

NO. 41099-1-II

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

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER EUGENE SIMMS  
and  
ADRIAN TUBIS BROUSSARD,  
APPELLANTS

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

No. 09-1-04280-4 & 09-1-04647-8

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**Brief of Respondent**

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**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. ..... 1

1. Whether, viewing the evidence in the light most favorable to the State, there was sufficient evidence from which a rational fact finder could have found the essential elements of the crime of attempted first-degree robbery beyond a reasonable doubt with respect to Defendant Broussard..... 1

2. Whether the trial court properly failed to give an accomplice testimony cautionary instruction where the testimony of the accomplice in question was not uncorroborated and neither defendant requested such an instruction. .... 1

3. Whether Defendants failed to meet their burden of showing prosecutorial misconduct or that any unchallenged argument was flagrant and ill-intentioned. .... 1

4. Whether Defendants waived any issue regarding the trial court's instruction to the jury number 22 concerning the special verdict forms..... 1

5. Whether Defendants failed to show ineffective assistance of counsel where their trial counsel chose not to propose an accomplice testimony cautionary instruction, to object to portions of the deputy prosecutor's closing argument, or to object to a special verdict instruction based on a then previously-approved WPIC. .... 1

6. Whether the sentencing court properly imposed contested conditions of community custody where such conditions were statutorily authorized and imposed consistently with the separation of powers doctrine, and whether defendants' vagueness challenge to such conditions is premature..... 2

B. STATEMENT OF THE CASE.

1. Procedure ..... 2

2. Facts..... 5

C.	<u>ARGUMENT</u> .....	17
1.	VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL FACT FINDER COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THE CRIME OF ATTEMPTED FIRST-DEGREE ROBBERY BEYOND A REASONABLE DOUBT WITH RESPECT TO DEFENDANT BROUSSARD. ....	17
2.	THE TRIAL COURT DID NOT ERR IN FAILING TO GIVE AN ACCOMPLICE TESTIMONY CAUTIONARY INSTRUCTION WHERE THE TESTIMONY OF THE ACCOMPLICE IN QUESTION WAS NOT UNCORROBORATED AND NEITHER DEFENDANT REQUESTED SUCH AN INSTRUCTION.....	24
3.	DEFENDANTS FAILED TO MEET THEIR BURDEN OF SHOWING PROSECUTORIAL MISCONDUCT OR THAT ANY UNCHALLENGED ARGUMENT WAS FLAGRANT AND ILL-INTENTIONED.....	31
4.	THE DEFENDANTS WAIVED ANY ISSUE REGARDING THE COURT’S INSTRUCTION TO THE JURY NUMBER 22 CONCERNING THE SPECIAL VERDICT FORMS. ....	49
5.	DEFENDANTS HAVE FAILED TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THEIR TRIAL COUNSEL CHOSE NOT TO PROPOSE AN ACCOMPLICE TESTIMONY CAUTIONARY INSTRUCTION, TO OBJECT TO PORTIONS OF THE DEPUTY PROSECUTOR’S CLOSING ARGUMENT, OR TO OBJECT TO A SPECIAL VERDICT INSTRUCTION BASED ON A THEN PREVIOUSLY-APPROVED WPIC.	55

6. THE SENTENCING COURT PROPERLY IMPOSED THE CONTESTED CONDITIONS OF COMMUNITY CUSTODY BECAUSE SUCH CONDITIONS WERE STATUTORILY AUTHORIZED AND IMPOSED CONSISTENTLY WITH THE SEPARATION OF POWERS DOCTRINE AND DEFENDANTS' VAGUENESS CHALLENGE TO SUCH CONDITIONS IS PREMATURE. .... 61

D. CONCLUSION..... 67

## Table of Authorities

### State Cases

<i>In Re Rice</i> , 118 Wn.2d 876, 889, 828 P.2d 1086 (1992) .....	56, 57
<i>McGarvey v. City of Seattle</i> , 62 Wn.2d 524, 533, 384 P.2d 127 (1963).....	26
<i>State v. Adams</i> , 91 Wn.2d 86, 90, 586 P.2d 1168 (1978) .....	57
<i>State v. Anderson</i> , 153 Wn. App. 417, 427, 220 P.3d 1273 (2009).....	32, 45, 46, 49
<i>State v. Anderson</i> , 153 Wn. App. 417, 428, 220 P.3d 1273 (2009).....	34
<i>State v. Bahl</i> , 164 Wn.2d 739, 753, 193 P.3d 678 (2008).....	62, 66
<i>State v. Bashaw</i> , 144 Wn. App. 196, 182 P.3d 451 (April 24, 2008) .....	60
<i>State v. Bashaw</i> , 169 Wn.2d 133, 147, 234 P.3d 195 (2010).....	50, 51, 54
<i>State v. Bowerman</i> , 115 Wn.2d 794, 808, 802 P.2d 116 (1990).....	55
<i>State v. Brett</i> , 126 Wn.2d 136, 175, 892 P.2d 29 (1995).....	34
<i>State v. Brockob</i> , 159 Wn.2d 311, 336, P.3d 59 (2006).....	18
<i>State v. Brown</i> , 132 Wn.2d 529, 561, 940 P.2d 546 (1997).....	32, 33
<i>State v. Calhoun</i> , 13 Wn. App. 644, 648, 536 P.2d 668 (1975).....	26, 29, 30, 31
<i>State v. Cannon</i> , 120 Wn. App. 86, 90, 84 P.3d 283 (2004).....	18, 21, 22, 23, 24, 25
<i>State v. Cienfuegos</i> , 144 Wn.2d 222, 25 P.3d 1011 (2001) .....	55, 56, 58
<i>State v. Contreras</i> , 57 Wn. App. 471, 476, 788 P.2d 1114, <i>review denied</i> , 115 Wn.2d 1014, 797 P.2d 514 (1990).....	32
<i>State v. Curtiss</i> , 161 Wn. App. 673, 250 P.3d 496 (2011) .....	31, 45

<i>State v. Emery</i> , 161 Wn. App. 172, 253 P.3d 413 (2011).....	34
<i>State v. Evans</i> , ___ P.3d ___ (2011)(WL 4036102).....	44, 45, 46
<i>State v. Faucett</i> , 22 Wn. App. 869, 876, 593 P.2d 559 (1979) .....	43, 44
<i>State v. Fisher</i> , 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009).....	32, 33
<i>State v. Fleming</i> , 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), <i>review denied</i> , 131 Wn.2d 1018, 936 P.2d 417 (1997).....	39, 41, 42, 43, 44
<i>State v. Garrett</i> , 124 Wn.2d 504, 518, 881 P.2d 185 (1994).....	56
<i>State v. Gilmore</i> , 76 Wn.2d 293, 456 P.2d 344 (1969) .....	56
<i>State v. Goldberg</i> , 149 Wn.2d 888, 893, 72 P.3d 1083 (2003).....	49, 54
<i>State v. Graham</i> , 59 Wn. App. 418, 429, 798 P.2d 314 (1990) .....	32
<i>State v. Green</i> , 119 Wn. App. 15, 23, 79 P.3d 460 (2003).....	35, 36, 37, 39
<i>State v. Green</i> , 94 Wn.2d 216, 221, 616 P.2d 628 (1980).....	18
<i>State v. Gregory</i> , 158 Wn.2d 759, 841, 147 P.3d 1201 (2006) .....	31, 35
<i>State v. Guloy</i> , 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), <i>cert. denied</i> , 475 U.S. 1020, 106 S.Ct. 1208, 89 L. Ed. 2d 321 (1986).....	38
<i>State v. Harris</i> , 102 Wn.2d 148, 155, 685 P.2d 584 (1984), <i>overruled on other grounds by State v. Brown</i> , 111 Wn.2d 124, 157, 761 P.2d 588 (1988).....	25, 30, 31, 58
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 78, 917 P.2d 563, 571 (1996).....	56
<i>State v. Hickman</i> , 135 Wn.2d 97, 101, 954 P.2d 900 (1997).....	19
<i>State v. Hoffman</i> , 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991) .....	35
<i>State v. Ish</i> , 170 Wn. 2d 189, 198-99, 202-03, 241 P.3d 389 (2010).....	34, 35, 36, 37, 39
<i>State v. Jessup</i> , 31 Wn. App. 304, 641 P.2d 1185 (1982).....	35

<i>State v. Johnson</i> , 143 Wn. App. 1, 19, 177 P.3d 1127 (2007).....	57, 59
<i>State v. Johnson</i> , 158 Wn. App. 677, 683, 243 P.3d 936 (2010).....	33
<i>State v. Johnston</i> , 143 Wn. App. 1, 177 P.3d 1127 (2007).....	55, 56
<i>State v. Kirkman</i> , 159 Wn.2d 918, 926, 155 P.3d 125 (2007) .....	38
<i>State v. Kroll</i> , 87 Wn.2d 829, 843, 558 P.2d 173 (1977) .....	26
<i>State v. Larios-Lopez</i> , 156 Wn. App. 257, 260, 233 P.3d 899 (2010).....	31, 33
<i>State v. Lewis</i> , 156 Wn. App. 230, 240, 233 P.3d 891 (2010) .....	34
<i>State v. Lopez</i> , 107 Wn. App. 270, 276, 27 P.3d 237 (2001) .....	18
<i>State v. Lucero</i> , 140 Wn. App. 782, 787, 167 P.3d 1188 (2007), <i>review granted on other grounds</i> , 166 Wn.2d 1014, 212 P.3d 557 (2009).....	26
<i>State v. McFarland</i> , 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995).....	38, 55, 56
<i>State v. McKenzie</i> , 157 Wn.2d 44, 134 P.3d 221 (2006) .....	32
<i>State v. McNeal</i> , 145 Wn.2d 352, 362, 37 P.3d 280 (2002).....	57
<i>State v. Millante</i> , 80 Wn. App. 237, 250, 908 P.2d 374 (1995).....	34-35
<i>State v. Myers</i> , 133 Wn.2d 26, 37, 941 P.2d 1102 (1997).....	18
<i>State v. Nunez</i> , 160 Wn. App. 150, 157, 248 P.3d 103 (2011).....	50, 51, 52, 53, 54, 60
<i>State v. O’Hara</i> , 167 Wn.91, 98, 217 P.3d 756 (2009).....	38, 51
<i>State v. Pastrana</i> , 94 Wn. App. 463, 479, 972 P.2d 557 (1999) .....	33
<i>State v. Russell</i> , 125 Wn.2d 24, 87, 882 P.2d 747 (1994).....	32, 33
<i>State v. Ryan</i> , 160 Wn. App. 944, 252 P.3d 895 (2011), <i>review granted</i> , 172 Wn.2d 1004, ___ P.3d ___ (2011)(WL 3523833).....	50, 54

<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).....	18
<i>State v. Sansone</i> , 127 Wn. App. 630, 642, 111 P.3d 1251 (2005).....	62, 65, 66
<i>State v. Sargent</i> , 40 Wn. App. 340, 343, 698 P.2d 598 (1985).....	34
<i>State v. Sherwood</i> , 71 Wn. App. 481, 484-85, 860 P.2d 407 (1993).....	25
<i>State v. Slight</i> , 157 Wn. App. 618, 625, 238 P.2d 83 (2010).....	59
<i>State v. Stenson</i> , 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), <i>cert. denied</i> , 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998).....	31
<i>State v. Studd</i> , 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).....	59, 60
<i>State v. Summers</i> , 107 Wn. App. 373, 382-83, 28 P.3d 780 (2002).....	59, 60
<i>State v. Swan</i> , 114 Wn.2d 613, 661, 790 P.2d 610 (1990).....	32
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	55, 56
<i>State v. Thorgerson</i> , ___ P.3d ___ (2011)(WL 3716980).....	34
<i>State v. Tolia</i> s, 135 Wn.2d 133, 140, 954 P.2d 907 (1998).....	38
<i>State v. Townsend</i> , 142 Wn.2d 838, 15 P.3d 145 (2001).....	56
<i>State v. Warren</i> , 165 Wn.2d at 30, 195 P.3d 940 (2008).....	34
<i>State v. Weber</i> , 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).....	33
<i>State v. Yarbrough</i> , 151 Wn. App. 66, 89, 210 P.3d 1029, 1040-41 (2009).....	55, 57
<i>State v. Yates</i> , 161 Wn.2d 714, 774, 168 P.3d 359 (2007).....	33
<i>State v. Zimmer</i> , 146 Wn. App. 405, 413, 190 P.3d 121 (2008).....	62

