

NO. 70858-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

EDMOND MAYNOR,

Appellant.

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COURT OF APPEALS  
DIVISION I  
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3

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA B. DOYLE

**BRIEF OF RESPONDENT**

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A. ISSUES PRESENTED

1. Two offenses merge for purposes of double jeopardy when proof of one is necessary to the proof of the other and elevates its degree. Edmond Maynor was charged with Robbery in the First Degree, predicated on his being armed with or displaying what appeared to be a deadly weapon during the course of the robbery. The State proved that Maynor committed the crime by threatening Tu Huynh with a gun and taking jewelry. Maynor was also charged with Assault in the Second Degree (as a lesser included offense of Assault in the First Degree), predicated solely on his shooting at Huynh after he had already obtained the jewelry and begun to leave the store. The assault, as charged and proven, was unnecessary to elevate the robbery to the first degree. Additionally, the robbery was completed before Maynor shot at the victim. Did the trial court properly decline to merge the two convictions?

2. A defendant claiming prosecutorial misconduct must show that the prosecutor did not act in good faith and that the conduct complained of was both improper and so prejudicial as to preclude a fair trial. Here, the prosecutor asked a question to highlight a reasonable inference from properly admitted evidence.

The question was never answered and the court sustained the defense objection and instructed the jury to disregard both the question and any inferences from it. Has Maynor failed to show reversible misconduct? Given the lack of prejudice, did the trial court properly deny Maynor's motion for a mistrial based upon a serious irregularity?

3. Multiple offenses do not constitute the same criminal conduct for offender scoring purposes unless they involve the same victim and occur at the same time and place and with the same objective intent. Here, the evidence shows that Maynor's three offenses against Huynh involved different objective intents and did not all occur at the same time and place. Has Maynor failed to establish that his counsel was constitutionally ineffective for failing to argue same criminal conduct at sentencing?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Edmond Maynor with one count of first-degree robbery and three counts of first-degree assault. CP 39-41. The jury convicted Maynor as charged, with the exception of one of the assault counts, on which the jury convicted him of the lesser

offense of second-degree assault. CP 119, 122, 124, 126. By special verdict, the jury also found that Maynor was armed with a firearm on each count. CP 120, 121, 123, 125. The trial court imposed a sentence of 474 months in prison. CP 131-40, 150.

## 2. SUBSTANTIVE FACTS

On the morning of September 21, 2012, Maynor entered Westlake Center through the Fourth Avenue doors. 3RP 19.<sup>1</sup> He wore a disguise, including a Caucasian mask, sunglasses, and hat. 3RP 25, 32, 41, 66, 101. He walked briskly up the stairs and into the Express Jewelry store. 3RP 24, 101.

Maynor approached the counter and told Tu Huynh, the only employee present, that he was looking for a diamond engagement ring worth \$7,000-\$15,000. 3RP 101-02. Huynh explained that the store did not carry such expensive jewelry, but pulled out a tray that contained a \$5,000 engagement ring, among others. 3RP 103-04. At that point, Maynor pulled out a gun, pointed it at Huynh, and demanded the whole tray of about 18 rings. 3RP 104. When Huynh froze, Maynor told him he would shoot if Huynh did not give

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<sup>1</sup> The verbatim report of proceedings is contained within six inconsistently-paginated volumes. The State refers to this material as follows: 1RP – 10/8, 10/22, 10/29, 11/15 & 8/30/2012; 2RP – 6/10/2013; 3RP – 6/12 & 6/13/2013; 4RP – 6/17/2013; 5RP – 6/18 & 6/19/2013; 6RP – 2/26/2014.

up the tray by the count of three. 3RP 105. Huynh gave Maynor the tray, and Maynor began to run. 3RP 106. After just a couple steps, however, Maynor came back, pointed his gun at Huynh, and fired once. 3RP 106-07. The bullet nearly struck Huynh, tearing a hole in the sleeve of his shirt. 3RP 107. The bullet continued through the wall and into the back of the neighboring Godiva Chocolate store, nearly hitting Godiva store manager Jeanine Beard-Thomas. 3RP 511.

Huynh chased Maynor through the mall until they reached the stairs to the Fourth Avenue entrance. 3RP 109. He loudly shouted “stop” and “help” and “robbery.” 3RP 12, 26, 111. Maynor jumped down the stairs, fell, and arose with gun in hand. 3RP 26-27. Maynor pointed the gun at Huynh and fired two more shots, then ran outside. 3RP 27, 29, 112, 114, 116. The shots came close, but Huynh ducked and was not hit. 3RP 27, 114.

Roberto Sandoval, a bell captain at the nearby Mayflower Hotel, saw Maynor running down the street in a mask. 3RP 66. Maynor’s hands were in his pockets. 3RP 84. Sandoval knew about the gun shots and heard people saying “that’s him, that’s him” as Maynor ran. 3RP 66. Sandoval chased Maynor for two or three blocks, caught up to him, pushed him, and said “stop.”

3RP 70. Maynor tried to hit Sandoval, but Sandoval pushed him down. 3RP 70. Maynor then pulled out his gun and pointed it at Sandoval, at which point Sandoval threw himself down on Maynor and began fighting for the gun. 3RP 70-71. Three shots were fired. 3RP 49, 84, 87-88. Sandoval was struck by one bullet in the right hand and arm. 3RP 73. He continued to try to grab the gun, and Maynor hit him three times on the head with it. 3RP 73. Sandoval yelled for help and several bystanders came to his aid. 3RP 73, 81. Maynor was unmasked and his gun was thrown out of reach. 3RP 75. As a result of the shooting, Sandoval no longer has movement in his right hand. 3RP 76.

