

No. 41059-1-II, 41143-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JESSUP B. TILLMON & JOHN BURNS,

Appellants.

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

The Honorable Pro Tem, Judge Richard A. Strophy  
Cause No. 09-1-01930-8

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BRIEF OF RESPONDENT

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## A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the evidence of robbery in the first degree in counts VI, VII, and VIII was sufficient to prove that the defendants Tillmon, Burns, or an accomplice took personal property from the person of another.

2. Whether the jury instructions improperly stated that the jury must be unanimous before returning a special verdict form finding that the defendants, Tillmon and Burns, were armed with a firearm during commission of the crimes described in counts I-VIII.

3. Whether defense counsels for both Tillmon and Burns were ineffective for failing to object to jury instruction number 50 which stated that the jury's verdict must be unanimous and further by failing to propose an accurate instruction and special verdict form.

## B. STATEMENT OF THE CASE.

1. The State accepts the appellant's statement of the case, while noting the following corrections, clarifications, and additions:

### Substantive:

Nicholas Oatfield was awakened by knocking at the front door and when he got up to see who was there, he heard the door open and Casey Jones screaming for him to call 911. [4/1/10 RP 149]. At that point he ran into Aaron Ormrod's bedroom, who was still in bed sleeping, turned on the light, locked the door, sat down with his back to it, and had Aaron Ormrod start calling 911 saying, "We're being robbed right now." [4/1/10 RP 150]. During the 911 call, Nicholas Oatfield testified while Aaron Ormrod was on the

phone, he could hear the defendants getting Casey Jones and Malcolm Moore down in the living room, coming down the hallway, and kicking down bedroom doors until they got to Aaron Ormrod's bedroom. [4/1/10 RP 150-51].

At that point, the defendants kicked down Aaron Ormrod's door, knocking Nicholas Oatfield forward, and put a shotgun to Nicholas Oatfield's forehead. [4/1/10 RP 151]. The men then had Aaron Ormrod get out of bed and had the two men lie down and crawl behind Nicholas Ormrod (who they had also forcibly removed from his bedroom) into the dining room. [4/1/10 RP 152]. Once in the dining room, the intruders indicated they could "smell the weed" and knew the residents had "nice stuff." [4/1/10 RP 155]. Nicholas Oatfield was then picked up by his hair and shoved by a shotgun back down the hall to his bedroom. [4/1/10 RP 155]. When he arrived, his room was torn apart and the defendants indicated the marijuana they thought Oatfield had was already in their possession, so they forced Oatfield back down on the ground and to crawl back out of the bedroom, stating they should "shoot this mother [expletive]." [4/1/10 RP 155].

Nicholas Ormrod testified he awoke to a large crash and voices, specifically Casey Jones saying, "Call 911." [4/1/10 RP 220-

21]. Nicholas Ormrod described closing his door, locking it, lying down, and then sitting in his bed with a blanket over him calling 911. [4/1/10 RP 222]. He testified his call was interrupted by a beating on his door just prior to it being kicked open by the defendants who were armed with a shotgun. [4/1/10 RP 222-23]. The intruder then told him to “get the [expletive] on the ground” and “crawl on [his] face into the kitchen.” [4/1/10 RP 222]. Nicholas Ormrod then testified he saw one of the intruders run back to the bedroom area, then return and grab some belongings off of a chair in the living room, and exit the house with Nicholas Ormrod’s television (which had previously been located in Nicholas Ormrod’s bedroom) under his arm. [4/1/10 RP 229-31]. Additionally, the intruder took two paintball guns, one of which had been located in the living room. [4/1/10 RP 229-31].

### C. ARGUMENT

1. The evidence was sufficient to support the jury’s verdict against both Tillmon and Burns for robbery in the first degree in counts VI, VII, and VIII.

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, 119 Wn.2d 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).

In the instant case, all of the items stolen which the defendants now take exception to were stolen from the victims' bedrooms. At the time of the break-in, all three relevant victims were located in their bedrooms with their personal property. [RP 152-55, 217, 224]. When the defendants broke into the house, all three men were ordered from the bedrooms at gun point and made to crawl into the dining area and lay face down.

The defendants now argue that because their property was not taken from "their person" and the state did not allege the alternative of "or in their presence" in the "to convict" instruction, that the evidence is insufficient to support the conviction and this court must reverse. Not surprisingly, the State disagrees. Based on the defendant's logic, even had the "in the presence of" language been included, the State would have been unable to prove a prima facie case because no one was in the victims' bedrooms at the time of the taking besides the defendants. This argument, however, is inconsistent with both statutory language and case authority.

RCW 9A.56.190 states that robbery in the first degree occurs when a person

. . . unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property of the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190. This is exactly the same language included in jury instruction number 32. [CP 95]. It is well-established law that juries are presumed to follow the instructions given them. See Richardson v. Marsh, 481 U.S. 200, 211, 95 L. Ed. 2d 176, 107 S. Ct. 1702 (1987).

