NO. 41167-9-II

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

STATE OF WASHINGTON, Respondent

v.

DAYLAN ERIN BERG and JEFFREY SCOTT REED, Appellants

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO. 09-1-00761-6 and
09-1-00762-4

BRIEF OF RESPONDENT

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III. Sufficient evidence supported Berg and Reed's convictions for Kidnapping in the First Degree.

IV. Pursuant to *State v. Nunez*, the special verdict instruction was neither flawed nor erroneous.

V. The evidence was sufficient to convict Berg of Intimidating a Witness.

VI. The trial court properly denied Reed's motion for a mistrial because Sergeant Alie did not provide improper opinion testimony.

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B. STATEMENT OF THE CASE

I. Procedural History

The appellants, Daylan Berg and Jeffery Reed, were charged by amended information as co-defendants with Count One: Attempted Murder in the First Degree, Count Two: Burglary in the First Degree, Count Three: Kidnapping in the First Degree, Count Four: Robbery in the First Degree, and Count Five: Intimidating a Witness. (Reed CP 7-9; Berg CP 1-3). Reed was also charged with Count Six: Unlawful Possession of a

Firearm in the First Degree, based on his 2002 conviction for Criminally Negligent Homicide. (Reed CP 9). Count One (Attempted Murder in the First Degree) included a sentencing aggravator based on the victim's status as a law enforcement officer who was performing his official duties at the time of the offense. (Reed CP 7; Berg CP 1). Counts One through Five included firearm enhancements. (Reed CP 7-9; Berg CP 1-3).

Following a trial by jury, the appellants were found guilty of all counts. (Reed CP 333 - 346; Berg CP 80 - 91). The jury also found the State proved the presence of the aggravating factor on Count One as well as each firearm enhancement on Counts One through Five. (Reed CP 335 - 345; Berg CP 82 - 92).

The appellants were sentenced before the Honorable Robert Lewis on September 3, 2010. (Reed CP 486; Berg CP 96). The court imposed a total sentence of 748 months confinement for each appellant. (Reed CP 489; Berg CP 99).

II. Summary of Facts

Albert Watts lived in a house at 7549 Delaware Lane, in Vancouver, Washington. (24 RP 986). Watts was employed at Veritas Communications, in Portland, Oregon. (24 RP 986). He was also licensed to grow medical marijuana and he cultivated a marijuana grow operation out of his home. (24 RP 988-89). Watts had a detached double-deep

garage. (24 RP 989). The grow huts for his marijuana plants were located in the secondary part (the back part) of the garage. (24 RP 989).

Jeffrey Reed had been to 7549 Delaware Lane on multiple occasions because the mother of his child (Summer Sterrett) used to live there with their child. (26B RP 1557-58, 1560). Reed's friend, Daylan Berg, would accompany Reed to the residence on a number of his visits. (26B RP 1560). Reed's most recent visit to the residence was at the end of March, 2009. (26B RP 1563, 1565). Watts was living at the residence at that time and his marijuana grow operation was visible in the garage. (26B RP 1563, 1568).

On the evening of April 15, 2009, Reed and Berg stopped by Reed's brother's home (James Roberts), in Portland. (27A RP 1683). Roberts' girlfriend, Keely Roylston, loaned Berg a black Carhartt jacket. (27ARP 1685). Reed and Berg left together, prior to 9:00 p.m. (27A RP 1686).

On that same night, Watts was in the back part of his garage, tending to his marijuana plants. (24 RP 987-88). The door to the back part of the garage was locked by dead-bolt. (24 RP 1012). Around 9:00 p.m., he heard a loud kicking at the door. (24 RP 991). Suddenly, the door was

broken down and Reed and Berg came bursting into the room.[1] (24 RP 991-92). Reed was the first man to enter. (24 RP 992-93). He was holding a semi-automatic pistol, which he pointed at Watts' head. (24 RP 992-94). Reed was immediately followed by Berg. (24RP 993). Reed told Watts to "get on the ground." (24 RP 993-94). Watts fell to the ground. (24 RP 995). The men said they were there to take Watts' marijuana plants and whatever else they wanted. (24 RP 995). Reed told Berg to get on Watts' back and "hold him down." (24 RP 995). Reed handed Berg the gun. (24 RP 995). Berg pressed his knee into Watts' back and pointed the gun next to his head, at the right side of his ear. (24 RP 995). Watts could not move. (24 RP 995).

From the corner of his eye, Watts could see Reed take a couple of trips in and out of the garage. (24 RP 998). Watts could also see Reed ripping up the marijuana plants and stuffing them into something. (24 RP 999). Berg told Watts to keep his head down. (24 RP 998). Any time Watts tried to turn his head, Berg told Watts "they would kill [him]...he would kill [him]." (24 RP 998).

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[1] The appellants refer to Reed as "the first to enter" or "the short man" and to Berg as "the second to enter" and "the taller man." (*See* Br. of Appellant – Reed, at p. 5; Br. of Appellant – Berg, at p. 3). However, because the identity of the perpetrators is uncontested on appeal, the State refers to Reed and Berg by their names.

Watts estimated that Berg had him pinned to the ground for about thirty minutes. (24 RP 999). After Reed was finished collecting the marijuana plants, he came back into the room where Watts was being held. (24 RP 1000). Berg got up. (24 RP 1000). Berg asked Reed, "what are we gonna do?" (24 RP 1000). Reed responded by telling Watts that he had his wallet, he knew where he lived, and he could find him. (24 RP 1000). Reed asked Watts if he was going to call the police. (24RP 1000). Watts said "no." (24 RP 1000). Reed asked Watts "what are you going to tell them?" (24 RP 1000). Watts said "nothing." (24 RP 1000). Reed said "we will find you." (24RP 1000). The men told Watts "they would hunt [him] down and kill [him] if he called the police." (24 RP 1017). Immediately before they left the residence, Reed ordered Watts to stay on the ground for fifteen minutes. (24 RP 1000).

After not hearing any rustling in the house for approximately three or four minutes, Watts got up. (24 RP 1000). Watts did not have a land line. (24 RP 1000). He went to his kitchen, where he had left his cell phone, so he could call the police. (24 RP 1000). Watts saw that his wallet and cell phone were gone. (24 RP 1000).

Meanwhile, Watts' neighbor, Cynthia Surber, had already called 911. (24 RP 1085). Surber lived across the street from Watts. (24 RP

1085). Surber called the police because she saw a man she did not recognize "creeping" down Watts' driveway while carrying something that looked like a Christmas tree stuffed into a light-colored pillow case. (24 RP 1092-95). Surber saw two men drive away in the white car, with the headlights turned off. (24 RP 1096). Reed's wife, Wendy Vasquez, owned a white Kia Spectra and Reed was known to drive it. (26B RP 1558).

Sergeant Jay Alie self-dispatched to the call of a white car fleeing a residential burglary at 7549 Delaware Lane. (24 RP 1131). Sergeant Alie had thirteen years of experience with the Vancouver Police Department ("VPD"). (24 RP 1130). Sergeant Alie was not assigned to the beat where the burglary took place; however, he happened to be in the neighborhood because he had just returned from having the headlight on his patrol car replaced at the nearby VPD shop. (24 RP 1131-32). Sergeant Alie saw a white car speed past him from the general direction of the burglary. Sergeant Alie provided the license plate of the white vehicle to dispatch. (24 RP 1136). Sergeant Alie did not know whether this was the same vehicle associated with the burglary. (24 RP 1136). He activated his overhead lights and turned around in pursuit of the vehicle, with the intent of conducting a traffic stop. (24 RP 1136). The white car continued to speed and then it made a sharp turn onto a side street. (24 RP

1137). Sergeant Alie intended to stop the vehicle at a nearby Fred Meyer; however, after the vehicle turned the corner, it rapidly slowed down and then came to a rolling stop at the curb. (24 RP 1136-38). Sergeant Alie could see his partner (VPD Office Donahue) behind him, in another patrol car. (24 RP 1137).

Sergeant Alie parked his patrol car behind the white vehicle. Sergeant Alie took a "wide approach" towards the vehicle. (24 RP 1140). As Sergeant Alie approached the white car, he could see there were two occupants inside the vehicle. (24 RP 1139). Sergeant Alie could also see that the driver's side window was down and the driver's side passenger window was also down. (24 RP 1141). Sergeant Alie found this surprising because it was a very cold night. (24 RP 1141). As he walked closer to the vehicle, he observed a marijuana plant sitting upside down with a fresh root ball sticking up in the back seat. (24 RP 1141). Sergeant Alie realized this was the car associated with the burglary call. (24 RP 1142).

