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04366-5

NO. 64366-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GERALD STARLING,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MARY YU

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The Supreme Court has rejected the claim that convictions for robbery and kidnapping violate double jeopardy. Has the defendant shown that somehow convictions for robbery and the lesser included offense of unlawful imprisonment violate double jeopardy?

2. Was there sufficient evidence for a rational trier of fact to have found the defendant guilty of unlawful imprisonment when he sped off in a stolen car with the victim still inside and threatened to blow her head off?

3. Did the prosecutor commit misconduct in closing argument and was the misconduct so flagrant and ill-intentioned that the defendant should be excused for failing to object below?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

A jury convicted the defendant as charged on three counts: count I, Robbery in the Second Degree; count II, Unlawful Imprisonment; and count III, Attempting to Elude a Pursuing Police Vehicle. CP 1-4, 8-10. The defendant received a standard range sentence of 25 months on count I, 16 months on count II, and

6 months on count III, all terms running concurrent to each other.

CP 37-45.

2. SUBSTANTIVE FACTS

Damien Lewis lives with his "auntie" in the Central District of Seattle. 2RP¹ 78-79. In early April of 2009, Damien bought a 1983 Chevrolet Monte Carlo. 2RP 79-80. Two weeks later, on the evening of April 24, Damien and his girlfriend, Denise Anderson, went to Pioneer Square for a birthday party of a friend being held at a local club. 2RP 80-82. Also along for the evening was the defendant's friend, Eastwood. 2RP 80.

When they arrived at Pioneer Square, Damien parked his Monte Carlo in a parking lot located at 1st Avenue and Washington Street. 2RP 83. At approximately 1:50 a.m., Damien and Denise returned to the car, with Denise getting into the front passenger seat and Damien getting into the driver's seat and starting the car. 2RP 85. The two waited for a few moments for Eastwood, but when he did not appear, Damien got out of the car, left the car running, and went looking for his friend. 2RP 87.

¹ The verbatim report of proceedings is cited as follows: 1RP--8/18/09, 2RP--8/19/09, 3RP--8/20/09, and 4RP--9/25/09.

As Denise sat in the car waiting, she noticed a man walk in front of the car, turn around and then walk in front of the car a second time. 2RP 149-50. The man--the defendant--then opened the driver's door, jumped into the car, put the car into gear and sped out of the parking lot onto Washington Street. 2RP 150-51. Denise, "freaking out," first blurted out something to the effect of "what the hell are you doing." 2RP 151. The defendant ordered Denise to "shut up, bitch," and threatened that if she didn't, "he would blow my head off." 2RP 151.

As the defendant sped down the street, Denise repeatedly (at least five times) asked the defendant to let her out of the car. 2RP 154. The defendant did not comply. Instead, he kept driving down the street. When the defendant reached the corner intersection, he took a right turn, sped approximately halfway down the block, then stopped in the middle of the street and pushed Denise out of the car. 2RP 155-56, 174-75.

A number of officers and detectives happened to be in the area. 2RP 8-9, 192-93. A long car chase then ensued, with the defendant speeding down I-5 and then through a residential area in SeaTac at speeds over 80 miles per hour. 2RP 195-99; 3RP 34. The car chase was captured on the officer's in-car video system.

3RP 24. The pursuit ended when the defendant crashed and was quickly apprehended. 3RP 35-37.

The defendant did not testify and called no witnesses on his behalf. Additional facts are included in the sections they pertain.

C. ARGUMENT

1. **CONVICTIONS FOR ROBBERY AND UNLAWFUL IMPRISONMENT DO NOT VIOLATE DOUBLE JEOPARDY.**

The defendant contends that his convictions for robbery in the second degree and unlawful imprisonment violate double jeopardy. He is incorrect. Consistent with Washington State Supreme Court case law regarding robbery and unlawful imprisonment's greater offense, kidnapping, the two crimes do not merger² or otherwise violate double jeopardy. See State v. Korum, 157 Wn.2d 614, 141 P.3d 13 (2006); State v. Louis, 155 Wn.2d 563, 120 P.3d 936 (2005); In re Fletcher, 113 Wn.2d 42, 776 P.2d 114 (1989); Vladovic, supra.

