Supreme Court No. 102118-6
COA No. 83387-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN BELL,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF SNOHOMISH COUNTY

PETITION FOR REVIEW

OLIVER R. DAVIS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER

Justin Bell seeks review of the Court of Appeals decision issued May 22, 2023. See Appendix A.

B. COURT OF APPEALS DECISION

Mr. Bells seeks review of the decision deeming nontransparent face masks to be per se within the court's authority to order the venire to wear in a pandemic, despite the disabling effect this has on the defendant's ability to select jurors for a fair trial. This categorical rule is untenable now, and in future pandemics, even assuming, solely *arguendo*, that the Court was correct that the disabling result of such masking is only a *partial* obscuring of each potential juror's full demeanor (it is, in fact, an effectively complete obscuring thereof). Mr. Bell also seeks review on issues of double jeopardy and of same criminal conduct.

C. ISSUES PRESENTED ON REVIEW

1. Does the Court of Appeals decision holding that a trial court order, requiring nontransparent face masks which obscure

and hide the faces of the venire members, is per se within the court's authority during a pandemic and thus never an abuse of discretion, institutionalize violation of Wash. Const. Art. 1, sec. 22 and the Sixth Amendment, rendering such decisions in the future immune to review?[1]

2. Where the charges of assault and drive-by shooting were both before the jury via evidence that Mr. Bell drove past the sidewalk where Mr. Brooks was walking, slowed to a stop, and purposefully aimed and fired his gun at Brooks multiple times, three of which shots resulted in injury while others missed, were the defendant's Double Jeopardy rights violated when the court entered judgment on both convictions?

3. In the particular circumstances of this case, was Mr. Bell's defense counsel ineffective for failing to argue that the counts were the same criminal conduct?

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[1] "RP" followed by the page number refers to the volume of transcript that includes trial and sentencing, covering the dates of October 18, 2022 through November 8, 2022.

C. STATEMENT OF THE CASE

1. Charging and trial. Justin Bell was charged with first degree assault with a firearm (with intent to inflict great bodily harm) pursuant to RCW 9.94A.36.011(1)(a) and drive-by shooting under RCW 9A.36.045, with a firearm allegation attached to the assault charge. CP 120-21. According to the affidavit of probable cause, Mr. Bell and Freddie Brooks got into a physical confrontation at a day-labor work assignment office on Evergreen Way. CP 127-128; 10/13/21RP at 373-78. The fight concerned the shared payment of gas money for driving to, and back from, the fish processing center in Stanwood where Bell, Brooks, and Brooks' girlfriend Briann Jenkins had been sent to work for the day. CP 12728; 10/13/21RP at 375-76. Ms. Jenkins had noticed during the drive to work in the morning that Mr. Bell had a firearm in his vehicle. 10/12/21RP at 321-22.

The physical fight between Bell and Brooks continued out onto the sidewalk, although the two men briefly stopped

punching each other and separated. CP 127-28; 10/12/14RP at 316. At some point Mr. Bell retrieved a firearm from his vehicle, and the sidewalk punching fight briefly continued. Then, the prosecution alleged, Mr. Bell went to his vehicle, drove out of the parking lot, and shot Mr. Brooks multiple times as Bell slowed to a stop while going past the day-labor office, successfully hitting him with three of the shots that were fired. CP 127-28; 10/12/14RP at 316-17; 10/13/21RP at 379, 10/14/21RP at 534-36.

Witnesses at trial stated that they saw a man with his arm out the window firing shots from a car, and saw Mr. Brooks then crumpling over on the ground. 10/13/21RP at 404-09. Briann Jenkins testified that when she heard the gunshots, she ran across the street. 10/12/21RP at 315-16. A car stopped and took Mr. Brooks to the hospital. 10/12/21RP at 317-18. Three of the bullets aimed at Mr. Brooks hit him. 10/14/21RP at 5343-34, 535-36, 538-39.

The jury convicted Mr. Bell on both charges and on the enhancement. 10/15/21RP at 656-57, 661-69; CP 44-46.

2. Sentencing and appeal. Following the jury verdicts of guilty, the court imposed the low end of the standard range for the assault and a concurrent sentence on the drive-by shooting. 10/28/21RP at 3-4; 10/29/21/RP at 13; CP 10, 15, 36-43. Mr. Bell appealed because his trial was unfair and he was wrongly sentenced. CP 5. The Court of Appeals nonetheless affirmed. Appendix A.

D. ARGUMENT

(1). The Court of Appeals decision deeming non-transparent face masks to be per se within the trial court's discretion to order during a period of pandemic disease, despite the hobbling effect such order has on the defendant's right to a fair jury trial when selecting jurors to sit in judgment on his case, warrants review by this Court.

a. Supreme Court review is warranted.

As the Court of Appeals correctly recognized, the issue of "nontransparent face masks" on the jury venire squarely presents an issue under a defendant's right to a fair jury trial.

Under the Washington and federal constitutions Appendix A, at p. 1, 4-5. Review is warranted under RAP 13.4(b)(3).

b. Mr. Bell has a state and federal right to a fair jury trial which includes the ability to assess potential jurors and secure a fair and impartial jury.

These rights were violated. Wash. Const. Art. 1, sec. 22 and the Sixth Amendment right to trial mandate that an accused receive a fair trial before a panel of impartial, fair, unbiased jurors. Groppi v. Wisconsin, 400 U.S. 505, 508-09, 91 S.Ct. 490, 492, 27 L.Ed.2d 571 (1971); U.S. Const. amend. VI; State v. Boiko, 138 Wn. App. 256, 260, 156 P.3d 934 (2007).

The Court of Appeals also correctly recognized that *voir dire* is more than just a question and answer session; and the interactions that inform whether the parties request a potential juror's disqualification for cause—and whether the court grants that request - are more than purely verbal. Instead, the parties and the court rely on all the modes by which one person may assess another's credibility, including their

demeanor. Appendix A, at p. 5 (citing Uttecht v. Brown, 551 U.S. 1, 2, 127 S. Ct. 2218, 167 L. Ed. 2d 1014 (2007); Reynolds v. United States, 98 U.S. 145, 156-57, 25 L. Ed. 244 (1878) ("[T]he manner of a juror [during voir dire] is oftentimes more indicative of the real character of [their] opinion than [their] words.").

The Court of Appeals failed to recognize that the defendant's right to view potential jurors' entire faces must be protected in order to protect his fair trial rights. In combination with non-obscuring protections, the trial court's other, rigorous COVID safety procedures regarding social distancing would more than fully have protected safety. Throughout pre-trial hearings, COVID protections, including physical distancing, were practiced, with participants appearing in person in small numbers. See, e.g., 10/2/21RP at 7-8; 10/8/21RP at 28-29. The court specified that it would be using the batch, or Salem method of physical distancing as to the jury selection process, bringing in a small group of jurors at a time for *voir*

dire. 10/8/21RP at 32. It was clear from the outset that physical distancing would be rigorously enforced; there was discussion of how the Drewel building would be used and/or how microphones and loud voices would be employed in the facility to ensure clear communication and creation of a court record - a concern that existed *given* the court's distancing rules. 10/8/21RP at 32-33. It was also clear that the court was prepared to allow additional alternate jurors so that any breaking of safety rules by a jury would not result in a jury of less than 12 if a juror had to be dismissed. 10/8/21RP at 29-40.

Our state recognizes that demeanor evidence is of considerable legal consequence - a rule that applies as much to jurors as it does to witnesses. The defendant's ability to assess the demeanor and fairness of those who will decide his case is at least as equal to the defendant's need for the jurors' to assess the witnesses because demeanor and manner is crucial, including "expressions of his countenance," along with aspects

of "non-verbal communication." In re Det. of Stout, 159 Wn.2d 357, 383, 150 P.3d. 86 (2007).

Mr. Bell was entitled to see the demeanor of potential jurors, to assess them for service using the same tools of discernment. The purpose of *voir dire* "is to enable the parties to learn the state of mind of the prospective jurors, so that they can know whether or not any of them may be subject to a challenge for cause, and determine the advisability of interposing their peremptory challenges." State v. Laureano, 101. Wn. 2d 745, 758, 682 P.2d 889 (1984). *Voir dire* is critical in assuring the criminal defendant that his constitutional right to an impartial jury will be honored. Morgan v. Illinois, 504 U.S. 719, 729-30, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992).

