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DIVISION II

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No. 37422-6-II

STATE OF WASHINGTON
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
BY DEPUTY
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
Cause No. 07-1-00515-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether sufficient evidence was produced at trial to support a conviction for first degree kidnapping distinct from the conviction for first degree robbery.

2. Whether the convictions for first degree kidnapping and first degree robbery constitute same criminal conduct for purposes of calculating the offender score.

3. Whether there was sufficient evidence produced to support the conviction for attempted first degree theft.

4. Whether Detective Hamilton's testimony about information obtained from non-testifying witnesses violated Van Brocklin's Sixth Amendment confrontation rights.

5. Whether Detective Hamilton impermissibly expressed an opinion as to Van Brocklin's guilt.

6. Whether Van Brocklin's attorney was ineffective for failing to object to the introduction of his booking photograph.

7. Whether the inadvertent omission of the jury instruction that informs the jury that the defendant is not compelled to testify and that no prejudice can result from his failure to do so requires reversal.

8. Whether there was cumulative error such as to require reversal.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the substantive and procedural facts of the case.

C. ARGUMENT.

1. The State produced sufficient evidence at trial to support the conviction for first degree kidnapping independent of the conviction for first degree robbery.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, *supra*, at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be

inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

Van Brocklin correctly cites In re Pers. 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. This is not one of those cases. Whether or not a kidnapping is incidental to another crime is a “determination to be made under the facts of each case, in light of the totality of surrounding circumstances.” State v. Green, *supra*, at 227.

To establish that a defendant committed the offense of first degree kidnapping, the State must prove that the defendant intentionally abducted another person. RCW 9A.40.020. However, the evidence may be insufficient to establish abduction where there is mere incidental restraint and movement of the victim during the course of another crime which has no independent purpose or injury. Green, *supra*, at 227. Green demonstrates that simply because the restraint takes place to facilitate another crime does not by itself render that restraint "merely incidental." A fundamental component of Green's holding was that the "mere incidental restraint and movement of a victim which might occur during the course of a homicide" do not alone establish a kidnapping. Id. That is, restraint and movement is merely incidental to a murder if the totality of the circumstances shows that the victim was restrained and moved *during* the commission of that murder.

In Van Brocklin's case, the kidnapping and robbery were sequential rather than simultaneous. A kidnapping that occurs close in time but after the completion of a robbery is not incidental to the robbery. State v. Allen, 94 Wn.2d 860, 864, 621 P.2d 143 (1980). In addition, restraint may not be merely incidental to the commission of a crime where actual physical restraints are involved. See, e.g.,

State v. Vladovic, 99 Wn.2d 413, 662 P.2d 853 (1983); Allen, *supra*. “Neither the flight from the scene of the robbery nor the means of flight therefrom was statutorily or logically a part of the robbery.” Allen, *supra*, at 864. Here, while the kidnapping was for the purpose of immobilizing and concealing the victim in order to facilitate the robbery, the robbery occurred some distance from the kidnapping and after it was complete. The victim had been attacked, tied up with his own suspenders, and dragged into some brush. [RP 117-119] Van Brocklin left him there, went to the pickup at the end of the driveway, and drove it away. [RP 120-121]. The abduction was not necessary in order to steal the pickup, nor was it part of the actual theft. The two offenses were distinct from each other.

Kidnapping in the first degree can be committed by several alternative means, differing by the intent of the abduction.

9A.40.020 Kidnapping in the first degree. (1) A person is guilty of kidnapping in the first degree if he intentionally abducts another person with intent:

- (a) To hold him for ransom or reward, or as a shield of hostage; or
- (b) To facilitate commission of any felony or flight thereafter; or
- (c) To inflict bodily injury on him; or
- (d) To inflict extreme mental distress on him or a third person; or

(e) To interfere with the performance of any governmental function.

Under Van Brocklin's interpretation, subsection (b) would be entirely superfluous because kidnapping would always be incidental to the crime it facilitated. A court must read a statute as a whole and harmonize each provision. State v. Nam, 136 Wn. App. 698, 704, 150 P.3d 617 (2007).

