91251-3

Supreme Court No. (to be set)
Court of Appeals No. 44642-1-II
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Jesse Clark
Appellant/Petitioner

Cowlitz County Superior Court Cause No. 11-1-01099-3
The Honorable Judge Michael H. Evans

PETITION FOR REVIEW

FILED
FEB 26 2015
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

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FILED IN COA ON JANUARY 29, 2015

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I. IDENTITY OF PETITIONER

Petitioner Jesse Clark asks the Court to review the decision of Division II of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Jesse Clark seeks review of the Court of Appeals Opinion entered on December 30, 2014. A copy of the Opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: Is the accomplice liability statute overbroad because it criminalizes pure speech even if the speech is not directed at or likely to incite imminent lawless action?
ISSUE 2: Do Mr. Clark's convictions for extortion and possession of stolen property violate double jeopardy under the "same evidence" test?
ISSUE 3: Do Mr. Clark's four bail jumping convictions violate double jeopardy because the prosecution proved at most two units of prosecution?
ISSUE 4: Did the state fail to prove that Mr. Clark had actual notice of the date and time of each hearing, and that he missed court at the scheduled date and time?
ISSUE 5: Did the prosecutor commit reversible misconduct by quantifying the reasonable doubt standard, "testifying" to "facts" not in evidence, improperly bolstering the state's case, relying on passion, prejudice, and propensity evidence, and disparaging the role of defense counsel?
ISSUE 6: Did defense counsel provide ineffective assistance by failing to argue same criminal conduct for Mr. Clark's extortion and possession of stolen property charges?

IV. STATEMENT OF THE CASE

A. Ivy Rose Folsom and Johnny Jordan kidnapped and killed a bulldog named Jagger.

Jessie Clark agreed to watch a bulldog for a friend. RP 265.[1] He brought the dog to his home, where he and his housemate Lori Vanderhoff cared for it. RP 267-69. He allowed the dog inside the house, and let it up on his furniture. RP 267. Mr. Clark built a structure for the dog on his front porch. RP 270. The dog left Mr. Clark's house after 2 days. RP 286.

Two days after the dog left Mr. Clark's home, Jennifer Thomas started receiving text messages demanding her pain medication and $1,000 for the safe return of her missing bulldog, Jagger. RP 98-100, 194-95. One of the texts included a photo of Jagger, with a rope similar to one found at Mr. Clark's house. RP 235-36, Ex 39.

Thomas went to the sheriff's office. RP 99. Thomas explained to the deputies that an acquaintance named Ivy Rose Folsom had stolen Jagger from her home. RP 82, 87, 91, 131-32. The Thomas family had distributed fliers with Jagger's picture, which they posted in the area between the time he was stolen and when the messages began. RP 95. The local news media ran numerous stories about the missing dog. RP 373-74.

More than two weeks later, Jagger was found dead. RP 226.

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[1] One witness testified that Mr. Clark said he had purchased the dog. RP 352.

Police contacted Mr. Clark, who initially denied any knowledge of the dog. RP 403. Later, however, Mr. Clark gave the officers Johnny Jordan's name. RP 406, 410. Jordan was Folsom's boyfriend. RP 83.

Police arrested Jordan, who they found hiding in a closet in the apartment he shared with Folsom. RP 321-22, 397-98, 406. In his pocket, Jordan had a copy of the flier bearing Jagger's photo. RP 171, 326-27. Jordan also had several cell phones, and Jagger's name written on a small notebook. RP 324, 326-27.

B. A jury convicted Mr. Clark of extortion, possessing stolen property, and four counts of bail jumping.

The state charged Mr. Clark with possession of stolen property and extortion. CP 1. The state later added four counts of bail jumping, alleging that he had missed two trial readiness hearings and the associated trial dates. CP 2. The state's evidence at trial indicated that Mr. Clark had only been released by court order or admitted to bail twice. RP 412-59.

At trial, several sheriff's deputies described their investigation into the text messages demanding ransom for Jagger's safe return. RP 145-62, 175-80, 187-212. Using Thomas's cell phone, law enforcement had arranged to meet with the kidnapper to make an exchange. RP 146-49. The messages eventually led the police to a road near a golf course in Kelso.

RP 155-56. Other deputies parked out of sight, near what they thought were the only two routes leaving the area. RP 175, 177.

At one point, a truck drove by. RP 159, 185, 211. One detective described the truck as a tan or white four-wheel-drive import with a barrel in the back. RP 159. A deputy testified that he thought the truck was a Nissan. RP 185. Another deputy saw a pickup truck but could not describe it. RP 211. The deputies were unable to contact the driver of the truck because it turned down a small road that they did not know about. RP 161, 167-69, 178-79. In closing, the prosecutor argued that it was "quite a coincidence" that Mr. Clark owned a white Toyota truck. RP 503.

Lori Vanderhoff, who had been staying on Mr. Clark's property, testified that Mr. Clark brought the dog to his house in his truck, and that it had an injured paw. RP 263-65. She testified that Mr. Clark had not slept for nine or ten days around the time that the dog was at his home. RP 273-74. She said the dog only stayed at the house two days. RP 285-86. She knew Folsom and Jordan, but did not see them during that time. RP 288-89. The dog was gone as of October 6th, which was two days before Thomas began receiving texts. RP 286, 297-98.

Vanderhoff did not see Mr. Clark with the dog after it left the house. RP 292. Vanderhoff also said that she moved from Mr. Clark's property partially because of a comment he made that he had "beat the shit

out of that f*cking d—." RP 275-76.[2] Vanderhoff understood "d—" to mean dog. RP 275. The state attempted to elicit the content of Vanderhoff's statement to the police, but the court sustained Mr. Clark's hearsay objection. RP 388.

The sheriff's deputies also testified about their search of Mr. Clark's property. RP 226-239, 300-309. They found the shelter Mr. Clark built for the dog as Vanderhoff described it. RP 233-36, 298, 304. They also found dog hair on a sofa inside Mr. Clark's home. RP 237-38.

The deputies did not testify that they uncovered any evidence linking Mr. Clark to the theft of the dog, the ransom demands, the cell phone from which the demands came, or the dog's death. RP 141-240, 293-343, 370-408. No testimony indicated that Mr. Clark had any contact with either the dog or with Folsom and Jordan after the dog left his house. RP 258-92. Although Thomas later received a picture of Jagger with a rope similar to one found at Mr. Clark's home, no testimony established when the photo was taken, or when it was provided to the person who sent it to Thomas. RP 199, 235-36; Ex. 39, 122.

The court instructed the jury that it could find Mr. Clark guilty of extortion as an accomplice. CP 50. The instructions permitted conviction

[2] Mr. Clark's neighbor also told the police that he had heard the comment, but did not recall at the time of his testimony. RP 354-56.

based on "words" or "encouragement," if made "with knowledge" that they would "promote or facilitate the commission of the crime." The court's instructions did not require proof that Mr. Clark intended to facilitate the crime. CP 50.

The jury found Mr. Clark guilty of all six charges. RP 539-40. At sentencing, defense counsel did not argue that the extortion and possession of stolen property charges comprised the same criminal conduct. RP 546-566. Mr. Clark appealed, and his conviction and sentence were affirmed. Opinion, p. 1, 23.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review and hold that the accomplice liability statute is overbroad. The Court of Appeals decision conflicts with the U.S. Supreme Court's decision in *Brandenburg*. This case presents a significant question of constitutional law that is of substantial public interest. RAP 13.4 (b)(1), (3), and (4).

1. Mr. Clark may bring an overbreadth challenge regardless of the facts of his case.

A statute is overbroad and violates the First Amendment[3] if it prohibits a substantial amount of constitutionally protected speech or conduct. *State v. Immelt*, 173 Wn.2d 1, 6-7, 267 P.3d 305 (2011). Anyone accused

[3] Applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Adams v. Hinkle*, 51 Wn.2d 763, 768, 322 P.2d 844 (1958) (collecting cases). Washington's constitution gives similar protection. Wash. Const. art. I, § 5.

of violating such a statute may bring an overbreadth challenge; she or he need not have engaged in constitutionally protected activity or speech. *Id* at 33. In other words, "[f]acts are not essential for consideration of a facial challenge... on First Amendment grounds." *City of Seattle v. Webster,* 115 Wn.2d 635, 640, 802 P.2d 1333 (1990), *cert. denied,* 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991).[4]

Mr. Clark's jury was instructed on accomplice liability. CP 50. Accordingly, he is entitled to bring a challenge to the accomplice liability statute, regardless of the facts of his case. *Hicks,* 539 U.S. at 118-119; *Webster,* 115 Wn.2d at 640.

2. The accomplice liability statute is overbroad because it criminalizes pure speech even if not directed at or likely to incite imminent lawless action.