Counsel must be permitted to serve his client by determining which jurors will be able to impartially follow the court's instructions and evaluate the evidence. To conduct a proper *voir dire* the parties and the judge needed to observe a

juror's entire face, because so much of communication is non-verbal. A juror's fitness to serve, and conversely the parties ability to assess that ability, may turn on such subtleties as the fact that the juror "never cracked a smile" and, therefore "did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case." Batson v. Kentucky, 476 U.S. 79, 106, 106 S.Ct. 1712, 1728, 90 L.Ed.2d 69 (1986) (concurring opinion of Marshall, J.) (citing People v. Hall, 35 Cal.3d 161, 197 Cal.Rptr. 71, 672 P.2d 854 (1983)).

The obverse is also true - a juror's grimace hidden by a face mask cannot be detected by counsel during jury selection, or trial. Several United States District Courts, although denying defense requests that jurors wear clear face shields during jury selection and/or during trial, have nonetheless recognized that hiding of a juror's mouth and nose area can impair an accused's ability to assess the juror for service. United States v. Trimarco, No. 17-CR-583 (JMA), 2020 WL 5211051, at *5 (E.D.N.Y. Sept. 1, 2020) (assessing jurors "includes the

language of the entire body" and not merely "those two body parts") (quoting United States v. Crittenden, 20-CR-7, 2020 WL 4917733, at *7 (M.D.G.A. Aug. 21, 2020)).

Other courts have recognized that the ability to view the entirety of jurors' faces is an aspect of a constitutional trial; in one case, the District Court denied a motion to continue or transfer venue to another district, holding that the trial arrangements during COVID were being fashioned so as to not infringe on the defendant's fair trial rights. United States v. Auzenne, No. 2:19-CR-53-KS-MTP, 2020 WL 6065556, at *11 (S.D. Miss. Oct. 14, 2020) ("Likewise, prospective jurors will be required to wear clear face shields, so that attorneys can see their faces during voir dire.").

The nontransparent face masks authorized by the Court of Appeals will hide the jurors' mouth and nose, hiding crucial aspects of demeanor and attitude toward the case and the lawyer's client, preventing defense counsel from being able to competently assess each juror's impartiality to sit in judgment,

or to perceive bases for seeking peremptory removal under GR 37. Jurors with nontransparent face masks similarly cannot be assessed by the trial court itself, which has a *sua sponte* duty to remove a juror who should not be seated:

> It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

RCW 2.36.110; see State v. Irby, 187 Wn. App. 183, 197, 347 P.3d 1103 (2015), review denied, 184 Wn.2d 1036 (2016). No lawyer, and no court, can meaningfully assess a juror or potential juror for consideration of challenge or removal, nor can a lawyer evaluate a juror's "bias, prejudice, indifference, [or] inattention" be fully discerned.

Jurors with masked faces prevent trial counsel from evaluating the jury's perception of the potential issues in the case, and from gauging the bias a juror may have in favor of the

State, and against the defense, defense counsel, or the defendant. These biases against the defense are often expressed in the slightest, but most meaningful facial gestures such as a smirk, or pursed lips. Trials going forward to the next pandemic cannot commence with jury selection so hobbled as to be a gamble on each individual juror.

c. The error was structural.

Although the harmless error rule applies to most constitutional violations, United States v. Hasting, 461 U.S. 499, 508-09, 103 S. Ct. 1974, 1984, 76 L. Ed. 2d 96 (1983), there is a "highly exceptional category" of fundamental constitutional errors that are not subject to harmless-error analysis "because they undermine the fairness of a criminal proceeding as a whole." United States v. Davila, 569 U.S. 597, 611, 133 S. Ct. 2139, 186 L. Ed. 2d 139 (2013). These structural errors "are so intrinsically harmful" that they "require automatic reversal" because actual prejudice is impossible to

measure, but is likely high. United States v. Lawrence, 735 F.3d 385, 401 (6th Cir. 2013).

Ordering nontransparent face masks in this case was a fundamental constitutional error that transcends the criminal process and thus counsel's inability to choose a fair jury affected the very "framework within which the trial proceeds." Weaver v. Massachusetts, 137 S.Ct. 1899, 1907, 198 L.Ed.2d 420 (2017). This Supreme Court should grant review and reverse Mr. Bell's convictions.

(2). The drive-by shooting conviction violates double jeopardy.

a. Review is warranted.

Double jeopardy is a constitutional claim, and thus it can be raised for the first time on appeal. State v. Hancock, 17 Wn. App. 2d 113, 117, 484 P.3d 514, review denied, 198 Wn.2d 1005, 493 P.3d 739 (2021); RAP 2.5(a)(3). Appellate court review of a double jeopardy challenge is *de novo*. State v. Kelley, 168 Wn.2d 72, 76, 226 P.3d 773 (2010). For these

same reasons, review is warranted under RAP 13.4(b)(3),and this Court can provide meaningful relief.

b. The constitution prohibits imposing multiple convictions for the same conduct.

The Fifth Amendment and article I, section 9, prohibit multiple punishments for the same offense. In re Pers. Restraint Petition of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). This protection applies even where the court imposes concurrent sentences for the convictions. Ball v. United States, 470 U.S. 856, 864-65, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985); State v. Calle, 125 Wn.2d 769, 774-75, 888 P.2d 155 (1995). The question becomes, "Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense." Orange, 152 Wn.2d at 815. To determine whether multiple convictions violate double jeopardy, Washington courts apply the "same evidence" test.

Calle, 125 Wn.2d at 777 (citing Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932)). Although the State may bring, and the jury may consider, multiple charges arising from the same conduct, courts may not enter multiple convictions for the same offense without violating double jeopardy. Absent clear legislative intent to the contrary, a defendant's double jeopardy rights are violated if he is convicted of offenses that are identical both in fact and in law. State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005).

Importantly, courts addressing double jeopardy evaluate the elements of the crimes "as charged and proved, not merely as the level of an abstract articulation of the elements." Freeman, 153 Wn.2d at 777. Two convictions violate double jeopardy when the evidence required to support a conviction on one charge would have been sufficient to warrant a conviction upon the other. Id. at 772 (citing State v. Reiff, 14 Wash. 664, 667, 45 P. 318 (1896)).

c. Mr. Bell's drive-by shooting conviction rests on the same facts and law as his convictions for murder and attempted murder.

The prosecution's claim underlying the first-degree assault conviction was that Mr. Bell fired multiple shots at Mr. Bell in order to be the winner in their dispute. Neither the first degree assault statute nor the drive-by shooting statute expressly authorizes multiple convictions for a single act. RCW 9A.36.011; RCW 9A.36.045. Accordingly, entering two convictions violated double jeopardy if they were the same in fact and law, as proved. State v. Hughes, 166 Wn.2d 675, 682, 212 P.3d 558 (2009).

Under RCW 9A.36.011(1), a "person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death[.]" RCW 9A.36.011(1)(a). And RCW 9A.36.045(1) governs drive-by shooting convictions: "A person is guilty of drive-by shooting when he or she recklessly discharges a

firearm . . . in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is . . . from a motor vehicle[.]

Although the statutory language for assault and drive-by shooting may each have an element that the other does not, this is not determinative. The question is whether the State could have proved either crime in this case without also proving the other. United States v. Dixon, 509 U.S. 688, 698, 113 S.Ct. 2849, 125 L.L.Ed.2d 556 (1993). It is irrelevant whether in other scenarios one crime could be established without also proving the other. Id.

For example, in Harris v. Oklahoma, the Court ruled that convictions for both felony murder with the predicate crime of robbery and for robbery itself violated double jeopardy even though the felony murder statute on its face did not require proof of robbery. Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.L.Ed.2d 1054 (1977). Here, the State's theory was that Mr. Bell intentionally shot Mr. Brooks, slowing to a stop so

that he could aim and achieve his objective. As the prosecutor stated in closing argument, expressly describing all of the six or eight bullets that Mr. Bell allegedly fired,

> Those were all in line with where Freddie Brooks was standing. These were not shots up in the air to scare him. These were shots targeted at Freddie Brooks. These were shots targeted at making his point, that he was not to be messed with; that getting into a skirmish out back at work, Justin Bell got the last word.

