

NO. 46921-9-II (Consolidated appeal)

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

STATE OF WASHINGTON, Respondent

v.

BRANDON MICHAEL ENGLISH
and CALVIN JAMES QUICHOCHO, Appellants

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NOS.13-1-02318-1 and
14-1-00672-1

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **Defendants' right to a public trial and right to be present were not violated when the parties' attorneys exercised juror challenges at the bench because the procedure does not constitute a courtroom closure and both defendants were present during the voir dire process.**
- II. **Defendants did not receive ineffective assistance when their attorneys chose not object to the admission of (1) a detective's question during Quichocho's interrogation; and (2) the fact that a cooperating witness agreed to testify truthfully because the evidence was properly admissible and there was tactical reasons for not objecting even if the evidence was inadmissible at the time it was offered.**
- III. **The State presented sufficient evidence to support the firearm enhancements.**
- IV. **The State concedes that the trial court should have vacated the defendants' Assault in the Second Degree convictions because those convictions merged with the convictions for Robbery in the First Degree.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Brandon Michael English and Calvin James Quichocho were charged by second amended information with two counts of Robbery in the First Degree, two counts of Kidnapping in the First Degree, and two counts of Assault in the Second Degree for an incident occurring on or

about December 4, 2013. Quichocho CP 8-10. Each charge also contained a firearm enhancement. Quichocho CP 8-10. The case proceeded to trial before The Honorable Barbara Johnson which commenced on October 13, 2014 with the selection of the jury, and concluded on October 23, 2014, with the jury's verdicts. RP 107-1642.

The jury found the defendants guilty as charged and the trial court sentenced each to a total standard range sentence of 456 months, which included the firearm enhancements. Quichocho CP 94-105, 112-121; English CP 135-146, 311-321; RP 1676-77. Both defendants filed timely notices of appeal. Quichocho CP 126; English CP 310.

B. FACTUAL HISTORY

On the afternoon of December 4, 2013, 19-year-old Austin Bondy and 17-year-old Brittany Horn were at their friend Colby Haugen's apartment waiting for him to come home from work. RP 431-33, 473, 548-49, 552. There was a knock at the door and Bondy answered it. RP 436, 554. At the door were three people, John Lujan, Brandon English, and Calvin Quichocho. RP 436-37, 440-42, 495, 838-39. They were let inside by Bondy because he and Horn knew Lujan as Lujan lived in the same apartment complex and was an acquaintance of Haugen's. RP 432, 442-43, 554-55. Lujan, English, and Quichocho stated that they had come

to Haugen's apartment because they wanted to buy marijuana, which Haugen was known to sell. RP 442, 474-75, 556.

Once everyone was inside the apartment, Bondy went into the kitchen to weigh out the marijuana that was requested. RP 443, 462. He was not able to finish, however, as Quichocho came into the kitchen, pulled out a revolver, and pointed it right at his face. RP 443-45, 461-62. Quichocho demanded "the money," but Bondy did not know what he was talking about. RP 446, 841. At the same time, while Horn was talking to Lujan, English shoved Lujan onto the couch and then onto the floor. RP 558, 839-40. Quichocho then ordered Bondy and Horn to the ground at gunpoint, and had them laying face first on the kitchen floor. RP 447-48, 462, 501, 560-63. Horn was terrified and thought she was going to die. RP 560-61. While on the ground, Bondy was able to see a bullet in the gun and Quichocho told Bondy that the bullet was for him. RP 445, 561.

Quichocho and English took the marijuana that was left, an Xbox, video games, a backpack, iPod, Bondy's wallet, Horn's purse and phone, and a change jar. RP 336-67, 447, 562-63, 567-68. Quichocho, by gunpoint, then ordered Bondy and Horn to stand up and made Lujan tie them up with the cords from hair clippers and headphones. RP 448-49, 456, 462, 563-64, 843-44. Lujan was then ordered to lie down on the

ground. RP 565, 844-45. Lujan thought he was going to die. RP 845.¹ Quichocho told English to take Horn back into a closet. RP 565-66, 845-46. At this point, Horn believed she was going to be raped or killed. RP 565-66. Bondy was then led back to the same closet. RP 845-46. As Bondy was being walked back to and put into the closet he thought he was going to die. RP 447-49.

