

NO. 46425-0-II

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

STATE OF WASHINGTON, RESPONDENT

v.

SOY OEUNG,
and
AZIAS DEMETRIUS ROSS,
APPELLANTS

Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Felnagle

No. 12-1-03300-7 and 12-1-03305-8

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
BRIAN WASANKARI
Deputy Prosecuting Attorney
WSB # 28945

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANTS' ASSIGNMENTS OF ERROR.

1. Whether Defendants' rights to a public trial were sustained where the *Sublett* experience and logic test confirms that the trial court did not close the courtroom in hearing peremptory challenges in this case.
2. Whether the trial court properly denied Defendants' motion for a mistrial.
3. Whether Defendants failed to meet their burden of showing prosecutorial misconduct.
4. Whether, where there was no trial error committed, the cumulative error doctrine is inapplicable, and Defendants' convictions should be affirmed.
5. Whether Defendants' convictions and enhancements should be affirmed where, viewing the evidence in the light most favorable to the State, there is sufficient evidence from which a rational trier of fact could have found the essential elements of the charged crimes and enhancements beyond a reasonable doubt.
6. Whether the sentencing court properly counted Defendants' convictions as separate and distinct rather than as same criminal conduct under RCW 9.94A.589(1)(a).
7. Whether Defendant Ross failed to show ineffective assistance of counsel where he failed to show that his trial counsel's performance was deficient.
8. Whether Defendants failed to preserve any alleged error in the trial court's instructions on the firearm enhancements, and even had they preserved the issue, whether the trial court properly instructed the jury on the enhancements.

9. Whether Defendants' convictions should be affirmed where a jury unanimity instruction was not required because the exact firearm used was not an element of the crimes or enhancements charged, and even were this not the case, any error was harmless.
10. Whether the trial court properly imposed a standard range sentence in Defendant Oeung's case.
11. Whether the cases should be remanded solely for the purpose of vacating, rather than dismissing without prejudice Defendant Ross's count IV, V, VII, and X and Defendant Oeung's count XVIII and XIX convictions, all of which were found by the trial court to be violative of double jeopardy convictions if allowed to stand along with other convictions.

B. STATEMENT OF THE CASE.

1. Procedure

On August 30, 2012, the State charged Soy Oeung, hereinafter referred to as "Defendant Oeung," by information filed in cause number 12-1-03300-7, with one count of conspiracy to commit first degree burglary (count XV), one count of first degree burglary (count XVI), one count of conspiracy to commit first degree robbery (count XVII), two counts of first degree robbery (counts XVIII and XIX), two counts of unlawful imprisonment (counts XX and XXI), and two counts of second degree assault (count XXII and XXIII). CP 1-5¹. All counts included a

¹ The information did not include counts I through XIV; those these numbers appear on the information filed in co-defendant Ross's case. See CP 1-5, 434-48.

firearm sentence enhancement. CP 1-5. Azias Demetrius Ross, Nolan Chamrouen Chouap, Alicia Vanny Ngo, and Azariah Chenas Ross were named as codefendants. CP 1-5.

The state charged Azias Demetrius Ross, hereinafter referred to as “Defendant Ross,” the same day by information filed in cause number 12-1-03305-8 with conspiracy to commit first degree burglary in counts I, VIII, and LXII, first degree burglary in counts II, IX, and LXIII, conspiracy to commit first degree robbery in counts III, X, and LXIV, first degree robbery in counts IV, XI, LXV, LXVI, LXVII, LXVIII, unlawful imprisonment in counts V, XII, LXXIII, LXXIV, LXXV, LXXVI, second degree assault in counts VI, LXIX, LXX, LXXI, and LXXII, first degree trafficking in stolen property in count VII, theft of a firearm in counts XIII and XIV, and conspiracy to commit first degree stolen property in count LXXVII. CP 434-48². All counts included a firearm sentence enhancement. CP 434-48. Soy Oeung, Nolan Chamrouen Chouap, Alicia Vanny Ngo, and Azariah Chenas Ross were named as codefendants. CP 434-48.

On December 23, 2013, the State filed an amended information in both cause numbers. CP 75-79, 471-82. The amended information filed in

² The information does not include counts XV through LXI. *See* CP 434-448.

cause number 12-1-0330-7 (pertaining to Defendant Oeung) added a count of conspiracy to commit first degree robbery and/or first degree burglary as count XIV, changed count XV to first degree burglary, changed count XVI to first degree robbery, changed count XVII to first degree robbery, changed count XVIII to second degree assault, changed count XIX to second degree assault, changed count XXII to theft of a firearm, and changed count XXIII to trafficking in stolen property in the first degree. CP 75-79. All counts of the amended information, except the theft of a firearm count, included firearm sentence enhancements. CP 75-79.

The amended information filed in cause number 12-1-03305-8 (pertaining to Defendant Ross) charged conspiracy to commit first degree robbery and/or first degree burglary in counts I, VII, and LIX, first degree burglary in counts II, VIII, and LX, first degree robbery in counts III, IX, LXI, and LXII, second degree assault in counts IV, X, LXIII, LXIV, LXV, and LXVI, unlawful imprisonment in counts V, XI, LXVII, LXVIII, LXIX, and LXX, first degree trafficking in stolen property in counts VI, XIII, and LXXI, and theft of a firearm in count XII. CP 471-82. All counts, except the theft of a firearm count, included firearm or deadly weapon sentence enhancements. CP 471-82.

In part because of an attorney medical issue, the court severed the trial of Azariah Ross from those of the other codefendants. 01/16/14 RP 1-12.³ The present defendants' cases were later called for a joint trial, along with those of co-defendants Alicia Ngo and Nolan Chouap. RP 21-22. However, the State moved to dismiss the case against Ngo without prejudice, and the court granted that motion, RP 22-29, leaving only the present defendants and Chouap joined for trial.

The parties devised and distributed to the venire a juror questionnaire regarding hardships, RP 35-40, 48-53, and the court took challenges for cause based on hardships of venire members. RP 74-142, 155-75. *See* RP 222-23. The remaining venire members then completed a second juror questionnaire. RP 175-76, 232-33.

The court conducted a CrR 3.5 hearing, 08/19/13 4-193; 10/15/13 RP 2-10, 10/24/13 RP, and heard motions in limine. RP 57-67, 177-222, 587-89, 596-608, 1537-51, 1644-81, 1713-28, 1833-57, 1988-2000. *See* RP 459-77.

Defendant Oeung made an oral motion to sever her trial from that of her remaining co-defendants just prior to *voir dire*, but given the lack of

³ The verbatim report of proceedings consists of 28 volumes, 17 of which are paginated consecutively, 1 through 2467, and titled, volume I through XVII. The consecutively-paginated volumes are herein cited: RP [Page Number]; the remaining volumes are cited: [Date of Proceeding] RP [Page Number].

notice to the State, the court deferred its decision until the State had an opportunity to respond. RP 249-54, 567-73. Defendants also made a motion to suppress, which was denied. RP 554-67.

The court heard a motion regarding admission of co-defendant statements pursuant to *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), and allowed redacted versions of these statements to be admitted at trial. RP 1312-56; 02/04/14 RP 95-99; 02/11/14 RP 27-80. The State proposed and the court gave a limiting instruction regarding these statements. RP 1442-44, 1447.

The parties conducted *voir dire*, starting with individual *voir dire* of nine venire members who requested questioning outside the presence of the remainder of the panel, RP 257-336, and continuing with *voir dire* of the entire venire. RP 336-439, 477-531. The State and court made clear for the record that no one was excluded from the courtroom during *voir dire*. RP 246.

The court explained that, because the case involved co-defendants, the parties would exercise peremptory challenges by noting them, in open court, in the presence of the venire, on a document titled “peremptory challenges,” and passing that document back and forth until a jury was selected. RP 56, 142-45, 224, 228, 532-33; CP 765-66. The parties then

exercised their peremptory challenges in open court. RP 548-49; CP 765-66. A jury was seated, and instructed. RP 549-52, 575-87.

The parties gave their opening statements. RP 610-11.

The State called Tacoma Police Detective Timothy Griffith, RP 611-24, Bora Kuch, RP 624-75, 681-97,703-10, Fred Van Camp, RP 710-92, Soeung Lem, RP 793-871, Tacoma Police Officer Jeffrey Smith, RP 880-93, Tacoma Police Officer Ronnie Halbert, RP 894-23, Tacoma Police Department Crime Scene Technician Lisa Rossi, RP 924- 43, 02/04/14 RP 85-89, 02/11/14 RP 7-14, Remegio Fernandez, RP 943-59, 974-1027, Norma Fernandez, RP 1028-53, Tacoma Police Officer Matthew Graham, RP 1054-61, Tacoma Police Officer Stanley James, RP 1061-66, Natalie Chan, 02/03/14 RP 3-16, Duoc Nguyen, 02/03/14 RP 17-50, 99-105, Thanh My Thi Vu, 02/03/14 RP 53-98, Tacoma Police Officer Chris Yglesias, 02/03/14 RP 105-20, Aubrey Askins, 02/04/14 RP 6-17, Nhi Ha, 02/04/14 RP 17-64, Than Ha, 02/04/14 RP 65-75, Khuyen Le, 02/04/14 RP 75-85, Rany Eng, RP 1077-1111, 1123-25, Thiem Moo, RP 1111-23, Tacoma Police Officer Corey Smith, RP 1126-55, Hing Yu, RP 1155-62, Tacoma Police Officer Jared Williams, RP 1162-75, Tacoma Police Department Crime Scene Technician Shea Wiley, RP 1175-84, Hoang Danh, RP 1189-1230, Sophea Danh, RP 1230-42, 1265-77, A.D.,

RP 1277-97, Tacoma Police Officer Sylvester Weaver, RP 1298-1308, Sidoung Sok, 02/11/14 RP 14-26, Tacoma Police Detective Robert Baker, 02/11/14 RP 81-240, Tacoma Police Officer Nicholas Jensen, RP 1448-61, Tacoma Police Officer Kenneth Smith, RP 1461-69, Timothy Taylor, RP 1469-87, Tacoma Police Detective Eric Timothy, RP 1487-1500, Tacoma Police Detective William Foster, RP 1505-14, Tacoma Police Detective Gregory Rock, RP 1514-23, Frank Kuhn, RP 1552-64, Harlan Moore, RP 1564-92, and Valerie Schibitov, RP 1592-99.

After this testimony, on February 19, 2014, Defendant Chouap pleaded guilty to a second amended information, which charged seven counts of first degree robbery, three with firearm sentence enhancements. RP 1602-17. *See* RP 1684-85. He stipulated to an exceptional sentence of 360 months plus 180 months of firearm enhancements for a total of 540 months. RP 1610.

Defendants moved for mistrial three times during trial, but their motions were denied. RP 962-66, 1623-43, 1740-45. However, the court read the jury a limiting instruction with regard to Fernandez's testimony. RP 966-69.

The State then called Garrison Ross, RP 1685-96, Tarey Rogers, RP 1696-1707, Tacoma Police Detective William Muse, RP 1707-13,

1729-40, 1746-51, Tacoma Police Detective David Hofner, RP 1751-56, Dale Vasey, RP 1756-74, Corrections Officer James Scollick, RP 1775-95, Tacoma Police Detective Timothy Griffith again, RP 1871-76, 1942-46 (defense voir dire), 2093-2147, Tacoma Police Detective John Bair, RP 1876-98, *see* RP 1914-20, 1960-81, 2001-20, Tacoma Police Officer James Buchanan, RP 1907-14, Tri Minh Ngo, RP 1935-42, and Tacoma Police Detective Robert Baker again, RP 2020-77, 2085-92.

The State moved to admit recordings of Defendant Ross's telephone calls from the Pierce County jail, and the court ruled them admissible, at least, statements of a co-conspirator. 02/04/14 RP 90-91, RP 1245-65, 1357-1433, 1804-28, 1857-71, 1904-06, 1920-26, 1946-51. They were admitted through the testimony of Detective Griffith. RP 2093-2147.

The court read a stipulation to the jury that Defendant Ross was incarcerated in the Pierce County Jail from May 9 to August 10, 2012. RP 2092-93; CP 625.

The State rested. RP 2147, 2235.

Defendants Ross and Oeung both moved to dismiss the conspiracy charges and all charges based on accomplice liability. CP 94-105, 654-62, RP 2158-74, 2193-98, 2200. The State responded, RP 2174-93, and the court denied Defendants' motions. RP 2198-2201.

Defendants also relied on *State v. Faust*, 93 Wn. App. 373, 967 P.2d 1284 (1998), to move to dismiss the firearm enhancements for insufficient evidence that a firearm was involved. RP 2206-08, 2211-13, 221-16. The State responded, RP 2208-11, 2214-15, and the court denied the motion. RP 2213-14.

Finally, Defendant Ross made and Defendant Oeung renewed her motion to sever, RP 2223-24, and the court denied these motions. RP 2225.

Defendants rested without presenting any testimony or other evidence. RP 2219-20, 2235-36.

The parties discussed jury instructions, RP 1243-45, 2218, and the court took formal exceptions to its instructions from the parties. RP 2220-23. The State took no exceptions. RP 2221. Both defendants excepted to instructions 1, 2, 7A, and to the failure to give a limiting instruction as to acts with which they were not directly charged. RP 2221-23. Defendant Oeung also objected to the definition of “traffic” in instruction 49. RP 2223. The court read its instructions to the jury. RP 2236-42; CP 231-304.

The State gave its closing argument. RP 2242-72 (State’s closing argument).

Defendants objected to a portion of the State's PowerPoint presentation, CP 168-225, 371-429, and made a fourth motion for mistrial, RP 2273-79, 2363-67, 2374-87, but the court denied that motion. RP 2388-90. Defendants also objected to a State comment regarding truth and justice. RP 2362-63.

The defendants then made their closing arguments and the State its rebuttal. RP 2280-94 (Defendant Ross's closing argument); RP 2295-1315 (Defendant Oeung's closing argument); RP 2316-52 (State's rebuttal argument).

After submitting questions, RP 2393-2407, 2409-11, CP 132-33, 226-27, 665-71, the jury returned verdicts. RP 2411-22, 2423-41; CP 305-26 (Oeung); CP 672-707 (Ross). The jury found Defendant Ross guilty as charged, except of conspiracy to commit first degree robbery as charged in counts VII and LIX and of conspiracy to commit first degree burglary as charged in count LIX. RP 2412-18; CP 672-707. It found Defendant Oeung guilty as charged. RP 2418-2422; CP 305-26.

Prior to sentencing on June 23, 2014, the defendants moved to vacate the judgment for insufficient evidence under CrR 7.8, 06/23/14 RP 2-21, and the court denied these motions. 06/23/14 RP 21-22.

The parties also made arguments regarding merger. 06/23/14 RP 23-37. With respect to Defendant Ross, the parties agreed that the conspiracy counts merge into one count with one firearm enhancement and that the two assault merges with the robbery with one enhancement. 06/23/14 RP 23 -24. *See* CP 739-56. The defendants argued that the robbery and unlawful imprisonment counts merge, and the State contended they did not. 06/23/14 RP 24-37. The court held that, with respect to Ross, only the January robbery and unlawful imprisonment counts merged. 06/23/14 RP 37-38. *See* CP 739-56.

Finally, defendants argued that the burglary, robbery and kidnapping counts were the same criminal conduct, 06/23/14 RP 38-43, but the court found them to be separate conduct. 06/23/14 RP 43. However, the court did find that theft of a firearm and first degree burglary were the same criminal conduct. 06/23/14 RP 43.

At sentencing, Defendant Oeung recommended an exceptional sentence below the standard range of 0 months plus the mandatory firearm sentence enhancements. 06/23/14 RP 46-57, 62-63. The State recommended a low-end standard range sentence plus the mandatory firearm sentence enhancements. 06/23/14 RP 57-62. The court sentenced her to the low end of the standard range on each count plus the

enhancements for a total of 417 months in total confinement. 06/23/14 RP 65-68; CP 355-68.

With respect to Defendant Ross, the State recommended the low end of the standard ranges plus the firearm sentence enhancements for a total of 507 months in total confinement. 06/23/14 RP 70-72. The court adopted this recommendation. 06/23/14 RP 75-77; CP 739-56.

Both defendants filed timely notices of appeal the same day. CP 369-70, 738. *See* 06/23/14 RP 69, 77.

2. Facts

Tacoma Police Detectives Timothy Griffith and Robert Baker were assigned as lead detectives in the investigation of a series of seven home-invasion robberies, which occurred in the city from January 25 to August, 26, 2012. RP 612-13; 02/11/14 RP 83-84.

a. 9106 McKinley Avenue January 25, 2012 Incidents (TPD Incident Number 12-025-1062)⁴:

Seoung Lem is a 59-year-old Cambodian immigrant, whose primary language is Cambodian, who lived in a four-bedroom house at 9106 McKinley Avenue in Tacoma in January, 2012. RP 793-96, 798.

⁴ *See, e.g.*, RP 793-96, 798, 882, 890-93.

She lived there with her three daughters, Natalie Chan, 31, Sokha Chan, 27, and Phala Chan, 25, and her son, Sokthy Chan, 29. RP 796-97.

On January 25, 2012, at a little after 4:00 p.m., Lem left through the back door of her residence to take out the garbage, and clean up the area outside. RP 798, 854. When she got back into the house, she heard her daughter's puppy barking nonstop upstairs. RP 799, 856. So, she called his name. RP 799, 856.

A man then grabbed Lem's arm and pointed a gun at her head. RP 799-800, 855, 857. She testified that she was scared to look at it, but "knew it was a gun." RP 799. The man then asked her, in English, do you know what this is? RP 800, 858. Lem could not answer; she was scared, and just screamed. RP 800. The man grabbed her arm and pushed her down, telling her to lay flat down in front of the stove. RP 800, 858. Once she was on the floor, he again asked her, this time in Cambodian, "do you know what this is, grandma[?]" RP 800-01, 858.

Lem answered, yes, and the man picked her up, and walked her to a sofa in the living room. RP 800-01, 859. While walking, he asked her where the gold was. RP 802. The man then tied her hands behind her back and sat her on the floor. RP 802, 804. He asked her where the gold jewelry was, and she told him there was no gold and/or to look for it himself; she

didn't know where it was. RP 802, 804. Lem noted that her kids were all gone at work at the time. RP 802. The man then had her lay down on the sofa, which she did, and covered her face with her jacket. RP 804-05.

The man was either wearing a mask or a hat and dark colored clothing. *See* RP 801, 859-60. He seemed to have some pimples on his face and a mustache. RP 807, 860, 862. While he was speaking with her, a second, taller man was searching the house. RP 803, 860-61.

The men stayed in her house for about thirty minutes before leaving. RP 805. Before they left, they told Lem to wait 15 minutes before she got up. After they exited the home, Lem worked to untie herself, but took about 15 minutes to do so. RP 805. She then closed the door, called her son and younger sister, and they both came to the house. RP 807-08.

Even after her sister arrived, Lem was terrified, scared, and nervous, and her body was shaking. RP 809. Her daughter described her as “[v]ery distraught” and “[t]rumatized.” 02/03/14 RP 7. When her son arrived, he asked her what happened, and then called the police. RP 809.

Her daughter Natalie Chan testified that the residence was ransacked and that her dog, a “little Chihuahua,” had been pepper sprayed by the assailants: he had orange on him and when she held him close, her eyes started to sting. 02/03/14 RP 8-9.

Tacoma Police Department Officers Jeffrey Smith and Aaron Joseph were dispatched to the residence at 5:53 p.m. to investigate a potential home invasion robbery. RP 882. They arrived seven to eight minutes later. RP 883.

When they got there, Lem's son and then her daughter, Natalie, translated as Lem described what happened. RP 816-17, 863-66, 883-86; 02/03/14 RP 9-10. Officer Smith testified that Lem seemed scared. RP 885.

She described her assailants as two Asian men, one of whom was about five feet tall and one about six feet tall. RP 886. Lem indicated that both were wearing dark clothing, and that one pointed a silver and black semiautomatic handgun at her. RP 886. According to Lem, one only spoke English and one only spoke Cambodian. RP 886.

According to Officer Smith, Lem showed him a USB cable used by the man to tie her hands. RP 887. Forensics was called to process the scene. RP 887-89.

Lem testified that the men took \$4,000 in cash from the residence, which included money that her daughter had saved since she was a little girl. RP 817-18, 868; 02/03/14 RP 10. The men stole a bracelet, gold

necklace with a pendant, a watch, and a purse, containing, a cell phone, and ID card and a “food stamp card,” from Lem. RP 820, 870.

Lem later identified two necklaces, one with a pendant, the stone of which had been removed, as being depicted in a photograph marked as exhibit 20A of property recovered by police. RP 820-24, 2041. Chan testified that her diamond earrings, diamond rings, necklaces, purses, two digital cameras, some video games, pairs of shoes, and electronic items were stolen from her. 02/03/14 RP 10-14. *See* RP 2041.

On July 26, 2012, Lem also reviewed a photo montage with Detective Baker, in which she identified photo number three, a photo of Nolan Chouap, as that of the man who tied her up. RP 824-27, 2038-41. She said she was 90% certain. RP 2040. Lem then identified defendant Choup as the man who tied her up, burglarized her home, and robbed her. RP 827, 853-54. *See* RP 850-51.

Lem identified photographs of her residence taken after the burglary, marked as exhibit 22, RP 810-15, and published to the jury. RP 815-16. She also identified a piece of wire, marked exhibit 16, as that used by the man to tie her hands behind her back. RP 813.

Tacoma Police Crime Scene Technician Lisa Rossi arrived at the scene at about 6:30 p.m., RP 926, spoke with one of Lem’s daughters,

photographed the scene, and processed it for latent fingerprints. RP 931-34. She identified exhibit 22 as the prints of the photographs she took that evening. RP 932-33. She could not find any latent fingerprints at the scene, though she found a suspected glove print on some of the items in the house. RP 934-35. Rossi then collected the black USB cord as evidence. RP 935-36.

b. 8208 South G Street April 27, 2012 Incidents (TPD Incident Number 12-118-1156)⁵:

Bora Kuch, a 58-year old Cambodian immigrant, lived at 8208 South G Street in Tacoma, Washington in April, 2012. RP 625-28, 712. Her daughter, Ratanna Van Camp, son-in-law, Fred Van Camp, V, and two-year-old grandson, F.V.C., VI, shared the two-story, four-bedroom house with her. RP 628-30, 682, RP 711-12.

