COA NO. 41167-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAYLAN BERG,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Robert Lewis, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. BERG'S FRIEND WAS UNJUSTIFIABLY EXCLUDED FROM THE COURTROOM.

Wyman, the man excluded from the courtroom, was a friend of Berg. CP 400. The right to a public trial encompasses the right to have one's friends present during trial. In re Oliver, 333 U.S. 257, 271-72, 68 S. Ct. 499, 92 L. Ed. 682 (1948). The accused has a particular interest in having friends and family attend the trial because "[o]f all members of the public, a criminal defendant's family and friends are the people most likely to be interested in, and concerned about, the defendant's treatment and fate." Longus v. State, 416 Md. 433, 446, 452 7 A.3d 64 (Md. 2010) (quoting Tinsley v. United States, 868 A.2d 867, 873 (D.C. Ct. App. 2005)). Accordingly, "it is precisely their attendance at trial that may best serve the purposes of the Sixth Amendment public trial guarantee." Tinsley, 868 A.2d at 873.

One purpose of a public trial is to allow a defendant the presence of a friend who might give legitimate assistance or comfort without interfering with the proceedings. Commonwealth v. Marshall, 356 Mass. 432, 434, 253 N.E.2d 333 (Mass. 1969) (reversing conviction where defendant's mother, brother, sister, and friend wrongly excluded). "The presence of an accused's friends in the courtroom lends moral support to

the accused and helps insure honest proceedings. If an accused is denied the presence of his friends, he is denied a public trial, unless the trial court can articulate on the record some compelling reason for excluding them." Addy v. State, 849 S.W.2d 425, 429 (Tex. Ct. App. 1993) (reversing where trial court failed to comply with constitutional requirements before excluding defendant's friends from courtroom); see also Guzman v. Scully, 80 F.3d 772, 775 (2d Cir. 1996) (reversing where exclusion of a defendant's family members and friends during part of the examination of one prosecution witness was insufficiently justified).

The State asserts the courtroom was not closed because the judge himself did not exclude Wyman from the courtroom. Brief of Respondent (BOR) at 21. That the judge did not order the exclusion does not mean Berg's right to a public trial was protected. No government actor, including courtroom security, may constitutionally abrogate the right to a public trial absent strict compliance with constitutional safeguards.

"Whether the closure was intentional or inadvertent is constitutionally irrelevant." Walton v. Briley, 361 F.3d 431, 433 (7th Cir. 2004) (right to public trial was violated when first two sessions of trial were held in evening hours after courthouse had closed). A courtroom may be closed in the constitutional sense where, as here, the trial judge did not create the closure and had no knowledge of the closure until after the

fact. See, e.g., Commonwealth v. Cohen, 456 Mass. 94, 95-96, 108-09, 921 N.E.2d 906 (Mass. 2010); Watters v. State, 328 Md. 38, 49-50, 612 A.2d 1288 (Md. 1992); State v. Vanness, 304 Wis.2d 692, 693, 698-99, 738 N.W.2d 154 (Wis. Ct. App. 2007); Owens v. United States, 483 F.3d 48, 63 (1st Cir. 2007).

In Cohen, a court officer posted a sign on the courtroom door during jury selection that stated, "Jury empanelment Do not enter." Cohen, 456 Mass. at 98-99. Upon learning of the sign, defense counsel moved for a mistrial, contending the judge "never made findings on the record or had a hearing as to whether or not the courtroom ought to be closed." Id. at 99. The trial judge concluded Cohen failed to satisfy his burden of showing the public was excluded from the trial because (1) the judge did not order a closure, (2) some members of the public attended despite the "Do Not Enter" sign, and (3) the court room was never "closed" because the judge made arrangements for family and press to be present. Id. at 108.

The Massachusetts Supreme Court held the violation of Cohen's right to a public trial constituted structural error requiring reversal. Id. at 116, 118-19. It rejected the argument no closure occurred because the trial judge did not effectuate it, recognizing a courtroom may be closed in the constitutional sense without an express judicial order. Id. at 108-09.

Watters is also instructive. In that case, a deputy sheriff unilaterally excluded the public, including members of defendant's family, from the courtroom during jury selection without the knowledge or consent of the trial judge or the parties. Watters, 328 Md. at 42. Defense counsel subsequently moved for a mistrial, claiming Watters had been deprived of his Sixth Amendment right to a public trial. Id. The trial judge denied the motion for mistrial, stating "it was done as a matter of court security because of the crowded conditions of the courtroom, and it is not denying him his right to a public trial." Id. at 43.