10/14/21RP at 627 (State's closing argument). In a brief mention of the second charge, the prosecutor characterized Mr. Bell's conduct as drive-by shooting because the shots were fired from a "moving vehicle." 10/14/21RP at 628.

The first degree assault and the drive-by shooting violate the prohibition on double jeopardy. As in Orange, supra, "the same shot directed at the same victim" established these offenses. Orange, 152 Wn.2d at 820. In Orange, the Court noted that the governing "same evidence" test is not a strict comparison of elements, but rather a determination that "the evidence required to support a conviction upon one of [the

offenses] would have been sufficient to warrant a conviction upon the other." Orange, 152 Wn.2d at 816. Such crimes are "identical both in fact and in law," and therefore count as the same offense for double jeopardy purposes. Id.; see also Freeman, 153 Wn.2d at 772-73 ("We consider the elements of the crime as charged and proved, not merely a[t] the level of an abstract articulation of the elements.").

Division Three has held in a case that convictions for second degree assault and drive-by shooting did not violate double jeopardy because each crime required proof of facts not required by the other. State v. Statler, 160 Wn. App. 622, 639, 248 P.3d 165 (2011). But in Statler, where the victims were fired at by a vehicle following them as they drove away from a drug deal gone bad, the Court of Appeals stated it was applying the "same evidence" test, but merely compared the statutory elements of first degree assault and drive-by shooting. State v. Statler, 160 Wn. App. at 638–39 ("Drive-by shooting requires the discharge of a firearm, which the other crime does not [and]

[a]ssault requires intent to inflict great bodily harm, which is not required for drive-by shooting.").

Here, it would circular to contend in this case that it does not violate double jeopardy to punish a person for drive-by shooting that occurs by virtue of a targeted firing of a gun to shoot Mr. Brooks, simply because of the added factual requirement that a drive-by shooting occur in or near a motor vehicle, which assaultive shooting does not require. And the fact that some of the defendant's shots missed their intended target does not not constitute a second offense.

In this case, the legal and factual elements are the same to a degree that constitutes a double jeopardy violation. The offenses rested on the same evidence from a single incident. Mr. Bell may not be punished for both assault and drive-by shooting for this incident.

d. Remedy.

Where two convictions violate double jeopardy, the court must vacate the conviction on the lesser offense. State v.

Womac, 160 Wn.2d 643, 656, 160 P.3d 40 (2007). This Court must strike the drive-by shooting conviction.

(3). Mr. Bell was sentenced based on an incorrect offender score where his counsel provided ineffective assistance of counsel at his sentencing hearing.

a. Review is warranted by this Supreme Court under RAP 13.4(b)(3).

Trial counsel provided ineffective assistance by failing to argue that the counts were the same criminal conduct. The Sixth Amendment to the United States Constitution guarantees effective assistance. U.S. Const., amend. VI. The Washington State Constitution similarly provides that "[i]n criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel[.]" Wash. Const., art. I, sec. 22 (amend. 10). These constitutionally guaranteed rights require non-deficient performance. Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Mr. Bell's defense counsel's failure to argue same criminal conduct at sentencing was ineffective assistance of counsel. State v.

Phuong, 174 Wn. App. at 547; State v. Saunders, 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004). This present an issue that warrants review under RAP 13.4(b)(3).

b. Sentencing based on an incorrect offender score was permitted by defense counsel who failed to object on Mr. Bell's behalf.

The drive-by shooting conviction should not have been scored, because the two crimes were the same criminal conduct. When sentencing an offender who has other current offenses, RCW 9.94A.589(1)(a) provides that, if a sentencing court finds that the offenses encompass the same criminal conduct, then the offenses are counted as one crime for sentencing purposes. State v. Calvert, 79 Wn. App. 569, 903 P.2d 1003, review denied, 129 Wn.2d 1005 (1995). Offenses constitute the same criminal conduct if they are (1) committed with the same criminal intent, (2) committed at the same time and place, and (3) involve the same victim. RCW 9.94A.589(1)(a); State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

The Court of Appeals erroneously reasoned that the specification of "another person" as the victim of the drive-by shooting precluded same criminal conduct. Appendix A, at pp. 23-24. In addition, at sentencing, the court properly entered a no-contact order as to the victim, the person of Freddie Brooks, not Ms. Jenkins. CP 16 (judgment and sentence).

The shots that were fired and did not hit Mr, Brooks were not fired recklessly, that were fired with intent to harm Mr. Brooks, and simply failed to do so. Here, both crimes involved the same victim - Mr. Brooks, who Mr. Bell intentionally did shoot and wound. The State is not required to specify a named victim in a charge of drive-by shooting, see Bowman v. State, 162 Wn.2d 325, 332, 172 P.3d 681 (2007), but it could do, yet it never named Ms. Jenkins. See e.g., State v. Graham, 153 Wn.2d 400, 402, 103 P.3d 1238 (2005) (defendant can be charged with separate count of reckless endangerment for each person endangered); State v. Ferreira, 69 Wn. App. 465, 850 P.2d 541 (1993). In this case, the State simply named Mr.

Brooks as the victim of the assault and stated in the instructions that the victim of the drive-by shooting was another person. CP 120-21 (amended information). This generic, common language cannot be now used by the Court of Appeals to distinguish the offenses as the latter drive-by shooting having a different person or persons as the victim. See Appendix A, at pp. 23.

As to time and place, offenses do not necessarily need to be precisely simultaneous in order to have been committed at the same time and place, State v. Porter, 133 Wn.2d 177, 183, 942 P.2d 974 (1997), but here, they were. State v. Taylor, 90 Wn. App. 312, 321-22, 950 P.2d 526 (1998) (the crimes "happened at the same time and place and involved the same victim [Murphy] because the assault and kidnapping were committed simultaneously").

Finally, intent, in the context of same criminal conduct, is not the *mens rea* of the statutory crimes; instead it is "the offender's objective criminal purpose in committing the

crime." State v. Phuong, 174 Wn. App. 494, 546, 299 P.3d 37 (2013) (quoting State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990)), review denied, 182 Wn.2d 1022 (2015); State v. Kloepper, 179 Wn. App. 343, 357, 317 P.3d 1088, review denied, 180 Wn.2d 1017, 327 P.3d 55 (2014); cf. State v. Ohnemus, 194 Wn. App. 1039, at *3 (Court of Appeals of Washington, Division 2. June 21, 2016) (2016 WL 3514165) (unpublished decision, cited pursuant to GR 14.1(a) only) (deciding same criminal conduct by merely comparing the *mens rea* of the statutory crimes).

Here, the crimes charged were a single transaction, engaged in pursuant to a plan: Mr. Bell's conduct was a targeted shooting of Mr. Brooks with a firearm. As the prosecutor emphasized in closing, the security videos appeared to show Mr. Bell going to his car, placing a gun on his person which he retrieved from inside his vehicle, and then, after recommencing the fight on the sidewalk, he returned to his car

alone, following which he drove past the work office and shot Brooks. 10/14/21RP at 621-22.

"[I]f one crime furthered another, and if the time and place of the crimes remained the same, then the defendant's criminal purpose or intent did not change and the offenses encompass the same criminal conduct." State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992); State v. Dunaway, 109 Wn.2d at 215. Here, in closing argument, the State's discussion of the charge of drive-by shooting was brief, and described it as an intentional act:

> You have also been instructed on drive-by shooting, Count 2. I'd argue to you that each element of that crime has been established as well: the defendant's intent, the defendant's acts, firing a gun from a moving vehicle. Each element has been met there.

10/14/21RP at 628. The Court of Appeals gives scant, if any, attention to how the case was proved. The shooting involved the same objective intent as part of a continuous transaction and a single, uninterrupted criminal episode. State v. Deharo, 136

Wn.2d 856, 858, 966 P.2d 1269 (1998). The offenses were the same criminal conduct.

