

78156-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE PERSONAL RESTRAINT PETITION OF

SCOTT SKYLSTAD,

PETITIONER

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE LINDA TOMPKINS

SUPPLEMENTAL BRIEF OF RESPONDENT

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CREATED
11/11/04

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I.

ISSUES PRESENTED

(1) Does the plain language of RCW 10.73.090(3) permit a collateral attack to be filed more than one year after the conclusion of the first appeal from the conviction?

(2) Does the doctrine of equitable tolling apply to RCW 10.73.090?

(3) Does the doctrine of equitable tolling apply when there has been no misconduct by the opposing party?

(4) Where petitioner has previously presented these arguments in his direct appeal, has he shown cause for them to be re-opened in this proceeding?

II.

STATEMENT OF THE CASE

The procedural history of this case can be dealt with rather summarily. Petitioner was convicted at a jury trial in the Spokane County Superior Court of first degree robbery. He appealed that conviction to the Court of Appeals, Division Three. The State cross-appealed the trial court's ruling running to the two weapons enhancements concurrently. A separate

appeal on an eluding conviction was consolidated with the robbery appeal. *See* COA files 20945-8-III and 20994-0-III.

The Court of Appeals affirmed the convictions, reversed the enhancement ruling, and remanded for a new sentencing. *See* Appendix A.¹ This Court declined to review that ruling. *See* file no. 74682-6. The mandate issued May 14, 2004.

The trial court re-sentenced the defendant on the robbery charge on July 28, 2004, and he again appealed to the Court of Appeals. *See* file no. 23241-7-III. Division Three reaffirmed its ruling on the weapons enhancements on October 11, 2005. After moving for reconsideration, defendant filed a petition for review with this Court on December 21, 2005. It was subsequently denied September 6, 2006. *See* file no. 78126-5. The Court of Appeals issued its mandate on September 15, 2006.

While the motion for reconsideration was pending, defendant filed the current personal restraint petition (PRP) with the Court of Appeals on November 21, 2005. It was assigned file no. 24681-7-III. The Court of Appeals dismissed the PRP as untimely on December 15, 2005, without serving a copy or calling for a response from the Spokane County

¹ This Court on September 21, 2006, granted petitioner's motion to include the record from the direct appeal in this proceeding. For the convenience of the readers, a copy of the Court of Appeals decision in the direct appeal is attached as Appendix A.

Prosecutor. Defendant subsequently filed a motion for discretionary review with this Court, asking that the dismissal order be reversed.

This Court directed that a response to the motion for discretionary review be filed. This Court then granted the motion for discretionary review and appointed counsel to represent petitioner in this Court.

III.

ARGUMENT

A. THIS PERSONAL RESTRAINT PETITION IS PRECLUDED BY THE PLAIN LANGUAGE OF RCW 10.73.090(3).

The Court of Appeals properly dismissed this case because the plain language of the statute required it. That approach also parallels this Court's jurisprudence on the limited scope of review of second appeals and appeals from collateral rulings. This Court should decline petitioner's request to construe the legislative scheme inconsistently with this Court's existing approach to repetitive appeals.

When a statute is clear and unambiguous, a court does not engage in statutory construction. State v. Bolar, 129 Wn.2d 361, 366, 917 P.2d 125 (1996). This Court has reaffirmed the rule that

[w]hen statutory language is unambiguous, we look only to that language to determine the legislative intent without

considering outside sources. Plain language does not require construction. When we interpret a criminal statute, we give it a literal and strict interpretation. We cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language. *We assume the legislature means exactly what it says.*

State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003) (emphasis supplied; citations and internal quotations omitted).

The principles of statutory construction are numerous and frequently stated in somewhat different terms, but the goal remains the same – to construe the meaning of legislation and advance the legislative purpose behind the statute. State v. Bright, 129 Wn.2d 257, 265, 916 P.2d 922 (1996). Thus, courts will give effect to every word in a statute and will not adopt an interpretation that renders words useless, superfluous, or ineffectual. City of Seattle v. State, 136 Wn.2d 693, 698, 701, 965 P.2d 619 (1998).

RCW 10.73.090(3) provides:

- (3) For the purposes of this section, a judgment becomes final on the last of the following dates:
 - (a) The date it is filed with the clerk of the trial court.
 - (b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or
 - (c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

This legislation presumes that one of two things will happen after a conviction has been entered and a sentence has been imposed: (1) there will be no appeal; (2) there will be an appeal. If there is no appeal, then the judgment becomes final when it is filed with the clerk of court. RCW 10.73.090(3)(a). If there is an appeal, then the judgment becomes final when the mandate issues unless a certiorari petition was timely filed in a case where the conviction was affirmed. RCW 10.73.090(3)(b), (c).

The petitioner spends a good deal of energy arguing that *any appeal* falls within the scope of subsection (3)(b) and that his appeal from the re-sentencing prevented the jury's verdict from becoming final. His construction of subsection (3)(b) reads language out of the statute in contravention of the well-established maxim that all language in a statute must be given effect. City of Seattle, supra. Specifically, the language in subsection (3)(b) in question is "timely direct appeal from the conviction." Petitioner argues that "conviction" means the same thing as "judgment" in this statute and that since no one can appeal from a verdict that has not been reduced to judgment, the Legislature can not have meant to limit which appeals prevent a judgment from becoming final. For a couple of reasons, his arguments fail. First, the definitional argument is circular. The opening sentence of subsection (3) announces that it is specifying

when a “judgment” is final. To then read “conviction” as “judgment” means that a “judgment” is final when it is a “judgment.” Such a definition tells us nothing.

