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Court of Appeals No. ~~41739-1-II~~
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(Consolidated cases)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JERRO DAGRACA,

Petitioner.

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PETITION FOR REVIEW ON BEHALF OF JERRO DAGRACA

On review from the Court of Appeals, Division Two,
and the Superior Court of Pierce County

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A. IDENTITY OF PETITIONER

Jerro DaGraca, appellant below, petitions this Court to grant review of the unpublished opinion of the court of appeals designated in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished decision of the court of appeals, Division Two, in State v. DaGraca/Young, __ Wn. App. __, __ P.3d __ (2014 WL 4225409), filed August 26, 2014,[1] in which Division Two affirmed his convictions for first-degree robbery and first-degree kidnapping.

C. ISSUES PRESENTED FOR REVIEW

1. Is RCW 13.04.030(1)(e)(v)(A), the so-called "automatic decline" statute, unconstitutional because it treats all juveniles of a certain age who commit certain crimes as adults without any consideration of the mitigating factors of youth, contrary to the reasoning of recent cases such as Miller v. Alabama, __ U.S. __, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)?

2. Is this Court's decision in In re Boot, 130 Wn.2d 553, 925 P.2d 964 (1996), the "automatic decline" statute no longer good law due to subsequent caselaw overturning some of the cases and principles upon which it relied?

3. The prosecution's claim was that Petitioner DaGraca (along

[1] A copy of the Opinion is filed herewith as Appendix A (hereinafter "App. A").

with Petitioner Young) approached the victim in his parked car, got him out of the car, robbed him at gunpoint, tried to use one of the victim's cards on a phone "app" and, when they did not succeed, forced the victim into the car and made him drive at gunpoint to a store in order to have him use the card they had already taken from him to try to withdraw cash and buy them food. DaGraca was convicted of both robbery and kidnapping.

When a defendant is engaging in such an ongoing robbery, is the proof insufficient to satisfy a separate conviction for kidnapping because the restraint was incidental to the ongoing robbery?

4. Are convictions for robbery and kidnapping which occurred at exactly the same time against the same victim the "same criminal conduct" for the purposes of sentencing, regardless whether the ongoing robbery involved taking the victim in his car to make him try to get money from a cash machine using a card the defendants had taken from the victim?

Does a robbery and kidnapping occur "at different times and in different locations" when they occur within minutes of each other in the same car which was stationary at one point but moving at another, simply because the car was moved?

D. STATEMENT OF THE CASE

1. Procedural facts

Petitioner Jerro DaGraca was charged with first-degree robbery and first-degree kidnapping, both with firearm enhancement allegations. CP 1-2; RCW 9.41.010; RCW 9.94A.530; RCW 9.94A.533; RCW 9A.56.190, RCW 9A.56.200(a)(i)(ii). After jury trial before the Honorable Judge

Ronald E. Culpepper in March of 2012,[2] DaGraca was found guilty of the underlying charges but not enhancements and ordered to serve a standard-range sentence. CP 55-58, 111-23.

DaGraca appealed and, on August 26, 2014, Division Two affirmed in an unpublished opinion. App. A at 1. This Petition follows.

2. Overview of facts relevant to issues on review

Moua Yang was sitting in his car in the parking lot of his apartment one early morning in November of 2011 when two men jumped over a nearby fence and approached. RP 110-12. Yang opened the car door, thinking the men were going to ask him for directions. RP 114. According to Yang, one of the men then pointed a gun and demanded all of Yang's money and "anything you got." RP 115.

Yang handed over some cash and his cellular telephone. RP 115-16. The second man then suggested searching Yang for credit cards or other valuables. RP 115-16. In that search, the men found Yang's "EBT" (food stamps) card and, apparently thinking it was a credit card, demanded

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[2]The verbatim report of proceedings consists of four volumes, which will be referred to as follows:

the volume containing the proceedings of January 9, February 23 and 27, March 8, 15, 20 and 26, 2012, as "1RP;"
the proceedings of February 28, 2012, as "2RP;"
the trial proceedings of March 27-28, as "RP;"
the sentencing on April 23, 2012, as "SRP."

the "PIN" access number. RP 117-18. Yang, who was now out of the car, made up a number and the man with the gun typed something into a cellular telephone, then said, "[y]ou're lying" and "[i]t's not working." RP 119.

At that point, the second guy said, "[t]his guy is really scared," after which one of the men hit Yang in the stomach and face. RP 119. Yang told the men they did not "have to do that" because he would give them all the money he had. RP 119. The guy with the gun then said, "[l]et's go to 7-Eleven to get food and money. If you don't get money for us, you're dead." RP 119. They pulled Yang back into his car and the one with the gun kept it pointed at Yang while Yang drove. RP 119-21.

A few moments later, they arrived at a "7-Eleven" all-night convenience store. RP 19, 54, 121. According to Yang, on the way the two men were talking about what they were going to do when they got the money - "they're going to kill me and put me in the lake so they can have the car and do whatever party they want to do." RP 121.

Once they arrived at the store, however, Yang drew the attention of nearby police by slamming on the brakes, jumping out and yelling he was being robbed and "[t]hey got guns." RP 71, 121. The two men jumped out of the car and officers chased after, losing sight but ultimately arresting

Corey Young and Jerro DaGraca, then 17 years old. RP 20, 61, 108. DaGraca had no weapons but a gun was found on the front passenger side floorboard of the car, with five .22 caliber bullets in a magazine in the gun and a sixth round in the chamber, and a cell phone and cash were also found. RP 64-65.

DaGraca and Young both testified that they had approached Yang to ask them to buy them alcohol after they had tried and failed themselves. RP 146-18. DaGraca knew Yang slightly from the neighborhood, and when Yang agreed, they all got in his car and drove to the nearby store. Along the way, they borrowed his phone to arrange to buy marijuana (then illegal) and Yang said he would drive them to pick it up if he could also try some. RP 149. DaGraca was surprised when they arrived and Yang suddenly rolled down the window and yelled at officers who were nearby that he was being robbed. RP 149.

Both DaGraca and Young said they ran because they had drugs in their pockets. RP 150-51, 165. Young also had some "warrants." RP 150-51, 165.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. THE COURT SHOULD GRANT REVIEW TO ADDRESS WHETHER THE "AUTOMATIC DECLINE" STATUTE VIOLATES DUE PROCESS AND RUNS AFOUL OF MILLER V. ALABAMA AND THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT BY TREATING JUVENILES AS ADULTS WITHOUT CONSIDERATION OF INDIVIDUAL CHARACTERISTICS OF EACH CHILD AND WHETHER THIS COURT'S IN RE BOOT DECISION UPHOLDING OUR STATUTE RETAINS CURRENCY

At the time the crime was committed, DaGraca was a juvenile. See RP 144; CP 1-2. Because of the nature of the offenses, he was subjected to "automatic decline" under RCW 13.04.030(1)(e)(v)(A). Under that statute, the adult court has exclusive original jurisdiction over juveniles who are 16 or 17 when they commit certain crimes, including first-degree robbery and first-degree kidnaping. See RCW 13.05.030(1)(e)(v)(A); see State v. Posey, 161 Wn.2d 638, 643, 167 P.3d 560 (2007).

In Boot, supra, this Court upheld the then-current version of the "automatic decline" statute against multiple constitutional challenges, including both the Eighth Amendment and due process. 130 Wn.2d at 565-66. This Court should grant review to address whether Boot is no longer good law.

