NO. 41467-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DEANDRE BECK and DARRYL HENDERSON, APPELLANTS

Appeal from the Superior Court of Pierce County
The Honorable Elizabeth Martin

No. 10-1-00590-2 and 10-1-00581-3

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the prosecuting attorney committed misconduct in eliciting and arguing admissible evidence?

2. Whether the defendants waived the issue where they failed to object at trial?

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9. Whether the conspiracy counts were two units of prosecution where the evidence proved two separate conspiracies?

10. Whether defendant Beck's convictions were the same criminal conduct for scoring and sentencing purposes?

B. STATEMENT OF THE CASE.

1. Procedure

On February 8, 2010, the Pierce County Prosecuting Attorney (State) charged defendants Deandre Beck, Darryl Henderson, and 30 other co-defendants with one conspiracy to commit murder in the first degree, robbery in the first degree, assault in the first degree, drive-by shooting, burglary in the first degree, and several other crimes. CP 1, 76. The State also charged Beck and Henderson specifically with robbery in the first degree and theft of a motor vehicle (TMV) arising from an incident that occurred on July 22, 2009. CP 1-3, 76-79.

The defendants filed ***Knapstad*** [1] motions. CP 177. The court granted the motions, which had the effect of severing Beck and Henderson from the other defendants for trial. CP 9-11, 253-255. The case ultimately went to trial on a Third Amended Information which charged Beck and

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[1] ***State v. Knapstad***, 107 Wn. 2d 346, 729 P. 2d 48 (1986).

Henderson with conspiracy to commit robbery in the first degree, robbery in the first degree, TMV, and conspiracy to commit TMV. CP 258-260. The counts also included a sentencing aggravating circumstance regarding gang activity. *Id.*; RCW 9.94A.535(3)(s).

After hearing all the evidence, the jury found the defendants guilty of the crimes charged. CP 15-18, 293, 295, 297, 299. However, the jury did not find the alleged aggravating factors of gang involvement. CP 294, 296, 298, 300. On November 17, 2010, the court imposed standard range sentences on the defendants. CP 66, 357. The defendants filed timely notices of appeal on the same day. CP 73, 364.

2. Facts

In 2009, Vincent Ligon (the victim) owned a well-preserved 1971 Pontiac LeMans. 2 RP 121. Ligon had outfitted the car with racing stripes, a special stereo system, and custom tires and wheels (or "rims"). 2 RP 122.

In the early morning hours of July 22, 2009, the victim drove his car to meet some acquaintances for drinks at a bar, the Pine Street Landing, in South Tacoma. 2 RP 121. He parked in the parking lot in the rear of the business. 2 RP 163. The victim became somewhat intoxicated. 2 RP 121.

Unbeknownst to the victim, on the same night, several members of the Hilltop Crips street gang were present at the bar. 3 RP 343. Some were socializing in the bar, while others were hanging out in the parking lot. 3 RP 343, 436. The defendants were present with their friends and fellow gang members Trevor Green, Brandon Starks, and Curtiss Hudson. 3 RP 343.

When the victim drove into the parking lot, his car attracted the attention of Henderson and the others. Henderson asked Starks if he knew how to steal the car. 3 RP 283, 286.

Henderson wanted to steal the tires and rims. 3 RP 347. He and the others formed a plan to assault the victim and take the car keys. 3 RP 347-348. The plan was for Henderson to knock the victim out, then take the keys. 3 RP 348-349.

When the victim came out of the bar, Henderson approached and swung at him. 3 RP 284. Henderson struck a glancing blow. 3 RP 349. The victim retreated to where his companions were parked, further away. 3 RP 445. Henderson, Starks, Green, Hudson, and Beck regrouped. 3 RP 349.

Henderson and the others approached the victim again. 3 RP 285, 350. Henderson attacked the victim. 3 RP 350. Almost immediately, the others joined in punching and kicking the victim, knocking him to the

ground. 3 RP 350. In the assault, Trevor Green took the victim's car keys. 3 RP 350. Starks took the wallet. 3 RP 3 RP 289. Green drove off in the victim's car. 3 RP 352. The others immediately left the scene. 3 RP 290, 352.