## **Federal and Other Jurisdictions**

<i>Beck v. Washington</i> , 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).....	32
<i>Strickland v. Washington</i> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	55, 56

## **Constitutional Provisions**

Sixth Amendment, United States Constitution .....	55, 56
Article I, section 3, Washington State Constitution.....	62
Article I, section 22 (amendment X), Washington State Constituton ....	55

## **Statutes**

RCW 9.94A.030(53)(a) (2010).....	61
RCW 9.94A.701(2).....	61
RCW 9.94A.703(1).....	61
RCW 9.94A.703(2).....	61
RCW 9.94A.703(3)(c) .....	62, 64
RCW 9.94A.703(3)(f).....	62, 64
RCW 9.94A.703(f).....	62
RCW 9.94A.704(1).....	63
RCW 9.94A.704(2)(a) .....	63, 65
RCW 9.94A.704(7).....	63
RCW 9.94A.704(7)(a) .....	66
RCW 9A.08.020(3)(a) .....	22
RCW 9A.56.200(2).....	61

**Rules and Regulations**

CrR 6.15(a) ..... 26

CrR 6.15(c) ..... 51

RAP 2.5(a) ..... 26, 38, 51, 52

RAP 2.5(a)(1)..... 52

RAP 2.5(a)(2)..... 52

RAP 2.5(a)(3)..... 51, 52

**Other Authorities**

WPIC 160.00..... 50, 60

WPIC 6.05..... 25

A. ISSUES PERTAINING TO APPELLANTS' ASSIGNMENTS OF ERROR.

1. Whether, viewing the evidence in the light most favorable to the State, there was sufficient evidence from which a rational fact finder could have found the essential elements of the crime of attempted first-degree robbery beyond a reasonable doubt with respect to Defendant Broussard.
2. Whether the trial court properly failed to give an accomplice testimony cautionary instruction where the testimony of the accomplice in question was not uncorroborated and neither defendant requested such an instruction.
3. Whether Defendants failed to meet their burden of showing prosecutorial misconduct or that any unchallenged argument was flagrant and ill-intentioned.
4. Whether Defendants waived any issue regarding the trial court's instruction to the jury number 22 concerning the special verdict forms.
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6. Whether the sentencing court properly imposed contested conditions of community custody where such conditions were statutorily authorized and imposed consistently with the separation of powers doctrine, and whether defendants' vagueness challenge to such conditions is premature.

B. STATEMENT OF THE CASE.

1. Procedure

On September 23, 2009, Christopher Eugene Simms, hereinafter referred to as "Defendant Simms," was charged by information with attempted first-degree robbery. Simms CP 1-2. On October 16, 2009, Adrian Tubis Broussard, hereinafter referred to as "Defendant Broussard," was charged by information with attempted first-degree robbery. Broussard CP 1-2. That charge included a firearm sentence enhancement and alleged, as an aggravator, that Broussard committed the offense to obtain or maintain his membership or advance his position in an organization, association, or group. Broussard CP 1-2.

On November 12, 2009, the two defendants' cases were joined for trial. Simms CP 10; Broussard CP 5. *See* 05/06/10 RP 141-48.

On April 14, 2010, Defendant Broussard moved to sever his trial, 04/14/10 RP 1-12, but the court denied that motion. 04/14/10 RP 12.

On June 1, 2010, the State filed an amended information in the matter involving Defendant Simms, which added count II, conspiracy to commit first-degree robbery, a firearm sentence enhancement, and an aggravator alleging that the offense was committed to maintain or advance defendant's membership or position in an organization, association, or identifiable group. Simms CP 40-41. *See* RP 8-9. Defendant Simms was arraigned on that amended information the same day. RP 37-38.

On June 2, 2010, the cases were called for a joint trial before the Honorable Judge John McCarthy. RP 3.

Broussard moved to exclude proposed expert testimony of Detective Ringer, and the court deferred judgment. RP 15-17. Both defendants moved to suppress evidence of affiliation with the Hilltop Crips gang. RP 36-44, but the court denied this motion. RP 44-46. The court also heard defendants motion to suppress evidence obtained as a result of a search warrant for cell phone records. RP 18-19, 48-55.

On June 2, 2010, the parties selected a jury and gave opening statements. RP 47, 58-60, 63-65.

The State then called Officer Kevin Bartenetti, RP 66-87, Officer Douglas Walsh, RP 88-93, Melissa Boyce, RP 93-107, Ashley Jones, RP

107-200, Anthony Smith, RP 202-281, 391-93, Kevin McField, RP 293-318, and Kendra Keith, RP 318-331. The State rested on June 3, 2010. RP 331.

Defendant Broussard called Monica Fowler, RP 343-57, Ciyona Fowler, RP 357-65, and Mercedes Hall, RP 365-72.

The parties stipulated to the testimony of defense investigator Richard Austring. RP 384-85, 390-91.

Neither defendant testified, RP 397-98, and both rested on June 8, 2010. RP 407-08.

The court read its proposed jury instructions to the parties, RP 399-402, and took exceptions to these instructions. RP 402-407. The parties had earlier discussed the special verdict instruction. RP 55-56. Neither defendant objected to any of the instructions, RP 402-07, and the court read the instructions to the jury. RP 408-09.

The parties gave their closing arguments. RP 409-31 (State's closing argument), 431-43 (Defendant Simms' closing argument), 444-65 (Defendant Broussard's closing argument), 466-82 (State's rebuttal argument).

On June 9, 2010, the jury found both defendants guilty of attempted first-degree robbery and found Simms guilty of conspiracy to commit first-degree robbery. RP 490; CP 89, 112, 114. The jury also

returned special verdict forms as to both defendants, indicating that each was armed with a firearm at the time of the commission of that crime. RP 490; CP 90, 113. However, the jury also returned special verdicts indicating that neither defendant committed the crime to obtain or maintain his membership or advance his position in an organization, association, or identifiable group. RP 491; CP 91, 115.

The court sentenced Defendant Broussard to 45.75 months on count I plus the 36-month firearm enhancement for a total of 81.75 months and 18 months in community custody. CP 100-113. It sentenced Defendant Simms to 56.25 months on counts I and II plus the 36-month firearm sentence enhancement for a total of 92.25 months in total confinement and 18 months in community custody. CP 151-64.

Both defendants filed timely notices of appeal. CP 114, 169-83.

## 2. Facts

On June 30, 2009, at about 10:00 p.m., Tacoma Police Officer Kevin Bartenetti was dispatched to apartment number 165, at 1818 Court F in Tacoma, Washington. RP 66-68. When he arrived, he contacted the Ashley Jones inside that apartment. RP 69-71. Jones was “frightened, crying, and appeared to have suffered some kind of traumatic incident.” RP 69-70.

Jones told Bartenetti that her former boyfriend, Defendant Broussard, came to her apartment door, knocked, and asked if he could come in. RP 73. She invited him in, and he asked for a sandwich, after which they shared a short meal and conversation. RP 73.

During that time, Jones noticed her neighbor Kevin McField at her kitchen door. RP 73, 77. McField asked her if she knew anything about a window screen that was lying on the south side of the building. RP 73-74. Jones recognized the screen as that from her window, and went back inside. RP 74. According to Bartenetti, Jones left the kitchen door open. RP 74.

After Broussard left, Jones began to clean up. RP 74. While she was doing so a third man entered her apartment through the kitchen door, pointed a gun at her, and asked her, "Where's the money?" RP 74. This man told Jones, "I got one in the chamber," and asked her, "do you want to die today?" RP 74. The man held a semi-automatic pistol in his right hand and a loaded magazine in his left. RP 74.

Jones believed the man intended to kill her and responded by saying, "I don't know what you are talking about. What money?" RP 75. Jones said she picked up her daughter and said, "I have my child here. What's going on?" RP 75.

Once she did this, the man left the apartment from the same door he entered. RP 75.

Jones described the man with the gun as wearing a black, zip-up, hooded sweatshirt and a blue bandana over his face. RP 75. She said, based on the exposed portion of his face, that he was “a black male, medium complexion, and had very tight corn rows, visible under his hood. RP 75.

Other officers arrived and established containment for a “K9 track.” RP 71-72, 81-82. Officer Bartenetti also called Melissa Boyce, a forensics investigator to the scene, who took photographs and processed the scene for fingerprints. RP 82-83, 101-06. Specifically, she processed the open window, the screen from that window, the doorknob of the kitchen door, and the railing located around it for fingerprints, but was unable to find any usable latent prints. RP 103-05, 119-21.

Ashley Jones testified that, on July 30, 2009, she lived in the apartment located at 1818 Court F in Tacoma, Washington. RP 110. She testified that she lived alone with her daughter, but that she had previously been involved in a romantic relationship with Defendant Broussard. RP 112-17. Jones testified that, on July 30, 2009, she and her daughter had just bathed when, at about 8:00 to 8:30 p.m., she looked out her window and saw her neighbor Kevin McField and Defendant Broussard looking up at her window. RP 112, 117. She then heard a knock at her door and someone yell her name. RP 117, 119.

When Jones opened the door, defendant Broussard stated he was hungry. RP 119. After Jones agreed to make him a sandwich, Broussard

came into the apartment, and McField went back to his next-door apartment. RP 119. Jones' daughter was home while Jones made Broussard a sandwich. RP 121.

Broussard asked Jones if he could use her bathroom and Jones went upstairs to dry the floor. RP 124. As she did so, her daughter began telling Broussard, "My uncle Martin's stuff is upstairs." RP 124. Jones confirmed that her brother, Martin Jones, did store some of his belongings in the upstairs portion of her apartment. RP 124. Broussard went into the upstairs bathroom and exited without Jones hearing the toilet flush. RP 126. Broussard was sending and/or receiving text-messages on his cell phone for two to three minutes. RP 126. His phone then rang and Broussard answered it, saying something to the effect of "I'll call you back." RP 126.

Jones stated that, once back downstairs, she was putting DVDs in a cabinet and the defendant was eating his sandwich, when Jones saw a shadow move past her back door. RP 122-23, 128. Jones asked who it was, and heard McField answer, "It's me, Kevin." RP 123. McField wanted Broussard, but Jones told McField to "go around to the front door" to meet him because she intended to close the back door. RP 123. Broussard, however, left through the back door anyway. RP 123-24, 129.

Jones finished putting the DVDs away and started walking to the back door to close and lock it, when someone entered that door with a gun.

RP 129. The man pointed the gun at her head and asked, "Where's the money at? Where's the money? Is the money upstairs?" RP 130.

Jones put her hands up, backed away, and replied, "Please don't shoot me, sir. Please don't shoot me. What money are you talking about?" RP 131. The man removed the magazine from the gun, but told Jones that "he had one in the chamber." RP 134. She then scooped up her daughter, who was holding her kitten, and began moving backward, towards the front door. RP 131. While Jones was trying to open the front door with one hand, the man looked her "in the eyes," turned, and ran out the back door. RP 131, 138.

Jones went to McField's apartment next door, and frantically called out, "someone call the police. Someone call the police." RP 139. When they opened the door, Jones saw Defendant Broussard standing on top of the stairs, and said, "This is a set-up. Someone call the police." RP 140. Broussard left the apartment about one minute later. RP 141.

McField did not have a telephone, but his brother, Jerome, who was also present did, and Jones used that phone to call 911. RP 140-41.

Police arrived at the scene about ten minutes later. RP 142. Jones could not identify the gunman by name at the time she spoke to the police. RP 143. She testified that the gunman was wearing black Dickies pants, and a black "hoodie." RP 136. He had the hood over his head, but she could tell his hair was done in "cornrows." RP 136. The man had a blue bandana wrapped around his mouth, black gloves, and all-black Nike

shoes. RP 136-38. Jones described the man as a light-skinned African-American. RP 137.