Petitioner’s argument that the Legislature intended that “conviction” and “judgment” mean the same thing is not supported by other legislative pronouncements. “Conviction” is used to mean essentially “verdict” throughout the Criminal Procedure title. *E.g.*, RCW 10.43; RCW 10.61.035; RCW 10.61.060 [“verdict of conviction”]; RCW 10.64.021 [“judgment of conviction”]; RCW 10.64.110 [“judgment and sentence of a felony conviction”]; RCW 10.64.140. It also is used in two other provisions of RCW 10.73. RCW 10.73.040 regulates bail in “an appeal taken from a judgment of conviction.”

Most telling is the use of the word “conviction” in RCW 10.73.160(2), a statute enacted only six years after RCW 10.73.090. There the Legislature, in the first sentence of the subsection, indicated the specific actions in which the State could recover its appellate costs: “Appellate costs are limited to expenses specifically incurred by the state in prosecuting or defending an appeal or collateral attack from a criminal conviction or sentence or a juvenile offender conviction or disposition.” [Emphasis supplied.] The Legislature expressly distinguished “conviction” from “sentence” when recognizing the various types of

appeals and collateral attacks that exist. It did not equate the concepts. If every appeal from a criminal “conviction” was necessarily an appeal from the “judgment,” there would be no need to distinguish the two concepts. Instead, the Legislature recognized that some appeals challenge verdicts and some appeals challenge sentences. It is not a one size fits all approach.

Petitioner’s second argument fails because the Legislature² was not defining the word “conviction” or setting forth the circumstances when an appeal can be taken. It was telling us the circumstances in which a judgment does not become final – when there is an appeal taken from the conviction. RAP 2.2(a) tells us when an appeal can be taken; RCW 10.73.090 makes no such claim.

Petitioner’s argument renders the noted language in subsection (3)(b) superfluous in violation of standard rules of statutory construction. What is clear is the language of the statute. The Legislature was detailing that only certain timely appeals would toll finality under the statute. Specifically, it only would be the appeal that challenges the

² Petitioner spends some time discussing state and federal common law definitions of finality. That discussion is simply not *apropos* because we are trying to construe a statute here. If the Legislature had intended to defer to common law definitions of finality, it would have said so or expressly adopted one of those. Similarly, if the Legislature was relying upon a federal definition of finality or court construction of that statute, it would likely have said so. What is a “final judgment” for purposes of RAP 2.2 simply is not an aid in determining what the Legislature was defining in RCW 10.73.090.

conviction that tolls the time for bringing collateral challenges to the conviction. Any other appeal such as an appeal taken from an order denying relief from judgment, CrR 7.8, or challenging a restitution award or an amended sentence, would not toll the finality of the judgment of conviction.

This approach is the same one this Court takes, and has always taken, with respect to appeals from collateral matters. The original verdict remains in place even if some component of the case is properly on appeal. One example comes from appeals taken from post-judgment proceedings. At common law it was very clear that a post-trial ruling was not, in the absence of a statute, appealable and, even when appealable, did not bring up the underlying judgment. *E.g.*, Sound Investment Co. v. Fairhaven Land Co., 45 Wash. 262, 88 Pac. 198 (1907); State v. Farmer, 39 Wn.2d 675, 237 P.2d 734 (1951). Modern rules are the same. An appeal taken from a post-verdict ruling does not bring up the trial. Cox v. General Motors, 64 Wn. App. 823, 827 P.2d 1052 (1992) [appeal from order granting a new trial did not allow appellant to challenge pre-trial rulings]; Kemmer v. Keiski, 116 Wn. App. 924, 68 P.3d 1138 (2003).

Similarly, the rules governing appeals in criminal cases limit the scope of post-judgment appeals. RAP 2.4(c) provides, in part, that:

. . . the appellate court will review a final judgment not designated in the notice only if the notice designates an order deciding a timely posttrial motion based on . . . (4) CrR 7.4 (arrest of judgment), or (5) CrR 7.6 (new trial).

The only post-conviction criminal motions that bring up the underlying verdict are CrR 7.4 and former CrR 7.6 (now found at CrR 7.5). Those also are the two pre-sentencing motions that can be brought to challenge a verdict. After judgment, the trial court can only consider a motion for relief from judgment under CrR 7.8. That motion is not one that brings up the underlying verdict. RAP 2.4(c).

There have many times been reported opinions in second appeals from new sentencing proceedings. None of those cases even suggest that an appeal from the new sentencing brought up the underlying verdicts. *E.g.*, State v. Worl, 129 Wn.2d 416, 918 P.2d 905 (1996); State v. Connors, 90 Wn. App. 48, 950 P.2d 519, *review denied* 136 Wn.2d 1004 (1998). Indeed, a modification to a judgment and sentence required by an initial appeal is not even enough to permit challenges in a second appeal to the portions of the sentence that were unchanged at the second sentencing. *E.g.*, State v. Barberio, 121 Wn.2d 48, 846 P.2d 519 (1993) [failure to raise exceptional sentence in first appeal precluded challenge to exceptional sentence imposed on remand]; State v. Traicoff, 93 Wn. App. 248, 257-258, 967 P.2d 277 (1998), *review denied* 138 Wn.2d 1003 (1999) [could not

challenge community placement conditions in appeal from new sentencing where challenge not raised in first appeal]. Rather, the rule of Barberio is that a sentence component that did not change from one judgment to the next will not be reviewed in the second appeal unless the trial court expressly discussed the provision at the second sentencing.

The effect of one appeal is typically to foreclose at least some issues from consideration on a second appeal in the same case. Indeed, that is the purpose of the law of the case doctrine. Folsom v. Spokane County, 111 Wn.2d 256, 263-264, 759 P.2d 1196 (1988). The judgment is necessarily final as to some aspects of the case even if a sentence or other collateral issues are still alive. There is nothing strained or improper in reading RCW 10.73.090(3)(b) the same way. The Legislature intended that convictions become final when the mandate issued in the initial appeal. The fact that a new sentencing hearing was required in this (or any other) case simply did not change the legislative judgment. This is totally consistent with the case law decisions on finality of judgments noted above. If those judgments are conclusive for purposes of a second appeal, why are they not for collateral attack purposes?

