97596-5

Court of Appeals Case No. 35828-3-III

SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington,
Respondent

v.

Jared S. Lee
Appellant

Appeal from Division III of the Court of Appeals

PETITION FOR REVIEW

Attorney for Appellant, Jared S. Lee:
Douglas D. Phelps, WSBA #22620
Phelps & Associates
N. 2903 Stout Rd.
Spokane, WA 99206
(509) 892-0467

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IDENTITY OF PETITIONER

COMES NOW, Jared S. Lee, Petitioner, respectfully brings this Petition for Review pursuant to RAP 13.4 and respectfully requests this court accept review of the Court of Appeals decision designated in Part II of this petition.

I. COURT OF APPEALS DECISION

The Petitioner seeks review of the Court of Appeals Decision issued July 30, 2019, denying Petitioner a new trial. The appellate court incorrectly interpreted RCW 9.94A.589(1)(a), same criminal conduct where victims occupied the same vehicle which is a question of substantial public interest requiring Supreme Court review under RAP 13.4(b)(4). The decision of the appellate court is contrary to the Washington Supreme Court in *State V. Roberts*, 117 Wn 2d. 576, 586, 817 P. 2d 855 (1991) by failing to apply the rule of lenity to an ambiguous statute.

II. ISSUES PRESENTED FOR REVIEW

A. Pursuant to RAP 13.4 (b) (1) and (4) the Supreme Court should accept review because the question of interpretation of RCW 9.94A.589(1)(a) in case of multiple victims in the same vehicle is a question of substantial public interest. Additionally the Court of Appeals failed to apply the *State V. Roberts*, 117 Wn 2d 576, 586, 817 P.2d 855 (1991) in interpreting the RCW 9.94A.589(1)(a).

III. STATEMENT OF THE CASE

The Appellant, Jared Steven Lee, was alleged on March 5, 2017 to have taken money from Esteban Salazar by use of force or threatened use of force, which is First Degree Robbery. (CP 38-39). Additionally, he was charged with Attempted First Degree Robbery of Roger Salazar for an attempt to take money from him by use or threatened use of force. (CP 35-39). Both of these charges were enhanced by the use of a firearm. (CP 35-39). In the same information, he was charged with First Degree Unlawful Possession of a Firearm. (CP 35-39).

Jury selection began on January 3, 2018 with Superior Court Judge Richard Bartheld presiding. (CP 74-75). The jury was selected and seated on January 3, 2018. Opening statements were given on January 3, 2018. (RP 175). The prosecutor advised they intended to prove Count I First Degree Robbery for taking twelve dollars ($12.00) in cash from Esteban Salazar. Count II Attempted First Degree Robbery was for trying to take three thousand dollars ($3,000.00) from Roger Salazar. Count III for having a firearm in his possession when he no longer had a right to do so. (RP 175-176). The defense reserved on its opening statement. (RP 186).

The State called Roger Salazar, age 24, to the stand. (RP 187). Roger Salazar testified his father is Esteban Salazar and he doesn't speak English, only Spanish. (RP 187). Roger Salazar was wanting to purchase a BMW car, which was found on Craigslist. (RP 188). He communicated through text messages

about the car. (RP 189). The person he communicated with claimed to be "Stacey" and he was sent a picture of the car. (RP 190). Ultimately, the two agreed on a price of $3,000.00 which he took out of his bank account. (RP 191).

An agreement was made to meet at Fiesta Foods in Yakima at around 3:30. (RP 192). The State introduced photos of a series of phone texts arranging the purchase of the BMW. (RP 206). He advised Stacey he would be arriving in a Jetta. (RP 238). He then texted that he was at the Sun Dome in the Fiesta Foods parking lot. (RP 241). He parked in the lot close to Fair Avenue and they had $3,000.00 with them. (RP 243). The money was in his wallet by the gearshift. (RP 244).

A man approached the car wearing a hooded sweatshirt with a hat that looked like a Seahawks hat. (RP 246). The man got into the car in the rear passenger seat. (RP 247). They drove to another location in the Fiesta Foods parking lot. (RP 218). The man pointed a gun at Esteban Salazar's head and said that there was no car, he wanted money. (RP 248). He also told them to stop the car and raise their hands. (RP 249). Roger Salazar testified he was afraid. (RP 249). He told the man that he did not have the money. (RP 250). The gun would move to point at him or his father depending on who was talking. (RP 251).