In Boot, this Court rejected the idea that there was any difference

between the sentences which could be imposed by juvenile and adult courts. The Court dismissed the perception that "the adult criminal court is capable of assessing much longer sentences" than juvenile court, noting the then-current law that even sending a 13-year old to prison for life without the possibility of parole had been upheld against an Eighth Amendment challenge. Boot, 130 Wn.2d at 570, citing, State v. Massey, 60 Wn. App. 131, 803 P.2d 340, review denied, 115 Wn.2d 1021, cert. denied, 499 U.S. 960 (1991) (declining to consider the defendant's youthful characteristics when deciding whether punishment was cruel and unusual because it found the determination "does not embody an element or consideration of the defendant's age").

Beginning in 2005, however, the U.S. Supreme Court has issued several opinions recognizing the very real differences between juveniles and adults, including that juveniles have a "lack of maturity and an underdeveloped sense of responsibility," have a higher susceptibility to outside pressure such as peer pressure and other "negative inferences," and that the juvenile's "character" is more transitory and less fixed than adults. See Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). As a result of these new understandings, the Court has reversed itself - and the underpinnings of Boot - in significant ways. In Roper, the

Court reversed its previous holding that a sentence of death for a crime committed when the defendant was 16 or 17 was not cruel and unusual punishment - thus reversing one of the major holdings upon which Boot relied. See Roper, 543 U.S. at 569-70; see also Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2011) (violation of 8th amendment to sentence a juvenile to life without the possibility of parole for any crimes other than homicide; overuling Massey *sub silentio* by holding that the age of the offender *is* relevant in 8th Amendment analysis).

Indeed, in Graham, the Supreme Court declared that "[a]n offender's age **is relevant** to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." Graham, 130 S. Ct. at 2031 (emphasis added).

More recently, in Miller v. Alabama, __ U.S. __, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the U.S. Supreme Court held that the 8th Amendment was violated by any sentence of life without the possibility of parole imposed on a juvenile for even a homicide if that sentence is not imposed after full consideration of the mitigation of youth. Although the Court did not foreclose the possibility that a sentencing authority might decide to impose a "life without" sentence after consideration of the

relevant facts, the Court required a specific analysis first: "we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them" under mandatory "life without the possibility of parole" provisions. What might be permissible for an adult is not necessarily permissible when the defendant is a juvenile, the Court noted. 132 S. Ct. at 2470.

This line of cases has cast serious doubt on the continuing validity of Boot and on the constitutionality of our current "automatic decline" scheme.

Taking the statute first, it clearly runs afoul of the principle in Graham, that "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." Here, of course, the "automatic decline statute" contains just such a failure, relegating all children from 16+ to adult court based solely upon the nature of the crime without any recognition of the development, maturity and culpability issues identified in Roper and Graham.

Further, the very underpinnings of Boot's Eighth Amendment and due process holdings have been steadily eroded. In reaching its conclusion, the Boot Court specifically relied on the mistaken belief that there was effectively no difference between juvenile and adult courts, as

well as the fact that the then-current understanding of the U.S. constitution was that even putting a child to death was permissible, so that "trial in adult court does not violate the substantive due process rights" of defendants. 130 Wn.2d at 572. Put another way, nothing is lost to the juvenile because there is essentially no difference between the sentences they could face in either adult or juvenile court. But that is no longer the case, and Miller and its antecedents make that clear. As does the fact that the Graham Court specifically overruled the death penalty for certain juvenile *precisely because* that penalty was imposed without proper consideration of proportionality and the youth of the offenders. And all of the recent U.S. Supreme Court caselaw establishes that juveniles are *not* to be treated as "little adults" but instead are to be dealt with in light of our understanding of the limits of their maturity and culpability. The "automatic decline" statute in this state fails to take into account *any* factors relevant to those issues. As such, the statute is no longer good law.

In upholding the statute on appeal, Division Two relied on this Court's decision in Posey, supra, and took issue with the concept put forth by DaGraca - that RCW 13.04.030(1)(e)(v)(A) "automatically removes jurisdiction from the juvenile court." App. A at 9. Instead, Division Two declared that juvenile courts are "jurisdictionally" a separate division of

the superior courts so that the "superior adult court had original jurisdiction over DaGraca for these offenses" under the statutory scheme. App. A at 8-9. Division Two also rejected DaGraca's argument that counsel was ineffective in failing to object to juvenile court jurisdiction. App. A at 16.

Posey, however, involved a very different question - the question of whether a defendant who was tried as a juvenile could be sentenced for a juvenile by any court - juvenile or adult - after he turned 21. 161 Wn.2d at 642-43. This Court's holding in Posey held that the power to hear the case still resided in the superior court, regardless whether it had been originally tried in juvenile court, once he turned 21. Id. That is a far cry from holding that there is no legal issue in automatically transferring a juvenile to be tried as an adult simply because the superior court generally has jurisdiction over felonies, as Division Two here held.

This Court should grant review. The issue of the proper application of Miller and the potential problems with our current system are issues of great public import. This Court has been hearing similar cases, such as In re McNeil, ___ Wn.2d ___, ___ P.3d ___ (September 25, 2014), decided today, in which the question was whether sentences were in violation of Miller. The decision of Division Two begs the issue and

focuses on the wrong question. This Court should grant review, hold that our "automatic decline" statute violates due process and the 8th Amendment, and grant relief.

2. REVIEW SHOULD BE GRANTED TO ADDRESS WHETHER RESTRAINT IS "INCIDENTAL" WHEN IT IS EMPLOYED FOR THE PURPOSES OF CONTINUING A ROBBERY BY TAKING THE VICTIM TO A NEARBY STORE TO MAKE HIM WITHDRAW MONEY FROM A CARD ALREADY STOLEN

Many crimes involve some degree of "restraint." See State v. Johnson, 92 Wn.2d 671, 676, 600 P.2d 1249 (1979), cert. denied, 466 U.S. 948 (1980). In addition, the statutes defining "restraint" crimes such as kidnapping are general "broadly worded," so that they may seem to encompass any restraint, even one which is incidental to the commission of another charged crime. See Johnson, 92 Wn.2d at 676; State v. Green, 94 Wn.2d 216, 226-27, 616 P.2d 628 (1980).

As a result, this Court has held that a separate conviction for a "restraint" crime cannot be upheld on appeal if that restraint was merely "incidental" to the commission of another crime. Green, 94 Wn.2d at 226-27. In Green, this Court held that "mere incidental restraint and movement of the victim during the course of another crime" will be insufficient to support a separate conviction for a restraint crime. In re Brett, 126 Wn.2d

136, 166, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996). Division Two has similarly held that, if restraint and movement of a victim are "integral to the commission of another crime," that restraint and movement are not an "independent, separate crime" of restraint and any conviction for a restraint crime must be dismissed. See State v. Korum, 120 Wn. App. 686, 703-704, 86 P.3d 166 (2004), affirmed in part and reversed in part on other grounds, 157 Wn.2d 614, 141 P.3d 13 (2007).

These holdings reflect the very real constitutional concerns which arise when there is a conviction for both a restraint crime and a separate crime involving that same restraint. Both the prohibitions against double jeopardy and the rights to be free from conviction upon less than sufficient evidence are involved. See Brett, 126 Wn.2d at 174 ("whether the kidnapping will merge into a separate crime to avoid double jeopardy"); Green, 94 Wn.2d at 226-27 (issue addressed under due process, sufficiency analysis).

