NO. 30361-6-III

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

Consolidated with
No. 303624 &
No. 303632

STATE OF WASHINGTON,

Respondent,

v.

GREGORY SHARKEY JR.,

Appellant.

FILED
Mar 14, 2012
Court of Appeals
Division III
State of Washington

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

The Honorable Gregory D. Sypolt, Judge

BRIEF OF APPELLANT

REBECCA WOLD BOUCHEY
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR 1

Issues Pertaining to Assignments of Error 2

B. STATEMENT OF THE CASE 3

1. Factual History: 3

2. Procedural History: 12

C. ARGUMENT 15

1. THE TRIAL COURT ERRED BY FAILING TO SUPPRESS SHARKEY'S STATEMENTS TO POLICE WHEN THERE IS NOT SUFFICIENT EVIDENCE THAT HE WAS ADEQUATELY ADVISED OF HIS MIRANDA RIGHTS PRIOR TO THE STATEMENT. 15

2. THE TRIAL COURT ERRED BY FINDING SHARKEY GUILTY OF THE FIRST DEGREE ASSAULT OF THOMAS TOWNSEND, DENNIS ELLSWORTH, ROYAL HORSEMAN, AND GORDON MCGLYNN WITHOUT SUFFICIENT EVIDENCE. 17

3. THE TRIAL COURT ERRED BY CONVICTING SHARKEY OF TAKING A MOTOR VEHICLE WITHOUT PERMISSION WHERE THIS CRIME WAS NOT CHARGED AND IS NOT A LESSER INCLUDED OFFENSE OF THE CHARGED CRIME, ROBBERY IN THE FIRST DEGREE 20

TABLE OF CONTENTS (CONT'D)

Page

4. SHARKEY WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY FAILED TO ARGUE THAT HIS CONVICTIONS FOR CONSPIRACY TO COMMIT FIRST DEGREE ROBBERY AND ATTEMPTED FIRST DEGREE ROBBERY WERE THE SAME CRIMINAL CONDUCT 25

D. CONCLUSION 28

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Ackles
8 Wash. 462, 36 P. 597 (1894).....21

State v. Aver
109 Wn.2d 303, 745 P.2d 479 (1987) 17

State v. Braun
82 Wash.2d 157, 509 P.2d 742 (1973).....17

State v. Brown
132 Wn.2d 529, 940 P.2d 546 (1997) 16

State v. Foster
91 Wn.2d 466, 589 P.2d 789 (1979) 21

State v. Gonzalez-Lopez
132 Wn. App. 622, 132 P.3d 1128 (2006).....20

State v. Green
94 Wn.2d 216, 616 P.2d 628 (1980) 18

State v. Kjorsvik
117 Wn.2d 93, 812 P.2d 86 (1991) 21

State v. Leach
113 Wn.2d 679, 782 P.2d 552 (1989) 20

State v. Lessley
118 Wn.2d 773, 827 P.2d 996 (1992) 26

State v. Markle
118 Wn.2d 424, 823 P.2d 1101 (1992) 21

State v. Peterson
133 Wn.2d 885, 948 P.2d 381 (1997) 20, 21

TABLE OF AUTHORITIES (CONT'D)

Page

State v. Thomas
109 Wn.2d 222, 743 P.2d 816 (1987) 1, 2, 17, 18, 26

State v. Wilson
125 Wn.2d 212, 883 P.2d 320 (1994) 18

State v. Workman
90 Wn.2d 443, 584 P.2d 382 (1978) 23, 24

FEDERAL CASES

Gideon v. Wainwright
372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) 25

Miranda v. Arizona
384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) .. 2, 15-17, 28

New York v. Quarles
467 U.S. 649, 104 S. Ct. 2626, 81 L.Ed.2d 550 (1984) 15

Oregon v. Elstad
470 U.S. 298, 105 S. Ct. 1285, 84 L.Ed.2d 222 (1985) 15

Roe v. Flores-Ortega
528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) 25

Strickland v. Washington
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 25

RULES, STATUTES AND OTHER AUTHORITIES

RAP 2.5 16

RCW 9.94A.589 ..... 26, 27

RCW 9A.28.020 27

RCW 9A.28.040 27

TABLE OF AUTHORITIES (CONT'D)

Page

RCW 9A.36.011 18

RCW 9A.56.075 24

RCW 9A.56.190 24

U.S. Const. Amend. IV 20

U.S. Const. Amend V 15

Wash. Const., art. 1, § 22 ..... 20, 21

A. ASSIGNMENTS OF ERROR

1. The trial court erred by finding Sharkey was adequately advised of his rights without sufficient evidence in the record to support the finding. FF 2. CP 34.

