

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

STATE OF WASHINGTON,

Respondent,

v.

JESSE LEE HARKCOM,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
09 MAR 25 AM 11:56
STATE OF WASHINGTON
BY CM
DEPUTY

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

The Honorable Chris Wickham, Judge
Cause No. 08-1-00224-5

BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT..... 1

 1. Harkcom's convictions for both first degree robbery and drive-by shooting do not violate the constitutional prohibition against double jeopardy..... 1

 2. The court did not abuse its discretion in finding that first degree robbery and drive-by shooting do not constitute the same criminal conduct for purposes of calculating Harkcom's offender score..... 7

 3. The imposition of a firearm enhancement to the conviction for first degree robbery does not violate double jeopardy, nor is it prohibited by Blakely v. Washington 12

 4. Defense counsel was not ineffective 17

 5. It was not reversible error for the trial court to delegate to the bailiff the duty to instruct the reconstituted jury that it was to begin deliberations anew, particularly where the defendant agreed to this procedure 21

D. CONCLUSION..... 27

TABLE OF AUTHORITIES

U.S. Supreme Court Decisions

<u>Apprendi v. New Jersey,</u> 503 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).....	15
<u>Blakely v. Washington,</u> 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).....	14
<u>Blockburger v. United States,</u> 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).....	2, 4
<u>Strickland v. Washington,</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	18, 19

Washington Supreme Court Decisions

<u>In re the Pers. Restraint of Bowman,</u> 162 Wn.2d 325, 172 P.3d 681 (2007)	4, 7, 11
<u>In re the Pers. Restraint of Goodwin,</u> 146 Wn.2d 861, 50 P.3d 618 (2002)	8
<u>In the Matter of the Pers. Restraint of Pirtle,</u> 136 Wn.2d 467, 965 P.2d 593 (1996)	18
<u>In re the Pers. Restraint of Thompson,</u> 141 Wn.2d 712, 10 P.3d 380 (2000)	25
<u>Seattle v. Klein,</u> 161 Wn.2d 554, 166 P.3d 1149 (2007)	26
<u>Seattle v. Patu,</u> 147 Wn.2d 717, 58 P.3d 273 (2002)	24, 25
<u>State v. Bradley,</u> 141 Wn.2d 731, 10 P.3d 358 (2000)	26
<u>State v. Calle,</u> 125 Wn.2d 769, 888 P.2d 155 (1995)	2, 7

<u>State v. Dixon,</u> 159 Wn.2d 65, 147 P.3d 991 (2006)	9
<u>State v. Dunaway,</u> 109 Wn.2d 207, 743 P.2d 1237 (1987)	11, 12
<u>State v. Freeman,</u> 153 Wn.2d 765, 108 P.3d 753 (2005)	2, 6
<u>State v. Haddock,</u> 141 Wn.2d 103, 3 P.3d 733 (2000)	10
<u>State v. Harris,</u> 102 Wn.2d 148, 685 P.2d 584 (1994)	14
<u>State v. Hendrickson,</u> 129 Wn.2d 61, 917 P.2d 563 (1996)	18, 19
<u>State v. McFarland,</u> 127 Wn.2d 332, 899 P.2d 1251 (1995)	18/ 19
<u>State v. Porter,</u> 133 Wn.2d 177, 942 P.2d 974 (1997)	10
<u>State v. Recuenco,</u> 163 Wn.2d 428, 180 P.3d 1276 (2008)	14
<u>State v. Rohrich,</u> 149 Wn.2d 647, 71 P.3d 638 (2003)	9
<u>State v. Sommerville,</u> 111 Wn.2d 524, 760 P.2d 932 (1988)	14
<u>State v. Stenson,</u> 132 Wn.2d 668, 940 P.2d 1239 (1997)	17
<u>State v. Studd,</u> 137 Wn.2d 533, 973 P.3d 1049(1999)	25

<u>State v. Vike,</u> 125 Wn.2d 407, 885 P.2d 824 (1994)	8
<u>State v. Vladovic,</u> 99 Wn.2d 413, 662 P.2d 853 (1983)	5, 6
<u>State v. Womac,</u> 160 Wn.2d 643, 160 P.3d 40 (2007)	3