She testified that she saw this man later in a Safeway store, laughing and talking with another person. RP 144. Jones testified that he was wearing the same pair of pants and Nike shoes at the store that he had been wearing at the time of the attempted robbery. RP 144-45. Jones identified the gunman as Defendant Simms, and stated that he was talking to Broussard's brother, Anthony Smith. RP 145-47. She subsequently went to the police department to report this. RP 161, 190-91.

Anthony Smith testified that he was a member of the Hilltop Crips street gang, along with Martin Jones, the victim's brother. RP 207. Smith testified that he participated in the attempt to rob Ashley Jones. RP 207. Smith met with Jamal Henry and Christopher Simms about two to three days before the incident to plan it. RP 205-08. According to Smith, the three believed that Martin Jones kept money at Ashley Jones' apartment. RP 208.

Smith testified that Martin Jones made his money selling crack cocaine in the Hilltop neighborhood, which caused a problem with the Hilltop Crips. RP 209. He testified that, although Martin Jones was also a Crip, he was considered a "[w]eak link." RP 209-10. So, the three of them decided to rob him of the money. RP 210-11, 242. Smith testified that Simms indicated that he was ready to do the robbery and Smith picked a location by St. Joseph Hospital at which to "post," or wait for

Simms, in his 1994 Suburban. RP 211-13. On cross-examination, Smith admitted that he, too, sold crack cocaine in the same Hilltop neighborhood as Martin Jones. RP 234-35.

While still in the Suburban, Simms called Broussard and told Broussard, who was then at McField's apartment, to go into Ashley Jones' apartment and leave the backdoor open when he left. RP 217, 226, 267-69. Smith heard Simms tell Broussard something to the effect of, "Cool, cool. If you are already over there, just go over there." RP 249. After Simms ended the call with Broussard, he told Smith that Broussard was "going to leave the back door open." RP 250.

Smith stated that Simms then left his vehicle wearing a "black cargo coat" with a hood, black pants, black shoes, and a blue "rag" covering his face. RP 218. Simms was carrying a 9-millimeter semi-automatic pistol. RP 219.

The pistol belonged to Simms, but Smith had fired it about a month earlier. RP 220. Smith testified that when he fired the pistol, it jammed, and that he had to remove the magazine and "mess around" with the slide to clear the jam. RP 220.

Smith then parked by the side of the hospital, about two blocks from the apartment of Ashley Jones, with two other gang members. RP 217-22. Smith waited for Simms for about ten to fifteen minutes, but, the two others decided that Simms was taking too long and had Smith drop them off on 15<sup>th</sup>. RP 222-23, 240. Smith did not return to the place he

had agreed to wait because he, too, thought that Simms was taking too long and was “kind of scared.” RP 223.

Smith later spoke to his older brother, Broussard, who was angry and called the incident stupid. RP 225-26. Broussard was mad at Simms for getting him involved with it, and was angry with his brother for allowing himself to be involved. RP 227.

Smith also spoke to Simms afterwards. RP 227. Simms reported that when he went into the apartment, he remembered Jones from school, saw her “little baby,” and decided to leave. RP 227-28.

Smith testified that he entered into a deal by which he agreed to testify. RP 229. He testified that he “pled guilty to Robbery in the Second Degree” and added gratuitously “for five years and to tell the truth about everything and my involvement in the Hilltop Crip gang.” RP 230.

Smith testified that he ultimately pleaded guilty to conspiracy to commit robbery, and that he was facing a five-year prison sentence, RP 230-31, but that the State would give a recommendation of DOSA [Drug Offender Sentencing Alternative] if [he was] truthful... truthful about everything that [he had] done, even [his] involvement and everything. RP 270-71. After reviewing the plea agreement, Smith testified that the court could, in fact, sentence him to a maximum of ten years in prison. RP 271.

On cross-examination, Smith also agreed that the plea agreement stated that

[a] reasonable belief on the part of the deputy prosecuting attorney the defendant is not being truthful during his testimony will result in a violation of this agreement.

RP 274-75. He also agreed that the agreement indicated that “[i]f there is any failure to perform any promises or obligations, the State will ask for 120 months.” RP 275. However, when the defense attorney asked if it was “pretty much up to [the deputy prosecutor] whether you get 20 months on DOSA or 10 years,” Smith testified, “I am not sure how that stuff works.” RP 275. Subsequent to that, the following exchange took place:

Q Okay. And to your understanding, who determines and who is the ultimate judge or who makes the decision of whether or not you are being absolutely truthful?

A The judge. I don’t know.

Q The judge does?

A I think. I am not sure. I don’t know how this stuff works.

RP 277-78.

The defense attorney continued:

Q Okay. So it’s to your – in your best interest to give truthful testimony or, you know, what the State considers truthful testimony; is that correct?

A No, not what the State considers, but to actually be truthful and tell the truth of what went on.

RP 279.

Smith testified that he had more status in the Hilltop Crips gang than Martin Jones because he had done things like robberies that Martin Jones was not willing to do. RP 259-60. Smith agreed that he had been convicted, as a juvenile, three times of third-degree theft, and three times of making a false or misleading statement to a public servant. RP 392.

Kevin McField testified that, on July 30, 2009, he was staying at his girlfriend's apartment, located at 1818 Court F. RP 296. McField stated that, that evening, he opened the front door and saw Broussard knocking on the door of Ashley Jones' apartment. RP 297. Broussard asked him if Jones was home and McField told Broussard to knock, which he did. RP 297-98. Jones opened the door and Broussard was allowed into the apartment. RP 297-98. McField went back inside his own apartment. RP 298.

About ten minutes later, McField took the garbage out and noticed a screen door laying on the back patio. RP 302, 309-10. He asked Ashley Jones who it belonged to and Jones said it was hers. RP 302.

McField then went back inside his apartment, where he saw a man jump over the railing to their apartment and run to the back. RP 299-300,

304, 307. McField testified that the man was wearing a black “hoodie” and blue jeans. RP 299, 317-18.

Ashley Jones then came to McField’s residence screaming that someone held her at gunpoint and that Broussard was setting her up. RP 304, 315. According to McField, Broussard also came to McField’s doorway, but when McField tried to talk to him, he just walked away. RP 305.

Kendra Keith, who was Ashley Jones’ cousin, testified that she was next door with McField and his brother on the evening of July 30, 2009. RP 320-21. She was upstairs in her apartment, looking out her window, when she saw someone wearing all black clothing, including a “hoodie,” hop over the fence behind her apartment. RP 321. After that, Jones came running to Keith’s apartment, saying, “it was a setup,” or “something is going on,” or “you pulled that gun.” RP 323, 328. Keith testified that Broussard also came into her apartment at that time, but ran out after Jones made her accusations. RP 322-23, 328. She also noted that Martin Jones was around the apartment on a regular basis. RP 324.

Monica Fowler, Simms’ mother, testified that, on July 30, 2009, her niece had a birthday party at her sister’s house located on 65<sup>th</sup> and Q Street. RP 345-46. She was not sure if Simms “was there at the party, but he was there that day after –at the end of the party.” RP 346. Fowler

testified that the party ended at about 6:00 to 6:30. RP 346. She said that Simms was watching television. RP 347. According to Fowler, Simms' friend Mercede came over "[a]bout 8:00." RP 347. Fowler testified that Simms did not leave the house after Mercede came over, but that he had left the house for about an hour before she came over. RP 347.

Fowler testified that Simms had dreadlocks at the time. RP 348. She testified that she had been a professional barber for twelve years and that there was a big difference between dreadlocks, cornrows, braids, and twists. RP 349. Fowler testified that Simms had his hair styled in dreadlocks or in twists occasionally. RP 349-50.

Ciyona Fowler testified that there was a birthday party on July 30, 2009 for her cousin. RP 358. She indicated that Simms was "there for a majority of the day," but could not remember the times that he was there. RP 358. She spent most of the day in her mother's room watching television, but came out for drinks with Simms and Mercede at about 9:30 to 10:00 p.m. RP 359-60. She testified that Simms was "[h]alf asleep" on the couch when she went to sleep sometime around 12:00 a.m. to 1:00 a.m. RP 360.

Mercede Hall testified that Simms was her best friend and that she attended a party for one of his cousins at his aunt's house on the east side of Tacoma. RP 366-68. Hall testified that she arrived around 8:00 p.m.

and that Simms, his mother, sister, aunt, and two cousins were there already. RP 367. Hall indicated that she watched the rest of a movie, had a couple drinks with Simms and his sister, ate, and fell asleep on the couch. RP 367. She testified that she spent the night there and that Simms did not leave the house after she got there. RP 368. Hall testified that she was at Simms' arraignment, but that she never went to law enforcement personnel and told them that Simms was with her on the night of the attempted robbery. RP 369-70.

The parties submitted a stipulation that defense investigator Richard Austring interviewed Ashley Jones, that he was unavailable to testify, but that he would have testified that Ashley Jones told him that she had a sexual encounter with Simms while they were in middle school together. RP 384-85. This was read by the court to the jury. RP 390-91.

C. ARGUMENT.

1. VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL FACT FINDER COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THE CRIME OF ATTEMPTED FIRST-DEGREE ROBBERY BEYOND A REASONABLE DOUBT WITH RESPECT TO DEFENDANT BROUSSARD.

In a criminal case, a defendant may challenge the sufficiency of the evidence before trial, at the end of the State's case in chief, at the end of

all of the evidence, after the verdict, and on appeal. *State v. Lopez*, 107 Wn. App. 270, 276, 27 P.3d 237 (2001). “In a claim of insufficient evidence, a reviewing court examines whether ‘any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,’ ‘viewing the evidence in the light most favorable to the State.’” *State v. Brockob*, 159 Wn.2d 311, 336, P.3d 59 (2006) (quoting *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). Thus, “[s]ufficient evidence supports a conviction when, viewing it in the light most favorable to the State, a rational fact finder could find the essential elements of the crime beyond a reasonable doubt.” *State v. Cannon*, 120 Wn. App. 86, 90, 84 P.3d 283 (2004). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (quoting *State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “Determinations of credibility are for the fact finder and are not reviewable on appeal.” *Brockob*, 159 Wn.2d at 336.

In the present case, the trial court instructed the jury that

To convict the defendant Adrian Tubis Broussard of the crime of attempted robbery in the first degree, each of the following elements must be proved beyond a reasonable doubt:

(1) That on or about the 30<sup>th</sup> of July, 2009, the defendant or an accomplice did an act that was a substantial

step toward the commission of robbery in the first degree;

(2) That the act was done with the intent to commit robbery in the first degree; and

(3) That the act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 60-88 (Instruction No. 16). *See* Appendix A.

Under the law of the case doctrine, where, as here, no party objected to this instruction, *see* RP 402-07, it became the law of the case.

*State v. Hickman*, 135 Wn.2d 97, 101, 954 P.2d 900 (1997).

Viewing the evidence in the light most favorable to the State, a rational fact finder could have found the essential elements of attempted first-degree robbery beyond a reasonable doubt with respect to both defendants.

The first element requires proof that the defendant or an accomplice did “an act that was a substantial step toward the commission of robbery in the first degree.” CP 60-88 (Instruction No. 16).

“A substantial step is conduct, that strongly indicates a criminal purpose and which is more than mere preparation.” CP 60-88.

In this case, there was testimony that Anthony Smith, Jamal Henry, Christopher Simms, and Adrian Broussard participated in an attempt to

rob Ashley Jones. RP 207. Smith testified that he met with Henry and Simms about two to three days before the robbery to plan it. RP 205-08. According to Smith, Jamal Henry, Christopher Simms, and he believed that the victim's brother, Martin Jones, kept money from dealing crack cocaine at Ashley Jones' apartment, RP 205-08, and they decided to rob him of that money. RP 210-11, 242.

