

67469-2

67469-2

NO. 67469-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DANIEL MILLER, ERIC COOPER and CHRISTOPHER BINGHAM,

Appellants.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES D. CAYCE

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

RANDI J. AUSTELL
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED

1. A trial court has wide discretion to cure trial irregularities. Here, a detective inadvertently violated a motion in limine that prohibited any reference to booking photos. The court specifically found that any prejudice had been cured when the court struck the testimony and instructed the jury to disregard it. Was the court well within its wide discretion when it ruled that a mistrial was unwarranted?

2. There is sufficient evidence to support a conviction where any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. The direct and circumstantial evidence at trial established that Miller, together with others, broke Tyler Anway's front door of down, beat him severely and stole his property. Does substantial evidence support Miller's convictions for first degree burglary and first degree robbery?

3. Legitimate trial tactics cannot support a claim of ineffective assistance of counsel. Where trial counsel opted not to object to an improper remark, likely because it only would have emphasized the damaging evidence, can counsel's decision be characterized as a legitimate trial tactic? Even if counsel should

have objected, where a defendant cannot establish prejudice, does his ineffective assistance of counsel claim fail?

4. When construing whether two crimes have the same criminal intent, the inquiry is, objectively viewed, to what extent did the defendant's criminal intent change from one crime to the next? A reviewing court must objectively view each underlying statute and determine whether the required intents are the same or different for each count. Here, Bingham committed burglary, which required the intent to commit *any* crime inside. The burglary was completed after the defendants broke the front door down and assaulted Anway. The robbery, which required intent to deprive Anway of his personal property, occurred after the burglary was completed. Because objectively viewed the underlying statutes require different intents, and Bingham's intent changed from one crime to the next, did the trial court properly determine that the offenses were not the same criminal conduct?

5. A trial court may impose an exceptional sentence when a defendant has multiple current offenses and his offender score would result in one of the offenses going unpunished. In this case, Bingham had multiple current offenses and an offender score of 19.

Did the trial court have the broad discretion to impose an exceptional sentence to ensure that each offense went punished?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

By amended information, the State charged Daniel Miller, Eric Cooper and Christopher Bingham with one count of first degree burglary¹ and one count of first degree robbery² for a November 30, 2010 incident (victim Tyler Anway).³ 1CP 48-49; 2CP 11-12; 3CP 14-15.⁴ The State also charged Cooper and Bingham with second degree assault⁵ and intimidating a witness⁶ committed during a time intervening November 1 - 30, 2010 (victim Darin Keatts). 2CP 13; 3CP 16. A jury convicted all defendants of

¹ RCW 9A.52.020.

² RCW 9A.56.200(1)(a)(iii) and RCW 9A.56.190.

³ The State also charged a fourth co-defendant, Anthony Robles. Pursuant to RCW 9A.56.065 and RCW 9A.56.020(1), Robles was also charged with theft of Darin Keatts's car. Pre-trial, Robles pled guilty to one count of residential burglary and one count of third degree assault.

⁴ The Brief of Respondent refers to the clerk's papers as 1CP (Miller); 2CP (Cooper); 3CP (Bingham).

⁵ RCW 9A.36.021(1)(c).

⁶ RCW 9A.72.110(1)(d).

robbery and burglary, but acquitted Cooper and Bingham of assault and witness intimidation. 1CP 60; 2CP 16-17; 3CP 152-53.

The trial court imposed standard range sentences for Miller and Cooper. 1CP 66-74; 2CP 18-26. The court imposed an exceptional sentence for Bingham, pursuant to RCW 9.94A.535(2)(c).⁷ 3CP 206-14, 221-23. Miller, Cooper and Bingham appeal.⁸ 1CP 127; 2CP 27; 3CP 224-38.

2. SUBSTANTIVE FACTS.

a. November 1 - 30, 2010 (Counts 3 and 4).⁹

During October and early November, 2010, Darin Keatts rented a home along with Bingham and Bingham's wife; Robles sometimes stayed there too. RP 770-72.¹⁰ October 31 or November 1, Keatts had a rental dispute with Bingham. RP 772,

⁷ The statute permits a trial court to impose an exceptional sentence when the "defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." The State fully addresses Bingham's assignment of error vis-à-vis his exceptional sentence in section C.4 of the Br. of Respondent, infra.

⁸ By order dated April 3, 2012, this Court granted Respondent's motion to consolidate the appeals.

⁹ Initially, these were counts 4 and 5 and count 3 was theft of Keatts's vehicle. The counts were renumbered after Robles pled guilty.

¹⁰ The designation of the verbatim report of proceedings is as follows: RP for the consecutively paginated volumes and all other volumes are referred to by date.

774. Keatts moved out on November 1st, after Robles stole his truck and cell phone (which Keatts needed for his mobile car detailing business), as collateral for the back rent. RP 769, 772-74, 868-69.