The two convictions could not be considered to be anything other than the same criminal conduct. If multiple offenses were committed at the same time and place with the same victim, and with the same objective criminal intent, counsel's failure to argue same criminal conduct is deficient performance that prejudices the defendant - here, by resulting in a higher offender score. Phuong, 174 Wn. App. at 548; Saunders, 120 Wn. App. at 825.

In this case, the facts, objectively viewed, under any analysis, can only support a finding that the defendant had the same criminal intent with respect to each count, and the counts constituted the same criminal conduct. See State v. Swarers, 11 Wn. App. 2d 1038, at *12 (2019) (Court of Appeals of Washington, Division 3) (December 5, 2019) (2019 WL 6607149) (unpublished decision, cited pursuant to GR 14.1(a) only) (citing State v. Rodriguez, 61 Wn. App. 812, 816, 812

P.2d 868 (1991)). There could be no legitimate tactical reason for counsel's failure to ask the court to make a same criminal conduct determination. Reversal and remand for resentencing is required.

F. CONCLUSION

Based on the foregoing, Mr. Bell asks thast this Court grant review, and reverse Mr. Bell's judgment and sentence.

This brief is formatted in font size 14 Times New Roman and contains 4,830 words.

Respectfully submitted this 20th day of June, 2023.

s/OLIVER R. DAVIS
Washington State Bar Number 24560
Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2710
e-mail: oliver@washapp.org

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. JUSTIN DOMINIC BELL, Appellant.	No. 83387-1-I DIVISION ONE PUBLISHED OPINION

SMITH, C.J. — Justin Bell was charged with first degree assault and drive-by shooting for an attack on his coworker, Freddie Brooks, that occurred shortly after a fistfight between the two. During jury selection, the court denied Bell's request that jurors wear clear face shields rather than nontransparent face masks covering their noses and mouths. Bell contends that this denial violated his right to select an impartial jury. He also asserts that his conviction on both counts violates double jeopardy and Washington's sentencing laws because his charges were based on one underlying act. He raises sufficiency of the evidence and confrontation clause challenges in his statement of additional grounds. Finding no error, we affirm.

FACTS

Justin Bell shot Freddie Brooks several times on December 14, 2017. Earlier that day, Brooks had argued with Bell, a coworker, over a carpooling payment Brooks owed Bell. As reported by another coworker, their argument

escalated and "g[ot] kind of pushy." They were told to leave their employer's building and they did, exchanging blows in the parking lot. When the fight ended, the two went their separate ways. Brooks headed to a corner store and then a bus stop with his girlfriend, Briann Jenkins, while Bell went toward his car.

As Jenkins and Brooks crossed the street to the bus stop, Jenkins heard gunshots, quickly ran toward a nearby Value Village store, and hid behind a car. Witnesses later described hearing six to eight shots. When Jenkins looked back, Brooks was crawling on the ground, hit by several bullets. A passing car transported him to the hospital, where he was treated for several potentially life-threatening bullet wounds. He recovered successfully.

Numerous individuals testified to seeing the shooting and the events surrounding it at trial. One witness, a passenger in a nearby car, testified that he heard gunfire while stopped at a light. Looking in the direction of the gunshots, he saw a black four-door sedan driving erratically, swerving through traffic and cutting off other cars.[1] This witness called the police to provide updates as his girlfriend followed the car. A recording of his 911 call in which he describes the first three letters of the license plate, BTB or BGB, was admitted at trial. Another witness who observed the license plate wrote down the last four numbers: 9767. Bell's registered vehicle was a 2017 Hyundai Elantra with the license plate BGB9767.

[1] At trial, the witness testified, "I said Saturn at the time. Maybe a Kia. I can't remember."

Eyewitnesses who managed to get a look at the shooter were able to match his age and race roughly with Bell's. One witness, peering into the sedan from less than a car-length away, managed to get a quick glimpse and confirmed his age and race. Another witness was able only to get a sense of his race.

Other evidence confirmed the origin of the gunshots. Most significantly, the State introduced video footage depicting the shooting and Brooks's collapse onto the ground.[2] This footage was then supported by eyewitness and forensic testimony and evidence. One witness, the passenger in a car located behind a vehicle he identified as a dark-colored Kia Sorento, saw the shooter's hand stretching out of the vehicle holding a gun. Still another witness, perhaps 10 or 15 feet away from the shooter's car, saw gunfire come from the driver's side window. The police used lasers to reconstruct the flight path of the fired bullets and concluded that they originated in the street.

Bell owned a firearm, a 9 mm caliber Kahr. Casings and bullet holes found at the scene of the shooting matched this caliber. In February 2018, Bell called the Marysville Police Department to report this firearm stolen. According to the police officer who took the call, Bell said he had reached out "in case something was to be done with that pistol" and demonstrated concern that "if a crime [occurred] or the pistol was used inappropriately that it could be associated with him."

[2] This footage was not included in the record on appeal, and we must therefore resort to descriptions from trial of what it depicts.

The State initially charged Bell with first degree assault. It later added a count of drive-by shooting. During jury selection, Bell requested that jurors not wear face masks that obstructed their noses and mouths, a request the trial court denied. After hearing testimony, the jury convicted Bell of first degree assault with a firearm enhancement and drive-by shooting. The court sentenced Bell to 171 months in prison, the low end of the standard range, using an offender score that included both crimes.

Bell appeals.[3]

ANALYSIS

Court's Ruling Concerning Face Masks

Bell first challenges the trial court's denial of his request that potential jurors wear face shields rather than face masks during jury selection, a request made so that potential jurors' demeanor would be more apparent during questioning. He contends that the trial court's ruling violated his right to an impartial jury. We are not persuaded.

1. The Purposes and Manner of Jury Selection

The Washington and federal constitutions guarantee a criminal defendant's right to an impartial jury. WASH. CONST. art. I, § 22;[4] U.S. CONST. amend. VI.[5] To enforce this right, potential jurors are removed "for cause" where

[3] The State also filed a notice of crossappeal. It, however, assigns no error and does no more than respond to Bell's arguments in its briefing on appeal.

[4] "In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury."

[5] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." This protection is applicable to the

the court or parties detect bias. RCW 4.44.190. Voir dire, the part of jury selection wherein the parties ask questions and engage in discussion with potential jurors to draw out potential bias, is central to securing the right to an impartial jury. State v. Momah, 167 Wn.2d 140, 152, 217 P.3d 321 (2009). But voir dire is more than just a question and answer session; and the interactions that inform whether the parties request a potential juror's disqualification for cause—and whether the court grants that request—are more than purely verbal. Instead, the parties and the court rely on all the modes by which one person may assess another's credibility, including their demeanor. Uttecht v. Brown, 551 U.S. 1, 2, 127 S. Ct. 2218, 167 L. Ed. 2d 1014 (2007); see also Reynolds v. United States, 98 U.S. 145, 156-57, 25 L. Ed. 244 (1878) ("[T]he manner of a juror while testifying is oftentimes more indicative of the real character of [their] opinion than [their] words.").

Decisions by the trial court about whether to excuse a juror are therefore reviewed for an abuse of discretion by appellate courts, "in part because a transcript cannot fully reflect" all the information conveyed—intentionally or inadvertently—by jurors during voir dire. Brown, 551 U.S. at 17-18 (explaining appellate courts' deference to trial courts concerning jury selection). A trial court abuses its discretion if its decision "adopts a view that no reasonable person would take." State v. Sisouvanh, 175 Wn.2d 607, 623, 290 P.3d 942 (2012).

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states via the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145, 157-58, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).

Similarly, the trial courts are vested with "broad discretion" in deciding the manner of voir dire. State v. Brady, 116 Wn. App. 143, 146, 64 P.3d 1258 (2003); see also RCW 2.28.150 ("[I]f the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws."). The courts' "discretion is limited only by the need to assure a fair trial by an impartial jury." Brady, 116 Wn. App. at 147. The scope of voir dire should be "coextensive with its purpose, . . . 'to enable the parties to learn the state of mind of the prospective jurors.' " State v. Frederiksen, 40 Wn. App. 749, 752, 700 P.2d 369 (1985) (quoting State v. Laureano, 101 Wn.2d 745, 758, 682 P.2d 889 (1984)).