² The term "merger" is used (and misused) in several different contexts. As used herein, it is a doctrine of statutory interpretation used to determine whether the legislature intended to impose multiple punishments for a single act that violates several statutory provisions. State v. Vladovic, 99 Wn.2d 413, 419 n.2, 662 P.2d 853 (1983). Merger is simply a part of the test for double jeopardy. State v. Frohs, 83 Wn. App. 803, 811, 924 P.2d 384 (1996) (citing State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995)).

a, The History Of Double Jeopardy And Merger.³

In beginning an analysis of an alleged double jeopardy/ merger violation, the first step is to look at what the double jeopardy clause is intended to protect against, i.e., the purpose of the rule. Without question, subject to constitutional constraints, the legislature has the absolute power to define criminal conduct and assign punishment. Calle, 125 Wn.2d 769, 776. In many cases, a defendant's conduct may violate more than one criminal statute. Without question, a defendant can permissibly receive multiple punishments for a single act that violates more than one criminal statute. Calle, at 858-60 (finding no double jeopardy violation where a single act of intercourse violated the rape statute and the incest statute). Double jeopardy is only implicated when the court exceeds its legislative authority by imposing multiple punishments where multiple punishments have not been authorized. Calle, at 776. Therefore, a reviewing court's role "is limited to determining

³ Because the defendant improperly combines various double jeopardy/ sufficiency of the evidence concepts--including previously rejected concepts regarding factual/conduct based double jeopardy claims and a claim that one crime can be merely "incidental" to another crime (the kidnap merger doctrine) and therefore violated double jeopardy--the State has endeavored to go through a complete double jeopardy analysis step by step in an attempt to clarify the issues and various concepts.

what punishments the legislative branch has authorized," and determining whether the sentencing court has properly complied with this authorization. Calle, at 776.

In Calle, the Supreme Court set forth a three-part test for determining whether multiple punishments were intended by the legislature.⁴ The first step is to review the language of the statutes to determine whether the legislation expressly permits or disallows multiple punishments. Calle, at 776. Should this step not result in a definitive answer, the court turns to another rule of statutory construction, the two-part "same evidence" or "Blockburger" test. This test asks whether the offenses are the same "in law" and "in fact." Calle, at 777. Failure under either prong creates a strong presumption in favor of multiple punishments, a presumption that

⁴ Calle represented an affirmation of the rejection of the factual type analysis that was being conducted by some courts prior to the early 90's--and the defendant seeks to do here. In 1993, the United States Supreme Court specifically overruled the "same conduct" fact based test for determining double jeopardy. United States v. Dixon, 509 U.S. 688, 704, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). Two years later, the Washington State Supreme Court did the same, recognizing that a factual analysis based test had been rejected by the United States Supreme Court and that the State double jeopardy clause did not provide broader protection than its federal counterpart. State v. Gocken, 127 Wn.2d 95, 896 P.2d 1267 (1995). This rejection of a fact based double jeopardy/merger analysis makes sense when considering the question is one of legislative intent of which the facts of a particular case tell us nothing. See also State v. Vaughn, 83 Wn. App. 669, 924 P.2d 27 (1996), rev. denied, 131 Wn.2d 1018 (1997) (recognizing rejection of the "same conduct" rule in finding no double jeopardy for kidnap and rape).

can only be overcome where there is "clear evidence" that the legislature did not intend for the crimes to be punished separately. Calle, at 778-80.

b. Step One: The Statutes Do Not Expressly Allow Nor Disallow Multiple Punishments.

Neither the robbery statute (RCW 9A.56.210 and RCW 9A.56.190), nor the unlawful imprisonment statute (RCW 9A.40.040) expressly allows or disallows multiple punishments for a single act. Because the statutes do not supply this Court with an answer, the Court must turn to the "same evidence" test.

c. Step Two: The Offenses Do Not Satisfy The Same Evidence Test And Thus It Is Presumed The Legislature Intended That Each Conviction Be Punished Separately.

