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No. 62479-2-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

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STATE OF WASHINGTON
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STATE OF WASHINGTON, Respondent,

vs.

GABRIEL NIGHTINGALE, Appellant.

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the record supports a presumption of prosecutorial vindictiveness when a second count of felony harassment was added after the jury could not reach a verdict on the original count of felony harassment where the prosecutor sought no additional penalty from the second count and had amended the information in order to simplify the jury instructions.
2. Whether the prosecutor committed misconduct in rebuttal by commenting about the lack of evidence regarding the defendant's "mental illness" in response to defense counsel's improper argument that the defendant's action may not have been knowing because of his mental illness and whether her comments created an incurable prejudice where the trial court ruled at the motion for mistrial that to the extent the prosecutor's comments were objectionable they did not affect the verdict.
3. Whether defense counsel was ineffective for failing to request a voluntary intoxication instruction where the evidence did not support such an instruction because there was no testimony regarding the effect of the defendant's intoxication upon his ability to form the requisite mental state.
4. Whether defense counsel's choice to move for a mistrial instead of objecting to the prosecutor's comments during rebuttal was ineffective assistance of counsel where the trial court concluded the comments did not affect the verdict.
5. Whether defense counsel's failure to move for dismissal of the second count of felony harassment on mandatory joinder grounds was ineffective assistance of counsel where the purpose of adding the count was to simplify the jury instructions and defendant did not face any additional penalty from the second count.

B. FACTS

1. Procedural facts

Appellant Gabriel Nightingale was charged on Feb. 12, 2008 with one count of felony Harassment and two counts of Assault in the Fourth Degree, one count related to Paul Shepard and the other Joseph Eickstadt. CP 71-72. Bail was initially set at \$5000. Supp. CP __, Sub Nom 3. In mid April 2008 Nightingale was tried by a jury, which jury acquitted him of the two assaults but could not reach a verdict on the harassment charge. CP 36-38. A mistrial was declared and a new trial date was set for May 19th, with a bail review hearing on April 24th. Supp. CP __, Sub Nom 30; 3RP 382-85.¹

At the bail review hearing defense counsel for Nightingale moved to withdraw and new counsel was subsequently appointed. Supp CP __, Sub Nom. 32, 38. The court denied the motion for release. Id. On June 8th, Nightingale posted bond. Supp CP __, Sub Nom. 40.

On Aug. 13, 2008 the State filed an amended information alleging two counts of felony Harassment. CP 32-33. On September 23, 2008 a jury found Nightingale guilty of both counts. CP 16-17. On September

¹ The State references the verbatim report of proceedings in the same manner as appellant.

24, 2008, Nightingale was sentenced to a standard range sentence of 8 months. CP 10; 6RP 653.

2. Substantive facts

On February 8, 2008 around 8:15 a.m. Paul Shepherd, the store manager of the Fairhaven Food Pavilion, was at the store preparing for a meeting of Brown & Cole store managers. 6RP 405-06, 430. Barry Whipple, manager of another store, and Joseph Eickstadt, the district manager, were also present. 6RP 406, 430-32, 456. Nightingale entered the store and asked Shepherd where the plantain bananas were. 6RP 407. Shepherd noticed that Nightingale smelled of alcohol and that his words were slurred a little, but he was not having problems walking. 6RP 407-08.

When Nightingale attempted to purchase a 40 ounce can of beer along with the bananas, the checker refused to sell him the beer because it was against the law for the store to sell beer to someone who was intoxicated. 6RP 408, 410. Nightingale became very agitated and Shepherd went over to the check stand to back up the checker. 6RP 408. When Nightingale, a big man, started to swear, yell and use threatening body gestures, Shepherd called for a "service code six," which is used to call for assistance with shoplifters and emergencies. RP 409, 413, 433.

Shepherd kept telling Nightingale he just needed to leave the store. RP 413.

Eickstadt responded but stood back initially. RP 458. Based on Nightingale's speech and demeanor, Eickstadt thought Nightingale was intoxicated. RP 460. Nightingale was swearing, saying that he had the right to buy the beer, while Shepherd was trying to calm him down and tell him he had to move along. RP 460. Nightingale was refusing to leave the store, so Eickstadt approached and told him that he had to leave the store. RP 461. At one point, amidst his swearing, Nightingale threatened to beat Shepherd's bald head. RP 462.