Roger's father, Esteban, threw twelve dollars ($12.00) at the man and told him that was all they had. (RP 252). The man with the gun told them they had the money and he wanted all of it. (RP 252). The man pointed the gun at Roger

Salazar and told him that he wanted all the money. (RP 253). Roger's father said something about his brother and grabbed the gun and started fighting. (RP 253). Roger turned off the car and went around to the back seat to open the door and grabbed the man with the gun. (RP 254). He pulled the man out by the neck and he let go of the gun and tried to run away. (RP 255). His father got out of the car and had the gun. (RP 255).

Roger grabbed the man by his vest and a bullet proof vest came off. (RP 256). As they struggled an employee from Fiesta Foods came over and helped hold the man. (RP 256). He kicked the man twice after he fell to the ground. (RP 257). His father hit the man with the gun on the head. (RP 259). He hit him on the head with the butt of the gun. (RP 260). A second man approached them and his father pointed the gun at him. (RP 261). The other man then ran away. (RP 262).

The police came and placed the man in handcuffs who he identified as the defendant, Jared Steven Lee. (RP 263). The police took pictures of the $3,000.00 that they had with them. (RP 264). The plate of the silver Jetta Volkswagen was introduced as evidence. (RP 267). A number of photos were admitted of the auto and the scene after the police arrived at Fiesta Foods. (RP 273). In exhibit #44, Roger Salazar points out a bullet-proof vest from Mr. Lee. (RP 279-280). Mr. Roger Salazar gave a DNA sample to the police. (RP 283). On cross-examination, Roger Salazar testified that his father threw the $12.00 to Mr. Lee.

(RP 287). Roger Salazar's father hit Mr. Lee in the head with the butt of the gun. (RP 288).

The prosecution called Joe Scherschligt, Yakima P.D. (RP 292). Officer Scherschligt was dispatched to Fiesta Foods for a fight involving a weapon. (RP 293-294). He pulled into the store parking lot where two males were holding a third male subject. (PR 295). The officer saw a .45 caliber gun and a bullet-proof vest lying on the ground. (RP 296). Pistol was silver in color and it was a semi-automatic. (RP 297). Roger Salazar and a man named Alejandro were holding on to Mr. Lee. (RP 297). He identifies COBAN on his car recording device. (RP300). When he approached, he drew his weapon, a semi-automatic weapon. (RP 302). Mr. Jared Lee had blood on his forehead. (RP 304). COBAN in-car video was admitted to show Mr. Lee in the police vehicle. (RP 305). The court later reversed and ruled the video of Mr. Lee in the back of the police vehicle was inadmissible until Mr. Lee testified. (RP 310). The court allowed the video until Mr. Lee was in the back of the squad car. (RP 317-318). A number of the photos of evidence including the firearm were admitted. (RP 322).

Anthony Avela is called as a government's witness. (RP 325). Mr. Anthony Avela works at Fiesta Foods. (RP 327). He saw a light-skinned guy held by two Hispanic males. He saw one of the Hispanic males pull-out a gun and start striking the white guy on the head. He told the Hispanic male to put down the gun. Then he waits for the police to arrive. (RP 328). When the police

officer arrived the officer drew his gun; that was when Mr. Avela released the white man he was holding onto. (RP 329). He did see the Hispanic male hitting Mr. Lee with the gun. (RP 332). The Hispanic man struck the white man three times with the gun. (RP 333).

Officer Jim Wolcott of the Yakima Police Department testified he has been on the department for 30 years and 8 months. (RP 334). He arrived at the Fiesta Foods parking lot where he observed a number of people fighting. (RP 335). He observed a firearm on the ground in the parking lot, a silver colored automatic handgun. (RP 337). The evidence was collected from the scene. (RP 339). He collected a jacket, mask, gloves and Legends Casino receipt. (RP 342). The body armor was admitted into evidence. (RP 349). The weapon was admitted into evidence. (RP 352). A Seahawks stocking cap was admitted into evidence. (RP 356). A cell phone was taken from the back seat of the Salazars' car. (RP 358). The officers located an identification for a "Brandon Lee" and it was admitted into evidence. (RP 371). He collected no money from the scene. (RP 380).

Rebecca Rasmusson was called to testify. (RP 381). She is the office assistant for Sun Comm 911 Communications. (RP 382). She took a 911 call from the case and put it on a disc. (RP 383-384). The 911 call was admitted into evidence. (RP 385).

