

NO. 46425-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

AZIAS ROSS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Linda Lee, Judge
The Honorable Thomas J. Felnagle, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. Insufficient evidence supports the firearm enhancements on counts 1, 2, 3, 4, 5, and 6 because the State failed to prove the firearm was operable.¹

2. For similar reasons, the court violated the appellant's right to a unanimous jury verdict on counts 1,² 8, 9, 11, and 13.³

Issues Pertaining to Supplemental Assignments of Error

The State charged the appellant with a number of counts with firearm enhancements based on home invasion robberies occurring in January and April of 2012. To prove a firearm enhancement, however, the State must introduce facts upon which the jury could find beyond a reasonable doubt the weapon in falls under the definition of a "firearm," that is, a weapon or device from which a projectile may be fired by an explosive such as gunpowder. This requires proof that the weapon or

¹ Ross raised a related issue in his Statement of Additional Grounds for Review (SAG), filed April 13, 2015.

² The court dismissed count 7, the April conspiracy count, based on double jeopardy, but extended the date of crime on count 1 to encompass the April incident. CP 741.

³ Ross previously raised this issue by adopting the co-appellant's related legal arguments. See Ross's March 16, 2015 RAP 10.1(g)(2) Notice to Adopt (attached as an Appendix). This brief is intended to supplement that argument.

device in question is operable. The State failed to present evidence that the robbers in either incident entered the homes with a real and operable firearm. However, as to the April robbery, the State presented evidence the robber took operable guns from the home.

1. Must this Court reverse and vacate the firearm enhancements as to the January incident based on insufficient evidence of firearm operability?

2. Must this Court reverse the firearm enhancements as to the April incident based on the violation of the appellant's right to a unanimous verdict as to the firearm enhancements?

B. SUPPLEMENTAL STATEMENT OF THE CASE⁴

For an incident occurring January 25, 2012, the State charged Azias Ross with conspiracy to commit first degree robbery and/or first degree burglary (count 1), first degree burglary (count 2), first degree robbery (count 3), second degree assault (count 4), unlawful imprisonment (count 5), and first degree trafficking in stolen property (count 6). CP 471-74.

For an April 27, 2012 incident, Ross was charged with conspiracy to commit first degree robbery and/or first degree burglary (count 7), first

⁴ The facts set forth in this Supplemental Statement of the Case are primarily those set forth in Ross's opening brief. They are included in this brief for the Court's convenience.

degree burglary (count 8), first degree robbery (count 9), second degree assault (count 10), unlawful imprisonment (count 11), theft of a firearm (count 12), and first degree trafficking in stolen property (count 13). CP 474-77.

The State alleged firearm enhancements for each of the January and April charges except count 12, theft of a firearm. CP 471-77.

The charges arose from the investigation of seven in-home robberies occurring in Tacoma between January and August of 2012. 11RP 612-13.⁵ The State alleged the same group of individuals committed the crimes, which primarily targeted Asian families. However, Ross was incarcerated on unrelated misdemeanor charges between May 9 and August 10, 2012 and was only charged with crimes occurring before and after that date. CP 625.

The relevant facts are as follows: Fifty-nine-year-old Soeung Lem moved to the United States from Cambodia in 1985 and testified through

⁵ This brief refers to the verbatim reports as follows: 1RP – 8/19/13; 2RP – 9/16/13; 3RP – 10/15/13; 4RP – 10/24/13 morning; 5RP – 10/24/14 afternoon; 6RP – 1/10 and 1/21/14; 7RP – 1/16/14; 8RP – 1/22/14; 9RP – 1/23/14; 10RP – 1/27/14; 11RP – 1/28/14; 12RP – 1/29/14; 13RP – 2/3/14; 15RP – 2/4/14; 16RP – 2/5/14; 17RP – 2/6/14; 18RP – 2/10/14; 19RP – 2/11/14 ; 20RP – 2/12/14; 21RP – 2/24/14; 22RP – 2/25/14; 23RP – 2/26/14; 24RP – 2/27/14; 25RP – 3/3/14; 26RP – 3/4, 3/5 and 6/5/14; and 27RP – 6/23/14.

an interpreter. On January 25, 2012, she lived in a house on the 9100 block of McKinley Avenue East in with four grown children. 12RP 794-97. Around 4 p.m., while Lem's children were at work, she took out the garbage through her back door. 12RP 798. Back inside, Lem heard her dog barking, which she found strange. Suddenly, a man grabbed her arm. 12RP 799. The man held a gun against her head and said in English, "Do you know what this is?" 12RP 799-800, 857. Lem screamed. In the Cambodian language, the man asked again, "Do you know what this is, grandma?" 12RP 801. Lem answered that she did.⁶ 12RP 801. Lem testified she was "scared to look at" the gun.⁷ 12RP 799.

