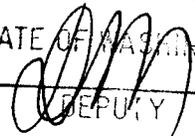


FILED
COURT OF APPEALS
DIVISION II

11 MAR 10 PM 12:44

STATE OF WASHINGTON
BY  DEPUTY

NO. 41059-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN LEE BURNS,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THURSTON COUNTY

Before the Honorable Richard Strophy, Judge

OPENING BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to prove all of the elements of the crime of first-degree robbery that appellant John Burns or an accomplice took property from the person of Nicholas Oatfield as set forth in the “to convict” instruction pertaining to Count VI and mandated by the “law of the case” doctrine where the State assumed the burden to prove this element.

2. There was insufficient evidence to prove all of the elements of the crime of first-degree robbery that Mr. Burns or an accomplice took property from the person of Aaron Ormrod as set forth in the “to convict” instruction pertaining to Count VII and mandated by the “law of the case” doctrine.

3. There was insufficient evidence to prove all of the elements of the crime of first-degree robbery that Mr. Burns or an accomplice took property from the person of Nicholas Ormrod as set forth in the “to convict” instruction pertaining to Count VIII and mandated by the “law of the case” doctrine.

4. The trial court erred in instructing the jury it must be unanimous in order to answer "no" on the special verdict forms.

5. Trial counsel’s failure to object to an improper special verdict instruction constituted ineffective assistance of counsel.

Thurston County Superior Court on February 23, 2010, with one count of burglary in the first degree burglary, contrary to RCW 9A.52.020; three counts of kidnapping in the first degree, contrary to RCW 9A.40.020; and four counts of robbery in the first degree, contrary to RCW 9A.56.200.¹ Supplemental Clerk's Papers [SCP] 271-73. Attachment A.

Each offense was alleged to have occurred while Mr. Burns or an accomplice was armed with a firearm. RCW 9.94A.533(3). SCP 271-73.

Trial to a jury began March 31, 2010, the Honorable Richard Strophy presiding.

The court provided the jury with special verdict forms regarding the firearm enhancements alleged in each count. CP 220, 222, 224, 226, 228, 230, 232, 234.

The court instructed the jury in Count VI:

That on or about December 27, 2009, the defendant or an accomplice unlawfully took personal property from the person of another, Nicholas Thomas Oatfield.

CP 207 (Instruction No. 40).

The court instructed the jury in Count VII:

That on or about December 27, 2009, the defendant or an accomplice unlawfully took personal property from the person of another, Aaron Francis Ormrod.

¹Mr. Burns was charged with co-defendants Jessup Tillmon and Deshone Herbin.

CP 210 (Instruction No. 43).

The court instructed the jury in Count VIII:

That on or about December 27, 2009, the defendant or an accomplice unlawfully took personal property from the person of another, Nicholas George Ormrod.

CP 213 (Instruction No. 46).

The court instructed the jury as to the special verdict forms:

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

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. . . .

CP 217-18 (Instruction No. 50).

The jury found Mr. Burns guilty as charged and answered "yes" on all eight of the special verdict forms. CP 220, 222, 224, 226, 228, 230, 232, 234, 258.

The matter came on for sentencing on August 10, 2010. The court

sentenced Mr. Burns to a total of 431 months of confinement. CP 262.

Timely notice of appeal by the defense was filed August 10, 2010. CP 256. This appeal follows.

2. Trial testimony:

Zachery Dodge, Nick Oatfield, Nick Ormrod and Aaron Ormrod, members of an organized “paintball team,” lived in a house located at 4714 Ridgemont Court in Olympia, Washington. 1Report of Proceedings [RP] at 80, 125, 126, 146.² Friends and other members of the paintball team would also occasionally stay at the house. 1RP at 80, 125, 146.

At approximately 3:30 a.m. on December 27, 2009, Malcolm Moore was dropped off at the house after being at a friend’s house. 1RP at 38, 57, 63. Casey Jones was asleep on a couch in the living room. 1RP at 39, 105. Moore made a sandwich and updated his Facebook status at 3:54 a.m. and then heard knocking on the front door. 1RP at 39. He woke up Jones and tried to look out the window. 1RP at 40. Moore testified that when he

²The Verbatim Report of Proceedings consists of twelve volumes:
RP January 12, 2010, hearing;
RP February 25, 2010, motion hearing;
RP March 1, 3, and 9, 2010, conditions of release hearings;
RP March 24, 2010, hearing;
1RP March 31, 2010, jury trial;
2RP April 1, 2010, jury trial;
3RP April 5, 2010, jury trial;
4RP April 6, April 8, 2010, jury trial;
5RP April 8, 9, 2010, jury trial;
RP April 13, 2010, jury trial, reading of verdicts;
RP May 27, 2010, hearing; and
RP August 10, 2010, sentencing.

looked through the window he saw someone staring at him from outside the house. At trial he identified John Burns as the person he saw outside the house. 1RP at 41.