2. The convictions for first degree kidnapping and first degree robbery do not constitute same criminal conduct for purposes of calculating Van Brocklin's offender score.

a. Van Brocklin did not raise this issue below, and should be precluded from seeking review.

During his sentencing hearing, Van Brocklin told the court that he thought a prior conviction from some seventeen years earlier might have washed out. [02/29/08 RP 15] The prosecutor and defense counsel agreed that because there were intervening misdemeanor convictions, the questioned conviction did not wash out. Van Brocklin did not raise the issue of counting the current first degree kidnapping and first degree robbery convictions as the same criminal conduct. An appellate court does not review on appeal an alleged error not raised at trial unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). An appellant must

show actual prejudice in order to establish that the error is “manifest.” State v. Lynn, 67 Wn. App. 339, 346, 835 P.2d 251 (1992).

Only an illegal or erroneous sentence is reviewable for the first time on appeal. Application of the same criminal conduct statute involves both factual determinations and the exercise of discretion. It is not merely a calculation problem, or a question of whether the record contains sufficient evidence to support the inclusion of out-of-state convictions in the offender score. We therefore see a fundamental difference between this case and [State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999)] and [State v. McCorkle, 137 Wn.2d 490, 973 P.2d 461 (1999)]. Unlike the out-of-state conviction provision, the same criminal conduct statute is not mandatory, and sound reasons exist for the implicit grant of discretion contained in the legislative language (“if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.”)

State v. Nitsch, 100 Wn. App. 512, 523, 997 P.2d 1000 (2000).

The Nitsch court reasoned that allowing a defendant to raise the same criminal conduct issue on appeal permits him to try one argument in the trial court, and if that is unsuccessful, asking for remand for the trial court to consider another, possibly inconsistent, argument. As discussed below, the same criminal conduct analysis includes an inquiry into the intent of the defendant; that is not an inquiry that an appellate court should be undertaking. Id., at 524.

Additionally, “permitting review for the first time on appeal is to require sentencing courts to search the record to ensure the absence of an issue not raised. . . . [T]he trial court’s failure to conduct such a review sua sponte cannot result in a sentence that is illegal.” Id., at 524-25.

Because Van Brocklin did not raise this issue below, the State asks this court to decline to consider it.

b. Even if this court accepts review of this issue, the two crimes do not constitute same criminal conduct.

Whether sentences are consecutive or concurrent is determined by RCW 9.94A.589(1):

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. . . . “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.

To constitute the same criminal conduct, the separate crimes must involve all three of the elements listed in the statute--(1) the same criminal intent, (2) the same time and place, and (3) the same

victim. State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). “This court must narrowly construe RCW [9.94A.589(1)] to disallow most assertions of same criminal conduct.” State v. Palmer, 95 Wn. App. 187, 190-91, 975 P.2d 1038 (1999). The trial court’s ruling will be reversed only if it abused its discretion or misapplied the law. State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

The same criminal conduct analysis involves both factual determinations and trial court discretion. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 875, 50 P.3d 618 (2002). Here, the victim was clearly the same for both counts. The place was the same Christmas tree farm. However, the time and intent were not.

“[T]he repeated commission of the same crime against the same victim over a short period of time” can constitute same criminal conduct, 13A SETH AARON FINE, WASHINGTON PRACTICE § 2810, at 112 (Supp. 1996). In Vike, *supra*, the defendant was convicted of two counts of possession of a controlled substance after he was arrested with both heroin and clonazepam in his possession at the same time. The court there held that “on the narrow facts before us, simultaneous simple possession of two or more controlled substances encompasses the same criminal conduct for sentencing purposes.” Vike, *supra*, at

409. In State v. Walden, 69 Wn. App. 183, 847 P.2d 956 (1993), the court found that two acts of sexual intercourse forced upon the same victim in a short period of time constituted the same criminal conduct.

