

29187-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

THOMAS A. BUTLER, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
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Mark E. Lindsey
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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred finding defendant's statements to law enforcement were voluntary.
2. Insufficient evidence supported the convictions for first degree Kidnapping and Conspiracy to commit first degree Robbery.
3. The court erred in denying defendant's motion to dismiss the Kidnapping charge at the conclusion of the trial.
4. Insufficient evidence supported the Conspiracy conviction charged in count III.
5. The trial court improperly instructed the jury regarding the use of deadly force by the homeowner.

II.

ISSUES PRESENTED

1. Did the court commit error by admitting the statements defendant voluntarily gave to law enforcement pursuant to CrR 3.5?
2. Was defendant "in custody" when he made statements to Detective Miller?

3. Does a Conspiracy require documented proof of a plan to engage in the criminal enterprise?
4. Does a court comment on the evidence when its jury instruction does not strictly comply with the Washington Pattern Jury Instructions (“WPIC”) approved version?

III.

STATEMENT OF THE CASE

For purposes of this appeal only, the Respondent accepts the Appellant’s statement of the case with the following additions.

Brad Benson testified that the defendant fired the first shots, then later indicated that Mr. Robertson had fired first. CP 201, 207. Taylor Robertson testified that the defendant fired the first shots. CP 125.

As part of the defendant’s CrR 3.5 hearing, the trial court made the following uncontested findings of fact:

1. The defendant, Mr. Butler, was shot during an incident that occurred on 3-30-09 at 4113 E. 16th, Spokane, Washington.
2. Mr. Butler was transported by ambulance to Deaconess Medical Center for treatment of his wounds.
3. On 4-6-09, Spokane Police Det. John Miller, went to Deaconess Medical Center to speak with Mr. Butler.

4. Det. Miller has received training in the medical field during his tour of duty in the United States Army.
5. Upon arrival at the hospital, Det. Miller first spoke with the ER Nurse in charge of Mr. Butler's care in the Hospital's ICU.
6. The ER Nurse is charged with controlling access to patients.
7. The ER Nurse stated to Det. Miller that Mr. Butler could carry on a conversation and was able to make informed health care decisions.
8. Det. Miller was satisfied that Mr. Butler could carry on a conversation. Det. Miller independently determined that Butler was able to carry on a conversation and understand what was going on.
9. Mr. Butler was on medication at the time of the interview.
10. Mr. Butler was making other important decisions related to his care at the time concurrent with this interview.
11. Det. Miller read Mr. Butler his constitutional rights from a pre-printed card which the defendant indicated he understood and would waive, orally. Butler did not sign the card do to his medical conditions.
12. There were no police officers stationed at the door or elsewhere in Mr. Butler's room.
13. Det. Miller left after interviewing the defendant. The defendant was not arrested until weeks after the interview.

CP 107-113.

The trial court made the following conclusions of law based upon its factual findings.

1. That the Court has jurisdiction over the parties and the subject matter.

2. That in order for *Miranda* rights to apply; there must be both custody and interrogation.
3. That custody is defined as either arrest or that a suspect's freedom of action or movement has been curtailed to a degree associated with formal arrest.
4. That interrogation involves express questioning, as well as words and actions on the part of the police that are likely to elicit incriminating responses.
5. The standard of proof that the statements made are voluntary is preponderance of the evidence.
6. That Mr. Butler was not in custody in this circumstance.
7. Therefore, *Miranda* did not apply.
8. Even if this interview had been custodial, Mr. Butler validly waived his rights.
9. The State may admit Mr. Butler's statements during its case in chief.

CP 107-113.

The jury found the defendant guilty as charged in counts I, II, III, IV, VII, and VIII, and acquitted defendant of counts V and VI. CP 326-39. This appeal followed. CP 342-355.

IV.

ARGUMENT

A. THE RECORD REFLECTS THAT THE DEFENDANT UNDERSTOOD HIS RIGHTS.

The first claim presented is a contention that the trial court erred in admitting defendant's statements to the police because of his alleged "incompetence" to understand and waive his rights. The record amply

supports the trial court's determination that defendant was not significantly impaired when he spoke to the Detective Miller.

As noted in many cases, the warnings required by *Miranda v. Arizona*, 384 U.S. 435, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), apply when a suspect is subject to (1) custodial (2) interrogation (3) by an agent of the state. *State v. Warner*, 125 Wn.2d 876, 884, 889 P.2d 479 (1995). Here, the trial court noted that the defendant was not in custody as contemplated by the *Miranda* court. RP 69. Accordingly, the trial court properly exercised its discretion finding that the court was dealing with a non-custodial interview between Detective Miller and defendant. RP 69.

