

No. 41875-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

REED BOYSEN,

Appellant.

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

The Honorable Carol Murphy, Judge
Cause No. 10-1-01650-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Boysen's right to confront witnesses against him, provided by the Sixth Amendment and art. 1, sec. 22 of the Washington constitution, was violated when the trial court ruled he could not cross-examine Chad Parker about the specific number of months difference between the potential sentence he faced as originally charged and the sentence he faced as a result of his pleas pursuant to a plea bargain.

2. Whether the prosecutor vouched for the credibility of the witness Chad Parker, and if so, whether it was flagrant and ill-intentioned prosecutorial misconduct. Because defense counsel did not object to the challenged comment at trial, whether counsel was ineffective for failing to do so.

3. Whether the trial court abused its discretion when it excused Juror No. 26 for cause over defense objection.

4. Whether the convictions for second degree assault and drive-by shooting violate the prohibition against double jeopardy.

5. Whether drive-by shooting and second degree assault should be considered the same criminal conduct for sentencing purposes.

B. STATEMENT OF THE CASE.

The State will accept Boysen's statement of the case, although it contains a significant amount of argument, contrary to RAP 10.3(5). The basic facts are correctly presented. However, he refers on page 12, fn. 2, to the sentence received by a co-defendant and witness against him, Chad Parker. That sentence is

not part of the record in this case, and the State asks this court to strike, or at least disregard, that footnote.

C. ARGUMENT.

1. The trial court did not significantly limit Boysen's cross-examination of Chad Parker regarding the plea agreement Parker made with the State. He had ample opportunity to use the plea agreement to show bias on the part of the witness. Even if this court does find error, it was harmless.

A defendant has the right to cross-examine State witnesses to elicit facts that tend to show bias, prejudice, or interest; however, the trial court has discretion to determine the scope or extent of such cross-examination. State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980). A criminal defendant has great latitude to cross-examine State witnesses to show motive and credibility. State v. Fisher, 165 Wn.2d 727, 752, 202 P.3d 937 (2009). This right is not without limitations, however. State v. Ahlfinger, 50 Wn. App. 466, 474, 749 P.2d 190 (1988). A trial court's ruling on the scope of cross-examination will not be disturbed absent a manifest abuse of discretion. State v. Dickenson, 48 Wn. App. 457, 466, 740 P.2d 312 (1987). Whether a defendant's confrontation right has been denied is determined on a case by case basis depending

on the surrounding circumstances and the evidence admitted at trial. Ahlfinger, 50 Wn. App. at 474.

It is a “well-established” rule that a jury has nothing to do with sentencing and must reach a verdict without considering the sentence that may be imposed. State v. Mason, 160 Wn.2d 910, 929-30, 162 P.3d 396 (2007).

This strict prohibition against informing the jury of sentencing considerations ensures impartial juries and prevents unfair influence on a jury’s deliberations. The only exception that allows juries to know about sentencing consequences is in a death penalty trial, and even then the jury is to consider the penalty only after a determination of guilt.

Id. at 930.

The court here prohibited Boysen from cross-examining Parker about the specific number of months he was facing as a result of his plea bargain versus the number of months he would have faced had he been convicted as originally charged. Parker’s original charges were identical to the charges Boysen was being tried for, and thus the jury would have known the sentencing range that Boysen was exposed to. [RP 246-47] During argument on the State’s motion to exclude that information, it was made clear that Boysen could elicit the fact that Parker had the firearm enhancements and the drive-by shooting charge dismissed, [RP

237, 241, 243-44] that he pled guilty to two counts of second degree assault, [RP 238], and that the benefit Parker received was significantly less time than he was facing before. [RP 246]

In State v. Portnoy, 43 Wn. App. 455, 718 P.2d 805 (1986), the court held that the State did not have the right to keep the jury from knowing the extent of the sentence the defendant would be facing if convicted, if that information was otherwise relevant. Id. at 461. In Portnoy, a co-defendant had entered a plea agreement giving him a substantial break in exchange for his testimony against Portnoy. The trial court prohibited cross-examination into the fact that the firearm enhancement, which Portnoy still faced, carried a mandatory term of confinement. Id. at 459. The Supreme Court said:

The jury needs to have full information about the witness's guilty plea in order to intelligently evaluate his testimony about the crimes allegedly committed with the defendant.

Id. at 461.