The trial courts' discretion over the manner of jury selection exists in a number of forms. A trial court may, for instance, where a certain line of examination is not calculated to uncover bias, limit the parties' questioning. State v. Bokien, 14 Wash. 403, 410, 44 P. 889 (1896). It may, where other constitutional rights are not at issue, conduct voir dire away from the public view to permit jurors the privacy to more easily express their opinions. See Momah, 167 Wn.2d at 152-53 (addressing conflicts between right to a public trial and right to an impartial jury, and allowing that circumstances may require closure in the name of impartiality). It may also, as the case demands, allot more or less time for voir dire. See Brady, 116 Wn. App. at 147 (court in certain circumstances may "reasonably reduc[e]" amount of time promised for questioning). But this discretion is not boundless. In Brady, to give one example, the trial court abused

its discretion when it promised counsel a certain amount of time for voir dire, counsel prepared to ask certain sensitive questions later in that time, and the court shortened the available time without allowing the attorneys an opportunity to adjust to that change. 116 Wn. App. at 147-48.

2. Jury Selection During the Pandemic

Starting at the beginning of the COVID-19[6] pandemic, Washington courts adopted a variety of strategies to ensure that trial could continue safely. The Washington State Supreme Court, in an order issued June 18, 2020, required courts to "conduct all [jury trial] proceedings consistent with the most protective applicable public health guidance in their jurisdiction." Ord. re: Modification of Jury Trial Proc., Statewide Response by Washington State Courts to the COVID-19 Public Health Emergency, No. 25700-B-631, at 3 (Wash. June 18, 2020).[7] It also ordered courts to inform jurors of steps the court would take to combat spread of the virus, including "face masking." Ord. re: Modification of Jury Trial Proc. at 2-3. It explicitly permitted dramatic changes to the usual voir dire procedures, changes that include remote jury selection, stating:

> The use of remote technology in jury selection, including use of video for voir dire in criminal and civil trials, is encouraged to reduce the risk of coronavirus exposure. Any video or telephonic proceedings must be conducted consistent with the constitutional rights of the parties and preserve constitutional public access. Authorization for video-conference proceedings under CrR 3.4(d)(1)

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[6] COVID-19 is the World Health Organization's official name for "coronavirus disease 2019," a severe, highly contagious respiratory illness that quickly spread throughout the world after being discovered in December 2019.

[7] The order exists online at https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/Jury%20Resumption%20Order%20061820.pdf [https://perma.cc/S5YJ-BWPR].

> . . . is expanded to include jury selection, though the requirement that all participants be able to simultaneously see, hear and speak to one another does not require that all potential jurors be able to simultaneously see one another.

Ord. re: Modification of Jury Trial Proc. at 3.

Snohomish County Superior Court promulgated a similar order. Emergency Ord. #15 re: Ct. Operations, No. 2021-7009-31A, In re Response by Snohomish County Superior Court to the Public Health Emergency in Snohomish County and the State of Washington (Snohomish County Super. Ct., Wash. Aug. 10, 2021).[8] It required "any person" entering a Snohomish County Superior Court courtroom to wear a mask covering their mouth and nostrils. Emergency Ord. #15 re: Ct. Operations at 3. It permitted "[a] defendant proceeding to jury trial [to] express his or her preference either for Zoom[9] or in-person jury selection." Emergency Ord. #15 re: Ct. Operations at 18. It further stated:

> Appropriate cloth, surgical, or N-95/KN-95 masks shall be worn by all persons in the courtroom. The Court may require that jurors wear N-95/KN-95. The Court may permit jurors, when being questioned during jury selection, to wear a clear mask instead of an otherwise appropriate mask.

Emergency Ord. #15 re: Ct. Operations at 19.

In addition to those orders issued by the courts and specifically directed at court proceedings, the state executive used its emergency powers to require face masking in various settings. At the time of trial in this case in October 2021, an

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[8] The order exists online at https://www.courts.wa.gov/content/publicUpload/COVID19_Snohomish/Snohomish%20County%20Superior%20Emergency%20Order%2015%20Superior%20Court%20Operations%20August%2010,%202021.pdf [https://perma.cc/2QQB-N8KN].

[9] Zoom is a web conferencing platform that is used for audio and/or video conferencing.

order from the secretary of the Washington Department of Health, Order 20-03.6, was in effect. Wash. Sec'y of Health, Ord. No. 20-03.6 (Wash. Sept. 24, 2021), https://mrsc.org/getmedia/5862c24f-a144-4f14-9045-043b9bf9c0dd/Secretary_of_Health_Order_20-03-6_Statewide_Face_Coverings.pdf [https://perma.cc/B52A-8AVG].[10] That order required "[e]very person in Washington State [to] wear a face covering . . . when they are in a place where any person from outside their household is present." Ord. No. 20-03.6, at 3. It allowed for a number of exemptions, such as while working alone indoors, while outdoors, while engaging in certain types of performance, while eating or drinking, or while engaging in a "transient activity" that required "temporary and very brief" removal of the mask. Ord. No. 20-03.6, at 3-4. None of those exemptions appears to have applied to jury service.

[10] It does not appear that either the Department of Health or the Governor's Office maintains these orders online; only some are accessible from official sources. However, the Municipal Research and Services Center, a nonprofit organization devoted to providing resources to local governments in Washington, has collected all permutations of the order at https://mrsc.org/Home/Explore-Topics/Public-Safety/Emergency-Services/Public-Health-Emergencies/Coronavirus-State-Proclamations-and-Guidance.aspx. This collection appears reliable. In particular, its copy of No. 20-03.7 matches the versions of that document that are available from official sources. Compare Wash. Sec'y of Health, Ord. No. 20-03.7 (Wash. Feb. 16, 2022), https://mrsc.org/getmedia/010ed3ae-ace0-46f2-972c-29e2adb9b3d2/Secretary-of-Healt-Order-20-03-7-Amended-Statewide-Face-Covering-2022-02-16.pdf.aspx [https://perma.cc/B56N-A9RK], with Wash. Sec'y of Health, Ord. No. 20-03.7 (Wash. Feb. 16, 2022), https://www.governor.wa.gov/sites/default/files/proclamations/WA_DOH_Secretary_of_Health_Order_20-03.7_Amended_Statewide_Face_Covering_2022.02.16.pdf [https://perma.cc/XVJ6-EXVS].

3. Constitutionality of Masked Jurors During the Pandemic

Washington was not alone in taking these steps to ensure the safety of jurors, court staff, counsel, parties, and the general public during a global health emergency. Many other jurisdictions did the same. Some of those jurisdictions have seen challenges to their pandemic-induced jury selection procedures similar to the one Bell brings. Courts have uniformly rejected these challenges.

Most cases rejecting the argument that requiring jurors to wear face masks during voir dire violates the defendant's right to an impartial jury come from federal district courts.[11] Only one federal circuit court appears to have addressed the issue so far, also upholding face masking during voir dire.[12] A number of state courts have also considered and rejected the issue.[13] No

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[11] See United States v. Crittenden, No. 4:20-CR-7 (CDL), 2020 WL 4917733, at *7-8 (M.D. Ga. Aug. 21, 2020) (court order); United States v. Trimarco, No. 17-CR-583 (JMA), 2020 WL 5211051, at *5 (E.D.N.Y. Sept. 1, 2020) (court order); United States v. James, No. CR-19-08019-001-PCT-DLR, 2020 WL 6081501, at *3 (D. Ariz. Oct. 15, 2020) (court order); United States v. Robertson, No. 17-CR-02949-MV-1, 2020 WL 6701874, at *2 (D.N.M. Nov. 13, 2020) (memorandum opinion and court order); United States v. Tagliaferro, 531 F. Supp. 3d 844, 851 (S.D.N.Y. 2021); United States v. Thompson, 543 F. Supp. 3d 1156, 1164-65 (D.N.M. 2021); United States v. Watkins, 18-CR-32-A, 2021 WL 3732298, at *7 (W.D.N.Y. Aug. 24, 2021) (decision and court order); United States v. Maynard, No. 2:21-CR-00065, 2021 WL 5139514, at *2 (S.D. W. Va. Nov. 3, 2021) (memorandum opinion and court order); United States v. Schwartz, No. 19-20451, 2021 WL 5283948, at *3 (E.D. Mich. Nov. 12, 2021) (opinion and court order); United States v. Davis, No. 18-cr-20085, 2021 WL 5989060, at *3 (E.D. Mich. Dec. 16, 2021) (court order).