Decisions Of The Court Of Appeals

<u>State v. Ashcraft,</u> 71 Wn. App. 444, 859 P.2d 60 (1993).....	22
<u>State v. Cole,</u> 117 Wn. App. 870, 73 P.3d 411 (2003).....	3, 5, 7
<u>State v. Adame,</u> 56 Wn. App. 803, 785 P.2d 1144 (1990).....	12
<u>State v Briggins,</u> 11 Wn. App. 687, 524 P.2d 694 (1974).....	18
<u>State v. Brown,</u> 100 Wn. App. 104, 995 P.2d 1278 (2000).....	9
<u>State v. Caldwell,</u> 47 Wn. App. 317, 734 P.2d 542 (1987).....	14
<u>State v. Davis,</u> 90 Wn. App. 776, 954 P.2d 325 (1998).....	11
<u>State v. Faagata,</u> 147 Wn. App. 236, 193 P.3d 1132 (2008).....	2, 3
<u>State v. Fredrick,</u> 45 Wn. App. 916, 729 P.2d 56 (1989).....	18
<u>State v. Frohs,</u> 83 Wn. App. 803, 924 P.2d 384 (1996).....	5, 6

<u>State v. Husted,</u> 118 Wn. App. 92, 74 P.3d 672 (2003).....	14
<u>State v. Kelley,</u> 146 Wn. App. 370, 189 P.3d 853 (2008).....	16
<u>State v. Nguyen,</u> 134 Wn. App. 863, 142 P.3d 1117 (2006).....	15, 16
<u>State v. Nitsch,</u> 100 Wn. App. 512, 997 P.2d 1000 (2000).....	8
<u>State v. Palmer,</u> 95 Wn. App. 187, 975 P.2d 1038 (1999).....	9
<u>State v. Price,</u> 103 Wn. App. 845, 14 P.3d 841 (2000).....	9, 12
<u>State v. Stanley,</u> 120 Wn. App. 312, 85 P.3d 395 (2004).....	22
<u>State v. Tessema,</u> 139 Wn. App. 483, 162 P.3d 420 (2007).....	16
<u>State v. Thomas,</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	17
<u>State v. Walden,</u> 69 Wn. App. 183, 847 P.2d 956 (1993).....	8
<u>State v. Winings,</u> 126 Wn. App. 75, 107 P.3d 141 (2005).....	25

Statutes and Rules

CrR 6.5.....	22
RCW 9.94A.533	13, 17
RCW 9.94A.589	7

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Harkcom's convictions for both first degree robbery and drive-by shooting violate the constitutional prohibition against double jeopardy.

2. Whether the court abused its discretion by finding that first degree robbery and drive-by shooting do not constitute the same criminal conduct for purposes of calculating Harkcom's offender score.

3. Whether the constitutional prohibition against double jeopardy is violated by the imposition of a firearm enhancement for first degree robbery.

4. Whether Harkcom received ineffective assistance of counsel.

5. Whether the court committed reversible error by delegating to a bailiff the duty of instructing the reconstituted jury that it was to begin deliberations anew where the defendant agreed to that procedure.

B. STATEMENT OF THE CASE.

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

C. ARGUMENT.

1. Harkcom's convictions for both first degree robbery and drive-by shooting do not violate the constitutional prohibition against double jeopardy.

Article I, section 9 of the Washington constitution and the Fifth Amendment to the federal constitution provide co-extensive protection against double jeopardy, which includes multiple

punishments for the same offense. State v. Faagata, 147 Wn. App. 236, 243, 193 P.3d 1132 (2008). “There are no non-double jeopardy reasons for reviewing multiple punishments—rather, the foundation for such review is the constitutional prohibition against double jeopardy.” State v. Calle, 125 Wn.2d 769, 775, 888 P.2d 155 (1995) The “dispositive question” is whether the legislature intended to punish the two crimes separately. If the legislature authorized two punishments for the two crimes, double jeopardy is not violated. State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005) Review is de novo. Id., at 770.

The first consideration, then, is whether there is either express or implicit legislative intent apparent from the statutes. Id., at 771-72. This occurs, for example, in RCW 9A.52.050, which makes other crimes committed during a burglary separately punishable. Here the convictions are for first degree robbery and drive-by shooting; neither statute specifically addresses the intent of the legislature.