Maria De La Luz Nino Sierra is called, who worked at Fiesta Foods. (RP 385-386). She was in the parking lot and heard yelling. (RP 387). She saw two Hispanic males holding a white guy. (RP 388). She saw that one of the Hispanic guys had a gun. (RP 388). The men were wrestling. (RP 388). She saw another employee help the Hispanic men hold the white guy. (RP 390). She made the 911 call to the police. (RP 392).

The State called Officer Kasey Hampton of the Yakima Police Department. (RP 409). Officer Hampton had been with the Yakima Police Department for 17 ½ years in March 2017, and she was assigned to the Detective division (RP 410). She worked the robbery investigation in the Fiesta Foods parking lot. (RP 411) She obtained DNA samples from Roger and Esteban Salazar. Additionally, she took a DNA sample from Mr. Lee. (RP 412) She forwarded the samples to the Washington State Patrol lab. (RP 413) Along with the samples taken from the gun by Ms. Drury of the Yakima City Crime lab. (RP 413) Identifies exhibit 14 as DNA swab from the grips of the gun. (RP 414) Exhibits 10, 11, 12, 13, 14, and 15 were admitted (RP 415-420)

Krista Drury of Yakima Police Department forensic lab called. (RP 420) Trained in forensic science from Central Washington University and Masters University of New Haven. (RP421) She examined a .45 caliber Smith and Wesson semi-automatic weapon capable of holding 8 rounds in the magazine and one bullet in the weapon. (RP 429-430)

The firearm was tested and it would fire a bullet. (RP 431) The weapon was fingerprinted, but no usable fingerprints were found on the weapon. (RP 434) DNA evidence was used to obtain DNA from the grips of the firearm. (RP 438) She observed a red stain on the firearm grips that she swabbed believing it to be blood. (RP 438-439)

State called Laura Kelly (RP 445) working with Washington State Crime Lab in Vancouver, Washington. (RP 446) The method of DNA testing used was the STR, or short tandem repeats. (RP 452) A mixed DNA profile includes DNA from more than one individual. (RP 455) Blood was found in the swabs from the grip and slide of the weapon. (RP 470-471) The profile from the DNA matched Jared Lee, 1 in 6.3 decillion. (RP 471) That would be 6.3 followed by 32 zeros. (RC 471) Jared Lee was the major mixture and no comparisons could be made for the minor component of the mixture. (RP 471) The profile from the magazine could not be identified. (RP 472) The blood on the gun could be consistent with a person being hit in the head or with a person holding the gun. (RP 478)

Officer Jaime Gonzalez is called as a witness. (RP 479) He is fluent in both English and Spanish. (RP 479) Responded to call at Fiesta Foods in Yakima. (RP 480) Esteban Salazar was present and he appeared excited and scared. (RP 482) He collected a Seahawk stocking cap from the vehicle owned by Salazar. (RP 484) A white-colored cell phone that was found in the back seat of Salazar's vehicle. (RP 485) Additionally, black gloves and sunglasses that

were found were admitted into evidence. (RP 486) There was no $12.00 that was recovered, but it was reportedly offered to person that had the gun. (RP 488) He does not remember anyone saying the money was taken, but that it was offered to Mr. Lee. (RP 488) The $3,000.00 was documented as being in the car. (RP 488) The police would have looked for the $12.00 if the victim had told them it was given to the suspect. (RP 489) He remembered that the $12.00 was offered to Mr. Lee, but it had not been taken. (RP 490, lines 11-14) Officer Gonzalez's report documents that Esteben Salazar said he offered the $12.00 from his pocket to the suspect. (RP 491, line 24 to RP 492, line 6) and the suspect yelled he wanted $3,000.00. Sergeant Tory Adams of the Yakima Police Department was called to the stand (RP 492) He responded to the Fiesta Foods parking lot and drove into the lot. (RP 493) Body armor, a black coat or sweatshirt, a firearm, and a wallet were found. (RP 493) The two pieces of body armor were approximately eight-feet apart. (RP 494) The firearm was found on top of the coat in the parking lot. (RP 494) The firearm, wallet, and jacket were all found close together. (RP 494) The wallet had Brandon Lee's identification inside it. (RP 495) He looked in the back seat but found nothing more of interest. (RP 495) A photo of the back seat was admitted as exhibits 68 and 69, and there was a bottle and papers but no money. (RP 496) Another photo of the floor board of the car was admitted as exhibit 70. (RP 497) A third and fourth photo of the back seat of the car were admitted as exhibits 71 and 72. The prosecutor published

photos 68-73 showing the back seat of the car. (RP 499) The Salazars showed $3200.00 they brought for the car purchase. (RP 500) He photographed the $3200.00, which they, Salazars, had with them. (RP 502)

