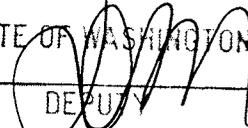


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

NO. 374226-II

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

STATE OF WASHINGTON,

Respondent,

v.

ERIN VAN BROCKLIN,

Appellant.

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

The Honorable Chris Wickham, Judge

REPLY BRIEF OF APPELLANT

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A. RESTATEMENT OF THE CASE

The State accepted Mr. Van Brocklin's "statement of the substantive and procedural facts of the case," and did not add any additional facts in its Statement of the Case. Brief of Respondent (BOR) 1.

B. ARGUMENT IN REPLY

1. **MR. VAN BROCKLIN'S KIDNAPPING CONVICTION SHOULD BE REVERSED AND DISMISSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE INDEPENDENT AND DISTINCT FROM THE ROBBERY CONVICTION TO SUPPORT IT.**

The State agreed, in its Brief of Respondent, that "Van Brocklin correctly cites In re Personal Restraint of Bybee, 142 Wn. App. 260, 175 P.3d 589 (2007), for the proposition that, in some cases, the restraint inherent in a robbery may be insufficient to also prove a separate charge of kidnapping." BOR at 3. The State further agreed with Mr. Van Brocklin that evidence at trial is insufficient to establish kidnapping, separate and distinct from robbery, "where there is mere incidental restraint and movement of the victim during the course of another crime which has no independent purpose or injury." BOR 4 (citing State v. Green, 94 Wn.2d 216, 227, 616 P.2d 628 (1980)).

The facts in this case fall squarely under this authority. The State, however, attempts to avoid the application of the authority by relying on cases where a kidnapping took place after the robbery, BOR at 4 (citing State v. Allen, 94 Wn.2d 860, 864, 621 P.2d 143 (1980)), or where there were different victims of the robbery and kidnapping. BOR at 4-5 (citing State v. Vladovic, 99 Wn.2d 413, 662 P.2d 853 (1983)). Under the undisputed facts of the case, and the court's instructions to the jury, however, these cases are inapplicable.

Here, the robbery clearly was not completed at the time the assailant tied Mr. Taptio with his own suspenders and moved him a short distance. Just as clearly, Mr. Taptio was restrained in this manner only to give the assailant the chance to get to the pickup truck where he expected to find Mr. Taptio's wallet and credit cards. The assailant first held Mr. Taptio with his arms around his neck and asked him for his wallet and credit cards. RP 116. It was only when Mr. Taptio told him that they were in the blue pickup that Mr. Taptio's hands were tied with the suspenders from his rain pants and moved approximately fifteen feet so that the assailant could get to the pickup truck to look for his

wallet. RP 118-119. Mr. Taptio was quickly able to free his hands and run to a public highway for help. RP 12.

Moreover, as the jury was instructed, the theft of the pickup was deemed to be a taking from Mr. Taptio's person for the robbery only because he was prevented from being at the place of the taking by being tied with his suspenders.

Finally, dismissing the kidnapping conviction in this case would not render RCW 9A.40.020(b) superfluous. In some instances, such as in Vladovic, a kidnapping might facilitate a robbery, and be charged under RCW 9A.40.020 (b), where the victim of the kidnapping was not the victim of the robbery; or as in Allen, where the robbery was complete at the time the kidnapping occurred. The facts of Mr. Van Brocklin's case resemble neither of these instances.

Here, the restraint was entirely incidental to the robbery and not sufficient to support the separate conviction for kidnapping. It served no purpose other than to allow the assailant to get to the truck; it facilitated the robbery and nothing else. For that reason the kidnapping conviction should be dismissed.

2. THE KIDNAPPING AND ROBBERY CONVICTIONS WERE THE SAME COURSE OF CRIMINAL CONDUCT.

a. The issue was not waived.

Mr. Van Brocklin asserts on appeal that if this Court does not dismiss his kidnapping conviction, it should be considered the same criminal conduct for calculating the standard ranges for the kidnapping and robbery convictions.