On April 27, 2012, at about 5:30 in the afternoon, Kuch was home alone with her grandson. RP 630. Her daughter had just left for work, and her grandson, who was upset because he wanted to go with his mother, was crying. RP 631. Kuch tried to calm her grandson and they were both watching television when she heard a “pounding sound.” RP 631, 687. Kuch initially thought the noise had come from the neighbor’s house, but, a moment later, heard the same sound again. RP 632.

⁵ See, e.g., RP 628-30, 682, 711-12, 896-98.

She left the upstairs bedroom where she was with her grandson and started down the stairs to investigate. RP 632, 687-88. Halfway down the stairs she was met by two people, one of whom pushed her back up the stairs and back into her bedroom. RP 632-34. *See* RP 688. Kuch was scared, shaking, her heart was beating quickly, and she felt cold when she encountered the men. RP 633, 661, 688.

She described the person who pushed her as an approximately 25-year-old man, who was about 1.5 to 1.57 meters, or about 4 feet, 11 inches⁶ to 5 feet, 2 inches⁷ in height, with a thin build, long hair, and a mustache. RP 635, 689, 691-92, 694-95. Kuch described his race as Khmer. RP 635. After pushing Kuch into her bedroom, the man took a shirt from Kuch's closet and used it to cover his face. RP 657-58, 689. He was wearing a black jacket, RP 690, gloves, and black shoes. RP 636, 693-94.

At some point, this man began pointing a handgun at Kuch. RP 635, 642, and demanding "money and stuff" in English, but when she told him she could not speak English, he started to speak Cambodian, though not fluently. RP 635. This man pushed the bedroom window shut, and when Kuch tried to open it, he yelled to her, "You want to die?" RP 63,

⁶ (1.5m)(3.28084 ft/m) = 4.92126 ft, or 4 ft and (.92126 ft)(12 in/ft) =) 11.05512 in., or about 4'11''.

⁷ (1.57m)(3.28084 ft/m) = 5.1509188 ft, or 5 ft and ((.1509188 ft)(12 in/ft) =) 1.8110256 in., or about 5'2''.

6427. He asked this a couple of times, and then tied Kuch's hands behind her back. RP 638-39, 641-42. This apparently took place in front of her grandson. RP 644.

After about ten minutes Kuch untied herself and walked into her daughter's bedroom, but the same man again tied her hands behind her back. RP 644-45. He then asked her for keys and money. RP 645-46.

After 20 to 30 minutes in her daughter's room, Kuch left and checked on her grandson and the activity of the two men. RP 647.

Kuch could not look at the other man because he was searching the remainder of the house while she was kept in the bedroom, though she indicated that he was significantly taller than the man who pushed her,⁸ RP 635-37, 657, had short, dark hair, and appeared to be approximately 25 years old. RP 695-96. This second man was wearing a black hat, black coat, gloves, and a handkerchief over his face. RP 657, 691, 696-97..

The men turned everything upside down," and "went up and down the stairs, looking for tools" to open a safe. RP 638. When they couldn't find a key to open a safe, the men demanded the key from Kuch. RP 637, 651. However, Kuch did not have the key, and the men were ultimately able to open the safe themselves using tools found in the garage of the residence. RP 651-52, 657; 02/11/14 RP 18.

⁸ Kuch described this second man's height to police in meters, and her daughter translated this description, and apparently converted the units of measurement from meters to feet and inches, to arrive at 5'9" tall. RP 695.

As they were there, the taller man was talking in English on what Kuch described as a phone with what sounded like a woman. RP 659. When the men had almost opened the safe, Kuch heard the man tell the woman on the phone, “almost.” RP 659. Kuch testified that she could “clearly” hear the female voice with whom the man was speaking on the phone, and believed that the female was “involved” in the burglary. RP 659-60, 708-09. However, she did not pay attention to the type of phone the man was using and did not know what a walkie-talkie is. RP 659-60.

The men then removed everything inside the safe. RP 652. Kuch testified that inside the safe were three to four firearms, as well as jewelry. RP 648, 653. Among those firearms was a long gun, which appeared to be a rifle. RP 652. One the men showed it to Kuch, and said, “This is a nice gun, grandma.” RP 652. The men left a second, older rifle behind. RP 654.

Kuch was forced to give the men about \$500 in cash that she had saved and some jewelry. RP 649-50. She testified that the men threatened to kidnap her grandchild if she did not give them the money. RP 649-50. The men also stole a gold ox necklace that her grandson, who was born in the year of the ox, was wearing, RP 650-51, 736, as well as jewelry belonging to Kuch and her daughter. RP 653-54.

Kuch testified that the men entered the house about 5:30 p.m., and remained there until a little after 7:00 p.m., when they left through the front door. RP 638, 658.

Kuch testified that this door had been locked at the time of the burglary. RP 633. However, after the men left, she found a broken window in the living room of the residence, which faced the back of the house. RP 655, 669.

Kuch then went downstairs and called her other daughter because she knew that daughter was off work at that time; it didn't occur to her to call 911, and she did not speak English to communicate with the 911 worker. RP 660. *Cf* RP 897. Kuch asked her daughter to call her son-in-law and have him come back. RP 661-62.

Fred Van Camp, V, testified that he got a telephone call at around 6:30 to 7:00 that night from his brother-in-law. RP 712-13. Van Camp armed himself with a pistol, called 911, and returned to his residence, arriving about 30 to 40 minutes later. RP 661-62, 714-15. *See* RP 662. When he arrived, Kuch was present, along with his sister and brother in law, and son. RP 715. *See* RP 663-64. Van Camp described Kuch as "frantic," breathing rapidly, a little shaky, and nervous. RP 717.

Tacoma Police Officer Ronnie Halbert was dispatched to the residence in response to the 911 call at about 8:00 p.m, and arrived ten to fifteen minutes later. RP 896-98. Van Camp was already present when the officers arrived. RP 901. Other officers arrived at about the same time. *See* RP 899. The officers cleared the residence to insure there were no longer any suspects or injured people inside. RP 899-900.

Afterwards, Kuch told them, with her daughter, and perhaps son, acting as a translator, what happened. RP 664-65, 691. *See* RP 722, 902-02. Kuch indicated that there were two suspects, one shorter than the other. RP 910. The shorter man was approximately 25 years of age, about five-foot-four with a thin build, a thick mustache, a dark complexion, and curly, collar-length hair, RP 910, 919-20. He was wearing a black cap, black coat, blue gloves, black pants, and black shoes. RP 910.

Officer Halbert described Kuch as, *inter alia*, very “emotionally upset[.]” RP 904. She described the taller man, through her daughter’s translation, as approximately the same age, about five-foot-nine, with short, black hair, and a dark complexion, wearing a black hat, black coat, gloves, black pants, and black shoes. RP 921. This man was also wearing a red and yellow scarf over his face. RP 922.

Van Camp walked through the residence with officers to identify items damaged or missing. RP 723- He testified that the downstairs window was shattered, a television stand and stereo equipment had been ripped out and were laying on the floor with the stand cracked, two safes had been cracked open, and one fell onto a desktop computer tower, destroying it. RP 724-25, 730. An Olympus camera was also stolen. RP 731.

Van Camp testified that he had been storing the property of his friend, Sidoung Sok, who had taken a trip to Cambodia. RP 726; 02/11/14

RP 17-19. That property included Sok's firearms and "his fire safe full of stuff." RP 726; 02/11/14 RP 17-20. Among the property stored in the safe was a gold necklace and a gold bar. RP 727.

Among the firearms were a Mossberg shotgun, two 9-mm pistols, a .40-caliber pistol, an SKS rifle, and a 16-gauge shotgun. RP 727-28; 02/11/14 RP 19-20. Van Camp testified that he also owned a 12-gauge shotgun, another Remington 870 shotgun, a 9-mm pistol, and a .357-caliber snub-nose revolver. RP 728. One of Sok's 9-mm pistols and Van Camp's pistol both had laser sights attached. RP 729. All of these firearms, except the .357 revolver, were kept in the gun safe. RP 729. Of these firearms, all but the (apparently non-Remington) shotgun and the SKS rifle were stolen from the residence. RP 728; 02/11/14 RP 20. *See* RP 739. Van Camp testified that he had fired the firearms he owned and that all functioned properly, firing projectiles with gunpowder. RP 744.

Kuch identified photos of her home taken the day of the burglary, all of which were admitted, and some of which were published to the jury. RP 665-72. She also identified photographs of two of her rings and of her daughter's necklace, all of which were stolen from the residence that day. RP 683-87, 2043-45. Van Camp also identified these photographs. RP 734, 740, 2043-45. She testified that the rings were composed of gold and each was worth more than \$100. RP 687.

Van Camp identified photographs of two necklaces and a ring as items belonging to his wife that were stolen from the residence. RP 734-35, 2043-45. He also identified a photo of the two shotguns, two pistols, a Muckleshoot bag, and a ring that were stolen from the residence. RP 738. This photo was taken from Defendant Ross's cell phone. RP 2045-46.

Finally, Van Camp searched a defendant's Facebook page and found a photo of a woman he knew as "Alicia" wearing a gold necklace with a blue topaz, which belonged to his wife and was stolen from his residence. RP 744-47, 788-89. Van Camp testified that he had bought the necklace for his wife, and that he could recognize it by its chain, the stone of its pendant, and the mounting for that stone. RP 791. He also testified that this woman had jewelry in her cheeks and that this was depicted in the photograph. RP 789-90. He gave this photo to Detective Baker. RP 747, 2046-54. *Cf.* RP 1927-30.

On July 24, 2012, Detective Baker showed Kuch a photo montage. RP 672-73, 681-82, 705-07, 2042-43. Kuch testified that she "told the officer that one picture looked similar to the person that came to rob [her]," and put her signature next to that photograph, but that "the officer said, no, that's not the right guy." RP 673-75. Kuch did, however, place her initials next to photograph 3, which was Nolan Chouap. RP 2043. She told the detective she was 80% certain of this. RP 2043.

Officer Halbert contacted forensic personnel to document the scene by, for example, taking photographs, and collecting fingerprints, if possible. RP 906. Rossi responded to the residence, and, after walking through the scene with a sergeant and an officer, took photographs. RP 938-39. She identified exhibit 3 as prints of those photographs. RP 939. Rossi then searched for latent finger- or glove prints in the residence, but could not find any. RP 940.

Halbert found the black nylon strap which was used to tie Kush's hands, RP 907-08, and Rossi collected it as evidence. RP 940-43. The strap was ultimately admitted at trial as exhibit 4. RP 940-43.

c. 7502 South Ainsworth Avenue May 10, 2012 Incidents (TPD Incident Number 12-131-1400)⁹:

Remegio Fernandez, a 66-year-old Filipino immigrant who served twenty years in the United States Army and in the United States Postal Service thereafter, lived in his home at 7502 South Ainsworth Avenue in Tacoma, Washington on May 10, 2012. RP 944-47, 1030. He shared the three-bedroom, tri-level home with his wife, Norma Fernandez, and his 26-year-old step-daughter, Carolyn Deguzman, RP 946-48, 1030.¹⁰

⁹ RP 944-47, 1055-56.

¹⁰ Because they share a surname, Mr. and Mrs. Fernandez will be referred to by their given names for clarity herein. No disrespect is intended.

On May 10, 2012, at about 5:00 p.m., Remegio was home with his wife when someone knocked at his door. RP 948-49, 1030-31. He looked out the window to see a woman and asked her what she wanted. RP 949, 1031. She asked for “John,” and Remegio told her that John didn’t live there. RP 949, 1031. She then turned, walked away, and got into the passenger side of a car that then drove away. RP 953-54. He described the woman as in her twenties, “kind of short and chubby” and wearing a brown shirt and blue jeans. RP 951-53, 974-75. Remegio, who is five-foot-two, testified that the woman was shorter than he is. RP 952.

After she left, Remegio and his wife watched television and played cards. RP 956, 982. Before 7:00 p.m., they heard a big crash at the back, glass door. RP 956, 982-83, 1031-32. The glass of that door was broken out and two men, one of whom was armed with a gun, came into their home. RP 956-57, 1032.

The gun itself was a black, 9-mm pistol with a laser sight, which the man pointed in Remegio’s face. RP 984-87. *See* RP 1038-39. They said something to the effect of “I want your money.” RP 984.

The man with the gun showed Remegio its magazine to demonstrate that the weapon was loaded, and said something to the effect of, “you know all I got to do is pull this trigger, and you are dead.” RP 985. He showed him the magazine multiple times. RP 985. Remegio testified that the magazine was loaded. RP 986.

Both men were wearing ski bonnets, or knit caps, and bandanas over their faces, such that all Remegio and his wife could see were their eyes. RP 957-58, 997, 1032-34. Remegio's wife believed that the bandanas of both men were blue. RP 1034, 1037. Their skin appeared to be brown, like that typically associated with some people of Asian descent. RP 1035, 1037.

However, there was one point at which the man with the pistol lowered his handkerchief. RP 975-76. Remegio noted that the man had dark skin, and was about five-feet-two inches in height. RP 976-78, 980. His wife estimated that he was between five-four and five-six. RP 1036. The man with the pistol was wearing a dark-hooded sweatshirt, a black bonnet, a blue handkerchief, gloves, and dark, baggy pants that looked to Remegio like sweat pants. RP 978-80, 1022-23. His wife thought they were blue jeans. RP 1032-33.

Remegio estimated that the second man was about five-feet-five to five-feet-six. RP 981. He had long, kind of curly, black hair. RP 982. His bonnet was black and handkerchief blue. RP 981-82. Otherwise, he was wearing clothing similar to that of the man with the gun. RP 982.

After the men came in and demanded money, Remegio told them he didn't have any money in the house. RP 987. One of the men told him that if he didn't have it at the house, they would take him to an ATM to withdraw it. RP 987. The men then took Remegio and his wife upstairs, to

search the rooms there. RP 988. They took them to the main bedroom and searched it, saying something to the effect of “we know you Asians, you Filipinos, you keep your money in the house.” RP 988, 1040. The man with the pistol stayed in the room with Remegio and his wife while the other man searched their daughter’s room, and ultimately found and stole over \$5000 in cash that she had been saving for a trip. RP 988, 1020. They also stole all the jewelry in the house, including the necklace Norma Fernandez was wearing, an X-Box 360 video game console, a .22-caliber Jennings pistol, and a samurai sword. RP 992, 999-1000, 1008-11, 1039-41. They moved a .22-caliber Marlin rifle from a closet to a bathtub. RP 1012-14.

At the same time, the man without the pistol had a “two-way radio” through which he was communicating with a woman, who asked them what they were doing, to which they responded “just wait, we still finding things.” RP 988-90, 1041-43. She asked them if they were finished and the men kept telling her to wait. RP 990, 1041-43. Remegio testified that the voice of the woman on the radio sounded the same as the voice of the woman who had been at his front door that evening. RP 990, 1060-61.

When they were searching the upstairs, Remegio tried to escape by running down the stairs and out the broken back door, but the men caught up to him and brought him back inside. RP 992-93, 1043-44. The man with the pistol stuck its barrel in Remegio’s mouth as they did so. RP 985,

994-95. They told him that all they had to do was pull the trigger, and that was it. RP 995.

The men kicked him and “roughed [him] up a little bit,” RP 993-94. The man with the pistol then tied his hands and legs with some telephone charger cables. RP 999-95, 1022.

The men stayed in the home for approximately three hours. RP 956. Before they left, they indicated that they had some friends at the Jack in the Box restaurant near the home who would come over and beat them up if they did anything. RP 991.

After they left, Remegio called 911, and told the communications officer that they had been robbed. RP 996. The police arrived about five to ten minutes later. RP 996. *But see* RP 1044 (where Remegio’s wife estimated the period as 15 to 20 minutes). When they arrived, Remegio told them what happened and walked through the house with them. RP 997.

Tacoma Police Officers Matthew Graham and Stanley James were dispatched to the Fernandez residence at about 9:48 p.m. that night. RP 1056, 1063. James cleared the house, located the exit point from which the assailants left, and waited for a canine officer to arrive. RP 1063-64.

Canine Officer Johnson, and his canine partner, Sam, arrived, and James accompanied them on a track of the suspects. RP 1064-66. They found tire tracks consistent with those of a car, and a small piece of

jewelry, which James collected as evidence, but they did not find the suspects. RP 1065-66.

Graham testified that he met with Remegio and Norma, that both appeared very shaken, and that Norma in particular appeared to be almost in shock over what had occurred. RP 1056-57. He noticed that “[t]he house was completely ransacked,” with broken glass and furniture, and that almost every drawer upstairs had been emptied and the contents thrown everywhere. RP 1057.

According to Officer Graham, Remegio described the woman who came to the door as a Hispanic female, about 25 to 30 years of age, who was heavy set and short. RP 1059. He described the man with the firearm as a short, “white or Hispanic male” in his twenties, of “average build,” who was wearing a blue bandana over his face and a black jacket. The other man was also described as white or Hispanic, in his 20s, with a slight build, and tall. RP 1059-60. He wore a blue bandana over his face, as well, with a black jacket and gray sweatpants. RP 1059-60. Both wore gloves the entire time. RP 1060. Finally, Remegio described the firearm as a black, semiautomatic pistol equipped with a laser sight. RP 1060.

Remegio and his wife later met with a detective and a sketch artist, and the artist produced sketches of the woman and the man with the pistol. RP 1014-17. They also viewed photo montages, and both identified Nolan Chouap, depicted in photograph number 3, as the man with the pistol,

Remegio with 70% certainty, and his wife with 60%. RP 1018-21, 1025-26, 1045-51, 2054-56. Remegio could not identify the woman who knocked on the door from a photo montage. RP 1027.

d. 1815 South 90th Street June 9, 2012 Incidents (TPD Incident Number 121610205):¹¹

On June 9, 2012, 75-year-old Vietnamese immigrant Duoc Nguyen was living with his wife, Thanh My Thi Vu, in a house located at 1815 South 90th Street in Tacoma, Washington. 02/03/14 RP 18-20, 53-56.

Thanh was sleeping in the master bedroom that morning when she woke to find a man pointing a gun at her. 02/03/14 RP 57. She saw some sort of “red color[ed]” light from the gun pointed at her face. 02/03/14 RP 57-58. She screamed, but the man covered her mouth. 02/03/14 RP 57. The man was wearing a pair of Thanh’s garden gloves. 02/03/14 RP 58-59. Thanh testified that his mouth was covered with something that was blue and bore something like a floral pattern and that he was wearing a hat or cap on his head. 02/03/14 RP 60. He was short. 02/03/14 RP 61.

He pushed her into the bathroom associated with the bedroom. 02/03/14 RP 60-61. A taller man then went into her husband’s bedroom. 02/03/14 RP 61, 63. Thanh testified that they spoke to one another in a

¹¹ See, e.e., 02/03/14 RP 19-20, 105-06.

language other than English, which Thanh, who was from Vietnam, and who studied in the Phillipines, didn't understand. 02/03/14 RP 55, 61-62.

Nguyen testified that he was in bed watching a soccer match, when, at about 2:40 a.m., his bedroom door opened. 02/03/14 RP 21-22. A person about his height with "a scarf on his face and [a] scar on his head," was pointing a gun at him. 02/03/14 RP 22. The scarf was black and he had another black scarf covering his head. 02/03/14 RP 26. The man had a dark skin tone. 02/03/14 RP 27. Nguyen described the gun he held as a pistol, with an apparent laser sight. 02/03/14 RP 23-24. He described the man who threatened him with that pistol removing its magazine to demonstrate to him that "[i]t's a real gun." 02/03/14 RP 38-39. Nguyen testified that he could see "bullets" inside. 02/03/14 RP 39.

The man asked Nguyen in English where the money was, and Nguyen told him he didn't have any money. 02/03/14 RP 27, 64. The man then took Nguyen to the master bedroom, where his wife and another man were. 02/03/14 RP 28. This man was also wearing a scarf over his face and holding a gun. 02/03/14 RP 28, 33, 39-40.

The men took the couple to the garage to search a car, then to the kitchen where one of them grabbed a knife; they tied up Nguyen and his significant other with some sort of tape in the bathroom associated with the master bedroom. 02/03/14 RP 28-29, 31-32, 34, 62, 66, 99. They then searched the residence. 02/03/14 RP 63-64.

The men were communicating on a walkie-talkie with a female. 02/03/14 RP 37. *See* 02/03/14 RP 68. The woman was asking the man if they had finished the job or not. 02/03/14 RP 68-69, 78-79.

After they left, Nguyen heard the sound of a car. 02/03/14 RP 38. Nguyen then called the police. 02/03/14 RP 40, 71.

Officers Yglesias and Belman were dispatched to the residence at 5:04 a.m. and arrived there at 5:12 a.m. 02/03/14 RP 108. When they arrived, they found that both Nguyen and Thanh had duct tape on their hands. 02/03/14 RP 109. Nguyen was “[v]isibly shaken” and his wife was “probably twice as bad.” 02/03/14 RP 112-13. After determining that their first language was Vietnamese, officers had Vietnamese-speaking Officer Pham respond. 02/03/14 RP 109-11, 40-41, 43, 72, 79.

Nguyen and Thanh described the suspects as Hispanic men, both about 30 to 35 years of age, 5’3” to 5’-5”, 130 pounds, with black hair, dark brown skin, and “brown Asian eyes,” one wearing a blue-hooded sweatshirt and pants with a brown bandana or something covering his face and one wearing a black-hooded sweat coat with black and red flowers all over it and a bandana over his face. 02/03/14 RP 115; RP 2057. This man may have been wearing a blue bandana over his face. RP 2058. Thanh described one of the men wearing her gardening gloves. 02/03/14 RP 115-16.

Officers called for forensics and Crime Scene Technician Aubrey Askins arrived in response. 02/03/14 RP 116; 02/04/14 RP 7-8. Askins took photographs of the scene, processed the home for latent fingerprints, and collected evidence, including tape removed from the victims and a roll of duct tape. 02/04/14 RP 9-16. She also processed these items of evidence for latent fingerprints, but could not recover any. 02/04/14 RP 14.