Jones opened the door a crack with his foot in front of the door and asked who was there. 1RP at 41, 109. Someone outside pushed the front door open and Moore and Jones tried to close it by pushing back. 1RP at 42, 109. A shotgun barrel came through the opening and prevented them from closing the door, and Moore and Jones yelled for others in the house to call 911. 1RP at 42, 52, 109.

Jones stated that three people entered the house; one wearing a dark colored "pea jacket," and one wearing a tan colored jacket, and that two were wearing masks and one was wearing a scarf. 1RP at 140, 141.

Moore stated that he heard voices saying to shoot and that he heard voices telling him to get down, and Moore and Jones laid down on the floor. 1RP at 42-43, 111. Moore said he saw two pairs of legs go down the hall, and that someone remained in the room with him. 1RP at 44. The person told Jones and Moore to crawl to the kitchen area of the house. 1RP at 45, 114. Jones crawled first and Moore followed him. 1RP at 45, 114. He heard them ask "where's the money at" and "where's the weed at?" 1RP at 47. Jones and Moore stated that someone patted their back pants pockets where each of their wallets ordinarily would have been located. 1RP at 47,

121. All the people in the house were eventually brought to the kitchen with Moore and Jones. 1RP at 48.

Zachery Dodge and Brittney Burgess were in a bedroom in the house designated at trial as bedroom No. 1. 1RP at 81; 2RP at 282. After hearing a loud banging noise and yelling, Dodge opened the bedroom door and then closed it, and they both remained in the room. 1RP at 82. Burgess said she heard Jones yell to call 911 and heard Moore yelling for help, and that she also heard unfamiliar voices in the house. 1RP at 83. She later heard a voice in the other two bedrooms saying “don’t call 911” and “we’ll kill you.” 1RP at 84. A person carrying a gun opened the bedroom door and asked “you didn’t call 911, did you? Don’t call 911” and then left. 1RP at 85. Another person carrying a gun came back into the room and went through Dodge’s clothing and drawers. 1RP at 87, 88. The person took Dodge’s laptop from the bedroom and Dodge gave him cash from his wallet. 2RP at 291, 298. The person told them get out of bed and were led down the hallway into the kitchen and told to lie on their stomachs, which they both did. 1RP at 90; 2RP at 291.

Nick Oatfield was in his own bedroom and was awakened by knocking at the front door. 1RP at 147. He got out of bed and walked down the hallway to see what was happening and then heard Jones yelling to call 911. 1RP at 149. Aaron Ormrod was in bedroom No. 3 and his brother Nick

Ormrod was in bedroom No. 4. 1RP at 186, 2RP at 217. Oatfield went into Aaron Ormrod's room, woke him up and told him to call 911. 1RP at 149. A person kicked down the door while Ormrod was on the phone to 911, and two people came into the room and one of them pointed a shotgun at Oatfield and then made Aaron Ormrod, Nick Ormrod and Oatfield crawl down the hall into the dining area to where Moore and Jones were located. 1RP at 152, 153. One of the intruders said that they could see the "nice stuff" in the house and that they knew they had money and marijuana, and Oatfield said he would show them where his marijuana was located, and they picked him up by his hair and shoved him down the hallway to his bedroom. 1RP at 155. Oatfield's room was been "torn apart" and he stated that they had already taken his marijuana. 1RP at 155, 167.

Oatfield later determined that about \$155 in cash was taken from his wallet which had been in his room on a nightstand. 1RP at 156, 157, 158.

Aaron Ormrod discovered that \$50.00 was missing from his wallet, which he left on a Rubbermaid tote container by his bed. 1RP at 196.

Nick Ormrod saw one of the intruders leave with a television set, and discovered later that his television was taken from his bedroom. 2RP at 229.