Boysen cites to United States v. Chandler, 326 F.3d 210 (3rd Cir. 2003) to support his argument. In that case, two witnesses testified pursuant to a plea agreement, and the court found that the trial court had "substantially restricted," though not "wholly cut off,"

the defendant's ability to inquire into the sentence reduction the witnesses hoped to receive. Id. at 216. The Chandler court recited the general rule that the Confrontation Clause does not prevent the trial court from imposing any limits on an exploration of the potential bias of prosecution witnesses. There is a two-step analysis. First, a reviewing court must determine if the ruling significantly interfered with the defendant's right to inquire into bias, and second, whether the constraints fell within the "reasonable limits" which a trial court has the discretion to impose. Id. at 219.

[C]ircuit courts generally have agreed that "[w]hether a trial court has abused its discretion in limiting the cross-examination of a witness for bias depends on 'whether the jury had sufficient other information before it, without the excluded evidence, to make a discriminating appraisal of the possible biases and motivations of the witnesses.'"

.....

With respect to the cross-examination of cooperating witnesses who expect to obtain, or have obtained, a benefit from the government in exchange for their testimony, the "critical question . . . is whether the defendant is allowed an opportunity to examine a witness [sic] 'subjective understanding of his bargain with the government,' *'for it is this understanding which is of probative value on the issue of bias.'*"

Id. at 219-20, internal cites omitted, emphasis added.

The Chandler court concluded that the question is whether the jury might have “received a significantly different impression” of the witnesses’ credibility had it known of the sentence reduction they received in exchange for their testimony. Id. at 221. The court found that under the circumstances of that case, it would, and thus further found that the trial court had abused its discretion. Id. at 222-23.

At Boysen’s trial, defense counsel questioned Parker extensively about the plea agreement. [RP 319-25, 359-60] Counsel elicited that Parker was trying to minimize his jail time [RP 320], his charges were reduced, he wouldn’t be sentenced until after he testified [RP 322], the firearm enhancement was dropped [RP 323], he would get substantially less time as a result of the plea bargain [RP 324], he was being forced to testify as part of the plea agreement [RP 324-25], that he didn’t think he was getting a great deal, and that his story changed after the plea agreement about the number of shots fired [RP 360].

Under the facts of this case, it is highly unlikely that the jury would have had a significantly different impression of Parker’s credibility had it also known that his sentence range dropped from the same range Boysen was facing to 12+ to 14 months. [CP 12]

Counsel did a very thorough job of impeaching Parker without the specifics of the sentencing ranges. As noted above, it is Parker's understanding of the plea agreement, not the specifics of the agreement itself, that is relevant to bias. He testified that he didn't think he got a great deal, and even if the jury had known the numbers, Parker still didn't think he got a great deal. It didn't matter if Boysen, the prosecutor, the court, and the jury all thought he got a good deal. His credibility is to be determined by his opinion of the deal. The trial court's ruling did not prevent the defense from inquiring extensively about Parker's perception. Because that is so, the trial court did not abuse its discretion by excluding questioning about the sentencing range.

For the same reason, even if this court were to find the trial court's ruling to be error, it is harmless error. Confrontation Clause violations are subject to a harmless error analysis. State v. Walker, 129 Wn. App. 258, 271, 118 P.3d 935 (2005).

A harmless error is an error which is *trivial*, or *formal*, or *merely academic*, and was not prejudicial to the substantial rights of the party assigning it, and *in no way affected the final outcome of the case*.

State v. Murphy, 86 Wn. App. 667, 671, 937 P.2d 1173 (1997), (emphasis in original). The evidence about the plea agreement

which was before the jury enabled it to make the same evaluation of Parker's bias as if it had heard the sentencing numbers.

Further, the physical evidence in the case was substantial. The victims testified that at Mud Bay something hit their truck. Eldridge thought it sounded like rocks hitting the side of the truck. [RP 123] Palmer thought it was gunfire. [RP 149] At the Black Lake exit, Eldridge and Palmer saw Parker fire three shots at them. [RP 124, 150] When Boysen and Parker were arrested, Boysen had a semiautomatic pistol in his pocket. [RP 193] The firearms examiner testified that the gun held 9 cartridges; there were four unfired cartridges in it. [RP 284-85] When the suspect's pickup was searched, a .22 caliber revolver was located under the seat. It held six cartridges, three fired, three unfired. [RP 378] Three bullet marks were found on the victim truck. [RP 138] Parker admitted shooting at the victims at the Black Lake exit, and then putting the gun under the seat of his pickup. [RP 314]

The shots fired at Mud Bay could only have come from Boysen's gun. It defies logic that Boysen would have handed his gun to Parker, Parker fired up to five bullets, then gave the gun back to Boysen, who put it in his pocket. Parker admitted to

shooting the revolver; it is unlikely that he would falsely accuse Boysen of firing the remaining shots.

