91007-3

Supreme Court No.
COA No. 43358-3-II
(41739-1-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

COREY YOUNG,

Petitioner

ON APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY

The Honorable Ronald E. Culpepper

PETITION FOR REVIEW

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FILED IN COA ON SEPTEMBER 25, 2014

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WASHINGTON CASES

ETHICAL STANDARDS

COURT RULES

A. IDENTITY OF PETITIONER

Corey Young was the defendant in Pierce County No. 11-1-04679-8, and the appellant in Court of Appeals No. 43358-3, consolidated with No. 43365-6, decided August 26, 2014.

B. COURT OF APPEALS DECISION

Mr. Young seeks review of the decision entered August 26, 2014. Appendix A (Decision).

C. ISSUES WARRANTING REVIEW

1. Whether review is warranted where the prosecutor's misconduct, in questioning Mr. Young at length about unproffered, unadmitted non-existent evidence of a .22 caliber bullet the prosecutor described as found by police in his jacket, was flagrant, incurable and reversibly prejudicial, and whether the Court failed to correctly apply the law of incurability and failed to apply the law that prejudicial effect occurs where the misconduct causes the jury to reject the facially believable defense version of events.

2. Whether review is warranted where the Court misapplied the test for whether restraint was incidental.

3. Whether review is warranted where the Court misapplied the same criminal conduct test.

4. Whether trial court irregularities were *per se* prejudicial in violation of Corey Young's Due Process rights.

D. STATEMENT OF THE CASE

Mr. Young was convicted of robbery, kidnapping, being armed with a gun in a robbery, being armed with a gun in a kidnapping, and possessing the gun illegally. CP 71-74, 139-52.

The alleged victim, Mr. Yang, pulled his car into the driveway of a 7-11 convenience store, where several police officers were congregating in the parking lot. Yang suddenly yelled out to them, and claimed that his passengers, Corey Young and Jero Dagraca, were robbing him at gunpoint. 3/27-28/12RP at 18-23. He testified at trial that the two males came to his vehicle, robbed him of cash, and then made him drive to the nearby 7-11 with a plan to use his card to access cash from a cash machine. 3/27-28/12RP at 114-22. But at trial, Young and Dagraca both explained to the jury that they had approached Mr. Yang at his car and he had agreed he would buy them beer at the nearby 7-11. 3/29/12RP at 153-54, 164-65.

In the car, Young and Dagraca gave Yang a "hit" of illegal marijuana, and then agreed to also contact a marijuana dealer for him. Corey Young was using Yang's phone to do so, when Yang panicked upon pulling into the 7-11 and seeing the police. Young

and Dagraca panicked themselves when Yang started yelling to the officers, and they ran from the car with the phone; additionally, Mr. Young believed he had a warrant. 3/29/12RP at 153-65. Young left behind a jacket on the pavement before being apprehended a short distance later. 3/27-28/12RP at 20-29; Exhibit 12 [paper evidence bag containing jacket].

The police witnesses at trial testified that a magazine-type pistol was found in Mr. Yang's vehicle. 3/27-28/12RP at 27-31 (Officer Michael Wulff). The pistol was a .22 caliber with 6 bullets in it, found in the passenger footwell of Mr. Yang's car. 3/27-28/12RP at 29-31, 42; Exhibit 3 [evidence box containing handgun), Exhibit 8 [magazine]; Exhibit 9 ["Yellow envelope containing ammunition (6 bullets)".

No police officer or other witness testified that any other bullet was seen, located, found or believed to exist. No such item was ever proffered much less admitted into evidence.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. THE FLAGRANT MISCONDUCT WAS INCURABLE AND REQUIRED REVERSAL.

a. <u>Review is warranted</u>. The Court of Appeals decision that the flagrant misconduct of the prosecutor did not require reversal

because it was not incurable and did not cause reversible prejudice warrants review under RAP 13.4(b)(1), (2) and (3) in several respects.

First, the Court of Appeals failed to follow the decision of this Court in State v. Emery, 174 Wn.2d 741, 760-72, 278 P.3d 653 (2012), which states that misconduct requires reversal, *inter alia*, if it is incurable based on its effect on the jury; and here, the misconduct was incurable because the jury could not effectively be told to ignore pivotal "bullet" evidence apparently claimed by the police and the prosecutor to exist, and its effect was to cause the jury to accept the State's version of events, and reject the defendants' version, which was facially plausible.