Police arrived shortly after the intruders left the house. Thurston County Deputy Sheriff Rod Ditrich saw a Ford Explorer near the house with someone sitting in the driver's seat and someone outside the passenger door,

trying to get into the vehicle. 3RP at 428. As his car approached, the person near the passenger side ran away. 3RP at 429. He stopped his car and let his dog chase the person he saw running. 3RP at 430. The dog chased the person for two to three minutes and then returned. 3RP at 433. The driver had run from the vehicle in the meantime. 3RP at 433. A second police dog found Mr. Burns in a water filled ditch at approximately 4:32 a.m. 1RP at 60, 2RP at 349, 352.

At 5:35 a.m. police dispatch received a telephone call from someone saying that he “was one of the people that were involved in the incident and that we were looking for him.” 3RP at 408. The caller gave his location, and police subsequently found Jessup Tillmon nearby. 3RP at 408. The 911 call was played to the jury. 3RP at 475. Deputy Ditrich stated that Tillmon was the person he saw on the passenger side of the Ford Explorer. 3RP at 411.

Kyle Swanson, who had been at 4714 Ridgemont Court in the past, said that he knew Tillmon and had invited him over to the house a few weeks before December 27, 2009. 4RP at 606.

Police found \$187 in currency in Mr. Burns’ sweatshirt pocket. 3RP at 445, 446. An Elite Issue hood, a Hatch brand right handed glove, a flat screen television, plastic zip ties, a paintball gun, an empty box of Remington shotgun slugs, and marijuana were found in the Ford Explorer. 4RP at 683, 685, 688 691, 730. Police found a shotgun near the house. 2RP at 267.

Records show the gun was sold to Tillmon on October 25, 2009. 3RP at 490.

Mr. Burns' counsel rested without calling any witnesses. 4RP at 791.

D. ARGUMENT

1. REVERSAL IS REQUIRED IN COUNTS VI, VII AND VIII BECAUSE THE PROSECUTION FAILED TO PROVE THE ELEMENTS OF FIRST-DEGREE ROBBERY AS SET FORTH IN THE "TO CONVICT" INSTRUCTION AND AS REQUIRED BY THE DOCTRINE OF THE "LAW OF THE CASE"

Under the state and federal due process clauses, the prosecution shoulders the constitutional burden of proving every essential element of a charged crime, beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980); *Jackson v. Virginia*, 443 U.S. 307, 316, 99 W. Ct. 2781, 61 L. Ed. 2d 560 (1979). Failure to meet that burden compels not only reversal but reversal and dismissal with prejudice. *State v. Smith*, 155 Wn.2d 496, 504-505, 120 P.3d 559 (2005).

In the usual case, the prosecution is only required to prove those elements which the law has deemed "essential." See, e.g., *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). Under the law of the case doctrine, jury instructions not objected to become "the law of the case." This principle is based on established roots, "reaching back to the earliest days of

statehood.” *State v. Hickman*, 135 Wn.2d 97, 101-102, 954 P.2d 900 (1998).

Here, because the robbery instructions omitted the phrase “or in the presence of another,” the State bore the burden of proving Mr. Burns or an accomplice took property “from the person of” Nicholas Oatfield, Aaron Ormrod and Nicholas Ormrod. The court instructed the jury in Counts VI, VII, and VIII that to convict Mr. Burns of first degree robbery it had to find that he “unlawfully took personal property from the person of another ...” CP 207, 210, 213 (Instructions 40, 43, 46). The “to-convict” instructions did not include the optional phrase, “or in the presence of another.” CP 207, 210, 213. The instructions, proposed by the prosecution and given by the court provided as follows, in relevant part:

To convict the defendant, John Lee Burns, of the crime of robbery in the first degree, as charged in Count [VI, VII, and VIII], each of the following six elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about December 27, 2009, the defendant or an accomplice unlawfully took personal property from the person of another, [Nicholas Oatfield, Aaron Ormrod and Nicholas Ormrod];
- (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’s or accomplice’s use or threatened use of immediate force, violence, or fear of injury to that person or to that person’s property or to the person or property of another;

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

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

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

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

CP 207, 210, 213.

