

NO. 39860-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOJO HAMILTON EVANS, SR.

Appellant.

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

The Honorable James R. Orlando

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to convict appellant of robbery in the first degree under accomplice liability.

2. The trial court erred in denying appellant's midtrial motion for dismissal of the charge of robbery in the first degree.

3. The prosecutor committed flagrant misconduct during closing argument by misstating the law on the presumption of innocence and misrepresenting the role of the jury and burden of proof.

4. The trial court erred in failing to unconditionally vacate the conviction of assault in the second degree.

Issues Pertaining to Assignments of Error

1. Is reversal and dismissal required where the evidence was insufficient to convict appellant of robbery in the first degree under accomplice liability because there was no evidence that appellant and the co-defendant knew each other and were acting as accomplices? (Assignments of Error 1 and 2)

2. Under this Court's holding in State v. Venegas, did the prosecutor commit flagrant misconduct during closing argument in misstating the law on the presumption of innocence and misrepresenting the role of the jury and the burden of proof by employing the improper "fill-in-the-blank" argument? (Assignment of Error 3)

3. Did the trial court err in failing to unconditionally vacate the assault in the second degree conviction which merged with the robbery in the first degree conviction thereby violating appellant's constitutional right against double jeopardy? (Assignment of Error 4)

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On November 6, 2008, the State charged appellant, Jojo Hamilton Evans, Sr., with one count of burglary in the first degree, one count of robbery in the first degree, one count of assault in the second degree, one count of unlawful possession of a controlled substance with intent to deliver, one count of possession of a stolen firearm, and one count of unlawful possession of a firearm in the second degree. CP 1-3. A jury trial was held before the Honorable James R. Orlando on August 18-21, 2009.² 2RP, 3RP, 4RP. At midtrial, the State dismissed the charge of possession of stolen firearm and the court granted Evans' motion to dismiss the charge of burglary in the first degree. 4RP 290, 303-06. The court denied Evans' motion to dismiss the charges of robbery in the first degree, assault in the second degree, and unlawful possession of a controlled substance with intent to deliver. 4RP 303-06.

¹There are four volumes verbatim report of proceedings: 1RP - 05/05/09, 05/11/09; 2RP -08/18/09; 3RP - 08/19/09; 4RP - 08/20/09, 08/21/09, 10/02/09.

² Evans was tried with co-defendant, Jarrett Lynn Reedy.

The jury found Evans guilty of robbery in the first degree, assault in the second degree, unlawful possession of a firearm in the second degree and not guilty of unlawful possession of a controlled substance with intent to deliver but guilty of the lesser offense of unlawful possession of controlled substance. 4RP 399-400; CP 118-24.

On October 2, 2009, the court sentenced Evans to 147 months in confinement and 18 months of community custody. 4RP 416-17; CP 131-32. Evans filed this timely appeal. CP 139.

2. Substantive Facts

On November 5, 2008, the undercover narcotics unit of the Lakewood Police Department was conducting a surveillance operation at the Econo Lodge Hotel. 3RP 129-30, 134. Officer Jeff Martin testified that while watching room 242 from his car parked about 60 yards away, he saw Evans come out of the room and walk to a Toyota Corolla in the parking lot. Evans entered the car for less than a minute and then walked back to the room but came out again and went to the car. The second time, he stayed in the car for about two minutes and walked back to the room. Martin did not see Evans carrying anything. Evans knocked on the door and Jarrett Reedy let him in. 3RP 135-36, 139-40, 143-44, 157.

In less than two minutes, the door “flung open” and two females and a male ran out of the room. The two females came down the stairs,

got into a SUV, and drove away. Martin lost sight of the male. Then he saw Evans run out of the room and after a delay, Reedy came running out of the room. 3RP 145-48. Martin stepped out of his car and confronted Evans. After identifying himself as a police officer, he drew his weapon and ordered Evans to the ground. 3RP 149-50. Evans looked at Martin while moving in front of a parked car where he reached into the front pocket of his sweatshirt and then Martin heard “a loud metal like clank or ping on the ground.” 3RP 154-55. When Martin kept ordering Evans to the ground, he complied and Martin placed him in handcuffs. 3RP 155-56. Martin searched Evans but found nothing of evidentiary value. 3RP 228.