The "same evidence" or "Blockburger"⁵ test asks whether the offenses are the same "in law" and "in fact." Calle, at 777. Offenses are the same "in fact" when they arise from the same act. Offenses are the same "in law" when proof of one offense would always prove the other offense. Calle, at 777. If each offense

⁵ Referring to Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

includes elements not included in the other, the offenses are considered different and multiple convictions can stand. Calle, at 777.

Here, the defendant's convictions are not the same "in law." As charged here, robbery requires proof of an intent to commit theft, proof of an actual taking of the personal property of another, and proof that the taking was by the use or threatened use of immediate force, violence or fear of injury. CP 21; RCW 9A.56.210; RCW 9A.56.190. None of these elements are necessary to prove unlawful imprisonment. Unlawful imprisonment requires proof that a defendant knowingly restrained another person. CP 25; RCW 9A.40.040. Robbery does not require that the defendant knowingly restrain the victim.

With each charged crime having an element not contained in the other, the two offenses fail the same "in law" prong of the "same evidence" test. See Fletcher, at 50; Vladovic, 99 Wn.2d at 423 (both cases finding robbery and kidnapping convictions do not violate double jeopardy). It makes no difference whether the convictions are the same "in fact." Because the offenses are not the same "in law," this Court must find that the defendant's

convictions were appropriately punished separately unless "there is a clear indication of contrary legislative intent." Calle, at 780.

d. Step Three: There Is No Clear Evidence That The Legislature Intended To Prohibit Multiple Punishments.

The "strong presumption" created by the "same evidence" test, that two offenses can be punished separately, can be overcome only by clear evidence of contrary legislative intent. Calle, at 780. Here, there is no such evidence and the defendant does not argue otherwise. To the contrary, the independent statutory schemes and different purposes underlying each statute strongly suggest that the legislature intended to allow for separate punishments when a defendant commits both unlawful imprisonment and robbery.

A good indicator of the legislature's intent to allow separate punishments is whether the crimes address separate evils. State v. Vermillion, 112 Wn. App. 844, 859-60, 51 P.3d 188 (2002), rev. denied, 148 Wn.2d 1022 (2003). The robbery statute is designed to discourage the taking of property by the use or threatened use of

force; it serves to protect individuals from loss of property and threat of violence to their persons. Vermillion, at 861. In contrast, like the kidnapping statute, unlawful imprisonment is contained in a wholly different section of the criminal code, a section that pertains to protecting persons from being restrained. Frohs, 83 Wn. App. at 814. The fact that the statutes address separate evils indicates that the legislature intended to punish each offense separately. Calle, at 780 (the crimes of rape and incest address two separate evils and therefore a single act of intercourse can violate both statutes).

e. The Merger Doctrine Does Not Apply.

Another tool used to determine legislative intent is the merger doctrine, but the doctrine is not applicable here. The merger doctrine:

only applies where the 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 [that] is defined as a crime elsewhere in the criminal statutes (e.g., assault or kidnapping).

State v. Eaton, 82 Wn. App. 723, 730, 919 P.2d 116 (1996) (citing Vladovic, 99 Wn.2d 413 (emphasis added)).⁶

Merger applies when one crime is elevated by proof of another crime. The premise is that this shows the legislature intended the punishment for the elevated crime to constitute the sole punishment for the single act. State v. Freeman, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005) (citing Vladovic, at 419).

Here, there is no elevated crime, second-degree robbery being the lowest level of robbery, and unlawful imprisonment being a lesser crime of kidnapping. Further, neither crime requires proof of the other for a conviction. Thus, for both these reasons, the merger doctrine does not apply.

f. **In re Fletcher, Vladovic, Louis And The Concept Of One Crime Being “Incidental” To Another Crime.**

In In re Fletcher, Vladovic and Louis, the Supreme Court rejected the argument that convictions for kidnapping and robbery

⁶ By statute, first-degree rape requires that the perpetrator engage in sexual intercourse with another person by forcible compulsion where the perpetrator either (1) kidnaps the victim or (2) inflicts serious physical injury upon the victim. RCW 9A.44.040. Without the required proof of a kidnapping or serious physical injury, intercourse by forcible compulsion constitutes the lesser offense of second-degree rape. RCW 9A.44.050.

violate double jeopardy. The Court also rejected the so called kidnap-merger rule, whereby the defense sought a rule that a second conviction violated double jeopardy if it was merely "incidental" to another conviction--one of the same arguments the defendant is making here.