Once in the closet, Quichocho told them to “[s]tay in here for an hour or I’ll come back and kill you” and the door was shut on Bondy and Horn. RP 455, 566, 846. While Bondy and Horn were shut in the closet they heard shuffling, things dropping, and running on stairs. RP 457, 575. After about ten to fifteen minutes, Lujan came into the closet, untied Bondy and Horn, and told them he needed to leave. RP 458, 466, 477, 502, 576, 846-47. Eventually, when Haugen returned to the apartment, 911 was called, and the events were reported. RP 458-460, 576-77, 579. At trial, both Bondy and Horn identified English and Quichocho as their assailants and during the police investigation both identified Quichocho from a photomontage, while Horn identified English from a photomontage albeit with some uncertainty. RP 435, 440-41, 443-44, 572-74, 604-08, 615, 758-59.

¹Lujan was involved in the planning of the robbery and expected to be involved but, according to him, he did not know that he was going to play the role of victim, that people would be tied up, or that a gun was going to be involved. RP 839-41, 843, 845.

That same night, when Lujan returned to his home the police were waiting for him. RP 848. Initially, he did not tell them the full story, but would later tell them everything. RP 848, 856. Lujan identified English and Quichocho as the two who committed the robbery with him. RP 839-840, 848-852. He identified English by name because he knew him and picked Quichocho out of a photo montage; he would later identify each in court as participants in the robbery. RP 762, 833, 837-38, 848-856. Lujan also explained that he, a friend of his named Juan Alfaro, and English had been planning on robbing Haugen prior to December 4. RP 822-24, 829, 834-35. Alfaro would testify, confirm the plans, and indicate he saw English with a revolver the day before the robbery. RP 681-692.² In fact, the three went to Haugen's apartment to purchase marijuana on December 3, and used the opportunity to plan their robbery.³ RP 682-84.

Lujan testified pursuant to a plea agreement in which he plead to a reduced charge of Robbery in the Second Degree. RP 855-56.

Nonetheless, in all important respects, Lujan's testimony about what happened inside Haugen's apartment on December 4 mirrored the

² Text messages exchanged between Lujan and Alfaro both before and after the robbery corroborated their trial testimony as the two discussed the plan, the robbery that occurred, and what property was taken. RP 684-688, 944-950. These text messages were discussed at trial and were admitted into evidence. RP 684-688, 944-950.

³ At trial Lujan testified that English was not present at Haugen's apartment on December 3, but Alfaro, Haugen, and Bondy testified otherwise and Alfaro identified English from a photo montage prior to trial when asked by police who he was with on December 3. RP 372-74, 434-35, 682-83, 690-91, 824

testimony provided by Bondy and Horn. *See* RP 818-856. Moreover, English's claim to police that he did not know Lujan was refuted by Lujan's relatives, to include Lujan's little brother A.L., who testified that English had showed him the revolver and told him of his plan to "hit a lick," i.e., commit a robbery. RP 729-730, 734-737 ("Brandon [English] comes up to me asks -- he said, 'Look.' And he showed me a gun and said that night that he was planning on hitting a lick."), RP 1123, 1131, 1135. In fact, English attended a belated Thanksgiving dinner at the Lujans' home. RP 713, 733, 832.

Additionally, Lujan, who initially did not know Quichocho's name, told the police that Quichocho was associated with a gray Impala with a Guam sticker on the rear window as he saw him leaning on one on the day of the robbery. RP 836-37, 872. Police would find a gray Impala with a Guam sticker parked in the garage of Quichocho's residence. RP 760-61, 795, 837, 1220. Like English, during Quichocho's interrogation by police he (Quichocho) denied knowing Lujan and he also denied knowing English. RP 891-922.

The police would ultimately seize a green iPhone associated with English and cellphone from the pocket of Quichocho. RP 626-27, 634, 636-37, 745-46, 756-57, 763. The police used specialized software to

extract data from each phone and generate reports, which linked the three robbers. RP 1145-1169. The reports showed calls made on the day of the robbery from English's phone to a contact with Quichocho's nickname, Lil Huss, text messages from English's phone referencing a "45" and "bullets," multiple calls between English's phone and Lujan's phone on the day of the robbery, and a text message from Quichocho's phone to English's phone the night before the robbery. RP 810, 1145-1169, 1219.