Sergeant Troy Adams remembers Roger Salazar was emotional and quivering. (RP 505) Esteban was more consoling towards his son. (RP 505-506) He never saw twelve dollars in the car. (RP 507) He never heard anyone say that twelve dollars was taken. (RP508)

The state calls Julie Jacobs. She works at Yakima Police Department in police services processing police reports. (RP 518) The system is called NIBRing, National Incident Base Reporting System. (RP 518) She found that the police report mentions $12.00 given to the suspect but that $12.00 was not recorded. (RP 521)

Officer Scherschligt was recalled by the state. (RP 522) Mr. Esteban Salazar said that he gave Mr. Lee $12.00. (RP 523) Mr. Lee was not found with the $12.00 by him. (RP 525) The report documents that Roger Salazar said he gave Mr. Lee $12.00 from his front pocket. (RP 526)

The state called Esteban Salazar to the stand. (RP527) An interpreter was interpreting his testimony. (RP 527) Mr. Salazar is 47-years-old. (RP 528) Roger Salazar is 24-years-old. (RP 528) He saw a car on Craigslist on March 4, 2017. (RP 529) He speaks very little English. (RP 530) Text messages were used to discuss the car purchase. (RP 530) An agreement was reached for the car

purchase. (RP 530) A meeting was set for Fiesta Foods to purchase the car. (RP 531) They took the $3,000.00 to purchase the car. (RP 531) The $3,000.00 was placed between the seats near the gear shift. (RP 532) They did not take a gun with them to Fiesta Foods (RP 532) As they were seated in the car, Mr. Lee approached them. (RP 533) The man spoke English as he got into the car. (RP 534) The man demanded the $3,000.00 (RP 535) The man pointed a gun at his head. (RP 535) He said that he pulled twelve dollars from his shirt and gave it to the man. (RP 535) The man took the twelve dollars, but said he wanted $3,000.00. (RP 536) He told him that his brother was coming with the money. (RP 536) The man looked away for a minute and he grabbed the gun. (RP 536) He punched the man in the face and he let go of the gun. (RP 537) Roger turned off the car and grabbed the man. (RP 537). Another man then came at him as he got out of the car and he pointed the gun at the other guy. (RP539) The police were called by him. (RP 539) The police responded and arrested the man. (RP 540) He was unable to identify the man who robbed him as Mr. Lee. (RP541-542) The man that was there has a Seahawk's hat. (RP 543)

He spoke with the man although his English is limited. (RP 546) He took the gun from the man because he pointed it at his son. (RP 548) He testified that he offered Mr. Lee the twelve dollars. (RP 548) That the man in the back seat took the $12.00 from him. (RP 548) The stipulation that on 7/30/1999, Mr. Lee

was convicted of a serious offense was read into the record. The government rests. (RP 558)

The defense raised a motion to dismiss the first degree robbery charge based upon the $12.00 that was unaccounted for after the search of the automobile. (RP 560) The twelve dollars was not in the automobile nor on Mr. Jared Lee. (RP 560) No one entered the $12.00 into evidence. One person said Roger had the $12.00, and Esteben said that he had the $12.00. Mr. Lee is not found with any money. (RP 560) Additionally, the defense sought dismissal of the firearm charges because the DNA places his blood on the gun from being struck in the head but no DNA of his on the grip or magazine well and also no fingerprints which is count 3. (RP 561)

The court ruled that it could dismiss only where there was no evidence to support the state's case. (RP 561, lines 13-16) The defense argued the $12.00 was never found. (RP 561) All the state has is the conflicting statements about both Roger and Esteben giving the money to Mr. Lee. (561) The court found that there was "some evidence" in the conflicting statements of the Salazars. (RP 562) Esteben said that he gave the $12.00 to Mr. Lee. (RP 562) Therefore, there is evidence to support the charge of First Degree Robbery (RP 562) As to the First Degree Possession of a Firearm, there is the DNA evidence and both Esteben and Roger testified that Jared Lee held the firearm. RP 563) In looking at whether it

was an attempt or actual robbery that is a question for the jury. (RP 564, lines 7-13)