A few days later, Keatts sent Robles a text message that said he had paid Bingham the back rent.¹¹ RP 773. On November 5th or 6th, Keatts went to Bingham's house to retrieve his truck. RP 774. A person unknown to Keatts answered the door and gave him back his truck key. RP 774. Keatts then drove away. RP 774.

Some days later, Bingham called Keatts and said that someone had kicked in his front door and stolen his "stuff." RP 775, 870. Bingham asked Keatts if he was responsible. RP 775-76, 870. Keatts said no, the last time he had been there was the "one day that the DOC came and Chris went to jail."¹² RP 776. Keatts then went to Bingham's house, concerned that his belongings might also have been stolen. RP 776-78.

¹¹ Approximately November 2nd or 3rd, Keatts got his cell phone back. RP 780, 870.

¹² Bingham claims that his trial counsel was ineffective for failing to object to this remark. The State fully discusses this claim in section C.3 of Br. of Respondent, infra.

When Keatts arrived, Bingham and Cooper were there. RP 777. Bingham led Keatts to the garage, where Keatts kept his tools. RP 779. Bingham was angry because he heard that Keatts intended to tell the police that Robles had stolen his truck - an allegation Keatts denied. RP 779-81, 786. Bingham did not believe Keatts. RP 781, 786-87.

Cooper then came into the garage and punched Keatts in the face. RP 781-82. Keatts "ducked and covered." RP 782. While Keatts was on the floor in a fetal position, Bingham beat him with a small aluminum bat. RP 782-85. Cooper punched Keatts again. RP 784-85. Keatts begged them to let him go. RP 785. They told Keatts not to go the police or they would kill him.¹³ RP 789. Despite his injuries,¹⁴ Keatts did not go to the police or seek medical aid. RP 790.

b. November 30, 2010 (Counts 1 and 2).

After the rent dispute, Keatts moved into Tyler Anway's house. RP 791. They had met about one year earlier; Anway

¹³ This assault and threat gave rise to the second degree assault and intimidation of a witness charges. 2RP 14-15; 3CP 17-18.

¹⁴ Most of Keatts's left side was bruised and he had a cut under his right eye - which left a permanent scar. RP 787-88, 838-40.

repaired electronic stereo equipment and Keatts had needed an amplifier repaired. RP 526, 619-20, 791-2. Even though Anway did not know Keatts very well, he permitted him to live in his house. RP 486, 509-10.

On November 30, 2010, in the early morning hours, Keatts was asleep in Anway's spare room, when he heard loud pounding on the front door. RP 795, 802, 837. Keatts looked through the peep hole. He saw Cooper and two other males whose faces he could not see clearly. RP 802-03. Keatts asked Cooper what he wanted. RP 803. Cooper angrily said, "You need to open the door. We need to talk." RP 803, 851. Outnumbered, Keatts did not want to get trapped in the house so he fled outside through the garage door. RP 803-04. As Keatts ran away, he heard a loud bang, which he presumed was the sound of front door being kicked in. RP 806. Keatts saw Miller on the front step, about to enter the house. RP 806.

Meanwhile, as Anway started to fall asleep in his bedroom, he heard someone kick in his front door. RP 480, 512-13, 589. Anway opened his bedroom door and saw Eric Cooper, whom he had previously met (Anway also knew each of the other defendants - some had purchased stereo equipment from him). RP 506, 515,

619-20. Cooper repeatedly punched Anway's head and face. RP 517, 667-68. Cooper accused Anway of having stolen an amplifier, an accusation that Anway denied. RP 518-19.

As Anway fled to a back room, Cooper followed. RP 519. Two defendants were already in the back room and one defendant stood in the kitchen and blocked the back door. RP 585, 610-11, 624. Eventually, all four defendants cornered Anway in the back room, where they pummeled him. RP 520-24, 585, 587, 592, 625, 634, 686.

Anway saw Bingham steal an amplifier. RP 547, 592, 653, 686. The defendants made three or four trips out of the house with Anway's property,¹⁵ which included an amplifier, a guitar¹⁶ and firearms.¹⁷ RP 523-27, 593, 670-72. The defendants traded places with one another so that different men took items while others

¹⁵ Keatts said that the defendants also stole his laptop computer and cell phone. RP 817.

¹⁶ The guitar had sentimental value; it had belonged to Anway's late brother. RP 471, 638.

¹⁷ Anway hunted and collected firearms. He had a gun safe; however, because he had difficulties with the combination lock, the safe was unlocked. RP 527-28. Several firearms were stolen from the unlocked safe. RP 598-99, 614. Two other firearms were taken from the living room or Anway's bedroom. RP 613-14. Anway was uncertain whether the firearms were stolen on November 30 or in the 72 hours after the robbery. RP 672. Anway was so frightened after the robbery that he stayed with his parents for the next three or four days, during which time Anway's house was vacant. RP 472, 559, 672.

assaulted Anway and prevented him from leaving the back room. RP 549-50, 554-55, 593, 668. The defendants then fled Anway's house and drove away. RP 525, 563, 595. Anway wanted to call the police, but he could not find his cell phone.¹⁸ RP 627.

