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NO. 40376-5-II
Cowlitz Co. Cause NO. 09-1-01047-9

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

STATE OF WASHINGTON,

Respondent

v.

JOSEPH LEE MOORE,

Appellant.

BRIEF OF RESPONDENT

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I. PROCEDURAL HISTORY

The appellant was charged by amended information with burglary in the first degree with two firearm enhancements (count I), robbery in the first degree with two firearm enhancements (count II), assault in the second degree with two firearm enhancements (count III), unlawful possession of a firearm in the second degree (count IV), unlawful possession of a firearm in the first degree (count V), and tampering with a witness (count VI). Count IV was dismissed prior to trial.

The appellant proceeded to jury trial on February 8, 2010 before the Honorable Judge James Stonier. On February 11, 2010, the jury found the appellant guilty as charged, also returning special verdicts for six firearm enhancements and several aggravating factors. The appellant was subsequently sentenced to an exceptional sentence of 572 months in prison. The instant appeal timely followed.

II. STATEMENT OF THE CASE

On the night of October 3rd, 2009, Courtney Anderson was at the residence of her boyfriend's parents, Mr. Robert Barrett and Mrs. Beverly Barrett, helping them prepare dinner. She heard a knock on the door, and when she answered there were two men standing on the front step, one of whom was wearing a red hat. RP 117-118. The men asked if a "Jason" was home, Ms. Anderson said no, as no one by that named lived there.

Shortly after this, Ms. Anderson left the residence to go across the street.
RP 120.

Mrs. Barrett and Mr. Barrett were then alone in the home. Mrs. Barrett was sixty-nine years old at the time, Mr. Barrett was seventy and was confined to a hospital bed due to paralysis from polio as a child. RP 126-127. Despite his disability, Mr. Barrett worked doing clock repair, and ran a business, Bob's Clock Shop, out of the family home. RP 125-126. That night, Mrs. Barrett heard another knock on the door shortly after Ms. Anderson left. Mrs. Barrett opened the door and saw the same two men from earlier standing on the front step. One man was wearing black and the other red. Mrs. Barrett began to tell the men that "Jason" didn't live at the residence, when the man in black pushed open the door. Mrs. Barrett saw a gun she described as a MAC 10 submachine gun in the man's hand. RP 131-132. The man in black was wearing a mask over his face, and forced his way into the Barretts' home. The man in red also forced his way inside, this man was wearing a red baseball cap and had bleach blonde hair. RP 133-134. The man in red was carrying a .380 caliber semiautomatic handgun. Id.

The man in black then struck Mrs. Barrett on the head with the butt of the MAC 10, knocking her to the ground. RP 134. The men then walked around the living room of the residence, leaving footprints in some

baking soda that was on the floor. RP 135. The two men then entered the bedroom where Mr. Barrett was in his hospital bed and held him at gunpoint. Mrs. Barrett followed the robbers into the bedroom. Mr. Barrett's practice was to keep his money in an envelope on a shelf next to his bed. RP 136. Mrs. Barrett picked up the envelope, containing cash and a novelty coin, and gave it to Mr. Barrett, who then handed it to the robbers. RP 137, 161. The robbers then fled in the direction of the Kelso train depot. RP 139. The Barretts described the two men as being between 5'6" and 5'8", with the one in black being thinner than the one in red. RP 140, 161.

Tammy Smith, an acquaintance of the appellant, testified that on the night in question the appellant and Dennis Repp ran up to residence, spoke with her briefly, and then left in a car. RP 146-150. Ms. Smith's residence was approximately one block north of the location that a police dog had tracked the robbers to. RP 229-240. During the dog track, the police recovered a mask and red hat that had been discarded by the fleeing robbers. RP 241-249.

Wade Hook testified to picking up the appellant and Dennis Repp at Ms. Smith's residence, and that Dennis Repp sold him a coin stolen in the robbery in the car. RP 209-210, 213. Mr. Hook also stated he saw the appellant with an envelope of cash, and that Repp was talking about

someone having been hit. RP 212-214. Mr. Hook stated he then dropped Repp and the appellant off at a hotel, which was confirmed by hotel staff and surveillance video. RP 215, 250-253, 298-299. At the motel, Mr. Hook stated he saw Repp take what looked like a gun from his waistband and place it under the bed. RP 215.