The legislation essentially tolls the need to collaterally challenge a conviction while there is still an appeal that is challenging the

conviction. However, once that appeal is completed, there is no longer any tolling of the time to file the collateral challenge.

Petitioner also raises policy arguments in support of his construction, decrying the fact that there could conceivably be multiple current actions taking place at one time. However, the current law permits that.³ It is not uncommon to see personal restraint petitions decided concurrently with a direct appeal. Nothing precludes a PRP from being filed even before an appeal is taken. Most certainly a defendant is not required to wait until appealing before filing a collateral attack.⁴

This Court looked at the policy behind RCW 10.73.090 in its initial review of the statute in In re Runyan, 121 Wn.2d 432, 853 P.2d 424 (1993). There this Court noted the legislative desire to promptly resolve criminal cases. Id. at 450. If there is to be a new trial for any reason, it should be as soon as possible. That policy is furthered by respondent's view

³ Petitioner's hypothetical about a death penalty verdict being set aside on appeal is not helpful to his argument. Once the penalty is set aside, it is no longer a capital case and defendant is not entitled to counsel to represent him in a collateral attack. *See* RCW 10.73.150(3). Instead, his case would be treated the same as every other PRP case – once the petitioner has shown meritorious issues, this court would be empowered to appoint counsel if necessary. RCW 10.73.150(4).

⁴ The defendant here had no particular reason to wait once the Court of Appeals issued its mandate since he was not the one who upset his sentence – the State did. From his perspective, the sentence was only going to get worse, not better. He had every incentive to mount his challenge right away. Indeed, if the State had not sought to re-sentence him after winning its cross appeal, he would be out of luck altogether under his reasoning.

of this statute. Repetitive appeals that do not challenge the underlying verdict simply do not toll the time for collaterally attacking those verdicts.

RCW 10.73.090(3)(b) speaks to one particular type of appeal -- the direct appeal following the verdict. With the issuance of the mandate, the case becomes final for collateral attack purposes. Nothing in that statute requires that the lower court be affirmed *en toto* or even affirmed at all. In other words, the case becomes final with the issuance of the mandate, regardless of what the appellate court's ruling actually was. Of course, if a conviction is set aside, there will be nothing to collaterally attack in the future. But the fact that a case is remanded for correction of a judgment or even a new sentencing hearing does not change the statutory requirement. The convictions here became final when the appellate mandate issued May 14, 2004.⁵ The current PRP was filed nineteen months later – seven months after the deadline. The Court of Appeals correctly dismissed it.

The Legislature understandably limited the types of appeals that would toll finality to appeals in which the convictions in question are at issue. That is the meaning of the phrase, “timely direct appeal from the conviction.” Appeals taken from a new sentencing or other proceeding

⁵ If petitioner is correct that the reversal of the sentence tolled finality further, it can not have tolled it past the re-sentencing date of July 28, 2004, so the petition is still untimely per RCW 10.73.090(3)(a). Only if petitioner can characterize his second appeal as a direct appeal from the conviction under subsection (3)(b), instead of an appeal from the re-sentencing, can he toll sufficient time to make this proceeding timely.

unrelated to the issues of guilt or innocence simply do not toll proceedings. They are neither “direct” appeals nor are they “from the conviction.” The Legislature limited tolling to the initial appeal. The Court of Appeals understood that limitation and properly found this proceeding untimely.

B. THERE IS NO BASIS IN THIS CASE FOR
EQUITABLY TOLLING THE STATUTE OF
LIMITATIONS ON COLLATERAL ATTACKS.

Petitioner also argues that his misreading of the statute justifies ignoring the time limits of RCW 10.73.090. He believes that the doctrine of equitable tolling should forgive the lateness of his petition. In light of the exceptions written into the statute, it is highly unlikely that the doctrine is at all compatible with RCW 10.73.090. Petitioner also has failed to satisfy the requirements for equitable tolling. For both reasons, this argument should be rejected.

This court has in *dicta* characterized RCW 10.73.090 as a statute of limitations.⁶ In re Runyan, *supra* at 445; Shumway v. Payne, 136 Wn.2d 383, 397-398, 964 P.2d 349 (1998). While equitable tolling can be applied to a statute of limitations, this Court has not applied the doctrine in a criminal case and has yet to decide whether it can do so. In re Carlson, 150 Wn.2d 583, 593, 80 P.3d 587 (2003). This Court has decided that it can

⁶ Respondent believes this characterization is inaccurate in view of the fact that RCW 10.73.090 acts as limitation on actions brought under RCW 7.36.130, which clearly is a jurisdictional statute. See discussion in In re Runyan, *supra* at 439-447.

not use a court rule to trump the statutory time deadline of RCW 10.73.090. In re Benn, 134 Wn.2d 868, 938-939, 952 P.2d 116 (1998).

RCW 10.73.100 creates six exceptions to the time limits of RCW 10.73.090. None of those exceptions involve a good faith misunderstanding of the meaning of the statute. A well known canon of statutory construction is *expressio unius est exclusio alterius* (inclusion of one is exclusion of the others). State v. Dumas, 148 Wn.2d 723, 729, 63 P.3d 792 (2003). Under this approach, the omission of an item from a statute is the exclusion of that item. In re Detention of Williams, 147 Wn.2d 476, 491, 55 P.3d 597 (2002). The Legislature has considered the circumstances in which it is willing to waive the time limits. It has not included any sort of misunderstanding or excusable neglect among those reasons. Thus, even if RCW 10.73.090 is merely a statute of limitations, it is not one that an exception can be read into because of the comprehensive list of exceptions created in RCW 10.73.100.