The First Amendment protects speech advocating criminal activity. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). Speech advocating criminal activity may only be punished if it "is directed to inciting or producing imminent lawless action

[4] The overbreadth doctrine is thus an exception to the general rule regarding facial challenges. U.S. Const. Amend. I; *Virginia v. Hicks*, 539 U.S. 113, 118, 156 L.Ed.2d 148, 123 S.Ct. 2191 (2003). The Supreme Court "has 'provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.'" *United States v. Platte*, 401 F.3d 1176, 1188 (10th Cir. 2005) (quoting *Hicks*, 539 U.S. at 119); *see also Conchatta Inc. v. Miller*, 458 F.3d 258, 263 (3rd Cir. 2006).

and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L.Ed.2d 430, 89 S.Ct. 1827 (1969).

This standard requires proof of criminal intent. *See, e.g., United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985). In cases involving speech, the jury must be instructed that speech is "protected unless both the intent of the speaker and the tendency of his words was to produce or incite an imminent lawless act, one likely to occur." *Id.* (citing *Brandenburg*).[5]

RCW 9A.08.020 criminalizes speech protected by the First Amendment. Under RCW 9A.08.020, a person may be convicted as an accomplice for speaking "[w]ith knowledge" that the speech "will promote or facilitate the commission of the crime." RCW 9A.08.020.[6] The statute does not require proof of intent, nor does it require any evidence regarding the likelihood that the words will produce imminent lawless action. RCW 9A.08.020. This interpretation criminalizes a vast amount of pure speech and runs afoul of the *Brandenburg* rule.

Thus, for example, Washington's accomplice liability statute would criminalize the speech protected by the U.S. Supreme Court in *Hess*

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[5] The court affirmed two of the convictions, finding that the "intent of the [defendant] and the objective meaning of the words used [were] so close in time and purpose to a substantive evil as to become part of the ultimate crime itself." *Freeman*, 761 F.2d at 552.

[6] The statute uses the word "aid," which Washington courts have interpreted to include "words" or "encouragement." RCW 9A.08.020; *see* WPIC 10.51.

v. Indiana, 414 U.S. 105, 107, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) ("We'll take the fucking street later [or 'again']"), in *Ashcroft* (virtual child pornography found to encourage actual child pornography), and *Brandenburg* itself (speech "'advocat(ing) * * * the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform'") (quoting Ohio Rev. Code Ann. s 2923.13). Each of these cases involved words or encouragement made with knowledge that the words or encouragement would promote or facilitate the commission of the crime, yet the U.S. Supreme Court found this speech—which would be criminal under RCW 9A.08.020—to be protected by the First Amendment.

It is possible to construe the accomplice statute in such a way that it does not reach constitutionally protected speech and conduct. Indeed, *Brandenburg* itself provides the appropriate language . However, such a construction has yet to be imposed. The prevailing construction—as expressed in WPIC 10.51 and adopted by the trial court in Instruction No. 12—is overbroad; therefore, RCW 9A.08.020 is unconstitutional. *Id.*

3. The appellate decision conflicts with *Brandenburg,* and the court's reasoning applies to any case involving accomplice liability.

The Opinion here conflicts with *Brandenburg.*[7] This case involves significant constitutional issues that are of substantial public interest. The Supreme Court should accept review under RAP 13.4(b)(1), (3), and (4). Mr. Clark's convictions must be reversed, the case remanded for a new trial without state use of any theory of accomplice liability. *Id.*

B. Mr. Clark's convictions for possession of stolen property and extortion violate double jeopardy under the "same evidence" test. This case presents a significant question of constitutional law that is of substantial public interest. RAP 13.4 (b)(3) and (4).

Both the Washington state and federal constitutions prohibit multiple punishments for a single offense. U.S. Const. Amends. V, XIV; Wash. Const. art. I, § 9; *In re Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). The *Blockburger*[8] or "same evidence" test controls the double jeopardy analysis unless there is a clear indication that the legislature intended otherwise. *State v. Womac*, 160 Wn.2d 643, 652, 160 P.3d 40 (2007). Under the *Blockburger* test, multiple convictions based on a single act violate double jeopardy if the evidence necessary to support a conviction for one

[7] The Court of Appeals did not analyze the issue, but instead relied on *State v. Coleman*, 155 Wn. App. 951, 231 P.3d 212 (2010) and *State v. Ferguson*, 164 Wn. App. 370, 264 P.3d 575 (2011). Opinion, p. 21. The *Ferguson* court adopted the reasoning in *Coleman.* All three decisions violate *Brandenburg. See* Appellant's Opening Brief, pp. 36-40.

[8] *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

offense is sufficient to support a conviction for the other. *Orange*, 152 Wn.2d at 816.

The legal elements of the offenses are not dispositive of the *Blockburger* test for double jeopardy. *Womac*, 160 Wn.2d at 652. The *Orange* court, for example, found that convictions for first degree attempted murder and first degree assault violated double jeopardy even though attempted murder required the additional element of intent to cause death. *Orange,* 152 Wn.2d at 820. Because the offenses were both based on the single act of firing one shot at another person, the evidence required for attempted murder was sufficient to support the assault conviction. *Id; see also State v. Martin*, 149 Wn. App. 689, 699, 205 P.3d 931 (2009) (finding that convictions for assault and attempted rape violated double jeopardy despite different legal elements).

Mr. Clark was charged with knowingly possessing stolen property, knowing it had been stolen. RCW 9A.56.160; CP 1. In order to find Mr. Clark guilty, the jury necessarily found that he possessed the bulldog with knowledge that it was stolen. RCW 9A.56.160; *State v. Khlee*, 106 Wn. App. 21, 24, 22 P.3d 1264 (2001). The state's theory on the extortion charge relied on the same evidence: that Mr. Clark kept the stolen dog on his property, knowing that Jordan planned to demand ransom. RCW 9A.56.120; RCW 9A.08.020(3).

The evidence necessary to convict Mr. Clark of extortion was also sufficient to convict him of possession of stolen property. *Orange*, 152 Wn.2d at 816. Convictions for both offenses violated double jeopardy under the *Blockburger* test. *Id.* This case presents a significant question of constitutional law that is of substantial public interest. The Supreme Court should accept review and vacate one of Mr. Clark's conviction. *Id.;* RAP 13.4(b)(3) and (4).

C. Mr. Clark's four bail jumping convictions violate double jeopardy because the state proved only two units of prosecution. This case presents a significant question of constitutional law that is of substantial public interest. RAP 13.4 (b)(3) and (4).

1. The unit of prosecution for bail jumping allows one conviction for each release order, not each scheduling order.

The protection against double jeopardy prohibits multiple convictions for the same offense. U.S. Const. Amends. V, XIV; art. I, § 9; *State v. Morales*, 174 Wn. App. 370, 384-85, 298 P.3d 791 (2013). Whether convictions for multiple counts of an offense violate double jeopardy turns on the "unit of prosecution" for that offense. *Morales*, 174 Wn. App. at 384. The unit of prosecution is the "act or course of conduct the legislature has defined as the punishable act." *Id.*

Washington courts have not yet determined the unit of prosecution for bail jumping. The approach for determining the unit of prosecution,

however, is "well settled." *Morales*, 174 Wn. App. at 385. The first step is analysis of the statutory language. *Id.* Ambiguities must be "resolved against turning a single transaction into multiple offenses." *Id.* Second, the court must review the statute's history. *Id.* Finally, the court must determine whether more than one unit of prosecution applies to the facts of the case. *Id.*

The bail jumping statute provides that:

> (1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state..., and who fails to appear ... as required is guilty of bail jumping.

RCW 9A.76.170.

The statute requires release by court order as a prerequisite to culpability. RCW 9A.76.170. The provision is ambiguous as to whether one offense derives from one release, one scheduling order, or one failure to appear. *Morales*, 174 Wn. App. at 385. This ambiguity must be construed in favor of a single unit of prosecution. *Id.* The rule of lenity requires that a sequence of failures to appear (following a single release from custody or admission to bail) constitute one unit of prosecution. *Id.*

Legislative history does not conflict with this interpretation.[9] Mr. Clark was twice released pursuant to court order. RP 419-20, 431-33. Thus the state proved at most two units of prosecution. *Id.;* RCW 9A.76.170.

2. The appellate court misapplied *Morales* to the bail jumping statute.

The Court of Appeals acknowledged the statute's ambiguity. Opinion, pp. 7-8 (*citing State v. O'Brien*, 164 Wn. App. 924, 267 P.3d 422 (2011)). However, the court erroneously read the statute as having only two interpretations. Opinion, pp. 7-8.

The court failed to recognize a third possibility: that the unit of prosecution turns on the number of times the accused was "released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance." RCW 9A.76.170. Indeed, the plain language suggests that the unit of prosecution rests on the number of times a person has actually "jumped bail." Once someone has "jumped bail" by failing to appear, double jeopardy prohibits subsequent charges absent a new release or posting of bail.