One of the people who came to Sandoval's aid was United States Marshall Almer Smith. 3RP 77. Smith was working as security for the federal courthouse when another officer said shots had been fired across the street. 3RP 78. Smith and two other federal officers crossed the street to find several people struggling with Maynor, and a handgun, mask, and some jewelry scattered on the ground. 3RP 81. Smith put Maynor in handcuffs and waited for Seattle Police to arrive. 3RP 82, 149.

Seattle Police Officers Eastman and Hoang took Maynor into custody. 3RP 149. On the way to the patrol car, Maynor said "You

better just kill me” or “You better shoot me, man.” 3RP 151, 153. At the scene, Officer Hoang collected a mask, sunglasses, small purse, shell casings, one glove and the handgun, which was locked, loaded, and jammed. 4RP 113-14, 118. The 15-round magazine loaded into the handgun had nine rounds remaining. 4RP 121.

In a search of Maynor’s person incident to arrest, Detective Thomas Conrad found a holster, the other glove, two bags, and a map of Seattle with the handwritten note, “Give me the diamond or I will kill you.” 4RP 126, 128. A second magazine for the gun was fully loaded with 15 additional rounds of ammunition. 4RP 130.

Maynor testified in his own defense. 4RP 167. He admitted that he robbed Express Jewelry. 4RP 167, 171. He admitted that he fired one shot in the store, but claimed that he did not intend to hurt Huynh and was only trying to scare him into letting go of the jewelry. 4RP 171. He admitted that he fired additional shots as he was fleeing in the hallway, but claimed that he was only trying to keep Huynh from following him. 4RP 172-73. He also admitted that his gun discharged three times during the struggle with Sandoval, but claimed he did not purposefully shoot the gun. 4RP 175-76.

Maynor explained that he had been desperate after a series of events left him unemployed, divorced, and broke. 4RP 167-69. He researched shotguns, sniper rifles, laser sights, suppressors, and what type of ammunition would penetrate body armor and bullet-proof glass. 4RP 205-06, 209. Eventually, he purchased a 9 mm handgun in the middle of 2012. 4RP 170. He practiced shooting at a gun range. 4RP 179. Maynor claimed that he bought the gun to shoot himself, but could not go through with the suicide. 4RP 170. Instead, he began planning a robbery. 4RP 170. When he set out to rob Express Jewelry, he hoped that he would be successful or be killed in the attempt. 4RP 177. He claimed he did not intend to shoot or harm anyone. 4RP 177-78.

Additional facts are included in the argument sections to which they pertain.

C. ARGUMENT

1. MAYNOR'S CONVICTIONS AND PUNISHMENTS FOR ROBBERY IN THE FIRST DEGREE AND ASSAULT IN THE SECOND DEGREE DO NOT VIOLATE DOUBLE JEOPARDY.

Maynor claims that his convictions for Robbery in the First Degree (Count I) and Assault in the Second Degree (Count II)

violate double jeopardy. But two offenses do not merge unless the legislature has clearly indicated that in order for the State to prove a higher degree of one crime, it must prove that the crime was accompanied by another crime. Although in some situations the crime of robbery may be elevated to the first degree by proof of an accompanying assault, in this case the Robbery in the First Degree was predicated on Maynor being armed with a deadly weapon. The assault, as charged here, was not required to elevate the robbery. Moreover, given the State's clear election of the shooting as the basis for Count II, the jury could only find that Maynor committed Assault in the Second Degree if it found that he shot at Huynh – an act that was not necessary to prove the first-degree robbery. Accordingly, Maynor's convictions for Robbery in the First Degree and Assault in the Second Degree do not merge.

Both the federal and state constitutions protect a defendant against multiple convictions for the same offense. U.S. Const. amend. V ("No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb."); Wash. Const. art. I, § 9 (same); State v. Calle, 125 Wn.2d 769, 775, 888 P.2d 155 (1995) (citing Whalen v. United States, 445 U.S. 684, 688, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980)). Multiple convictions whose

sentences are served concurrently may still violate double jeopardy. Calle, 125 Wn.2d at 775.

Within these constitutional constraints, the legislature has broad power to define crimes and assign punishments. Id. at 776. Where a single act supports conviction under multiple statutes, multiple punishments may be permitted unless, in light of legislative intent, the crimes are the same offense. State v. Kier, 164 Wn.2d 798, 803-04, 194 P.3d 212 (2008). In other words, the question of whether conviction and punishment for multiple crimes arising out of the same conduct violates double jeopardy turns on how the legislature intended to punish the conduct. State v. Louis, 155 Wn.2d 563, 568-69, 120 P.3d 936 (2005); State v. Freeman, 153 Wn.2d 765, 768, 108 P.3d 753 (2005); Calle, 125 Wn.2d at 776. This Court's review of legislative intent is de novo. Freeman, 153 Wn.2d at 770; Kier, 164 Wn.2d at 804.

In determining whether multiple punishments were authorized by the legislature, a reviewing court must use the three-part test articulated by our supreme court in Calle. First, this Court looks to the language of the statutes themselves to see if the legislature implicitly or explicitly authorized or prohibited cumulative punishments. Calle, 125 Wn.2d at 776-77; Kier, 164 Wn.2d at 804.

Here, the statutes themselves do not address whether separate punishments may be imposed. Compare RCW 9A.56.200 (Robbery in the First Degree) with RCW 9A.36.021 (Assault in the Second Degree). See also Freeman, 153 Wn.2d at 774-76 (holding that there is no evidence that the legislature intended to punish second-degree assault separately from first-degree robbery).