Among the property the men took was \$90 in cash from Nguyen, “[\$]200-something” in cash from Thanh, a phone, an iPad, a camera, jewelry, including earrings, and a ring, perfume bottles, and glasses. 02/03/14 RP 35, 45-46, 65, 70.

Nguyen later discovered that a back door and window had been left open. 02/03/14 RP 36.

On July 27, 2012, Detective Baker showed Thanh a photo montage, and she selected Nolan Chouap, who was depicted in photo number 3, as the shorter man with 80 percent certainty. 02/03/14 RP 83-87; RP 2058-59. Nguyen did not recognize either man among the photos. 02/03/14 RP 104.

e. 1510 South 86th Street June 17, 2012
Incidents (TPD Incident Number):¹²

On June 17, 2012, Nhi Ha, a Vietnamese immigrant, who owned a nail shop, lived with her parents, Than Ha and Khuyen Le, and her two children at 1510 South 86th Street in Tacoma, Washington in a two-level, four-bedroom home. 02/04/14 RP 18-22, 65-66, 75-78. In the early morning of that day, she was asleep when she was woken by noises, and opened her bedroom door to find two men, who were Thai or Cambodian, wearing black clothes, masks, hats, gloves, and carrying handguns. 02/04/14 RP 22-35. *See* 02/04/14 RP 70, 82. One was taller than the other 02/04/14 RP 61. Ha was scared. RP 25. They demonstrated that they were real guns by taking “the bullets out and put[ting] it back in[.]” 02/04/14 RP 35-36.

One of them raised a gun, and told her that if she didn’t listen to them, they would shoot her. 02/04/14 RP 26. She screamed, and, according to her testimony, her parents came out of their rooms. 02/04/14 RP 27, 79. Her father testified that he was awoken by someone screaming and that the men took him from his room. 02/04/14 RP 67-69. The men then took Ha and her parents into a bathroom. 02/04/14 RP 26-27, 68, 83.

One of the men watched them while the other searched the home. 02/04/14 RP 30, 32, 69-70. This man told them that he had “a real gun” and that if they resisted, he might shoot them to death. 02/04/14 RP 36-37,

¹² *See, e.g.*, 02/04/14 RP 18-21

71. The person searching the house was speaking to a third person on something with an antenna that was not a cell phone. 02/04/14 RP 37

The men took the jewelry that Ha and her mother were wearing, and took jewelry, including a watch, a hammer, \$2,300 in cash from Ha, and either \$2,400 or \$1,400 in cash from her mother. 02/04/14 RP 27-29, 43-45, 52, 79-81, 83-84.

About ten minutes after they left, Ha called the police, and the police came right away. 02/04/14 RP 41.

Forensics Technician Rossi checked the house for latent fingerprints, but found none. 02/04/14 RP 86-87. She also collected a hammer, which was found at the residence near a damaged window. 02/04/14 RP 87-88.

Detective Baker later had Ha view a photo montage from which she selected Nolan Chouap, depicted in photograph number 3, as the shorter man with 90 percent certainty. 02/04/14 RP 53-54, 61-64; RP 2059-61.

f. 9036 South K Street June 29, 2012 Incidents
(TPD Incident Number 12-181-0936):¹³

On June 29, 2012, Rany Eng, a Cambodian immigrant, lived with her husband, Thiem Hane, and her then seven-year-old daughter at 9036 South K Street in Tacoma, Washington. RP 1077-79, 1081. They lived

¹³ See, e.g., RP 1055-56, 1176-77.

with her friend, Ha Thiem, and her parents, Thiem Moo and Hung Yu. RP 1079.

That day, she was home with her daughter, and Ha's parents. RP 1080-81. *See* RP 1157. She had gone out her back door because she was boiling water on a grill and when got back inside the house through the same door, she noticed two men behind her. RP 1082-85.

They were wearing black gloves and a blue and white handkerchief over their faces. RP 1085, 1087, 1157-58. *See* RP 1121. Eng testified that, though they were of different heights, neither was tall and both were slim. RP 1085-86. Both spoke in English to each other, but one of them spoke Cambodian to Eng. TP 1086-87.

Eng testified that she was shaking, scared, and that her heart was pounding. RP 1086-87, 1090. They told her to sit down. RP 1087. Eng testified that one man pulled out "two guns" and pointed them at her while the other ran upstairs, though she indicated that there was a red light coming from both. RP 1087-88. Thiem Moo testified that the man was holding one gun. RP 1121. Hang Yu also testified that the man had one gun, which emitted a red light, and that the man pointed it at him. RP 1158. According to Yu, the man "unload[ed] the gun, [and] showed [him] a bullet," before asking him, "Do you want to die?" RP 1158. Yu felt he did this to demonstrate that he was holding a "real gun[.]" RP 1158.

Yu testified that he tried to run outside his home, but the man caught him, and kicked him. RP 1158-59. Yu fell down on the floor and the man kicked him, pulled him back into the house, and told him to sit down. RP 1158. The man tied his hands and feet up. RP 1159.

The man had Eng, her daughter, and Yu and his wife sit in the same vicinity. RP 1088-89, 1157. Eng's daughter was also scared and shaking. RP 1090.

Yu pressed a button to activate a household alarm several times, without any apparent effect. RP 1088-90, 1159. The man saw him do so and hit him "behind [his] neck[.]" RP 1159.

One of the men apparently threw a "scoop" at a camera, which was part of the alarm system, causing the camera to fall down, and strike Moo Thiem and her daughter in the face. RP 1090-96, 1121. Her daughter suffered some bleeding and swelling on her face as a result. RP 1093. Moo Thiem suffered some swelling and pain, as well. RP 1102, 1121-23. The men also knocked off the remaining three cameras installed in the residence, causing damage to the walls. RP 1095.

One of the men told Eng, "Just give me the money and gold, I won't do anything to you." RP 1097. Eng testified that she had been saving and had \$8,000 in cash in the home. RP 1097-98. While the man

with the gun watched the residents of the house, the other man went upstairs and stole the money and purses, as well as some recent birthday gifts given to her daughter, placing them in one of Eng's pillowcases. RP 1099, 1125, 1160. They took \$8,000 in cash that belonged to Eng and her husband and another \$4,000 that belonged to Ha Sok. RP 1104. Eng testified that her legs with tied with a red rope. RP 1099. She asked them to return her identification to her, and one of the men did. RP 1100.

Eng testified that while they were in the house, she heard a female voice speaking to one of the men, though she was not sure if he was on the phone. RP 1106.

Both men then left the residence through the front door. RP 1100. Hing Yu pressed the alarm again and Eng apparently called the police. RP 1101, 1107. The police arrived at the residence while Eng was still on the phone. RP 1101, 1107.

Tacoma Police Officers including Officers Smith, Williams, Antush, and Robinson responded to the house alarm, and arrived at Eng's residence shortly after 6:00 p.m. RP 1127-30, 1163-64. With the assistance of a neighbor, who translated for police, the police were able to get the residents to come outside of the home. RP 1132-35. *See* RP 1170-71. Officer Smith noticed that Yu still had some tape around his ankles

from where the assailants had restrained him. RP 1135-36. Officers Smith and Robinson then cleared the residence to make sure there were no other victims or suspects inside, and found neither. RP 1136, 1172. Officer Smith interviewed the occupants and Tacoma Police Detective Baker arrived and did more in-depth interviews. RP 1138-39.

Officer Smith got suspect descriptions from the occupants. RP 1139-40 . Yu told him there were two male assailants, one who was about five foot six and the other about five foot ten. RP 1139. Both were Asian, skinny, and wearing black clothing and blue bandanas over their faces as masks. RP 1139. Eng's description matched that of Yu, except she added that she believed both to be right handed. RP 1140. Eng also told the officer that she heard a female voice from a walkie-talkie used by one of the male assailants. RP 1154.

Officers attempted to track the suspects with a canine, but were unable to do so. RP 1136-38, RP 1172-74.

Neighbor Tri Ngo testified that he saw a light yellow colored car bearing what he believed to be an Idaho license plate parked on the side of his house, around the corner from the victim residence. RP 1939-40.

Forensics was called to the scene, and Tacoma Police Department Crime Scene Technician Shea Wiley responded. RP 1172, 1174-77. After

an initial walk-through of the scene, Wiley photographed the victims and the residence, processed the scene for latent fingerprints, and collected evidence. RP 1177-78. She identified exhibit 40 as prints of her photographs. RP 1178. Eng also identified these photographs as photographs of the injuries to her daughter and Moo Thiem and of the state of her home after the incident. RP 1101-03. Among the pieces of evidence collected by Wiley were the piece of tape removed from Yu's ankle, a piece removed from the wrist of one of the females, and tape removed from the upper level landing of the residence. RP 1179-81. Wiley testified that she was able to recover some latent fingerprint impressions from the scene, including one from a hutch and one from an alcohol box container in the residence. RP 1182.

Eng's daughter and Moo Thiem went to a hospital for treatment of their injuries. RP 1109.

About a month after the incident, a detective showed Eng a photomontage, but Eng was unable to identify anyone in that montage as being involved in the incidents. RP 1109-10.

g. 631 East 51st Street August 26, 2012 Incidents (TPD Incident Number 12-239-0919)¹⁴:

On August 26, 2012, Hoang Danh, a Vietnamese immigrant, lived with his wife, Sophea, and their two children, Ad.K.D. and An.K.D. at a residence located at 631 East 51st Street in Tacoma. RP 1189-91. *See* RP 1232. On that date, he went to Home Depot with his children to buy a new mailbox because someone had been opening their mail. RP 1192.

When he returned, he carried one of his sons into the home through a garage entrance. RP 1193, 1227. His second son walked in behind him some minutes thereafter. RP 1193, 1227, 1279-80. As Danh entered the residence, two men grabbed him, RP 1193, 1200, 1227. When his other son came in, a man tried to grab him as well. RP 1280-81. His son jumped back and kicked the man, but the man eventually secured him, and brought all three upstairs to a bathroom associated with the master bedroom. RP 1195-99, 1280-82.

The men were armed with knives. RP 1204-05. *See* RP 1282-83. They asked Danh to open a safe that he kept in a closet of his master bedroom, and he did so because he was concerned for his children's safety. RP 1194-95, 1199-1200, 1283. Inside the safe Danh had stored

¹⁴ *See, e.g.*, RP 1190-91. 1300-01; 02/11/14 RP 7-8.

jewelry, about \$20,000 in \$100 bills, and “important documents.” RP 1200, 1270-71. After he opened it, the men removed the money and jewelry. RP 1206, 1283. Danh described the money as his wife’s “life savings[.]” RP 1212. The men also stole a camera from the house. RP 1268-69.

The men tied Danh’s hands and then left him and his children in the bathroom while they searched the remainder of the house. RP 1206-07. Danh and his children were scared. RP 1208.

About an hour later, at about 4:00 p.m., Danh’s wife returned home. RP 1206-07, 1233. She entered the residence through the garage . RP 1233. As she did so, she saw her husband’s telephone left in the garage, and one of the passenger-side doors of his vehicle ajar. RP 1233-34.

She then entered the house from the garage, and two men came running down the stairs towards her. RP 1234. *See* RP 1209-10. A person who had used one of her shirts to cover his face then tried to grab her, and she told him, “Don’t do that. Don’t play like that.” RP 1235. She tried to go back out of the house, but one of the men pulled her back and the other told her not to fight back. RP 1235. One man held a knife to her and said:

[I]f you don’t want to die, go up stair[s], because your family, if you fight back, I will kill all your kids. If you

don't want that to happen to your kid, go upstairs],
because your family is up there.

RP 1235-27. *See* RP 1285. Sophea testified that the knife used was her butcher knife, taken from her kitchen, and identified a photograph of it in exhibit 41. RP 1236-37. She was scared and shaking and went upstairs with them to the bathroom, where she found her husband and their children, all tied up with tape. RP 1210, 1237-38. She was tied up and placed in the bathroom, as well, where she cried and asked why this happened to them. RP 1238.

Her oldest son tried to comfort her and told her "don't cry, I don't want them to hurt all of us." RP 1239-40. *See* RP 1210-11.

Sophea indicated that they were in the bathroom for about twenty to thirty minutes. RP 1240.

Sophea described the man who grabbed her as an Asian man in his 20s, who was about five-four to five-five in height, with a slim build. RP 1265-67. He was wearing something over his face, and Sophea testified that one of the two men took one of her shirts and covered his face with it. RP 1266.

As they were preparing to leave, the men moved a bed to block the doorway from the bathroom. RP 1211, 1241, 1283, 1286.

After Danh could not hear the men's voices anymore, he and his wife opened the door. RP 1211-13, 1241-42, 1283. They then called a friend, who called the police. RP 1213, 1242, 1283. Danh estimated that the police arrived ten to twenty minutes later. RP 1213. His wife testified that it was close to an hour. RP 1242.

Tacoma Police Officer Sylvester Weaver was dispatched to the Danh residence at 5:01 that afternoon, and arrived, with other units, about a minute later. RP 1300-02. They noticed that the garage door was opened and entered the residence. RP 1302. Weaver found the occupants inside, and they told him they had been robbed and gave a description of the suspects. RP 1303.

They described one as an Asian male, about five-foot-five, thin build, with a thin face, and "sharp nose," wearing a black "sweater-like jacket" and black Nike shoes. RP 1304. The second was described as an Asian man, about five-foot-three, thin build, with a thin face, a thin nose, and a scar on the bridge of his nose. RP 1304.

Dahn testified that both men were Asian and skinny, but that one was taller than the other. RP 1200-02. Both men had taken an article of clothing from the house and used it to cover their faces, though they did not cover their entire faces. RP 1201-02, 1228, 1289. He described the

shorter one as about his height, and testified that he was five-foot-three to five-foot-four. RP 1201. The shorter man told him that he was Laotian. RP 1202. The taller man had a darker complexion. RP 1202. The men spoke English. RP 1203, 1267-68, 1287-88, 1304-05. However, Officer Weaver testified that the Danhs told him they also spoke Cambodian. RP 1304-06, 1308.

Officers called out forensics, RP 1305, and Rossi responded to the residence. 02/11/14 RP 7-8. She took photos of the home, and collected, as evidence, tape with which the victims were bound. 02/11/14 RP 8-10. She also checked the home for latent fingerprints, and recovered a few prints from items found inside the bedroom. 02/11/14 RP 10-14.

Danh identified exhibit 41 as photographs of his home as it appeared after the robbery, and the exhibit was admitted and published to the jury. RP 1214-23. He determined that the men gained access to the residence by breaking through a ground-floor window. RP 1216. Among the photographs was the photograph of one of the kitchen knives used by the men. RP 1221.

On August 30, 2012, Detective Baker showed Danh, his wife, and their eldest son a photo montage. RP 1223-25, 1229-30, 1273, 1290-91, 2061-65. Danh identified Nolan Chouap, depicted in photograph number

3, as a possible match with what he termed 20 percent certainty. RP 1223-25, 1229-30, 2061-64. Sophea also selected Chouap as the man who threatened her, writing that she did so with 50 percent confidence. RP 1273-77, 2061-65. Finally, their eldest son identified Chouap, as well, and did so with what he reported to Detective Baker was 90 percent certainty, and what he testified was 70 to 80 percent certainty. RP 2061-63. *See* RP 1291-97.

Detective Baker also showed Danh and his wife photographs of jewelry removed from Azariah Ross, Defendant Ross, Defendant Oeung, Nolan Chouap, and Alicia Ngo at the time of their arrest, and the couple identified pieces of this jewelry as being stolen from their residence. RP 1225-26, 1271-72, 2065-67.

h. Follow-Up Investigation:

While in the Pierce County Jail from March 12 to July 13, 2012, Dale Vasey met Defendant Ross. RP 1757-59, 1762. During the first week of July, Vasey, who had a subscription to the local newspaper, saw an article in it about some home invasion robberies. RP 1764. He loaned his copy to Defendant Ross, who read the article before turning to the inmate next to him and asking him to “read this.” RP 1764-65. Defendant Ross asked Vasey if he could hold on to that portion of the newspaper for a

while, and Vasey allowed him to. RP 1766. Ross took the article to a telephone, and called his mother. RP 1766-67. Ross then asked for his mom to get in touch with his brother. RP 1768. Vasey, who had been washing his hands and brushing his teeth, walked back to his bunk and did not hear the remaining conversation. RP 1768. Ross later returned the paper. RP 1768.

Vasey contacted Detective Griffith with this information on July 12, 2012, and Griffith then listened to telephone calls made by Defendant Ross from the jail. RP 2094, 2097-98. He found two telephone calls made by Ross from the Jail on July 4, 2012, and ultimately listened to 15 to 20 hours of calls made by Ross to others during his May 9 to August 10, 2012 jail incarceration. RP 2098-99, 2100-04. Most of the calls he made were to Defendant Oeung. RP 2104-05. Recordings of excerpts of 15 different calls were admitted and published to the jury. RP 2109-26.

Based on this information, beginning July 13, and continuing into August, 2012, Officers conducted surveillance on the residence of Defendant Ross, located at 8632 South Asotin Street, RP 1909-10, 1688-94, and on that of Nolan Chouap, located at 915 East 75th Street Apartment B in Tacoma. RP 1451-52.

On August 27, 2012, Officer Benson observed Chouap exit that residence and enter the driver's seat of a green minivan with two occupants, and then leave the area. RP 1451-52, 1463-64. Chouap drove to South Hill Mall, where he parked along with a black Dodge Stratus. RP 1452, 1464. Tacoma Police detained everyone in both vehicles. RP 1452-53, 1465.

In the green minivan with Chouap was Michael Leair and Kasandra Zuniga, RP 1454. Defendants Ross and Oeung were in the Stratus, along with their child, Ross' brother Azariah, and Alicia Ngo. RP 1454-55. Azariah Ross was arrested with, among other things, a bag that contained a gold watch and other jewelry and, in his right pocket, a large amount of cash, including 56 new \$100-bills. RP 1467-68, 2071-75. Ngo had over \$7,200 in cash, including 72 new \$100-bills and two business cards on her: one for Gold & Silver Plus, Inc., and one for American Gold, Inc. RP 2068-70.

After these people were detained and arrested, officers returned to the Chouap residence at 915 East 75th Street Apartment B and searched it. RP 1457. Among the items of evidence found there were a temporary Washington identification card issued to Nolan Chouap found in a bedroom (Exhibit 89), RP 1489-90, an X-Box 360 console, serial number

049671102708, power supply, and controller, all owned by Remegio Fernandez, RP 1490-94, (exhibit 90), an “AK-47 style” assault rifle, under a mattress, a black and silver Ruger P95 DC semiautomatic pistol, RP 1494-95, an extra magazine for that pistol, RP 1496, and five rounds of .357 Magnum ammunition in Chouap’s bedroom. RP 1457-60.

Detective William Foster assisted in the search, focusing his efforts on the residence laundry room. RP 1506-07. He found two pistols, both in cases, in that room: a .357-caliber Ruger revolver (serial number 57290786), and a .22-caliber Ruger semiautomatic pistol (serial number 223-64306). RP 1507-13. Both were collected as evidence. RP 1508-09. He also found a ring in the .357 revolver’s case, and testified that it looked “like possibly a wedding type ring[.]” RP 1513.

Tarey Rogers testified that she lived at the 915 75th Street East Apartment B residence in 2012, with her children, her husband, and Nolan Chouap. RP 1698-99. It was a two-bedroom apartment; her children slept in one bedroom and she and her husband would sleep in the other or in the living room. RP 1700. When they did not sleep in the bedroom, Chouap would. RP 1700. She testified that Chouap slept in the bedroom for a four-month period at one point. RP 1701. He was not working and did not pay rent. RP 1704. She described Chouap as Asian, skinny, and about five-

three in height, and testified that he went by the names “Monkey” and “Sneaky.” RP 1701, 1704. *See* RP 2107. He would sometime have friends over. RP 1701. Rogers did not know their real names, but knew them as “A.Z.” and “Azzzy.” RP 1701-02. She identified A.Z. as Defendant Ross. RP 1702. Rogers would sometimes see Defendant Ross with Defendant Oeung, whom she knew as “Taidaiz.” RP 1702-03. Ross testified that there was an X-Box console in her bedroom, but she did not know where it came from. RP 1706. She testified that it first appeared there two to the three months before the search warrant was served. RP 1705.

Detective Gregory Rock executed search warrants for both the 1995 Ford van and the 2005 Dodge Status from which the suspects were arrested. RP 1515-19. Inside the Ford, he found a Coach purse on the front passenger seat, a CD in the front seat rear pocket, and a pink bag with what appeared to be costume jewelry. RP 1518. Found inside the Coach purse was \$2,430 in cash, which included 24 \$100-bills, an ID card in the name of Kasandra Zuniga, and some credit cards in her name. RP 1518-19, 1522. Inside the Dodge, he found a BB gun that resembled a rifle and a tin of pellets for that gun. RP 1517. Photographs were taken of the vehicles. RP 1519.

On August 29, 2012, police executed a search warrant at the Ross residence at 8632 South Asotin Street. RP 1708-09. Detective William Muse searched a downstairs bedroom and portions of an upstairs family room of that house. RP 1712. In the downstairs bedroom, Muse found mail addressed to Defendants Ross and Oeung. RP 1733. Inside a drawer in that bedroom, Muse found a Coach-brand bag, a red bandana, and a magazine for a Taurus .44-caliber, semiautomatic pistol. RP 1733-35, 1748-51, exhibit 105. In the family room, he found a black glove. RP 1736., 1746-47. A second black glove was found behind that drawer and may have been in the drawer. RP 1747. Muse also found a book titled "Safecrackers Manual" inside that cabinet. RP 1747. Muse identified exhibit 103 as photographs of the residence on the day of the search. RP 1729. *See* RP 1753-54.

Detective David Hofner searched the family room, storage room, laundry room, and garage on the lower level of the Ross house. RP 1753. In the storage room beneath the stairs, he found two bandanas, a pair of gloves, and boxes of ammunition of different calibers. RP 1754-55. He also found a stocking cap and a pair of gloves on top of a shelf in the laundry room. RP 1755.