On appeal, the state argued even if there was a violation that would ordinarily require a new trial if committed by a judicial officer, that principle was inapplicable because the error was committed by a deputy sheriff acting without knowledge of the court. Id. at 49. In reversing conviction, the court wasted little time in rejecting the state's argument: "That the defendant was denied a constitutional right by a State official other than the judge is of little moment." Id. at 49-50. In support, the court cited Parker v. Gladden, where the Supreme Court ordered a new trial because of prejudicial statements made by a bailiff to jurors during

deliberation. Watters, 328 Md. at 50 (quoting Parker v. Gladden, 385 U.S. 363, 364, 87 S. Ct. 468, 17 L. Ed. 2d 420 (1966)).[1]

In Vanness, the defendant argued his Sixth Amendment right to a public trial was violated when the courthouse doors were locked at 4:30 p.m., which denied the public access to the courtroom while he presented his case and the state presented its rebuttal. Vanness, 304 Wis.2d at 693-94. The state argued the closure was trivial, pointing to the lack of an affirmative act by the trial court to close the courthouse doors. Id. at 697-98. In reversing conviction due to a public trial right violation, the appellate court concluded the trial court's intent is "irrelevant to determining whether the accused's right to a public trial has been violated by an unjustified closure." Id. at 699. The analysis must focus on the effect of the closing to determine whether a defendant's constitutional right to a public trial has been violated. Id.

In Owens, uniformed officers prevented two of defendant's family members from entering the courtroom during the first day of jury selection. Owens, 483 F.3d at 61. The First Circuit rejected the notion that this exclusion could not constitute a closure in violation of the right to public trial, recognizing a court officer's unauthorized closure of a courtroom

[1] Describing the bailiff as "an officer of the State," the Court in Parker held the statements of the bailiff to the jurors were controlled by the command of the Sixth Amendment. Parker, 385 U.S. at 364.

impeding public access, if substantiated, violated the Sixth Amendment right to a public trial. Id. at 63; see also United States v. DeLuca, 137 F.3d 24, 32-35 (1st Cir. 1998) (marshals' unauthorized initiation of security measures created a partial closure, but public trial right not violated because trial court's balancing of interests satisfied modified Waller requirements).

The analytical approach taken by these courts is mandated by the purpose behind the right to a public trial. The Sixth Amendment right to a public trial is the right of the accused for the benefit of the accused. Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 723, 175 L. Ed. 2d 675 (2010); Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). It does not matter to Berg whether a judge, a courtroom security officer, a law enforcement officer working in an investigative capacity, or any other government actor violates that right. The dispositive point is that the right has been violated, to the detriment of the accused, in the absence of following constitutionally mandated procedures to justify the exclusion of a member of the public from trial. The fact that the trial judge did not personally order Berg's friend out of the courtroom is constitutionally insignificant in determining whether that exclusion violated the right to a public trial.

An officer assigned to courtroom security and under the control of custody officers effectuated Wyman's removal from the courtroom under the guise of investigating an alleged attempt to tamper with a former witness, the basis for which involved Wyatt eyeing the witness in court and then leaving the courtroom after the witness had left. RP 1608-12, 1699-70; CP 400, 642-44. When Wyman returned to the courtroom a few days later, a member of the courthouse security detail told Wyman he was trespassed from the trial. CP 643-44. The trial judge, upon learning of the situation, stated no one but the judge had authority to remove or ban someone from the courtroom, and that no one could do that without his approval. RP 1674, 1676, 1862; CP 404.

Contrary to the State's suggestion, the trial judge does not abdicate control of the courtroom to security personnel or law enforcement. "A trial court has inherent authority to determine what security measures are necessary to maintain decorum in the courtroom." State v. Monschke, 133 Wn. App. 313, 336, 135 P.3d 966 (2006), review denied, 159 Wn.2d 1010, 154 P.3d 918 (2007), cert. denied, 552 U.S. 841, 128 S. Ct. 83, 169 L.Ed.2d 64 (2007). Thus, for example, the trial court has inherent authority to regulate the conduct of a trial by excluding one person from the courtroom for a limited period of time in order to prevent witness tampering. State v. Gregory, 158 Wn.2d 759, 816, 147 P.3d 1201 (2006).

The judge has this authority. The court controls the security measures to be taken in the courtroom. Courtroom security officers and the sheriff's office do not.

It is established under federal law and a number of other jurisdictions that partial closures of the courtroom — where access is restricted but other members of the public are permitted to attend — are still closures for purposes of the Sixth Amendment right to a public trial. See, e.g., United States v. Rivera, 682 F.3d 1223, 1225, 1230-33 (9th Cir. 2012) (Sixth Amendment right to a public trial violated by the district court's exclusion of defendant's family members, including seven-year-old son, from sentencing proceedings); United States v. Sherlock, 962 F.2d 1349, 1357 (9th Cir. 1989) (protection of young sex crime victims from trauma and embarrassment of public scrutiny was substantial reason; some of defendant's family members excluded after court found they peered and giggled at previous witnesses); Woods v. Kuhlmann, 977 F.2d 74, 76-77 (2d Cir. 1992) (witness intimidation was substantial reason justifying exclusion of defendant's family during testimony of one witness); State v. Mahkuk, 736 N.W.2d 675, 685 (Minn. 2007) (prosecutor's unsupported assertion of witness intimidation did not constitute overriding interest, partial closure of courtroom through exclusion of defendant's brother and

cousin violated right to public trial); State v. Ortiz, 91 Haw. 181, 191, 981 P.2d 1127 (Haw. 1999) (citing cases).

