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Division I
State of Washington
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SUPREME COURT
STATE OF WASHINGTON
7/20/2018
BY SUSAN L. CARLSON
CLERK

SUPREME COURT NO.96104-2

NO. 75735-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICHARD ARGO,

Petitioner.

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

The Honorable Ken Schubert, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Richard Argo, appellant below, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Argo seeks review of the Court of Appeals decision in State v. Argo, No. 75735-1-I (Slip Op. filed May 29, 2018). A copy of the decision is attached as Appendix A. A copy of the "Order Denying Motion for Reconsideration" entered by the Court of Appeals on June 15, 2018, is attached as Appendix B.

C. REASONS TO ACCEPT REVIEW

This Court should accept review because the decision raises a significant question of law under the state and federal constitutions, to wit; under U.S. Const. amend. VI; Const. art. I, §§ 21 & 22, does a criminal defendant have the right to be tried only for the crimes charged and to unanimous jury verdicts? RAP 13.4(3).

D. ISSUES PRESENTED FOR REVIEW

Argo was charged with committing both a first-degree robbery and first-degree burglary against Kathy Wetzler. At trial, the State presented evidence the same offenses were committed against Martha Mills, even though Argo was not charged with those offenses. The to-convict instructions allowed the jury to convict Argo of committing the burglary and

robbery against either Wetzler or Mill. Did the to-convict instructions violated Argo's constitutional rights under U.S. Const. amend. VI and Wash. Const. art. I, §§ 21 & 22, which provide a criminal defendant the right to be tried only for the crimes charged and to unanimous jury verdicts?

E. STATEMENT OF THE CASE[1]

1. Procedural Facts

In September 2013, the King County Prosecutor charged Argo with two counts of first degree robbery, including deadly weapon allegations for both. CP 1-2. Named codefendants included Derek Donnelly, Joshua Rowe, Louis Crawford and Kristina McDonald. Id. The State alleged that on December 4, 2011, the defendants planned and executed the home-invasion robbery of Kathy Wetzler's home and injured both Wetzler and her renter Martha Mills in the process of taking property. CP 3-16.

Donnelly, Crawford, McDonald and Rowe pled guilty to the original or lesser charges. RP 610, 654, 844, 1071. Argo proceeded to a jury trial, held May 12 through June 8, 2016. Prior to trial, the State amended the charges, replacing the robbery charge involving Mills, with a first-degree burglary charge with Wetzler as the named victim and an

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[1] A more detailed statement of the case is set forth in the Argo's Brief of Appellant at pages 3-24 and incorporated herein by reference.

associated deadly weapon allegation, and the State also added two first degree assault charges, one each for Mills and Wetzler, both with accompanying deadly weapon allegations. CP 21-23.

Argo was acquitted of the first-degree assault of Wetzler but convicted of second degree assault as a lesser included offense, albeit without a deadly weapon. CP 49-51. The jury convicted Argo on the other counts, including finding he or an accomplice were armed with a deadly weapon for each offense. CP 44-46, 48, 52; RP 1524-26.

2. Substantive Facts

Mills testified that as of December 2011, she had been renting a room from Wetzler in her single-wide mobile home in north Seattle trailer park for about a year. RP 212-13, 216. Mills agreed Wetzler both used and sold drugs, and usually kept her money and drugs in a blue "bank bag." RP 214, 237.

Late on December 4, 2011, Mills was in her room at the back of the trailer when she heard Wetzler exclaim "oh, shit," and then saw Wetzler, who was in the front of the trailer, falling backwards to the ground, as if pushed. RP 215-16, 220-22. When Mills made her way to the front of the trailer, she discovered a man on top of Wetzler armed with a knife and screwdriver cutting Wetzler's face. Another man was standing inside by the front door, which was closed. RP 222-23.

When Mills told the man to get off Wetzler, he came at Mills and cut the inside of her mouth as the man at the door demanded they turn over a bag of money. RP 222-26. Mills saw the bag they wanted and as she retrieved it she was stabbed in the back by the armed assailant. RP 226. Mills recalled tossing the bag to the man at the door after being stabbed, after which both men ran off. RP 226-27.

Mills initially testified she believed Argo was the man she saw standing at the door demanding the bag of money. RP 225. She later admitted she did not get a very good look at the man as she "didn't really want to draw attention" to herself and recognized that "maybe [she] didn't want to be able to identify him." RP 234. When asked if she got a good enough look to identify him at trial, Mills replied, "You know, it's been quite a while and it happened pretty fast and he looks different." RP 236. Mills agreed she could not provide a description of the man at the door when interviewed by police shortly after the incident. RP 246.

According to Crawford, on December 4, 2011, he was with Argo, who he claimed he knew as "Capone" (RP 532, 655, 746), Donnelly, McDonald and Rowe at the home of Justin Defrang and his girlfriend, all doing methamphetamine, all provided by Crawford. RP 538-39, 643. When Crawford said he would no longer pay for everything for

everybody, an agreement was made by the group to make some money. Id.

As the self-proclaimed "master-mind" behind the eventual raid on Wetzler's home, Crawford said he assigned roles, which each person agreed to. RP 539, 561, 578. The plan was for McDonald, who Wetzler and Mills knew, would gain entry to the trailer, and then Argo and Donnelly would enter. RP 562.

Sometime after 9 p.m. Rowe drove them to a Shell station near the trailer park where Wetzler and Mills lived. RP 564. Crawford, Donnelly, McDonald and allegedly Argo, then walked into the trailer park, where Crawford pointed out Wetzler's trailer. RP 564-65.

Donnelly had known Crawford for several years and had lived with him in the past. RP 1073-74, 1103. Donnelly acted as a debt collector for Crawford at times and acknowledged such collection can "turn into a violent situation." RP 1076-77.

Donnelly did not recall a prior discussion about everyone role in the scheme, noting he usually takes care of everything, and it was clear to him that his job was to go get the money. RP 1077-78. Donnelly recalled going to the trailer park with Argo, Crawford, Rowe and "some girl named Krissy." RP 1076. It was Donnelly's understanding they were there to collect an $800 to $1300 debt from Mills and Wetzler, who he

described as “drug dealers” living in a “drug house,” and who were prone to committing acts of violence themselves “by proxy.” RP 1076, 1086, 1091, 1104-07. Donnelly specifically described Mills as “a really large woman” who acted as security for Wetzler’s drug deals. RP 1109.

Donnelly recalled approaching the trailer with Argo and “Krissy,” and after the door opened, entering and demanding the money for the drug debt. When the women claimed not to have the money, Donnelly got violent with them. RP 1082. Donnelly denied intentionally stabbing anyone but admitted brandishing a knife that may have cut them as he beat them. RP 1083-85.

Donnelly repeatedly denied Argo ever entered the trailer, claiming instead he just stood outside. RP 1083, 1090, 1098, 1106, 1112. He claimed Argo was “just around” and that it was he who grabbed the bag of money once the women told him where it was. RP 1086-87. Donnelly admitted he was a little mad about Argo’s lack of support against the women but understood how he might have been surprised by the encounter turning violent. RP 1088-89.