The State responds, citing State v. Nitsch, 100 Wn. App. 512, 523, 997 P.2d 1000 (2000), review denied, 141 Wn.2d 1030 (2002), that Mr. Van Brocklin waived this issue at sentencing. BOR 6-8.

Mr. Van Brocklin's case is distinguishable from Nitsch. Unlike Nitsch, he did not *affirmatively* agree to the calculation of his offender score: "We hold that Nitsch waived review of this issue when he agreed to the calculation of the standard range." Nitsch, 100 Wn. App. at 514. The Nitsch court, in fact, expressly distinguished its holding from the holdings in State v. Anderson, 92 Wn. App. 54, 960 P.2d 975 (1998), review denied, 137 Wn.2d 1016 (1999); State v. Rowland, 97 Wn. App. 301, 983 P.2d 696 (1999); and State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1991), where silence was held not to constitute a waiver.

The State represented Mr. Van Brocklin's standard range sentences to be 108 to 144 months for the kidnapping conviction and 87 to 116 months for the robbery. RP(sent) 11. Allowing him to challenge the erroneous standard ranges on appeal will not allow him to argue inconsistently at trial and on appeal because he did not agree that these were correct standard ranges at sentencing, nor base any argument at sentencing on an agreement that these ranges were correct.

Nor does routine consideration of the same criminal conduct issue unduly burden the sentencing court. RCW 9.94A.589(1) plainly and unambiguously provides that in calculating offender score, other current offenses are not included if the other current offenses are found by the trial court to be the same criminal conduct. Where two crimes against the same person are intertwined and one requires proof that it furthers the other, under RCW 9.94A.589(1), the sentencing court should routinely consider whether they are the same criminal conduct before concluding that each should be counted as offender score for the other. While the trial court's determination of the issue may involve discretion, In re Personal Restraint of

Goodwin, 146 Wn.2d 861, 875, 50 P.3d 618 (2002), the right to consideration under RCW 9.94A.589(1) is not discretionary, nor is there anything in the statute which requires a defendant to raise the same criminal conduct issue.

The issue should not be deemed to have been waived by silence.

b. There is no factual dispute; the crimes are the same criminal conduct.

The State asserts that the kidnapping and robbery are not the same criminal conduct because they were sequential and involved different criminal intents. The State asserts that "[w]hile the kidnapping left him free to then commit the robbery, Van Brocklin had ample time to 'pause and reflect' before committing the robbery." BOR at 12.

Under the undisputed facts, however, the sole intent of the kidnapping was to allow the robbery to be completed. Objectively viewed, the intent did not change throughout the incident. The intent throughout was to commit the robbery, and the kidnapping facilitated the robbery and had no independent purpose. This differs from the case cited by the State, State v. Wilson, 136 Wn. App.

596, 150 P.2d 144 (2007), in which Wilson entered a residence in violation of a restraining order and assaulted the victim and then left the house and returned and threatened to kill the victim. Wilson, 136 Wn. App. at 613-614. In Wilson, as the Court found, the defendant simply committed two unrelated crimes against the same victim; neither furthered the other.

The relevant cases are those cited in the Opening Brief of Appellant. In State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237 (1987), the defendant got into a car with two women at a shopping mall near Everett, Washington, and forced them, at gun point, to drive to Seattle. Dunaway, 109 Wn.2d at 211. The defendant took money from each woman and forced one of the women to enter a bank to withdraw money to give to him. When the woman failed to return, Dunaway left. He pled guilty to one count of kidnapping and one count of robbery for each victim. Dunaway, at 211-221. The Supreme Court held that the convictions for both crimes against each victim encompassed the same criminal conduct; the kidnapping conviction depended on his intent to commit robbery and his intent did not change between the two crimes. Dunaway, at 217.

In State v. Anderson, 72 Wn. App. 453, 464 P.2d 1001 (1994), the defendant, who was an inmate being transported, struggled with the transporting officer and escaped. The Anderson court held that the assault furthered the escape and constituted the same criminal conduct. Anderson, 72 Wn. App. at 464.