Second, when legislative intent is not clear from the statutes, this Court turns to the Blockburger<sup>2</sup> or “same evidence” test. Freeman, 153 Wn.2d at 776-77; Calle, 125 Wn.2d at 777-78. Under that test, if there is an element of each offense that is not included in the other, and proof of one offense would not always prove the other, the two offenses are not the same for constitutional double jeopardy purposes. Freeman, 153 Wn.2d at 772, 776-77; Calle, 125 Wn.2d at 777-78; State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983). Robbery in the First Degree requires proof of an unlawful taking, which Assault in the Second Degree does not. Likewise, Assault in the Second Degree requires an intentional assault, which Robbery in the First Degree does not. Compare RCW 9A.56.190 & .200 with RCW 9A.36.021. Thus, Robbery in

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<sup>2</sup> Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

the First Degree and Assault in the Second Degree are not the same offense under this analysis, and Maynor does not argue otherwise.

This result of the same evidence or Blockburger test creates a strong presumption that the legislature intended that the crimes should be punished separately, which can be overcome only by clear evidence of contrary legislative intent. Louis, 155 Wn.2d at 570. Nonetheless, the third part of the Calle test requires this Court to apply the merger doctrine as a tool of statutory construction to determine whether the legislature intended to impose multiple punishments. Id.; Freeman, 153 Wn.2d at 772-73. That doctrine “only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime (e.g., first-degree rape) the State *must* prove not only that a defendant committed that crime (e.g., rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (e.g., assault or kidnapping).” Vladovic, 99 Wn.2d at 421 (emphasis added). Washington courts have held in certain situations that Robbery in the First Degree and Assault in the Second Degree merge under this analysis. E.g., Freeman, 153

Wn.2d at 777-78; Kier, 164 Wn.2d at 805-06. However, that doctrine does not apply here.

The application of the merger doctrine rests on how the crimes were charged and proved to the jury in the individual case. Freeman, 153 Wn.2d at 778; see also id. at 774 (“[N]o per se rule has emerged; instead, courts have continued to give a hard look at each case”). Here, the jury was instructed that it could convict Maynor of Robbery in the First Degree only if it found that he was armed with a deadly weapon in the course of the robbery. CP 92. That crime was proved by evidence that Maynor pulled out a gun, threatened to shoot if Huynh refused to give him the tray of jewelry, and thereby obtained the jewelry. 3RP 104-05.

By contrast, the jury was instructed that it could convict Maynor of Assault in the Second Degree only if it found that he intentionally assaulted Huynh with a deadly weapon or intentionally assaulted Huynh and recklessly inflicted substantial bodily harm. CP 100. Although the jury instructions defined assault to include acts done to create a reasonable apprehension of imminent bodily injury (i.e., pointing or threatening with the gun) as well as an intentional shooting, the State clearly elected that the act constituting the assault charged in Count II was “the round[] that

Mr. Maynor fired at Tu Huynh inside the Express Jewelry store.”  
5RP 287.<sup>3</sup> Thus, the jury’s consideration of Assault in the Second Degree was limited to the act of Maynor’s shooting at Huynh – an act that was entirely unnecessary to a robbery predicated on being armed with a deadly weapon. Accordingly, in order to prove Robbery in the First Degree as charged and proven in this case, the State was not required to prove the shooting that formed the sole basis for the assault charge. The offenses do not merge.

Examination of cases where Washington courts have found that robbery and assault merge further underscores why there is no merger in this case. For example, in Zumwalt, the companion case in Freeman, 153 Wn.2d 765, the defendant punched a woman in the face, breaking her eye socket, and robbed her of \$300 in cash and casino chips. 153 Wn.2d at 770. Our supreme court determined that the first-degree robbery (based on bodily harm) and the second-degree assault (predicated on the injury to the

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<sup>3</sup> Maynor argues that the State also relied on the shooting to establish the robbery. Brief of Appellant at 8-9. Review of the record of closing arguments shows that the State provided very little argument with respect to the robbery charged in Count I because Maynor had admitted to that crime. 5RP 279. The prosecutor added, “He was armed with a firearm. He went there with the intent to deprive Mr. Huynh in Express Jewelry store of its property, and *he did so by threatening to use his weapon*. And he fired a round in the store, for goodness sakes, put it through the wall right behind where Mr. Huynh was standing. That is not at issue.” 5RP 279 (emphasis added). In context, it is clear that the State did not rely on the shooting to prove the robbery, but merely underscored the seriousness of the threat, which was itself the act it relied upon.

woman) merged, because the assault was committed “in furtherance” of the robbery. Id. at 778. In other words, the court concluded that, but for the conduct amounting to the charged assault, the defendant would have been guilty of only second-degree robbery. Id. That is not the case here. Whether Maynor shot at Huynh – the only act supporting the second-degree assault conviction – was immaterial to his robbery conviction. Rather, the Robbery in the First Degree was committed by Maynor threatening Huynh with a gun and taking the jewelry.

Similarly, in Kier, 164 Wn.2d 798, the court merged a first-degree robbery and a second-degree assault committed during the course of a carjacking, where the defendant aimed a gun at the occupants of the car in order to steal it. But there, both charges required the State to prove “that Kier’s conduct created a reasonable apprehension of fear of harm.” Id. at 806. Given the State’s clear election of the shooting as the act constituting the assault in this case, however, the jury could not find that the assault was committed merely by Maynor’s use of a gun to create a reasonable apprehension of harm; while such fear was necessary for the robbery, the assault required an actual shooting. CP 92, 104; 5RP 287. Thus, Maynor’s shooting at Huynh did not “elevate[]

robbery to the first degree,” and the merger doctrine is not triggered.