Argo denied any involvement in the crimes against Mills and Wetzler and denied every being at the trailer park. RP 1147, 1150, 1172, 1272. Argo testified that those who were involved were trying to frame him for the crimes because they found out he was a confidential informant

for law enforcement and had gotten one of their friends jailed. RP 1153-54, 1198, 1231-32, 1241-42.

Argo explained that as of December 2011, he lived in Coupeville and had been working as a confidential informant (C.I.) the past two years for the Snohomish County Drug Task Force under contract. RP 1139-41. This arrangement had led him to make controlled buys, which led to the raid of the friend's house and his subsequent incarceration. RP 1141, 1144, 1198.

Argo was not sure when the group discovered he was a C.I. RP 1198. He noted, however, that a couple of weeks after the incident at Wetzler's trailer, Crawford and Donnelly tried to hurt and rob him at knife point, but he got away. RP 1221-22. Argo also recalled friends of Donnelly and Crawford chasing him to Tacoma, where he had to enlist the help of police. RP 1222. Argo moved out of Washington in February or March of 2012, not returning until his arrest in this matter. RP 1223.

Although not involved in the crimes against Mills and Wetzler, Argo acknowledged seeing those that were on December 4, 2011. Argo had been at Defrang's home part of December 4th, where he overheard Crawford, Donnelly, Rowe and McDonald discussing a robbery they planned to commit, although he did not hear the details. RP 1150-51.

In closing argument, the prosecutor began by describing Wetzler as "an old, older, frail woman, who sold drugs and apparently used drugs on the side." RP 1429-30. Thereafter, the prosecutor's only specific references to Wetzler were in the context of the assault charge associated specifically with her. RP 1442, 1462.

In discussing the to-convict instruction for the first-degree robbery charge, the prosecutor acknowledge that to commit the offense, the taken property need only be taken in the presence of the person with a "representative . . . interest" in the property. RP 1437-38; see CP 141 (Instruction 10, defining "robbery," including that "A person with a representative interest includes an agent, employee, or other representative of the owner of the property."). The prosecutor then explained: "That just means it was theirs. It was their property, their jewelry, their money, their – even their drugs, even their drugs, their money bag." RP 1438.

In rebuttal, the prosecutor spoke only generally about the burden of proof, accomplice liability and witness credibility. RP 1485-92. The prosecutor did not specify Wetzler as the only potentially eligible victim for the robbery and burglary charges.

F. ARGUMENT

THE COURT OF APPEALS ERRED IN CONCLUDING THE INSTRUCTIONS DID NOT DEPRIVE ARGO'S OF HIS CONSTITUTIONAL RIGHTS TO BE CONVICTED ONLY OF

THE CHARGED CRIMES AND TO UNANIMOUS JURY VERDICTS.

Argo was charged with committing both a first-degree robbery and first-degree burglary against only Kathy Wetzler. CP 21-22. At trial, the State presented evidence the same offenses were also committed against Mills, who lived with, paid rent to and acted as an "enforcer" for Wetzler. RP 212-227, 1109, 1073-1112. The to-convict jury instructions informed the jury that to find guilt, it must determine beyond a reasonable doubt Argo or an accomplice committed the burglary and robbery against "a person" without specifying any names. CP 146-47 (Instruction 15, "to-convict" for first-degree robbery); CP 156-57 (Instruction 23, "to-convict" for first-degree burglary. These instructions violated Argo's constitutional rights by permitting the jury to convict him of crimes against Mills for which he was never charged, and/or without unanimity.

An accused person has a constitutional right to be tried only on the charged crime, and to unanimous jury verdicts. State v. Jain, 151 Wn. App. 117, 121, 210 P.3d 1061 (2009) (citing State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987); State v. Ortega-Martinez, 124 Wn. 2d 702, 707, 881 P.2d 231, 234 (1994); U.S. Const. amend. VI; Const. art. I, §§ 21 & 22. Thus, the jury instruction defining the elements the jury must find to convict

may not extend more broadly than the charging document. Jain, 151 Wn. App. at 124 (citing State v. Brown, 45 Wn. App. 571, 726 P.2d 60 (1986)).

For example, in Brown, the State alleged a conspiracy involving 12 named individuals. 45 Wn. App. at 576. The to-convict jury instruction, by contrast, described a conspiracy with "one or more persons." Id. Because several witnesses who were not named in the information testified about their involvement in the conspiracy, the court reversed. Id. at 576-77. The court concluded the jury instruction was erroneous and the jury could have convicted for an uncharged crime, namely, a conspiracy involving persons not named in the information. Id.

Similarly, in Jain, the charge was money laundering based on disposition of two named properties. 151 Wn. App. at 122-23. However, evidence was presented at trial of disposition of other unnamed properties, and the to-convict instruction did not specify which property must be proved. Id. at 123. Again, the Court reversed because the jury could have returned a guilty verdict based on acts not charged in the information. Id. at 124.

The same unconstitutional scenario that occurred in Brown and Jain occurred here. Argo was charged with first-degree burglary and first-degree robbery against Wetzler. CP 21-22. Evidence was presented that allowed finding the same offenses were committed against Mills, yet the jury instructions failed to limit jurors' consideration to only the charged crimes

involving only Wetzler. CP 146-47, 156-57 55; RP 212-227, 1073-1112. As in Brown and Jain, the possibility the jury convicted on uncharged, or without jury unanimity (some could have relied on Mills, while others on Wetzler as the victim) crimes warrants reversal of the convictions.

As Brown and Jain make clear, the erroneous "to convict" instructions are presumed prejudicial, and Argo is entitled to a new trial unless the State can prove the error was harmless beyond a reasonable doubt. Jain, 151 Wn. App. at 121; Brown, 45 Wn. App. at 576. It was not.

Neither the to-convict nor verdict forms for the burglary and robbery charges required that the jury identify the victim, making it impossible for the State to argue the jury necessarily limited its focused on the charged victim, Wetzler. CP 44, 46. Moreover, the State's closing argument did nothing to limit the jury's consideration or reduce the risk that the jury convicted Argo of the uncharged robbery and burglary of Mills or lacked unanimity. See e.g., RP 1429-64 & 1485-92 (neither in closing nor rebuttal does the prosecutor make clear to the jury that Wetzler was the only eligible victim for the robbery and burglary charges); compare State v. Moton, 51 Wn. App. 455, 459-60, 754 P.2d 687 (1988) (although more than one victim was involved, the witnesses' detailed testimony and counsels' arguments clearly identified the victim identified in the information as the focus of the jury's deliberations).

The Court of Appeals rejected Argo's claims on appeal. Appendix A. That court incorrectly assumed that because the jury unanimously found Argo was armed with a deadly weapon when he committed the robbery, the jury must have convicted him of the offenses as charged. Appendix A at 9-10. But Argo does not claim he was convicted of uncharged *means*, but instead that the jury may have convicted him of committing the robbery against Mills instead of Wetzler, or that they lacked unanimity as to who he committed the robbery and burglary against. Brief of Appellant at 26-27. As such, he was either deprived of a unanimous verdict or convicted of an uncharged crime.