In State v. Collins, 110 Wn.2d 253, 262-263, 751 P.2d 837 (1988), the court held that two convictions were the same criminal conduct where the defendant knocked on the victim's door looking for the address of the previous residents, but when the victim allowed the defendant in to use the telephone, he assaulted and raped her. In State v. Vermillion, 66 Wn. app. 223, 832 P.2d 95 (1992), the court held that an assault furthered the commission of indecent liberties where the defendant knocked his victim to the ground and then groped her. See also, State v. Taylor, 90 Wn. App. 312, 950 P.2d 526 (1998) (assault and kidnapping were the same criminal conduct where the assault furthered the defendant's intent to abduct the victim).

Here, at the least, the convictions for robbery and kidnapping should be considered the same criminal conduct.

3. MR. VAN BROCKLIN'S CONVICTION FOR ATTEMPTED FIRST DEGREE THEFT SHOULD BE REVERSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE OF INTENT TO STEAL A CAR.

The State asks this Court to speculate that Mr. Van Brocklin intended to steal Mr. McCarty's truck rather than something inside it. Speculation is insufficient to establish proof beyond reasonable doubt. The evidence showed that Mr. Van Brocklin was trying to get into the truck through the passenger side window. The State admits that he could just as likely have been trying to take Mr. McCarty's briefcase which was left in the truck. BOR 14.

Further, the record shows that Mr. Van Brocklin did not take a pickup truck which was parked near the open gate to Mr. Taptio's property, apparently with the keys in it. Mr. Taptio also reported that his assailant wanted his wallet and credit cards, not the keys to his truck. It was Mr. Taptio who suggested the the wallet was in the truck. Given this evidence, there was insufficient evidence for "a rational trier of fact taking the

evidence in the light most favorable to the State [to] find, beyond a reasonable doubt, the facts needed to support the conviction." Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 216, 616 P.2d 628 (1980); State v. Green, supra.

4. THE INTRODUCTION OF TESTIMONIAL HEARSAY DENIED MR. VAN BROCKLIN HIS RIGHTS UNDER THE SIXTH AMENDMENT.

The State concedes that testimonial hearsay was introduced at trial through Detective Hamilton, in violation of Mr. Van Brocklin's Sixth Amendment right to confrontation of witnesses, as set out in Crawford v. Washington, 541 U.S. 36, 124 S. Ct, 1354, 158 L. Ed. 2d 177 (2004). The State nevertheless argues that the error was harmless. BOR 14-20.

As constitutional error the State bears the burden of showing that the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). This standard cannot be met by the State.

The erroneously-admitted evidence was introduced to support the State's theory that Mr. Van Brocklin was near the scene of the McCarty truck at the time someone tried to break into it and that he was trying to steal the truck rather

than steal something inside the truck. The telephone number provided by Lois Reese tended to place Mr. Van Brocklin with a blue pickup truck after the Taptio incident, as did the testimony that the battery in Mr. Taptio's pickup when it was found was new. This evidence placed other events in context and supported the eye-witness identifications which the jury might otherwise have questioned. The erroneous admission of the evidence was not harmless beyond a reasonable doubt.

5. DETECTIVE HAMILTON'S OPINION TESTIMONY AS TO GUILT DENIED MR. VAN BROCKLIN HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO A JURY DETERMINATION BASED ON THE EVIDENCE AGAINST HIM.

The State tries to minimize the impact of Detective Hamilton's opinion testimony even though it clearly conveyed to the jury his opinion that the police believed Mr. Van Brocklin was attempting to steal Mr. McCarty's truck rather than his briefcase or something else inside the truck. BOR 2-24. Detective Hamilton's opinion testimony, however, could not have been more prejudicial, given the absence of evidence supporting the conclusion that Mr. Van Brocklin intended to steal the truck.

First, the State asserts that Hamilton's opinion was harmless because Mr. Van Brocklin was charged with stealing the truck. This argument should be rejected. Mr. Van Brocklin was charged with first degree theft; and, in any event, the jurors were expressly instructed that the filing of an information could not be considered evidence of guilt. CP 100, 174-175. Second, contrary to the State's argument, it is very likely that the jurors were swayed by the opinions of a police officer. "An opinion as to guilt of the defendant is particularly prejudicial and improper where it is expressed by a government official, such as a sheriff or a police officer." State v. Sanders, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992).