The prosecution argued because Mr. Esteben gave the $12.00 to Jared Lee that is the First Degree Robbery in Count I. (RP 605, lines 2-6) The demand for all the money was the Attempted Robbery. (RP 606, lines 10-17) The $3,000.00 was not obtained, but he got everything he could get. (RP 607), lines 6-13)

On appeal, the appellant argued that sentencing the defendant for two robbery counts and two weapons enhancements for the same course of conduct was improper under the merger doctrine. (Appellant's brief, pgs. 14-17) The appellate court cites to RCW 9.94A.589(1)(a) as the basis for the denial of the appellant's request to not impose multiple firearm enhancements. *Washington v. Lee*, Case No. 35828-3-III p.8

IV. ARGUMENT

1. Pursuant to RAP 14.4(b)(1) and (4), the Supreme Court should accept review because the question of interpretation of RCW 9.94A.589(1)(a) in a case of multiple victims in the same vehicle is a question of substantial public interest. Additionally, the Court of Appeals failed to apply State v. Roberts, 117 Wn.2d 576, 586, 817 P. 2d 856 (1991) in interpreting RCW 9.94A.589(1)(a)

Has the court of appeals misinterpreted RCW 9.94A, 589 (1)(a) under the facts of this case to increase the defendants sentence based upon "same criminal conduct"?

The appellate court in its unpublished opinion on page 9 applies the "same criminal conduct" to determine that the two alleged victims both seated in the automobile at time of the crime were separate victims.

The legislature specifically writes in 9.94A.589(1)(a) that:

"Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place and involve the same victim. This definition applies in cases, involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle."

The language sets out that victims under vehicular assaults or vehicular homicide in the same vehicle apply this definition. The legislature did not set out the same criteria for cases of robbery that occur with victims in the same vehicle. Had the legislature intended that multiple victims of robbery occurring in a single vehicle were to be held to be treated as separate victims the legislature would have included armed robber in RCW 9.94A.589 (1)(a).

In this case as the court of appeals decision ignores the language which specifically states vehicular assault and vehicular homicide where victims are in the same vehicle applies. Had the legislature intended other crimes to be calculated similarly it would have included those crimes in its legislation.

Arguably, the statute is ambiguous as applied to Mr. Lee because the robbery occurred in a vehicle with two different individuals. As RCW 9.94A.589(1)(a) is ambiguous as applied in this case the rule of lenity applies. Under the rule of lenity, the court must adopt the interpretation most favorable to the criminal defendant *State V. Roberts*, 117 Wn 2d 576,586, 8.7P. 2d 855 (1991).

Had the legislature intended for multiple victims of a robber occurring in a vehicle to be treated as "same criminal conduct" the legislature would have included robbery cases under RCW 9.94A.589(1)(a). No such statement was included in the legislation therefore the legislature must have intended robbery case occurring in the same vehicle as "same criminal conduct".

Under the facts of the Lee case the statute is subject to two or more reasonable interpretations, it is ambiguous *State V. Garrison*, 46Wn.App. 52, 54, 728 P. 2d 1102 (1986); cp. *McDonald v. State Farm Fire And Gas Co.* , 119 Wn 2d 724, 733, 837 P.2d 1000 (1992).

The Supreme Court should accept review of Mr. Lees' case pursuant to RAP 13.4 (b)(1) and (4). The question of the legislative intent in applying "some course of conduct" to crimes involving multiple victims in a vehicle is an issue of substantial public interest that should be determined by the Supreme Court. Many crimes involve some criminal

conduct occur in a vehicle with arguably multiple victims I.e. robbery, carjacking, assaults, kidnapping, and others.

Further, the court of appeals has misinterpreted the legislative intent which results in a significantly longer sentence for Mr. Lee and other criminal defendant's similarly situated. The failure to properly interpret RCW 9.94A.589(1)(a) applying *State v. Roberts*, 117, 589 (1)(a) applying *State v. Roberts*, 117 Wn 2d 576, 586, 817 P. 2d 855 (1991) is contrary to the ruling of the Washington State Supreme Court and review is proper under RCW 9.94A.589(1)(a)(1) as the court of appeals failed to properly apply *Roberts* supra in interpreting RCW 9.94A.589(1)(a).

