70148-7

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NO. 70148-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

RONALD R. BROWN,

Appellant.

BRIEF OF RESPONDENT

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B. ISSUES RELATING TO ROBBERY CONVICTIONS.

(2) The defendant was charged with committing robbery while armed with a deadly weapon. The jury instructions erroneously included the additional alternative of inflicting bodily injury. Those instructions were requested by the defense. Does the invited error doctrine preclude consideration of a challenge to those instructions?

(3) Did counsel's request for these instructions constitute ineffective assistance, where overwhelming evidence showed that the robbers were armed with deadly weapons?

(4) Evidence showed that the defendant restrained the victims, knowing that this restraint aided the commission of robbery. Is this evidence sufficient to support his conviction as an accomplice to the robberies?

(5) In closing argument, the prosecutor argued that if a person engages in a criminal enterprise to commit assault, and his accomplices then commit robbery, the person is an accomplice to that robbery. No objection was raised to this argument. Has the defendant shown that a curative instruction would have been ineffective, so as to allow the argument to be challenged for the first time on appeal?

(6) Did defense counsel's failure to object to this argument constitute ineffective assistance, where (a) the instruction was irrelevant to the defense theory of the case and (b) the correct definition of accomplice liability was set out in the instructions, which this court presumes the jury followed?

C. ISSUE RELATING TO ASSAULT CONVICTIONS.

(7) After the kidnappings and robberies were completed, one of the perpetrators was killed by another perpetrator. To cover up that killing, one of the perpetrators assaulted the victims. Does a

conviction for that assault merge with the convictions for kidnapping and robbery?

II. STATEMENT OF THE CASE

In late 2011, Jeff Brinkley and Ethan Mattox were living in a "fifth wheel" on property adjoining the residence of Louis and Susan Munson. Both Mr. Brinkley and Mr. Mattox were using and selling drugs. 1 RP 74. Kenneth Easley ("Dirty") supplied them with methamphetamine, which he obtained from the defendant, Ronald Brown ("Mountain"). 3 RP 423-24. On one occasion, Mr. Easley came to the Munson residence to collect a debt that Mr. Mattox owed to the defendant. Mr. Munson told Mr. Easley that he had to call before coming over. 1 RP 76-79.

On December 1, Mr. Easley came to the Munson's home to collect money from Mr. Brinkley and Mr. Mattox. He tried to call in advance, but he was unsuccessful. Mr. Munson was very angry that Mr. Easley had failed to call. When a fight between them was about to start, Mr. Brinkley and Mr. Mattox intervened. They took Mr. Easley into the basement, beat him up, and robbed him. Among other items, they took $4700 in cash, four ounces of methamphetamine, a gun, and his car. They talked to Mr. Munson

about killing Mr. Easley, but they decided not to. 1 RP 72-86, 91-95; 3 RP 428-38.

Mr. Easley reported these events to his drug supplier, the defendant. The defendant asked him what he needed. Mr. Easley said that he needed some guns and a couple dudes, as soon as they could get there. 3 RP 440-41.

Mr. Easley summoned his "friends" to help – Clark Johnson, Robbie Rose, Kenneth Rehak ("Bird"), and Megan Easley (Mr. Easley's wife). The defendant arrived with Danny Fordham, William Davis, and John Frohs ("Bigfoot"). The defendant's group brought assault rifles, sawed-off shotguns, and Kevlar vests. They decided to go to the Munsons' and get Mr. Easley's stuff back. 3 RP 441-44; 4 RP 626-30; 5 RP 752-58. Mr. Easley testified that it was not enough just to get his property back – they had to make "an example" of the people who robbed him. Otherwise, he'd be a "mark" that anyone could rob. 3 RP 445. Mr. Fordham similarly testified that if someone robs you, you usually won't be satisfied with just getting your property back. "The majority of the time, if you rip me off, I'm probably going to take your stuff when I see you." 5 RP 759.

Mr. Fordham testified that the plan called for a "good cop, bad cop kind of situation." He was to be the "attack dog." The defendant was "the boss." He was to be "the one that was more mellow" and "in control." 5 RP 759-61.