That is one reason why petitioner's attempt to rely upon Scannell v. State, 128 Wn.2d 829, 912 P.2d 489 (1996), is unavailing. There the petitioner had missed the thirty day deadline set forth in RAP 5.2(a) for filing an appeal due to a change in the wording of the rule. Importantly, this Court used its authority under RAP 18.8 to waive its own rule due to the confusion the amendment had caused. It was not attempting to amend a

statute by use of a court rule, an approach that Benn had already rejected. The case also did not even discuss the doctrine of equitable tolling. Moreover, this Court pointedly noted that any future misreading of the rule would not be treated so leniently. Id. at 835-836. *Accord*, Shumway v. Payne, *supra* at 396. Scannell simply does not give a free pass to anyone who claims they misread a statute.

Petitioner's argument also fails because even if equitable tolling were available under this statute, he has not met the requirements for the rule. As noted in Carlson, "Equitable tolling is generally used only sparingly, when the plaintiff exercises diligence and there is evidence of bad faith, deception, or false assurances by the defendant." 150 Wn.2d at 591. As in Carlson, there has been no showing that the government did anything wrong or misled Mr. Skylstad into filing his petition late.

Equitable tolling was not available to the defendant. He also has not met the requirements of the doctrine. For both reasons, this effort to get out from underneath RCW 10.73.090 must be rejected.

C. IT IS PREMATURE TO ORDER A REFERENCE HEARING WHERE PETITIONER HAS OTHER UNRESOLVED CLAIMS AND HAS NOT SHOWN WHY THE INTERESTS OF JUSTICE PERMIT RELITIGATION OF ARGUMENTS RAISED IN THE DIRECT APPEAL.

Petitioner's final contention is not related to the issue presented in this discretionary review. He claims to have meritorious issues

and seeks to have a ruling on his PRP bypassed in favor of a reference hearing on two claims. Those claims are only a few of many that have not been resolved yet. They also are claims previously determined in his appeal. He has not shown why they should be considered in this proceeding.

During his first, direct, appeal, the defendant presented *pro se* several arguments that were considered on their merits by the Court of Appeals. *See* Appendix A at 8-15. Among those contentions was the very same claim of prosecutorial misconduct that petitioner now contends should be the subject of a reference hearing. *Id.* at 14-15. He also raised several arguments why his counsel did not perform effectively, although he did not present his current claim of imputed conflict of interest twice removed. *Id.* at 8-13.

These facts bring in to play the decision in In re Taylor, 105 Wn.2d 683, 687-688, 717 P.2d 755 (1986). There this Court reviewed its prior precedent on repetitive appellate challenges and set forth the standard to govern the situation presented here -- a personal restraint petition attempting to relitigate challenges initially raised on appeal:

A petitioner cannot be allowed to institute appeal upon appeal and review upon review in forum after forum ad infinitum. *In re Hagler*, at 826. On the other hand, collateral review must be available in those cases in which petitioner is actually prejudiced by the error. We believe the opinion in *In re Haverty* accommodates these interests. Hence, we hold the mere fact that an issue was raised on appeal does not

automatically bar review in an PRP. Rather, a court should dismiss a PRP only if the prior appeal was denied on the same ground and the ends of justice would not be served by reaching the merits of the subsequent PRP.

Id. at 688. *Accord*, In re Jeffries, 114 Wn.2d 485, 487, 789 P.2d 731 (1990); In re Harris, 111 Wn.2d 691, 692, 763 P.2d 823 (1988).

The ends of justice will permit the relitigation of a formerly rejected claim only if the petitioner makes a showing of "factual innocence," or demonstrates an intervening change in the law that warrants relitigation of his claims. *See* Kuhlmann v. Wilson, 477 U.S. 436, 454, 91 L. Ed. 2d 364, 106 S. Ct. 2616, 2627 (1986); Campbell v. Blodgett, 982 F.2d 1321 (9th Cir. 1992); In re Taylor, *supra* at 688-689.

As to the fact that petitioner now has yet another ground for claiming ineffective assistance, this Court has previously decided that changing the basis for an argument does not create a new ground for relief.

[S]imply "revising" a previously rejected legal argument ... neither creates a "new" claim nor constitutes good cause to reconsider the original claim. As the Supreme Court observed in Sanders, "identical grounds may often be proved by different factual allegations. So also, identical grounds may often be supported by different legal arguments, ... or vary in immaterial respects. Thus, for example, "a claim of involuntary confession predicated on alleged psychological coercion does not raise a different 'ground' than does one predicated on physical coercion."

In re Jeffries, *supra* at 488 (citations omitted).

The request for a reference hearing is premature. Petitioner has not demonstrated that the ends of justice require consideration yet again of these claims in this proceeding. The Court of Appeals may well decide to dismiss the claims on that basis. It also might find merit in some other claim and not need to address the arguments at all.

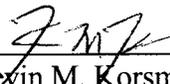
If this Court finds the petition timely, the matter should be remanded to the Court of Appeals for addressing the merits of the claims. It is premature to act upon the claim for a reference hearing.

IV.

CONCLUSION

For the reasons stated, the ruling dismissing the petition as untimely should be affirmed.

Respectfully submitted this 11th day of October, 2006.



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APPENDIX A

FILED

OCT 07 2003

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 20944-0-III
)	No. 20945-8-III
Respondent and)	
Cross-Appellant,)	
)	Division Three
v.)	Panel Six
)	
SCOTT WILLIAM SKYLSTAD,)	UNPUBLISHED OPINION
)	
Appellant.)	

