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COURT OF APPEALS STATE OF COLORADO 2 E. 14th Avenue, 3rd Floor Denver, Colorado 80203	
Appeal from the District Court of Adams County Honorable Chris Melonakis Case No. 07CR3418	
PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. VU BA LE Defendant-Appellant.	▲ COURT USE ONLY ▲
Attorney for Defendant-Appellant: Forrest W. Lewis 1600 Broadway, Suite 1525 Denver, Colorado 80202 (303) 830-2190 Reg. No.: 5817	Case No. 09CA1989

OPENING BRIEF

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INTRODUCTION

Appellant Vu Le was the Defendant in the District Court and will be referred to by name or as Defendant. References to the record are in parenthesis and are referred to by volume or date of transcript, page and line. There is one volume of

pleadings and documents from the court file and one cd containing e-transcripts of the trial, pretrial hearings and sentencing.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the prosecutor's pursuit of a conviction based on complicity, under the circumstances of this case, deprived Mr. Le of a fair trial.

2. Whether the imposition of consecutive sentences on the lesser-included offenses of attempt to commit assault in the first degree violate the constitutional prohibition against double jeopardy.

STATEMENT OF THE CASE

Vu Le was charged in the District Court of Adams County with multiple counts of criminal attempt to commit murder and assault and illegal discharge of a firearm. The charges were related to an incident which occurred in Adams County on September 16, 2007. (Vol. 1, pp. 1-6). A jury trial began on June 1, 2009. Verdicts were returned on June 4, 2009, finding Mr. Le guilty of criminal attempt to commit murder in the second degree as to one victim, criminal attempt to commit murder in the first degree (extreme indifference) as to four victims and four counts of criminal attempt to commit assault in the first degree (extreme indifference). The jury found Mr. Le *not guilty* of one count of criminal attempt to commit assault in the first degree (regarding the victim on the guilty verdict to

criminal attempt to commit second-degree murder) and *not guilty* of the count of illegal discharge of a firearm. (Vol. 1, pp. 113-129).

Mr. Le was sentenced on August 13, 2009, to the Department of Corrections for 10 years on the attempted second-degree murder count, 16 years each on the attempted first-degree murder counts and five years on the attempted assault counts, all to run consecutively. (*Id.*, pp. 153-155). Mr. Le filed a Notice of Appeal and this appeal was duly perfected.

STATEMENT OF FACTS

Monica Elsen was taking her son to a party on September 16, 2007, around 2:30 p.m. Her nephew and niece were with them. Near 96th Avenue and the I-76 on-ramp, she heard a loud noise. Her son yelled "Mommy." She looked back and saw that her car window had shattered and her son "had glass all over him." (Trpt. 6/1/09, p. 219, l. 21-25). There was a car passing her when she heard the loud noise. It was the right rear window that was shattered. (*Id.*, p. 222, l. 5-10). No one in her car was hurt. (*Id.*, p. 225, l. 22).

A young man in a car in front of her stopped to help. He said he "knew what was going on" and called the police. (*Id.*, at l. 8-10).

Eric Bowers was the person who stopped to help Ms. Elsen. He had been previously employed in a business owned by Mr. Le's family. He had filed a

worker's compensation claim and thought there were "some bad feelings" between him and the Le family. He was fired from that job in February 2007. (*Id.*, p. 240, l. 25). He claimed that Vu Le told him he was going to "get" him or "take care" of him. (*Id.*, at l. 9-14).

On the day of the incident, he saw Mr. Le and Clayton Gilson (a current employee of the Le business) at an auto parts store. He testified that when he left the store, Mr. Le followed him. He said Mr. Le was driving and "he was right behind us." (*Id.*, p. 246, l. 12). Clayton Gilson, he said, was in the car with Mr. Le. (*Id.*, at l. 21).

Mr. Bowers went to another parts store and Mr. Le and Gilson continued to follow him. (*Id.*, p. 250, l. 25). In the area of 96th Avenue and I-76 ramp, he said Mr. Le was still following him at a high rate of speed, 80 to 90 miles per hour. (*Id.*, p. 252, l. 9). As he was getting ready to turn onto the on-ramp he saw Mr. Le's car making a "sharp, swift U-turn." He heard three popping sounds and saw some smoke across his back window. He noticed the car in front of him pulling over and glass falling out of that car. (*Id.*, p. 252, l. 12-20). He pulled over, realizing that the sounds he heard were gunshots. (*Id.*, p. 253, l. 4). He got out to help the lady in the car, helped her clean the glass out of the car and gave her his name and phone number and told her to call the police. (*Id.*, p. 254, l. 23-25).

Mr. Bowers said he knew that Mr. Le often carried a weapon, a chrome handgun. (*Id.*, p. 256, l. 2-15). He said when he heard the shots, he saw "a hand come out of the sunroof with a gun" (from Mr. Le's car). He heard three shots. He could not say who shot the gun, the driver or the passenger (*Id.*, p. 257, l. 9-14).