“When a trial court determines a confession is voluntary, that determination is not disturbed on appeal if there is substantial evidence in the record from which the trial court could have found the confession was voluntary by a preponderance of the evidence.” *State v. Aten*, 130 Wn.2d 640, 664, 927 P.2d 210 (1996). Evidence of intoxication is simply a factor to be considered in determining whether a *Miranda* waiver is voluntary. *State v. Cuzetto*, 76 Wn.2d 378, 457 P.2d 204 (1969); *State v. Gardner*, 28 Wn. App. 721, 626 P.2d 56,

review denied 95 Wn.2d 1027 (1981); *State v. Collins*, 30 Wn. App. 1, 11, 632 P.2d 68, *review denied* 96 Wn.2d 1020 (1981); *State v. Reuben*, 62 Wn. App. 620, 625-626, 814 P.2d 1177, *review denied* 118 Wn.2d 1006 (1991); *State v. Saunders*, 120 Wn. App. 800, 810, 86 P.3d 232 (2004).

Defendant claims here that his statements to Detective Miller were not voluntary because of his alleged drug intoxication/impairment. However, there is no evidence at all that he did not understand what he was doing. Defendant claims that his medication impaired his faculties, yet the record reflects that defendant oriented to time and place, acknowledged his understanding of his rights, and gave coherent answers to Detective Miller's inquiries. There simply was no reason to believe the defendant was impaired so substantially that he could not knowingly waive his constitutional rights and make voluntary statements to Detective Miller. There was ample evidence for the trial court to find that defendant voluntarily and knowingly waived his rights. *State v. Aten, supra*. The trial court did not err in admitting defendant's statements to Detective Miller.

At the CrR 3.5 hearing, the State presented the testimony of Detective Miller, and David Henry, R.N., regarding defendant's condition

when he was advised of his rights. Defendant testified at the hearing that he did not remember much, only that he did not get along with Nurse Henry. Nurse Henry testified regarding his extensive training, experience and professional responsibilities as the defendant's primary health care provider during his hospitalization. RP 9-19. Nurse Henry testified that defendant had provided informed consent to the Neurosurgeon for purposes of his required spinal operation. Nurse Henry related that "informed consent" legally requires that the patient be "alert, oriented, clearly aware of their current situation and aware of the intended surgery, the patient risks, harm, benefits. RP 11. Nurse Henry opined that the defendant was "fully alert, oriented, and able to clearly discuss his surgery with the surgeon, and then give informed consent." RP 12. Nurse Henry testified that he was no more than twenty feet from the defendant the entire shift he worked. RP 12. Nurse Henry testified that the defendant consulted with the surgeon and gave his informed consent between 8:00-9:00 a.m. on April 6, 2009, then was contacted by Detective Miller in the afternoon around 2:00 - 4:00 p.m. Nurse Henry testified that at no time did the defendant's mental state deteriorate on April 6th to the point that he would not be considered alert, oriented, and aware of this situation.

RP 12. Nurse Henry testified that: the defendant did not exhibit any signs of having hallucinations; did not complain about having hallucinations; did not display any signs that he was not coherent or situationally aware. RP 18-19. Finally, the defendant did not object to the admission of his statements to Detective Miller at trial.

The trial court entered written findings of facts that the defendant did not challenge, so the court's findings are verities on appeal. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). In the trial court's oral ruling, the court noted no disputed facts. The trial court noted that the defendant was under medication, yet had been stabilized for a week prior to the contact with Detective Miller. RP 69-70. Importantly, a defendant's mental disability due to the use of drugs at the time of making a confession are considered, yet those factors do not necessarily render a confession involuntary. *Aten*, 130 Wn.2d at 664.

Finally, the trial court weighed in the fact that defendant had made other important decisions regarding consent to medical treatment, including surgery, shortly before his contact with Detective Miller. RP 70. The trial court ruled that it was "satisfied, given that overall situation, that he was able, if it were to be determined that he was in a custodial

situation...he validly waived his rights at that point.” RP 70. The trial court properly concluded that defendant’s statements to Detective Miller were voluntarily given. As noted, a trial court’s conclusion regarding the admissibility of a confession will not be set aside on appeal if there is substantial evidence in the record from which the trial court could have found by a preponderance of the evidence that the confession was voluntary. *State v. L.U.*, 137 Wn. App. 410, 414, 153 P.3d 894 (2007). Here, there was no error as the trial court concluded that the defendant’s medical treatment did not affect the voluntariness of his statement.