Second, relatedly, the Court of Appeals failed to properly analyze the misconduct for its prejudicial effect, because it looked solely to the implicating evidence the State had proffered, instead of correctly assessing the fact of the defendants' offering a facially believable version of events, as against the State's factual theory of the events, and assessing whether the misconduct prejudiced the outcome in respect of the jury reaching the same result absent the prosecutor's "bullet" misconduct. This was contrary to this Supreme Court's decision in State v. Fricks, 91 Wn.2d 391, 396,

588 P.2d 1328 (1979), and multiple decisions of the Court of Appeals. Appellant Corey Young's position is that incurability inherently establishes reversible prejudice. This Court should grant review.

b. Misconduct. The right to a fair jury trial is secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967 (1999); U.S. Const. amends 6, 14; Wash. Const. art. 1, sec. 22. But prosecutorial misconduct may deprive a defendant of this right to a fair trial. See, e.g., In re Glassman, 175 Wn.2d 696, 286 P.3d 673 (2012) (citing State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984)).

> If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. State v. Stenson, 132 Wn.2d. 668, 727, 940 P.2d 1239 (1997). Under this heightened standard, the defendant must show that (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." [State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)].
> * * *

> An objection is unnecessary in cases of incurable prejudice only because "there is, in effect, a mistrial and a new trial is the only and the mandatory remedy." State v. Case, 49 Wn.2d. 66, 74, 298 P.2d 500 (1956).

State v. Emery, at 760-72.

c. The non-existent bullet. Beyond just the general standards of error and appealability above, it is specific error to argue evidence to the jury that has not been admitted at trial. State v. Pete, 152 Wn.2d 546, 553–55, 98 P.3d 803 (2004).

The pistol found in Mr. Yang's vehicle carried a magazine, and 6 bullets or rounds. 3/28/12RP at 27-31.

However, during Mr. Young's testimony, the prosecutor cross-examined him regarding a seventh bullet, which he described as located in the jacket that Mr. Young dropped as he fled Yang's vehicle:

> Q: There was a .22 caliber bullet found in that jacket. Is that your gun?
> A: No, sir. I don't know anything about that.

3/29/12RP at 167-68. Mr. Young repeatedly denied that he knew what the prosecutor was talking about, but the prosecutor then implied that Mr. Young was wrongly denying the existence of a bullet and in turn then denying that the jacket was his own jacket, in order to avoid the bullet evidence. 3/29/12RP at 168-69.

But the record does not indicate the existence of any such bullet.

c. The misconduct was flagrant incurable and prejudicial. In general, lay jurors tend to trust the prosecutor because he is a representative of the State and the community, with an obligation to do justice. See United States v. Young, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985); Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934).

Thus the fair trial to which the defendant is entitled certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office into the scales against the accused. State v. Monday, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (alteration in original).

In In re Glassman, 175 Wn.2d 696, 286 P.3d 673 (2012), this Court found that photographs of the defendant, which had the words "guilty" superimposed over them, were flagrant misconduct because they created nonexistent evidence. Glassman, 175 Wn.2d at 704-05.

The Court held the appellant in Glassman to the standard that, because he did not object at trial, the errors were waived unless the misconduct was so flagrant and ill intentioned that an

instruction would not have cured the prejudice. Glassman, 175 Wn.2d at 705 (citing State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43 (2011); State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)). But the Court emphasized that the misconduct injected evidence not before the jury, and stated that the consideration of unadmitted matters requires reversal where there is "reasonable ground" to believe the defendant may have been prejudiced:

> Our courts have repeatedly and unequivocally denounced the type of conduct that occurred in this case. First, we have held that it is error to submit evidence to the jury that has not been admitted at trial. State v. Pete, [152 Wn.2d 546, 553–55, 98 P.3d 803 (2004)]. The "long-standing rule" is that " 'consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced.' " Id. at 555 n. 4, 98 P.3d 803 (quoting State v. Rinkes, 70 Wn.2d 854, 862, 425 P.2d 658 (1967) (emphasis omitted)); see also, e.g., State v. Boggs, 33 Wn.2d 921, 207 P.2d 743 (1949), overruled on other grounds by State v. Parr, 93 Wn.2d 95, 606 P.2d 263 (1980).

Glassman, 175 Wn.2d at 704-06 (also stating that "here the prosecutor's modification of photographs by adding captions was the equivalent of unadmitted evidence.").