VI. CONCLUSION

The case should properly be granted discretionary review to determine the proper application of RCW 9.94A.589(1)(a) to determine how same criminal conduct is to be applied in cases involving multiple victims in automobile other than vehicular assaults or vehicular homicides. Did the appellate court properly interpret the statute and apply the rule of lenity as required by *State v. Roberts*, 117 Wn 2d 576, 586, 817 P.2d 855 (1991) Mr. Lee therefore seeks review by the Washington Supreme Court.

Respectfully submitted this 29 day of August, 2019.

Douglas D. Phelps, WSBA #22620

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff/Respondent vs. JARED STEVEN LEE, Defendant/Appellant	Cause No. 35828-3-III Trial Court: 17-1-00440-39 PROOF OF SERVICE (RAP 18.5(b))

I, Douglas D. Phelps, do hereby certify under penalty of perjury that on August 29, 2019, I mailed to the following, by U.S. Postal Service first class mail, postage-prepaid, or provided e-mail service by prior agreement (as indicated)a true and correct copy of the Appellant's Petition for Review:

Jared Steven Lee (#339655)
Washington Corrections Center
PO Box 900
Shelton, WA 98584

E-mail: drdocument@me.com
Ken Beck, transcriptionist
5610 North "D" Street
Spokane, WA 99205

E-mail: tamara.hanlon@co.yakima.wa.us
Tamara H. Hanlon
Yakima County Prosecutor's Office
128 N. 2nd Street, Room 329
Yakima, WA 98901

E-mail: giddeon.newmark@opd.wa.gov
E-mail: Debbie.Coplen@opd.wa.gov
Giddeon Newmark, Appellate Program Mgr
Debbie Coplen, Admin. Technology Asst.
Office of Public Defense

Phelps & Associates, P.S., 2903 N. Stout Rd
Spokane, WA 99206
T: (509) 892-0467
F: (509) 921-0802
phelps@phelpslaw1.com

Susan Gasch
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223

E-mail: joan.anderson@co.yakima.wa.us
Joan Anderson, Official Court Reporter
Yakima County Superior Court
128 N. 2nd St.
Yakima, WA 98901

Respectfully submitted this 29 day of August, 2019.

By: _____
DOUGLAS D. PHELPS
Attorney for Appellant
WSBA # 22620

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

STATE OF WASHINGTON, Respondent, v. JARED STEVEN LEE, aka TANK, Appellant.	))))))))))	No. 35828-3-III UNPUBLISHED OPINION

KORSMO, J. — Jared Lee appeals from convictions for first degree robbery, attempted first degree robbery, and first degree unlawful possession of a firearm, arguing that the evidence was insufficient, his counsel was ineffective, and that there were sentencing errors. We affirm.

FACTS

The noted charges arose from the attempted purchase of a BMW automobile that was advertised on-line. Roger Salazar was interested in purchasing the BMW and agreed to pay $3,000 for the vehicle. He arranged to meet the seller in a grocery store parking lot.

Esteban Salazar, Roger's father, accompanied him to the would-be purchase location. Roger drove the car and Esteban sat in the passenger seat. Roger brought

$3,000 with him that he had placed in his wallet by the gearshift. When they pulled into the parking lot, Jared Lee came over and asked the men if they were there to purchase the BMW. When they answered affirmatively, Lee explained that the car was on the other side of the parking lot and asked for a ride over to the location. Roger Salazar agreed.

Lee was in the back seat and the car was in motion when he pulled a gun, pointed it at the head of Esteban Salazar, and demanded the $3,000. Roger stopped the car and told him they did not have the money with them, but that his brother had the money. Esteban gave $12 from his wallet to Lee and said that was all they had. Lee, not dissuaded, took the money and continued to demand the $3,000. He repositioned his gun and pointed it at Roger.

Esteban claimed to see his brother and, while Lee was distracted, grabbed the gun and the two men struggled to possess the weapon. Roger got out of the car, opened the back door, and pulled Lee out. Lee released the gun and Esteban took control of it. Lee ran off and Roger pursued him, catching and pulling Lee by the shirt. Esteban caught up to the two younger men. When Lee continued to try to escape, Esteban hit him on the head with the gun. The Salazars asked store employees to call the police. Law enforcement responded and took Lee into custody.

The prosecutor charged Lee with one count of first degree robbery of Esteban Salazar, one count of attempted first degree robbery of Roger Salazar, and one count of

first degree unlawful possession of a firearm. The two robbery charges also carried firearm enhancement allegations.