By then, Keatts had fled to a nearby house and hid in the front porch bushes. RP 807-08. When the homeowner emerged, Keatts told him that something was happening at Anway's house. RP 807. The homeowner handed Keatts a cell phone; a 911 operator was already on the line. RP 808. Keatts told the dispatcher that the men were fleeing Anway's house in a pick-up truck and, based on the direction of travel, they were most likely headed to Bingham's house.¹⁹ RP 812, 866.

Moments later, King County Sheriff's Deputies Victor and Pike arrived.²⁰ RP 382, 385, 387, 418, 423, 627-28, 834-35. Keatts flagged them down; he said that he had called 911. RP 419-

¹⁸ Anway did not have a land line. RP 628.

¹⁹ Keatts knew that the pick-up belonged to Cooper but he did not share that information with the police dispatcher. RP 812.

²⁰ The deputies were dispatched to an intersection, about 1,000 feet from Anway's residence because Keatts did not know Anway's address. RP 454-55, 810.

20, 811. Keatts identified two of the males that he had seen at Anway's house: Eric Cooper, known as "Big Coop," and Daniel Miller. RP 420.

The deputies saw Anway's damaged front door. RP 387. The door frame was splintered and there was a big boot print on the door, which appeared fresh. RP 387, 396, 402-03, 423. The home was in disarray. RP 424. A smashed television was face down on the floor in front of an empty television stand. RP 431-33, 600-01, 813. It looked as though a struggle had occurred in the living room and the kitchen. RP 424.

Anway was inside, dazed and beaten up. RP 388, 435-36. Anway had fresh blood and bruises on his swollen face. RP 436-38, 440. He had blood on his hands and the front of his pants.²¹ RP 442. Anway had trouble breathing; his nose bled profusely and dried blood clogged his nasal passages. RP 436-38, 442. Anway identified the four men who broke into his house, beat him and took his property: Daniel Miller, Eric Cooper, Christopher Bingham and Tony Robles. RP 421.

²¹ Anway had changed shirts before the police officers arrived because he used his first shirt to wipe the blood from his face. RP 661-62.

Additional facts and procedural history will be discussed in the sections to which they pertain.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED THE CO-DEFENDANTS' MOTION FOR A MISTRIAL.

Miller, Cooper and Bingham contend that the court abused its discretion when it denied a defense motion for a mistrial after a detective testified - in violation of a court order - that the first step in creating a photo montage is to "take a photograph, and normally, that's a booking photograph."²² The defendants characterize this event as a "trial irregularity" and claim that it denied them a fair trial.

This argument fails for 3 reasons. First, although the detective mentioned booking photos, she never said that Miller's, Cooper's or Bingham's montage contained booking photos. Second, the trial court struck the testimony and instructed the jury to disregard it. Finally, the defendants failed to demonstrate prejudice; thus, the trial court properly denied their motion for a mistrial.

²² RP 705.

Trial irregularities are irregularities that occur during a criminal trial that implicate the defendant's due process rights to a fair trial. State v. Davenport, 100 Wn.2d 757, 761 n.1, 675 P.2d 1213 (1984). In considering whether a trial irregularity warrants a new trial, the court must consider (1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could have been cured by an instruction. State v. Post, 118 Wn.2d 596, 620, 837 P.2d 599 (1992). A mistrial should be granted only when " 'nothing the trial court could have said or done would have remedied the harm done to the defendant.' " State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979) (quoting State v. Swenson, 62 Wn.2d 259, 280, 382 P.2d 614 (1963)). "Only errors affecting the outcome of the trial will be deemed prejudicial." State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). The trial court has wide discretion to cure trial irregularities and its decision is reviewed for abuse of discretion. Post, 118 Wn.2d at 620. Great deference is given to the trial court because it is in the best position to discern prejudice. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

a. Facts.

The trial court granted a defense motion to preclude testimony that the montage photos were obtained from "prior arrests." Supp. CP ___, sub. no 30 (Robles's trial memorandum); RP 68. During direct examination, the following exchange between the deputy prosecutor and Detective Theresa Schrimpsher occurred:

Q. Now, I assume you can't just make a montage out of thin air. Do you need something to get started before you actually meet with a witness?

A. Typically, you take a photograph, and *normally*, that's a booking photo.

Defense counsel objected. The court sustained the objection. RP 705.

The deputy prosecutor continued,

Q. A photograph of some type. I assume you make montages of different pictures.

A. Yes, I do.

Q. Without being specific, how do you get started, is what I'm saying, are you given a name from which to work or a description?

A. I'm normally given the name of an individual, yes.

Q. Okay. Do you remember what happened in this case?

A. In this case, I was given the numbers of the booking -- of the montage forms that were already --

Following an objection and a sidebar, the court instructed the jury:

In terms of the montage testimony, we'll start over, all of that is stricken, the jury is to disregard totally what you have heard with respect to montage testimony up to this point. So let's just start over.²³

RP 705-06.