When Whipple responded he saw Shepherd and Eickstadt talking to Nightingale and trying to get him to leave the store. Shepherd told Nightingale that he would sell him the bananas but not the alcohol. RP 434. Nightingale was swearing and yelling, upset at being denied the alcohol. RP 434-35, 440. Nightingale appeared intoxicated to Whipple because he was slurring his words a little, had really red eyes, although he had no difficulty walking. RP 435, 440-41.

Eickstadt and Shepherd tried to get Nightingale to leave the store by escorting him out the door. RP 409, 411, 433, 436-37. After Shepherd asked an employee to call 911, Nightingale started to leave. RP 409, 417. When Nightingale threatened to kill Shepherd's family to teach Shepherd

a lesson, Eickstadt told Nightingale that he needed to be calm, that Shepherd was only doing his job. 6RP 464. When Nightingale was two steps from the exit, without any provocation, he turned around and bumped chests with Eickstadt, screaming into Eickstadt's face "I am going to beat you down old man." 6RP 410, 415-16,437, 441-42, 464, 468. Nightingale was bigger than Eickstadt who was 6'2". 6RP 468-69. Shepherd stepped in and placed his hand on Nightingale's chest and told him, "Back off, just go," that all he had to do was leave the store. 6RP 410, 415, 442, 466. Nightingale grabbed Shepherd's shirt and ripped the shirt in half. 6RP 411, 415, 418, 442, 466. Shepherd tackled Nightingale, but it took all three men to subdue Nightingale, who was bigger than each of them. 6RP 411, 418, 445, 472-73.

It took all three men to hold Nightingale down. RP 419.

Nightingale was furious. RP 444. Nightingale continued to squirm, scream and swear. Id. Nightingale looked Shepherd in the eyes and told Shepherd he was going to find Shepherd and kill him, his family and his grandmother. 6RP 420-21, 444. Nightingale looked at Shepherd's name tag and asked him what his last name was. 6RP 420-21, 472-73.

Nightingale told Eickstadt that he was going to find him and kill him. He told Whipple that he was going to find him and throw his bloody body in a

ditch. 6RP 420, 444, 472-73. Nightingale stared at each of them when he threatened them. 6RP 446.

Nightingale wasn't joking and all three men took his threats seriously. 6RP 421, 423, 445-46, 477. Shepherd was very scared at this point, thought Nightingale would come find him, and refused to let Nightingale up until the police arrived. 6RP 420-21. Nightingale continued to scream and swear and make threats, even when the police arrived. 6RP 422, 445, 447-48, 453. At the officer's request, they continued to hold Nightingale down until the second officer arrived. RP 447. Nightingale was not intimidated by the police officers and became even more verbal when they tried to get him into the patrol car. 6RP 422-23.

When Det. English arrived Nightingale was still upset and screaming. 6RP 528. Nightingale turned his head toward Shepherd and threatened to "kill the bald motherfucker" several times. RP 529, 531. English could smell intoxicants on Nightingale, but believed he was coherent, although angry. 6RP 530-31. Nightingale's anger appeared to be directed at Shepherd, but English decided to wait until another officer could arrive before trying to get Nightingale into the patrol car. 6RP 532-33. When Officer Johnson arrived Nightingale was still being held down on the ground by the three men. He was pretty upset and yelling.

According to Johnson, Nightingale's speech was slurred and he was intoxicated, but not incoherent. 6RP 517-18. Nightingale refused to cooperate with getting into the patrol car and he continued to yell once in the car. 6RP 519, 521, 535. At one point he yelled something like "they had better keep me locked up." 6RP 536.

On cross examination, defense elicited from Det. English that Nightingale was shouting about his mental illness and needing to lock him up. 6RP 549. On redirect, Det. English testified that although Nightingale was highly intoxicated, he was in control of his thinking and actions, and appeared to be making conscious decisions. 6RP 559.

C. ARGUMENT

- 1. The prosecutor did not act vindictively in amending the information to add an additional count of felony harassment because the amendment did not penalize Nightingale for exercising any right and the amendment did not result in any additional penalty.**

Nightingale asserts that his conviction should be reversed because the prosecutor acted vindictively when she amended the charges to add a second count of felony harassment after the first trial resulted in a hung jury. He relies upon a presumption of vindictiveness to assert this claim. However, he never objected below to the amendment of the information nor alleged prosecutorial vindictiveness below. As he did not assert this

issue below nor address whether this issue is a manifest error of constitutional magnitude, he has waived this issue. Moreover, the prosecutor did not amend the charges in response to Nightingale asserting any constitutional or statutory right; she amended the charges to simplify the trial, agreeing not to score the second count against the first should he be convicted of both. The record does not support a presumption of vindictiveness, and Nightingale has not asserted actual vindictiveness. His claim therefore fails.