Moreover, in Kier, our supreme court approved of the result in State v. Esparza, 135 Wn. App. 54, 143 P.3d 612 (2006). Kier, 164 Wn.2d at 806-07. In Esparza, this Court declined to merge an Attempted Robbery in the First Degree and an Assault in the Second Degree. Esparza and his co-defendant Beaver tried to rob a jewelry store at gunpoint; Beaver aimed a gun at the jeweler, who shot him, causing Beaver to flee before obtaining any property. Esparza, 135 Wn. App. at 57-58. In concluding that there was no double jeopardy violation, the Esparza court noted that the State had to prove only that Beaver was armed with or displayed a deadly weapon in order to prove the Attempted Robbery in the First Degree. Id. at 66. The Court then held,

Since it was unnecessary under the facts of this case for the State to prove that Beaver engaged in conduct amounting to second degree assault in order to elevate his robbery conviction, and because the State did prove conduct not amounting to second degree assault that elevated Beaver’s attempted robbery conviction, the merger doctrine does not prohibit Beaver’s conviction for both attempted first degree robbery and second degree assault.

Id. The case at bar is indistinguishable from Esparza. The State had to prove that Maynor was armed with a deadly weapon in order

to prove the first-degree robbery. CP 92. The assault – the shooting at Huynh – was unnecessary to elevate the crime of robbery to Robbery in the First Degree. The offenses do not merge.

Instead of citing Esparza, Maynor relies on In re Personal Restraint of Francis, 170 Wn.2d 517, 242 P.3d 866 (2010).

However, in Francis, the attempted first-degree robbery charge was based upon the alternative means that Francis inflicted bodily injury upon the victim – just like the situation in Zumwalt. Id. at 524. The court held that the merger doctrine applied because “Francis’ second degree assault conduct was also charged as an element of the first degree robbery charge.” Id. at 524. The court acknowledged that its holding would have been different had the State charged the attempted robbery based upon a different alternative means:

The State also argues the second degree assault conduct need not be part of the attempted first degree robbery charge because Francis was armed with and/or displayed a deadly weapon (a baseball bat) in his attempt, and thus his attempted robbery is alternatively elevated to the first degree pursuant to RCW 9A.56.200(1)(a)(i) and (ii). But again, the State didn’t charge Francis with attempted first degree robbery based upon those alternative grounds, but rather based upon the infliction of bodily injury, RCW 9A.56.200(1)(a)(iii). The State has great latitude and

discretion when it chooses what it will charge a defendant. But once the State has charged the defendant, short of a timely amendment, the State is stuck with what it chose.

Id. at 527.

The court distinguished Esparza on this same ground:

Esparza held that when the State charges a defendant with an attempt crime *but does not specify what the substantial step is*, for double jeopardy analysis, the court need not assume the assault conduct is the substantial step when other conduct would also satisfy that requirement. Id. at 61-64, 143 P.3d 612. But here the State charged Francis with *specific* conduct – inflicting bodily injury on Jacobsen – to satisfy the statutory element to raise the attempted robbery to the first degree. See RCW 9A.56.200(1)(a)(iii). The second degree assault conduct is inseparable from the attempted first degree robbery *as it was charged*.

Id. at 526 n.6 (emphasis in original). Francis is consistent with Esparza and Kier and does not support Maynor’s double jeopardy claim.

Even if this Court concludes that the merger doctrine applies, the two offenses may still be punished separately if the defendant’s particular conduct demonstrates an independent purpose or effect. Kier, 164 Wn.2d at 804; Vladovic, 99 Wn.2d at 421. Certainly, the assault and robbery statutes are “directed to separate evils.” See Albernaz v. United States, 450 U.S. 333, 343,

101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981). Stealing the jewelry and shooting at Huynh caused separate and distinct injuries; neither is “merely incidental to the [other] crime.” Vladovic, 99 Wn.2d at 421 (quoting State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979), overruled on other grounds by State v. Sweet, 138 Wn.2d 466, 980 P.2d 1223 (1999)). And because the shooting occurred after the first-degree robbery was legally completed, “there was a separate injury and intent justifying a separate assault conviction.” Freeman, 153 Wn.2d at 779 (citing State v. Prater, 30 Wn. App. 512, 516, 635 P.2d 1104 (1981)). See also State v. Knight, 176 Wn. App. 936, 309 P.3d 776 (2013) (holding that second-degree assault conviction did not merge with first-degree robbery conviction because the robbery was completed before the act amounting to assault in the second degree occurred).

In short, the State proved that Maynor committed Robbery in the First Degree by being armed with a deadly weapon. That crime was completed when Maynor threatened Huynh with his gun and took the jewelry. The State proved that Maynor committed Assault in the Second Degree when, after beginning to flee from the robbery, Maynor returned and shot at Huynh. Under the facts of this case and the prosecutor’s clear election in closing argument,

no other act could have supported the assault conviction in Count II. Thus, proof of the assault was not necessary to the conviction for Robbery in the First Degree. The two offenses do not merge.

2. THE TRIAL COURT PROPERLY DENIED  
MAYNOR A MISTRIAL BECAUSE THERE WAS  
NO PREJUDICIAL MISCONDUCT.

Maynor contends the trial court erred by denying his motion for a mistrial after the prosecutor asked Maynor whether he had “contemplated hurting others in an effort to be shot by police,” after representing in pretrial discussions that he would not elicit any prior bad acts evidence. 4RP 183. Because the prosecutor had a good-faith basis for the inquiry and Maynor cannot establish prejudice in any event, this Court should reject the claim.

a. Relevant Facts.

During a pretrial hearing, the prosecutor advised that he did not intend to introduce any prior bad acts or other ER 404(b) evidence concerning Maynor. 2RP 9. During his testimony, however, Maynor testified that he was having an “emotional breakdown” at the time of the offense and was suicidal. 4RP 167,

170. Maynor explained that when he set out to commit the robbery that day, he “didn’t want to see the end of September. I didn’t want to see the end of the day. I was hoping that, you know, I would be gone, and I would have something to provide for my family.”

4RP 177. Maynor agreed that he was “hoping that [he] would be dead or successful in [his] robbery.” 4RP 177. Maynor testified that this was what he meant when he told Officer Eastman, “It would have been better if you had shot me.”<sup>4</sup> 4RP 177.