Because of this evidence, Parker's testimony was not quite as critical as Boysen argues it is, and it corroborated Parker's account. It cannot be said that Boysen was prejudiced by the court's ruling that the specifics of Parker's sentencing not come before the jury. If the court's ruling was error, it was harmless.

2. The single question asked by the prosecutor of the witness cannot fairly be characterized as vouching for the credibility of the witness. It was not misconduct at all, and certainly not "flagrant and ill-intentioned" misconduct, such that even if this court finds error it is harmless. Defense counsel was not ineffective for failing to object at trial.

Chad Parker entered into a plea agreement with the State. He got a significant reduction in charges and potential penalties in exchange for his truthful testimony at Boysen's trial. Before his testimony, the State brought the motion in limine discussed in the preceding section to preclude cross-examination about the specific number of months Parker was facing if found guilty as originally charged. [RP 236-247] Defense counsel made it clear that Parker's credibility and bias would be challenged. [RP 238-241, 244-246] The written plea agreement itself was never put into evidence and never before the jury.

Early in direct examination the following exchange took place:

Q: Did you recently plead guilty to some crimes?

A: Yes, sir.

Q: What did you plead guilty to?

A: Assault in the second degree.

Q: Two counts?

A: Yes, sir.

Q: Did you also enter into an agreement to truthfully testify?

A: Yes, sir.

Q: Now, do you know Mr. Reed Boysen?

A: I do.

[RP 309] There was no objection.

Defense counsel began cross-examination of Parker by asking questions about the plea agreement. [RP 319-25] He asked Parker if he wanted to be truthful, [RP 324], and said, “[L]et’s talk about the events of this day and being truthful.” [RP 325] When asking about Parker’s statement to the police, he asked whether Parker wanted to be truthful. [RP 338] He elicited

admissions from Parker that he had lied a number of times. [RP 338-42]

The prosecutor made no mention of the plea agreement or Parker's obligation to testify truthfully in his opening statement, closing argument, or rebuttal. [RP 111-14, 446-52, 469-74] During defense closing, counsel argued, "Let's talk about Chad Parker just a minute. Is he a liar? Absolutely." [RP 460] Counsel then proceeded for several pages of transcript to call Parker a liar. [RP 460-68] Even so, on rebuttal the prosecutor did not refer to Parker's obligation to testify truthfully.

The prosecution may not vouch for the credibility of its own witnesses.

"Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony."

United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980).

Improper vouching may be considered prosecutorial misconduct.

To raise prosecutorial misconduct for the first time on appeal, the defendant must show that the conduct was so "flagrant and ill-intentioned" that a curative instruction would not have averted the prejudice. State v. Coleman, 155 Wn. App. 951, 956-57, 231 P.3d

212 (2010). Claims of prosecutorial misconduct are reviewed under an abuse of discretion standard. State v. Ish, 170 Wn.2d 189, 195, 241 P.3d 389 (2010),

Boysen relies on Ish as authority for his contention that the prosecutor's question about the agreement's requirement for truthful testimony was misconduct. In Ish, the defendant was charged with first degree murder and second degree felony murder. He was convicted of second degree felony murder for beating his girlfriend to death. He did not deny the killing; his defense was that his drug use and strange behavior at the time showed that he did not form the required mental state. Id. at 192. The State obtained the testimony of Ish's jail cellmate by agreeing to reduce his pending charges significantly and make a very favorable sentencing recommendation. In exchange, the cellmate was to provide "a complete and truthful statement," "to testify truthfully," and to "have told the truth, to the best of his knowledge." Id. at 193.

During pretrial arguments about the admissibility of the agreement, the trial court ruled, over defense objection, that the State could ask the cellmate on direct examination about the terms of the agreement, including the obligation to testify truthfully, but the State could not argue that he was complying with the terms of the

agreement. Id. at 193-94. On direct examination the cellmate testified that the agreement required truthful testimony, and after his credibility had been attacked on cross-examination, the State asked whether the agreement required truthful testimony and whether he had in fact testified truthfully. [RP 194] The cellmate testified that Ish had recounted to him the details of the crime but said that he was going to claim he didn't remember anything about it. Id. at 192-93.