Testimony established that the appellant matched the physical description of the second robber, matching the height, weight, race, and hair color observed by the victims. RP 195-196, 359. The defendant's shoe size matched the measurements of the footprints left in the victims' residence also. RP 196. When interrogated by the police, the appellant offered an incoherent and changing version of what he was doing the night of the crimes. Though the details changed as he was confronted with the evidence against him, the appellant consistently placed himself with Dennis Repp, and near the scene of the robbery. The appellant's statements also corroborated Ms. Smith and Mr. Hook's testimony. RP 181-188.

After his arrest in this case, the appellant was recorded making several phone calls from the Cowlitz County Jail. On these calls, the appellant stated that he would be able to "beat" the charges if Mr. Hook did not testify against him. RP 303-305. In a later call, the appellant attempted to induce Mr. Hook not to appear and testify against him. RP

311-312. Also, in one call the appellant made a verbal slip, stating, in reference to Courtney Anderson, that there was only “one person that *seen us*. (Caller clears throat.) One person seen the people that robbed them.” RP 305.

At trial, Dennis Repp testified that he forced his way into the victim’s residence, and then robbed Mr. Barrett. RP 277-278. However, Mr. Repp claimed that he was armed with a BB gun rather than an actual firearm. RP 278. Mr. Repp further claimed that he could not recall if another person committed these acts with him, supposedly because he was under the influence of various substances, and that if there was another person he could not remember their identity. RP 279-280. Mr. Repp was subsequently impeached with prior inconsistent statements he had made where he stated the appellant had committed the crimes with him. However, these statements were not substantive evidence. RP 288-290, 417.

In closing argument, the State summarized the acts underlying the crimes charged as:

Back on the 3rd of October last year, the defendant and Dennis Repp committed heinous crimes. They forced their way into the residence of an elderly couple and Ms. – Mrs. Barrett was struck on the head with a firearm, pistol whipped in her own home, falls to the floor injured, frantic. Mr. Barrett – Mr. Robert Barrett, the proprietor of Bob’s Clock Shop robbed at gunpoint in his own home as he lays helpless in his hospital bed.

RP 431.

The next crime, robbery. They took property from Mr. Barrett at gunpoint in his home, by threat of force....

Assault for the pistol whipping of Mrs. Barrett with the handgun, with a gun during the entry.

RP 441.

Finally, at sentencing, the trial court expressed its dismay at the appellant's crimes, particularly the striking of Mrs. Barrett. The court found that:

It combined the basest of motivations, greed and violence, perpetrated an assault on a defenseless women unnecessarily. It didn't further your goals. You had already terrified them. The blow was so totally unnecessary to what you were seeking to accomplish and it is going to have a long term impact on them.

RP 489.

III. ISSUES PRESENTED

1. Did the Trial Court Err in Instructing the Jury Regarding the Charge of Assault in the Second Degree?
2. Did the Appellant's Convictions for Robbery in the First Degree and Assault in the Second Degree Violate Double Jeopardy?
3. Was there Insufficient Evidence to Support the Firearm Enhancements and Verdicts for Unlawful Possession of a Firearm and Assault in the Second Degree?
4. Did the Testimony of the Appellant's Accomplice Deny Him a Fair Trial?

IV. SHORT ANSWER

1. No.
2. No.
3. No.
4. No.

V. ARGUMENT

I. The Trial Court Correctly Instructed the Jury on the Elements of Assault in the Second Degree.

The appellant argues that the trial court erred by failing to give a unanimity instruction for count III, the assault in the second degree against Ms. Barrett. The appellant further claims the trial court failed to properly instruct the jury on the definition of a “deadly weapon”, arguing that because the firearm was used to strike Ms. Barrett rather than shoot her it was not a per se deadly weapon. These claims were not preserved for appeal, and are without merit in any event.

At trial, the appellant did not object to the trial court’s jury instructions regarding count III, assault in the second degree, and similarly did not request any additional instructions. RP 403, 410. As he failed to object at trial, the appellant must now show the alleged instructional error was “manifest” as defined by RAP 2.5(a)(3). A manifest error must have

practical and identifiable consequences apparent on the record that would have been reasonably obvious to the trial court. State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007).

Instructional errors that have been found to be manifest include: directing a verdict, shifting the burden of proof to the defendant, failure to define “beyond a reasonable doubt,” failure to require jury unanimity, and omitting an element of the crime charged. State v. O’Hara, 167 Wn.2d 91, 103, 217 P.3d 756 (2009). Conversely, instructional errors that have not been found to be manifest include failure to instruct on lesser included offenses and failure to define individual terms. Id.; see also State v. Scott, 110 Wn.2d 682, 690-691, 757 P.2d 492 (1988). Applying this standard, the Supreme Court held that the failure to fully define the term “malice” as it relates to a claim of self-defense was not a manifest error that could be asserted for the first time on appeal. O’Hara, 167 Wn.2d at 107-108.