Mr. Clark was convicted of four counts of bail jumping. CP 2, 4. However, he was only released on two occasions. He jumped bail twice –

[9] Bail jumping was first criminalized pursuant to the 1975 overhaul of the criminal code. 1975 1st ex.s. c 260. The only changes to the language since then have related to the knowledge requirement and affirmative defenses. 2001 c 254 § 3; 1983 1st ex.s. c 4 § 3.

once for each time he was released. His other convictions stemmed from conduct occurring after he'd already "jumped bail" by failing to appear at a readiness hearing. Ex. 205, 206, 211. Absent additional release orders, he could not be charged for failing to appear again after already jumping bail. *Morales*, 174 Wn. App. at 385. The facts support only two units of prosecution for bail jumping. *Id.*

Mr. Clark's four convictions violate his double jeopardy rights. The Court of Appeals should have reversed two of his convictions. It misapplied *Morales* and misinterpreted RCW 9A.76.170. This case raises a significant question of constitutional law that is of substantial public interest. The Supreme Court should grant review. RAP 13.4(b)(3), (4).

D. The state failed to prove that Mr. Clark had actual notice of the date and time of each hearing, or that he failed to appear at the scheduled date and time. This case presents significant constitutional issues that are of substantial public interest. RAP 13.4(b)(3) and (4).

The bail jumping statute criminalizes failing to appear at court when a person is "released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state... and who fails to appear ..." RCW 9A.76.170(1).

To meet the knowledge element, the state must prove that the accused received notice of the required court dates. *State v. Cardwell*, 155 Wn. App. 41, 47, 226 P.3d 243 (2010) *review granted, cause remanded on*

other grounds, 172 Wn.2d 1003, 257 P.3d 1114 (2011). The state must also prove that the accused person was absent at the specific time at which s/he was notified the hearing would occur. *Coleman*, 155 Wn. App. at 964.

Testimony regarding a person or organization's usual practices may not be sufficient to prove that an event occurred in accordance with those practices on a particular occasion. *United States v. Lo*, 231 F.3d 471, 477 (9th Cir. 2000) *holding modified on other grounds by United States v. Larson*, 495 F.3d 1094 (9th Cir. 2007).

1. The state did not prove that Mr. Clark received actual notice of the April 19th court date, or that he failed to appear as required.

Count III charged Mr. Clark with bail jumping based on his failure to appear on April 19, 2012. CP 2. The clerk's minutes show that the court set a readiness hearing for that date. Ex. 206. The minutes, however, do not specify what time the hearing was supposed to occur. Ex. 206. No written notice regarding this court date was offered into evidence. Nor did anyone testify that notice had been provided to Mr. Clark. RP 412-59.

The clerk who prepared the minutes testified that the April 19th hearing was supposed to be at 9:00am and that it was the court's practice to inform the accused person of the date and time s/he is to appear. RP 424. No witness testified that Mr. Clark was actually informed that he was

required to personally attend the April 19th hearing, or what time the hearing would be held. RP 412-59.

The clerk's minutes from the April 19th hearing indicated that Mr. Clark did not appear for that hearing. Ex. 207. The minutes do not indicate the time at which Mr. Clark was determined to be absent. Ex. 207. No witness testified regarding what time the court determined Mr. Clark was absent. RP 412-59. Nothing in the record shows that the court waited until 9:00 a.m. to poll the courtroom or the steps taken to determine if Mr. Clark was present. RP 412-59.

The state presented insufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Mr. Clark knew the date and time of his hearing. *Cardwell*, 155 Wn. App. at 47. Additionally, the state provided insufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Mr. Clark was absent from court at the specific time at which his hearing was set. *Coleman*, 155 Wn. App. at 964. Mr. Clark's conviction for count III must be reversed. *Id.*

2. The state did not prove that Mr. Clark received actual notice of the April 23rd trial date, that the trial was set for a specific time on the 23rd, or that Mr. Clark failed to appear as required.

Count IV charged Mr. Clark with bail jumping for failure to appear for his trial date on April 23, 2012. CP 2. Again, the state presented clerk's minutes as evidence that Mr. Clark was required to be in court on that

date. Ex. 205. The minutes do not indicate the time at which Mr. Clark was required to appear for trial. Ex. 205. In fact, the state did not even present evidence showing what time cases are usually called for trial.

Likewise, the minutes do not state that Mr. Clark was informed of the trial date or the time that he was required to be in court on April 23rd. Ex. 205. No witness testified that the court told Mr. Clark about the April 23rd trial date or gave him a time to appear in court. RP 412-59. Although a clerk had testified that the court's practice is to inform a defendant of the date and time for a readiness hearing, no witness testified that the court followed this same practice for the trial date and time associated with the readiness hearing. RP 412-459.

The state did not offer any written notice that had been provided to Mr. Clark informing him of the date and time of his trial. No witness testified that such a notice existed. RP 412-59. The state did offer the clerk's minutes from April 23, 2012, which stated that Mr. Clark was not in court at 8:52am on that date. Ex. 209. The court adjourned at 8:53am. Ex. 209. The state presented no evidence showing that the court reconvened at 9:00 a.m. to see if Mr. Clark showed up at that time.

No rational trier of fact could have found beyond a reasonable doubt that Mr. Clark was aware of his April 23rd trial date. *Cardwell*, 155 Wn. App. at 47. The state did not prove the time Mr. Clark was required to

be in court on April 23rd. There was no evidence that Mr. Clark failed to appear at the specific time the trial was to start. No rational trier of fact could have found that he failed to appear at the required time. *Coleman*, 155 Wn. App. at 964. Mr. Clark's conviction for count IV must be reversed. *Id.*

3. The state did not prove that Mr. Clark received actual notice of the August 2nd court date, or that he failed to appear as required.

Count V charged Mr. Clark with failure to appear for a readiness hearing on August 2, 2012. CP 2. The clerk's minutes – which the state offered as evidence that Mr. Clark was required to appear on that date – did not state what time the hearing would be held. Ex. 213. A clerk testified that the readiness hearing was to be at 9:00am, but did not testify that Mr. Clark was informed of the date or time of the hearing. RP 444. Again, the state did not introduce written notice informing Mr. Clark of the date and time scheduled for the hearing. No witness testified that Mr. Clark received written notice. RP 412-59. The clerk's minutes from August 2nd state that Mr. Clark was not present in court, but do not indicate what time he was determined to be absent. Ex. 214. Nor do the minutes show what steps were taken to see if he were present.

No rational trier of fact could have found beyond a reasonable doubt that Mr. Clark knew the date and time of the August 2nd hearing or

that he failed to appear at the scheduled time. *Cardwell*, 155 Wn. App. at 47; *Coleman*, 155 Wn. App. at 964. Mr. Clark's conviction for count V must be reversed. *Cardwell*, 155 Wn. App. at 47; *Coleman*, 155 Wn. App. at 964.

4. The state did not prove that Mr. Clark received actual notice of the August 6th trial date, or that he failed to appear as required.

Finally, count VI charged Mr. Clark with failure to appear for trial on August 6, 2012. CP 2. The clerk's minutes state that trial was set for that date. Ex. 213. Those minutes do not, however, provide a time at which Mr. Clark was required to appear. Ex. 213. A clerk testified that the trial was to start at 8:30am, and that the court generally informs the accused of that fact. RP 441-42. Again, the state did not offer any written notice informing Mr. Clark of the date and time of the trial, and no witness testified that he'd been provided written notice. RP 412-49.

The clerk's minutes from August 6th state that Mr. Clark was not present in court at 8:56am and that the court ordered that his bench warrant remain in effect at 8:57am. Ex. 216.

The clerk's statement that the court usually tells the accused of the date and time of trial is insufficient to prove that Mr. Clark, specifically, was so informed. *Lo*, 231 F.3d at 477. No rational trier of fact could have found beyond a reasonable doubt that Mr. Clark was aware of the date and

time of the August 6th trial. *Cardwell*, 155 Wn. App. at 47; *Coleman*, 155 Wn. App. at 964. Mr. Clark's conviction for count VI must be reversed. *Cardwell*, 155 Wn. App. at 47; *Coleman*, 155 Wn. App. at 964.

5. The state's attempted shortcut in proving bail jumping presents a significant constitutional issue of substantial public interest. RAP 13.4(b)(3) and (4).

The state attempted to prove bail jumping with inadequate documentation and insufficient testimony. The Supreme Court should accept review and reverse Mr. Clark's convictions. This would help ensure that defendant's receive adequate notice of hearing dates in future. It would also ensure that convictions for bail jumping rest on sufficient proof. This case presents a significant constitutional issue of substantial public interest. The Supreme Court should accept review. RAP 13.4(b)(3) and (4).