Thus, where a defendant grabbed the victim, picked her up, carried her 50-60 feet to move her behind a building and then killed her, the restraint of grabbing and moving and secreting her did not support a separate kidnaping conviction because the restraint and movement of the victim was "incidental" to the homicide, i.e., part and parcel of its

commission. Green, 94 Wn.2d at 226-27. Similarly, the restraint was incidental to rape charges when a defendant took girls into separate rooms in his home, bound them, raped them, left to buy cigarettes, returned, then took one of the girls out of the home to a wooded area where he raped her again. Johnson, 92 Wn.2d at 672-73. The restraint was "incidental" because the crimes occurred at almost the same time and place and the sole purpose of the restraint was to facilitate the rapes. Id.

Here, the restraint was also "incidental" to the commission of the robbery, because the sole purpose of restraining Tang and having him drive to the nearby store was to effectuate the ongoing robbery over the 20 or 30 minutes it lasted. Not only the jury instructions but the law makes this clear. Jury instruction 15, the "to convict" instruction for Mr. DaGraca on the kidnaping offense specifically told jurors that they had to find "three elements" beyond a reasonable doubt, as follows:

> (1) That on or about the 19th day of November, 2011, the defendant or an accomplice intentionally abducted Moua Yang,
>
> (2) That the defendant or an accomplice abducted that person with intent to facilitate the commission of robbery or flight thereafter, and
>
> (3) That any of these acts occurred in the State of Washington.

CP 79.

Thus, the plain language of the jury instruction established that, in this case, the purpose of the restraint and the intent behind it was, in fact, "to facilitate the commission of robbery or flight thereafter."

Indeed, if the jury had not found that the restraint of Yang was for the purposes of committing the robbery, under the jury instruction the jury would have been required to acquit DaGraca of the kidnapping offense.

Here, the "taking" was ongoing, starting with the cash in Yang's pockets and then, when the QWEST card was revealed, including an effort to take the money from that card as well. During the commission of the robbery, Yang was certainly restrained and moved to a place where the card could be used and the robbery made complete. But again, the purpose of that movement was not a separate harm but instead to facilitate the robbery of Yang which had started a few moments before.

In upholding the convictions here, the court of appeals relied on the belief that, by taking the QWEST card and other items by force, Young and DaGraca "had completed the robbery" and "further restraint was unnecessary." App. A at 12. Division Two believed that the "subsequent ordering" of Yang to drive them to a Seven-11 was not "inherent" in the "already completed robbery." App. At at 12-31.

But this Court has specifically rejected the "complete upon taking"

view of robbery the appellate court used here. See State v. Johnson, 155 Wn.2d 609, 611, 121 P.3d 91 (2005). Instead of applying that common law view, in this state a "transactional view" is used, so that "robbery can be considered an ongoing offense." Id. As a result, courts have held, for example, that even after someone has taken an item *without* threat or use of force, a robbery conviction which requires proof of such threat or use can be supported by evidence that the defendant used force *after* the taking was complete, if the force is used to escape or prevent the victim from regaining his property. Id.; see also, State v. Manchester, 57 Wn. App. 765, 790 P.2d 217, review denied, 116 Wn.2d 1019 (1990) (upholding a robbery conviction when the use of force did not occur "until after the taking is legally complete").

The ongoing robbery of Yang started in his car at his apartment and ended a few blocks away, at the convenience store, when he attracted the attention of police. This Court should grant review on this issue. Notably, this Court has recently granted review on the issue of the proper scope and definition of the Green concept of "incidental restraint" in the state's appeal in State v. Berg/State v. Reed, Nos. 89570-8- (consolidated). That is an indication that the proper application of the incidental restraint doctrine is of substantial interest to the Court. Review should also be

granted in this case.

3. THIS COURT SHOULD GRANT REVIEW TO ADDRESS WHETHER TWO OFFENSES ARE THE "SAME CRIMINAL CONDUCT" WHEN THEY OCCUR WITHIN MOMENTS OF EACH OTHER IN THE SAME CAR AS PART OF AN ONGOING OFFENSE AGAINST A SINGLE VICTIM

Two crimes amount to the "same criminal conduct" for sentencing purposes when they require the same criminal intent, are committed at the same time and place and involve the same victim." RCW 9.94A.589(1)(a). In determining whether two crimes meet these standards, the question is whether the defendant's criminal intent, objectively viewed, changed from the first crime to the next. See State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). While a trial court's decision is reviewed for abuse of discretion, here such abuse occurred, as Dunaway shows.

In Dunaway, one of the consolidated defendants went to a mall, got into someone's car, showed them a gun, threatened them to make them drive him towards Seattle, made them give him cash they had on them, then told one of the women to go into a bank to get more money for him and, when she did not return, drove with the other woman for about an

hour before he got out of the car. 109 Wn.2d at 211-12. The defendant was charged with two counts of first-degree kidnapping and two counts of first-degree robbery, which the sentencing court counted as one after finding the crimes against each woman involved the same criminal conduct.

In this Court, the prosecution argued that the crimes were not the same criminal conduct. 109 Wn.2d at 215-16. This Court disagreed, for several reasons. First, the kidnapping charges were elevated by the robberies to first degree, so that it was "Dunaway's very intent to commit robbery that enabled the prosecutor to raise the charge." 109 Wn.2d at 216. As a result, this Court held, "robbery was the objective intent behind both crimes," so they shared the same intent. Second, the kidnapping furthered the robbery. 109 Wn.2d at 217. And the third reason was that the crimes were committed "at the same time and place."

Thus, Dunaway rejected the idea that movement of any kind renders all crimes separate and distinct for the purposes of sentencing. Here, however, that is the basis for Division Two's decision on this issue. The court held that the "kidnapping occurred *after* DaGraca had robbed Yang of his property and continued in Yang's car" when he was forced to drive to the 7-Eleven. App. A at 14. Division Two then declared that the

robbery and kidnapping, which occurred within moments of eachother, "occurred at different times and in different locations (stationary car for the robbery and moving car for the kidnapping)."

But this Court has rejected a "simultaneity" requirement. State v. Porter, 133 Wn.2d 177, 942 P.2d 974 (1997). Further, in Dunaway itself, the defendant made the victims drive around - yet the crimes were deemed "same criminal conduct." Dunaway, 109 Wn2d at 211-12. Division Two's declaration that the two crimes occurred "at different times" when they were only moments apart and in "different locations" because the car was stationary for one crime and moving for the other makes no sense in light of Dunaway. This Court should grant review to address whether Division Two's decision was proper in light of Dunaway.

F. CONCLUSION

For the foregoing reasons, this Court should accept review of the published decision of Division Two of the court of appeals in this case.

DATED this 25th day of September, 2014.
Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel by efiling at the Division Two portal upload at pcpatcecf@co.pierce.wa.us, and counsel for codefendant Young at oliver@washapp.org and petitioner by depositing the same in the United States Mail, first class postage pre-paid, as follows: Mr. Jerro DaGraca, DOC 357576, Olympic Corrections Center, 11235 Hoh Main Line, Forks, WA. 98331.

DATED this 25th day of September, 2014.

Respectfully submitted,

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DIVISION II

STATE OF WASHINGTON Respondent, v. JERRO DE JON DAGRACA, Appellant.	No. 43358-3-II UNPUBLISHED OPINION
STATE OF WASHINGTON, Respondent, v. COREY DUAWAYN YOUNG, Appellant.	Consolidated with No. 43365-6-II UNPUBLISHED OPINION

HUNT, J. — Jerro De Jon DaGraca and Corey Duawayn Young appeal their jury convictions and sentences for kidnapping and robbery, for which Young's sentences include firearm enhancements. Young also appeals his separate conviction and sentence for first degree unlawful possession of a firearm. Both DaGraca and Young (Defendants) argue that the trial court erred in ruling that the kidnapping was not "incidental to the ongoing armed robbery."[1] Young separately argues that (1) the prosecutor committed misconduct by questioning him about a bullet located in the pocket of a red and black jacket that he wore during the crimes, and (2) his counsel was ineffective in failing to object to the prosecutor's questioning. DaGraca separately

[1] Br. of Appellant (Young) at 7.

argues that RCW 13.04.030(1)(e)(v)(A), under which he was tried in adult court instead of juvenile court, violates the Eighth Amendment to the United States Constitution. DaGraca also adopts and incorporates the arguments in Young's initial and supplemental briefing.