Thus, in the instant case, the appellant may not complain of the lack of a Petrich instruction when he failed to propose one to the trial court. See State v. Lucero, 152 Wn.App. 287, 217 P.3d 369 (2009) (when a party fails to request an instruction it “cannot predicate error on its omission.”) citing McGarvey v. City of Seattle, 62 Wn.2d 524, 533, 384 P.2d 127 (1963). Similarly, the appellant did not object at trial to the definition of “deadly weapon” that was provided to the jury. Now, the

appellant argues that the instruction was incomplete because it did not include the “manner of use” prong of the definition. However, failure to include the complete statutory definition is not a manifest error. See O’Hara, 167 Wn.2d at 107-108 (not manifest error to fail to fully define “malice”). Given this, the appellant may not assert these alleged instructional errors on appeal. These claims were not properly preserved at trial, and have been waived.

Should this Court reach the appellant’s arguments regarding the jury instructions for count III, the Court will find that the trial judge properly instructed the jury. The facts of this case did not require a Petrich instruction, and the jury was corrected instructed that a firearm is a per se deadly weapon.

The appellant argues that because the evidence showed that Mrs. Barrett was struck with the firearm and shortly afterwards had the firearm pointed at her, the trial court was required to give a unanimity instruction pursuant to State v. Petrich, 101 Wn.2d 566, 693 P.2d 173 (1984). Petrich requires that when the evidence establishes several distinct acts, the jury must be instructed to unanimously agree upon a particular act. 101 Wn. 2d at 572. However, if the facts establish a continuing course of conduct, a continuing offense, a unanimity instruction is not required. To determine whether the facts constitute a “continuing offense” or “several distinct

acts”, the court views the facts in a “common sense manner.” Id. at 572. Several distinct acts typically occur over a long time frame and in different locations. Id.

Conversely, if the criminal conduct occurred in one place during a short period of time between the same victim and aggressor, the evidence tends to show a continuing offense. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). In Handran, no unanimity instruction was required in burglary case where the defendant assaulted his ex-wife by striking her and kissing her against her will. 113 Wn.2d at 17-18. See State v. Stockmyer, 83 Wn.App. 77, 920 P.2d 1201 (1996) (no unanimity instruction required for assault incident where defendant pointed gun at victim two different times in short period of time); State v. Craven, 69 Wn.App. 581, 849 P.2d 681 (1993) (repeated assaults on a child over a three week period were a continuing offense); State v. Marko, 107 Wn.App. 215, 27 P.3d 228 (2001) (multiple threats against witnesses during ninety minute period constituted one continuing offense of witness intimidation).

Here, the evidence showed that Mrs. Barrett was struck over the head with a firearm while the appellant and his accomplice were forcing their way into the Barrett’s residence. Almost immediately after, the appellant and his accomplice continued to brandish their firearms inside

the residence. RP 131-136. These acts occurred with a short timeframe and in the same location. As in the other cases cited by the State, no unanimity instruction was required as the facts were clearly a continuing offense. See Handran, Stockmyer, etc. Also, in closing, the State argued that the act that constituted the assault in the second degree was the striking of Mrs. Barrett with the gun, the pistol whipping. RP 431, 441. There was no argument that any other act qualified as assault in the second degree. Thus, the State did not assert that there were multiple acts that could each comprise the assault the second degree, but rather elected the pistol whipping incident. The Court should find that no Petrich instruction was required for count III, the assault in the second degree.

Next, the appellant claims that because Mrs. Barrett was struck with the firearm, whether than having it pointed at her, the firearm was not a per se deadly weapon and the jury was required to be instructed under the “manner of use” prong of the deadly weapon definition. Notably, the appellant provides no authority for this novel claim. Indeed, the plain language of the statute, RCW 9A.04.110(6), states that a deadly weapon is a “loaded or unloaded firearm.” The statute makes no reference to a firearm only being a per se deadly weapon when it is used in some

particular fashion, as argued by the appellant.¹ Instead, RCW 9A.04.110(6) specifically indicates that even an *unloaded* firearm is still a per se deadly weapon. Thus, the clear intent of the legislature was to indicate that firearms, even ones that are immediately incapable of being fired, are always deadly weapons.