When Schrimpsheer testified anew, she said that Detective Do compiled the four photo montages. RP 707. Do then gave her five-digit numbers that specifically identified the pre-made montages so that she could bring them up on her computer, print them and show them to Anway.²⁴ RP 707, 713. Defense counsel objected. RP 707. The court overruled the objection. RP 707. Schrimpsheer then identified exhibits 32-35 as the montages that Detective Do created. RP 707.

²³ Bingham claims that the court struck Schrimpsheer's testimony "over Bingham's objection." Br. of Bingham at 10 (citing RP 706). The record does not bear that out. Certainly, Bingham objected to the use of the words "booking photo," but Bingham did not object to the trial court's remedy. See RP 716-22 (parties memorialized the sidebar).

²⁴ Schrimpsheer initially misspoke when she said that Do had given her four-digit numbers. RP 707. Later, she corrected herself and said that she had the five-digit numbers needed to bring the montages up on her computer. RP 713.

When Schrimpscher had shown Anway each montage she asked, " 'Is one of these individuals involved in the incident that you're here for?' " RP 708-09. Anway selected a photograph from each montage and identified the person by name. RP 709. After Schrimpscher wrote the information down, Anway initialed the photographs and signed and dated the back of the montage forms. RP 709-10; Exs. 32-39.

Outside the jury's presence, the parties memorialized the earlier sidebar, where the court ruled that because Schrimpscher said "booking photographs," the State could not offer the montages (exhibits 32-35) into evidence. RP 710-11, 716-22. However, the State could offer the portion of each montage that included the name of the person whom Anway had identified (exhibits 36-39).²⁵ RP 711-13, 715.

There was a defense motion for a mistrial. RP 719, 721. Counsel conceded that their defense was not mistaken identity, ("We're not challenging that Mr. Anway identified these three individuals"), but argued that the words "booking photos" prejudiced

²⁵ Anway identified Bingham (exhibit 36), Eric, a.k.a. "Big Coop" (exhibit 37), Miller (exhibit 38) and Robles (exhibit 39). RP 714-15.

their clients because the jury could infer that the defendants were convicted felons. RP 719-21.

The trial court denied the motion. The court said:

I'm not going to grant a mistrial. I instructed them (the jury) not to consider it, but certainly, if the Court of Appeals thought it was prejudicial, I have no problem with whatever they choose to do later. I just don't think it is [prejudicial].

RP 721. The court also stated that it did not believe Schrimpsheer intentionally said "booking photos." RP 722. "[S]he was honestly answering the question. Unfortunately, it happens."²⁶ RP 722.

b. There Was No Serious Trial Irregularity.

A passing reference to a defendant's prior arrest does not necessarily constitute a serious trial irregularity. See State v. Condon, 72 Wn. App. 638, 865 P.2d 521 (1993). In Condon, the defendant was convicted of murder. The trial court granted the defense motion to exclude any reference to the fact that Condon had spent time in jail. Condon, 72 Wn. App. at 648. Later, during direct examination, a witness testified that Condon had called her

²⁶ The State recognizes that whether the statement was deliberate or inadvertent is not the proper inquiry; rather, the inquiry must focus on whether the statement prejudiced the jury and thus violated the defendants' right to a fair trial. See Weber, 99 Wn.2d at 165.

“when he was getting out of jail.” Id. Defense counsel objected. The court struck the remark and instructed the jury to disregard it. Id. Minutes later, the same witness testified that Condon had asked her to pick him up from jail in Seattle. Id.

Outside the jury’s presence, the trial judge explained to the witness that she was not permitted to mention that Condon had been in jail. Id. The court denied the defense motion for a mistrial. Id. The court gave the jurors a cautionary instruction after they returned to the courtroom:

Two references have been made by this witness to the defendant having been in jail. You ... are to completely disregard such references and the references should not be considered by you in anyway in your deliberations upon this case.

Id.

Condon appealed and asserted that the trial court had abused its discretion when it denied his motion for a mistrial. Id. This Court disagreed. The Court reasoned that the reference to Condon having been in jail was ambiguous. Id. at 649. The Court stated:

The mere fact that someone has been in jail does not indicate a propensity to commit murder, and the jury just as easily could have concluded that Condon was in jail for a minor offense. Also, the fact that someone

has been in jail does not necessarily mean that he or she has been convicted of a crime.

Id. The Court concluded that, although the remarks may have had the “potential for prejudice,” they were not so serious as to warrant a mistrial, and the court’s cautionary instruction to disregard the remarks lessened any prejudice that may have resulted. Id. at 649-50.

Likewise, in the present case, Schrimpsheer’s reference to “booking photos” may have had the “potential for prejudice,” but it was not so serious as to warrant a mistrial. Moreover, any potential prejudice was ameliorated after the trial court struck the testimony and instructed the jurors “to disregard totally what you have heard with respect to montage testimony up to this point. So, let’s start over.”²⁷ See Condon, 72 Wn. App. at 649-50. After the close of evidence, the court further instructed the jury that, “If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.” 3CP 155. This Court presumes that the jury followed the judge’s instructions to disregard the stricken testimony. See Weber, 99 Wn.2d at 166.

