery in the first degree. The multiple punishments here violate the prohibition on double jeopardy and this Court should reverse the deadly weapon enhancement as to Count I and order that it be stricken.

VII. MR. ANDERSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY WITHDREW HIS PROPOSED INSTRUCTION OF THEFT IN THE THIRD DEGREE.

Defense counsel for Mr. Anderson included an instruction on the lesser included offense of theft in the third degree for the count of robbery in his packet of proposed instructions. However, the instruction was not included in the Court's Instructions to the Jury and defense counsel did not take exception to the court's failure to give any of his proposed instructions. Thus, defense counsel withdrew the instruction, although the record does not show why. The standard of review on ineffective assistance of counsel outlined in Part V, above, is adopted for this section.

By statute, defendants in Washington are entitled to have juries instructed not only on the charged offense, but also on all lesser included

offenses. RCW 10.61.006.¹¹ A defendant is entitled to a lesser included offense instruction if (1) each of the elements of the lesser offense is a necessary element of the charged offense; and (2) the evidence supports an inference that the defendant committed the lesser offense. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The first requirement is the “legal prong;” the second requirement is the “factual prong.” *State v. Berlin*, 133 Wn.2d 541, 546, 947 P.2d 700 (1997).

The lesser offense rule allows defendants to effectively argue their theories of the case to the jury. *Berlin* at 545, 548. The rule also “affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal.” *Beck v. Alabama*, 447 U.S. 645, 633, 100 S.Ct. 2382 (1980). “Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.” *Beck* at 634. This result is avoided when the jury is given the option of finding a defendant guilty of a lesser included offense, thereby giving “the defendant the full benefit of the reasonable-doubt standard.” *Id.*

“Theft” means “[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with

¹¹ RCW 10.61.006 provides: “[T]he defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information.”

intent to deprive him or her of such property or services.” RCW

9A.56.020 (1) (a). A person is guilty of third degree theft if he commits theft of property that does not exceed \$250 in value. RCW 9A.56.050 (1) (a).

A person commits robbery when he (1) unlawfully takes personal property from another, (2) with intent to commit theft; (3) against the person’s will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone; and (4) such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. *State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991); RCW 9A.56.190. Per RCW 9A.56.200, (1) A person is guilty of robbery in the first degree if:

(a) In the commission of a robbery or of immediate flight therefrom, he or she: (i) Is armed with a deadly weapon; or (ii) Displays what appears to be a firearm or other deadly weapon; or (iii) Inflicts bodily injury.

Since robbery includes the elements of larceny, third degree theft is always an included offense of robbery under the legal prong. *Application of Salter*, 50 Wn.2d 603, 605, 313 P.2d 700 (1957); *State v. Byers*, 136 Wash. 620, 622, 241 P. 9, 10 (1925) (“Robbery includes the elements of the crime of larceny, one of which is an intent to deprive the

owner or other persons of the things taken.”) The “to convict” instruction for first degree robbery required the State to prove “the defendant or an accomplice unlawfully took personal property from another” and that “the defendant or an accomplice unlawfully took personal property from another” and that “the defendant or an accomplice intended to commit theft of the property.” CP 15. The legal prong is satisfied because theft is a necessary element of first degree robbery. See *Kjorsvik* at 98 (intent to steal is a necessary element of robbery).

To satisfy the factual prong of the *Workman* test, the evidence must raise an inference that only the lesser included offense was committed. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). A requested jury instruction on a lesser offense should be administered “[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.” *Fernandez-Medina* at 456 (citation omitted). In other words, “the evidence must affirmatively establish the defendant’s theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt.” *Fernandez-Medina* at 456.

When determining if the evidence at trial was sufficient to support the giving of a lesser instruction, the appellate court must view the

supporting evidence in the light most favorable to the party that requested the instruction. *Fernandez-Medina* at 455-56. The court must consider all evidence presented at trial, regardless of its source, when deciding whether a lesser offense instruction should be given.

Here, the factual prong is satisfied in that a reasonable trier of fact, having concluded that Mr. Anderson did not knowingly possess the shotgun, either actually or constructively, at any point during this incident, could have concluded that Mr. Anderson was an accomplice to no more than theft in the third degree and vehicle prowling. Because the jury was erroneously instructed that the intent to commit theft was enough to find Mr. Anderson was an accomplice to robbery, and because they acquitted Mr. Anderson of unlawful possession of a firearm, it is reasonable to conclude that they found that Mr. Anderson's intent was no greater than to commit a theft.¹² Had defense counsel performed competently, and offered an instruction on theft in the third degree, the outcome of this proceeding would very likely have been different.