In a Statement of Additional Grounds (SAG), Young asserts that the trial court denied him a fair trial, compelled him to testify against himself, violated his time-for-trial rights, and committed other irregularities warranting reversal. In his SAG, DaGraca asserts that (1) his counsel was ineffective for failing to object to jurisdiction and failing to request a remand to the juvenile court, and (2) his counsel's deficient performance denied him a fair trial. We hold that RCW 13.04.030(1)(e)(v)(A) is not unconstitutional, the kidnapping was not incidental to the robbery, and the prosecutor's misconduct during cross-examination was curable by an instruction.[2] We affirm both defendants' convictions and sentences.

FACTS

I. Robbery and Kidnapping

Early in the morning on November 19, 2011, Moua Yang was talking on the phone in his car in his apartment parking lot when Corey Duawayn Young and Jerro De Jon DaGraca[3] jumped over the parking lot fence and approached him. One[4] pointed a gun at him, said, "Today is a bad day. . . . Give me all your money; give me anything you got," and took Yang's cell

[2] Defendants' other arguments fail.

[3] At the time he committed these crime, DaGraca was still a juvenile, approximately one month and two days short of turning 18. The State charged him as an adult. RCW 13.04.030(1)(e)(v)(A).

[4] At trial, Yang positively identified both men as his assailants. In discussing this fact, Young's brief of appellant notes that he was the man with the gun.

phone and $117. 1 Verbatim Report of Proceedings (VRP) at 115. The other told the first man to search Yang's pockets for credit cards. The first man, the one with the gun, found an Electronic Benefit Transfer (EBT) "Quest"[5] food stamp card and a military identification card in Yang's pocket and demanded the personal identification number for the Quest card. Yang gave him a fictional number.

Apparently after checking the number on his phone, the man with the gun told Yang, "It's not working; you're lying," hit Yang in the stomach, put the gun on Yang's stomach, and punched Yang in the face. 1 VRP at 119. Both men then ordered Yang, at gunpoint, to drive them to a nearby 7-Eleven, saying, "Let's go to 7-Eleven to get food and money. If you don't get money for us, you're dead." 1 VRP at 119. They pulled Yang "back [into] the car" and kept the gun pointed at him while they directed Yang to drive for "about five[-]seven minutes" to a 7-Eleven store. 1 VRP at 121. During the drive, the men said that after they got the money, they would kill Yang and "put [him] in the lake so they [could] have the car." 1 VRP at 121.

Several police officers, standing at the 7-Eleven, saw Yang pull into the lot "very quickly," "slam . . . on [his] brakes," and "jump . . . out and yell" that he was being robbed and that "[t]hey got guns." 1 VRP at 71. DaGraca and Young fled the vehicle, and the police gave chase on foot. According to Officer Christopher Michael Bowl, the man "with a red hat and red and black jacket jumped out of the [p]assenger front seat," and the other man, "in a black jacket, jump[ed] out of the rear passenger side of the car." 1 VRP at 73, 74. The two men split up as the police chased them through the parking lot of an adjacent shopping mall. Bowl observed the man in the red hat and red and black jacket shed the jacket.

[5] Clerk's Papers (CP) (Young) at 6.

The police captured and arrested Young and DaGraca, retraced their steps, and found the discarded hat and jacket. Officer Michael Robert Wulff found a gun on the "front passenger side floorboard"[6] of Yang's car, five .22 caliber bullets in a magazine in the gun, and a sixth round loaded in the chamber.

II. PROCEDURE

On November 21, 2011, the State charged DaGraca[7] and Young with first degree robbery and first degree kidnapping; the State separately charged Young with first degree unlawful possession of a firearm. The State also alleged special firearm sentencing enhancements for the robbery and kidnapping charges.

A. Continuances

Forty-nine days into the case, at a January 9, 2012 hearing, DaGraca's attorney requested a continuance for time to prepare adequately. DaGraca himself objected to this continuance;[8] Young agreed to it. Because of the "very serious nature of [the] charges and the fact that Mr. DaGraca and Mr. Young [would be] likely looking at substantial jail time if they [would be] convicted," the trial court granted the continuance to February 23. VRP (Jan. 9, 2012) at 4.

At the February 23 hearing, the State moved for a continuance; both defendants objected. The trial court continued the case until February 27 because no courtrooms were available. On February 27, the trial court set trial over to the next day. At the February 28 hearing, the trial

[6] 1 VRP at 30.

[7] The State charged DaGraca in adult court.

[8] Although DaGraca objected to all requested continuances, he did not assert CrR 3.3 time-for-trial violations below. Nor does he so assert on appeal.

court proposed continuing the trial to March 8, finding "good cause" because the trial judge was unavailable to begin on February 29. VRP (Feb. 28, 2012) at 2-3.

On March 8, the trial court heard another State's motion to continue because the prosecutor was unavailable. Young agreed, but DaGraca objected. The trial court found "good cause" to continue the matter one week to March 15. VRP (Mar. 8, 2012) at 10. At the March 15 hearing, the trial court again continued the trial, this time to March 20, based on the prosecutor's absence being "good cause"; both defendants objected. VRP (Mar. 15, 2012) at 12. On March 20, the trial court found "good cause" and continued the trial to March 26 because courtrooms were unavailable; again, both defendants objected. On March 26, again because courtrooms were unavailable, the trial court continued the case one more day. Trial began the next day, on March 27.

B. Jury Voir Dire

During voir dire on the first day of trial, Young's defense counsel asked several prospective jurors about their attitudes toward tattoos. Prospective juror 18, a prison corrections officer, responded that he recognized that certain tattoos reflected gang affiliations, but not all tattoos had such a purpose, and he did not have a problem with tattoos. This prospective juror, however, did not serve on the jury that tried the case.

C. Trial

The State presented testimonies from the police officers and Yang, as previously described. The State also offered as exhibits the items the police had recovered during DaGraca and Young's flight and the gun from Yang's car. DaGraca and Young each testified and denied robbing or kidnapping Yang.

DaGraca testified that he and Young had been celebrating an upcoming music performance, were looking for someone to buy them alcohol, were not "familiar with"[9] Yang, but nevertheless approached him and asked "if he wanted to buy [them] some alcohol." 2 VRP at 149. Yang told them to get in his car; with DaGraca sitting behind Yang and Young sitting in the front passenger seat, Yang drove to the 7-Eleven. On the way, they asked to use Yang's phone to arrange a marijuana purchase; Yang allowed them to use his phone and volunteered to drive them to buy marijuana if Yang could try it with them. As they approached the 7-Eleven, Yang drove into the parking lot, where the police were standing, and told the police that he was being robbed.

On cross-examination, the prosecutor asked Young whether he had another bullet in his jacket, even though there was no evidence in the record that the police found an additional bullet in Young's jacket. Young did not object to the questioning, but he denied knowledge of any bullet in the jacket.

Neither DaGraca nor Young objected to any of the court's proposed jury instructions. But after the trial court returned from recess, Young's counsel moved for a mistrial, stating, "Apparently, I misunderstood what [Young] said. He apparently told me he did not want to [testify]. I thought he said he did want to [testify]." 2 VRP at 181. The State objected. The trial court denied the motion for mistrial on grounds that counsel had had ample time to clarify whether Young would testify and that when Young took the stand, he did not express any desire not to testify.