The distinction between per se deadly weapons, such as firearms, and items that may be deadly weapons depending on the manner of their use, is well recognized in case-law. See State v. Taylor, 97 Wn.App. 123, 982 P.2d 687 (1999). Under the appellant's theory, a firearm would only be a per se deadly weapon if it was used in some particular manner, thus rendering meaningless the legislature's determination that a firearm is always a deadly weapon. While this argument may have some logical appeal, it flies in the face of the plain meaning of the statute. By conflating the two categories, without any support in the plain language of the statute or caselaw, the appellant's argument would rewrite the statute at issue. The court cannot, and will not, do this. See State v. Groom, 133 Wn.2d 679, 689, 947 P.2d 240 (1997). The Court should give effect to the statute as written, not as the appellant would have it be written. This Court should

¹ The appellant does not identify what acts would be sufficient for a firearm to be considered a per se deadly weapon. Presumably actually discharging a firearm at a person would be sufficient under his theory. However, as the statute states that even an unloaded firearm is a per se deadly weapon, it is apparent that the RCW 9A.04.110(6), as written, is not concerned with the manner in which a firearm is used.

hold that the jury was properly instructed that the Mrs. Barrett was assaulted with a per se deadly weapon, a firearm, when she was struck on the head. The appellant's conviction for assault in the second degree should be upheld.

II. The Appellant's Convictions for Robbery in First Degree and Assault in the Second Degree Do Not Violate Double Jeopardy.

The appellant argues that his convictions for robbery in the first degree and assault in the second degree offend double jeopardy. However, these two crimes involved different acts and different victims, and the assault had a purpose independent and distinct from the robbery. Given this, separate convictions do not violate double jeopardy and both convictions should stand.

The appellant argues that under State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005) and State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008), his conviction for assault in the second degree should merge with his conviction for robbery in the first degree. In Kier, the Supreme Court noted that the particular facts, charges, and arguments of each case should be considering when determining whether a charge of assault merges with a robbery conviction. 164 Wn.2d at 808. There, the defendant was convicted of assault and robbery stemming from carjacking incident where he stole a vehicle from the driver at gunpoint and pointed the gun at a

passenger during the robbery. Id. at 803. The Supreme Court held that these convictions merged, but noted that the outcome would have differed if the assault had an independent purpose separate and distinct from the robbery. Id. at 814.

Here, the appellant himself concedes that if the appellant's conviction for assault in the second degree was based on the pistol whipping of Mrs. Barrett, then the assault had an independent purpose and does not merge with the robbery. See Appellant's brief at 11-12, 17. As argued above, the State clearly relied upon the pistol whipping alone for the assault conviction; therefore, this issue is resolved by the appellant's own arguments. The striking of Mrs. Barrett was clearly a gratuitous act, not necessary for the commission of the robbery. The trial court recognized this very fact at sentencing. RP 489. The pistol whipping had a purpose and effect independent of taking property by force from the Barretts, namely to simply inflict pain and injury for its own sake. In fact, striking Mrs. Barrett was counterproductive to the robbery, as it delayed the appellant from his ultimate goal. RP 134-135. As such, this assault should not merge with the robbery. See State v. Wade, 133 Wn.App. 855, 872 138 P.3d 168 (2006) (assault and robbery did not merge where defendant pistol whipped one victim to extract information and then robbed another victim); State v. Prater, 30 Wn.App. 512, 516, 635 P.2d

1104 (1981) (assault was separate from robbery where the defendant forced one victim to search for money and then shot another victim while he was lying on the floor). The appellant concedes as much in his brief.

Should the Court still consider this issue, the facts of this case indicate that the convictions for both offenses are proper. The State consistently argued Mr. Barrett was the victim of the robbery while Mrs. Barrett was the victim of the assault. RP 431, 441. The information charged that Mr. Barrett was the victim of the robbery, and Mrs. Barrett was the victim of the assault. CP 3-4. The evidence at trial established that, while Mrs. Barrett handed the property to Mr. Barrett, the actual taking by force was from Mr. Barrett. RP 136-137. Thus, though Mrs. Barrett was present during the robbery, the evidence establishes Mr. Barrett as the actual victim of the crime. The appellant's argument would allow a robber to assault multiple persons during the course of a robbery, but only be held accountable for one offense. Fortunately, the law does not require such a nonsensical outcome. As there were two separate victims, the trial court properly entered judgment for two separate offenses. The instant case is therefore distinguishable from Kier, and the Court should find that the brutal assault of Mrs. Barrett does not merge with the robbery of Mr. Barrett.

III. There Was Sufficient Evidence for the Jury To Find the Appellant Was Armed with Firearms During the Crimes, And to Support His Convictions for Unlawful Possession of a Firearm and Assault in the Second Degree.