There is a strong presumption of adequate performance; however, this presumption is overcome when "there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, at 130. Any trial

¹² Because the State did not offer any evidence about the value of the CD player or the Judd's CD inside of it, the level of theft in this case is third degree.

strategy “must be based on reasoned decision-making...” *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). Under these facts, as they pertain specifically to Mr. Anderson, there is no conceivable tactical reason for counsel having failed to present the jury with the option of convicting Mr. Anderson of misdemeanor theft in the third degree. There was strong evidence to suggest that whoever retrieved the gun from the car and brandished it (Mr. Woods, according to the identification of Swofford and Molnar) did it without the knowledge of his companions, two of whom were searching through the Explorer and two of whom were “running around,” “running back and forth,” and “bouncing around,” according to the testimony. The evidence suggests that the person who brandished a gun acted in a rogue fashion. Mr. Anderson received ineffective assistance of counsel where his attorney withdrew the proposed instruction on theft in the third degree and he was prejudiced because the outcome of the trial most likely would have been different but for this unprofessional error. Mr. Anderson should be granted a new trial.

VIII. THE COURT’S ACCOMPLICE LIABILITY
INSTRUCTION RELIEVED THE STATE OF ITS BURDEN

**TO PROVE THAT MR. ANDERSON COMMITTED AN
OVERT ACT.**¹³

Accomplice liability requires an overt act. *See, e.g., State v. Matthews*, 28 Wn. App. 198, 203, 624 P.2d 720 (1981). It is not sufficient for a defendant to approve or assent to a crime; instead, she must say or do something that carries the crime forward. *State v. Peasley*, 80 Wn. 99, 100, 141 P. 316 (1914). In *Peasley*, the Supreme Court distinguished between silent assent and an overt act:

To assent to an act implies neither contribution nor an expressed concurrence. It is merely a mental attitude which, however culpable from a moral standpoint, does not constitute a crime, since the law cannot reach opinion or sentiment however harmonious it may be with a criminal act.
Peasley, at 100.

See also State v. Everybodytalksabout, 145 Wn.2d 456, 472, 39 P.3d 294 (2002) (“Physical presence and assent alone are insufficient” for conviction as an accomplice.)

Similarly, in *State v. Renneberg*, the Supreme Court approved the following language: “to aid and abet may consist of *words spoken, or acts done...*” *State v. Renneberg*, 83 Wn.2d 735, 739, 522 P.2d 835 (1974), *emphasis added*. The Court noted that an instruction is proper if it requires ““*some form of overt act in the doing or saying of something that*

¹³ The text under this assignment of error was adopted from the brief of co-counsel for Mr. Winter with permission.

either directly or indirectly contributes to the criminal offense.”

Renneberg, at 739-740, *emphasis added*, quoting *State v. Redden*, 71 Wn.2d 147, 150, 426 P.2d 854 (1967).

Instruction No. 9 was fatally flawed because it allowed conviction without proof of an overt act. Under the instruction, the jury was permitted to convict if Mr. Winter was present and assented to his codefendants' crimes, even if he committed no overt act. Court's Instructions to the Jury, CP 66. Because of this, the instruction violates the "overt act" requirement of *Peasley, supra* and *Renneberg, supra*.

The last two sentences of Instruction No. 9 do not correct this problem. The penultimate sentence ("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") does not exclude other situations. Instruction No. 9, Court's Instructions to the Jury, CP 66. Thus a person who is present and *unwilling* to assist, but who approves of the crime, may still be convicted if she or he knows his presence will promote or facilitate the crime.

Similarly, the final sentence fails to save the instruction as a whole. Although the final sentence ("more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice") excludes presence coupled with mere knowledge, the instruction does not exclude presence coupled with silent

assent or silent approval. Instruction No. 9, Court's Instructions to the Jury, CP 66. Even with this final sentence, a person who is present and unwilling to assist, but who silently approves of the crime could be convicted.

Because the instructions allowed conviction as an accomplice in the absence of an overt act, the convictions must be reversed and the case remanded to the trial court for a new trial. *Peasley, supra; Renneberg, supra.*

IX. THE SRA, AS AMENDED IN 2008, VIOLATES THE FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND THE PRIVILEGE AGAINST SELF-INCRIMINATION BY SHIFTING THE BURDEN OF PROOF AT SENTENCING.

A criminal defendant has a constitutional privilege against self-incrimination. U.S. Const. Amend. V; U.S. Const. Amend. XIV. This includes a constitutional right to remain silent pending sentencing. *In re Detention of Post*, 145 Wn.App. 728, 758, 187 P.3d 803 (2008) (citing *Mitchell v. United States*, 526 U.S. 314, 325, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999) and *Estelle v. Smith*, 451 U.S. 454, 462-63, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)). A sentencing court may not draw adverse inferences from an offender's silence pending sentencing. *Mitchell*, at 328-329. Thus, for example, it is improper to imply lack of remorse from an accused person's presentencing silence. *Post*, at 758.