KURTZ, J. – After a car chase, Scott Skylstad was stopped and arrested for attempting to elude the police. On his way to the hospital and while at the hospital, Mr. Skylstad made statements about being involved in a robbery that had occurred two days earlier. Mr. Skylstad was charged with first degree robbery and attempting to elude a police vehicle. The court denied Mr. Skylstad’s motion to suppress the statements he made in the hospital and Mr. Skylstad was convicted of both charges. The court included one weapon enhancement with his sentence. Mr. Skylstad appeals, contending that the court erred by admitting his statements. The State cross-appeals contending that the court erred by sentencing Mr. Skylstad to only one weapon enhancement. Pro se, Mr. Skylstad

submitted a statement of additional grounds for review setting forth numerous arguments. We affirm Mr. Skylstad's convictions, reverse his sentence, and remand for resentencing.

FACTS

On September 17, 2001, two men armed with guns and wearing Halloween-type masks and latex gloves robbed the Mountain View Credit Union in Spokane. Approximately \$15,000 was taken in the robbery. Michael Stricker, the branch manager, went outside and saw a car with at least two people in it leave the parking lot. Several workers in the area noticed three strangers lingering near the credit union earlier that day and were able to identify two of them as being Jason Kiss and Scott Skylstad.

The car used in the robbery was spotted later that day at a car wash and the police questioned the owner of the car, Russell Crosswhite. The police executed a search warrant at Mr. Crosswhite's residence where he lived with Mr. and Ms. Skylstad and Ms. Skylstad's father, David Hilliard. The police found \$1,115 in Ms. Skylstad's purse and receipts for several, recent, large expenditures. They also found latex gloves in the Skylstads' bedroom.

On September 19, Police Officer Kurt Vigesaa tried to stop a driver who was speeding and driving erratically. The driver refused to stop and a lengthy, high-speed chase ensued. The chase ended when two police cars pinned the suspect car between them and forced it to stop. The officers were able to extract the driver, Scott Skylstad,

from the car by putting a police dog through the window of his car and pulling him out. Mr. Skylstad had been using methamphetamines and fought with the officers. After a lengthy struggle, the officers subdued Mr. Skylstad and put him in leg restraints and handcuffs.

During the struggle, Mr. Skylstad yelled, "I was just trying to get away from you guys. I didn't rob no bank. I didn't get any money. The money would be in my car, but it's not. It's not in that guy's truck." Report of Proceedings (RP) at 13-14. Mr. Skylstad had an elevated body temperature and his arm was injured from a dog bite, so he was transported to the hospital. In the ambulance, Mr. Skylstad said he was going to prison for the rest of his life because the bank robbery was his third strike.

At the hospital, Mr. Skylstad was advised of his Miranda¹ rights and stated he understood them and was willing to answer questions. Mr. Skylstad commented to a nurse that he had robbed a bank. She asked which one and he responded, "They know which one." RP at 16. The nurse asked how much did he get, and he replied: "\$15,000." RP at 16. A little while later, Mr. Skylstad stated: "Hey, Lieutenant, you want to know something else? That robbery I did all myself. No one else did shit." RP at 25. No one questioned Mr. Skylstad, but he told an officer that he was the one who robbed the bank,

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

that he did not want anyone else to go down for it, and he was willing to write out a statement.

Mr. Skylstad was charged with one count of first degree robbery and one count of attempting to elude a police vehicle. The charges were joined for trial. At the CrR 3.5 hearing, the court found that all of Mr. Skylstad's statements were unsolicited and voluntary and, therefore, admissible. Mr. Skylstad was found guilty of both charges by a jury. At sentencing, the State asked for two 5-year weapon enhancements because two weapons were used. The court sentenced Mr. Skylstad to only one weapon enhancement. Mr. Skylstad appeals and the State cross-appeals.

ANALYSIS

Mr. Skylstad's Statements. Mr. Skylstad contends that his statements made during the arrest, in the ambulance, and at the hospital were inadmissible because he had not been given his Miranda warning. To trigger the protections afforded by Miranda, there must be a custodial interrogation by a state agent. State v. Warner, 125 Wn.2d 876, 884, 889 P.2d 479 (1995); State v. Breedlove, 79 Wn. App. 101, 112, 900 P.2d 586 (1995); State v. Walton, 64 Wn. App. 410, 413, 824 P.2d 533 (1992); State v. McWatters, 63 Wn. App. 911, 915, 822 P.2d 787 (1992). Both custody and interrogation must be present. "A suspect who is not in custody does not have Miranda rights. A suspect who

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is in custody but not being interrogated does not have Miranda rights.” State v. Warness, 77 Wn. App. 636, 639-40, 893 P.2d 665 (1995) (citations omitted).

It is not disputed that Mr. Skylstad was in custody. However, the court found that Mr. Skylstad’s statements were voluntary and not in response to interrogation. In determining whether the court correctly decided that Mr. Skylstad’s statements were not in response to an interrogation, we apply the clearly erroneous standard of review. Walton, 64 Wn. App. at 414 (citing United States v. Booth, 669 F.2d 1231, 1238 (9th Cir. 1981)).

A custodial “interrogation” is defined as “express questioning” or its “functional equivalent” initiated by law enforcement officers after a person is in custody or otherwise significantly deprived of his freedom. State v. Hawkins, 27 Wn. App. 78, 82, 615 P.2d 1327 (1980). For purposes of Miranda, the “functional equivalent” of express police questioning includes any words or actions on the part of police that they “‘should know are reasonably likely to elicit an incriminating response from the suspect.’” State v. Sargent, 111 Wn.2d 641, 650, 762 P.2d 1127 (1988); State v. Mahoney, 80 Wn. App. 495, 497, 909 P.2d 949 (1996); Hawkins, 27 Wn. App. at 82 (all are quoting Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)); see Walton, 64 Wn. App. at 414. “‘Interrogation’ involves some degree of compulsion.” Warner, 125 Wn.2d at 884. The perception of the suspect and the nature of the question rather

than the procedure during which the question is asked or the intent of the police are decisive. Sargent, 111 Wn.2d at 651; Walton, 64 Wn. App. at 414.