E. Prosecutorial misconduct denied Mr. Clark a fair trial. This case raises significant issues of substantial public interest. RAP 13.4(b)(3) and (4).

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, Wash. Const. art. I, § 22. A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must

look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

1. The prosecutor committed misconduct by quantifying the reasonable doubt standard.

A prosecutor commits misconduct by attempting to "quantif[y] the level of certainty required to satisfy its burden of proof." *State v. Fuller*, 169 Wn. App. 797, 825-26, 282 P.3d 126 (2012). At Mr. Clark's trial, the state argued that "[T]he law says you don't have to be convinced beyond all doubt, beyond any doubt, 99%." RP 506.

This argument improperly quantified the reasonable doubt standard. It prejudiced Mr. Clark, because the state's evidence against him was weak. No evidence linked Mr. Clark to Jordan's threats or Folsom's theft of the dog. Nothing in the record established his knowledge that the dog was stolen or that Jordan intended to demand ransom. The jurors may well have been 99% convinced of his guilt as an accomplice to extortion and yet that remaining 1% of doubt could have been reasonable. Because the evidence of Mr. Clark's knowledge was so thin, the prosecutor's improper argument prejudiced Mr. Clark. *Glasmann*, 175 Wn.2d at 704.

2. The prosecutor impermissibly bolstered the state's case.

A prosecutor commits misconduct by improperly bolstering witness credibility or the state's case. *State v. Boehning*, 127 Wn. App. 511,

514, 111 P.3d 899 (2005); *State v. Stith*, 71 Wn. App. 14, 22, 856 P.2d 415 (1993). It is also misconduct for a prosecutor to argue "facts" that have not been admitted into evidence. *Glasmann*, 175 Wn.2d at 696. Here, the prosecutor engaged in these kinds of misconduct. During closing, the prosecutor argued that:

> Mrs. Vanderhoff told you the same as she told the police, that she was concerned about that, the Defendant had been acting erratically, engaged in some bizarre behavior up for ten days at a stretch, and he told ... her [she wasn't] welcome on the property. RP 498.

Vanderhoff did not testify that Mr. Clark had been "acting erratically" or that he had "engaged in some bizarre behavior." RP 258-282. She did not testify that Mr. Clark ever told her or anyone else that she was not welcome on his property. RP 258-282. Furthermore, the state was not permitted to elicit testimony regarding the content of Vanderhoff's conversations with the police; thus, argument that she "told you the same as she told the police" was unsupported. RP 388, 498.

The prosecutor's argument constituted "testimony" to "facts" that had not been admitted into evidence. *Glasmann*, 175 Wn.2d at 696. The prosecutor's statement about Vanderhoff's prior statements to the police impermissibly bolstered her credibility using "facts" that had been specifically excluded by the court. *State v. Jones*, 144 Wn. App. 284, 293-294, 183 P.3d 307 (2008).

Vanderhoff was the key witness connecting Mr. Clark to the stolen dog. The state's case relied on the jury believing her testimony. The prosecutor's attempt to bolster Vanderhoff's credibility prejudiced Mr. Clark.

A prosecutor may not comment on a court's prior probable cause finding in a case. *Stith*, 71 Wn. App. at 22. Such an argument improperly indicates to the jury that, "if there were any question of the defendant's guilt, the defendant would not even be in court." *Id.* Here, the state argued that Vanderhoff's statements were verified when police "finally get enough evidence to raid and search the defendant's house." RP 499.

The argument that the police "finally got enough evidence" to search Mr. Clark's home improperly bolstered the state's case by implying that a court had already decided sufficient evidence supported his guilt. *Stith*, 71 Wn. App. at 22. It impermissibly suggested the warrant would not have been issued if there was any doubt about Mr. Clark's guilt. *Id.*

3. The prosecutor encouraged jurors to convict based on passion, prejudice, and propensity evidence.

A prosecutor must "seek conviction based only on probative evidence and sound reason." *Glasmann*, 175 Wn.2d at 704. It is misconduct for the state to make arguments designed to inflame the passions or prejudices of the jury. *Id.* The prosecutor argued that Mr. Clark participated in the extortion plot out of greed, as evidenced by the way he treated the dog:

> Easy answer and it's an old answer: greed. Greed. Lust for money, lust for drugs. Because that's what Jagger meant to the Defendant and the people he was working with. To him, Jagger was not a pet, Jagger was not a friend of the family, Jagger was just a way to get what he wants. And he's willing to do whatever he want -- needs to get from him. Dog has value to him, because of what it can get him. And when the dog can't get him anything anymore, dog's not worth anything to him. And we see where that ended up.
> RP 497.

This argument encouraged the jury to convict Mr. Clark based on passion and prejudice rather than the evidence in the case. The evidence linking Mr. Clark to the extortion plot was tenuous at best. The jury was subjected to graphic photos of the dog's mutilated body, which were not linked to Mr. Clark in any way. RP 380-85, Ex 141-50. The prosecutor's argument linking Mr. Clark to Jagger's mistreatment invited the jury to convict based on emotion rather than fact. Mr. Clark was prejudiced by the state's improper argument.

4. The prosecutor committed misconduct by disparaging the role of defense counsel.

A prosecutor commits misconduct by disparaging the role of defense counsel, "draw[ing] a cloak of righteousness" around the state's case. *State v. Gonzales*, 111 Wn. App. 276, 282, 45 P.3d 205 (2002). At Mr. Clark's trial, the state attorney said rebuttal is his favorite part of trial because "... by [that] point, [he] get[s] to hear what the defense arguments are and they never fail to entertain." RP 526.

This argument disparaged defense counsel and attempted to "draw the cloak of righteousness" around the state's case by dismissing Mr. Clark's defense as laughable. *Gonzales*, 111 Wn. App. at 282. The state presented only tenuous evidence connecting Mr. Clark to the extortion plot. Rather than argue the facts in this close case, the prosecutor encouraged the jury to reject Mr. Clark's defense based on his personal opinion of its value. The argument encouraged the jury to reject Mr. Clark's defense out of hand rather than consider its evidentiary merit. Mr. Clark was prejudiced by the prosecutor's improper remark.

5. The cumulative effect of the prosecutor's misconduct requires reversal.

The cumulative effect of repeated instances prosecutorial misconduct can be "so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011). Here, the prosecutor's ongoing misconduct requires reversal. *Id.*

The prosecutor in Mr. Clark's case committed numerous instances of prejudicial misconduct by attempting to quantify the state's burden of proof, bolstering witness credibility and the state's case with "facts" not in evidence, encouraging the jury to convict based on passion and prejudice, and disparaging the role of defense counsel. All of these instances of mis-

conduct, whether considered individually or in the aggregate, require reversal of Mr. Clark's convictions. *Id.* The Supreme Court should accept review to address the prosecutor's misconduct. The state's improper remarks raise significant constitutional issues that are of substantial public interest. RAP 13.4(b)(3)(4).

F. Mr. Clark was deprived of effective assistance of counsel. The Supreme Court should accept review because this significant constitutional issue is of substantial public interest. RAP 13.4(b)(3) and (4).

Defense counsel provides ineffective assistance by failing to argue that two offenses constitute the same criminal conduct for sentencing purposes when the facts support such a conclusion. *State v. Phuong*, 174 Wn. App. 494, 547-48, 299 P.3d 37 (2013). The accused is prejudiced if there is a reasonable probability that the sentencing court would have scored the convictions as one point. *Id.*

Mr. Clark's possession of stolen property and extortion convictions were based on the same criminal conduct. *Id.* The offenses had the same victim and were committed at the same time and place. The state's theory of Mr. Clark's liability for the extortion charge was that he acted as the hostage-holder in the scheme when he possessed the dog at his home. RP 494-507. Under the state's theory, Mr. Clark's intent – and, indeed, his actions – were identical for both charges.

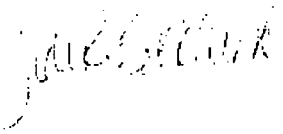
Nonetheless, his defense attorney did not argue that they should only add a single point to his offender score. RP 551-53. This failure constituted deficient performance. *Phuong*, 174 Wn. App. at 547-48. There is a reasonable probability that the court would have scored Mr. Clark's convictions as the same criminal conduct. Mr. Clark was prejudiced by his counsel's deficient performance. *Id.* The Supreme Court should accept review and hold that defense counsel provided ineffective assistance which prejudiced Mr. Clark. This significant constitutional issue is of substantial public interest. RAP 13.4(b)(3) and (4).

VI. CONCLUSION

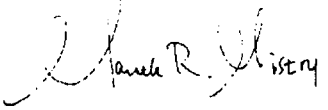
The issues here are significant under the State and United States Constitutions. Furthermore, because the issues impact a large number of criminal cases, they are of substantial public interest. The Supreme Court should accept review pursuant to RAP 13.4(b)(3) and (4). In addition, the Court of Appeals decision conflicts with the United States Supreme Court's decision in *Brandenburg*. The Supreme Court should accept review pursuant to RAP 13.4(b)(1).