The Court of Appeals affirmed. State v. Ish, 150 Wn. App. 775, 208 P.3d 1281 (2009) That court found the evidence that the agreement required truthful testimony only gave the jury context in which to evaluate the testimony, and that admitting the agreement was not an abuse of discretion. "While it is improper for a prosecutor to vouch for the credibility of a witness, no prejudicial error arises unless counsel clearly and unmistakably expresses a personal opinion as opposed to arguing an inference from the evidence." Id., at 786, citing to State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008).

The Supreme Court accepted review and issued a plurality opinion. Four justices found the testimony a "mild form of vouching":

[C]ourts have found that a witness's testimony that they were speaking the truth and living up to the terms of their plea agreement *may* amount to a mild form of vouching. . . . As with the initial admission of the plea agreement itself, such testimony suggests that the witness *might* have been compelled to tell the truth by the prosecutor's threats and the State's promises. . . . It *may* imply that "the prosecutor can verify the witness's testimony and thereby enforce the truthfulness condition of the plea agreement."

Ish, 170 Wn.2d at 197-98 (internal cites omitted, emphasis added).

Even so, those four justices had no difficulty finding harmless error.

Id. at 200. "In order to prove the conduct was prejudicial, the defendant must prove there is a substantial likelihood the misconduct affected the jury's verdict." Id., citing to State v. Korum, 157 Wn.2d 614, 650, 141 P.3d 13 (2006), which cited to In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 481-82, 965 P.2d 593 (1998).

Four other justices found that there was no error. Ish, 170 Wn.2d at 201. Citing to State v. Bourgeois, 133 Wn.2d 389, 945 P.2d 1120 (1997), the concurrence said this:

When the State offers a witness who has agreed to testify as part of a plea agreement, the existence of a "deal" is an obvious ground for impeachment. It shows potential bias and motivation to lie. There is even the possible inference that the State offered the witness the plea agreement to procure *fraudulent* testimony implicating the defendant. In the face of obvious (and damning) lines of questioning on cross-examination, the prosecutor in this case wished to present [the cellmate's] testimony in its true context—

as part of a plea deal in exchange for truthful testimony. By questioning [the cellmate] on direct examination about this issue, the prosecutor intended to “pull the sting” from the anticipated examination.

Ish, 170 Wn.2d at 202, emphasis in original.

These four justices approved the holding of State v. Green, 119 Wn. App. 15, 79 P.3d 460 (2003), that the State could ask questions on direct examination about the agreement but not introduce the agreement itself unless the defense opened the door on cross-examination. Ish., 170 Wn.2d at 204. The questions can be asked before the witness’s credibility is attacked. Green, 119 Wn. App. at 24. The Green court also found harmless error, even though the written agreement itself had been admitted into evidence. Id., at 24-25.

Only one Supreme Court justice found reversible error in Ish. Ish, 170 Wn.2d at 206. Eight justices found it was not reversible error, and four of those found that it was not error at all. The Court of Appeals applied Ish in State v. Smith, 162 Wn. App. 833, 262 P.3d 72 (2011) (published in part). In Smith, three defendants were charged with murdering two people. One of them, Pierre Spencer, entered into an agreement with the State. He pled guilty as charged, to two counts of aggravated first degree murder, one

count of first degree robbery, and one count of first degree burglary, with deadly weapon enhancements on each count. If he testified truthfully at the trial of the other two, he would be permitted to withdraw the pleas and instead plead guilty to first degree murder and first degree manslaughter, and would face a sentencing range of 240-320 months rather than life in prison without the possibility of parole. Id. at 839-40. During opening statements, the prosecutor made reference to the plea agreement. Before Spencer testified, the court admitted a redacted plea agreement (removing mention of a polygraph test) and Spencer's guilty plea statement. The defense objected to none of this. On direct examination Spencer testified about his understanding of the agreement in some detail, although not at any great length. Id. at 843-44. There were questions on cross-examination and redirect. Id. at 844-45. There were several references to Spencer's obligation to testify truthfully.