To constitute a prima facie case of robbery, the State must show that the victim was put in fear of violence to his person or property and that something of value was taken from his person or in his presence. The evidence is sufficient to support the conviction that a taking occurred from the victim or in his presence, even though he is not actually present, if the property is taken after the victim has been removed or prevented by force or fear from approaching the place where the taking occurs. State v. McDonald, 74 Wn.2d 141, 443 P.2d 651 (1968). In McDonald, no one was

present when the defendant or his co-defendant took the item stolen. Id. at 144. Our Supreme Court observed, though, that this does not defeat the State's "prima facie proof of 'taking of personal property from the person of another, or in his presence[.]'" Rather, the Court held that a taking occurs nonetheless when a victim is physically separated from the property by a defendant prior to the occurrence of the taking. See People v. Wilkes, 16 App. Div. 2d 962, 229 N.Y.S.2d 793 (1962); People v. Lavender, 137 Cal. App. 582, 31 P.2d 439 (1934); Braley v. State, 54 Okla. Crim. 219, 18 P.2d 281 (1932); State v. Kennedy, 154 Mo. 268, 55 S.W. 293 (1900); Clements v. State, 84 Ga. 660, 11 S.E. 505 (1890); State v. Calhoun, 72 Iowa 432, 34 N.W. 194 (1887); Clark & Marshall, Crimes, § 12.12 (Wingersky rev. 6th ed. 1958); 2 Wharton's Criminal Law and Procedure, § 553 (Anderson ed. 1957); 2 W. Burdick, Law of Crime, § 598 (1946). The court then said, "Indeed this principle is explicit in the robbery statute where it is stated that '[s]uch taking constitutes robbery *whenever* it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.'" McDonald, 74 Wn.2d at 145 (emphasis added).

Division One restated this premise in dicta in State v. Manchester, observing that “courts have upheld convictions for robbery when the victim is absent, but only when force or fear was used to prevent the victim from being present when the robbery occurred.” 57 Wn. App. 765, 768, 790 P.2d 217 (1990). The court then cited specifically to the previously discussed holding in McDonald as well as State v. Blewitt, 37 Wn. App. 397, 680 P.2d 457 (1984), *review denied*, 103 Wn.2d 1017 (1985) (evidence sufficient to support conviction for robbery where victims were forcibly relocated from property prior to the actual taking).

While the issue in Manchester dealt with the distinct problem of what “in the presence of” entailed versus the act of “taking” in the absence of presence, the logic applied is equally applicable here and directly in accordance with case law and statutory authority. As the court stated in Manchester, the appellants’ argument ignores the plain language of the statute. Manchester, 57 Wn. App. at 769. The statutory language is unambiguous--the legislature clearly intended that a defendant cannot overcome the “person of” or “presence of” requirement, simply by removing them from the area of their property by force prior to the actual taking. To read the statute otherwise would make the “taking” language superfluous

and would take the rest of the language out of context. State v. Cooper, 156 Wn.2d 475, 483, 128 P.3d 1234 (2006); State v. Thorne, 129 Wn.2d 736, 761, 921 P.2d 514 (1996). Further, it would require the jury to disregard the inclusion of the robbery statute altogether in instruction 32 and apply only the “to convict” instruction. Such a view is inconsistent with the presumption that juries follow all instructions given them by the court and that all other instructions are incorporated by reference.

The appellants cite to State v. Nam, 136 Wn. App. 698, 150 P.3d 617 (2007) in support of their premise, but that case is distinguishable from the facts of the instant case. In that case, the defendant stole the victim’s purse from the seat next to her. Nam, 136 Wn. App. at 707. This court held that sufficient evidence did not support the conviction because the “to convict” instruction omitted the alternative “presence” language and there was no evidence the purse was actually held by or attached to the victim at the time of the taking. Id. In Nam, however, there was no evidence the defendant removed the victim from the location of her property by force prior to taking it.

In contrast, the victims here were physically separated from their property by force and threat of force and prevented by

gunpoint from returning to the location of their property. A jury could reasonably find that Burns and Tillmon, or their accomplice, Deshone Herbin, used force to prevent the three young men from being present or having their property on their person when the takings occurred based on the testimony presented. Under McDonald and Blewitt and the logic of Manchester, these facts are sufficient to establish first degree robbery. After viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of first degree robbery. As a result, the holdings of McDonald, Blewitt, and Manchester control and Nam is inapplicable to the instant case. The defendants' argument fails.

2. The State concedes that the trial court erred in instructing the jury that it must be unanimous in finding on the special verdict forms that Tillmon and Burns were armed with a firearm at the time of the commission of the eight crimes, counts I-VIII, and if it did, the remedy is to vacate and remand for re-impanelling of a jury.