In Van Brocklin's case, the kidnapping was complete when he tied up the victim and dragged him into the undergrowth. He then traveled some distance to the pickup, which was parked in the driveway near the road. The two crimes did not occur simultaneously, such as the assault and indecent liberties in State v. Vermillion, 66 Wn. App. 223, 832 P.2d 95 (1992), or the two drug transactions in State v. Porter, 133 Wn.2d 177, 942 P.2d 974 (1997). Here the crimes were sequential and not the same criminal conduct.

To be considered the same criminal conduct, the two crimes must have the same objective, not subjective, intent. State v. Dunaway, 109 Wn.2d 207, 216, 743 P.2d 1237 (1987). This court has found different intents even where the two offenses at issue were assault in violation of a restraining order and felony harassment. In State v. Wilson, 136 Wn. App. 596, 150 P.2d 144 (2007), Wilson had broken down the door of the residence he shared with his victim, even though she had a restraining order

against him. He grabbed her by the hair, pulled her out of bed, and kicked her. After leaving the house briefly, he reentered, picked up a piece of wood, and threatened to kill her with it. In finding that the two offenses were not the same criminal conduct, the court articulated the standard this way:

Two crimes do not contain the same criminal intent when the defendant's intent objectively changes from one crime to the other. . . Objective intent may be determined by examining whether one crime furthered the other or whether both crimes were a part of a recognizable scheme or plan. . . But where the second crime is "accompanied by a new objective 'intent,'" one crime can be said to have been completed before commencement of the second; therefore, the two crimes involved different criminal intents and they do not constitute the same criminal conduct. . .

Id., at 613-14, (internal cites omitted).

The Wilson court further examined the intents for the two crimes as defined in the statutes and found them different. Here, the intent for first degree kidnapping is to abduct another person and to facilitate another crime or the flight thereafter, RCW 9A.40.020, and the intent in first degree robbery is theft, to take personal property from the person or in the presence of another. RCW 9A.56.190, 200. Van Brocklin's intent, as shown by the evidence presented, was to incapacitate the victim so he would not

interfere with Van Brocklin's taking of his property, *i.e.*, abduct and then steal. This language from Wilson applies equally well to Van Brocklin's case:

Not only do these two crimes' respective statutes define different criminal intents, but also the two acts giving rise to the two criminal charges were separated in time, providing opportunity for completion of the assault and ending Wilson's assaultive intent, followed by a period of reflection and formation of a new, objective intent upon reentering the house to threaten Sanders and to harass her. . . Construing RCW 9.94A.589(1)(a) narrowly, as we must, to disallow most assertions of "same criminal conduct," we vacate the trial court's same-criminal-conduct finding. . .

Wilson, *supra*, at 615 (internal cites omitted).

Van Brocklin's crimes were sequential, with different intents. While the kidnapping left him free to then commit the robbery, Van Brocklin had ample time to "pause and reflect" before committing the robbery. Given the general rule that the crimes count separately, there is no basis here for finding an exception to the rule. The facts here are significantly different than those in Vike, *supra*, for example, where the court held that "on the narrow facts before us, simultaneous simple possession of two or more controlled substances encompasses the same criminal conduct for sentencing purposes." Given the facts in Van Brocklin's case, first

degree kidnapping and first degree robbery do not constitute the same criminal conduct for purposes of calculating his offender score. The court did not abuse its discretion in counting the two offenses separately.

3. There was sufficient evidence presented to support the conviction for attempted first degree theft.

The standard for review of a sufficiency of the evidence challenge is set forth above. Using that standard, there was sufficient evidence for a rational trier of fact to find that Van Brocklin was attempting to steal McCarty's pickup. Van Brocklin's car had broken down very near the location where McCarty's vehicle had also quit running. [RP 33] He was attempting to use the broken-off antenna from the McCarty pickup to break into that vehicle. [RP 86, 89] He did, in fact, later steal the pickup belonging to Don Taptio. [RP 121]