Inferring from this evidence that Maynor planned to effect his suicide by provoking the police to shoot him, the prosecutor intended to cross examine Maynor about his intent, planning and preparation. 4RP 183-84. Maynor had a small notebook with him at the time of his arrest that contained evidence that he had contemplated buying (and presumably using) a sniper rifle, a suppressor (to muffle the noise of the gun), armor-piercing ammunition and rounds that would go through bullet-proof glass, laser sights to improve accuracy, and various disguises including that of a security officer and a member of the U.S. Army. 4RP 183-84, 191-92, 206-09, 211-12, 213; Ex. 82. Near an entry about

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<sup>4</sup> Officer Eastman testified that Maynor said “You better just kill me” as he was being led to a police car. 3RP 151-52. A dash-cam video apparently shows Maynor saying, “You better shoot me, man.” Id.

a sniper rifle is the statement, "I hate this world, I was never meant to be here." 4RP 209. This notebook was admitted without objection or limitation as part of Exhibit 82. 4RP 116, 202.

Given Maynor's testimony about his suicidal thoughts, his intent to either successfully rob a jewelry store or be killed trying, his evident planning to buy and presumably use firearms designed to accurately target and kill others, and his possession of two full clips of ammunition at the time of the robbery, the prosecutor asked Maynor, "This is not the first time that you had contemplated hurting others in [an] effort to be shot by police, was it?" 4RP 183. Maynor did not answer the question, instead asking, "What do you mean?" 4RP 183. Defense counsel then objected and requested a sidebar. 4RP 183.

Out of the presence of the jury, the prosecutor explained his position that Maynor had opened the door to his state of mind by testifying that he was suicidal at the time of the robbery but had no intent to hurt anyone else. 4RP 184, 186. The trial court concluded that the prejudicial effect of the line of questioning outweighed its probative value and that its only relevance was to show Maynor's propensity for violence. 4RP 186-87. The court accordingly sustained the defense objection. 4RP 201.

Maynor moved for a mistrial. 4RP 187. He argued that the prosecutor's question effectively "leads this jury to believe that Mr. Maynor has committed or planned to commit some other violent act on some other occasion." 4RP 192. The prosecutor admitted that his question was "a bit inartful," but explained that it was meant as a lead-in to examination about Maynor's notebook and evident planning of the events at issue:

[T]he truth of the matter is, he put up a great deal of thought into ultimately what came to be the events of September 21<sup>st</sup> of 2012. Then we are going to go through many of these entries in this book.

So, this book really represents evidence of the defendant's state of mind, which he injected in this case through his testimony, saying "I didn't intend to hurt anyone, I didn't intend to shoot anyone."

He also injected in [this] case this suicidal ideation, which I think is fair ground for cross examination. My intent is to cross examine Mr. Maynor about some of the contents as to what I see are the pertinent contents of this notebook relative to the planning and the thought that he had given prior to the 21<sup>st</sup> of September, to the type of weapon he might choose, to what those weapons were capable of doing, how he might escape culpability by researching other crimes that had nothing to do with him, but as [defense counsel] said, were committed by others. ...

... I don't see it as 404(b), rather it is evidence of intent, and planning, and the thought that Mr. Maynor put into this, which I think is all relevant and probative evidence for ... proper cross examination.

4RP 191-92.

Noting that the notebook had been admitted into evidence without limitation, the court concluded that the evidence in the notebook was relevant and was not precluded by ER 404(b). 4RP 195. Nevertheless, the court maintained that the prosecutor's question went more to his intent at some past time, a matter that was not relevant to whether he intended to harm people on this occasion. 4RP 195-96. The court acknowledged that the prosecutor's question suggested that there was evidence in the notebook that Maynor intended to harm people on other occasions, but concluded that any such misapprehension could be corrected through further examination. 4RP 196. Moreover, the court pointed out, "The jury can review the entire notebook and see that there is really nothing in there indicating that he had a generalized intent to hurt people." 4RP 196-97. Under these circumstances, the trial court concluded that the prosecutor's unanswered question would not deprive Maynor of a fair trial and denied the mistrial motion. 4RP 197.

Maynor reluctantly accepted the trial court's offer to provide a curative instruction. 4RP 200. The trial court also directed the prosecutor to focus his questioning on the notebook "so that it's clear that [the prosecutor] isn't referring to some prior incident,

some prior act, but rather thoughts that were recorded in the journal itself.” 4RP 199. When the jury returned, the court advised, “Jury, the last question from the prosecutor is stricken. You are instructed to disregard that question and any inferences from that question.” 4RP 202. The prosecutor immediately began questioning Maynor about his notebook. 4RP 202.

b. Maynor Cannot Establish Prejudicial Misconduct.

Maynor contends that the prosecutor’s unanswered question “falsely accus[ed]” Maynor of “prior similar crimes” and so prejudiced him that nothing short of a new trial can cure it. Brief of Appellant at 11. But the prosecutor had a good-faith basis for his inquiry; it was not improper. Further, even if the question was improper, there is very little chance that it affected the outcome of trial in light of the evidence and the court’s curative instruction.

“To prevail on a claim of prosecutorial misconduct, the burden is on the defendant to show that the prosecutor did not act in good faith and that the conduct complained of was both improper and so prejudicial as to deny the defendant a fair trial.”

State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985)

(citing State v. Weekly, 41 Wn.2d 727, 728, 252 P.2d 246 (1952)).

To show prejudice, he must prove that “there is a substantial likelihood [that] the instances of misconduct affected the jury’s verdict.” State v. Thorgerson, 172 Wn.2d 438, 442-43, 258 P.3d 43 (2011) (quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). Maynor makes neither showing.