Mr. Skylstad argues that the officers' conduct amounted to interrogation because they gave Mr. Skylstad the silent treatment which created a coercive environment and it was conduct that the police should have known was reasonably likely to elicit an incriminating response from him. The evidence shows that Mr. Skylstad was not questioned about the robbery because initially the officers did not even know he was a robbery suspect. Even after Mr. Skylstad was read his Miranda rights, he was not questioned because the officers were told that the sheriff's department would be taking over the investigation. There is no evidence that the officers were using the silent treatment to create a coercive environment. Mr. Skylstad freely talked about the robbery. "Statements which are freely given are voluntary and if they are likewise spontaneous, unsolicited, and not the product of custodial interrogation, they are not coerced within the concept of Miranda." State v. Miner, 22 Wn. App. 480, 483, 591 P.2d 812 (1979). Mr. Skylstad's statements were spontaneous and voluntary.

Mr. Skylstad further contends he did not knowingly and voluntarily waive his Miranda rights because he was impaired by a severe wound, high body temperature, drugs, and the coercive environment. Statements obtained as a result of police interrogation are voluntary and admissible only if the person receives the Miranda

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warnings and waives his right against self-incrimination. Such a waiver must be knowing and intelligent, which of course requires the person to be mentally capable of waiver.

State v. Davis, 73 Wn.2d 271, 284-86, 438 P.2d 185 (1968).

“The voluntariness of a confession is determined by examining the totality of the circumstances in which the confession was made.” State v. Cushing, 68 Wn. App. 388, 392, 842 P.2d 1035 (1993). The fact that the person in custody has recently used drugs or alcohol, or is in withdrawal from such use, does not automatically invalidate a waiver, but is a factor for the court to consider. State v. Aten, 130 Wn.2d 640, 664, 927 P.2d 210 (1996); State v. Ortiz, 104 Wn.2d 479, 484, 706 P.2d 1069 (1985); State v. Lawley, 32 Wn. App. 337, 345, 647 P.2d 530 (1982); State v. Turner, 31 Wn. App. 843, 845-46, 644 P.2d 1224 (1982). A trial court’s determination of voluntariness should be reversed on appeal where it is not supported by substantial evidence in the record. Cushing, 68 Wn. App. at 393. In reviewing the question of voluntariness, the appellate court reviews the challenged findings of fact. State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997).

Mr. Skylstad was not read his Miranda rights until he was stabilized in the hospital. The court found that at the hospital Mr. Skylstad was oriented, coherent, and able to understand advice and follow instructions. Mr. Skylstad responded to the Miranda warning by stating that he understood his rights and was willing to answer

questions. The officer who read Mr. Skylstad his rights said he appeared to be oriented, to understand his constitutional rights, and to understand what the nurses were doing. The nurse treating Mr. Skylstad said he appeared oriented, answered questions, followed directions, and was cooperative. There is substantial evidence that Mr. Skylstad's waiver was voluntary.

In conclusion, the trial court did not err by denying the motion to suppress Mr. Skylstad's statements.

Additional Grounds for Review. Mr. Skylstad submitted a statement of additional grounds for review setting forth numerous arguments. He contends he received ineffective assistance of counsel because his attorney failed to object to immaterial, nonrelevant evidence. We review an ineffective assistance of counsel claim de novo. State v. S.M., 100 Wn. App. 401, 409, 996 P.2d 1111 (2000). The court presumes that defense counsel's performance is within the broad range of reasonable professional assistance. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

The test for ineffective assistance of counsel is whether: (1) defense counsel's performance fell below the objective standard of reasonableness, and (2) this deficiency prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (quoting Strickland, 466 U.S. at 687). Prejudice results when it is reasonably probable

that “‘but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” State v. Lord, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991) (quoting Strickland, 466 U.S. at 694). If a reviewing court concludes that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990). If counsel’s conduct can be characterized as a reasonable trial strategy, a court will not find ineffective assistance of counsel. State v. Soonalole, 99 Wn. App. 207, 215-16, 992 P.2d 541 (2000).

Mr. Skylstad argues that his counsel should have objected to the search of Ms. Skylstad’s purse because the search warrant was for Mr. Crosswhite’s bedroom, not Ms. Skylstad’s purse. A warrant that authorizes a search of premises justifies a search of the owner’s personal effects found on the premises if they are plausible repositories for the objects specified in the warrant. State v. Worth, 37 Wn. App. 889, 892, 683 P.2d 622 (1984). A premises search warrant also gives permission for law enforcement officials to detain non-owner occupants at the site. Id. But a premises warrant generally does not authorize a personal search of occupants and other individuals found at the site.

To show ineffective assistance of counsel, the defendant must show both deficient performance and prejudice. McFarland, 127 Wn.2d at 334-35. In other words, the burden is on Mr. Skylstad to demonstrate from the record before us that the trial court likely would have granted the motion to suppress the evidence obtained from a search of

Ms. Skylstad's purse. Because no motion to suppress was made, the record before us does not indicate whether the trial court would have granted the motion. For that reason, Mr. Skylstad has not overcome the strong presumption that his counsel's representation was effective.

Mr. Skylstad contends that his counsel should have objected to the introduction of duplicates of money and receipts the police found in the Skylstads' possession. He argues that the originals were admitted and the admission of the copies misled the jury into believing there was more money than what was actually there. A duplicate is admissible "to the same extent as an original" except when the authenticity of the original is questioned or when it would be unfair to admit the duplicate instead of the original. ER 1003. The record indicates that the original money and receipts were admitted into evidence. In addition, photographs of the money showing how and where the money was found were admitted. There is no evidence that this confused the jury into thinking there was more money, and there was no reason for defense counsel to object.