If legislative intent is unclear, a reviewing court then applies the same elements test similar to that set forth in Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Freeman, *supra*, at 772; that is, whether the offenses are

the same in law and in fact. State v. Cole, 117 Wn. App. 870, 875, 73 P.3d 411 (2003) “Offenses are not constitutionally the same if there is any element in one offense not included in the other and proof of one offense would not necessarily prove the other.” Faagata, *supra*, citing to State v. Womac, 160 Wn.2d 643, 652, 160 P.3d 40 (2007). If they are not the same in law, the strong presumption is that the legislature intended for the two to be punished separately, even if they are committed by the same act. Id. In Harkcom’s case, the two offenses are not the same in law.

First degree robbery, as presented to the jury in this instance, required proof of these elements: (1) an unlawful taking of personal property from the person of another, (2) with the intent to commit theft of the property, (3) against the victim’s will, accomplished by use or threatened use of immediate force, violence, or fear of injury to the victim’s person or property, or the person or property of another, and (4) that force or fear was used to obtain or retain possession of the property or overcome resistance to the taking, and that either during the commission of the taking or in immediate flight therefrom, Harkcom was armed with a deadly weapon or displayed what appeared to be a deadly weapon. [Instruction No. 19, CP 152]

Drive-by shooting, on the other hand, required proof of these elements: (1) Harkcom recklessly discharged a firearm, (2) the discharge created a substantial risk of death or serious bodily injury to another person, and (3) the discharge was either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm to the scene of the discharge. [Instruction 24, CP 157]

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Blockburger, 284 U.S. at 304.

Here first degree robbery clearly includes an element that drive-by shooting does not, and vice-versa. Robbery requires an intent to commit theft, as well as an actual theft, whereas drive-by shooting does not. Drive-by shooting requires that a firearm be discharged recklessly in the immediate area of the vehicle which brought the gun or the shooter, or both, to the scene. Robbery does not. "Drive-by shooting does not require a victim; it only requires that reckless conduct creates a risk that a person might be injured." In re the Pers. Restraint of Bowman, 162 Wn.2d 325, 332, 172 P.3d

681 (2007) Robbery clearly does require a victim. The two crimes do not meet the Blockburger test.

Further, the two offenses are in different chapters of the criminal code—robbery is in 9A.56 RCW and drive-by shooting in 9A.36 RCW. [CP 13-14] “[P]lacement of the two offenses in different chapters of the criminal code is evidence of the legislature’s intent to punish them as separate offenses.” Cole, *supra*, at 875.

Even where the crimes are not the same in law, they may run afoul of the merger doctrine.

The merger doctrine is a rule of statutory construction which our Supreme Court has ruled only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime the State must prove not only that the defendant committed that crime but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes.

State v. Frohs, 83 Wn. App. 803, 806, 924 P.2d 384 (1996) (citing to State v. Vladovic, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983)).

Robbery is elevated to first degree because, under the facts of this case, Harkcom was armed with a deadly weapon or displayed what appeared to be a deadly weapon. [CP 152] Shooting the weapon was not required to elevate robbery to first degree, but it was

required to prove drive-by shooting. Because the State could prove the robbery without proving the drive-by shooting, the two crimes do not merge.

Even if merger applied, a conviction for the “included” crime can be permitted to stand if it involves some separate and distinct injury that is not merely incidental to the crime of which it forms an element. *Id.*, at 807. Firing a gun off into the distance in a public place puts in danger any person who happens to be in the area. The drive-by shooting constitutes a separate and distinct harm that would preserve two convictions even if the merger doctrine did apply. “This court has repeatedly rejected the notion that offenses committed during a ‘single transaction’ are necessarily the ‘same offense.’” *Vladovic, supra*, at 423. Merger is not avoided merely because Harkcom used more violence than was necessary to accomplish the robbery. The test is whether the unnecessary force had a purpose or effect independent of the robbery. *Freeman, supra*, at 779. Here the danger to the public was an effect independent of the robbery of the victim.