Under RAP 2.5(a), an error is waived if not preserved below unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988); State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). RAP 2.5(a)(3) is not intended to afford defendants a means for obtaining new trials whenever they can identify a constitutional issue not raised before the trial court. Scott, 110 Wn.2d at 688. It is the defendant's burden to show how the alleged constitutional error was manifest, how it actually prejudiced his rights. State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999). A claim of prosecutorial vindictiveness can be waived if not raised below. See U.S. v. Whaley, 830 F.2d 1469, 1475-76 (7th Cir. 1987), *cert. denied*, 486 U.S. 1009 (1988), *abrogated on other grounds by U.S. v. Dunrive*, 902 F.2d 1221 (7th Cir. 1990) (failure to raise prosecutorial vindictiveness

claim below waived issue unless cause shown for granting relief from waiver). Nightingale never asserted below that the prosecutor acted vindictively in amending the information; he never even objected to the amendment. Supp CP __, Sub Nom. 66; 6RP 551-52, 628. Nightingale waived this issue by failing to assert it below.

Prosecutorial vindictiveness occurs when additional charges are brought to penalize the defendant for exercising a statutory or constitutional right.

Constitutional due process principles prohibit prosecutorial vindictiveness. *See generally United States v. Goodwin*, 457 U.S. 368, 372-85, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982). Prosecutorial vindictiveness occurs when “the government acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights.” *United States v. Meyer*, 810 F.2d 1242, 1245 (D.C.Cir.1987). Thus, “a prosecutorial action is ‘vindictive’ only if *designed* to penalize a defendant for invoking legally protected rights.” *Id.* (emphasis added).

There are two kinds of prosecutorial vindictiveness: actual vindictiveness and a presumption of vindictiveness. *Id.* ... A presumption of vindictiveness arises when a defendant can prove that “all of the circumstances, when taken together, support a realistic likelihood of vindictiveness.” *Id.* at 1246. The prosecution may then rebut the presumption by presenting “objective evidence justifying the prosecutorial action.” *Id.* at 1245.

State v. Korum, 157 Wn.2d 614, 627-628, 141 P.3d 13 (2006). A mere opportunity for vindictiveness is insufficient: the possibility of increased punishment must pose a realistic likelihood of vindictiveness. United

States v. Goodwin, 457 U.S. 368, 384, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982).

There is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting. In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State had a broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized.

Goodwin, 457 U.S. at 381.

A number of federal circuits have concluded that filing additional charges after a mistrial, one to which the prosecution did not object, does not support a presumption of vindictiveness. *See, U.S. v. Perry*, 335 F.3d 316, 324 (4th Cir. 2003), *cert. denied*, 540 U.S. 1185 (2004) (no presumption of vindictiveness where prosecutor filed additional charged after mistrial where mistrial was due to deadlocked jury and government did not object); U.S. v. Contreras, 108 F.3d 1255, 1263 (10th Cir. 1997), *cert. denied*, 522 U.S. 839 (1997) (modification in charging following a mistrial due to hung jury, without objection from government, raises no presumption of vindictiveness); U.S. v. Whaley, *supra* (no presumption of prosecutorial vindictiveness where prosecutor filed additional charges resulting in additional punishment where additional charges were filed after a mistrial was declared to which the prosecutor did not object); U.S.

v. Khan, 787 F.2d 28, 33 (2d Cir. 1986) (no presumption of prosecutorial vindictiveness where prosecutor filed additional charges resulting in increase in punishment after mistrial declared and after defendant rejected plea offer after mistrial where prosecution did not object to mistrial); U. S. v. Ruppel, 666 F.2d 261 (5th Cir.), *cert. den.* 458 U.S. 1107 (1982) (“mere reindictment after a mistrial due to a hung jury is insufficient to demonstrate the realistic likelihood of prosecutorial vindictiveness”); United States v. Thurnhuber, 572 F.2d 1307 (9th Cir. 1977).

These courts have relied upon the lack of connection between the prosecutor’s actions and those of the defendant in finding that a presumption of vindictiveness does not apply in the context of the amendment of charges after a mistrial. In Khan, the court reasoned:

[t]he circumstances here pose no “realistic likelihood” of vindictiveness sufficient to warrant applying a presumption of vindictiveness. It was not the defendant's request for a trial that precipitated the possible duplication of resources and raised the spectre of the prosecution avenging the defendant's rightful exercise of a constitutional right. The root cause of these troubles was the jury's inability to agree on a verdict which in turn caused the mistrial.

