IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAVID ANDREW FRASQUILLO, and JOSEPH FRASQUILLO, JR. Appellants.	No. 39128-7-II Consolidated with No. 39135-0-II PART PUBLISHED OPINION

Worswick, A.C.J. — At a consolidated jury trial, David and Joseph Frasquillo were each convicted of two counts of second degree assault and one count of attempted second degree assault, all with firearm sentencing enhancements. Joseph[1] was also convicted of first degree unlawful possession of a firearm. David appeals his convictions, arguing that (1) introducing Joseph's statements against him violated his confrontation clause rights,[2] (2) the trial court gave an erroneous accomplice liability instruction, and (3) there was insufficient evidence as to one of the victims. Joseph appeals his convictions and the firearm enhancements, arguing that (1) the

[1] For clarity, because this case involves multiple members of two different families, we use first names to refer to the people involved, intending no disrespect.

[2] U.S. Const. amend. VI.

trial court erroneously gave a transferred intent jury instruction, (2) the trial court erred by failing to dismiss the attempted assault charges, (3) there was insufficient evidence to prove the assault charges, (4) the trial court's refusal to sever the firearm possession charge violated his right to a fair trial, (5) the trial court placed him in double jeopardy by failing to dismiss with prejudice two first degree assault charges on which the jury did not reach a unanimous verdict, and (6) the trial court erred by applying multiple firearm sentencing enhancements because the firearm was an element of each of the charged offenses. In his statement of additional grounds (SAG),[3] Joseph further argues that (1) there was insufficient evidence to convict him of firearm possession, and (2) the trial court gave an erroneous "to convict" instruction. We affirm.

FACTS

This case involves a conflict between two groups of friends that escalated into David and Joseph Frasquillo and an accomplice shooting out the windows of an occupied house. The conflict was between the friends of Andrew Treacher[4] and the friends of Andrew's ex-girlfriend, Shaelyn Luzik.[5]

On the evening before the incident, Andrew's friend Dustin Williams received a text message claiming that Shaelyn came to Andrew's workplace with four men, including her boyfriend Matthew Knowlton, and pushed Andrew around. The record does not demonstrate whether this assault actually occurred; the only evidence presented at trial regarding this exchange

[3] RAP 10.10.

[4] Andrew's friends included Aaronessa Devin, Dustin Williams, and Zach Gibbs-Churchley.

[5] Shaelyn's friends included Matthew Knowlton, Jacob Knowlton, and Mike Lawrence.

was testimony that Shaelyn's friends, Jacob Knowlton and Mike Lawrence, came to Andrew's workplace and were loud and disorderly. Nonetheless, Dustin retaliated by leaving a threatening note on Shaelyn's car. From there, a conflict built between the two groups involving the exchange of threatening text messages and phone calls that culminated in an agreement for the groups to meet in Silverdale to fight.

Before driving to Silverdale, Andrew's group drove past the home of Shaelyn's boyfriend, Matthew Knowlton, to find out if Matthew and Shaelyn were there or if they had left to meet them in Silverdale. Matthew and Shaelyn were there, though the group did not see them. Matthew saw the group's two cars drive past his house without their lights on. Due to the threatening phone calls and text messages, Matthew called the police and reported that suspicious cars had driven past his house.

Andrew's group then drove to Silverdale to meet Shaelyn's group, but Shaelyn's group was not there. Zach Gibbs-Churchley, one of Andrew's friends, then directed the group to the Frasquillo home where they met David and Joseph Frasquillo. There, one of the witnesses, Aaronessa Devin, saw both David and Joseph handle a pair of shotguns.

Andrew's group then met up in the parking lot of a Payless drug store in East Bremerton. Aaronessa testified that David and Joseph were in Zach's minivan[6] in the Payless parking lot at that time, and Zach was very angry at Shaelyn's group. Andrew testified that he saw both David and Joseph in Zach's van wearing paintball masks and holding shotguns. He also testified that Zach's van drove out of the parking lot just before 3:00 a.m.

[6] Andrew testified that Zach's van was a light blue Oldsmobile or Mercury.

At 2:30 or 3:00 a.m., Matthew saw a light blue or dark color Mercury Villager or Nissan Quest minivan drive past his house. Matthew got back into bed, and then the window of his bedroom shattered. Matthew assumed the window had been shattered by a rock. Shaelyn, who was in bed with Matthew at the time, also believed a rock had shattered the window. Shaelyn received superficial cuts from glass that fell onto the bed.