As here, the prosecutor in Glassman created evidence not in the record, and by doing so also placed the credibility and prestige of the State behind that factual assertion. Glassman, 175 Wn.2d at

705-07 (citing American Bar Association Standards for Criminal Justice std. 3–5.8; and State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006) (finding it improper for a prosecuting attorney to express his individual opinion that the accused is guilty, independent of the evidence in the case)); see also State v. Claflin, 38 Wn. App. 847, 849–50, 690 P.2d 1186 (1984) ("a prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record").

This was incurable because the prosecutor put the weight of his office and that of the police behind his insistent claims. Despite Mr. Young's denials, the prosecutor continued to refer to a seventh bullet, continuing to state in front of the jury that a .22 caliber bullet for the gun in Mr. Yang's car had been located by police in the pocket of Mr. Young's jacket, and claiming that police witnesses had collected such evidence. 3/29/12RP at 167-69.

Mr. Young continued to respond "no" and expressed his denial and confusion over the prosecutor's claims. 3/29/12RP at 168 ("I don't get what you are trying to say."). The prosecutor pursued the bullet evidence claim at length, including essentially accusing Mr. Young of wrongfully denying it. This misconduct was so cumulative and pervasive that it meets the standard that it could not have been

cured by an instruction. State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011). When applying this standard, this Court has noted that courts should "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." State v. Emery, 174 Wn.2d at 762. But no matter how strongly cautioned, no jury could possibly ignore this claimed evidence by the prosecutor and pretend that the State's and apparently the police's claim that it existed.

Reversal is required. When there is a reasonable ground to believe that the defendant may have been prejudiced by unadmitted matters, the verdict must be vitiated. Pete, supra (citing State v. Rinkes, 70 Wn.2d at 862). Mr. Young has shown that the prosecutor's flagrant conduct was prejudicial. Thorgerson, 172 Wn.2d at 442. Considering the differing accounts of events of the parties and the connection that the bullet matter appeared to create to the complainant's account, Mr. Young has shown a substantial likelihood that the misconduct affected the jury verdict.

Under State v. Fricks, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979), the weight of the State's evidence in a case does not defeat reversal where the misconduct was material to the jury not accepting the defense's competing theory of the case. Thus in

State v. Gutierrez, 50 Wn. App. 583, 591, 749 P.2d 213,(1988), the Court of Appeals, relying on Fricks, echoed that a claim of overwhelming evidence is insufficient to affirm if the misconduct was material to the jury accepting the defendant's wholly different explanation for the very same evidence:

> In this case, Mr. Warren's credibility was also at issue because he testified on his own behalf concerning disputed facts. His exculpating story was also plausible. He presented corroborating testimony and a receipt in an effort to support his story. Nevertheless, the State argues it produced overwhelming evidence linking Mr. Warren to the premises where the drugs were found.. . . However, if Mr. Warren's story had been believed by the jury, there is a reasonable doubt whether they would have found he exercised the necessary dominion and control over the trailer.

State v. Gutierrez, 50 Wn. App. at 591. Also similar is the case of State v. Holmes, 122 Wn. App. 438, 93 P.3d 212 (2004). The Holmes Court stated that "the outcome of the trial depended on the jury's evaluation of [defendant's] credibility as compared to theirs. Credibility determinations "cannot be duplicated by a review of the written record, at least in cases where the defendant's exculpating story is not facially unbelievable." State v. Holmes, 122 Wn. App. at 438 (quoting State v. Gutierrez, 50 Wn. App. at 591).

In the Fricks case, circumstantial evidence linked the defendant to burglary of a service station and a confession, later recanted, was admitted. On appeal, the Court of Appeals held that the State's conduct in making references to defendant's post-Miranda silence violated his Due Process rights. On the issue of harmless error the Court stated the following:

> The State contends, however, that any constitutional error was harmless. We cannot agree. Defendant's credibility was at issue because he testified on his own behalf on disputed matters. His exculpating story was plausible. While the State has substantial evidence against him, its case is not overwhelming.

Fricks, 91 Wn.2d at 396. The same is true here. This was outcome-determinative. The claimed bullet described as found in the jacket allowed the jury to reject Mr. Young's defense. Both Mr. Young and Mr. Dagraca testified and described in detail how they had approached Mr. Yang that night, because they were trying to find an adult who would purchase alcohol for them. RP 146-148, 157, 162-63. After some effort, Mr. Yang agreed to buy them beer, and Mr. Yang also wanted the two young men to locate an amount of marijuana for him to purchase. RP 153-54, 164-65.