Mr. Bowers did not report the incident because there were warrants for his arrest. He spoke with the investigating detective several days later when the detective contacted him. (Trpt. 6/2/09, p. 28, l. 1-12).

Clayton Gilson worked at Mr. Le's family business. He said he was in the car with Mr. Le when the events happened. Mr. Le was driving, Mr. Gilson was in the front passenger seat. He said they went to the auto parts store where they saw Eric Bowers. Mr. Le, he said, "waited for Eric to leave and started following him." (*Id.*, p. 81, l. 7-12). They followed Bowers to another store. Mr. Le did not say why he was following Bowers and Mr. Gilson did not know the reason. He did opine that "they didn't really like each other too much." He had heard that Bowers was fired from the Le family business because he stole some tools. (*Id.*, p. 82, l. 20-25).

Mr. Gilson testified that Mr. Le pulled a gun out of the center console (*Id.*, p. 89, l. 24), cocked it and said, "I am going to buck." (*Id.*, p. 90, l. 16). He said Mr.

Le "shot three times out the sunroof. . . ." (*Id.*, p. 89, l. 10). The shots were fired in the general direction of the Bowers and *Elsen* cars. (*Id.*, p. 98, l. 22).

After the shooting they went to Gilson's house and put the car in the garage. He said Mr. Le told him "if you don't say anything, nothing will happen." (*Id.*, p. 99, l. 9). Mr. Gilson cleaned the interior of the car. He was on probation and did not want to get in trouble. (*Id.*, p. 100, l. 10). He said he helped Mr. Le hide the car because he was "scared of what might happen" to him. (*Id.*, p. 102, l. 7).

Mr. Gilson was charged with accessory-after-the fact. Those charges were dismissed in exchange for his testimony. (*Id.*, p. 103, l. 1-3).

Mr. Gilson had problems with his probation at the time. A complaint for revocation was filed. When detectives first contacted him regarding the shooting, he told them he did not know anything about it. (*Id.*, p. 128-129).

A Colorado State Patrol accident reconstruction expert testified that "given the position of the vehicles, and the view that both occupants had" it was possible that the passenger was the shooter. (*Id.*, p. 210, l. 23). His reconstruction for the State, however, did not address the passenger as the shooter, even though the initial reports suggested the passenger as shooter because the driver was occupied with driving and the Elsen vehicle was hit on a side window. (*Id.*, p. 211, l. 1-12).

There was some interesting forensic evidence in this case. A very small amount (one particle) of gunshot residue was found on a swab sample from the driver's side window. Multiple particles of residue were found on a swab from the passenger window. This suggests (is consistent with) a gun was shot from or in the vicinity of the passenger window. (*Id.*, p. 255, l. 22).

If the car were cleaned after the shooting, a single particle could be inadvertently transferred to the driver window. (*Id.*, l. 23-25). The detective who interviewed Mr. Bowers in the early stages of the investigation asked about the position of the vehicles, trying to determine where the shots came from. The testimony regarding this exchange is as follows:

> Q. And then do you remember him saying that "As soon as my mom turned on I-76, he made a U-turn as we heard the shots being fired?
>
> A. Yes.
>
> Q. That was Mr. Bowers telling you that?
>
> A. Yes.
>
> Q. And then he goes on and says, "A very quick rapid U-turn." Do you remember that?
>
> A. Yes.
>
> Q. So then based on that, you said, "So if he was making a U-turn, it would be the passenger that did the shooting." Is that correct? Do you remember saying that to him?

A. Yes.

Q. And he said, "You know, we couldn't tell."

A. Correct.

Q. So after that answer, then you say, "It's definitely as he was making the U-turn is when the shots went off?" And he says, "Yes," again, correct?

A. Correct.

Q. Then you ask him "Was he making a U-turn to the right or to the left?" And he says, "To the left"?

A. Correct.

Q. Then you say, "Okay. So the passenger side of the Lexus would have been at the passenger side of the car that got shot?" And he says, "Yes"?

A. Correct.

(Trpt. 6/3/09, p. 71, l. 7-25, p. 72, l. 1-10).

There were no bullet fragments found in either the Bowers or Elsen vehicle, nor were there identifiable bullet holes in either. (*Id.*, p. 58, l. 1-9).

SUMMARY OF THE ARGUMENT

I. The prosecutor's pursuit of a conviction based on complicity, under the unique facts of this case resulted in unreliable verdicts and a denial of Mr. Le's right to a fair trial. The fact that the jury was misled on this issue is clear from the verdict on the illegal discharge of a firearm count.

II. The mandatory sentencing statute does not, and cannot, require consecutive sentences on counts that are merged as lesser-included offenses. The sentences for attempt to commit first-degree assault must be vacated.