ARGUMENT

I. Defendants' right to a public trial and right to be present were not violated when the parties' attorneys exercised juror challenges at the bench because the procedure does not constitute a courtroom closure and both defendants were present during the voir dire process.

Defendants claim that the exercise of juror challenges at the bench violated their right to a public trial and that their absence from the bench when these challenges occurred violated their right to be present. Our Supreme Court in *State v. Love* recently dispatched of both arguments. 183 Wn.2d 598, 354 P.3d 841 (2015).⁴ *Love* held that practice of exercising juror challenges at the bench does not violate the right to a public trial because the practice does not constitute a "courtroom closure" since the challenges are "made in open court, on the record, and subject to

⁴English appropriately acknowledges *Love* rejected his arguments and notes the need to nevertheless raise the issues for preservation purposes. Brief of Appellant English at 15 FN 12.

public scrutiny.” *Id.* at 606-607. Similarly, *Love* held that the absence of a defendant from the bench when the challenges occur does not violate a defendant’s right to be present unless the record establishes that defendant was not present in the courtroom during voir dire or that the defendant “could not consult with his attorney about which jurors to challenge or meaningfully participate in the process.” *Id.* 608.

Here, the challenges for cause were done out loud and on the record with the defendants present and the jury panel excused. RP 164-172, 250-51. The peremptory challenges began this way as well before Quichocho’s counsel requested the panel to return to the courtroom to aid in the exercise of those challenges. RP 252-56. It was at this point that the attorneys proceeded to bar or bench to finish the peremptory challenges. RP 260-66.

Ultimately, however, the jury selection process that was utilized at Defendants’ trial is legally indistinguishable from the process at issue in *Love*. Thus, *Love* requires that Defendants’ public trial claim fails. Likewise, the record here, as in *Love*, does not establish that either Defendant was absent during the voir dire process or unable to consult with their attorneys about the process. *See* RP. Because courts do “not, for the purpose of finding reversible error, presume the existence of facts as to which the record is silent,” Defendants’ right to be present claim

necessarily also fails. *Love*, 183 Wn.2d at 608 (quoting *Barker v. Weeks*, 182 Wn. 384, 391, 47 P.2d 1 (1935)).

II. Defendants did not receive ineffective assistance when their attorneys chose not object to the admission of (1) a detective's statement during Quichocho's interrogation; (2) a detective's question during Quichocho's interrogation and (3) the fact that a cooperating witness agreed to testify truthfully because the evidence was properly admissible and there were tactical reasons for not objecting even if the evidence was inadmissible at the time it was offered.

A defendant has the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That said, a defendant is not guaranteed successful assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). The defendant must make two showings in order to demonstrate ineffective assistance: (1) that counsel's performance was deficient and (2) that counsel's ineffective representation resulted in prejudice. *Strickland*, 466 U.S. at 687. A court reviews the entire record when considering an allegation of ineffective assistance. *State v. Thomas*, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). Moreover, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's

perspective at the time.” *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 689).

a. Deficient Performance

The analysis of whether a defendant’s counsel’s performance was deficient starts from the “strong presumption that counsel’s performance was reasonable.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); *State v. Hassan*, 151 Wn.App. 209, 217, 211 P.3d 441 (2009) (“Judicial scrutiny of counsel’s performance must be highly deferential.”) (quotation and citation omitted). Thus, “given the deference afforded to decisions of defense counsel in the course of representation” the “threshold for the deficient performance prong is high.” *Grier*, 171 Wn.2d at 33. This threshold is especially high when assessing a counsel’s trial performance because “[w]hen counsel’s conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.” *Id.* (quoting *Kylo*, 166 Wn.2d at 863); *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (“[T]his court will not find ineffective assistance of counsel if the actions of counsel complained of go to the theory of the case or to trial tactics.” (internal quotation omitted)). On the other hand, a defendant “can rebut the presumption of reasonable performance by demonstrating that ‘there is no conceivable legitimate tactic explaining

counsel's” decision. *Id.* (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

1. Opinion Testimony

The general rule is that “no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant ‘because it invad[es] the exclusive province of the [jury].’” *State v. Demery*, 144 Wn.2d 753, 30 P.3d 1278 (2001) (alterations in original) (quoting *City of Seattle v. Heatley*, 70 Wn.App. 573, 577, 854 P.2d 658 (1993)). Nonetheless, our courts have consistently “declined to take an expansive view of claims that testimony constitutes an opinion of guilt.” *Id.* (citations omitted). Accordingly, for example, in *Demery* our Supreme Court held that statements by an officer as part of an interrogation that accuse the defendant of lying do not constitute improper opinion testimony because such “statements are part of a police interview technique commonly used to determine whether a suspect will change her story during the course of an interview . . . and are admissible to provide context to the relevant responses of the defendant.” *Id.* at 760-62, 764-65. In other words, such statements are “not an expression of [an officer’s] personal beliefs,” but instead are part of an interrogation tactic. *State v. Curtiss*, 161 Wn.App.