Because the robbery instructions omitted the phrase “or in the presence of another,” the State bore the burden of proving Mr. Burns took property “from the person of” the victim. See *Hickman, supra*. Here, the testimony regarding Courts VI, VII, and VIII can be summarized as follows:

Count VI: Mr. Burns charged with robbery of Nick Oatfield.	\$155 was missing from Oatfield’s wallet, which had been in his bedroom on a nightstand. 1RP at 156, 157, 158.
Count VII: Mr. Burns charged with robbery of Aaron Ormrod.	Aaron Ormrod discovered that \$50.00 was missing from his wallet which he left on a Rubbermaid tote container in his bedroom. 1RP at 196, 197.
Count VIII: Mr. Burns charged with robbery of Nick Ormrod.	Nick Ormrod saw one of the intruders leave the house with a television set, and he later discovered that his television was taken from his bedroom. 2RP at 229.

Because there was no evidence that money from Oatfield's wallet, Aaron Ormrod's wallet, and Nick Ormrod's television set were taken from their persons, Mr. Burns' convictions for robbery in the first degree in Counts VI, VII, and VIII must be reversed.

2. **THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT THEY MUST BE UNANIMOUS IN ORDER TO ANSWER "NO" ON THE SPECIAL VERDICT FORMS**

The State charged Mr. Burns with commission of the offenses while armed with a firearm. SCP 271-73. The trial court provided the jury with special verdict forms regarding the firearm enhancements. CP 220, 222, 224, 226, 228, 230, 232, 234.

The court also instructed the jury in Instruction 50:

In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. **If you unanimously have a reasonable doubt as to this question, you must answer "no."**

CP 217 (Emphasis added).

Under *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), this instruction was error. In *Bashaw*, Bashaw was charged with three counts of delivery of a controlled substance based on three separate sales to a police

informant. *Bashaw*, 169 Wn.2d at 137. The State sought sentence enhancements, pursuant to RCW 69.50.435(1)(c), based on the allegation each sale took place within 1,000 feet of a school bus route stop. *Id.* The jury was given a special verdict form for each charge, which asked the jury to find whether each charged delivery took place within 1,000 feet of a school bus route stop; in the jury instruction explaining the special verdict forms, jurors were instructed: "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." *Id.* at 139. The jury found *Bashaw* guilty of all three counts of delivery of a controlled substance and found that each took place within 1,000 feet of a school bus route stop. *Id.*

The Court held the jury need not be unanimous in a special finding for a sentence enhancement: "A non-unanimous jury decision on such a special finding is a final determination that the State has not proved that finding beyond a reasonable doubt." *Bashaw*, 169 Wn.2d at 145. Further, the Court held the error was not harmless, as it was impossible to discern what might have occurred had the jury been properly instructed. *Id.* at 148. The Court therefore vacated the sentence enhancements. *Id.*

The same error that occurred in *Bashaw* also occurred in this case. The jury was instructed that all twelve of them must agree in order to answer

the special verdict forms and that they must be unanimous in order to answer "no" on the forms. CP 217. Because it is impossible to discern what the jury might have found if properly instructed, the sentence enhancements must be vacated. *Bashaw*, 169 Wn.2d at 148.

3. **TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO INSTRUCTIONS IMPROPERLY REQUIRING THE JURY TO BE UNANIMOUS TO ANSWER "NO" ON THE SPECIAL VERDICTS.**

Both the federal and state constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), *cert. denied*, 510 U.S. 944 (1993).

To establish the first prong of the *Strickland* test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." *State v.*

Thomas, 109 Wn.2d 222, 229-30, 743 P.2d 816 (1987). To establish the second prong, the defendant “need not show that counsel’s deficient conduct more likely than not altered the outcome of the case” in order to prove that he received ineffective assistance of counsel. *Thomas*, 109 Wn.2d at 226. Rather, only a reasonable probability of such prejudice is required. *Strickland*, 466 U.S. at 693; *Thomas*, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 226.

In this case, defense counsel’s failure to object to improper special verdict instructions constitutes ineffective assistance of counsel. Washington requires unanimous verdicts in criminal cases. Wash. Const. art. I, § 21; *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). For special verdicts on aggravating factors, jurors must be unanimous to find that the State has proven the existence of the aggravating factors beyond a reasonable doubt. *State v. Goldberg*, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003). Jury unanimity is not required to answer a special verdict “no,” however. *Bashaw*, 169 Wn.2d at 145; *Goldberg*, 149 Wn.2d at 893. Where the jury is deadlocked or cannot decide, the answer to the special verdict is “no.” *Id.*

The jury here was given eight special verdict forms and instructed that “[b]ecause this is a criminal case, all twelve of you must agree in order to answer the special verdict forms.” CP 217 (Instruction 50). This is an incorrect statement of law because unanimity is not required for the absence of a special finding. *Bashaw*, 169 Wn.2d at 145. There was no legitimate reason for counsel’s failure to object to the improper instructions.