First, the record does not support Maynor’s assertion that the prosecutor accused him of prior similar crimes. Rather, the prosecutor asked a question: whether or not Maynor had previously “contemplated” hurting others as a way to provoke the police to shoot him. Second, the prosecutor had a good-faith basis for that inquiry. Maynor testified that he was suicidal and that he had purchased the gun he used in the robbery with the intent to shoot himself. 4RP 170. He testified that he could not go through with it and decided to commit a robbery instead. 4RP 170. He testified that he planned to either successfully complete the robbery or be killed. 4RP 177. Upon arrest, Maynor told the police that it would have been better if they had shot him. 4RP 177. Further, his notebook, which was admitted without objection or limitation, provides evidence that Maynor researched weapons and accessories that would be impractical or unnecessary for use on

oneself, including a sniper rifle, a shotgun, an AK-47, a laser scope, armor-piercing ammunition, an extended barrel, and a suppressor. Ex. 82. Maynor also testified that he practiced shooting at a gun range, something not reasonably necessary to shoot oneself. 4RP 179. And he loaded and brought two 15-round magazines, far more than necessary to rob an unguarded jewelry store. 4RP 181. It is reasonable to infer from this evidence that Maynor, suicidal but unable to shoot himself, planned a violent crime to incite the police to shoot him. The question whether he had “contemplated” doing this before the day of the robbery was not improper.

Even if the question was improper, Maynor has not shown prejudice. He admits that the question caused no prejudice with respect to Counts I or II, but asserts that the jury might have convicted him of lesser offenses with respect to Counts III (first-degree assault of Sandoval) and IV (first-degree assault of Huynh at the stairs) but for the prosecutor’s inquiry. Maynor’s theory is that the jury was more likely to find that he acted with intent to inflict great bodily harm because the prosecutor’s question suggested that Maynor had “contemplated hurting others” before. CP 105, 111. But the evidence for Count IV was that Maynor pointed his gun at Huynh and pulled the trigger twice in an open

shopping mall. The evidence for Count III was that Maynor ran from the mall with his hands in his pockets, that he pulled out the gun when Sandoval tried to stop him, and that he fired the gun twice, paused, and fired once more, then struck Sandoval in the head with the gun three times. 3RP 45, 73. This evidence belies Maynor's claim that he never meant to hurt Huynh or Sandoval; it is unlikely that the jury would accept such a defense whether or not the prosecutor had suggested that Maynor had contemplated hurting others in the past.

Further, Maynor disregards the fact that the defense objection was sustained, the inquiry was stricken, and the jury was instructed to disregard the question and any inferences that it might have raised. "Juries are presumed to follow instructions absent evidence to the contrary." State v. Dye, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013). Maynor provides no evidence to rebut the presumption that the jury disregarded the prosecutor's unanswered question and any inferences from it. Accordingly, he cannot establish prejudice and his misconduct claim fails.

c. Maynor Cannot Establish A Serious Irregularity Requiring A Mistrial.

Maynor alternatively argues that the trial court erred by refusing to grant a mistrial on the basis of a serious irregularity. But his inability to show a substantial likelihood that the improper evidence affected the jury's verdict defeats this claim as well.

A trial court will grant a mistrial "only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." State v. Rodriguez, 146 Wn.2d 250, 270, 45 P.3d 541 (2002). The trial judge is in the best position to determine the impact of a potentially prejudicial remark, so appellate courts will not overturn the trial court's decision to deny a mistrial absent abuse of discretion. State v. Escalona, 49 Wn. App. 251, 254-55, 742 P.2d 190 (1987). "A reviewing court will find an abuse of discretion only when no reasonable judge would have reached the same conclusion." Rodriguez, 146 Wn.2d at 270 (quoting State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)).

To determine whether a trial irregularity may have prejudiced the jury, a court should consider several factors, all "viewed against the backdrop of all the evidence": (1) the seriousness of the

irregularity; (2) whether the statement in question was cumulative of other evidence properly admitted; and (3) whether the irregularity could be cured by an instruction to disregard the remark, which a jury is presumed to follow. Escalona, 49 Wn. App. at 254. See also State v. Gamble, 168 Wn.2d 161, 178-79, 225 P.3d 973 (2010) (evidence revealing defendant's prior criminal history in violation of an order in limine was a serious irregularity, but was cured by a prompt instruction to disregard).

Maynor argues that the irregularity was serious because the prosecutor's question violated a pretrial ruling and was factually false. That is incorrect. The trial court granted the defense motion to exclude prior bad acts under ER 404(b). 2RP 9. The prosecutor's inquiry was not designed to elicit evidence of prior bad "acts," but to introduce evidence of Maynor's state of mind, planning and preparation. And Maynor's notebook provided a factual basis for the inference that he intended to commit "suicide by cop," so the inquiry was not "false."

Maynor argues that the statement in question was not cumulative because there was no other evidence that Maynor had previously contemplated harming others. But Exhibit 82 and Maynor's testimony about it establishes that Maynor researched

assault weapons, accessories, and ammunition that could not practically be used against himself. The obvious inference from this evidence is that he contemplated using such weapons against others. The prosecutor's question merely highlighted this inference.

Maynor also argues that the irregularity could not be cured by an instruction to disregard "because intent was heavily contested." Brief of Appellant at 14. Maynor points out that his "entire defense was that he was so depressed after his multiple setbacks that he just wanted to either be dead or to steal something of value; he never intended to hurt anyone." Id. Setting aside the fact that stealing someone's property at gunpoint is itself hurtful, Maynor's unsupported argument that the suggestion that he had "contemplated" hurting others in the past so overwhelmed the jury that it could not comply with the trial court's instruction to disregard is unpersuasive. The trial court did not abuse its discretion in denying Maynor's request for a mistrial.

