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Washington State
Court of Appeals
Division Two

April 24, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANTHONY SAMNANG HEM. Appellant.	No. 49811-1-II UNPUBLISHED OPINION

MELNICK, J. — Anthony Samnang Hem challenges his conviction following a bench trial for felony murder in the second degree (felony murder), with an underlying predicate of attempting to elude a pursuing police vehicle (attempt to elude).[1] Hem argues insufficient evidence exists that the victim was not a participant in the predicate felony, that the prosecutor committed misconduct by shifting the burden of proof in closing argument, and that the court also shifted the burden. Hem filed a statement of additional grounds (SAG) relating to his sentencing. We affirm.

FACTS

Hem drove recklessly and caused Marisa Richie's death. Richie and Pierre Jennings rode in a stolen truck Hem drove while the police chased him.

[1] The court also convicted Hem of robbery in the first degree; however, Hem does not appeal from that conviction. In his statement of additional grounds, Hem makes assertions for reversal or modification of his sentence for robbery in the first degree

Approximately ninety minutes before the chase, Richie, Hem and Jennings sat in a parked car in a parking spot assigned to Terry Sumey. Sumey approached the three and asked them to move the car. Hem and Jennings punched and repeatedly kicked Sumey. Hem, Jennings and Richie left the scene in Sumey's truck.

Approximately ninety minutes after the above incident, Officers Zach Spangler and Dean Waubanascum saw Sumey's truck parked at a residence.[2] While approaching the truck, Spangler turned on his patrol vehicle's spotlight. Hem immediately started the engine, drove the truck directly at the driver's side door of the officers' vehicle, and then sped off. He reached speeds of between 80 and 100 miles per hour. Spangler saw figures in the truck. RP at 266. Spangler saw a male driver, a female passenger in the middle seat, and another male passenger.

Hem drove recklessly. He ran stop signs and red lights. He drove on the wrong side of the road with his lights off, and he hit another vehicle. Hem crashed the truck into a power pole. Spangler could see Hem, Jennings, and Richie inside the cab of the truck, Spangler did not see Richie try to get out of the truck or interfere with Hem's driving. Spangler saw nothing to indicate Richie wanted to or did not want to be in the truck.

Hem plead guilty to attempting to elude a pursuing police vehicle, vehicular assault of Jennings, assault in the second degree of Spangler and Waubanascum, and vehicular homicide of Richie. In his guilty plea, Hem admitted he knowingly drove Sumey's truck recklessly while attempting to outrun a police vehicle, resulting in a collision that caused Richie's death.

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[2] Prior to this time, another officer saw the stolen truck in a different parking lot and approached it in his patrol car. The officer saw three occupants. The "truck sped up rapidly, went over the curb, over some bushes, across the sidewalk and off the curb before speeding away." Report of Proceedings (RP) (Sept. 7, 12 & Oct. 21, 2016) at 325. The officer told dispatch he had located the stolen truck, but he could not maneuver out of the parking lot in time to pursue the vehicle.

Hem waived his right to a jury on the remaining counts of felony murder and robbery in the first degree. The State charged attempt to elude as the predicate felony to the felony murder charge.

The trial court found Hem guilty of both felony murder and robbery in the first degree. The court entered written findings of fact and conclusions of law, including findings that the testimony of Hem and Jennings was not credible, that Hem "was the driver and made all decisions regarding how to drive," that "[c]redible evidence does not support that Ms. Richie was an accomplice" to the attempt to elude and, thus, was not a participant in the underlying felony. Clerk's Papers (CP) at 86-87.

The court sentenced Hem to 360 months for felony murder, 171 months for robbery in the first degree, 144 months for vehicular homicide, 84 months for vehicular assault, and 84 months for assault in the second degree. The court merged the attempt to elude conviction with the felony murder conviction, denied Hem's motion to merge the convictions for vehicular homicide and felony murder, and concluded that vehicular homicide and felony murder do not constitute the same criminal conduct.[3] The court ordered all sentences to run concurrently for a total of 360 months custody. Hem appeals.

ANALYSIS

I. SUBSTANTIAL EVIDENCE

Hem argues insufficient evidence exists to prove Richie's nonparticipation in the attempt to elude or to convict Hem of felony murder.[4] Hem challenges the trial court's finding that he

[3] Hem stipulated to an offender score of six based on five prior adult convictions and two juvenile convictions counting as half a point.

[4] Hem's raises the same argument in his SAG. We address it here.