Also in the house were Matthew's mother, Linda, his father, Keith, and his brother, Jacob. Linda was awake at the time of the shooting. Linda testified that she heard two loud knocks. Keith was asleep at the time of the shooting and was awakened by what he believed was "a really loud knock on the door." 4 Report of Proceedings at 428. There was no evidence of either Keith or Linda being frightened by the incident. Jacob slept through the shooting. A subsequent police investigation revealed that Matthew's bedroom window and the window of another room in the house had been shot out by two shotgun blasts. The police arrested Zach in connection with the shooting.

The police obtained a warrant to search the Frasquillo house and, while executing the warrant, saw Joseph Frasquillo's car drive past the house and accelerate away. A deputy pursued the car and stopped it, detaining David and Joseph. Before the police searched the trunk of the car, Joseph said that the shotgun inside belonged to David. David also told the police that the shotgun was his. The police searched the trunk of the car and found a shotgun and two paintball masks. The police found another shotgun in an unlocked case in the Frasquillos' living room. Evidence at trial established that the car belonged to Joseph and further established that the

shotguns found were the same guns that David and Joseph had possessed just before the shooting. David and Joseph's father testified that all guns in the Frasquillo house were kept locked and away from Joseph. David and Joseph's brother, Darren Frasquillo, testified that both of the shotguns at issue belonged to David, who did not let Joseph use them.

The State charged both David and Joseph with first degree assault or, in the alternative, second degree assault against Matthew and Shaelyn (counts I through IV), and with attempted second degree assault against Keith, Linda, and Jacob (counts V through VII). All of the assault charges alleged the use of a firearm as a sentencing enhancement. The State also charged Joseph with first degree unlawful possession of a firearm.

The State moved to consolidate the charges against David and Joseph; the trial court granted this motion. Joseph moved to sever the firearm charge, arguing that David's testimony would be necessary for Joseph's defense to that charge and that David would be unavailable to testify in the consolidated trial because he was a codefendant. The trial court denied this motion. During pretrial motions, when discussing Joseph's statement that David owned the shotgun found in Joseph's trunk, David's counsel assured the trial court that the statement did not raise an issue under *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

At trial, David and Joseph called an alibi witness, Tiffany Weir. Tiffany testified that David and Joseph had been at her house from 10:30 p.m. on the night before the shooting until at least 5:00 a.m. on the morning of the shooting. A detective testified that Tiffany reported that David and Joseph had left her house at 1:30 or 2:00 that morning, though Tiffany denied making

such a statement. At the close of the State's case and again at the close of all the evidence, both David and Joseph moved to dismiss the charges for insufficient evidence. The trial court denied these motions.

The trial court instructed the jury on transferred intent.[7] The trial court also gave instructions on accomplice liability.[8] And the trial court further instructed the jury not to consider one defendant's out-of-court statements as evidence against the other.[9] The trial court also gave "to convict" instructions on the second degree assault charges that failed to include the intent element.[10] The jury found David and Joseph guilty of second degree assault against Shaelyn and Matthew (counts II and IV), and of attempted second degree assault against Jacob (count VII).

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[7] The transferred intent instructions read, "If a person acts with intent to assault another, but the act harms a third person, the actor is also deemed to have acted with intent to assault the third person." Clerk's Papers (CP) at 339, 534.

[8] The accomplice liability instructions read, in pertinent part:

> A person is an accomplice in the commission of Assault in the First Degree or Assault in the Second Degree if, with the knowledge that it will promote or facilitate the commission of an assault, he either:
>
> (1) solicits, commands, encourages or requests another person to commit assault; or
>
> (2) aids or agrees to aid another person in planning or committing an assault.

CP at 344, 539.

[9] The co-defendant statements instructions read, "You may consider a statement made out of court by one defendant as evidence against that defendant, but not as evidence against the other defendant." CP at 222, 525.

[10] The "to convict" instructions informed the jury that to convict, the jury must find that "the defendant assaulted [the victim] with a deadly weapon" and that "[t]his act occurred in the state of Washington." CP at 348, 350, 543, 545. No other elements were set forth in the "to convict" instructions.

The jury returned special verdicts finding that David and Joseph were armed with firearms during all three assaults. The jury failed to reach unanimous verdicts as to first degree assault against Shaelyn and Matthew (counts I and III) and as to attempted second degree assault against Keith and Linda (counts V and VI). The jury found Joseph guilty of first degree unlawful possession of a firearm.