Respectfully submitted January 29, 2015.

BACKLUND AND MISTRY



Jodi R. Backlund, No. 22917
Attorney for the Appellant



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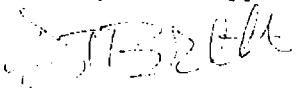


Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Jesse Clark, DOC #364621
Cedar Creek Corrections Center
PO Box 37
Littlerock, WA 98556-0037

and I sent an electronic copy to

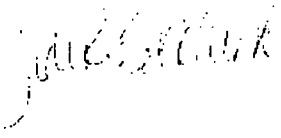
Cowlitz County Prosecuting Attorney
baurs@co.cowlitz.wa.us

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 29, 2015.



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APPENDIX:

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DIVISION II

2014 DEC 30 AM 9:46

STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JESSE JAMES CLARK, Appellant.	No. 44642-1-II UNPUBLISHED OPINION

LEE, J. — A jury found Jesse James Clark guilty of second degree possession of stolen property, first degree extortion, and four counts of bail jumping. Clark appeals, arguing that (1) his convictions for bail jumping violate double jeopardy, (2) his convictions for second degree possession of stolen property and second degree extortion violate double jeopardy, (3) insufficient evidence supports the jury's verdicts finding him guilty of bail jumping, (4) the prosecutor committed misconduct during closing arguments, (5) the accomplice liability statute is unconstitutional, (6) the trial court improperly calculated his offender score because his convictions for possession of stolen property and extortion were the same criminal conduct, and (7) he received ineffective assistance of counsel because his counsel failed to argue same criminal conduct at sentencing. Clark's claims fail, and we affirm.

FACTS

On October 4, 2011, Jennifer Thomas was at home with her daughter. An acquaintance of Thomas', Rose Folsom, came to the house to pick up some items that Thomas had bought for Folsom's baby. While Folsom was bringing the baby items to her car, Thomas received a phone call. Folsom left while Thomas was on the phone.

A short time after Folsom left, Thomas realized that her bulldog, Jagger, was missing. 1 Thomas began searching for Jagger. She put fliers up throughout the area, and she contacted newspapers and other media. On October 8, 2011, Thomas received a series of text messages demanding pain medication and $1,000 for Jagger's return. And the text messages stated that, if Thomas did not give the thieves the drugs and money, Jagger would be tortured and killed. In one text message, the thieves told Thomas that, if she did not comply, Jagger would be cut up. Thomas also received pictures of Jagger tied up.

Thomas informed the sheriff's office about the text messages. Cowlitz County Sheriff's Detective Sergeant Bradley Thurman coordinated an undercover operation in which they posed as Thomas and arranged to meet the thieves to exchange the drugs and money for Jagger's safe return. The sheriffs used Thomas' car and waited for the thieves on a road right outside the Three Rivers Golf Course. At one point, the deputies saw a light colored pickup truck with a barrel in the back. However, when the other deputies in marked vehicles were sent to intercept the truck, they were unable to locate it. The deputies did not make contact with the thieves. Several weeks later, Jagger's decapitated body was discovered by the train tracks on the edge of the golf course.

The deputies identified Folsom, Folsom's boyfriend Johnny Jordan, and Clark as potential suspects. On October 17, Deputy Danny O'Neill spoke to Clark, but he denied ever having Jagger

on his property. On November 1, deputies served a search warrant at Jordan's house. They found a notebook with Jagger's name written on it and one of the fliers Thomas posted in Jordan's pocket. The deputies also found what appeared to be bloodstains in the interior of Folsom's car. On October 26, deputies executed a search warrant at Clark's home. They found rope matching the rope in the pictures the thieves texted to Thomas. They also found a makeshift shelter made with a child's toy desk in Clark's yard, and dog hair on the futon in Clark's house. Clark's white Toyota pickup truck had bloodstains on the interior and barrels of paint or solvent in the back.

The State charged Clark with first degree extortion and second degree possession of stolen property. On February 2, 2012, the trial court ordered Clark to appear for a pretrial hearing on March 27 and a trial date on April 23. When Clark appeared for his hearing on March 27, the trial court ordered him to appear for another pretrial hearing on April 19. Clark failed to appear on April 19, and he failed to appear for trial on April 23. The trial court issued a bench warrant after Clark failed to appear at his April 19 pretrial hearing, and Clark was later arrested on that warrant.

When Clark again appeared before the trial court on May 29, 2012, the trial court ordered Clark to appear for a pretrial hearing on June 19 and for trial on August 6. Clark appeared on June 19, at which time the trial court ordered him to appear for another pretrial hearing on August 2. Clark failed to appear for the August 2 pretrial hearing and the August 6 trial date. Another bench warrant was issued after Clark failed to appear at the August 2 pretrial hearing. The State charged Clark with four counts of bail jumping for failing to appear on April 19, April 23, August 2 and August 6 as ordered by the court.

The case went to a jury trial on February 26, 2013. At trial, the State presented Lori Vanderhoff's testimony. Vanderhoff was a close friend of Clark's and was staying with him during

October 2011. She testified that during that time, Clark was not sleeping. Around October 4, Vanderhoff saw Jagger on the front seat of Clark's truck, bleeding. Clark told Vanderhoff that he was watching Jagger for a friend. Later, Vanderhoff saw Jagger tied up outside the house near a shelter made out of a child's play school desk. While Jagger was at the house, Vanderhoff became concerned about Clark's behavior and became fearful of him. A few days later, Jagger was gone. When Vanderhoff asked about Jagger, Clark told her that she did not need to worry about Jagger anymore. And, he told her that he "beat the shit out of that fucking d—." 2 Report of Proceedings (RP) at 275. Vanderhoff moved the next day.

Dmitry Powers, Clark's neighbor, also saw Jagger tied up in front of Clark's house. Clark told Powers that he bought Jagger. A couple days later, Jagger was no longer at the house. Clark told Powers that he "beat the crap out of the dog." 3 RP at 356.

Staci Myklebust, a Cowlitz County Superior Court clerk, testified that the trial court always verbally informs defendants of the date and time they are ordered to appear in court. If the trial court forgets to inform the defendant, the prosecutor will remind the trial court. When the defendant is notified of the date and time of their required court appearances, the court clerk will check off the box on the clerk's minutes indicating that the defendant was ordered to appear. The State introduced the clerk's minutes from the dates Clark was ordered to appear and the clerk's minutes from the dates Clark failed to appear.

During closing argument, the State argued that Clark knew the dog was stolen because he gave inconsistent stories about how he got the dog. The State also argued that Clark did not care for Jagger the way a person would care for his or her pet. And, the State argued that Clark was guilty of extortion as an accomplice. In addition to hiding Jagger, the State argued that Clark took

the pictures that were sent to Thomas because the pictures showed Jagger tied up with the rope found at Clark's house. Clark either went to the area to perform the exchange, or let Folsom and Jordan use his truck to make the exchange. And, the State argued that, because of his statements to Vanderhoff and Powers, the jury could infer that Clark beat and killed Jagger and then dumped his body at the railroad tracks.

The jury found Clark guilty of extortion, second degree possession of stolen property, and four counts of bail jumping. The trial court calculated Clark's offender score at 5 and imposed standard range sentences. Clark appeals.

ANALYSIS

A. DOUBLE JEOPARDY

The United States and Washington Constitutions prohibit double jeopardy. U.S. CONST. amend. V; WASH. CONST. art 1, § 9. This court reviews alleged violations of double jeopardy de novo. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 979-80, 329 P.3d 78 (2014). "The prohibition on double jeopardy generally means that a person cannot be prosecuted for the same offense after being acquitted, be prosecuted for the same offense after being convicted, or receive multiple punishments for the same offense." *Villanueva-Gonzalez*, 180 Wn.2d at 980. While Clark alleges a constitutional error, determining whether Clark's convictions constitute multiple punishments for the same offense requires determination of legislative intent and presents a question of statutory interpretation. *Villanueva-Gonzalez*, 180 Wn.2d at 980. "The legislature is tasked with defining criminal offenses, and the prohibition on double jeopardy imposes '[f]ew, if any, limitations' on that power." *Villanueva-Gonzalez*, 180 Wn.2d at 980 (quoting *Sanabria v. United States*, 437 U.S. 54, 69, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978)).