Garrison Ross, the father of Azariah, or “Azzy,” and Defendant Ross, RP 1687, also known as “Zi,” testified that in 2012 he lived with his wife, and these two sons in the split level house at 8632 South Asotin Street. RP 1688-89, 1693-94. Defendant Ross had a bedroom in the downstairs of that home, and his brother Azariah had a bedroom upstairs. RP 1694. Sometimes Defendant Oeung, and Nolan Chouap, among others, lived there, as well. RP 1688-92. Neither of his sons had a job. RP 1688-89. Garrison testified that Defendants Ross and Oeung have a daughter in common. RP 1689-90. He also testified that Azariah Ross and Alicia Ngo were in a romantic relationship during 2012. RP 1690-91.

Garrison described Chouap as a thin, Asian male, about five-three to five-four in height. RP 1692. He testified that Azariah was taller than Chouap. RP 1692.

Detectives Timothy Griffith and examined the digital contents of Defendant Ross’s Apple iPhone cellular telephone, marked as exhibit 115, pursuant to a search warrants. RP 1872-74. On July 18, 2012, Detective Bair, whose primary duties are conducting cell phone forensics, downloaded the data from the telephone, and placed it on a disc ultimately marked exhibit 109. RP 1874, 1877, 1880-83. Among the data recovered from Defendant Ross’s phone were text messages and voicemails. RP

1890-92. Included within these were text message exchanges from October 10, 2011 and April 18, 2012, RP 1893-96, and voice mails from at or about 10:53 p.m. on April 15, 2012, at or about 7:01 p.m. on May 1, 2012, and at or about 9:39 p.m. of May 1, 2012. RP 1961-68. On at least the May 1, 2012 voicemails, the caller asked to speak to "Azias." RP 1967-68.

In a 11:36:53 p.m., January 26, 2012 text message exchange, Ross's phone received a message from "Taidaiz Reallaz" stating, "I know you're going to take quite a while, so I'm gonna find a ride to my mom." RP 1969-70. A response of, "yup" was sent at 11:38:22 p.m. RP 1970-71. Reallaz responded, "okay, TTYL. Muuaah" at 11:38:57 p.m. RP 1971. The reply sent from the Ross phone at 11:40:12 p.m. was "Muuaah." RP 1971. Another response was then sent from the Ross phone at 11:40:38 p.m., stating, "I'm at South Hill LOL, but now I'm going back, B N I to sell my gold." RP 1971-72, 2018-20.

On April 27, 2012, there was an exchange of text messages to and from Ross' phone beginning at 5:39:12 a.m. and ending at 6:43:12 p.m. RP 1976-78. The subject of the conversation seemed to be negotiation for the sale and purchase of a car. RP 1979. A message sent from the Ross phone at 6:29:03 p.m. read, "Fuck wit,... me, G. This ain't got to be one

time thing. I'm always having thangs,... I'm talking jewels, TVs, laptops, choppas cars... and anything you need." RP 1979-80, 2017. A follow-up message sent from the phone at 6:30:50 p.m., stated, "We can work sumthing out... on mamas. I really want that Monte. You give me a lil time... I'll get... sum cash. I'm bout... to make some money as we speak." RP 1980, 2017-18. Finally, a 6:38:35 p.m. message from the phone read, "I-ma... get sum... dough, N I'm ah holla... at you if something, or if someone else hit you up bout it, let me know, G-E." RP 1980-81.

On April 28, 2012 at or about 3:02:04 a.m., Ross's phone sent a MMS to "Sneaky," phone number 253-951-6559, which included, as an attachment a photograph of shotguns and handguns. RP 1972-75, 2018.

i. Defendants' Statements

On August, 27, 2012, Detectives Griffith and Baker interviewed the defendants after their arrest. 02/11/14 RP 84-87.

They interviewed Defendant Oeung, after giving her the *Miranda* warnings. 02/11/14 RP 87-104. The detectives then told her they were investigating a series of home invasion robberies, to which she stated, "I have not been hanging out with them," meaning Azariah Ross and Alicia Ngo. 02/11/14 RP 90. However, when detectives confronted her with

information they had regarding the 7502 South Ainsworth robbery, she admitted that she had been involved in that one, but said that was the only one with which she was involved. 02/11/14 RP 90-91. She said she agreed with the other participants to knock on the door and ask for someone by name in exchange for money. 02/11/14 RP 91. Oeung initially said she didn't know why she was supposed to do that, but detectives confronted her regarding a previous conversation and asked if she wanted to tell them what happened. She nodded, yes. 02/11/14 RP 92.

She said that Alicia Ngo, Azariah Ross, and "the other person involved" arrived at her residence, picked her up, asked her to knock on the door, and dropped her off in front of the residence. 02/11/14 RP 92-94. She did so, and an Asian man talked to her through a window. 02/11/14 RP 94, 232. She said she could not understand what he said, and returned to the car. 02/11/14 RP 94. She told the others that there was an "old man" in the house, and indicated that they told her that "they were going to get something or whatever." 02/11/14 RP 94-96, 232-33. Ngo parked about five to six blocks from the residence at which Oeung had knocked, and Azariah Ross and the other individual got out of the car, and told them that they were going to go check out a couple of houses. 02/11/14 RP 96. Oeung understood this to mean that they were going to go take stuff from

them. 02/11/14 RP 96. Ngo and Oeung then went a Jack in the Box restaurant before returning to the area and waiting. 02/11/14 RP 97. Oeung said they waited for a long time, and that during this time, Ngo was communicating with Azariah Ross and the other person using a walkie-talkie. 02/11/14 RP 97-98. Ngo asked, "What are you guys doing," and "When are you coming back?" 02/11/14 RP 98. Eventually Ngo began driving and picked up Ross and the other individual down the street from the victim's house. 02/11/14 RP 98. Both were then carrying backpacks. 02/11/14 RP 99. Oeung said they then went to the 8632 South Asotin residence, where they began looking through the property stolen from 7502 South Ainsworth. 02/11/14 RP 99-100. Oeung described seeing some of the property stolen from the residence: all types of jewelry, including gold jewelry and necklaces and a stack of \$20-bills about a half-inch thick. 02/11/14 RP 100-02. She said she was paid \$200 from one of the backpacks for knocking on the door. 02/11/14 RP 100-02. Oeung denied involvement in the other robberies, but stated that Azariah Ross and the other individual told her that they had "come up" several times, street slang for obtaining money or property through robbery. 02/11/14 RP 102-03, 224.

Detectives also interviewed Nolan Chouap, Azariah Ross, and Defendant Ross on August 27, 2012. 02/11/14 RP 104-05, 105-49 (Chouap interview).

Chouap stated that he had a gun during the robberies, though not all of them, and that we he did, it was a .38 snub nose revolver.” 02/11/14 RP 130, 147. Chouap also said that Azariah Ross carried a gun in all the robberies, usually or always a semiautomatic pistol. 02/11/14 RP 148-49. Detectives did not ask Chouap is this pistol had a laser sight. RP 148.

Detectives read Defendant Ross the *Miranda* warnings before they interviewed him. 02/11/14 RP 149-50. They told him that they were investigating a series of home invasion robberies and asked him how many times he had been in the car outside during these robberies. 02/11/14 RP 151. Defendant Ross responded, “Honestly, it was only one time.” 02/11/14 RP 151. He said it took place at a house in the area of East 59th and S Street, and that he was the one who drove the people involved to that location. 02/11/14 RP 152. He said that he and Ngo waited in the car while two others did the burglary. 02/11/14 RP 154.

Defendant Ross eventually admitted that he had driven participants to two of the home invasion robberies, 02/11/14 RP 154, and admitted to knowing what the participants were planning on doing. 02/11/14 RP 237.

He said the first was at a residence on the west side of McKinley, just south of 84th Street, which matched the January 25 incident in TPD Incident number 12-025-1062. 02/11/14 RP 155. Ross admitted driving Azariah Ross and the other individual to the location and said he waited in the car during the robbery. 02/11/14 RP 155. They called and he picked them up after the robbery was done. 02/11/14 RP 156, 236-37. Defendant Ross said they got gold and about two to three thousand dollars in cash from the residence. 02/11/14 RP 156, 236-37. He told detectives that they sold the gold. 02/11/14 RP 156.

Ross also described his involvement in the robbery of 8208 South G Street, saying that he drove Azariah Ross, Alicia Ngo, and the other person to the home, and that Ngo knocked on the door to see if anyone was home. 02/11/14 RP 160-62. Ngo indicated that nobody answered the door, so he dropped off Azariah and the other person and he and Ngo waited in the car. 02/11/14 RP 162, 227. However, Azariah and the other person encountered a person within the residence. 02/11/14 RP 163, 238-39. Ngo was speaking to Azariah and the other person via walkie-talkie so that if there was a shooting inside the house or anyone went into the house the participants could contact each other more quickly than with a cell phone. 02/11/14 RP 163-64, 239. When Azariah and the other person were

done with the robbery, they called on the walkie-talkie and asked Defendant Ross to come get them. 02/11/14 RP 164, 240. Defendant Ross picked them up around the corner. 02/11/14 RP 164. Azariah and the other person were carrying a pillowcase and a gun case that contained two shotguns. 02/11/14 RP 164-65.

Ross said he drove everyone to his residence at 8632 South Asotin, where they took the stolen property into his house and went through it together. 02/11/14 RP 165. Once there, he took a photograph of the stolen weapons with his cell phone and then emailed it to another person to assist in the sale of these weapons. 02/11/14 RP 165-66. Detectives found the photo on Ross' cell phone, and Ross acknowledged that it was the photo he took. 02/11/14 RP 166-68.

Defendant Ross told detectives that guns were used in the two robberies in which he drove, 02/11/14 RP 159-60, that is, that the two men who went into the residences had guns. 02/11/14 RP 226-27.

He continued to make statements such as "Any time they get jewelry, I never keep it," and "I took them to sell it," referring to multiple incidents. 02/11/14 RP 156. He indicated that he participated in these other incidents at least to the extent of selling gold, and that he sold gold at several places, including "the watch place" at the South Hill Mall and a

place behind B&I. 02/11/14 RP 156, 158-59. He said he got between \$200 and \$300 when he helped them sell gold. 02/11/14 RP 157. Ross told them that, in total, he received anywhere from \$5,000 to \$10,000 for his involvement. 02/11/14 RP 167.

C. ARGUMENT.

1. THE DEFENDANTS' RIGHTS TO A PUBLIC TRIAL WERE SUSTAINED BECAUSE THE **SUBLETT** EXPERIENCE AND LOGIC TEST CONFIRMS THAT THE TRIAL COURT DID NOT CLOSE THE COURTROOM IN HEARING PEREMPTORY CHALLENGES IN THIS CASE.

A criminal defendant's right to a public trial is found in article I, section 22 of the Washington State Constitution, and the Sixth Amendment to the United States Constitution: both provide a criminal defendant the right to a “public trial by an impartial jury.” (comma deleted from text of the Sixth Amendment).

The state constitution also provides that “[j]ustice in all cases shall be administered openly.” Wash. Const. article I, section 10. This provision grants the public an interest in open, accessible proceedings, similar to rights granted in the First Amendment of the federal constitution. *State v. Lormor*, 172 Wn.2d 85, 91, 257 P.3d 624 (2011); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); *Press-Enter. Co. v.*

Superior Court, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).

The public trial right “serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.” *State v. Sublett*, 176 Wn.2d 58, 72, 292 P.3d 715 (2012). “There is a strong presumption that courts are to be open at all trial stages.” *Lormor*, 172 Wn.2d at 90.

The right to a public trial includes *voir dire*. *Presley v. Georgia*, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010). However, “case law does not hold that a defendant’s public trial right applies to every component of the broad ‘jury selection’ process,” but “only to a specific component of jury selection –i.e., the ‘voir dire’ of prospective jurors who form the venire.” *State v. Wilson*, 174 Wn. App. 328, 338, 298 P.3d 148 (2013). *See State v. Love*, 176 Wn. App. 911, 309 P.3d 1209, 1213, fn 5 (2013).

The right to a public trial is violated when: (1) the public is fully excluded from proceedings within a courtroom, *State v. Bone-Club*, 128 Wn.2d 254, 257, 906 P.2d 325 (1995) (no spectators allowed in courtroom during a suppression hearing), *State v. Easterling*, 157 Wn.2d 167, 172, 137 P.3d 825 (2006) (all spectators, including codefendant and his

counsel, excluded from the courtroom while codefendant plea-bargained); (2) the entire *voir dire* is closed to all spectators, *State v. Brightman*, 155 Wn.2d 506, 511, 122 P.3d 150 (2005); and (3) when individual jurors are privately questioned in chambers, see *State v. Momah*, 167 Wn.2d 140, 146, 217 P.3d 321 (2009), and *State v. Strode*, 167 Wn.2d 222, 224, 217 P.3d 310 (2009) (jury selection is conducted in chambers rather than in an open courtroom without consideration of the *Bone-Club* factors).

In contrast, conducting individual *voir dire* in an open courtroom without the rest of the venire present does not constitute a closure. *State v. Erickson*, 146 Wn. App. 200, 189 P.3d 245 (2008).

Nor is the right to a public trial “absolute, and a trial court may close the courtroom under certain circumstances.” *Wilson*, 174 Wn. App. at 334. “To protect the public trial right and to determine whether a closure is appropriate, Washington courts must apply the *Bone-Club* factors and make specific findings on the record to justify the closure.” *Id.* at 334-35.

The *Bone-Club* factors are as follows:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a ‘serious and imminent threat’ to that right.

2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

4. The court must weigh the competing interests of the proponent of closure and the public.

5. The order must be no broader in its application or duration than necessary to serve its purpose.

State v. Wilson, 174 Wn. App. 328, 335, fn 5, 298 P.3d 148 (2013)

(quoting *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325

(1995) (quoting *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

“Failure to conduct a *Bone-Club* analysis before closing a proceeding required to be open to the public is a structural error warranting a new trial.” *Wilson*, 174 Wn. App. at 335.

However, “not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public.” *Sublett*, 176 Wn.2d at 71. Rather, as this Court has noted, the Supreme Court’s decisions in *State v. Paumier*, 176 Wn.2d 29, 288 P.3d 1126 (2012), *State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (2012), and *State v. Sublett*, 176 Wn.2d 58, 292 P.3d 715 (2012),

appear to articulate two steps for determining the threshold issue of whether a particular proceeding implicates a defendant’s public trial right, thereby requiring a *Bone-Club* analysis before the trial court may “close” the

courtroom: First, does the proceeding fall within a specific category of trial proceedings that our Supreme Court has already established implicates the public trial right? Second, if the proceeding does not fall within such a specific category, does the proceeding satisfy *Sublett*'s "experience and logic" test?

State v. Wilson, 174 Wn. App. 328, 337, 298 P.3d 148 (2013).

The *Sublett* "experience and logic" test, first formulated by the United States Supreme Court in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986), proceeds as follows:

The first part of the test, the experience prong, asks "whether the place and process have historically been open to the press and general public." The logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." If the answer to both is yes, the public trial right attaches and the Waller or Bone-Club factors must be considered before the proceeding may be closed to the public.

Sublett, 176 Wn.2d at 73.

Applying that test, the *Sublett* Court held that no violation of the right to a public trial occurred when the trial court considered a jury question in chambers. *Id.* at 74–77. "None of the values served by the public trial right is violated under the facts of this case.... The appearance of fairness is satisfied by having the question, answer, and any objections placed on the record." *Id.* at 77.

The defendant has the burden to satisfy the "experience and logic" test. See *In re Personal Restraint of Yates*, 177 Wn.2d 1, 29, 296 P.3d 872 (2013); *State v. Love*, 176 Wn. App. 911, 309 P.3d 1209, 1214 (2013).

“Whether a defendant’s constitutional right to a public trial has been violated is a question of law, which [appellate courts] review de novo on direct appeal.” *State v. Wilson*, 174 Wn. App. 328, 298 P.3d 148 (2013); *State v. Momah*, 167 Wn.2d 140, 147, 217 P.3d 321 (2009). When faced with a claim that a trial court has improperly closed a courtroom, the Washington Supreme Court has held that the reviewing court determines the nature of the closure by the presumptive effect of the plain language of the court’s ruling, not by the ruling’s actual effect. *In re Personal Restraint of Orange*, 152 Wn.2d 795, 807-8, 100 P.3d 291 (2004).

In the present case, Defendant Ross argues that the trial court violated his “right to a public trial and the public’s right to open proceedings” by conducting peremptory challenges on paper. Brief of Appellant Ross (BOAR), p. 21-30. The record shows otherwise.

It shows that, prior to *voir dire*, the court explained that, because the case involved co-defendants, the parties would exercise peremptory challenges by noting them, in open court, in the presence of the venire, on

a document titled “peremptory challenges,” and passing that document back and forth until a jury was selected. RP 56, 142-45, 224, 228, 532-49; CP 765-66. The court explained:

I don't generally pass the paper, but I do when there's multiple defendants, because I don't want to put the defendants in a position of looking like they are or are not working together or working separately, so I just let you pass the paper[]back and forth so we don't appear to be.... co-conspirators, or individual conspirators or any kind of conspirators.

RP 224.

So, what we will do, then, is bring them back at 1:30 and we will begin the process, and I will have them visually –I am not going to seat them up here [in the jury box] because they're not going to get up and leave, and somebody new take the seat when each one is challenged, so we will just seat them in the back of the courtroom, and you can pass the paper as you see fit.

First for the first 12, and then once we've got the first 12 picked, we will put them in the box, and then you will be left with the jurors for the rest, and what I would propose is, if we have enough jurors, we will go –after we pick our 12 primary, if you don't use all of your peremptories, and we have one juror left, we will go ahead and seat four[.]

RP 540.

The parties then exercised their peremptory challenges in open court, RP 548, and recorded these challenges on a document titled “peremptory challenges,” which was filed in open court the same day. CP

765-66. The court then read the list of venire members who were selected for the jury in open court. RP 548-49.

Thus, the record shows that the parties exercised peremptory challenges in open court by writing them on a piece of paper, and handing it to the court. RP 540, 548-49. The courtroom was never closed. *See* RP 548. The sheet upon which the parties recorded their challenges was filed in open court the same day. CP 765-66. A jury was then empanelled, sworn, and given initial instructions, all in open court. RP 548-52.

Hence, there was no closure and, contrary to Defendant's argument, the court was not required to conduct a *Bone-Club* analysis.

Indeed, all three divisions of this Court have recently considered and rejected arguments very similar to that made by the defendant here, and the Washington State Supreme Court has affirmed this result. *State v. Love*, ___ Wn.2d ___ (2015 No. 89619-4).

In *State v. Love*, 176 Wn. App 911, 309 P.3d 1209 (2013), affirmed by *Love*, ___ Wn.2d ___ (2015 No. 89619-4), 340 P.3d 228 (2015), Division III applied the "experience and logic" test of *Sublett* and held "that the trial court did not erroneously close the courtroom by hearing the defendant's for cause challenges at sidebar, nor would it have

been error to consider the peremptory challenge in that manner if the court had done so.” *Love*, 176 Wn. App. at 1213-1214.

With respect to the experience prong of the *Sublett* test, the Court in *Love* found no authority to require challenges for cause to be conducted in public. Indeed, it found that “there is no evidence suggesting that historical practices required these challenges to be made in public.” *Love*, 309 P.3d at 1213. Hence, the Court concluded that “[o]ur experience does not require the exercise of these challenges,” whether for cause or peremptory, “be conducted in public.” *Id.* at 1214.

With respect to the logic prong, the Court found that the purposes of the public trial right

[s]imply are not furthered by a party’s actions in exercising a peremptory challenge or in seeking a cause challenge of a potential juror. The first action presents no questions of public oversight, and the second typically presents issues of law for the judge to decide.

Love, 309 P.3d at 1214.¹⁵

Thus, in *Love*, Division III concluded, “[n]either prong of the experience and logic test suggests that the exercise of cause or peremptory

¹⁵ Defendant’s argument that the oral exercise of peremptory challenges would “allow[] the public to determine whether a party is targeting and eliminating jurors for impermissible reasons” such as race, BOAR, p. 27, does not necessitate a contrary conclusion. The race of venire members would not necessarily be patent on visual inspection or discernible by an oral exercise of peremptory challenges or any other readily available means. Nor, perhaps, given the conceptually tenuous nature of race and the fact that race should be irrelevant to jury selection, see, e.g., *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), should venire members, who may not have a clear understanding of even their own races, be required to identify it (them) nor the court required to record their responses.

challenges must take place in public.” *Id.* The state supreme court affirmed *Love*. *State v. Love*, ___ Wn.2d ___ (2015 No. 89619-4).

This Court has “agree[d] with Division Three that experience and logic do not suggest that exercising peremptory challenges at the clerk's station implicates the public trial right.” *State v. Dunn*, 180 Wn. App. 570, 575, 321 P.3d 1283 (2014), *review denied by*, *State v. Dunn*, 181 Wn.2d 1030, 340 P.3d 228 (2015).

It affirmed this position in *State v. Webb*, rejecting a defendant’s “argu[ment] that his right to a public trial was violated because counsel conducted peremptory challenges on paper,” and holding, as it held in *Dunn*, “that the trial court did not violate a defendant's right to a public trial when the attorneys exercised peremptory challenges at a side bar.” 183 Wn. App. 242, 246-47, 333 P.3d 470, 472-73 (2014), *review denied by*, 182 Wn.2d 1005, 342 P.3d 327 (2015).

This Court again reached this same conclusion in *State v. Marks*, 184 Wn. App. 782, 339 P.3d 196 (2014).

Finally, Division One has taken this position as well, holding that “[a]llowing litigants to exercise peremptory challenges in writing does not implicate the public trial right when a public record is kept showing which jurors were challenged and by which party.” *State v. Filitaula*, 184 Wn.

App. 819, 821-24, 339 P.3d 221 (2014). *See also State v. Schumacher*, ___ Wn. App. ___, 347 P.3d 494 (2015) (WL 1542526).

Therefore, exercise of peremptory challenges on paper at sidebar, as was done in this case, does not implicate and could not have violated Defendants' rights to a public trial, and their convictions should be affirmed.

2. THE TRIAL COURT PROPERLY DENIED DEFENDANTS' MOTION FOR A MISTRIAL.

"[W]hen a trial irregularity occurs," and a motion for mistrial is brought, a trial "court must decide its prejudicial effect." *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010). "In determining the effect of an irregularity, [the court] examine[s] (1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it." *Gamble*, 168 Wn.2d at 177 (*quoting State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)). These three "*Hopson* factors" are "considered with deference to the trial court, *State v. Perez-Valdez*, 172 Wn.2d 808, 818, 265 P.3d 853 (2011), because the trial court is in the best position to discern prejudice." *State v. Garcia*, 177 Wn. App. 769, 776-77, 313 P.3d 422 (2013) (*citing State v. Lewis*, 130 Wn.2d 700., 707, 927 P.2d 235 (1996)).