The state has the burden of proving an offender's criminal history, and does not meet its burden through "bare assertions, unsupported by evidence." *State v. Ford*, 137 Wn.2d 472, 482, 973 P.2d 452 (1999). An offender's "failure to object to such assertions [does not] relieve the State of its evidentiary obligations." *Ford* at 482. This rule is constitutionally based, and thus cannot be altered by statute. As the Supreme Court pointed out in *Ford*, requiring the offender to object when the state presents no evidence "would result in an unconstitutional shifting of the burden of proof to the defendant." *Ford*, at 482.

In 2008, the legislature amended RCW 9.94A.500 and RCW 9.94A.530. *See* Laws of 2008, Chapter 231, Section 2. Under RCW 9.94A.500(1), "[a] criminal history summary relating to the defendant from the prosecuting authority... shall be prima facie evidence of the existence and validity of the convictions listed therein." RCW 9.94A.500(1). Furthermore, the sentencing court may rely on information that is "acknowledged in a trial or at the time of sentencing," and "[a]cknowledgment includes... not objecting to criminal history presented at the time of sentencing." RCW 9.94A.530(2).¹⁴

¹⁴ Under the prior version of the statute, a Statement of Prosecuting Attorney was insufficient to establish an offender's criminal history. *State v. Mendoza*, 165 Wn.2d 913, 205 P.3d 113 (2009).

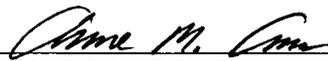
These provisions result in the “unconstitutional shifting of the burden of proof to the defendant.” *Ford*, at 482. By requiring an offender to object to a prosecutor’s allegations, RCW 9.94A.500(1) and RCW 9.94A.530(2) violate the Fifth and Fourteenth Amendments to the U.S. Constitution. *Ford, supra*.

Mr. Anderson should have been sentenced with an offender score of (at most) one, because he stipulated (at trial) that he had a prior felony conviction. CP 9. Instead of sentencing him with an offender score of one, the trial judge adopted the prosecutor’s statement of criminal history and sentenced Mr. Anderson with an offender score of ten. CP 142. By accepting the prosecutor’s statement, the court relied on “bare assertions” of criminal history in violation of *Ford, supra*. Because the prosecutor failed to prove Mr. Anderson’s criminal history, the judgment and sentence must be vacated and the case remanded to the trial court for resentencing. *Ford, supra*.

E. CONCLUSION

Mr. Anderson’s conviction for robbery in the first degree should be dismissed due to insufficient evidence. The special verdict should also be dismissed due to insufficient evidence, and because the finding violates double jeopardy. Alternatively, Mr. Anderson should be granted a new trial on the charge of robbery in the first degree.

RESPECTFULLY SUBMITTED this 4th day of August, 2009.



ANNE M. CRUSER, WSBA# 27944
Attorney for Mr. Anderson

COURT OF APPEALS
THURSTON COUNTY
09 AUG -5 AM 11:18
STATE OF WASHINGTON
BY _____
DEPUTY _____

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

STATE OF WASHINGTON,)
) Court of Appeals No. 38902-9-II
) Thurston County No. 08-1-02090-1
 Respondent,)
)
 vs.)
) AFFIDAVIT OF MAILING
 TOBY ANDERSON,)
)
 Appellant.)
 _____)

ANNE M. CRUSER, being sworn on oath, states that on the 4th day of August 2009,
affiant placed a properly stamped envelope into the mails of the United States addressed to:

Carol La Verne
Thurston County Deputy Prosecuting Attorney
2000 Lakeridge Dr. S.W.
Olympia, WA 98502

AND

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

AND

Toby Anderson
DOC# 872918

Anne M. Cruser
Attorney at Law
P.O. Box 1670
Kalama, WA 98625
Telephone (360) 673-4941
Facsimile (360) 673-4942
anne-cruser@kalama.com

1
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4 Washington State Penitentiary
1313 N.13th Ave.
5 Walla Walla, WA 99362

6 and that said envelope contained the following:

- 7 (1) BRIEF OF APPELLANT
8 (2) SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS (To Mr. Ponzoha
and Ms. LaVerne)
9 (3) RAP 10.10 (To Mr. Anderson)
(4) AFFIDAVIT OF MAILING

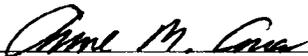
10 affiant further states that she placed a properly stamped envelope into the mails of the
11 United States addressed to:

12 Ms. Betty Gould, Clerk
13 Thurston County Clerk's Office
2000 Lakeridge Dr. S.W.
14 Olympia, WA 98502

15 and that said envelope contained the following

- 16 (1) SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS
17 (2) AFFIDAVIT OF MAILING

18 Dated this 4th day of August, 2009

19
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21 
22 ANNE M. CRUSER, WSBA #27944
23 Attorney for Appellant
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I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place: August 4, 2009, Kalama, WA

Signature: Anne M. Cruser