The Court of Appeals acknowledged that "'[i]t is a well-settled rule . . . that a party cannot be convicted for an offense with which he was not charged.'" Appendix A at 3-4 (quoting State v. Garcia, 65 Wn. App. 681, 686, 829 P.2d 241 (1992)). Likewise, the Court of Appeals acknowledged "[i]t is constitutional error if the instructions allow the defendant to be convicted without a unanimous jury verdict. Appendix A at 4 (citing State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). But it then addressed the issue raised as one involving alternative means instead of the uncharged offense and lack of unanimity arguments presented by Argo.

For example, the Court of Appeals analogizes the circumstances at Argo's trial with those in State v. Nicholas, 55 Wn. App. 261, 776 P.2d 1385 (1989). Appendix A at 7-10. In Nicholas, one issue was whether Nicholas was convicted of an uncharged *means* of first degree robbery; Nicholas was charged with being *armed* with a deadly weapon at the time, but the jury instructions allowed for conviction if he merely displayed what *looked* like a firearm or deadly weapon. 55 Wn. App. at 272. The Court found the error harmless because the jury entered a special verdict finding he had been armed with a deadly weapon at the time of the offense, so he was necessarily convicted as charged. Id. at 273.

Here, although there was a special verdict that Argo or an accomplice was armed with a deadly weapon, that does not resolve the issue here as it did in Nicholas. Argo did not challenge the *means* by which he allegedly committed the robbery, but instead the expanded universe of potential victims jurors could consider for purposes of a conviction, as well the potential for lack of unanimity among jurors as to who was robbed and burglarized.

In Nicholas, the appellant also challenged a to-convict instruction that allowed the jury to convict him of robbing either one of two liquor store clerks when the information charged him with committing the robbery against both. Id. This Nicholas Court found this error harmless;

> The two clerks identified Nicholas as the robber, both in court and in unchallenged photo-montages. Their accounts of Nicholas' actions in the back room of the liquor store were essentially identical. Whether both clerks were robbed was not in dispute; the sole issue was the identity of the robber. In light of the evidence presented at trial, the jury could not have had a reasonable doubt about the victims of the robbery.

Id. at 274.

Although this issue in Nicholas is similar to the issue raised by Argo, the factual scenario giving rise to the issue is significantly different. In Nicholas, both liquor store clerks identified Nicholas at trial as the robber and gave essentially identical accounts of what occurred. Id. Here, however, Mills testified at Argo's trial, but Wetzler did not.

Mills' identification of Argo as the second robber was suspect. When first interviewed by police she was unable to provide a description of the man at the trailer door. RP 225, 246. She later admitted she did not get a very good look at the man as she "didn't really want to draw attention" to herself and recognized that "maybe [she] didn't want to be able to identify him." RP 234. Mills admitted she hoped that by not paying attention to the man he would leave, and that her attention was more focused on the armed assailant. RP 235. When asked if she got a good enough look to identify him at trial, Mills replied, "You know, it's

been quite a while and it happened pretty fast and he looks different." RP 236.

The only other testifying eyewitness to the robbery was Donnelly, who pleaded guilty before trial and, according to Argo, was involved in the conspiracy to frame him for the crimes after they found out he was working for law enforcement. RP 1071-72, 1153-54, 1198, 1231-32, 1241-42. Donnelly testified repeatedly that although Argo was present, he never entered the trailer where Donnelly assaulted Mills and Wetzler and robbed and burglarized Wetzler. RP 1083, 1090, 1098, 1106, 1112.

In Nicholas there was consistent, corroborating testimony that unequivocally identified Nicholas as the robber of both liquor store clerks. Here, the only non-codefendant identification of Argo as one of the robbers was by Mills, who was less than certain, noting he "looks different." RP 236. Wetzler never testified, and the truthfulness of the testifying codefendants was suspect in light of Argo's claim they were trying to frame him.

That Argo was also convicted of both charged assaults does not resolve the issue, despite the Court of Appeals' contrary conclusion. Appendix A at 10. It was uncontested that both Wetzler and Mills were assaulted by Donnelly. RP 1082-85. The issue for the jury was whether Argo was an accomplice to those assaults. The jury could have found he

was by his presence in or near Wetzler's trailer during the encounter. But this does not mean all the jurors would have voted to convict him of the robbery and burglary had consideration of those offenses been limited to Wetzler as the victim, if for no other reason than Wetzler never testified.

The Court of Appeals also misapprehends the law regarding charging documents, when it claims Argo "was fully aware that the robbery and burglary charges arose out of actions involving both Wetzler and Mills." Appendix at 16. A charging document is constitutionally defective if it fails to include all "essential elements" of the crime. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995); Hamling v. United States, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974); U.S. Const. Amend. VI; Wash. Const. Art. I, § 22. "More than merely listing the elements, the information must allege the particular facts supporting them." State v. Nonog, 169 Wn.2d 220, 226, 237 P.3d 250 (2010) (citing State v. Leach, 113 Wn.2d 679, 688, 782 P.2d 552 (1989)). This is a requirement of the essential elements rule. State v. Simms, 171 Wn.2d 244, 250, 250 P.3d 107 (2011). "Failure to provide the facts 'necessary to a plain, concise and definite statement' of the offense renders the information deficient." Nonog, 169 Wn.2d at 626 (citing Leach, 113 Wn.2d at 690 (quoting JCrR 2.04(a)).

Here, the information provided the facts necessary to alert Argo that he had been charged with assaulting both Mills and Wetzler, and of robbing and burglarizing *only* Wetzler. CP 21-23. The problem is not a deficient information, but the information that was filed should have limited the jury to considering only Wetzler as the robbery and/or burglary victim because that was the only factual basis for those charges included in the final information filed by the prosecution. By failing to so limit the jury through instruction or by election during the prosecutor's closing argument, it cannot be said beyond a reasonable doubt that the jury convicted Argo of the charged burglary and robbery, or that the jury was unanimous as to who was robbed or burglarized.

At the very least, the verdicts rendered here are ambiguous given the charging language, the evidence presented, and the instructions given. See State v. Kier, 164 Wn.2d 798, 813-14, 194 P.3d 212 (2008) (guilty verdicts were ambiguous given how the case was presented to the jury). This ambiguity cannot be reconciled with a determination that any error was harmless beyond a reasonable doubt. If all the jurors relied on Mills as the robbery and burglary victim to convict, which is likely because only she testified, and not Wetzler, then Argo was convicted of an uncharged crime. If just some did, then Argo was deprived of his right to unanimous

verdicts. That these are two reasonable possibilities exist preclude finding the errors here were harmless beyond a reasonable doubt.

Argo was never charged with committing robbery or burglary against Mills, but the jury instructions and evidence permitted conviction for those offenses without juror unanimity. His convictions therefore appear to violate U.S. Const. amend. VI and Wash. Const. art. I, §§ 21 & 22. This Court should grant review to resolve this significant question of constitutional law. RAP 13.4(b)(3).