"was the driver and made all decisions regarding how to drive[.]" Br. of Appellant at 1. Hem also challenges the trial court's finding that Richie was not a participant in the attempt to elude.

A. Legal Principles

We review challenged findings of fact in a criminal bench trial for substantial evidence. Review is limited to determining "whether substantial evidence supports the challenged findings of fact and whether the findings support the trial court's conclusions of law." *State v. Smith*, 185 Wn. App. 945, 956, 344 P.3d 1244 (2015). "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person that the findings are true." *Smith*, 185 Wn. App. at 956.

Unchallenged findings of fact are verities on appeal. *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). "Direct and circumstantial evidence carry the same weight." *State v. Hart*, 195 Wn. App. 449, 457, 381 P.3d 142 (2016), *review denied*, 187 Wn.2d 1011 (2017). "Credibility determinations are for the trier of fact and are not subject to review." *Hart*, 195 Wn. App. at 457.

A person is guilty of felony murder if he commits any felony and, "in the course of and in furtherance of such crime or in immediate flight therefrom," he "causes the death of a person *other than one of the participants*" in the underlying felony. RCW 9A.32.050(1)(b) (emphasis added). Nonparticipation by the victim in the underlying felony "is clearly an element of the crime of second degree felony murder." *State v. Langford*, 67 Wn. App. 572, 579, 837 P.2d 1037 (1992).

At trial, the court admitted Hem's plea of guilty proving every element of felony murder, except Richie's nonparticipation in the attempt to elude.

B. Challenged Findings of Fact and Conclusion of Law

Hem challenges the finding that he "was the driver and made all decisions regarding how to drive[.]" Br. of Appellant at 1-2. He also challenges the finding that Richie was not a participant in the attempt to elude.

1. Hem Drove and Made All Driving Decisions.

There is substantial evidence to support the finding that Hem "was the driver and made all decisions regarding how to drive." CP at 87. In pleading guilty, Hem admitted to driving during the attempt to elude. Hem also testified that he was "used to being on the run," and that it was his "instinct" to flee. RP (Sept. 7, 12 & Oct. 21, 2016) at 378. The speed and recklessness of Hem's driving also indicated that Hem made all driving decisions. Based on those facts, substantial evidence supports the finding that Hem drove and made all driving decisions during the attempt to elude.

2. Richie was Not a Participant.

Hem argues insufficient evidence supported the trial court's finding that Richie was not a participant in the attempt to elude. He claims "the State presented no evidence to establish that [Richie] did not participate," because the State did not present "testimony or evidence to show what occurred inside the cab of the truck." Br. of Appellant at 2, 11.

An accomplice is one who, with knowledge she is promoting or facilitating the specific crime charged, either "[s]olicits, commands, encourages, or requests [another] person to commit" the crime; or "[a]ids or agrees to aid [another] person in planning or committing" the crime. RCW 9A.08.020(3)(a)(i) & (ii); *State v. Moran*, 119 Wn. App. 197, 210, 81 P.3d 122 (2003). Mere

physical presence, even with knowledge of ongoing criminal activity, is insufficient to establish accomplice culpability. *State v. Truong*, 168 Wn. App. 529, 540, 277 P.3d 74 (2012). However, knowledge that one is promoting an ongoing crime by encouraging the principal actor, with the intent that the crime succeed, is sufficient to prove accomplice liability. *In re Welfare of Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979).

We conclude that substantial evidence supports the trial court's finding that Richie was not a participant. Hem drove the stolen truck and made all driving decisions. Hem was used to being on the run and had the instinct to flee. He sped and drove recklessly while attempting to elude the officers. This circumstantial evidence demonstrates that Hem made up his mind about how to drive. There is no credible evidence Richie solicited, commanded, encouraged, or requested Hem to commit an attempt to elude.[5] She was merely present and mere presence even with knowledge of criminal activity is insufficient for accomplice liability. Sufficient evidence supported the trial court's finding.

II. Burden Shifting

A. Prosecutorial Misconduct

Hem argues that in closing argument the prosecutor committed misconduct by shifting the burden of proof regarding Richie's nonparticipation in the attempt to elude.

The State bears the burden of proving every element of its case beyond a reasonable doubt, and may not shift any part of that burden to the defendant. *In re Matter of Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006).

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[5] Although Hem presented evidence that Richie told him to "go," the trial court found that Hem's testimony on this point lacked credibility. CP at 87. We do not review credibility determinations. *Hart*, 195 Wn. App. at 457.