Moreover, the defense was prejudiced by counsel’s deficient performance, even though the jury returned unanimous “yes” verdicts on the enhancements. In *Bashaw*, the jury received the same erroneous instructions. Rejecting the State’s contention that the error was harmless because the jury returned unanimous yes verdicts, the Supreme Court held,

The error here was the procedure by which unanimity would be inappropriately achieved.... The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction.... We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.

Bashaw, 169 Wn.2d at 148.

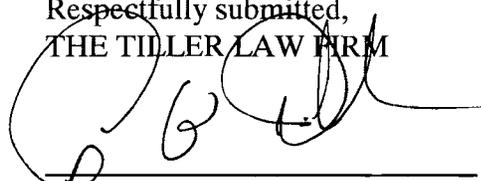
Here, as in *Bashaw*, because the special verdict instructions erroneously required unanimity, the special verdicts must be vacated.

E. CONCLUSION

Based on the above, Mr. Burns respectfully requests that this Court reverse and dismiss his convictions for first degree burglary in Counts VI, VII, and VIII, and to remand for resentencing consistent with the arguments presented herein.

DATED: March 9, 2011.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'P. B. Tiller', is written over the printed name of the attorney.

PETER B. TILLER-WSBA 20835
Of Attorneys for John Burns

APPENDIX A

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.

09-1-01927-8

10 FEB 23 AM 9:33

BETTY J. GOULD, CLERK

BY _____
DEPUTY

**IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY**

STATE OF WASHINGTON,

Plaintiff,

vs.

JOHN LEE BURNS
DESC: B/F/508/130/BRN/BLK
DOB: 09/03/1990
SID: UNKNOWN FBI: UNKNOWN
BOOKING NO: C0160637
PCN: 767017839

Defendant.

NO. 09-1-01927-8

**THIRD AMENDED INFORMATION
(adding Aggravating Factor)**

DAVID H. BRUNEAU
Senior Deputy Prosecuting Attorney

Jointly Charged with Co-Defendant(s):
JESSUP B. TILLMON, 09-1-01930-8
DESHONE V. HERBIN, 09-1-01928-6

Comes now the Prosecuting Attorney in and for Thurston County, Washington, and charges the defendant with the following crime(s):

COUNT I - BURGLARY IN THE FIRST DEGREE, WHILE ARMED WITH A DEADLY WEAPON - FIREARM, RCW 9A.52.020(1), RCW 9.94A.602 AND RCW 9.94A.533(3) - CLASS A FELONY:

In that the defendant, JOHN LEE BURNS, in the State of Washington, on or about December 27, 2009, as a principal or as an accomplice, with intent to commit a crime against a person or property therein, did enter or remain unlawfully in a building and in entering such building or while in such building or in immediate flight therefrom, the actor or another participant in the crime was armed with a deadly weapon, or did assault any person. It is further alleged that during the commission of this offense, the defendant or an accomplice was armed with a deadly weapon, to-wit: a firearm.

COUNT II - KIDNAPPING IN THE FIRST DEGREE, WHILE ARMED WITH A DEADLY WEAPON - FIREARM, RCW 9A.40.020, RCW 9.94A.602 AND RCW 9.94A.533(3) - CLASS A FELONY:

In that the defendant, JOHN LEE BURNS, in the State of Washington, on or about December 27, 2009, as a principal or as an accomplice, did intentionally abduct another person to wit: MALCOM D. MOORE, with intent to facilitate the commission of a felony or flight thereafter.

THIRD AMENDED INFORMATION - I

Edward G. Holm
Thurston County Prosecuting Attorney
2000 Lakeridge Drive S.W.
Olympia, WA 98502
360/786-5540 Fax 360/754-3358

1 It is further alleged that during the commission of this offense, the defendant or an accomplice
2 was armed with a deadly weapon, to-wit: a firearm.

3 **COUNT III - KIDNAPPING IN THE FIRST DEGREE, WHILE ARMED WITH A**
4 **DEADLY WEAPON – FIREARM, RCW 9A.40.020, RCW 9.94A.602 AND RCW**
5 **9.94A.533(3) - CLASS A FELONY:**

6 In that the defendant, JOHN LEE BURNS, in the State of Washington, on or about December
7 27, 2009, as a principal or as an accomplice, did intentionally abduct another person to wit:
8 CASEY ROBERT JONES, with intent to facilitate the commission of a felony or flight
9 thereafter. It is further alleged that during the commission of this offense, the defendant or an
10 accomplice was armed with a deadly weapon, to-wit: a firearm.

