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No. 69077-9-I

IN THE
WASHINGTON COURT OF APPEALS
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

vs.

SHANE SKJOLD,

Appellant.

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

The Honorable Harry McCarthy, Judge

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

SHANE SKJOLD
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I.

Statement of the Case

SHANE SKJOLD [hereinafter Appellant] is currently serving a sentence of 229-months in prison after having been convicted in a jury trial of First Degree Burglary, Second Degree Assault, and Unlawful Imprisonment.

Appellant incorporates by reference the remainder of the statement of the case from the Opening Brief of Appellant and invites the Court to refer to the same.

II.

Argument

A. APPELLANT WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND ON APPEAL.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." This fundamental right is assured in the State Court's by the Due Process Clause of the Fourteenth Amendment. Powell v. Alabama, 53 S.Ct. 55, 77 L.Ed. 158 (1932); U.S.C.A. VI., XIV; Wash. Const. Art. I, §22.

A criminal defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be

different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064-65, 80 L.Ed.2d 674 (1984).

The Constitutional right to counsel includes the right to effective assistance of counsel at trial and on direct appeal. McMann v. Richardson, 397 U.S. 759, 771 N.14 (1970); Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437 1974); Evitts v. Lucey, 105 S.Ct. 800, 835 (1985).

The 2-two prong Strickland test requires proof that the attorney acted deficiently and that the deficient performance prejudiced the defense. Id., at 418. Deficient conduct by an attorney must show errors so serious that the defendant in effect has been deprived of his Sixth Amendment right to counsel. Id., at 418. That means performance falling below the "customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances." State v. Visitacion, 55 Wn.App. 166, 173, 776 P.2d 986 (1989). The prejudice prong is met by showing a reasonable probability that, absent the deficient performance, the outcome of the proceeding would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1985); Strickland,

466 U.S. at 694. Such a reasonable probability need only undermine confidence in the outcome and need not show that the deficient conduct "more likely than not" altered it. Thomas, Id., at 26.

Washington Court's, however, have recognized that some circumstances require a presumption of prejudice. See In Re Richardson, 110 Wn.2d 669, 675 P.2d 209 (1983); In Re Boone, 103 Wn.2d 24, 233, 691 P.2d 964 (1984); In Re Farney, 91 Wn.2d 72, 593 P.2d 1210 (1978); State v. Kitchen, 110 Wn.2d 403, 413, 756 P.2d 105 (1988).

The Federal Court's have likewise presumed prejudice where an attorney fails to perform his duties. See United States v. Cronic, 466 U.S. 648, 658-61, (1984); Strickland, 466 U.S. at 692; Smith v. Robbins, 528 U.S. at 287; Roe v. Flores-Ortega, 528 U.S. 470, 483-84 (2000).

The claim whose omission forms the basis of an ineffective assistance claim may be either a federal law or a state-law claim, so long as the "failure to raise the state or federal ... claim fell 'outside the wide range of professionally competent assistance.'" Strickland, 466 U.S. at 690, 104 S.Ct. at 2066).

In assessing the attorney's performance, a reviewing court must judge his conduct on the basis of the facts of the particular case, "viewed as of the time of counsel's

conduct," Strickland, Id., and may not use hindsight to second-guess his strategy choices, Fretwell, 506 U.S. 364, ___, 113 S.Ct. 838, 844.

In evaluating the prejudice component of the Strickland test, a court must determine whether, absent counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. "A reasonable probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. The outcome determination, unlike the performance determination, may be made with the benefit of hindsight. See Fretwell, 506 U.S. at ___, 113 S.Ct. at 844.

(a) Defense Counsel Failed to Object to the Prosecutions Elicitation of Hearsay From Several Witnesses at Trial Which Deprived Appellant of His Right to Effective Assistance of Counsel and Confrontation.