Vladovic arose from an incident at Bagley Hall on the University of Washington campus. An armed man entered Bagley Hall, gathered the five employees in one location, made them lie on the floor and then bound their hands and taped their eyes shut. Other confederates were then brought into the building. The robbers then removed the employees' wallets. One employee, a Mr. Jensen, was then taken to a storeroom where he was instructed to open a safe containing platinum crucibles. Officers then arrived and arrested the men. Vladovic, at 415-16.

The defendant was convicted of attempted first-degree robbery for attempting to steal the contents of the safe, first-degree robbery for stealing money from Mr. Jensen's wallet, and four counts of first-degree kidnapping for restraining the other employees. Vladovic, at 416. The Supreme Court found that none of the convictions merged or otherwise violated double jeopardy.

The court first discussed the applicability of the merger doctrine. The court reaffirmed its earlier holds from State v. Johnson, 92 Wn.2d 671, 600 P.2d 1249 (1979) and State v. Johnson, 96 Wn.2d 926, 639 P.2d 1332 (1982), that merger only applies when in order to obtain one conviction the legislature has required that the State also prove another crime. Vladovic, at 419-20. In applying this concept to Vladovic's convictions, the Court held that because proof of kidnapping is not necessary to prove robbery or attempted robbery, it is clear that the legislature intended the offenses of robbery and attempted robbery to be punished separately from the offense of kidnapping. Vladovic at 420.

The Court also addressed dictum from State v. Allen, 94 Wn.2d 860, 621 P.2d 143 (1980), which suggested that if a kidnapping was merely incidental to a robbery, the former offense would merge into the robbery. Vladovic, at 420, referring to, Allen, 94 Wn.2d at 864. The court held that this statement in Allen was not in accord with the merger doctrine and that pursuant to the

merger doctrine, "kidnapping does not merge into first degree robbery." Vladovic at 421 (emphasis added).⁷

Six years later, the Supreme Court reaffirmed the holding of Vladovic in In re Fletcher, supra. While Fletcher drove one car, his co-defendant forced his way into another car at gunpoint. The car was occupied by two women. The women were driven to a remote area where they were shot in the head. Fletcher was convicted of first-degree assault, first-degree kidnapping, and first-degree robbery for the stealing of the car. Fletcher, at 43-44. Just as the defendant does here, and just as Vladovic did, Fletcher argued that his kidnapping of the two women was merely "incidental" to the robbery of the car. Id. at 52. The Supreme Court once again rejected this argument that somehow a kidnapping could be merely incidental to a robbery and therefore could not stand. Id. at 49-52.

Another fifteen years later, the defense again tried to persuade the Court to adopt an "incidental" merger double jeopardy rule. In State v. Louis, the defendant was convicted of robbery and kidnapping for a jewelry store heist in which he bound his victims in a back bathroom. The Supreme Court first rejected Louis' double

⁷ The defendant cites to and relies on Allen but does not indicate that the case has been repudiated on at least three separate occasions by the Supreme Court.

jeopardy challenge and then addressed his argument that the kidnapping was merely incidental to his robbery and therefore the conviction could not stand. As the Court put it, Louis "reasons that a kidnapping will always be simultaneous and incidental to armed robbery," and therefore the convictions should merge. Louis, 155 Wn.2d at 570. The Court rejected Louis' argument, stating, "[w]e see no reason to depart from our decisions in Vladovic and Fletcher." Louis, at 571. The defendant cites no controlling case to the contrary.⁸

The analysis from these three cases is no different here where the court is dealing with robbery and unlawful imprisonment, the lesser crime of kidnapping. The crimes fail the same evidence test and the Supreme Court has rejected an "incidental" crime double jeopardy analysis. *Stare decisis* requires this Court to hold firm to the well-reasoned and properly decided cases of Vladovic, Fletcher and Louis. State v. Gentry, 125 Wn.2d 570, 587 n.12, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995).