Khan, 787 F.2d at 33. The court in Thurnhuber similarly reasoned:

since Thurnhuber did not attempt at his first trial to assert any procedural right, the prosecutor's action in adding the two counts before the second trial cannot be characterized as a “retaliatory” or “vindictive” response to an assertion of a procedural right by a defendant. And, since there was no such assertion, there can be no resulting dampening effect on the

defendant's exercise of a procedural right. Without that close temporal or otherwise apparent link between the exercise of the right and the "penalty," there can be no "realistic likelihood of 'vindictiveness,' " Blackledge, 417 U.S. at 27, 94 S.Ct. 2098, and there is, therefore, no need to invoke the broad presumptive rule of Pearce and Blackledge.

Thurnhuber, 572 F.2d at 1310; *see also*, Whaley, 830 F.2d 1479

(defendant was not penalized for exercising a statutory or constitutional right because after the mistrial was declared defendant took no action nor exercised any specific right for which he was penalized).

Here the first trial resulted in a hung jury on the harassment count and an acquittal on the assault charges. In the first trial there was considerable discussion and consternation as to how the jury should be instructed regarding the harassment charge since the prosecutor had not charged a specific victim and was asserting that Nightingale was guilty of harassment for threatening to kill either Paul Shepard or Barry Whipple, thus raising a unanimity issue. CP 48, 71-72; Supp. CP __, Sub Nom. 20; 2RP 202-09; 214-15; 245-56. In order to simplify things for the second trial, the prosecutor moved to amend the information to allege two counts of harassment, one with respect to Paul Shepard and the other with respect to Barry Whipple, informing defense counsel that she was not seeking an increase in penalties, that she would not count a second conviction for harassment against a first conviction. CP 25-26, 32-33; Supp CP __, Sub

Nom. 71; 6RP 550-52, 628. In fact at sentencing, the prosecutor did as promised, marking the two counts as the same criminal conduct on the judgment and sentence, and asserted an offender score of one based solely on a prior felony harassment conviction from 2000.² CP 5-6; 6RP 628. There is no realistic likelihood of vindictiveness under these facts.

The fact that the prosecutor did not seek to increase the penalties, in and of itself, defeats Nightingale's argument for a presumption of vindictiveness. In Lane v. Lord, the Second Circuit addressed the issue of whether a prosecutor's decision to add a charge, which did not increase the maximum penalty the defendant faced, after a mistrial was declared gave rise to a presumption of vindictiveness. Lane v. Lord, 815 F.2d 876, 877 (2d Cir. 1987). In that case, after the court declared a mistrial when the jury could not reach a verdict, the prosecutor filed a superseding indictment adding a count of conspiracy to the original charges. *Id.* at 877. The additional charge did not, however, increase the maximum amount of time the defendant faced. *Id.* The prosecutor's purpose in adding the conspiracy count was to facilitate admission of some other act evidence that had previously been excluded. *Id.* The court found that in the context of additional charges after a mistrial, "a threat of greater

² Nightingale is mistaken in his belief that his offender score of one was based on the other current offense of felony harassment.

punishment is required to justify a ‘realistic’ apprehension of retaliatory motive on the part of the prosecution.” Id. at 879. The court therefore concluded that the facts did not give rise to a presumption of vindictiveness. Id.

Likewise here, from the record it is clear that the prosecutor did not act vindictively in amending the information after a mistrial was declared. Her purpose in doing so was to simplify and clarify the jury instructions. She sought no additional penalty from the second count. No presumption of vindictiveness should apply to the prosecutor’s actions.

2. The prosecutor did not commit misconduct in responding to defense counsel’s improper argument nor did the comments result in incurable prejudice.

Nightingale also asserts that the prosecutor committed misconduct in closing argument by making statements that he alleges shifted the burden of proof. The prosecutor’s comments came in rebuttal and were a direct response to defense counsel’s improper comments in his closing that Nightingale’s threats were not knowing because of his “mental illness.” Defense counsel raised this very issue immediately after trial when he moved for a mistrial. Nightingale has failed to show that the trial court erred in denying the mistrial or that any misconduct resulted in incurable prejudice.