The court reviews challenged jury instructions *de novo*. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). When a jury makes a special verdict finding on an aggravating factor, the decision is only required to be unanimous as to the presence of that aggravating factor, but not to the absence of the factor. State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010) (citing State v.

Goldberg, 149 Wn.2d 888, 893, 72 P.3d 1083 (2003)). A trial court errs if it instruct the jury to the contrary. Goldberg, 149 Wn.2d at 894.

Although directly in line with the Washington pattern jury instruction at the time, WPIC 160.00, the court here incorrectly instructed the jury that any verdict given, whether positive or negative, had to be unanimous. Based on the controlling law of Bashaw, any such error cannot be harmless because it cannot be said "with any confidence what might have occurred had the jury been properly instructed." Bashaw, 169 Wn.2d at 148.

The State submits that the proper remedy, however, is to vacate the sentence enhancements and remand for re-impanelling of a new jury to determine the sentence enhancements in accordance with RCW 9.94A.537(2) which states:

In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

3. Neither defense counsel for Tillmon and Burns were ineffective for failing to object to jury instruction number 50 or further by failing to propose an accurate instruction and special verdict form.

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). First, 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). For example, "[o]nly in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995) (internal quotation omitted).

While it is easy in retrospect to find fault with tactics and strategies that failed to gain acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial

counsel reversible error. State v. Renfro, 96 Wn.2d 902, 090, 639 P.2d 737 (1982). 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 fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 694-95.

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to

improve the quality of legal representation”, but rather to ensure defense counsel functions in a manner “as will render the trial a reliable adversarial testing process.” Strickland, 466 U.S. at 688-689; See Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel, but rather one which “make[s] the adversarial testing process work in the particular case.” Strickland, 466 U.S. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Second, prejudice occurs when but for the deficient performance, the outcome would have been different. In re Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996).

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by

defense counsel. Id. at 696. 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). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . [then] that course should be followed [first].” Strickland, 466 U.S. at 697.

Prior to Bashaw, WPIC 160.00, as used in the instant case, was accurate. The State does not disagree that Bashaw specifically changed the appropriate wording for jury instructions regarding special verdict forms. However, Bashaw did not become controlling authority until its filing on July 1, 2010. The instructions in this case, however, were given in April of 2010, a full three months prior to the Bashaw decision. Neither counsels’ performance can be construed as ineffective for failing to object to language in instruction number 50 which had not yet been deemed inaccurate.

Moreover, neither counsel could have proposed an appropriate instruction, as the defendants now allege, because the Supreme Court had not yet filed the opinion relating what the appropriate language was until after the instructions here had already been given. In addition to the fact that counsel is entitled to

the presumption of effectiveness, the State submits it does not fall below an objective standard of reasonableness for counsel to refrain from objecting in the middle of a fast-moving and complicated trial to language our Supreme Court had not yet come to its own conclusion regarding, even after nearly 10 months of consideration and debate.

Lastly, the mere existence of error, as noted in Strickland, does not constitute prejudice resulting in reversal. The question is whether the error was “egregious” and resulted in a verdict which was not a reliable result of the adversarial process—the “but for” test. While there is evidence here that in retrospect, the decision in Bashaw made the jury instruction inaccurate, there is no evidence that had defense counsel objected at the time, without case authority to support their objection, the trial court would have allowed an instruction inconsistent with the language of the WPIC or that the jury would have subsequently found in the alternative on the special verdict forms. So while the error itself is not harmless per case law discussed in section two of the State’s brief (and noted by appellate counsel), the State submits it is not prejudice of the nature considered by Strickland and its progeny such that it rises to the level of ineffective assistance of counsel.

As a result, the defendants fail to establish ineffective assistance on either prong—defense counsels' actions were not objectively unreasonable in light of the case authority at the time, nor were the defendants prejudiced in the manner considered by Strickland. The appellants must establish on both prongs in order to succeed and they have not. Their argument fails.

#### D. CONCLUSION

For the reasons previously stated, the State respectfully requests this court to affirm the convictions, reverse on the aggravating factors, and remand for re-impanelling and resentencing on the aggravating factors.

Respectfully submitted this 23<sup>d</sup> of June, 2011.



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CERTIFICATE OF SERVICE

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

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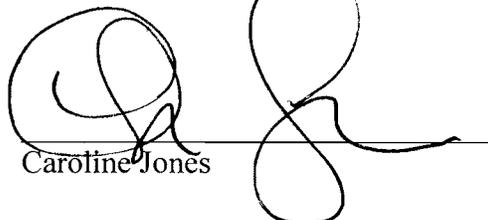
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 23 day of June, 2011, at Olympia, Washington.

  
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