The two statutes at issue here address different evils, lending support to the State’s position that the legislature intended the two to be separately punished. Drive-by shooting criminalizes

“reckless conduct that is inherently dangerous”, Bowman, *supra*, at 332; the robbery statute is intended to “protect individuals from loss of property and threat of violence to their persons.” Cole, *supra*, at 877-78. “[T]he differing purposes served by the incest and rape statutes, as well as their location in different chapters of the criminal code, are evidence of the Legislature’s intent to punish them as separate offenses.” Calle, *supra*, at 780.

Harkcom’s convictions for first degree robbery and drive-by shooting do not violate the constitutional prohibition against double jeopardy.

2. The court did not abuse its discretion in finding that first degree robbery and drive-by shooting do not constitute the same criminal conduct for purposes of calculating Harkcom’s offender score.

The calculation of the offender score is controlled by RCW 9.94A.589, which reads in pertinent part:

(1)(a) . . . [W]henever 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.

Before the court can find that two crimes constitute the same criminal conduct, “both crimes must involve: (1) the same objective criminal intent, which can be measured by determining whether one crime furthered another; (2) the same time and place; and (3) the same victim.” The absence of any of the prongs prevents a finding of “same criminal conduct.” State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). In deciding whether the intent is the same, “the focus is on the extent to which the defendant’s criminal intent, viewed objectively, changed from one crime to the next.” State v. Walden, 69 Wn. App. 183, 187-88, 847 P.2d 956 (1993).

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). The same criminal conduct statute is not mandatory. State v. Nitsch, 100 Wn. App. 512, 523, 997 P.2d 1000 (2000). The trial court’s determination as to what constitutes the same criminal conduct for purposes of calculating the offender score will not be reversed unless the court abused its discretion or misapplied the law. Walden, *supra*, at 188. A reviewing court will find an abuse of

discretion when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006), citing State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based “on untenable grounds” or made “for untenable reasons” if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. Id. A decision is “manifestly unreasonable” if the court, despite applying the correct legal standard to the supported facts, adopts a view that “no reasonable person would take,” and arrives at a decision “outside the range of acceptable choices.” Id.

A reviewing court “must narrowly construe RCW 9.94A.[589](1)(a)¹ to disallow most assertions of same criminal conduct.” State v. Price, 103 Wn. App. 845, 855, 14 P.3d 841 (2000) (citing to State v. Palmer, 95 Wn. App. 187, 190-91, 975 P.2d 1038 (1999)). If crimes do not constitute the same criminal conduct, they are necessarily separate and distinct. State v. Brown, 100 Wn. App. 104, 113, 995 P.2d 1278 (2000).

Harkcom argues that the drive-by shooting and the first degree robbery were sequential events involving the same victim

¹ At the time Price was decided, this section was codified as RCW 9.94A.400(1)(a).

and the same criminal intent. The State disagrees as to all three. The drive-by shooting occurred during the robbery. [Trial RP 47] Harkcom at most interrupted the robbery on two occasions to fire the two shots. The only plausible way to view these two crimes is that they happened simultaneously. If Harkcom were correct that the two events occurred sequentially, his argument that one furthered the other might have some merit, but the furtherance test does not apply when the crimes occurred at the same time. State v. Haddock, 141 Wn.2d 103, 114, 3 P.3d 733 (2000). (“[T]his court has stated that ‘the furtherance test lends itself to sequentially committed crimes, [but] its application to crimes occurring literally at the same time is limited.’”) See also State v. Porter, 133 Wn.2d 177, 183, 942 P.2d 974 (1997).

The two crimes did not have the same victim. There is no question but that Gene Blaney was the victim of the robbery. He was not, however, the victim of the drive-by shooting. Blaney testified that Harkcom moved the gun each time and shot off to the side. [Trial RP 47, 54] Blaney was never in any danger of being shot at the time these two bullets were fired. The inference is obvious that Harkcom wished to frighten Blaney in order to make him more cooperative, but that does not make him the victim of the

shooting. Every other person in the area was at risk; Blaney was not. Drive-by shooting does not even require a victim.

It is plain to see that the drive-by shooting statute does not criminalize conduct that causes bodily injury or fear of such injury. Rather, the statute criminalizes specific *reckless conduct* that is inherently dangerous and creates the risk of causing injury or death. Although a drive-by shooting may cause fear of bodily injury, bodily injury, or even death, such a result is not required for conviction. Drive-by shooting does not require a victim; it only requires that reckless conduct creates a risk that a person might be injured.