[12] United States v. Ayala-Vieyra, No. 21-1177, 2022 WL 190756, at *5 (6th Cir. Jan. 21, 2022); United States v. Smith, No. 21-5432, 2021 WL 5567267, at *2 (6th Cir. Nov. 29, 2021).

[13] Commonwealth v. Delmonico, 251 A.3d 829, 842 (Pa. Super. Ct.), appeal denied, 265 A.3d 1278 (Pa. 2021); Cooper v. State, 2022 Ark. App. 25, at 6, 638 S.W.3d 872 (2022); Collins v. Nizzi, No. 354510 (Mich. Ct. App. Jan. 20, 2022) (unpublished), https://www.courts.michigan.gov/4b0259/siteassets

Washington court has yet addressed it.[14]

Several notable patterns emerge from the various courts' treatment of this issue. First, appellate courts reviewing trial courts' decisions to permit potential jurors to wear masks apply an abuse of discretion standard. United States v. Ayala-Vieyra, No. 21-1177, 2022 WL 190756, at *5 (6th Cir. 2022) (unpublished); Commonwealth v. Delmonico, 251 A.3d 829, 842 (Pa. Super. Ct.), appeal denied, 265 A.3d 1278 (Pa. 2021); Cooper v. State, 2022 Ark. App. 25, at 6, 638 S.W.3d 872 (2022); Gootee v. State, No. 119, slip op. at 23-24 (Md. Ct. Spec. App. Mar. 25, 2022) (unpublished), https://mdcourts.gov/sites/default/files /unreported-opinions/0119s21.pdf [https://perma.cc/YGG3-Q6FD], cert. denied, 479 Md. 465 (2022). This matches the appellate courts' typical deference to trial court decisions concerning the manner of jury selection, described above, and we follow suit.

/case-documents/uploads/opinions/final/coa/20220120_c354510_51_354510.opn.pdf [https://perma.cc/9WHM-2LPE]; Gootee v. State, No. 119, slip op. (Md. Ct. Spec. App. Mar. 25, 2022) (unpublished), https://mdcourts.gov/sites/default/files/unreported-opinions/0119s21.pdf [https://perma.cc/YGG3-Q6FD], cert. denied, 479 Md. 465 (2022).

[14] But see State v. Osborne, No. 37779-2-III, slip op. (Wash. Ct. App. Jan. 27, 2022) (unpublished) (declining to consider issue because not sufficiently briefed), https://www.courts.wa.gov/opinions/pdf/377792_unp.pdf; State v. Dean, No. 82366-3-I, slip op. at 3 n.2 (Wash. Ct. App. Aug. 8, 2022) (unpublished) ("Dean also stated he had difficulty hearing and strained to hear people talking through masks, and his attorney also was concerned about how wearing a mask prevented him from fully using his 'toolbox as it were.' Dean does not raise these issues on appeal."), https://www.courts.wa.gov/opinions/pdf/823663.pdf. See GR 14.1(c) ("Washington appellate courts should not, unless necessary for a reasoned decision, cite or discuss unpublished opinions in their opinions.").

Second, these cases conclude that the parties' inability to see a juror's mouth and nose deprives them of access to only a small part of their demeanor. They focus on the observation that "[d]emeanor includes the language of the entire body," and that other aspects of voir dire, such as questionnaires and questioning, permit gathering "sufficient information to detect bias." United States v. Crittenden, No. 4:20-CR-7 (CDL), 2020 WL 4917733, at *7-8 (M.D. Ga. Aug. 21, 2020) (court order); see also United States v. Tagliaferro, 531 F. Supp. 3d 844, 851 (S.D.N.Y. 2021) (defendant is "still free to examine and assess juror credibility in all critical aspects besides the few concealed by the wearing of a mask"); United States v. Trimarco, No. 17-CR-583 (JMA), 2020 WL 5211051, at *5 (E.D.N.Y. Sept. 1, 2020) (court order) ("Being able to see jurors' noses and mouths 'is not essential' for assessing credibility."). At least one court has suggested that the potential difficulty caused by face masking has been partially mitigated over time because "people have become accustomed to conversing with masks during the past year and a half." United States v. Maynard, No. 2:21-CR-00065, 2021 WL 5139514, at *2 (S.D. W. Va. Nov. 3, 2021) (memorandum opinion and court order).

Finally, while acknowledging the necessity that the parties be able to ascertain bias, courts emphasize the countervailing need to provide for safety of all participants in the midst of a pandemic. United States v. Thompson, 543 F. Supp. 3d 1156, 1164 (D.N.M. 2021) (the defendant's "ability to ask questions during voir dire and to see the upper half of prospective jurors' faces is enough to satisfy his constitutional rights during jury selection, at least during an ongoing

global pandemic"); United States v. Robertson, No. 17-CR-02949-MV-1, 2020 WL 6701874, at *2 (D.N.M. Nov. 13, 2020) (memorandum opinion and court order) (seeing faces and asking questions enough, "at least in the middle of a global pandemic"); United States v. Smith, No. 21-5432, 2021 WL 5567267, at *2 (6th Cir. Nov. 29, 2021) (trial courts have "inherent authority" and " 'grave responsibility' " to ensure safety of trial participants (quoting Morgan v. Bunnell, 24 F.3d 49, 51 (9th Cir. 1994)).

4. Application to Bell's Jury Selection

Here, we conclude that the trial court did not abuse its discretion when it denied Bell's motion. It did not adopt procedures that no reasonable person could support.

The trial court was responsive to Bell's concerns throughout the selection process. Per the Snohomish County emergency order, Bell had the option to conduct voir dire online if he wished, which would have permitted access to the potential jurors' faces, albeit at the cost of some of their body language. He did not take advantage of this option, instead requesting that jurors wear face shields. The court denied his request, saying, "[T]his is a safety issue as far as I'm concerned." But it also, in response to this and other worries raised by Bell's attorney, indicated a willingness to offer more time for jury selection than would otherwise have been allotted.[15] The court, at the request of defense counsel, ultimately permitted 30 minutes of questioning for each, rather small, batch of 15

[15] The trial court stated, "In my experience, if I give you more time, you can explore every issue that you need to explore adequately."

potential jurors, and again offered to extend that time if needed. But no extra time was necessary; instead, during discussion with one batch of potential jurors, defense counsel did not even use all of the time initially allotted.

Even under normal circumstances, without a global contagion and the face masking it requires, significant variations exist in trial court jury selection. Some courtrooms place counsel and parties farther away from juries or at an angle, less able to see the nuances of their expression or hear the subtleties of their inflection. Some jurors are more or less hidden within jury boxes. Time for questioning and availability of questionnaires differ courtroom to courtroom and case to case.

These circumstances, however, were not normal. The Washington State courts' responsibilities to jurors (and others)—who reasonably feared for their safety—were far graver than usual. And the trial court was acting under the umbrella of orders from the Washington State and county courts and the state executive that aimed not only to protect the rights and health of the individuals involved in particular proceedings but also to avoid any possible spread of the contagion beyond the participants. The trial court's decision could have resulted in adverse health outcomes both in and out of the courtroom. By eroding trust of both court employees and the greater public in the judiciary's safety protocols, this could have hampered the judiciary's ability to function at all during the pandemic.