In Crawford v. Washington, 124 S.Ct. 1354 (2004), the United States Supreme Court re-installed the traditional right of confrontation, which developed historically to prohibit the use of "ex parte examinations as evidence against the accused". Crawford, 124 S.Ct. at 1363; also see Bruton v. United States, 391 U.S. 123, 138, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)(Stewart, J. Concurring)("[A]n out-of-court accusation is universally conceded to be

constitutionally inadmissible against the accused.")(emphasis added); Green v. California, 399 U.S. 149, 179, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970)(Harlan, J., Concurring)("[T]he confrontation clause was meant to constitutionalize a barrier against flagrant abuses," including trials by absentee 'witnesses'")(emphasis added). When a declarant has given a "testimonial" statement, that statement may not be used against the defendant unless the declarant is available for cross-examination. Crawford, 124 S.Ct. at 1374.

Crawford, defines "testimonial" statements as "ex parte in-court testimony or its functional equivalent - that is material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that the declarants' would reasonably expect to be used prosecutorially". Id., 124 S.Ct. at 1364 (emphasis added and quotation omitted).

Although, the U.S. Supreme Court declined to give a "comprehensive" definition of when declarants would reasonably expect their statements to be used prosecutorially, Id., at 1374, the Court did describe certain circumstances that cause statements to fit that mold. The open "[i]nvolvement of government officer's

in the production of testimony with an eye toward trial" renders out-of-court statements testimonial. Crawford, Id., 124 S.Ct. at 1367 n.7; Lilly v. Virginia, 527 U.S. 116, 137, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999)(plurality opinion)("when the government is involved in the statements production and when the statements describe past events", the statements "implicate the core concerns of the old ex parte affidavit practice"). Similarly, "recorded statements knowingly given in response to structured police questioning" qualify as testimonial statements. Id., 124 S.Ct. at 1365 n.4. Also see Davis v. Washington, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)(providing in depth analysis of when statements are testimonial).

The Confrontation Clause confers on an accused the right to confront face to face in the courtroom those who give testimony against him or her. The confrontation clause reflects a preference for face-to-face confrontation at trial. Maryland v. Craig, 497 U.S. 836, 846 (1990); Coy v. Iowa, 487 U.S. 1012, 1019 (1988); Melendez-Diaz v. Massachusetts, 129 S.Ct. 2557 (2009). A primary interest secured by confrontation is the right of cross-examination. Douglas v. Alabama, 380 U.S. 415 (1965); United States v. Inadi, 475 U.S. 387 (1986).

At trial in this case, the prosecution elicited

hearsay testimony from witnesses' Police Officer Domingcil, (RP 60-61 June 21, 2012); and Mr. Salse (RP 56-61 June 27, 2012) the testimony was hearsay statements that Ms. Pitblado allegedly made, and are clearly inadmissible hearsay related to police interrogation and/or investigation of crime with an eye towards prosecution, and are therefore testimonial evidence which appellant did not have an opportunity to confront. See Davis, 126 S.Ct. 2277-78; (quoting Crawford, 541 U.S. at 53, n.4, 124 S.Ct. 1354, 158 L.Ed.2d 177. Also see Melendez-Diaz, 129 S.Ct. at 2546 ("[W]e do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman ... recite the unsworn hearsay testimony of the declarant ...); Craword, at 124 S.Ct. 1365.

In State v. Pugh, 167 Wn.2d 825, 835, 225 P.3d 842 (citing State v. Foster, 135 Wn.2d 441, 957 P.2d 712 (1998), our Supreme Court concluded that art. I, §22 is more protective than the Sixth Amendment with regard to a defendants right of confrontation.

On appeal it is the states burden to establish that the statements here were non-testimonial. State v. Koslowski, 166 Wn.2d 409, 417 n., 209 P.3d 479 (2009).