For the first time on appeal, one of the defendants, Darrel Jackson, raised a claim of prosecutorial misconduct. The court found that the State was entitled to "anticipatory rehabilitation" because Jackson had made it clear he was going to attack Spencer's credibility. Asking Spencer about his agreement to testify truthfully was, therefore, not "flagrant and ill-intentioned," and

the defendant could not raise the issue for the first time on appeal. Id. at 848. Applying Ish, the Smith court held that there was no reversible error.

Where “there is little doubt” that the defendant will attack the veracity of a State’s witness during cross-examination . . . the State is entitled to engage in preemptive questioning of its witness on direct to “take the sting” out of the inevitable damaging cross examination.

Smith, 162 Wn. App at 850, citing to Ish, 170 Wn.2d at 199 n. 10. The Smith court declined to consider the claim. Smith, 162 Wn. App. at 851.

In Boysen’s case, far less information about the plea agreement was before the jury than in Ish or Smith. The prosecutor asked one question. Defense counsel had announced before Parker took the stand that he would be attacking Parker’s credibility, and the State was justified in “anticipatory rehabilitation.” If that one question was error, and under Ish that is by no means decided, it cannot be raised for the first time on appeal because the prosecutor’s conduct was not “flagrant and ill-intentioned.”

Since Boysen did not preserve this claim for appeal, he attempts to bootstrap it in as a claim of ineffectiveness of counsel,

which can be raised for the first time on appeal. State v. Soonalole, 99 Wn. App. 207, 215, 992 P.2d 541 (2000).

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). 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). “The reasonableness of counsel’s performance is to be evaluated from counsel’s perspective at the time of the alleged error and in light of all the circumstances.” Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

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.

Boysen claims that his counsel’s failure to object to the single question about whether the agreement required Parker’s truthful testimony was deficient performance. The question, then, is if, assuming *arguendo* that it was error, whether the outcome of the trial would have been different had defense counsel objected to the statement. Had that happened, the court may have sustained the objection and the jury would have been instructed not to consider the witness’s answer. In light of the totality of the facts of this case, it cannot fairly be said that the single mention of truthfulness by the State had any significant impact on the outcome of the trial.

Boysen argues that there is no tactical or strategic reason for his counsel not to have objected to the State's question, and that his counsel was therefore deficient. Appellant's Brief at 34. While there may have been no strategic reason for defense counsel to not object to the error, the competency of counsel must be judged from the record as a whole, and not from an isolated segment. State v. Piche, 71 Wn.2d 583, 591, 430 P.2d 522, 527 (1967). On the other hand, counsel may well have chosen not to call the jury's attention to the witness's obligation to testify truthfully. It would not be in Boysen's interest to reinforce Parker's obligation to be truthful, when he intended to, and did, repeatedly call Parker a liar.

Boysen has not shown, based on the record as a whole, that his counsel was ineffective.

3. The trial court did not abuse its discretion when it excused Juror No. 26 for cause over defense counsel's unsupported objection.

During voir dire questioning by the State, prospective Juror No. 26 told the court that she (the prosecutor referred to the juror as "she," RP 89) had a nephew who had been convicted of some unspecified crime, had been serving time in Spokane, and had been transferred to Aberdeen. Those with knowledge of the Washington system of corrections would understand that the

nephew was serving time for a felony, since there are state prisons in both of those cities and prisoners serving time in county jails are typically not transferred from one county to another. Juror No. 26 believed that her ability to be fair was “possibly” impaired because of the closeness of the family relationship and the trauma of the experience. [RP 53] Defense counsel did not ask any questions of that juror. [RP 56-88]

While the jury panel was out of the courtroom, the court addressed challenges for cause. The State asked to excuse Juror No. 26 for cause. Defense counsel objected. [RP 89] When asked if he wished to make a record of his reasons, counsel declined. [RP 90] Without further comment, the court dismissed Juror No. 26. [RP 90] Boysen claims that this was error that violated his right to a fair and impartial jury.

A defendant has a right, guaranteed by both the Sixth Amendment and article I, section 22 of the Washington Constitution, to an impartial jury. That right is protected by excusing for cause potential jurors whose views would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” State v. Gonzales, 111 Wn. App. 276, 277-78, 45 P.3d 205 (2002). The decision

about a challenge for cause is within the discretion of the trial court and will be reversed only upon a showing of manifest abuse of that discretion. State v. Grunewald, 55 Wn. App. 807, 810, 780 P.2d 1332 (1989). *“If a juror should have been excused for cause, but was not, the remedy is reversal.”* Id., emphasis added. The State has been unable to find a case which says that if a prospective juror was dismissed, but should not have been, the remedy is reversal.