The victim called the police and reported the crime. 2 RP 132, 139. When the car was located, it had been stripped of its valuable tires, rims, and stereo. 2 RP 127.

C. ARGUMENT.

1. THE PROSECUTING ATTORNEY DID NOT COMMIT MISCONDUCT IN ELICITING AND ARGUING EVIDENCE ADMITTED BY THE TRIAL COURT.

a. By failing to object to the prosecutor's remarks in closing argument, the defendant waived the issue on appeal.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. ***State v. Gentry***, 125 Wn.2d 570, 640, 888 P.2d 570 (1995), citing ***State v. Hoffman***, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. ***State v. Binkin***, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds* by ***State v. Kilgore***, 147 Wn.2d 288, 53 P.3d 974 (2002). Failure by the

defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so "flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." ***State v. Stenson***, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), citing ***Gentry***, 125 Wn.2d at 593-594.

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. ***State v. Russell***, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994). Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. ***Stenson***, 132 Wn.2d at 718-19.

Here, the defendants argued that the evidence of gang membership and the testimony of detective Ringer was irrelevant and prejudicial. 1 RP 69-71. The court denied the defendants' pretrial motions to exclude the testimony. 1 RP 74. The court reasoned that, where the state had alleged an aggravating factor that the crimes were committed in furtherance of gang activity, evidence of gang membership and activity were relevant. 1 RP 84.

In his closing argument, the prosecuting attorney began by emphasizing what the video evidence showed: a concerted action by the defendants and their companions. 5 RP 769. He went on to question the defendants' contention that while they were gang members, they were not actively involved in gang activity – not "bangers". 5 RP 770. He argued that their gang membership was tied into their participation in the crimes. 5 RP 771. Because of the crimes and aggravating factor charged, the State had to prove that the two were linked.

The prosecutor consistently argued that the defendants' gang membership was the reason why they agreed to participate in these crimes. 5 RP 785. If other gang members want help to steal a car, or commit some other crime, gang members are expected to assist. This was evidence admitted at trial. 2 RP 237.

b. The defendants failed to preserve objections to specific parts of Det. Ringer's testimony.

The defendants assert that the prosecutor improperly elicited expert testimony that gang members commit violent crimes in the community. Henderson Brf. at 33. However, this testimony from Det. Ringer came in without objection. 2 RP 207. He further testified, again without objection, that this particular type of robbery was a typical gang crime 2 RP 239, 242. Although the defendants' pretrial motions regarding Det. Ringer's

testimony were denied, the court did so "without prejudice". 1 RP 74. Counsel were free to object to any evidence that they thought was inadmissible. This testimony from Det. Ringer may or may not have been admissible under ER 404(b). However, the time and place to litigate that is in the trial court. The defendants cannot complain on appeal where they did not raise the objection at trial. RAP 2.5(a).

2. THE DEFENDANTS DO NOT DEMONSTRATE DEFICIENCY OF COUNSEL, NOR PREJUDICE THEREBY.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *see also*, ***State v. Thomas***, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also*, ***Strickland***, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the

errors, the fact finder would have had a reasonable doubt respecting guilt.").

There is a strong presumption that a defendant received effective representation. ***State v. Brett***, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L.Ed.2d 858 (1996); ***Thomas***, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. ***McFarland***, 127 Wn.2d at 336.

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 751 P.2d 1165 (1988). Whether counsel's tactical and strategic trial decisions were reasonable or deficient must be measured against the backdrop of the evidence and testimony.

Here, the defendants were charged with acting in concert to steal the victim's property, through violent means. The State had alleged that they so acted because of their gang affiliation. Therefore, as pointed out *infra*, evidence of their gang membership was admissible. It was inescapable. Their acts of violence were caught on video. That, too, was going to be admitted. Henderson's strategy had to be that which was pursued at trial; to minimize his participation in the greater crime and assert that he only intended a fistfight with the victim.