DNA testing of the firearm concluded that the blood on the gun came from Lee, and that Lee was the major contributor to the DNA on the handle of the weapon, although at least two others contributed to that DNA. A cell phone and hat found in the back seat of the Salazar vehicle did not belong to either of the Salazars. The $12 was never recovered. Police took photographs of $3,200 in Roger Salazar's wallet and returned the money to him.

No evidence was presented at trial by the defense. The jury convicted Mr. Lee on all three charges, and also found that both robberies were committed while he was armed with a firearm. The court imposed standard range prison terms on all counts.

Mr. Lee then timely appealed to this court. A panel considered his appeal without hearing argument.

ANALYSIS

Mr. Lee's appeal raises six issues, which we regroup by subject matter into three claims. In order, we will address the sufficiency of the evidence, severance, and the offender score calculation. We will then turn to Mr. Lee's pro se statement of additional grounds (SAG).

Sufficiency of the Evidence

The appeal challenges the sufficiency of the evidence of the first degree robbery count, the unlawful possession of a firearm count, and the firearm enhancements. The evidence allowed the jury to return the verdicts it did.

These challenges are governed by long settled law. Appellate courts assess such challenges to see if there was evidence from which the trier of fact could find each element of the offense proved beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). The reviewing court will consider the evidence in a light most favorable to the prosecution. *Id.* This court also must defer to the finder of fact in resolving conflicting evidence and by accepting credibility determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

As charged here, first degree robbery is committed when a person robs another while displaying "what appears to be a firearm or other deadly weapon." RCW 9A.56.200(1)(a)(ii). In turn, robbery occurs when one "takes personal property from the person of another." RCW 9A.56.190. Mr. Lee argues that there was no evidence that he took the $12 from Esteban Salazar and, hence, he was not guilty of first degree robbery.

Contrary to his argument, both Salazars testified that the $12 was given to Lee at gunpoint. The elements of robbery are satisfied and, thus, the evidence supported the verdict. The failure of the police to recover the $12 was a fact that could be considered

by the jury in assessing the credibility of the victims—as Mr. Lee argues—but it was not a fact that requires overturning of the jury's verdict. It was equally likely, if not more so, that Mr. Lee discarded the money while he was trying to get away. Since the testimony established that first degree robbery was committed, the evidence supported the verdict.

Mr. Lee next argues that the evidence does not support finding that the gun recovered at the scene was his. Again, the jury resolved this credibility issue against Mr. Lee and this court does not get to reweigh that evidence. Both victims testified that Mr. Lee brought and displayed the gun while demanding money; his DNA was the primary DNA on the gun's handle. Ample evidence supported the unlawful possession of a firearm verdict.

Lastly, Mr. Lee argues for the same reasons that the two weapons enhancements were not proved. For the same reasons noted above, the evidence supported both special verdicts. There was no error.

The evidence supported the jury's verdicts.

Severance

The appeal next argues that trial counsel was ineffective for not seeking to sever the unlawful possession charge from the robbery charges. Because the three offenses were based on the same evidence, requiring joinder, counsel did not err.

Once again, well settled standards govern review of this issue. Effectiveness of counsel is judged by the two pronged standard of *Strickland v. Washington*, 466 U.S. 668,

104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). That test requires the criminal defendant to show that (1) counsel's performance failed to meet a standard of reasonableness, and (2) actual prejudice resulted from counsel's failures. *Id*. at 690-692. If a defendant fails to establish one prong, the other need not be addressed. *Id*. at 697. Effective assistance in the plea bargain context is judged by whether the attorney "actually and substantially assisted his client in deciding whether to plead guilty." *State v. Cameron*, 30 Wn. App. 229, 232, 633 P.2d 901 (1981). There is a strong presumption counsel was competent. *State v. Jamison*, 105 Wn. App. 572, 590, 20 P.3d 1010 (2001).

To prevail on an ineffective assistance claim based on failure to move to sever counts, the defendant must show deficient performance by counsel and demonstrate prejudice by showing both that the motion would likely have been granted and a reasonable probability that the outcome of the proceeding would have been different had the motion been granted. *State v. Sutherby*, 165 Wn.2d 870, 884, 204 P.3d 916 (2009). In determining whether severance is appropriate, a court considers (1) the strength of evidence on each count, (2) the clarity of the defenses on each count, (3) the court's instructions to consider each charge separately, and (4) the admissibility of the evidence of one charge in a separate trial of the other charge. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994).