At sentencing, the State moved to dismiss counts I, III, V and VI without prejudice. David and Joseph argued that the counts should be dismissed with prejudice. The trial court granted the State's motion and dismissed the counts without prejudice. The trial court sentenced Joseph to 132 months of incarceration, including 90 months for firearm sentencing enhancements. The trial court sentenced David to 103 months of incarceration, also including 90 months for firearm sentencing enhancements. David and Joseph appeal.

ANALYSIS

I. Joseph Frasquillo

A. Transferred Intent Instruction

Joseph argues that the trial court violated his right to a fair trial by giving the transferred intent jury instruction. He argues that the doctrine of transferred intent did not apply because neither Linda, Keith, nor Jacob were harmed or put in apprehension of harm. We hold that the transferred intent instruction was erroneous, but the instruction as written did not apply to the attempted assault charges and was harmless.

An erroneous instruction is harmless if it appears beyond a reasonable doubt that the error

did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 332, 58 P.3d 889 (2002). An instructional error that benefits the defendant is harmless beyond a reasonable doubt. *See State v. Bailey*, 114 Wn.2d 340, 349-50, 787 P.2d 1378 (1990).[11]

Our Supreme Court addressed the doctrine of transferred intent in the context of assault in *State v. Elmi*, 166 Wn.2d 209, 207 P.3d 439 (2009). There, Elmi used a firearm to shoot into his estranged wife's house. He was convicted of attempted first degree murder against his wife and first degree assault against her children who were also present in the house during the shooting. On appeal to the Supreme Court, Elmi argued that the State was required to prove that he had the specific intent to assault the children. The court disagreed, holding that when a person shoots into a building intending to harm a certain occupant, under the assault statute[12] this intent transfers to any victims who were unintentionally harmed or put in apprehension of harm.[13] *Elmi*, 166 Wn.2d at 218. The court held that there was sufficient evidence to find that the children were put in apprehension of harm and, thus, Elmi's intent to assault his wife properly transferred to her children. *Elmi*, 166 Wn.2d at 218-19.

From *Elmi*, it is clear that the intent to assault one victim transfers to all victims who are

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[11] Joseph asserts that the standard of review for jury instructions is abuse of discretion. But we review errors of law in jury instructions de novo. *State v. Montgomery*, 163 Wn.2d 577, 597, 183 P.3d 267 (2008).

[12] RCW 9A.36.011.

[13] The court made clear that RCW 9A.36.011 "encompasses transferred intent" and decided the issue based on the statute, not on the common law doctrine of transferred intent. *Elmi*, 166 Wn.2d at 218. The second degree assault statute, RCW 9A.36.021, contains the same wording with regard to intent. Thus, *Elmi* applies equally to second degree assault.

unintentionally harmed or put in apprehension of harm. The logical corollary of *Elmi* is that intent does not transfer to "victims" who are neither harmed nor put in apprehension of harm.

Contrary to *Elmi*, the transferred intent instruction to which Joseph assigns error read, "If a person acts with intent to assault another, but the act *harms* a third person, the actor is also deemed to have acted with intent to assault the third person." Clerk's Papers (CP) at 339 (emphasis added). This instruction required that the victim be harmed in order for transferred intent to apply. This was error because under *Elmi*, transferred intent can also apply to victims who are only put in *apprehension* of harm. But this error was not to Joseph's detriment. As such, any error was harmless as to Joseph's conviction for attempted assault against Jacob.

B. Motion to Dismiss Attempted Assault Charges

Joseph next argues that the trial court erred by refusing to grant his motion to dismiss counts V, VI, and VII (the attempted assaults against Keith, Linda, and Jacob).[14] Joseph argues that dismissal was warranted because the transferred intent doctrine did not apply to the attempted assault charges, and because there was insufficient evidence of Joseph's intent to assault any of those victims. We disagree.

"A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1). In *State v. Ferreira*, Division Three of this court noted, "'Evidence of intent

[14] Joseph asserts that the standard of review on this issue is abuse of discretion, but he cites no authority to that effect. The proper standard of review on a motion to dismiss for insufficient evidence is whether a rational jury could have found guilt beyond a reasonable doubt. *State v. Athan*, 160 Wn.2d 354, 378 n.5, 379, 158 P.3d 27 (2007).