[9] 2 VRP at 156.

The jury found DaGraca guilty of first degree robbery and first degree kidnapping; but did it not reach a unanimous decision about whether he had been armed with a firearm during the commission of either offense. The jury found Young guilty of all three charges: first degree robbery, first degree kidnapping, and unlawful possession of a firearm. By special verdict, the jury also found that Young had been armed with a firearm during the robbery and kidnapping.

D. Sentencing

At the sentencing hearing, the trial court denied Defendants' motion to merge their kidnapping and robbery convictions, stating that, although the crimes were "related," they were separate and thus did not qualify as "same criminal conduct under [RCW] 9.94A.589." VRP (Apr. 23, 2012) at 4. The trial court also ruled that the kidnapping was not incidental to the robbery and, thus, these two crimes must be treated as separate.

The trial court sentenced DaGraca to standard range sentences of 68 months of incarceration for count I (first degree robbery) and 72 months for count II (first degree kidnapping), to run concurrently. As required by RCW 9.94A.701, the trial court also imposed 18 months of community custody on count I (violent offense) and 36 months of community custody on count II (serious violent offense).

The trial court sentenced Young to standard range sentences of 87 months on count I (first degree robbery), 110 months on count II (first degree kidnapping), and 54 months on count III (first degree unlawful possession of a firearm), all to run concurrently. The trial court added firearm enhancements of 60 months to Young's base sentences for counts I and II, to run consecutively to each other and to the sentences on the underlying counts. The trial court also

imposed 18 months of community custody for count I and 36 months of community custody for count II.

DaGraca and Young appeal their convictions and sentences.

ANALYSIS

I. DaGraca: Adult Court Jurisdiction

DaGraca argues that RCW 13.04.030(1)(e)(v)(A), under which he was tried as an adult court rather than as a juvenile, violates both the due process clause and the Eighth Amendment to the United States Constitution (cruel and unusual punishment). He contends that in automatically vesting the adult superior court with exclusive original jurisdiction over the serious violent offenses he was charged with committing (first degree robbery and first degree kidnapping), the statute failed to take into account his youth. DaGraca's constitutional challenges fail.

As our Washington Supreme Court has recently reiterated:

> In adopting Washington Constitution article IV, section 6, the people of this state granted the superior courts original jurisdiction 'in all criminal cases amounting to felony' and in several other enumerated types of cases and proceedings. In these enumerated categories where the constitution specifically grants jurisdiction to the superior courts, the legislature cannot restrict the jurisdiction of the superior courts. *See Blanchard v. Golden Age Brewing Co.*, 188 Wn. 396, 418, 63 P.2d 397 (1936).
> [. . . .]
> Article IV, section 6 also grants the superior courts *residual* jurisdiction over nonenumerated cases and proceedings, providing that superior courts 'shall *also* have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court . . . .'.

State v. Posey, 174 Wn.2d 131, 135-36, 272 P.3d 840 (2012). The court went on to explain the evolution of juvenile court as a "'division of the superior court, not a separate court,'"[10] a statutory creation of the legislature that "[*could*]*not*" and "*did not*" "divest the superior courts of their criminal jurisdiction over juveniles." *Posey*, 174 Wn.2d at 140. Thus, "[t]he juvenile courts are properly understood, jurisdictionally, as a separate *division* of the superior courts." *Posey*, 174 Wn.2d at 140 (emphasis added).

When DaGraca committed the charged crimes, he was a juvenile, approximately one month shy of his eighteenth birthday. RCW 13.04.030(1)(e)(v)(A) and (C), respectively, expressly exclude from juvenile court jurisdiction 16- and 17-year-old minors charged with committing first degree robbery and first degree kidnapping.[11] Thus, the superior adult court had original jurisdiction over DaGraca for these offenses, contrary to DaGraca's argument that this statute automatically removes jurisdiction from the juvenile court.

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[10] *Posey*, 174 Wn.2d at 137 (quoting *State v. Werner*, 129 Wn.2d 485, 493, 918 P.2d 916 (1996).

[11] RCW 13.04.030 provides, in part:

> (1) Except as provided in this section, the juvenile courts in this state shall have exclusive original jurisdiction over all proceedings:
>
> . . . .
>
> (e) Relating to juveniles alleged or found to have committed offenses . . . unless:
>
> . . . .
>
> (v) The juvenile is sixteen or seventeen years old on the date the alleged offense is committed and the alleged offense is:
> (A) A *serious violent offense* as defined in [former] RCW 9.94A.030 [(2011)];
>
> . . . .
>
> (C) *Robbery in the first degree*, rape of a child in the first degree, or drive-by shooting, committed on or after July 1, 1997

(Emphasis added).

> Former RCW 9.94A.030 (2011), in turn, provided, in part:
> (44) "Serious violent offense" is a subcategory of violent offense and means:
>
> . . . .
>
> (vi) *Kidnapping in the first degree*.

(Emphasis added).

DaGraca argues in general that our Supreme Court's 1996 decision *In re Boot,* 130 Wn.2d 553, 925 P.2d 964 (1996), upholding the constitutionality of a previous version of the juvenile court decline statute, "is no longer good law." Br. of Appellant (DaGraca) at 8. He relies primarily on United States Supreme Court cases addressing whether statutes that impose the death penalty or life imprisonment without parole for juveniles violate the Eighth Amendment.[12] Although DaGraca contends that RCW 13.04.030 runs afoul of the Eighth Amendment, he never argues how his sentences were "cruel and unusual." U.S. CONST. amend. VIII. On the contrary, the trial court sentenced DaGraca to 68 months of confinement for count I (first degree robbery) and 72 months for count II (first degree kidnapping), far short of the "most severe punishments" at issue in *Graham.*[13] *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). Furthermore, DaGraca fails to show that his standard range sentences

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[12] DaGraca cites *Graham v. Florida*, in which the United States Supreme Court held that the Eighth Amendment to the United States Constitution prohibits a court from imposing a sentence of life without parole on a juvenile offender for a nonhomicide crime and stated: "An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Graham v. Florida*, 560 U.S. 48, 76, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). Based on this quote, and ignoring *Graham*'s homicide/life without parole context, DaGraca (1) essentially asks us to interpret *Graham* to mean that any jurisdictional or sentencing statute that automatically treats a juvenile the same as an adult is unconstitutional; and (2) contends that the superior court's "'automatic'" exercise of original jurisdiction over him violated the Eighth Amendment and *Graham*. Br. of Appellant (DaGraca) at 7. As we explain above, we reject DaGraca's expansive reading of *Graham*.

[13] Nor does DaGraca's attempted analogy persuade us that his *potential* maximum sentence of life imprisonment for either offense (based on his having a previous felony conviction) was unconstitutionally cruel and unusual. RCW 9.94A.515 (providing standard sentence ranges); RCW 9A.20.021(1)(a) (establishing a maximum term of life imprisonment for class A felonies).

constitute cruel and unusual punishment or otherwise violate the Eighth Amendment.[14]

Beginning with the presumption of constitutionality accorded to our legislature's enactments, we hold that RCW 13.04.030(1)(e)(v)(A) does not violate the Eighth Amendment by treating 16- and 17-year-olds as adults for first degree robbery and first degree kidnapping charges. *State v. Jorgenson*, 179 Wn.2d 145, 150, 312 P.3d 960 (2013).