Sergeant Alie took a position at the pillar between the driver's side door and the driver's side passenger door. (24 RP 1142). Reed was sitting in the driver's seat and Berg was sitting in the passenger's seat.[2] Sergeant Alie observed that Reed (the driver) was sitting with both hands on the

[2] The location of Reed and Berg in the vehicle is uncontested on appeal.

steering wheel. (24 RP 1142). Reed looked straight ahead, he did not respond to Sergeant Alie, and he did not respond to anything else. (24 RP 1142). The vehicle's engine was still running. (24 RP 1142). Sergeant Alie told Reed to turn the car off. (24 RP 1142). Reed did not respond to Sergeant Alie's command. (24 RP 1142). Instead, there was "a beat" where there was nothing – "no movement at all." (24 RP 1142). Suddenly, Reed said "okay." (24 RP 1143). Reed bent forward in his seat, towards the center console. (24 RP 1143). Reed's head went down past the steering wheel. (24 RP 1144). Believing that Reed was reaching for a weapon, Sergeant Alie started to reach into the vehicle in an effort to stop him. (24 RP 1144). At the exact moment that Reed bent forward, the passenger, Berg, reached over Reed's back with a pistol in his right hand. (24 RP 1144-45). Berg pointed the pistol at Sergeant Alie. (24 RP 1144-45). The barrel of the gun was approximately one foot away from Sergeant Alie's face. (24 RP 1145). Sergeant Alie could see that the gun was a matt chrome grey semi-automatic. (24 RP 1145). Almost instantaneously, as Berg reached the pistol over Reed's lowering back, the gun went off. (24 RP 1144). Sergeant Alie believed he had been shot in the face. (24 RP 1145). He screamed and jumped back. (24 RP 1145-46). The vehicle sped off. (24 RP 1146). Sergeant Alie fell to the

ground. (24 RP 1147). He drew his gun, but could not get a safe shot at the vehicle. (24 RP 1148).

Pastor Toby Beck was working in his garage, with the garage door open when he saw two patrol cars following a "small white, whitish import looking car." (24 RP 1109-10). Beck saw the white car come to a stop. (24 RP 1109-10). Beck observed a patrol car stop behind the white car. (24 RP 1111). Beck observed that one-to-two minutes passed before the officer from the patrol car approached the driver's side of the white car. (24 RP 1112). Beck looked away, heard a loud pop, turned back around, and then saw the white car speed away. (24 RP 1113).

Jeff Whitestone was walking outside, adjacent to where Sergeant Alie was shot, immediately after Sergeant Alie was shot. (24 RP 1124-25). Whitestone saw a white Kia speed through a red light and nearly hit an oncoming truck. (24 RP 1124-25).

VPD Sergeant Patrick Johns was the first to arrive to provide emergency aid to Sergeant Alie. (24 RP 1147). Sergeant Johns laid Sergeant Alie on the lawn of an adjacent property. (25B RP 1295-96). Sergeant Johns could see a bullet hole in Sergeant Alie's uniform, located above the right chest pocket. (25B RP 1296). Sergeant Johns could also

see that Sergeant Alie's uniform was missing a button at the right chest pocket. (25B RP 1299).

Sergeant Alie was rushed to the emergency room at St. John's Hospital. (25B RP 1297). The bullet had not penetrated through to Sergeant Alie's chest. (25B RP 1296). Instead, a bullet fragment was discovered lodged in the shock plate of the right chest portion of Sergeant Alie's bullet-proof vest. (25B RP 1328, 1340). VPD Detective Scott Smith collected the bullet fragment as evidence. (25B RP 1340).

Detective Smith also discovered four plastic button fragments lying on the ground at the location where Sergeant Alie was shot. (25B RP 1356-58). He collected the button fragments as evidence. (25B RP 1356-58).

While Sergeant Alie was being treated at the hospital, a man hunt was underway for Reed and Berg, which involved the coordinated efforts of VPD and the Portland Police Department ("PPD"). (25A RP 1205). Minutes after the shooting, PPD Officer Tim Pahlke observed a white Kia pass him near Pardee Street in Portland. (25A RP 1211). Office Pahlke followed the car and found it stopped in the middle of the road at 113th Street. (25A RP 1211). By the time Officer Pahlke reached the vehicle, it was abandoned. (25A RP 1211). The passenger door was wide open, the

vehicle's engine was running, and the lights were on. (25A RP 1212). Officer Pahlke observed an open gate to a backyard east of where the Kia was abandoned. (25A RP 1212-13).

Officer Pahlke set up a perimeter around the vehicle. (25A RP 1213). The white Kia was found to contain the following items: a flat screen TV, multiple green marijuana plants, and white trash bags containing marijuana leaves in the backseat; one spent .40 caliber shell casing, one .40 caliber round, and one plastic button fragment near the driver's-side-seat control levers. (26B RP 1647-1651).

PPD Officer Anthony Passadore had contact with the same white Kia approximately one year prior. (26B RP 1620). At that time, he identified that driver of the Kia as Jeffrey Reed. (26B RP 1620). At that time, he also confirmed that Reed's address was 11407 S.E. Pardee Street, in Portland, which was approximately one block from where the Kia was located on the night of April 15, 2009. (26B RP 1620).

PPD Officer Shawn Gore used a tracking dog in an effort to locate the suspects. (26BRP 1545-46). Officer Gore discovered a black Carhart jacket lying in the backyard of a residence at 113th Street. (26B RP 1545-46).

Berg returned to Reed's brother's house (James Roberts), alone, around 10:00 p.m., on the night of April 15, 2009. (27A RP 1687). Berg did not tell Roberts where he had been, but he asked to stay the night. (27A RP 1692). At the same time Berg arrived, Roberts received a call on his cell phone. (27A RP 1687). Roberts immediately left the residence in his maroon IROC Camaro. (27A RP 1689). When Roberts' girlfriend, Keely Rolyston, called Roberts to check on his status, she heard sirens in the background. (27A RP 1690).

Shawn Wood lived one block away from where the white Kia was abandoned. (25A RP 1225). Wood saw police surrounding her neighborhood and she saw a young, stocky male, who was wearing a black hoody, jump over a fence and run through a neighbor's yard. (25A RP 1226). Immediately thereafter, Wood observed a maroon IROC, with no headlights on, pull into the adjacent parking lot. Wood saw the man in the black hoody jump into the IROC. (25A RP 1228-29). Wood saw the IROC drive away. (25A RP 1230). She called 911. (25A RP 1227).

Multnomah County Sheriff's Office Deputy Kerri Oman observed a maroon IROC Camaro, with two occupants, driving towards her at a high rate of speed. (25A RP 1238-39). Deputy Oman executed a traffic stop of the vehicle. (25A RP 1238-39). The driver was identified as

Reed's brother, James Roberts. (25A RP 1240). The passenger was identified as Reed. (25A RP 1240).

Reed was taken into custody. At the time of his arrest, Reed had a silver cell phone on his person. (25A RP 1259). Reed also had what appeared to be fresh marijuana leaves on the soles of his red Adidas shoes. (26B RP 1627). Officers also discovered cash and a pet store receipt for A to Z Pets on the passenger side of the IROC. (26 BRP 1655).

The following morning (April 16, 2009), Berg got a ride to his friend, Jennifer Ward's, house in Vancouver. (27A RP 1693, 1712). Ward refused to let Berg stay with her and drove Berg to his parents' house in Lake Oswego, Oregon. (27A RP 1716).

That same morning, a fugitive task force set up surveillance at Berg's parents' home in Lake Oswego. (27A RP 1722). Officers observed Berg peek his head out the front door and then take off. Berg ran through his parents' backyard and into an adjacent field. (27A RP 1729). Berg was carrying a visible pistol in his waistband. (27A RP 1738). Berg was commanded to drop the pistol. (27A RP 1738). The pistol went flying into the air and landed on the ground. (27A RP 1738-39). Berg was apprehended and the pistol was secured. (27A RP 1748).

The pistol that was recovered from Berg was a Smith and Wesson .40-caliber firearm with a magazine. (27A RP 1765). The accompanying magazine also belonged to a .40 caliber semi-automatic pistol. (27A RP 1767).

Johan Schoeman is forensic scientist III and a firearm and toolmark examiner for the Washington State Patrol ("WSP") Crime Lab. (28A RP 1944). By using a process called "microscopic individualization," Schoeman was able to determine that the fired bullet (discovered in Sergeant Alie's bullet-proof vest) and the fired cartridge case (discovered on the driver's-side of Reed's abandoned Kia) both came from the firearm that Berg dropped from his waistband immediately prior to his arrest. (28A RP 1991-92).

Ronald Wojceichowski is a supervising forensic scientist for the WSP Crime Lab. (27B RP 1869). By using infrared spectroscopy and chemical analysis comparison, Wojceichowski determined that the four button fragments (discovered at the location where Sergeant Alie was shot) and the single button fragment (discovered on the driver's-side of Reed's Kia) came from the same source. (27B RP 1870, 1873). Wojceichowski also determined that each fragment was consistent with

the button that was missing from Sergeant Alie's patrol uniform, immediately after the shooting. (27B RP 1870-1873).

Sharon Herbelin, a forensic scientist at the WSP Crime Lab, tested the substance that was found on the bottoms of Reed's shoes at the time of his arrest. Herbelin determined the substance was marijuana. (27B RP 1845-46, 1852).