The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be fairly tried.” *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012); *Gamble*, 168 Wn.2d at 177. “[A]pplication of the *Hopson* factors means that not every irregularity in trial –even a relatively serious one- triggers a mistrial.” *Garcia*, 117 Wn. App. at 784. “[A] defendant is entitled to a fair trial but not a perfect one.”” *State v. Davis*, 175 Wn.2d 287, 345, 290 P.3d 43 (2012) (quoting *Brown v. United States*, 411 U.S. 223, 231, 93 S. Ct. 1565, 36 L. Ed. 208 (1973) (quoting *Bruton v. United States*, 391 U.S. 123, 135, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (quoting *Lutwak v. U.S.*, 344 U.S. 604, 73 S. Ct. 481, 97 L. Ed. 593 (1953)))).

“A trial court’s denial of a motion for a mistrial is reviewed for abuse of discretion,” *Gamble*, 168 Wn.2d at 177, and appellate courts “find abuse only “when no reasonable judge would have reached the same conclusion.”” *Emery*, 174 Wn. at 765 (quoting *Hopson*, 113 Wn.2d at 284 (quoting *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711, 780 P.2d 260 (1989))). “A denial of a mistrial should be overturned only when there is a substantial likelihood that prejudice affected the

verdict.” *Gamble*, 168 Wn.2d at 177. See *State v. Garcia*, 177 Wn. App. 769, 776, 313 P.3d 422 (2013).

In the present case, Defendant Ross argues that the trial “court erred in denying [his] mistrial motion” based on admission of evidence of a .38-caliber revolver discovered in his residence. BOAR, p. 30-35. The record shows otherwise.

It shows that the State moved to admit among other things, evidence of “a .357 Smith & Wesson revolver that was recovered from a curio cabinet in the living room” of the Ross residence, “a .45 caliber Taurus gun lock and a magazine,” and ammunition for various calibers of handguns” found in the bedroom the Defendants shared. RP 1674. The defendants objected in part because none of the victims testified “that there was a .357 revolver involved in any of these particular robberies.” RP 1674-75. The State noted that Chouap had told police that he used a .357 revolver, RP 1678. See RP 02/11/14 RP 147. The court found evidence of the .357 revolver to be admissible. RP 1679.

During his subsequent testimony, Detective Muse testified that a photograph depicted “a .38 caliber revolver” found in an open drawer in Defendant Ross’s residence. RP 1736.

The defense objected because this was evidence of a .38 rather than a .357. RP 1737-38.

The State noted and the parties agreed that Chouap had referenced a .38-caliber rather than a .357-caliber revolver, and that this statement should not be considered. RP 1739. *See* 02/11/14 RP 130, 147. The State also stipulated to withdrawing the photograph and asked the court to instruct the jury to disregard it. RP 1739.

The court agreed to do so, RP 1740, but Defendants moved for mistrial, arguing, *inter alia*, “that there is evidence of guns in common areas now, which is very prejudicial.” RP 1740-43.

The court found that the evidence at issue was not “particularly inflammatory at all” and that “the jury can follow the Court’s instructions,” and denied this motion. RP 1743-45.

The *Hopson* factors indicate that the court did so properly.

With respect to the first *Hopson* factor, the seriousness of the irregularity, “[t]he question is whether the irregularity was ‘serious enough to materially affect the outcome of the trial.’” *Garcia*, 177 Wn. App. at 777 (quoting *Hopson*, 113 Wn.2d at 286). There is virtually no probability that Muse’s five-word utterance, “[t]hat’s a .38 caliber revolver,” RP 1736, would have affected the outcome of this trial.

Here, 12 of the 26 counts with which Defendant Ross was charged and all of the counts with which Defendant Oeung was charged required proof that a firearm was used in the home-invasion robberies at issue. *See* CP 75-79, 471-82.

The victims in all of the robberies at issue in these counts indicated that at least one of their assailants was armed with a handgun, and that this man took pains to insure that the victims knew it was a real gun. *See, e.g.*, RP 799-800, 855, 635, 642, 956-57, 984-87, 1032.

Defendant Ross, himself, admitted that his co-conspirators in these robberies were armed with a firearm, *see* 02/11/14 RP 159-60, 226-27, and there was other evidence admitted that Ross had access to handguns, including a Taurus .44-caliber, semiautomatic pistol magazine found in his bedroom, RP 1733-35, 1748-51, and boxes of ammunition of different calibers. RP 1754-55. While Defendant Ross is correct that “the State never alleged that Ross himself used a gun to commit any of the crimes,” BOAR, p. 34, the State had no obligation to do so. It presented the evidence it needed to, that there were real guns used to commit those crimes.

In this context, there is virtually no possibility that the evidence of a firearm in Ross’s residence could have “materially affect[ed] the

outcome of the trial,” *Garcia*, 177 Wn. App. at 777, and the first *Hopson* factor indicates the trial court properly denied the mistrial motion.

With respect to the second factor, “[i]f the evidence was cumulative, a mistrial may not be necessary.” *Garcia*, 177 Wn. App. at 781. Here, the evidence of a firearm was cumulative. Again, there was evidence that at least one of the co-conspirators was armed with a handgun in each of the robberies at issue, that this man took pains to insure that the victims knew it was a real gun. *See, e.g.*, RP 799-800, 855, 635, 642, 956-57, 984-87, 1032, that there was a Taurus .44-caliber, semiautomatic pistol magazine in Ross’s bedroom, RP 1733-35, 1748-51, that there was a gun lock for a Taurus semiautomatic pistol in Ross’s bedroom, RP 1748-51, that there were boxes of ammunition of different calibers in Ross’s residence, RP 1754-55, and that Defendant Ross, himself, admitted that his co-conspirators in these robberies were armed with a firearm. 02/11/14 RP 159-60, 226-27. Although Defendant is correct that no actual firearm was found in his bedroom, BOAR, p. 34, one could reasonably infer from this evidence that he had access to at least a Taurus .44-caliber, semiautomatic pistol, and given ammunition of different calibers, other firearms, as well. Therefore, the evidence of a handgun “was cumulative,

“and, under the second *Hopson* factor, a mistrial was not necessary.

Garcia, 177 Wn. App. at 781.

Finally, with respect to the third *Hopson* factor, “the trial court properly instructed the jury to disregard [the irregularity],” *Gamble*, 168 Wn.2d at 177. As soon as the jury re-entered the courtroom after the evidence at issue was introduced, the court informed it that the defendants’ objection was sustained, and that “[y]ou are to disregard both the testimony and the page from the exhibit that was being displayed[.]” RP 1746.

Regardless of Defendant’s conclusory claim to the contrary, *see* BOAR, p. 34, appellate courts “presume that juries follow the instructions and consider only evidence that is properly before them,” *Perez-Valdez*, 172 Wn.2d at 818-19. Here, the jury was instructed to disregard Chouap’s statement regarding the revolver, Muse’s testimony concerning the photograph of it, and the photograph itself. While jurors may not have been able “to fully erase [such evidence] from their minds,” BOAR, p. 34, they are certainly able to follow the court’s proper instructions, and put it aside in analyzing whether the State presented sufficient evidence to convict. Because the court properly instructed the jury to disregard the

evidence at issue here, the third *Hopson* factor also indicated that the court rightly denied the mistrial motion.

Hence, all three factors indicate that the trial court properly denied that motion, and the court could not have abused its discretion in doing so. Therefore, Defendants' convictions should be affirmed.

3. DEFENDANTS FAILED TO MEET THEIR
BURDEN OF SHOWING PROSECUTORIAL
MISCONDUCT.

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

Boehning, 127 Wn. App. 511, 518, 111 P.3d 899, 903 (2005).

Prosecutorial misconduct violates this duty and deprives a defendant of his right to a fair trial. *See Boehning*, 127 Wn. App. at 518.

However, “[w]ithout 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)). Thus, “the defendant must show that (1) ‘no curative instruction would have obviated any prejudicial effect on the jury’ and (2) the misconduct resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

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). See *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011); *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.

“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, Defendant Ross argues that the deputy prosecutor committed misconduct in three ways.

First, he argues that “[t]he State’s repeated mischaracterization of key evidence, including a misquotation employed in eight separate PowerPoint slides, denied [him] a fair trial.” BOAR, p. 39, 35-44.

The evidence in question was introduced through Detective Baker, who testified that Ross told him that Ross’s co-conspirators used walkie-talkies in part so that “if there was a shooting inside the residence, Azariah Ross and the other individual could call him quicker on a walkie-talkie than a cell phone.” 02/11/14 RP 163-64.

During his closing argument, the deputy prosecutor made the following relevant argument:

[Defendant] says himself they were real guns. And if you have any doubt about what he knew, look at his next statement. Why did you use walkie-talkies? We used walkie-talkies for safety reasons. What do you mean safety reasons? Well, I had to be able to get ahold of them on a moment's notice, quicker than a cellphone. Well, why is that important? ***Because if they shot someone in the home, I needed to be there ASAP. That's what [Defendant] Ross tells the detectives. Were they real guns? His own words tell you that they were real guns.***

RP 2252-53 (emphasis added).

When they go in the home and they are using walkie-talkies at some point, [Defendant] Ross would have realized, this is a home invasion, it's not just a burglary, that's why they have the walkie-talkies, in case they have to shoot someone to give each other updates about what is going on.

RP 2260.

The deputy prosecutor also displayed a PowerPoint presentation with two slides that included the following language: "Azias: 'We used walkie talkies so I could come quick in case they shot anyone,'" and six slides that included the language: "'We used walkie talkies just for safety... so I could come quick in case they shot anyone.'" CP 371-429.

Defendant argues that "[t]he prosecutor committed misconduct" through these statements "by repeatedly misrepresenting the evidence as to what [Defendant] said." BOAR, p. 40.

One may quite reasonably infer from Defendant's statement, that "if there was a shooting inside the residence," his co-conspirators "could call him quicker on a walkie-talkie than a cell phone," 02/11/14 RP 163-64, that he assumed any shooting would be a result of the guns that he knew his co-conspirators carried into the homes for the robberies, RP 160, 226-27, rather than from any other source. Therefore, one could infer from Defendant's statement about walkie-talkies that he knew his co-conspirators were armed with real guns.

Moreover, as noted, "prosecutors are allowed to draw reasonable inferences from the evidence." *Anderson*, 153 Wn. App. at 427-28.

Therefore, to the extent the deputy prosecutor here was merely drawing this inference for the jury, his comments were proper.

Nevertheless, the statements at issue here, at least those enclosed in quotation marks in the PowerPoint slides, seem to be presented as direct quotations, and the language contained within those quotations, seems to vary from the testimony in the record. *Compare* CP 371-429 *with* 02/11/14 RP 163-64.

However, even if these statements were considered to be improper, Defendant cannot show that they were prejudicial for at least two reasons.

First, Defendant Ross objected to the State's comments, and secured an immediate and effective curative jury instruction:

[COUNSEL FOR ROSS] And Your Honor, I am going to object at this point because that is not a verbatim quote or what –it alleges facts not in evidence.

THE COURT: With regard to the evidence in the case, folks, it's your interpretation of what was proven and what was not proven that is important. The attorney's remarks, statements[,] and arguments are not evidence in the case as I've instructed you [in instruction no. 1], it's what you remember from the evidence and what you find from the evidence that makes the difference in the case, so you are free to disregard any argument that's contrary to the evidence as you find it.

RP 2252-53.

If followed by the jury, this instruction and the first jury instruction it referenced, CP 231-304, would be sufficient to eliminate any possibility of prejudice caused by the prosecutor's rendition of the testimony at issue. Because juries are presumed to follow the court's instructions, *see, e.g., Weber*, 99 Wn.2d at 166, any prosecutorial misconduct may be considered neutralized by this curative jury instruction. *See Russell*, 125 Wn.2d at 86.

Second, "placing the remarks 'in the context of the total argument, the issues in the case, [and] the evidence addressed in the argument,'" *Yates*, 161 Wn.2d at 774, shows they could not have been prejudicial.

Trial counsel for Ross was able to notify the jury of the mis-quotation and place her rendition of the testimony before the jury:

So, the State went on ad nauseam about this statement that [Defendant] Ross made about shooting inside, and the using of walkie-talkies. The actual statement that was testified to by Detective Baker was: [Defendant] Ross also mentioned that if there was shooting inside the house, the suspects inside could call him more quickly.

That is not the same as if they shot someone inside the house. There can be numerous ways that a shooting can occur inside a home, a homeowner could come home and have a gun. A neighbor could see someone breaking in and go over there with a shotgun. Police could be called and they could response and they could have shots fired. A shooting inside cannot be extrapolated to well, he knew they had guns, and he knew they had walkie-talkies in case they shot someone inside. That is not what he said.

RP 2285.

Moreover, given the other evidence in the record, the comments at issue could not have been prejudicial. Defendant argues that the source or prejudice to him was that the statements, as presented by the deputy prosecutor, “suggested [he] knew the two principals had real guns before going into the houses, a point that the defense strongly, and reasonably, disputed[.]” BOAR, p. 40-44. The problem with this argument is that evidence that the co-conspirators were armed with real guns was virtually overwhelming.

Again, the victims of the robberies at issue testified that at least one of the co-conspirators was armed with a handgun and that this man took pains to insure that they knew it was a real gun. *See, e.g.*, RP 799-800, 855, 635, 642, 956-57, 984-87, 1032. There was a Taurus .44-caliber, semiautomatic pistol magazine found in Ross's bedroom. RP 1733-35, 1748-51. There was a gun lock for a Taurus semiautomatic pistol found in Ross's bedroom. RP 1748-51. There were boxes of ammunition of different calibers found in Ross's residence. RP 1754-55. Most importantly perhaps, Defendant Ross, himself, admitted that his co-conspirators in robberies were armed with a firearm. 02/11/14 RP 159-60, 226-27.

In this context, there can be no "substantial likelihood the misconduct affected the jury's verdict," and hence, the prosecutor's comments, if improper, cannot have been prejudicial. *Yates*, 161 Wn.2d at 774.

Therefore, Defendant cannot show prosecutorial misconduct in this regard and his convictions should be affirmed.

Second, Defendant Ross challenges the following comments made by the deputy prosecutor during rebuttal argument:

Okay, so getting then to the elements, you don't have to be convinced about every detail of things, but *you do have to*

be convinced beyond a reasonable doubt as to the elements.

One of the first things that I asked, if you will remember, way back when you first walked in and we got to get up and start asking you questions to choose you as jurors in this case was, you know, I want to know what you think about the truth, how important is the truth in our system. A few people talked about it. Everybody agreed, it's the basics of whether our system's effective and works fairly for everybody is an understanding of the truth. Without it, you just don't have justice, right?

As related to the elements, again, what is truth? The State doesn't have to, again, I'm just beating this, prove everything in these cases, but the State does have to satisfy you regarding the truth of those elements.

....

And when you came in that door and we started asking these questions, you knew nothing about this case whatsoever. ***The judge*** talked to you a little bit about the charges, and introduced the parties, et cetera, ***reiterated that it's only a charge and the only evidence you are to consider comes once the trial starts and through the witnesses and admitted evidence***, et cetera. So your clean slate became full.

....

So that slate is full. And you need to carefully evaluate those feelings, those understandings that you have and how they apply to this case, what the State's proven, what happened in this case, ***and compare that, of course, to this legal standard of beyond a reasonable doubt.***

....

The instruction that talks about, that the Court gave you, that's a formal instruction on what beyond a reasonable doubt means, it says that it's a –let me read it so I don't misquote it. I want to focus on one part, and I am truly almost finished.

Okay. The last paragraph of Instruction Number 2 says a reasonable doubt is one for which a reason exists, it 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, which are the elements, you are satisfied beyond a reasonable doubt. So that means just as when I talked to these other jurors, that when you come to the decision that you come to individually, when you come to the decision you come to collectively, it has to be a decision that you have an abiding belief in the truth of. You can't change your mind 30 minutes after you render your verdict. You can't change your mind a week after, you can't change your mind two years after. You have to have an abiding belief, one that lasts over time, so that when you're called back here and if you don't dodge your subpoena to come serve as a juror next time, and someone stands up and says I want you to look back on that case or cases and think about it, when you apply those same facts, when you apply that same law, are you still satisfied to that day in the truth of your verdict based on the law --

[COUNSEL FOR ROSS]: Your honor, I am going to object. One this doesn't seem like rebuttal, it seems like a second closing argument, and we are treading on dangerous territory, if we keep going down the truth highway.

THE COURT: I'm going to sustain the objection, but I am going to direct counsel that we are reworking some ground here, and...

[DEPUTY PROSECUTOR]: I'm winding –

THE COURT: The concept of abiding belief is only with regard to the prosecution's burden and the defense, I remains the jury, doesn't have to prove anything. The State has to prove the case beyond a reasonable doubt. My instructions explain to you what reasonable doubt it. Proceed.

[DEPUTY PROSECUTOR]: Thank you. Getting back on track, and now I've somewhat lost it but it's an abiding belief, again down the road. You've got to be still convinced, and what I was saying when I -- when there was an objection was based on the law that the Court gives you, based on the facts as you understand them, not based on nebulous feelings, et cetera, but based on the facts as applied to the law that the Court gives you.

RP 2348-52 (emphasis added).

Defendant Ross argues that these arguments “diminished [the State's] burden, undermined the presumption of innocence, and denied [him] a fair trial.” BOAR, p. 44-49. The law shows otherwise.

Because “[a] jury's job is not to ‘solve’ a case,” but “to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt[,]” *State v. McCreven*, 170 Wn. App. 444, 472, 284 P.3d 793 (2012) (quoting *State v. Walker*, 164 Wn. App. 724, 733, 265 P.3d 191 (2011), review denied, 170 Wn.2d 1002, 245 P.3d 226 (2010) (quoting *State v. Anderson*, 153 Wn. App. 417, 429 220 P.3d 1273 (2009))), a “prosecutor should not argue to the jury that it must “declare”

or “decide” the truth” or “that they must “determine if [they] have an abiding belief in the truth of the charge[,]” *McCreven*, 170 Wn. App. at 473.

Here, the deputy prosecutor did none of these things.

Contrary to Defendant’s argument, he did not tell the jury that “its role was to determine the truth.” BOAR, p. 47.

While the deputy prosecutor did discuss the concept of “truth as it “relate[s] to the elements,” RP 2348, he did so to emphasize rather than diminish the State’s burden, and to properly focus the jury on the elements of the charged crimes rather than on irrelevant considerations.

Specifically, he stated that “[t]he State doesn’t have to... prove everything in these cases, but the State does have to satisfy you regarding the truth of those elements.” RP 2343. In so doing, he did not change the standard of proof beyond a reasonable doubt to one of “an abiding belief in the truth of the charge,” as was found to be improper in *McCreven*, 170 Wn. App. at 473. Rather, he remained focused on proof of the elements beyond a reasonable doubt. The deputy prosecutor told the jury that “it had “to be convinced beyond a reasonable doubt as to the elements,” RP 2348, and read to the jury the proper definition of proof beyond a reasonable doubt given in the court’s instructions. RP 2350.

Nor did the prosecutor mislead the jury as to the presumption of innocence. BOAR, p. 47. Indeed, he reminded the jury that the allegations were only “charge[s],” that “the only evidence you are to consider comes once the trial starts and through the witnesses and admitted evidence,” and that the jury had to “compare that [evidence], of course, to this legal standard of beyond a reasonable doubt.” RP 2349.

In other words, the deputy prosecutor did no more than tell the jury that it must “determine whether the State has proved its allegations against a defendant beyond a reasonable doubt[,]” which is proper. *McCreven*, 170 Wn. App. at 472.

Even were the prosecutor’s remarks considered to be have implicitly “diminished [the State’s] burden” or “undermined the presumption of innocence,” BOAR, p. 46, any potential prejudice was neutralized by the court’s curative instruction.

Here, contrary to Defendant’s present assertion, the court sustained (rather than overruled) Defendant’s objection to the argument here at issue. *Compare* BOAR, p. 45-46 *with* RP 2351. It then instructed the jury that:

[t]he concept of abiding belief is only with regard to the prosecution’s burden and the defense, I remind the jury, doesn’t have to prove anything. The State has to prove the

case beyond a reasonable doubt. My instructions explain to you what reasonable doubt it.

RP 2351-52.

Because 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, *Weber*, 99 Wn.2d at 166, there is no "substantial likelihood" that the argument at issue, even if misconduct, "affected the jury's verdict." *Yates*, 161 Wn.2d at 774.

As a result, even if Defendant could show improper conduct, he cannot show prejudice, and hence, he cannot show prosecutorial misconduct.

Therefore, his convictions should be affirmed.

Finally, Defendant Ross argues that the following statement was an improper opinion on the defendant's guilt, BOAR, p. 49-50:

And in this case the State is confident *based on the evidence in this case, and the law*, these defendants are guilty of all crimes charged.

RP 2352 (emphasis added).

It is improper for a prosecutor to "assert[her or] his personal opinion of the credibility of the witness and the guilt or innocence of the accused." *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984). See *State v.*

Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008); *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006).

However, here, the prosecutor did not assert his personal opinion of anything. “[P]rosecutors are allowed to draw reasonable inferences from the evidence,” *Anderson*, 153 Wn. App. at 427-28, and here, the deputy prosecutor did no more than this. He argued that “based on the evidence in this case, and the law, these defendants are guilty of all crimes charged.” RP 2352. Because this argument was “based on the evidence in this case, and the law,” RP 2352, it cannot be a personal opinion.

Therefore, the deputy prosecutor could not have committed prosecutorial misconduct in this regard, and Defendants’ convictions should be affirmed.

4. BECAUSE THERE WAS NO TRIAL ERROR COMMITTED, THE CUMULATIVE ERROR DOCTRINE IS INAPPLICABLE, AND DEFENDANTS’ CONVICTIONS SHOULD BE AFFIRMED.

Under the cumulative error doctrine a court “may reverse a defendant’s conviction when the combined effect of errors during trial effectively denied the defendant her [or his] right to a fair trial, even if each error standing alone would be harmless.” *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010).