II. Kidnapping and Robbery

DaGraca and Young contend that the trial court should have dismissed their kidnapping convictions because their restraint of Yang, a necessary element of kidnapping, was "incidental to the ongoing armed robbery," and they were not separate crimes.[15] The State responds that, when DaGraca and Young took Yang's money and cards, they completed the robbery and any further restraint thereafter was a separate crime. We agree with the State and the trial court that the kidnapping and robbery were separate crimes.

A. Kidnapping not Incidental to Robbery

The restraint and movement of a victim that are merely incidental to and not independent of the underlying crime do not constitute kidnapping. *State v. Green*, 94 Wn.2d 216, 227, 616

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[14] Addressing former RCW 13.04.030(1)(e)(v)(A) (1999), Division Three of our court held that our state juvenile court automatic decline statute does not violate equal protection and due process rights. *State v. Posey*, 130 Wn. App. 262, 269, 122 P.3d 914 (2005), *rev'd in part, aff'd in part on other grounds*, 161 Wn.2d 638, 167 P.3d 560 (2007). The Supreme Court did not address and left intact Division Three's holding the statute constitutional. *Posey*, 161 Wn.2d at 643. For purposes of our analysis here, former RCW 13.04.030(1)(e)(v)(A) does not differ materially from the current version of the statute.

[15] Br. of Appellant (Young) at 7.

P.2d 628 (1980).[16] "Although rooted in merger doctrine, courts reviewing kidnapping charges that are arguably merely incidental to another crime frequently borrow a sufficiency of the evidence analysis." *State v. Elmore*, 154 Wn. App. 885, 901, 228 P.3d 760, *review denied*, 169 Wn.2d 1018 (2010). Thus, in general, whether "kidnapping is incidental to the commission of other crimes" involves both "a fact-specific determination" and a legal determination about whether the facts merge to support one crime instead of two. *Elmore*, 154 Wn. App. at 901 (citing *Green*, 94 Wn.2d at 225-27 and *State v. Korum*, 120 Wn. App. 686, 707, 86 P.3d 166 (2004), *aff'd in part, rev'd in part on other grounds*, 157 Wn.2d 614, 141 P.3d 13 (2006)). Here, we review de novo the trial court's conclusion of law that the restraint was not incidental to the robbery.

In *Berg*, we held that, as a matter of law, that

> restraint was incidental to the . . . robbery when (1) facilitating the robbery was the restraint's sole purpose, (2) the restraint was inherent in the robbery, (3) the robbery victims were not transported from their home to a place where they were not likely to be found, (4) the restraint did not last substantially longer than necessary to complete the robbery, and (5) the restraint did not create a significant independent danger.

State v. Berg, 177 Wn. App. 119, 136-37, 310 P.3d 866 (2013) (citing *Korum*, 120 Wn. App. at 707), *review granted*, 179 Wn.2d 1028 (2014).

Once DaGraca and Young took the Quest card and the military identification card from Yang's person by force, they had completed the robbery; further restraint was unnecessary. Thus, DaGraca and Young's subsequent ordering Yang at gunpoint to drive them to the 7-Eleven

[16] *See also State v. Elmore*, 154 Wn. App. 885, 901, 228 P.3d 760, *review denied*, 169 Wn.2d 1018 (2010).

was neither "inherent" in nor "integral to [the] commission" of the already completed robbery;[17] rather, it was for the new purpose of obtaining money from Yang's Quest card. By restraining Yang at gunpoint and threatening to kill him during the drive to the 7-Eleven[18], DaGraca and Young created a new danger separate from the already completed robbery. We hold that DaGraca and Young have not shown that the kidnapping restraint "was so incidental to" the robbery "that it could not support a separate conviction." *Elmore*, 154 Wn. App. at 903.

B. Kidnapping Not "Same Criminal Conduct" as Robbery

DaGraca and Young also argue that the trial court abused its discretion in not finding that Yang's kidnapping merged into the "same criminal conduct" as his robbery. Br. of Appellant (Young) at 9; Br. of Appellant (DaGraca) at 18. For sentencing purposes, "'[s]ame criminal conduct' . . . means two or more crimes require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a).[19] Here, the trial court ruled that DaGraca and Young had completed the robbery when they

> stuck the gun in Mr. Yang's face and took his wallet. They then formed the intent to try to get some more money from him and formed the intent to abduct him at gunpoint in his car. That is a separate crime.

VRP (Apr. 23, 2012) at 4-5.

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[17] *Berg*, 177 Wn. App. at 136; *Korum*, 120 Wn. App. at 703, 707.

[18] Yang testified that one of the defendants had said, "If you don't get money for us, you're dead," and that once Yang obtained the money for them, "they[would] kill [him] and put [him] in the lake so they [could] have the car." 1 VRP at 119, 121.

[19] The legislature amended RCW 9.94A.589 in 2014. LAWS OF 2014, ch. 101 § 1. The amendments did not alter the statute in any way relevant to this case; accordingly, we cite the current version of the statute.

We review a trial court's determination of "same criminal conduct" under RCW 9.94A.589(1)(a) for abuse of discretion. *State v. Graciano*, 176 Wn.2d 531, 533, 295 P.3d 219 (2013). The defendant bears the burden of proving all three statutory elements of "same criminal conduct." *Graciano*, 176 Wn.2d at 538; *see* RCW 9.94A.589(1)(a). "'[T]he statute is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act.'" *Graciano*, 176 Wn.2d at 540 (quoting *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997)).

Here, we need not decide whether DaGraca and Young's objective intents changed after they took Yang's wallet because the evidence shows that the kidnapping occurred *after* DaGraca and Young had robbed Yang of his property and continued in Yang's car when DaGraca and Young forced Yang to drive them to the 7-Eleven. Because the robbery and the kidnapping occurred at different times and in different locations (stationary car for the robbery and moving car for the kidnapping), the trial court properly ruled that the crimes were not the same criminal conduct for sentencing purposes.

III. Prosecutorial Misconduct

A. No Prejudice

Defendants argue that the prosecutor committed misconduct by repeatedly questioning him about a bullet located in the red and black jacket that he wore during the crimes.[20] Officers had already testified that they found six bullets with the gun. While cross-examining Young, however, the prosecutor asserted that a .22 caliber bullet had been found in the jacket and asked

[20] Although Young asserts that the prosecutor cross-examined him about a "seventh bullet," the prosecutor never referred to a "seventh" bullet. Suppl. Br. of Appellant (Young) at 6.

whether the bullet belonged to Young, even though the State had no evidence that such a bullet existed.[21] Neither defendant objected to the prosecutor's questioning, and Young denied knowledge of any bullet in the jacket. We agree with Defendants that this cross-examination was improper. Nevertheless, reversal is not required because, as we next explain, Defendants waived any error when they did not object to the misconduct below.

A defendant who "fails to object or request a curative instruction at trial" waives his right to challenge the misconduct[22] "unless the conduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014).[23] Assuming, without deciding, that the prosecutor's misconduct was flagrant and ill-intentioned, Defendants fail to show how an instruction could not have cured any resulting prejudice if Young had timely objected. Young's failure to object denied the trial court an opportunity to instruct the jury to disregard the now-challenged question.[24] Thus, Defendants' prosecutorial misconduct challenge fails.

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[21] The State concedes that the record contains no evidence of such additional bullet.

[22] The trial court must have the opportunity to correct any alleged error, and the defendant's failure to object at trial waives his right to challenge the remarks on appeal. *State v. Hamilton*, 179 Wn. App. 870, 878, 320 P.3d 142 (2014); *State v. Fullen*, 7 Wn. App. 369, 389, 499 P.2d 893, *cert. denied*, 411 U.S. 985 (1973).