. . . is to be gathered from all of the circumstances of the case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats.'" 69 Wn. App. 465, 468-69, 850 P.2d 541 (1993) (quoting *State v. Woo Won Choi*, 55 Wn. App. 895, 906, 781 P.2d 505 (1989)). The *Ferreira* court further held that "a person who commits an act of violence with intent to place more than one person in fear of serious bodily injury may be found guilty of multiple offenses under the same criminal statute." 69 Wn App at 470. The *Ferreira* court concluded that, because the defendants in that case fired into an occupied house, there was sufficient evidence to find that they intended to assault all the likely occupants of the house. 69 Wn. App. at 469-70.

Here, there is sufficient evidence that the shooter intended to assault more than one person in the house. This evidence includes prior events and threats between the two groups[15] and the fact that the shooter shot out two windows at Matthew's house. Under *Ferreira*, because the shooter fired into the house intending to assault more than one victim within, there was sufficient evidence to find that he intended to assault all likely occupants of the house. And the shooter's act of shooting into the house was a substantial step towards assaulting every person within. That Keith, Linda, and Jacob were not actually harmed or put in apprehension of harm means that the shooter and his accomplices were guilty of attempted assault rather than a completed assault; the failure to complete the crime does not absolve Joseph of criminal culpability.

Because there was sufficient evidence of Joseph's (or his accomplice's) intent to assault

[15] These events include Jacob's harassment of Andrew, Shaelyn and Matthew's reported pushing of Andrew, and numerous threats through text messaging and phone calls.

Keith, Linda, and Jacob, it was not necessary for the jury to apply the transferred intent doctrine to find guilt on those charges. And the instructions did not allow the jury to apply transferred intent on counts V, VI, and VII, since the victims on those counts were not harmed. Joseph's claim fails.[16]

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

C. Sufficiency of the Evidence—Assault Convictions

Joseph next challenges the sufficiency of the evidence as to his second degree assault and attempted second degree assault convictions (counts II, IV, and VII), pointing to inconsistencies in the testimony of the State's witnesses and his presentation of an alibi witness. Joseph premises his claim on viewing the evidence in the light most favorable to him, which is not the standard. An appellant claiming insufficiency of the evidence admits the truth of the State's evidence and all inferences reasonably drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable, and we defer to the trier of fact on conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

The record shows that David and Joseph were in Zach's van just before the shooting, that

[16] In the unpublished portion of this opinion, we hold that (1) there was sufficient evidence to support the convictions, (2) the failure to sever the trials was not an abuse of discretion, (3) failure to dismiss the first degree assault charges did not violate double jeopardy, (4) any error in the instructions was harmless, and (5) David's confrontation clause rights were not violated.

they were armed with shotguns, that the shooting occurred immediately after Zach's van was seen driving past Matthew's house, and that the police then recovered the shotguns used in the attack from the Frasquillo home and from the trunk of Joseph's car. We hold that this evidence was sufficient to permit a rational trier of fact to find that Joseph was either a principal or an accomplice to the shooting.

D. Motion to Sever

Joseph next contends that the trial court erred by refusing to grant his motion to sever the firearm possession charge from the other charges. Joseph argues that because David was his codefendant, Joseph was denied the benefit of David's testimony as to the firearm possession charge. The State counters that the failure to sever did not prejudice Joseph because Joseph was able to present the essential facts of his defense without David's testimony. We agree with the State.

We review a trial court's refusal to sever charges for manifest abuse of discretion. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994). The trial court's failure to sever charges may prejudice a defendant by impairing his ability to present separate defenses, by inviting the jury to find guilt by cumulating evidence, or by inferring a criminal disposition. *Russell*, 125 Wn.2d at 62-63.

> In determining whether the potential for prejudice requires severance, a trial court must consider (1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial.

Russell, 125 Wn.2d at 63.

Joseph argues only the second factor of the test laid out in *Russell*. As the State points out, Joseph presented an alibi defense on the assault charges, and he defended against the firearm possession charge by arguing that there was insufficient evidence of possession. These defenses were factually distinct and there was no danger that the jury would have confused them. Moreover, Joseph was able to introduce the essential evidence supporting his defense to the possession charge even though David did not testify. The trial court admitted Joseph's statement to the police that the shotgun belonged to David. Joseph's brother Darren also testified that Joseph did not have access to David's guns. And David and Joseph's father testified that all guns in the Frasquillo house were kept locked and away from Joseph. Joseph does not inform us why David's testimony would have been any more helpful to his defense than the evidence already in the record, and he does not explain how the lack of David's testimony prevented him from presenting clear defenses to the charges. As such, we hold that the trial court did not abuse its discretion in refusing to sever the firearm charge.