Where prosecutorial misconduct is claimed, the appellant bears the burden of showing both the impropriety of the conduct and its prejudicial effect. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). Absent an objection, a claim of misconduct is waived unless it is so flagrant or ill intentioned that it creates an incurable prejudice. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). Defense counsel's tactical decision to not object does not change this analysis. State v. Gregory, 158 Wn.2d 759, 841 n 39, 147 P.3d 1201 (2006). Misconduct does not create an incurable prejudice unless: (1) there is a substantial likelihood that it affected the jury's verdict, and (2) a properly timed curative instruction could not have prevented the potential prejudice. State v. Brett, 126 Wn.2d 136, 175-76, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996). When a defendant moves for a mistrial, "the court gives deference to the trial court's ruling because the trial court is in the best position to evaluate whether the prosecutor's comment prejudiced the defendant." Gregory, 158 Wn.2d at 841.

A prosecutor's comments in closing must be viewed in context of the entire closing argument, the issues in the case, the evidence presented and the jury instructions given. Russell, 125 Wn.2d at 85-86. A prosecutor enjoys wide latitude in expressing reasonable inferences from

the evidence and is entitled to respond to arguments of defense counsel. Gregory, 158 Wn.2d at 841, 842. A prosecutor's remarks, even if improper, are not grounds for reversal if they were provoked by the defense as long as the remarks did not go beyond that which was necessary to respond to the defense argument, did not bring matters before the jury that were not in the record, and were not so prejudicial that a curative instruction could not be effective. State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005), *rev. denied*, 156 Wn.2d 1004 (2006); State v. Graham, 59 Wn. App. 418, 428, 798 P.2d 314 (1990).

Nightingale asserts that the prosecutor committed misconduct by arguing the missing witness doctrine, thereby shifting the burden of proof to the defense.

Generally, a prosecutor cannot comment on the lack of defense evidence because the defendant has no duty to present evidence. ... However, ... under proper circumstances the prosecutor may comment on a defense failure to call a witness under the missing witness doctrine. Under this doctrine, where a party fails to call a witness to provide testimony that would properly be a part of the case and is within the control of the party in whose interest it would be natural to produce that testimony, and the party fails to do so, the jury may draw an inference that the testimony would be unfavorable to that party. ... The inference only arises where the witness is peculiarly available to the party, i.e., peculiarly within the party's power to produce. In addition, the testimony must concern a matter of importance ... as opposed to a trivial matter, it must not be merely cumulative, the witness's absence must not be otherwise explained, the witness must not be incompetent or

his or her testimony privileged, and the testimony must not infringe a defendant's constitutional rights. ... If the prosecutor properly invokes the missing witness doctrine, no prosecutorial misconduct occurs.

State v. Cheatam, 150 Wn.2d 626, 652-653, 81 P.3d 830 (2003) (citations and page numbers omitted). A prosecutor may attack the defense presented, but may not attack the defendant's failure to explain the evidence presented. *Id.* at 654.

The prosecutor's comments in rebuttal responded to defense counsel's improper argument that Nightingale did not knowingly make the threats because of his "mental illness."³ 6RP 619. In his closing defense counsel argued that the crux of the case was whether Nightingale knowingly made the threats. 6RP 593. In addition to arguing that Nightingale was intoxicated, he drew specific attention to Nightingale's statements about his mental illness and lack of control when he was being

³ After pointing out that while defense counsel had argued that all the witnesses said Nightingale was intoxicated, counsel had left out that they also testified that he appeared to know what he was doing, the prosecutor argued:

You know, Mr. Nelson can ask Detective Nelson or Detective English did it appear in your experience there was any mental illness component here with Mr. Nightingale? He didn't ask him that. There wasn't – the only mention of mental illness came from Mr. Nightingale. Not from a doctor. Not from any treating physician. Not from any diagnosis. I mean, that could have been offered up. If it existed. He easily could have brought in a doctor to say Mr. Nightingale suffers from X,Y, Z and therefore he may not – people get evaluated all the time in our system ... That wasn't presented – not even one of the witnesses was asked that question. Did there appear to you to be any, just from a layman's point, of view any mental health issues here? No there appear to be alcohol issues or entitlement issues.

6RP 600-01.

placed into the patrol car. 6RP 695. Defense counsel continued to argue that Nightingale was drunk and mentally ill, that his reaction to being denied beer was not logical, and that his intoxication or mental illness explained his behavior. 6RP 596-98. As the court observed in denying the defense motion for a mistrial, defense's argument concerning Nightingale's mental illness was improper as there was no evidence to support it. 6RP 622-23.⁴

The prosecutor argued that here merely suggesting that the defense could have called a witness did not shift the burden, that the defense argument left the State in a difficult position because the State has no idea whether the defendant has been diagnosed with a mental illness or not, that such evidence would have to come from the defendant or a witness that was peculiarly available to the defendant.⁵ 6RP 618, 621. A missing witness instruction is not required in order to argue the missing witness doctrine. *See, State v. Montgomery*, 163 Wn.2d 577, 598, 183 P.3d 267 (2008) (under missing witness doctrine state may argue and jury may infer

⁴ Apparently, defense counsel had even informed the jury after the trial that Nightingale had not been diagnosed with a mental illness. 6RP 620.