ARGUMENTS

I. THE PROSECUTOR'S PURSUIT OF A CONVICTION BASED ON COMPLICITY, UNDER THE CIRCUMSTANCES OF THIS CASE, DEPRIVED MR. LE OF A FAIR TRIAL.

During voir dire, the prosecutor repeatedly advanced a complicity theory, using an analogy of a bank robbery where one of the suspects waited outside in a "getaway car." The driver, the prosecutor suggested, was equally culpable. (Trpt. 6/1/09, p. 111, l. 4). (*Id.*, p. 118, l. 19). "Culpability of the person on the outside [getaway driver] is just as guilty as the person on the inside . . ." (*id.*, p. 125, l. 8). The jury accepted this theory in their responses. *Id.*

The first topic in the prosecutor's opening voir dire was complicity: ". . . you might not do the crime per se, but you assist in the crime . . . ." The court told the prosecutor to "steer clear of instructions or law . . . ." (Trpt. 6/1/09, p. 51). A few minutes later, the prosecutor came right back to the same issue, "A robbery is occurring. It is at a bank. There are two individuals inside the bank doing the robbery. One outside in the getaway car. Do you think that an individual in the

getaway car is any less culpable, any less responsible for what is going on inside?" THE JUROR: "No." (*Id.*, p. 62, l. 7-13).

This line of juror qualification was particularly improper. The prosecutor knew that Mr. Gilson would testify that Mr. Le was the shooter, it was not planned beforehand and Gilson was surprised. There was never any doubt that this was not a complicity case. The prosecutors knew that Gilson had credibility problems and that some evidence suggested the passenger was the shooter. The prosecutors must have reasoned that by advancing complicity, they would get a conviction on Mr. Le even if the jury thought (or had a reasonable doubt) that *Gilson* was the shooter. The jury could speculate that Mr. Le aided and abetted by making the quick U-turn and that he knew that Mr. Gilson was going to shoot.

The prosecutor's exchange with the first replacement juror included this sequence:

> MR. HARTFORD: The hypothetical I was talking about where you have two individuals that were robbing a bank, the third individual outside in the getaway car, as a lookout? What is your view as to that third party's culpability? Are they as culpable as the guys inside since they all planned this out, they are just filling the role as lookout in the getaway car, a driver, or is there a lesser lack of culpability of that third party outside waiting in that getaway car?
>
> THE JUROR: *They are all guilty the same.*

Id., p. 111, l. 4-15 (emphasis added).

With the next replacement juror the prosecutor also got the desired response: ". . . do you feel he [the driver] is culpable because he participated in the plan, they figured it out together, or is he less culpable?" THE JUROR: "He is equally as culpable." *Id.*, p. 118, 23-25.

This scenario was repeated with such effect that the jurors interrupted the scenario with the "right" answer: ". . . culpability of person on the outside, just as guilty as the person on the inside of the –" THE JUROR: "*YES.*" *Id.*, p. 125, l. 8-10 (emphasis added).

The prosecution argued for a complicity instruction at the close of the evidence. (Trpt. 6/3/09, p. 127). The court ruled as follows:

> I am not giving a complicity instruction in this case because *either Mr. Le is the shooter or he is not.* There is no showing, no evidence that he aided, abetted, advised or encouraged Mr. Gilson to commit this offense . . . . Either he is the perpetrator, on the status of the record, of the crime, or he is not . . . .

(*Id.*, p. 129, l. 1-6.)

Mr. Le agrees with the trial court's analysis. Based on the jury verdicts, however, the jury was apparently misled by the prosecutor's "complicity" voir dire. Having no instruction on the applicability of this legal theory, they were left to their own speculation based on the voir dire discussion.

As the court ruled, Mr. Le was either the shooter or not. If he committed the offenses for which he was found guilty it was because he was the shooter. He was found not guilty, however, of illegal discharge of a firearm, the pivotal, dispositive answer to the identification of the shooter. (Vol. I, p. 129).

This is no small or illusory issue. The evidence was in great conflict as to who fired the weapon. In ruling of the motion for judgment of acquittal, the trial court observed that there were "substantial issues regarding the credibility of the . . . witnesses in this case . . . ." As the court observed, the resolution of credibility issues was left to the jury. The trial judge expressed "reservations . . . regarding credibility of Mr. Bowers or Mr. Gilson . . . ." (*Id.*, p. 123, l. 12-14). As for complicity, the court said, "I will not give the case to the jury on complicitor theory and have them speculate." (*Id.*, p. 126, l. 23). In hindsight, based on the illegal discharge of a firearm verdict, that is exactly what they did.

