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DIVISION II

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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

AARON CHRISTOPHER GERMAN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John A. McCarthy

No. 07-1-05419-9

BRIEF OF RESPONDENT

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

1. Whether defendant should receive credit for time served on electronic home monitoring?
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3. Whether defendant received effective assistance of counsel?
4. Whether the trial court violated defendant's right against double jeopardy by enhancing defendant's sentence for the firearm enhancement when the Supreme Court decided this exact issue in *Kelley*?
5. Whether the State adduced sufficient evidence to find defendant guilty of first degree robbery and unlawful possession of a firearm?

B. STATEMENT OF THE CASE.

1. Procedure

On October 22, 2007, the Pierce County Prosecutor's Office filed an information charging AARON CHRISTOPHER GERMAN, hereinafter "defendant," with one count of robbery in the first degree and one count of unlawful possession of a firearm in the second degree. CP 1-2. The case

proceeded to trial on April 2, 2009, in front of the Honorable John A. McCarthy. RP¹ 2. An amended information was filed during trial to correct a scrivener's error on the original information. RP 401; CP 22-23.

During deliberations, the presiding juror went online to research about the prosecution and defense roles during a trial. RP 490. Because she came back and relayed this information to the other jurors, the court questioned each juror independently about what the presiding juror had said. RP 493-524. The court also inquired about whether the jurors could continue deliberations without considering those outside influences. RP 493-524.

The other jurors told the court that the presiding juror had said she had done some research regarding the roles of the prosecutor and the defense. RP 497-524. At that point the other jurors told her to stop talking and called in the judicial assistant. RP 497-524. All of the jurors stated that they would be able to put out of their mind what the presiding juror had said and continue to follow the court's instructions on the law. RP 497-524. Juror number 6 expressed some hesitancy about disregarding what the presiding juror had said, but said she thought she could put it out of her mind and follow the court's instructions. RP 511-512.

¹ The verbatim report of proceedings are in consecutively paginated volumes for the majority of the proceedings and will be referred to as RP. The proceedings on April 13, 2009 will be referred to as 1RP and the sentencing proceedings will be referred to as SRP.

Defense counsel asked that the presiding juror and juror number 6 be substituted by the alternates, but believed the rest of the jury pool remained untainted. RP 525. The prosecution did not object. RP 526. The court stated that it believed juror misconduct occurred with regard to the presiding juror, excused her and replaced her with an alternate. RP 526, 532. The court kept juror number 6 on stating that he did not believe she was any different from the other jurors and she had stated she could continue to deliberate. RP 526. Defense counsel clarified that there was no motion to dismiss juror number 6. RP 528.

The jury found defendant guilty of first degree robbery and unlawful possession of a firearm. 1RP 3. They answered yes to the special verdict form finding defendant was armed with a firearm at the time of the commission of the crime. 1RP 3. Defendant had an offender score of 1. SRP 3.

During sentencing, defense counsel made a verbal motion for mistrial on behalf of the family which the court denied. SRP 8, 24. Defense counsel asked that defendant be given credit for the court imposed electronic home monitoring conditions. SRP 9. Defense counsel did not have legal authority for his position, but the statute was presented to the court and discussed by both parties. SRP 9-11. Based on the discussion of the statute, the court did not give defendant credit for the electronic home monitoring, but told counsel that if he wanted to file a motion to reconsider with legal authority, the court would revisit the issue.

SRP 11-12. Defendant was sentenced to a midrange sentence of 102 months in confinement. CP 34-47; SRP 22. Defendant filed a timely notice of appeal. CP 48.

2. Facts

On October 19, 2007, Gino DePaul went over to the house of his friends Elliott and Tristan Morrison. RP 37. Elliott Morrison came up with a plan to rob Bob's Grocery Store with the help of another friend, defendant, Aaron German. RP 39. Mr. DePaul traveled to his home with defendant, Elliott Morrison and Jennifer Gapinski to get his shotgun. RP 42. He believed it functioned properly because he had previously shot it a few months earlier. RP 42. Mr. DePaul also grabbed a handful of shotgun shells while at the house and put them in his pocket. RP 43. On his way out, Mr. DePaul got into an argument with his sister and she kicked him out of the house. RP 52.