673, 697, 250 P.3d 496 (2011) (citations omitted); *State v. Notaro*, 161 Wn.App. 654, 669-670, 255 P.3d 774 (2011).

Here, Quichocho complains that his trial attorney performed deficiently when he chose not to object to the admission of a portion of Quichocho's interrogation where a detective said to Quichocho: "And you're not helping us disprove things. Because, to be quite honest with you, man, I don't think you are being honest with us." RP 907; Br. of App. Quichocho at 14.⁵ This portion of the interrogation happened right after the following exchange:

DETECTIVE GRANNEMAN: Well, I need you to take a minute, man, because there's a lot of evidence here –

MR. QUICHOCHO: Uh-huh.

DETECTIVE GRANNEMAN: -- that suggests you're involved.

MR. QUICHOCHO: Right.

DETECTIVE GRANNEMAN: And it's tough when you're going to -- you're going to sit there and you say, "Well, I – I don't know how I can be involved. I don't know any of these people." I mean, you're not -- you're not helping yourself out.

MR. QUICHOCHO: Right.

RP 907.

⁵ Prior to playing the interrogation in front of the jury the State and Quichocho had already gone through the entire interrogation and agreed to a redacted version that resulted from Quichocho's suggestions. RP 801-04. This version was played for the jury.

In context, the statements at issue were plainly “part of a police interview technique commonly used to determine whether a suspect will change her story during the course of an interview . . . and [were] admissible to provide context to the relevant responses of” Quichocho. *Demery*, 144 Wn.2d at 760-62. Thus, the complained about statement was not “not an expression of [Det. Granneman’s] personal beliefs” and not an improper opinion. *Curtiss*, 161 Wn.App. at 697. Therefore, Quichocho correctly did not object to the admission of the above portion of the interview, as it was properly admissible. Moreover, it was a reasonable tactic not to object even if the statement was inadmissible because it allowed Quichocho to show that despite an aggressive interrogation he maintained his innocence and a lack of a connection to the others involved in the crime. Because he did not testify this was his only way to introduce his denial. Consequently, regardless of the admissibility of the statements Quichocho’s counsel’s performance cannot be deemed deficient since his “conduct can be characterized as legitimate trial strategy or tactics.” *Grier*, 171 Wn.2d at 33.

2. *Confrontation Right*

Generally, a defendant’s right to confront witnesses is violated by the admission of a co-defendant’s testimonial statement when the co-defendant does not testify and the admitted statement inculcates the

defendant. *Bruton v. U.S.*, 391 U.S. 124, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1986). Testimonial statements may be admitted, however, if they are “offered for purposes other than to prove the truth of the matter asserted” without violating the defendant’s confrontation rights. *State v. Davis*, 154 Wn.2d 291, 301, 111 P.3d 844 (2005) *aff’d Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 266, 165 L.Ed.2d 224 (2006); *Crawford v. Washington*, 541 U.S. 36, 59 FN 9, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). “There is no doubt that Washington decisions following *Crawford* recognize that [w]hen out-of-court assertions are not introduced to prove the truth of the matter asserted, they are not hearsay and no confrontation clause concerns arise.” *In re Theders*, 130 Wn.App. 422, 433, 123 P.3d 489 (2005) (internal quotations omitted) (alterations in original); *But see State v. Mason*, 160 Wn.2d 910, 921-22, 162 P.3d 396 (2007) (musing in *dicta* that “we are not convinced a trial court’s ruling that a statement is offered for a purpose other than to prove the truth of the matter asserted immunizes the statement from confrontation clause analysis.”).

Here, Quichocho asserts that the State violated his confrontation rights when it played for the jury his tape-recorded interrogation with Det. Granneman and the following exchanged occurred:

DETECTIVE GRANNEMAN: Okay. Brandon English knows you.