Mr. Le acknowledges *People v. Frye*, 898 P.2d 559 (Colo. 1995), and subsequent cases which limit the scope of inconsistent verdict analysis. Under the unique circumstances of this case, however, the not guilty verdict on discharging the weapon stands as conclusive evidence that the jury speculated on the complicity theory advanced in voir dire and did not reach a reliable verdict. *Frye*, and its progeny notwithstanding, Mr. Le does not understand how the verdict on

discharge of a firearm does not legally preclude a finding of an essential element of the other offenses. The jury must have thought that the resolution of the "shooter" issue was of no moment, vis a vis the prosecutor's robbery getaway car analogy.

The trial court's concern about avoiding jury speculation on the complicity/shooter issue was well placed. Jury speculation on important evidentiary issues deprives a defendant of a fair trial. *Yusem v. People*, 210 P.3d 458, 467 (Colo. 2009) (case reversed because 404[b] evidence created a situation in which "the jury was forced to speculate about whether Yusem purposefully displayed his gun."). *People v. Muniz*, 190 P.2d 774, 780 (Colo. App. 2008) (court should "avoid encouraging the jury to speculate.").

A prosecutor's insinuation that additional inculpatory evidence exists that was not presented at trial "invites the jury to speculate about such phantom proof, and may be even more prejudicial than erroneously admitted specific proof." *Domingo-Gomez v. People*, 125 P.3d 1043, 1057 (Colo. 2005). This is precisely what happened to Mr. Le. The only explanation for the divergent verdicts is that the jury speculated on a complicity theory, avoiding the issue of who fired the gun.

II. THE IMPOSITION OF CONSECUTIVE SENTENCES ON THE LESSER-INCLUDED OFFENSES OF ATTEMPT TO COMMIT ASSAULT IN THE FIRST DEGREE VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY.

In its order of June 16, 2009 (Vol. I, pp. 135-138), the trial court ruled that the attempted first-degree assault counts merge into the attempted first-degree murder counts as a matter of law. Mr. Le agrees with the trial court's ruling on this issue.

For sentencing, however, the trial court concluded that § 18-1.3-406(1)(a), C.R.S., required consecutive sentences, even on the counts that were merged as a matter of law. These consecutive sentences were imposed (five years each) on the attempted first-degree assault counts. (Vol. I, pp. 154-155). This is an illegal sentence since principles of merger preclude judgments of conviction and sentences on the merged offenses.

In Colorado, merger "precludes *a conviction* for a crime that is the lesser-included offense of another crime for which the defendant has also been convicted in the same prosecution." *Bouilles v. People*, 770 P.2d 1274, 1282 (Colo. 1989). *See People v. Abiodun*, 111 P.3d 462 (Colo. 2005); *Woellhaf v. People*, 105 P.3d 209 (Colo. 2005).

In *Patton v. People*, 35 P.3d 124, 130 (Colo. 2001), the court discussed the "statutory elements test" required by § 18-1-408, C.R.S., which provides that a defendant may not be punished multiple times for the same conduct if one offense is included in the other. Applying this test, the court held that possession of a

controlled substance was a lesser-included offense of manufacturing a controlled substance. The court concluded, therefore, that multiple punishments would violate the constitutional prohibition against double jeopardy.

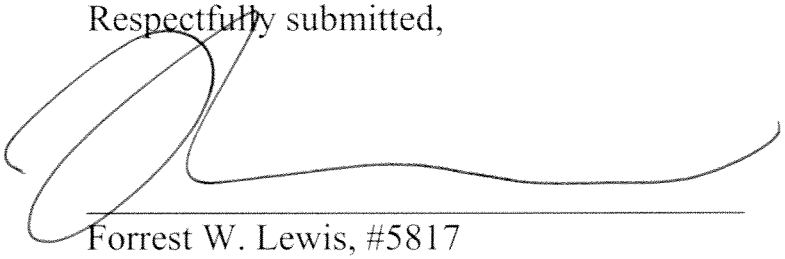
Just as a defendant could not manufacture a drug without possessing it, Mr. Le could not attempt to murder someone without attempting to cause them serious bodily injury. Convictions and sentences on both counts, particularly *consecutive* sentences, are constitutionally prohibited.

The mandatory sentence statute, § 18-1.3-406, C.R.S., does not require consecutive sentences on the merged offenses because they are not properly considered "convictions." The conviction for a lesser-included offense must be vacated and no sentence can be imposed on them. *People v. Abiodun, supra*, (possession and distribution of controlled substance as part of the same transaction merged and conviction on lesser-included offense of possession must be vacated).

CONCLUSION

Mr. Le requests judgment vacating his convictions and remanding this matter for a new trial. In the alternative, Mr. Le requests judgment vacating the convictions and sentences on the attempt to commit assault in the first-degree counts.

Respectfully submitted,



Forrest W. Lewis, #5817

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing **OPENING BRIEF** was placed in the U.S. mail, postage prepaid, on this 19th day of February, 2010, to the following address:

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