The group drove to the Munsons' house. Mr. Munson saw three cars arriving in his driveway. He did not believe that he would be able to keep the people out. So he called out, "Dirty, if you're out there, go ahead and come on in." The first person through the door was the defendant. He pushed a shotgun into Mr. Munson's stomach and said, "Brother, do you got a gun, give it up now or I'm going to kill you." He walked Mr. Munson into his living room and had him sit down on the couch. Meanwhile, the other people checked the rooms in the house to make sure that no one was there. 1 RP 99-109; 3 RP 446-48; 5 RP 761-63.

While Mr. Munson was sitting on the couch, Mr. Fordham and Mr. Rehak took his wallet, his money, and his watch. They were going to take his wedding ring as well. The defendant told them not to take that, so they gave the wedding ring back. They kept the other items. 1 RP 118.

Some time later, Susan Munson arrived home. She found people with guns in her house. The defendant was leaning against

her couch. He asked her to have a seat. Later she became worried about her dog and asked the defendant if she could go get the dog. He allowed her do that. When she started to go down the stairs, however, a "big guy" stopped her. She returned to the couch in the living room. Shortly afterwards, she asked the defendant if she could use the bathroom. He gave her permission to do that as well. 3 RP 305-12.

As Ms. Munson returned to the living room, she heard people in the bedroom going through her things. The defendant told them not to take anything from the room, but they did so anyway. She returned to the living room and sat down again. 3 RP 313-15. At one point, the defendant asked Ms. Munson what she would do if the cops came. She asked what he wanted her to do. He answered, "I want you to get rid of them, otherwise, there's going to be two dead cops." 1 RP 130.

The defendant told Ms. Munson that "they were not there for us, they needed to get ahold of Ethan [Mattox] and Jeff [Brinkley]." Mr. Munson called Mr. Mattox and handed the phone to the defendant. After talking to Mr. Mattox, the defendant said that Ethan and Jeff were going to be coming over. They did not, however, ever arrive. 1 RP 120.

While these events were going on, Mr. Fordham was walking through the house making threats. He was brandishing an assault rifle. He told the Munsons that if they called the police, he would find someone to kill them. He found their address book in the bedroom. He also took their daughter's picture of the wall and read her name and address off the back. He said that if the Munsons ever said anything, they would kill their families. 1 RP 122-23; 3 RP 321-22; 5 RP 768. Mr. Munson became so upset that he feared he would have a heart attack. 1 RP 121-22; 3 RP 318-19; 456. The defendant told him, "that's his job, he's supposed to be an intimidator." 1 RP 122.

Eventually, Patrick Buckmaster (another one of Mr. Easley's "friends") arrived. He went into the hallway. The people in the house heard a shotgun blast. Mr. Fordham looked into the hallway and saw Mr. Buckmaster's body. Mr. Frohs told the defendant that it was an accident. The defendant told everyone to grab their stuff and go. 1 RP 139; 3 RP 328-31, 459-60; 4 RP 640-41; 5 RP 769-71. As they were leaving, Mr. Fordham pointed his gun at Mr. and Ms. Munson. Mr. Munson testified that he told them "don't you fucking move, don't you call the cops, you know, he says, or I'll

come back and, you know, kill you." 1 RP 139. Ms. Munson testified that Mr. Fordham told them not to move. 3 RP 331.

After they left, Mr. Easley called Mr. Munson. He told them they were coming back to deal with the body. Mr. and Ms. Munson left their house. 1 RP 140-41; 3 RP 462. The defendant, Mr. Easley, and Megan Easley removed Mr. Buckmaster's body. They buried him in the mountains near Granite Falls. 3 RP 465-67. Subsequently, the defendant and his associates made an extensive effort to remove the evidence. They tore out the carpet, removed the blood-stained floorboards, took out part of the wall, and then rebuilt everything. 3 RP 470-73.