Beck's strategy was also limited by the evidence. He had to argue that he was a peripheral and spontaneous participant.

Here, respective counsel filed or joined motions to exclude gang evidence and expert testimony. CP 148, 373, 264-272, 759-760. Henderson joined in Beck's extensive motions in limine, which included statements of the co-defendants and the expert testimony of Det. Ringer. CP 759-760. As discussed above, the gang-related motions were denied without prejudice. *Id.*

Henderson decided to take the stand and attempt to minimize his gang involvement. 3 RP 426. Unfortunately, Henderson had hundreds of gang-related photographs on his MySpace page. 4 RP 534, 536. There was a photograph of Henderson and friends showing gang signs in front of the Pine Street Landing, where this crime occurred. 4 RP 536-537, Exh. 15.

Exh. 16 was a photograph, again from Henderson's MySpace page, of numerous gang members gathered outside Beck's house at So. 25th and Ash Streets in Tacoma.

Despite the testimony of other witnesses, including Brandon Starks, Henderson denied that the others in the Pine Street surveillance video were his friends or fellow Hilltop Crips. 4 RP 489. On cross-examination, Henderson then identified Starks as one of the persons in a photograph of numerous Hilltop Crips, which was on Henderson's MySpace page. 4 RP 547. Exh. 17-19 were likewise photographs from Henderson's MySpace page, of Hilltop Crips showing gang signs, at two funerals of gang members. 4 RP 555, 563. Exh. 19 is a photograph of Henderson showing gang signs. 4 RP 565.

With so much evidence of gang membership and gang activity admitted in the State's case and through Henderson himself, it would be reasonable for both defense counsel to focus instead on the level of their respective client's involvement. It would be a reasonable strategy to tacitly admit the gang membership and argue that there was no conspiracy and that the real culprit was Trevor Green. Indeed, the defense called Green, who admitted that he took the victim's property. 4 RP 630. Green testified that Beck was not involved in stealing the car. 4 RP 629-630.

The fact that the strategy did not work does not mean that the strategy was not reasonable.

b. The defendants cannot show prejudice from the alleged deficiency of counsel.

Here, as in many cases, both defense counsel could have made more objections. The question is whether the objections would likely have changed the result of the trial, i.e., the defendants would have been acquitted. As argued above, evidence of gang affiliation and the way gangs operate was admissible in this case. Also, as detailed in section 7 below, the evidence regarding the participation of the defendants was overwhelming. The defense counsel were not deficient and the defendants cannot demonstrate prejudice.

3. THE TRIAL COURT DID NOT ERR IN FAILING TO GIVE A ***PETRICH*** INSTRUCTION WHERE THE THEFTS UNDERLYING THE ROBBERY WERE A CONTINOUS COURSE OF CONDUCT.

Where the State presents evidence of several distinct acts, any one of which could be the basis of a criminal charge, the trial court must ensure that the jury reaches a unanimous verdict on one particular incident. ***State v. Petrich***, 101 Wn.2d 566, 683 P.2d 173 (1984). However, this rule applies only where the State presents evidence of "several distinct acts ". It does not apply where the evidence indicates a "continuing course

of conduct". *Id.*, at 571. To determine whether criminal conduct constitutes one continuing act, the facts must be evaluated in a commonsense manner. ***Petrich***, at 571; ***State v. Handran***, 113 Wn.2d 11, 17, 775 P. 2d 453 (1989).

Here, the defendants were charged with robbery in that they did "take personal property belonging to another". CP 259, 313. Therefore, proof that the defendants, directly or as accomplices, took any of the victim's property would satisfy this element.