Lem initially testified the man wore a mask covering his face from the nose down, 12RP 801, 857, but she later testified that she saw his forehead and moustache and noticed he had pimples on his face. 12RP 859-60.

The man moved Lem to the sofa in the family room and tied her hands with wire or cable. 12RP 802-04. The man asked Lem where the

⁶ Through an interpreting family member, Lem told a responding officer that she saw a silver and black handgun. 13RP 886-87.

⁷ See Ross's SAG at 9 (arguing insufficient evidence supports the enhancements because Lem never actually testified that she saw a gun).

gold was. 12RP 802. Lem told the man she didn't know where the gold was and that her children were at work. 12RP 802, 804.

At some point, Lem realized there was a second man present. He was searching the home. 12RP 803. The two men spoke to each other in English. 12RP 806.

The first man eventually covered Lem's face with her jacket. 12RP 805. The men remained in the home about 30 minutes after that. Before leaving, they removed the jacket and told Lem to wait 15 minutes before getting up. 12RP 805.

Lem eventually freed her hands and called family members, who called the police. 12RP 808-09. After the men left, Lem discovered they had taken her purse as well as \$4,000 in cash belonging to Lem's daughter. 12RP 817-20, 868-70. The men also took jewelry that Lem and her daughter. 12RP 821-23; 14RP 13; 20RP 1572-73; 23RP 2037-38, 2041-42.

Six months later, Lem picked Chouap out of a photomontage as the man who tied her hands. 12RP 826-27; 23RP 2038-39 (Detective Baker testimony).

Bora Kuch, 58 years old, was a more recent immigrant from Cambodia and also required an interpreter at trial. 11RP 626. She lived in a house at the 8200 block of South "G" Street in Tacoma with her

daughter, son-in-law, and two-year-old grandson. 11RP 626-29; 13RP 897. On April 27, 2012, at around 5:30 p.m., she was upstairs in her home with her grandson while the others were at work. 11RP 630-31. Kuch heard a pounding noise from downstairs but thought the sound came from her neighbor's home. After a period of quiet, she heard the sound again. 11RP 631-32. Kuch headed downstairs to investigate but met with two men before she got there. 11RP 632. One of the men pushed Kuch up the stairs and into her bedroom. There was a second man behind him. 11RP 633-34.

Kuch saw the first man's face before he covered it with one of Kuch's shirts. 11RP 634, 658. The man was "over 20 years old, long hair, with mustache." 11RP 635. He spoke to Kuch in Cambodian, although he did not speak the language fluently. 11RP 635-36.

Kuch did not get a good look at the second man, who spent his time searching the home. She noticed, however, that he was taller than the first. 11RP 636. Kuch heard the taller man talking on the phone during the incident and heard a woman's voice on the other end. 11RP 659.

Kuch and her grandson sat in Kuch's bedroom while the men went up and down the stairs looking for an implement to open a gun safe they had found. 11RP 637-38. The grandson watched television in that room throughout most of the incident. 11RP 645. The first man tied Kuch's

hands, but Kuch tried to open a window to get help. 11RP 638, 642-43. When the first man discovered Kuch doing this, he yelled, "You want to die?" and pointed a black gun at Kuch. 11RP 642. Kuch later untied her hand and went to her daughter's room, which she discovered had been ransacked. 11RP 644. The same man eventually tied her up again and took her back her to her bedroom. 11RP 645.

The men spent about 90 minutes at Kuch's residence. 11RP 638. Kuch gave the men \$500 in cash as well as jewelry belonging to Kuch's daughter and grandson. 11RP 649-50, 652-54.

The men eventually opened the gun safe using tools found in the home's garage. 11RP 648, 651, 657. One of the men showed Kuch a rifle that had been in the safe and said, "This is a nice gun, grandma." 11RP 652. The men put the handguns in the grandson's diaper bag and carried out the rifle in its case, although they left an older rifle. 11RP 653-54.

After the men left, Kuch called her daughter. 11RP 660. Kuch's son-in-law was contacted, and he called the police. 11RP 664.

Kuch's son-in-law, Fred Van Camp, testified that the house, which had been clean when Van Camp left for work, was in disarray when he returned. 12RP 723-24. Van Camp's gun safe was open and lay on its side. 12RP 724-25. There had been 10 guns in the safe, including six that belonged to Van Camp's friend, Sidoung Sok. Most were missing after

the robbery, as was a .357-caliber revolver that had been stored in the closet. 12RP 727-29.

Van Camp identified various guns from a photograph that was found on Ross's cell phone. 12RP 737-40; 23RP 2045-46. He testified his guns and Sok's guns were all operable. 12RP 744, 748-49; see also 19RP 15-25 (Sok testimony).