Eventually, police learned of these events. The defendant was ultimately charged with two counts of first degree kidnapping, two counts of first degree robbery, two counts of second degree assault, and one count of first degree burglary. Each crime had a firearm allegation. For the kidnapping, robbery, and assault, one count named Mr. Munson as the victim; the other count named Ms. Munson. 2 CP 925-26. A jury found the defendant guilty as charged. 1 CP 92-107.

III. ARGUMENT

A. ISSUE RELATED TO KIDNAPPING CONVICTIONS.

1. Instructing The Jury On An Uncharged Alternative Was Harmless, Because There Was Overwhelming Evidence Of A Proper Alternative.

With regard to the kidnapping convictions, the defendant raises only one issue. He claims that the jury was improperly instructed on an alternative that was not charged in the information.

The State agrees that the instructions were erroneous. As the defendant points out, the information charged two alternative means of committing first degree kidnapping: intent to facilitate commission of a felony, and intent to inflict extreme emotional distress. 2 CP 925; see RCW 9A.40.020(1)(b), (d). The jury instructions, however, included two other alternatives: holding a person for ransom or reward, and holding a person as a shield or hostage. (The instructions omitted the "intent to commit a felony" alternative.) 1 CP 121, 127 (inst. no. 11, 16). It is error to instruct the jury on an uncharged alternative. In re Brockie, 178 Wn.2d 532, 536 ¶ 7, 309 P.3d 498 (2013). This is a constitutional error that can be raised for the first time on appeal. State v. Chino, 117 Wn. App. 531, 538, 72 P.3d 256 (2003).

An error of this nature may, however, be harmless. Id. at 540. "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result, despite the error." State v. Aumick, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995). In a comparable situation, this court held it harmless error to instruct the jury on an alternative that is unsupported by the evidence, if there is overwhelming evidence of a proper alternative. State v. Jones, 22 Wn. App. 506, 512, 591 P.2d 816 (1979).

In the present case, there is overwhelming evidence that the kidnapping was committed with the intent to inflict extreme mental distress. This is clearest from the behavior of Danny Fordham. According to five witnesses, Mr. Fordham repeatedly threatened Mr. Munson with an assault rifle. 1 RP 115-16 (Louis Munson); 3 RP 318 (Susan Munson). 455-56 (Kenny Easley); 4 RP 637 (Megan Easley); 5 RP 765-66 (Fordham). The stress from this was so severe that Mr. Munson began experiencing heart palpitations and believed that he was going to have a heart attack. 1 RP 121; 3 RP 318-19, 456.

Mr. Fordham testified that he had agreed with the defendant in advance to play "good cop/bad cop." Mr. Fordham would be the

"attack dog," while the defendant would be "more mellow." 5 RP 760. Mr. Easley likewise testified that Mr. Fordham's behavior was "part of the plan." 3 RP 456. This is corroborated by the defendant's reaction to Mr. Fordham's behavior. When the Munsons complained, the defendant said that Mr. Fordham was doing his job. 1 RP 122; 3 RP 320.

Under RCW 9A.40.020, "extreme mental distress" means "an intention to cause more mental distress than a reasonable person would feel when being restrained by the threat of deadly force." The focus is on the mental state of the defendant rather than the actual resulting distress. State v. Garcia, 179 Wn.2d 828, 843 ¶ 33, 318 P.3d 266, 275 (2014). In Garcia, the defendant displayed a knife for a short time, but he never made threatening movements with the knife or told the victim that he was going to use it. The court held that this was insufficient evidence of intent to inflict extreme mental distress. Id. ¶ 35. In the present case, in contrast, Mr. Fordham repeatedly threatened the victims with an assault rifle. The defendant expressly approved of this conduct, and there was evidence that he had pre-arranged it. No reasonable jury could view this as anything other than intent to inflict extreme mental distress. Since the evidence of this charged alternative was

overwhelming, the error in instructing the juror on an uncharged alternative was harmless.

B. ISSUES RELATING TO ROBBERY CONVICTIONS.

1. Instructing The Jury On An Uncharged Alternative Was Not Reversible Error.

a. Because the instruction was requested by the defense, it is invited error that cannot be raised on appeal.