Bowman, *supra*, at 332 (emphasis in original).

Two crimes cannot be the same criminal conduct if one involves only one victim and the other involves two. State v. Davis, 90 Wn. App. 776, 782, 954 P.2d 325 (1998). In this instance Blaney was the sole victim of the robbery and everybody in the area except Blaney was the victim of the drive-by shooting. Because the two crimes have different victims, they are not the same criminal conduct. "Convictions of crimes involving multiple victims must be treated separately." State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987).

The State also disagrees with Harkcom that these two crimes involved the same intent. The inquiry must focus on intent

as objectively viewed, and whether it changed from one crime to the other. Id.

First, we must objectively view each underlying statute and determine whether the required intents are the same or different for each count. . . . If they are the same, we next objectively view the facts usable at sentencing to determine whether a defendant's intent was the same or different with respect to each count.

Price, *supra*, at 857. Here, because the objective intents are different, we do not reach Harkcom's subjective intent.

The intent of robbery is to acquire property. State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). The only intent required by the drive-by shooting statute is recklessness. [CP 157]

It cannot be said that the trial court abused its discretion by counting these two crimes as separate and distinct. The court considered them when it merged the second degree assault conviction into the robbery while declining to merge the drive-by shooting. It did not count the two separately for criminal history purposes based on untenable grounds or for untenable reasons. [Sentencing RP 13-14] Harkcom's offender score should stand.

3. The imposition of a firearm enhancement to the conviction for first degree robbery does not violate double jeopardy, nor is it prohibited by Blakely v. Washington.

Sentencing enhancements for firearms and other deadly weapons are authorized by statute. RCW 9.94A.533. The constitutional principles of the double jeopardy prohibition are discussed above in Section One of this brief and will not be repeated here.

Harkcom argues that the legislature, and thus the voters, could not have intended to impose a firearm enhancement with a crime in which the possession or use of a firearm is an element. He makes this argument while acknowledging that RCW 9.94A.533(3)(f) provides:

The firearm enhancements in this section shall apply to all felony crimes except for the following: Possession of a machine gun, possessing a stolen firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony.

He maintains that this section establishes that the voters wanted to avoid redundant punishment but somehow overlooked first degree robbery when this list of exclusions was enacted. On the contrary, it demonstrates that these, and only these, crimes are ones that the legislature chose to exclude. An old maxim of the statutory construction is *expressio unius est exclusio alterius*—specific inclusions exclude implication. State v. Sommerville, 111 Wn.2d

524, 535, 760 P.2d 932 (1988). The legislature was presumably aware of all the crimes which it had created, and exempted only the ones in this list from being paired with a firearm enhancement.

As noted above, the double jeopardy clause does no more than prevent a sentencing court from imposing greater punishment than the legislature intended. Where the legislature intended to impose multiple punishments, imposing such a sentence does not violate the Constitution. Washington courts do not consider sentencing enhancements to create additional criminal offenses. State v. Harris, 102 Wn.2d 148, 159-60, 685 P.2d 584 (1994). Courts have repeatedly upheld deadly weapon enhancements even when being armed with a deadly weapon is an element of the offense. State v. Husted, 118 Wn. App. 92, 95, 74 P.3d 672 (2003); see also State v. Caldwell, 47 Wn. App. 317, 319-20, 734 P.2d 542 (1987).

Nevertheless, Harkcom argues that this analysis has been changed by the decisions in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008). He claims that these cases have converted the sentencing enhancement into an element that must be pled and proved to a jury, and thus constitutes double

jeopardy when applied to a crime in which a weapon is already an element of the offense.

The decision in Blakely followed the holding of Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed 2d 435 (2000). Apprendi held that “other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 530 U.S. at 490. Blakely clarified Apprendi by holding that the statutory maximum for this purpose is “the maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant.” 542 U.S. at 303. Recuenco held that harmless error analysis does not apply when a court imposes the firearm enhancement when only the lesser deadly weapon enhancement was charged, instructed to the jury, and found by the jury. Here the jury entered a finding that Harkcom was armed with a firearm at the time the first degree robbery was committed. [CP 130]

None of these cases held that the sentencing enhancement becomes an element of the offense, or that double jeopardy is implicated. A similar argument to the one that Harkcom makes was raised in State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 (2006)

rev. denied 163 Wn.2d 1053, 187 P.3d 752 (2008). Division One of the Court of Appeals said:

[U]nless the question involves the consequences of a prior trial, double jeopardy analysis is an inquiry into legislative intent. The intent underlying the mandatory firearm enhancement is unmistakable: the use of firearms to commit crimes shall result in longer sentences unless an exemption applies. . . . Any “redundancy” in mandating enhanced sentences for other offenses involving use of a firearm is intentional.