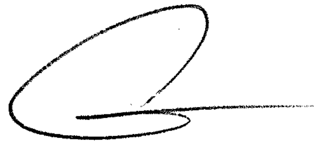
G. CONCLUSION

For the reasons stated herein, this Court should grant review.

DATED this 13th day of July 2018

Respectfully submitted,

NIELSEN, BROMAN & KOCH PLLC



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Appendix A

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Court Administrator/Clerk

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May 29, 2018

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CASE #: 75735-1-I
State of Washington, Respondent v. Richard Daniel Argo, Appellant
King County, Cause No. 13-1-12367-0 SEA

Counsel:

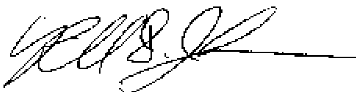
Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

> “We affirm the judgment and sentence."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived. Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

lls

Enclosure

c: The Honorable Ken Schubert
Richard Daniel Argo

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 75735-1-I
Respondent,	)	DIVISION ONE
v.	)	
RICHARD DANIEL ARGO,	)	UNPUBLISHED
Appellant.	)	FILED: May 29, 2018

COURT OF APPEALS DIV I
STATE OF WASHINGTON
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Cox, J. — Richard Argo appeals his judgment and sentence based on convictions for first degree robbery, first degree theft, and first and second degree assault. He argues that his convictions for robbery and burglary must be set aside because the jury instructions were broader than the charging document. Thus, he claims that he was convicted of uncharged crimes and deprived of his right to a unanimous jury. Because any variances between the charging document and the jury instructions were harmless beyond a reasonable doubt, we disagree.

For the first time on appeal, he also challenges the adequacy of the jury instructions on unanimity. On this record, we reject this claim.

Finally, he claims that the trial court abused its discretion by declining to merge his robbery and burglary convictions in calculating his offender score at sentencing. The trial court did not abuse its discretion in this respect. And Argo's counsel did not provide ineffective assistance of counsel in connection with this claim.

We affirm in all respects.

In December 2011, Argo, Louis Crawford, and three other accomplices decided to rob Kathryn Wetzler. According to Crawford, Wetzler had drugs and cash in a bank-deposit bag in her mobile home. Argo, Kristina McDonald, and Derek Donnelly forced their way into Wetzler's mobile home. Once inside, Donnelly stabbed and struck Wetzler while Argo guarded the exit. Donnelly demanded Wetzler's "money bag." Her housemate, Martha Mills, found the bag hidden between the cushions on the couch. As Mills grabbed the bag, Donnelly stabbed her in the face and back. Mills threw the bag at Argo, who was at the door of the mobile home. Argo and Donnelly took the bag and fled.

Mills suffered multiple stab wounds to her mouth and back and a collapsed lung. Wetzler had a punctured cheek, broken bones in her face, five broken ribs, and internal bleeding, including a subdural hematoma.

After making several stops, Crawford, Argo, and the other three accomplices divided up the items found in the bag. The items included $800, some jewelry, and a "bit" of heroin.

The State charged Argo with first degree robbery, first degree burglary, and two counts of first degree assault, alleging that all four crimes were

committed with a deadly weapon. His accomplices were also charged, but they accepted plea agreements that included testifying truthfully against Argo at trial. Argo testified in his own defense and denied any involvement in the crimes.

The jury convicted Argo on all counts except first degree assault against Wetzler. It found by special verdict that Argo committed all three first degree crimes while armed with a deadly weapon. It convicted Argo of second degree assault against Wetzler without possession of a deadly weapon.

At sentencing, the trial court vacated the second degree assault conviction, merging it with the first degree robbery conviction. The court declined to merge the robbery and burglary convictions.

Argo appeals.

CONVICTION OF UNCHARGED CRIMES

Argo argues that his convictions for first degree burglary and first degree robbery must be reversed. This is based on variances between the charging document and the jury instructions. The charging document names a particular victim. The instructions do not. Thus, Argo claims that it was possible for the jury to convict him of uncharged crimes and deprive him of his constitutional right to a unanimous jury. Because these variances were harmless beyond a reasonable doubt, we disagree.

"[T]he sixth amendment to the United States Constitution and article 1, section 22 of the Washington Constitution guarantee criminal defendants the right to be informed of the nature of the charges against them."[1] Thus, "[i]t is a

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[1] State v. Moton, 51 Wn. App. 455, 458–59, 754 P.2d 687 (1988).

well-settled rule in this state that a party cannot be convicted for an offense with which he was not charged."[2] And, "when an information alleges only one crime, it is constitutional error to instruct the jury on a different, uncharged crime."[3]

Article 1, section 21 of the Washington Constitution also guarantees criminal defendants the right to jury unanimity.[4] It is constitutional error if the instructions allow the defendant to be convicted without a unanimous jury verdict.[5]

A constitutionally erroneous instruction "is presumed prejudicial unless it affirmatively appears that the error was harmless."[6] "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error."[7] And the State has the burden to prove that the error was harmless beyond a reasonable doubt.[8]

In the amended information, Argo was charged with first degree robbery based upon allegations that:

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[2] State v. Garcia, 65 Wn. App. 681, 686, 829 P.2d 241 (1992).

[3] State v. Kirwin, 166 Wn. App. 659, 669, 271 P.3d 310 (2012).

[4] State v. Woodlyn, 188 Wn.2d 157, 162-63, 392 P.3d 1062 (2017); Moton, 51 Wn. App. at 458.

[5] State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988).

[6] State v. Jain, 151 Wn. App. 117, 121, 210 P.3d 1061 (2009).

[7] Id. at 121-22 (quoting State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)).

[8] Guloy, 104 Wn.2d at 425.

> together with another, . . . on or about December 4, 2011, [he] did unlawfully and with intent to commit theft take personal property of another, to wit: U.S. Currency, jewelry and drugs, ***from the person and in the presence of Kathryn Susan Wetzler***, who had an ownership, representative, or possessory interest in that property, against her will, by the use or threatened use of immediate force, violence and fear of injury to such person or her property and to the person or property of another, and in the commission of and in immediate flight therefrom, [Argo] and another participant in the crime ***inflicted bodily injury on Kathryn Susan Wetzler***.[9]

The amended information also alleged that Argo and Donnelly were armed with a deadly weapon during the commission of the crime.[10]

The trial court instructed the jury that to convict Argo of first degree robbery, the State had to prove beyond a reasonable doubt that:

> (1) [O]n or about December 4, 2011, [Argo] or an accomplice unlawfully took personal property from the person or in the presence ***of another***;
> (2) That the person from whom or in whose presence the property was taken had an ownership, representative, or possessory interest in that property;
> (3) That [Argo] or an accomplice intended to commit theft of the property;
> (4) That the taking was against the person's will by [Argo's] or an accomplice's use or threatened use of immediate force, violence or fear of injury to that person or to that person's property or to the person or property of another;
> (5) That force or fear was used by [Argo] or and [sic] accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
> (6) ***(a) That in the commission of these acts or in immediate flight therefrom [Argo] or an accomplice was armed with a deadly weapon or (b) That in the commission of these acts or in immediate flight therefrom [Argo] or an accomplice displayed what appeared to be a firearm or other deadly weapon or (c) That the commission of these acts or in immediate flight therefrom [Argo] or an accomplice inflicted bodily injury;*** and

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[9] Clerk's Papers at 21 (emphasis added).