With regard to the robbery convictions, the defendant raises three issues. The first is similar to the issue involving the kidnapping convictions: that the jury was instructed on an uncharged alternative. The other two issues are insufficiency of evidence and prosecutorial misconduct in closing argument.

With regard to the jury instruction issue, the State again agrees that the instruction was erroneous. The information alleged two means of committing first degree robbery: that the defendant was armed with a deadly weapon and displayed what appeared to be a deadly weapon. 2 CP 925-26; see RCW 9A.56.200(1)(a)(i), (ii). The jury instructions included a third means: that the defendant inflicted bodily injury. 1 CP 133-36, inst. no. 21-22.

There is, however, a significant difference between this issue and the corresponding issue involving the kidnapping counts. The defendant proposed jury instructions that included the alternative of

inflicting bodily injury. 1 CP 159-62. The inclusion of this alternative was therefore invited error. Even when constitutional issues are involved, invited error precludes review. State v. Henderson, 114 Wn.2d 867, 792 P.2d 514 (1990).

b. Requesting This Instruction Was Not Ineffective Assistance Of Counsel, Because There Is No Reasonable Probability That A Different Instruction Would Have Changed The Outcome Of The Case.

The defendant claims that his attorney was ineffective in requesting this instruction. Such a claim may be raised on appeal if the relevant facts appear in the record. State v. Studd, 137 Wn.2d 533, 973 P.2d 1039 (1999); see State v. McFarland, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). Re-formulating the claim in this manner, however, substantially changes the standard of review. When the issue is one of ineffective assistance of counsel, the defendant has the burden of showing that (1) counsel's representation was deficient and (2) the deficient representation prejudiced the defendant. Studd, 137 Wn.2d at 551; see Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus, the State does not have the burden of proving harmlessness. Rather, the defendant has the burden of proving prejudice.

In this case, the State cannot suggest any tactical reason for instructing the jury on an uncharged alternative. It thus appears that counsel's action in requesting such an instruction was deficient. This is, however, not sufficient to demonstrate ineffective assistance – the defendant must also show prejudice. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

In the present case, this standard is not satisfied. There was overwhelming evidence that the defendant and his accomplices were armed with deadly weapons. All of the witnesses who were present testified that some of the perpetrators had guns. Three witnesses specifically testified that the defendant had a gun. 1 RP 106 (Louis Munson); 3 RP 307-08 (Susan Munson), 448 (Kenneth Easley); 4 RP 639 (Megan Easley); 5 RP 707 (Davis), 764-65 (Fordham). In view of this undisputed evidence, there is no reasonable probability that omitting the "bodily injury" alternative would have resulted in a different outcome.

The defendant argues that a jury could have found "bodily injury" because someone was killed during the robbery. That killing was carried out with a gun. If a juror relied on that event, he or she would necessarily conclude that a perpetrator was armed with a deadly weapon. There is no way that a rational juror could find the "bodily injury" alternative proved without *also* finding that the "deadly weapon" alternative was proved.

The defendant claims that prejudice is shown "if it is possible the jury convicted the defendant under the uncharged alternative." Brief of Appellant at 23, citing State v. Doogan, 82 Wn. App. 185, 189, 917 P.2d 155 (1996). In Doogan, the defendant was charged with promoting prostitution. That crime can be committed in two ways: by profiting from prostitution, or by advancing prostitution. The information charged only profiting, but defense counsel proposed an instruction that included advancing. The court held that this deficient performance was prejudicial:

> The error of offering an uncharged means as a basis for conviction is prejudicial if it is possible that the jury might have convicted the defendant under the uncharged alternative. Here, there is a reasonable possibility that the jury convicted [the defendant] on the uncharged means of advancing prostitution without ever considering whether, as charged, she profited from prostitution.

...

> The jury heard evidence of numerous things that [the defendant] did that would satisfy the definition of advancing prostitution even if it did not consider or believe the evidence that she financially participated in the proceeds received by [the prostitutes]. The abundance of evidence to support a conviction for advancing prostitution serves only to increase the likelihood that the error was prejudicial. In these circumstances we cannot have confidence that the error did not affect the outcome of the trial.

