

No. 303616
Consolidated with
No. 303624 & 303632

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

GREGORY SHARKEY, JR., APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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Mark E. Lindsey
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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. Insufficient evidence supports trial court finding defendant was advised of rights prior to making statement to law enforcement.
2. No evidence supports trial court finding that defendant's waiver of rights was knowing and voluntary.
3. No evidence that defendant was advised of his rights adequately.
4. The trial court erroneously admitted defendant's statements to law enforcement because advisement of rights was incomplete.
5. Insufficient evidence supports trial court finding that there were ten people in Frederick house at the time of shooting.
6. Insufficient evidence to convict defendant of first degree assault of Thomas Townsend.
7. Insufficient evidence to convict defendant of first degree assault of Royal Horseman.
8. Insufficient evidence to convict defendant of first degree assault of Dennis Ellsworth.
9. Insufficient evidence to convict defendant of first degree assault of Gordon McGlynn.

10. Trial court erroneously convicted defendant of taking a motor vehicle without permission because defendant was not charged therewith.
11. Trial court erred in denying defendant's motion for arrest of judgment.
12. Defendant received ineffective assistance of counsel when counsel failed to argue that Conspiracy to commit first degree robbery and attempted first degree robbery constituted the same criminal conduct for sentencing purposes.

II.

ISSUES PRESENTED

1. Did the trial court abuse its discretion by denying a motion to suppress defendant's statements to law enforcement?
2. Did trial court err finding defendant guilty of the first degree assaults of Thomas Townsend, Dennis Ellsworth, Royal Horseman, and Gordon McGlynn based upon insufficient evidence that each was present at the shooting?
3. Did the trial court err convicting defendant of taking a motor vehicle without permission when he was not charged with that crime and it is not a lesser included of first degree robbery?

4. Did defendant receive ineffective assistance of counsel for counsel's failure to argue that Conspiracy to commit first degree robbery and attempted robbery constitute the same criminal conduct for sentencing purposes?

III.

STATEMENT OF THE CASE

Superior Court Cause No. 10-1-00141-8 (Shooting at the W. Frederick Residence)

In the evening of December 22, 2009, several friends gathered at the home of Daniel Bolen, Steven and Charles Everett at 1103 W. Frederick, Spokane, WA, to "hang out." RP 136, 16, 216. Some of the group had planned on going out later to a club. RP 108-109. The total number of people that were at the home was estimated to be 7-12 at the time of the shooting. RP 85, 86, 88, 90, 97, 100, 109, 250, 268. Several witnesses testified to being at the home during the shooting: Steven and Charles Everett, Jordann Tivis, Zachary Davis, Daniel Bolen, Andrew Servatius, and *Thomas* Townsend.¹ The trial court found there were ten people at the 1103 W. Frederick residence at the time of the shooting. CP 35-40. The other people identified as being at the W. Frederick residence

¹ Appellant identified Thomas Townsend as "Brandon" then noted that he is not a named victim. The record reflects that it was "Thomas Brandon Edward" Townsend who testified and was the named victim in Count II of the Information as "Thomas B.E. Townsend." RP 257; CP 5-9.

included, Royal (“Roy”) Horseman, Dennis Ellsworth, and Gordon (“Gordy”) McGlynn. RP 85, 86, 88, 90, 97, 100, 109, 250, 266, 268.

It is undisputed that the shooting at the Frederick residence was triggered by an argument over someone in the residence shining a laser pointer on a group walking up the street. RP 66, 86, 100-101, 110, 138. The group of Tony Dawson, defendant, Dominic Shaver, Danniela Shaver, and Margaret Shults were out “mobbing” when they were lit by the laser near the Frederick residence on December 22, 2009, around 8:30 p.m. CP 35-40; RP 65-66, 86-87, 100-101, 138. After the laser was pointed at their group, Dominic Shaver, defendant, and Tony Dawson confronted the people from the residence in the front yard. CP 5-40; RP 66, 110, 138. Initially, the confrontation was a verbal exchange between the groups which ended without violence. CP 35-40; RP 87, 111, 138-139, 162, 219-220, 260, 266.