The cell phone that was discovered on Reed's person at the time of his arrest was determined to be Albert Watts' cell phone. (24 RP 1016; 25A RP 1275-76, 1319-20). The pet store receipt that was discovered on the passenger side of the IROC at the time of Reed's arrest was determined to be Albert Watts' receipt from a recent purchase. (24 RP 1015; 27A RP 1757, 1761-62).

Michael Alldrit became acquainted with Berg while he and Berg were detained in the Clark County Jail following Berg's arrest, between May and June of 2009. (28A RP 1901). On fifteen to thirty occasions, Berg boasted to Alldrit about his involvement in a home invasion and an officer shooting in Vancouver. ((28A RP 1901-02). Berg told Alldrit "that he came back from a trip down - - down south and went to a friend's house, and they planned a home invasion and followed through with that home invasion on the same day." (28A RP 1902). Berg told Alldrit that it

took place in Vancouver. (28A RP 1902). Berg told Alldrit that they got pulled over after the home invasion "and the police officer came up to the driver's door and [Berg] reached over the driver and shot the police officer." (28A RP 1903). Berg said the police stopped him the next day, "he threw a gun, and they arrested him." (28A RP 1903).

C. ARGUMENT

I. Reed and Berg's public trial right was not violated when officers temporarily removed one spectator from the courtroom in order to conduct a criminal investigation.

Reed and Berg claim their public trial right was violated because "there is no question that a member of the public was improperly excluded from the courtroom during the proceedings." *See* Brief – Reed, at p. 17. The appellants' claim is without merit. The appellants' claim is based on the following facts:

Trial commenced on May 19, 2010. (24 RP 976). Several undercover officers were present in the courtroom during the two week trial of Reed and Berg in order to respond to any breaches of security. (25A RP 1183). Both the State and defense counsel were aware of the officers' presence. (25A RP 1183).

On May 24, 2010, during a recess, defense counsel for Berg told the court that undercover officers had "excluded" a member of the public

from courtroom proceedings "for reasons unknown to him." (26B RP 1606). The court noted that it had not excluded any member of the public from the courtroom. (26B RP 1606). The court called VPD Lieutenant John Chapman, who was assigned as one of the undercover officers, to the court to respond to defense counsel's allegation. (26B RP 1609). Lieutenant Chapman advised the court that VPD was currently interviewing one of the spectators on suspicion of intimidating a witness. (26B RP 1609-10). Lieutenant Chapman said officers had reason to believe the spectator intimidated a witness when he left the courtroom the other day, "so we're looking into that and want to do an investigation on that." (26B RP 1610). Lieutenant Chapman said the spectator was currently detained, for the purposes of their investigation. (26B RP 1610).

The spectator was identified as Berg's friend, Joel Wyman. (26B RP 1668). The next morning (May 25, 2010), defense counsel for Berg submitted a declaration from Mr. Wyman. (27A RP 1674). In his declaration, Mr. Wyman alleged he had been threatened with being arrested for trespass if he returned to the courtroom. (27A RP 1674-75). It was unclear who made the threat to Mr. Wyman and it was unclear when the threat was made. (27A RP 1674). No courthouse security officers testified before the court that Mr. Wyman's assertions were true. In addition, the State never confirmed Mr. Wyman's assertions were true.

However, the State advised the court that, the previous evening, the civil unit for the prosecuting attorney's office had advised the custody officers in the courtroom that they could not direct the exclusion of anyone from the courtroom. (27A RP 1674). The State followed, "so...if [that direction] was given, [it] has been rescinded." (27A RP 1674).

On the afternoon of May 25, 2010, counsel for Berg filed a motion for a mistrial based on a "public trial" violation. (27B RP 1856). In the alternative, counsel for Berg moved the court for a specific order for "public access," which stated people would not be barred from coming into the courtroom. (27B RP 1858). Counsel for Reed joined Berg's motion. (27B RP 1858).

The court signed-off on the defendants' order for public access; however, the court denied the joint motion for a mistrial. (27B RP 1861, 1863). In denying the defendants' motion, the court found it had not excluded anyone from the courtroom and that "the proceedings [had] been open to the public at all times." (27B RP 1861). The court also found Mr. Wyman was not excluded from the courtroom; rather, he was temporarily detained from the courtroom based on a criminal investigation. (27B RP 1862). If anyone told Mr. Wyman that he was "excluded" from the courtroom, the court found this was error; however, the court stated that law enforcement had been advised to tell Mr. Wyman that he was

welcome to return to the courtroom, now that the criminal investigation was apparently complete. (27B RP 1862). The court stated the fact that Mr. Wyman had not returned to the courtroom, despite this notice, did not indicate that Mr. Wyman was "excluded;" instead, it indicated that he had "chosen not to return." (27B RP 1862).

Whether the right to a public trial has been violated is a question of law that is reviewed de novo. *State v. Momah*, 167 Wn.2d 140, 147, 217 P.3d 321 (2009). The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution provide criminal defendants with the right to a public trial by an impartial jury. In addition the First Amendment and article I, section 10 provide the public with an interest in open and accessible proceedings. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). The public trial right is not absolute; "it is strictly guarded to assure that proceedings occur outside the public courtroom in only the most unusual circumstances." *State v. Strode*, 167 Wn.2d 222, 226, 217 P.3d 310 (2009) (citing *State v. Easterling*, 157 Wn.2d 167, 174-75, 137 P.3d 825 (2006)). The Washington Supreme Court has articulated guidelines that the trial court must follow before closing a courtroom to the public. *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). Those criteria are: (1) the proponent of closure or sealing must make some showing [of a compelling

interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; and (5) the order must be no broader in its application or duration than necessary to serve its purpose. *Id.*

However, before the right to a public trial is implicated, in which case the court must address the *Bone-Club* factors, a court closure must be contemplated or requested. *State v. O'Connor*, 755 Wn. App. 282, 293, 229 P.3d 880 (2010), *rev. denied*, 169 Wn.2d 1018, 238 P.3d 502 (2010). For example, in *O'Conner*, the Court of Appeals found the defendant's public trial right was not implicated when the public was subjected to routine screening and search before entering the courthouse, even though this action might have dissuaded people from entering the courthouse who did not wish to be screened before entering, because closure was neither "contemplated or requested" and there was no evidence that any "non-routine general courthouse security screening occurred." *O'Connor*, 755 Wn. App. at 287, 293.

Here, similar to *O'Connor*, Berg and Reed's public trial right was not implicated because court closure was never contemplated or requested. First, neither party brought a motion for closure. Second, the court never ordered closure of the courtroom. Third, if Mr. Wyman was ever absent from the courtroom it was not because he was being "excluded" as a member of the public; rather, it was because he was being investigated as the subject of a routine criminal investigation. Law enforcement had reason to believe Mr. Wyman had intimidated a witness outside the courtroom on the previous day. When Mr. Wyman appeared at the courthouse the following day, it was incumbent upon the officers to investigate the criminal allegation by interviewing Mr. Wyman. There is no authority to suggest that a spectator's right to observe a trial supersedes law enforcement's right to conduct a criminal investigation. Further, there is no authority to suggest that the trial court must engage in a *Bone-Club* analysis before law enforcement can commence a criminal investigation. In addition, there is no evidence that the temporary detention of Mr. Wyman exceeded the scope of law enforcement's criminal investigation against him. In fact, law enforcement was advised to tell Mr. Wyman that he was welcome to return to the courtroom, once the criminal investigation was complete.

Next, there is no corroborative evidence that Mr. Wyman was ever "excluded" from the courtroom after the criminal investigation against him was complete. However, if Mr. Wyman was ever excluded from the courtroom, such exclusion would not violate Berg and Reed's right to a public trial because the Washington Supreme Court recently held "the exclusion of one person, without more, is simply not a closure." *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011).

In *Lormor*, the trial court *sua sponte* excluded the defendant's daughter from the courtroom, based on a finding that the defendant's daughter was of tender years and that the sound of her ventilator could be distracting to the jury. *Lormor,* 172 Wn.2d at 88-89. The trial court did not conduct a *Bone-Club* analysis before it excluded the child. *Id.*, at 90.

On appeal, Lormor claimed the exclusion of his daughter violated his right to a public trial. In analyzing Lormor's claim, the Court compared Lormor's case to the preeminent cases in which the Court found "closure" occurred. *Id.*, at 92-93, *citing Bone-Club*, 128 Wn.2d at 257 (closure occurred when general public was excluded from suppression hearing); *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 807-08, 100 P.3d 291 (2004), *accord State v. Brightman*, 155 Wn.2d 506, 511, 122 P.3d 150 (2005) (closure occurred when general public excluded from voir dire); *State v. Easterling*, 157 Wn.2d 167, 172, 137 P.3d 825 (2006)

(closure occurred when general public, defendant, and defendant's counsel excluded from courtroom while codefendant plea-bargained); *State v. Momah*, 167 Wn.2d 140, 146, 217 P.3d 321 (2009), *accord State v. Strode*, 167 Wn.2d 222, 224, 217 P.3d 310 (2009) (closure occurred when individual jurors privately questioned in chambers). Based on its analysis, the Court found "a 'closure' of a courtroom occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." *Id.*, at 93. Because the public was never fully excluded from the courtroom during Lormor's trial, the Court held that a "closure" never occurred and Lormor's public trial right was not implicated. *Id.*, at 93.