*** Deficient Performance

Despite these clear violation's of appellants' right of confrontation, and legal standing to challenge the testimonial hearsay evidence, counsel wholly failed to object. This was objectively unreasonable [deficient conduct] and below prevailing professional norms for attorney performance. See Strickland, 466 U.S. at 687; Reynoso v. Givrbind, 462 F.3d 1099 (2006)(trial tactic/strategy can be basis for ineffectiveness); Bolander v. Iowa, 978 F.2d 1079 (9th Cir. 1992)(trial counsel's failure to object to the introduction of hearsay evidence, which was principal evidence on premeditation element, constitutes ineffective assistance of counsel); Gains v. Thieret, 846 F.2d 402 (7th Cir. 1988)(failure to object to the introduction of hearsay evidence may constitute ineffective assistance of counsel); Lyons v. McCotter, 770 F.2d 529 (5th Cir. 1985)(where counsel passes over clearly inadmissible evidence, which is prejudicial to defendant, it has no strategic value and constitutes ineffective assistance of counsel); Sager v. Maas, 84 F.3d 1212 (9th Cir. 1996)(same); Harris v. House, 697 F.2d 202 (8th Cir. 1982)(counsel's failure to object to hearsay ineffective assistance); Hollines v, Estelle, 569 F.Supp. 146 (W.D. Tex. 1983)(counsel's failure to object to hearsay

ineffective assistance); Henry v. Scully, 78 F.3d 51 (2nd Cir. 1996)(counsel's failure to object to hearsay ineffective assistance); Mason v. Scully, 16 F.3d 38 (2nd Cir. 1994)(counsel's failure to object to hearsay ineffective assistance).

*** Prejudice

Defense counsels failure to object to detective Domingcils', and Mr. Salse testimony describing alleged out-of-court statements of Ms. Pitblado, should be presumed to have resulted in prejudice. See Cronic, 466 U.S. at 658-61; Strickland, 466 U.S. at 692, 694; Bonin, 59 F.3d at 833; Lenz v. Washington, 444 F.3d 295 (4th Cir. 2006). Also see Bell v. Cone, 535 U.S. 685, 695-96 (2002)("[P]rejudice presumed where counsel entirely fails to subject the prosecutions case to meaningful adversarial testing").

Moreover, even if prejudice cannot be presumed, counsel's failure to object to the out-of-court testimonial statements clearly prejudiced appellant before the jury. This is true because detective Domingcils' testimony created an aura of trustworthyness. See State v. Carlin, 140 Wn.App. 698, 700 P.2d 323 (1985)(statement made by a government official or law enforcement officer is more likely to influence the fact finder); United States v.

Gutierrez, 995 F.2d 169, 172 (9th Cir. 1993)(statements of law enforcement officers often carry "an aura of special reliability and trustworthiness").

Finally, there could not have been any strategic or tactical reason why defense counsel failed to make a proper objection, and even if such could be characterized as strategic or tactical, it was unreasonable under the facts, and outside the wide range of professionally competent assistance. See Cave v. Singletary, 971 F.2d 1513, at 1514 (11th Cir. 1992)("[C]ounsel's strategy or tactics must be reasonable"); Martin v. Rose, 744 F.2d 1245 (6th Cir. 1984)(trial counsel's tactics can constitute ineffective assistance if they fall outside the wide range of professionally competent assistance or prevailing professional norms). Also see Wiggins, 539 U.S. at 527; Cronic, 466 U.S. 648, n.19.[1]

(b) Appellate Counsel Failed to Obtain the Full Verbatim Report of Proceedings Depriving Appellant of Effective Appellate Counsel, Due Process of Law and Right to Appeal.

Article I, § 22 of the Washington State Constitution expressly guarantees the right to appeal in all criminal cases. See State v. Koloske, 100 Wn.2d 889, 676 P.2d 456 (1984); State v. Rolax, 104 Wn.2d 123, 139, 702 P.2d

1 Although, defense counsel may have said his failure to object to the hearsay was a strategy, however, pre-trial, counsel also said he had an issue with Ms. Pitblado's Statements. RP 29 (June 21, 2012).

1185 (1985).

Washington State also now recognizes that criminal defendants appealing there cases have a right to appeal pro-se. See State v. Rafay, 222 P.3d 86 (en banc 2009)(The State constitution guarantees the criminally accused a right of self-representation on appeal).