Here, the trial court's decision to require potential jurors to wear face masks may have deprived Bell of some portion of his ability to assess their

demeanor. But jurors' discomfort at being forcibly unmasked in a crowded room around a group of strangers in the midst of a pandemic may have also affected their demeanor and impeded accurate determination of their mood and credibility.[16] And their tone of voice, body language, eyes, and other aspects of their demeanor remained as accessible as they normally would have been. Judging credibility in such situations is inherently multivariable; some variables in the jury selection process may inhibit counsel's ability to determine credibility, while others may improve it. It is for this reason that the trial courts' knowledge of their courtroom, parties, jurors, and situation generally provides them with the best opportunity to assess matters, and this is why they are given discretion in the manner of jury selection.

The trial court here, recognizing the departure from standard procedures face masking entailed, made sure to accommodate the parties' concerns. In particular, it allowed more time for questioning, counterbalancing concerns about inability to assess demeanor. We therefore hold that the trial court did not abuse its discretion when, during a pandemic, it required jurors to wear face masks during jury selection.

5. Application to Bell's Trial

Bell contends that his right to an impartial jury was violated not only by the trial court's requirement that jurors wear face masks during selection, but also

[16] It is not only jurors who are concerned for their own health, of course, or for others' health. Counsel often come to court masked out of a concern for their own and others' safety even at the appellate level, where there are typically far fewer people in a courtroom.

during trial. But his motion before the trial court focused exclusively on jurors wearing face masks during jury selection. Any argument about the constitutionality of jurors remaining masked at trial was therefore not properly preserved for appeal, which usually precludes our consideration. See RAP 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court.").

RAP 2.5(a) does allow argument about unpreserved issues where the issues are "manifest error affecting a constitutional right." But the appealing defendant has the initial burden of showing that the error was of a constitutional dimension. State v. Grimes, 165 Wn. App. 172, 185-86, 267 P.3d 454 (2011).

The right to an impartial jury, however, is not typically implicated unless a biased juror was actually seated. United States v. Martinez-Salazar, 528 U.S. 304, 316, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000). Bell does not even assert that one was. He does not explicitly address the issue of preservation at any point, and does not cite to cases that establish a relevant constitutional right that would ensure him, or his counsel, a view of jurors' (as opposed to witnesses') noses and mouths at trial. Instead, Bell contends that inability to fully access jurors' demeanor prohibits counsel from tailoring their arguments to jurors' "apparent perceptions of the evidence, of the State's closing argument, and his or her own closing argument." And he refers to RCW 2.36.110, which requires removal of seated jurors who manifested unfitness to serve during trial. But this is not enough to meet his initial burden under RAP 2.5(a), and as a result, we do not consider this issue.

Double Jeopardy

Bell next contends that his conviction for both assault in the first degree with a firearm enhancement and drive-by shooting is barred by his constitutional protections against double jeopardy. We disagree.

The Washington and federal constitutions both prohibit the entry of multiple convictions for the same offense. State v. Womac, 160 Wn.2d 643, 650, 160 P.3d 40 (2007); see also WASH. CONST. art. I, § 9;[17] U.S. CONST. amend. V.[18] To determine whether a defendant's double jeopardy protections have been violated, Washington applies the "same evidence" rule, asking if they are the same in fact and in law. Womac, 160 Wn.2d at 652. "[I]f each offense includes an element not included in the other and requires proof of a fact the other does not," double jeopardy is not offended. State v. Harris, 167 Wn. App. 340, 352, 272 P.3d 299 (2012). Because double jeopardy claims raise issues of law, they are reviewed de novo on appeal. Womac, 160 Wn.2d at 649.

The two crimes of which Bell was convicted contain distinct elements. RCW 9A.36.011(1)(a) creates the crime of assault in the first degree, which is committed when a person "with intent to inflict great bodily harm . . . [a]ssaults another with a firearm or any deadly weapon." RCW 9A.36.045(1) creates the crime of drive-by shooting, which is committed when a person "recklessly discharges a firearm . . . in a manner which creates a substantial risk of death or

[17] "No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense."

[18] "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb."

serious physical injury to another person and the discharge is . . . from a motor vehicle." Conviction of assault in the first degree requires intent to inflict great bodily harm. Conviction of drive-by shooting requires discharge of a firearm from a motor vehicle. Each of these elements is present in only one of Bell's charged crimes. As a result, the two offenses are not the same in law.

Nor are the offenses the same in fact, for much the same reasons. Proof that Bell committed drive-by shooting required proof that he discharged his firearm from within a car. This proof would not have been required to show assault in the first degree, which does not have such specific requirements for the manner of the attack. On the other hand, his conviction of assault in the first degree required proof that he intended to inflict great bodily harm on Brooks. Such proof would not have been required to show drive-by shooting, which requires only a reckless discharge.

We therefore conclude that double jeopardy does not bar Bell's conviction for both drive-by shooting and assault in the first degree.

Same Criminal Conduct

Bell makes a second argument that his actions cannot support his two convictions, this time under statute rather than the constitution. He asserts that his two crimes concerned the same criminal conduct, a term of art used in Washington's sentencing scheme, and that the trial court therefore lacked the statutory authority to convict him as it did. Relatedly, Bell asserts that his counsel was ineffective for failing to argue the same criminal conduct issue at the trial court. We conclude that Bell did not preserve this issue for our direct

consideration because he affirmatively agreed to his offender score. But we reach it nonetheless by way of his ineffective assistance of counsel claim. We conclude that the court did not err by implicitly concluding that his offenses were not the same criminal conduct. Because no objection would have been sustained, his counsel was effective.

Washington's sentencing act determines the range of possible sentences the trial court may impose by considering both the seriousness of the crime involved and the defendant's criminal history. RCW 9.94A.530. The defendant's criminal history is accounted for through the use of an "offender score" calculated by assigning numerical values to each prior crime and adding them together; more serious crimes carry higher values. RCW 9.94A.525. "[W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense [is] determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score." RCW 9.94A.589(1)(a).

Crimes may not, however, be counted separately in the offender score calculation if they encompass the "same criminal conduct." RCW 9.94A.589(1)(a). Same criminal conduct is "two or more crimes that [(1)] require the same criminal intent, [(2)] are committed at the same time and place, and [(3)] involve the same victim." RCW 9.94A.589(1)(a). Unless all of these elements are present, the criminal offenses must be counted separately. State v. Chenoweth, 185 Wn.2d 218, 220, 370 P.3d 6 (2016).

Determinations by the trial court about whether two offenses are the same criminal conduct are reviewed for abuse of discretion. State v. Aldana Graciano, 176 Wn.2d 531, 536, 295 P.3d 219 (2013). Where the record supports only one conclusion, the sentencing court abuses its discretion by ruling otherwise. Graciano, 176 Wn.2d at 537-38. Where the trial court has made no specific finding as to same criminal conduct but has calculated the offenses separately as part of the offender score, as here, the appellate court treats this as an implicit determination that the defendant's offenses did not constitute the same criminal conduct. State v. Channon, 105 Wn. App. 869, 877, 20 P.3d 476 (2001).

1. Preservation of Error

As a threshold matter, the State contends that this argument has been waived because it was not raised at the trial court. We agree that Bell may not directly challenge the trial court's implicit determination that his offenses do not constitute the same criminal conduct.

Under most circumstances, issues not raised at the trial court have not been preserved for consideration on appeal. RAP 2.5(a).[19] However, "[i]n the context of sentencing . . . illegal or erroneous sentences may be challenged for the first time on appeal." State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). An exception exists to this exception: where the alleged error is factual and discretionary in nature, rather than of a purely legal dimension, defendants

[19] RAP 2.5(a) carves out exceptions to this principle when (1) the trial court lacked jurisdiction, (2) a party failed to establish facts upon which relief could be granted, or (3) a "manifest error affecting a constitutional right" occurred. Bell does not invoke these exceptions to argue that we should consider this issue.

may waive their ability to challenge the error later on by agreeing to underlying facts. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). A defendant waives "any challenge to a miscalculated offender score by agreeing to that score (or to the criminal history on which the score is based) in a plea agreement or by other stipulation." Goodwin, 146 Wn.2d at 873. The same criminal conduct analysis is partially factual in nature and is reviewed for an abuse of discretion. RCW 9.94A.589(1)(a); Graciano, 176 Wn.2d at 536. A defendant can therefore waive their ability to challenge a same criminal conduct calculation that impacted the offender score used at their sentencing.