A reviewing court gives great deference to the trial court regarding decisions about a juror’s ability to be impartial. State v. Noltie, 116 Wn.2d 831, 839, 809 P.2d 190 (1991).

Because “a juror’s competency to serve impartially” is a credibility determination that the trial court is necessarily in the best position to make, this court applies a deferential standard of review and will reverse the trial court’s determination only if the court has manifestly abused its discretion. (Cites omitted.) (“Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors.”)

State v. Yates, 161 Wn.2d 714, 743, 168 P.3d 359 (2007).

[I]t is a good rule for the trial judge to honor challenges for cause whenever he may reasonably suspect that circumstances outside the evidence may create bias or an appearance of bias on the part of the challenged juror.

Grunewald, 55 Wn. App. at 811.

Boysen's argument implies that because this potential juror was excused over his objection he was denied a fair and impartial jury. He does not explain how this is so. He has not pointed to any evidence in the record that the chosen jurors were biased. The rule in Washington has always been that while a party has the right to an impartial jury, he does not have a "vested right" to any particular juror. Creech v. Aberdeen, 44 Wash. 72, 74, 87 P. 44 (1906) ("The plaintiff, as has long been held in this state, had no vested right in any particular juror. He had a right to an impartial jury, and this right seems to have been enjoyed by him.") See also State v. Gentry, 125 Wn.2d 570, 615, 888 P.2d 1105 (1995) ("A defendant has no right to be tried by a particular juror or by a particular jury.")

Finally, Boysen should be deemed to have waived this claim by failing to inform the court of the reason for his objection. If the court did not know the basis for the objection, it could not take that factor into account. Based upon the information available to the court, and giving deference to the court's credibility determination, there is no doubt that the court properly exercised its discretion.

4. The convictions for second degree assault and drive-by shooting do not violate the prohibition against double jeopardy.

Boysen argues that his convictions for second degree assault and drive-by shooting violate double jeopardy. The State understands him to say that one of the second degree assault charges is the same conduct as the drive-by shooting, but not both.

Assault in the second degree is defined in RCW 9A.36.021; the portions of that statute relevant to this case are set forth below:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

.....

(c) Assaults another with a deadly weapon.

Drive-by shooting is prohibited by RCW 9A.36.045:

(1) A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

“A double jeopardy violation does not occur simply because two adverse consequences stem from the same act.” In re Pers.

Restraint of Mayner, 107 Wn.2d 512, 521, 730 P.2d 1321 (1986).

Both the Fifth Amendment to the United States Constitution and

article I, section 9 of the Washington Constitution protect against double jeopardy. The Washington protection is coextensive with the federal protection. State v. Womac, 160 Wn.2d 643, 650, 160 P.3d 40 (2007). Both prohibit multiple punishments for the same act unless the legislature intended to authorize such punishments. State v. Baldwin, 150 Wn.2d 448, 454, 78 P.3d 1005 (2003). Review is de novo. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

Boysen is correct that the first inquiry is into the intent of the legislature. Division Three of the Court of Appeals has held, in three opinions, that the statutory language of the two statutes does not indicate legislative intent. State v. Gassman, 160 Wn. App. 600, 615, 257 P.3d 666 (2011), *review denied* 172 Wn.2d 1002, 257 P.3d 666 (2011); State v. Larson, 160 Wn. App. 577, 676-77, 249 P.3d 669 (2011), *review denied* 172 Wn.2d 1002, 257 P.3d 666 (2011); State v. Statler, 160 Wn. App. 622, 638, 248 P.3d 165 (2011), *review denied* 172 Wn.2d 1002, 257 P.3d 666 (2011). If legislative intent is unclear, Washington courts move on to the same evidence test set forth in Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). That test provides that if each offense contains an element that the other

does not, the offenses are different and multiple punishments are permitted. Womac, 160 Wn.2d at 652.

Boysen maintains that the use of a gun elevated the assaults from fourth degree to second degree. Appellant's Opening Brief at 46. That is correct. It is not the drive-by shooting that elevates the assault to second degree. And it is drive-by shooting that he is attempting to argue results in double jeopardy because one is included in the other.