There are two tests that are employed to determine whether multiple convictions violate double jeopardy by imposing multiple punishments for the same offense. *Villanueva-Gonzalez*, 180 Wn.2d at 980-81. As our Supreme Court recently explained:

> The "unit of prosecution" analysis applies when a defendant has multiple convictions under the same statutory provision, and it asks "what act or course of conduct has the Legislature defined as the punishable act." [*State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998)]. The "[*Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932)]" analysis applies when a defendant has convictions under different statutes, and it asks whether the convictions were "the same in law and in fact." [*Adel*, 136 Wn.2d at 632-33].

Villanueva-Gonzalez, 180 Wn.2d at 980-81.

1. Unit of Prosecution—Bail Jumping

Clark argues that his multiple convictions for bail jumping violate double jeopardy. Under the unit of prosecution test, we employ principles of statutory construction to determine what the legislature intended as the punishable act. *State v. Turner*, 102 Wn. App. 202, 206, 6 P.3d 1226 (2000) (citing *Adel*, 136 Wn.2d at 634), *review denied*, 143 Wn.2d 1009 (2001). "[I]f the legislature fails to define the unit of prosecution or its intent is unclear, under the rule of lenity, any ambiguity must be 'resolved against turning a single transaction into multiple offenses.'" *State v. Tvedt*, 153 Wn.2d 705, 711, 107 P.3d 728 (2005) (quoting *Adel*, 136 Wn.2d at 635) (internal quotations marks omitted).

Under RCW 9A.76.170(1):

> Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

Based on the statutory language the unit of prosecution for bail jumping could be defined as either violating the court order releasing the defendant or the defendant's failure to appear on a specific date.

In *State v. O'Brien*, 164 Wn. App. 924, 267 P.3d 422 (2011), Division One of this court determined that the bail jumping statute was ambiguous regarding the unit of prosecution and, thus, must be interpreted in favor of the defendant. In *O'Brien*, the defendant was released under four court orders, in four different cases, that all required him to report to the jail on the same date and time. 164 Wn. App. at 927. The defendant failed to report to jail as ordered, and the State charged him with four counts of bail jumping. *O'Brien*, 164 Wn. App. at 927. The court observed that "the statute is ambiguous as to whether the legislature intended to punish the single failure to appear or the violations of multiple court orders." *O'Brien*, 164 Wn. App. at 929-30. Applying the rule of lenity to the specific facts of the case, the court determined that the unit of prosecution in the case was the defendant's single failure to report rather than the violation of four separate court orders. *O'Brien*, 164 Wn. App. at 930, 932-33. However, the *O'Brien* court was clear that its decision was based on the specific facts of the case; it did not determine that, as a matter of law, the failure to appear was the unit of prosecution for bail jumping. 164 Wn. App. 930, 932-33.

We presume that the legislature knows the existing state of case law. *Woodson v. State*, 95 Wn.2d 257, 262, 623 P.2d 683 (1980). Therefore, we presume that the legislature is aware that an ambiguity exists within the bail jumping statute—an ambiguity that must be resolved in favor of the defendant based on the facts of each case. Yet, the legislature has declined to take any action to clarify the unit of prosecution for bail jumping. Accordingly, we apply the same analysis employed in *O'Brien* to Clark's case. Here, Clark violated four separate orders from the court to

appear on four separate court dates. Therefore, regardless of whether the unit of prosecution is based on the number of court orders Clark violated or the number of times Clark failed to appear, the State could have charged Clark with four counts of bail jumping.

As to the two April bail jumping convictions, the clerk's minutes from February 2, demonstrate that the trial court ordered Clark to appear for a pretrial hearing on March 27 and for trial on April 23. When Clark appeared on March 27, the clerk's minutes show that the trial court ordered Clark to appear on April 19 for another pretrial hearing, but the clerk's minutes do not reference the April 23 date. Clark failed to appear on April 19 as ordered by the trial court on March 27, and he failed to appear for trial on April 23 as ordered by the trial court on February 2. Clark violated two separate court orders each time he failed to appear in April. Therefore, regardless of whether the unit of prosecution is based on the failure to appear or on court orders, Clark's two convictions for bail jumping based on his two failures to appear in April do not violate double jeopardy.

Similarly, on May 29, the clerk's minutes show that the trial court ordered Clark to appear for a pretrial hearing on June 19 and for trial on August 6. When Clark appeared on June 19, the clerk's minutes indicate that Clark was ordered to appear for another pretrial hearing on August 2, but the clerk's minutes do not specifically reference the August 6 trial date. Clark failed to appear for the August 2 pretrial hearing as ordered by the trial court on June 19, and he failed to appear for trial on August 6 as ordered by the trial court on May 29. Like the April hearing dates, each time Clark failed to appear in August, he was violating a separate court order. Therefore, neither of Clark's convictions for the bail jumping charges for the August court dates violate double jeopardy.

2. Same Evidence Test – Extortion and Possession of Stolen Property

Clark also argues that his convictions for extortion and possession of stolen property violate double jeopardy under the "same evidence" test. Br. of Appellant at 18-20.[1] Our Supreme Court has stated that:

> Under the same evidence rule, if each offense contains elements not contained in the other offense, the offenses are different and multiple convictions can stand. [*State v. Baldwin*, 150 Wn.2d 448, 454, 78 P.3d 1005 (2003)]. The test requires the court to determine "'whether each provision requires proof of a fact which the other does not.'" [*Baldwin*, 150 Wn.2d at 455] (quoting *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)).

State v. Jackman, 156 Wn.2d 736, 747, 132 P.3d 136 (2006) (internal footnote omitted). Clark alleges that his convictions for possession of stolen property and extortion violate double jeopardy because "the evidence necessary to convict Mr. Clark of extortion was also sufficient to convict him of possession of stolen property." Br. of Appellant at 20.

It is undisputed that the elements of possession of stolen property and the elements of extortion are different. RCW 9A.56.160(1)(a)[2], .110.[3] However, Clark relies on *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004), to argue that his convictions violate double jeopardy because both convictions are predicated on the same act—keeping Jagger at his

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[1] There is a four-part framework employed when analyzing whether convictions for two offenses violate double jeopardy. *State v. Freeman*, 153 Wn.2d 765, 765, 771-73, 108 P.3d 753 (2005). However, Clark limits his argument and analysis to the same evidence test, therefore we decline to address the other tests for determining whether two convictions violate double jeopardy. RAP 10.3(a)(6).

[2] A person is guilty of possessing stolen property in the second degree if: (1) he possesses property that (2) he knows is stolen and (3) the property is worth more than $750.

[3] A person is guilty of extortion if he (1) obtains or attempts to obtain (2) property by (3) threatening the owner of the property.

house. In *Orange*, the defendant was convicted of both first degree assault and first degree attempted murder based on shooting the victim. 152 Wn.2d at 803. Our Supreme Court held that the defendant's convictions violated double jeopardy because the evidence used to convict the defendant of first degree attempted murder necessarily proved that the defendant committed first degree assault. *Orange*, 152 Wn.2d at 820. Clark argues that same situation exists here; the State proved that Clark was guilty of extortion because he kept Jagger at his house. And, this evidence necessarily proved that Clark was guilty of possession of stolen property. We disagree.

The State did not simply prove that Clark was an accomplice to the extortion plan because he held Jagger hostage. The State proved that Clark committed possession of stolen property by proving that Jagger was at Clark's house and that Clark knew he was stolen because of how he treated Jagger. While the State relied in part on the evidence that Jagger was in Clark's house to prove Clark committed extortion, the State also relied on other evidence to prove that Clark was guilty of extortion. The State proved that Clark took the pictures that were used in the ransom text messages; the State proved that Clark beat and killed Jagger and then disposed of Jagger's body on the railroad tracks; and the State proved that Clark's truck was used to attempt to exchange Jagger for the ransom. There were numerous acts on which the State based the extortion charge, at least three of which were not limited to Clark keeping Jagger at his house. Accordingly, Clark's convictions for possession of stolen property and extortion do not violate double jeopardy under the same evidence test.

B. SUFFICIENCY OF THE EVIDENCE —BAIL JUMPING

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt

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. All "reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are deemed equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Clark argues that there was insufficient evidence to support his convictions for bail jumping because (1) the State did not prove that Clark was aware of the exact time he was required to appear and (2) the State did not prove exactly what time Clark failed to appear at court. There was sufficient evidence to support the jury's verdicts finding Clark guilty of all four counts of bail jumping; therefore, Clark's arguments lack merit.

As noted above, under RCW 9A.76.170(1),

> Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

The State must prove that the defendant had notice of the required court date. *State v. Cardwell*, 155 Wn. App. 41, 47, 226 P.3d 243 (2010). And, under *State v. Coleman*, 155 Wn. App. 951, 964, 231 P.3d 212 (2010), *review denied*, 170 Wn.2d 1016 (2011), the State must prove that the defendant failed to appear at the time he was ordered to appear. In *Coleman*, the defendant was ordered to appear at 9:00 AM, and the State presented evidence that, at 8:30 AM, the court clerk

noted that the hearing had been stricken and the court had issued a bench warrant. 155 Wn. App. at 963-64. The court determined that there was insufficient evidence because the clerk's minutes did not indicate that the defendant failed to appear at 9:00 AM as ordered. *Coleman*, 155 Wn. App. at 964.