Id., at 868. Further, the court held:

Second, Blakely does not implicate double jeopardy, but rather involves the procedure required by the Sixth Amendment for finding the facts authorizing the sentence.

Id.

Division One decided a similar case in State v. Tessema, 139 Wn. App. 483, 162 P.3d 420 (2007). Tessema was convicted of second degree assault while armed with a firearm and argued that the firearm enhancement violated double jeopardy. Again, the court found that Blakely had no application to the double jeopardy issue. Most recently, Division Two took on the issue in State v. Kelley, 146 Wn. App. 370, 189 P.3d 853 (2008). Kelley argued that the firearm enhancement to his second degree assault conviction violated double jeopardy and that Blakely had characterized the enhancement as an additional element of the underlying crime. The

court adopted the reasoning in Nguyen and found that Blakely has no application to double jeopardy. As noted, Recuenco does not address double jeopardy.

Harkcom's argument treats the firearm enhancement as if it were a separate crime. It is not. It is additional time added to the sentence for another crime. RCW 9.94A.533(3). The court properly added the firearm enhancement to his sentence.

4. Defense counsel was not ineffective.

Harkcom argues that his trial counsel was ineffective for failing to object to inadmissible ER 404(b) evidence of prior bad acts when Detective Costello testified that he obtained information about Harkcom from a police data base and that he failed to argue that the drive-by shooting and first degree robbery were the same criminal conduct for purposes of calculating the offender score.

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). Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974).

A defendant must overcome the presumption of effective representation and demonstrate (1) that his lawyers' performance in not objecting to the comparability of his offenses was so deficient that he was deprived of "counsel" for Sixth Amendment purposes

and (2) that there is a reasonable probability that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

a. ER 404(b) evidence.

The State has no dispute with the law cited by Harkcom as it pertains to ER 404(b) evidence. The State does dispute that the facts to which he cites constitute evidence of other bad acts. Detective Costello actually referred to obtaining information about Harkcom on two occasions; he cites to only one in his brief.

In the first instance, Costello testified that he put together two photo montages to show to witnesses, and that Harkcom's picture was included in one of those montages. [Trial RP 110-112] He testified that he obtains photos for the montages from either booking photos or driver's license photos. [Trial RP 110] He did not explain which data base produced the photo used in the montage. The jury, if it considered the matter at all, was as likely to conclude his photo came from his driver's license as a booking record.

Secondly, and this is the instance of which Harkcom complains in his brief, [Appellant's brief at page 30] Costello

testified that he had available a data base that could track all registered vehicles by the name of people to whom they are registered. He testified that he could enter his own name in this data base and find all the vehicles registered to himself. [Trial RP 113]. By running Harkcom's name, he discovered that Harkcom and Nicole Teeter were joint owners of a pickup; he then ran Teeter's name alone and discovered she was the owner of a vehicle that matched the description of the car used during the commission of the crimes for which Harkcom was on trial. [Trial RP 113-14] Therefore, all that the jury learned from this evidence is that Harkcom, his girlfriend, and the detective were all listed in the same data base of registered vehicles, which scarcely qualifies as evidence of "other bad acts."

Harkcom's trial counsel can certainly not be found to be deficient for failing to object to this information. Objecting to such innocuous testimony would have left the jury wondering what he was trying to hide. Nor can Harkcom establish prejudice. He stipulated that he had been convicted of a serious offense that precluded him from owning or possessing firearms. [Trial RP 116] Even if the jury believed his booking photo was used in the montage, he plainly told them that he had been convicted of a

crime for which they could expect there would be a booking photo in existence.

b. Same criminal conduct.