However, the “cumulative error doctrine” is “limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.” *State v. Greiff*, 141 Wn. 2d 910, 929, 10 P.3d 390 (2000). Hence, “[t]he doctrine does not apply where the errors are few and have little or no effect on the trial’s outcome.” *Venegas*, 155 Wn. App. at 520.

In this case, Defendant Ross argues that even if the errors he asserts occurred in the court’s denial of his mistrial motion and in the prosecutor’s argument “do not individually warrant reversal, their combined effect does.” BOAR, p. 50-51.

However, as explained in the argument above, *see* §§ C(2)-(3), *supra*, there was no error committed in denial of the mistrial motion or the prosecutor’s arguments. Because there was no error, there can be no cumulative error.

Therefore, the cumulative error doctrine is inapplicable, and the defendant’s convictions should be affirmed.

5. DEFENDANTS' CONVICTIONS AND ENHANCEMENTS SHOULD BE AFFIRMED BECAUSE, VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THE CHARGED CRIMES AND ENHANCEMENTS BEYOND A REASONABLE DOUBT.

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. Salinas*, 118 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, Defendants collectively make six challenges to the sufficiency of the evidence supporting their convictions.

First, both defendants argue that there was insufficient evidence to support their conviction of theft of a firearm as an accomplice as charged in count XII of Defendant Ross’s amended information, and count XXII of Defendant Oeung’s amended information BOAR, p. 51-54; BOAO, p. 46-50; CP 75-79, 471-82. The record shows otherwise.

The court, in relevant part, gave the following instructions, to which neither defendant objected:

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 and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that

a person present is an accomplice.

CP 231-304 (instruction no. 6) (emphasis added). *See* RCW 9A.08.020

To convict defendant Azias Ross of the crime of theft of a firearm as charged in count XII, each of the following three elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about 27th day of April, 2012, the defendant Ross or an accomplice wrongfully obtained or exerted unauthorized control over a firearm belonging to another;
- (2) That the defendant or an accomplice intended to deprive the other person of the firearm; and
- (3) That this act occurred in the State of Washington

CP 231-304 (instruction no. 56). *See* RCW 9A.56.300.

[T]he State must prove an accomplice in a charged crime of theft of a firearm had general knowledge of the crime of “theft.” The State is not required to prove an accomplice had knowledge a firearm would be taken during the theft.

CP 231-304 (instruction no. 7).

Here, Kuch testified that, on April 27, 2012, two men came into her home at 8208 South G Street in Tacoma, Washington, one of them armed with a handgun, forced open a safe, and stole, among other things, several firearms. RP 628-53. Among these firearms were shotguns, two 9-mm pistols, a .40-caliber pistol, and a .357-caliber snub-nose revolver. RP 727-28; 02/11/14 RP 19-20.

Defendant Ross admitted that he drove the men who came into the residence that day, 02/11/14 RP 154, and to knowing what the participants were planning on doing. 02/11/14 RP 154, 237.

He told detectives that he drove Azariah Ross, Alicia Ngo, and another person to the home, and that Ngo knocked on the door to see if anyone was inside. 02/11/14 RP 160-62. Ngo indicated that nobody answered the door, so he dropped off Azariah and the other person while he and Ngo waited in the car. 02/11/14 RP 162, 227. However, Azariah and the other person encountered a person within the residence. 02/11/14 RP 163, 238-39. When Azariah and the other person were done with the robbery, they called on the walkie-talkie and asked Defendant Ross to come get them. 02/11/14 RP 164, 240. Defendant Ross picked them up around the corner. 02/11/14 RP 164.

Azariah and the other person were carrying a pillowcase and a gun case that contained two shotguns. 02/11/14 RP 164-65. Ross said he drove everyone to his residence at 8632 South Asotin, where they took the stolen property into his house and went through it together. 02/11/14 RP 165.

Once there, Defendant Ross took a photograph of the stolen firearms with his cell phone and then emailed it to another person to try to sell the stolen firearms. 02/11/14 RP 165-66. Detectives found the photo

on Ross' cell phone, RP 2045-46, and Ross acknowledged that it was the photo he took. 02/11/14 RP 166-68. Van Camp identified the photo as depicting the firearms stolen from his residence. RP 738.

Hence, there was evidence in the record that Ross aided Azariah and the other man by driving them to the Tacoma, Washington home to commit the robbery in which the firearms were stolen, driving them and the stolen firearms from the home after the robbery, and helping them sell the firearms in question. In other words, viewing the evidence in the light most favorable to the State, a rational fact finder could find that Ross aided the men in "committing the crime" of theft of a firearm. CP 231-304 (instruction no. 6), and thus, that he was an accomplice of Azariah and the other man. See *Cannon*, 120 Wn. App. at 90.

Because there was evidence that on or about 27th day of April, 2012, these men (1) wrongfully obtained or exerted unauthorized control over a firearm belonging to others, (2) intended to deprive the other people of the firearms; and (3) that this occurred in the State of Washington, "a rational fact finder could find the essential elements of the crime [of theft of a firearm as charged in count XII] beyond a reasonable doubt," *Cannon*, 120 Wn. App. at 90, and Defendant's conviction thereof should be affirmed.

Similarly, there was evidence that Defendant Oeung assisted her co-conspirators in reconnoitering a residence with knowledge that they were going to burglarize it and “take stuff” from inside, 02/11/14 RP 92-96, and that a .22-caliber pistol was among the stuff they took from inside. RP 992.

Although Defendant Ross and Oeung argue that there was insufficient evidence of knowledge that their assistance would promote or facilitate the commission of the crime of theft of a firearm rather than theft of other goods, BOAR, p. 51-54, BOAO, p. 48, (1) such was not required, and (2) the record shows otherwise.

Preliminarily, it should be noted that the jury was instructed that “[t]he State is not required to prove an accomplice had knowledge a firearm would be taken during the theft” to prove theft of a firearm based on accomplice liability. CP 231-304 (instruction no. 7). Because Defendant did not object to this instruction, it was the law of the case, and the evidence Defendant now argues is insufficient was unnecessary.

Even assuming such evidence was necessary, however, the record shows it was sufficient. The record shows that Ross expressly told detectives that he knew from the beginning what Azariah and the other person were planning to do at the house, 02/11/14 RP 237, that he knew it

was a home invasion “robbery,” 02/11/14 RP 154-55, and, in fact, he admitted to having already driven the two to a previous home invasion robbery. 02/11/14 RP 155-57. It similarly shows that Oeung knew her co-conspirators were going to “take stuff” from inside the residence. 02/11/14 RP 92-96.

One may reasonably infer from these statements that both defendants knew their co-conspirators were planning on the theft of whatever goods they could find inside these homes, including firearms. 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, this inference must be drawn.

Moreover, if Ross did not know the aid he was providing would promote the theft of firearms before he arrived at the residence, he certainly knew it when he drove the men and their stolen firearms away from that residence, and took a photograph of those firearms in an attempt to sell them. 02/11/14 RP 64-66.

Hence, there was evidence in the record that both defendants provided aid to the others “with knowledge that it w[ould] promote or facilitate the commission of the crime,” CP 231-304 (instruction no. 6), of theft of a firearm.

Therefore, their convictions thereof should be affirmed.

Second, Defendant Oeung argues that “[t]here is no evidence that [she] gave assistance to [her co-conspirators] knowing of any other crimes, beyond buglarious entry into the Ainsworth Street home to take property, including any plan to commit robbery, assault, unlawful imprisonment, or theft of a firearm.” BOAO, p. 47, 46-50. The record shows otherwise.

It shows that Oeung admitted to knocking on the door of 7502 South Ainsworth and speaking to a resident inside. 02/11/14 RP 94, 232. Therefore, the evidence showed Oeung knew the home was occupied by *at least* one of its residents when her accomplices left the car to “take stuff” from them. 02/11/14 RP 96.

Thus, the evidence showed that she knew, at a minimum, that her accomplices were going to burglarize the home while at least one of its residents were home.

Given that the residence in question was a tri-level house, RP 946-48, with at least one resident home, 02/11/14 RP 94, 232, it would be reasonable to infer that not only one person lived there and that other residents may be home, as well.

Moreover, it would be reasonable to infer that Oeung knew that in order to “take stuff” from residents inside their own home, her accomplices would have to commit the robberies, assaults, unlawful imprisonments, and thefts with which she was ultimately charged. It would be almost nonsensical to believe that such would not be the case, which is why her accomplices entered that home with a firearm. RP 956-57, 1032.

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, this inference must be drawn. When it is, there is evidence from which “a rational fact finder could find the essential elements of the crime[s at issue] beyond a reasonable doubt,” *Cannon*, 120 Wn. App. at 9, and hence, sufficient evidence to support her conviction of these crimes. Therefore, her convictions should be affirmed.

Third, both defendants argue that there was insufficient evidence to support the firearm enhancement of the conviction for conspiracy as charged in count I of Ross’s amended information and count XIV of Oeung’s amended information. BOAR, p. 62-67; BOAO, p. 52-53. *See* CP 75, 471, 681-82.

With regard to these counts, the jury was instructed, in relevant part, as follows:

To convict the defendant[s] of the crime of conspiracy to commit burglary in the first degree as charged in Count I[or XIV with respect to Oeung], each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 25th day of January, 2012 [with respect to Ross and on or about the 10th day of May, 2012, with respect to Oeung], the defendant agreed with one or more persons to engage in or cause the performance of conduct constituting the crime of burglary in the first degree;

(2) That 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.

CP 231-304 (instruction no. 17, 20).

RCW 9.94A.533(3) provides that additional time “shall be added to the standard range for” conviction of the offense “if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010.”

“‘[A] person is ‘armed’ if [1] a weapon is easily accessible and readily available for use, either for offensive or defensive purposes.’”

State v. Eckenrode, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007)(quoting *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993)), see *State v. Easterlin*, 159 Wn.2d 203, 206, 149 P.3d 366 (2006), and [2] there is

“some nexus between the defendant, the weapon, and the crime.”

Eckenrode, 159 Wn.2d at 493. See *Easterlin*, 159 Wn.2d at 206; *State v. Barnes*, 153 Wn.2d 378, 383, 103 P.3d 1219 (2005); *Valdobinos*, 122 Wn.2d at 282.

A “[f]irearm” is defined as “a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder.” RCW 9.41.010(9).

Here, Defendant Ross contends that “the State presented no evidence [he] was armed when, and where, the plan was formulated or furthered.” BOAR, p. 64. Oeung argues similarly. BOAO, p. 52-53. The record shows otherwise.

Specifically, it shows that Defendants Ross and Oeung, who had a romantic relationship and a child in common, stayed in the same residence as their co-conspirator Azariah Ross, who is Defendant Ross’s brother. RP 1688-94. Defendant Ross also admitted to driving his co-conspirators to and from the robberies in question, 02/11/14 RP 154, and that, at least by the time he drove them to the first incident in January, 2012, he knew they were going to engage in home invasion robbery. 02/11/14 RP 154, 237.

One can reasonably infer from such evidence that these co-conspirators made their agreement sometime at the residence or, at the

latest, in the vehicle Ross drove to the robberies. 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, this inference must be drawn.

Moreover, given that there was at least one firearm at that residence, RP 1733-35, 1748-55, and at least one firearm in the vehicle, *see* 02/11/14 RP 159-60, 226-27, there must have been a firearm “easily accessible and readily available for use, either for offensive or defensive purposes,” *Eckenrode*, 159 Wn.2d at 493, at the time of the agreement here at issue.

Therefore, “viewing [the evidence] in the light most favorable to the State, a rational fact finder could find” that the co-conspirators, including the defendants here, were armed with a firearm at the time of the commission of the conspiracy charged in count I “beyond a reasonable doubt,” *Cannon*, 120 Wn. App. 90, and the firearm enhancement pertaining to that count should be affirmed.

Fourth, Defendant Oeung challenges the sufficiency of evidence supporting the imposition of the firearm enhancements on her remaining counts, arguing that she “did not have knowledge that a perpetrator was armed with a firearm” during the incidents in question. BOAO, p. 50-53.

The record shows otherwise.

It shows that there was a gun lock and a magazine for a Taurus .44-caliber semiautomatic pistol in the bedroom Oeung at least sometimes shared with Ross, RP 1733-35, 1748-51, and that there were boxes of ammunition of different calibers in that same residence. RP 1754-55. It shows that Oeung admitted to knocking on the door of 7502 South Ainsworth and speaking to a resident inside. 02/11/14 RP 94, 232. Therefore, the evidence showed Oeung knew the home was occupied when her co-conspirators left the car to “take stuff” from the occupant. 02/11/14 RP 96.

It would be reasonable to infer from this evidence that Oeung’s two co-conspirators would not be sufficiently confident to invade someone’s residence while that person was home and steal their property 02/11/14 RP 94, 96, 232, without first arming themselves with a weapon of some sort. It would be similarly reasonable to infer that, because the co-conspirators had access to firearms, *see, e.g.*, RP 1733-35, 1748-51, they took one with them during this burglary and robbery.

Because Oeung’s co-conspirators were inside the house for a long time, 02/11/14 RP 97-98, about three hours according to the victim, RP 956, and returned to the car with backpacks of goods stolen from the

residence, O2/11/14 RP 98-99, it would be reasonable to infer that they were able to secure the occupants inside that residence for an extended period of time, and that to do so, they must have used a firearm.

Finally, the evidence also showed that one of these co-conspirators was in fact armed with a firearm at the time, RP 956-57, 1032, it would be reasonable to infer that Oeung, who drove to the residence with them and knew they were burglarizing it, knew they were armed.

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, this inference must be drawn. When it is, there is evidence from which “a rational fact finder could find” that her co-conspirators were armed with a firearm at the time of the commission of the crimes charged in counts XV, XVI, XVII, XX, XXI, and XXIII, and hence, “[s]ufficient evidence supports,” *Cannon*, 120 Wn. App. at 9, the firearm enhancements of these counts.

Therefore, these enhancements should be affirmed.

Fifth, Defendant Ross argues that “[i]nsufficient evidence supports the firearm enhancements on the January counts,” i.e., counts I through VI, CP 471-74, because, he contends, “the State failed to prove the firearm purportedly possessed by the robber was operable.” Supplemental Brief of

Appellant Ross (SBOAR), p. 1, 8-10. The record shows otherwise.

“[I]n order to prove a firearm enhancement, the State must introduce facts upon which the jury could find beyond a reasonable doubt the weapon in question falls under the definition of a ‘firearm’: ‘a weapon or device from which a projectile may be fired by an explosive such as gunpowder.’ ” [*State v. Recuenco*, 163 Wash.2d [428,] 437, 180 P.3d 1276 [(2008)](quoting 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 2.10.01 (Suppl. 2005)). To uphold a firearm enhancement, the State must present the jury with sufficient evidence to find a firearm operable under this definition. *Recuenco*, 163 Wash.2d at 437, 180 P.3d 1276 (citing *State v. Pam*, 98 Wash.2d 748, 754–55, 659 P.2d 454 (1983), overruled in part on other grounds by *State v. Brown*, 111 Wash.2d 124, 761 P.2d 588 (1988)).

State v. Pierce, 155 Wn. App. 701, 714, 230 P.3d 237 (2010).

The State presented such evidence here.

Specifically, Lem testified that one of Defendant’s accomplices “point[ed] a gun” at her head. RP 799, 857. She testified that she was scared to look at it, but “knew it was a gun.” RP 799. The man then took pains to make sure she knew it was a real firearm, asking her, in English, “do you know what this is[?]” RP 800, 858. Lem testified that she as too scared to answer, and just screamed. RP 800. The man then grabbed her arm and pushed her down, telling her to lay flat down in front of the stove. RP 800, 858. Once she was down, he again asked her, this time in Cambodian, “do you know what this is, grandma[?]” RP 800-01, 858.

The State also presented the statement of Defendant Ross, himself, who drove his accomplices to the residence, and told detectives that the two men who went into the residence had guns. 02/11/14 RP 159-60, 226-27.

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, Defendant’s own statement that his accomplices were armed with firearms must be considered to be true. This seems particularly appropriate given that the accomplices entered a stranger’s home in which an unknown number of residents with an unknown number of weapons awaited, and where the Defendant was their accomplice, drove them to the scene, and thereby had a firm basis to know they were in fact armed with firearms. When this testimony is admitted to be true, as it must be here, a rational fact finder could find that Defendant’s accomplice was armed with a firearm for purposes of the crimes charged in counts I through VI, CP 471-74, beyond a reasonable doubt.” *Id.*

Therefore, there is sufficient evidence to support those convictions, and they should be affirmed.

Finally, Defendant Oeung argues that there was insufficient corroboration of her incriminating statements under the *corpus delicti* rule, and, when those statements are removed from consideration, insufficient evidence to support her conviction of conspiracy to commit first degree burglary and first degree robbery as charged in count XIV of her amended information. BOAO, p. 36-42. *See* CP 471-82, 739-56. The record is to the contrary.

Here, the jury was instructed, in relevant part, that,

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

- (1) That on or about the 10th day of May, 2012, defendant Oeung agreed with one or more persons to engage in or cause the performance of conduct constituting the crime of robbery in the first degree;
- (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.

CP 231-304 (instruction no. 31). *See* RCW 9A.28.040(1).

“A conspiracy is ... the result of the agreement and not the agreement itself.” *State v. Casarez-Gastelum*, 48 Wn. App. 112, 116, 738 P.2d 303 (1987) (*quoting United States v. Freie*, 545 F.2d 1217, 1222 (9th

Cir.1976), *cert. denied*, ***Gangadean v. United States***, 430 U.S. 966, 97 S. Ct. 1645, 52 L. Ed. 2d 356 (1977) (citing ***Glasser v. United States***, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942))). Hence, “[n]o formal agreement between the parties is essential to the formation of the conspiracy, for the agreement may be shown “if there be concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose.” ***Casarez-Gastelum***, 48 Wn. App. at 116.

“Corpus delicti means the “body of the crime” and must be proved by evidence sufficient to support the inference that there has been a criminal act.” ***State v. Brockob***, 159 Wn.2d 311, 327-28, 150 P.3d 59 (2006) (quoting ***State v. Aten***, 130 Wn.2d 640, 655, 927 P.2d 210 (1996) (quoting 1 McCormick on Evidence § 145, at 227 (John W. Strong ed., 4th ed.1992)). Thus, “[a] defendant’s incriminating statement alone is not sufficient to establish that a crime took place,” and “[t]he State must present other evidence independent of the incriminating statement that the crime a defendant *described in the statement* actually occurred.” ***Brockob***, 159 Wn.2d at 328 (emphasis in the original).

In determining whether there is sufficient independent evidence under the corpus delicti rule, we review the evidence in the light most favorable to the State. *Id.* at 658, 927 P.2d 210. ***The independent evidence need not be***

sufficient to support a conviction, but it must provide prima facie corroboration of the crime described in a defendant's incriminating statement. *Id.* at 656, 927 P.2d 210. Prima facie corroboration of a defendant's incriminating statement exists if the independent evidence supports a “‘logical and reasonable inference’ of the facts sought to be proved.” *Id.* at 656, 927 P.2d 210 (*quoting Vangerpen*, 125 Wn.2d at 796, 888 P.2d 1177).

Brockob, 159 Wn.2d at 328 (emphasis added).

In this case, there was an overwhelming amount of “independent evidence” that provided at least “prima facie,” if not complete, “corroboration of the crime described in [D]efendant [Oeung]’s incriminating statement.” *Id.*

Specifically, Oeung told detectives that on May 10, 2012, she agreed with Alicia Ngo, Azariah Ross, and “the other person involved” to knock on the door of 7502 South Ainsworth and ask for someone by name in exchange for money, and that she did in fact do this. 02/11/14 RP 90-94. Remegio Fernandez corroborated these statements by testifying that, on May 10, 2012, a woman, who at least partially matched Oeung’s description, *compare* RP 951-53, 974-75 *with, e.g.* CP 471-82, knocked on his door and asked for “John.” RP 948-49, 1030-31.

Oeung told detectives that an Asian man then talked to her through “a window that was adjacent to the door.” 02/11/14 RP 94, 232. Fernandez’s testimony also corroborated this statement: he testified that he

was a Filipino immigrant, RP 944-47, that he “went to [his] front window and looked towards [his] left where the door is located,” and spoke to the woman who had knocked at his door through a window. RP 949-51, 1031.

Oeung told detectives that she couldn’t understand what the man said, “returned to the car and told the other individuals there was an old man in the residence.” 02/11/14 RP 94. Fernandez, who was three times Oeung’s age at the time of the trial, *compare* RP 944 *with* CP 741, corroborated this by testifying that after he talked to her, the woman turned, walked away, and got into the passenger side of a car that then drove away. RP 953-54.

Oeung told detectives that Ngo parked about five to six blocks from Fernandez’s residence, and that Azariah Ross and the other individual got out of the car, and told them that they were going to go check out a couple of houses, which Oeung understood to mean that they were going to go take stuff from them. 02/11/14 RP 96. This was also corroborated by Fernandez, who testified that, among other things, two men entered his residence with a gun by breaking a glass door, assaulted him, and robbed his wife and himself. *See, e.g.* RP 956-96.

Oeung told detectives that she and Ngo and Oeung waited at a Jack in the Box restaurant before returning to the area, and that Ngo was

communicating with Azariah Ross and the other person using a walkie-talkie. 02/11/14 RP 97-98. According to Oeung's statement, Ngo asked, "What are you guys doing," and "When are you coming back?" 02/11/14 RP 98. Again, Fernandez corroborated these statements through his testimony. He testified that one of his assailants had a "two-way radio" through which he was communicating with a woman, who asked them, among other things, "what they were doing[.]" RP 988-90, 1041-43. Remegio testified that the voice of the woman on the radio sounded the same as the voice of the woman who had been at his front door that evening. RP 990. Fernandez also testified that the men who were robbing him told him that they had some friends at the Jack in the Box restaurant near the home who would come over and beat them up if they did anything. RP 991. Fernandez testified that there was a Jack in the Box restaurant about a quarter of a mile from his home. RP 991.