First, Clark argues that there was insufficient evidence to support his convictions for bail jumping because the State did not present sufficient evidence to prove that Clark knew about the date and time that he was required to appear. Clark relies on *United States v. Lo*, 231 F.3d 471 (9th Cir. 2000), to argue that testimony regarding the routine practice of the trial court was insufficient to prove that Clark was given notice of the court date. However, *Lo* does not support Clark's contention. In *Lo*, the court determined that the testimony in that case was insufficient to establish a routine practice that proved mail fraud. In *Lo*, the jury would have had to infer that the mortgage company created a particular document, and then started the process that resulted in mailing the document; and, the court determined that this chain of events was too tenuous to present sufficient of evidence of mail fraud. 231 F.3d at 476. The court recognized that, as the chain of inference based on usual practices gets longer, the probability that nothing went wrong in administering those practices lessens. "At some point, a reasonable doubt arises concerning whether, as Murphy's Law predicts, that which can go wrong did go wrong." *Lo*, 231 F.3d at 477.

Here, there is only one inference that the jury was required to make—that the trial court followed its usual practice and notified Clark of the court date when it was set. The likelihood of something going wrong when the trial court ordered Clark to appear at his court dates is not a chain of events that is so tenuous as to be insufficient as a matter of law. Accordingly, the clerk's testimony that it was the trial court's routine practice to inform the defendant of the date and time

of his court date was sufficient evidence to prove that Clark was notified of the date and time he was required to appear.

Second, Clark argues that the State failed to present sufficient evidence to prove that Clark failed to appear at the ordered time. Here, the State presented testimony from the clerks who were in court on the days that Clark was required to appear. The clerks testified that Clark did not appear at court. And, the State introduced the bench warrants that were issued after Clark failed to appear. Contrary to Clark's assertion, *Coleman* does not require that the State present direct evidence that Clark was not in the court at exactly 9:00 AM. Rather, in *Coleman*, the clerk's minutes that established the defendant failed to appear were entered *before* the time the defendant was ordered to appear. 155 Wn. App. at 963.

Here, the evidence showed that Clark failed to appear at the time he was ordered to appear. For the pretrial readiness hearing dates (April 19 and August 2), the clerks who were present in court on these dates testified that pretrial hearings start at 9 AM and that the trial court informs defendants that pretrial hearings start at 9 AM. The bench warrants for Clark's failure to appear for his pretrial readiness hearings were issued at 11:29 AM for the April 19 hearing date and at 2:47 PM for the August 2 prehearing date. Therefore, the State presented sufficient evidence to prove that Clark did not appear at court when ordered to do so. As for the trial dates (April 23 and August 6), the clerks testified that trials are scheduled to begin at 8:30 AM and that the trial court informs defendants that trials start at 8:30 AM. The clerk's minutes for April 23 show that Clark was not present at court at 8:52 AM, after the time he was ordered to appear. And, the clerk's minutes for August 6 show that Clark was not at court at 8:57 AM, after he was ordered to appear. Accordingly,

there was sufficient evidence to show that Clark failed to appear at the time he was ordered to appear.[4]

C. PROSECUTORIAL MISCONDUCT

To prevail on a claim of prosecutorial misconduct, Clark must show that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012) (citing *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011)). First, we must determine that the prosecutor's conduct was improper. *Emery*, 174 Wn.2d at 759. If we determine that the prosecutor's conduct was improper, we then determine whether the prosecutor's improper conduct resulted in prejudice to Clark. *Emery*, 174 Wn.2d at 757-78, 760-61. If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *Emery*, 174 Wn.2d at 760-61 (citing *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997)).

Here, Clark did not object to any of the comments he now characterizes as prosecutorial misconduct; therefore, Clark is presumed to have waived any error. The defendant is presumed to have waived any error because objections are required to prevent additional improper remarks and abuse of the appellate process. *Emery*, 174 Wn.2d at 762. Accordingly, we apply a heightened standard which requires the defendant to show that "(1) 'no curative instruction would have

[4] To the extent that Clark is arguing that if he was ordered to appear at 8:30, he could only be found guilty of bail jumping if he is absent at court exactly at 8:30, this argument necessarily leads to absurd results. First, a defendant could be found guilty of bail jumping if he is five minutes late to court. Second, a defendant would not be guilty of bail jumping if he was present at 8:30 and left immediately thereafter before the scheduled court proceeding commences.

obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). When reviewing a prosecutor's misconduct that was not objected to, we focus "less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Emery*, 174 Wn.2d at 762.

In closing argument, prosecutors are afforded wide latitude to draw and express reasonable inferences from the evidence. *State v. Reed*, 168 Wn. App. 553, 577, 278 P.3d 203, *review denied*, 176 Wn.2d 1009 (2012). When analyzing prejudice, we do not look at the comment in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007), *cert. denied*, 554 U.S. 922 (2008). We presume the jury follows the court's instructions. *State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010).

Clark alleges that there were four specific instances of misconduct committed by the prosecutor during closing arguments. First, he argues that the prosecutor improperly quantified the beyond a reasonable doubt standard. Second, he argues that the prosecutor improperly bolstered the State's case. Third, he argues that the prosecutor improperly appealed to the passions and prejudices of the jury. Fourth, he argues that the prosecutor improperly disparaged defense counsel. And, Clark argues the cumulative effect of the prosecutor's misconduct denied him a fair trial.

Here, the prosecutor did not improperly quantify the burden of proof, improperly bolster the State's case, or improperly appeal to the passions or prejudices of the jury. And, although the prosecutor improperly disparaged defense counsel during rebuttal closing argument, the

prosecutor's comment was not so flagrant and prejudicial that it could not have been cured. Furthermore, the cumulative error doctrine does not apply.

1. Quantifying Beyond a Reasonable Doubt

The prosecutor commits misconduct if he or she minimizes the burden of proof or attempts to quantify the level of certainty required to satisfy the beyond a reasonable doubt standard. *State v. Fuller*, 169 Wn. App. 797, 825, 282 P.3d 126 (2012), *review denied*, 176 Wn.2d 1006 (2013). Clark argues that the prosecutor improperly attempted to quantify the beyond a reasonable doubt standard by stating:

> Well, the law says you don't have to be convinced beyond all doubt, beyond any doubt, 99%.

4 RP at 506. The prosecutor goes on to state:

> You have to beyond [sic] a reasonable doubt. And Judge Evans defines it for us. He tells us that a reasonable doubt is one for which a reason exists, and if you have an abiding belief; a belief that lasts, a belief that endures in the Defendant's guilt, then you are convinced . . . beyond a reasonable doubt.

4 RP at 506. Within the context of the prosecutor's argument, it is clear that the prosecutor is not improperly quantifying the level of certainty required to satisfy the beyond a reasonable doubt standard. When the prosecutor referred to 99 percent, he was telling the jury what the beyond a reasonable doubt standard is not, the prosecutor is not attempting to tell the jury what the standard is. And, the prosecutor immediately discusses the correct definition of beyond a reasonable doubt directly from the court's jury instructions. The prosecutor's argument was not an improper statement quantifying the beyond a reasonable doubt standard.

2. Bolstering the State's Case

"Improper vouching occurs when the prosecutor expresses a personal belief in the veracity of a witness or indicates that evidence not presented at trial supports the testimony of a witness." *Thorgerson*, 172 Wn.2d at 443. However, it is not misconduct for the prosecutor to argue that other evidence presented at trial corroborates a witness's testimony. *State v. Gentry*, 125 Wn.2d 570, 641, 888 P.2d 1105 (1995). Clark argues that the prosecutor improperly bolstered the State's case and vouched for Vanderhoff's credibility by arguing;

> And what Ms. Vanderhoff tells the police, everything she says is corroborated by what the police find when they finally get enough evidence to raid and search the Defendant's house.

4 RP at 499. The prosecutor went on to list all the evidence the police found that corroborated Vanderhoff's testimony. The prosecutor did not rely on references to evidence outside the record to argue that Vanderhoff was credible. And, the prosecutor did not express a personal opinion as to Vanderhoff's credibility. Instead, the prosecutor relied on evidence presented at trial to argue that Vanderhoff's testimony was credible because other evidence corroborated it. There was nothing improper about the prosecutor's argument; thus, the prosecutor did not commit misconduct by bolstering the State's case or expressing a personal belief regarding Vanderhoff's credibility.