The State need not disprove all conceivable theories consistent with innocence as long as the record contains sufficient probative facts from which the jury could reasonably find guilt beyond a reasonable doubt. State v. Bridge, 91 Wn. App. 98, 100, 955 P.2d 418 (1998). Circumstantial evidence that is consistent with the theory of guilt is as probative and reliable as direct

evidence. State v. Sewell, 49 Wn.2d 244, 246, 299 P.2d 570 (1956). As with direct evidence, circumstantial evidence need not be proved to be inconsistent with any conceivable hypothesis of innocence. It need only be sufficient to convince a reasonable jury of guilt beyond a reasonable doubt. State v. Gosby, 85 Wn.2d 758, 765-66, 539 P.2d 680 (1975); State v. Kovac, 50 Wn. App. 117, 119, 747 P.2d 484 (1987).

Here it is true that the jury could have inferred from the evidence that Van Brocklin intended only to break into the McCarty vehicle and steal the contents. However, there is sufficient evidence which, considered in the light most favorable to the State, as it must be, allows a rational jury to conclude that he was attempting to steal the pickup itself.

4. Detective Hamilton's testimony regarding information obtained from non-testifying witnesses was improper but not grounds for reversal.

Van Brocklin assigns error to three specific portions of Detective Hamilton's testimony. The first is the recitation of statements made by a woman who lived on Forstrom Road and who saw the defendant's vehicle on the road in front of her home on the morning of March 18, 2007. She told Hamilton that she had seen a male in and around the vehicle around 11:00 a.m. There

was no description of the male. Van Brocklin did not object to this testimony. [RP 35]

Second, Hamilton testified that the defendant told him he had contacted Lois Reese. Hamilton contacted Reese and, on the stand, began to testify as to what she had told him regarding phone numbers. Van Brocklin objected and was sustained. [RP 219-220] Then, without objection, Hamilton testified that he later called her back and obtained phone numbers captured on her phone from incoming calls. [RP 220-21]

Third, Hamilton testified that when the pickup stolen from Taptio was located, it had a new battery in it, and, knowing that the pickup had had battery problems on March 18-19, he investigated and learned that the battery had been recently acquired. Van Brocklin made a hearsay objection, but before the court could rule, the prosecutor asked if the battery had been purchased after March 19, 2008. Hamilton said that it was. There was no objection to that statement. [RP 225]

While the first two instances are testimonial hearsay statements, the third is questionable. Officers often testify at trials regarding information they obtain from various sources, and, when the specific statement is not repeated, it is not necessarily hearsay,

i.e., a statement, other than one made by the declarant while testifying at trial, offered to prove the truth of the matter asserted. [ER 801(c)] However, for purposes of this argument, the State will assume that the testimony was hearsay.

Appellate courts will generally not consider issues raised for the first time on appeal. [RAP 2.5(a)]; State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). An objection provides the trial court the opportunity to prevent or cure the error, such as striking testimony or giving curative instructions. Id. “However, a claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right.” Id., at 927. An error is manifest if it actually affected the defendant’s rights at trial. If the error is manifest, it is still subject to a harmless error analysis. Id.

[C]onstitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. . . . However, a constitutional error does not require reversal when it is clear beyond a reasonable doubt that the jury verdict is unattributable to the error.

State v. Watt, 160 Wn.2d 626, 644-45, 160 P.3d 640 (2007)

(internal cites omitted).

Van Brocklin has raised a confrontation clause challenge to these statements, based upon Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The Crawford court specifically did not address the issue of whether a violation of the confrontation clause can be harmless error. Id., at 42. The Washington Supreme Court, in Watt, *supra*, at 635, held that confrontation clause violations are still subject to a harmless error analysis after Crawford.

Automatic reversal is required only when a constitutional error can be characterized as a "structural defect." "Structural defects" defy harmless error analysis because they undermine the framework of the trial process itself, their effect cannot be ascertained without resort to speculation, or the question of harmlessness is irrelevant based on the nature of the right involved.

.....
The admission of a hearsay statement in violation of the confrontation clause is a classic trial error. This is so because a reviewing court may evaluate the possible effect of the hearsay statement in the context of all the evidence presented at trial.