Finally, Oeung told detectives that after the burglary and robbery, Ngo picked up Ross and the other individual down the street from the victim's house, 02/11/14 RP 98, and that they then went to the 8632 South Asotin residence, where they began looking through the property stolen from 7502 South Ainsworth. 02/11/14 RP 99-100. Oeung described seeing some of the property stolen from the residence as all types of jewelry,

including gold jewelry and necklaces and a stack of \$20-bills about a half-inch thick. 02/11/14 RP 100-02. Fernandez corroborated these statements, as well, by testifying that the men who came into his home stole all the jewelry in the house, including the necklace his wife was wearing and \$5,000 in cash that his daughter had been saving for a trip. RP 988, 1020.

Given such testimony, the State “provide[d] prima facie corroboration of the crime described in [D]efendant[Oeung]'s incriminating statement[s],” and hence, those statements were properly admitted and considered by the jury. *Brockob*, 159 Wn.2d at 328. With these statements, “viewing [the evidence] in the light most favorable to the State, a rational fact finder could find the essential elements of the crime [of conspiracy as charged in count XIV] beyond a reasonable doubt,” and hence, “[s]ufficient evidence supports [Defendant Oeung’s] conviction,” *Cannon*, 120 Wn. App. at 90, thereof.

Therefore, that conviction should be affirmed, as well.

6. THE SENTENCING COURT PROPERLY COUNTED DEFENDANTS’ CONVICTIONS AS SEPARATE AND DISTINCT RATHER THAN AS SAME CRIMINAL CONDUCT UNDER RCW 9.94A.589(1)(a).

At sentencing, a defendant’s current offenses must be counted separately in calculating his or her offender score unless the trial court

enters a finding that they “encompass the same criminal conduct.” RCW 9.94A.589(1)(a).

“[S]ame criminal conduct” means “two or more crimes that [1] require the same criminal intent, [2] are committed at the same time and place, and [3] involve the same victim.” RCW 9.94A.589(1)(a); *State v. Walker*, 143 Wn. App. 880, 890, 181 P.3d 31 (2008); *State v. Tili*, 139 Wn.2d 107, 985 P.2d 365 (1999).

The Legislature intended the phrase “same criminal conduct” to be construed narrowly, *State v. Saunders*, 120 Wn. App. 800, 824, 86 P.3d 232 (2004); *State v. Flake*, 76 Wn. App. 174, 180, 883 P.2d 341 (1994), and the absence of any one of these criteria prevents a finding of same criminal conduct. *Walker*, 143 Wn. App. at 890; *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000); *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

“Intent in this context means the defendant’s objective criminal purpose in committing the crime.” *Walker*, 143 Wn. App. at 891. To determine whether two or more criminal offenses involve the same criminal intent, the Washington Supreme Court established the objective criminal intent test, which requires a court to focus on “the extent to which a defendant’s criminal intent, as objectively viewed, changed from one

crime to the next.” *State v. Dunaway*, 109 Wn.2d 207, 214-15, 743 P.2d 1237 (1987); *State v. Lessley*, 118 Wn.2d 773, 777-778, 827 P.2d 996 (1992). The Court also “consider[s] whether one crime furthered the other.” *State v. Grantham*, 84 Wn. App. 854, 858, 932 P.2d 657 (1997). Thus, this Court has held that “evidence of a gap in time between” two or more crimes together with “the activities and communications that took place during that gap in time, and the different methods of committing the [crimes]” can be “sufficient to support a finding that the crimes did not occur at the same time and that [the defendant] formed a new criminal intent when he committed the second [or subsequent crime].” *State v. Grantham*, 84 Wn. App. 854, 859, 932 P.2d 657 (1997).

At sentencing, “it is the defendant who must establish the crimes constitute the same criminal conduct.” *State v. Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013).

On review, “determinations of same criminal conduct are reviewed for abuse of discretion or misapplication of law.” *State v. Graciano*, 176 Wn.2d 531, 535-38, 295 P.3d 219 (2013); *State v. Maxfield*, 125 Wn.2d 378, 402, 866 P.2d 123 (1994) (“[t]he trial court's determination whether two offenses require the same criminal intent is reviewed by this court for abuse of discretion or misapplication of the law”).

In the present case, both defendants argue that some of their convictions should have been counted as the same criminal conduct. BOAR, p. 54-58; BOAO, p. 70-72.

Defendant Ross contends that the court erred in failing to find that the first degree burglary, charged in count II, and the first degree robbery, charged in count III of his amended information, were the same criminal conduct. BOAR, p. 54-58. Specifically, he argues that, because these “offenses were committed with the same objective criminal intent, committed at the same time and place, and involved the same single victim, the Court abused its discretion when it found the crimes could not be considered the same criminal conduct.” BOAR, p. 58. This argument fails for at least two reasons.

First, even assuming *arguendo* that the burglary and robbery at issue involved “the same criminal intent” and were “committed at the same time and place,” they did *not* “involve the same victim.” RCW 9.94A.589(1)(a).

While the victim of the robbery was Lem, CP 472, the victims of the burglary were Lem, and her four adult children. Lem shared the 9106 McKinley Avenue home with her three daughters, Natalie Chan, 31,

Sokha Chan, 27, and Phala Chan, 25, and her son, Sokthy Chan, 29. RP 796-97. Simply because they were not present at the time of the burglary does not mean they were not victims of that burglary. Indeed, Natalie Chan testified that her home had been ransacked in the burglary. 02/03/14 RP 8-9. Ross's accomplices took \$4,000 in cash from the residence, which included money that one of Lem's daughters had saved since she was a little girl. RP 817-18, 868; 02/03/14 RP 10. Chan testified that Ross's accomplices had pepper sprayed her dog, a "little Chihuahua." 02/03/14 RP 8-9. The dog had orange on him and when Chan held him close, her eyes started to sting from the weapon used against him. 02/03/14 RP 8-9. Chan also testified that her diamond earrings, diamond rings, necklaces, purses, two digital cameras, some video games, pairs of shoes, and electronic items were stolen from her. 02/03/14 RP 10-14. *See* RP 2041.

Hence, the burglary and robbery did not "involve the same victim," and, therefore, cannot be the "same criminal conduct[.]" RCW 9.94A.589(1)(a). *See Walker*, 143 Wn. App. at 890 (the absence of any one of these criteria prevents a finding of same criminal conduct.).

Therefore, the trial court could not have abused its discretion in so finding, and Defendant Ross's convictions and sentence should be affirmed.

Second, even if these crimes had involved the same victim, the court's decision to treat them as separate was proper under the burglary statute.

That statute provides that “[e]very person who, in the commission of a burglary shall commit any other crime, may be punished therefore as well as for the burglary, and may be prosecuted for each crime separately.” RCW 9A.52.050.

This statute expresses the intent of the legislature that “any other crime” committed in the commission of a burglary does not merge with the offense of first-degree burglary when a defendant is convicted of both. *State v. Sweet*, 138 Wn.2d 466, 980 P.2d 1223 (1999). Indeed, it “*gives the sentencing judge discretion to punish for burglary, even where the burglary and an additional crime encompasses the same criminal conduct.*” *State v. Bradford*, 95 Wn. App. 935, 950, 978 P.2d 534 (1999) (emphasis added).

Contrary to Defendant Ross's present contention, BOAR, p. 54, the court below expressly based its decision, at least in part, on the burglary anti-merger statute. 06/23/14 RP 43. The State argued that the court could treat burglary “under the antimergers statute,” 06/23/14 RP 40,

and the court held that “[t]he case law *and the statute* do make it clear that burglary and robbery are separate offenses.” 06/23/14 RP 43 (emphasis added).

Because RCW 9A.52.050 “gives the sentencing judge discretion” to punish burglary and any additional crimes it may encompass separately even if they otherwise involve the same criminal conduct, the court’s decision to punish the burglary and robbery at issue here separately cannot be an abuse of discretion.

Therefore, the trial court could not have abused its discretion in so finding, and Defendant Ross’s convictions and sentence should be affirmed.

Defendant Oeung argues that (1) her convictions for burglary and robbery and (2) her convictions for robbery and unlawful imprisonment were the same criminal conduct. BOAO, p. 70-72. The record shows otherwise.

With respect to the burglary and robbery convictions, her argument fails for at least two reasons.

First, these convictions did not “involve the same victim.” RCW 9.94A.589(1)(a). The burglary charged in count XV was committed against the residence of Remegio Fernandez and Norma Fernandez, the

robbery charged in count XVI against Remegio Fernandez only, and the robbery charged in count XVII against Norma Fernandez only. CP 75-79, 231-304 (instructions 23, 34, 35). Hence, these crimes did not “involve the same victim,” and cannot be the “same criminal conduct[.]” RCW 9.94A.589(1)(a), *See Walker*, 143 Wn. App. at 890.

Second, even if these crimes had involved the same victim, the court’s decision to treat them as separate was proper under the burglary anti-merger statute, RCW 9A.52.050, which, again, “gives the sentencing judge discretion to punish for burglary, even where the burglary and an additional crime encompasses the same criminal conduct.” *State v. Bradford*, 95 Wn. App. at 950.

Therefore, the trial court could not have abused its discretion in so doing here, and Defendant Oeung’s convictions and sentence should be affirmed.

Oeung’s second argument, that her convictions for robbery and unlawful imprisonment were the same criminal conduct, fails because these crimes did not “involve the same victim[.]” RCW 9.94A.589(1)(a).

The victim of the unlawful imprisonment charged in count XX was Remegio Fernandez, and the victim of the unlawful imprisonment charged in count XXI was Norma Fernandez. CP 78. However, Remegio and

Norma Fernandez shared the home that was robbed with their daughter, Carolyn Deguzman. RP 946-48, and during the robberies charged in counts XVI and XVII, CP 76-77, the Defendant's accomplices stole \$5000 in cash from Deguzman. RP 988, 1020. Hence, the victims of the robberies at issue in counts XVI and XVII were Remegio Fernandez, Norma Fernandez, and Carolyn Deguzman.

As a result, the robberies and unlawful imprisonments at issue did not "involve the same victim[.]" and cannot be the "same criminal conduct[.]" RCW 9.94A.589(1)(a).

Therefore, Defendants' convictions and sentences should be affirmed.

7. DEFENDANT ROSS FAILED TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE FAILED TO SHOW THAT HIS TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT.

"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). See *In Re Elmore*, 162 Wn.2d 236, 251, 172 P.3d 335 (2007); *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). “A failure to establish either element of the test defeats an ineffective assistance of counsel claim.” *Riofta v. State*, 134 Wn. App. 669, 693, 142 P.3d 193 (2006).

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)).

An ineffective assistance of counsel claim must not be allowed to “function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest ‘intrusive post-trial inquiry’ threaten the integrity of the very adversary process the right to counsel is meant to serve.”

Harrington v. Richter, 131 S. Ct. 770, 778, 178 L. Ed. 2d 624 (2011). “It is ‘all too tempting’ to ‘second-guess counsel’s assistance after conviction or adverse sentence.’” *Id.* (quoting *Strickland*, 466 U.S. at 689). “The question is whether an attorney’s representation amounted to incompetence under ‘prevailing professional norms,’ not whether it deviated from best practices or most common custom.” *Id.* (quoting *Strickland*, 466 U.S. at 690).

This Court “defer[s] to an attorney’s strategic decisions to pursue, or to forego, particular lines of defense when those strategic decisions are reasonable given the totality of the circumstances.” *Riofta*, 134 Wn. App.

at 693. If reasonable under the circumstances, trial counsel need not investigate lines of defense that he has chosen not to employ.” *Id.*

With respect to the second prong, a “defendant must affirmatively prove prejudice, not simply show that “the errors had some conceivable effect on the outcome.” *State v. Crawford*, 159 Wn.2d 147, 99, 147 P.3d 1288 (2006). “In doing so, ‘[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Crawford*, 159 Wn.2d at 99-100 (*quoting Strickland*, 466 U.S. at 694). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* (*quoting Strickland*, 466 U.S. at 694); *Cienfuegos*, 144 Wn.2d at 229.

In the present case, Defendant Ross argues that his trial counsel was ineffective for failing to argue that the first degree robbery charged in count IX and the unlawful imprisonment charged in count XI were the same criminal conduct. BOAR, p. 59-62.

“Counsel’s failure to make a motion does not support an ineffective assistance of counsel claim unless the defendant can show that the motion would properly have been granted.” *State v. Price*, 127 Wn. App. 193, 203, 110 P.3d 1171 (2005) (*citing State v. Jamison*, 105 Wn.

App. 572, 591, 20 P.3d 1010, *review denied*, 144 Wn.2d 1018, 32 P.3d 283 (2001)); *State v. Contreras*, 92 Wn. App. 307, 317, 966 P.2d 915 (1998) (*quoting State v. McFarland*, 127 Wn.2d 322, 334 n.2, 899 P.2d 1251 (1995)). Defendant Ross cannot make that showing here.

Again, a defendant's current offenses must be counted separately in calculating his or her offender score unless the trial court enters a finding that they "encompass the same criminal conduct." RCW 9.94A.589(1)(a). "[S]ame criminal conduct" means "two or more crimes that [1] require the same criminal intent, [2] are committed at the same time and place, and [3] involve the same victim." RCW 9.94A.589(1)(a).

Here, none of these requirements are met.

First, the robbery and unlawful imprisonment at issue do not "involve the same victim." RCW 9.94A.589(1)(a). The first degree robbery was committed against, at least, both Bora Kuch and her grandson, F.V.C., CP 475-76, RP 711-12, while the unlawful imprisonment was committed against Kuch alone. CP 475-76, 231-304 (instruction no. 45).

Indeed, while Defendant's accomplices threatened to kidnap F.V.C. and stole a necklace from F.V.C. while the child was wearing it, RP 649-51, they never unlawfully imprisoned or otherwise restrained him

as they did Kuch. RP 641-44. Hence, both Kuch and F.V.C. were victims of the robbery, but only Kuch was the victim of the unlawful imprisonment. Moreover, given that Kuch shared the residence with her daughter and son-in-law, RP 628-30, 682, 711-12, and that this collective residence was damaged, *see, e.g.*, RP 655, 669, 723-30, and property was stolen from them and their friend, as well, in the robbery, *see, e.g.*, RP 653-54, 731, 02/11/14 RP 17-19, Kuch's daughter and son-in-law could also be considered victims of the robbery but not of the unlawful imprisonment. Therefore these crimes did not "involve the same victim," and cannot be the same criminal conduct. RCW 9.94A.589(1)(a).

It is also doubtful that they required the same criminal intent.

To determine whether two or more criminal offenses involve the same criminal intent, courts use the objective criminal intent test, which requires a court to focus on "the extent to which a defendant's criminal intent, as objectively viewed, changed from one crime to the next." *State v. Dunaway*, 109 Wn.2d at 214-15.

In this case, there was a fairly clear division of labor between Defendant's accomplices. One immediately pushed Kuch back into her bedroom and restrained her, while the other was searching the remainder of the house. *See, e.g.*, RP 632-37. The intent of the person searching the

house was clearly to locate and steal property from the house, while the intent of the other person was to restrain Kuch, to facilitate, among other things, the accomplices' entry and escape from the home.

Hence, there were two different people accomplishing elements of these two crimes with two different intents.

Finally, it is unclear whether the robbery and unlawful imprisonment were "committed at the same time and place." RCW 9.94A.589(1)(a). The unlawful imprisonment began almost immediately after the accomplices entered the home and one of them pushed Kuch back into her bedroom, and took place in the upstairs bedrooms. RP 632-34, 644-46. The robbery, however, began after this, ended before it, and occurred largely in the remainder of the house where the second accomplice was searching. *See, e.g.*, RP 635-37. Therefore, the crimes were not "committed at the same time and place." RCW 9.94A.589(1)(a).

Because the robbery and unlawful imprisonment at issue did not "require the same criminal intent," were not "committed at the same time and place," and did not "involve the same victim," they were not the "same criminal conduct." RCW 9.94A.589(1)(a).

As a result, Defendant Ross cannot show that a motion to count them as the same criminal conduct "would *properly* have been granted[.]"

and his “[c]ounsel’s failure to make [such] a motion does not support an ineffective assistance of counsel claim[.]” *Price*, 127 Wn. App. at 203 (emphasis added). *Cf.* CP 744.

Therefore, Defendant’s convictions and sentences should be affirmed.

8. DEFENDANTS FAILED TO PRESERVE ANY ALLEGED ERROR IN THE COURT’S INSTRUCTIONS ON THE FIREARM ENHANCEMENTS, AND EVEN HAD THEY PRESERVED THE ISSUE, THE TRIAL COURT PROPERLY INSTRUCED THE JURY ON THE ENHANCEMENTS.

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) (quoting *McGarvey v. City of Seattle*, 62 Wn.2d 524, 533, 384 P.2d 127 (1963)). See RAP 2.5(a).

“Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case and, when read as a whole, properly inform the jury of the applicable

law.” *State v. Fleming*, 155 Wn. App. 489, 503-04, 228 P.3d 804 (2010) (citing *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002)); *State v. Mills*, 154 Wn.2d 1, 109 P.3d 415 (2005); *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

The standard for review applied to a challenge to a trial court’s instructions depends on whether the trial court’s decision is based upon a matter of law or of fact. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). “[A] trial court’s choice of jury instructions,” is reviewable only “for abuse of discretion.” *Fleming*, 155 Wn. App. at 503; *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997); *Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). However, “an alleged error of law in jury instructions” is reviewed *de novo*, *Fleming*, 155 Wn. App. at 503, and in the context of the instructions as a whole. *State v. Woods*, 143 Wn.2d 561, 590, 23 P.3d 1046 (2001) (quoting *State v. Benn*, 120 Wn.2d 631, 654-55, 845 P.2d 289 (1993)).

In a criminal case, “[j]ury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every element of a criminal offense beyond a reasonable doubt.” *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). See *In re Winship*, 397 U.S. 358, 90 S. Ct.

1068, 25 L. Ed. 2d 368 (1970); *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995).

Moreover, a jury must be unanimous to either accept or reject aggravating circumstances, such as sentence enhancements. *State v. Nunez*, 174 Wn.2d 707, 712, 285 P.3d 21 (2012).

In this case, in its instruction number 59 (corrected), the court instructed the jury, in relevant part, that

You will also be given special verdict forms for certain counts. If you find the defendant not guilty of a particular count, do not use the corresponding special verdict form for that count. If you find the defendant guilty of a particular count, you will then use the special verdict form for that particular count. In order to answer a special verdict form “yes,” all twelve of you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. ***If you do not unanimously agree that the answer is “yes” then the presiding juror should sign the section of the special verdict form indicating that the answer has been intentionally left blank.***

CP 300 (instruction no. 59).

Defendant Oeung argues that, in this instruction, the “jury was not properly instructed on returning a ‘no’ answer on the firearm enhancements.” BOAO, p. 53-59. She relies principally on *State v. Nunez*, 174 Wn.2d 707, 285 P.3d 21 (2012), to argue that this instruction was improper because it did not instruct the jury that “it could (and must, in

certain circumstances) answer ‘no’ on a special verdict form.” BOAO, p. 56-57. Defendant’s argument fails for at least two reasons.

First, Defendant failed to preserve this argument by not taking exception to the instruction at issue below or proposing an alternative. *See* RP 2221-23; CP 106-29, 626-53. Because a party which fails to propose a desired jury instruction, “cannot predicate error on its omission,” *Lucero*, 140 Wn. App. at 787, Defendant here cannot predicate error on the absence of her desired language now. *See Kroll*, 87 Wn.2d at 843; *McGarvey*, 62 Wn.2d at 533.

Second, even had Defendant preserved the issue, the language in the challenged instruction was proper.

In rejecting its prior holding in *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), “that a jury may reject a special finding on an aggravating circumstance even if the jurors are not unanimous,” *Nunez*, 174 Wn.2d at 709, the Washington State Supreme Court noted that

[w]e are not called upon in these cases to develop a rule that would better serve both the purposes of jury unanimity and the policies of judicial economy and finality. We do note, however, that *the instruction given in Brett*, [126 Wn.2d 136, 892 P.2d 29 (1995)] *requiring a jury to leave a special verdict form blank if it could not agree, is a more accurate statement of the State's burden and better serves the purposes of jury unanimity*. *See* 126 Wash.2d at 173, 892 P.2d 29. For these reasons, we endorse the *Brett* instruction going forward.

Nunez, 174 Wn.2d at 718-19 (emphasis added).

In *Brett*, the trial court gave the following instruction as to finding aggravating circumstances:

If, after fully and fairly considering all of the evidence or lack of evidence you are not able to reach a unanimous decision as to any element of any one of the aggravating circumstances, do not fill in the blank for that alternative.

Brett, 126 Wn.2d at 173.

In this case, the court instructed the jury that

If you do not unanimously agree that the answer is “yes” then the presiding juror should sign the section of the special verdict form indicating that the answer has been intentionally left blank.

CP 300 (instruction no. 59).

In other words, here, as in the *Brett* instruction approved by *Nunez*, the court’s instruction “require[ed] a jury to leave a special verdict form blank if it could not agree[.]” *Nunez*, 174 Wn.2d at 719. As a result, the present instruction “is a more accurate statement of the State’s burden and better serves the purposes of jury unanimity,” than that proposed by Defendant Oeung, was, at least implicitly endorsed by the Supreme Court in *Nunez*, and is therefore, proper.

As a result Defendant’s firearm enhancements, like her convictions, should be affirmed.

9. DEFENDANTS' CONVICTIONS SHOULD BE AFFIRMED BECAUSE A JURY UNANIMITY INSTRUCTION WAS NOT REQUIRED WHERE THE EXACT FIREARM USED WAS NOT AN ELEMENT OF THE CRIMES OR ENHANCEMENTS CHARGED, AND EVEN WERE THIS NOT THE CASE, ANY ERROR WAS HARMLESS.

Article I, section 21 of the Washington State Constitution gives criminal defendants the right to a unanimous jury verdict. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). See Wn. Cont. Art. I, § 22.

Thus, “[w]hen the prosecution presents evidence of multiple *acts* of like misconduct, any one of which could form the basis of a count charged, either the State must elect which of such *acts* is relied upon for a conviction or the court must instruct the jury to agree on a specific criminal *act*.” *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007) (emphasis added). See *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), *overruled on other grounds by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988).