Mr. DePaul went back to the car and put the shotgun in the trunk of the car. RP 50. He passed the shotgun shells to the people in the backseat and told them to hold on to them. RP 50-51. Defendant and Elliott Morrison were in the backseat while Mr. DePaul drove. RP 54. The backseats folded down which allowed people to access the trunk from the backseat. RP 55. Jennifer Gapinski, Mr. DePaul's girlfriend was in the front passenger seat and believed they were going to get food. RP 54. Mr. DePaul testified he saw defendant put a pair of gloves on. RP 89.

They drove around and stopped at Bob's Grocery. RP 54. Elliott Morrison and defendant got out of the car wearing gloves and beanies. RP 59-60.

Jim Campbell was the cashier working at Bob's Grocery. RP 139. He testified that around closing time at 11 p.m., someone came into the store wearing dark colored clothing with their face covered and carrying a shotgun. RP 140-142. The person ordered Mr. Campbell to the ground. RP 141. A second person wearing a blue shirt and dark jacket and carrying a handgun went behind the counter. RP 141-142. After the people left, Mr. Campbell locked the doors and called 911. RP 142. He believed two to five packs of cigarettes and \$100 were taken. RP 251.

Mr. DePaul testified that Elliott Morrison and defendant returned to the car after running away from the store. RP 60. Elliott Morrison was wearing a ski mask that covered his entire face. RP 61. The lower portion of defendant's face was covered with a blue bandana. RP 62. Defendant carried the shotgun. RP 120. Mr. DePaul testified Elliott Morrison and defendant got into the car yelling "go, go, go!" RP 65.

Officer Jason Mills of the Tacoma Police Department testified that he and several other officers responded to the scene. RP 233. They attempted to use a K-9 unit to track the suspects, but were unsuccessful. 235. Officer Mills spoke with Mr. Campbell, the only witness to the robbery. RP 235. Bob's Grocery had a surveillance video system and Mr.

Campbell gave Officer Mills the surveillance video from that night. RP 143, 235. The surveillance video was played for the jury at trial. RP 147.

Later on the evening of the robbery, Officer Mills received a call from someone who said they had information regarding the robbery. RP 238. Based on that call, Officer Mills contacted Tristan Morrison, Elliott Morrison's brother. RP 240. He also contacted Elliott Morrison who agreed to meet with him. RP 241. At their meeting, Officer Mills arrested Elliott Morrison for the armed robbery of Bob's Grocery. RP 241.

Officer Mills testified that he noticed no signs of intoxication coming from Elliott Morrison when he arrested him. RP 293. He testified that Elliott Morrison gave him a description of the car and five of the six license plate numbers of the car that was used in the robbery. RP 297. Elliott Morrison also told him that Gino DePaul and defendant were involved in the robbery. RP 297.

Officer Mills contacted Gino DePaul from the information given to him by Elliott Morrison. RP 242. He found Mr. DePaul at a motel he was staying at with his girlfriend. RP 243. Officer Mills arrested Mr. DePaul. RP 243. In the driveway of the motel, Officer Mills saw a car matching a description of the car used in the robbery. RP 243. When Officer Mills looked through the window of the car, he saw shotgun casings, a pistol, gloves, and a hat or stocking of some kind. RP 244, 249.

Mr. DePaul told Officer Mills that the keys to the car were in his beanie in the motel room. RP 234. Officer Mills testified that Mr. DePaul

admitted to being involved in the robbery. RP 250, 252. Officer Mills got the keys from the motel room and found a loaded shotgun shell in the beanie. RP 245. The vehicle was towed to the police station. RP 249.

A search warrant was obtained for the vehicle. RP 189. The police searched the vehicle and found shotgun shells and a left hand glove in the back seat. RP 192. An airsoft BB gun was found underneath the driver's seat area accessible to the back seat. RP 197. The orange tip, which for safety purposes lets people know that it is not a real gun had been painted silver. RP 197-198. Two ski masks and a set of gloves were found in the center console. RP 205-08. Another glove was found stuffed between the back seats. RP 208. In the trunk of the vehicle, a pair of jeans was found with defendant's ID in the back pocket. RP 195-197.