Mr. Skylstad argues that his counsel should have objected to the joining of the eluding and the robbery charges because it misled the jury into thinking that they happened together rather than two days apart. Joinder is proper for counts where the offenses are of the same or similar character, or are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

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CrR 4.3; State v. Russell, 125 Wn.2d 24, 62, 882 P.2d 747 (1994). We construe the rule expansively to promote the public policy of conserving judicial and prosecutorial resources. State v. Hentz, 32 Wn. App. 186, 189, 647 P.2d 39 (1982), rev'd in part on other grounds, 99 Wn.2d 538, 663 P.2d 476 (1983). The underlying principle behind this rule ensures that the defendant receives a fair trial untainted by undue prejudice. State v. Bryant, 89 Wn. App. 857, 865, 950 P.2d 1004 (1998). In deciding whether joinder was proper as a matter of law, we must determine whether the defendant suffered actual prejudice. Id.

Mr. Skylstad argues that testimony made it sound like the eluding happened right after the robbery and Mr. Crosswhite was being arrested as Mr. Skylstad drove by. The testimony Mr. Skylstad refers to occurred when the prosecutor used the map showing the course of the pursuit of Mr. Skylstad to show the location of the car wash where Mr. Crosswhite was arrested. There was no testimony that the two activities were going on at the same time. It was clear that the map was being used simply to show a location. Mr. Skylstad was not prejudiced by the joinder of the two charges, and defense counsel did not err by failing to object.

Mr. Skylstad also contends that his counsel should have produced evidence at the CrR 3.5 hearing showing he could not have made a valid waiver of his Miranda rights. The evidence he refers to are photographs taken in the hospital showing his arm severely

damaged by the dog bite and a photograph of Mr. Skylstad lying in bed with his eyes closed. As previously discussed, although Mr. Skylstad was injured, the evidence showed he was oriented and coherent and able to make a valid waiver of his Miranda rights. Introduction of the photographs at the CrR 3.5 hearing would not have changed the outcome. Defense counsel's performance was not deficient and Mr. Skylstad received effective assistance of counsel.

Mr. Skylstad contends the court erred by admitting evidence of an unrelated crime. The trial court's decision to admit or exclude evidence is an act of discretion. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. State v. Ortiz, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). "A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds." Viereck v. Fibreboard Corp., 81 Wn. App. 579, 587, 915 P.2d 581 (1996) (quoting Woodhead v. Discount Waterbeds, Inc., 78 Wn. App. 125, 131, 896 P.2d 66 (1995)). "It is not an abuse of discretion for a trial court to admit testimony when the party seeking exclusion fails to demonstrate prejudice as a result of admission." Viereck, 81 Wn. App. at 587. Defense counsel introduced testimony that Mr. Crosswhite, Mr. Kiss, and Mr. Skylstad discussed a proposed robbery other than the Mountain View Credit Union robbery. The court limited that testimony to evidence that another robbery was discussed, but did not allow testimony that the other robbery actually occurred. The court

also instructed that a witness only refer to “a robbery” rather than robberies. The court actually prevented evidence of another robbery from being introduced and this was not an abuse of discretion.

Mr. Skylstad also contends that the court erred by denying the motion to arrest judgment when the evidence was contrary to the verdict. He points to testimony that there were only two men involved in the robbery, not three. He also argues that he had a solid alibi because he was posting a bond at the time of the robbery. Under CrR 7.4(a)(3), judgment may be arrested on the basis of insufficiency of the proof of a material element of the crime. When reviewing a motion to arrest judgment pursuant to CrR 7.4(a)(3), an appellate court’s function is to determine “‘whether the evidence is legally sufficient to support the jury’s finding.’” State v. Bourne, 90 Wn. App. 963, 967, 954 P.2d 366 (1998) (quoting State v. Robbins, 68 Wn. App. 873, 875, 846 P.2d 585 (1993)). “The evidence is sufficient if any rational trier of fact viewing it most favorably to the State could have found the essential elements of the charged crime beyond a reasonable doubt.” Bourne, 90 Wn. App. at 968.

Some of the witnesses who testified saw two men, while others saw three men. The jury was entitled to believe that there were three men involved in the robbery. Also, the bail bondsman testified that Mr. Skylstad was in his office at some time between 10:30 A.M. and 1:30 P.M. Mr. Skylstad would have had time to commit the robbery and

get to the bondsman by 1:30 P.M. The evidence was sufficient to support the verdict and the court did not err by denying the motion to arrest judgment.

Mr. Skylstad also contends that the court erred by denying the motion to vacate when it was made aware that Mr. Kiss had been coerced not to testify. The decision to deny a motion to vacate is reviewed for an abuse of discretion. See, e.g., Mosbrucker v. Greenfield Implement, Inc., 54 Wn. App. 647, 651, 774 P.2d 1267 (1989) (quoting State v. A.N.W. Seed Corp., 44 Wn. App. 604, 607, 722 P.2d 815 (1986)). It is unclear why Mr. Skylstad believes Mr. Kiss was coerced not to testify. Mr. Kiss did testify at Mr. Skylstad's trial and stated that he had been driving the car when the eluding took place. Mr. Kiss exercised his Fifth Amendment rights and chose not to testify about the robbery. There is no evidence of coercion. The court did not abuse its discretion by denying the motion to vacate.

Finally, Mr. Skylstad contends this court should reverse because his right to a fair trial was prejudiced by governmental misconduct. Specifically, he refers to the failure of Mr. Crosswhite to grant an interview before trial, the failure of the government to disclose that some of the fingerprints on the mask could not be identified, and the State's conduct of charging him with the robbery as a cover up for police brutality. These arguments or theories were not presented to the trial court. Consequently, these

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contentions cannot be considered on appeal. RAP 2.5(a); In re Marriage of Tang, 57 Wn. App. 648, 655, 789 P.2d 118 (1990).