Then as the two groups separated, someone from the residence said something that caused Tony Dawson to turn and unload, “dump” his Kimber .45 cal semiautomatic handgun into the group of people from the residence. CP 35-40; RP 65, 88-89, 102, 111, 141, 163, 253, 260, 266-269, 292. Margaret Shults, Charles Everett, Zachary Davis, Daniella Shaver, and Dominic Shaver all testified that defendant also fired a handgun or that there were two handguns involved in the shooting at the W. Frederick residence. CP- 35-40; RP 106-107, 151, 164-166, 188-192, 221, 224. The handguns used by Tony Dawson and

defendant in the shootings were obtained by defendant at an earlier time from defendant's work. CP 35-40; RP 164, 188. Ms. Shults testified that defendant always carried the .38 caliber handgun that he obtained from his prior employment and that Tony Dawson used the .45 caliber handgun that evening. CP 35-40; RP 164.

Ms. Shults testified that defendant carried the .38 caliber revolver that night. CP 164-166. Ms. Shults testified that defendant fired the gun after Tony Dawson fired. RP 166. Defendant had his hand in the air, started shooting, and fired off 5-6 rounds. RP 166. Investigation of the scene at the W. Frederick residence discovered six .45 cal shell casings and four bullets. RP 43-44. Detectives recovered the two handguns from inside an empty hot tub in a neighboring back yard on W. Frederick. RP 56-61. The .38 caliber handgun is a revolver which does not eject its spent shell casings which explained the reason why no .38 caliber casings were found the W. Frederick scene. RP 44-45. The .38 caliber revolver contained four spent shell casings when recovered from where defendant placed it in the hot tub during his flee from the shooting scene. CP 35-40; RP 57-61. The two handguns were tested for DNA and the results linked the DNA of Tony Dawson, defendant, and Margaret Shults to having handled the guns. CP- 35-40; RP 127-129. Ms. Shults was present when the guns were cleaned by Tony Dawson and defendant after the shooting. RP 297. She

observed them remove the spent shell casings from the .38 caliber revolver and dispose of same in a garbage bag. RP 297.

Further investigation of the W. Frederick shooting scene discovered that numerous shots had been fired with several passing through the residence. CP 35-40; RP 33-44, 96-98. One of the shots struck and critically wounded Charles Everett which required hospitalization. CP 35-40; RP 91, 95-97, 102-105.

After the shooting, defendant and his group all fled back to Tony Dawson's residence. RP 143-144, 167, 221, 269. Dominic Shaver left shortly after their arrival at Dawson's house because of his curfew. RP 146, 169, 222, 271. Then Dawson advised Danniela Shaver that they would not let her walk home alone because they were worried that she would tell someone right away. RP 146-148, 170, 272. Dawson, defendant and Shults walked Danniela Shaver home where her Brother, Dominic Shaver was still awake awaiting her return. RP 148, 170, 272.

After leaving the Shaver's house, defendant, Dawson, and Shults walked towards defendant's Mom's house looking for a vehicle to steal to get out of town. CP 25-29; RP 170-172.

Spokane Superior Cause No. 09-1-04662-1 (Conspiracy and Attempted First Degree Robbery)

On December 23, 2009, about 4:30 a.m., at 1110 E. Sanson, Spokane, Jamie Cartwright was going to work early. CP 25-29; RP 229. She went outside

to leave and noticed a male in a dark-colored hooded sweatshirt about four houses away at the end of the block, pacing. RP 229-230. Ms. Cartwright kept watching the male while hurrying to her vehicle, a Ford Bronco, but forgot her coffee, so she ran back to her home and retrieved her coffee. CP 25-29; RP 230. She ran back to her vehicle and locked herself inside, but noticed that the male had moved two houses closer to her vehicle. CP 25-29; RP 231. Ms. Cartwright looked in her rearview mirror, but the male was not there. RP 231. Then suddenly, somebody in a white hooded sweatshirt crashed in the window of her vehicle with a gun sending glass across her face. CP 25-29; RP 231-232. Ms. Cartwright was trying to start her vehicle while the male was swinging the gun. CP 25-29; RP 232. She screamed, but the male told her to shut up then he struck Ms. Cartwright in the side of her head with the gun. RP 232. Ms. Cartwright was finally able to start her vehicle, escape and contact law enforcement. CP 25-29; RP 233.