When Yang's car pulled into the 7-11, Yang suddenly and falsely yelled out the window to the police officers that he was being

robbed, perhaps scared that he was engaged in at least two illegal activities. RP 150, 165. Mr. Young and Mr. Dagraca got out of the car and ran away because they were scared and they had marijuana on them. RP 150-52. Mr. Young also explained that he ran because he had warrants. RP 165-66. This was an entirely credible account of the events. However, the bullet appeared to connect Mr. Young to the gun found in Yang's vehicle and support the jury accepting Mr. Yang's version of events over that of the testifying co-defendants. See Fricks, 91 Wn.2d at 396.

The need for reversal is also demonstrated by the fact that little if any evidence is "untainted" where the misconduct would cause the jury to reject the defense's account. In determining whether the untainted evidence is overwhelming, the court must examine whether the defendant's credibility was at issue if he testified on his own behalf regarding disputed matters, and whether the defendant's exculpatory story was plausible. State v. Heller, 58 Wn. App. 414, 421, 793 P.2d 461 (1990). If the defendant's exculpatory story is facially believable, an appellate court cannot conclude that, absent the error, a reasonable jury would have found the defendant guilty. Fricks, 91 Wn.2d at 396; State v. Gutierrez, 50 Wn. App. at 591. Under these authorities, the incurable

misconduct warrants review and requires reversal. RAP 13.4(b)(1), (2).

2. ANY RESTRAINT WAS INCIDENTAL TO THE ONGOING ROBBERY.

a. Review is warranted. The Court of Appeals rejected Mr. Young's argument that any restraint was incidental to the robbery and was not a separate kidnap, a sufficiency and Double Jeopardy issue. Decision, at pp. 11-13. This was contrary to State v. Green, 94 Wn. 2d. 216, 227, 616 P.2d 628 (1980) and U.S. Const. amends 5, 14. Review is warranted under RAP 13.4(b)(3) and (4).

b. The restraint was incidental to the robbery. Per Green, supra, and State v. Berg, 177 Wn. App. 119, 136-37, 310 P.3d 866 (2013), the restraint was incidental. In Berg, the Court of Appeals held that, as a matter of law:

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

State v. Berg, 177 Wn. App. at 136–37. The crucial factor in this case, which controls the other factors, is that the restraint was part

of the robbery (Mr. Young vigorously disputes that this is the true account of events, see Part E.1, supra). The purpose of the short car ride and the ongoing threats was that the perpetrators wanted to employ Yang's card to obtain money, the object of the robbery, from the cash machine at 7-11. 3/27-28/12RP at 114-22. The Court of Appeals erroneously held that the robbery was completed before the persons entered the car, and that further restraint was unnecessary. Decision, at pp. 12-13. Reversal is required.

3. THE COURT OF APPEALS MISAPPLIED THE SAME CRIMINAL CONDUCT ANALYSIS.

a. Review is warranted. The Court of Appeals misapplied the same criminal conduct analysis of State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237, 749 P.2d 160 (1987). Review is warranted under RAP 13.4(b)(1).

b. The crimes were the same criminal conduct. The defendants' alleged crimes against Mr. Yang shared the same objective intent and so were the crimes committed at the same time and place. The Court of Appeals failed to understand that the robbery was an ongoing matter. Although none of what the alleged victim claimed was taken from him was found on the defendants (Young had cash in a totally different amount), Yang said that the

defendants took a cash or debit-type card from him, and then they drove to the 7-11 under their threat, in order to get money withdrawn. The robbery was not "over" or completed before the very short car trip. This is not accurately described as a situation where the defendant completed one crime before he commenced the next. See State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997). Here, the entire episode was an ongoing robbery effort. Thus in State v. Dunaway, 109 Wn.2d 207, this Supreme Court held that kidnapping and robbery constituted the same criminal conduct where the objective of abducting the victim was to commit robbery.

Further, when determining if two crimes share a criminal intent, this Court focuses on (1) whether the defendant's intent, viewed objectively, changed from one crime to the next and (2) whether commission of one crime furthered the other. State v. Collicott (Collicott II), 118 Wn.2d 649, 667–669, 827 P.2d 263 (1992). Thus in State v. Taylor, the Court of Appeals reasoned:

> The evidence established that Taylor's objective intent in committing the kidnapping was to abduct Murphy by the use or threatened use of the gun and that his objective intent in participating in the second degree assault was to persuade Murphy, by the use of fear, to not resist the abduction. The assault began at the same time as the abduction, when Taylor and

> Nicholson entered the car. It ended when the kidnappers exited the car and the abduction was over. And there is no evidence that Taylor or Nicholson engaged in any assaultive behavior during the kidnapping that did anything beyond facilitating and furthering the abduction.