²⁷ RP 706.

Miller, Cooper and Bingham rely on State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987), a case that is distinguishable. In Escalona, the defendant was convicted of second degree assault with a deadly weapon. The trial court granted the defendant's motion to exclude reference to the fact that the defendant previously had been convicted *of the same crime*. Escalona, 49 Wn. App. at 252 (italics added). During cross examination, Escalona's roommate, the victim, explained that he was nervous that he would be stabbed in a confrontation with Escalona because Escalona "already has a record and had stabbed someone." Id. at 253. The trial court ordered the comment stricken, denied a motion for a mistrial, and instructed the jury to disregard the remark. Id.

This Court reversed Escalona's conviction, finding that (1) the irregularity was extremely serious, (2) it was not cumulative, since the trial court had already ruled that evidence of the prior crime could not be admitted, and (3) the trial court's instruction to the jury could not have cured the prejudice caused by the remark. Id. at 255. The Court stated,

[D]espite the court's admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact. Furthermore, the jury undoubtedly would use it for its most improper purpose, that is, to conclude that

Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past.

Id. at 256. The Court thus held that the trial court had abused its discretion in denying the motion for a mistrial. Id.

In this case, on the other hand, Schrimpsheer did not testify that Miller, Cooper or Bingham had a criminal history, much less that the defendants had committed crimes similar or identical to the crimes for which they were on trial.²⁸ Moreover, the defendants assert that Schrimpsheer said the montages in this case included booking photos. They are mistaken. What Schrimpsheer said was that, "*Typically*, you take a photograph, and *normally*, that's a booking photo." RP 705. Schrimpsheer later said that Detective Do had given her "the numbers of the booking -- of the montage forms that were already --" RP 706. Before Schrimpsheer could finish her answer, there was an objection and a sidebar. RP 706. Once Schrimpsheer had the opportunity to complete her response, she stated that Detective Do had given her five-digit numbers that identified each defendant's montage. RP 713-15.

²⁸ Bingham asserts that after the jurors heard he had a criminal record, they likely used the information as propensity evidence; i.e., because Bingham had previously been involved in the criminal justice system, he was likely involved in the charged offenses. Br. of Bingham at 11. Schrimpsheer did not say that Bingham had a criminal record. And, Bingham does not cite to any portion of the record in support of his assertion.

The defendants also claim that Schrimpscher mentioned the defendants' "booking numbers." RP 720-21. She did not. Schrimpscher explained that the five-digit numbers underneath the comment lines on exhibits 36-39 were the numbers identifying the particular montages. In other words, "66621" identified the Robles montage, "66618" identified the Coopers montage, "66629" identified the Bingham montage and "66628" identified the Miller montage. The five-digit numbers also appear on exhibits 32 -35 after the words "Lineup ID."²⁹ Exs. 32-35.

In sum, the trial court correctly determined that Schrimpscher's remarks were not so serious as to warrant a mistrial. The court exercised its discretion properly when it denied the defense motion for a mistrial.

2. THIS COURT SHOULD AFFIRM COUNTS I AND II BECAUSE SUFFICIENT EVIDENCE SUPPORTS THE JURY'S VERDICTS.

Miller contends that the State provided insufficient evidence to establish that he committed burglary or robbery. Specifically,

²⁹ As a general rule, a defendant's "booking number" appears on the "Superform," a document that is filed with the Information and the Certification for Determination of Probable Cause. Compare, e.g., 3CP 10 (Bingham's Superform with B/A (booking) number 210041493) with exhibits 32 and 36 (wherein the five-digit number that identifies Bingham's montage is 66629).

Miller claims that the State failed to prove that he unlawfully entered Anway's house or assaulted Anway.³⁰ This Court should reject Miller's argument. As discussed fully below, the jury's verdicts in both Counts I and II were supported by substantial evidence.

There is sufficient evidence if, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). This Court draws all reasonable inferences in the State's favor and interprets them most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In claiming the evidence was insufficient, the defendant admits the truth of the State's evidence and all inferences reasonably drawn from it. Id. Circumstantial evidence is not to be considered any less reliable than direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). This Court defers to the trier of fact on the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

³⁰ Miller contends that the State failed to prove that he was inside the house. Br. of Miller at 11. Yet, Miller concedes that Anway "identified Mr. Miller as being in the house." Br. of Miller at 12.

In order to convict Miller of first degree burglary, the State had to prove that Miller (1) entered or remained unlawfully in a building, (2) with intent to commit a crime against a person or property therein, and (3) in entering or while in the building or in immediate flight therefrom, Miller or another participant in the crime assaulted Anway. RCW 9A.52.020(1)(b); 1CP 48; 2CP 167.

In order to convict Miller of first degree robbery, the State had to prove that: (1) Miller unlawfully took personal property from or in the presence of another, (2) Miller intended to commit theft of the property, (3) the taking was against the person's will by use of immediate force, violence or fear of injury to that person, (4) force or fear was used by Miller to obtain or retain possession of the property, and (5) in the commission of these acts or in immediate flight therefrom, Miller inflicted bodily injury. RCW 9A.56.190; RCW 9A.56.200(1)(a)(iii); 1CP 49; 2CP 176.