C. SUPPLEMENTAL ARGUMENT

1. INSUFFICIENT EVIDENCE SUPPORTS THE FIREARM ENHANCEMENTS ON COUNTS 1, 2, 3, 4, 5, AND 6 BECAUSE THE STATE FAILED TO PROVE THE FIREARM WAS OPERABLE.

Insufficient evidence supports the firearm enhancements on the January counts because the State failed to prove the firearm purportedly possessed by the robber was operable.

“[T]o 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. Pierce, 155 Wn. App. 701, 714, 230 P.3d 237 (2010) (quoting State v. Recuenco, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008) (quoting 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 2.10.01 (Suppl. 2005))). The State must present the jury with sufficient

evidence to find a firearm operable under this definition. Recuenco, 163 Wn.2d at 437 (citing State v. Pam, 98 Wn.2d 748, 754-55, 659 P.2d 454 (1983), overruled in part on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988)).

In Pierce, this Court held the State failed to present evidence from which a reasonable jury could find the firearm Pierce allegedly used during the commission of certain crimes was operable. During the incident supporting most of Pierce's enhancements, the victims noticed that an intruder, later determined to be Pierce, was holding "what appeared to be" a handgun. 155 Wn. App. at 705. The intruder directed the victims to cover their heads and then ransacked and robbed their home. Id.

The State argued it was not required to *produce* the weapon used to support a firearm enhancement. This Court did not disagree. However, this Court observed:

This may be true when there is other evidence of operability, such as bullets found, gunshots heard, or muzzle flashes. Although the evidence is sufficient to prove an element of the offense of robbery or burglary or a deadly weapon enhancement, where proof of operability is not required, the evidence here is insufficient to support the imposition of a firearm sentencing enhancement where proof of operability is required.

Pierce, 155 Wn. App. at 714 n.11 (citing Recuenco, 163 Wn.2d at 437; Pam, 98 Wn.2d at 754-55).

Finding the evidence of operability insufficient, this Court remanded to the superior court with directions that it dismiss the firearm enhancements and resentence Pierce without them. Pierce, 155 Wn. App. at 715.

As in Pierce, the State presented no evidence the purported gun used in the January incident was an operable weapon. Lem did not describe any tell-tale characteristics, such as bullets, gunshots, or muzzle flashes.⁸ As in Pierce, this Court should vacate the enhancements as to the January charges.

2. FOR SIMILAR REASONS, ROSS'S RIGHT TO A UNANIMOUS JURY WAS VIOLATED AS TO COUNTS 1, 8, 9, 11, AND 13.

The court violated Ross's right to a unanimous jury on the charges relating to the April incident. In closing, the State argued either the stolen guns, or, alternatively, a gun already possessed by the robbers, supported

⁸ Victims of later robberies associated with Ross's original co-defendants witnessed the removal of ammunition magazines or were shown bullets. 13RP 986 (testimony regarding May 10 incident); 14RP 38-39 (June 9 incident); 15RP 36 (June 17 incident); 16RP 1158 (June 29 incident). These robberies occurred after an incident in which real, operable guns were stolen. Thus, it would be improper to draw any inference from evidence presented as to the later robberies.

the enhancements as to those charges. For reasons similar to those set forth in the first argument section, however, the State presented insufficient evidence as to the operability of the latter. Thus, the court violated Ross's right to jury unanimity on the enhancements.

Criminal defendants in Washington have a right to a unanimous jury verdict. Const. art. I, § 21. This rule applies to sentence enhancements. State v. Nunez, 174 Wn.2d 707, 712, 285 P.3d 21, 23 (2012) (citing Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 313-14, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)). When the State presents evidence of multiple acts that could constitute a charged crime, "the State must tell the jury which act to rely on in its deliberations or the [trial] court must instruct the jury to agree on a specific criminal act." State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), overruled on other grounds by Kitchen, 110 Wn.2d 403. The State's failure to elect the act, coupled with the court's failure to instruct the jury on unanimity, is constitutional error. Kitchen, 110 Wn.2d at 411. "The error stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction." Id.

Such an error may be raised for the first time on appeal because a trial court's failure to give a unanimity instruction is a manifest error affecting a constitutional right. State v. Holland, 77 Wn. App. 420, 424, 891 P.2d 49 (1995).

The court violated Ross's right to a unanimous jury verdict as to the firearm enhancements on counts 1, 8, 9, 11, and 13. The court did not instruct the jury it must unanimously agree on the act constituting the charged enhancement, and the State informed jurors it could find the enhancements based on the robber's gun or the stolen weapons. See 11RP 642 (Kuch description of robber's gun); 12RP 744, 748-49 and 19RP 15-25 (testimony regarding guns taken from safe at Kuch home); 25RP 2254-55 (State's closing argument that robber entered house armed but also armed because stole guns from safe); 22RP 2284-85 (defense argument disputing robber used real gun with Kuch); CP 231-304 (jury instructions in Ross and Oeung cases). Ross previously made this argument by adopting the co-appellant's related argument. See Appendix.