[10] Id.

> (7) That any of these acts occurred in the State of Washington.[11]

The jury was further instructed that it "need not be unanimous as to which alternatives 6(a), 6(b) or 6(c), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt."[12]

As to first degree burglary, the amended information alleged that Argo:

> together with another, . . . on or about December 4, 2011, did enter and remain unlawfully in a building located at 2200 NE 88th Street, . . . with intent to commit a crime against a person or property therein, and in entering, and while in such building and in immediate flight therefrom, [Argo] and another participant in the crime was armed with a deadly weapon and ***did assault a person, to-wit: Kathryn Susan Wetzler***.[13]

The amended information also alleged that Argo and Donnelly were armed with a deadly weapon during the commission of the crime.[14]

The trial court instructed the jury that to convict Argo of first degree burglary, it had to find beyond a reasonable doubt that:

> (1) [O]n or about December 4, 2011, [Argo] or an accomplice unlawfully entered a building;
> (2) That the entering was with intent to commit a crime against a person or property therein;
> (3) That in so entering or while in the building or in immediate flight from the building [Argo] or an accomplice in the crime charged was armed with a deadly weapon or assaulted ***a person***; and

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[11] Id. at 146-47 (emphasis added); see WPIC 37.02.

[12] Clerk's Papers at 147.

[13] Id. at 22 (emphasis added).

[14] Id.

(4) That any of these acts occurred in the State of Washington.[15]

Argo claims that because the amended information identified Wetzler as the victim of the first degree robbery and burglary crimes, the jury had to unanimously find that Wetzler, not Mills, was the victim of those crimes. He argues that, because the jury instructions failed to specifically identify Wetzler as the victim, he could have been convicted of crimes not charged—robbery and burglary with Mills as the victim. And he argues that his constitutional right to a unanimous jury was violated because the jury did not have to be unanimous as to whether Wetzler or Mills was the victim of the robbery and burglary.

We assume, without deciding, that these variances between the charging document and the instructions rise to the level of constitutional claims. Nevertheless, we conclude the variances are harmless beyond a reasonable doubt.

State v. Nicholas is instructive.[16] There, Duane Nicholas was charged with four counts of first degree robbery while ***armed*** with a deadly weapon.[17] On count one, the jury was instructed that it could convict Nicholas if it found that he was either ***armed*** with a deadly weapon or ***displayed what appeared*** to be a firearm or deadly weapon.[18] Nicholas claimed that his first degree robbery

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[15] Id. at 156 (emphasis added); see WPIC 60.02.

[16] 55 Wn. App. 261, 776 P.2d 1385 (1989).

[17] Id. at 262-63 (emphasis added).

[18] Id. at 272 (emphasis added).

conviction had to be reversed because the jury was instructed on an alternative means that was never charged—that he committed the crime while displaying what appeared to be a firearm or deadly weapon.[19]

This court recognized that the instruction "erroneously submitted to the jury the uncharged alternative means of committing first degree robbery."[20] It then held that even assuming the error was of "constitutional magnitude it was harmless beyond a reasonable doubt."[21]

The error was harmless beyond a reasonable doubt because the jury had found by special verdict "that Nicholas was 'armed with a deadly weapon at the time of the commission of the crime.'"[22] Because "[t]he jury was instructed that the State had to prove this fact beyond a reasonable doubt, . . . there [was] no possibility that Nicholas was impermissibly convicted on [the uncharged alternative]."[23]

As to count four, Nicholas argued that his constitutional right to a unanimous jury verdict was violated because the information charged him with robbing two named clerks but the jury was instructed that it could convict Nicholas if he took the property "from the person or in the presence 'of

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[19] Id.

[20] Id. at 273.

[21] Id.

[22] Id.

[23] Id.

another.'"[24] He argued that some jurors may have found that he robbed one clerk while others found that he robbed the other.[25]

This court again held that "even assuming that this issue is truly of constitutional magnitude, the error, if any, was harmless beyond a reasonable doubt."[26] Both clerks identified Nicholas as the robber, their accounts were virtually identical, whether both clerks were robbed was not in dispute, and "the sole issue was the identity of the robber."[27] Thus, the jury could not have had a reasonable doubt about the victims of the robbery.[28]

First degree robbery is an alternative means crime because it may be committed by a defendant who is armed with or displays a deadly weapon or a defendant who inflicts bodily harm.[29] In the amended information, the State alleged that Argo committed first degree robbery while armed with a deadly weapon. The court's instructions to the jury mirrored this allegation of the State. In the special verdict, the jury unanimously found that Argo committed the crime while using a deadly weapon. Thus, it is clear that the jury unanimously convicted him based on this means whether or not it found that Argo also inflicted

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[24] Id.

[25] Id. at 273-74.

[26] Id. at 274.

[27] Id.

[28] Id.

[29] RCW 9A.56.200; see In re Pers. Restraint of Brockie, 178 Wn.2d 532, 535, 309 P.3d 498 (2013).

bodily harm. Therefore, the failure to identify a victim in the jury instructions was harmless beyond a reasonable doubt.

First degree burglary is also an alternative means crime because it can be based on a defendant's actions of assaulting a person while committing burglary or being armed with a deadly weapon while committing the burglary.[30] In the amended information Argo was charged with committing the burglary while being armed with a deadly weapon. The court's instructions to the jury mirrored this allegation. The jury then found by special verdict that Argo or an accomplice was armed with a deadly weapon when Argo committed the crime of burglary. Because the jury unanimously found that Argo committed the burglary while armed with a deadly weapon, whether or not it also found that Argo assaulted anyone, the failure of the jury instructions to identify a victim of the burglary was harmless beyond a reasonable doubt.

Finally, the amended information charged Argo with committing two counts of assault during the robbery, one against Wetzler and one against Mills. The jury unanimously found that Argo committed both crimes. So, as in Nicholas, the jury could not have a reasonable doubt that both Wetzler and Mills were victims of the robbery.[31]

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[30] See RCW 9A.52.020(1); State v. Williams, 136 Wn. App. 486, 498, 150 P.3d 111 (2007).

[31] See 55 Wn. App. at 274.

We also affirm because Wetzler's identity as a victim of the robbery and burglary was superfluous information in the charging document that did not need to be repeated in the jury instructions.

"An information must state all the essential statutory and nonstatutory elements of the crimes charged."[32] But any surplus language in the information may be disregarded.[33] The surplus language is not an element of the crime so it need not be proved unless it is repeated in the jury instructions or the defendant is somehow prejudiced by the inclusion of that language.[34]

"[T]he unit of prosecution for robbery is each separate forcible taking of property from or from the presence of a person having an ownership, representative, or possessory interest in the property, against that person's will."[35] There may only be one single count for each taking even if a number of people are put in fear.[36] Thus, "[p]roof of robbery does not require the specific identity of the victim or victims" and the victim's name is not an element of the

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[32] State v. Tvedt, 153 Wn.2d 705, 718, 107 P.3d 728 (2005) (internal citations omitted).