11 **COUNT IV - KIDNAPPING IN THE FIRST DEGREE, WHILE ARMED WITH A**
12 **DEADLY WEAPON – FIREARM, RCW 9A.40.020, RCW 9.94A.602 AND RCW**
13 **9.94A.533(3) - CLASS A FELONY:**

14 In that the defendant, JOHN LEE BURNS, in the State of Washington, on or about December
15 27, 2009, as a principal or as an accomplice, did intentionally abduct another person to wit:
16 BRITTANY THERESA BURGESS, with intent to facilitate the commission of a felony or flight
17 thereafter. It is further alleged that during the commission of this offense, the defendant or an
18 accomplice was armed with a deadly weapon, to-wit: a firearm.

19 **COUNT V - ROBBERY IN THE FIRST DEGREE, WHILE ARMED WITH A DEADLY**
20 **WEAPON – FIREARM, RCW 9A.56.200(1), RCW 9.94A.602 AND RCW 9.94A.533(3) -**
21 **CLASS A FELONY:**

22 In that the defendant, JOHN LEE BURNS in the State of Washington, on or about December 27,
23 2009, as a principal or as an accomplice, with intent to commit theft, did unlawfully take personal
property from the person or in the presence of ZACHARY OLSON DODGE, against such person's
will, by use or threatened use of immediate force, violence, or fear of injury to said person or the
property of said person or the person property of another, and in the commission of said crime or in
immediate flight therefrom, the defendant was armed with a deadly weapon or displayed what
appeared to be a deadly weapon. It is further alleged that during the commission of this offense,
the defendant or an accomplice was armed with a deadly weapon, to-wit: a firearm.

COUNT VI - ROBBERY IN THE FIRST DEGREE, WHILE ARMED WITH A DEADLY
WEAPON – FIREARM, RCW 9A.56.200(1), RCW 9.94A.602 AND RCW 9.94A.533(3) -
CLASS A FELONY:

In that the defendant, JOHN LEE BURNS in the State of Washington, on or about December 27,
2009, as a principal or as an accomplice, with intent to commit theft, did unlawfully take personal
property from the person or in the presence of NICHOLAS THOMAS OATFIELD, against such
person's will, by use or threatened use of immediate force, violence, or fear of injury to said person
or the property of said person or the person property of another, and in the commission of said crime
or in immediate flight therefrom, the defendant was armed with a deadly weapon or displayed what

1 appeared to be a deadly weapon. It is further alleged that during the commission of this offense,
the defendant or an accomplice was armed with a deadly weapon, to-wit: a firearm.

2 **COUNT VII - ROBBERY IN THE FIRST DEGREE, WHILE ARMED WITH A**
3 **DEADLY WEAPON – FIREARM, RCW 9A.56.200(1), RCW 9.94A.602 AND RCW**
4 **9.94A.533(3) - CLASS A FELONY:**

5 In that the defendant, JOHN LEE BURNS in the State of Washington, on or about December 27,
6 2009, as a principal or as an accomplice, with intent to commit theft, did unlawfully take personal
7 property from the person or in the presence of AARON FRANCIS ORMROD, against such
8 person's will, by use or threatened use of immediate force, violence, or fear of injury to said person
9 or the property of said person or the person property of another, and in the commission of said crime
10 or in immediate flight therefrom, the defendant was armed with a deadly weapon or displayed what
11 appeared to be a deadly weapon. It is further alleged that during the commission of this offense,
12 the defendant or an accomplice was armed with a deadly weapon, to-wit: a firearm.

13 **COUNT VIII - ROBBERY IN THE FIRST DEGREE, WHILE ARMED WITH A**
14 **DEADLY WEAPON – FIREARM, RCW 9A.56.200(1), RCW 9.94A.602 AND RCW**
15 **9.94A.533(3) - CLASS A FELONY:**

16 In that the defendant, JOHN LEE BURNS in the State of Washington, on or about December 27,
17 2009, as a principal or as an accomplice, with intent to commit theft, did unlawfully take personal
18 property from the person or in the presence of NICHOLAS GEORGE ORMROD, against such
19 person's will, by use or threatened use of immediate force, violence, or fear of injury to said person
20 or the property of said person or the person property of another, and in the commission of said crime
21 or in immediate flight therefrom, the defendant was armed with a deadly weapon or displayed what
22 appeared to be a deadly weapon. It is further alleged that during the commission of this offense,
23 the defendant or an accomplice was armed with a deadly weapon, to-wit: a firearm.