The testimony disclosed that Trevor Green took the victim's keys and Starks the wallet, as Henderson, Beck and others beat the victim. 3 RP 289, 350. Green proceeded directly to the victim's nearby car and drove it away as Henderson, Beck, and the others prevented the victim from regaining his car, or any other property. 3 RP 351-352. The testimony and video shows that this all happened in a nearly unbroken sequence in a very short period of time. 3 RP 350, Exh. 8. Because the taking of property occurred as a continuous course of conduct, the State was not required to elect which "item" taken served as the basis for the robbery; nor was the court required to give a ***Petrich*** instruction.

4. THE TRIAL COURT DID NOT ERR IN DECLINING TO INSTRUCT THAT ASSAULT IN THE FOURTH DGREE IS A LESSER INCLUDED OFFENSE OF ROBBERY REGARDING DEFENDANT BECK.

The rule in Washington is that each party may have instructions embodying its theory of the case if evidence supports that theory. ***State v. Berlin***, 133 Wn.2d 541, 546, 947 P.2d 700 (1997). The appellate court applies a two-part test to determine when a lesser included offense instruction is appropriate. ***State v. Workman***, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978), cited in ***Berlin***, at 545. First, each of the elements of the lesser offense must be a necessary element of the offense charged (the legal prong). ***Berlin***, 133 Wn.2d at 545-46. Second, the evidence must affirmatively establish an inference that the lesser crime was committed (factual prong). ***State v. Warden***, 133 Wn.2d 559, 563, 947 P.2d 708 (1997).

The test is whether the greater offenses, as charged, could have been committed without also committing fourth degree assault. ***State v. Aumick***, 126 Wn.2d 422, 426-27, 894 P.2d 1325 (1995). Because this case was charged as a strong-arm/ injury robbery, the legal prong of ***Workman*** and ***Berlin*** is met.

To satisfy the factual prong of the lesser included offense test, the evidence must permit a jury to rationally find a defendant guilty of the lesser offense and to acquit him or her of the greater. ***Berlin***, at 551. To meet the factual prong, the evidence, when viewed in the light most favorable to the requesting party, must affirmatively establish the defendant's theory that only the inferior offense was committed-"it is not enough that the jury might disbelieve the evidence pointing to guilt." ***State v. Fernandez-Medina***, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000).

The evidence and Henderson's admission showed that the defendants assaulted the victim by beating and kicking him. Henderson supplied the "affirmative evidence" necessary to support the assault in the fourth degree when he testified that he only engaged in a fight with the victim. Therefore, Henderson met the factual prong under ***Workman*** and ***Berlin***.

However, Beck did not satisfy the factual prong. Unlike Henderson, the evidence does not affirmatively establish Beck's similar theory of the case. Beck could truly only argue that the jury might disbelieve the evidence as outlined in sufficiency of the evidence section *infra*. This is insufficient. *See* ***Fernandez-Medina***, *supra*.

While the assault was part of the taking by force, for Beck the evidence must show that it was only an assault, and not a taking. The

record lacks sufficient evidence to affirmatively establish that Beck only assaulted the victim during the robbery, or to permit a rational jury to acquit him of the greater charges. Although the evidence showed that the defendants assaulted the victim, it also proved the assault was for the purpose of obtaining the victim's property. Consequently, the record does not support a fourth degree assault instruction for Beck.

5. IF THE COURT ERRED IN FAILING TO INSTRUCT ON A LESSER-INCLUDED OFFENSE OF ASSAULT IN THE FOURTH DEGREE, THE ERROR IS HARMLESS.

The failure to give a lesser-included offense instruction is not an error of constitutional magnitude. *See*, ***State v. Scott***, 110 Wn.2d 682, 688 n. 5, 757 P.2d 492 (1988). When an error is not of constitutional magnitude, the Court determines, within reasonable probabilities, if the outcome of the trial would have been different if the error had not occurred. *See*, ***State v. Jackson***, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

The jury resolved the issue raised by Henderson against him. Henderson testified that he was only involved in an assault of the victim, not a robbery. 3 RP 437, 448. Under this theory, the lesser-included of assault would only apply to the robbery charge, not the conspiracies, nor the TMV. The jury found Henderson guilty of all four counts, clearly rejecting his contention that he was not involved in the concerted group

effort to rob the victim and steal the victim's car. Therefore, failing to instruct regarding assault in the fourth degree was harmless.