Lormor should control in this case. Here, even if one person was temporarily removed or excluded from the courtroom, trial was conducted in an open courtroom, the general public was never excluded, Reed and Berg's family were not excluded, the doors were never closed to the public, and trial was never held in an inaccessible location. Consequently, no courtroom closure occurred, a *Bone-Club* analysis was not required, and Reed and Berg's public trial right was not violated.

Lastly, if any error occurred, the error was inadvertent and trivial and it does not warrant the reversal of Berg and Reed's six felony

convictions.[3] The purpose of the public trial right is to ensure that the judge and the prosecutor carry out their duties responsibly, that perjury is discouraged, and that witnesses come forward. *Lormor*, at 96. The courts have found that these purposes are not subverted when a courtroom closure is brief in its duration and in its nature. *Snyder v. Coiner*, 510 F.2d 224 (4th Cir. 1975) (finding closure was "entirely too trivial to amount to a constitutional deprivation" when, for a time during arguments of counsel before the jury, a bailiff refused to allow persons to enter or leave the courtroom); *U.S. v. Al-Smadi*, 15 F.3d 153 (10th Cir. 1975) (finding brief and inadvertent closing of the courthouse did not violate the Sixth Amendment).

If Mr. Wyman was ever excluded from the courtroom, then this "exclusion" would have occurred at the end of the day on May 24, 2010. Courthouse security would have been directed to tell Mr. Wyman that he was welcome to return to court immediately thereafter, prior to the morning of May 25, 2010. No witnesses would have testified during this time and no evidentiary rulings would have been made in Mr. Wyman's absence. Therefore, the purposes behind the public trial right would not

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[3] In *Lormor*, the Court stated that Washington has not expressly rejected a "trivial or de minimis" standard when reviewing court closures. Rather, the Court has "not yet been presented with a case or facts that warrant the adoption of the rule." *Lormor*, at 96.

have been implicated and any error would have been too trivial and insignificant to warrant reversal of the appellants' six felony convictions.

For each of these reasons, Reed and Berg's public trial right was never violated and their convictions should be affirmed.

II. The prosecutor did not commit misconduct during closing argument and Berg and Reed did not receive ineffective assistance of counsel.

Berg and Reed claim the prosecutor committed misconduct during closing argument because he misstated the reasonable doubt standard. *See* Brief – Reed, at p. 26-27. Because this error touched on a constitutional right, the appellants claim the court must apply a constitutional harmless error standard of review. *Id.* Claiming the State cannot prove harmlessness beyond a reasonable doubt, Berg and Reed contend their convictions for Count One: Attempted Murder in the First Degree, only, must be reversed. *Id.* Berg and Reed's claim is without merit.

During the State's closing argument, the prosecutor made the following comments regarding the reasonable doubt standard. Berg and Reed only take exception to the italicized portion of the prosecutor's comments.

> Defense counsel in this situation and the defendants I want to emphasize have no obligation. They - - they have no obligation to establish anything, disprove anything. That is because the presumption of innocence, which they were protected by the day that this event started, is continuing.

And it's going to continue until you reach some decision in deliberation, which have not started yet, to the contrary.
...

...And the Court's instruction on the - - regarding the burden of proof, which is instruction No. 4, tells you, number one, that the burden is on me. It tells you that the defendant is presumed innocent. And it tells you what a reasonable doubt is. And that's one that can be based on the evidence provided or the failure to prove a particular matter.

But the Court - - the Court's instruction goes on to tell you that if after you've fully, fairly and carefully considered the evidence that's come in through the trial, you have an abiding belief in the truth of the charge, you're satisfied beyond a reasonable doubt.

So I'm going to be talking this morning about whether or not there's sufficient evidence for you to collectively to attain that abiding belief in the truth of the charges that we have alleged.

And an abiding belief is, I think, I will suggest to you, the same sort of frame of mind that we require in any important decision we make. Say, a decision to marry or a decision to make a significant investment. What we do in those scenarios, hopefully, is to consider all of the facts, the pros, the cons, the ups, the downs, consider all the facts in an objective, reasonable way, and then determine a course of action.

And the point I would make to you is that we're never certain if that marriage is going to succeed or that investment is going to pay off big time, but we have an abiding belief in the decision that we made, we- - we - - we believe the decision to marry or make that investment was a correct one.

(29 RP 2242-44) (emphasis added). Neither defense counsel objected to the prosecutor's comments.

As a preliminary matter, pursuant to the Washington Supreme Court's holding in *State v. Emery, Jr.* and *State v. Olson* this court should not review the appellants' assignment of error under a constitutional harmless error standard. No. 86033-5 (June 14, 2012). In *Emery* the defendants also claimed the Court should apply a harmless error standard of review because the prosecutor touched on a constitutional right when he allegedly misstated the reasonable doubt standard. *Id.*, slip op. at 5, 8. The Court declined the defendants' invitation to adopt a harmless error standard of review, stating "[i]n a prosecutorial misconduct claim, the defendant bears the burden of proving that the prosecutor's conduct was both improper and prejudicial." *Id., citing State v. Thorgerson,* 172 Wn.2d 438, 442, 258 P.3d 43 (2011).

Here, the appellants' prosecutorial misconduct claim must fail because Berg and Reed cannot demonstrate that the prosecutor's comment was improper. In *State v. Anderson*, the prosecutor made the following comments about the reasonable doubt standard during closing argument:

> ...beyond a reasonable doubt is a standard that you apply every single day. [For example, in choosing to have] elective surgery, dental surgery, [you] might get a second opinion. You might be worried, do I really need it? If you

> go ahead and do it, you were convinced beyond a reasonable doubt.

Anderson, 153 Wn. App. 417, 424, 429, 220 P.3d 1273 (2009), *review denied* 170 Wn.2d 1002 (2010). The prosecutor went on to compare reasonable doubt to decisions such as "leaving [your] children with a babysitter" and "changing lanes in the freeway." *Anderson.*, 153 Wn. App. at 425. On review, the Court of Appeals for Division II found it was improper for the prosecutor to compare the reasonable doubt standard to common, "everyday decision making." *Anderson*, at 431. Such a comparison was improper because it "minimized the importance of the reasonable doubt standard and of the jury's role in determining whether the State had met its burden." *Id.* The court stated:

> [b]y comparing the certainty required to convict with the certainty people often require when they make everyday decisions--both important decisions and relatively minor ones--the prosecutor trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case against Anderson. This was improper.

Id. The court also found it was improper for the prosecutor to focus on the "degree of certainty the jurors would have to have to be *willing* to act, rather than that which would cause them to *hesitate* to act." *Id.*, at 432 (emphasis in original). However, the court's concern appeared to be that a juror's willingness to act on a common, everyday decision would be based upon a degree of certainty that is far less exacting than the degree of

certainty that should be required to find a defendant guilty beyond a reasonable doubt.

The facts in Berg and Reed's case are distinguishable from the facts in *Anderson*. Here, the prosecutor did not commit the error of comparing the reasonable doubt standard to common, everyday decisions (such as the decision to call a babysitter or the decision to visit the dentist). Rather, the prosecutor compared the reasonable doubt standard to momentous and often once-in-a-lifetime decisions, such as the decision to make a significant investment or the decision to get married. By comparing the reasonable doubt standard to such weighty and momentous decisions, the prosecutor did not trivialize the State's burden of proof. Rather, he appropriately conveyed the gravity of the State's burden and the jury's role in assessing its case against Berg and Reed. Also, by comparing the reasonable doubt standard to momentous decisions, the prosecutor did not invite the jury to be "willing to act" based upon a degree of certainty that is far less exacting than that which should be required to find a defendant guilty beyond a reasonable doubt.

In addition, in contrast to the cases cited by Berg and Reed, the prosecutor never compared the reasonable doubt standard to a jigsaw puzzle, he never told the jury that the presumption of innocence eroded throughout the trial, and he never told the jury that, in order to find the

defendant not-guilty, they had to "fill in the blank" with a reason that the defendant was not guilty. *See* Brief - Reed, at p. 27-28 *citing State v. Johnson*, 158 Wn. App. 677, 243 P.3d 936 (2010); *State v. Venegas*, 155 Wn. App. 507, 228 P.3d 813 (2010). For each of these reasons, the prosecutor's argument was not improper.