A person is an accomplice of another person 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 such other person to commit the crime; or (2) aids or agrees to aid such other person in planning

or committing the crime.³¹ RCW 9A.08.020(3)(a)(i), (ii). The word “aid” means:

[a]ll assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

WPIC 10.51 (citing State v. Landon, 69 Wn. App. 83, 848 P.2d 724 (1993)); 2CP 162.

Taking the evidence in the light most favorable to the State, as the Court must do, the direct and circumstantial evidence established Miller’s complicity in the burglary and the robbery.

Anway testified that: (1) he knew Miller; (2) Miller was inside his house; (3) Miller, along with Cooper, Bingham and Robles beat him; and (4) as some defendants beat him and prevented him from leaving, other defendants stole his belongings.³² Although Anway saw only Bingham steal an amplifier, he said that the defendants also stole his late brother’s guitar. RP 547-48, 558-60, 592, 612-14, 638. It is legally insignificant that Anway did not see Miller carry

³¹ In response to an inquiry by the jury, the trial court instructed the jury that, “Accomplice liability is not limited to any particular offense(s).” 2CP 199-200.

³² RP 505-06, 520-26, 531, 547, 549-55, 585, 587, 592-93, 612-17, 625-27, 634, 638, 655, 672, 686.

any property outside, because the defendants committed the crimes together. See RCW 9A.08.020(3)(a)(i), (ii).

Keatts did not see Miller inside Anway's house, but he heard what sounded like someone kicking in Anway's front door and he then saw Miller about to enter the house. RP 806. Keatts's testimony supports the reasonable inference that Miller was not merely present at Anway's house, but, rather, that he went into the house.

Miller is mistaken that Anway was "unable to describe anything that Mr. Miller might or might not have done." Br. of Miller at 12. Although Anway was unable to specify which defendant landed a particular blow or stole property other than the amplifier, he was quite certain that all four men - Miller, Cooper, Bingham and Robles - broke into his house, beat him, and stole his property. RP 520-24, 587, 625, 686; see also n.32, supra.

Contrary to Miller's claim, there was not a "dearth of evidence" regarding Miller's guilt. Rather, substantial evidence supports the jury's conclusion that, beyond a reasonable doubt, Miller burglarized and robbed Anway. The Court should accordingly affirm Miller's convictions.

**3. BINGHAM HAS FAILED TO ESTABLISH
INEFFECTIVE ASSISTANCE OF COUNSEL.**

Bingham contends that his counsel was ineffective for failing to object to an improper remark that Keatts made. This claim falls short because (1) counsel's failure to object was a legitimate trial tactic and (2) the remark did not prejudice Bingham.

To prove that the failure to object rendered counsel ineffective, a defendant must show that (1) not objecting fell below prevailing professional norms,³³ (2) the proposed objection would likely have been sustained,³⁴ and (3) the result of the trial would have been different if the evidence had not been admitted. State v. Hendrickson, 129 Wn.2d 61, 80, 917 P.2d 563 (1996). To prevail on this issue, a defendant must rebut the presumption that counsel's failure to object "can be characterized as legitimate trial strategy or tactics." State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

Counsel's decision not to object can be characterized as a legitimate trial tactic because counsel may not wish to emphasize

³³ State v. Townsend, 142 Wn.2d 838, 847, 15 P.3d 145 (2001).

³⁴ State v. McFarland, 127 Wn.2d 322, 337 n.4, 899 P.2d 1251 (1995).

damaging testimony. See, e.g., State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447 (1993) (“[T]rial counsel decided not to ask for a limiting instruction as a trial tactic so as not to reemphasize this very damaging evidence.”). “Only in egregious circumstances, on testimony central to the State’s case, will the failure to object constitute incompetence of counsel justifying reversal.” State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). On review, trial counsel’s strategic decisions must be given exceptional deference. McNeal, 145 Wn.2d at 362.

Here, defense counsel’s decision not to object to Keatts’s remark did not fall below prevailing professional norms. On direct examination, Keatts recounted his rental dispute with Bingham and the ensuing events, including Bingham’s accusatory telephone call. Bingham asked Keatts if he had stolen anything from his house after someone kicked down his front door. RP 775-76. Keatts responded that he only had been at Bingham’s house the day “that the DOC came and Chris went to jail.” RP 776. Defense counsel likely did not object, because an objection would only have emphasized the damaging testimony. Bingham has not rebutted the presumption that defense counsel had a tactical reason not to object.

Even if defense counsel should have objected, Bingham suffered no prejudice from Keatts's remark. The jurors apparently did not put much credence in Keatts's testimony vis-à-vis the rental dispute and the ensuing events because they acquitted Bingham of assault and witness intimidation. On the other hand, the jury credited Anway's testimony about the burglary and the robbery. The strength of the State's substantial evidence against Bingham on those charges is unchallenged, i.e. Bingham has not claimed that insufficient evidence supports those convictions.