Martin saw Reedy drop something into a trash can before other officers stopped him, ordered him to the ground, and handcuffed him. 3RP 158-59. Martin recovered a 9 millimeter handgun and “packaging that contained a large amount of methamphetamine” from the trash can and found a .45 caliber handgun from underneath the car where Evans was standing. 3RP 161, 167, 171, 213-14. Thereafter, Martin inspected the Toyota Corolla from the outside of the car and saw “a single live ammunition round” on the back floorboard. 3RP 200-01. Upon obtaining a search warrant, Martin recovered two .45 caliber rounds and a backpack containing a digital scale, plastic bags, and a baggie from the car. 3RP 202-03, 207, 220. While Evans and Reedy were detained, one person was

brought back to the scene and they “were shown to that person.” 3RP 221-223.

After receiving information from Martin, Sergeant Anders Estes stopped two females in a gold SUV about a mile from the Econo Lodge. 3RP 116-20. Estes detained Amber Sawyer-Jones while Officer Darcy Olsen drove Shalamar Erickson to the Econo Lodge “to confirm or deny that the people that were in custody were the suspects.” 3RP 117-18, 89. Erickson identified two individuals, “She said both of them were participants in different -- in different ways. They were both there, but one did not commit the robbery or the assault; the other one did.” 3RP 100-01, 111.

Shalamar Erickson testified that she and Amber Sawyer-Jones went to a motel room to meet her friend, Travis, and “smoke and buy meth.” 2RP 17, 35. Travis was at the room with another man who she did not know. 2RP 19. They were in the room for about 10 or 15 minutes smoking meth, when another man “entered the room with a gun” and hit Travis over the head with the gun. 2RP 20-21. Erickson and Sawyer-Jones ran out of the room to their car and left but were stopped by the police a few blocks away. 2RP 21-22. The officers questioned them about what happened in the motel room, “took some information from us, our names, phone numbers, and let us go.” 2RP 23-24, 25. Erickson did

not recall being taken anywhere to identify anybody. 2RP 24-25. She could not remember what the other man in the room looked like but he had nothing to do with the incident. 2RP 26-27, 35-36. Erickson could not remember what the man who hit Travis over the head looked like or what she told the police, "I was pretty high." 2RP 26-27.

Amber Sawyer-Jones testified that Erickson told her that "she knew somebody who had some marijuana and that we were going to go buy some." 2RP 46. They drove to the Econo Lodge and went to a room at the motel. There were three males and "one kept going in and out of the room." 2RP 47-48, 57. The men did not have any marijuana but they were using meth. 2RP 49, 61. While the others were smoking meth, she sat around and played a video game during the 15 or 20 minutes she and Erickson were in the room. 2RP 48-49, 60. Suddenly, the man who was going in and out of the room said "everybody was getting jacked" and hit one of the other men with a gun. 2RP 51, 58. She and Erickson ran out of the room, jumped in her suburban, and drove away. 2RP 51. Sawyer-Jones drove about two blocks before the police pulled them over and questioned them about what happened in the motel room. 2RP 52-54. An officer drove Erickson somewhere and another officer stayed with her until Erickson returned. 2RP 54-55. She could not remember what the

three men looked like and did not recall giving a description to the officers. 2RP 56-57.

Officer David Crommes responded to Martin's call for assistance. 4RP 261. Crommes followed the man who "walked away from the room and towards the back of the building and out of sight." 4RP 264. Crommes went around to the back of the Econo Lodge and saw the man on the second floor about to come down the stairs. 4RP 264-65. He stopped and questioned the man who identified himself as Travis Patterson. 4RP 266. Patterson did not tell him that anything was taken from his room. 4RP 269, 277-78. Crommes noticed that Patterson had a cut on his forehead "that was bleeding a little bit" and a cut on the back of his head so he took him to St. Clare Hospital for treatment. 4RP 265-67.

The Washington State Patrol Crime Lab tested the substances that were recovered from the trash can and Toyota Corolla and concluded that each contained methamphetamine. 3RP 73-74, 77-78. The forensics division of the Lakewood Police Department tested the firearms retrieved as evidence and found that they fired and functioned normally but they were not processed for fingerprints. 3RP 183-86, 191. Both Evans and Reedy stipulated that they were convicted of a felony which prohibited them from possessing a firearm. 4RP 279-80.

During closing argument, while explaining the concept of reasonable doubt, the prosecutor told the jury that if it had any doubt, it must fill in the blank:

If you are -- if you decide to decide, what you should be able to say, "I have a doubt about, okay, element x, and it's because of this reason," fill in the blank, okay? And it should be a reason that comes from evidence or lack of evidence. And I suggest to you your instruction doesn't tell you to say, "Well, I wish I had more." Because let me tell you what, you are always going to wish you had more. Always going [to] be questions. Okay?

4RP 391.