E. Accomplice Liability Instruction—Failure to Instruct Specific Degree of Crime

Joseph next challenges the trial court's accomplice liability instruction. Joseph argues that the accomplice instruction was defective because it informed the jury that Joseph was liable as an accomplice if he knew his conduct would aid "an assault," rather than the specific crime of second degree assault. The State argues that the instruction was proper because an accomplice need only know of the crime generally, not its degree. The State is correct.

A person accused of being an accomplice need not know of the specific elements of the crime charged; general knowledge of the specific crime is sufficient. *State v. Roberts*, 142 Wn.2d 471, 512, 14 P.3d 713 (2000). We have recognized that

> "[A]n accused who is charged with assault in the first or second degree as an accomplice must have known generally that he was facilitating an assault, even if only a simple, misdemeanor level assault, and need not have known that the principal was going to use deadly force or that the principal was armed."

State v. McChristian, 158 Wn. App. 392, 401, 241 P.3d 468 (2010) (quoting *In re Pers. Restraint of Sarausad*, 109 Wn. App. 824, 836, 39 P.3d 308 (2001)). In other words, an accused who knows that his conduct will aid an assault is liable as an accomplice to assault whether or not he knows of the facts that would determine the degree of the crime.

We hold that the accomplice liability instruction here was not erroneous. The jury was not required to find that Joseph knew he would aid a second degree assault, but only that he knew he would aid an assault. Thus, Joseph's claim fails.

F. Double Jeopardy—First Degree Assault

Joseph further asserts that the trial court violated his right to be free from double jeopardy by refusing to dismiss the first degree assault charges with prejudice. Joseph argues that because the jury convicted him on the lesser charges of second degree assault, the trial court's failure to dismiss the first degree assault charges with prejudice places him in danger of facing two convictions for the same crime. Joseph's claim is premature.

Both the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington State Constitution protect defendants from being put in jeopardy twice for the same

offense. *State v. Ervin*, 158 Wn.2d 746, 752, 147 P.3d 567 (2006). This right protects defendants whenever "(1) jeopardy has previously attached, (2) that jeopardy has terminated, and (3) the defendant is in jeopardy a second time for the same offense in fact and law." *Ervin*, 158 Wn.2d at 752. In a jury trial, jeopardy attaches when the jury is empaneled and sworn. *State v. Daniels*, 165 Wn.2d 627, 632 n.7, 200 P.3d 711 (2009) (quoting *Crist v. Bretz*, 437 U.S. 28, 38, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978)). But a double jeopardy challenge brought prior to the State's attempt to re-prosecute the defendant is premature, and we need not address it. *See State v. Boldt*, 40 Wn. App. 798, 801, 700 P.2d 1186 (1985).

Joseph's claim fails because the State has not sought to retry Joseph on these charges. There has been no double jeopardy violation because the State has not put him in jeopardy for a second time on the same offense. Joseph's claim is therefore premature and we do not address it.

G. Double Jeopardy—Firearm Enhancements

Joseph finally asserts that the firearm enhancements added to his sentence violated his right to be free from double jeopardy because a firearm was an element of each of the charged offenses. At the time Joseph filed his brief, *State v. Kelley*, 168 Wn.2d 72, 226 P.3d 773 (2010), had not been decided. The *Kelley* court considered and rejected Joseph's argument. 168 Wn.2d at 78. Joseph's claim on this point fails.

II. David Frasquillo

A. Confrontation Clause

David first argues that his confrontation clause rights were violated when the trial court

admitted Joseph's statements against him. David asserts that Joseph's statement that the shotgun in the trunk of his car belonged to David was testimonial and, because Joseph was a codefendant and did not testify, this statement was inadmissible under the confrontation clause of the Sixth Amendment. He argues this issue under both *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). These arguments fail.

i. *Crawford v. Washington*

David first argues that, as testimonial hearsay, Joseph's statement was inadmissible under *Crawford*. The State responds that the statement was admissible under *Crawford* because it was not offered for the truth of the matter asserted. The State is correct.