The evidence of Henderson's guilt was overwhelming. Even if Henderson was entitled to a lesser included offense, any error in the trial court's denial of such instruction would be harmless in light of the overwhelming evidence of Henderson's participation in the crimes charged. As outlined in detail below regarding sufficiency of evidence, co-participants testified regarding Henderson's participation in the robbery. In addition, the entire incident, including Henderson's participation, was captured on video, which was narrated by the participants on the witness stand.

6. THERE WAS NO CUMULATIVE ERROR DEPRIVING THE DEFENDANTS OF A FAIR TRIAL.

The doctrine of cumulative error recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. ***In re Lord***, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); ***State v. Coe***, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); ***see also State v. Johnson***, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) ("although none of the errors discussed above alone mandate reversal...."). The analysis is intertwined with the harmless error doctrine, in that the

type of error will affect the court's weighing those errors. ***State v. Russell***, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

The record of this case, as a whole, shows that the defendants received a fair trial. As argued above, the court correctly admitted evidence, instructed the jury, and sentenced the defendants.

7. THE STATE ADDUCED SUFFICIENT EVIDENCE FOR THE JURY TO FIND ALL ELEMENTS OF CONSPIRACY TO COMMIT FIRST DEGREE ROBBERY; THEFT OF A MOTOR VEHICLE; AND CONSPIRACY TO COMMIT TMV REGARDING DEFENDANT BECK BEYOND A REASONABLE DOUBT.

The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the State met the essential elements of the crime beyond a reasonable doubt. ***State v. Joy***, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Id.*

Circumstantial and direct evidence are considered equally reliable. reliable." ***State v. Thomas***, 150 Wn.2d 821, 874, 83 P.3d 970 (2004),

abrogated in part on other grounds, ***Crawford v. Washington***, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004). In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

To prove a conspiracy, it is not necessary to show a formal agreement. ***State v. Smith***, 65 Wn. App. 468, 471, 828 P.2d 654, *review denied*, 119 Wn.2d 1019, 838 P.2d 692 (1992). A conspiracy "may be proven by showing the declarations, acts and conduct of the conspirators." ***State v. McGonigle***, 144 Wash. 252, 260, 258 P. 16 (1927). The agreement may be shown by a " 'concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose.' " ***State v. Casarez-Gastelum***, 48 Wn. App. 112, 116, 738 P.2d 303 (1987). Also, a conspiracy may be proven through circumstantial evidence. ***State v. Barnes***, 85 Wn. App. 638, 664, 932 P.2d 669 (1997); ***State v. Brown***, 45 Wn. App. 571, 579, 726 P.2d 60 (1986).

In the present case, there was an agreement, a plan, to steal the victim's car, specifically the tires and rims. Hudson testified that Henderson wanted to steal the tires and rims. 3 RP 347. Henderson, Green, Starks, and Hudson developed a plan where they would assault the victim, take his keys and get the car. 3 RP 347-348, 350-351. They tried once and

failed. 3 RP 349. They regrouped and tried again; the second time with more force and participants. 3 RP 350. Hudson testified that Beck participated in assaulting the victim the second time, when the keys and wallet were taken. 3 RP 350.

Starks testified that Henderson asked him if Starks knew how to steal the car. 3 RP 283, 286. Starks looked at the car and told them that the car would be difficult to steal because it had an alarm. 3 RP 347. Starks testified that the plan was for Henderson to assault the victim so they could get the keys. 3 RP 284. Starks testified that Beck participated in the second attack, when the keys and wallet were taken. 3 RP 289.