Smith testified that, on the night of the robbery, Simms called Broussard and told Broussard, who was then at McField's apartment, to go into Ashley Jones' apartment and leave the backdoor open when he left. RP 217, 226, 267-69. After Simms terminated the call with Broussard, Simms told Smith that Broussard was "going to leave the back door open." RP 250.

Jones testified that Broussard did just that. Specifically, she testified that, shortly before the robbery, Broussard knocked on her door, and came into her apartment. RP 119-20. She testified that, while in her apartment, Broussard's phone rang and he answered it, saying something to the effect of "I'll call you back." RP 126. She also testified that he subsequently left her apartment through the back door, leaving it open, despite being told to use the front door. RP 119-20, 123-24, 129. Then, as Jones was walking to that back door to close and lock it, Simms entered through that door with a gun, pointed it at her head, and demanded

“the money.” RP 129-30; RP 145-47. Simms removed the magazine from the gun, but told Jones that “he had one in the chamber.” RP 134, 145-47. Jones thought that Simms intended to kill her. RP 75.

Because “[a] claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom,” *Cannon*, 120 Wn. App. at 90, it must be admitted for purposes of this analysis, that Broussard agreed to leave Jones’ backdoor open to allow Simms into the apartment to rob Jones of her brother’s money, and that Simms entered the apartment through that door, pointed a loaded handgun at Jones, and demanded “the money” from her.

Here, a rational fact finder could have found that the act of Simms pointing a handgun at Jones and demanding money from her is “conduct, that strongly indicates a criminal purpose and which is more than mere preparation.” CP 60-88. So, the question becomes whether Broussard is an accomplice of Simms.

Uncontested instruction number 7 provided, in relevant part, that

***[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.***

CP 60-88 (Instruction No. 7)(emphasis added). *See* Appendix A; RCW 9A.08.020(3)(a).

Although Defendant Broussard argues that “Jones did not ask [him] to close the back door as he left, and she did not close it herself, either,” Opening Brief of Appellant Adrian T. Broussard, p. 11, the record shows that Jones instructed McField to meet Broussard at her front door “because at this time [she] was shutting [her] back door.” RP 123. Jones testified that Broussard disregarded her request and “went out the back door anyway,” and, that shortly thereafter, Simms came through that open back door with a gun. RP 123-24.

Given that Smith testified that Simms called Broussard and told him specifically to go into Jones’ apartment and leave the backdoor open when he left, RP 217, 226, 267-69, the evidence supports the conclusion that Broussard left that backdoor open for Simms to enter and rob Jones.

Because “[a] claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom,” *Cannon*, 120 Wn. App. at 90, it must be admitted for purposes of this analysis, that Broussard left the backdoor open to allow Simms into the apartment to rob Jones. When it is, a rational fact finder could find that Broussard aided Simms in committing the crime, and hence, that he was an accomplice. Thus, a rational fact finder could find that, on or about the

30th of July, 2009, the defendant or an accomplice did an act that was a substantial step toward the commission of robbery in the first degree.

Therefore, there was sufficient evidence of the first element. *See Cannon*, 120 Wn. App. at 90.

The second element requires proof that the act was done with the intent to commit robbery in the first degree. CP 60-88.

A person commits the crime of robbery when he or she unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person or to the person or property of anyone. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial.

CP 60-88 (Instruction No. 11). *See* Appendix A.

A person commits the crime of robbery in the first degree when in the commission of a robbery or in immediate flight therefrom he or she is armed with a firearm or displays what appears to be a firearm.

CP 60-88 (Instruction No. 10). *See* Appendix A.

In the present case, Broussard's accomplice, Simms, pointed a handgun at Jones, indicated it was loaded, and demanded money from her. RP 129-30. A rational fact finder could find that such action demonstrates an intent to take personal property from or in the presence of Jones by the use or threatened use of immediate force, violence, or fear of injury.

Because Simms displayed what appeared to be a firearm, RP 129-30, a rational fact finder could find that the act was done with the intent to commit robbery in the first degree. *See* CP 60-88 (Instruction No. 10). Therefore, a rational fact finder could find that the second element of attempted first-degree robbery was proven beyond a reasonable doubt, and, as a result, there was sufficient evidence of this element to support the conviction. *See Cannon*, 120 Wn. App. at 90.

The third and final element requires proof that the act occurred in the State of Washington. CP 60-88. Ashley Jones testified that the apartment in which Simms held her at gunpoint was located at 1818 Court F in Tacoma, Washington. RP 110. Tacoma Police Officer Kevin Bartenetti also testified that this apartment was located in Tacoma, Washington. RP 66-68. No inconsistent evidence was presented. RP 1-408. Hence, a rational fact finder could have found that the act in question occurred within the State of Washington beyond a reasonable doubt. Therefore, there was sufficient evidence of this element to support the conviction. *See Cannon*, 120 Wn. App. at 90.

Because a rational fact finder could find all of the essential elements of the crime of attempted first-degree robbery beyond a reasonable doubt, there was sufficient evidence to support Broussard's

conviction thereof. See *Cannon*, 120 Wn. App. at 90. Therefore, that conviction should be affirmed.

2. THE TRIAL COURT DID NOT ERR IN FAILING TO GIVE AN ACCOMPLICE TESTIMONY CAUTIONARY INSTRUCTION WHERE THE TESTIMONY OF THE ACCOMPLICE IN QUESTION WAS NOT UNCORROBORATED AND NEITHER DEFENDANT REQUESTED SUCH AN INSTRUCTION.

The Washington State Supreme Court has articulated the following three-part rule for evaluating the necessity of giving an accomplice testimony cautionary instruction, such as that found at WPIC 6.05:

[I]t is always the better practice for a trial court to give the cautionary instruction whenever accomplice testimony is introduced; (2) failure to give this instruction is always reversible error when the prosecution relies solely on accomplice testimony; and (3) whether failure to give this instruction constitutes reversible error when the accomplice testimony is corroborated by independent evidence depends upon the extent of corroboration. ***If the accomplice testimony was substantially corroborated by testimonial, documentary or circumstantial evidence, the trial court did not commit reversible error by failing to give the instruction.***

*State v. Harris*, 102 Wn.2d 148, 155, 685 P.2d 584 (1984), overruled on other grounds by *State v. Brown*, 111 Wn.2d 124, 157, 761 P.2d 588 (1988) (emphasis added); *State v. Sherwood*, 71 Wn. App. 481, 484-85, 860 P.2d 407 (1993). “It is also the generally established rule that, while the corroborating evidence must be independent of the testimony of the accomplice, it is sufficient if it fairly tends to connect the accused with the

commission of the crime charged, and it is not necessary that the accomplice be corroborated in every part of his testimony.” *State v. Calhoun*, 13 Wn. App. 644, 648, 536 P.2d 668 (1975).

In the present case, neither defendant proposed an accomplice testimony cautionary instruction and neither objected to the court’s instructions, which did not include such an instruction. *See* RP 402-07.

Proposed jury instructions must be served and filed when a case is called for trial, CrR 6.15(a), and “[n]o error can be predicated on the failure of the trial court to give an instruction where no request for such an instruction was ever made.” *State v. Kroll*, 87 Wn.2d 829, 843, 558 P.2d 173 (1977); *State v. Lucero*, 140 Wn. App. 782, 787, 167 P.3d 1188 (2007), *review granted on other grounds*, 166 Wn.2d 1014, 212 P.3d 557 (2009) (quoting *McGarvey v. City of Seattle*, 62 Wn.2d 524, 533, 384 P.2d 127 (1963), for the proposition that if a party fails to propose a desired jury instruction, that party “cannot predicate error on its omission.”); RAP 2.5(a).

Because neither defendant ever proposed an accomplice testimony cautionary instruction nor objected to its absence from the court’s instructions, the issue should be considered waived here.

However, even if this issue were properly before the Court, the accomplice testimony was substantially corroborated by the testimony of Ashley Jones, and the trial court did not commit reversible error by failing to give the un-proposed instruction. *See Calhoun*, 13 Wn.App. at 648.

With respect to Defendant Simms, accomplice Smith testified, in relevant part, that Simms, Jamal Henry, and he believed that Martin Jones kept money at Ashley Jones' apartment, and that they decided to rob that money. RP 208, 210-11, 242. Smith testified that Simms called Broussard and told Broussard, who was then at McField's apartment, to go into Ashley Jones' apartment and leave the backdoor open when he left. RP 217, 226, 249-50, 267-69. Smith stated that Simms then left his vehicle wearing a "black cargo coat" with a hood, black pants, black shoes, and a blue "rag" covering his face. RP 218. Simms was carrying a 9-millimeter semi-automatic pistol. RP 219. The pistol belonged to Simms, but Smith had fired it about a month earlier. RP 220. Smith testified that when he fired the pistol, it jammed, and that he had to remove the magazine and "mess around" with the slide to clear the jam. RP 220.

This testimony was corroborated by that of Ashley Jones, who testified that the man who entered her door with a gun, pointed it at her, and demanded "the money," RP 130, was Defendant Simms. RP 145-47. Such testimony is sufficient to corroborate that of Smith with respect to the attempted first-degree robbery count

Nevertheless, Defendant Simms argues that such corroboration was not "substantial" because, he asserts, others told Jones that Simms was involved before she made the identification, and hence Jones was identifying Simms as Simms rather than independently identifying him as

the shooter. Appellant Simms' Opening Brief, p. 22-23. The record, however, demonstrates otherwise. Specifically, after discussing what Jones had been told by her brother, Jones was specifically asked “[d]id you come to understand, *you yourself, did you ever in your mind identify the gunman?*”, to which she replied, “[y]es.” RP 143-44. Her ability to identify Simms as the man who came into her apartment is lent credibility by the fact that Jones, according to a stipulation by the parties, attended school and once had a romantic relationship with Simms. RP 384-85, 390-91.

However, even if Jones' identification of Simms were to be discounted, her other testimony substantially corroborated that of Smith. Whereas Smith testified that Simms left his vehicle wearing a “black cargo coat” with a hood, black pants, black shoes, and a blue “rag” covering his face, RP 218, Jones gave an almost identical description of the man who came into her apartment, testifying that the gunman was wearing a black “hoodie,” black Dickies pants, all-black Nike shoes, and a blue bandana wrapped around his mouth. RP 136-38.

Smith testified that Simms was carrying a 9-millimeter semi-automatic pistol when he left for the apartment. RP 219. Smith testified that he had fired that pistol, that it jammed, and that he had to remove the magazine and “mess around” with the slide to clear the jam. RP 220. Similarly, Jones testified that the gunman who entered her apartment pointed a black handgun at her, but then turned around and “took the clip

out of the gun,” telling her he had “one in the chamber.” RP 133-34. This testimony, because it describes the idiosyncratic nature by which the pistol to which Smith referred had to be fired, substantially corroborates Smith’s testimony.

Although Defendant Simms argues that “the only evidence of any ‘agreement’ here was Smith’s testimony about the conversation he claimed that he, [Henry] and Simms had in which they decided to commit the robbery,” Opening Brief of Appellant Simms, p. 23-24, the record suggests otherwise.

Specifically, Jones testified that Broussard came into her apartment, took a telephone call from an unknown caller, and left through the back door despite being told to go through the front, just before Simms came through the door Broussard left open. She was so sure that the two were acting in concert that she burst into McField's apartment, where she again found Broussard, screaming that he had set her up.

Taken together, the testimony of Jones, which was obviously “independent of the testimony of the accomplice [Smith]... tends to connect the accused [Simms] with the commission of the crime[s] charged” in count not only count I, but also count II, conspiracy to commit robbery in the first degree. See *Calhoun*, 13 Wn. App. at 648. Therefore, the testimony of Jones provided substantial corroboration of the testimony of accomplice Smith. See *Calhoun*, 13 Wn. App. at 648.

Because the accomplice testimony was substantially corroborated by the testimonial evidence, the trial court did not commit reversible error by failing to give the accomplice testimony cautionary instruction. *See State v. Harris*, 102 Wn.2d 148, 155, 685 P.2d 584 (1984). Therefore, Defendant Simms' convictions should be affirmed.