At sentencing, defense counsel argued that because assault in the second degree merged with robbery in the first degree, the court must dismiss the assault conviction to avoid double jeopardy. The court agreed, but the judgment and sentence includes the assault in the second degree conviction and the record does not contain an order of dismissal. 4RP 417; CP 127-38.

C. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO CONVICT EVANS OF ROBBERY IN THE FIRST DEGREE BEYOND A REASONABLE DOUBT UNDER ACCOMPLICE LIABILITY.

Evans' conviction of robbery in the first degree must be reversed and dismissed because the evidence was insufficient to prove beyond a

reasonable doubt that Evans committed the crime under accomplice liability.

In a criminal prosecution, due process requires that the State prove every element necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Wash. Const. art. I, section 3. “[T]he reasonable-doubt standard is indispensable, for it ‘impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.’ ” State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995) (quoting In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)).³

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citing State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). A claim of insufficiency admits the truth of the State’s evidence and all inferences that can reasonably be drawn from it. DeVries, 149 Wn.2d at 849.

³ The United States Supreme Court noted, “It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of guilt with utmost certainty.” In re Winship, 397 U.S. at 364.

Dismissal is required following reversal for insufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (the double jeopardy clause of the Fifth Amendment protects against a second prosecution for the same offense after reversal for insufficient evidence) (citing North Carolina v. Pearce, 395 U.S 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled in part on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989)).

The trial court instructed the jury that in order to convict Evans of the crime of robbery in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 5th day of November, 2008 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 accomplice intended to commit theft of the property;
- (3) That the taking was against the person's will by the defendant or 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 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 or in immediate flight therefrom the defendant or accomplice was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon or inflicted bodily injury; and

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

CP 89.

The trial court also instructed the jury on the meaning of accomplice liability:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. 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. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

CP 104.

The record substantiates that there was no evidence that Evans or an accomplice unlawfully took personal property not belonging to him from the person or in the presence of another by the use of force or fear. Shalamar Erickson and Amber Sawyer-Jones were the only witnesses who

testified that they were in the room at the Econo Lodge during the alleged robbery. Erickson testified that they were at the motel smoking meth with her friend, Travis Patterson, and a man who she did not know when another man entered the room carrying a gun and hit Patterson over the head with the gun. 2RP 17, 19-21, 35. Erickson and Sawyer-Jones immediately ran out of the room to their car and drove off. 2RP 21-22. During direct examination, the State questioned Erickson about what happened in the room:

Q. . . . We talked about the people who were in the room when you first got there.

A. Okay.

Q. That being your friend and another male.

A. Right.

Q. Did the other male, to your knowledge, participate in the incident where your friend got hit over the head?

A. No, he -- no. He left pretty quickly, so --

Q. And do you remember what the person who hit your friend over the head looked like today?

A. I don't.

Q. How about the other man who was in the room, do you remember what he looked like?

A. No, I don't.

2RP 26-27.

During cross-examination, Erickson reiterated that the man in the room with Patterson was not involved in the incident:

Q. . . . You said that you and Amber got to the room and your friend was there already. Right?

A. That's correct.

Q. Okay. And what's your friend's name? Just first.

A. Name is Travis.

Q. Travis, thank you. And there was another individual there?

A. That's correct.

Q. And you don't know -- you didn't know this individual?

A. Correct.

Q. And we will call him Mr. X.

A. Correct.

Q. So Mr. X and Travis are there?

A. Right.

Q. And you arrive with Amber. Is that correct so far?

A. Yeah.

Q. Now, at some point, then, another individual came in, Mr. Y. And this individual then did something that you remember?

A. Right.

Q. And you indicated today that X, who was already there when you got there, had nothing to do with anything?

A. That's correct.

Q. Is that true?

A. Right.

2RP 35-36.

Sawyer-Jones testified that there were three men in the room and one of them who kept going in and out of the room suddenly said "everybody was getting jacked" and hit one of the other men with a gun. 2RP 47-48, 51, 57-58. Officer Darcy testified that at the show-up, Erickson identified two individuals and said "both of them were participants in different -- in different ways. They were both there, but one did not commit the robbery or the assault; the other one did." 3RP 100-01, 111. Officer Crommes testified that when he stopped and questioned Patterson outside the motel, Patterson did not tell him that anything was taken from his room. 4RP 269, 277-78. According to Officer Martin, he retrieved a handgun from under the car parked where he confronted Evans and recovered a handgun and packaging from a trash can after seeing Reedy throw something in it. 3RP 158-59, 161, 167, 171, 213-14.