2. The trial court erred by finding that Sharkey's waiver of his constitutional rights was knowing and voluntary where there is no evidence that the advisement included all the required rights.

3. The trial court erred by failing to suppress the defendant's statement to police where the advisement of rights was incomplete.

4. The trial court erred by finding without sufficient evidence that there were ten people in the Frederick house at the time of the shooting. FF 2, CP 36.

5. The trial court erred by convicting Sharkey of the first degree assault of Thomas Townsend without sufficient evidence.

6. The trial court erred by convicting Sharkey of the first degree assault of Royal Horseman without sufficient evidence.

7. The trial court erred by convicting Sharkey of the first degree assault of Dennis Ellsworth without sufficient evidence.

8. The trial court erred by convicting Sharkey of the first degree assault of Gordon McGlynn without sufficient evidence.

9. The trial court violated Sharkey's constitutional rights by convicting Sharkey of taking a motor vehicle without permission in the second degree when he was not charged with that crime.

10. The trial court erred by denying the defense motion for arrest of judgment.

11. Sharkey was deprived of effective assistance of counsel when his counsel failed to argue that his convictions for conspiracy to commit first degree robbery and attempted first degree robbery should be treated as the same criminal conduct for sentencing purposes.

Issues Pertaining to Assignments of Error

1. Whether the trial court erred by failing to suppress Sharkey's statements to police when there is not sufficient evidence that he was adequately advised of his Miranda rights prior to the statement.

2. Whether the trial court erred by finding Sharkey guilty of the first degree assault of Thomas Townsend, Dennis Ellsworth, Royal Horseman, and Gordon McGlynn where there is not sufficient evidence in the record that they were present at the time of the shooting.

3. Whether the trial court erred by convicting Sharkey of taking a motor vehicle without permission where this crime was not charged and is not a lesser included offense of the charged crime, robbery in the first degree.

4. Whether Sharkey was deprived of effective assistance of counsel when his trial attorney failed to argue that his convictions for conspiracy to commit first degree robbery and attempted first degree robbery were the same criminal conduct.

B. STATEMENT OF THE CASE

1. Factual History:

This case involves a series of events that occurred during the evening of December 22 to the morning of December 23, 2009. 1RP 85. The first incident was a shooting that occurred in front of a house located on Frederick street in Spokane, hereinafter known as the "Frederick house." 1RP 85-86.

Seven witnesses testified to having been at the house during the shooting: Steven Everett, Jordan Tivitis, Charles Everett, Zachary Davis, Daniel Bolen, Andrew Servatius, and Brandon

Townsend.[1] 1RP 85, 94, 99, 108-9, 2RP 250, 258. There was inconsistent testimony about who else was in the house at the time of the shooting. 1RP 85, 90, 96, 100, 109. The only other names mentioned were "Roy," 1RP 88, 109, "Gordy," 1RP 90, 100, 109, and "Dennis," 1RP 85. Likewise, the testimony about the number of people at the Frederick house during the shooting varied from seven (Charles Everett) to thirteen (Zackory Davis). 1RP 86, 97, 100, 109, 2RP 250.

The various witnesses agree that the incident began over an argument about someone in the Frederick house shining a laser pointer out of the window. 1RP 66, 86, 100-1, 110, 138. Tony Dawson, Gregory Sharkey, Jr., Dominic Shaver, Margaret Shults, and Danniela Shaver were walking by the Frederick house when someone inside the house pointed the laser light at them. 1RP 66, 86, 100-1, 110, 138. Dominic Shaver and Dawson confronted several boys from the Frederick house on the front lawn and they got into a verbal confrontation. 1RP 66, 110, 138. After a short argument, Dominic Shaver and Dawson turned and began to walk away. 1RP 162. At that point, most witnesses agree that Dominic

---

[1] Brandon Townsend was not named as a victim in any of the counts charged.

Shaver and Dawson were closest to the house, the two women were standing farthest away across the street, and Sharkey was across the street between the two other groups.[2] 1RP 73, 87, 110, 163, 219.

Suddenly, Dawson stepped around Shaver and opened fire in the direction of the Frederick house. 1RP 163, 220. It is undisputed that Dawson was shooting with a .45 caliber semi-automatic handgun. 2RP 268; 1RP 89.