Defendant Oeung argues that her convictions of conspiracy, first degree burglary, first degree robbery, theft of a firearm, and the firearm enhancements should be reversed because the court did not give a unanimity instruction and the State did not elect which of three firearms

should form the basis of conviction for these counts and enhancements. BOAO, p. 20-36, 42-45. Similarly, Defendant Ross argues that his convictions of conspiracy, first degree burglary, first degree robbery, unlawful imprisonment, and first degree trafficking in stolen property, as charged in counts I (as it now pertains to the April conspiracy), VIII, XIX, XI, and XIII, and of the enhancements pertaining thereto should be reversed because the court did not give a unanimity instruction and the State did not elect which firearm should form the basis of conviction for these counts and enhancements. SBOAR, p. 1-2, 10-13. Both arguments fail because neither a unanimity instruction nor an election was required in these cases

Unlike in multiple acts cases such as *State v. Coleman*, 129 Wn.2d 509, 150 P.3d 1126 (2007), and *State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (, where “several acts are alleged and any one of them could constitute the crime charged,” *Kitchen*, 110 Wn.2d at 411, the evidence at issue here showed just one act supporting each of Defendants’ convictions. Hence, there was no need for a unanimity instruction.

With respect to the conspiracy count, Oeung was charged with only one conspiracy, the conspiracy to commit first degree robbery and first degree burglary that occurred on May 10, 2012, and hence with only

one agreement. *See, e.g.*, CP 231-304 (instruction no. 31); *Casarez-Gastelum*, 48 Wn. App. at 116. Similarly, Ross was charged with only one conspiracy for the April charges he now challenges, CP 471-82, and hence, with only one agreement. Although, in closing argument, the deputy prosecutor discussed different pieces of evidence from which the jury could find or infer the existence of an agreement, *see, e.g.*, RP 2246-47, this does not mean that he presented evidence of more than one agreement.

Indeed, there was only evidence of one agreement for each conspiracy charge in the record. With respect to Oeung, it was her agreement with Ngo, Azariah Ross, and the fourth individual to assist in the burglary and robbery of 7502 South Ainsworth. 02/11/14 RP 87-104. With respect to Ross's April conspiracy charge, it was his agreement to drive his accomplices to and from the 8208 South G Street residence and assist in the sale of the firearms they stole therefrom. *See, e.g.*, 02/11/14 RP 160-68. There was evidence that both defendants denied involvement in any other agreement, 02/11/14 RP 90-91, 154, and the presented evidence of no other.

Because the prosecution did not "present[] evidence of multiple *acts* of like misconduct, any one of which could form the basis of [the]

count [of conspiracy] charged,” it was not required to “elect which of such *acts* is relied upon for a conviction” and the court was not required to “instruct the jury to agree on a specific criminal act.” *Coleman*, 159 Wn.2d at 511. Therefore, the court could not have erred in failing to do so, and Defendants conviction for conspiracy to commit first degree robbery and first degree burglary should be affirmed.

With respect to the other charges involving firearms or deadly weapons, there was no necessity for unanimity as to which firearm Defendants’ accomplices used because use of a particular firearm was not an element of the crimes or enhancements at issue. *See* CP 231-304 (instruction no. 22, 23, 33, 34, 35, 45, 52, 57, & 60).

“Where a unanimous verdict is required... the jury must unanimously agree that *every element* of the crime is established beyond a reasonable doubt, for convictions to be valid.” *State v. Franco*, 96 Wn.2d 816, 832, 639 P.2d 1320 (1982) (emphasis added).

Here, however, the specific firearm used was not *an element* of any of the crimes of conviction Defendants now contest. CP 231-304 (instruction no. 22, 23, 33, 34, 35, 45, 52, 57, & 60). In relevant part, conviction of first degree burglary and first degree robbery required proof that “the defendant or an accomplice was armed with *a deadly weapon*.”

CP 231-304 (instruction no. 22, 23, 33, 34, 35), conviction of theft of a firearm required proof that “the defendant or an accomplice wrongfully obtained or exerted unauthorized control over *a firearm* belonging to another,” CP 231-304 (instruction no. 57), conviction of unlawful imprisonment and first degree trafficking in stolen property didn’t require proof an any firearm whatsoever, CP 231-304 (instruction no. 45 & 52), and the enhancements required proof that Defendants or an accomplice “was armed with *a deadly weapon* at the time of the commission of the crime” at issue. CP 231-304 (instruction no. 60). *See* CP 231-304 (instruction no. 15 &16).

Thus, while Defendants argue that the State did not prove which of the firearms at issue here satisfied these elements, the jury could still unanimously conclude that the State proved beyond a reasonable doubt that one of their accomplices “was armed with a deadly weapon,” CP 231-304 (instruction no. 23, 34, 35, 60), and “wrongfully obtained or exerted unauthorized control over *a firearm* belonging to another,” CP 231-304 (instruction no. 57), for purposes of all of the convictions they now challenge.

As a result, the court did not err by failing to give a multiple acts unanimity instruction as to which firearm was used and the State was not required to make an election among them.

Therefore, Defendants' convictions should be affirmed.

However, even had Defendants' right to a unanimous jury been implicated and violated, any error was harmless.

"In reviewing a multiple acts case in which there has been no election by the State or unanimity instruction by the trial court," a conviction will be upheld if it is "harmless beyond a reasonable doubt," that is, "if no rational juror could have a reasonable doubt as to any one of the incidents alleged." *Kitchen*, 110 Wn. 2d at 411-12.

In this case, no rational juror could have a reasonable doubt that the handgun carried by Defendants' accomplice, or the .22-caliber pistol and .22-caliber rifle owned by Fernandez, were firearms.¹⁶

Again, a "[f]irearm" is defined as "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(9); CP 231-304 (instruction no. 16).

¹⁶ Given victim testimony as their operability, RP 744, 748-49, 02/11/14 RP 15-25, Defendant Ross does not contest that there was sufficient evidence such that no rational juror could have a reasonable doubt that the weapons stolen in the April incident were firearms. SBOAR, p. 12-13.

In the May 10, 2012 incident upon which Defendant Oeung's charges are based, there were three firearms: the pistol carried by her accomplice, a .22-caliber Jennings pistol owned by the victim, Mr. Fernandez, and a .22-caliber Marlin rifle, also owned by Fernandez. *See, e.g.* RP 984-87, 993-95, 1008-11, 1012-14.

With respect to the pistol carried by Defendants' accomplice, there are several pieces of evidence, that taken together, are such that no rational juror could have a reasonable doubt that it was, in fact, a firearm.

First, it is not rational or reasonable to believe that someone would forcibly and unlawfully enter a residence she or he knew to be occupied by an unknown number of people and weapons, and display a fake, toy, or otherwise inoperable firearm. To do so would only encourage a violent response to which the perpetrator carrying an inoperable gun could do nothing to prevent.

Second, with respect to Oeung's convictions, Fernandez, a 20-year veteran of the United States Army who had the pistol pointed at his face and stuck in his mouth, was able to identify the object carried by the accomplice as a 9-mm pistol with a laser sight, RP 944-47, 984-87, 993-95, not a fake or toy gun. Similarly, with respect to Ross's convictions, Lem testified that one of Defendant's accomplices "point[ed] a gun" at her

head. RP 799, 857. She testified that she “knew it was a gun.” RP 799. The man then took pains to make sure she knew it was a real firearm, asking her, in English, “do you know what this is[?]” RP 800, 858. Lem testified that she was too scared to answer, and just screamed. RP 800. The man then grabbed her arm and pushed her down, telling her to lay flat down in front of the stove. RP 800, 858. Once she was down, he again asked her, this time in Cambodian, “do you know what this is, grandma[?]” RP 800-01, 858. This is tantamount to an admission by the accomplice that he was carrying a firearm.

Third, Defendants’ accomplice used that pistol in a manner consistent with it being a firearm. In both the April and the May incidents at issue here, he used it for protection and coercion during the crimes. In the May incidents, he demonstrated that it was a real and operable firearm by repeatedly removing its magazine, showing that it was loaded, and telling Fernandez, “you know all I got to do is pull the trigger, and you are dead.” RP 985. The accomplice also put the pistol in Fernandez’s mouth after he tried to escape and said all they had to do was pull the trigger and that was it. RP 993-95. In other words, the accomplice again admitted that what he had and what he was using was a real firearm.

Finally, Defendant Ross himself admitted that his accomplice was armed with a firearm. 02/11/14 RP 159-60, 226-27.

Given such evidence, “no rational juror could have a reasonable doubt,” *Kitchen*, 110 Wn. 2d at 411-12, that the accomplice’s pistol was a firearm.

There are also several pieces of evidence that provide proof beyond a reasonable doubt that the pistol and rifle owned by Fernandez were, in fact, firearms.

First, after Oeung’s accomplices forced their way into Fernandez’s home, they asked him if he had “guns in the house.” RP 992. It would not be rational or reasonable to believe that someone who forcibly and unlawfully entered a residence at gunpoint would do so to steal a fake, toy, or inoperable firearm. The defendant’s accomplices were, by their own words, looking to steal “guns.” RP 992. Anything else would lack sufficient resale value and prove insufficient reward for their high risk behavior.

Second, Fernandez identified the firearm the defendants took as a .22-caliber Jennings *pistol*, and the firearm they moved as a rifle. RP 1008-11, 1012-14. He identified neither as a toy, fake, or replica.

Finally, Fernandez testified that he had owned the rifle since he had been in the service, that he had fired it, albeit quite some time ago, and that it worked properly. RP 1011-12.

Given such evidence, “no rational juror could have a reasonable doubt” that all three of the weapons at issue were firearms, and, even if there was err in failing to give a unanimity instruction or make an election between these firearms, Defendants’ convictions must be upheld as “harmless beyond a reasonable doubt.” *Kitchen*, 110 Wn. 2d at 411-12.

10. THE TRIAL COURT PROPERLY IMPOSED A STANDARD RANGE SENTENCE IN DEFENDANT OEUNG’S CASE.

Defendant Oeung argues that “the trial court’s refusal to impose an exceptional sentence below the standard range requires reversal [of the standard range sentence] because the court relied on an untenable legal basis for refusing to consider and impose an exceptional sentence” and failed to exercise its discretion by, apparently failing to find another legal standard upon which to base an exceptional sentence. BOAO, p. 66-67, 60-67. The law and record below require otherwise.

Under RCW 9.94A.585(1), “[a] sentence within the standard sentence range” is generally not appealable.

However, as the Supreme Court found with respect to an earlier version, the statute is not an absolute prohibition on the right to appeal, and “precludes only appellate review of “challenges to the amount of time imposed when the time is within the standard range.” *State v. Herzog*, 112 Wn.2d 419, 423, 771 P.2d 739 (1989) (quoting *State v. Ammons*, 105 Wn.2d 175, 183, 713 P.2d 719, 718 P.2d 796, cert. denied, 479 U.S. 930, 107 S. Ct. 398, 93 L. Ed. 2d 351 (1986)).

Thus, “the statute itself does not preclude a challenge to the procedure by which a sentence within the standard range is imposed[.]” *State v. Garcia-Martinez*, 88 Wn. App. 322, 329, 944 P.2d 1104 (1997).

“[W]here a defendant has requested an exceptional sentence below the standard range: review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range. A court refused to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances; i.e., it takes the position that it will never impose a sentence below the standard range. A court relied on an impermissible basis for declining to impose an exceptional sentence below the standard range if it takes the position, for example, that no drug dealer should get an exceptional sentence down or it refuses to consider the request because of the defendant’s race, sex or religion. Even in those instances, however, it is the refusal to exercise discretion or the impermissible basis for the refusal that is appealable, not the substance of the decision about the length of the sentence. Conversely, a trial court that has considered the facts and has concluded that there is no basis for an

exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling.

Garcia-Martinez, 88 Wn. App. at 330.

In this case, the trial court “considered the facts and... concluded that there [wa]s no basis for an exceptional sentence.” *Id. See* 06/23/14 RP 46-67.

Specifically, it considered the oral argument and sentencing memoranda filed by Defendant Oeung in which she argued for an exceptional sentence below the standard range of 0 months with only imposition of the minimum term for the firearm enhancements. 06/23/14 RP 46-57, 62-63; CP 327-54.

Defendant argued that “she comes into this Court with absolutely ... no... felonies on her record,” that she was “badly abused by her father,” that her “mother was somewhat nonexistent,” that she had a pregnancy that left her addicted to “pain pills,” that she had “a lesser level of participation... than anybody else in this crime,” and that, as a result, the standard range sentence would be “clearly excessive.” 06/23/14 RP 47-55

The court stated explicitly that it knew that the statutory list of mitigating factors was not exclusive. 06/23/14 RP 48, 55.

While it found Defendant's involvement was "minimal in comparison to those who went into the house and actually confronted the victims and terrorized them," it concluded "that her role is not minimal in the sense that she knew what was going on and she was involved in it completely[.]" 06/23/14 RP 65.

The court then considered on the record what it termed Oeung's "terrible upbringing" and its view that "the firearm enhancement scheme exacts a terrible toll on defendants." 06/23/14 RP 65. However, the court found, the firearm enhancement scheme was "a choice that the legislature can make and has made in this instance," 06/23/14 RP 65-66, one which was not unconstitutional, and that "terrible backgrounds are not the kind of thing that support a mitigated [exceptional] sentence." 06/23/14 06/23/14 RP 66. The court, therefore, imposed a low-end, standard range sentence. 06/23/14 RP 67; CP 355-68.

In so doing, it did not "refuse[] categorically to impose an exceptional sentence below the standard range under any circumstances," and hence, did not "refuse[] to exercise its discretion[.]" *Garcia-Martinez*, 88 Wn. App. at 330. Nor did it "rel[y] on an impermissible basis for refusing to impose an exceptional sentence below the standard range." *Id.*

Rather, as shown above, the court “considered the facts and... concluded that there [wa]s no basis for an exceptional sentence,” and therefore “exercised its discretion, and the defendant may not appeal that ruling.” *Id.*

As a result, Defendant Oeung’s standard range sentence should be affirmed.

11. THE CASES SHOULD BE REMANDED SOLELY FOR THE PURPOSE OF VACATING, RATHER THAN DISMISSING WITHOUT PREJUDICE, DEFENDANT ROSS’S COUNT IV, V, VII, AND X, AND DEFENDANT OEUNG’S COUNT XVIII AND XIX CONVICTIONS, ALL OF WHICH WERE FOUND BY THE SENTENCING COURT TO BE VIOLATIVE OF DOUBLE JEOPARDY PROTECTIONS IF ALLOWED TO STAND ALONG WITH OTHER CONVICTIONS.

The double jeopardy clause of the Fifth Amendment to the United States Constitution provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. Amend. V. It applies to the states through the due process clause of the Fourteenth Amendment. *State v. Wright*, 165 Wn.2d 783, 801, 203 P.3d 1027 (2009) (citing *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)).

The Washington State Constitution similarly mandates that no person shall “be twice put in jeopardy for the same offense.” Wn. Const. Art. I, Sec. 9.

“Washington’s double jeopardy clause is coextensive with the federal double jeopardy clause and ‘is given the same interpretation the Supreme Court gives to the Fifth Amendment.’” *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010); *State v. Adel*, 136 Wn.2d 629, 632, 632, 965 P.2d 1072 (1998) (citing *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)).

Both clauses have been interpreted to protect against the same triumvirate of constitutional evils: “being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after conviction, and (3) ***punished multiple times for the same offense.***”

Turner, 169 Wn.2d at 454 (emphasis added). See *Whalen v. United States*, 445 U.S. 684, 688, 100 S. Ct. 1432, 1436, 63 L. Ed. 2d 715 (1980).

“The term ‘punishment’ encompasses more than just a defendant’s sentence for purposes of double jeopardy.” *Id.* at 454-55. “Indeed, even a conviction alone, without an accompanying sentence, can constitute ‘punishment’ sufficient to trigger double jeopardy protections.” *Id.* at 455. Therefore, “a defendant convicted of alternative charges may be judged

and sentenced on one only,” and courts “should enter a judgment on the greater offense only and sentence the defendant on that charge without reference to the verdict on the lesser offense.” *State v. Trujillo*, 112 Wn. App. 390, 411, 49 P.3d 935 (2002) (citing *State v. Gohl*, 109 Wn. App. 817, 824, 37 P.3d 293 (2001)). See *Turner*, 169 Wn.2d at 463-66.

Thus, “a court may violate double jeopardy either by reducing to judgment both the greater and the lesser of two convictions for the same offense or by conditionally vacating the lesser conviction while directing, in some form or another, that the conviction nonetheless remains valid.” *Turner*, 169 Wn.2d 448, 464, 238 P.3d 461 (2010). While “double jeopardy does not require permanent, unconditional vacation of the lesser of the two convictions for the same criminal conduct,” *Id.* at 455-61, the lesser conviction should be vacated, *State v. Womac*, 160 Wn.2d 643, 649-65, 160 P.3d 40 (2007), and “a judgment and sentence must not include any reference to the vacated conviction –nor may an order appended thereto include such a reference.” *Turner*, 169 Wn.2d at 464-65. In short, “explicit conditional vacation of a lesser conviction,” whether oral or written, “violates double jeopardy.” *Id.* at 465 (emphasis added).

However, “it remains the law that a lesser conviction previously vacated on double jeopardy grounds may be reinstated if the defendant’s conviction for a more serious offense based on the same act is subsequently overturned on appeal.” *Turner*, 169 Wn.2d at 466.

“Claims of double jeopardy are questions of law, reviewed de novo.” *In Re Newlun*, 158 Wn. App. 28, at 32, 240 P.3d 795 (2010); *In re Francis*, 170 Wn.2d 517, 523, 242 P.3d 866 (2010); *State v. Hughes*, 166 Wn.2d 675, 681, 212 P.3d 558 (2009); *State v. Martin*, 149 Wn. App. 689, 693, 205 P.3d 931 (2009); *State v. Knight*, 162 Wn.2d 806, 810, 174 P.3d 1167 (2008).

“The appropriate remedy for a double jeopardy violation is vacating the offending conviction.” *Francis*, 170 Wn.2d at 532; *Knight*, 162 Wn.2d at 812.

In the present case, the sentencing court found, with respect to Defendant Ross, (1) that the convictions of second degree assault, as charged in counts IV and X, would violate double jeopardy protections given the convictions of first degree robbery in counts III and IX, (2) that conviction of the conspiracy charged in count VII would violate double jeopardy provisions given the conviction of conspiracy charged in count I, and (3) that the conviction of unlawful imprisonment charged in count V

would violate double jeopardy protections given the conviction of first degree robbery charged in count III. CP 744.

Similarly, the court found, with respect to Defendant Oeung, that the convictions of second degree assault, as charged in counts XVIII and XIX, would violate double jeopardy protections given the convictions of first degree robbery in counts XVI and XVII. CP 359.

With respect to Defendant Ross, the court apparently attempted to remedy this by dismissing counts IV, V, VII, and X without prejudice, CP 744, and with respect to Defendant Oeung, it dismissed counts XVIII and XIX without prejudice. CP 359.

Because “a court may violate double jeopardy” by either “conditionally vacating the lesser conviction while directing, in some form or another, that the conviction nonetheless remains valid[,]” or including “any reference to the vacated conviction,” *Turner*, 169 Wn.2d at 464-65, the sentencing court here violated double jeopardy provisions by dismissing these counts without prejudice.

Instead, “[t]he appropriate remedy for a double jeopardy violation is vacating the offending conviction.” *Francis*, 170 Wn.2d at 532.

Therefore, these cases should be remanded so that the sentencing court may vacate, rather than dismissing without prejudice, Defendant

Ross's count IV, V, VII, and X and Defendant Oeung's count XVIII and XIX convictions.

Defendant Oeung also argues that, because the jury returned two guilty verdicts pertaining to count XIV, CP 315-16, one of these verdicts should be vacated. BOAO, p. 67-69. The law does not so require.

Because the sentencing court neither "reduc[ed] to judgment both... convictions for the same offense [n]or... conditionally vacat[ed] [one] conviction while directing, in some form or another, that the conviction nonetheless remains valid," it did not violate double jeopardy by receiving the verdict and taking no further action.

Therefore, the second verdict need not be vacated.

Rather, the cases should be remanded solely for the purpose of vacating, rather than dismissing without prejudice, Defendant Ross's count IV, V, VII, and X, and Defendant Oeung's count XVIII and XIX convictions, all of which were found by the trial court to be violative of double jeopardy convictions if allowed to stand along with other convictions.

D. CONCLUSION.

Defendants' right to a public trial was sustained because the *Sublett* experience and logic test confirms that the trial court did not close the courtroom in hearing peremptory challenges in this case.

The trial court properly denied Defendants' motion for a mistrial.

Defendants failed to meet their burden of showing prosecutorial misconduct by failing to show improper conduct or prejudice.

Defendants' convictions and enhancements should be affirmed because, viewing the evidence in the light most favorable to the State, there is sufficient evidence from which a rational trier of fact could have found the essential elements of the charged crimes and enhancements beyond a reasonable doubt.

The sentencing court properly counted Defendants' convictions as separate and distinct rather than as same criminal conduct under RCW 9.94A.589(1)(a).

Defendant Ross failed to show ineffective assistance of counsel because he failed to show that his trial counsel's performance was deficient or prejudicial.

The Defendants failed to preserve any alleged err in the trial court's instructions on the firearm enhancements, and even had they preserved the issue, the trial court properly instructed the jury on the enhancements.

Defendants' convictions should be affirmed because a jury unanimity instruction was not required since the exact firearm used was not an element of the crimes or enhancements charged, and even were this not the case, any error was harmless.

Because there was no trial error committed, the cumulative error doctrine is inapplicable.

The trial court properly imposed a standard range sentence in Defendant Oeung's case.

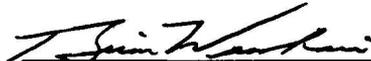
Therefore, Defendants' convictions and sentences should be affirmed.

However, the cases should be remanded solely for the purpose of vacating, rather than dismissing without prejudice, Defendant Ross's count IV, V, VII, and X, and Defendant Oeung's count XVIII and XIX convictions, all of which were found by the trial court to be violative of

double jeopardy convictions if allowed to stand along with the other convictions.

DATED: July 17, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney


BRIAN WASANKARI
Deputy Prosecuting Attorney
WSB # 28945

Certificate of Service:

The undersigned certifies that on this day she delivered by US 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.

7-17-15 
Date Signature

PIERCE COUNTY PROSECUTOR

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