The appellant argues that the State presented insufficient evidence to prove that he and his accomplice were armed with firearms during the commission of the crimes charged. If correct, this would require that his six firearm enhancements be vacated, along with his convictions for unlawful possession of a firearm and assault in the second degree. However, the appellant's argument misapprehends the issue before the court and is based on a faulty understanding of the record and the law. Accordingly, this Court should reject this claim.

The State agrees that a firearm enhancement under RCW 9.94A.533(3) may only be imposed where the defendant was armed with an actual, real firearm during the commission of the crime. A "firearm" is defined by RCW 9.41.010(7) as "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." In the instant case, the jury was instructed that, in order to return special verdicts for the firearm enhancements, it must find that he was armed with a firearm as defined in RCW 9.41.010(7). RP 428-430, see also WPIC 2.10.01. The jury was similarly instructed that, in order to convict the appellant of unlawful possession of a firearm or assault in the second

degree, it must find that he either possessed, or assaulted Mrs. Barrett, with a firearm as defined RCW 9.41.010(7). RP 424. By returning special verdicts for the firearm enhancement, and guilty verdicts on unlawful possession of a firearm and assault in the second degree, the jury expressly found that the State had proved the firearms at issue met the definition set forth in RCW 9.41.110(7). The question thus becomes whether these verdicts were supported by sufficient evidence.

Before turning to the facts of this case, it is necessary to address the correct legal standard for proving the nature of a firearm. The appellant argues that State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008), established a new requirement that a firearm be “operable” in order for a firearm enhancement to be imposed. This argument is not well-founded, as it is based on a statement contained in dicta in Recuenco. The issue in Recuenco was whether it was harmless error for the trial court to impose a firearm enhancement where the defendant was charged with, and the jury had returned a special verdict for, a deadly weapon enhancement. 163 Wn.2d at 433. The holding was based on the failure to allege a firearm enhancement, and the mention of “operability” was therefore unnecessary and non-binding dicta. See State v. Raleigh, 157 Wn.App. 728, 238 P.3d 1211 (2010).

Leaving aside Recuenco's dicta, the actual issue is whether the item at issue is an actual firearm, as defined in RCW 9.41.010(7), or a toy gun or other non-firearm. This has been the law in Washington since State v. Tongate, 93 Wn.2d 751, 613 P.2d 121 (1980), and State v. Pam, 98 Wn.2d 748, 659 P.2d 454 (1983). This Court recognized the same in State v. Faust, 93 Wn.App. 373, 967 P.2d 1284 (1998), holding that a firearm enhancement was properly imposed where the firearm at issue was incapable of firing due to a mechanical defect. As the item at issue was an actual firearm, a gun in fact, the firearm enhancement was properly imposed. Faust, 93 Wn.App. at 380. See also State v. Berrier, 110 Wn.App. 639, 41 P.3d 1198 (2002) (This Court held that an inoperable firearm is still a firearm if it is a gun in fact).

Turning to the manner of proof that an item is an actual firearm, the courts have consistently held that such proof may be by circumstantial evidence, and that the firearm need not be found or discharged. In Tongate, no firearm was discharged or recovered, but witnesses testified that a firearm was used in the crime. The Supreme Court noted that the question was whether the firearm was real, and that "[t]he evidence is sufficient if a witness to the crime has testified to the presence of such a weapon, as happened here. The evidence may be circumstantial; no weapon need be produced or introduced." 93 Wn.2d at 754 (internal

citations removed). Again, in Pam, no firearm was discharged or recovered. Witnesses testified the defendant carried a shotgun, which fell apart as he fled, and only what appeared to be the stock of a shotgun was found. The Supreme Court found that this could have been sufficient evidence, but reversed because the jury had not been properly instructed on the burden of proof. 98 Wn.2d at 755.

Also, in State v. Mathe, 35 Wn.App. 572, 668 P.2d 599 (1983), the firearm at issue was not discharged or recovered, but witnesses testified and described seeing what appeared to be an actual gun. The court found this evidence sufficient, noting that circumstantial evidence is no less reliable than direct evidence. Mathe, 35 Wn.App. at 581-582; citing State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Again in State v. Bowman, 36 Wn.App. 798, 678 P.2d 1273 (1984), a rape victim described the defendant's firearm and her belief it was real. Though the firearm was not discharged or recovered, the court found this was sufficient evidence of the nature of the weapon. Bowman, 36 Wn.App. at 804. Yet again in State v. Goforth, 33 Wn.App. 405, 655 P.2d 714 (1982), witnesses testified to being robbed at gunpoint, describing the firearms used. No firearm was discharged or recovered, yet the court found there was sufficient evidence. Goforth, 33 Wn.App. at 411-412. The court held that "testimony from witnesses alone may provide sufficient evidence from

which a jury may conclude beyond a reasonable doubt that the gun was operable in fact.” Id. at 412.