The failure to give a unanimity instruction in a multiple acts case will be deemed harmless only if no rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. State v. Hanson, 59 Wn. App. 651, 659, 800 P.2d 1124 (1990) (citing Kitchen, 110 Wn.2d at 411). The gun owners testified

the guns taken from Kuch's home in the April incident were operable. 12RP 744, 748-49; 19RP 15-25. But the State did not present any evidence of the sort required by this Court in Pierce to prove the weapon purportedly brought by the robber was a real, operable firearm. Pierce, 155 Wn. App. at 714 n.11. Kuch described only a black gun. 11RP 642.

Because, under Pierce, insufficient evidence supports one of the State's theories for the enhancements as to the April offenses, this Court should reverse those enhancements. Hanson, 59 Wn. App. at 660.

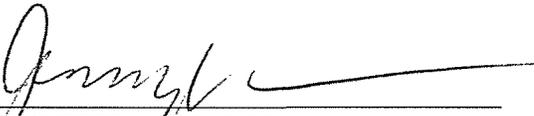
D. CONCLUSION

For the foregoing reasons, all of the firearm enhancements should be reversed. As to the January charges, the enhancements should be reversed and vacated based on insufficient evidence.

DATED this 19th day of May, 2015.

Respectfully submitted,

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Attorneys for Appellant

APPENDIX

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

STATE OF WASHINGTON,)	No. 46425-0-II
)	
Respondent,)	
)	NOTICE TO ADOPT
v.)	ARGUMENTS OF
)	CO-APPELLANT
AZIAS ROSS,)	SOY OEUNG
)	UNDER RAP 10.1(g)(2)
Appellant.)	
_____)	

Pursuant to RAP 10.1(g)(2), appellant Azias Ross, by and through counsel of record, Nielsen, Broman & Koch, hereby gives notice that he adopts by reference the following assignments of error, corresponding issues, and corresponding arguments raised by the co-appellant:

1. **Assignments of Error 1 and 3; corresponding Issues 1 and 3; legal arguments set forth at pages 20-36 of Oeung brief (unanimity of verdicts on substantive crimes and enhancements related to presence of firearm).** Ross raises these arguments as to counts 1,¹ 8, 9, 11, and 13 (April 27, 2012 incident) and their related firearm enhancements. CP 474-77 (information); CP 739-56 (judgment and sentence). Ross also cites the following portions of the record in support of this argument: 11RP² 642 (Kuch description of robber's gun); 12RP 744, 748-49 and 19RP 15-25 (testimony regarding guns taken from safe at Kuch home); 25RP 2254-55 (State's

¹ The court dismissed count 7, the April conspiracy count, based on double jeopardy, but extended the date of crime on count 1 to encompass the April incident. CP 741.

(State's closing argument that robber entered house armed but also armed because stole guns from safe); 22RP 2284-85 (defense argument disputing robber used real gun with Kuch); CP 231-304 (jury instructions in Ross and Oeung cases).

2. **Assignment of Error 7; corresponding Issue 7; legal arguments set forth at pages 50-53 of Oeung brief (insufficient evidence of knowledge and lack of nexus as to weapon enhancements).** Ross raises this issue as to the firearm or weapon enhancement on each count except count 12, which does not have a corresponding enhancement. See CP 739-56 (judgment and sentence).

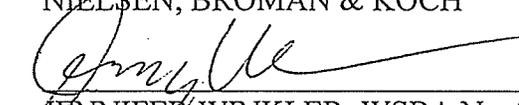
3. **Assignment of Error 8; corresponding Issue 8; legal arguments set forth at pages 53-59 of Oeung brief (erroneous special verdict instructions and forms).** Ross raises this issue as to the firearm or weapon enhancement on each count except count 12, which does not have a corresponding enhancement. See CP 300-01 (jury instruction); CP 672-707 (completed verdict forms); CP 739-56 (judgment and sentence).

4. Ross also gives notice that he adopts the co-appellant's other assignments of error and arguments insofar as they apply to his convictions and sentence.

DATED this 16th day of March, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH


JENNIFER WINKLER, WSBA No. 35220
Office ID No. 91051

Attorneys for Appellant

² This notice refers to the verbatim reports as set forth at page 5 of Ross's Brief of Appellant.

NIELSEN, BROMAN & KOCH, PLLC

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 46425-0-II
)	
AZIAS ROSS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 19TH DAY OF MAY, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] AZIAS ROSS
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x *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

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