State v. Taylor, 90 Wn. App. 312, 321, 950 P.2d 526 (1998). This same analysis, regarding objective intent, bears on the fact that the two crimes were ongoing from the robbery commencement at the car through the short car trip. Resentencing is required.

4. TRIAL IRREGULARITIES PREJUDICED MR. YOUNG.

a. Review is warranted. The Court of Appeals rejected Mr. Young's Statement of Additional Grounds argument that the court failed to keep the jury separated in the hallway where persons were congregating, and in failing to tell them to disregard anything they heard. SAG, at pp. 4, 9. This violated Due Process, U.S. Const. amend. 14, and State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). Review is warranted under RAP 13.4(b)(1), and (3).

b. Trial court irregularities. Courts determine whether a trial irregularity requires a new trial by considering (1) the seriousness of the irregularity, (2) whether the irregularity involved cumulative evidence, and (3) whether the court properly instructed the jury to disregard it. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514

(1994) (quoting State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014(1989)). Here, the trial court allowed jurors to sit and congregate in the hallway during trial, failed to tell the jurors that they could not be in the hallway, and failed to admonish them to disregard anything they might have seen or heard. And indeed, there were jurors in the hallway frequently. 3/27/12RP at 112-14, 127. In particular, it appeared that jurors were congregating in the hallway and, as a result, seeing various friends of the defendants. 3/27-28/12RP at 87-88. These are an array of irregularities that caused *per se* prejudice. State v. Westlund, 13 Wn. App. 460, 472, 536 P.2d 20, review denied, 85 Wn.2d 1014 (1975). Mr. Young argues his trial was not the fair trial to which he was entitled. Estelle v. Williams, 425 U.S. at 503; U.S. Const. amend 14.

F. CONCLUSION

Based on the foregoing, Mr. Corey Young asks this Court to accept review and reverse his judgment and sentence.

DATED this 25 day of September, 2014.

Respectfully submitted,

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Appendix A - Decision

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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

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

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

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

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

FACTS

I. ROBBERY AND KIDNAPPING

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

[2] Defendants' other arguments fail.

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

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

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

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

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

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

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

II. PROCEDURE

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

A. Continuances

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

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

[6] 1 VRP at 30.

[7] The State charged DaGraca in adult court.

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

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

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

B. Jury Voir Dire

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

C. Trial

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

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

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

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

[9] 2 VRP at 156.

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

D. Sentencing

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

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

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

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

DaGraca and Young appeal their convictions and sentences.

ANALYSIS

I. DaGraca: Adult Court Jurisdiction

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

As our Washington Supreme Court has recently reiterated:

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

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

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

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

[11] RCW 13.04.030 provides, in part:

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

(Emphasis added).

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

(Emphasis added).

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

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

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

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

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

II. KIDNAPPING AND ROBBERY

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

A. Kidnapping not Incidental to Robbery

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

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

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

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

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

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

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

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

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

B. Kidnapping Not "Same Criminal Conduct" as Robbery

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

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

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

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

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

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

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

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

III. PROSECUTORIAL MISCONDUCT

A. No Prejudice

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

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

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

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

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

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

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

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

B. Effective Assistance of Counsel

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

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

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

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

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

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

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

IV. STATEMENTS OF ADDITIONAL GROUNDS

A. DaGraca

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

B. Young

1. Trial court irregularities

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

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

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

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

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

2. Juror bias

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

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

3. Prosecutorial misconduct: Referencing clothing and aliases

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

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

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

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

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

[28] 2 VRP at 169.

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

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

4. Ineffective assistance of counsel; testifying on own behalf

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

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

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

5. Time for trial and speedy trial rights

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

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

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

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

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

CrR 3.3(f).

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

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

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

6. Firearm sentencing enhancements

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

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

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

[30] WASH. CONST. art I, § 22.

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

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

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

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

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

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

We affirm.

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

Hunt, J.

We concur:

Bjorgen, A.C.J.

Bjorgen, A.C.J.

Maxa, J.

Maxa, J.

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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. 43358-3-II**, 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 / residence / e-mail address as listed on ACORDS / WSBA website:

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☐ petitioner

☒ Kathryn Selk - Attorney for other party

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