The State maintains the Supreme Court's recent decision in State v. Lormor, 172 Wn.2d 85, 257 P.3d 624 (2011) controls the outcome here.[2] BOR at 22-23. The question decided there was "whether the removal of a person from the courtroom, under the facts in this case, was a closure in violation of the right to a public trial." Lormor, 172 Wn.2d 87. Lormor's daughter was excluded from the courtroom before trial. Id. She was four days shy of her fourth birthday, terminally ill, confined to a wheelchair and required a ventilator to breathe. Id. The Court defined "closure" for public trial purposes as a total closure where the public was fully excluded from the courtroom. Id. at 92.

The Court held "the exclusion of one person is not a closure that violates the defendant's public trial right but instead is an aspect of the court's power to control the proceedings." Id. The Court affirmed conviction because removal of the defendant's young daughter was not unreasonable. Id. at 87, 95. The record established the basis for the removal of Lormor's daughter and the removal was not an abuse of discretion. Id. at 95. The judge discussed the removal on the record and

[2] The Supreme Court's decision in Lormor issued after the opening briefs were filed in this consolidated appeal.

gave his reasons for doing so. Id. The girl's ventilator was loud and she made other noises, which could understandably interrupt court proceedings and serve as a distraction. Id.

The exclusion of Berg's friend from the courtroom is error under Lormor even if that exclusion does not constitute a closure and merely falls within a court's discretionary power to control courtroom proceedings. "A trial court has the inherent, as well as statutory, power to remove disruptive spectators from the courtroom." Id. at 96. Conviction will be affirmed where the trial judge gives reasons on the record for the removal and the justification for removal is not an abuse of discretion. Id. at 96-97.

But here, the trial judge did not justify the removal of Berg's friend. The judge did not exercise its discretion at all because courtroom security, acting unilaterally to exclude Berg's friend from the courtroom, prevented the judge from exercising his power over the matter.

The failure to exercise discretion is an abuse of discretion. Bowcutt v. Delta N. Star Corp., 95 Wn. App. 311, 320, 976 P.2d 643 (1999); State v. Flieger, 91 Wn. App. 236, 242, 955 P.2d 872 (1998) (decision to use shock box to restrain defendant in court was made by sheriff's office personnel responsible for defendant's custody; court abused its discretion in declining to involve itself with this decision because the court is ultimately responsible for security in the courtroom), review

denied, 137 Wn.2d 1003, 972 P.2d 466 (1999). The exercise of sound discretion presupposes the trial court has an opportunity to exercise it. See State v. McGill, 112 Wn. App. 95, 100, 102, 47 P.3d 173 (2002) (trial court cannot "exercise its discretion if it is not told it has discretion to exercise.").

In Berg's case, courtroom security usurped the inherent power of the trial judge to control his own courtroom. Because the judge was not made aware of Wyman's exclusion from the courtroom, it did not exercise its discretionary authority over whether Wyman could be properly excluded. As a result, the trial judge did not give reasons on the record for Wyman's removal and did not justify the removal. The judge must do both of those things to affirm a conviction on appeal. Lormor, 172 Wn.2d 96-97.

The judge rescinded the trespass order upon learning of the exclusion. RP 1674, 1862. The damage was already done. Six witnesses had already testified in Wyman's absence and nothing in the record shows Wyman was notified the trespass order was rescinded by the court. RP 1613-67, 1674-75, 1677. Berg's convictions should be reversed.

2. PROSECUTORIAL MISCONDUCT VIOLATED BERG'S RIGHT TO A FAIR TRIAL AND DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE MISCONDUCT.

The State's arguments diminishing the burden of proof and exhorting the jury to declare the truth were clearly improper. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (truth statements improper); State v. Anderson, 153 Wn. App. 417, 425, 431, 220 P.3d 1273 (2009) (truth statements and comparing jury's decision to other kinds of decisions), review denied, 170 Wn.2d 1002, 245 P.3d 226 (2010); State v. Johnson, 158 Wn. App. 677, 685, 243 P.3d 936 (2010) (comparing jury's decision to other kinds of decisions).

The State argues the misconduct issue is waived for review because there was no objection below and the misconduct was curable by instruction had such instruction been requested. BOR at 32-33. In support, the State cites Emery, which held a prosecutor's "fill in the blank" and truth statements were curable by instruction. Emery, 174 Wn.2d at 763-64.

If the misconduct here was curable, then defense counsel was ineffective in failing to seek the cure. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). Berg's trial counsel recognized the prosecutor misstated the law but did not object. Counsel made a tactical decision to respond to the State's improper argument by

challenging it in his own argument. RP 2321-22, 2367-68. A tactical decision is not insulated from a claim that the decision was deficient. State v. Grier, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011). "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

The relevant question here is whether it was reasonable not to object to the State's improper argument or request a curative instruction. "[D]efense counsel should be aware of the law and make timely objection when the prosecutor crosses the line." State v. Neidigh, 78 Wn. App. 71, 79, 95 P.2d 423 (1995). Defense counsel needed to protect his client's right to a fair trial when the prosecutor failed to honor its duty of ensuring one. See State v. Horton, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003) (reversing on ineffective assistance ground where defense counsel failed to object to prosecutor's improperly expressed personal opinion about defendant's credibility during closing argument).