The appellant cites to State v. Pierce, 155 Wn.App. 701, 230 P.3d 237 (2010), claiming that this case requires proof that the firearm was operable, and that this proof must be in the form of “bullets found, gunshots heard, or muzzle flashes.” Appellant’s brief at 25.

In Pierce, this Court reversed the defendant’s firearm enhancement where the jury was not instructed on definition of “firearm” in RCW 9.41.010(7) and the jury actually returned special verdicts for deadly weapon enhancements instead of firearm enhancements. 155 Wn.App. at 714. Since the jury in the instant case was instructed that it must find the weapons at issue were firearms under RCW 9.41.010(7), Pierce is immediately distinguishable. Furthermore, as the enhancements in Pierce were already reversed on other grounds, the court’s further holding that there was insufficient evidence for the firearm enhancements is non-binding dicta.

Moreover, to the extent that Pierce may be read to require the firearm be operable and this proof be made by “bullets found, gunshots heard, or muzzle flashes”, the decision was in error. Pierce makes no reference to the longstanding line of cases cited by the State, such Faust, Tongate, Mathe, Bowman, Berrier, etc. These cases unmistakable indicate

that operability is not required, and that witness testimony describing the items at issue as firearms is sufficient evidence. Since these cases were not addressed in Pierce, the State does not believe this Court intended to, or did, overrule a longstanding principle set forth by itself and the Supreme Court. Instead, the Court should adhere to the principles set forth in prior precedent, and the analysis in Raleigh, 157 Wn.App. 728. In Raleigh, the Court properly recognized the operability portion of the Recuenco opinion as dicta, and reiterated the continued viability of Tongate and Faust.

The inquiry next turns to whether there was sufficient evidence from which a rational jury could have found the appellant used firearms during the crime. When the sufficiency of the evidence is challenged, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the defendant was guilty beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-222, 616 P.2d 628 (1980). It is not the Court's role to reweigh the evidence and substitute its judgment for that of the jury, but rather to simply assess if there was sufficient evidence to support the jury's finding. Green, 94 Wn.2d at 221. In this assessment, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906-907, 567 P.2d 1136 (1977). Moreover, a claim of insufficiency "admits the truth of the

State's evidence and all inferences that reasonably can be drawn therefrom.” State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Here, Mrs. Barrett testified that one of the robbers carried a black gun that she described as a MAC 10. RP 132-133. Mrs. Barrett even drew a sketch of this firearm, which was consistent with a real MAC 10. Id., 300-301. Furthermore, Mrs. Barrett testified she was struck on the head with the butt of the MAC 10. RP 134. Sgt. Blain with the Kelso Police testified the wound from this blow was consistent with her being struck by a gun. RP 156. Mrs. Barrett further testified that the other robber carried a black semiautomatic handgun, which appeared to be a .380 caliber. RP 134.

Mr. Barrett also described one of the robbers as carrying a MAC 10 submachine gun. RP 161. Mr. Barrett’s description of the MAC 10 was consistent with the appearance of such a firearm. RP 169, 300-301. Wade Hook also testified that he saw Dennis Repp remove would looked like a gun from his waistband shortly after the robbery, and hide it under a hotel room bed. RP 215. Mr. Hook also drew a picture of this gun, which was substantially the same as Mrs. Barrett’s. RP 215, 321.

This testimony was sufficient for the jury to conclude that the items in question were actual firearms, not toy like objects as the appellant argued at trial. RP 452. As in Goforth, Mathe, Bowman, and Tongate, the

witnesses gave detailed descriptions of the two firearms used in the crimes. The witnesses specified the model of one firearm, a MAC 10, and the caliber and action of the other, a .380 automatic. These descriptions were not fanciful, but matched actual types of existing firearms. For the purposes of this claim, the Court “admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d at 201. The witnesses’ testimony that they saw actual firearms is therefore sufficient to sustain the jury’s verdicts.