Mr. DePaul testified at trial that after Elliott Morrison and defendant returned to the car, they drove around for twenty minutes. RP 94, 280. Mr. DePaul testified they went to Little Caesar's and he dropped Elliott Morrison off at a friend named Jacob Millhollen's house. RP 65, 94. He dropped off defendant at his house afterwards. RP 66. Mr. DePaul went to the hotel he was staying at and was awoken at 4 a.m. by police officers. RP 66. He went with them to the station and gave a statement. RP 68-69.

Elliott Morrison pled guilty to armed robbery in the first degree for his participation in the robbery of Bob's Grocery. RP 282. When he spoke to police after the robbery, he told them defendant was with him

during the robbery and carried the shotgun. RP 287. At defendant's trial, Elliott Morrison testified that he was intoxicated the night of the robbery. RP 279. He said he remembered being with Gino DePaul and hanging out at Jacob Millhollen's house. RP 278-79. Elliott Morrison testified he went into the store carrying a BB gun, but could not remember whether he went in with anyone else. RP 280. He also recalled going to a pizza place afterwards. RP 281. He testified the next thing he remembered was waking up in Remann Hall. RP 282.

Anisa Miller, a friend of defendant's, testified that on the night of the robbery she was hanging out at her friend Kelsey's house. RP 348-251. She testified that she called defendant, he came over around 9 p.m., they watched a movie and he stayed until 11 or 11:30 p.m. RP 351-352. Anisa Miller found out that defendant was accused of robbery a couple of days later. RP 356. She testified that eight months later she went to the police station and gave a written statement that said defendant was with her the 26th of October. RP 358. The detective pointed out that the robbery occurred on the 19th and Anisa Miller clarified that defendant was with her the 19th of October. RP 358. Anisa Miller testified that she also provided the police with a statement written by Kelsey, which contained the same error in the date and similar language describing the events of the night. RP 361.

Defendant testified at trial that he was with Gino DePaul the night of the robbery. RP 368. He testified that he had brought a change of

clothes and put them in the trunk of Mr. DePaul's car. RP 370. Defendant said around 9 p.m. Mr. DePaul dropped him off at his friend Kelsey's house to hang out with Anisa Miller. RP 371. Defendant testified that around 11 p.m. he called Mr. DePaul who came and picked him up down the street from Kelsey's house. RP 372. He testified he had never been in Bob's Grocery before and did not participate in the robbery that occurred there on October 19, 2007. RP 372.

C. ARGUMENT.

1. DEFENDANT SHOULD RECEIVE CREDIT FOR
TIME SERVED ON ELECTRONIC HOME
MONITORING DETENTION.

Sentencing courts are required to give offenders credit for pre-sentence time served on electronic home monitoring detention. *State v. Speaks*, 119 Wn.2d 204, 206, 829 P.2d 1096 (1992). RCW 9.94A.505(6) reads, "the sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced." Courts do not distinguish between pre-trial and post-conviction confinement. *State v. Anderson*, 132 Wn.2d 203, 212, 937 P.2d 581 (1997).

In the present case, defendant was confined to electronic home monitoring for approximately five months prior to sentencing. 1RP 11-12.

Defendant was charged with first degree robbery, a violent crime, which under the SRA does not allow pre-sentence release on electronic home detention. But, in *State v. Swiger*, the court held that even where a defendant was erroneously confined to electronic home monitoring on a violent crime, the Equal Protection Clause mandates that he receive credit for that time of confinement. *State v. Swiger*, 159 Wn.2d 224, 149 P.3d 372 (2006). The court stated that regardless of the State's objection to the imposition of electronic home monitoring, the focus is on the fact that defendant spent time on electronic home monitoring and subsequently deserves credit for such time served. *Id.* at 228.

As a result, defendant in the present case should be entitled to credit for time served on electronic home monitoring detention. The fact that his offense was a violent crime and he was erroneously released to electronic home detention pending sentencing is irrelevant as courts mandate that defendant receive credit for such confinement. Therefore, the State agrees defendant should be given credit for time served on electronic home monitoring.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONTINUING DELIBERATIONS AFTER JUROR MISCONDUCT OCCURRED WHICH DID NOT PREJUDICE THE DEFENDANT.