With respect to Defendant Broussard, accomplice Smith testified that Simms called Broussard and told Broussard, who was then at McField's apartment, to go into Ashley Jones' apartment and leave the backdoor open when he left. RP 217, 226, 249-50, 267-69.

Jones testified that Broussard did just that, and in so doing, corroborated the testimony of Smith almost entirely. Specifically, she testified that, on July 30, 2009, she looked out her window and saw McField and Broussard looking up at her. RP 112, 117. She then heard a knock at her door and someone yell her name. RP 117, 119. Jones opened the door, and Broussard came into the apartment, stating that he was hungry. RP 119. When he left, although Jones instructed him to use the front door, "Broussard disregarded her request and "went out the back door anyway," apparently leaving it open. RP 123-24, 129.

Thus, the independent testimonial evidence provided by Jones not only "fairly tends to connect" Broussard with the commission of the crime charged, but corroborates the testimony of Smith in almost "every part of his testimony." *Calhoun*, 13 Wn. App. at 648. Thus, the testimony of

Jones provided substantial corroboration of the testimony of accomplice Smith. See *Calhoun*, 13 Wn. App. at 648.

Because the accomplice testimony was substantially corroborated by the testimonial evidence, the trial court did not commit reversible error by failing to give the accomplice testimony cautionary instruction. See *Harris*, 102 Wn.2d 148, 155, 685 P.2d 584 (1984). Therefore, Defendant Broussard's convictions should be affirmed.

3. DEFENDANTS FAILED TO MEET THEIR  
BURDEN OF SHOWING PROSECUTORIAL  
MISCONDUCT OR THAT ANY  
UNCHALLENGED ARGUMENT WAS  
FLAGRANT AND ILL-INTENTIONED.

“Without a proper timely objection at trial, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill-intentioned that no curative jury instruction could have corrected the possible prejudice.” *State v. Curtiss*, 161 Wn. App. 673, 250 P.3d 496 (2011); *State v. Larios-Lopez*, 156 Wn. App. 257, 260, 233 P.3d 899 (2010) (citing *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006) (quoting *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998))). This is because the absence of an objection “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context

of the trial.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (emphasis in original).

Even where there was a proper objection, an appellant claiming prosecutorial misconduct “bears the burden of establishing the impropriety of the prosecuting attorney’s comments and their prejudicial effect.” *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009); *State v. Fisher*, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009); *State v. McKenzie*, 157 Wn.2d 44, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)); *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

Hence, a reviewing court must first evaluate whether the prosecutor’s comments were improper. *Anderson*, 153 Wn. App. at 427. “The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *Anderson*, 153 Wn. App. at 427-28, 220 P.3d 1273. It is not misconduct for a prosecutor to argue that the evidence does not support a defense theory, *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (citing *State v. Graham*, 59 Wn. App. 418, 429, 798 P.2d 314 (1990), *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114, review denied, 115 Wn.2d 1014, 797 P.2d 514 (1990)), and “the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.” *Russell*, 125 Wn.2d at 87. Moreover, “[r]emarks of the prosecutor, even if they are improper, are not grounds for reversal if they

were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.” *Id.* at 86.

“A prosecutor’s improper comments are prejudicial ‘only where ‘there is a substantial likelihood the misconduct affected the jury’s verdict.’” *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007) (quoting *Brown*, 132 Wn.2d at 561, 940 P.2d 546; *Fisher*, 165 Wn.2d at 747. “A reviewing court does not assess ‘[t]he prejudicial effect of a prosecutor’s improper comments... by looking at the comments in isolation but by placing the remarks ‘in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.’” *Id.* (quoting *Brown*, 132 Wn.2d at 561; *State v. Johnson*, 158 Wn. App. 677, 683, 243 P.3d 936 (2010). “[R]emarks must be read in context.” *State v. Pastrana*, 94 Wn. App. 463, 479, 972 P.2d 557 (1999); *Larios-Lopez*, 156 Wn. App. at 261.

Prosecutorial misconduct may be neutralized by a curative jury instruction, *Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), and juries are presumed to follow the court’s instructions. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

In the present case, although the defendants argue that the deputy prosecutor committed misconduct in several ways, Appellant Simms’ Opening Brief, p. 27-43, they have failed to make the requisite showing.

- a. Although Smith volunteered in direct that he was “to tell the truth about everything,” Smith’s answer was not responsive to the prosecutor’s proper question.

“It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness.” *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). Such “[i]mproper vouching occurs when the prosecutor expresses a personal belief in the veracity of a witness or indicates that evidence not presented at trial supports the testimony of a witness.” *State v. Thorgerson*, \_\_ P.3d \_\_ (2011)(WL 3716980).

However, the Court “will not find prejudicial error ‘unless it is clear and unmistakable that counsel is expressing a personal opinion.’” *State v. Emery*, 161 Wn. App. 172, 253 P.3d 413 (2011) (citing *State v. Warren*, 165 Wn.2d at 30, 195 P.3d 940 (2008) and *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (emphasis omitted) (quoting *State v. Sargent*, 40 Wn. App. 340, 343, 698 P.2d 598 (1985)). “To determine whether the prosecutor is expressing a personal opinion about the defendant’s guilt, independent of the evidence, we view the challenged comments in context.” *State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009).

Rather, “a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence.” *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010); *State v. Millante*, 80 Wn. App. 237, 250,

908 P.2d 374 (1995) (emphasis added) (citing *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991)); *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006) (“[t]he prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility.”).

It is clear that “[e]vidence of agreements between the State and a testifying witness are admissible on cross examination to show bias,” and if such “a witness is impeached, the State may introduce the agreement as an exhibit to rebut a charge of bias as “evidence of explanation.”” *State v. Green*, 119 Wn. App. 15, 23, 79 P.3d 460 (2003) (quoting *State v. Jessup*, 31 Wn. App. 304, 641 P.2d 1185 (1982)); *State v. Ish*, 170 Wn. 2d 189, 198-99, 202-03, 241 P.3d 389 (2010). However, if the agreement contains a provision to provide truthful testimony, the State may not introduce that agreement as an exhibit in its case in chief before the witness’ credibility is attacked. *Green*, 119 Wn. App. at 23-24; *Ish*, 170 Wn.2d at 198-99, 204-05.

Moreover, Division 1 of this Court has held that, the State should be allowed “to inquire in its direct examination about the existence of an agreement and the witness’s reasons for cooperating to avoid an appearance that it was attempting to conceal information from the jury.” *Green*, 119 Wn. App. at 24.

However, the Supreme Court recently addressed this same issue, and failed to issue a majority opinion. See *State v. Ish*, 170 Wn.2d 189,

241 P.3d 389 (2010). A four-justice plurality opinion authored by Justice Chambers held, contrary to *Green*, that “evidence that a witness has agreed to testify truthfully generally has little probative value and should not be admitted as part of the State’s case in chief.” *Ish*, 170 Wn.2d 189, 198, 241 P.3d 389 (2010). Justice Sanders authored a dissenting opinion, in which no other justice joined, which appears to form a majority for the proposition that the State can not, during direct examination, “reference the truth-telling condition of the informant’s plea agreement.” *Ish*, 170 Wn.2d at 206.

Nevertheless, a second four-justice plurality opinion, authored by Justice Stephens, held that “[i]n *Green*, the Court of Appeals struck the right balance” in finding that

the State could “pull the sting” [out of anticipated cross-examination] by asking questions on direct examination to set up the context of the testimony but could not introduce the plea agreement, with its self-serving language, unless the defense opened the door on cross-examination. [*State v. Green*, 119 Wn. App. 15, 24, 79 P.3d 460 (2003)] “This approach... allows the State to inquire in its direct examination about the existence of an agreement and the witness’s reasons for cooperating to avoid an appearance that it is attempting to conceal information from the jury.” *Id.*

*Ish*, 180 Wn.2d at 204.

Even the Chambers opinion, however, held that “the State may ask the witness about the terms of agreement on redirect once the defendant has opened the door,” though “prosecutors must not be allowed to

comment on the evidence, or reference facts outside the record, that implies they are able to independently verify that the witness is in fact complying with the agreement.” *Ish*, 180 Wn.2d at 199.

In the present case, the following exchange took place during the deputy prosecutor’s direct examination of Anthony Smith:

Q And at some point did you enter into a deal, I guess I will call it, with the State?

A Yes, I did.

Q Where you would get some consideration if you agreed to testify?

A Yes, I did.

Q Do you know when it was that you entered into that agreement?

A I want to say March.

**Q *And did you at that time plead guilty to anything?***

**A *Yes, I did. I plead guilty to Robbery in the Second Degree and for five years and to tell the truth about everything and my involvement in the Hilltop Crip gang.***

RP 228-30 (emphasis added).

The deputy prosecutor did not ask one question in his direct examination of Smith that called for any information about his agreement to testify truthfully. *See* RP 202-34. Although Smith volunteered in direct that he was “to tell the truth about everything,” he said this in response to the question, “did you at that time plead guilty to anything?” RP 230. Smith’s answer was not responsive to the prosecutor’s question, and under either standard of *Ish* and certainly under the standard of *Green*, the

deputy prosecutor's question was proper. As a result, the defendants here have failed to show prosecutorial misconduct in this regard.

Nor do the defendants have ground to complain about the admission of such testimony independent of their claims of prosecutorial misconduct because neither defendant, at any time during trial, objected to its admission.

Generally, "appellate courts will not consider issues raised for the first time on appeal." *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (citing *State v. Tolias*, 135 Wn.2d 133, 140, 954 P.2d 907 (1998); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995); RAP 2.5(a). Indeed, "[a] party may assign evidentiary error on appeal only on a specific ground made at trial." *Id.* (citing *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L. Ed. 2d 321 (1986)). Moreover, "[a]n objection which does not specify the particular ground upon which it is based is insufficient to preserve the question for appellate review." *Guloy*, 104 Wn.2d at 422. An "objection gives a trial court the opportunity to prevent or cure error." *Id.* "The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial." *State v. O'Hara*, 167 Wn.91, 98, 217 P.3d 756 (2009).

In the present case, unlike in *Ish* or *Green*, neither defendant objected to the Smith's testimony that he was "to tell the truth," either pre-trial, concurrently with his testimony, or at any time thereafter, and both elicited further testimony concerning that agreement during cross-examination. RP 244-45, 257-58, 274-75, 278-80. Therefore, the admission of this testimony cannot now be raised by the defendants as an issue independent of their claim of prosecutorial misconduct, and their convictions should be affirmed.

- b. The Deputy Prosecutor did not commit misconduct by making a "false choice" argument.

In the present case, the defendants argue that, in closing argument, the deputy prosecutor repeatedly presented an improper "false choice" argument, Appellant Simms' Opening Brief, p. 34-38, but the record demonstrates otherwise.

"[I]t is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken," *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), *review denied*, 131 Wn.2d 1018, 936 P.2d 417 (1997). Such an argument "misstate[s] the law and misrepresent[s] both the role of the jury and the burden of proof" because "[t]he jury would not have had to find

that [the State's witness] was mistaken or lying in order to acquit; instead, it was required to acquit unless it had an abiding conviction in the truth of her testimony." *Id.*

Despite the defendants' contentions, the deputy prosecutor here made no such argument. Defendants first contend that the deputy prosecutor made this argument by stating that "this was 'very clearly' a case where they 'have to decide who is telling the truth,'" "that there was 'no issue' that this was what was required of them," and "that they had 'to determine whether someone is telling the truth' the state's witnesses and those for the defense." Appellant Simms' Opening Brief, p. 37 (citing RP 411-12).