Bell waived his ability to challenge his offender score on appeal. In his sentencing memorandum, he wrote:

> The controlling standard range in this matter is 111-147 months (Assault First Degree, Offender Score of 2 points due to the other current offense of Drive by Shooting) . . . plus a 60 month Firearm Enhancement (due to the special verdict of the jury).
>
> The total controlling range is therefore 171 months to 207 months.

Bell had no prior adult felony convictions to be included in his offender score. Therefore, only his conviction for drive-by shooting impacted the length of his conviction for assault. By affirmatively agreeing to a controlling offender score of two, Bell necessarily asserted that the court did not need to conduct a same criminal conduct analysis.

It follows that the State is correct when it asserts that Bell did not preserve this issue for our direct review. We still reach it, however, by way of Bell's

argument that his attorney's failure to raise the issue in the trial court constituted ineffective assistance of counsel.

2. Ineffective Assistance of Counsel

Defendants enjoy a constitutional right to effective representation by counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984); State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). To demonstrate that this right was violated by their attorney's defective performance, an appellant must demonstrate that (1) defense counsel's representation fell below an objective standard of reasonableness, and (2) except for counsel's unreasonable representation, the result of the proceeding would have been different. McFarland, 127 Wn.2d at 334-35. Because of the test's second element, failure to object where that objection would not have been sustained is not ineffective assistance of counsel. State v. Johnston, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007).

To prevail in his ineffective assistance of counsel claim, Bell must demonstrate that had his attorney raised the same criminal conduct issue at the trial court, he would have likely prevailed. In re Pers. Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). This, though, is a burden he cannot meet because his two offenses do not encompass the same criminal conduct.

Bell's offenses do not encompass the same criminal conduct because they did not involve the same victim, a necessary part of the same criminal conduct test. RCW 9.94A.589(1)(a). Freddie Brooks was the victim of Bell's assault, as reflected in the court's instructions to the jury: "[t]o convict the

defendant of the crime of assault in the first degree, [the State must prove that] the defendant assaulted *Freddie Brooks*." (Emphasis added.) In contrast, the jury instructions for drive-by shooting were less direct, requiring only that Bell created "a substantial risk of death or serious physical injury to *another person*." (Emphasis added.)

The language in the jury instructions for drive-by shooting tracks case law interpreting the drive-by shooting statute, which portrays it as a crime that criminalizes conduct that puts at risk—victimizes—the general public. See In re Pers. Restraint of Bowman, 162 Wn.2d 325, 332, 172 P.3d 681 (2007) ("Although a drive-by shooting may cause fear of bodily injury, bodily injury, or even death, such a result is not required for conviction. Drive-by shooting does not require a victim; it requires only that reckless conduct creates a risk that a person might be injured."). That it does not require a specific victim places drive-by shooting in that category of offenses whose "victim" can be the general public. See State v. Haddock, 141 Wn.2d 103, 110-11, 3 P.3d 733 (2000) (holding unlawful possession of a firearm victimizes the general public); State v. Williams, 135 Wn.2d 365, 369, 957 P.2d 216 (1998) (holding victim of intent to sell drugs was general public).

This legal conclusion about the nature of the charge is reflected in the facts of the case, which also support a determination that Bell's two crimes impacted different victims. The general public was victimized because Bell indiscriminately fired a gun in a public place, from the midst of traffic, with a commercial building behind his intended target. Jenkins, Brooks's girlfriend, was

walking near him when the shots were fired, was forced to take cover, and was also victimized.

Because the victim of Bell's assault, Brooks, is different from the victim of his drive-by shooting, the general public and Jenkins in addition to Brooks, we conclude that the trial court did not err by implicitly determining that his two offenses do not encompass the same criminal conduct. As a result, because a motion by Bell's attorney that his convictions be considered the same criminal conduct would not have been sustained, his counsel was not ineffective.

Statement of Additional Grounds

In addition to his attorney's briefing on appeal, Bell submitted a statement of additional grounds. Statements of additional grounds are permitted by RAP 10.10. They serve to ensure that an appellant can raise issues in their criminal appeal that may have been overlooked by their attorney. Recognizing the practical limitations many incarcerated individuals face when preparing their own legal documents, RAP 10.10(c) does not require that the statement be supported by reference to the record or citation to authorities. It does require, however, that the appellant adequately "inform the court of the nature and occurrence of alleged errors." RAP 10.10(c). And it relieves the court of any independent obligation to search the record in support of the appellant's claims, making it prudent for the appellant to support their argument through reference to facts where possible. RAP 10.10(c). To enable that factual support, it provides the means for appellants to obtain copies of the record from counsel. RAP 10.10(e).

Here, Bell has submitted a succinct statement consisting of only five sentences:

> Inside the hearing the person didn't appear in court[,] made the decision to not come. Their [sic] was no testimony.
>
> In the video that was shown the person had a hood on not being noticeable.
>
> . . . .
>
> While in the court every witness had no clue who did the shooting. Nobody identified me as the shooter.

We interpret this as raising two issues: (1) a confrontation clause challenge concerning the lack of testimony from Bell's victim Brooks—the noteworthy witness absence of the trial, and (2) a general challenge to the sufficiency of the evidence by which he was convicted. Neither challenge is successful.

1. Confrontation Clause

The Washington and federal constitutions both protect a criminal defendant's right to confront the witnesses against them and the defendant's right to obtain witnesses in their own favor. WASH. CONST. art. I, § 22;[20] U.S. CONST. amend. VI.[21] These are complementary rights. Relying on them, our state Supreme Court has rejected claims that the State's failure to call certain witnesses violated a defendant's rights, writing, "The right to process to compel the attendance of witnesses must be asserted and maintained." State v. Summers, 60 Wn.2d 702, 706, 375 P.2d 143 (1962) (concluding defendant's

[20] "In criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face [and] to have compulsory process to compel the attendance of witnesses in his own behalf."

[21] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor."

article I, section 22 rights were not violated when State chose not to bring testimony from potential witnesses). The State has no obligation to make a defendant's case for them; a defendant has the tools needed to make their own case and ensure witnesses' presence.

Here the victim of Bell's crimes, Freddie Brooks, did not testify. He was in prison at the time of Bell's trial and was "essentially unwilling . . . to be involved in that way" with the charges against Bell. Because the absence of such a key witness was noteworthy, it was discussed throughout the proceedings at the trial court. In particular, during jury selection, the State sought to make sure that no jurors would hold Brooks's absence against it, and his absence was directly addressed in trial. Because it was a running theme of trial and because Brooks is arguably the most material witness in the crime against Bell, it is reasonable to construe Bell's statement that "the person didn't appear in court[,] made the decision not to come" refers to Brooks's choice not to testify.

As in Summers, the State not calling Brooks to testify does not violate Bell's article I, section 22 and Sixth Amendment rights. If Bell wished for Brooks's testimony, he could have compelled it. He did not. We conclude that Bell's right to confront the witnesses against him was not affected by Brooks's absence.

2. Sufficiency of the Evidence

Finally, Bell challenges whether the evidence admitted at trial was sufficient to support his conviction. We conclude that it was.

Evidence is sufficient if " 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (plurality opinion) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). Because credibility determinations are for the trier of fact—in this case, the jury—appellate courts "defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Here, the evidence was sufficient for the jury to convict. Bell had fought with Brooks earlier in the day. He owned a gun of the same caliber used in the shooting, a gun he later claimed he had lost. The witnesses' descriptions of the make, model, and license plate of the shooter's car very closely matched Bell's car. And eyewitness testimony of the shooter's appearance, though very vague, roughly described Bell. Bell's arguments amount to the assertion that his conviction requires particular forms of evidence—namely, testimony from his victim and witnesses testifying that they recognized him as the shooter—to stand. This is incorrect. We conclude that the evidence was sufficient.

We affirm.

Smith, C.J.

WE CONCUR:

Díaz, J.

Coburn, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 83387-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Amanda Campbell
[Amanda.campbell@co.snohomish.wa.us]
Snohomish County Prosecuting Attorney
[Diane.Kremenich@co.snohomish.wa.us]

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

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