Assuming, *arguendo*, this court finds the prosecutor's comment was improper, the appellants' prosecutorial misconduct claim must nevertheless fail because Berg and Reed cannot demonstrate that the prosecutor's comment was flagrant or ill-intentioned. Allegedly improper comments must be viewed in the context of the total record. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). If defense counsel does not object to the prosecutor's statements and does not request a curative instruction, the issue is waived. *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). An exception to the rule regarding waiver arises only if the prosecutor's remark was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice" that could not have been neutralized by an instruction to the jury. *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995). Improper prosecutorial remarks can touch on a constitutional right but still be curable by a proper instruction. *State v. Smith*, 144 Wn.2d 665, 679-80, 30 P.3d 1245, 39 P.3d 294 (2001). "Reversal is not required if the error could have been obviated by a

curative instruction which the defense did not request." *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).

Here, the prosecutor's comparison of the reasonable doubt standard to a momentous life decision was not the type of argument that the courts have found to be flagrant and ill-intentioned. *See State v. Monday*, 171 Wn.2d 667, 680, 257 P.3d 551 (2011) (finding prosecutor's argument was flagrant and ill-intentioned when prosecutor intentionally injected racial bias into trial by repeatedly referring to police as "po-leese" and by arguing that "'black folk don't testify against black folk'"); *State v. Reed*, 102 Wn.2d 140, 143-44, 684 P.2d 699 (1984) (prosecutor repeatedly called defendant a liar and said defense witnesses could not be trusted because they were from out of town and drove fancy cars); *State v. Belgrade*, 110 Wn.2d 504, 506-07, 755 P.2d 174 (1988) (prosecutor stated the American Indian group with whom defendant was affiliated was "'a deadly group of madmen'" and "'butchers,'" and told the jury to remember "'Wounded Knee, South Dakota'").

Rather, if the prosecutor's reasonable doubt argument was improper, then it was the type of argument that the courts have found *not* to be flagrant or ill-intentioned and that which can be cured by an appropriate instruction. For example, in *Anderson*, when the prosecutor improperly compared the reasonable doubt standard to everyday decision

making, the reviewing court found "[t]he trial court's instructions regarding the presumption of innocence minimized any negative impact on the jury." *Anderson*, at 432. Similarly, in *Emery*, when the prosecutor told the jury they had to have a "reason" to not find the defendant guilty, the Court found any potential prejudice could have been cured by a proper instruction regarding the State's burden of proof, if the defendants had objected at trial. *Emery*, slip op. at 11.

The jury is presumed to follow the court's instructions. *State v. Hopson,* 113 Wn.2d 273, 287, 778 P.2d 1014 (1989). Here, the trial court properly instructed the jury on the presumption of innocence and on the reasonable doubt standard. (Reed CP 285, Instr. No. 4; Berg CP 32, Instr. No. 4). In addition, the prosecutor repeatedly reminded the jury of the defendant's presumption of innocence and of the State's burden of proof. For example, immediately before the prosecutor made the comments to which the appellants assign error, the prosecutor told the jury that "the defendants...have no obligation to establish anything, disprove anything" because the "presumption of innocence...is continuing." (29 RP 2242). The prosecutor also told the jury that the burden of proof was on the State. *Id.* Under these circumstances, if any prejudice was engendered by the prosecutor's reasonable doubt argument, then this prejudice was cured by the court's instructions, or it could have been cured by an additional

reference to these instructions, had Berg or Reed objected at trial. The fact that neither Berg nor Reed objected to the prosecutor's comment, despite the fact that they objected throughout the trial, suggests the prosecutor's comment "was of little moment at the time of trial." *State v. Rogers*, 70 Wn. App. 626, 631, 855 P.2d 294 (1993).

Next, Berg and Reed seem to argue that the prosecutor's utterance of the word "truth" during his closing argument, contributed to the "flagrancy" of the prosecutor's reasonable doubt argument. *See* Brief – Reed, at p. 23-24. However, the prosecutor's use of the word "truth" was not improper because the prosecutor did not tell the jury that its job was to search for the truth. *State v. Warren*, 165 Wn.2d 17, 25, 195 P.3d 940 (2008). Rather, the prosecutor used "the truth" as a term that encapsulated how the jury should properly arrive at their verdicts. For example, the prosecutor asked "how is the best way to get to the truth when you're in deliberation?" He responded by stating

> I would suggest, number one, follow the law. Follow the law, read those instructions, make sure you understand them, and stay on that. That's a road map to the decision-making process.

(29 RP 2244). However, if it was improper for the prosecutor to utter the word "truth" during his closing argument, then, any error was cured by the court's instructions. *Emery*, slip op. at 8 (finding improper "truth"

argument and improper reasonable doubt argument were cured by court's instructions).

Further, contrary to the appellants' assertion, the jury was properly instructed "that the lawyers' statements are not evidence." (Reed CP 281, Instr. No. 1; Berg CP 28). The prosecutor reiterated this instruction when he said

> [t]he closing arguments are not evidence...[w]hat the lawyers say is not evidence. If I say something that when you get back in deliberations does not ring true to your collective memory, you disregard what I say and operate on what your collective memory tells you.

- (29 RP 2246).

Lastly, the evidence that both Berg and Reed took a substantial step towards committing the crime of murder in the first degree was overwhelming. *See* sec. VI, *infra*. Consequently, neither Berg nor Reed can show a substantial likelihood that the outcome of their case would have been different but-for the prosecutor's comments during closing argument. Therefore, even under a constitutional harmless error standard, any error was harmless beyond a reasonable doubt.

Berg and Reed's claim that they received ineffective assistance of counsel must also fail. A claim of ineffective assistance of counsel is reviewed de novo. *State v. Binh Thach*, 126 Wn. App. 297, 319, 106 P.3d 782 (2005). There is a strong presumption that counsel is effective. *State*

v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The 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). In order to show ineffective assistance of counsel, the defendant must demonstrate: (1) counsel provided deficient representation (meaning, counsel's conduct fell below an objective standard of reasonableness), and (2) counsel's ineffective representation resulted in prejudice (meaning, there is a reasonable probability that, "but for" counsel's errors, the outcome of the case would have been different). *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland*, 466 U.S. at 694. If defense counsel's conduct can be characterized as legitimate strategy or tactics, it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel. *State v. Ray*, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991). The decision of when, or whether, to object is an example of trial tactics. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002, 777 P.2d 1050 (1989).

Here, Berg and Reed cannot demonstrate deficient performance because their attorneys' decision to not object to the prosecutor's comments was sound trial strategy. The prosecutor compared the

reasonable doubt to the audacious decision of whether or not to get married. An objection to this argument would have only suggested to the jury that the appellants believed the reasonable doubt standard required far less circumspection than the decision to get married. In addition, given the fact that the appellants' attorneys had already lodged objections and moved for mistrials throughout the trial, an objection to a fleeting comment during closing argument would have only unnecessarily emphasized the deficiencies in Berg and Reed's case.

Even if Berg and Reed *could* demonstrate deficient performance, they cannot demonstrate resulting prejudice. This is the case because the prosecutor's comment was neither flagrant nor ill-intentioned and because any resulting prejudice was cured by the court's instructions. Therefore, the appellants cannot show a reasonable probability that the outcome of the trial would have been different, had Berg or Reed's attorney objected.

Berg and Reed's conviction for Count One: Attempted Murder in the First Degree, should be affirmed.

III. Sufficient evidence supported Berg and Reed's convictions for Kidnapping in the First Degree.

Citing to *State v. Korum* and *State v. Green* as authority, Berg and Reed claim insufficient evidence supported their convictions for Kidnapping in the First Degree because the kidnapping was "merely

incidental" to the commission of Robbery in the First Degree. *See* Brief – Berg, at p 12, 14; Brief – Reed, at p 32, 34, *citing Korum*, 120 Wn. App. 686, 707, 86 P.3d 166 (2004); *Green,* 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The facts in Berg and Reed's case are distinguishable from *Korum* and *Green* and the appellants' claims are without merit.

The court reviews challenges to the sufficiency of the evidence by viewing the evidence in the light most favorable to the State. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). Evidence is sufficient if any rational trier of fact could have found the elements of the charged offense beyond a reasonable doubt. *Id.* A claim of insufficiency admits the truth of the State's evidence as well as all reasonable inferences that can be drawn from it. *Id.*

"A person is guilty of kidnapping in the first degree if he or she intentionally abducts another person with intent:...(b) To facilitate commission of any felony or flight thereafter..."[4] RCW 9A.40.020. "Abduct" means

> (1)...to restrain a person by either (a) secreting or holding him or her in a place where he or she is not likely to be found, or (b) using or threatening to use deadly force.
> ...
>
> (6) "Restrain" means to restrict a person's movements without consent and without legal authority in a manner

[4] The underlying felony charged was the burglary of Mr. Watts. (Reed CP 307, Instr. No. 26; Berg CP 54, Instr. No. 26).

> which interferes substantially with his or her liberty. Restraint is "without consent" if it is accomplished by (a) physical force, intimidation, or deception...