[33] Id.

[34] Id.

[35] Id. at 714-15.

[36] State v. Kier, 164 Wn.2d 798, 812, 194 P.3d 212 (2008).

crime.[37] Likewise, the unit of prosecution for burglary is each illegal entry regardless of the number of people inside.[38]

State v. Tvedt is instructive.[39] Ronald Tvedt was charged with 12 counts of first degree robbery, and two of those counts were based on taking cash from two different locations.[40] The information alleged that Tvedt took the cash from or from the presence of two named persons at each location.[41] However, identifying one person at each location was sufficient to state the elements of the offenses charged.[42] The names of the additional people could be disregarded as surplusage.[43] Here, even if the amended information had specifically identified both Wetzler and Mills, that information would have been surplusage.

Argo claims that State v. Kier[44] supports his argument that the discrepancies between the amended information and the jury instructions violated his right to a unanimous verdict. This is incorrect.

In Kier, Herbert John Kier was convicted of first-degree robbery for carjacking a vehicle from the driver Qualagine Hudson, and his passenger,

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[37] Id.; see State v. Levy, 156 Wn.2d 709, 722, 132 P.3d 1076 (2006).

[38] State v. Brooks, 113 Wn. App. 397, 399-400, 53 P.3d 1048 (2002).

[39] 153 Wn.2d 705, 107 P.3d 728 (2005).

[40] Id. at 708-09, 718-19.

[41] Id. at 718-19.

[42] Id. at 719

[43] Id.

[44] 164 Wn.2d 798, 194 P.3d 212 (2008).

Carlos Ellison.[45] He was also convicted of second degree assault for pointing a gun at Ellison.[46] He was not charged with assaulting Hudson. The criminal information named both Hudson and Ellison as victims of the robbery, and the to convict instruction required the jury to find that Kier took personal property from "the person or in the presence of another."[47]

The supreme court noted that, because the prosecution unit for robbery is a single taking regardless of how many victims are placed in fear of harm, "whether the robbery victim was Hudson or Ellison, or both, was not essential to Kier's conviction."[48] But, because the jury heard evidence describing both Hudson and Ellison as victims of the robbery and the instruction did not specify a victim, the basis for Kier's conviction was ambiguous.[49] If the jury based its first degree robbery conviction on a finding that Kier assaulted Ellison, the second degree assault conviction would merge into the robbery conviction.[50] If the jury based the robbery conviction on a finding that Kier assaulted Hudson, the second degree assault conviction with Ellison as the victim could be upheld.[51] Because

[45] Id. at 802-03.

[46] Id.

[47] Id. at 803, 808.

[48] Id. at 812.

[49] Id. at 812-13.

[50] Id. at 813-14.

[51] Id.

the basis for conviction was not clear, Kier's conviction for second degree assault had to be reversed.[52]

As in Kier, we may affirm Argo's first degree robbery conviction because for purposes of that conviction, it is not relevant whether Wetzler or Mills was the victim of that crime.[53] And, consistent with Kier, the trial court here merged Argo's conviction for second degree assault into the first degree robbery conviction.

Argo also argues that State v. Brown[54] and State v. Jain,[55] support his claim that the jury could have wrongfully convicted him of uncharged crimes, but neither case is persuasive. In Brown, Stanley Christiansen challenged his conviction for criminal conspiracy to commit first degree theft.[56] The information named 12 co-defendants who were involved in the conspiracy, but the jury was instructed that it only had to find that Christiansen conspired with "one or more persons."[57] Because several uncharged witnesses had testified to their involvement in the conspiracy, this court reversed Christiansen's convictions.[58] This court reversed because conspiracy requires an agreement, and

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[52] Id.

[53] See id. at 812.

[54] 45 Wn. App. 571, 726 P.2d 60 (1986).

[55] 151 Wn. App. 117, 210 P.3d 1061 (2009).

[56] 45 Wn. App. at 572.

[57] Id. at 572-73, 576.

[58] Id. at 576-77.

Christiansen could have been convicted based on an agreement with persons who were not identified in either the charging documents or the instructions.[59]

Unlike Brown, Argo could not have been convicted of offenses against victims that were never identified in either the amended information or instructions. State v. Garcia is instructive.[60] There, the amended information charged Roberto Garcia with delivering a controlled substance to Officer C.W. Trebesh while the evidence at trial indicated that Garcia had delivered it to a "Mr. Rutherford."[61] The jury instructions required the jury to only find that Garcia "delivered a controlled substance."[62]

Garcia argued that his due process rights were violated because he was convicted of a crime not charged in the information.[63] This court disagreed.[64] It determined that the error was merely technical in part because Garcia had full notice of the charges against him.[65] This court distinguished Brown in part because Garcia did not rely on the incorrect information that stated that he had made the delivery to Officer Trebesh.[66] Also, Garcia was charged with only one

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[59] Id. at 576.

[60] 65 Wn. App. 681, 829 P.2d 241 (1992).

[61] Id. at 684-85.

[62] Id. at 685.

[63] Id. at 685-86.

[64] Id. at 686.

[65] Id.

[66] Id. at 688.

delivery while Christiansen was charged with entering into agreements with a number of persons.[67] It was beyond a reasonable doubt that the jury convicted Garcia for his delivery to Rutherford because there was no conflicting evidence regarding a delivery to any other party.[68]

Likewise here, Argo was charged with, and convicted of, one robbery and one burglary. And he was fully aware that the robbery and burglary charges arose out of actions involving both Wetzler and Mills. Both women were identified as victims of assault in the charging document and the jury unanimously found Argo guilty of assaulting both women during the robbery. Moreover, Argo took Wetzler's property while it was in Mills' possession,[69] and his defense was that he did not participate in the crimes, and he was not even present in the mobile home. Therefore, any error in failing to name the victims in the jury instructions in no way prejudiced his defense.[70]

Jain is similarly distinguishable. A drug task force had investigated Yatin Jain for spending significantly more than could be traced to his legitimate income including his purchase of various properties.[71] He was charged with money

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[67] Id. at 687-88.

[68] Id. at 688.

[69] See Tvedt, 153 Wn.2d at 718-19; State v. Rupe, 101 Wn.2d 664, 693, 683 P.2d 571 (1984).

[70] See Garcia, 65 Wn. App. at 688.

[71] Jain, 151 Wn. App. at 120-21.

laundering based on his purchase of two pieces of unimproved property.[72] At trial, the State introduced evidence of five other properties that he had purchased that were not identified in the information.[73] The jury was instructed that it could convict Jain on each money laundering count upon finding that Jain "conducted a financial transaction" involving "proceeds of specified unlawful activity."[74] This court reversed Jain's convictions for two counts of money laundering because Jain could have been convicted based upon transactions involving properties that were never named in the information.[75]

Unlike Jain, Argo was charged with, and the jury unanimously decided that Argo committed, only one act of first degree robbery and one act of first degree burglary.