And further, that the defendant has committed multiple current offenses and the defendant's high
offender score results in some of the current offenses going unpunished. RCW 9.94A.533(2)(c)

DATED this 23 day of February, 2010.


DAVID H. BRUNEAU, WSBA #6830
Senior Deputy Prosecuting Attorney

APPENDIX B

STATUTES

RCW 9.94A.533

Adjustments to standard sentences.

(1) The provisions of this section apply to the standard sentence ranges determined by RCW 9.94A.510 or 9.94A.517.

(2) For persons convicted of the anticipatory offenses of criminal attempt, solicitation, or conspiracy under chapter 9A.28 RCW, the standard sentence range is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the completed crime, and multiplying the range by seventy-five percent.

(3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. If the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any firearm enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) Three years for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

(c) Eighteen months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection;

(d) If the offender is being sentenced for any firearm enhancements under (a), (b), and/or (c) of this subsection and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (4)(a), (b), and/or (c) of this section, or both, all firearm enhancements under this subsection shall be twice the amount of the enhancement listed;

(e) Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under *RCW 9.94A.728(4);

(f) The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony;

(g) If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a firearm enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

(4) The following additional times shall be added to the standard

sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any deadly weapon enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the deadly weapon enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a deadly weapon enhancement. If the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any deadly weapon enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Two years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) One year for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

(c) Six months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection;

(d) If the offender is being sentenced under (a), (b), and/or (c) of this subsection for any deadly weapon enhancements and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (3)(a), (b), and/or (c) of this section, or both, all deadly weapon enhancements under this subsection shall be twice the amount of the enhancement listed;

(e) Notwithstanding any other provision of law, all deadly weapon enhancements under this section are mandatory, shall be served in total

confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under *RCW 9.94A.728(4);

(f) The deadly weapon enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony;

(g) If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a deadly weapon enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

(5) The following additional times shall be added to the standard sentence range if the offender or an accomplice committed the offense while in a county jail or state correctional facility and the offender is being sentenced for one of the crimes listed in this subsection. If the offender or an accomplice committed one of the crimes listed in this subsection while in a county jail or state correctional facility, and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section:

(a) Eighteen months for offenses committed under RCW 69.50.401(2) (a) or (b) or 69.50.410;

(b) Fifteen months for offenses committed under RCW 69.50.401(2) (c), (d), or (e);

(c) Twelve months for offenses committed under RCW 69.50.4013.

For the purposes of this subsection, all of the real property of a state correctional facility or county jail shall be deemed to be part of that facility or county jail.

(6) An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or **9.94A.605. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

(7) An additional two years shall be added to the standard sentence range for vehicular homicide committed while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502 for each prior offense as defined in RCW 46.61.5055.

(8)(a) The following additional times shall be added to the standard sentence range for felony crimes committed on or after July 1, 2006, if the offense was committed with sexual motivation, as that term is defined in RCW 9.94A.030. If the offender is being sentenced for more than one offense, the sexual motivation enhancement must be added to the total period of total confinement for all offenses, regardless of which underlying offense is subject to a sexual motivation enhancement. If the offender committed the offense with sexual motivation and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(i) Two years for any felony defined under the law as a class A felony or with a statutory maximum sentence of at least twenty years, or both;

(ii) Eighteen months for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both;

(iii) One year for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both;

(iv) If the offender is being sentenced for any sexual motivation enhancements under (i), (ii), and/or (iii) of this subsection and the offender has previously been sentenced for any sexual motivation enhancements on or after July 1, 2006, under (i), (ii), and/or (iii) of this subsection, all sexual motivation enhancements under this subsection shall be twice the amount of the enhancement listed;

(b) Notwithstanding any other provision of law, all sexual motivation enhancements under this subsection are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other sexual motivation enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under *RCW 9.94A.728(4);

(c) The sexual motivation enhancements in this subsection apply to all felony crimes;

(d) If the standard sentence range under this subsection exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a sexual motivation enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced;

(e) The portion of the total confinement sentence which the offender must serve under this subsection shall be calculated before any earned early release time is credited to the offender;

(f) Nothing in this subsection prevents a sentencing court from imposing a sentence outside the standard sentence range pursuant to RCW 9.94A.535.