RCW 9A.40.010. "[T]he definition of 'abduction' in the kidnapping statutes does not require movement or asportation of the victims." *State v. Vladovic*, 99 Wn.2d 413, 418, *fn* 1, 662 P.2d 853 (1983).

Evidence of restraint, which is "merely incidental" to the commission of another crime, is insufficient to support a separate kidnapping conviction. *State v. Elmore*, 154 Wn. App. 885, 901, 228 P.3d 760, *review denied*, 169 Wn.2d 1018, 238 P.3d 502 (2010). However, kidnapping is not merely incidental to another crime, as a matter of law, because the other crime requires the use of force or restraint. *See State v. Stirgus*, 21 Wn. App. 627, 631, 586 P.2d 532 (1978). Rather, whether kidnapping is incidental to the commission of the other crime is a fact-specific determination. *Elmore*, 154 Wn. App. at 901.

In *Korum*, the defendants entered a residence where seven people were located, pointed a gun at them, and then bound them with duct tape and slip ties while they stole money, drugs, a vehicle, and other valuables. *Korum*, 120 Wn. App. at 691. The seven people who were bound remained together, in their home, during the course of the robbery. *Id.*, at 691-92. Some victims were placed in chairs. *Id.*, at 692. At one point during the robbery, one of the victims was taken into a room where she

remained with two unbound children. *Id.* The defendants attempted to free the victims when the robbery was complete. *Id.*, at 691-92. The defendants stopped freeing the victims, attempting to flee the scene instead, only because the police had arrived in response to a neighbor's call to 911. *Id.*, at 692.

Following trial, Korum was found guilty of 29 counts, including 10 counts of first degree kidnapping and 3 counts of first degree robbery. *Id.*, at 695-98. On review, the Court of Appeals found the kidnappings were "merely incidental" to the robberies because "restraining the victims was contemporaneous with the robberies." *Id.*, at 707, *fn* 19 (noting "after gathering what they wanted to steal from the [victims'] home, the robbers tried to unbind the victims, stopping when they realized that the police had arrived outside.") In addition, the kidnappings were found to be merely incidental to the robbery because the victim was "not secreted in a place where she was unlikely to be found." *Id.*, at 707 (noting "the victim was with other people, including the trailer's residents"). For each of these reasons, the court found any restraint was for the sole purpose of facilitating the commission of the robbery. Consequently, the court held Korum's separate kidnapping convictions could not stand. *Id.*[5]

[5] It is worth noting that one of the court's primary concerns in *Korum* was the issue of prosecutorial vindictiveness. *Id.*, at 700. Korum was originally allowed to plead guilty to one count of kidnapping in the first degree and one count of unlawful possession of a

Berg and Reed's case is distinguishable from *Korum* because the appellants secreted Watts in a place where he was unlikely to be found. Instead of being placed in a chair, inside a residence that was occupied by seven people, where neighbors could observe the situation, Watts was placed on the floor, face-down, in the back-part of his garage, while he was alone. After the robbery was complete, Watts remained at this location and in this position. He was instructed to stay on the ground for fifteen minutes, following Reed and Berg's departure. Watts had no means of seeking help because Berg and Reed had stolen Watts' cell phone. Secreting Watts was unnecessary in order to commit robbery. Therefore, restraining Watts by secreting him constituted the separate offense of kidnapping.

The fact that Watts was restrained by secreting him also makes this case distinguishable from *Green*. *Green*, 94 Wn.2d at 225-26 (finding kidnapping was merely incidental to murder because victim was not restrained by secreting her when, prior to victim's murder, she was restrained in apartment's exterior loading area, which was visible from the

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firearm, with a recommended sentence of 132 months confinement. However, after Korum successfully withdrew his guilty plea, the State filed a second amended information, in which it charged 10 counts of kidnapping and 3 counts of robbery, amongst 19 other charges. Following Korum's trial, the State recommended a 117 year prison sentence. *Id.*, at 694-98. Prosecutorial vindictiveness has not been raised as an issue by Berg or Reed and, certainly, there is no evidence to support such a claim.

children's play area and which could be viewed from rear windows of other apartments).

In addition, Berg and Reed's case is distinguishable from *Korum* because the restraint of Watts did not *only* occur contemporaneously with the robbery. Berg and Reed did not attempt to free Watts after the robbery was complete. Instead, after Reed finished taking Watts' marijuana plants and "whatever else they wanted," Reed and Berg kept Watts pinned to the ground, lying face down. Immediately before they left Watts' residence, Reed and Berg ordered Watts to stay on the ground for fifteen minutes, they warned Watts to not call the police, and they threatened to come back and kill him if he disobeyed their commands. Here, Berg and Reed restrained Watts "by using or *threatening to use* deadly force." Because this restraint occurred after the robbery was complete, it was not "merely incidental" to the robbery. Rather, this restraint also constituted the separate offense of kidnapping. The fact that Watts got-up three or four minutes after Reed and Berg left his residence is irrelevant because Reed and Berg's expectation was that Watts would remain restrained, pursuant to their threat of deadly force, for fifteen minutes following their departure.

The facts in the appellants' case are strikingly similar to the facts in *State v. Allen*, where the Washington Supreme Court held the offense of

kidnapping was not merely incidental to the offense of robbery. 94 Wn.2d 860, 862-63, 621 P.2d 143 (1980), *abrogated on other grounds by Vladovic*, 99 Wn.2d at 420. In *Allen*, two men approached Daniel Rodriguez, while in their vehicle, as Rodriguez was working alone at a convenience store. *Allen,* 94 Wn.2d at 861. The men told Rodriguez to come to their car. When Rodriguez arrived at the men's car, the passenger pointed a rifle at Rodriguez, told him this was a "hold up," and directed Rodriguez to get into the back of their car. The passenger asked Rodriguez how to operate the cash register. The passenger then handed the rifle to the driver and went into the store. While the passenger was inside the store, the driver pointed the rifle at Rodriquez and told him to lie down with his face hidden, so that he could not be observed. The passenger ultimately returned to the vehicle with the cash register in his hands. The passenger reclaimed the rifle and pointed it at Rodriguez. The men drove for approximately two blocks, with Rodriguez still lying flat in the backseat. The men then stopped the car, told Rodriguez to start running, and told him to not look back. Rodriguez did as he was told. *Id.*

The Court in *Allen* found the robbery was complete once the property was obtained (i.e. the cash register). *Allen*, at 864. The Court went on to find that the purpose of restraining Rodriguez, before the property was obtained, was to effectuate the robbery. *Id.*, at 863. In

contrast, the purpose of restraining Rodriguez, after the property was obtained, was to facilitate the defendants' "flight" from the scene of the crime. *Id.* The Court clearly stated that "flight" is not an element of robbery. *Id.*, at 864 (stating, "[w]e are aware of no case which supports the unique theory that a felon is entitled, as a part of the criminal act, to escape from the scene of the crime"). Therefore, the restraint that occurred in order to facilitate the defendants' flight from the robbery was not merely incidental to the robbery. Instead, this restraint constituted the separate offense of kidnapping. *Id.*

In Berg and Reed's case, the robbery was complete once the marijuana plants were obtained. Similar to *Allen*, the appellants restrained Watts after the robbery was complete by secreting Watts in a place where he was not likely to be found and by threatening to kill him if he moved from this location before the expiration of fifteen minutes. The purpose of this restraint was to facilitate Berg and Reed's flight from the scene of the crime. For the reasons set forth in *Allen*, restraining Watts to facilitate their flight from the robbery was not an element of robbery and it was not merely incidental to the robbery. Instead, this restraint constituted the separate offense of kidnapping.

Lastly, to the extent that Berg and Reed are arguing that the merger doctrine applies, the Washington Supreme Court's holding in *State v.*

Louis dictates that the appellants may be punished separately for robbery and kidnapping. 155 Wn.2d 563, 571, 120 P.3d 936 (2005). The Court in *Louis* explained that the merger doctrine applies only where the legislature

> has clearly indicated that in order to prove a particular degree of crime (e.g. first degree rape) the State must prove not only that a defendant committed that crime (e.g. rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes.

Louis, 155 Wn.2d at 571 (quoting *Vladovic*, 99 Wn.2d at 421). The legislature has not indicated that a defendant must commit kidnapping before he can be found guilty of first degree robbery or that he must commit robbery before he can be convicted of first degree kidnapping. *Id.* Therefore, "a defendant can be punished separately for robbery and kidnapping." *State v. Ferguson*, 164 Wn. App. 370, 264 P.3d 575 (2011), *review denied by State v. Ferguson*, 2012 Wash. LEXIS 341 (Wash. Apr. 25, 2012), *citing id.*

The evidence was sufficient to convict Berg and Reed of the separate offense of kidnapping. Berg and Reed's kidnapping convictions should be affirmed.