⁸ The defendant's citation to State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995) is misguided. Although he claims the Brett court's reference to an incidental crime involves merger and double jeopardy (see Def. br. at 12), this is incorrect. The Court's reference in an incidental crime was made in regards to a sufficiency of the evidence review of Brett's kidnapping conviction, not in regards to double jeopardy or merge. See Brett, 126 Wn.2d at 166-67.

**2. AMPLE EVIDENCE SUPPORTS THE
DEFENDANT'S CONVICTION FOR UNLAWFUL
IMPRISONMENT.**

The defendant contends that even when the evidence is viewed in the light most favorable to the State, no rational trier of fact could have found him guilty of unlawful imprisonment. Under the facts of this case, this claim cannot be supported.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). A reviewing court will draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A factual sufficiency review "does not require the reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt but rather only whether any rational trier of fact could be so convinced." State v. Smith, 31 Wn. App. 226, 640 P.2d 25 (1982).

As charged and proved here, to convict the defendant of unlawful imprisonment, the jury had to find that the defendant knowingly restrained Denise Anderson. RCW 9A.40.040; CP 25.

A victim of unlawful imprisonment does not need to be chained to a wall, held for days, moved to a different location or have a gun placed to their forehead. Rather, to restrain means "to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his [or her] liberty." RCW 9A.40.010(1). This is an interference that is a "real or material interference" with the liberty of another as contrasted with "a petty annoyance, a slight inconvenience, or an imaginary conflict." State v. Washington, 135 Wn. App. 42, 50, 143 P.3d 606 (2006). Further, the presence of a means of escape may help to defeat a prosecution for unlawful imprisonment unless the known means of escape presents a danger or more than a mere inconvenience. Id.

Denise Anderson was captive in a speeding car. When she protested, she was told to "shut up" or face getting her head "blow[n]... off." 2RP 151. This threat, Denise took seriously. 2RP 151. Denise's only means of potential escape was to jump out of a fast moving vehicle, something few people would contemplate as a safe viable solution.

While the restraint here may not have been for an appreciable amount of time, the threat of death by the defendant,

with no means of safely escaping, rendered the restraint more than "a petty annoyance, a slight inconvenience, or an imaginary conflict." Denise was not free to leave and could not do so safely. She feared the defendant and thought she was not going to be allowed to leave. Any reasonable person would have felt the same way in Denise's untenable position. Under these facts, a reasonable jury could find and did find all the elements of unlawful imprisonment.

In arguing otherwise, the defendant cites to State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) and again seems to argue that there is some different sufficiency of the evidence, double jeopardy/merger test involving kidnapping or unlawful imprisonment involving "incidental" crimes. First, as stated in the section above, the Supreme Court has rejected this notion.⁹ Second, Green is simply a sufficiency of the evidence case, a case where the Court found there was insufficient evidence of abduction as that term is defined.

⁹ For the same proposition, the defendant also cites repeatedly to Division Two's decision in State v. Korum, 120 Wn. App. 686, 86 P.3d 166 (2004), affirmed in part, reversed in part on other grounds, 157 Wn.2d 614 (2006). However, in stating that restraint that is "merely incidental" to another crime may not stand, the Court of Appeals in Korum, cited directly to the dissent in Vladovic, a position that was later rejected in Fletcher, and then once again--shortly after the Korum decision--in Louis.

In Green, persons in an apartment building heard screaming coming from an alley. Witnesses observed the defendant holding a young child while trying to silence her. He then carried her a “short distance” around the corner where he killed her. Green, at 222-23. Green was charged with kidnapping in aggravation of first-degree murder. The Supreme Court ruled that “after considering the evidence most favorable to the State, we conclude there is not substantial evidence to support a determination of kidnapping.” Id. at 219. In short, the Court found that Green did not try to secret the victim to a place she was not likely to be found, that the killing itself could not constitute restraint by means of deadly force, and thus the element of abduction was missing. Id.