There is no sound reason why counsel should not have objected and requested curative instruction to ensure his client's right to a fair trial. A properly sustained objection and request for curative instruction would have alerted the jury to the fact that the prosecutor had made improper arguments, that they were not supported by the court's instruction, and that they should

be disregarded. As it was, the jury was left to decide who was right on how to interpret the burden of proof — the prosecutor or defense counsel. Prosecutors, in their quasi-judicial capacity, usually exercise a great deal of influence over jurors. State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956); see also Washington v. Hofbauer, 228 F.3d 689, 700 (6th Cir. 2000) ("a jury generally has confidence that a prosecuting attorney is faithfully observing his obligation as a representative of a sovereignty."). Criminal defense attorneys enjoy no such status. The jury was likely inclined to believe the prosecutor's word over that of a defense attorney when it came to describing the beyond a reasonable doubt standard.

The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). There was no legitimate reason supporting the failure to object given the prejudicial nature of the prosecutor's improper argument. Berg derived no benefit from letting the jury consider those misstatements of the law as it deliberated on his fate. An objection and request for curative instruction would not have precluded defense counsel from addressing the proper standard of proof in his closing argument.

If a curative instruction could have erased the prejudice resulting from the prosecutor's misconduct, then counsel was deficient in failing to

request such instruction. Cf. State v. Warren, 165 Wn.2d 17, 26-28, 195 P.3d 940 (2008) (prosecutor's misstatement of the burden of proof and presumption of innocence during closing argument did not require reversal only because the court gave a strongly worded curative instruction). When a reviewing court decides misconduct occurred and curative instruction could have cured the prejudice resulting from that misconduct, it necessarily recognizes the presence of prejudice that was susceptible to cure. No legitimate strategy justified allowing the prosecutor's prejudicial comments to fester in juror's minds without instruction from the court that the improper argument should be disregarded and play no role in deliberations.

Prejudice results from a reasonable probability that the result would have been different but for counsel's performance, but Berg "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Strickland, 466 U.S. at 693. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

There is a reasonable probability the misconduct and counsel's failure to request a curative instruction influenced the outcome. No one identified Berg as the man who participated in the home invasion or the man who was a passenger or driver in the car when Alie was shot. RP 1005, 1027, 1034-35, 1147. Only vague descriptions of the man involved

were available. RP 993, 1147, 1151, 1199, 1203, 1301-03. Alie thought the Kia passenger might have been wearing a brown jacket. RP 1199, 1203, 1301-03.

Royston, who was Roberts' girlfriend, maintained Berg and Reed were together at her house prior to the home invasion, that she gave Berg a black Carhart jacket before he left, and that Berg returned to her house later that night. RP 1681-85, 1692-94. Royston's credibility was also vulnerable because jurors could infer she lied to get out of jail as part of a cooperation agreement. RP 1698-1705. She agreed to tell the story that officers and lawyers wanted to hear. RP 1702.

A black Carhart jacket was later found in the vicinity of the abandoned Kia. RP 1544-47, 1550-52. But Berg's DNA was not found on the jacket. RP 2056, 2062-63, 2075. Moreover, Surber saw not two but three or four people outside the Watts residence. RP 1099-1101. A rational trier of fact could infer one of those other people entered the residence and committed the burglary/robbery/kidnapping and could conclude the State had not proven Berg was the one who did so. Moreover, as set forth in section A. 4., infra, evidence of witness intimidation based on an accomplice liability theory was weak due to no or scant evidence showing Berg's knowledge.

Circumstantial evidence that could be interpreted to show Berg was in the Kia from which Alie was shot does not necessarily lead to a finding of guilt on the attempted murder charge. Berg's DNA was not found in the Kia. RP 2063-65. Alie did not identify Berg as either the passenger or the driver of the Kia. RP 1147, 1151, 1199, 1203, 1301-03. Berg had a gun in his possession the next day, which the State firearm examiner opined was the gun used in the Alie shooting. RP 1991-92. But the defense forensic scientist opined it was inconclusive whether the cartridge found on the floor of the Kia and bullet lodged in Alie's vest came from the firearm later found in Berg's possession. RP 2031, 2035-36, 2053.

Aldritt claimed Berg bragged about doing the home invasion and shooting, but Aldritt had severe credibility problems. RP 1901-20. He had read a newspaper article about the incident. RP 1915. He testified against Berg to escape prison time on his own pending charges as part of a cooperation agreement. RP 1889-99, 1905-07, 1911. The jury was aware Aldritt had motive to lie. The jury was also was also aware Aldritt had an extensive history of committing crimes of dishonesty. RP 1899-1900, 1904-06. Evidence of prior convictions under ER 609 enlightens the jury with respect to a witness's credibility. State v. Alexis, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980). Aldritt admitted some would consider him a liar. RP

1906. A rational juror could certainly reach that conclusion and reject his self-serving testimony regarding what Berg supposedly told him.