Watt, *supra*, at 632-33.

The correct inquiry is whether, assuming that the damaging potential of the testimony was fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. . . . Factors bearing on this inquiry include "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence

corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and . . . the overall strength of the prosecution's case.

State v. Saunders, 132 Wn. App. 592, 604, 132 P.3d 743 (2006) (citing to Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)).

In State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985), the Supreme Court adopted the "overwhelming untainted evidence test," where the court looks "only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." Watt, at 636.

Examining the three hearsay statements complained of by Van Brocklin, in light of these principles, it is apparent that all three are harmless error.

Van Brocklin did not object to Hamilton's testimony that an unidentified woman saw a man at the defendant's broken-down vehicle about 11:00 a.m. Hearsay not objected to is admitted for its truth. State v. Whistler, 61 Wn. App. 126, 139, 810 P.2d 540 (1991). His failure to object precludes appellate review unless it is a manifest error. He argues that it tends to support the State's theory that he was trying to steal McCarty's pickup rather than break into it

for other purposes. This does not, however, show prejudice, particularly in light of the overwhelming evidence that he did intend to steal the pickup. Before he spoke to the woman, Hamilton had already located the defendant's disabled Bronco near both the Christmas tree farm and the McCarty vehicle, so the jury knew he was on foot and needed transportation. [RP 33] He did steal the pickup belonging to the owner of the tree farm a short time later. The fact that an unidentified man was seen near Van Brocklin's disabled vehicle at 11:00 a.m. adds little to the quantity of evidence before the jury.

Although Van Brocklin objected when Hamilton started to repeat what he had been told by Lois Reese, he did not object when Hamilton testified that he called Reese to get the numbers from which Van Brocklin had called her, he got two numbers, and one of them led him to George Albertson, the chaplain who had tried to assist a person who asked to use his phone. [RP220-221]. While it is true that the State felt this evidence important enough to introduce it, even without it there was more than enough evidence to prove Van Brocklin had stolen the blue pickup. Taptio identified Van Brocklin in court as the person who attacked him and drove off in the blue pickup. The further information fleshed out the picture

for the jury, but even if the jury had not heard that Reese's phone had recorded the chaplain's phone number, it would have had sufficient evidence to convict him of first degree kidnapping and first degree robbery.

The testimony that the battery in the recovered pickup had been purchased after March 19 is even more tangential. The chaplain testified he had helped a man try to jump start a pickup like the stolen one; that the man looked like the defendant, but was thinner, and that the man had borrowed his phone to call someone in Centralia to come get him. [RP 211-12] The fact that when the pickup was recovered several days later it had a new battery in it that was purchased after March 19 does not add to the quantity of evidence proving Van Brocklin guilty. Relevance would have been a more appropriate objection than hearsay.

Under a harmless error analysis, all of the hearsay statements of which Van Brocklin complains are harmless beyond a reasonable doubt.

5. Detective Hamilton did not express an opinion as to Van Brocklin's guilt.

Van Brocklin takes issue with three portions of Detective Hamilton's testimony, which he labels as opinion testimony. The

State agrees that he has accurately stated the law regarding opinion testimony, and that Hamilton does not qualify as an expert under ER 702. However, it is a stretch to label these comments as “opinion.”

The first remark, which he claims tells the jury that he was attempting to steal the McCarty’s vehicle, came early in Hamilton’s testimony when the prosecutor was asking what contact he had and what information he received from other officers. He replied:

I did. Dep. Rudloff pulled up a short time after I arrived and told me he had been investigating an attempted auto theft that occurred probably an eighth of a mile east of the entrance to the tree farm. Dep. Rudloff said that earlier, maybe an hour or two, if I remember, an individual had attempted to steal a vehicle. His vehicle had broken down, and the person that owns the vehicle had apparently went home to get his spouse, returned in another vehicle. When they returned, they seen an individual somehow trying to jimmy with the window or something to unlock the car. There was a confrontation, according to Dep. Rudloff, and the individual ran out into the roadway, was nearly struck by a vehicle, and then ran into the woods.