Doogan, 82 Wn. App. at 189-90 (citations omitted). Doogan is thus a case in which the jury could have *reasonably* relied on *only* the uncharged alternative. Doogan did not involve overwhelming evidence. Nor did it involve a situation in which proof of the uncharged alternative necessarily also proved the charged alternative. The present case does involve such a situation. Under the facts here, there is no reason to believe that including the uncharged alternative affected the outcome. Consequently, the defendant has failed to establish ineffective assistance.

2. Evidence Shows That The Defendant Knowingly Aided Commission Of Two Robberies, Which Makes Him Guilty As An Accomplice.

The defendant next argues that the evidence was insufficient to establish that he was an accomplice to the robberies.

> The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of

> fact could have found guilt beyond a reasonable doubt. When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. 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) (citations omitted). Evaluating witness credibility and resolving conflicting testimony is the sole province of the jury. An appellate court will not review the jury's decisions on these subjects. State v. Curtiss, 161 Wn. App. 673, 150 P.3d 496 (2011).

The State's theory was that the defendant was an accomplice to robbery. The requirements for accomplice liability are set out in RCW 9A.08.020(3):

> A person is an accomplice of another person in the commission of a crime if:
>
> (a) With knowledge that it will promote or facilitate the commission of a crime, he
>
> (i) solicits, commands, encourages, or requests such other person to commit it; or
>
> (ii) aids or agrees to aid such other person in planning or committing it...

In this case, these requirements were set out in jury instruction no. 10. 1 CP 120.

"The language of the accomplice liability statue establishes a mens rea requirement of 'knowledge' of 'the crime.'" State v. Roberts, 142 Wn.2d 471, 510, 14 P.3d 713 (2000). The liability of an accomplice does not extend beyond the crimes of which the accomplice actually has knowledge. Id. at 511. "[A]n accomplice ... need not participate in or have specific knowledge of every element of the crime nor share the same mental state as the principal." State v. Berube, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003).

Here, the evidence shows that the defendant aided the commission of the crime of robbery. From the moment that he entered, he took control of Mr. Munson. At gunpoint, he forced Mr. Munson to sit on the couch in his living room. 2 RP 211. He then remained in the living room watching Mr. Munson. 2 RP 220. When Ms. Munson arrived home, the defendant took control of her as well. He initially ordered her as well to sit in the living room. 3 RP 309. When she wanted to get her dog or go to the bathroom, she asked the defendant for permission. 3 RP 311-13. He told her that if the cops came, she needed to get rid of them – "otherwise, there's going to be two dead cops." 1 RP 130. By maintaining control of the victims and preventing them from interfering, the defendant aided commission of the robberies.

The evidence further establishes that the defendant knew that his actions promoted and facilitated commission of the robberies. The robbery of Mr. Munson took place in the defendant's presence. The defendant restrained Mr. Munson while two other people took his wallet and watch. The defendant ordered the robbers not to take Mr. Munson's wedding ring – but he said nothing about the other items. 1 RP 118.

The robbery of Ms. Munson took place in another room, but the evidence shows that the defendant was nonetheless aware of it. Ms. Munson was in the same room as the defendant. She testified that she could hear things breaking as people went through her room. The defendant told the people that "nothing was to be taken" -- indicating his knowledge that they were taking things. 3 RP 314. He nonetheless continued to restrain Ms. Munson, thereby preventing her from interfering with the robbery.

The defendant claims that because he told his accomplices not to take anything, he did not share in their criminal intent. As discussed above, however, the mental state for accomplice liability is knowledge, not intent. Moreover, the jury was not required to take the defendant's statements at face value. There was testimony that retaliation against a robber would usually not be limited to

recovering the stolen property, but would also include taking the former robber's property. 5 RP 759. As already pointed out, there was also evidence that the defendant had agreed in advance to play "good cop/bad cop." 5 RP 760. The jury could conclude that the instructions not to take anything were part of the defendant's "good cop" role, made without any intent that the instructions be carried out. Furthermore, with regard to the robbery of Mr. Munson, the defendant said *nothing* when his accomplices took Mr. Munson's wallet and watch. He told them not to take Mr. Munson's wedding ring – and they obeyed that instruction. The jury could infer that the defendant could have prevented robbery of the other items as well, if he had any genuine desire to do so. 1 RP 118.