(9) An additional one-year enhancement shall be added to the standard sentence range for the felony crimes of RCW 9A.44.073, 9A.44.076, 9A.44.079, 9A.44.083, 9A.44.086, or 9A.44.089 committed on or after July 22, 2007, if the offender engaged, agreed, or offered to engage the

victim in the sexual conduct in return for a fee. If the offender is being sentenced for more than one offense, the one-year enhancement must be added to the total period of total confinement for all offenses, regardless of which underlying offense is subject to the enhancement. If the offender is being sentenced for an anticipatory offense for the felony crimes of RCW 9A.44.073, 9A.44.076, 9A.44.079, 9A.44.083, 9A.44.086, or 9A.44.089, and the offender attempted, solicited another, or conspired to engage, agree, or offer to engage the victim in the sexual conduct in return for a fee, an additional one-year enhancement shall be added to the standard sentence range determined under subsection (2) of this section. For purposes of this subsection, "sexual conduct" means sexual intercourse or sexual contact, both as defined in chapter 9A.44 RCW.

(10)(a) For a person age eighteen or older convicted of any criminal street gang-related felony offense for which the person compensated, threatened, or solicited a minor in order to involve the minor in the commission of the felony offense, the standard sentence range is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the completed crime, and multiplying the range by one hundred twenty-five percent. If the standard sentence range under this subsection exceeds the statutory maximum sentence for the offense, the statutory maximum sentence is the presumptive sentence unless the offender is a persistent offender.

(b) This subsection does not apply to any criminal street gang-related felony offense for which involving a minor in the commission of the felony offense is an element of the offense.

(c) The increased penalty specified in (a) of this subsection is unavailable in the event that the prosecution gives notice that it will seek an exceptional sentence based on an aggravating factor under RCW 9.94A.535.

(11) An additional twelve months and one day shall be added to the standard sentence range for a conviction of attempting to elude a police vehicle as defined by RCW 46.61.024, if the conviction included a finding by special allegation of endangering one or more persons under RCW 9.94A.834.

(12) An additional twelve months shall be added to the standard sentence range for an offense that is also a violation of RCW 9.94A.831.

RCW 9A.40.020

Kidnapping in the first degree.

(1) A person is guilty of kidnapping in the first degree if he intentionally abducts another person with intent:

- (a) To hold him for ransom or reward, or as a shield or hostage; or
- (b) To facilitate commission of any felony or flight thereafter; or
- (c) To inflict bodily injury on him; or
- (d) To inflict extreme mental distress on him or a third person; or
- (e) To interfere with the performance of any governmental function.

(2) Kidnapping in the first degree is a class A felony.

RCW 9A.52.020

Burglary in the first degree.

(1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

(2) Burglary in the first degree is a class A felony.

RCW 9A.56.200

Robbery in the first degree.

(1) A person is guilty of robbery in the first degree if:

(a) In the commission of a robbery or of immediate flight therefrom, he or she:

(i) Is armed with a deadly weapon; or

(ii) Displays what appears to be a firearm or other deadly weapon; or

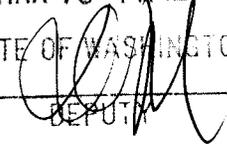
(iii) Inflicts bodily injury; or

(b) He or she commits a robbery within and against a financial institution as defined in RCW 7.88.010 or 35.38.060.

(2) Robbery in the first degree is a class A felony.

FILED
COURT OF APPEALS
DIVISION II

11 MAR 10 PM 12:45

STATE OF WASHINGTON
BY 
DEPUTY

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOHN LEE BURNS,

Appellant.

COURT OF APPEALS NO.
41059-1-II

THURSTON COUNTY NO.
09-1-01927-8

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original Opening Brief of Appellant was mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to John Burns, Appellant, and David Bruneau, Thurston County Deputy Prosecuting Attorney, by first class mail, postage pre-paid on Wednesday, March 09, 2011, at the Centralia, Washington post office addressed as follows:

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Court of Appeals
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Tacoma, WA 98402-4454

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Dated: March 9, 2011.

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'P. B. Tiller', written over a horizontal line.

PETER B. TILLER – WSBA #20835
Of Attorneys for Appellant

CERTIFICATE OF
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