B. SUFFICIENT EVIDENCE EXISTED TO SUPPORT THE KIDNAPPING CONVICTION.

When analyzing a sufficiency of the evidence claim, the court will draw all inferences from the evidence in favor of the State and against the defendant. *State v. Joy*, 121 Wn.2d 333, 339, 851 P.2d 654 (1993). The reviewing court will defer to the jury on the credibility of witnesses and the weight of the evidence. *State v. Bonisisio*, 92 Wn. App. 783, 794, 964 P.2d 1222 (1998), *review denied*, 137 Wn.2d 1024 (1999). Even if an appellate court is convinced that a verdict is incorrect, that court will not gainsay the verdict of the jury. *Burke v. Pepsi-Cola Bottling Co.*, 64 Wn.2d 244, 391 P.2d 194 (1964). An insufficient claim admits the

truth of the State's evidence. *State v. Smith*, 155 Wn.2d 496, 501, 120 P.3d 559 (2005). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Here, the jury was instructed that to find the defendant guilty of first degree kidnapping, as charged in Count I, it had to find:

1. That on or about March 30, 2009, the defendant, intentionally abducted Brad Benson;
2. That the defendant...abducted Mr. Benson with intent to facilitate the commission of first degree burglary or first degree robbery or flight thereafter;
3. The acts occurred in Spokane, Washington.

CP 37-84 (Instruction No. 7).

The trial court defined "abduct" for the jury as: "to restrain a person by using or threatening to use deadly force. Restraint or restrain means to restrict another person's movements without consent and without lawful authority." CP 37-84 (Instruction No. 8).

Defendant contends that the kidnapping was incidental to and in furtherance of the robbery, so that his conviction for the kidnapping must be vacated. Defendant cites *State v. Korum*, 120 Wn. App. 686, 86 P.3d 166 (2004), *rev'd on other grounds*, 157 Wn.2d 614, 141 P.3d 13 (2006). However, the Supreme Court did not address this issue in its opinion therein because the State failed to properly preserve that issue for

appeal. This argument was considered and rejected by the Supreme Court in *State v. Louis*, 155 Wn.2d 563, 120 P.3d 936 (2005).

In *State v. Louis*, the Supreme Court cited to its earlier decisions in *State v. Vladovic*, 99 Wn.2d 413, 423-24, 662 P.2d 853 (1983) and *In re Pers. Restraint of Fletcher*, 113 Wn.2d 42, 50, 776 P.2d 114 (1989) where it held that "kidnapping and robbery charges are not the same offense." The Supreme Court further noted that the merger doctrine only applies where:

[T]he Legislature has clearly indicated that in order to prove a particular degree of crime (e.g. first degree rape) the State must prove not only that a defendant committed that crime (e.g. rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the crime statutes (e.g. assault or kidnapping).

Id., at 421.

In *State v. Vladovic*, the Supreme Court held that "kidnapping does not merge into first degree robbery because proof of kidnapping is not necessary to prove robbery. *Id.*, at 421. While in *Fletcher*, the Supreme Court held that the merger doctrine did not apply to first degree kidnapping and first degree robbery because a "person who intentionally abducts another need do so only with the *intent* to carry out one of the incidents enumerated in RCW 9A.40.020(1)(a) through (e); not that the person actually complete the action." *Fletcher*, 113 Wn.2d at 53.

The Supreme Court summed up its perspective of this issue as follows:

As neither statute has been changed in any significant way since we rendered our decisions in *Vladovic* and *Fletcher*, we can conclude only that the Legislature has not indicated that a defendant must commit kidnapping before he...can be found guilty of first degree robbery or commit armed robbery before he...can be found guilty of first degree kidnapping. Thus, we adhere to our decisions in *Vladovic* and *Fletcher* and hold that [defendant] may be punished separately for robbery and kidnapping.

State v. Louis, 155 Wn.2d at 571.