Additionally, the circumstantial evidence, and the inferences that flow therefrom, lends further support to the jury’s verdicts. Mrs. Barrett’s injury was consistent with being struck with a gun, the appellant’s accomplice hide the firearm after the crime, and the firearms were not discarded after the crime like the masks and clothing worn by the appellant and his cohort. Firearms are valuable items, particularly to criminals, and are not likely to be thrown away. Conversely, a toy pistol would have no further value, and would only serve to incriminate whoever was found with it after the crime, thus leading the robbers to discard a toy with the mask and clothes. The fact that no firearms were found supports, rather than undermines, the real nature of the weapons. When the evidence is viewed in the light most favorable to the State, it is clear that a rational

jury could have concluded the items used were real firearms. See Green, 94 Wn.2d at 220-222.

Finally, the appellant argues that there was insufficient evidence because his accomplice, Dennis Repp, testified that one of the firearms was in fact a BB gun. Appellant's brief at 25. However, the jury was not bound to accept this testimony, and clearly did not accept it, based on the verdicts returned. It is beyond dispute that an appellate court defers to the jury's determination of witness credibility. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The State asks the Court to adhere to the principles set forth in Tongate, Faust, and Raleigh and find that there was sufficient evidence to support the jury's finding that actual firearms were used in this case. To hold otherwise would be to invade the province of the jury, and elevate certain types of evidence above others. This Court should uphold the jury's verdicts, as they were based in the evidence and applicable law.

IV. The Testimony of Dennis Repp Did Not Deny the Appellant a Fair Trial.

The appellant argues that his accomplice, Dennis Repp, failed to take an oath to tell the truth prior to testifying before the jury. Appellant's brief at 27. However, the Mr. Repp was in fact given an oath to tell the truth, though not in the jury's presence. Thus, this argument is without

merit. Should the Court find there was some error in Mr. Repp's oath, then the issue was waived or was harmless.

At trial, the appellant's accomplice, Dennis Repp, was called by as witness by the State. Prior to Mr. Repp being brought into court, the jury was excused. Mr. Repp then entered the courtroom and the following exchange occurred:

JUDGE STONIER: Mr. Repp, would you stand and raise your right hand? Do you promise to tell the truth under the penalty of perjury?

MR. REPP: I really don't have nothing to say.

JUDGE STONIER: All right. Go ahead and be seated. Counsel? RP 270. The parties and Mr. Repp's counsel then had a brief discussion with the trial court, the ultimate conclusion of which was that Mr. Repp did not have any right to remain silent and would be in contempt if he refused to testify. RP 271-274. After finding that Mr. Repp was required to testify, the trial court told him the following:

JUDGE STONIER: All right. And, that I'm going to order you to testify in front of the jury and if you testify untruthfully, it will be perjury. Do you understand that?

MR. REPP: Yes, sir.

RP 274. The jury then entered the courtroom and Mr. Repp testified.

ER 603 states that:

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

Here, the record clearly indicates that the trial court did in fact administer an oath to Mr. Repp, albeit not in the jury's presence. ER 603 by design does not require the oath to be administered in any particular form or manner. See State v. Avila, 78 Wn.App. 731, 899 P.2d 11 (1995). Neither does ER 603 require the witness take the oath in the presence of the jury. Indeed, the purpose of the rule is to impress on the witness, not the jury, the importance of telling the truth. In re M.B., 101 Wn.App. 425, 471, 3 P.3d 780 (2000). The appellant has not provided any authority that would require the witness to take the oath in the jury's presence, and the Court should find that this claim is without merit.

Should the Court find the oath should have been taken in the jury's presence, or was otherwise deficient, the appellant has waived this issue by his failure to object at trial. In Avila, the trial court completely failed to give an oath to a child victim, but the defendant did not object. The appellate court held that the failure to object at trial constituted a waiver of the error. Avila, 78 Wn.App. at 737-738, see also State v. Dixon, 37 Wn.App. 876, 876, 684 P.2d 725 (1984). Here, assuming that Mr. Repp

did not take the oath properly, the appellant did not object in any fashion to his testimony. Under RAP 2.5(a), this argument has been waived by the appellant's failure to present it to the trial court.

Finally, even if this Court should consider this issue, any error was harmless in light of the other evidence against the appellant. When the trial court commits an error, such an error only justifies reversal if it results in prejudice. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Error is without prejudice, or harmless, where the evidence is of minor significance compared with the overwhelming evidence as a whole. State v. Yates, 161 Wn.2d 714, 766, 168 P.3d 359 (2007).