Trial counsel was not ineffective for failing to argue at sentencing that drive-by shooting and first degree robbery constituted the same criminal conduct. He raised the merger issue regarding both drive-by shooting and second degree assault merging into first degree robbery, and was successful in convincing the court to vacate the assault conviction. [Sentencing RP 14] The court found that the drive-by shooting did not merge, and counsel could reasonably conclude that the court would not entertain an argument that they constituted same criminal conduct. Nor, as argued above in the second section of this brief, are they in fact the same criminal conduct. Failing to argue something not likely to succeed is not ineffective assistance of counsel.

5. It was not reversible error for the trial court to delegate to the bailiff the duty to instruct the reconstituted jury that it was to begin deliberations anew, particularly where the defendant agreed to this procedure.

Harkcom complains that his constitutional right to a unanimous verdict was violated because the court did not, on the record, instruct the reconstituted jury that it was to begin

deliberations anew. This right is protected, where a juror is replaced with an alternate after deliberations have begun, by CrR 6.5, which reads, in pertinent part:

If the jury has commenced deliberations prior to replacement of an initial juror with an alternate juror, the jury shall be instructed to disregard all previous deliberations and begin deliberations anew.

In State v. Ashcraft, 71 Wn. App. 444, 464, 859 P.2d 60 (1993), the court held that it was reversible error for the court to fail to instruct the reconstituted jury on the record that it must begin deliberations anew. In State v. Stanley, 120 Wn. App. 312, 316, 85 P.3d 395 (2004), the court held that the “reviewing court must be able to determine from the record that jury unanimity’ was preserved,” (citing to Ashcraft).

Claims of manifest constitutional error are reviewed de novo. Stanley, *supra*, at 314.

In Ashcraft and Stanley, the trial court either did not ensure, or did not make a record, that the parties were present when the alternate juror was seated. The Ashcraft trial court apparently made no effort to instruct the reconstituted jury, and the record is silent in Stanley. The situation in Harkcom’s case is different. Both parties were present when the excused juror was questioned and were

permitted to ask questions themselves. [Trial RP 215-21] Both parties agreed that she should be excused. [Trial RP 221-22]

Thereafter, the following colloquy took place:

THE COURT: I'm going to excuse this juror, and I would ask that you call in the alternate, and then when the alternate comes in, ask the jury to begin deliberating from scratch.

THE BAILIFF: Okay. Very good.

THE COURT: Anything else, counsel?

[PROSECUTOR]: No, your Honor. I think that is the proper route.

[DEFENSE COUNSEL]: I guess I just wonder if the jury should be instructed, and, frankly, in all of the jury trials I have had, I've never had an alternate called in. I don't know if there is a procedure to have to instruct the jury not to speculate and begin anew or not.

THE COURT: I have no problem once the alternate is here calling the entire jury into the courtroom and instructing them to begin deliberations anew, if counsel are wanting me to do that.

[PROSECUTOR]: If that is Mr. Harkcom and Mr. Meyer's request, I have no objection. I don't know that it's necessary, but it certainly couldn't hurt anything.

I think the one thing that is required by the law and that is that they be instructed that they are to start their deliberations again from the start, so that the alternate can be included, and that's what you asked the bailiff to direct them to do.

[DEFENSE COUNSEL]: Your Honor, I would just leave it at your discretion as to how you want to restart it.

THE COURT: I have had previous alternates come in, and I have not given special instructions to the

jury, maybe in part not to make the event assume greater significance than it does.

And as long as I think the bailiff knows to instruct them to begin from the beginning, I'm comfortable with that, but if counsel are concerned that the bailiff might not adequately instruct the jury in that way, as I say, I'm willing to bring them into the courtroom.

[DEFENSE COUNSEL]: That's fine. You can go ahead and do it.

THE COURT: I will just ensure the bailiff, I have already told him that, but I will tell him again outside the courtroom to make sure to tell the jury that once the alternate gets here that the jury is to begin deliberations anew. Anything further?

[DEFENSE COUNSEL]: No, Your Honor.

[Trial RP 222-24]

The court rule cited above requires that the jury be instructed to begin deliberations anew, but it does not require that the judge be the one to do the instructing. Further, unlike in Ashcraft and Stanley, the record here shows that the issue was thoroughly discussed with the parties, the court instructed the bailiff to instruct the jury, and the defendant agreed to have the bailiff instruct the jury. If this was error, it was invited error.