MR. QUICHOCHO: I don't even know him.

DETECTIVE GRANNEMAN: Then why does he say he knows you?

MR. QUICHOCHO: The other person -- the other two people (inaudible) me --

Br. of App. Quichocho at 15-16; RP 914. Admission of the exchange at issue did not violate Quichocho's confrontation rights for numerous reasons: 1) as argued above, the detective's statement and question were part of an interrogation tactic; 2) the detective's statement and question were not offered to prove the truth of the matter asserted but to provide context to the interrogation and Quichocho's answers; 3) the detective's statement and question were *his own statements* and not testimonial statements of co-defendant English—no other evidence was admitted suggesting English made a testimonial statement in which he said he knew Quichocho—and; 4) even assuming English made the statement, the statement is not inculpatory. Consequently, the admission of the exchange is properly understood as the admission of Det. Granneman's statements as part of an interrogation tactic and not as the admission of co-defendant English's testimonial statement inculpatory Quichocho. Therefore, there was no violation of Quichocho's confrontation rights and concomitantly Quichocho cannot show his counsel's performance was deficient. Additionally, as also argued above, even assuming the statement was

inadmissible it was a reasonable tactic not to object because it allowed Quichocho to show that despite an aggressive interrogation he maintained his innocence and lack of a connection to the others involved in the crime.

3. *Vouching*

“Improper vouching generally occurs (1) if the prosecutor expresses his or her personal belief as to the veracity of the witness or (2) if the prosecutor indicates that evidence not presented at trial supports the witness's testimony.” *State v. Ish*, 170 Wn.2d 190, 196, 241 P.3d 389 (2010) (citation omitted). Vouching is improper because “[w]hether a witness has testified truthfully is entirely for the jury to determine.” *Id.* Consequently, evidence that as part of a cooperation agreement a “witness has agreed to testify truthfully . . . should not be admitted as part of the State’s case in chief.” *Id.* at 198. Thus, the prosecutor in *Ish* improperly vouched for the cooperating witness when he asked him: “[w]ith regard to exchanging testimony in this case, what type of testimony?” and the informant answered “[t]ruthful testimony” and then on redirect, reiterated the agreement to testify truthfully, and implied that the State would revoke the agreement if the witness breached it. *Id.* at 192-94.

That said, “where ‘there is little doubt’ that the defendant will attack the veracity of a State’s witness during cross-examination, for example, the State is entitled to engage in preemptive questioning of its

witness on direct to ‘take the sting’ out of the inevitable damaging cross-examination.” *State v. Smith*, 162 Wn.App. 833, 850, 262 P.3d 72 (2011) (quoting *Ish*, 170 Wn.2d at 199 FN 10). Nonetheless, “[if] the agreement contains provisions requiring the witness to give truthful testimony, the State is entitled to point out this fact on redirect if the defendant has previously attacked the witness's credibility.” *Ish*, 170 Wn.2d at 199.

Here, the defendants’ claim that the State improperly vouched for the cooperating witness Lujan when the following exchanged occurred:

[STATE] Now, were you, in fact, charged with a crime based out of this case -- charged with robbery?

[LUJAN] Yes.

[STATE] And at some point down the road were you made a plea bargain?

[LUJAN] Yes.

[STATE] Okay. And was that plea bargain for reduced charges?

[LUJAN] Yes.

[STATE] In exchange . . .

[LUJAN] To testify truthfully.

[STATE] Okay. So the offer indicated to testify truthfully?

[LUJAN] Yes.

RP 855; Br. of App. English at 24-28⁶; Br. of App. Quichocho at 21-22. In addition, the State asked Lujan if his story had changed “just because you got this offer to testify truthfully, has it?” to which Lujan responded: “No.” RP 856.

Lujan was cross-examined extensively by both defendants and his credibility was attacked immediately and numerous times. RP 856-882, 932-955, 966-69. In fact, English interrogated him about the existence of the cooperation agreement, his reduction in charges and sentence, and his agreement to testify truthfully. RP 939-41. Because of Lujan’s role as a cooperating witness who was involved in the charged crimes, and as the cross-examination shows, the State correctly anticipated an attack on Lujan’s credibility “based on his plea agreement.” *Smith*, 162 Wn.App. at 851. Therefore, the State was “entitled to engage in preemptive questioning of its witness on direct to ‘take the sting’ out of the inevitable damaging cross-examination.” *Id.* at 850, (quoting *Ish*, 170 Wn.2d at 199 FN 10).