Here, Mr. Repp's testimony was vague, and potentially more helpful to the appellant than the State. Mr. Repp testified that he forced his way in the victim's residence, and then robbed Mr. Barrett. RP 277-278. However, Mr. Repp claimed that he was armed with a BB gun rather than an actual firearm. RP 278. Mr. Repp further claimed that he could not recall if another person committed these acts with him, supposedly because he was intoxicated, and that if there was another person he could remember whom it was. RP 279-280. Mr. Repp was subsequently impeached with prior inconsistent statements that implicated the appellant, but these statements were not substantive evidence. RP 288-290, 417. Considering this, Mr. Repp added nothing to the State's case, and actually

allowed the appellant to argue the firearm was instead a BB gun. This evidence was of minor significance, and could not have prejudiced the appellant. Yates, 161 Wn.2d at 766.

This conclusion is inescapable when the other evidence against the appellant is considered. The appellant matched the physical description of the second robber, matching the height, weight, race, and hair color observed by the victims. The defendant's shoe size matched the footprints left in the victims' residence also. An eyewitness, Tammy Smith, placed the appellant one block north of where a police dog had tracked the robbers, shortly after the incident. Ms. Smith also testified that the appellant and Dennis Repp ran up, out of breath, and then left in a vehicle.

Wade Hook testified to picking up the appellant and Dennis Repp at Ms. Smith's residence, and that Dennis Repp sold him a coin stolen in the robbery in the car. Hook also stated he saw the appellant with an envelope of cash, and that Repp was talking about someone having been hit. Hook stated he then dropped Repp and the appellant off at a hotel. Video surveillance and hotel staff confirmed this testimony.

When interrogated by the police, the appellant offered an incoherent and changing version of what he was doing the night of the crimes. Though the details changed, the appellant consistently placed himself with Dennis Repp, and near the scene of the robbery. Subsequent

to his arrest, the appellant was recorded making incriminating phone calls from the Cowlitz County Jail. On these calls, the appellant stated that he would be able to “beat” the charges if Mr. Hook did not testify against him. In a later call, the appellant actually attempted to induce Mr. Hook not to appear and testify against him. Also, on one call the appellant made a verbal slip, stating, in reference to Courtney Anderson, that “one person seen us—(Caller clears throat.) – one person seen the – seen the robbers.” These calls were highly incriminating, as they contained an attempt to tamper with a witness and an outright admission to having committed the crimes charged.

The evidence against the appellant was highly damning. Mr. Repp’s testimony was vague, non-substantive, and non-incriminating. Given this, any error cannot be said to have influenced the outcome of the trial, but was instead harmless. If this Court should find there was error in the oath administered to Mr. Repp, it should find the error harmless.

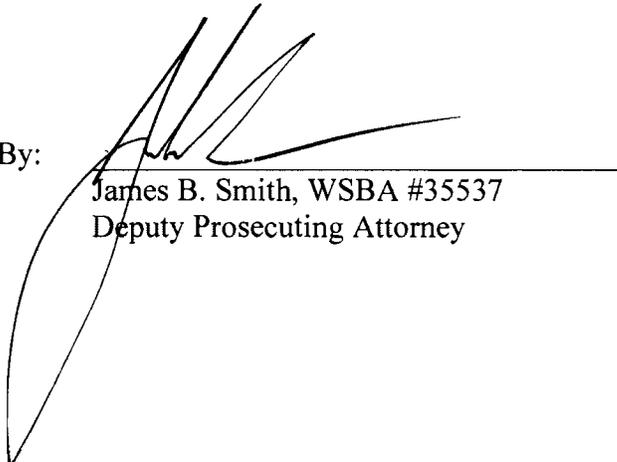
VI. CONCLUSION

Based on the preceding argument, the State respectfully requests the Court to affirm the appellant's convictions. The judgment and sentence of the trial court should be affirmed.

Respectfully submitted this 2nd day of February, 2011.

Susan I. Baur
Prosecuting Attorney
Cowlitz County, Washington

By:



James B. Smith, WSBA #35537
Deputy Prosecuting Attorney

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

STATE OF WASHINGTON,)	NO. 40376-5-II
)	Cowlitz County No.
Respondent,)	09-1-01047-9
)	
vs.)	CERTIFICATE OF
)	MAILING
JOSEPH LEE MOORE,)	
)	
Appellant.)	

BY _____
DEPUTY
11 FEB 11 10:10 AM
COURT OF APPEALS, STATE OF WASHINGTON

I, Michelle Sasser, certify and declare:

That on the 2nd day of February, 2011, I deposited in the mails

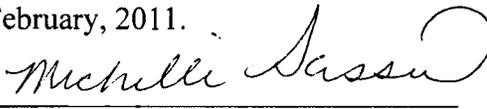
of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Respondent's Brief addressed to the following parties:

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

Dated this 2nd day of February, 2011.



Michelle Sasser