Moreover, the jury was given the option of finding Berg guilty of attempted second degree murder as a lesser offense. CP 37, 39-44, 46 (Instructions 9, 11-16, 18). The jury therefore had to consider proof of premeditated intent to determine which degree of attempted murder Berg committed. State v. Reed, 150 Wn. App. 761, 773-74, 208 P.3d 1274 (2009). The circumstances surrounding the shooting allowed for competing reasonable inferences as to whether the shooting was carried out with a deliberately formed design to kill as opposed to an intentional but rash decision made without forethought. RP 1119-20, 1138-46; CP 42 (instruction defining premeditation). Aldritt acknowledged Berg never suggested the shooting was planned. RP 1913-14. Substantial evidence supported the lesser offense theory of the case as recognized by the judge who gave the lesser offense instruction and the State who conceded such instruction was appropriate. RP 2168-69; see State v. Griffith, 91 Wn.2d 572, 574, 589 P.2d 799 (1979) (criminal defendant entitled to jury instruction on his theory of the case if substantial evidence supports it).

A rational trier of fact could conclude the State had not met its burden of proof beyond a reasonable doubt. The probability of that happening was lessened, however, by the State's misstatement of the law

on the burden of proof and counsel's failure to request a curative instruction.

3. THE EVIDENCE IS INSUFFICIENT TO PROVE THE KIDNAPPING AS A SEPARATE CRIME UNDER THE INCIDENTAL RESTRAINT DOCTRINE.

In claiming sufficient evidence supported the kidnapping charge under the incidental restraint doctrine, the State asserts Korum is distinguishable because Watts was secreted in a place where he was unlikely to be found. BOR at 40. The State is wrong.

The salient point in Korum was that the victims were not moved from their homes in the course of the robberies, which meant that the victims were not secreted in a place where they were unlikely to be found. State v. Korum, 120 Wn. App. 686, 707, 86 P.3d 166 (2004), rev'd on other grounds, 157 Wn.2d 614, 141 P.3d 13 (2007). The same rationale holds here. The garage — the site of Watts's restraint — was attached to Watts's house. RP 998, 1001. Watts was not removed from the environment in which he was found and isolated in another. Watts was restrained in the garage at its backdoor, which leads to the backyard. RP 991-92, 994-95. There is a regular entry door that leads directly from the garage to the interior of the house. RP 998, 1001.

No Washington court has ever found a victim was transported to a place where he was unlikely to be found when the victim remained in his

residence or an area attached to his residence for the entire duration of the crime. Cf. State v. Harris, 36 Wn. App. 746, 754, 677 P.3d 202 (1984) (sufficient evidence of kidnapping distinct from rape where defendants picked up victim from bar but drove victim to dead end gravel road instead of taking her home, thereby holding her in a secluded place where she was not likely to be found).

Moreover, Watts had a roommate who lived in the house with him. 986-87, 999. This is another fact undermining a finding of concealment sufficient to support an independent kidnapping conviction. Watts's restraint in the garage attached to a residence shared with another housemate does not amount to be placed in a secluded area where the victim was unlikely to be found.

The State contends Watts had no means of seeking help after the assailants left because he did not have his cell phone. BOR at 40. Watts was free to walk out the door. And he did just that, where he was met by police responding to a neighbor's 911 call about suspicious activity at the residence. RP 1001-04, 1085.

Moreover, the State is unable to cite to a single case where the victim was not moved anywhere during the course of another crime and yet there was sufficient evidence to support a kidnapping charge under the incidental restraint analysis. Courts may assume that, where no authority

is cited in support of a proposition, "counsel, after diligent search, has found none." State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171, cert. denied, 439 U.S. 870, 99 S. Ct. 200, 58 L. Ed. 2d 182 (1978).

The State maintains Berg's case is distinguishable from Korum because the restraint of Watts did not only occur contemporaneously with the robbery. BOR at 41. According to the State, a short period of restraint occurred after the robbery was complete and was therefore not incidental to the robbery. BOR at 41.

There are several problems with that argument. First, kidnapping is a continuing crime that lasts only so long as the unlawful detention of the kidnapped person lasts. State v. Dove, 52 Wn. App. 81, 88, 757 P.2d 990, 994 (1988). Watts was no longer unlawfully detained after Reed and Berg fled. The State offers no authority for its proposition that a person can be "restrained" within the meaning of the kidnapping statute after the abductor has fled the scene, leaving the victim to physically move about. A person is not "restrained" when there is a ready means of escape. State v. Kinchen, 92 Wn. App. 442, 451-52, 963 P.2d 928 (1998) (addressing unlawful imprisonment offense, which uses same definition of restraint as kidnapping). Watts had a ready and accessible means of escape. He was able to get up and walk out of the garage, into his house and then go

outside. The restraint required for kidnapping ended when the robbery ended.