⁵ Evidence regarding a defendant's mental illness would have to come from qualified witness, a doctor or mental health expert. The State would have no knowledge of this unless raised by the defense pre-trial and would not have any ability to inquire of such a witness unless the defendant waived his physician-patient privilege.

that absent witness's testimony would have been unfavorable to the defendant).⁶

The court noted that the prosecutor's argument focused on the lack of evidence elicited regarding a mental illness from the witnesses who did testify. 6RP 626. Here, given defense counsel's unsupported argument, the prosecutor's response was properly directed at showing that there was no support for defendant's argument that his "mental illness" explained his actions and rendered them unknowing. The comments certainly were not so flagrant or ill-intentioned as to result in enduring prejudice. *See, Gregory*, 158 n. 2d at 845-46 (prosecutor's comment that defense failed to call persons who they alleged committed the murder as a witness was not so flagrant as to result in an enduring prejudice). The trial court did not err in concluding that any improper aspect of the comments did not affect the verdict in denying the motion for mistrial.

3. Nightingale has failed to demonstrate ineffective assistance of counsel.

Nightingale asserts that defense counsel was ineffective for failing to request an instruction on voluntary intoxication, for failing to object to the State's rebuttal argument, and for failing to move to dismiss the

⁶ *State v. Frazier*, 55 Wn. App 204, 777 P.2d 27, *rev. den.*, 113 Wn.2d 1024 (1989), cited by Nightingale, stands for the specific proposition that the trial court's decision not to permit defense counsel to argue the missing witness doctrine, absent a proper instruction, was not an abuse of discretion where the "missing" witness's testimony was relatively unimportant. *Id* at 212.

second count of felony harassment based on mandatory joinder grounds. Even if defense counsel's representation was ineffective in some manner, Nightingale cannot show prejudice therefrom. Nightingale would not have been entitled to a voluntary intoxication defense, so counsel's failure to request one was not ineffective assistance nor prejudicial. Second, defense counsel tactically decided not to object during closing as he felt it would not have been effective and chose instead to move for a mistrial. His choice at any rate did not prejudicially impact the trial, as the court found that the prosecutor's comments did not affect the verdict. Last, defense counsel likely did not object to the amendment of the information or move for dismissal of the second count for the same reason the prosecutor moved to add it, to simplify the instructions for the jury. Given the prosecutor's representations, he would have known that Nightingale would not face any additional penalties from the second count. In fact Nightingale did not receive any additional penalty from the second count, therefore there was no prejudice.

In order to demonstrate ineffective assistance of counsel, a defendant must show that (1) his counsel's representation fell below a minimum objective standard of reasonableness based on all the circumstances, and (2) there is a reasonable probability that but for counsel's unprofessional errors, the outcome would have been different.

State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (1993), *cert. den.*, 510 U.S. 944 (1993); State v. Wilson, 117 Wn. App. 1, 15, 75 P.3d 573, *rev. den.*, 150 Wn.2d 1016 (2003). It is the defendant's burden to overcome the strong presumption that counsel's representation was effective. Wilson, 117 Wn. App. at 15; Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Defendant must meet both parts of the test or his claim of ineffective assistance fails. State v. Mannering, 150 Wn.2d 277, 285-86, 75 P.3d 961 (2003).

In order to show prejudice, a defendant must show that there is a reasonable probability that but for counsel's deficient performance, the result of the trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding ... not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." West, 139 Wn.2d at 46, (*citing Strickland*, 466 U.S. at 693). A reviewing court need not address both prongs of the test if a petitioner fails to make a sufficient showing under one prong. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed."

Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984).

- a. *Defense counsel was not ineffective for failing to request a voluntary intoxication instruction because the evidence did not support such an instruction.*

Nightingale's assertion that defense counsel was ineffective for failing to request a voluntary intoxication instruction necessarily implies that he was entitled to such an instruction. He was not. Therefore, counsel was not ineffective for failing to request one.