Green is a pure sufficiency of the evidence case. The test for sufficiency of the evidence does not change just because one of the charged crimes happens to be kidnapping.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable

doubt. Tilton, 149 Wn.2d at 786. The evidence was sufficient here.¹⁰

3. THE DEFENDANT HAS FAILED TO PROVE THE PROSECUTOR COMMITTED MISCONDUCT.

The defendant contends that the prosecutor committed such flagrant misconduct in closing argument and rebuttal argument that his convictions must be reversed, even though he never objected below and defense counsel used some of the prosecutor's very words against the State. The defendant's claim must be rejected. Argument regarding the defense strategy is appropriate for prosecutorial comment and, contrary to the defendant's claim, in discussing the defense strategy, the prosecutor did not offer a personal opinion, disparage trial counsel or in any other way

¹⁰ The defendant also seems to argue that because Anderson was not transported very far (although the defendant asserts Anderson was moved a far shorter distance than she actually was), she was therefore not restrained. (The defendant claims the vehicle moved only 10 to 15 feet before Anderson was thrown out--Def. br. at 7--however, the record actually reflects that Anderson was driven out of the parking lot, down the full rest of the block, taken around the corner and then driven halfway down the next block before she was pushed out of the vehicle--see 2RP 150-51, 155-56, 174-75.) In any event, the point is that the statute does not require that a victim of unlawful imprisonment be moved anywhere. The defendant could just have easily kept Anderson in the vehicle by threatening to blow her head off, without moving the vehicle, and the analysis would be the same, with the exception of the possible escape route being jumping from a stationary vehicle, instead of the moving vehicle--upon the perceived threat of being shot.

commit misconduct. In addition, the defendant is barred from raising this issue on appeal.

When a defendant alleges that the prosecutor's arguments prejudiced his right to a fair trial, he bears the heavy burden of establishing both (1) the impropriety of the prosecutor's arguments and (2) that there was a "substantial likelihood" that the challenged comments affected the verdict. State v. Reed, 102 Wn.2d 140, 145, 685 P.2d 699 (1984). In closing argument, a prosecutor has wide latitude in drawing and expressing reasonable inferences from the evidence. State v. Harvey, 34 Wn. App. 737, 739, 664 P.2d 1281, rev. denied, 100 Wn.2d 1008 (1983). Alleged improper comments are reviewed in the context of the entire argument. State v. Bryant, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998), rev. denied, 137 Wn.2d 1017 (1999).

The defendant contends the following passage by the prosecutor in closing argument constituted flagrant misconduct:¹¹

Ladies and gentlemen of the jury, it's rare for you as jurors to have what you have in this case. You have eyewitness testimony, you have testimony from the victims, you have multiple detectives who were in the area, you have in-car video.

¹¹ The quotations provided by the State contain more than the few sentences cited by the defendant. This is done so that the Court can see the comments in the context in which they were made.

This case is a prosecutor's dream come true. Any why? You have every piece of evidence right in front of you that you need to convict the defendant in each of the three crimes which he has been charged. Do not make this any more complicated than you need to. Take the evidence that you have, your common sense, your life experience, put them all together and you will come back as I asked you to and indicated I would ask you for a second time in closing with three guilty verdicts of the three crimes as charged.

3RP 66-67. The defendant raised no objection below. In fact, defense counsel began his closing argument by mocking the prosecutor's closing argument and using the prosecutor's own words:

Ladies and gentlemen of the jury, this case is a prosecutor's dream come true. There are no contested issues. And by the way, don't make it complicated. There's an old adage if somebody tells you something that's too good to be true, you know it's not. If somebody tries to sell you something and they go oh, this is perfect, don't buy it. If somebody gives you something to look at and to sign like a contract or a plea form, mark it guilty and sign it and don't make it too complicated, it's because they don't want you to look at the fine print.