The Constitutional right to appeal in a criminal case includes the right to a "record of sufficient completeness." See Draper v. Washington, 372 U.S. 487, 497, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963); State v. Larsen, 62 Wn.2d 64, 67, 381 P.2d 120 (1963); The record must allow counsel to determine which issues to raise on appeal, Id., at 67, and permit effective appellate review. State v. Thomas, 70 Wn.App. 296, 298, 852 P.2d 1130 (1993); Coppedge v. United States, 369 U.S. 438, 446, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962). Also see Britt v. North Carolina, 404 U.S. 226, 227, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971); Griffin v. Illinois, 351 U.S. 12, 20, 76 S.Ct. 585, 100 L.Ed. 891, 55 A.L.R.2d 1055 (1956); State v. Williams, 84 Wn.2d 853, 856, 529 P.2d 1088 (1975).

The Constitution does not, however, guarantee a perfect record on appeal. Draper, Id., 372 U.S. at 497, 83 S.Ct. 774. The absence of a portion of the record

is not reversible error unless the defendant can demonstrate prejudice. See State v. White, 40 Wn.App. 483, 488 , 698 P.2d 1123 (1985).

In the instant case, the trial court Verbatim Report of Proceedings [transcripts] provided to appellant on direct appeal are lacking in several respects. First, appellant was not provided with Opening Statements, (RP 54-55 (2012); Voir Dire, (RP 40 June 21, (2012); Judges Oral Reading of Instructions to Jury, (RP 50 June 28, 2012). Appellant, on numerous occasions requested appellate counsel, and staff at the law offices of Nielsen Broman & Koch to obtain the missing verbatim report of proceedings, however, those requests were ignored or superseded. See Exhibit "1" herein

As a threshold matter, because appellant is asserting error's in a Statement of Additional Grounds for Review herein, and a full verbatim report of proceedings have not been provided, due process to appeal is implicated.

Additionally, under the circumstances, it cannot be suggested that appellate counsel was acting in the role of an advocate where counsel filed an appellate brief without procuring and reviewing the entire record of the lower court proceedings. See Anders v. California, 87 S.Ct. 1396, 1400 (1967)(The constitutional

requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae); Entsminger v. State of Iowa, 87 S.Ct. 1402, 1403 (1967)("[A]s we have held again and again, an indigent defendant is entitled to the appointment of counsel to assist him on his first appeal"); Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 81 (1963), and appointed counsel must function in the active role of an advocate, as opposed to that of amicus curiae. See Ellis v. United States, 356 U.S. 674, 78 S.Ct. 974, 2 L.Ed.2d 1060 (1958).

In Hardy v. U.S., 84 S.Ct. 424, 375 U.S. 277 (U.S. Dist.Col. 1964), the U.S. Supreme Court held that a criminal defendant appealing his criminal conviction, who is appointed different counsel on appeal, then he had at trial, must be afforded a record of sufficient completeness in order for effective appellate review. The Supreme Court stated:

> It cannot seriously be suggested that a retained and experienced appellate lawyer would limit himself to the portions of the transcript designated by his client or even by the trial attorney, especially where the Court of Appeals may, and not infrequently do, reverse convictions for 'plain errors' not raised at trial. ... As any effective appellate advocate will attest, the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and

> his trained eyes may roam in search of an error, a lead to an error or even a basis upon which to urge a change in an established hitherto accepted principal of law. Anything short of a complete transcript is incompatible with effective appellate advocacy.

Hardy, 375 U.S. at 287-88. Also see Mayer v. City of Chicago, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (U.S. Ill. 1971); Draper v. Washington, 372 U.S. 487, 497-98, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963); United States v. MacCullom, 426 U.S. 317, 326, 96 S.Ct. 2086, 2092, 4343 L.Ed.2d 666 (1976)("[t]he basic question is one of adequacy of respondent's access to procedures for review of his conviction ..."); The Jailed Pro Se Defendant and the Right to Prepare a Defense, 86 Yale L.J. 2092 (1976)(arguing that an adequate opportunity to prepare one's own defense is a fundamental component of due process).