Even if he were correct, that the drive-by shooting formed part of the proof for the assaults and thus constitute double jeopardy, there would be some indication of legislative intent to punish both crimes separately. In Freeman, the court found that first degree assault and first degree robbery are to be separately punished. When a court vacates a conviction on grounds of double jeopardy, it vacates the crime that forms part of the proof of the other. That is because the greater offense carries a greater punishment that includes punishment for the lesser included offenses. However, when first degree assault raises robbery to first degree, the standard sentence for assault is much longer than the standard sentence for robbery. While not finding that dispositive, the Freeman court did give it great weight in holding that first

degree robbery and first degree assault were separately punishable. Id. at 778. Similarly, in this case, a first offense for second degree assault carries a standard range sentence of 3 to 9 months, while a first offense drive-by shooting carries 15-20 months. [CP 12-13] Therefore, if drive-by shooting actually did raise assault from fourth to second degree, there is some evidence that the legislature intended for both to be punished.

Next, the same evidence test also supports the conclusion that the two crimes are not the same for double jeopardy purposes. Each crime requires proof of facts that the other does not. Assault requires intent [CP 75], in this case to create apprehension and fear of bodily harm; drive-by shooting requires only recklessness. [CP 81] Drive-by shooting requires the discharge of a firearm, [CP 81], while second degree assault requires nothing more than the display of a deadly weapon, not necessarily a firearm, which creates apprehension and fear of bodily harm in the victim. [CP 75] A drive-by shooting must occur from or in the vicinity of a vehicle which brought the shooter, the gun, or both, to the scene of the shooting. Assault requires no vehicle.

Boysen correctly cites to Freeman that the court considers the elements of the crime as charged and proved, not necessarily

in the abstract. Appellant's Opening Brief at 43, Freeman, 153 Wn.2d at 777. The court went on to say, however, "the mere fact that the same *conduct* is used to prove each crime is not dispositive." Id

Boysen next argues that the merger test applies. It does not. The merger doctrine applies only when, in order to prove a particular degree of a crime, the State must also prove the defendant committed that crime plus an act which is defined elsewhere in the criminal statutes as a crime. State v. Vladovic, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983). Because drive-by shooting does not elevate a lesser degree of assault to second degree assault, merger is not applicable.

5. Second degree assault and drive-by shooting are not the same criminal conduct for sentencing purposes.

Boysen argues that his conviction for drive by shooting constitutes the same criminal conduct as one of the second degree assaults for purposes of sentencing. A trial court's decision as to same criminal conduct is given great deference. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000)

RCW 9.94A.589 tells a sentencing court when to impose consecutive or concurrent sentences. As a general rule, all current

convictions are treated as prior convictions when determining the offender score. The exception is that if the court finds that some or all of the current offenses are the same criminal conduct, they count 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.

RCW 9.94A.589(1)(a). 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).

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, 69 Wn. App. 183, 188, 847 P.2d 956 (1993). 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). 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).

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

The State does not dispute that the drive-by shooting and the second assault happened at the same time and place. It does dispute that the intent was the same. For the second degree assault the intent was to frighten the two occupants of the victim truck; for the drive-by shooting the “intent” was simply recklessness—indifference as to whether anybody else was struck by the bullets or frightened by the shooting.

And the victims were not the same. Eldridge and Palmer were the victims of the assaults. The general public was the victim of the drive-by shooting, as well as Eldridge and Palmer. In State v. Rodgers, 146 Wn.2d 55, 62, 43 P.3d 1 (2002), the Supreme Court reasoned:

In our view, the legislature aimed this relatively new [drive-by shooting] statute at individuals who discharge firearms from or within close proximity of a vehicle. Undoubtedly, it was concerned that reckless discharge of a firearm from a vehicle or in close proximity to it presents a threat to the safety of the public that is not adequately addressed by other statutes.

The facts here support the conclusion that the public at large was also a victim of the drive-by shooting. There was other traffic on the road at the time, and if the shots had missed the victim truck,

which they may well have done, the chances of hitting another car or person was great.

Because the victims were different, and the intent was different, the two crimes do not constitute the same criminal conduct and the sentencing court was correct to count them separately.

D. CONCLUSION.

Boysen's constitutional rights were preserved at trial and at sentencing. The State respectfully asks this court to affirm Boysen's convictions.

Respectfully submitted this 20th day of January, 2012.



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THURSTON COUNTY PROSECUTOR

January 20, 2012 - 11:54 AM

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