Article I, section 21 of the Washington Constitution provides that the right of trial by jury means a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct. *State v. Tigano*, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991). Each case of juror misconduct is decided on its own facts. *State v. Cummings*, 31 Wn. App. 427, 429, 642 P.2d 415 (1982). Granting or denying a mistrial founded upon alleged jury misconduct is a discretionary function of the trial court whose ruling will not be disturbed unless it clearly appears the court abused its discretion. *State v. Kerr*, 14 Wn. App. 584, 591, 544 P.2d 38 (1975).

A juror's use of extraneous evidence is misconduct and entitles a defendant to a new trial, if the defendant has been prejudiced. *State v. Boling*, 131 Wn. App. 329, 332, 127 P.3d 740 (2006). Once juror misconduct is established, prejudice is presumed. *Boling*, 131 Wn. App. at 333. The State bears the burden of overcoming this presumption by showing that when viewed objectively it is unreasonable to believe that the misconduct could have affected the verdict. *Boling*, 131 Wn. App. at 333. The court's inquiry is an objective one which should ask whether the extrinsic evidence could have affected the jury's determinations. *Boling*, 131 Wn. App. at 333. The jury is presumed to follow the court's

instructions unless a showing otherwise is made. *Bordynoski v. Bergner*, 97 Wn.2d 335, 342, 644 P.2d 1173 (1982).

During deliberations in the present case, the presiding juror sent a note to the court that said “is it okay to have researched the responsibilities of the prosecution and the defense and regular court procedure, or is that considered outside influence?” RP 483. Upon questioning by the court, the presiding juror stated that the previous night she had gone to a legal website online which outlined the court’s responsibility, the defense attorney’s responsibility and the prosecuting attorney’s responsibility. RP 487. She said she relayed to the other jurors that morning that in her experience “the prosecutor has this responsibility. The defense has this responsibility.” RP 488, 490. She said she did not learn anything which was in addition to what the jury instructions told the jury and stated that:

through my course of working, I have had occasion to talk with prosecutors and I have had occasion to talk with defense attorneys, so pretty much what it did was it clarified what I believed was the procedure.

... the only thing I mentioned from the website was, hey, the prosecutor is supposed to present his case. He gets to decide how he is going to present his case. Defense has the responsibility of discovery, you know, the discovery, and then they get to rebut the prosecutor’s case.

RP 489-490.

Based on her explanations, the court chose to voir dire each juror individually. All of the jurors stated that the presiding juror said she had gone on the internet the night before to find out what the process of real

court cases were. RP 497-524. At this, the other jurors stopped her from saying anything else and called in the judicial assistant. RP 497-524. Most of the jurors stated that the presiding juror had spoken for less than a minute about her research and many could not recall what she had said. RP 497-524. All of the jurors said they could continue to follow the court's instructions without allowing outside influences to affect them. RP 497-524.

At the conclusion of the individual voir dire of jurors, some concern was raised about juror number 6. When asked if the statements by the presiding juror influenced her, she said "I don't think it influenced me much, you know. I, like everyone else, was wondering, why didn't we get to hear from certain people." RP 511. When asked if she could put out of her mind what the presiding juror had said, juror number 6 stated "it's been said. I think I can, but you know, you never can totally put it out of your mind." RP 512.

The court found misconduct had occurred, dismissed the presiding juror and replaced her with an alternate. RP 531. Although there was no motion to dismiss juror number 6 by defense counsel, the court clarified "I really don't think she was really any different than the rest of the jurors. She was honest in saying, 'well, I heard it.' How does anybody ever say, 'I heard something and I didn't hear it?' But I gathered from her discussion that she is still able to continue to deliberate." RP 526, 528. With regard to the rest of the jurors, the court did not detect that they had

been tainted and believed that they represented that they could follow the court's instructions and put any outside influences aside. RP 525.

Reviewing this factual scenario under an abuse of discretion standard, it is evident that although juror misconduct occurred, it did not prejudice the defendant and the trial court acted accordingly. The trial court looks to whether the extrinsic evidence could have affected the jury's determinations. In this case, there was no extrinsic evidence presented to the jury other than information about the roles the court, prosecutor and defense attorney are generally known to have. The presiding juror stated that she did not tell the rest of the jurors anything she did not already know from her common experience and interaction with prosecutors and defense attorneys. RP 487-490. The research she performed clarified the roles these players had in the courtroom, but did not bring forth any additional evidence or extraneous information related to the trial itself. RP 487-490.