In this case, because appellate counsel filed the opening brief of appellant without obtaining, reviewing, the entire trial transcripts, and appellant requested that appellate counsel obtain the aforementioned transcripts, See Exhibit "1", and appellate counsel failed to do so, appellant was deprived of the ability to identify and present further issues on direct appeal in a Statement of Additional Grounds for Review (SAG),

thus, effective appellate review of appellant's criminal conviction can not occur implicating appellant's rights to effective assistance of counsel on appeal, to appeal his criminal conviction, and due process of law. See Evitts, Id.; U.S.C.A. VI, XIV; Wash. Const. Art. I, § 3; 22.

B. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO DECLARE A MISTRIAL FOR THE PROSECUTION'S ELICITING TESTIMONY OF APPELLANT'S PRIOR BAD ACTS IN VIOLATION OF THE IN LIMINE RULING.

A court should grant a mistrial when the defendant has been so prejudiced that nothing short of a new trial can ensure that he will be tried fairly. State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986).

The remedy for a violation of an in limine order by a prosecution witness is a mistrial. State v. Escalona, 49 Wn.App. 251, 256, 742 P.2d 190 (1987). In determining the effect of an irregularity in trial proceedings, courts examine (1) the seriousness of the irregularity; (2) whether the irregularity involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard the irregularity. State v. Weber, 99 Wn.2d 158, 165 P.2d 1102 (1983). A trial court's denial of a motion for a mistrial is reviewed under an abuse of discretion standard. State v. Wade, 138 Wn.2d 460, 464, 979 P.2d

850 (1999).

(a) Detective O'Bryant's reference to Appellant's Being Under DOC Supervision improperly implied he was guilty because he was already a convicted felon.

The defense argued, and the trial court agreed in granting the in limine motion, that testimony that the appellant's statements about being under DOC supervision was inadmissible and more prejudicial than probative. See RP 25 (June 21, 2012). Nevertheless, the investigating detective violated the order answering the prosecutions questions.

Specifically, the prosecution elicited the following testimony from Detective O'Bryant:

Q: And what did he say about the knife?

A: He said the knife wasn't his, and he was very specific. He said because he's under DOC super--

Q: Wait

Mr. Ferrall: Move to strike.

The Court: Motion Granted.

RP 147-48 (June 26, 2012)(emphasis added). The defense moved for a mistrial. RP 176-77 (June 26, 2012). The trial court denied a mistrial. RP 178 (June 26, 2012).

In Escalona, supra, the defendant was charged with assault while armed with a deadly weapon, a knife.

49 Wn.App. at 252. Before trial, the court granted a defense motion in limine to exclude any reference to Mr. Escalona's prior conviction for the same crime. Id. At trial, Vela, the States' primary witness, testified that Escalona "already has a record and had stabbed someone." Id., at 253. Although the trial court instructed the jury to disregard the statement, Escalona moved for a mistrial, which was denied. Id.

On appeal, the Court of appeals held that the trial court abused its discretion in denying Mr. Escalona's motion for a mistrial, concluding that the prejudicial effect of Vela's statement could not be cured due to "the seriousness of the irregularity here, combined with the weakness of the State's case and the logical relevance of the statement." Escalona, 49 Wn.App. at 256.

Here, as in Escalona, the detective's statements were extremely serious in light of ER 609 and 404(b). This is even more so in light of the relatively weak case against appellant. In addition, the detective's statements were not cumulative or repetitive of other evidence. In fact, the trial judge had ruled that this information could not be admitted.[2]

2 The trial court did however, permit the prosecution to admit other prior bad acts evidence which was also likely inadmissible under ER 404(b). RP 69-70 And the prosecution used this ER 404(b) evidence in closing. RP 67, 68 (June 28, 2012).

Moreover, the court failed to give any curative instructions to the jury to disregard the detective's remark, and even if the court had provided a curative instruction it could not "remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." Escalona, 49 Wn.App. at 255, quoting State v, Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968). Also see Old Chief v. United States, 519 U.S. 172, 179, 182, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997)(Stating in dicta that "[t]here is ... no question that propensity evidence would be an 'improper basis' for conviction); Boyd v. United States, 142 U.S. 450, 458, 12 S.Ct. 292, 295, 35 L.Ed. 1077 (1892)(finding that admission of prior crimes committed by defendants so prejudiced their trial as to require reversal); Brinegar v. United States, 338 U.S. 160, 174, 69 S.Ct. 102, 1310, 93 L.Ed. 1879 (1949)(similar).