But you as members of this jury took an oath to look at the fine print, to look at the evidence, to analyze it, to be critical, to be fair to both sides but to do your duty as jurors. There are issues to be contested in this particular case. There are many, but you have to look at them. Don't sign documents because that's the easy way out.

3RP 69-70.

Later in closing, defense counsel told the jury that "the Defense submits if you look at her [Denise Anderson] lying, her misleading, her leaving the scene, her inconsistencies with her own boyfriend, the lack of injuries, the lack of the car part, you cannot be convinced beyond a reasonable doubt" of the defendant's guilt.

3RP 88. Counsel then speculated that Denise had a financial interest in having "somebody" found guilty of the robbery. 3RP 90.

In rebuttal, the prosecutor began by addressing the issues raised by defense counsel, the reasons defense counsel posited that Denise should not be found credible. See 3RP 90-92. The prosecutor concluded this argument by stating the following:

Now, Defense Counsel is doing what he has to do. He's doing his job. But I ask you to consider the concept of the red herring or the concept of throwing it up against the wall and seeing what sticks.

As we talked about in jury instructions there are many reasons that people would go to trial. One very legitimate reason is because they didn't do it. I would submit to you that based off all the evidence that you've heard and all the evidence you've seen that's not the reason Mr. Starling is taking this case to trial. I would submit to you Mr. Starling is hoping that just one of you gets caught up on one of the many red herrings that Defense Counsel has just mentioned and says you know what, I don't know if that crime really happened.

Now, the fact of the matter is Mr. Stoddard [defense counsel] has a very difficult job getting away from the

elude because it's on video. So what does he do? He spends his time nit-picking the minutia of the other two charges. Well, you know what? I'm sorry and I'm sure Ms. Anderson is sorry that nobody happened to see her as she was getting abducted in a car and not allowed to leave...Guess who picks when crimes happen? Defendants. Guess when they normally commit crimes? They try not to commit them in front of a bunch of witnesses.

3RP 92-93.

a. The Failure To Object.

Defense counsel's failure to object to misconduct at trial constitutes waiver on appeal unless the misconduct is so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice incurable by a jury instruction. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). In other words, misconduct cannot be the basis for reversal if it could have been "obviated by an objection and curative instruction that the defense did not request." State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). Further, the Supreme Court has stated, "[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for a new trial or on appeal." Russell, 125 Wn.2d at 93. The defendant cannot overcome his failure to object here.

First, it is clear that if trial counsel even considered the prosecutor's comments as misconduct, he made the tactical decision to use the prosecutor's words against the State rather than object. Generally, the failure to object that involves a trial tactic cannot form the basis for a later appeal. See State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

Second, if the comments by the prosecutor were misconduct, there is no reason whatsoever that a simple objection, possible admonishment of the prosecutor in front of the jury, and a curative instruction would not have obviated any prejudice. This is not a case where the prosecutor interjected new evidence or stated something so inflammatory that curative measures would be useless. In short, the defendant's failure to object is fatal to his argument. This is especially true when one considers the fact that the jurors were specifically instructed that the lawyers' statements are not evidence and that they must disregard any remark, statement, or argument that is not supported by the evidence or the law." State v. Stith, 71 Wn. App. 14, 856 P.2d 415 (1993) (jurors are presumed to follow instructions). A further instruction along these lines would have been sufficient.

b. There Was No Misconduct.

First, the defendant claims the prosecutor was rendering a personal opinion as to the defendant's guilt. This is not correct. Taken in context, all the prosecutor was expressing was that there was a great deal of evidence supporting the charges. In fact, just prior to stating the case was a prosecutor's dream, the prosecutor proceeded to list all the different evidence supporting conviction-- from eyewitness testimony to a video tape of the crime. The fact that the prosecutor used different language to describe the fact that there was a lot of evidence in the case does not change the statement into a personal opinion as to guilt.

Second, the prosecutor did not disparage defense counsel or draw an adverse inference from the defendant deciding to go to trial or his defense. The prosecutor told the jury that a good reason to go to trial is if you are innocent, but that "all the evidence you've seen" shows the defendant is not innocent. The defendant fails to articulate how this comment is misconduct. It is simply a comment on the quantity of evidence and argument that the State had met its burden of proof.