It was disputed whether there was an additional shooter. Sharkey denied having a gun or shooting at the Frederick house. 1RP 64. He said he ran away when the shooting started. 1RP 64. The only physical evidence found at the scene was from a .45 caliber handgun. 1RP 35, 39, 43. Dawson testified that he was the sole shooter and that Sharkey was not armed. 2RP 268, 269. Steven Everett, Servatius, and Townsend only saw or heard one gun. 1RP 89, 90, 253. Charles Everett and Davis thought they saw two guns. 1RP 102, 107, 111.

Margaret Shults testified that there were two shooters and the second was Sharkey. 1RP 166. Shults initially told police that

---

[2] The only exception to this is Danniela Shaver, who puts her brother in the middle position, and Sharkey next to Dawson. 1RP 157. Dominick Shaver said he was standing next to Dawson. 1RP 220.

Sharkey did not shoot that night. 1RP 182. However, Shults later changed her story as she negotiated a plea deal with the State. 1RP 183. Shults testified that Sharkey was armed with a .38 caliber handgun and fired five to six rounds in the air, high above his head. 1RP 165, 166, 183, 211. Dominic Shaver also initially told police that Dawson was the only shooter, but testified at trial that Sharkey also fired. 1RP 220, 224, 227.

There is also disagreement among the witnesses over how many shots were fired. Steven Everett testified that "at least 9" shots were fired, 1RP 88; Tivitis testified to five, 1RP 98; Davis estimated four to five, 1RP 111; Danniela Shaver estimated seven, 1RP 153; Servatius heard six to nine shots, 2RP 254-55; and Dawson testified that he fired six to seven shots, emptying his clip, 2RP 269. Six casings and four bullets were recovered. 1RP 35, 39, 43.

Fortunately, only Charles Everett was actually shot. 1RP 102. He was taken to the hospital immediately, and survived a bullet wound to his back. 1RP 103, 104.

After the shooting, Dawson, Danniela and Dominic Shaver, Sharkey, and Shults all ran back to Dawson's house. 1RP 143, 144, 167, 221. Dominic Shaver left around 10 p.m. 1RP 146, 169,

222. Later, Dawson, Sharkey and Shults walked Danniela Shaver home. 1RP 146-47, 170.

According to Shults, after leaving Shaver at her house, the remaining three walked around and eventually decided to steal a car to leave town. 1RP 172, 175.

At 4:20 a.m. on December 23, Jamie Cartwright came out of her house to drive her Bronco to work. 1RP 231. Down the street, she saw someone wearing a dark hooded sweatshirt pacing. 1RP 230. She quickly got in her car and turned to look behind as she backed up. 1RP 231. Suddenly, a man in a white hooded sweatshirt shattered her windshield with a gun. 1RP 231. He then reached in and swung the gun at her, hitting her in the head. 1RP 232. She managed to drive away to a store and call the police. 1RP 233. Cartwright testified that the man with the gun had the hood up and she could not see his face or determine his race. 1RP 232-33.

According to Dawson, he and Shults decided to steal the Bronco and Shaver had walked off without them. 2RP 274-75. This confirms Sharkey's statement to police that he did not see the Bronco incident. 1RP 67. Shults testified that she checked to see if the vehicle was locked, then left with Dawson to wait for Sharkey.

1RP 171. She said Sharkey called Dawson and he left her to meet Sharkey. 1RP 171. Shults said that when she met back up with Sharkey and Dawson, Dawson told her they did not get the car because the driver took off. 1RP 173.

As they talked, they saw a Suburban drive up and the driver got out and left the car unattended. 1RP 173. Shults got in the Suburban and drove over to pick up Dawson and Sharkey. 1RP 68, 174. Dawson sat in the back behind the driver and Sharkey sat in the front seat. 1RP 175.

Shults testified that they decided to return to Dawson's house and Dawson was directing Shults back to his house when they accidentally drove down Frederick Street. 1RP 68, 176. As they drove past the Frederick house, they attracted the attention of a police officer, Kris Honaker, who began to follow them. 1RP 119, 176.

Officer Honaker testified that he saw the Suburban drive by around 5:11 a.m., suspected it was the vehicle reported stolen, and began to follow at a distance as he ran the license plates. 1RP 119-20.

Dawson told Shults to pull over so they could pretend to go into a house, which she did. 1RP 176. When they pulled over, Officer Honaker activated his lights. 1RP 120, 177.