Because the Pine Street Landing has surveillance cameras in the parking lot, this entire incident is on video. Exhibit 8 contains video from two cameras: Camera 13 and camera 15. Camera 13 shows the incident at the end of a row of parked cars, closest to where the final assault occurred. Camera 15 is closer to the entrance of the bar. It shows the activity in the parking lot from the opposite end of the same row of parked cars. The victim parked his car approximately in the middle of the row. Exh. 8: camera 13:25.58.[2]

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[2] The video will be referred to by the camera number and the sequence as it appears on the video; e.g. camera 13 at 25.58.

Beck can be seen on the video speaking with the victim and later looking into the victim's car. Exh. 8: camera 15: 26.38. 2 RP 164, 166. After the victim entered the bar, Beck, Henderson, and others can be seen gathered by the victim's car. Camera 13:36.37, 15:40.7. The victim later approached his car, handling his keys. Camera 15: 47.23. At this point, Henderson tried to punch the victim. Camera 13:47.24, 15:47.24. The victim retreated. Henderson advanced briefly, with Beck right behind him. Camera 13:47.30, 15:28. Beck and Henderson stayed by the victim's car. Camera 15:47.38. After this unsuccessful attempt, the defendants and their companions re-grouped. Camera 15:47.49.

Less than a minute later, Beck and the others advanced toward the victim again. Camera 13: 50.23, 15:48.2. Henderson led the assault on the victim. Camera 13:50.54, 15:50.59. When Green grabbed the victim's keys, Beck stepped in between the victim and Green. Camera 13:51.8. Beck, Henderson, and the others kept the victim cornered while Green went to the victim's car. Camera 13:51.16. At one point, the victim broke away and moved toward his car. Beck grabbed and punched him. Camera 13:51.23. Beck was part of the group who continued to assault the victim, knocking him to the sidewalk. Camera 13:27-29. Seconds after Green pulled out in the victim's car, all the participants dispersed. Camera 13:51.46-50. Henderson and Beck left in Henderson's vehicle. 3 RP 352.

As the assault continued, Green grabbed the victim's keys. Camera 13:51.5. He returned to the victim's car, got in, and started it. Camera 13: 51.16, 15:51.16. Green eventually drove off in the victim's car. 15:51.30.

Several participants narrated the video for the jury: Starks 3 RP 291-295; Hudson 3 RP 355-359; and Green 4 RP 626. They identified the participants on the video, including Beck and themselves. 3 RP 291, 469, 4 RP 626. On cross-examination, the prosecuting attorney took Henderson through the video in great detail. 3 RP 468-476, 4 RP 485-507.

When the victim came out of the bar, Beck joined in attacking the victim with Henderson. 3 RP 289. Beck and the others fled immediately after the victim's keys and wallet were taken. 3 RP 290. The "fight" stopped as soon as Green drove out of the lot with the victim's car. 3 RP 295.

When Henderson went to attack the victim, Beck followed. 3 RP 289. Beck joined in assaulting the victim as Green took the car keys. *Id.*

The challenge to the sufficiency admits that all this evidence, and all reasonable inferences from it are true. *See*, ***Salinas***, *supra*. The jury could conclude from the defendant's acts and conduct, that he acted in agreement and the necessary substantial steps were taken. The testimony and narration of the video by several witnesses, four of whom were

participants, left the jury with the inescapable conclusion that Beck was a full participant and guilty of all the crimes charged.

8. THE CONSPIRACY COUNTS WERE TWO UNITS OF PROSECUTION.

To determine if multiple convictions under the same statute violate double jeopardy, the inquiry focuses on what "unit of prosecution" the Legislature intended to punish. ***State v. Adel***, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). Washington courts have determined that the "Legislature intended the unit of prosecution for conspiracy, within the meaning of double jeopardy, to be an agreement and an overt act rather than the specific criminal objects of the conspiracy." ***State v. Bobic***, 140 Wn.2d 250, 266, 996 P.2d 610 (2000). As a result, "the punishable criminal conduct is the plan, not whatever statutory violations the coconspirators considered in the course of devising the plan." ***State v. Knight***, 134 Wn. App. 103, 109-10, 138 P.3d 1114 (2006), *aff'd*, 162 Wn.2d 806, 174 P.3d 1167 (2008). Generally, this means "one plan, one count." ***State v. Williams***, 131 Wn. App. 488, 496, 128 P.3d 98 (2006) (citing ***Bobic***, 140 Wn.2d at 261), *remanded*, 158 Wn.2d 1006 (2006), *aff'd*, 147 Wn. App. 479, 195 P.3d 578 (2008).