Under *Crawford*, the testimonial statements of a witness who does not testify at trial may not be admitted unless the witness is unavailable and the defendant had a prior opportunity to cross-examine him or her. 541 U.S. at 54. Statements taken by police during interrogations are testimonial. *Crawford*, 541 U.S. at 52. The State concedes, and we agree, that Joseph's statement was testimonial. And Joseph, being a codefendant, was unavailable to testify at trial, putting his statement within the ambit of *Crawford*. *See* 541 U.S. at 54.

As the State points out, however, *Crawford* does not exclude testimonial statements offered for purposes other than for the truth of the matter asserted. 541 U.S. at 59 n.9. Here, the statement was admitted to show that Joseph knew that the shotgun was in the trunk, not to show that the shotgun actually belonged to David. The prosecutor's closing argument and the trial

court's instructions support this assertion. During closing argument and on rebuttal, the State pointed to Joseph's statement as evidence that Joseph knew the shotgun was in the trunk, arguing that he therefore had constructive possession of it. The State never argued that Joseph's statement proved any facts against David. And the court instructed the jury not to consider the statements of one defendant as evidence against the other, precluding the jury from considering Joseph's statement as evidence that David owned the shotgun. *Crawford* therefore does not apply and David's argument on this point fails.

ii. *Bruton v. United States*

David also argues that the charges were improperly joined under *Bruton*, 391 U.S. 123.[17] The State responds that any error under *Bruton* issue was invited.

In arguing that he preserved the issue, David points to his trial counsel's opposition to the State's motion to consolidate his and Joseph's trials. David's memorandum in opposition to consolidation, however, did not mention *Bruton*. And, as the State points out, David's trial counsel assured the trial court that there was no *Bruton* issue related to Joseph's statements.

The invited error doctrine provides that a party who sets up an error at trial cannot complain of that error on appeal. *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009), *cert denied* 131 S. Ct. 160 (2010). "This doctrine applies even to errors of constitutional magnitude that can be raised for the first time on appeal." *State v. Heddrick*, 166 Wn.2d 898,

[17] "Under *Bruton*, a criminal defendant may be entitled to severance if (1) his codefendant implicates him in a confession, (2) the confession is introduced into evidence without sufficient redaction, and (3) the defendant who confessed does not testify and is, therefore, not subject to cross-examination." *State v. Johnson*, 147 Wn. App. 276, 288-89, 194 P.3d 1009 (2008).

909, 215 P.3d 201 (2009). Because David's trial counsel assured the trial court that *Bruton* was not an issue, David cannot now claim this alleged error on appeal. Therefore, we do not address the merits of this argument.[18]

B. Accomplice Liability Instruction—Failure To Instruct on Specific Assault

David next argues that his right to a fair trial was violated when the trial court gave an erroneous accomplice liability instruction. He argues that the jury instruction was defective because it instructed that one is an accomplice if he acts with knowledge that he is facilitating "an assault." He argues that the State was required to prove that he knew he was aiding the specific assault charged and that failing to instruct the jury accordingly was reversible error. The State responds that because there was no evidence at trial of any assaults other than those charged, any error was harmless beyond a reasonable doubt. We agree with the State.

The State bears the burden of proving every element of the charged crime beyond a reasonable doubt. *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). It is reversible error to instruct the jury in a manner that relieves the State of this burden. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). We review a challenged instruction de novo, in the context of the instructions as a whole. *Bennett*, 161 Wn.2d at 307. An erroneous instruction is harmless if it appears beyond a reasonable doubt that the error complained of did not contribute

[18] Only a directly incriminating codefendant statement is outright forbidden under *Bruton*. *Richardson v. Marsh*, 481 U.S. 200, 208, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987). An indirectly incriminating statement may be cured by a limiting instruction. *See State v. Dent*, 123 Wn.2d 467, 486-87, 869 P.2d 392 (1994). Without deciding the issue, we note that *Bruton* likely did not apply here because David's ownership of the gun was not a directly incriminating fact and the jury was properly instructed not to consider Joseph's statements against David.

to the verdict obtained. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

Under RCW 9A.08.020(3), a person is an accomplice if he knowingly aids or agrees to aid another in committing "the crime." As our Supreme Court held in *Brown*, "It is a misstatement of the law to instruct a jury that a person is an accomplice if he or she acts with knowledge that his or her actions will promote *any* crime." 147 Wn.2d at 338. "[F]or accomplice liability to attach, a defendant must not merely aid in any crime, but must knowingly aid in the commission of the specific crime charged." *Brown*, 147 Wn.2d at 338. But where the State does not present evidence of uncharged crimes and does not argue that the jury may find accomplice liability based on uncharged crimes, an erroneous accomplice liability instruction may be harmless. *See State v. Carter*, 154 Wn.2d 71, 82, 109 P.3d 823 (2005). When it is clear from the record that the jury must have found the defendant to be an accomplice based on his knowledge of the charged crimes alone, an erroneous accomplice liability instruction is harmless beyond a reasonable doubt. *See Carter*, 154 Wn.2d at 83.