IV. Pursuant to *State v. Nunez*, the special verdict instruction was neither flawed nor erroneous.

Reed and Berg claim the trial court erred when it instructed the jury that they must be unanimous in order to answer "no" to the special

verdicts. *See* Brief – Reed, at p.35-40, Brief – Berg, at p. 20-27, *citing State v. Bashaw* 169 Wn.2d 133, 234 P.3d 195 (2010), *State v. Goldberg*, 149 Wn.2d 888, 895, 72 P.3d 1083 (2003). As a remedy for this error, Reed and Berg claim their exceptional sentences, which were based on the jury's findings of aggravating circumstances and firearm enhancements, must be vacated.

Reed and Berg's claim for relief is foreclosed by the Washington Supreme Court's holding in *State v. Nunez*. No. 85789-0 (consolidated with *State v. Ryan*, No. 85947-7), (June 7, 2012). In *Nunez*, the Washington Supreme Court found *Goldberg's* adoption of the non-unanimity rule was incorrect. *Nunez*, slip op. at 5, 7. Therefore, the Court overruled the portion of *Bashaw* that adopted the non-unanimity rule for aggravating circumstances. *Id.*, slip. op at 2-12. Accordingly, the Court held the special verdict instruction, which instructed the jury that it must be unanimous to answer "yes" or "no" on the special verdict forms, was not erroneous. *Id.*, slip op. at 3.

The special verdict instruction that was given in *Nunez* mirrors that which was given in Reed and Berg's case. (Reed CP 330, Instr. No.46; Berg CP 77, Instr. No. 46). Pursuant to the Court's holding in *Nunez*, the special verdict instructions were not erroneous. Reed and Berg's exceptional sentences must be affirmed.

V. The evidence was sufficient to convict Berg of Intimidating a Witness.

Berg claims the evidence was insufficient to convict him as an accomplice to the crime of Intimidating a Witness because the evidence did not show that "Berg, in participating in the robbery and burglary, knew Reed was going to commit the crime of witness intimidation." *See* Brief – Berg, at p. 19. Berg's claim is without merit.

Evidence is sufficient to support a conviction if, when viewed in a light most favorable to the State, 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). "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. In order to determine whether the necessary quantum of proof exists, the reviewing court need only be satisfied that substantial evidence supports the State's case. *State v. Galista*, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 875-75, 83 P.3d 970 (2004).

Under RCW 9A.72.110(d), a person commits the crime of Intimidating a Witness if a person, "by use of a threat against a current or

prospective witness, attempts to ... [i]nduce that person not to report the information relevant to a criminal investigation..."

Under RCW 9A.080.020(3)(a), a person is an accomplice of another if:

> (a) [w]ith knowledge that it will promote or facilitate the commission of the crime, he or she:
>
> > (i) [s]olicits, commands, encourages, or requests such other person to commit it; or
> >
> > (ii) [a]ids or agrees to aid such other person in planning or committing it...

In order to find a person guilty as an accomplice, it must be proven that the person "'shared in the criminal intent of the principal.'" *State v. Gladstone*, 76 Wn.2d 306, 313, 474 P.2d 274 (1970) (quoting *Johnson v. United States*, 195 F.2d 673 (8th Cir. 1952)). The term "'aiding and abetting,'...assumes some participation in the criminal act in furtherance of the common design, either before or at the time the criminal act is committed.'" *Gladstone*, 76 Wn.2d at 313 (quoting *Johnson*, 195 F.2d 673).

In his appeal, Berg claims that he acted only pursuant to Reed's instructions and that he could not have known that Reed was going to threaten Watts. However, Berg fails to mention the fact that he, individually, threatened to kill Watts while Reed was busy collecting the

marijuana plants, without Reed's instruction to do so. (24 RP 998). In addition, Watts did not specifically testify that it was Reed, not Berg, who threatened to kill him, once the marijuana plants had been collected, if he called the police. Rather, Watts testified that the men told him "they" would hunt him down and kill him if he called the police. (24 RP 1017).

Furthermore, the evidence shows that Berg and Reed acted in coordination throughout the night of April 15, 2009, in order to achieve their common design: successfully taking Watts' marijuana plants by any means necessary. For example, Berg and Reed arrived at and departed from Reed's brother's house, together, on the night of April 15, 2009. Berg borrowed a dark jacket that would help to conceal him. Berg and Reed kicked-down the door to Watts' garage, together. Both Berg and Reed told Watts that they were there to take his marijuana plants and whatever else they wanted. Reed originally pointed the gun at Watts and forced him to the ground; however, Berg then took-over with the gun, pointed it at Watts' head, and made sure that Watts stayed on the ground. Berg pinned Watts' to the ground for approximately 30 minutes, while Reed collected the marijuana plants. Berg threatened Watts at one point and Reed threatened Watts at another point. In addition, Berg boasted to his fellow inmate, Michael Alldrit, that he and his friend planned the criminal episode, together, and they carried it out, together.

In order for Berg and Reed to accomplish their common design of taking Watts' marijuana plants by any means necessary, intimidating Watts was a necessary component. Each act that Berg and Reed engaged in, from the moment they burst into Watts' home, was designed to intimidate Watts. Berg arguably played a larger role than Reed in intimidating Watts because he pinned Watts to the ground for a half-hour, while he pointed a gun at Watt's head, and because he, individually, threatened to kill Watts. It is irrelevant whether it was Berg or Reed who ultimately told Watts they would kill him if he called the police because these words were merely an extension of Reed and Berg's common design.

The evidence was sufficient for a reasonable trier of fact to find Berg guilty as either a principal or as an accomplice to Intimidating a Witness. Therefore, Berg's conviction for Intimidating a Witness should be affirmed.

VI. The trial court properly denied Reed's motion for a mistrial because Sergeant Alie did not provide improper opinion testimony.

Reed claims the trial court abused its discretion when it denied his motion for a mistrial, based on Sergeant Alie's "improper opinion testimony." *See* Brief – Reed, at p. 40. As a remedy, Reed claims his

conviction for Attempted Murder in the First Degree must be reversed. Reed's claim is based on the following facts and it is without merit.

During motions in limine, Reed moved the court to ban the State's witnesses from offering, opining, and/or concluding as to the state of mind of the driver of the Kia (Reed) "relative to any particular act" and, specifically, relative to when Reed leaned forward in the vehicle. (19 RP 809-10). The trial court agreed that it would be impermissible opinion testimony for any witness to testify that Reed moved forward in the vehicle "with the intent of allowing the officer to be shot." (19 RP 811). However, the court stated it may not be impermissible opinion testimony for a witness to testify that Reed "moved forward as if he was trying to get...out of the way of the passenger's hand." (19 RP 811). The court stated there was testimony "in between" that which would be impermissible opinion testimony and that which would be descriptive of Reed's actions. (19 RP 811). Therefore, the court only granted Reed's motion "in general," stating "I grant the motion that personal opinions regarding mental state are not relevant." (19 RP 811).

During Sergeant Alie's direct examination, the State asked Sergeant Alie to describe what took place as he approached the white Kia, after the Kia came to a rolling stop. (24 RP 1141). The following colloquy ensued:

STATE: So describe what happened then as you moved further forward.

ALIE: So at this point I'm committed, I'm - - I'm at the back window of the car. I can see what's in the backseat. I realize these are the people involved in what I'm dealing with.

...

Car was still running. ... So I bladed off to the car behind the pillar. I said 'Turn the car off.'

There's a beat where there's nothing, no response at all. Suddenly [Reed] makes a real willful, intentional movement (indicating) - -

- (24 RP 1142).

Reed immediately objected to Sergeant Alie's testimony. (24 RP 1142). The court sustained the appellant's objection. (24 RP 1142). The court admonished Sergeant Alie, in the jury's presence, stating: "[o]fficer, you need to describe what it is that you saw. It's for the jurors to decide what it is the mental state of any particular witness..." (24 RP 1142). The court then instructed the jury to disregard Alie's testimony, stating: "[t]he personal opinions of the officer in that regard should be disregarded by you." (24 RP 1142-43). Next, the court instructed the State and Sergeant Alie to move on, stating "[n]ow, restate your question again and try to answer the question that's asked." (24 RP 1143). After the court's

admonishments, the following colloquy ensued between the State and Sergeant Alie:

> STATE: What did you observe [Reed] do?
>
> ALIE: He bent over, ducking toward the center console area. And I'm in a position where I - - I'm stuck. He - - in my mind, he's going for a weapon. He's gonna jam the car in gear.
>
> STATE: So this was a - - a furtive move, as they call it?
>
> ALIE: Yes.

(24 RP 1143). Reed did not object to this testimony. (24 RP 1143). Sergeant Alie did not provide any further testimony regarding Reed's actions as he leaned forward in the driver's seat; the State did not ask Sergeant Alie any questions that called for his opinion regarding Reed's mental state; and the State did not refer to Sergeant Alie's stricken testimony during its closing argument. (24 RP 1143-1158).