The invited error doctrine was originally conceived to prevent a party from setting up an error at trial and then appealing on that basis. The doctrine has been expanded to apply in cases where the error resulted from neither negligence nor bad faith. Seattle v.

Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). The invited error doctrine has been applied even where the “to convict” instruction omitted an essential element of the crime. Id. “A party may not request an instruction and later complain on appeal that the requested instruction was given.” Id., at 721, (citing to State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999)). As Patu demonstrated, the invited error doctrine applies even where constitutional rights are involved.

Under the doctrine of invited error, even where constitutional rights are involved, we are precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording.

State v. Winings, 126 Wn. App. 75, 89, 107 P.3d 141 (2005).

In In re the Pers. Restraint of Thompson, 141 Wn.2d 712, 724, 10 P.3d 380 (2000), the court reviewed several invited error doctrine cases, and concluded that “[i]n these invited error doctrine cases, the defendant took knowing and voluntary actions to set up the error; where the defendant’s actions were not voluntary, the court did not apply the doctrine.” Here Harkcom was given the opportunity to have the jury brought into the courtroom and instructed, but he left it to the court’s discretion. While the State is certainly not suggesting that defense counsel was attempting to set

up an error, Harkcom did voluntarily acquiesce to the very procedure he now challenges.

Constitutional rights can be relinquished by a voluntary, knowing, and intelligent waiver. Seattle v. Klein, 161 Wn.2d 554, 556, 166 P.3d 1149 (2007). By agreeing to have the bailiff instruct the jury, Harkcom can be said to have waived his right to this particular assurance of a unanimous jury verdict.

In a criminal case, even where a defendant is barred from challenging an error he or she caused, the merits of the challenge can still be reached under an ineffective assistance of counsel claim. State v. Bradley, 141 Wn.2d 731, 736, 10 P.3d 358 (2000). While Harkcom has claimed ineffective assistance of counsel in other matters, he has not made that claim in connection with the failure of the court to instruct the jury on the record. Nor can it be said, under the standard for effectiveness of counsel set forth above, that defense counsel was ineffective. The court, on the record, told the bailiff to instruct the jury. It promised the parties it would, outside the courtroom, advise the bailiff again. If a defendant can justifiably place so little confidence in the judge and the bailiff, who had been with the jury whenever it was in the

courthouse but outside of the courtroom, to do as they promised to do, then the jury system itself is called into question.

The record in this case allows a reviewing court to find with assurance that the reconstituted jury was properly instructed. By agreeing to this procedure, Harkcom waived the right to challenge it on appeal.

D. CONCLUSION.

Harkcom's convictions for first degree robbery do not violate double jeopardy, nor do they constitute same criminal conduct for purposes of calculating his offender score. The firearm enhancement does not violate double jeopardy. Harkcom's trial counsel was not ineffective. Any error by the trial court in failing to instruct the reconstituted jury on the record was invited error, and Harkcom waived his constitutional rights by agreeing to the procedure he now challenges. The State respectfully asks this court to affirm all of his convictions and his sentence.

Respectfully submitted this 23^d day of March 2009.



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the State's Brief of Respondent, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by

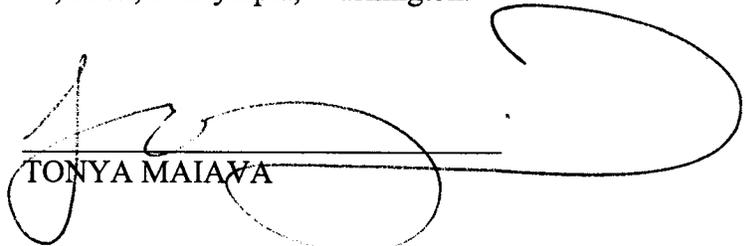
TO:

PETER B. TILLER
ATTORNEY AT LAW
PO BOX 58
CENTRALIA WA 98531

FILED
COURT OF APPEALS
DIVISION II
09 MAR 25 AM 11:56
STATE OF WASHINGTON
BY mm
DEPUTY

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

Dated this 24 day of March, 2009, at Olympia, Washington.


TONYA MAIAVA