Cross-Appeal. The State cross-appeals contending that the court erred by adding only one weapon enhancement when both Mr. Skylstad and his accomplice were armed with a firearm. RCW 9.94A.510(3)(e) provides that: “Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter.” The State argues that this means all deadly weapon enhancements must run consecutively to all other deadly weapon enhancements, even multiple enhancements added to one underlying offense.

Statutory interpretation is a question of law that this court reviews de novo. State v. Spandel, 107 Wn. App. 352, 358, 27 P.3d 613, review denied, 145 Wn.2d 1013 (2001). We must give effect to the legislative intent and give statutory terms their plain and ordinary meaning. State v. Bright, 129 Wn.2d 257, 265, 916 P.2d 922 (1996). If a statute is ambiguous, this court may look at the legislative history to discern the legislature’s intent. State v. Van Woerden, 93 Wn. App. 110, 116, 967 P.2d 14 (1998).

A firearm enhancement is not a separate sentence or a separate substantive crime, but a statutorily-imposed sentence increase for a particular crime based upon certain

factors involved in the crime. In re Post Sentencing Review of Charles, 135 Wn.2d 239, 253, 955 P.2d 798 (1998). The State cites Spandel as controlling. In Spandel, the court accepted that a single charge of robbery could be enhanced twice. The jury found Mr. Spandel guilty of first degree robbery and second degree assault, but the trial court vacated the assault charge. At the robbery, Mr. Spandel was armed with a sawed-off shotgun, and his cohort was armed with a knife. The trial court sentenced Mr. Spandel to 75 months for the robbery, and it imposed consecutive 60-month firearm and 24-month nonfirearm deadly weapon enhancements. Thus, Mr. Spandel's enhancements were consecutive to a single underlying offense. The court held that former RCW 9.94A.310² clearly did not limit the consecutive enhancements provision to enhancements on separate underlying offenses. Rather, the court stated that the enhancement provision applies "to all firearm . . . enhancements and . . . these enhancements are to run consecutively to other enhancements related to all offenses." Spandel, 107 Wn. App. at 359. The court further stated: "If the Legislature intended to restrict the application of [former] RCW 9.94A.310(3)(e) . . . to situations involving more than one underlying offense, it clearly could do so." Spandel, 107 Wn. App. at 358-59.

Mr. Skylstad argues that State v. DeSantiago, 108 Wn. App. 855, 33 P.3d 394 (2001), aff'd in part, rev'd in part, 149 Wn.2d 402, 68 P.3d 1065 (2003) is controlling. In

² RCW 9.94A.310 was recodified as RCW 9.94A.510 by Laws 2001, ch. 10 § 6.

DeSantiago, five defendants were convicted of first degree kidnapping while each was armed with a firearm and another deadly weapon. The trial court imposed two consecutive enhancements on each defendant's sentence. This court reversed concluding that the intent of former RCW 9.94A.310(3) and (4) was to impose either a deadly weapon enhancement or a firearm enhancement, but not both, when only one offense is committed with both a deadly weapon and a firearm. Mr. Skylstad argues that under DeSantiago, if there is a single offense and a defendant and/or his accomplice is armed, only one enhancement is imposed.

However, DeSantiago was recently reversed. In State v. DeSantiago, 149 Wn.2d 402, 421, 68 P.3d 1065 (2003), the court concluded that the plain language of RCW 9.94A.510 requires a sentencing judge to impose an enhancement for each firearm or other deadly weapon that a jury finds was carried during an offense. The court reasoned that the plain language of RCW 9.94A.510(3)(e) and (4)(e) "mandates that one enhancement must be applied for each firearm or other deadly weapon that a jury finds was carried by the offender or an accomplice during a crime. . . . For each weapon found by special verdict, the sentencing judge must determine whether the weapon in question is a 'firearm' or 'other deadly weapon' and apply the appropriate corresponding enhancement." DeSantiago, 149 Wn.2d at 418; see RCW 9.94A.510(3)(e), (4)(e).

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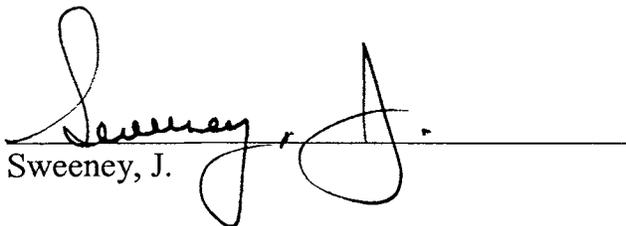
Here, the jury returned two special verdict forms finding that both Mr. Skylstad and his accomplice were armed with a firearm. The court erred by not imposing two firearm enhancements.

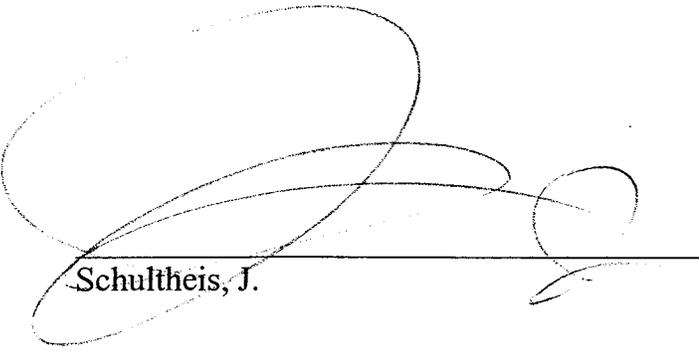
We affirm Mr. Skylstad's convictions, reverse his sentence, and remand for resentencing.

The majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Kurtz, J.

WE CONCUR:


Sweeney, J.


Schultheis, J.