3. MAYNOR'S OFFENDER SCORE WAS PROPERLY CALCULATED.

For the first time on appeal, Maynor claims that his convictions for the three offenses involving Huynh constitute the "same criminal conduct" for scoring purposes. Having waived this issue by affirmatively agreeing to his offender score, Maynor argues that his counsel's failure to raise this argument at sentencing amounted to constitutionally ineffective assistance. Because Maynor has not established a reasonable probability that the trial court would have found that the convictions were the same criminal conduct, he has not shown that his counsel's representation was deficient. His claim accordingly fails.

For purposes of calculating a defendant's offender score, current offenses are counted as prior convictions unless two or more of the offenses constitute the same criminal conduct. RCW 9.94A.589(1)(a). Crimes are considered the "same criminal conduct" if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." Id. "[T]he statute is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act." State v. Graciano, 176 Wn.2d 531, 540, 295 P.3d 219 (2013)

(quoting State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997)). The defendant bears the burden of proving same criminal conduct. Graciano, 176 Wn.2d at 538.

Although Maynor affirmatively agreed to his offender score calculation at sentencing, 1RP 15, he seeks to avoid waiver by challenging that score in the context of a claim of ineffective assistance of counsel. A defendant in a criminal case has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prevail on an ineffective assistance of counsel claim, the defendant must show that (1) his attorney's conduct fell below an objective standard of reasonableness and (2) this deficiency resulted in prejudice. Id. at 687-88; State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). If the defendant fails to demonstrate either prong, the inquiry ends. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). "Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

Courts presume that counsel has provided effective representation and are "highly deferential" when scrutinizing counsel's performance. Strickland, 466 U.S. at 689. "Effective

assistance of counsel” does not mean “successful assistance,” nor is counsel’s competency measured by the result. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Reviewing courts make “every effort to eliminate the distorting effects of hindsight.” In re Personal Restraint of Rice, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992). The relevant inquiry on review is “whether counsel’s assistance was reasonable considering all the circumstances.” Strickland, 466 U.S. at 688. There is a “wide range” of reasonable performance and a “strong presumption” of competence. Id. at 689.

Further, the defendant must show prejudice, specifically “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Strickland, 466 U.S. at 687. Prejudice exists where “there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different.” Hendrickson, 129 Wn.2d at 78; Strickland, 466 U.S. at 694. “The likelihood of a different result must be *substantial*, not just conceivable.” Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 792, 178 L. Ed. 2d 624 (2011) (emphasis added).

Maynor’s counsel was not constitutionally ineffective for failing to raise a same criminal conduct argument given the

evidence at trial and the law regarding same criminal conduct.

Two crimes constitute the same criminal conduct only if they share the same (1) criminal intent, (2) time and place, and (3) victim.

RCW 9.94A.589(1)(a). If any one of these elements is missing, the crimes cannot be considered same criminal conduct and must be counted separately in calculating the offender score. State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). A reviewing court will reverse a sentencing court's determination of "same criminal conduct" only upon a showing of a "clear abuse of discretion or misapplication of the law." State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

a. Maynor's Three Offenses Against Huynh Did Not All Occur In The "Same Place."

Counts I, II, and IV each involved the same victim, satisfying one of the requirements for same criminal conduct. Maynor contends that the offenses also occurred in the "same place" because they all occurred within Westlake Center. He relies on State v. Davis, 174 Wn. App. 623, 300 P.3d 465 (2013). In Davis, a man shot a police officer in the arm inside a cabin, then followed the officer outside, where he tried to shoot the officer several more

times and with a different weapon. Id. at 630. The trial court found that these offenses constituted the same criminal conduct, and the State cross-appealed this determination. Id. at 631.

Division Two of this Court held that the State had not met its burden to show an abuse of discretion, noting that the “trial judge was in the best position to evaluate the sequence of events and to determine whether these locations were separate places for the purposes of the same criminal conduct analysis. Where, as here, the different physical locations are adjacent and within a short distance of each other, we cannot say that the trial court abused its discretion by finding them to be the same place.” Id. at 644. But the Davis court emphasized that the two physical locations were not the same place as a matter of law, and relied heavily on the demanding standard of review to resolve the matter. Id. at 643-44. In other circumstances, the same court concluded that offenses that occur in different rooms of the same house are not the same place for purposes of same criminal conduct. State v. Stockmyer, 136 Wn. App. 212, 220, 148 P.3d 1077 (2006) (“guns found in different rooms in the same house are found in different ‘places’ for purposes of the same criminal conduct test”).

In this case, the three offenses under consideration are the robbery in the jewelry store, the second-degree assault by shooting in the jewelry store, and the first-degree assault by shooting in the stairway. The two offenses in the jewelry store occurred in the same place, but the shooting on the stairs did not. While the robbery and shooting inside the jewelry store imperiled only those present in that store (or on the other side of the wall when the bullet went through), opening fire within the common areas of a busy shopping center put many others in grave danger. In Stockmyer, the court observed that the defendant's unlawful possession of multiple guns in three different rooms in the same house did not constitute the same criminal conduct because "multiple guns in different rooms in felons' homes increase the peril to both law enforcement and the general public in that they provide felons with easier and more ready access to guns in the home, thus increasing the possibility of harm to others." 136 Wn. App. at 219. Similarly, Maynor's shooting in the common area of the shopping center posed a different and much greater possibility of harm to others than the robbery and shooting within the jewelry store. Under Stockmyer, the offenses did not occur in the same place, and

Maynor's counsel was not ineffective for failing to argue to the contrary.

b. The Offenses Against Huynh Did Not Occur At The "Same Time."