Ms. Shults and Mr. Dawson testified that they with defendant were planning to steal a vehicle to flee town. CP 25-29; RP 171-172, 273-274. At the time defendant and Tony Dawson were still armed with the handguns from the W. Frederick shooting. CP 25-29; RP 172. Ms. Shults and Mr. Dawson separated from defendant when defendant indicated that he would wait and try to steal a vehicle they found running, but locked. RP 171. Eventually, defendant called Mr. Dawson and he met up with defendant near a school. CP 25-29; RP 172-173.

Defendant and Mr. Dawson then telephoned Ms. Shults and asked her to meet them at the school. RP 172. Mr. Dawson told her that their attempt to steal the vehicle had failed. RP 173. Defendant advised that the lady drove off with them standing there. RP 66, 173.

Spokane Superior Court Cause No. 09-1-04680-9 (Taking Motor Vehicle).

While the three were at the school, they noticed a Suburban pull up across from their location. RP 68, 173, 278. Defendant and Mr. Dawson walked over and confirmed that the vehicle was empty and that it was the car to get out of town. RP 173-174. The vehicle was left by the driver with its engine running. RP 68. Ms. Shults entered and drove the Suburban away, then turned around and picked up Mr. Dawson and defendant. RP 174, 278-279. Defendant sat in the front passenger seat while Tony Dawson took the seat behind the driver. RP 68, 175. Ms. Shults was driving and being given directions by defendant and Mr. Dawson until they ended up driving back by the shooting scene on Frederickson. RP 175-176, 279-280. They passed an unmarked police car at the shooting scene and both defendant and Dawson told Ms. Shults to drive normally. RP 117, 176. The police car driven by Officer Honaker confirmed that the Suburban that had driven by the shooting scene was reported stolen, so he started following the vehicle. RP 117, 176, 280. Officer Honaker followed the Suburban because of the knowledge that it had been stolen very recently and only a few blocks from

the shooting scene on Frederickson. RP 117. Eventually, Ms. Shults pulled the Suburban over and parked, so Officer Honaker stopped and placed himself in a position for a felony stop behind the door of his vehicle with weapon drawn. RP 177, 120. Officer Honaker observed the rear passenger window roll down and a white male lean out and fire a handgun several times at the Officer. RP 68, 121, 177, 280-281. One of the four bullets fired at Officer Honaker struck his vehicle. RP 123, 282-283. Defendant, Mr. Dawson and Ms. Shults then fled the scene of the second shooting at a rapid speed. RP 68, 283. They stopped after a few blocks and fled on foot. RP 68-69, 71-72, 178-179, 283. While fleeing, they disposed of the weapons. RP 179-180, 284. Eventually, they returned to Mr. Dawson's house. RP 181-182, 285. They were contacted by law enforcement on December 25, 2009. RP 63, 182.

The State charged defendant in Superior Court Cause No. 09-1-04680-9 with first degree robbery and attempted murder for the incident concerning the Suburban and the shooting of Officer Honaker. CP 1-2. The State charged defendant in Superior Court Cause No. 09-1-04662-1 with conspiracy to commit first degree robbery and attempted first degree robbery for the incident involving Ms. Cartwright and her vehicle. CP 3-4. The State charged defendant in Superior Court Cause No. 10-1-00141-8 with ten counts of attempted first degree murder, or, in the alternative, first degree assault, with firearm enhancements, for the incident involving the shootings at the house on West Frederick. CP 5-9.

A pre-trial CrR 3.5 hearing was held to determine the admissibility of defendant's statements to law enforcement. CP 32-34; RP 15-28.

CrR 3.5 Hearing regarding the Admissibility of Defendant's Statements to Law Enforcement.