Detective Hamilton's testimony that the tree branches were significant and that they were placed on top of Mr. Taptio told the jurors how to resolve disputed facts and that the police had determined during their investigation what happened during the incident and that Mr. Van Brocklin was guilty of the crimes with which he was charged. RP 52, 65, 177.

In none of the three instances was Detective Hamilton's opinion testimony admissible under ER

702 because his opinions were not based on expertise but were merely a personal resolution of disputed factual issues.

A challenge to this impermissible opinion testimony can be raised for the first time on appeal because it is a manifest constitutional error that has "practical and identifiable consequences in the trial of the case." State v. Florczak, 76 Wn. App. 55, 73-74, 882 P.2d 199 (1994) (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

The extensive and unfairly prejudicial opinion as to guilt and invasion of the province of the jury denied Mr. Van Brocklin a fair trial and should require reversal of his convictions.

6. MR. VAN BROCKLIN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S FAILURE TO OBJECT TO THE INTRODUCTION OF HIS BOOKING PHOTOGRAPH.

The jurors not only heard that the photo montage shown to witnesses were "booking photos," they heard Detective Hamilton testify that when he asked Deputy Cassidy to "punch in" the name Erin Van "something" into his computer to access county and jail files, Cassidy came up with Mr. Van Brocklin's name. RP 31, 34, 199.

The introduction of past involvement with crimes and the booking photo improperly conveyed to the jurors that Mr. Van Brocklin had a criminal history and that he was acting consistently with his criminal character in committing the charged crime. As set out in the Opening Brief of Appellant this was improper under ER 404(b) and denied Mr. Van Brocklin his state and federal constitutional rights to the presumption of innocence.

Because it is well settled that a booking photograph is not generally admissible and is unfairly prejudicial to a defendant, defense counsel was ineffective for failing to object to its admission. State v. Sanford, 128 Wn. App. 280, 286, 115 P.2d 368 (2005); State v. Henderson, 100 Wn. App. 794, 803, 998 P.2d 907 (2000); State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986); Estelle v. Williams, 425 U.S. 501, 504-505, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976) (forcing a defendant to appear in jail garb at trial may deny him a fair trial); State v. Stevens, 35 Wn. App. 68, 70, 665 P.2d 426 (1983).

There was no possible strategic reason for allowing the State, without objection, to label the

photograph used in the montages as a "booking photo" of Mr. Van Brocklin or to elicit testimony that Mr. Van Brocklin had been involved in the criminal justice and jail system in the past. This evidence could not have evoked sympathy for Mr. Van Brocklin or tended to negate any of the elements of the crimes charged against him. The only effect of the introduction of the photo and testimony was to invite the jury to convict Mr. Van Brocklin on a theory that he was the type of person to have committed the crimes. Therefore, by failing to object, defense counsel's performance fell below an objective standard of reasonableness and prejudiced Mr. Van Brocklin.

Under Strickland v. Washington, 466 U.S. 690, 80 L. Ed. 2d 674, 104 S. Ct. 2052, 2066 (1984), he was denied the effective assistance of counsel guaranteed to him by the state and federal constitutions. Counsel's performance fell below an objective standard of reasonableness and prejudiced Mr. Van Brocklin; within reasonable probabilities, sufficient to undermine confidence in the result, the deficient performance affected the outcome of trial. State v. Meckleson, 133 Wn. App. 431, 436, 135 P.2d 991 (2006), review denied, 154 P.3d 919

(2007); State v. Rainey, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001), review denied, 145 Wn.2d 1028 (2002).

Counsel's deficient performance denied Mr. Van Brocklin the presumption of innocence and the effective assistance of counsel. His convictions should be reversed.

7. THE FAILURE TO INSTRUCT THE JURY THAT NO ADVERSE INFERENCE COULD BE DRAWN FROM THE FACT THAT MR. VAN BROCKLIN DID NOT TESTIFY SHOULD REQUIRE REVERSAL OF HIS CONVICTIONS.