Shults testified that Sharkey suggested that they all get out and run. 1RP 177. But Dawson told Shults to drive away or he would shoot her and Sharkey. 1RP 177, 208. As Shults began to drive off, Dawson leaned out the window and fired at the officer, hitting the grill of his car. 1RP 69, 121, 123, 177. Both Sharkey and Shults were shocked when Dawson opened fire. 1RP 178.

After leaving the police car behind, Dawson directed Shults to pull off the road and the three ran away. 1RP 178-9. As they ran, they passed an empty hot tub in a back yard, were they left the guns in the hot tub. 1RP 180. Shults testified that Dawson and Sharkey also threw their coats over a fence. 1RP 179.

The three went to a nearby hotel, caught a bus, and returned to Dawson's home. 1RP 181. They were arrested two days later on December 25. 1RP 182.

Shults testified that both Sharkey and Dawson were armed that night. 1RP 164. She said that the .45 and .38 had originally been found by Sharkey weeks earlier in a hotel room, but he gave them to Dawson. 1RP 164-65. She testified that she saw Sharkey

and Dawson test-fire the guns days before these incidents and that she had seen both load and unload the guns. 1RP 165.

In his statement to police, Sharkey denied being involved in the shooting at the Frederick house and said that although he knew Dawson was armed, he had no idea he was going to shoot anyone. 1RP 63, 66, 73, 74.

In rebuttal testimony, Shults testified that when they returned to Dawson's house after the Frederick house incident, she saw Dawson and Sharkey clean the guns and eject the shells from the .38 into the garbage. 2RP 297.

In a search of the Frederick house scene, Police found six bullet casings for a .45 caliber semi-automatic and four bullets also from that gun. 1RP 35, 39, 43. There were two bullets that passed through the front window of the house into the wall. 1RP 36-37. At the second shooting location, four casings from the .45 were recovered. 1RP 46.

Police also recovered a white jacket, a black bandana, and a pistol magazine with eight unspent cartridges from a neighboring backyard. 1RP 56-57, 60. In another backyard, police found two guns in an empty hot tub—a .45 caliber Kimber semi-automatic pistol and a .38 caliber Rossi revolver. 1RP 57. The .45 had three

unspent cartridges in the magazine and one in the chamber. 1RP 58. The .38 had one cartridge in the cylinder and no other bullets or casings. 1RP 58-59.

According to police testimony, .45 semi-automatic handgun can hold up to eight rounds in the magazine and one round in the chamber. 1RP 44. A .38 revolver can hold up to six rounds. 1RP 45. The .38 does not eject its spent cartridges. 1RP 45. Police testified that there was no physical evidence found at either scene that would indicate that a .38 revolver was fired. 1RP 54.

DNA tests were done on the .45 and .38. The DNA on the trigger of the .45 matched Dawson. 1RP 127. The DNA on the slide of the .45 was a mixed sample of at least two people. 1RP 128. Dawson and Sharkey were possible contributors, along with 1/16 of the U.S. population. 1RP 128. The DNA on the grip of the .38 was a mix of at least two people. 1RP 128. Both Sharkey and Shults were possible contributors, along with 1/26 of the U.S. population. 1RP 128. There is no way to know when the DNA samples were left on the guns. 1RP 128.

2. Procedural History:

Gregory Sharkey, Jr., was charged with first degree robbery, and attempted murder in the incident with the Suburban and shooting of Officer Honaker. CP 1-2. He was also charged with conspiracy to commit first degree robbery and attempted first degree robbery in the incident with the Bronco. CP 3-4. Finally, he was charged with ten counts of attempted murder in the first degree, or first degree assault in the alternative, for the Frederick house shooting, with firearm enhancements. CP 5-9.

Prior to trial, the court held a CrR 3.5 Hearing on the admissibility of Sharkey's statements to police. 1RP 17. Detective Timothy Madsen testified that he contacted Mr. Sharkey after he had been arrested, handcuffed, and brought to the police department. RP1 17-18. He told Mr. Sharkey he was under arrest for "obstructing" and that he was also being investigated in a shooting. RP1 18-19. Detective Madsen said he wanted Mr. Sharkey's side of the story. 1RP 63. Sharkey then told Madsen that he was present at both shootings, but he was not the shooter. 1RP 63.

Detective Madsen then uncuffed Sharkey, told him he was going to interview Shults and would return shortly. RP1 19. Nearly three hours later, Detective Madsen returned to Sharkey. RP1 19.