In short, the evidence established that the defendant knowingly aided the commission of the two robberies. This evidence supports the jury's finding that the defendant was guilty of both counts of first degree robbery.

3. There Was No "Prosecutorial Misconduct" That Justifies A New Trial.

a. Since the erroneous argument could have been corrected by a curative instruction, a challenge to that argument cannot be raised for the first time on appeal.

In his final challenge to the robbery convictions, the defendant claims that the following argument constituted "prosecutorial misconduct":[1]

> What is an accomplice? That's Instruction No. 10. I'm not going to read the whole thing for you because it's almost a whole page. But if you are somewhere willing to help plan, participate or encourage others to participate in a crime, you bring people to the table, you bring them there, you go with them, you're

[1]"'Prosecutorial misconduct' is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." State v. Fisher, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing that words pregnant with meaning can undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct" to intentional acts, rather than mere trial error. See American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf (last visited Aug. 29, 2014); National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Aug. 29, 2014). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. See, e.g., State v. Fauci, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); State v. Leutschaft, 759 N.W.2d 414, 418 (Minn. App.), review denied, 2009 Minn. LEXIS 196 (Minn. 2009); Commonwealth v. Tedford, 598 Pa. 639, 960 A.2d 1, 28-29 (2008).

> involved, the State of Washington says you're responsible for everybody's actions that are involved.
>
> So if you go to commit an assault, and your buddy takes something, you're now on the hook for robbery. That's what this says. You go with a group of people to commit a criminal enterprise, you're in for a penny, in for a pound. The only difference is when and it's a weird little glitch, in Washington, somebody dies who happens to be part of their conspiracy, it's a weird little glitch. If they're one of the people that are one of the accomplices.[2]
>
> [DEFENSE COUNSEL]: Your Honor, I'm going to object. At this time that's not before the jury.
>
> THE COURT: Sustained.

7 RP 990-91.

The State concedes that this argument was inaccurate. As discussed above, the liability of an accomplice does not extend beyond the crimes of which the accomplice actually has knowledge. Roberts, 142 Wn.2d at 511. So a person who commits an assault would not necessarily be guilty of robbery if his accomplice unexpectedly committed that crime. He would only be guilty if he knowingly aided commission of the robbery.

The defendant did not, however, raise any objection to this argument. He only objected to the portion that alluded to liability for

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[2] The last "sentence" at this end of this paragraph is a fragment. The punctuation at the end should probably be an ellipsis, not a period.

murder – which, as counsel said, was "not before the jury." The court sustained that objection, and the defense did not seek any further action from the court. Under such circumstances, their ability to raise the issue on appeal is limited:

> The failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. When reviewing a claim that prosecutorial misconduct requires reversal, the court should review the statements in the context of the entire case.

State v. Thorgerson, 172 Wn.2d 438, 443 ¶ 8, 258 P.3d 43 (2011) (citation omitted).

This standard is based on the defendant's duty to object to improper arguments.

> Objections are required not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process. An objection is unnecessary in cases of incurable prejudice only because there is, in effect, a mistrial and a new trial is the only and the mandatory remedy.
>
> Based on these principles, misconduct is to be judged not so much by what was said or done as by the effect which is likely to flow therefrom. Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured. The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a defendant from having a fair trial?

State v. Emery, 174 Wn.2d 741, 762 ¶¶ 39-40, 278 P.3d 653 (2012) (citations and footnote omitted).