At the hearing, Spokane Police Department Detective Timothy Madsen testified with regard to his contact with, and interview of defendant on December 25, 2009 at the Public Safety Building ("PSB"). CP 32-34; RP 15-28.

Detective Madsen initially contacted defendant in the PSB about 3:00 p.m. RP 15-16. Defendant was advised that he was under arrest for Obstructing because he had run from police when they attempted to detain him. CP 32-34; RP 18. Detective Madsen advised defendant that he was investigating a couple of shootings. RP 19. Defendant was left unhandcuffed, provided a soda, advised that he would have bathroom breaks, but the Detective was also interviewing Margaret Shults, so he would be back. RP 19.

Detective Madsen returned with Detective Gilmore and advised defendant that he had interviewed Ms. Shults. RP19. Detectives advised defendant that they would like to talk to him and that if he chose to, then he could pick and choose what he wanted to say. RP 19. Detectives advised defendant that he could stop answering questions at any time and that if he did not like a particular question, he could choose not to answer that question. RP 19.

Detectives read defendant his rights from a constitutional rights card because he was in physical custody. CP 32-34; RP 20. During the initial advisement of rights, defendant did not ask any questions, listened, acknowledged that he understood his rights and indicated that he would waive those rights. RP 20. Detectives noted that defendant appeared to understand everything he was being advised. CP 32-34; RP 20. Defendant was read his rights word for word from a constitutional rights card, including the right to have an attorney present, the right to remain silent. CP 32-34; RP 20. Defendant then waived the rights read to him verbally and signed the rights card. CP 32-34; RP 21.

Defendant demonstrated that he understood what was happening because he exercised his right to remain silent by indicating that he was choosing not to answer certain questions. RP 21. Defendant did not ask for any attorney at any time during the interview. CP 32-34; RP 22. Defendant did not appear to be intoxicated during the interview that occurred almost three hours after he originally arrived at the PSB. CP 32-34; RP 22. Defendant appeared to be quite lucid, sober, understood what the detectives were talking about and did not exhibit any strange behavior. RP 22. The trial court concluded that: defendant had been provided his *Miranda* warnings; defendant acknowledged those rights before exercising a knowing, intelligent and voluntary waiver of those rights; answered questions; and defendant's statements were admissible. CP 32-34; RP 24-28.

Defendant waived his right to a trial by jury and the case was tried to the bench. In Cause No. 10-1-00141-8, the trial court acquitted defendant of ten counts of attempted first degree murder before convicting him in the alternative of ten counts of first degree assault with firearm enhancements for the shootings at the Frederick residence. CP 35-40, 69-82. In cause no. 09-1-04662-1, the trial court convicted defendant of conspiracy to commit first degree robbery and attempted first degree robbery for the incident involving Jamie Cartwright. CP 25-29; 56-68. In cause no. 09-1-04680-9, the trial court acquitted the defendant of first degree robbery and attempted murder in the first degree, then convicted the defendant of taking a motor vehicle without permission in the second degree for the incident involving the theft of the Suburban and shooting at Officer Honaker. CP 83-86; CP 43-55. Thereafter, the trial court sentenced defendant and he timely appealed those judgments and sentences.

IV. ARGUMENT

A. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING THE DEFENDANT'S STATEMENTS TO LAW ENFORCEMENT.

The defendant challenges the admission of his confessions to the charged crimes. Defendant contends that the trial court abused its discretion in finding that his statements to law enforcement were knowingly and voluntarily provided after being advised of his rights pursuant to the provisions of *Miranda v. Arizona*,

384 U.S. 435, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), due to a lack of evidence. The record contains ample evidence that defendant was advised of rights pursuant to *Miranda v. Arizona* prior to his being asked any guilt-seeking questions by law enforcement. RP 18-22, and 63.