Joinder is proper under CrR 4.3(a) when two offenses are of the same character or are based on connected acts. When, as here, the offenses arise from the same conduct,

joinder is mandatory. CrR 4.3.1(b). The decision whether to sever charges is reviewed for abuse of discretion. *State v. Kalakosky*, 121 Wn.2d 525, 536, 852 P.2d 1064 (1993). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Mr. Lee cannot establish that the court would have granted a motion to sever. The same evidence—the two Salazars testifying that Mr. Lee pulled the gun on them and pointed it at each—supported both the two robbery counts as well as the unlawful possession charge. The defenses to the charges were clear and the same—the gun was not Lee's. The trial court did instruct the jury to consider each charge separately. Finally, the prior conviction element of the unlawful possession charge was stipulated to by the parties, so the jury did not see evidence of the prior convictions that disqualified Mr. Lee from possessing a gun. That is the only piece of evidence that might not have been admissible in a separate trial, and it was minimized so that there was little possibility of prejudice on any of the counts.

The *Russell* factors do not suggest that the trial court would have granted severance of these charges since they arose from the same evidence. Accordingly, Mr. Lee cannot establish either that his trial counsel erred in failing to seek a severance or that he was unduly prejudiced by the joint trial. For both reasons, he has not established that his counsel provided ineffective assistance.

Offender Score Calculation

Mr. Lee next argues that the trial court erred by treating the two robbery convictions as separate criminal offenses and that the related firearm enhancements should not have been applied. The existence of separate victims on the two counts disposes of his arguments.

At issue initially is RCW 9.94A.589(1)(a). When imposing sentence under that subsection, courts are required to include each other current offense in the offender score unless one or more of those offenses constitute the same criminal conduct, in which case they shall be "counted as one crime." The statute then defines that particular exception to the scoring rule: "'Same criminal conduct,' as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id.*

It is the defendant's burden to establish that offenses constitute the same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 540-541, 295 P.3d 219 (2013). We review the trial court's ruling on this issue for abuse of discretion. *Id*. at 541. Because Esteban Salazar was the victim of the robbery count and Roger Salazar was the victim of the attempted robbery count, the two offenses were separate crimes for scoring purposes.

Mr. Lee also argues that the two offenses were based on the same conduct and, therefore, double jeopardy principles are violated by punishing both crimes. There was no double jeopardy violation. The short answer, again, is that offenses involving

different victims do not violate double jeopardy. *See State v. Baldwin*, 150 Wn.2d 448, 457, 78 P.3d 1005 (2003). For that reason, Mr. Lee's derivative argument that both firearm enhancements cannot apply also fails.

The robbery of one person and the attempted robbery of another constitute separate offenses for criminal scoring and for double jeopardy purposes. The trial court did not err by imposing separate sentences, including the firearm enhancement, for each offense.

Statement of Additional Grounds

The SAG argues that Mr. Lee's constitutional speedy trial right was violated. He fails to make the required showing of prejudice.

A criminal defendant has a constitutional right to a speedy trial guaranteed by both the Sixth Amendment to the United States Constitution and article I, § 22 of the Washington Constitution. The rights provided by the two constitutions are equivalent. *State v. Iniguez*, 167 Wn.2d 273, 290, 217 P.3d 768 (2009). We review de novo an allegation that these rights have been violated. *Id.* at 280. Because some delay is both necessary and inevitable, the appellant bears the burden of demonstrating that the delay between the initial accusation and the trial was unreasonable, creating a "presumptively prejudicial" delay. *Id.* at 283. Once this showing is made, courts must consider several nonexclusive factors in order to determine whether the appellant's constitutional speedy trial rights were violated. *Id.* These factors include the length and reason for the delay,

whether the defendant has asserted his right, and the ways in which the delay caused prejudice. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). None of the *Barker* factors are either sufficient or necessary to demonstrate a constitutional violation. *Iniguez*, 167 Wn.2d at 283.

Mr. Lee makes the initial showing that there was sufficient delay to trigger a *Barker* analysis. *Id.* at 291-292 (eight month delay sufficient to raise claim). However, he provides no analysis of the *Barker* factors and, in particular, makes no showing that his defense was prejudiced at trial because of the delay. Accordingly, his speedy trial argument fails.

The judgment is affirmed.

A 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.

Korsmo, J.

WE CONCUR:

Pennell, A.C.J.

Siddoway, J.

PHELPS & ASSOCIATES, P.S.

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