At that point, Detective Madsen said he read Sharkey his rights from a departmental card. RP1 21. Detective Madsen said he could not find that card, but that he remembered Mr. Sharkey had signed it and agreed to talk with him. RP1 21. Specifically, the only rights Detective Madsen said he told Mr. Sharkey he had were: the "right to have an attorney present," and the "right to remain silent." RP1 20. Detective Madsen testified that he believed Mr. Sharkey understood his rights, RP1 21, never asked for an attorney, RP1 22, and did not seem intoxicated, 1RP 22.

Mr. Sharkey then gave an extensive statement. The court found that Mr. Sharkey's statement before the rights were given was "spontaneous" and admissible and his other statements were made after advisement of rights and were also therefore admissible. 1RP 28, CP 32-34.

The case was tried to the bench. 1RP 11. The trial court convicted Sharkey of ten counts of first degree assault as both accomplice and principle for the Frederick house shooting. 2RP 336-7. The court also found Sharkey guilty as an accomplice to the

attempted first degree robbery as well as conspiracy to commit first degree robbery in the Bronco incident. 2RP 341-42. In the final incident involving the Suburban and Officer Honaker, the court acquitted Sharkey of the charges of first degree robbery, finding that Sharkey had no knowledge that Dawson would open fire on the officer. 2RP 341. Instead the court found Sharkey was guilty of taking a motor vehicle without permission. 2RP 342.

The defense filed a motion to arrest judgment, arguing that there was not sufficient evidence to support the verdicts for conspiracy to commit robbery in the first degree and that the court could not convict Sharkey of taking a motor vehicle without permission because that crime had not been charged. CP 13-14, 2RP 346-7. The motion was denied. 2RP 349.

Sharkey was sentenced to 2215 months total confinement. CP 74. This appeal timely follows.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY FAILING TO SUPPRESS SHARKEY'S STATEMENTS TO POLICE WHEN THERE IS NOT SUFFICIENT EVIDENCE THAT HE WAS ADEQUATELY ADVISED OF HIS MIRANDA RIGHTS PRIOR TO THE STATEMENT.

Miranda v. Arizona requires police to issue four warnings before engaging in custodial interrogation in order to protect that person's Fifth Amendment right to be free from self-incrimination. 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Those admonishments are: (1) the right to remain silent; (2) that anything said can be used against the person; (3) the right to an attorney; and (4) that if the person cannot afford an attorney, one will be appointed. If law enforcement officers violate a suspect's Miranda rights, such as by failing to fully provide the warnings before interrogating him, the resulting statements may not be admitted as substantive evidence at trial. Oregon v. Elstad, 470 U.S. 298, 305, 105 S. Ct. 1285, 84 L.Ed.2d 222 (1985) (quoting New York v. Quarles, 467 U.S. 649, 654, 104 S. Ct. 2626, 81 L.Ed.2d 550 (1984)). Whether a statement should have been suppressed due to inadequate advisement of Miranda rights is a manifest constitutional issue that can be raised for the first time on appeal

under RAP 2.5(a)(3). State v. Brown, 132 Wn.2d 529, 580, 940 P.2d 546 (1997).

Although no formal motion to suppress was brought by the defense below, the court did hold a full hearing on the admissibility of the statements. 1RP 14-28. The trial court found that Sharkey was advised of his constitutional rights prior to his statements and that those statements were therefore admissible. 1RP 28, CP 32-34. There is not sufficient evidence in the record to support the court's finding that Sharkey was advised of all of his Miranda rights.

Detective Madsen testified that he read Mr. Sharkey his rights from a "departmental card." RP1 21. However, the "departmental card" was not introduced into evidence, nor was it read into the record. Detective Madsen said he could not find that card, but that he remembered Sharkey had signed it and agreed to talk with him. RP1 21. The record does not show that the "departmental card" includes all the rights required by Miranda.

When asked what rights he advised Sharkey of prior to his statement, Detective Madsen said he told Sharkey only that he had: the "right to have an attorney present," and the "right to remain silent." RP1 20. There is no evidence in the record that Sharkey was advised, as Miranda requires, that anything he said could be

used against him at trial, nor that he was advised that if he could not afford an attorney, one would be appointed.

For a statement to be admissible under Miranda, the State must establish by a preponderance of the evidence that the defendant, after being fully advised of his rights, knowingly and intelligently waived them. State v. Braun, 82 Wash.2d 157, 162, 509 P.2d 742 (1973). The record in this case does not show that Sharkey was fully advised of his Miranda rights. Therefore, his statements to police should have been suppressed. This error requires reversal and a new trial without the admission of Sharkey's unconstitutionally obtained statement.