It is undisputed that defense counsel proposed a "no-adverse-inference" instruction, WPIC 6.31, and the trial court agreed to give it. CP 77. The trial court, however, inadvertently left it out. RP(sent) 8, 10.

Without any citation to authority, the State asks this Court to hold that failing to notice that a proposed instruction has been omitted is analogous to proposing an erroneous instruction. BOR 31. That invitation should be rejected because "failing to notice" a mistake by the court is quite different from affirmatively proposing an erroneous instruction. Defense counsel did nothing more than rely on the trial court's affirmative agreement to give the instruction.

In effect the trial court's error was the same as a refusal to give the "no-adverse-interference" instruction, which under settled law is harmless error only if harmless beyond a reasonable doubt. Carter v. Kentucky, 450 U.S. 288, 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981); State v. Soto, 519 F.3d 927 (2008).

Here, the error was not harmless beyond a reasonable doubt. It is very likely that the jury decided that Detective Hamilton was correct in testifying that Mr. Van Brocklin intended to steal Mr. McCarty's truck because he did not testify otherwise, or that he intended to kidnap Mr. Taptio. The failure to give the instruction should require reversal of Mr. Van Brocklin's convictions. The failure to give the instruction was constitutional error under the state and federal constitutions.

8. CUMULATIVE ERROR DENIED MR. VAN BROCKLIN A FAIR TRIAL.

As set out in the Opening Brief of Appellant, the combined effects of the errors in the case require reversal, even if no one individual error would. Detective Hamilton told the jurors that Mr. Van Brocklin had attempted to steal the car and had

attempted to conceal Mr. Taptio by placing branches of a tree over him. He told the jurors that his version of where the incident took place and what happened was what happened. Hamilton introduced testimonial hearsay and evidence that Mr. Van Brocklin had been booked for a crime in the past. These errors, combined with the failure to give the instruction to the jurors that they could not draw any adverse inferences from Mr. Van Brocklin's not testifying denied him a fair trial.

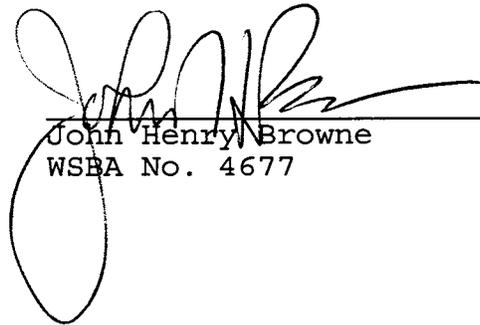
Although the State argues on appeal that the errors were harmless because Mr. Van Brocklin's counsel argued to the jury that his acts did not constitute the crime charged, rather than deny all involvement, no authority is cited for this argument. Mr. Van Brocklin defended against the charges at trial and the errors collectively prejudiced him. The jury very likely was swayed by the opinion of Detective Hamilton that he was attempting to steal a car, by evidence that Mr. Van Brocklin had past convictions or arrests and by his failure to testify on his own behalf. These errors individually, and certainly cumulatively, denied Mr. Van Brocklin the fair trial to which he is guaranteed by the state and federal constitutions.

C. CONCLUSION

Appellant respectfully submits that his first degree kidnapping and attempted first degree theft convictions should be vacated and his remaining counts reversed for retrial. If his first degree kidnapping conviction is not dismissed, it should be considered the same criminal conduct as his robbery conviction.

DATED this 24 day of November, 2008

Respectfully submitted,



John Henry Browne
WSBA No. 4677

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DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Respondent,

ERIN VAN BROCKLIN,

Appellant.

No. 347226-II
Court of Appeals

DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I caused to be served by ABC Legal Messenger Service a copy of the attached "Reply Brief of Appellant" upon the following counsel of record:

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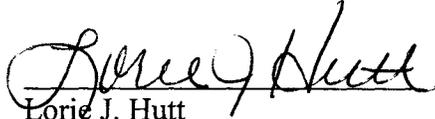
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and mailed a copy via U.S. Regular Mail, postage prepaid to:

Erin VanBrocklin, DOC 705894
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DATED at Seattle, Washington, this 24th day of November, 2008.



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