Furthermore, all of the other jurors stated that they were not influenced by what the presiding juror had said and would be able to follow the court's instructions. RP 497-524. Once they recognized there may be an issue, they stopped the presiding juror from talking and called in the judicial assistant. RP 497-524. The fact they did this shows that they were following the court's instructions even while this scenario played out.

The court correctly reasoned that juror number 6's statements were statements made in an effort to be honest. They were not statements showing she was influenced by the presiding juror's statements, but rather explanations describing how that in all honesty, once someone hears something, it does not simply vanish. In this respect, the court properly understood that juror number 6 was not influenced in the same definition as the court was asking. The presiding juror's comments did not influence the jury.

Because the isolated juror's statements did not influence the jury, the jurors stated they could follow the court's instructions and the jurors are presumed to be able to follow the court's instructions, the jury was not tainted. As a result, the defendant could not show prejudice and the court did not abuse its discretion in continuing deliberations.

3. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* "The essence of an ineffective-assistance claim is that counsel's

unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney’s performance was deficient, and (2) that he or she was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule

forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (C.A. 9, 1995).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. *Id.* An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. ***State v. Carpenter***, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. ***Strickland***, 466 U.S. at 489; ***United States v. Layton***, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that defendant did not receive effective assistance of counsel. ***State v. Lord***, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. ***State v.***

McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). In determining whether trial counsel's performance was deficient, the actions of counsel are examined based on the entire record. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994).

- a. Defense counsel was not ineffective when he forgot to provide the court with legal authority supporting the defendant's proposition to receive credit for time served on electronic home monitoring.

Defendant's argument that defense counsel's oversight in failing to bring legal authority supporting a minor issue fails on both prongs of the *Strickland* analysis. During sentencing, defense counsel made a verbal motion that defendant receive credit for time served on electronic home monitoring, but did not have legal authority in support of his argument. SRP 9. The court ruled that it would not give defendant credit for the time served on electronic home monitoring, but stated:

if you do, you know, get some authority fairly quickly that he is entitled to that four-month credit, I would do it, but that's kind of – that's something that's either one way or the other, you know. And if there is some authority that says do it, fine, I am all for it. If there is not, then I don't think I can.

SRP 23. Defendant cannot show defense counsel was deficient for such a minor oversight which was able to be easily remedied.

During sentencing, defense counsel filed the notice of appeal to the court. SRP 23. RAP 6.1 reads that "the appellate court 'accepts review'

of a trial court decision upon the timely filing in the trial court of a notice of appeal from a decision which is reviewable as a matter of right.” Once defense counsel filed the notice of appeal with the trial court, the appellate court retained jurisdiction. Once the appellate court has jurisdiction, any determinations which will change the trial court decision must receive permission from the appellate court prior to the formal entry of those decisions. RAP 7.2(e). Thus, for defendant to receive credit for time served on electronic home monitoring, because the notice of appeal was filed and the appellate court had jurisdiction, defense counsel would have needed to make a motion to the appellate court.

Rather than file a separate motion citing legal authorities, defense counsel has effectively done this through defendant’s appeal. Because the State is not challenging defendant’s argument that he receive credit for time served, defendant cannot claim he was prejudiced by defense counsel’s action.

In sum, defendant cannot claim defense counsel’s performance was deficient when he properly notified the court he did not have the legal authority and objected to the decision thereby preserving the record for an appeal. Defendant cannot claim he was prejudiced by defense counsel’s failure to bring the legal authorities as the State is conceding on appeal that defendant should receive credit for time served, making the issue effectively moot.

- b. Defense counsel was not ineffective when he chose not to make a motion for a new trial based upon juror misconduct when defendant was not prejudiced by the misconduct.

In order to show ineffective assistance of counsel, defendant must show his attorney's performance was deficient and defendant was prejudiced by this deficiency. *See Strickland*. Defendant cannot satisfy the first prong as defense counsel's performance was not deficient. As a result, defendant's claim of ineffective assistance of counsel fails.

In the present case, defense counsel chose not to make a motion for a new trial based upon juror misconduct. The court found juror misconduct had occurred by the presiding juror and properly remedied the situation by dismissing the juror and bringing in an alternate. During an individual voir dire of each juror, juror number 6 was slightly hesitant in her responses regarding her ability to completely ignore what the presiding juror had said.