Further, a "bell once rung cannot be unrung." State v. Trickel, 16 Wn.App. 18, 30, 533 P.2d 19 (1976); U.S. v. Jones, 16 F.3d 487, 493 (2nd Cir. 1994)(Juror's are presumed to adhere to limiting instructions, however, this presumption fades when there is

overwhelming probability that jury will be called upon to perform humanly impossible feats of mental dexterity); U.S. v. Figueroa, 618 F.2d 933, 946 (2nd Cir. 1980).

C. THE APPELLANT'S OFFENDER SCORE WAS IMPROPERLY CALCULATED BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO RULE THE THREE COUNTS ENCOMPASS THE SAME CRIMINAL CONDUCT.

At sentencing appellant moved the trial court to find the three counts constituted the same criminal conduct. RP 23 (July 23, 2012). The trial court failed to conduct a same criminal conduct analysis and counted each conviction as points in the offender score. It appears that the court presumed, without further explanation, that the mens rea for each crime was distinct. Presumably, as the record is silent, therefore there was no continuing course of conduct. Id. The trial court abused its discretion.

A persons offender score may be reduced if the court finds two or more of the current offenses constitute the same criminal conduct. RCW 9.94A.589(1)(a). Same criminal conduct "means two or more of the current offenses constitute the same criminal intent, are committed at the same time and place, and involve the same victim." Id. Thus, when determining same criminal conduct for purposes of calculating an offender score, courts look

for the concurrence of intent, time, and place, and victim. State v. Bickle, 153 Wn.App. 222, 229-30, 234, 222 P.3d 113 (2009). As part of this inquiry, courts examine whether the defendant substantially changed the nature of his criminal objective from one offense to another and whether one crime furthered the other. Id.

The State has the burden to prove the crimes did not occur as part of a single incident. State v. Dolen, 83 Wn.App. 361, 365, 921 P.2d 590 (1996)("If the time the offense was committed affects the seriousness of the sentence, the state must prove the relevant time."). The trial courts same criminal conduct determination is reviewed for an abuse of discretion or misapplication of the law. Id. at 364.

(a) The burglary, second degree assault, and unlawful imprisonment occurred in uninterrupted sequence.

Multiple offenses need not occur simultaneously in order to meet the "same time and place" requirement of the same criminal conduct analysis. State v. Williams, 135 Wn.2d 365, 368, 957 P.2d 216 (1998). Where the crimes occurred sequentially, the question is whether they "occurred in continuing, uninterrupted sequence of conduct as part of a recognizable scheme." Id. (quoting State v. Porter, 133 Wn.2d 177, 185-86, 942 P.2d 974 (1997)). Even separate incidents may satisfy the same time element

of the test when they occur as part of a continuous transaction or in a single, uninterrupted criminal episode over a short period of time. Porter, 133 Wn.2d at 18. A mere pause between criminal acts does not prevent a finding of same criminal conduct. State v. Palmer, 95 Wn.App. 187, 975 P.2d 1038 (1999).

Here, the incidents flowed together in an uninterrupted sequence.

State v. Dolen presented a similar situation. 83 Wn.App. 361. The Dolen Court reviewed evidence of six different incidents in which Mr. Dolen engaged in sexual intercourse and/or sexual contact with a child. The court determined it was unclear from the record whether the jury convicted him of the two offenses in a single incident or in separate incidents. Id. at 365. The court reasoned that if Mr. Dolen had been convicted of two offenses from a single incident, then they would have encompassed the same criminal conduct. Id. Because the State has the burden of proving a defendants criminal history, the State had the burden of showing that Mr. Dolen committed these acts in separate incidents. Id. Ultimately, the court held: "the State failed to prove that [Mr.] Dolen committed the crimes in separate incidents, [c]onsequently, the trial court's finding that the two convictions did not

constitute the same criminal conduct is unsupported." Id. Like in Dolen, the trial court's ruling here is unsupported.