[RP 29-30].

What this testimony does is tell the jury that Hamilton received this information from Rudloff, and that the McCarty incident was being investigated as an attempted vehicle theft. It does not in any way tell the jury that what occurred was, in fact, an

attempted theft of the vehicle. These remarks were followed by nearly two hundred pages of testimony. The jury was instructed that it was to decide the facts based upon the evidence presented during the trial. [Instruction No. 1, CP 100] This testimony did not, as Van Brocklin asserts, tell the jury how to resolve disputed facts. It was no secret that the State witnesses believed Van Brocklin had attempted to steal the McCarty vehicle. That's what he was charged with. It is highly unlikely that the jurors, during deliberation, would have said, "Gosh, the evidence of attempted car theft is pretty weak, but Detective Hamilton said that's what it was, and being a police officer, he must be right, so we'll convict the defendant."

The second remark to which Van Brocklin objects is this statement made by Hamilton in response to the prosecutor's question as to whether, when Hamilton arrived at the tree farm, another deputy already present had shown him around the area:

He did. Sgt. Brady, I don't know if he actually even had an idea of what happened or where it even happened, but he was able to walk the grounds of the tree farm and find evidence and what we believed and what we later found to be what happened there.

[RP 35-36] This comment (which verges on the incoherent) does not tell the jury that the evidence supported the State's theory of the

case. Read literally, all it says is that Sgt. Brady found evidence. It could be read as saying that “what we believed” and “what we later found to be what happened there” are two different things. It tells the jury nothing, and certainly not that the law enforcement suspicions were confirmed by the evidence.

The final challenged testimony came during Hamilton’s description of the scene of the assault against Taptio and his recording of that scene:

We took a picture of this trail for two reasons: One, it’s the exact scene where it occurred, and also there is some broken branches up there that are going to be of significant importance.

[RP 50] Later, when recounting what he was told by Taptio, Hamilton said:

Then the struggle turned and went this way probably, according to Mr. Taptio, ended up somewhere in this mid area of the trail, and Mr. Taptio was down and covered with some sticks.

[RP 65] When Taptio testified, he told the jury that when he freed himself from the bushes where Van Brocklin put him, he found a broken branch, but “I don’t know if he broke that branch off and put it on me, if he took that time, or the branch broke as he was pushing me into the bushes. I don’t know.” There was a branch, it was on top of Taptio, and the fact that Hamilton referred to it as of

significant importance does not make the comment a statement of an opinion. It is clear that the branch was not broken before Taptio was stashed in the bushes, and it is an indication of the amount of force used to put him there, regardless of whether it was broken off purposely or accidentally. The jury was instructed that it was the sole judge of the value and weight of the evidence. [Instruction No. 1, CP 100]

Even if any or all of these statements could be construed as opinions about the evidence, none of them would be inadmissible. ER 704 does not prohibit opinion evidence just because the opinion “embraces an ultimate issue to be decided by the trier of fact.” State v. Sanders, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992), citing to State v. Jones, 59 Wn. App. 744, 749-50, 801 P.2d 263 (1990), *review denied* 116 Wn.2d 1021 (1991). No witness may testify to an opinion regarding the guilt of the defendant, either directly or by inference, but to qualify as an impermissible opinion it must relate directly to the defendant. Sanders, *supra*, at 387. See also Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993); In Heatley, a police officer was permitted to testify to his opinion that the defendant was “obviously intoxicated” even though that opinion spoke to an ultimate issue of fact in the DUI prosecution. “The fact

that an opinion encompassing ultimate factual issues supports the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt.” Id., at 579.

Further, none of these claimed errors was objected to at trial. It is true that an unpreserved manifest error is reviewable on appeal. State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 492 (1988), but RAP 2.5(a)(3) does not provide that all asserted constitutional claims may be raised for the first time on appeal. The exception to the requirement that the issue be preserved below is a narrow one, affording review only of certain constitutional questions. Id., at 687. The error must be manifest, which means “unmistakable, evident, or indisputable, as distinct from obscure, hidden, or concealed—the error must have had ‘practical and identifiable consequences in the trial of this case.’” State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

Improper opinion testimony is subject to a harmless error analysis.