Bingham has failed to establish either deficient performance or prejudice. This Court should reject Bingham's ineffective assistance of counsel claim.

4. BINGHAM'S MULTIPLE CURRENT OFFENSES AND AN OFFENDER SCORE OF 19 CONSTITUTE SUBSTANTIAL AND COMPELLING REASONS THAT JUSTIFY A SENTENCE ABOVE THE STANDARD RANGE.

Bingham challenges his sentence on two separate but related grounds. Bingham first asserts that the trial the court erred when it decided that the burglary and robbery were not the same criminal conduct court. Bingham then claims that, since the court erred when it counted the burglary and the robbery as multiple

current offenses (instead of one offense under the same criminal conduct provision), the court lacked authority to impose an exceptional sentence. Bingham thus contends that his exceptional sentence must be reversed.

These arguments fail. The court determined that the two crimes had different criminal intents, and were therefore not same criminal conduct. The imposition of an exceptional sentence based on Bingham's multiple current offenses and high offender score was a proper exercise of the trial court's discretion. The Court should affirm Bingham's sentence.

a. Facts.

In this case, pursuant to RCW 9.94A.535(2)(c), the trial court initially imposed consecutive sentences on Bingham's burglary and robbery convictions. 7/22/11 RP 15-17. The court did so because Bingham's offender score was so high (9+)³⁵ that unless the court imposed an exceptional sentence, one of Bingham's current offenses would have gone unpunished. 7/22/11 RP 15-17. The

³⁵ Bingham's offender score for the burglary was 19 and his offender score for the robbery was 18. 3CP 208.

court told Bingham that, "Your criminal history is one of the worst I've seen. So it does provide me with a basis for an exceptional sentence." 7/22/11 RP 15.

Bingham brought a motion for reconsideration and argued, in part, that because the burglary and robbery were the same criminal conduct, the sentences should run concurrently. 8/15/11 RP 2-3; 3CP 216-19. The court denied the motion. The court said that because the burglary and the robbery had two different criminal intents, the sentence imposed for consecutive time was warranted. 3CP 220. The court entered written findings of fact and conclusions of law that reflected its oral ruling. 3CP 221-23.

b. The Burglary And Robbery Had Different Criminal Intentions.

Under the Sentencing Reform Act of 1981 (SRA), multiple current offenses are presumptively counted separately in determining a defendant's offender score unless the trial court finds that current offenses encompass the "same criminal conduct" and the offenses are then counted as one offense in determining the offender score. RCW 9.94A.589(1)(a). The SRA defines "same criminal conduct" as "two or more crimes that require the same criminal intent, are committed at the same time and place, and

involve the same victim.” RCW 9.94A.589(1)(a). If any one element is missing, multiple offenses cannot be said to encompass the same criminal conduct. State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

To decide whether two crimes involve the same criminal intent, this Court must objectively view each underlying statute and determine whether the required intents are the same or different for each count. State v. Price, 103 Wn. App. 845, 857, 14 P.3d 841 (2000). Crimes may share the same objective intent where one crime furthered the other. State v. Wilson, 136 Wn. App. 596, 613, 150 P.3d 144 (2007). However, if the second crime occurs after the first is completed or furthers some other purpose, then the two crimes do not share the same objective intent. Id. at 613-14.

A trial court’s determination of what constitutes the “same criminal conduct” will not be disturbed absent an abuse of discretion or a misapplication of the law. Price, 103 Wn. App. at 855. Review for abuse of discretion is a deferential standard and is appropriate when the facts are sufficient to support a finding either way regarding the presence of the above criteria (same time and place, same victim, same objective criminal intent). State v. Anderson, 92 Wn. App. 54, 62, 960 P.2d 975 (1998). This Court

must narrowly construe the language of RCW 9.94A.589(1)(a) to disallow most assertions of same criminal conduct. Price, 103 Wn. App. at 855.

The State concedes that the first two elements of same criminal conduct are satisfied: the offenses occurred at the same time and place and involved the same victim. The third element is at issue here - the objective criminal intent.

Objectively viewed, each underlying statute requires different intents. The intent required for burglary is intent to commit any crime inside the burglarized premises. RCW 9A.52.020(1); State v. Bergeron, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985). The intent required to prove robbery is the intent to deprive the victim of property. State v. Decker, 127 Wn. App. 427, 431, 111 P.3d 286 (2005).

In this case, the objective intent of Bingham's and his accomplice's burglary was complete when they broke into Anway's house and punched Anway multiple times. See, e.g., Lessley, 118 Wn.2d at 778. In Lessley, the defendant went to his ex-girlfriend's (Ms. Olson's) parent's (George and Janette Thomas's) house. Id. at 775. Ultimately, Lessley burst into the house, armed with a firearm, which he brandished at the Thomases and Olson. Id.