Before a defendant's statements to police can be admitted at trial, the court must first determine that they were voluntarily given. In most instances, that will require proof that the defendant was given the warnings required by *Miranda*. However, the *Miranda* warnings need only be given to a person who is undergoing custodial interrogation. *Heinemann v. Whitman County*, 105 Wn.2d 796, 801, 718 P.2d 789 (1986). Here, defendant had been arrested for Obstructing and was unhandcuffed in an interview room in the Public Safety Building when contacted by Detective Madsen. RP 18-19, 63-64. Detective Madsen introduced himself, advised that he was investigating two shooting incidents and that he was interested in defendant's "side of what happened, but that [he] was also interviewing Margaret Shults." RP 18-19. At that time, defendant made an unsolicited statement to Detective Madsen (RP 19) that defendant was present during both shootings, yet was not the shooter. RP 63-64. Detective Madsen then left defendant unsecured in an unlocked room in the Public Safety Building while he was interviewing Margaret Shults. RP 19.

A defendant's confession is voluntary if the totality of the circumstances demonstrates that law enforcement neither coerced the defendant nor overpowered the defendant's will. *State v. Broadaway*, 133 Wn.2d 118, 131-132, 942 P.2d 363 (1997). The emphasis is on the behavior of the police. Here, the record reflects that defendant voluntarily confessed his participation in the charged crimes before he was asked a guilty-seeking question by law enforcement which would trigger the necessity for advisement of *Miranda* warnings.

Nevertheless, the uncontroverted record reflects that the defendant was completely and formally advised of his *Miranda* warnings prior to actually being interviewed by Detectives Madsen and Gilmore. RP 19-22. The warnings required by *Miranda*, apply when a suspect is subject to (1) custodial (2) interrogation (3) by an agent of the state. *State v. Warner*, 125 Wn.2d 876, 884, 889 P.2d 479 (1995). It is undisputed in the record that defendant was undergoing a custodial interrogation when Detectives Madsen and Gilmore actually interviewed defendant. It is undisputed in the record that the defendant was given *Miranda* warnings which he acknowledged and waived before he agreed to talk to the officers. RP 19-22, 63-64. Defendant disputes whether he was adequately advised of his *Miranda* warnings.

The trial court found that it was undisputed that: defendant was under arrest when the interrogation occurred; defendant understood the English language and was able to ask questions; defendant did not appear to be under the

influence of anything; defendant was read his Constitutional rights from a rights card; defendant stated he understood his rights and agreed to answer questions; defendant did not request an attorney anytime or invoke his right to remain silent; no threats or promises were made to defendant during the interrogation; and defendant answered those questions he chose to answer while declining to answer others. CP 32-34; RP 19-22. Defendant never asked to stop the interview. The trial court concluded that: defendant's statements were made in response to custodial interrogation which triggered the protections of *Miranda*; defendant was given his *Miranda* warnings; defendant then made a knowing, intelligent and voluntary waiver of his rights prior to any interrogation; and *Miranda* was complied with, thus making defendant's statements admissible. CP 32-34; RP19-22. The trial court's determination is supported by the evidence. A trial court's findings of fact are entitled to great deference upon review. *State v. Atchley*, 142 Wn.2d 147, 154, 173 P.3d 323 (2007). The findings of fact are examined under the clearly erroneous standard and will be reversed only if not supported by substantial evidence. *State v. Grewe*, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Defendant has not shown any prejudicial error. Defendant was not subjected to custodial

interrogation before he was advised of and waived his rights. There was no error in the admission of the statements. The convictions should be affirmed.

B. SUFFICIENT EVIDENCE IN THE RECORD SUPPORTS THE TRIAL COURT'S FINDING DEFENDANT GUILTY OF FIRST DEGREE ASSAULT AS CHARGED IN COUNTS II, III, VI, AND VIII.

In Superior Court Cause No. 10-1-00141-8, defendant contends that insufficient evidence was admitted into evidence to support his convictions for First Degree Assault as charged in Counts II, III, VI, and VIII. Defendant was charged in the alternative for Counts II, III, VI, and VIII with First Degree Assault pursuant to RCW 9A.36.011(1)(a) as follows:

. . . That the defendant GREG SHARKEY, JR, as actor and/or accomplice of Tony E. Dawson, in the State of Washington, on or about between December 22, 2009, did, with intent to inflict great bodily harm, intentionally assault THOMAS B. TOWNSEND (DENNIS M. ELLSWORTH, ROYAL HORSEMAN, GORDON MCGLYNN), with a firearm, or deadly weapon...