Defense counsel's decision not to ask for a new trial was based on the fact that there was no support for the argument. Although juror number 6 expressed some concern about what was said, she stated that she could continue to follow the court's instructions. Her hesitation was made in an effort to remain fully honest with the court, not because she was actually influenced by the statements that were made.

Defense counsel understood this. When asked for clarification about whether there was a motion to dismiss juror number 6, defense counsel stated “no motion. I would probably tend to agree that although there was some hesitation in her response, she did respond very similar to the remaining jurors. And I also agree on the court’s further comment that you hear something, you hear something.” RP 528. Because juror number 6 was not influenced by the statements, and rather was merely trying to be honest with the court that she had heard what was said, a decision by defense counsel to ask for a new trial would be meritless. She was the only juror who expressed any hesitation. The rest of the jury remained neutral and stated their ability to continue following the courts instructions.

Not only would it be a frivolous motion on the merits, it would cause an unreasonable delay. Making a motion for a new trial on an issue understood by everyone in the court to be frivolous would only cause delay and frustration in the court. Such a decision may be viewed as a strategic decision made in an effort to not overburden and delay the court with a frivolous issue.

Furthermore, defendant fails to satisfy the second element of the prong and show that he was prejudiced by defense counsel’s deficiency. In this case, had defense counsel asked for a mistrial, it would most likely not have been granted. The court had already determined that the jury was not influenced by the presiding juror’s statements. Therefore, even if for

the sake of argument the court determined juror number 6 was influenced, the court would have replaced him or her with an alternate thereby eliminating any potential influence in the jury. Thus, a motion for mistrial would surely be denied as the entire jury would still have remained uninfluenced by the presiding juror's statements. As such, defendant cannot claim he was prejudiced by an action which would not have changed his trial in the least.

As a result, defendant fails to show defense counsel's decision not to move for a mistrial was deficient or that it prejudiced the defendant.

4. THE TRIAL COURT DID NOT VIOLATE DEFENDANT'S RIGHT AGAINST DOUBLE JEOPARDY BY ENHANCING DEFENDANT'S SENTENCE FOR THE FIREARM ENHANCEMENT WHEN THE SUPREME COURT DECIDED THIS ISSUE IN *KELLEY*.

The double jeopardy clause bars multiple punishments for the same offense. *In re Borrereo*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007) (citing U.S. Const. amend. V; Wash. Const. art. I, sec. 9; *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995)). When a defendant's act supports charges under two statutes, the court must determine whether the legislature intended to authorize multiple punishments for the crimes in question. *Id.* "If the legislature intended that cumulative punishments can be imposed for the crimes, double jeopardy is not offended." *Id.* (citing *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005)).

Legislative intent is the foremost consideration. “The question of what punishments are constitutionally permissible is no different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution.” *Missouri v. Hunter*, 459 U.S. 359, 386, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983) (emphasis in the original) (citing *Albernaz v. United States*, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981)).

The Supreme Court recently decided this same issue. In *State v. Kelley*, ____ Wn.2d ____, ____ P.3d ____ 2010 WL18947 (2010), the Supreme Court rejected the notion that *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), require a new analysis of firearm sentencing enhancements in terms of double jeopardy. Citing clear legislative intent, the court found that there was no violation of double jeopardy when a firearm sentencing enhancement is imposed on a crime that has use of a weapon as an element. *Id.* As such, defendant’s argument on this issue fails.

5. THE JURY HAD SUFFICIENT EVIDENCE TO
CONVICT DEFENDANT OF ROBBERY IN THE
FIRST DEGREE AND UNLAWFUL
POSSESSION OF A FIREARM.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Salinas*, 119 Wn.2d 192; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility

determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict; these determinations should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[G]reat deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, if the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

Defendant challenges the sufficiency of evidence in both of his convictions.

- a. The State proved beyond a reasonable doubt that defendant committed first degree robbery.