2. THE TRIAL COURT ERRED BY FINDING SHARKEY GUILTY OF THE FIRST DEGREE ASSAULT OF THOMAS TOWNSEND, DENNIS ELLSWORTH, ROYAL HORSEMAN, AND GORDON MCGLYNN WITHOUT SUFFICIENT EVIDENCE.

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. State v. Aver, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

In this case, Sharkey was found guilty of ten counts of first degree assault, all for the shooting that took place at the Frederick house. CP 38-40. To convict Sharkey of first degree assault, the State had to prove that Sharkey or an accomplice (1) intended in inflict great bodily harm and (2) assaulted a person with a firearm. RCW 9A.36.011. While intent to inflict great bodily harm can be transferred to an unintended victim, See State v. Wilson, 125 Wn.2d 212, 218, 883 P.2d 320 (1994), that does not relieve the State of it's burden to identify a specific victim of the assault.

The trial court's findings and conclusions state that: "The defendant, on December 22, 2009, did act with the intent to inflict great bodily harm, did intentionally assault, Thomas B E Townsend, with a firearm." CP 38. There is not sufficient evidence in the record to support this finding, nor the conviction in this count, because there was no evidence introduced that someone named Thomas Townsend was present at the Frederick house during the shooting. Seven witnesses testified to who was present at the Frederick house that night: Tivitis, Steven and Charles Everett, Davis, Bolen and Servatius. 1RP 85, 90, 96, 100, 109. None of these witnesses mention Thomas Townsend being there. There is no evidence in the record at all regarding Thomas Townsend. Consequently, there

is insufficient evidence to support a conviction for assault against Thomas Townsend and this conviction must be reversed.

There is also insufficient evidence in the record to support the trial court's findings and conclusions regarding the alleged assaults of "Dennis M. Ellsworth," "Royal Horseman," and "Gordon McGlynn." None of the witnesses ever fully identify these three men as having been present at the time of the shooting. There is testimony from Steven Everett that someone named "Dennis" was at the party that night, but he never gives a last name. 1RP 85. He was not asked if "Dennis" is "Dennis Ellsworth." 1RP 85. Both Steven Everett and Davis testified that someone named "Roy" was also a guest at the house, but do not give a full name. 1RP 88, 109. Neither witness was asked if "Roy" is "Royal Horseman." Steven Everett, Davis, and Charles Everett all mention that "Gordy" was there and took Charles to the hospital, but again never give a full name. 1RP 90, 100, 109. The testimony given about "Gordy," "Roy," and "Dennis," is not clear enough to the identity the victims of the assault because they are never identified by their full names and the fact finder should not have to guess if these nicknames refer to the named victims. The State did not meet its burden of proving beyond a reasonable doubt who the victims of the assault

were and there is not sufficient evidence in the record to support the trial court's findings of guilt as to these three alleged named victims. Consequently, these convictions must also be reversed.

3. THE TRIAL COURT ERRED BY CONVICTING SHARKEY OF TAKING A MOTOR VEHICLE WITHOUT PERMISSION WHERE THIS CRIME WAS NOT CHARGED AND IS NOT A LESSER INCLUDED OFFENSE OF THE CHARGED CRIME, ROBBERY IN THE FIRST DEGREE.

The Fourth Amendment of the U.S. Constitution and the Washington Constitution, art. I, sec. 22 (amend. 10) both require that, in every prosecution, the defendant must be informed of the nature and cause of the accusation. "A charging document must allege facts supporting every element of the offense, and must adequately identify the crime charged." State v. Gonzalez-Lopez, 132 Wn. App. 622, 625-26, 132 P.3d 1128 (2006), citing State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). This also means that the defendant has the right "to be tried only for offenses charged." State v. Peterson, 133 Wn.2d 885, 889, 948 P.2d 381 (1997). This protects the defendant's constitutional right to the opportunity to prepare an adequate defense. State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991).