[23] *See also State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

[24] Young also argues that the prosecutor's repeated questioning was "so cumulative and pervasive" that a jury instruction could not have cured the resulting prejudice. Suppl. Br. of Appellant (Young) at 9. But even if Young could show that the prosecutor's misconduct was incurable, he fails to show a substantial likelihood that the statements affected the jury's verdict. *Emery*, 174 Wn.2d at 760. "In analyzing prejudice, we do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury." *Emery*, 174 Wn.2d at 764 n.14.

B. Effective Assistance of Counsel

Young also argues that he received ineffective assistance when his trial counsel failed to object to the prosecutor's cross-examination about the bullet. This argument also fails.

To prove ineffective assistance of counsel, Young must show that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). A defendant alleging ineffective assistance must overcome "'a strong presumption that counsel's performance was reasonable.'"[25] *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)), *adhered to in part on remand*, 168 Wn. App. 635, 278 P.3d 225 (2012), *petition for cert. filed*, May 27, 2014.. "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). If

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Here, the misconduct was harmless because, "look[ing] only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt," we are "convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *State v. Guloy*, 104 Wn.2d at 412, 426, 425, 705 P.2d (1985). Even without the prosecutor's improper question about the additional bullet, there was ample evidence of other bullets, Young and DaGraca did not present credible stories, and the evidence overwhelmingly supported the conclusion that they robbed and kidnapped Yang.

Other evidence linked the firearm to Young and gave the jury a sufficient independent basis on which to convict him of unlawful possession of a firearm. The jury heard Officer Bowl's testimony that the individual in a "red and black jacket" (later identified as Young) jumped out of the front passenger seat, 1 VRP at 73; Yang's testimony that the individual with the gun was in the front passenger seat; and Young's testimony that he had discarded a "red jacket" while fleeing from the police. 2 VRP at 167. Furthermore, after this cross-examination, the prosecutor never again raised the issue of an additional bullet or otherwise again implied that Young had a bullet in his jacket.

[25] We also presume that, under the circumstances, the alleged errors "might be considered sound trial strategy." *Strickland*, 466 U.S. at 689.

counsel's conduct "'can be characterized as legitimate trial strategy or tactics, performance is not deficient.'" *Grier*, 171 Wn.2d at 33 (quoting *Kyllo*, 166 Wn.2d at 863).

To show prejudice, the defendant must establish that "'there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.'" *Grier*, 171 Wn.2d at 34 (quoting *Kyllo*, 166 Wn.2d at 862). A defendant's failure to prove either prong of this test ends our inquiry. *Hendrickson*, 129 Wn.2d at 78. Young fails to meet his burden here. Young cannot show prejudice flowing from counsel's failure to object to the prosecutor's cross-examination of him about the bullet. Even if Young's counsel had objected and the trial court had responded by precluding the prosecutor's questions, Young fails to show a substantial likelihood that this cross-examination affected the jury's verdict because there was ample evidence linking the firearm to Young, supporting the jury's verdict that he robbed and kidnapped Yang at gunpoint. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Because Young fails to meet the prejudice prong of the test, he fails to show that he received ineffective assistance counsel.

IV. Statements of Additional Grounds

A. DaGraca

In his SAG, DaGraca asserts that (1) his counsel was ineffective for failing to object to the adult superior court's jurisdiction and for failing to request a remand to the juvenile court, and (2) his counsel's deficient performance denied him a fair trial. We have already upheld the superior court's exercise of jurisdiction under RCW 13.04.030(1)(e)(v). Thus, counsel did not render deficient or ineffective assistance in failing to object to the juvenile court's decline of jurisdiction under this statute.

B. Young

1. Trial court irregularities

Young asserts that "[t]he trial court abused its discretion by allowing jurors to sit and congregate in the hallway during trial," failing to tell the jurors that they could not be in the hallway, and failing to admonish them to disregard anything they might have seen or heard; he contends that these errors tainted the proceedings and violated his right to a fair trial. SAG (Young) at 4. We disagree.

The "trial court has wide discretionary powers in conducting a trial and dealing with irregularities which arise." *State v. Westlund*, 13 Wn. App. 460, 472, 536 P.2d 20, *review denied*, 85 Wn.2d 1014 (1975). And, unless Young shows that "the irregular incidents are of a number and magnitude that they are per se unfair, that is, prejudice undoubtedly resulted," he must show "actual prejudice." *Westlund*, 13 Wn. App. at 472. Young fails to demonstrate prejudice.

During the second day of trial, the prosecutor believed that he had seen "about three [jurors]" "in the hallway" and asked the trial court to request the public in the courtroom (which included the defendants' friends) not to "congregate outside the courtroom . . . in the hallway." 1 VRP at 87. The trial court announced that "the jurors shouldn't be sitting out there." 1 VRP at 87. Young's counsel responded, "[A]s far as congregating, I think [the friends of Defendants] have a right to be in the hall as long as they're quiet, and, as the Court pointed out, the jurors are not supposed to be there." 1 VRP at 88. At the next recess later that day, the trial court admonished the jury not to "discuss the case among [themselves] or with others." 1 VRP at 102.

Neither Young nor DaGraca raised any objections to the fairness of the proceedings, and neither asked the trial court to investigate further whether jurors were sitting in the hallway.

Nothing in the record shows that there was another similar incident. Neither the State nor Defendants raised a similar concern again during trial. Furthermore, Young has not shown that the incident prejudiced him in any way. Thus, Young has failed to show that the trial court abused its discretion or violated his right to a fair trial.

2. Juror bias

Young also asserts that he was denied an impartial jury and a right to a fair trial because one of the jurors was biased against him, contending that the juror believed that Young's tattoos signified gang affiliation and that the juror's comments reflected bias.[26] The record, however, does not support Young's assertions: Nothing in the record shows that this juror was biased; on the contrary, the juror's statements reflected an ability to remain impartial. Young never raised an objection to the fairness of the proceedings. Furthermore, prospective juror 18 did not serve on the jury that found Young guilty. Thus, Young's challenge lacks merit.

[26] Apparently Young refers to prospective juror 18, whom counsel questioned during voir dire about his attitude towards tattoos. Juror 18 stated that tattoos could sometimes, but not always, signal gang affiliations; this prospective juror also confirmed that tattoos would not "cause [a] problem" for him. Suppl. VRP (Mar. 27, 2012) at 97.

3. Prosecutorial misconduct: Referencing clothing and aliases

Young further asserts that the prosecutor committed misconduct by referring to his (Young's) clothing colors and aliases to insinuate gang affiliation, which prejudiced him. This assertion also fails.

During trial, police officers identified clothing items found at the scene and on the defendants, which included a "red bandanna," 1 VRP at 44, "a red hat," and a "red and black jacket." 1 VRP at 73. The prosecutor cross-examined Young about the clothing that he had worn during the incident, asking whether Young had a jacket, a red bandanna, and a red hat. Young admitted to having a jacket and a red hat, but could not "remember having a bandanna." 2 VRP at 169. The prosecutor then asked, "Is your stage name 'Little Bones'? . . . What about 'Little Flame'?" 2 VRP at 169-70. Young denied using either alias.

"[A] prosecutor engages in misconduct when making an argument that appeals to jurors' fear and repudiation of criminal groups or invokes racial, ethnic, or religious prejudice as a reason to convict." *State v. Perez-Mejia*, 134 Wn. App. 907, 916, 143 P.3d 838 (2006). The prosecutor did not argue or present a case that Young and DaGraca were part of a gang.