In general, it is presumed that the jury will follow the court's instructions to disregard an improper argument. State v. Swan, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991). Incurable prejudice may be found if the prosecutor's statements "engendered an inflammatory effect." Emery, 174 Wn.2d at 763 ¶ 41. Here, there was nothing inflammatory about the prosecutor's remarks. Nothing in them would produce a "feeling of prejudice ... in the minds of the jury." The remarks simply reflected an error of law. Had the court instructed the jurors on the correct law, there is no reason why they would have been unable to follow that instruction. Under such circumstances, a mistrial was not "the only and the mandatory remedy." Since the error could have been cured by a timely objection, the issue cannot be raised for the first time on appeal.

b. The Lack Of Objection To This Argument Does Not Establish Ineffective Assistance Of Counsel.

i. Defense counsel could reasonably decide not to object, since the jury instructions clearly set out the correct standard, and the issue had little relevance to the defense theory of the case.

In an attempt to overcome this problem, the defendant claims that his attorney's failure to object constituted ineffective assistance. As already mentioned, establishing ineffective assistance requires a showing of both deficient performance and prejudice. Studd, 137 Wn.2d at 551. To establish deficient performance, the defendant must show that counsel's actions were "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. In making this evaluation, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. The defendant "must overcome a strong presumption that counsel's performance was reasonable." State v. Grier, 171 Wn.2d 17, 33, ¶ 41, 246 P.2d 1260 (2011). "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." Id. ¶ 421.

In this case, there were at least two legitimate reasons for counsel's decisions not to object to the prosecutor's argument.

First, the argument was irrelevant to the defense theory of the case. Their theory was that the defendant did not intend to commit *any* crime. Counsel discussed accomplice liability in exactly those terms:

> The accomplice liability has always been a good issue. Someone who solicits, command, encourages or requests another person to commit the crime. Okay. What crime? Did he solicit, command, encourage, request another person to rob somebody? Did he encourage them or command them to kidnap somebody, abduct somebody? Did he encourage them to do any of what he's charged with? I mean, assault, did he encourage anybody to assault anyone? It seems to me that he was the one that was saying not to do that.

7 RP 1021.

The State's evidence indicated that the defendant was the leader of the group that committed the crimes. Defense counsel could anticipate that if the jurors believed that the defendant directed *some* of the crimes, they would conclude that he directed *all* of the crimes. Defense counsel therefore relied on the theory that the defendant was not the leader of any of the crimes: "Mr. Brown was only in charge of himself and what he did that day." 7 RP 1024. Given this theory, counsel could have seen no reason to object to a prosecution argument that was essentially harmless.

Second, counsel could believe that the court's instruction was sufficiently clear on its face. The instruction clearly required the defendant to aid a specific crime:

> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
>
> (1) solicits, commands, encourages, or requests another person to commit the crime; or
>
> (2) aids or agrees to aid another person in planning or committing the crime.
>
> ...
>
> A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

1 CP 120, inst. no. 10. This instruction clearly requires an accomplice to solicit or aid the commission of **the** crime, not just "a crime." Moreover, it says that an accomplice is guilty of **that** crime, not some other crime. In light of this instruction, counsel could conclude that the jury was unlikely to be misled by the prosecutor's argument. Since there were legitimate tactical reasons for counsel's failure to object, that failure cannot be characterized as ineffective assistance.

ii. Since this court must assume that the jury followed its instructions, any mis-statement of the law in the prosecutor's argument was not prejudicial.

Even if counsel's performance is considered deficient, the defendant still has the burden of showing prejudice.

> To satisfy the prejudice prong of the Strickland test, the defendant must establish that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In assessing prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law and must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification' and the like.

Grier, 171 Wn.2d at 34 ¶ 43 (citations omitted).

As already pointed out, the jury instructions correctly set out the requirements for accomplice liability. The jury was expressly told to disregard any argument that was not supported by the law in the court's instructions. 1 CP 110, inst. no 1. This court cannot properly assume that the jurors accepted the prosecutor's arguments when they contradicted the court's instructions.