This rule is subject to two statutory exceptions: where a defendant is convicted of a lesser included offense of the one charged pursuant to RCW 10.61.006, and where a defendant is convicted of a crime which is an inferior degree pursuant to RCW 10.61.003. State v. Peterson, 133 Wn.2d 885, 889, 948 P.2d 381 (1997), citing State v. Markle, 118 Wn.2d 424, 488, 823 P.2d 1101 (1992); State v. Foster, 91 Wn.2d 466, 471, 589 P.2d 789 (1979). The Peterson court held:

> While it is true that the jury may find a defendant not guilty of the crime charged, but guilty of an offense of lesser degree, or of an offense necessarily included within that charged, it is also true that "accusation must precede conviction," and that no one can legally be convicted of an offense not properly alleged. The accused, in criminal prosecutions, has a constitutional right to be apprised of the nature and cause of the accusation against him. Const., art. 1, § 22. And this can only be made known by setting forth in the indictment or information every fact constituting an element of the offense charged. This doctrine is elementary and of universal application, and is founded on the plainest principle of justice.

Id., 133 Wn.2d at 889, quoting State v. Ackles, 8 Wash. 462, 464-65, 36 P. 597 (1894).

For the incident involving the Suburban, Sharkey was charged with first degree robbery. CP 1. The information states that Sharkey or an accomplice, "with intent to commit theft, did

unlawfully take and retain personal property, that the defendant did not own, from the person and in the presence of Officer Kristopher Honaker, against such person's will, by use of threatened use of immediate force . . ." CP 1.

The trial court acquitted Sharkey first degree robbery, but found him guilty of the crime of taking a motor vehicle without permission in the second degree. 2RP 342, Supp. CP., FF & CoFL, p. 4. Specifically, the court found: "That it was undisputed that the defendant knew the car was stolen and was the front passenger. The defendant was present when the car was taken." Supp. CP., FF & CoFL, p. 2. In his oral ruling, the court stated that Sharkey was guilty of taking a motor vehicle without permission because "he knowingly rode in the vehicle." 2RP 342. However, the court found that: "There was no testimony that indicated defendant Sharkey had knowledge of Dawson intent to shoot at the officer or that he participated in any way. There was no testimony that there was a plan at that time." Supp. CP., FF & CoFL, p. 3.

The defense moved to arrest judgment, arguing that the court could not convict Sharkey of a crime that had not been charged and that taking a motor vehicle without permission was not

a lesser included offense of the charged crime, robbery in the first degree. CP 13-14. The motion was denied. 2RP 349.

Because Sharkey was not charged with taking a motor vehicle without permission in the second degree, this conviction can stand only if it is a lesser-included offense of the charged crime—first degree robbery.

The test for determining whether an offense is the lesser included of another offense is expressed in State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978). Under the "legal prong" of the *Workman* test, an offense is the lesser offense of another if each of the elements of the lesser offense are necessary elements of the charged offense.[3] Workman, at 447-48.

According to statute, a person commits robbery:

> when he unlawfully takes personal property from [1] the person of another or [2] in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking . . .

---

[3] The second prong of the Workman test, the "factual prong," would apply only to determining whether an instruction is warranted in a certain case, which is not applicable to this case.

RCW 9A.56.190. First degree robbery occurs when the defendant is armed with a deadly weapon, appears to be armed with a deadly weapon, or inflicts bodily injury. RCW 9A.56.200.

A person is guilty of taking a motor vehicle without permission (TMV) in the second degree:

> If he or she, without the permission of the owner or person entitled to possession, intentionally takes or drives away any automobile or motor vehicle, . . . that is the property of another, or he or she voluntarily rides in or upon the automobile or motor vehicle with knowledge of the fact that the automobile or motor vehicle is unlawfully taken.

RCW 9A.56.075.

Under the Workman test, TMV in the second degree is not a lesser included offense of robbery in the first degree because it contains elements not included in robbery. Specifically, one can commit TMV in the second degree by merely knowing the car is stolen and riding in it (which is what the court found in this case), while robbery requires an unlawful taking. Moreover, TMV requires that the property taken be a motor vehicle or automobile, while robbery requires only that it be personal property. Because robbery can be committed without committing TMV in the second degree, it is not a lesser included offense of first degree robbery.

Accordingly, the trial court erred by convicting Sharkey of taking a motor vehicle without permission in the second degree when this offense was not charged in the information and was not a lesser included offense of the charged crime. The conviction must be vacated.

4. SHARKEY WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY FAILED TO ARGUE THAT HIS CONVICTIONS FOR CONSPIRACY TO COMMIT FIRST DEGREE ROBBERY AND ATTEMPTED FIRST DEGREE ROBBERY WERE THE SAME CRIMINAL CONDUCT.