Here, defendant contends that the kidnapping charge should merge into the robbery conviction because the kidnapping was simultaneous and incidental to armed robbery. Nevertheless, the evidence before the jury was that Mr. Benson was pistol-whipped upon being awakened in his bed, and then faced the threat of deadly force by the defendant holding a gun pointed at Mr. Benson's head the entire time. There was sufficient evidence from which the jury could find that the defendant committed first degree kidnapping by his actions vis-à-vis Mr. Benson on March 30, 2009. Accordingly, the trial court properly denied defendant's motion to dismiss the first degree kidnapping charge and hence, the conviction should be affirmed.

C. SUFFICIENT EVIDENCE EXISTED TO SUPPORT THE CONSPIRACY CONVICTION.

Defendant contends that there was no evidence of an agreement between defendant and Derrick Taylor to commit robbery. As noted, evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it allows any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt and an insufficient claim admits the truth of the State's evidence. *State v. Smith*, 155 Wn.2d at 501.

Criminal conspiracy is an agreement to carry out a criminal scheme, along with a substantial step toward carrying out that agreement. RCW 9A.28.040(1). As defendant correctly noted, the punishable conduct is the plan; the agreement which constitutes the conspiracy that RCW 9A.28.040(1) punishes. *State v. Bobic*, 140 Wn.2d 250, 264-65, 996 P.2d 610 (2000). Further, a conspiracy may be proven by the declarations, acts and conduct of the conspirators. *State v. McGonigle*, 144 Wash. 252, 258 P. 16 (1927). Moreover, the agreement may be established by evidence of concerted actions. *State v. Casarez-Gastelum*, 48 Wn. App. 112, 738 P.2d 303 (1987). Finally, a conspiracy may be established by circumstantial evidence. *State v. Barnes*, 85 Wn. App. 638, 932 P.2d 669 (1997).

Here, testimony established that defendant and Mr. Taylor acted together: driving to the victims' home; breaking into and entering their residence uninvited while armed with a firearm; pistol-whipping Mr. Benson; holding Mr. Benson at gun point and threatening him with deadly force unless he cooperated with their demands for money and drugs; then taking Mr. Benson upstairs while they gathered drugs and property in his presence while continuing to hold him at gunpoint. CP 176-86, 188, 199-200; CP 124-26, 138-39; CP 247-53, 255-58, 261, 263-64. Viewing the evidence in the light most favorable to the State and resolving all inferences therefrom against the defendant, there was sufficient evidence from which the jury could find beyond a reasonable doubt that defendant was guilty of conspiracy to commit first degree robbery.

D. THE TRIAL COURT DID NOT COMMENT ON THE EVIDENCE WHEN IT INSTRUCTED THE JURY ON THE LAW TO BE APPLIED TO THE CASE.

Defendant contends that the trial court's instruction 31 regarding the use of deadly force by a resident to ward off the commission of a felony on, or use of deadly force against, a resident constituted a comment on the evidence in violation of the Washington State Constitution. Article IV, §16 prohibits a judge from conveying to the jury the judge's personal attitudes regarding the merits of the case. *State v. Becker*, 132 Wn.2d 54,

64, 935 P.2d 1321 (1997). The provision is designed to prevent the jury from being unduly influenced by the trial court's opinion regarding the credibility, weight, or sufficiency of the evidence. *State v. Sivins*, 138 Wn. App. 52, 58, 155 P.3d 982 (2007).

Generally, the purpose of a jury instruction is to provide the jury with the law to be applied to the evidence admitted in the case. *State v. Borrero*, 97 Wn. App. 101, 107, 982 P.2d 1187 (1999). A trial court's statement constitutes a comment on the evidence where the trial court's attitude toward the merits or evaluation of disputed facts is inferable therefrom. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). The reviewing court examines the facts and circumstances of the specific case to determine whether a trial court's statement amounts to a comment on the evidence. *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). An instruction improperly comments on the evidence where it resolves a disputed issue that should be decided by the jury. *State v. Becker*, 132 Wn.2d at 64. Nevertheless, an instruction does not constitute an impermissible comment on the evidence when there is sufficient evidence in the record to support the instruction and it is an accurate statement of the law. *State v. Johnson*, 29 Wn. App. 807, 811, 631 P.2d 413, *rev. denied*, 96 Wn.2d 1009 (1981).