UNANIMITY DURING JURY DELIBERATIONS

Argo argues for the first time on appeal that the trial court erred in failing to instruct the jury that it could only deliberate when all twelve jurors were present. Because this claimed error is not manifest under RAP 2.5(a), we decline to consider it.

Article 1, section 21 of the Washington constitution guarantees criminal defendants the right to a unanimous jury verdict.[76] An essential part of that right

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[72] Id. at 121.

[73] Id. at 123.

[74] Id.

[75] Id. at 124.

[76] Woodlyn, 188 Wn.2d at 162-63.

is that the jury deliberations leading to a unanimous verdict be "the common experience of all [jurors]."[77]

This court reviews de novo whether Argo was denied his constitutional right to a unanimous jury.[78]

Under RAP 2.5(a)(3), a party may raise, for the first time on appeal, a manifest error affecting a constitutional right. In order to claim a manifest error affecting a constitutional right, the party "must identify the constitutional error and show that it actually affected his or her rights at trial."[79] This requires the party to "make a plausible showing that the error resulted in actual prejudice, which means that the claimed error had practical and identifiable consequences in the trial."[80] "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest."[81]

After the jury was seated, the trial court instructed it that "[u]ntil you are in the jury room for those deliberations, you must not discuss the case with the other jurors or with anyone else or remain within hearing of anyone discussing

[77] State v. Lamar, 180 Wn.2d 576, 585, 327 P.3d 46 (2014) (quoting People v. Collins 17 Cal.3d 687, 693, 552 P.2d 742, 131 Cal. Rptr. 782 (1976)).

[78] State v. Armstrong, 188 Wn.2d 333, 339, 394 P.3d 373 (2017).

[79] Lamar, 180 Wn.2d at 583.

[80] Id.

[81] State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

it."[82] Then, before the parties' closing arguments, the trial court instructed the jury that:

> As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.[83]

The jury was also instructed on how to initiate and carry out the deliberative process and that each juror had a right to be heard.

Argo argues that these instructions were insufficient to guarantee unanimity. He contends that the trial court should have informed the jury at each recess not to discuss the case between themselves or with any other persons. He further argues that the trial court should have instructed the jury after closing arguments of its constitutional duty to deliberate only when all 12 jurors were present. He argues that in the absence of such instruction, "there is no valid basis to assume the verdicts rendered were the result of 'the common experience of all of [the jurors],' which our State constitution requires."[84]

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[82] Report of Proceedings (May 17, 2016) at 181.

[83] Clerk's Papers at 133.

[84] Appellant's Opening Brief at 32 (quoting Lamar, 180 Wn.2d at 585).

This court recently rejected this argument in State v. Sullivan.[85] This court observed that RAP 2.5(a) precluded Kevin Sullivan "from raising this issue for the first time on appeal unless he c[ould] show that failure to provide the additional instruction [was] a 'manifest error affecting a constitutional right.'"[86] This court further observed that "[f]or an error to be manifest, there must be evidence of 'actual prejudice' having 'practical and identifiable consequences [at] trial.'"[87]

The court then considered Sullivan's argument and determined that he had offered "no evidence that the jury failed to deliberate as a whole."[88] Instead, he relied "entirely on speculation."[89] The court held that such speculation was "'insufficient to warrant review under RAP 2.5(a)(3).'"[90]

Here, although Argo argues that "[i]t is safe to assume one or more jurors left the jury room [at some point] during deliberations, [at least] to use a bathroom,"[91] there is nothing in this record to support this assumption. Because "the facts necessary to adjudicate the claimed error are not in the record on

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[85] No. 76358-0-1 (Wash. Ct. App. April 30, 2018).

[86] Id. at 2-3 (quoting RAP 2.5(a)(3)); see Lamar, 180 Wn.2d at 583.

[87] Sullivan, slip. op. at 3 (quoting State v. O'Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009)).

[88] Id. at 4.

[89] Id.

[90] Id. (quoting State v. St. Peter, 1 Wn. App.2d 961, 963, 408 P.3d 361 (2018)).

[91] Appellant's Opening Brief at 35.

appeal, no actual prejudice is shown and the error is not 'manifest.'"[92] As in Sullivan, "without evidence to demonstrate that the jury did not deliberate as a whole, the asserted error is not manifest."[93]

Therefore, we decline to address Argo's argument for the first time on appeal under RAP 2.5(a)(3).

Argo further argues that even if he cannot show prejudice, reversal is still warranted because "[t]he failure to instruct a jury in a criminal trial how to achieve constitutional unanimity constitutes structural error for which reversal is required without the need to show actual prejudice."[94] The problem with this argument is that it assumes we reach the merits of this claim. Because we do not reach the merits, we need not address this structural error claim.

SENTENCING

Argo argues that the trial court abused its discretion by failing to recognize or consider the possibility of merging his robbery and burglary convictions as the same criminal conduct for purposes of his offender score at sentencing. The court did not abuse its discretion.

Under the general rule set forth in RCW 9.94A.589(1)(a), "whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior

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[92] Sullivan, slip. op. at 3 (quoting McFarland, 127 Wn.2d at 333).

[93] Id. at 5.

[94] Appellant's Opening Brief at 36-39; see State v. Wise, 176 Wn.2d 1, 13-14, 288 P.3d 1113 (2012).

convictions as if they were prior convictions for the purpose of the offender score." But, "if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those offenses shall be counted as one crime."[95]

If one of the current offenses is burglary, the burglary antimerger statute applies which provides that "[e]very person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately."[96] Under the antimerger statute, a sentencing court has the discretion to count both a conviction for burglary and a conviction for another crime committed during a burglary toward the defendant's offender score even if those crimes encompass the same criminal conduct.[97]

This court reviews for abuse of discretion the trial court's determination of same criminal conduct and its calculation of the offender score.[98]

A trial court abuses its discretion if it "categorically refus[es]" to exercise its discretion or fails to recognize that it has discretion.[99] Abuse of discretion means that no reasonable judge would have ruled the way the trial court did.[100]

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[95] RCW 9.94A.589(1)(a).

[96] RCW 9A.52.050.

[97] See State v. Lessley, 118 Wn.2d 773, 781-82, 827 P.2d 996 (1992).

[98] See id. at 780-81.

[99] State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

[100] State v. Arredondo, 188 Wn.2d 244, 256, 394 P.3d 348 (2017)

During the first sentencing hearing on June 29, 2016, the parties and trial court mostly discussed Argo's request to merge the first degree assault and robbery convictions. The State argued that only the second degree assault conviction should merge with the robbery, and the trial court asked for additional briefing on this issue.

The parties also addressed whether the trial court should exercise its discretion and merge the first degree robbery and burglary convictions as the same criminal conduct. The State urged the trial court to apply the antimerger statute and not merge the convictions because of the multiple acts of violence inside of the mobile home. The State recited the antimerger statute, and argued at length why the robbery and burglary were two discrete offenses and should be scored as two.