CP 5-9. (victims were consolidated for purposes of illustration).

Defendant contends that the record contains either no evidence or insufficient evidence that the four victims identified in Counts II, III, VI, and VIII of the Information were at the Frederick house during the December 22, 2009 shooting. Nevertheless, Mr. Townsend testified to being at the house on Frederick when the shooting on December 22, 2009 occurred. RP 258-261. Mr. Townsend testified that "shots rang out" and he ran away from the gunshots to

seek cover behind the house. RP 258-261. Other witnesses testified that there were between 8-10 people at the Frederick house at the time of the shooting on December 22, 2009, including Dennis Ellsworth, Royal (“Roy”) Horseman, and Gordon (“Gordy”) McGlynn. RP 85, 86, 88, 90, 97, 100, 109, 250, 266, 268, 295. There is no evidence contesting Mr. Townsend’s sworn testimony to his being present at the house when the gunshots were fired and he was forced to seek shelter therefrom. There is no evidence contesting the sworn testimony of witnesses that on December 22, 2009, Dennis Ellsworth, Royal Horseman, and Gordy McGlynn were present at the Frederick house at the time of the shooting.

“A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Evidence is sufficient to support a conviction if, after reviewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements proved beyond a reasonable doubt. *State v. Hendrickson*, 129 Wn.2d 61, 81, 917 P.2d 563 (1996). The elements of a crime may be established by either direct or circumstantial evidence, one type being no more valuable than the other. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Issues regarding conflicting testimony and credibility of witnesses are for the finder of fact and cannot be reviewed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

An appellate court also does not retry factual issues, *State v. Mewes*, 84 Wn. App. 620, 622, 929 P.2d 505 (1997), nor does it weigh the facts. “The fact that a[n]...appellate court may conclude the evidence is not convincing, or may find the evidence hard to reconcile in some of its aspects, or may think some evidence appears to refute or negate guilt, or to cast doubt thereon, does not justify the court’s setting aside the...verdict.” *State v. Randecker*, 79 Wn.2d 512, 517-18, 487 P.2d 1295 (1971). Here, the trier of fact was presented with more than sufficient evidence to support the verdicts rendered in cause no. 10-1-00141-8.

C. THE TRIAL COURT PROPERLY CONVICTED DEFENDANT OF THE LESSER INCLUDED CRIME OF TAKING A MOTOR VEHICLE WITHOUT PERMISSION.

Defendant contends that in Superior Court cause No. 09-1-04680-9 the trial court erred by convicting him of Taking a Motor Vehicle Without Permission as the lesser included of First Degree Robbery. Defendant is constitutionally entitled to be notified of the nature and cause of an accusation to facilitate preparation of an adequate defense. Defendant claims that the taking motor vehicle conviction can only stand if it is a lesser included offense of first degree robbery since he was not originally charged with that crime. It is of interest that defendant on appeal claims a violation of his constitutional right to notice and due process, yet it was defendant’s trial counsel who argued to the trial court that the

evidence supported the lesser included offense of taking a motor vehicle without permission in lieu of the first degree robbery. RP 320. More significantly, is that the trial court found in defendant's favor in convicting him of the lesser included crime as his trial counsel argued, yet defendant claims error on appeal.

Trial defense counsel argued, "The only thing that this defendant did, according to the evidence that we have, is that he actually rode in a vehicle knowing that it was stolen." RP 320. A defendant is entitled to a lesser included offense instruction when each element of the lesser crime is an element of the charged crime (the legal prong) and where the evidence would support a verdict that the lesser crime was committed but the charged crime was not (the factual prong). *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

RCW 9A.56.075 Taking a Motor Vehicle Without Permission in the Second Degree, provides, in pertinent part:

A person is guilty of taking a motor vehicle without permission in the second degree if he..., without the permission of the owner or person entitled to possession, intentionally takes or drives away any...motor vehicle...that is the property of another, or he...voluntarily rides in... the...motor vehicle with knowledge of the fact that the... motor vehicle was unlawfully taken.