Here, the instruction provided that one is an accomplice to assault if he knows that his conduct will aid "an assault." Clerk's Papers (CP) at 539. This instruction was erroneous. But it is uncontroverted that the State presented no evidence of any assaults other than the ones charged, and it did not argue that David could be found liable as an accomplice to any uncharged assaults. Thus, this error was harmless.

David argues, however, that the error was not harmless under *Brown*, and that we must reverse his convictions because the instructions allowed the jury to find that he was the principal

actor and not an accomplice. We disagree.

Brown was charged with a robbery against a victim, and there was direct evidence that Brown was the principal actor in that crime. But Brown was also charged with rape and assault against the same victim, and there was no evidence that Brown was the principal actor in those crimes. The jury was given an erroneous jury instruction permitting them to find Brown culpable as an accomplice if he knew his conduct would facilitate "a crime." The *Brown* court held that the erroneous instruction was not harmless because it allowed the jury to conclude that Brown was an accomplice to the rape and the assault simply because he robbed the victim. *Brown*, 147 Wn.2d at 341-42. This possible inference improperly lifted the State's burden to show that Brown knew that his conduct would specifically aid the charged crimes of rape and assault.

Here, in contrast, David was charged with multiple assaults arising from the two shotgun blasts fired at Matthew's house. The facts here do not present the same problem as in *Brown*, where the jury might have found that one of Brown's crimes against the victim necessarily made him an accomplice to the other two crimes. Here, there was evidence of only the two shotgun blasts fired at the house. There was no evidence or argument at trial regarding any other assault. Thus, in order to find David culpable as an accomplice, the jury was required to find that David knew his conduct would facilitate the particular assaults charged. As such, the record makes clear that the erroneous accomplice liability instruction was harmless beyond a reasonable doubt, and David's claim fails.

C. Sufficiency of Evidence—David's Assault Against Jacob

David finally argues that the State presented insufficient evidence to convict him of attempted assault against Jacob. The State argues that the evidence was sufficient because it showed David's (or his accomplice's) intent to put all occupants of the house in danger. The State is correct.

In evaluating the sufficiency of the evidence, an appellate court reviews the evidence in the light most favorable to the State. *State v. Drum*, 168 Wn.2d 23, 34, 225 P.3d 237 (2010). "The relevant question is 'whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.'" *Drum*, 168 Wn.2d at 34-35 (quoting *State v. Wentz*, 149 Wn.2d 342, 347, 68 P.3d 282 (2003)).

David relies on *Elmi*, 166 Wn.2d 209, to argue that because David lacked any specific intent to harm Jacob and because Jacob slept through the shooting, the State could not prove the intent element of attempted second degree assault. David argues that because Jacob slept through the shooting and was not harmed or put in apprehension of harm, *Elmi* requires reversal. David is correct that, under *Elmi*, the jury could not apply transferred intent to find David's intent to assault Jacob, but rather was required to find that David or his accomplice actually intended to assault Jacob. But he is incorrect in arguing that there was insufficient evidence of this intent.

The circumstances of the shooting here provided sufficient evidence of the shooter's intent to assault Jacob. "Intent to attempt a crime may be inferred from all the facts and circumstances." *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). As analyzed above, the act of

shooting into the house showed David's (or his accomplice's) intent to put every person in the house in apprehension of bodily injury, including Jacob. David's claim on this point fails.

Statement of Additional Grounds

I. Sufficiency of Evidence—Firearm Possession

In his statement of additional grounds (SAG), Joseph argues that there was insufficient evidence that he possessed the shotgun found in his trunk. Joseph argues that because the shotgun was in a locked case in the trunk, and because the State did not prove that he could open the case, the State failed to prove that he possessed the firearm.