In ***Knight***, the defendant and two others agreed to commit a robbery. 134 Wn. App. at 106. The defendant pleaded guilty to conspiracy

to commit burglary and conspiracy to commit robbery, but the court found that the record only supported the conspiracy to commit robbery. *Id.* at 110. The State had charged Knight with conspiracy to commit burglary based on an earlier plan to enter the victim's hotel room in order to rob him, but this plan "was subsumed in the overall scheme that comprised the single criminal conspiracy." *Id.*, at 111. As a result, conviction on both conspiracy to commit burglary and conspiracy to commit robbery violated double jeopardy. *Id.* Similarly, in ***Bobic,*** the defendant's involvement in a complex car theft scheme resulted in only one conviction for conspiracy despite his involvement in a "single, ongoing, multiobjective agreement." 140 Wn.2d at 261.

Multiple conspiracies may be charged where the facts support multiple criminal agreements. ***Bobic,*** 140 Wn. 2d at 266. For example, in ***State v. Walker***, 24 Wn. App. 78, 79, 599 P.2d 533 (1979), the court found multiple conspiracies to possess and deliver heroin. According to the court, "the agreements occurred between Walker and three separate persons, at different times, places and for somewhat different purposes." *Id.* at 81. To determine whether multiple criminal agreements exist, the appellate court looks to whether the time, persons, places, offenses, and overt acts were distinct. *Id.*

Here, the evidence showed that there were separate conspiracies: to steal the car and to rob the victim. The defendants first formed a conspiracy to steal the car without the victim. Henderson asked Starks if Starks could steal it. Starks examined the car and said no. The plan proved unsuccessful.

The defendants came up with the second conspiracy: robbery; take the keys and car from the victim by force. In the second plan, Henderson would assault the victim, knock him out, and take the keys. This, too, proved unsuccessful. The final plan was the assault and taking in force.

9. DEFENDANT BECK'S CONVICTIONS WERE NOT THE SAME CRIMINAL CONDUCT.

When a defendant is convicted of two or more current offenses, the court calculates his offender score, and resulting sentence ranges, by counting all other current and prior convictions as prior convictions. RCW 9.94A.589(1)(a). If, however, any of the current offenses encompass "the same criminal conduct" the court counts these offenses as one crime. RCW 9.94A.589(1)(a); ***State v. Dolan***, 83 Wn. App. 361, 364, 921 P.2d 590 (1996). The trial court's determination will only be reversed upon a finding that there was an abuse of discretion or that there was a misapplication of the law in making this determination. ***State v. Porter***, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

For separate offenses to constitute the "same criminal conduct" under RCW 9.94A.589, three elements must be present: 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). The phrase "same criminal conduct" is narrowly construed to disallow most assertions of same criminal conduct. ***State v. Flake***, 76 Wn. App. 174, 180, 883 P.2d 341 (1991); ***Porter***, 133 Wn.2d at 181.

In deciding different crimes encompass the same criminal conduct, a focus is on whether the criminal intent, as objectively viewed, changed from one crime to the next. ***State v. Dunaway***, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). This objective test considers how closely related the crimes are, whether the nature of the criminal objective changed between crimes, and whether one crime furthered the other. ***State v. Burns***, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).