Under that test, “[a] constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. . . . Under the overwhelming evidence test, the court examines whether the untainted evidence is so overwhelming that it leads necessarily to a finding of guilt.

State v. Thach, 126 Wn. App. 297, 313, 106 P.3d 782 (2005).

In this case, it takes a certain amount of imagination to classify the challenged testimony as opinion evidence. Even if it were, it does not constitute a manifest error, and therefore cannot be challenged for the first time on appeal. Even if it could, any error is harmless. The likelihood that the testimony swayed the jury to convict despite the evidence is nonexistent.

6. Trial counsel was not ineffective for failing to object to the introduction of Van Brocklin's booking photograph.

On two occasions, State witnesses referred to obtaining Van Brocklin's booking photo and using it to create photo montages which were then shown to witnesses. [RP 31, 199] On neither occasion did Van Brocklin object, thus any evidentiary issue has not been preserved for appeal. State v. Guloy, *supra*, at 422. Because he did not do so, he now bootstraps his claim as ineffective assistance of counsel. "Claims of ineffective assistance of counsel are of constitutional magnitude and may be brought for the first time on appeal." State v. Soonalole, 99 Wn. App. 207, 215, 992 P.2d 541 (2000).

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient;

and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have been different. In the Matter of the Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989).

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. Neidlich, 78 Wn. App. 71, 77, 895 P.2d 423 (1995) (internal quotes omitted). Failure to object to admission of photos that were clearly mug shots is not necessarily ineffective assistance. See Pittman v. Warden, Pontiac Correctional Ctr., 960 F.2d 688 (7th Cir. 1992) (failure to object to mug shot and lineup identifications was defensible strategic decision within range of competent professional assistance). Nor is failure to request a limiting instruction ineffective assistance where it could be presumed that counsel decided not to reemphasize potentially damaging evidence. See State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447 (1993).

To determine the effect of an improper statement, the court must determine whether the remark, when viewed against the backdrop of all the evidence, so tainted the entire proceeding that the accused did not have a fair trial. State v. Weber, 99 Wn.2d 158, 164, 659 P.2d 1102 (1983). Here there were two references to booking photos, but none to any crimes Van Brocklin had previously committed. Even if the remarks were improper, they were not so prejudicial as to require reversal. If the jurors recognized the significance of the term, at most it told them that Van Brocklin had been arrested before. The evidence of the photo

montages themselves was appropriate, and even if the officers had not used the words “booking photo”, reasonably knowledgeable jurors would have realized that the photos had to come from some place, and the place a police officer is most likely to look is among booking photos.

Van Brocklin has not demonstrated any prejudice resulting from the testimony he challenges. While he argues that it took away his presumption of innocence, that does not make it so. The jury was instructed that he was presumed innocent. [Instruction No. 7, CP 107] The evidence against him was very strong. In closing, his counsel did not even argue that he did not do the acts of which he was accused, but rather that those acts did not constitute the crimes with which he was charged. [RP 302-07] In the context of the entire trial, these two references to booking photos are, at most, harmless error.

7. The inadvertent omission of WPIC 6.31 from the jury instruction is not grounds for reversal.

Van Brocklin included WPIC 6.31 in his proposed instructions. [CP 77] That instruction provides:

The defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way.

Van Brocklin did not testify at trial.