Even when viewing the evidence in the light most favorable to the State, the evidence fails to show that Evans and Reedy were acting as accomplices and that they took personal property belonging to Patterson by the use of force or fear. Erickson's testimony establishes the contrary, that Evans and Reedy were not associated with each other. Although Martin claimed that he saw Reedy discard something in the trash can, there was no evidence that Evans solicited, commanded, encouraged, requested, or aided Reedy in taking anything from Patterson's room. Furthermore, Martin found nothing of evidentiary value when he searched Evans incident to arrest. 3RP 228.

The mere fact that Reedy was in the room with Patterson, Erickson, and Sawyer-Jones during the alleged robbery fails to prove complicity beyond a reasonable doubt in light of this Court's decision in State v. Asaeli, 150 Wn. App. 543, 208 P.3d 1136, review denied, 167 Wn.2d 1001, 220 P.3d 207 (2009). Asaeli involved a gang shooting at a park which led to the second degree felony murder conviction of a co-defendant. Id. at 549-552. The evidence established that the co-defendant was at the park, he drove the other members of the group to the park, and that he was aware that some of the members were trying to locate the victim, but there was no evidence that he was aware of a plan to shoot the victim. Id. at 568-69. This Court reversed the conviction,

concluding that “mere presence at the scene with knowledge that others were looking for [the victim]” was insufficient to prove complicity in the shooting. *Id.* at 569-70.

Accordingly, reversal and dismissal is required because there was significantly less evidence of complicity where there was no evidence that Evans and Reedy knew each other and planned and committed the robbery acting as accomplices. Consequently, the evidence was insufficient to prove beyond a reasonable doubt that Evans committed robbery in the first degree under accomplice liability.⁴

2. THE PROSECUTOR COMMITTED FLAGRANT MISCONDUCT DURING CLOSING ARGUMENT BY MISSTATING THE LAW ON THE PRESUMPTION OF INNOCENCE AND MISREPRESENTING THE ROLE OF THE JURY AND THE BURDEN OF PROOF.

Reversal of Evans’ conviction of robbery in the first degree is required because the prosecutor committed flagrant misconduct during closing argument by misstating the law on the presumption of innocence and misrepresenting the role of the jury and the burden of proof in violation of Evans’ constitutional right to a fair trial.

“Every prosecutor is a quasi-judicial officer of the court, charged with the duty of ensuring that an accused receives a fair trial.” *State v.*

⁴ The trial court therefore erred in denying Evans’ midtrial motion to dismiss the charge of robbery in the first degree.

Jones, 144 Wn. App. 284, 290, 183 P.3d 307 (2008)(citing State v. Huson, 73, Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096, 89 S. Ct. 886, 21 L. Ed. 2d 787 (1969)). The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. The presumption of innocence is a basic component of a fair trial under our system of criminal justice. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976)(citing Drope v. Missouri, 420 U.S. 162, 172, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975)). Misstating the basis on which a jury can acquit may insidiously shift the burden of the State to prove the defendant's guilt beyond a reasonable doubt. State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018, 936 P.2d 417 (1997).

Here, during closing argument, the prosecutor improperly made the "fill-in-the-blank" argument that this Court deemed flagrant and ill-intentioned in State v. Venegas, 155 Wn. App. 507, 228 P.3d 813 (2010). In Venegas, the prosecutor stated, "In order to find the defendant not guilty, you have to say to yourselves: 'I doubt the defendant is guilty, and my reason is' -- blank." Id. at 821. This Court concluded that the remarks were improper:

The jury need not engage in any such thought process. By implying that the jury had to find a reason in order to find [the defendant] not guilty, the prosecutor made it seem as

though the jury had to find [the defendant] guilty unless it could come up with a reason not to. Because we begin with the presumption of innocence, this implication that the jury had an initial affirmative duty to convict was improper. Furthermore, this argument implied that [the defendant] was responsible for supplying such a reason to the jury in order to avoid conviction.

Id. at 821 (citing State v. Anderson, 153 Wn. App. 417, 430, 220 P.3d 1273 (2009)). Emphasizing that “[t]he presumption of innocence is the bedrock upon which the criminal justice system stands,” this Court held that the prosecutor committed flagrant misconduct. Id.

Similarly, the prosecutor here, told the jury that if it had any doubt, it must fill in the blank:

If you are -- if you decide to decide, what you should be able to say, “I have a doubt about, okay, element x, and it’s because of this reason,” fill in the blank, okay? And it should be a reason that comes from evidence or lack of evidence. And I suggest to you your instruction doesn’t tell you to say, “Well, I wish I had more.” Because let me tell you what, you are always going to wish you had more. Always going [to] be questions. Okay?