The trial court wondered how the two crimes could be considered as separate courses of conduct. It then asked the State what Argo's offender score would be if the robbery and burglary convictions were merged as the same criminal conduct. The State responded that the score would drop from six to four, but there would still be a weapon enhancement on each charge. It informed the trial court that it would seek the same prison term given the severity of the crimes. Specifically, if the offender score was four instead of six, the range for first degree assault would drop from 129 to 171 months instead of 162 to 216 months. The sentence for burglary would not change because it would be served concurrently with the first degree assault except for the 24 month firearm enhancement which would stay the same. The trial court then noted that the

State was recommending 162 months, the lower end if Argo's offender score was six and the upper end if it was four.

Defense counsel then urged the court to exercise its discretion, merge the charges, and not apply RCW 9A.52.050. He reminded the court that Donnelly, not Argo, had injured the victims.

The trial court noted that even if the burglary and robbery counts merged, the effect on the sentence would be minimal because of the deadly weapon enhancements. It indicated it would take everything "under advisement" and set over sentencing.

At the second sentencing hearing on August 29, 2016, defense counsel agreed with the State that only the second degree assault conviction could merge with robbery.[101] The State then advised the trial court that Argo had an offender score of six for the three remaining convictions—first degree robbery, first degree burglary, and first degree assault.

The State recommended that the trial court impose the low end of the standard range for each offense totaling 234 months of incarceration. Defense counsel replied that, in light of this low end recommendation, he would recommend that as well. He also reminded the trial court that Argo did not personally harm anyone and had had no history of violence.

The trial court recognized Argo's limited role, but also observed that this is "the risk you take when you hook up with people like [Donnelly]," he didn't need to stab the "two elderly ladies" and "you were there and were playing a part in

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[101] See State v. Freeman, 153 Wn.2d 765, 778, 108 P.3d 753 (2005).

that, no matter how small of a role."[102] It considered the letters written on Argo's behalf, and the defense's presentence and amended presentence reports. It then concluded that it "was pleased that the State was asking for the low end because that had been my thoughts before this . . . hearing . . . and I think that's entirely appropriate to impose for each count the low end of each one."[103]

The trial court vacated the second-degree assault conviction and, based on an offender score of six, imposed the low-end standard sentence range for each remaining count and 72 months in deadly weapon enhancements for a total sentence of 234 months.

Argo argues that because the issue of whether the trial court should exercise its discretion to merge the burglary and robbery convictions was never discussed during the second sentencing hearing, the trial court forgot about that possibility. He argues that, had the court remembered, there was a "reasonable probability" it would have exercised its discretion and merged those crimes for purposes of sentencing. This record does not support this argument.

The record shows that the trial court exercised its discretion in considering whether to merge the robbery and burglary convictions for purposes of Argo's offender score. At the first sentencing hearing, it considered the impact of applying the antimerger statute and the State's position that its recommendation as to sentencing would be the same either way. At both sentencing hearings, the trial court considered Argo's involvement in the crimes, and the appropriate

[102] Report of Proceedings (August 29, 2016) at 1677.

[103] Id. at 1678.

sentence given that involvement. It provided reasons for agreeing with the State not to merge the robbery and burglary convictions but to impose a sentence at the bottom of the higher range.

Argo relies on In the Matter of the Personal Restraint of Mulholland as support for his contention that the trial court failed to recognize and act on its discretion to disregard RCW 9A.52.050 and merge the robbery and burglary convictions.[104] His reliance is misplaced.

There, Daniel Mulholland was convicted of six counts of first degree assault.[105] The trial court ordered that all of Mulholland's first degree assault sentences be served consecutively and expressly concluded that it lacked discretion to impose concurrent sentences.[106] The supreme court granted Mulholland's personal restraint petition and remanded for resentencing because the trial court failed to recognize that it had the discretion to impose concurrent sentences.[107]

Here, there is no such error because the trial court sentenced Argo after being advised that it had the discretion to decide whether to count the robbery and burglary convictions as one crime for purposes of the offender score. The record also shows the court took into consideration whether to merge the two and decided not to do so.

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[104] 161 Wn.2d 322, 166 P.3d 677 (2007).

[105] Id. at 324.

[106] Id. at 324, 326.

[107] Id. at 334-35.

INEFFECTIVE ASSISTANCE OF COUNSEL

Argo argues that his trial counsel was ineffective for failing to re-raise the issue of merging his robbery and burglary convictions at the second sentencing hearing. This claim is without merit.

To prevail on an ineffective assistance of counsel claim, the defendant must show both deficient performance and resulting prejudice.[108] Performance is deficient if it falls "below an objective standard of reasonableness."[109] Deficient performance is not shown by matters that go to trial strategy or tactics, and this court presumes counsel's performance was reasonable.[110]

To establish prejudice, the defendant must show "there is a reasonable probability that, but for counsel's error, the result would have been different."[111]

This court reviews de novo whether a defendant received ineffective assistance of counsel.[112]

Argo acknowledges that the trial court was on notice after the first hearing that he wanted it to exercise its discretion to merge the burglary and robbery convictions. But he argues that his trial counsel was ineffective in failing to re-argue for merger at the time of the second hearing. He argues there was "no

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[108] State v. Townsend, 142 Wn.2d 838, 843, 15 P.3d 145 (2001).

[109] State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

[110] Id. at 33-34.

[111] Townsend, 142 Wn.2d at 844.

[112] See State v. Cross, 156 Wn.2d 580, 605, 132 P.3d 80 (2006).

reasonable strategic basis for defense counsel not to argue in favor" of merger at the second hearing. He is wrong.

During the first sentencing hearing, the issue of whether to merge the robbery and burglary convictions was fully addressed by both parties. And the State told the trial court that it would seek the same sentence whether or not the robbery and burglary counts merged. Argo's counsel could have made the strategic decision not to continue to seek merger given the State's recommendation. Thus, Argo has failed to establish that the failure to repeat arguments previously made at the first hearing "fell below an objective standard of reasonableness under professional norms."[113]

Argo further argues that counsel's deficient performance prejudiced him. He claims that had counsel raised the issue of merger at the second hearing, the court would have exercised its discretion to disregard RCW 9A.52.050 and merge the burglary and robbery convictions. Because Argo failed to show that his counsel was deficient, we need not need address his arguments regarding prejudice.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Spearman, J.

Leach, J.

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[113] Townsend, 142 Wn.2d at 843-44.

Appendix B

FILED
6/15/2018
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. RICHARD DANIEL ARGO, Appellant.	)	No. 75735-1-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Richard Argo, has moved for reconsideration of the opinion filed in this case on May 29, 2018. The court having considered the motion has determined that the motion for reconsideration should be denied. The court hereby

ORDERS that the motion for reconsideration is denied.

For the Court:

Cox, J.P.T.

Judge Pro Tempore

NIELSEN, BROMAN & KOCH P.L.L.C.

July 13, 2018 - 12:30 PM

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