These comments, however, occurred in the context of the deputy prosecutor's discussion of the court's instruction that the jury is to determine the credibility of witnesses:

**The first is *Instruction No. 1. There is a paragraph on the second page that begins, "You are the sole judges of the credibility of each witness."* Now, this case very clearly is a case where you have to decide who is telling the truth, no issue, because you've got Mr. Smith and Ms. Jones, to an extent Mr. McField, and Ms. —if you remember Kendra and Kevin, if you remember their testimony, and that in contrast to a great extent with the witnesses that the defense put on, these alibi witnesses, those things cannot both be true. Mr. Simms could not have been there participating in this robbery and also have been somewhere else watching a movie. *So you have to decide the credibility of the***

*witnesses, and that's what this instruction, in part, tells you, gives you some sort of guidance in that area.*

RP 411-12 (Instruction No. 1) (emphasis added). Unlike in cases such as *Fleming*, where the prosecutor argues that “in order to acquit a defendant, the jury must find that the State’s witnesses are either lying or mistaken,” *State v. Fleming*, 83 Wn. App. at 213, the prosecutor here simply told the jury, based on the court’s proper instruction, that its members were “the sole judges of the credibility of each witness,” that this meant that they must decide who is telling the truth,” and that instruction number 1 gave guidance in this regard. There is nothing in these comments which told the jury that it had to find anything to find the defendant not guilty. The comments were simply an explanation of a proper court instruction.

The defendants next argue that, in telling the jury that defendants were guilty “if they ‘believe that she [i.e., Ms. Jones] is telling the truth,” the deputy prosecutor made a false choice argument. Appellant Simms’ Opening Brief, p. 37 (citing RP 420). The record does not support this conclusion.

The contested argument was as follows:

So based on her confidence and her description that this is the person who held the gun, that is all you need to convict. If you believe she is telling the truth, if you believe that she is accurate, that Chriss Simms, a person she knew in junior high, is the person who came in there with the gun, then he is guilty.

RP 420. Unlike *Fleming*, this is not an argument that “in order to acquit a defendant, the jury must find that the State’s witnesses are either lying or mistaken,” *Fleming*, 83 Wn. App. at 213, it is simply an admission that proof of the State’s case depends on the jury’s determination that Jones was credible. Nothing in this argument misstates the law or misrepresents the role of the jury or the burden of proof. Compare *Fleming*, 83 Wn. App. at 213. It was therefore, proper, and defendants have failed to meet their burden of showing prosecutorial misconduct in this regard.

The defendants further challenge the following argument as setting up a false choice:

Finally, in summary, I put up here the motive, the opportunity, the bias, the manner while testifying and the reasonableness of testimony in light of all the facts. And again, this is a credibility contest. This is who is telling the truth.

RP 428. See Appellant Simms Opening Brief, p. 37. These statements, as Defendant Simms concedes, *Id.* at p. 35, are an apparent reference to a projected slide, and seem to have dealt, again, with the court’s instruction regarding credibility. That instruction told the jury

In considering a witness’s testimony, you may consider these things: the *opportunity* of the witness to observe accurately; the quality of a witness’s memory while testifying; *the manner of the witness while testifying*; any *personal interest that the witness might have in the outcome or the issues*; and *bias* or prejudice that the witness may have shown; *the reasonableness of the*

*witness's statements in the context of all of the other evidence*; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

CP 83-111 (Instruction No. 1) (emphasis added). While perhaps inartfully phrased, the deputy prosecutor's comment here that "this is a credibility contest," that "this is who is telling the truth," seems to be a reference to the court's proper instruction to the jury that it is the sole judge of credibility, *see State v. Faucett*, 22 Wn. App. 869, 876, 593 P.2d 559 (1979), an instruction to which neither defendant objected. *See* RP 402-07. These comments certainly do not form an argument "that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken," *Fleming*, 83 Wn. App. at 213. Nor do they misstate the law or misrepresent "the role of the jury and the burden of proof." *Id.* They are, instead, a proper elaboration on the court's valid, uncontested instruction. Therefore, the defendants have failed to prove that the prosecutor's comments were improper and have failed to show prosecutorial misconduct in this regard.

Defendants also challenge the following comments as setting up an improper false choice:

So in conclusion, it is a credibility issue, and it's for you to decide, one, who is telling the truth; and two, whether the

State has met its burden of proof beyond a reasonable doubt.

RP 430.

This, however, is not an argument “that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken,” *Fleming*, 83 Wn. App. at 213. It does not misstate the law or misrepresent “the role of the jury and the burden of proof.” *Id.* It simply echoes the court’s proper instruction to the jury that its members “are the sole judges of the credibility of each witness.” CP 83-111. *See Faucett*, 22 Wn. App. at 876. “A prosecutor may argue to the jury,” as the prosecutor here seemed to have, “that if it accepts one witness’s version of the facts, it can reject conflicting testimony.” *State v. Evans*, \_\_\_ P.3d \_\_\_ (2011)(WL 4036102). After all, the prosecutor here never told the jury to decide the case based on “which side was telling the truth,” Appellant Simms’ Opening Brief, p. 37, but to decide which evidence was credible and then to determine, based on that evidence, “whether the State has met its burden of proof beyond a reasonable doubt.” RP 430. There is nothing improper in this argument, and therefore, the defendants have failed to meet their burden of showing prosecutorial misconduct.

Therefore, the defendants’ convictions should be affirmed.

- c. The deputy prosecutor's argument was proper and did not amount to a request to simply declare the truth.

“Urging the jury to render a just verdict that is supported by evidence is not misconduct.” *State v. Curtiss*, 161 Wn. App. 673, 701, 250 P.3d 496 (2011). Indeed, “courts frequently state that a criminal trial’s purpose is a search for truth and justice.” *Curtiss*, 161 Wn. App. at 701.

However, it is improper for the prosecutor to repeatedly request that the jury “declare the truth” because it is not “[a] jury’s job to ‘solve’ a case,” but “to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt.” *State v. Anderson*, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009); *State v. Evans*, \_\_\_ P.3d \_\_\_ (2011)(WL 4036102).

Although the defendants apparently argue that the prosecutor, in three portions of his argument, urged the jury to decide the case on the improper basis of truth, *see* Appellant Simms’ Opening Brief, p. 38-40, the record does not support this contention.

Defendants first contend that the following statements constituted an improper request to the jury to declare the truth:

So in conclusion, it is a credibility issue, and it’s for you to decide, one, who is telling the truth; and two, whether the State has met its burden of proof beyond a reasonable doubt. The State is asking you to use your common sense

and to render verdicts that represent your truth in this case.  
Thank you.

RP 430-31. See Appellant Simms' Opening Brief, p. 38-40.

However, in this argument, unlike those at issue in *Anderson* or *Evans*, the deputy prosecutor did not request the jury to simply “declare the truth.” *Anderson*, 153 Wn. App. at 429, 220 P.3d 1273 (2009); *Evans*, \_\_\_ P.3d \_\_\_ (2011)(WL 4036102). While he asked it to “render verdicts that represent your truth in this case,” he explained what this meant in the proceeding sentence, telling the jury that it must first determine “who is telling the truth,” i.e., which witnesses are credible, and then, based on such credible evidence “decide... whether the State has met its burden of proof beyond a reasonable doubt.” RP 430-31. Such an argument does not misstate the jury's role, and does not suffer the infirmity noted in *Anderson*. Indeed, as *Anderson* mandates, the deputy prosecutor here properly asked the jury “to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt.” *State v. Anderson*, 153 Wn. App. at 429. As a result, this argument cannot be improper and the defendants have failed to show prosecutorial misconduct

Second, defendants contend that the following argument was a request to declare the truth:

***Now, the statements that the State disagrees with both counsel is that you are not here to figure out the***

**truth.** Truth doesn't matter, so to speak, and this fill-in-the-blank concept, and you are not to solve the case is what I heard. If there are any questions remaining, then you can't be convinced.

One other statement, in all aspects, they have to prove the case beyond a reasonable doubt. That's not accurate. The instructions tell you — I'm writing on one set, and I think the correct set I wasn't writing on. Instruction No. 1, the first paragraph says, "It's your duty to decide the facts in the case based on the evidence presented to you during this trial." And, of course, that's what our system is about. You obviously have to get to the truth; otherwise, none of this makes sense.

But the truth of everything is where I am going with this. You don't have to decide. *-And that same paragraph says, "You must apply the law that the Court gives," so it says, "from my instructions to the facts that you decide have been proved and in this way decide the case." So you do have to decide the case, so to speak, in that regard.*

RP 477-78 (emphasis added).

Although the defendants seek to portray the first portion of this passage as a request to declare the truth, Appellant Simms' Opening Brief, p. 38-39, the deputy prosecutor explains what he means in the final two sentences. Specifically, he quotes the court's proper and un-objected to instruction number one in stating that the jury must apply the law "to the facts that [it] decides have been proved and in this way decide the case." RP 478; CP 83-111 (Instruction No. 1). Further, just before the passage quoted by the defendants, the deputy prosecutor discussed the standard of proof beyond a reasonable doubt, telling the jury that:

[T]he bottom line is, it's a high standard, and you have to be convinced, not just now but for good, that these defendants are guilty. I mean, that's as simple as it can be said.

This abiding belief in the truth of the charge, you can't just have a fleeting belief that they are guilty or, as defense said, they are probably guilty. You have to believe beyond a reasonable doubt.

RP 477. The deputy prosecutor later read from the instruction defining reasonable doubt to the jury. RP 480.

Thus, in the contested passage, the deputy prosecutor simply told the jury, in accordance with the court's proper instruction, that it must first determine what facts have been proven before it can determine if the elements of the crimes charged have been proven beyond a reasonable doubt. There is nothing improper about this argument.

Lastly, defendants argue that the prosecutor requested the jury to declare the truth in the following passage:

I called on somebody. I can't remember who — to render a verdict that represents the truth about what happened. And in some respect, I mean, everybody said, yeah, that's what it's about. But this refines it. It's the truth about the charges.

RP 480-81. Although defendants argue that, in this passage, the deputy prosecutor urged the jury to declare the truth, Appellant Simms' Opening Brief, p. 39-40, they neglect the paragraph which immediately proceeded this one in the prosecutor's rebuttal. In that paragraph, the deputy

prosecutor read verbatim from the court's proper instruction on proof beyond a reasonable doubt. RP 480. Only then did he tell the jury to "render a verdict that represents the truth about what happened," and that "this refines it." RP 481.

Given the preceding paragraph, the "this" to which the prosecutor refers is the concept of proof beyond a reasonable doubt, and the "it" is the concept of "a verdict that represents the truth of what happened." Thus, put in context, the deputy prosecutor here did no more than ask the jury to render a verdict based on the standard of proof beyond a reasonable doubt. Such an argument does not misstate the jury's role, and, as *Anderson* mandates, properly asks the jury "to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt." *Anderson*, 153 Wn. App. at 429. There is nothing improper about this.

Therefore, the defendants have failed to show prosecutorial misconduct and their convictions should be affirmed.

4. THE DEFENDANTS WAIVED ANY ISSUE REGARDING THE COURT'S INSTRUCTION TO THE JURY NUMBER 22 CONCERNING THE SPECIAL VERDICT FORMS.

"Though unanimity is required to find the presence of a special finding increasing the maximum penalty, [*State v.*] *Goldberg*, 149 Wn.2d [888,] 893, 72 P.3d 1083 [(2003)] it is not required to find the absence of

such a special finding.” *State v. Bashaw*, 169 Wn.2d 133, 147, 234 P.3d 195 (July 1, 2010). Therefore, a jury instruction which states that “unanimity [i]s required for either determination” is error. *Bashaw*, 169 Wn.2d at 147; *State v. Ryan*, 160 Wn. App. 944, 252 P.3d 895 (2011), *review granted*, 172 Wn.2d 1004, \_\_\_ P.3d \_\_\_ (2011)(WL 3523833); *State v. Nunez*, 160 Wn. App. 150, 248 P.3d 103 (2011).

In the present case, the jury was given the following instruction regarding the firearm enhancements pertaining to the attempted first-degree robbery counts, titled instruction number 22:

You will also be given special verdict forms for the crimes of attempted robbery in the first degree charged in counts I and II. If you find the defendant not guilty of this crime or crimes, do not use the special verdict forms. If you find the defendant guilty of this crime or 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”.

CP 83-111 (Instruction No. 22). This instruction was modeled on the then current version of Washington Pattern Jury Instruction –Criminal (WPIC) 160.00. *Compare* CP 83-111 (Instruction No. 22) with WPIC 160.00.