⁶ English fails to argue why this Court should consider this issue for the first time on appeal or what the standard of review is for this type of error. Because this type of “vouching” is considered prosecutorial misconduct he must show that the examination was so “flagrant and ill-intentioned” that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *Smith*, 162 Wn.App. at 848 (citing *State v. Weber*, 159 Wn.2d 252, 270, 149 P.3d 646 (2006)). A failure to show that, let alone argue it, constitutes waiver. *Id.* at 851. Quichocho, on the other hand, adopts English’s argument but adds that if the error is deemed waived it should be considered as ineffective assistance of counsel. Br. of App. Quichocho at 21-22.

Thus, neither defendant suffered from the deficient performance of counsel when both properly did not object to the State's permissible preemptive questioning of Lujan regarding his cooperation agreement. Moreover, the tactical reason for not doing so is plain on its face; the agreement to testify truthfully *was* going to be introduced at some point during Lujan's testimony so no real benefit would be gained by objecting and, presumably, in the eyes of the jury an objection to the question of whether someone has agreed to testify truthfully would reflect poorly on counsel.

b. Prejudice

In order to prove that deficient performance prejudiced the defense, the defendant must show that "counsel's errors were so serious as to deprive [him] of a fair trial. . . ." *State v. Greer*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 687). In other words, "the defendant must establish that 'there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.'" *Id.* at 34 (quoting *Kyllo*, 166 Wn.2d at 862).

"In assessing prejudice, 'a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law' and must 'exclude the possibility of arbitrariness, whimsy, caprice, nullification and the like.'" *Id.* (quoting

Strickland, 466 U.S. at 694–95). Moreover, when juries return guilty verdicts reviewing courts “must presume” that those juries actually found the defendants “guilty beyond a reasonable doubt” of those charges. *Id.* at 41. Additionally, when it comes to the admission of improper opinion testimony, absent evidence the jury was unfairly influenced reversible error will not be found “where the trial court properly instructs the jury . . . that it is the sole judge of witness credibility and not bound by witness opinions.” *Curtiss*, 161 Wn.App. at 697-98 (citing *State v. Montgomery*, 163 Wn.2d 577, 595-96, 183 P.3d 267 (2008) (*State v. Kirkman*, 159 Wn.2d 918, 937-38, 155 P.3d 125 (2007)).

Here assuming any one of the above errors, or all of them, the defendants cannot establish prejudice. Neither was denied a fair trial. They were identified as the perpetrators of the crimes by Bondy, Horn, Haugen⁷, and Lujan through photo montages and/or at trial, linked together by call logs and text messages, physical evidence, such as the Impala with the “Guam” sticker corroborated Quichocho’s involvement, and English told another about his plan to “hit a lick” and showed others the gun prior to the robbery. The evidence was overwhelming.

⁷ Haugen only identified English.

III. The State presented sufficient evidence to support the firearm enhancements.

Evidence is sufficient to support a conviction if, when viewed in a light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The same is true of sentencing enhancements. *State v. Hennessey*, 80 Wn.App. 190, 194, 907 P.2d 331 (1995). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533 (1992).

If a defendant or an accomplice is armed with a firearm during the underlying offenses for which the defendant is convicted he or she may be subject to a firearm sentencing enhancement. RCW 9.94A.533(3). A firearm, for the purposes of the enhancement, is defined as a “weapon or device from which a projectile may be fired by an explosive such as gunpowder.” CP 47; RCW 9.94A.533(3), RCW 9.41.010(9). Moreover,

“gun” has the same meaning as firearm. RCW 9.41.010(10). Essentially, what the State must prove is that the firearm “is a ‘gun in fact’ rather than a ‘toy gun.’” *State v. Raleigh*, 157 Wn.App. 728, 734, 238 P.3d 1211 (2010) *rev denied*, 170 Wn.2d 1029 (2011) (quoting *State v. Faust*, 93 Wn.App. 373, 380, 967 P.2d 1284 (1998)).