A defendant is entitled to a voluntary intoxication instruction if she can show (1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking, and (3) evidence that the drinking affected the defendant's ability to acquire the required mental state. State v. Everybodytalksabout, 145 Wn.2d 456, 479, 39 P.3d 294 (2002), State v. Gabryschak, 83 Wn. App. 249, 252, 921 P.2d 549 (1996). Evidence of drinking by itself is not sufficient to warrant a voluntary intoxication instruction, there must be "substantial evidence of the effects of the alcohol on the defendant's mind or body". Gabryschak, 83 Wn. App. at 253. "Under RCW 9A.16.090, it is not the fact of intoxication which is relevant, but the degree of intoxication and the effect it had on the defendant's ability to formulate the requisite mental state." State v.

Gallegos, 65 Wn. App. 230, 238, 828 P.2d 37, *rev. denied*, 119 Wn.2d 1024 (1992). In order to warrant the giving of the instruction, there must be “evidence in the record from which a rational trier of fact could determine the effect of [the defendant’s] intoxication on his ability to form the required mental state.” Gabryschak, 83 Wn. App. at 250.

While the witnesses testified that Nightingale was intoxicated, there is little in the record to support a contention that as a result of his intoxication his actions in making the threats were not knowing. The record instead reflects that Nightingale acted with purpose and knowledge throughout his contact with store employees. When he entered the store he inquired where the bananas were, went to the produce area to get them, got some beer and proceeded to the check-out line. He did not become irate until he was told that he could not purchase the beer. He was moving to the exit when he turned around in order to confront one of the store employees. His threats were specific and directed to each of the employees individually. He tried to obtain their last names. While witnesses testified that his speech was slurred, there was no testimony that they couldn’t understand him or that he was stumbling around. There was no testimony as to how the defendant’s intoxication affected his ability to form the requisite mental state of knowledge.

This case is very similar to that in State v. Gabryschak, in which the defendant was also charged with felony harassment. In that case, when officers responded to the apartment of the defendant's mother, the defendant threatened to "kick their asses" if they didn't leave. Gabryschak, 83 Wn. App at 251. Once inside the apartment, the officers discovered the apartment in disarray with many broken items, which the mother told officers the defendant had broken. Id. at 251-52. The defendant tried to escape while being escorted to the police car. Once inside the car, the defendant repeatedly threatened to kill the officer even though the officer advised him that he would be charged with felony harassment if he continued to make the threats. Id. at 252. In that case, one officer testified that the defendant had alcohol on his breath and appeared intoxicated, while another officer described him as very intoxicated. Id. at 253. The defendant's mother testified that he was too drunk to drive. Id. The defendant, however, did not testify or call any witnesses. Id. The court found that while there was ample evidence of intoxication, there was no evidence in the record from which the jury could "reasonably and logically infer that [the defendant] was too intoxicated to be able to form the required level of culpability to commit the crimes with which he was charged." Id. at 254. "At best, the evidence show[ed] that [the defendant] can become angry, physically violent, and

threatening when he is intoxicated.” *See also, State v. Gallegos*, 65 Wn. App. 230, 828 P.2d 37 (1992) (trial court did not err in declining voluntary intoxication instruction where there was ample evidence that defendant had been drinking and that the drinking affected his balance and coordination, but nothing in the record demonstrating that he was unaware of his actions or acted without volition).

Nightingale cites to *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987), in support of his argument. The question in *Thomas* was whether defense counsel was ineffective for failing to properly present a diminished capacity defense based on voluntary intoxication in an attempting to elude case. There the court found that the defendant was entitled to an instruction on the subjective component of the element of willful and wanton disregard. *Id.* at 227. The court further found that counsel was not able to argue adequately the defense without such an instruction and therefore he had been ineffective in not requesting one. *Id.* at 227-28. However, there was testimony in *Thomas* that the defendant blacked out, didn’t remember portions of the incident, and was blitzed or incoherent at the time of the incident. *Id.* at 224-25. There is no such testimony in this case. *Thomas* is inapposite because the evidence there clearly showed that the defendant’s level of intoxication affected her ability to form the requisite mental state.

The record here reveals that Nightingale was intoxicated but does not support his contention that he was entitled to a voluntary intoxication defense. Defense counsel therefore was not ineffective in failing to request one.

- b. *Defense counsel's failure to object to the prosecutor's comments in rebuttal was not ineffective because the prosecutor's comments responded to counsel's argument and the court concluded they did not affect the verdict.*

Next, Nightingale asserts that his counsel was ineffective for failing to object to the prosecutor's comments in rebuttal that he claims shifted the burden of proof. As argued above, the prosecutor's comments were in response to defense counsel's argument that Nightingale's statements were not knowing due to his mental illness and thus were not improper. Therefore, Nightingale cannot show prejudice.