Clark also argues that the prosecutor alluded to evidence outside the record when he stated that Vanderhoff testified that Clark had been acting erratically and engaging in bizarre behavior. And, he alleges that the prosecutor improperly stated that Clark told Vanderhoff she was not welcome on the property. The prosecutor's comments regarding Clark's bizarre and erratic behavior were supported by Vanderhoff's testimony. Vanderhoff testified that Clark was not

sleeping and his behavior was causing her to be concerned and fearful. Vanderhoff's testimony supports the inference that Clark's behavior could be characterized as erratic or bizarre.

Clark is correct that Vanderhoff did not testify that Clark told her she was unwelcome on the property. However, she did state that she had become fearful of Clark and that was why she left. It is reasonable to infer from her statements that Clark's behavior made her feel unwelcome. And, to the extent that the prosecutor attributed Vanderhoff's feeling to a statement made by Clark, any possible prejudice was cured by the trial court's instructions to the jury. The jury was explicitly instructed that the lawyers' remarks during closing argument are not evidence. And, the jury was instructed to disregard any remark that was not supported by the evidence; therefore, we must presume that the jury disregarded the inference that Clark told Vanderhoff she was unwelcome. Accordingly, the prosecutor's statement could not have had a substantial likelihood of affecting the jury's verdict.

3. Appealing to the Passions and Prejudices of the Jury

A prosecutor may not make statements that are unsupported by evidence or invite the jurors to decide a case based on emotional appeals to their passions and prejudices. *State v. Jones*, 71 Wn. App. 798, 808, 863 P.2d 85 (1993), *review denied*, 124 Wn.2d 1018 (1994). Clark argues that the prosecutor improperly appealed to the passions and prejudices of the jury by arguing:

> That's the way you treat a hostage. That's what he was doing. Holding the bulldog hostage. Why? Easy answer and it's an old answer: greed. Greed. Lust for money, lust for drugs. Because that's what Jagger meant to the Defendant and the people he was working with. To him, Jagger was not a pet, Jagger was not a friend of the family, Jagger was just a way to get what he wants. And he's willing to do whatever he wants—needs to get from him. Dog has value to him, because of what it can get him. And when the dog can't get him anything anymore, dog's not worth anything to him. And we see where that ended up.

4 RP at 497.

Contrary to Clark's assertion, the prosecutor was not improperly appealing to the passions and prejudices of the jury. Putting aside the fact that the entire case was about Clark killing Jagger, a family pet, for money and drugs which will naturally evoke emotion from jurors, the prosecutor's argument was made specifically regarding Clark's knowledge that Jagger was stolen. The State was required to prove that Clark knew Jagger was stolen. Clark claimed that he did not know Jagger was stolen; he told Vanderhoff he was watching Jagger for a friend and he told Powers that he had bought Jagger as a pet. The prosecutor was arguing that the way Clark treated Jagger demonstrated that he viewed Jagger not as a pet, but rather as an object that served a particular purpose. The prosecutor's argument was not specifically calculated to inflame the passions and prejudices of the jury. Rather, the prosecutor's argument was based on making inferences to support the conclusion that Clark knew Jagger was stolen. The prosecutor's comments were not improper.

4. Disparaging Defense Counsel

It is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn counsel's integrity. *Thorgerson*, 172 Wn.2d at 451. A prosecutor's conduct is improper when the prosecutor's arguments accuse defense counsel of engaging in "sleight of hand" or use terms such as "bogus" or "deception." *Thorgerson*, 172 Wn.2d at 451-52. Clark contends that the prosecutor disparaged defense counsel at the beginning of rebuttal closing argument when the prosecutor said:

> Rebuttal argument is always my favorite part of the trial because, by this point, I get to hear what the Defense arguments are and they never fail to entertain. But

> then I get another chance to talk to you folks about what's reasonable and what the evidence really shows.

4 RP at 526. The prosecutor essentially made light of defense counsel's arguments. And, the prosecutor implied that defense counsel's arguments were unreasonable and misrepresented the evidence. The prosecutor improperly disparaged defense counsel, and the comments were improper.

However, Clark did not object to the prosecutor's comments. Although improper, Clark cannot show that any resulting prejudice caused by the prosecutor's comments could not have been cured by a timely objection and instruction. If Clark had objected to the prosecutor's comments, the trial court could have instructed the jury to disregard the comment. Because we presume that the jury follows the trial court's instructions, any resulting prejudice from the comment could have been cured by the trial court's instruction. Accordingly, Clark has not met his burden to demonstrate that the prosecutor's comments disparaging defense counsel were so flagrant and ill-intentioned that reversal is required.

5. Cumulative Error

Clark argues that the cumulative effect of the prosecutor's misconduct deprived him of a fair trial. Under the cumulative error doctrine, a combination of errors may require reversal even when each individual error is otherwise harmless. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), *cert. denied*, 551 U.S. 1137 (2007). However, the doctrine does not apply where there are few errors or the errors have little to no effect on the outcome of the trial. *Weber*, 159 Wn.2d at 279. Here, there were two instances where the prosecutor's conduct was improper: the prosecutor's disparaging comments in rebuttal closing argument and the prosecutor's misstatement

regarding Vanderhoff's testimony. Here, both instances of improper conduct were relatively minor and Clark has not demonstrated that they had an effect on the outcome of the trial. Accordingly, the cumulative error doctrine does not entitle Clark to relief.

D. ACCOMPLICE LIABILITY INSTRUCTION

Clark argues that the accomplice liability statute is unconstitutionally overbroad because it punishes protected speech. This court has twice considered, and rejected, this same argument. In *Coleman*, 155 Wn. App. at 960, Division One of this court held that the accomplice liability instruction was not unconstitutionally overbroad because [the statute's] "sweep avoids protected speech activities that are not performed in aid of a crime and that only consequentially further the crime." We explicitly adopted Division One's holding in *State v. Ferguson*, 164 Wn. App. 370, 376, 264 P.3d 575 (2011), *review denied*, 173 Wn.2d 1035 (2012).

Clark also argues that *Coleman* and *Ferguson* were wrongly decided because they did not apply the appropriate standard that the United States Supreme Court articulates in *Brandenberg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969). We disagree. Therefore, we do not further consider Clark's claim that the accomplice liability statute is unconstitutionally overbroad.[5]

E. OFFENDER SCORE CALCULATION

Clark may not challenge the calculation of his offender score because of the belief that, if asked, the trial court would have found the defendant's current offenses encompassed the same

[5] In *Ferguson*, we explicitly held that the accomplice liability statute is not unconstitutional because "it does not forbid the mere advocacy of law violation that is protected under the holding of *Brandenburg*." 164 Wn. App. at 376. Therefore, Clark is incorrect in his assertion that *Coleman* and *Ferguson* were wrongly decided because they did not apply the *Brandenburg* standard when determining that the accomplice liability statute is not unconstitutionally overbroad.

criminal conduct. *State v. Nitsch*, 100 Wn. App. 512, 524-25, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030 (2000); *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). Whether convictions are the same criminal conduct includes factual questions for the trial court to resolve. *Nitsch*, 100 Wn. App. at 524-25. And, the failure to request that the trial court do a same criminal conduct analysis is "a failure to identify a factual dispute for the court's resolution and a failure to request an exercise of the court's discretion." *Nitsch*, 100 Wn. App. at 520. Therefore, the failure to request a same criminal conduct analysis in the trial court leaves this court with an insufficient record to review whether the trial court abused its discretion when making the factual findings supporting a same criminal conduct determination. *Nitsch*, 100 Wn. App. at 524. Because Clark failed to argue that his convictions were the same criminal conduct at sentencing, he has waived his objection to the trial court's offender score calculation based on his assertion that his extortion and possession of stolen property convictions are the same criminal conduct.

F. INEFFECTIVE ASSISTANCE OF COUNSEL

Clark claims that he received ineffective assistance of counsel because his counsel did not request that the trial court consider same criminal conduct during sentencing. A defendant claiming ineffective assistance of counsel has the burden to establish that (1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Because same criminal conduct favors the defendant, the defendant bears the burden of proving that his convictions are the same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013). Therefore, in the ineffective assistance of counsel context, the defendant must show that

it was objectively unreasonable for defense counsel to fail to make a same criminal conduct argument because the same criminal conduct argument would have been successful.

To prevail on a same criminal conduct claim, the defendant must prove that the convictions required the same criminal intent, were committed at the same time and place, and involved the same victim. RCW 9.94A.589(1)(a). Here, the State argued, and presented sufficient evidence to prove, that one way in which Clark was an accomplice to extortion was by using his truck to perform the exchange of Jagger for the money and drugs. This conduct was committed at a different time and place than keeping Jagger at his house. Accordingly, Clark has not shown that a same criminal conduct argument would have been successful and his ineffective assistance of counsel claim fails.

We affirm.

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

Lee, J.

We concur:

Worswick, P.J.

Sutton, J.

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January 29, 2015 - 8:18 AM

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