The Defendants argue that the State presented insufficient evidence to support the firearm enhancements because the State did not present sufficient evidence of a firearm’s operability. Br. of App. Quichocho at 17-20; Br. of App. English at 28-30. Both also rely on *State v. Recuenco* and *State v. Pierce*⁸ for their contention that in order to prove a firearm enhancement the State must present evidence of operability. 163 Wn.2d 428, 190 P.3d 1276 (2008); 155 Wn.App. 701, 230 P.3d 237 (2010). *Recuenco*, in fact, does state that “a jury must be presented with sufficient evidence to find a firearm operable under this definition in order to uphold the enhancement.” 163 Wn.2d at 437.

This court, however, in *State v. Raleigh*, analyzed *Recuenco* in depth and held that the statement quoted above “was not part of *Recuenco’s* holding and is non-binding *dicta*.” 157 Wn.App. at 735.

⁸ *Pierce* simply cites *Recuenco* for the same proposition but does not analyze or address the conflicting authorities. 155 Wn.App. at 713-15.

Raleigh, thus adhered to *State v. Faust*,⁹ which had rejected the argument that “a gun that is incapable of being fired during the crime due to mechanical defect is not a ‘firearm’ for purposes of sentence enhancement.” *Id.* at 736; 93 Wn.App. at 375-76, 380-81; *see also State v. Berrier*, 110 Wn.App. 639, 645, 41 P.3d 1198 (2002) (noting that “even an inoperable firearm is still a firearm under RCW 9.41.010[], and thus a trial court may rely on possession of such a firearm to impose a firearm sentence enhancement. . . .”). The holdings in *Raleigh* and *Faust* are well-founded because an inoperable gun, like an unloaded one, “creates the same apprehension in the victim and . . . can be loaded, [or made operable,] during the commission of a crime, and, therefore, has the same potential to inflict violence.” 93 Wn.App. at 381¹⁰ (citing *State v. Sullivan*, 47 Wn.App. 81, 84 733 P.2d 598 (1987)); *State v. Faille*, 53 Wn.App. 111, 115, 766 P.2d 478 (1988).

This court should continue to abide by its decision in *Raleigh* and hold that for the purposes of proving a firearm enhancement the State must present sufficient evidence that a firearm is a “gun in fact.” 157 Wn.App. at 734. Even if, however, this court determines that the State must prove the operability of the firearm in question it must acknowledge that the

⁹ “[Defendant] argues that *Recuenco* overruled *Faust sub silencio*. It does not.” *Raleigh*, 157 Wn.App. at 735.

¹⁰ *Faust* notes on the same page that “a malfunctioning gun can be fixed.” *Id.*

quantum of evidence necessary to establish operability in an insufficiency claim is low. This is because all evidence is taken in the light most favorable to the State and because operability may be inferred from evidence showing a threat to use a real gun or from evidence that witnesses saw what they believed to be a real gun. *State v. Hentz*, 99 Wn.2d 538, 541, 663 P.2d 476 (1983) (holding a defendant's "express verbal threat to 'shoot' his victim necessarily implied he had access to a firearm *capable* of killing or seriously injuring his victim.") (emphasis added); *State v. Mathe*, 35 Wn.App. 572, 581-82, 668 P.2d 599 (1983) *aff'd* 102 Wn.2d 537, 688 P.2d 859 (1984); *State v. Goforth*, 33 Wn.App. 405, 411-412, 655 P.2d 714 (1982).

Here, the State presented sufficient evidence that the defendants were armed with a "gun in fact" during the commission of their crimes and that any gun used was operable. Horn, in describing the defendants' crimes, explained that "the guy with the gun"¹¹ . . . then turned and pointed the gun at me, told me to get in the kitchen, get on the ground." RP 560, 563. She also testified that later when the gun was pointed at Bondy, as he was on the ground, she heard the defendant holding it say that "the bullet was for him." RP 561. And while Horn indicated that she was not that familiar with guns, she was still able to describe the gun at issue as the

¹¹ Horn identified the "guy with the gun" as Quichocho both before and at trial. RP 574-75.

type that has a round cylinder in which bullets are placed rather than the type in which a clip or magazine ejects out of the bottom of the handle. RP 561-62, 584 (“I wasn’t looking at his hand. I was looking at the gun.”). Furthermore, she reported that after she and Bondy were ordered into the closet “the short one with the gun told us ‘Stay in here for an hour or I’ll come back and kill you.’” RP 566.