In order to prevail on an ineffective assistance of counsel claim based on failure to object, the appellant "must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct ...; (2) that an objection to the evidence would likely have been sustained ...; and (3) that the result of the trial would have been different had the evidence not been admitted ..." State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Here, while defense counsel did not object at the time, he did move for a mistrial immediately afterwards. 6RP 610. The court deferred the motion until the next day, where defense counsel explained why he did not object at the time: “I don’t like objecting in the middle of a closing. I don’t think it’s effective and I don’t think it would have mattered.” 6RP 617. The court found defense counsel’s argument regarding Nightingale’s “mental illness” was objectionable because there was no evidence to support it. 6RP 622-23. While the judge did indicate that the prosecutor’s comment was objectionable, he didn’t think the comments were improper when viewed in context of the entire line of argument. Ultimately, he found that the alleged misconduct did not affect the verdict and denied the motion for a mistrial. 6RP 627-28.

As noted previously when a defendant moves for a mistrial, “the court gives deference to the trial court’s ruling because the trial court is in the best position to evaluate whether the prosecutor’s comment prejudiced the defendant.” State v. Gregory, 158 Wn.2d at 841. The trial court was in the best position to determine if the prosecutor’s comments prejudiced Nightingale. Since the prosecutor’s comments did not prejudice Nightingale, defense counsel’s decision not to object and to wait to move for a mistrial certainly did not prejudice him.

- c. *Defense counsel was not ineffective for failing to move to dismiss the second count based on mandatory joinder grounds because Nightingale faced no increase in penalty from the additional count*

Nightingale next asserts counsel was ineffective for failing to move for dismissal, based on mandatory joinder grounds, of the additional count of felony harassment that was charged after the first trial.

Nightingale asserts that the second count raised his offender score and thus the standard range he faced. To the contrary, the second count did not raise his offender score, but was considered as the same course of criminal conduct. The prosecutor explained to the court her reason for amending the information and that she did not intend for Nightingale to face any additional penalty from the amendment. Nightingale therefore cannot demonstrate any prejudice from defense counsel's failure to move for dismissal of the second count based on mandatory joinder grounds.

Under CrR 4.3.1 joinder of related offenses is mandatory. State v. Lee, 132 Wn.2d 498, 501, 939 P.2d 1223 (1997). Offenses are "related" if they are based on the same conduct and within the jurisdiction and venue of the same court. *Id.* Although the remedy for the State's failure to join related offenses under CrR 4.3.1 is generally dismissal with prejudice of the new charge, the State is not precluded from retrying the defendant on the same charge or any lesser included offenses. State v. Dallas, 126

Wn.2d 324, 892 P.2d 1082 (1995); State v. Anderson, 96 Wn.2d 739, 742-44, 638 P.2d 1205 (1982), *cert. denied*, 459 U.S. 842 (1982). Where amendment of the information affects only form rather than substance, the amendment does not violate the mandatory joinder rules. State v. Haven, 70 Wn. App. 251, 255, 852 P.2d 1120, *rev. denied*, 122 Wn.2d 1023 (1993).

Defense counsel's decision to not object to the amendment of the information was likely a tactical decision on his part. As the prosecutor referenced in sentencing, she informed counsel that her purpose in amending the information to allege two counts of harassment was to facilitate the trial, i.e., the jury instructions, that she did not intend to score a conviction on the one count against a conviction on the other. 6RP 550-52, 628. She marked the box to reflect that the offenses were the same criminal conduct. Contrary to his argument on appeal, his current offenses were counted as one crime and he was sentenced on an offender score of one due to a *prior* felony harassment conviction from 2000. CP 5-6. As Nightingale would not face any additional time given the prosecutor's representations⁷, Nelson likely decided that simplified jury instructions would be the better route.

⁷ The counts would not otherwise constitute the same course of criminal conduct because there were two victims.

Moreover, Nightingale cannot show prejudice under the facts of this case. Even if Nelson had objected and successfully moved to dismiss the amended information, Nightingale would have faced the same penalties that he did face at sentencing.

D. CONCLUSION

The State respectfully requests that this court affirm Nightingale's convictions for felony harassment.

Respectfully submitted this 25th day of June, 2009.


HILARY A. THOMAS, WSBA#22007
Appellate Deputy Prosecutor
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the United States mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached to this Court, and appellant's counsel, Jennifer Sweigert, addressed as follows:

Nielsen, Broman & Koch, PLLC
1908 East Madison
Seattle, WA 98122


Legal Assistant

6/25/2009
Date

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