4RP 391.

As in Venegas, the defense counsel did not object, but the error has not been waived because the remark was “so flagrant and ill-intentioned that it evinces enduring and resulting prejudice incurable by a jury instruction.” Venegas, 155 Wn. App. 507, 228 P.3d at 821 (citing State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009)).

To establish prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). Prejudice occurs where there is a substantial likelihood that the misconduct affected the jury's verdict. In re Detention of Sease, 149 Wn. App. 66, 81, 201 P.3d 1078 (2009). It is evident from the record that there is a substantial likelihood that the prosecutor's misconduct affected the jury's verdict finding Evans guilty of robbery in the first degree because there was insufficient evidence to find him guilty beyond a reasonable doubt. Should this Court conclude that reversal and dismissal is not warranted on the insufficiency of the evidence, reversal is required based on prosecutorial misconduct because the State's untainted evidence was not overwhelming. "[T]rained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case." Fleming, 83 Wn. App. at 215.

Evans' conviction of robbery in the first degree must be reversed because the prosecutor committed flagrant misconduct denying Evans a fair trial.

3. THE TRIAL COURT ERRED IN FAILING TO VACATE THE ASSAULT IN THE SECOND DEGREE CONVICTION THEREBY VIOLATING EVANS' CONSTITUTIONAL RIGHT AGAINST DOUBLE JEOPARDY.

Remand for resentencing is required because the trial court erred in failing to vacate the assault in the second degree conviction thereby violating Evans' constitutional right against double jeopardy.

The fifth amendment to the United States Constitution provides “[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb. . . .” Similarly, article I, section 9 of the Washington Constitution provides “[n]o person shall be . . . twice put in jeopardy for the same offense.” Washington’s double jeopardy clause offers the same scope of protection as the federal double jeopardy clause. In re Personal Restraint of Percer, 150 Wn.2d 41, 49, 75 P.3d 488 (2003)(citing State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)). Both prohibit “(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 imposed in the same proceeding.” Percer, 150 Wn.2d at 48-49 (citing State v. Bobic, 140 Wn.2d 250, 260, 996 P.2d 610 (2000)).

In State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2006), the State charged Womac with homicide by abuse, felony murder in the second

degree, and assault of a child in the first degree for the death of his infant son. A jury found Womac guilty as charged and the trial court entered judgment on all three counts. Id. at 647-48. Womac moved to dismiss counts II and III, claiming dismissal was necessary to avoid a double jeopardy violation. The State asked that the charges and verdicts on counts II and III remain in place until Count I had survived postsentence challenges. The trial court determined double jeopardy did not require dismissal of counts II and III and left both convictions on Womac's record. Id. at 648.

On appeal, this Court directed the trial court to "conditionally dismiss Counts II and III," allowing reinstatement should Count I later be reversed, vacated, or otherwise set aside. The Washington Supreme Court reversed this Court's order to conditionally dismiss counts I and II and directed the trial court to vacate Womac's convictions for felony murder and assault in the first degree, emphasizing that "conditional dismissal of Womac's lesser charges and verdicts, allowing for reinstatement if the greater verdict and sentence are later aside, is entirely without merit." Id. at 649, 658. The Court concluded that the trial court cannot enter multiple convictions for the same offense without offending double jeopardy. Id. at 658.

At sentencing here, defense counsel argued that because assault in the second degree merged with robbery in the first degree, the court must dismiss the assault in the second degree conviction to avoid double jeopardy. 4RP 417. The court responded, "I will dismiss the assault second degree." 4RP 417. However, the judgment and sentence includes the assault in the second degree conviction and the record does not contain an order of dismissal. CP 127-38. Under Womac, the trial court erred in failing to vacate the second degree assault conviction thereby violating Evans' constitutional right against double jeopardy. Resentencing is required for the court to unconditionally vacate the assault conviction in accordance with the Supreme Court's holding.

D. CONCLUSION

For the reasons stated, this Court should reverse and dismiss Mr. Evans' conviction of robbery in the first degree and remand for resentencing for dismissal of the assault in the second degree conviction.

DATED this 30th day of June, 2010.

Respectfully submitted,


VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Jojo Hamilton Evans, Sr.

DECLARATION OF SERVICE

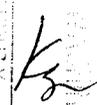
On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Jojo Hamilton Evans, Sr., DOC # 741109, Washington Corrections Center, P.O. Box 900, Shelton, Washington 98584.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 30th day of June, 2010 in Kent, Washington.



Valerie Marushige
Attorney at Law
WSBA No. 25851

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