Additionally, Bondy testified that Quichocho “pulled a gun out on” him. RP 443-44. Similar to Horn, Bondy explained he was not very familiar with guns. RP 444. Nevertheless, he was able to describe the type of gun, “[i]t was a revolver,” and stated that it had a revolving chamber where the bullets go, that he was able to see a bullet in the chamber, and that the bullet “was metal.” RP 444-45.¹² Quichocho told him “that that bullet was for [him].” RP 445-46.

Lujan, the third member of the robbery team, also indicated that Quichocho was armed with a gun during the robbery and that he (Quichocho) was pointing it at him and the victims. RP 840-41, 843, 845. In fact, when Quichocho ordered Lujan to lie down on the kitchen floor by gunpoint, he (Lujan) was thinking “I’m dead.” RP 845. Even Lujan’s little brother, A.L., was aware of the gun as he saw English before the robbery with a gun that he (A.L.) described as a “6-cylinder,” and testified that

¹² He also disclaimed that the gun was the type in which a clip or magazine is placed in the bottom of the handle. RP 444.

English told him “I have a new gun,” and that he was “planning to hit a lick” (commit a robbery). RP 729-730, 734-737 (“Brandon comes up to me asks -- he said, ‘Look.’ And he showed me a gun and said that night that he was planning on hitting a lick.”)

Finally, Alfaro, who was involved in planning the robbery but did not participate, testified that the day before the robbery English showed him a revolver that had been wrapped in a black and white bandana. RP 691-692, 695. Alfaro’s confidence in his identification of the gun is exemplified in the following exchange with the State:

[STATE:] Are you aware that certain guns you load the magazine or the clip into the handle, and then certain guns you can load the bullets into a round cylinder?

[ALFARO:] It was a revolver.

[STATE:] It was a what?

[ALFARO:] Revolver.

RP 691.

The testimony from the above five witnesses present when the gun was used or displayed is sufficient evidence to establish that the defendants were armed with a “gun in fact” and that the gun was operable. Quichocho’s “express verbal threat[s] to ‘shoot’ his victim[s] necessarily implied he had access to a firearm capable of killing or seriously injuring his victim.” *Hentz*, 99 Wn.2d at 541. Moreover, the consistent

observations about the type of gun it was, the fear of death because of the gun—demonstrating sincere beliefs the gun was real and could effectuate its purpose—and Bondy’s ability to determine there was a metal bullet in the chamber of the gun corroborate the realness of the firearm and its operability. Furthermore, Lujan would not have thought he was going to die had one of his co-conspirators pulled out a toy or inoperable gun. And common sense tells us that English would not have told and showed A.L what he stated was a “new gun” if what he really had was a toy or broken gun. As a result, the State provided sufficient evidence to support the firearm enhancements and this court should decline Defendants’ invitation to vacate them.

IV. The State concedes that the trial court should have vacated the defendants’ Assault in the Second Degree convictions because those convictions merged with the convictions for Robbery in the First Degree.

Quichocho correctly argues that his convictions for Assault in the Second Degree violate his right to be free from being put in jeopardy twice for the same offense. Br. of App. Quichocho at 9 – 12. English adopts the same arguments. The assaults at issue, based on the use of a deadly weapon, were used to elevate the robbery charges to Robbery in the First Degree. CP 8-10, 29-30, 42-43. When an assault elevates a robbery the two offenses are the same for double jeopardy purposes, that

is, they merge. *State v. Kier*, 164 Wn.2d 798, 194 P.3d 212 (2008); *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005). And when convictions merge the lesser offenses are to be vacated. *State v. Hughes*, 166 Wn.2d 675, 686 FN 13, 212 P.3d 558 (2009).

Here, it appears at sentencing that the State, at first, attempted to concede the issue and that the trial court was amendable to the suggestion. RP 1651. At the end of the sentencing, however, the trial court indicated she considered the assaults to be the same criminal conduct and the State acceded. RP 1677-78. Nonetheless, the assault convictions appeared on each defendant's judgement and sentence. Quichocho CP 112-121; English CP 311-321. Consequently, this court should remand the defendants' cases to the trial court for vacation of their convictions for Assault in the Second Degree.

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CONCLUSION

For the foregoing reasons, the State requests this Court to affirm the defendants' convictions and remand their cases to the trial court for vacation of their convictions for Assault in the Second Degree.

DATED this 25th day of November, 2015.

Respectfully submitted:

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