(b) The similarity of purpose for all the crimes also supports a finding of same criminal conduct.

In determining whether the criminal intent prong of the same criminal conduct analysis is satisfied, the question is whether the defendant's criminal intent, objectively viewed, changed from one crime to the next. State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999); State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987), amended by 749 P.2d 160 (1988); State v. Walden, 69 Wn.App. 183, 188, 847 P.2d 956 (1993). As used in this analysis, intent "is not the particular means rea element of a particular crime, but rather is the offenders objective criminal purpose in committing the crime." State v. Adame, 56 Wn.App. 803, 811, 785 P.2d 1144 (1990). To constitute separate conduct, the record must show a substantial change in the criminal objective. State v. Calloway, 42 Wn.App. 420, 423-24, 711 P.2d 382 (1985). The mere fact that distinct methods are used to accomplish sequential crimes does not prove a different criminal intent. State v. Grantham, 84 Wn.App. 854, 859, 932 P.2d 657 (1997).

Objective intent may be found when one crime furthered the other or if both crimes were part of a recognizable scheme or plan. State v. Israel, 113 Wn.App. 243, 295, 54 P.3d 1218 (2002). One crime furthers another where the first crime facilitates commission of the other crime, State v. Saunders,

120 Wn.App. 800, 824-25, 86 P.3d 232 (2004); State v. Collins, 110 Wn.2d 253, 263, 751 P.2d 837 (1988). In Saunders, for example, the kidnap arguably furthered the rape where a fact finder could find the perpetrators restrained the victim as retribution for her past noncompliance with Saunders' sexual demands, to allow Saunders to accomplish his sexual agenda, or both. 120 Wn.App. at 824-25. The court further held a fact finder could find the rape and kidnap were part of the same scheme or plan, where it appeared the defendants primary motivation for both crimes was to dominate the victim and cause her pain and humiliation. Id. at 825. Similarly, in Collins the Supreme Court concluded a burglary furthered a rape and assault, where the defendant committed the burglary in order to accomplish the attacks. Collins, 110 Wn.2d at 263.

Here according to the State's evidence, as in Saunders, appellant had the same primary motivation for the burglary, assault and unlawful imprisonment. Consistent with the State's theory at trial, the commission of each act was part of a common plan to uncover the thief of the missing 5,000. Appellant furthermore, had no time in between criminal acts to form a new intent. Moreover, appellants' action's in entering Mr. Remero's house furthered the assault, and unlawful imprisonment.

In sum, because the crimes were committed against the

same victim, as part of an uninterrupted sequence of events and with the same criminal purpose, the trial court abused its discretion in refusing to find same criminal conduct. Appellants' sentence must be reversed and remanded.

D. THE COURT SHOULD REVERSE THE SENTENCE BECAUSE SUCH AMOUNTS TO CRUEL AND UNUSUAL PUNISHMENT UNDER BOTH THE U.S. AND WASHINGTON CONSTITUTION'S. U.S.C.A. VIII; WASH. CONST. ART. 1, § 14.

Washington State Constitutional Article 1, § 14 provides:

> Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.

Article 1, § 14 protects against grossly disproportionate sentences. State v. Gimorelli, 105 Wn.App. 370, 3380, 20 P.3d 430 (2001)(citing State v. Morin, 100 Wn.App. 25, 29, 995 P.2d 113, review denied, 142 Wn.2d 1010, 16 P.3d 1264 (2000)). Also see Braverman v. U.S., 317 U.S. 49 (1942). Consistent with this constitutional provision, the SRA gives discretion to the trial court to impose a sentence below the guidelines if the sentencing range is clearly excessive. See RCW 9.94A.390(1)(g); see also State v. Fitch, 78 Wn.App. 516, 897 P.2d 424 (1995); State v. Sanchez, 69 Wn.App. 255, 848 P.2d 208, review denied 122 Wn.2d 1007, 859 P.2d 604 (1993).

The factors to be considered in determining whether a sentence is disproportionate under art. 1, § 14 include:

1. The nature of the crime;

2. The legislative purpose behind the sentence;

3. The sentence the defendant would receive in other jurisdictions; and

4. The sentence the defendant would receive for other similar crimes in Washington.

State v. Faith, 94 Wn.2d 287, 397, 617 P.2d __ (1980).