To prove a defendant guilty of robbery in the first degree, the State had to convince a jury of the following elements beyond a reasonable doubt:

- (1) That on or about the 19th day of October, 2007 the defendant or an accomplice unlawfully took personal property, not belonging to the defendant, from the person or in the presence of another;
- (2) That the defendant or an accomplice intended to commit theft of the property;
- (3) That the taking was against the person's will by the defendant or an accomplice's use or threatened use of immediate force, violence or fear of injury to that person;
- (4) That the force or fear was used by the defendant, or an accomplice, to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
- (5) That in the commission of these acts the defendant, or an accomplice, was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon; and
- (6) That any of these acts occurred in the State of Washington.

CP Supp. 53-77, Jury Instruction No. 15.

Defendant alleges the State failed to prove beyond a reasonable doubt the identity of the robber. Identity involves a question of fact for the jury and any relevant fact, either direct or circumstantial, which would convince or tend to convince a person of ordinary judgment the identity of a person should be received and evaluated. *State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618 (1974).

In the present case, sufficient evidence existed to prove beyond a reasonable doubt that defendant was the perpetrator of the crime. Gino DePaul testified at trial that he drove with defendant and a few other

people to Bob's Grocery store intending to rob it. RP 39, 50-55. He testified defendant and Elliott Morrison got out of the car at Bob's Grocery wearing gloves and beanies. RP 59-60. The clerk at the store testified that two people with their faces covered and wearing dark clothing came in. RP 141-142. One carried a shotgun, and the other carried a handgun. RP 141-142.

Mr. DePaul testified that defendant and Elliott Morrison returned to the car running away from the store. RP 60. Elliott Morrison was wearing a ski mask and defendant's face was covered with a blue bandana. RP 61. One of them carried a shotgun and they yelled "go, go, go!" as they got into the car. RP 65.

Elliott Morrison testified at trial that defendant was with him during the robbery and carried the shotgun. RP 242, 287. Police searched the vehicle used in the robbery and found shotgun casings, an airsoft BB gun with the orange safety tip painted silver, gloves, and two ski masks. RP 205-08, 244, 249. In the trunk of the car, police found a pair of jeans with defendant's ID in the back pocket. RP 195-197.

In sum, two people testified at trial that defendant participated in the robbery. He was seen going into the store wearing something covering his face and returned running out with his face covered yelling "go, go, go." Items described in the robbery by the clerk were found in a car alongside defendant's jeans with his ID in the pocket.

Defendant denied any involvement in the robbery testifying he had never been to Bob's Grocery before. RP 372. His friend, Anisa Miller testified that she was watching a movie with defendant the night of the robbery. RP 361. But, even though she knew defendant was in trouble a few days after the robbery, she did not tell police he was with her until eight months after the robbery. RP 358. She also wrote in her statement to police the wrong date and it was after a detective corrected her that she referred to the night of the robbery. RP 358. Ms. Miller provided police with a written statement by another friend "Kelsey," who has since moved, which contained the same error in the date and similar language describing the events of the night. RP 361.

Determining the identity of the robbers in this case relied primarily on testimony by witnesses. All inferences are drawn in favor of the State and credibility determinations are for the trier of fact and not reviewed on appeal. In the case at bar, the jury chose to believe the testimony of Elliott Morrison and Gino DePaul over defendant and Anisa Miller. Elliott Morrison and Mr. DePaul's testimony was supported by the facts of the case and the clerk's corroborating testimony. As such, there was sufficient evidence for the jury to find defendant committed first degree robbery.

b. The State proved beyond a reasonable doubt that defendant possessed a firearm.

To prove a defendant guilty of unlawful possession of a firearm, the State had to convince a jury of the following elements beyond a reasonable doubt:

- (1) That on or about the 19th day of October, 2007 the defendant knowingly had a firearm in his possession or control;
- (2) That the defendant on the 19th day of October, 2007, was under the age of eighteen and was not otherwise authorized to possess a firearm as defined elsewhere in these instructions; and
- (3) That the acts occurred in the State of Washington.

CP Supp. 53-77, Jury Instruction No. 17.

Defendant challenges the first element of the conviction, that he knowingly had a firearm in his possession or control. The trial court provided the jury with the following instruction on possession:

A person is armed with a firearm, if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive purposes. If one participant in a crime is armed with a firearm, all accomplices are deemed to be so armed, even if only one firearm is involved.

CP Supp. 53-77, Jury Instruction No. 21.