Finally, the prosecutor discussed the defense tactic in attacking the credibility of Denise Anderson.¹² Counsel described the "concept" of a red herring argument, the bringing up irrelevant issues in an attempt to cast doubt upon Denise.

"Red herring" is simply a colloquial term used to describe argument or the presentation of facts that distract attention from the real issue. See Merriam-Webster's Collegiate Dictionary, 11th Edition at 1042 (2003). In State v. Fredrick, the Court of Appeals rejected a similar argument regarding the use of the term "red herring," finding that the term was used to "get the jury to focus on the pertinent evidence in the case." State v. Fredrick, 123 Wn. App. 347, 355, 97 P.3d 47 (2004); see also State v. Guizzotti, 60 Wn. App. 289, 298, 803 P.2d 808 (use of the term "smoke" and describing the defense argument as an attempt to confuse the jury was the prosecutor's inartful but proper attempt to point out that the defense theory was unfounded), rev. denied, 116 Wn.2d 1026 (1991).

¹² For example, after Denise and Damien left the club, they bought hotdogs from a street vendor. 2RP 85, 146, 149. In closing, defense counsel argued Denise was not credible because it made no sense that she waited to eat her hotdog until she got in the car while Damien ate his hotdog while walking back to the car. 3RP 78. Counsel also said Denise's credibility could be questioned because the jury did not know how old she was (3RP 75), did not know what clothing she was wearing that night (3RP 84) and because she did not tell the jury how a part of the car fell off during the carjacking (3RP 80-81).

The prosecutor did not disparage trial counsel nor misstate the role of defense counsel. It must be "clear and unmistakable" that counsel committed misconduct. State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598, reversed on other grounds, 111 Wn.2d 641 (1985). And it is the defendant who bears the heavy burden of establishing the impropriety of the prosecutor's conduct. Reed, 102 Wn.2d at 145. The defendant cannot meet that burden here.

c. The Facts Were Overwhelming.

Finally, the defendant must prove that there was a "substantial likelihood" that the challenged comments affected the verdict. Reed, at 145. The challenged comments were not of such significance or of such gravity that the defendant can prove that but for the comments, he likely would not have been found guilty.¹³

This was not an identification case. The defendant was captured in the stolen car after a car chase that was caught on

¹³ The defendant seeks to apply a constitutional harmless error standard. However, when it comes to alleged misconduct, there is but one standard. See State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984); Russell, at 85-87; State v. Weber, 99 Wn.2d 158, 659 P.2d 1102 (1983). The Supreme Court has recently called into question certain court of appeals cases applying a different standard. See State v. Warren, 165 Wn.2d 17, 26 n.3, 195 P.3d 940 (2008); see also State v. Dixon, 150 Wn. App. 46, 57 n.4, 207 P.3d 459 (2009). In any event, the evidence here was so overwhelming that any error is harmless under either standard.

tape. There is no evidence the victims and the defendant knew each other and no evidence that would suggest the defendant did anything other than steal Damien's car with Denise still inside. Particularly telling of the strength of the State's case is defense counsel's closing wherein counsel's strategy was to discredit Denise but where there was really no explanation or reasoned argument that would suggest anything other than a carjacking. Thus, the defendant's hopeful reliance upon a claim of misconduct cannot prevail.

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction and sentence.

DATED this 18 day of August, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

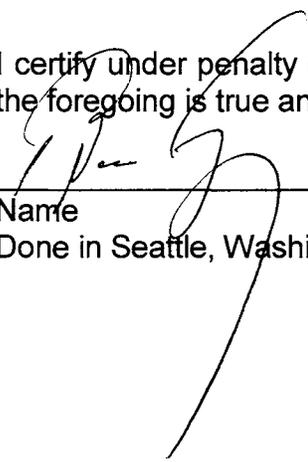
By: 

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. STARLING, Cause No. 64366-5-1, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

08/18/10

Date

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