This conclusion is reinforced by the strength of the evidence. This is particularly true of the robbery of Mr. Munson. As already pointed out, that robbery occurred in the defendant's presence while he was restraining the victim. Moreover, he demonstrated his

authority over the robbers by ordering them not to take the victim's wedding ring – but allowing them to take other items. 1 RP 118. Although the robbery of Ms. Munson took place in another room, the defendant's statements at the time clearly reflect his knowledge that the robbery was occurring. 3 RP 314. In light of this evidence, and applying the assumption that the jurors followed their instructions, there is no reasonable probability that an objection to the prosecutor's argument would have changed the outcome of the trial. Consequently, the defendant has not established that this failure constituted ineffective assistance.

C. ISSUE RELATING TO ASSAULT CONVICTION

1. Since Assaults Were Committed To Cover Up A Crime Separate From The Robberies Or Kidnappings, The Assault Convictions Do Not Merge With The Convictions For Those Crimes.

With respect to the assault conviction, the defendant raises one issue: that the assaults merged into the robbery and kidnapping convictions.[3] The Supreme Court has applied the merger doctrine to first degree robbery and second degree assault. These crimes will merge if "to prove first degree robbery as charged and proved by the State, the State had to prove the defendants

[3] This is the only issue in this appeal that was raised in the trial court.

committed an assault in furtherance of the robbery." State v. Freeman, 153 Wn.2d 765, 778 ¶ 29, 108 P.3d 753 (2005). This Division has held that the analysis of Freeman applies equally to kidnapping. State v. Davis, 177 Wn.2d 454, 464 ¶ 20, 311 P.3d 1278 (2013), review denied, 179 Wn.2d 1025 (2014); but see State v. Taylor, 90 Wn. App. 312, 319-20, 950 P.2d 426 (1998) (Division Two) (second degree assault does not merge with second degree kidnapping).

In this case, the defendant was charged with first degree robbery while armed with a deadly weapon. 2 CP 925-26. In the abstract, this charge does not require any assault: a person can be armed with a weapon without using it for any overt threat. The proof, however, indicated the victims were threatened with guns during the robberies. Thus, as proved, the robberies involved assaults in furtherance of them.

Similarly, the kidnapping charge involved the infliction of extreme mental distress. 2 CP 925-26. Again, this charge in the abstract does not involve any use of a weapon, but as proved it did. The basic elements of merger are thus present with respect to both crimes.

There is, however, an exception to the merger doctrine. Two offenses "may in fact be separate when there is a separate injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element." This exception will "allow two convictions even when they formally appear to be the same crime under other tests." Freeman, 153 Wn.2d at 778 ¶ 30. The trial court relied on this exception in rejecting the defendant's claim of merger. Sent. RP 11.

This reasoning was correct. Second degree assaults occurred as the perpetrators were leaving. Mr. Fordham pointed his assault rifle at both Mr. and Ms. Munson. According to Mr. Munson, Mr. Fordham told them not to move and not to call the cops, or he would come back and kill them. 1 RP 139; 3 RP 331. As the trial court pointed out, the robberies and kidnappings were already completed by that time. These assaults involved an injury to the victims that was separate and distinct from the robberies and assaults.

The defendant points out that a robbery is considered ongoing until the robber has effected an escape. State v. Truong, 168 Wn. App. 529, 535-36 ¶ 13, 277 P.3d 74, review denied, 175 Wn.2d 1020 (2012). Here, however, the evidence showed that the

assault was committed for purposes related, not to the robbery, but to the killing of Patrick Buckmaster. As soon as the perpetrators realized that someone had been killed, "Everybody broke, everybody ran." 5 RP 771 (Fordham); see 1 RP 139 (Louis Munson); 3 RP 331 (Susan Munson), 460 (Kenneth Easley). Thereafter, their efforts were focused on covering up the killing. 1 RP 150-59 (Louis Munson); 3 RP 462-74 (Kenneth Easley); 5 RP 776-78 (Fordham). An assault committed to cover up a different crime is separate and distinct from an assault committed in the course of robbery or kidnapping. Because these assaults involved separate and distinct injuries, the defendant was properly convicted of the assaults in addition to the kidnappings and robberies.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on September 3, 2014.

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