The Sixth Amendment right of a criminal defendant to have a reasonably competent counsel is fundamental and helps ensure the fairness of our adversary process. Gideon v. Wainwright, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). This fundamental right to effective counsel ensures that a defendant's conviction or sentence will not stand if it was brought about as a result of legal representation that fell below an objective standard of reasonableness. Roe v. Flores-Ortega, 528 U.S. 470, 120 S. Ct. 1029, 1034, 145 L. Ed. 2d 985 (2000). To establish ineffective assistance of counsel, the defendant must show both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

To establish prejudice, the defendant must show a reasonable probability that the outcome of the trial or ruling would have been different absent counsel's deficient performance. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). In this case, this means that the appellate court must determine whether the two crimes would have been found to be the same criminal conduct had the issue been argued.

When two or more crimes (1) require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim, they constitute the same criminal conduct and the sentencing court must count them as one offense when computing the defendant's criminal history at sentencing. RCW 9.94A.589(1)(a); State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). The standard for determining the same intent prong is the extent to which the criminal intent, viewed objectively, changed from one crime to the next. Lessley, 118 Wn.2d at 777. The fact that one crime furthered commission of the other may indicate the presence of the same intent. Lessley, 118 Wn.2d at 777.

Sharkey was convicted of both conspiracy to commit first degree robbery and attempted first degree robbery. CP 56.

Sharkey's attorney failed to argue that these crimes constituted the same criminal conduct. See 2RP 357, CP 58.

Had trial counsel argued that these two offenses should be treated as the same criminal conduct, the sentencing court would likely have found that they met the test in RCW 9.94A.589(1)(a). The victim for both crimes was the same—the owner of the Bronco, Jamie Cartwright. CP 3-4. Likewise, both crimes were committed in the same time and place because when Dawson tried to take the car, that act was the "substantial step" for both crimes.

Finally, both crimes were committed with the same intent—the intent to commit robbery. RCW 9A.28.020(1) provides: "A person is guilty of an attempt to commit crime if, with intent to commit a specific crime, he does any act which is a substantial step toward the commission of that crime." RCW 9A.28.040(1) provides:

> A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.

In this case, the intent for both the attempt and the conspiracy charges is the same: the intent to commit robbery in the first degree.

Consequently, had counsel argued to the court that these two crimes were the same criminal conduct for sentencing purposes, the court would likely have so found. There is no legitimate strategic reason for defense counsel to have failed to make this argument. Consequently, Sharkey was deprived of his constitutional right to effective assistance of counsel when his attorney failed to make the same criminal conduct argument to the court.

D. CONCLUSION

The trial court erred by failing to suppress Sharkey's statements to police where there is not sufficient proof in the record that he was advised of all of his Miranda rights. Therefore, he is entitled to a new trial without the admission of these statements.

Further, the assault convictions with the named victims Thomas Townsend, Dennis Ellsworth, Royal Horseman, and Gordon McGlynn must be reversed because there was insufficient evidence of the identity of the victims. The conviction for taking a motor vehicle without permission must also be reversed because Sharkey was not charged with that crime.

Finally, Sharkey was deprived of his constitutional right to effective assistance of counsel when his attorney failed to argue at

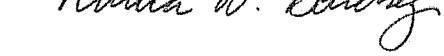
sentencing that his convictions for conspiracy to commit first degree robbery and attempted first degree robbery should be treated as the same criminal conduct.

Sharkey respectfully asks that the court remand for a new trial, or in the alternative, remand for resentencing.

DATED: March 14, 2012

Respectfully submitted,

NIELSEN, BROMAN & KOCH



Rebecca Wold Bouchey
WSBA No. 26081
Attorneys for Appellant

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.
1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488
WWW.NWATTORNEY.NET

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. LIND
JENNIFER M. WINKLER
ANDREW P. ZINNER
CASEY GRANNIS
JENNIFER J. SWEIGERT

OF COUNSEL
K. CAROLYN RAMAMURTI
JARED B. STEED

State v. Gregory Sharkey

No. 30361-6-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 14th day of March, 2012, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4):

Spokane County Prosecuting Attorney
kowens@spokanecounty.org

Signed in Seattle, Washington this 14th day of March, 2012.

x Patrick Mayovsky

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

STATE OF WASHINGTON, Respondent, vs. GREGORY SHARKEY, Appellant.	)))))))))	COA NO. 30361-6-III

DECLARATION OF SERVICE

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

THAT ON THE 14TH DAY OF MARCH 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT**TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] GREGORY SHARKEY
DOC NO. 302829
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF MARCH 2012.

x Patrick Mayovsky