Because this instruction states that “unanimity [i]s required” to either answer “yes” or “no,” it appears to run afoul of *Bashaw*, 169 Wn.2d at 147.

However, “RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them.” *State v. Nunez*, 160 Wn. App. 150, 157, 248 P.3d 103 (2011). This “general rule has special applicability with respect to claimed errors in jury instructions in criminal cases through CrR 6.15(c), requiring that timely and well stated objections be made to instructions given or refused “in order that the trial court may have the opportunity to correct any error.”” *Nunez*, 160 Wn. App. at 157.

A “manifest error affecting a constitutional right” is one of the exceptions that can be raised for the first time on appeal, RAP 2.5(a)(3), however, “an appellant must ‘identify a constitutional error and show how the alleged error actually affected the [appellant’s] rights at trial.’” *Nunez*, 160 Wn. App. at 157-58 (quoting *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)). In other words, it must be demonstrated that the claim at issue “implicates a constitutional interest as compared to another form of trial error,” and that the claim at issue is “manifest.” *Id.* at 158. “‘Manifest’ in RAP 2.5(a)(3) requires a showing of actual prejudice.” *Id.* “To demonstrate actual prejudice there must be a ‘plausible showing by

the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.” *Id.* “In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim.” *Id.*

In the present case, the defendants did not object or take exception to instruction number 22 of which they now complain, and indeed, raised no issue regarding it until now. *See* RP 402-07. Therefore, under RAP 2.5(a), this Court should not entertain this issue unless the defendants can show an exception thereto. They cannot.

The defendants do not claim that the trial court lacked jurisdiction under RAP 2.5(a)(1) or a “failure to establish facts upon which relief can be granted” under RAP 2.5(a)(2). Therefore, unless the defendants can “identify a constitutional error and show how the alleged error actually affected [their] rights at trial,” *Nunez*, 160 Wn. App. at 157-58, under RAP 2.5(a)(3), this issue should be considered waived.

However, the Court in *Nunez* has already held that “[t]he trial court’s failure to instruct the jury that it could acquit [the defendant] of the aggravating factor nonunanimously is... not an error of constitutional dimension.” *Nunez*, 160 Wn. App. at 159. There, like here, the sentence enhancement was imposed following a deliberative procedure to which [the defendant] did not object; which no court, state or federal, has found

to be unconstitutional or unfair, which has been acknowledged to have procedural advantages; and which, in the lesser included crime context, is preferred by a number of jurists and courts. *Id.* at 162-63. “This is not constitutional error.” *Id.* at 163. Therefore, the defendant has not so much as identified a constitutional error, and this issue should be considered waived. *Nunez*, 160 Wn. App. 150.

Although the defendants attempt to distinguish their cases from *Nunez* by arguing that that the constitutional error at issue is their right to “the benefit of any reasonable doubt and the presumption of innocence,” Appellant Simms’ Opening Brief, p. 44, at no point do they articulate why the presumption of innocence or the standard of proof beyond a reasonable doubt confers a right to a non-unanimous acquittal on a special verdict. *See* Appellant Simms’ Opening Brief (Simms), p. 45-46. Simms does argue that an instruction requiring unanimity to acquit on a special verdict “deprives the defendant of the benefit of the doubts some jurors may have had,” but this argument is not significantly different from that considered and rejected in *Nunez* that such an instruction “denied [the defendant] the chance that the jury would refuse to find the aggravating factors had it suspended its deliberations short of reaching a unanimous agreement.” *Nunez*, 160 Wn. App. at 159. Therefore, the defendant here has not raised a constitutional issue not considered and rejected by the Court in *Nunez*.

The defendants also urge this Court to follow Division 1, which held that an instruction requiring unanimity to acquit on a special verdict “must be treated as [an error] of constitutional magnitude and is not harmless.” *State v. Ryan*, 160 Wn. App. 944, 949, 252 P.3d 895 (2011), review granted, 172 Wn.2d 1004, \_\_\_ P.3d \_\_\_ (2011)(WL 3523833). However, this decision, currently under Supreme Court review, 172 Wn.2d 1004, \_\_\_ P.3d \_\_\_ (2011)(WL 3523833), seems to rest on an inference undercut by explicit language. While the Court in *Ryan* found that “[t]he *Bashaw* court *strongly suggests* its decision is grounded in due process,” *Ryan*, 160 Wn. App. at 948, the *Bashaw* Court itself stated that this was not the case. Indeed, the *Bashaw* Court quite directly noted that its “rule is not compelled by constitutional protections against double jeopardy, but rather *by the common law precedent of this court*, as articulated in *Goldberg*.” *Bashaw*, 169 Wn.2d at 146 (citation omitted)(emphasis added).

The simple, undeniable fact is that there is no constitutional provision, state or federal, which confers the right to an acquittal on a special verdict by a non-unanimous verdict. *Nunez*, 160 Wn. App. 150.

As a result, the defendants cannot identify a constitutional error and therefore, this issue should be considered waived, and the defendants’ convictions and sentences affirmed.

5. DEFENDANTS HAVE FAILED TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THEIR TRIAL COUNSEL CHOSE NOT TO PROPOSE AN ACCOMPLICE TESTIMONY CAUTIONARY INSTRUCTION, TO OBJECT TO PORTIONS OF THE DEPUTY PROSECUTOR’S CLOSING ARGUMENT, OR TO OBJECT TO A SPECIAL VERDICT INSTRUCTION BASED ON A THEN PREVIOUSLY-APPROVED WPIC.

“Effective assistance of counsel is guaranteed by both the United States Constitution amendment VI and Washington Constitution article I, section 22 (amendment X).” *State v. Yarbrough*, 151 Wn. App. 66, 89, 210 P.3d 1029, 1040-41 (2009); *State v. Johnston*, 143 Wn. App. 1, 177 P.3d 1127 (2007). A claim of ineffective assistance of counsel is reviewed de novo. *Yarbrough*, 151 Wn. App. at 89.

“Washington has adopted the *Strickland* test to determine whether a defendant had constitutionally sufficient representation.” *State v. Cienfuegos*, 144 Wn.2d 222, 25 P.3d 1011 (2001) (citing *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990)); *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). That test requires that the defendant meet both prongs of a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See also *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). “First, the defendant must show that counsel’s performance was

deficient” and “[s]econd, the defendant must show that the deficient performance prejudiced the defense.” *Strickland*, 466 U.S. at 687; *Cienfuegos*, 144 Wn.2d at 226-27. A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563, 571 (1996); *In Re Rice*, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

The first prong “requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. Specifically, “[t]o establish deficient performance, the defendant must show that trial counsel’s performance fell below an objective standard of reasonableness.” *Johnston*, 143 Wn. App. at 16. “The reasonableness of trial counsel’s performance is reviewed in light of all the circumstances of the case at the time of counsel’s conduct.” *Id.*; *State v. Garrett*, 124 Wn.2d 504, 518, 881 P.2d 185 (1994). “Competency of counsel is determined based upon the entire record below.” *State v. Townsend*, 142 Wn.2d 838, 15 P.3d 145 (2001) (citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)).

“To prevail on a claim of ineffective assistance of counsel, the defendant must overcome a strong presumption that defense counsel was effective.” *Yarbrough*, 151 Wn. App. at 90. This presumption includes a strong presumption “that counsel’s conduct constituted sound trial strategy.” *Rice*, 118 Wn.2d at 888-89. “If trial counsel’s conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel.” *Yarbrough*, 151 Wn. App. at 90 (*citing State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002), *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

“In order to show that counsel was ineffective for failing to object to the remarks of the prosecutor, the defendant must show that the objection would have been sustained.” *State v. Johnson*, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007). Moreover, “[c]ounsel’s decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions,” and “[o]nly in egregious circumstances, on testimony central to the State’s case, will the failure to object constitute incompetence of counsel justifying reversal.” *Id.*

With respect to the second prong, “[p]rejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed.” *Id.* “A reasonable probability is a

probability sufficient to undermine confidence in the outcome.”

*Cienfuegos*, 144 Wn.2d at 229.

In the present case, the defendants argue that their trial counsel were ineffective for three reasons.

First, they argue that their counsel’s failure to propose an accomplice testimony cautionary instruction was ineffective assistance. Appellant Simms’ Opening Brief, p. 24-27.

To find that a defendant received ineffective assistance of counsel based on the failure of trial counsel to request a jury instruction, it must be shown that the defendant was entitled to the instruction, that counsel’s performance was deficient in failing to request the instruction, and that the failure to request the instruction prejudiced the defendant. *See State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001).

In this case, the accomplice testimony was substantially corroborated by the testimonial evidence, and therefore, the defendants would not have been entitled to an accomplice testimony cautionary instruction. *See Harris*, 102 Wn.2d at 155. As a result, the defendants here cannot show that they would have been entitled to that instruction. Therefore, they cannot show ineffective assistance of counsel and their convictions and sentences should be affirmed.

Second, defendants argue that their counsel were ineffective for failing to object to the instances of alleged prosecutorial misconduct that they contend occurred during trial.

However, as argued above, the deputy prosecutor here committed no misconduct, and therefore, any objections made by defense counsel would not have been sustained. Because, “[i]n order to show that counsel was ineffective for failing to object to the remarks of the prosecutor, the defendant must show that the objection would have been sustained.” *Johnson*, 143 Wn. App. 19, the defendants here cannot show that their trial counsel was ineffective for failing to object.

Lastly, the defendants state that their trial counsel was ineffective in failing to object to instruction number 22, the concluding instruction regarding special verdicts. Appellant Simms’ Opening Brief, p.43.

However, defense counsel cannot “be faulted for [even] requesting a jury instruction based upon a then-unquestioned WPIC.” *State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999). *State v. Summers*, 107 Wn. App. 373, 382-83, 28 P.3d 780 (2002) (holding that “trial counsel can hardly be found to fall below acceptable standards by requesting an instruction based upon a WPIC appellate courts had repeatedly and unanimously approved.”). See *State v. Slight*, 157 Wn. App. 618, 625, 238 P.2d 83 (2010).

In the present case, the parties discussed jury instructions and the defense attorney chose not to object to instruction number 22. RP 402-07. Instruction 22 was based on and, followed virtually verbatim, the language of WPIC 160.00. *Compare* CP 83-111 (instruction 22) *with* WPIC 160.00.

WPIC 160.00 was, at the time, not only unquestioned, but had recently been approved by the Court of Appeals decision in *State v. Bashaw*, 144 Wn. App. 196, 182 P.3d 451 (April 24, 2008). Moreover, as the Court in *Nunez* recently noted, “[i]n the context of a jury’s deciding aggravating factors, we found no case outside the *Bashaw* decisions in which the issue of whether jurors should or should not deliberate to unanimity in order to acquit has been considered.” *Nunez*, 160 Wn. App. at 163.

Thus, at the time defense counsel here failed to object to instruction number 22, that instruction was based on a WPIC which had been approved by the Court of Appeals. WPIC 160.00; *Bashaw*, 144 Wn. App. 196. Because trial counsel cannot be found to fall below acceptable standards by even requesting an instruction based upon an unquestioned WPIC, *State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999), or one which an appellate court previously approved, *State v. Summers*, 107 Wn. App. 373, 382-83, 28 P.3d 780 (2002), the defendant’s trial counsel cannot be said to have fallen below acceptable standards.

As a result, the defendants have failed to show that their counsel's performance was deficient, and have failed to show ineffective assistance of counsel. Therefore, their convictions and sentences, including the firearm sentence enhancements, should be affirmed.

6. THE SENTENCING COURT PROPERLY IMPOSED THE CONTESTED CONDITIONS OF COMMUNITY CUSTODY BECAUSE SUCH CONDITIONS WERE STATUTORILY AUTHORIZED AND IMPOSED CONSISTENTLY WITH THE SEPARATION OF POWERS DOCTRINE AND DEFENDANTS' VAGUENESS CHALLENGE TO SUCH CONDITIONS IS PREMATURE.