Here, appellant received in essence what is a life sentence, 229-Months is 9-Months more than the mandatory minimum for first degree murder. See In Re Breedlove, 138 Wn.2d 298, 305 n.2, 979 P.2d 417 (1999)('[t]he maximum sentence for a class A felony is 20 years. RCW 9.A.20.021(1)(a)); State v. Collins, 50 Wn.2d 740, 756 (1957)("A mandatory sentence of Life imprisonment is not a mandate of imprisonment for life").

E. Conclusion

For the reasons stated, this Honorable Court should reverse appellants' conviction, and remand for resentencing, based on individual reversible error, or if the court finds none by itself to be prejudicial, than on the accumulation of error that denied appellant a fair trial. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Perrett, 86 Wn.App. 312, 322, 936 P.2d 426 (1997); State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); U.S. v. Necochehea, 986 F.2d 1273, 1281 (9th Cir. 1993).

DATED this 11 day of February, 2013.

Respectfully submitted,

SHANE SKJOLD
Appellant

IN THE
WASHINGTON COURT OF APPEALS
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 69077-9-I
	)	
vs.	)	
	)	AFFIDAVIT OF SHANE
SHANE SKJOLD,	)	SKJOLD
	)	
Defendant.	)	
	)	

STATE OF WASHINGTON)
) ss:
COUNTY OF FRANKLIN)

I, SHANE SKJOLD after being first duly sworn upon oath deposes and declares under penalty of perjury under the laws of the State of Washington, and of the United States of America that the foregoing statements are true and correct to the best of my belief and knowledge: That I am above the age of 21-years, and am competent to testify to the matters stated herein which are based on my personal knowledge and which are admissible as evidence at the time of hearing in this matter.

1. That I am representing myself in this matter, i.e., preparation of SAG, and it is in that capacity that I prepare this affidavit.

2. That on or about January 7-20, 2013, I spoke with the Neilson, Broman & Koch Secretary, Ms. Baker, and asked her for copies of the transcripts of the jury voir dire, and opening statements, and further;

3. That she related to me that she would order the transcripts of the voir dire, and opening statements, and further;

4. That on or about January 22, 2013, I telephoned the law Offices of Neilson Broman & Koch and spoke with my appellate attorney Ms. Bouchey, and further;

Exhibit "1"

5. That during the conversation with Ms. Bouchey, she asked me if I had asked the secretary Ms. Baker to order the voir dire and opening statements, and further;

6. That I told Ms. Bouchey that I had in fact requested the transcripts of the voir dire, and opening statements, and further;

7. That Ms. Bouchey told me that she was canceling the order for the voir dire and opening statements, "she said they were unnecessary", and further;

8. That I told Ms. Bouchey that I needed the voir dire regarding juror No. 4, and that Ms. Bouchey said there would be nothing in the voir dire regarding juror No. 4, and further;

9. That I also related to Ms. Bouchey the need for the opening statements and she said they were unnecessary, and further;

10. That I feel that I was unable to pursue additional issues regarding opening statements, voir dire, juror No. 4, and the judges oral instruction to the jury because I was not provided the necessary transcripts.

I, SHANE SKJOLD, certify, state, and declare under penalty of perjury that the foregoing is true and correct to the best of my personal knowledge. 28 U.S.C. § 1746; 18 U.S.C. § 1621.

DATED this 11 day of February, 2013.

SHANE SKJOLD
Affiant

Declaration

I, SHANE SKJOLD, declare that, on February 11, 2013, I deposited the foregoing STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW, or a copy thereof, in the internal mail system of the Coyote Ridge Corrections Center, and made arrangements for postage, addressed to: KING County Prosecutor, W. 554 Courthouse, 516 3rd Avenue, Seattle, WA 98104

I declare under penalty of perjury under the Laws of the State of Washington that the foregoing is true and correct.

DATED at Connell, Washington on February 11, 2013.

SHANE SKJOLD
Appellant