Second, even if Watts was "restrained" after the abductors left, the duration of restraint need not end simultaneously with the other crime for the incidental doctrine to apply. In Korum, the kidnappings were incidental to the robberies in part because, although some victims were left restrained in their homes when the robbers left, the duration of the restraint was not "substantially longer" than the commission of the robberies. Korum, 120 Wn. App. at 707. One of the kidnappings was incidental to the robbery where the victim remained tied up after the assailants left but was able to free himself within five minutes after their departure. Id. at 707 n.19.

Here, the robbery took about 30 minutes. RP 999. After Reed returned to the garage one last time, he told Watts to stay on the floor for 15 minutes and then left with Berg. RP 1000, 1034. Watts stayed on the floor for three or four minutes after the pair left and then got up and went to the kitchen before going outside. RP 1000-04.

The State argues the fact that Watts got up after three minutes is "irrelevant" because Reed told him to stay down for 15 minutes. That argument cannot be squared with Korum. One man in Korum was left tied up after the robbery but managed to cut himself free after five minutes.

Korum, 120 Wn. App. at 707, 707 n.19. The court looked to that five minute period of time as the relevant one in determining the duration of restraint was not substantially longer than the commission of the robberies. Id. The relevant time here is three or four minutes after Reed and Berg left. Watts was immediately able to move after the robbers left and he in fact did so very soon thereafter. The duration of the restraint does not appear to have been "substantially longer" than that required for commission of the robbery. Id. at 691.

The State's argument suffers from an additional flaw. Its claim that the kidnapping was not incidental to the robbery because the robbery was "completed" before the restraint ended is based on an incorrect view of when a robbery ends. BOR at 41.

Washington courts take a transactional view of robbery that does not consider the robbery complete until the assailant has escaped. State v. Manchester, 57 Wn. App. 765, 769-70, 790 P.2d 217 (1990). The robbery statute provides "force or fear must be used to obtain *or retain* possession of the property, *or to prevent or overcome resistance* to the taking[.]" RCW 9A.56.190 (emphasis added). By retaining possession of the gun that had been held to Watts's head, warning Watts not to call the police upon pain of death, and in this context commanding Watts to remain on the floor for 15 minutes following their departure, the pair used the threat

of force to retain Watts's property or prevent Watts's resistance to the taking. Under the transactional view, the robbery remained ongoing after the taking was complete and after Reed and Berg left the residence because they used the threat of force to retain the property. The restraint used on Watts was incidental to the taking.

The State elsewhere claims the facts of this case are "strikingly similar" to the fact of State v. Allen, 94 Wn.2d 860, 621 P.2d 143 (1980), abrogated by State v. Vladovic, 99 Wn.2d 413, 662 P.2d 853 (1983). BOR at 41-42. The State's reliance on Allen is misplaced.

In Allen, "[t]he first crime (robbery) had come to an end before the second crime (kidnapping) began." Allen, 94 Wn.2d at 864. That is a far cry from Berg's case, where the kidnapping began at the inception of the robbery and continued for the duration of the robbery.

In Allen, "[n]either the flight from the scene of the robbery nor the means of flight therefrom was statutorily or logically a part of the robbery." Allen, 94 Wn.2d at 864. In Berg's case, the kidnapping is part and parcel of the robbery. The restraint used on Watts (knee in back and gun to head) was for the sole purpose of facilitating the robbery inside his house. RP 991-95, 999.

In Allen, the subsequent kidnapping the force used in the subsequent kidnapping was used to abduct the victim by secreting him in a

place where he was not likely to be found (i.e., lying flat in the back seat of a car) after he was removed from the convenience store that was robbed. Allen, 94 Wn.2d at 863. Watts was not moved at all from the place where he was initially found and, as set forth above, was not secreted in a place where he was unlikely to be found.

Furthermore, Allen failed to take into account the transactional view of robbery, which does not consider the robbery compete until escape. The transactional view of robbery was not established law at the time Allen was decided, but it is now. Manchester, 57 Wn. App. at 770; accord State v. Truong, 168 Wn. App. 529, 277 P.3d 74, 77-78 (2012).

In any event, Allen was not decided under the sufficiency of evidence standard but rather a double jeopardy standard. Korum was decided under the sufficiency of evidence standard. As set forth above, the duration of restraint in Berg's case was not substantially longer than the robbery itself and was therefore the kidnapping was incidental to the robbery. Korum, 120 Wn. App. at 707.[3]

The Supreme Court has held "the mere incidental restraint and movement of [a] victim during the course of another crime" cannot support a separate kidnapping charge where the movement and restraint

[3] Korum cited Allen in support of its incidental restraint analysis. Korum, 120 Wn. App. at 705.

had "no independent purpose or injury." State v. Brett, 126 Wn.2d 136, 166, 892 P.2d 29 (1995) (citing State v. Green, 94 Wn.2d 216, 227, 616 P.2d 628 (1980)). The State does not explain what independent purpose or injury the kidnapping had apart from the robbery. When the only evidence presented to the jury demonstrates the restraint is merely incidental to completing another crime, the jury has not received sufficient evidence to convict the defendant of a separately charged kidnapping. Korum, 120 Wn. App. at 707. That is what happened here.