After the court concluded testimony for the day, Reed moved for a mistrial. (24 RP 1161-62). The appellant claimed a mistrial should be granted because Sergeant Alie testified to Reed's mental state. (24 RP 1161). The court denied the appellant's motion for a mistrial for two reasons. (24 RP 1165-66). First, the court agreed that Sergeant Alie chose his words poorly because "it was unnecessary to use words which are

linked to elements of the offense;" however, the court found Sergeant Alie did not express his opinion about the elements of the crime. (24 RP 1165). Rather, the officer "talked about the movement that the...driver made and described it as willful and intentional as opposed to accidental, that a person feints and falls forward." Therefore, the officer's testimony was "descriptive." (24 RP 1165). Second, the court noted that it immediately sustained the appellants' objections; it advised the jury to disregard the comment; and it indicated to the jury that, if it appeared the officer was "expressing his personal opinions about any of the elements of the offense...[,] they should disregard it because it was not relevant evidence." (24 RP 1165-66).

Washington has "expressly declined to take an expansive view of claims that testimony constitutes an opinion on guilt." *Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011, 869 P.2d 1085 (1994)). A witness provides improper opinion testimony only when he or she comments on the guilt or veracity of the defendant. *State v. Carlin*, 40 Wash. App. 698, 700, 700 P.2d 323 (1985), *overruled on other grounds in Heatley,* 70 Wn. App. at 584 (finding officer improperly commented on defendant's guilt when officer stated his tracking dog followed a "fresh guilt scent"); *State v. Alexander*, 64 Wash. App. 147, 154, 822 P.2d 1250 (1992) (finding expert witness improperly

commented on witness's veracity when expert stated he believed a child was "not lying" about sexual abuse). Such testimony is improper because it invades the exclusive province of the jury. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

In contrast, a witness does not provide improper opinion testimony when his or her statement is based on inferences from the evidence. *Heatley*, at 578. For example, in *Heatley*, the Court of Appeals found an officer in a DUI prosecution did not render improper opinion testimony when he stated the defendant was "obviously intoxicated" because the officer's opinion was based on his "detailed testimony about his observations" of the defendant. *Id.*, at 581-82; *see also Dependency of Luntsford*, 24 Wn. App. 888, 890-91, 604 P.2d 195 (1979) (finding a witness "may testify in terms of inferences or impressions, provided that the inferences are drawn from observations which are difficult to describe precisely"). These opinions are consistent with ER 701, which provides a lay witness may testify in the form of opinions or inferences "which are rationally based on the perception of the witness."

If a witness provides improper opinion testimony, then the error is considered a trial irregularity. *See State v. Post*, 59 Wn. App. 389, 395, 797 P.2d 1160 (1990), *aff'd*, 118 Wn.2d 596, 826 P.2d 172, 837 P.2d 599 (1992). A trial irregularity constitutes reversible error only if it deprives the

defendant of a fair trial. *Post*, 59 Wn. App. 389. In determining whether a trial irregularity deprived the defendant of a fair trial, the court considers: (1) the seriousness of the irregularity; (2) whether the challenged evidence was cumulative of other evidence properly admitted; and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow. *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

A trial court's decision to grant or deny a mistrial, based on a trial irregularity, is reviewed for abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). The trial court abuses its discretion only when its decision is "manifestly unreasonable or based upon untenable grounds or reasons." *Powell*, 126 Wn.2d at 258. The trial court should grant a mistrial "only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be fairly tried." *Emery*, slip. op. at 33.

Here, the trial court did not abuse its discretion in denying Reed's motion for a mistrial because Sergeant Alie did not provide improper opinion testimony. When Sergeant Alie testified that Reed made a "real willful, intentional movement," he was not stating his personal opinion as to Reed's guilt; rather, he was attempting to describe his observations. Specifically, Sergeant Alie was attempting to explain that Reed's act of

leaning forward did not appear to be the result of being pushed, of passing out, of losing his balance, or of having an involuntary spasm. Instead, Reed's act of leaning forward appeared to be deliberate in nature. It is difficult to describe with preciseness the observation of a person moving "with purpose." However, this is exactly what Sergeant Alie (albeit inartfully) tried to do: he tried to describe with preciseness what he saw.

In addition, Sergeant Alie's statement was not improper opinion testimony because he never commented on Reed's guilt and he never commented on Reed's veracity. Also, in contrast to *State v. Montgomery*, the case on which Reed relies, Sergeant Alie never rendered his personal opinion as to any of the elements of the offense. *See* Brief - Reed, at p. 42, *citing* 163 Wn.2d 577, 584-86, 591, 183 P.3d 267 (2008) (when defendant was charged with Possession of Pseudoephedrine with Intent to Manufacture Methamphetamine, finding officer rendered improper opinion testimony when he said he "felt very strongly" that the defendants were, in fact, buying pseudoephedrine in order to manufacture methamphetamine). Here, although Sergeant Alie testified that Reed appeared to lean forward in an "intentional movement," he never opined that Reed appeared to lean forward with the intent to commit murder in the first degree and he never opined that Reed appeared to lean forward with the intent that his passenger could shoot him.

Assuming *arguendo*, this Court finds Sergeant Alie's testimony was improper, this Court should find Reed's motion for a mistrial was properly denied because Reed was not so prejudiced by the officer's comment that nothing short of a new trial could ensure that he would be fairly tried. First, Sergeant Alie's testimony was not serious in nature because it was singular and fleeting. Sergeant Alie described Reed's movement as appearing to be intentional only one time; the State did not ask Sergeant Alie any questions that would elicit a similar response; and the State did not repeat Sergeant Alie's statement during its closing argument.

Second, any prejudice engendered by Sergeant Alie's statement was cured by the court's immediate and comprehensive instructions. First, the court sustained Reed's objection, immediately after Alie's comment was made. Then, the court admonished Sergeant Alie that it was for the jury to decide a witness's particular mental state. Next, the court orally instructed the jury that it must disregard any personal opinions of the officer, and the court instructed both the State and Sergeant Alie to reframe their questions and answers. Also, at the conclusion of the trial, the court instructed the jury that it must not discuss or consider any evidence that it has been instructed to disregard. (29RP 2202; Reed CP

280; Instr. No. 1). The jury is presumed to follow the court's curative instructions and there is no evidence that they failed to do so here.

Next, if Sergeant Alie's testimony was a comment on Reed's intent to commit murder, then it was harmless because it was cumulative of other evidence properly admitted. Even if Sergeant Alie had not offered his challenged description of "how" Reed leaned forward, the jury would have heard evidence that Reed, in fact, leaned forward. The jury would have also heard about the facts and circumstances surrounding Reed's act of leaning forward. It was these surrounding facts and circumstances that proved Reed's intent to commit murder. For example, Pastor Beck testified that he observed between one and two minutes pass between the time Sergeant Alie parked behind Reed's vehicle and the time Alie arrived at the driver's side door of Reed's car. Given the fact that Reed and Berg had been coordinating their actions all night, it would have been reasonable for the jury to conclude that Reed and Berg used this time to plan a coordinated response to the officer's arrival at their vehicle.

The fact that Reed and Berg planned to shoot Sergeant Alie when he arrived at their vehicle was demonstrated by the evidence that Reed kept the engine running when Sergeant Alie arrived, Reed refused to respond to Sergeant Alie's commands, Reed looked straight ahead, and Reed kept his hands on the steering wheel. The fact that Reed and Berg

planned to shoot Sergeant Alie was further demonstrated by the evidence that Reed bent over, lowering his body below the steering column, at the exact moment that Berg raised his arm over Reed's lowered back and shot Sergeant Alie. This coordinated act between Reed and Berg occurred immediately after Reed, who had been silent up to this point, said "okay." Lastly, that Reed and Berg planned to shoot Sergeant Alie was demonstrated by the evidence that, immediately after the shooting, Reed raised his body and then sped away. It was these purposeful and coordinated actions between Reed and Berg, not Sergeant Alie's challenged comment, which proved Reed's intent.

For each of these reasons, the trial court's denial of Reed's motion for a mistrial was not manifestly unreasonable or based on untenable grounds. Reed's conviction for Attempted Murder in the First Degree should be affirmed.

VII. No cumulative error occurred.

Reed claims cumulative error requires reversal of his convictions. *See* Brief – Reed, at p. 48. Reed's claim is without merit.

The cumulative error doctrine is only triggered when actual trial errors are identified. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). In order for cumulative error to warrant reversal, the errors must be of such a magnitude as to deprive the defendant of a fair trial. *Greiff*,

141 Wn.2d 929 (finding "the cumulative effect of...insignificant errors did not deprive [the defendant] of a fair trial").

Reed has failed to identify any actual trial errors, let alone errors that deprived him of his due process right to a fair trial. Consequently, there is no cumulative error. The jury's verdicts on four Class A felonies and two Class B felonies, following a two week trial, should be affirmed.

D. CONCLUSION

Reed and Berg's convictions should be affirmed. Reed and Berg's sentences should also be affirmed.

DATED this _____ day of _____, 2012.

Respectfully submitted:

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