Joseph was convicted of first degree unlawful possession of a firearm under RCW 9.41.040(1). To convict on this charge, the State was required to prove that Joseph had actual or constructive possession of the shotgun. *See State v. Raleigh*, 157 Wn. App. 728, 737, 238 P.3d 1211 (2010). "Actual possession" means that an object was in the defendant's physical custody, while "constructive possession" means that the defendant had dominion and control over the object. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994).

A jury can find that a defendant constructively possessed a firearm if he had dominion and control over the premises where it was found. *State v. Turner*, 103 Wn. App. 515, 520-21, 13 P.3d 234 (2000). A vehicle is considered "premises" for this purpose. *Turner*, 103 Wn. App. at 521. To establish constructive possession, the defendant's dominion and control need not be exclusive. *State v. Summers*, 107 Wn. App. 373, 384, 28 P.3d 780, 43 P.3d 526 (2002). No one factor controls the question of constructive possession but, rather, dominion and control is

resolved based on the totality of the circumstances. *Turner*, 103 Wn. App. at 521. Factors to be considered include the defendant's ability to reduce an object to actual possession and his or her proximity to the object, although proximity alone is not sufficient. *Turner*, 103 Wn. App. at 521. In firearm possession cases, a defendant need not be able to immediately access a firearm in his possession to be convicted. *State v. Howell*, 119 Wn. App. 644, 650, 79 P.3d 451 (2003).

Here, the evidence was sufficient for the jury to find that Joseph constructively possessed the shotgun. The evidence showed that the car belonged to Joseph, giving him dominion and control over the vehicle. The evidence showed that David often drove the vehicle as well; but dominion and control need not be exclusive to support a finding of constructive possession. Because Joseph controlled the "premises" on which the shotgun was found, the jury was entitled to find that he constructively possessed it. That Joseph could not immediately access the gun and operate it is immaterial. *See Howell*, 119 Wn. App. at 650. The evidence was sufficient to support a finding that Joseph constructively possessed the shotgun and his claim fails.

II. "To Convict" Instruction

Joseph also contends in his SAG that the trial court's "to convict" jury instructions deprived him of due process of law. Joseph argues that the "to convict" instructions as to counts II and IV erroneously omitted the element of intent, requiring reversal. We disagree.

"To convict" instructions must contain every element of the crime charged if they purport to be a complete statement of the elements. *State v. Fisher*, 165 Wn.2d 727, 753, 202 P.3d 937 (2009); *State v. Oster*, 147 Wn.2d 141, 143, 52 P.3d 26 (2002). Failure to include every element

is constitutional error that may be raised for the first time on appeal. *Fisher*, 165 Wn.2d at 753. We review "to convict" instructions de novo. *Fisher*, 165 Wn.2d at 754. A "to-convict" instruction need not encompass all information relevant to the jury's inquiry. Division One of this court has held that the use of the word "assault" in a "to-convict" instruction for burglary did not require a definition of the "assault" element because "[t]he word 'assault' is not exclusively of legal cognizance, and an understanding of its meaning can fairly be imputed to laymen." *State v. Pawling*, 23 Wn. App. 226, 233, 597 P.2d 1367 (1979). And in a "to-convict" instruction for robbery, our Supreme Court held the element of "theft" to be a "term of sufficient common understanding to allow the jury to convict of robbery" without the definition of theft in any of the jury instructions. *State v. Ng,* 110 Wn.2d 32, 44-45, 750 P.2d 632 (1988).

The "to convict" instructions here provided that, to convict the defendants of second degree assault, the jury was required to find that "the defendant assaulted [the victim] with a deadly weapon." CP at 348, 350. This language mirrors RCW 9A.36.021(1)(c), which provides that one is guilty of second degree assault when one "[a]ssaults another with a deadly weapon." That the challenged "to convict" instructions did not expressly include the element of intent, or define "assault" does not mean they were erroneous. Rather, we review "the instructions, taken in their entirety," to determine whether they "inform the jury that the State bears the burden of proving [the defendant] acted with an intent either to create in [the victim's] mind a reasonable apprehension of harm or to cause bodily harm." *State v. Byrd*, 125 Wn.2d 707, 714, 887 P.2d 396 (1995). Here, the trial court offered a separate instruction that properly defined "assault" as

requiring "the intent to create in another the apprehension and fear of bodily injury." CP at 337. We presume that juries follow their instructions. *State v. Gamble*, 168 Wn.2d 161, 178, 225 P.3d 973 (2010). Joseph's claim on this point fails.

Affirmed.

Worswick, A.C.J.

We concur:

Hunt, J.

Van Deren, J.