Maynor argues that the robbery, second-degree assault, and first-degree assault against Huynh happened at the same time because the robbery and second-degree assault occurred "at precisely the same time" and the first-degree assault on the stairs occurred "just a few seconds after[.]" Brief of Appellant at 18. But as noted above, the robbery and assault did not occur at the same time. Maynor completed the robbery by threatening Huynh with the gun, at which point Huynh released the tray of jewelry and Maynor turned and began to run to the store exit. 3RP 105-06. Maynor then came back to shoot at Huynh, who was not following at the time but "just stood there, like nothing." 3RP 106. Once Maynor left the store, Huynh followed. Then, though just steps from the exit, Maynor again turned and fired two more shots at Huynh.

Maynor relies on State v. Porter, in which an undercover officer made two drug buys in two transactions within ten minutes.<sup>5</sup> 133 Wn.2d 177, 183, 942 P.2d 974 (1997). Our supreme court concluded that the two drug sales occurred at the same time because they “were part of a continuous, uninterrupted sequence of conduct over a very short period of time” during which the officer “never left the scene.” Id. But unlike Porter, Maynor’s crimes against Huynh were not part of an “uninterrupted sequence.” Rather, after completing the robbery and beginning to flee, Maynor had an opportunity to cease his criminal activity but instead decided to turn back and shoot at Huynh. Likewise, when Maynor fell at the stairs just steps away from the mall exit, he had the opportunity to keep running, but instead chose to turn back and fire two more shots in an open shopping center. Thus, each crime in the sequence was interrupted by Maynor’s attempt to flee and decision to return to assault Huynh. Porter does not favor Maynor’s position.

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<sup>5</sup> Maynor also cites State v. Calvert, where Division Three held that two forged checks deposited on the same day were the same criminal conduct even if they were not deposited at the same moment. 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995). But Calvert includes no details about whether the two deposits were interrupted by an opportunity to cease criminal activity, which is crucial to a “same time” determination under the later-decided case law. Indeed, it is not even clear that the two forged checks were deposited in separate transactions. Calvert is no help here.

Where the defendant completes each offense before committing the next and has the opportunity after each to “either cease his criminal activity or proceed to commit a further criminal act,” the offenses do not occur at the same time. State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997) (two rapes occurred in the same room sequentially within a short period of time, but not continuously because the defendant had time to pause and reflect before committing second rape). Here, though his sequential crimes occurred in quick succession, Maynor completed each before committing the next and had an opportunity between each crime to cease his criminal activity, but instead proceeded to commit another crime. Accordingly, the three crimes against Huynh did not occur at the same time.

c. **Maynor's Three Offenses Against Huynh Do Not Reflect The Same Objective Intent.**

Even if the three offenses against Huynh occurred at the same time and place, Maynor has not established that they were committed with the same intent. The standard for determining whether two offenses involved the same objective criminal intent is “the extent to which the criminal intent, objectively viewed, changed

from one crime to the next.” Vike, 125 Wn.2d at 411. Relevant to the analysis is whether one crime “furthered” the other. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). Intent, in this context, does not mean the mens rea element of the crime, but rather the defendant’s “objective criminal purpose” in committing the crime. State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990).

Maynor claims that all of his crimes were animated by the same intent: “to obtain and retain the tray of rings.” Brief of Appellant at 19. This is similar to the argument rejected in Dunaway. There, in separate but consolidated cases, two defendants robbed restaurant employees and then tried to kill the employees. 109 Wn.2d at 210-11. Each argued that the intent behind the crimes was the same in that the murders were attempted in order to avoid being caught for committing the robberies. Id. at 216. Our supreme court rejected this argument because it “focuses on the subjective intent of the defendants, while the cases make clear that the test is an objective one.” Id. at 216-17 (collecting cases). “When viewed objectively, the criminal intent in these cases was substantially different, the intent behind

robbery is to acquire property while the intent behind attempted murder is to kill someone.” Id. at 216.

Additionally, neither crime furthered the commission of the other. While the attempted murders may have been committed in an effort to escape the consequences of the robberies, they in no way furthered the ultimate goal of the robberies. Clearly, the robberies did not further the attempted murders. Accordingly, we hold that these crimes did not encompass the same criminal conduct.

Dunaway, 109 Wn.2d at 217.

Dunaway is indistinguishable from the case at bar. Like the defendants in Dunaway, Maynor argues that all three offenses arose from his intent to steal the tray of rings. This may have been his subjective intent, but as Dunaway teaches, this is different from the objective intent. Viewed objectively, the intent behind robbery is to acquire property while the intent behind assault is to hurt someone or make that person believe they are about to be hurt. RCW 9A.56.190; CP 87, 96. Further, even if Maynor committed the assaults in an effort to escape the consequences of the robbery, the assaults did not “further” the robbery, which was completed when Huynh gave the tray of rings to Maynor under threat.

Because the three offenses did not share the same objective intent, they do not constitute the same criminal conduct.

d. Maynor's Counsel Was Not Ineffective.

Maynor has not established that the three offenses against Huynh occurred at the same time, same place, and with the same objective intent. Since the absence of even one element of same criminal conduct is sufficient to defeat such a claim, Maynor cannot show that his counsel was deficient for failing to argue same criminal conduct at sentencing. And even if his counsel was deficient, Maynor cannot show prejudice. He must show that there is "a reasonable probability" that the court would have found that his crimes constituted the same criminal conduct. Given the evidence that Maynor's crimes occurred in different places, at different times, and involved different criminal intent, Maynor cannot show that there is a reasonable probability that the trial court would have found in his favor. Maynor's ineffective assistance of counsel claim should therefore be rejected.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Maynor's convictions and sentence.

DATED this 9<sup>th</sup> day of September, 2014.

Respectfully submitted,

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By   
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lila J. Silverstein, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the, containing a copy of the BRIEF OF RESPONDENT, in STATE V. EDMOND MAYNOR, Cause No. 70858-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 9<sup>th</sup> day of September, 2014

uBrame

Name

Done in Seattle, Washington