"A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense." RCW 9.94A.701(2). Attempted first-degree robbery and conspiracy to commit first-degree robbery are violent offenses. RCW 9.94A.030(53)(a) (2010); RCW 9A.56.200(2).

When a court sentences a person to a term of community custody, it must impose the mandatory conditions listed in RCW 9.94A.703(1), and, unless waived by the court, the conditions listed in RCW 9.94A.703(2). The court may also impose certain discretionary

conditions, including ordering the offender to “[p]articipate in crime-related treatment or counseling services,” and to “[c]omply with any crime-related prohibitions.” RCW 9.94A.703(3)(c) & (f).

“A ‘crime-related prohibition’ is an order prohibiting conduct that directly relates to the circumstances of the crime.” *State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121 (2008). “Sentencing courts have the power to delegate some aspects of community placement to the D[e]partment of Corrections.” *State v. Sansone*, 127 Wn. App. 630, 642, 111 P.3d 1251 (2005).

“Imposing conditions of community custody is within the discretion of the sentencing court and will be reversed if manifestly unreasonable.” *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008). “Imposition of an unconstitutional condition would... be manifestly unreasonable.” *Id.*

Under the federal due process clause and Article I, section 3 of the Washington State constitution, “a prohibition is void for vagueness if either (1) it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited, or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” *State v. Sansone*, 127 Wn. App. at 638-39; *Bahl*, 1164 Wn.2d at 752-53.

The legislature has provided that “[t]he department [of corrections] shall assess the offender’s risk of reoffense and may establish and modify additional conditions of community custody based upon the risk to community safety.” RCW 9.94A.704(2)(a).

(7)(a) The department shall notify the offender in writing of any additional conditions or modifications.

(b) By the close of the next business day after receiving notice of a condition imposed or modified by the department, an offender may request an administrative review under rules adopted by the department. The condition shall remain in effect unless the reviewing officer finds that it is not reasonably related to the crime of conviction, the offender’s risk of reoffending, or the safety of the community.

RCW 9.94A.704(7).

None of this can happen, however, until after the offender is released from total confinement and reports to the Department of Corrections. *See* RCW 9.94A.704(1).

In the present case, the court imposed conditions of community custody in its judgment and sentence and in appendix F thereto, *see* CP 100-13 (Broussard), CP 151-64 (Simms), including two now challenged by defendants. Defendants first challenge a condition that appears in paragraph 4.6 of and/or appendix F to their judgments and sentences, that “[t]he defendant shall participate in the following crime-related treatment or counseling services: Per CCO.” CP 100-13, 151-64. Second, they

challenge a condition, appearing in Appendix F, that they “comply with any crime-related prohibitions.” CP 100-13, 151-64.

Defendants argue that these conditions were so vague as to violate their rights to due process, that they were not statutorily authorized, and that they amounted to an improper abdication of judicial power to the department of corrections in violation of the doctrine of separation of powers. Appellant Simms’ Opening Brief, p. 47-50. However, the conditions were statutorily authorized, imposed consistently with the separation of powers doctrine, and defendants’ challenge with respect to vagueness is premature.

First, the condition requiring defendants to “participate in the following crime-related treatment or counseling services: Per CCO,” CP 100-13, 151-64, was authorized by RCW 9.94A.703(3)(c), which allows the court to order an offender to “[p]articipate in crime-related treatment or counseling services.” That requiring the defendants to “comply with any crime-related prohibitions,” CP 100-13, 151-64, was authorized by RCW 9.94A.703(3)(f), which allows the court to order an offender to “[c]omply with any crime-related prohibitions.” Therefore, both conditions at issue here were authorized by statute.

Second, there was no improper delegation of judicial power in this case. “Sentencing courts have the power to delegate some aspects of

community placement to the DOC,” *State v. Sansone*, 127 Wn. App. 630, 641-42, 111 P.3d 1251 (2005). However, a sentencing court may “not delegate excessively,” that is, it “may not wholesaledly ‘abdicate[] its judicial responsibility for setting conditions of release.’” *Sansone*, 127 Wn. App. at 642.

In the present case, there was no improper delegation. The legislature has specifically authorized the Department of Corrections (D.O.C.) to “establish and modify additional conditions of community custody based upon the risk to community safety.” RCW 9.94A.704(2)(a). By noting that the “CCO,” or Community Corrections Officer assigned by D.O.C. to supervise the defendants, shall determine “the crime-related treatment or counseling services,” CP 100-13, 151-64, and “crime-related prohibitions,” CP 100-13, 151-64, the court was simply allowing the CCO, who is in a better position to judge the individual needs of his or her client, to “establish and modify additional conditions of community custody based upon the risk to community safety.” RCW 9.94A.704(2)(a). Hence, neither condition violated the separation of powers doctrine.

Finally, the defendants’ challenges to these conditions as unconstitutionally vague are premature. “Preenforcement vagueness challenges can be brought against conditions of community custody,

provided the challenges are ripe.” *State v. Bahl*, 164 Wn.2d 739, 761, 193 P.3d 678 (2008). “Three requirements compose a claim fit [i.e., ripe] for judicial determination: if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.” *Bahl*, 164 Wn.2d at 751.

In the present case, the defendants’ challenges are not ripe because they will require further factual development. Specifically, after the defendants are released from total confinement and begin community custody, their CCOs will “notify the offender[s] in writing of any additional conditions or modifications,” RCW 9.94A.704(7)(a), including “the crime-related treatment or counseling services” in which they are to participate, CP 100-13, 151-64, and any additional “crime-related prohibitions.” CP 100-13, 151-64. Only then will a court be able to properly discern whether these conditions “either (1) [do] not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited, or (2) [do] not provide ascertainable standards of guilt to protect against arbitrary enforcement.” *Sansone*, 127 Wn. App. at 638-39; *Bahl*, 1164 Wn.2d at 752-53. In other words, only after further factual development can a court discern whether these conditions are unconstitutionally vague. Therefore, defendants’ due process claims are premature.

Because the conditions at issue were statutorily authorized, imposed consistently with the separation of powers doctrine, and because defendants' challenge with respect to vagueness is premature, the defendants' sentences, including these conditions, should be affirmed.

D. CONCLUSION.

For the forgoing reasons, the defendants' convictions and sentences should be affirmed.

DATED: September 28, 2011

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

*Brian Wasankari by K. Lester*  
BRIAN WASANKARI *14811*  
Deputy Prosecuting Attorney  
WSB # 28945

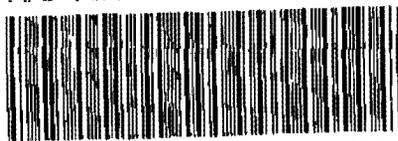
Certificate of Service:

The undersigned certifies that on this day she delivered by *certified* ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

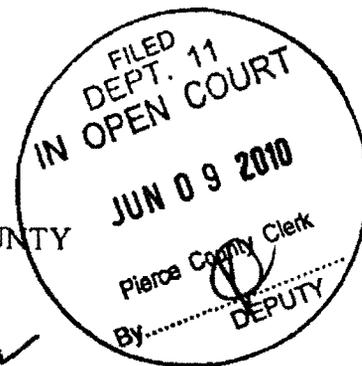
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Date  
*[Signature]*  
Signature

## **APPENDIX “A”**

*Court’s Instructions to the Jury*



09-1-04280-4 34471189 CTINJY 06-14-10



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

CHRISTOPHER EUGENE SIMMS, ✓

ADRIAN TUBIS BROUSSARD,  
Defendant.

CAUSE NO. 09-1-04280-4, ✓  
09-1-04647-8

COURT'S INSTRUCTIONS TO THE JURY

DATED this 7<sup>th</sup> day of June, 2010.

*Jana McCarthy*  
JUDGE

INSTRUCTION NO.   1  

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses [, stipulations][, and the exhibits that I have admitted,]during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not *discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.*

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value

of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 3

The defendant is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or to prejudice him in any way.

INSTRUCTION NO. 4

You may consider evidence that a witness has been convicted of a crime only in deciding what weight or credibility to give to the testimony of the witness, and for no other purpose.

INSTRUCTION NO. 5

Each defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, *fairly, and carefully considering all of the evidence or lack of evidence*. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 6

A separate crime is charged against each defendant. You must decide the case of each defendant separately. Your verdict as to one defendant should not control your verdict as to the other defendant.

INSTRUCTION NO. 1

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.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

INSTRUCTION NO. 8

A person commits the crime of attempted robbery in the first degree when, with intent to commit that crime, he or she does any act which is a substantial step toward the commission of that crime.

INSTRUCTION NO. 9

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

INSTRUCTION NO. 10

A person commits the crime of robbery in the first degree when in the commission of a robbery or in immediate flight therefrom he or she is armed with a firearm or displays what appears to be a firearm.

INSTRUCTION NO. 11

A person commits the crime of robbery when he or she unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person or to the person or property of anyone. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial.

INSTRUCTION NO. 12

Theft means to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services.

INSTRUCTION NO. 13

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

INSTRUCTION NO. 14

A substantial step is conduct, that strongly indicates a criminal purpose and which is more than mere preparation.

INSTRUCTION NO. 15

To convict the defendant Christopher Eugene Simms of the crime of attempted 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 30<sup>th</sup> of July, 2009, the defendant or an accomplice did an act that was a substantial step toward the commission of robbery in the first degree;
- (2) That the act was done with the intent to commit robbery in the first degree; and
- (3) That the act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 16

To convict the defendant Adrian Tubis Broussard of the crime of attempted 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 30<sup>th</sup> day of July, 2009, the defendant or an accomplice did an act that was a substantial step toward the commission of robbery in the first degree;
- (2) That the act was done with the intent to commit robbery in the first degree; and
- (3) That the act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 17

A person commits the crime of conspiracy to commit robbery in the first degree, when, with intent that conduct constituting the crime of robbery in the first degree be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.

INSTRUCTION NO. 18

A substantial step is conduct of the defendant, which strongly indicates a criminal purpose.

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INSTRUCTION NO. 19

To convict the defendant Christopher Eugene Simms of the crime of conspiracy to commit robbery in the first degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 30<sup>th</sup> day of July, 2009, the defendant agreed with one or more persons to engage in or cause the performance of conduct constituting the crime of robbery;

(2) That the defendant made the agreement with the intent that such conduct be performed;

(3) That any one of the persons involved in the agreement took a substantial step in pursuance of the agreement; and

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

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 20

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 21

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the judicial assistant. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions and the verdict forms for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

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. The presiding juror must sign the verdict forms and notify the judicial assistant. The judicial assistant will bring you into court to declare your verdict.

INSTRUCTION NO. 22

You will also be given special verdict forms for the crimes of attempted robbery in the first degree and conspiracy to commit robbery in the first degree charged in Counts I and II. If you find the defendant not guilty of this crime or crimes, do not use the special verdict forms. If you find the defendant guilty of this crime or 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".

INSTRUCTION NO. 23

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime in Count I.

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant or an accomplice. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the weapon at the time of the crime, the type of weapon.

If one participant in a crime is armed with a firearm, all accomplices to that participant are deemed to be so armed, even if only one firearm is involved.

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

INSTRUCTION NO. 24

If you find the defendant guilty of attempted robbery in the first degree as charged in Count I or the crime of conspiracy to commit robbery in the first degree as charged in Count II, then you must determine if the following aggravating circumstance exists:

Whether the defendant committed the crime to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.

INSTRUCTION NO. 25

The State has the burden of proving the existence of the aggravating circumstance beyond a reasonable doubt. In order for you to find the existence of an aggravating circumstance in this case, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt.

**PIERCE COUNTY PROSECUTOR**

**September 28, 2011 - 10:37 AM**

**Transmittal Letter**

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Case Name: State v. Christopher Simms & Adrian Broussard

Court of Appeals Case Number: 41099-1

Designation of Clerk's Papers                      Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

■ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: \_\_\_\_\_

Sender Name: Heather M Johnson - Email: [hjohns2@co.pierce.wa.us](mailto:hjohns2@co.pierce.wa.us)

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