RCW 9A.56.075.

RCW 9A.56.190 Robbery, provides, in pertinent part:

A person commits robbery when he...unlawfully takes personal property from the person of another or 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 or her 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; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190.

Comparing the language of the two statutes, both crimes require the intentional unlawful taking of another's property without permission. The significant difference being that robbery incorporates the use or threatened use of force. Both crimes have the *actus reus* of the unlawful taking of another's property and both crimes require the *mens rea* that the unlawful taking be intentional. Even if we default to the lesser *mens rea* of knowledge for the lesser crime, the legal prong of the *Workman* test is satisfied. The evidence herein supports the finding that defendant is guilty of the lesser included crime of Taking a Motor Vehicle since defendant had no prior knowledge that Mr. Dawson was going to use force to retain the stolen motor vehicle, hence, the factual prong of the *Workman* test is satisfied. Accordingly, the trial court committed not error in convicting defendant of the lesser included crime of Taking a Motor Vehicle Without Permission in the Second Degree.

D. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL DID NOT ARGUE THAT THE SEPARATE CRIMES OF CONSPIRACY TO COMMIT AND ATTEMPTED FIRST DEGREE ROBBERY CONSTITUTED "THE SAME CRIMINAL CONDUCT" FOR SENTENCING PURPOSES.

Defendant contends in Superior Court Cause No. 09-1-04662-1 that his counsel rendered ineffective assistance by not arguing that his convictions for Conspiracy to commit First Degree Robbery and Attempted First Degree Robbery constituted the same criminal conduct for sentencing purposes. Effective assistance of counsel is guaranteed under U.S. Const. amend VI, Wash. Const. art. I, § 22. The issue here, as defendant presents, is whether defendant received effective assistance of counsel, not whether the two crimes constituted the "same criminal conduct." Hence, respondent is confining its analysis to the claimed error of ineffective assistance of counsel without conceding that the two crimes qualified as "same criminal conduct" under the circumstances of this case.

To prove ineffective assistance of counsel, defendant must show that counsel's deficient performance prejudiced him. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 420-21, 114 P.3d 607 (2005). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P. 2d 593 (1998).. The failure to establish either prong of the test is fatal to the claim of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 697,

104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Here, defendant contends that “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.” Appellant's Br. at 28. However, assuming, *arguendo*, that the two convictions from Spokane County Cause No. 09-1-04662-1 were counted as the same criminal conduct, defendant's offender score would remain a “9+.” CP 56-68. Defendant's offender score was a “9+” based upon his 2006 First Degree Robbery conviction which counted as two points; plus his ten First Degree Assault convictions from cause no. 10-1-00141-8 which counted as two points each for a total of twenty points; plus his conviction for Taking a Motor Vehicle Without Permission from cause no. 09-1-04680-9 which counted as one point. CP 56-68. Therefore, a “same criminal conduct” finding would not have affected defendant's sentence. Defendant has failed to demonstrate prejudice from counsel's failure to argue that the two convictions from cause no. 09-1-04662-1 constituted the “same criminal conduct” for sentencing purposes. On the contrary, defendant's counsel rendered very effective assistance by virtue of the fact that defendant was acquitted on ten counts of attempted first degree murder and one count of first degree robbery. Accordingly, there is no evidence in, or reasonable inferences to be drawn from a review of, the record to support that defendant's trial counsel was ineffective.

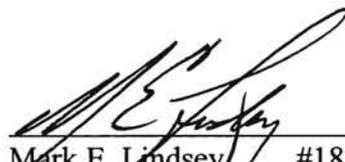
V.

CONCLUSION

It is respectfully requested that this Court affirm the judgments and sentences entered in each of the identified causes joined herein on appeal.

Dated this 4th day of May, 2012.

STEVEN J. TUCKER
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