When the instructions were assembled and read to the jury, this instruction was not included. [CP 99-130] Neither party nor the judge noticed the omission at the time, but the following day defense counsel realized the instruction had not been given, and brought a motion for a new trial. [02/29/08 RP 3-5] The court denied the motion. [02/29/08 RP 10]

An appellate court reviews a denial of a motion for a new trial for abuse of discretion. State v. Hutcheson, 62 Wn. App. 282, 297, 813 P.2d 1283 (1991). Here the court based its denial on (1) the fact that it read the instructions to the jury in the presence of counsel, and Van Brocklin did not object to the omission of the requested instruction, and (2) the instructions which were given adequately informed the jury of the defendant's rights. [02/29/08 RP 9-10] A review of those instructions shows that the jury was instructed that it was to consider all of the evidence admitted, but only that evidence [CP 100], the State bore the burden of proof, and the defendant is presumed innocent and had no burden of proving reasonable doubt [CP 107]. From those instructions a jury would understand that the defendant had no duty to testify, and if there was no duty, no adverse inferences could be drawn from his

failure to do so. A defendant receives a fair trial when the instructions, read as a whole, correctly state the applicable law, are not misleading, and allow each party to present its arguments. State v. Holt, 56 Wn. App. 99, 105-6, 783 P.2d 87 (1989). That occurred in this case.

Under the invited error doctrine a defendant who proposes an erroneous instruction cannot complain when it is given. State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999). Whether failing to notice that a proposed instruction has been omitted is invited error appears to be a question of first impression. The State maintains that it is analogous to proposing an erroneous instruction. The Studd court noted that the above rule is a strict one. Id.

It is true that when the defendant requests the instruction that the jury must not draw adverse inferences from his failure to testify, it is error for the court to refuse to give it, unless the error is harmless beyond a reasonable doubt. United States v. Soto, 519 F.3d 927, 930-31 (9th Cir., 2008) Here, however, the court did not refuse to give it. If refusal can be harmless error, then surely an inadvertent failure to give the instruction can also be harmless error. Given the overwhelming quantity of evidence against Van Brocklin, this error, if any, is harmless.

8. There was no cumulative error such as to require reversal.

Under the cumulative error doctrine, a defendant may be entitled to a new trial when several errors, though individually not reversible, cumulatively produced a trial that was fundamentally unfair. See State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. In re Personal Restraint Petition of Lord, 123 Wn.2d 296, 332, *clarified*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849, 130 L. Ed. 2d 86, 115 S. Ct. 146 (1994). Where no prejudicial error is shown to have occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. State v. Stevens, 58 Wn. App. 478, 498, 794 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 128 (1990).

In Van Brocklin's case, any errors which occurred were not prejudicial. There was overwhelming evidence that he committed the crimes, and, as noted, in closing argument his attorney did not deny that he committed the acts which formed the basis of the charges. He argued that those acts should be interpreted differently than the State interpreted them, resulting in a conviction for nothing more than unlawful imprisonment. The only assigned error that

speaks to the interpretation of those acts is his claim that Detective Hamilton gave impermissible opinion evidence, but, as discussed above, the challenged evidence can scarcely be called opinion. There was no prejudicial error, and thus no cumulative error. It cannot be said that the trial Van Brocklin received was “fundamentally unfair.”

D. CONCLUSION.

The State produced sufficient evidence to support all of the charges for which the jury convicted Van Brocklin. The kidnapping and robbery do not constitute the same criminal conduct for purposes of calculating an offender score. Any hearsay errors were harmless beyond a reasonable doubt. Detective Hamilton did not give impermissible opinion testimony. Defense counsel was not ineffective, the inadvertently omitted jury instruction was at worst harmless error, and there was no cumulative error requiring reversal. The State respectfully asks this court to affirm all of the convictions.

Respectfully submitted this 4th day of November, 2008.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent No. 37422-6-II, on all parties or their counsel of record on the date below as follows:

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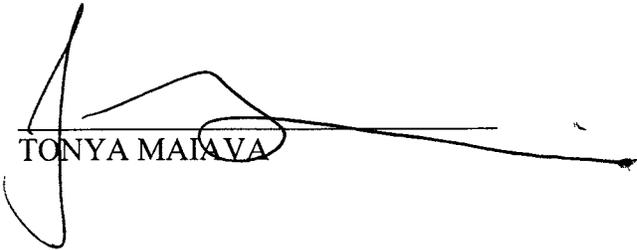
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 4th day of November, 2008, at Olympia, Washington.



TONYA MAIAVA