Young does not explain how the prosecutor's questions about his clothing[27] or aliases showed gang affiliations or prejudiced his right to a fair trial. Rather the prosecutor's inquiry about Young's clothing was relevant to support the State's evidence connecting Young and DaGraca's articles of clothing to the persons witnesses had observed committing the charged crimes. The prosecutor's questions about Young's "stage name"[28] were relevant to the veracity

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[27] Young did not object to the prosecutor's questions about his clothes.

[28] 2 VRP at 169.

of Young's earlier testimony that he was a "music artist" and that, on the evening of the incident, he and DaGraca had been celebrating an upcoming musical performance and looking for someone to buy them alcohol. 2 VRP at 160.

Moreover, neither Young nor DaGraca objected to the evidence elicited in this line of questioning; nor did either request a curative instruction. And nothing in the record suggests that the prosecutor's questions prejudiced the jury. We find no misconduct and no prejudice in the prosecutor's asking these questions.

4. Ineffective assistance of counsel; testifying on own behalf

Young also asserts that he was denied effective assistance of counsel by being "forced to testify." SAG (Young) at 9. Again, the record does not support this assertion.

Young and DaGraca both testified at trial. After the defendants rested and the court completed discussions about jury instructions, Young's counsel moved for a mistrial, stating he had believed that Young had wanted to testify, but apparently had misunderstood that Young did not want to testify. The State objected because Young had never expressed a desire not to testify and Young did not speak up when his counsel called him to the witness stand. The trial court denied the motion for mistrial, noting that, before Young testified, it had held a sidebar to give defense counsel ample opportunity to decide whether Young would testify. The trial court further noted that, when defense counsel said that Young would testify, Young never corrected him, something which defense counsel was unable to explain during his later motion for a mistrial. Young fails to establish that he was forced to testify against his will or that his counsel rendered ineffective assistance in calling him to the witness stand.

Young additionally asserts that he received ineffective assistance when his counsel failed to object to various statements or evidence presented by the State. Although he references various lines in the report of proceedings, he does not explain why these statements or evidence were prejudicial. *See* RAP 10.10(c). Moreover, these assertions of error are either unfounded or cumulative with other assertions of error we have already addressed. Thus, we do not further address these asserted errors.

5. Time for trial and speedy trial rights

Young next asserts that the trial court violated his CrR 3.3 time for trial[29], Sixth Amendment, and Fourteenth Amendment rights by failing to bring him to trial in a timely manner. Again, the record does not support this assertion.

Instead, the record shows that Young was timely brought to trial as required by law. CrR 3.3 governs the time for trial in superior court criminal proceedings. CrR 3.3 provides that a defendant "shall be brought to trial" within 60 days of the defendant's commencement date, which CrR 3.3(c)(1) establishes as the arraignment date, if he or she is detained in jail, CrR 3.3(b)(1), or within 90 days of the commencement date if the defendant is not detained in jail, CrR 3.3(b)(2). The record does not reveal either defendant's arraignment date; but this is not necessary to resolve Young's asserted error.

When computing the time for trial, CrR 3.3(e)(3) excludes delay for continuances granted in the following circumstances:

[29] Although Young asserts a violation of his "speedy trial rights," which are constitutional, he primarily raises arguments under CrR 3.3, which are procedural "time for trial" court rules. Young (SAG) at 10.

> (1) Written Agreement. Upon written agreement of the parties . . . the court may continue the trial date to a specified date.
>
> (2) Motion by the Court or a Party. On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

CrR 3.3(f).

At the January 9, 2012 continuance hearing, Defendants requested and the trial court ordered the trial reset to February 23. Because the parties agreed to set the trial over until February 23, (1) CrR 3.3(f)(2) excluded the period between January 9 and February 23 from the new time for trial calculation; and (2) thus, at the February 23 hearing, Defendants were only 49 days into their reset time for trial period. The subsequent continuances were excluded from the time for trial period, CrR 3.3(e)(3), and the time for trial would not have expired until 30 days after the end of the last excluded period. CrR 3.3(b)(5). The record thus shows that, when Defendants' trial began on March 27, 2012, Young was timely brought to trial.

Moreover, for Young to be able to raise time for trial violations on appeal, he must have timely objected below to the trial date set by the trial court. CrR 3.3(d)(4). If a court sets a trial date outside the time for trial deadlines, CrR 3.3(d)(3) requires a defendant to object within 10 days after the court gives notice of the trial date, or the defendant loses the right to object. CrR 3.3(d)(4). The record reflects no such objection by Young. Thus, Young's assertion fails on this ground as well.

Not only has Young failed to show a CrR 3.3 time for trial violation, but he also fails to show how the trial court violated his state[30] and federal[31] constitutional speedy trial rights or how the continuances prejudiced him; thus, his Sixth Amendment claim fails. *See State v. Ollivier*, 178 Wn.2d 813, 826, 312 P.3d 1 (2013), *pet. for cert. filed*, May 7, 2014. Nor can we surmise how Young might prevail on a constitutional speedy trial violation where the law and record show that he was timely brought to trial under the applicable court rules. *See* RAP 10.10(c) ("the appellate court is not obligated to search the record in support of claims made in a defendant/appellant's statement of additional grounds for review."). Thus, Young's speedy trial challenges also fail.

6. Firearm sentencing enhancements

Lastly, Young asserts that the trial court erred in adding two firearm enhancements to his sentence instead of one. He contends that chapter 9.94A RCW (the Sentencing Reform Act) provides that, when sentences run concurrently, the offender should be given only one firearm sentencing enhancement if he has no prior firearm offenses. Young is incorrect.

RCW 9.94A.533(3)[32], which governs firearm sentencing enhancements, provides in part:

> The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm . . . and the offender is being sentenced [for a crime eligible for firearm enhancements]. If the offender is being sentenced for more than one offense, the firearm . . . enhancements must be added to the total period of

[30] WASH. CONST. art I, § 22.

[31] U.S. CONST. amend. VI.

[32] The legislature amended RCW 9.94A.533 numerous times since 2011. The amendments did not alter the statute in any way relevant to this case; accordingly, we cite the current version of the statute.

> confinement for all offenses. [T]he following additional times shall be added to the standard sentence range . . . :
>
> (a) Five years for any felony defined under any law as a class A felony . . . ;
>
> . . . .
>
> (e) Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements.

The jury convicted Young of first degree robbery, first degree kidnapping (both Class A felonies), and first degree unlawful possession of a firearm (a Class B felony). *See* RCW 9A.56.200(2), 9A.40.020(2), 9.41.040(1)(b)[33]. By special verdict form, the jury also found that Young had committed both the robbery and kidnapping while armed with a firearm, thus subjecting him to firearm sentencing enhancements under RCW 9.94A.533(3). The trial court imposed (1) standard low end sentences for count I, first degree robbery (87 months) and for count II, first degree kidnapping (110 months), both Class A felonies; and (2) a standard high end sentence for count III, unlawful possession of a firearm (54 months), a Class B felony. Because both counts I and II were Class A felonies, RCW 9.94A.533(3)(a) required the trial

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[33] The legislature amended RCW 9.41.040 in 2014, LAWS OF 2014, ch. 111, §1. The amendments did not alter the statute in any way relevant to this case; accordingly, we cite the current version of the statute.

court to sentence Young to an additional 60-month firearm enhancement for each of these two counts, to run consecutively. The trial court did not err in adding firearm enhancements to each of Young's Class A felony standard range sentences.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Hunt, J.

Hunt, J.

We concur:

Bjorgen, A.C.J.

Bjorgen, A.C.J.

Maxa, J.

Maxa, J.

RUSSELL SELK LAW OFFICES

September 25, 2014 - 4:51 PM

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