Finally, the State argues "to the extent" Berg argues the merger doctrine applies under a double jeopardy analysis, that argument is foreclosed by State v. Louis, 155 Wn.2d 563, 571, 120 P.3d 936 (2005). BOR at 43-44. Berg does not argue the merger doctrine applies. Berg advances a sufficiency of evidence argument. The sufficiency of evidence analysis is distinct from whether crimes merge for double jeopardy purposes. In re Pers. Restraint of Bybee, 142 Wn. App. 260, 266-67, 175 P.3d 589 (2007) ("Although Green borrowed the 'incidental restraint' concept from an earlier merger case, it incorporated this concept into a new standard for determining sufficiency of evidence on appeal.").

The State's citation to State v. Ferguson, 164 Wn. App. 370, 264 P.3d 575 (2011), review denied, 173 Wn.2d 1035, 277 P.3d 669 (2012) is

inappropriate. BOR at 44. The State cites to the unpublished portion of that partially published opinion. This is not allowed under GR 14.1(a).

3. THE EVIDENCE IS INSUFFICIENT TO CONVICT BERG AS AN ACCOMPLICE TO WITNESS INTIMIDATION.

The State claims the evidence is sufficient to convict Berg of witness intimidation because Berg himself individually threatened to kill Watts while Reed collected the marijuana plants. BOR at 47-48. Specifically, Berg told Watts to keep looking straight down and reminded Watts they would kill him whenever he tried to turn his head. RP 998.

There are two problems with this argument. First, this threat did not attempt to induce a prospective witness (Watts) "not to report the information relevant to a criminal investigation." RCW 9A.72.110(1)(d). The threat was an attempt to prevent Watts from moving around while the residence was robbed. There is insufficient evidence to support the witness intimidation charge based on this threat.

Second, the State did not rely on Berg's threat as the basis for the witness intimidation count. This is not surprising, given sufficient evidence does not support an intimidation charge based on that threat. Rather, the prosecutor at trial clearly elected a different threat uttered by Reed as the basis for the witness intimidation conviction. The prosecutor in closing argument specified the threat to kill Watts if he talked to police

as basis for this count: "The fourth allegation is that of intimidating a witness, which the Court has given you an instruction on, and I'm going to run through those material elements here a little later. But that has to do with threatening to kill Mr. Watts if he talks to the police." RP 2254.

The core factual basis for the witness intimidation count is worth repeating. When Reed (the short man) returned to the area where Watts was restrained, Berg (the tall man) got off Watts and asked what they were going to do. RP 1000. Reed told Watts he had his wallet, knew where he lived, could find him, and asked if he was going to call the police. RP 1000. Watts said no. RP 1000. Reed asked "What are you gonna tell the police?" RP 1000. Watts said, "I'll tell them nothing." RP 1000. Reed responded, "We will find you." RP 1000.

The prosecutor returned to this scenario a short time later: "Let me drop back to the point where the intruders were getting ready to depart and you were told by the shorter of the two that he had your wallet and information. What was it, if anything, that they said they would do if you went to the police?" RP 1017. Watts answered, "They would hunt me down and kill me." RP 1017.

The prosecutor framed the leading question as "they said" without specifying who said the threat. Watts, in answer to that leading question, responded with what was said: "They would hunt me down and kill me." RP

1017. But Watts did not specify who uttered this threat. From the preceding context, in which Reed warned Watts not to talk to the police, it is apparent that Reed said they would hunt him down and kill him.

And in fact, the prosecutor in closing argument made it clear that Reed was the one who uttered the threat that formed the basis for the witness intimidation count.[4] RP 2252, 2278, 2292. For example, the prosecutor at one point set forth the facts as follows: "when they're done with taking all this property, the first guy, the shorter guy, comes back while the younger taller guy is still with Mr. Watts. And the younger guy asks the shorter guy, "What are we gonna do with him?" meaning Mr. Watts. And that's when the shorter fellow asks Mr. Watts, "What are you gonna tell the police?" and Mr. Watts says, "I'm not gonna tell the police anything." And the shorter guy tells him, "I've got your wallet. I know who you are. And if you talk to the police, I will come back and kill you. All that's occurring in the presence of the other, younger, taller kid that was restraining Mr. Watts." RP 2252. The prosecutor identified Reed as the shorter guy. RP 2278. The prosecutor later invited the jury to convict both defendants on the witness intimidation charge by explaining "The shorter of the two guys in the presence of the taller of the two guys who was holding Mr. Watts at

[4] Reed's defense counsel likewise conceded in closing argument that Reed was the one who directed this threat to Watts. RP 2382.

gunpoint on the floor told Mr. Watts, "if you talk to the police, I have your wallet, I have your information, I am gonna come back and kill you." RP 2292.

In light of these circumstances, the State's argument that Berg was guilty as a principal to the crime must fail. The State is judicially estopped from arguing on appeal that Berg could be guilty of witness intimidation on the factual basis that Berg uttered the threat. In closing argument, the State plainly elected Reed as the person who uttered the threat that formed the basis for the witness intimidation count.

"Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." Anfinson v. FedEx Ground Package System, Inc., __Wn.2d__, 281 P.3d 289, 294 (2012) (quoting Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (internal quotations omitted)). "There are two primary purposes behind the doctrine: preservation of respect for judicial proceedings and avoidance of inconsistency, duplicity, and waste of time." Anfinson, 281 P.3d at 295.

As an equitable doctrine, judicial estoppel is not to be defined with reference to "inflexible prerequisites or an exhaustive formula for determining [its] applicability." New Hampshire v. Maine, 532 U.S. 742,

751, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001). Courts focus on three factors when deciding whether to apply judicial estoppel: (1) whether the party's later position is clearly inconsistent with its earlier position; (2) whether accepting the new position would create the perception that a court was misled; and (3) whether a party would gain an unfair advantage from the change. Miller v. Campbell, 164 Wn.2d 529, 539, 192 P.3d 352 (2008).

Judicial estoppel "prevents a party from taking a factual position that is inconsistent with his or her factual position in previous litigation." Holst v. Fireside Realty, Inc., 89 Wn. App. 245, 259, 948 P.2d 858 (1997). The State's factual position on appeal is clearly inconsistent with its position at the trial level. On appeal, the State argues Berg uttered the threat. At the trial level, the State exclusively argued Reed uttered the threat. The integrity of the judicial system depends upon factual consistency. It would affront the integrity of the judicial system to allow the State to argue on appeal that Berg was the one who uttered the threat when its factual position taken in front of the jury was that Reed was the one who made the threat.

Furthermore, if this Court were to accept the State's new position on appeal, it would create the perception that this Court was misled in this action. In addition, the State would gain an unfair advantage in being able

to defeat a sufficiency of evidence challenge on the basis of a factual position it rejected at the trial level. The State elected Reed as the person who uttered the threat and invited the jury to convict both defendants based on that factual predicate. The jury duly found Berg guilty. The State seeks to gain an unfair advantage on appeal by attempting to defeat the sufficiency of evidence challenge on the basis of a factual predicate that is inconsistent with its position below. Estoppel is necessary in this circumstance to maintain the integrity of the judicial process.

Turning to the accomplice liability theory, the State argues Berg and Reed acted in coordination throughout the night of April 15, 2009 in order to achieve the common design of robbery. BOR at 48-49. Yet when Reed returned to the area where Watts was restrained after being gone for a period of time, Berg asked Reed what they were going to do with Watts. RP 1000. That evidence does not support the argument that Berg knew Watts was going to imminently commit the crime of witness intimidation by uttering the threat to kill Watts if he went to the police.

Boiled down, the State's "common design" argument is a "forseeability" argument under a different label. It is nothing more than the argument that Berg should be found guilty because it was foreseeable that Reed would commit the crime of witness intimidation during the course of the planned robbery. That is not the law. "[F]oreseeability is

not sufficient to establish accomplice liability." State v. King, 113 Wn. App. 243, 288, 54 P.3d 1218 (2002). "While an accomplice may be convicted of a higher degree of the general crime he sought to facilitate, he may not be convicted of a separate crime absent specific knowledge of that general crime." King, 113 Wn. App. at 288.

King is instructive. In that case, the State argued defendant Israel was guilty as an accomplice to kidnapping because that crime is a natural consequence of robbery and therefore no specific knowledge is required. Id. at 288. The court rejected that argument because foreseeability is not sufficient to establish accomplice liability. Id. Although the evidence was sufficient to show that Israel was involved in planning the robbery, evidence did not show kidnapping was a part of that plan. Id. The evidence was insufficient to convict Israel of kidnapping because there was no evidence Israel knew Bryant planned to commit the crime of kidnapping. Id.

The same analysis applies here and compels the same result. The question comes down to whether Berg had knowledge that he was aiding in the crime of witness intimidation. Id. The record does not establish this fact. Berg's participation in the robbery offense cannot be extrapolated to show knowledge that Reed would commit the crime of witness intimidation. The evidence, looked at in the light most favorable to the

State, shows Berg planned the robbery with Reed. But it does not show that Berg knew that Reed planned to commit the crime of witness intimidation during the course of that robbery. Berg asked Reed what they should do with Watts. RP 1000. Reed responded by threatening Watts. RP 1000, 1017. The evidence shows Reed's decision to do so was spontaneous. RP 1000, 1017. The evidence does not show Berg knew Reed was going to utter that threat and is therefore insufficient to convict Berg of witness intimidation.

B. CONCLUSION

Berg requests reversal of the convictions.

DATED this 7th day of September 2012.

Respectfully Submitted,

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 41167-9-II
	)	
DAYLAN BERG,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7TH DAY OF SEPTEMBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DAYLAN BERG
DOC NO. 34306
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF SEPTEMBER 2012.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

September 07, 2012 - 3:00 PM

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Court of Appeals Case Number: 41167-9

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