In ***State v. Grantham***, 84 Wn. App. 854, 932 P.3d 657 (1997), this Court framed the critical issues as:

> The question is whether the combined evidence of a gap in time between the two rapes and the activities and communications that took place during that gap in time, and the different methods of committing the two rapes is sufficient to support a finding that the crimes did not occur at the same time and that Grantham formed a new criminal intent when he committed the second rape.

Grantham, 84 Wn. App. at 858. A period of time between acts, therefore, not only defeats the "same time" prong of the same criminal conduct test, it also defeats the "same objective intent" prong because:

> If at the scene of the crime the defendant can be said to have realized that he has come to a fork in the road, and nevertheless decides to invade a different interest, then his successive intentions make him subject to cumulative punishment and he must be treated as accepting the risk whether he in fact knew of it or not.

Grantham, 84 Wn. App. at 861 (quoting ***Harrell v. State***, 88 Wis. 2d 546, 277 N. W. 2d 462, 466 (1979)).

In ***Grantham***, the defendant anally raped his victim and, immediately after completing this rape, started kicking and hitting his victim. He turned her around and then told her he wanted her to perform oral sex with him. When she kept her mouth shut he slammed her head into the wall and forced her to comply. *Id.* at 856.

The court noted that Grantham finished one act of rape before committing the other, that he had the presence of mind between rapes to threaten his victim not to tell, and he used new physical force to gain compliance. 84 Wn. App., at 859. That evidence was sufficient to establish that Grantham "had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act." 84 Wn. App. at 859. Because he chose to the latter, he

formed a new intent to commit the second act, and as such, the crimes were sequential, not simultaneous or continuous. *Id.*

Here, the testimony, and the video evidence, established that the defendants conspired to steal the victim's vehicle. They discussed how to get the vehicle, and took a substantial step towards the theft of the motor vehicle when they consulted with Starks about his ability to steal the car. When they were told that he would not be able to take the vehicle, they discussed alternative means to get the car.

This is analogous to ***Grantham***. There was a gap in time, greater than that in ***Grantham***, in which the defendants had the opportunity to pause, reflect, and either cease with the criminal activity or proceed to commit a further criminal act. As a result, the conspiracy to commit theft of a motor vehicle was completed and does not constitute the same criminal conduct as the three other counts.

After discovering that Starks could not surreptitiously steal the car, the defendants decided that they needed the keys to get the vehicle, and the only way to get the keys was to take them from the victim. The testimony and video evidence were clear. Henderson said that he could knock the victim out with one punch. The video shows Henderson waiting for the victim to attempt to open the car door before attacking him, landing a single blow to his head while the victim was looking down.

When Henderson was unable to knock the victim out, the video and testimony at trial clearly establish that the defendants huddled up and discussed alternative means of getting the victim's keys. Three minutes later the defendants and their accomplices attacked the victim, took the keys and wallet from his person, and stole his motor vehicle.

The conspiracy to commit robbery in the first degree clearly shows a different intent (take the keys from the victim) and occurred after several minutes of contemplation and preparation. Again, the defendants had opportunity to pause, reflect, and either cease their criminal activity or proceed to commit a further criminal act.

The two conspiracies did not occur at the same time and place, and they had separate objective criminal intents. Therefore, they are separate courses of conduct from one another and the completed crimes, as these crimes were completed prior to the underlying offenses being carried out.

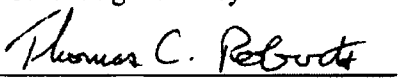
D. CONCLUSION.

The defendants received a fair trial where ample evidence was appropriately admitted to prove their guilt. Conduct of trial and argument of the prosecuting attorney and defense counsel were appropriate. For all

the reasons argued in the Respondent's brief, the State respectfully requests that the judgments be affirmed.

DATED: September 27, 2011.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



Thomas C. Roberts
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WSB # 17442

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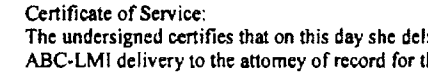
The undersigned certifies that on this day she delivered by ~~U.S.~~ E. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.



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