The trial court gave instruction 31 based upon the evidence produced during the trial and defendant's theory of the case. The evidence before the jury included defendant's testimony that: he and Mr. Taylor went to the victims' residence to buy dope, were invited in by Mr. Benson, and they smoked dope together until a fight broke out between Mr. Taylor and Mr. Benson. Vol. 5 RP 9, 14-15. Mr. Robertson, Ms. Carpenter, and Mr. Benson testified that neither defendant nor Mr. Taylor had been invited into their home for a party; rather, that defendant and Mr. Taylor had broken into the residence. CP 176-86, 188, 199-200; CP 124-26, 138-39; CP 247-53, 255-58, 261, 263-64. When law enforcement responded to the scene it found the front door of the residence kicked in with a corresponding debris field inside the residence. Vol. II, RP 148-149, 192-195; Vol. III, RP 385-387. Evidence at the residence showed that it had been ransacked by intruders. Vol. II, RP 215, 234, 242-244, 257, 287; Vol. IV, RP 385, 390. Evidence at the scene included the development of a K-9 track that led to the defendant in hiding with items belonging to Mr. Benson and others found in defendant's possession as well as the handgun defendant used during the burglary, kidnapping, robbery and assaults. Vol. II, RP 83-93, 103-115, 124-126, 153-154, 167-181. Evidence at the scene corroborated that a shooting had occurred

inside the residence. Vol. I, RP 122123, 147-152, 192, Vol. III, 207-212, 214, 216-228, 230-236, 250-252, 254, 263-273, 276-279. Evidence before the jury included that Mr. Robertson observed the defendant holding Mr. Benson at gun point in the living room while defendant's conspirator gathered stolen property. CP 124-25. Evidence before the jury included evidence that Mr. Robertson fired his weapon in response to defendant firing his weapon at Mr. Robertson. CP 125. Evidence before the jury included testimony that defendant and companion went to the victims' residence to buy dope and a fight broke out between Mr. Benson and defendant's companion, Mr. Taylor. Vol. V, RP 14-16. Finally, the evidence before the jury included testimony that defendant fired his weapon in response to Mr. Robertson firing his weapon first. Vol. V, RP 18.

Defendant contends that the trial court's modification of the WPIC that was the basis for instruction 31 resulted in an inaccurate reflection of the law. Initially, it is important to note that the pattern instructions are not law and frequently have not been approved by the Supreme Court. *See, e.g. State v. Studd*, 137 Wn.2d 533, 973 P.2d 1049 (1999). Moreover, the Washington pattern instructions do not have the force of law, and may be modified to fit the law and facts of each case. *See, State v. Studd*, 137 Wn.2d at 545-46. A trial court's decision regarding jury instructions

is reviewed for abuse of discretion. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

Here, trial court's instruction 31 properly advised the jury of the applicable law and did not prevent defendant from offering his chosen defense, so the trial court did not abuse its discretion utilizing this instruction. The record before the jury included conflicting evidence regarding whether defendant was lawfully inside the residence, so the jury needed guidance regarding the relative legal status of the Mr. Robertson vis-à-vis defendant.

Defendant contends that the trial court modified instruction 31 because the court did not want defendant to be able to argue that he only shot in response to receiving gunfire. Defendant claims that the trial court modified instruction 31 because the un rebutted evidence was that defendant was not the initial shooter. The record reveals that defendant's claim that he was not the initial shooter was, in fact, rebutted by Mr. Robertson's testimony. CP 125. Instruction 31 only advised the jury that if, in weighing the credibility of all the evidence, it found that defendant had unlawfully broken into the residence and presented the possibility of the use of force to facilitate a criminal enterprise, then the residents had a legal right to defend themselves and one another against that circumstance. Accordingly, the trial court's instruction 31 did not

constitute a comment on the evidence because it did not resolve a disputed issue that should be decided by the jury. Instruction 31 did not direct a verdict, merely advised the jury of the law to be applied to the evidence produced in this case.

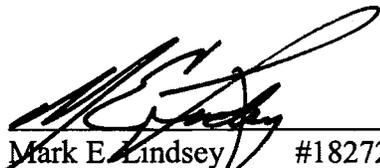
V.

CONCLUSION

For the reasons stated, the convictions of the defendant should be affirmed.

Dated this 12TH day of May, 2011.

STEVEN J. TUCKER
Prosecuting Attorney



Mark E. Lindsey #18272
Senior Deputy Prosecuting Attorney
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,)
)
 Respondent,) NO. 29187-1-III
 v.)
)
THOMAS A. BUTLER,)
)
 Appellant,)

I certify under penalty of perjury under the laws of the State of Washington, that on May 12, 2011, I mailed a copy of the Respondent's Brief in this matter, addressed to:

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(Date)

Spokane, WA
(Place)


(Signature)