Possession may be actual or constructive. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). A defendant actually possesses an item if he has physical custody of it; he constructively possesses the item

if he has dominion and control over it or the premises where the item is found. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002); *State v. Coahran*, 27 Wn. App. 664, 668, 620 P.2d 116 (1980) (citing *State v. Callahan*, 77 Wn.2d 27, 31, 459 P.2d 400 (1969)). An automobile is considered to be “premises.” *State v. Turner*, 103 Wn. App. 515, 521, 13 P.3d 234 (2000); *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942 (1971).

A person has dominion and control of an item if he has immediate access to it. *Jones*, 146 Wn.2d at 333. Mere proximity, however, is not enough to establish possession. *Id.* No single factor is dispositive in determining dominion and control. *State v. Collins*, 76 Wn. App. 496, 501, 886 P.2d 243, review denied, 126 Wn.2d 1016, 894 P.2d 565 (1995). But the ability to reduce an object to actual possession is an aspect of dominion and control. *Turner*, 103 Wn. App. at 521. One can be in constructive possession of an object jointly with another person. *Id.* The totality of the circumstances must be considered. *Collins*, 76 Wn. App. at 501.

In the present case, a rational trier of fact could reasonably infer that defendant possessed or controlled a gun that was within his reach. Defendant not only had a firearm readily accessible to him, but there was evidence both he and his accomplice were armed with firearms during the robbery. Defendant and Elliott Morrison sat in the backseat of the car while Mr. DePaul drove. RP 54. Mr. DePaul testified at trial that he

placed his shotgun in the trunk of the car. RP 50. The trunk of the car was accessible to defendant and Mr. DePaul by folding the seats down. RP 54. This puts defendant in constructive possession of the shotgun.

After the robbery when the police searched the car, they found an airsoft BB gun in the backseat. RP 197. It was in plain view and seen by Officer Mills when he looked in the window of the car. RP 244, 249. When he obtained a warrant and opened the door, he found the gun was tucked slightly under the driver's seat area accessible to the backseat passengers. RP 197. The orange safety tip was painted silver so it resembled a handgun. RP 197. This is similar to other cases where courts have found a person to be in constructive possession of a firearm when a gun is sticking out from underneath a seat of the car they are in, inferring that they knew the gun was there. *See State v. Turner* 103 Wn. App. 515, 521, 13 P.3d 234 (2000); *State v. Escheverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997).

A jury could also find defendant was in constructive or actual possession of the shotgun used during the robbery. Mr. Campbell testified that during the robbery, two people entered the store, one of whom carried a shotgun. RP 140-142. Mr. DePaul testified that when defendant and Elliott Morrison came running out of the store, defendant carried his shotgun. RP 120. After his arrest, Elliott Morrison told police that defendant carried the shotgun during the robbery. RP 287. Based on the

testimony at trial, sufficient evidence existed for a rational trier of fact to find defendant carried the shotgun during the robbery.

Finally, because Elliott Morrison admitted to carrying a BB gun during the robbery, there was sufficient evidence for defendant to be found in constructive possession of the BB gun. RP 280. If one participant in a crime is armed with a firearm, all accomplices are deemed to be so armed and thus, defendant was in constructive possession of the BB gun Elliott Morrison carried during the robbery.

As a result, there is sufficient evidence that defendant could be deemed to have unlawfully possessed a firearm. The trier of fact could find defendant was in constructive possession of the BB gun and the shotgun while in the car. The trier of fact could find defendant was in actual possession of the shotgun during the robbery. The trier of fact could find defendant was in constructive possession of the BB gun during the robbery. Thus, sufficient evidence existed to prove defendant unlawfully possessed a firearm.

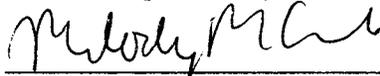
D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court affirm defendant's convictions and remand to correct defendant's

judgment and sentence only to reflect defendant's credit for time served
for electronic home monitoring.

DATED: February 10, 2010

MARK LINDQUIST
Pierce County
Prosecuting Attorney

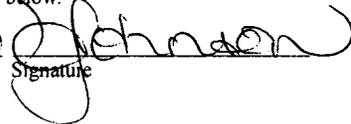


MELODY M. CRICK
Deputy Prosecuting Attorney
WSB # 35453

Chelsey McLean
Rule 9

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.

2/10/10 
Date Signature

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BY _____
DEPUTY