Lessley then kidnapped the two women. At sentencing, Lessley argued that the burglary and kidnappings encompassed the same criminal conduct because he broke into the house with the intent to kidnap Olson. Id. at 776. The trial court disagreed, finding that the burglary was complete once Lessley broke in and assaulted the Thomases and Olson, and the kidnappings were separate crimes. Id.

On review, this Court affirmed. The lead opinion reasoned that the anti-merger statute applied irrespective of whether the crimes were the same criminal conduct. State v. Lessley, 59 Wn. App 461, 464–65, 798 P.2d 302 (1990), aff'd, 118 Wn.2d 773 (1992). Two judges affirmed the result but rejected the anti-merger rationale and simply found Lessley's crimes did not encompass the same criminal conduct. Lessley, 59 Wn. App. at 467–69 (Baker, J., concurring).

Writing for the concurrence, Judge Baker said that the objective intent of Lessley's burglary was completed when he broke into the Thomas's house while armed with a deadly weapon. Id. at 468. The Court said:

Crimes which he objectively intended to commit
[inside the Thomas's residence] included the property
damage caused when he broke in, the assault against

Mr. Thomas and the assaults against Mrs. Thomas and his former girlfriend, Dorothy Olson. His subjective intent is irrelevant, and we would only be speculating to assume that that subjective intent was to kidnap and rape his former girlfriend. He may initially only have intended to confront her.

Id. at 468-69.

The trial court in this case properly refrained from speculating as to Bingham's subjective intent, and focused instead on Bingham's objective intent. The court said, "I do think that it's substantially different breaking into somebody's house and stealing property, as opposed to assaulting someone in their own house. That is different criminal intent." 8/15/11 RP 6.

As stated above, the intent to commit burglary requires the intent to commit *any* crime inside the burglarized building. RCW 9A.52.020(1); Bergeron, 105 Wn.2d at 4. The crimes which Bingham objectively intended to commit inside Anway's house included the damage to the front door and the door frame caused when Anway's front door got kicked in, the smashed television and the assault against Anway. Whether Bingham's subjective intent was to break in for the mere purpose of stealing Anway's property is irrelevant. See Lessley, 59 Wn. App. at 468-69 (Baker, J., concurring). Bingham and his accomplices may have chosen to

steal Anway's property only after they had cornered Anway in the back room and pummeled him. As this Court recognized in Lessley, the decision as to whether two crimes encompass the same criminal conduct must focus on objectively viewing the criminal intent of each offense and not on speculation. Lessley, at 468–69 (Baker, J., concurring).

Here, the trial court did not abuse its discretion or misapply the law in finding that Bingham's burglary was "separate and distinct" from the robbery.

c. Bingham's Multiple Current Offenses And High Offender Score Justified The Exceptional Sentence.

Bingham claims that the trial court could not impose an exceptional sentence based on multiple current offenses because the burglary and robbery should have counted as one offense. Because the trial court exercised proper discretion when it found that the burglary and robbery were separate and distinct offenses, Bingham's claim must fail.

A trial court may impose consecutive sentences on multiple current offenses only under the exceptional sentence provisions of RCW 9.94A.585. RCW 9.94A.589(1)(a). A court may impose a

sentence outside the standard range if substantial and compelling reasons justify an exceptional sentence. RCW 9.94A.535. A trial court may impose an exceptional sentence when: "The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." RCW 9.94A.535(2)(c). In order to reverse the trial court's sentence, this Court must find:

(a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585(4).

The record supports the trial court's reasons for imposing a sentence outside the standard range and the reasons justify an exceptional sentence. As discussed fully above, the trial court found that Bingham had multiple current offenses because the burglary and the robbery were not the same criminal conduct. Additionally, Bingham's very high offender score was "one of the worst" that the trial court had seen. 7/22/11 RP 15; 3CP 207. The

exceptional sentence was justified because otherwise one of Bingham's current offenses would have gone unpunished. 3CP 235.

Moreover, the trial court found that consecutive sentences – perhaps, as opposed to another sentence up to the statutory maximum - provided sufficient punishment. 3CP 235. This Court should affirm Bingham's exceptional sentence. The sentence is justified and it is not clearly excessive.

D. CONCLUSION

For the reasons provided above, this Court should affirm (1) the defendants' convictions for first degree burglary and first degree robbery, and (2) Bingham's exceptional sentence.

DATED this 30 day of April, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
RANDI J. AUSTELL, WSBA #28166
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric Nielsen, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of Brief of Respondent, in STATE V. CHRISTOPHER BINGHAM, Cause No. 67555-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame
Name
Done in Seattle, Washington

4/30/12
Date

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Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Suzanne Lee Elliott, the attorney for the appellant, at 1300 Hoge Building, 705 Second Ave., Seattle, WA, 98104, containing a copy of Brief of Respondent, in STATE V. ERIC COOPER, Cause No. 67505-2-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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Name
Done in Seattle, Washington

9/30/12
Date

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Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of Brief of Respondent, in STATE V. DANIEL MILLER, Cause No. 67469-2-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame

Name

Done in Seattle, Washington

4/30/12

Date