An assignment of error based on improper statements by a prosecutor at trial is waived where there is no objection at trial, unless the remark is "'so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized.'" *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43, 46 (2011) (quoting *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)). We presume the trial court judge in a bench trial disregards improper argument and improper evidence, applying the law correctly and avoiding any prejudice that might result from even flagrant and ill-intentioned statements by a prosecutor. *State v. Adams*, 91 Wn.2d 86, 93, 586 P.2d 1168 (1978); *State v. Read*, 147 Wn.2d 238, 245-46, 53 P.2d 26 (2002).

Hem challenges the following statement of the prosecutor during closing argument:

> Richie, this is the defense position because they are saying she's a participant . . . . *That's part of what has to be shown, usually by the State, to show that a person is an accomplice, in this case as a participant* . . . . [T]here has to be some action on the part of Ms. Richie that the Court finds in evidence that shows she did something . . . . Her presence at the commission of the crime, even with knowledge of the crime, does not subject her to criminal liability, unless she shares the criminal intent of Mr. Hem, and she demonstrates a community of unlawful purpose."

RP (Sept. 7, 12 & Oct. 21, 2016) at 389 (emphasis added). Hem did not object. Additionally, the following comment by the prosecutor preceded the challenged statement:

> the defense would have to prove, since they decided to put on evidence—*they wouldn't have to prove, let me qualify that*—the defense's evidence is to suggest a reasonable doubt exists because.

RP Sept. 7, 12 & Oct. 21, 2016) at 388.

The State agrees it had the burden to prove Richie's nonparticipation in the underlying felony beyond a reasonable doubt. The State argues the prosecutor's statement did not shift the burden and, even if it had, Hem waived the assignment of error and suffered no prejudice because the judge was the trier of fact.

We conclude that the prosecutor's statement, when viewed in context, was not flagrant and ill-intentioned. The prosecutor clearly started to misstate the applicable burden of proof on Richie's nonparticipation as an accomplice in the underlying felony, but immediately corrected himself.

Because the prosecutor did not shift the burden, there is no misconduct.

B. Court Applied Correct Burden of Proof.

Hem argues the trial court applied the incorrect burden of proof on Richie's nonparticipation in the underlying felony in its written and oral findings of fact.

Washington is a written order state. A trial court's oral decision has no binding or final effect unless the court formally incorporates the oral decision into the findings of fact and conclusions of law and the judgment and sentence. *State v. Dailey*, 93 Wn.2d 454, 458-59, 610 P.2d 357 (1980); *State v. McReynolds*, 142 Wn. App. 941, 949, 176 P.3d 616 (2008). We will not review the trial court's oral findings.

As to written findings of fact and conclusions of law in a bench trial, we presume the trial court judge applies the law correctly, including the burden of proof. *Adams*, 91 Wn.2d at 93; *Read*, 147 Wn.2d at 245-46. However, the challenging party can rebut the presumption by showing the trial court judge misunderstood and misapplied the law. *Cantu*, 156 Wn.2d at 825.

Hem contends the trial court's written finding that "[c]redible evidence does not support that Ms. Richie *was* an accomplice," shows the trial court judge misapplied the law by shifting the burden of proof. CP at 87 (emphasis added). If the court applied the correct burden, Hem claims it would have said it found credible evidence does support that Richie *was not* an accomplice.

Hem had no burden to produce any evidence that Richie participated. The State had the burden of proving that Richie was not an accomplice.

The wording of the trial court's finding could be clearer, but it is insufficient to rebut the presumption that the trial court applies the law correctly. We read the court's finding as a statement that the court weighed the evidence and made a credibility determination. It does not indicate that it applied the wrong burden of proof.

IV. SAG

Hem's SAG also raises additional grounds for reversal or modification of his sentence.

A. Age as a Substantial and Compelling Factor Warranting a Lesser Sentence

Hem challenges the length of his standard range sentences, asserting that his relative youth compared to Richie's justified a sentence below the standard range. [6] He was twenty-three when he committed the offenses; Richie was twenty-seven.

Hem failed to preserve this assertion. RAP 2.5(a). Hem did not request an exceptional sentence in his sentencing memorandum or at the sentencing hearing. Hem's counsel only requested sentences at the low end of the standard range for each conviction.

We will not consider Hem's assertion on this point because he was over the age of eighteen, and therefore failed to assert violation of a manifest error affecting a constitutional right. *State v. Houston-Sconiers*, 188 Wn.2d 1, 19-20, 391 P.3d 409 (2017); RAP 2.5(a).

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[6] Hem's SAG also states that the "sentencing court erroneously believed it ha[d] no discretion in [his] sentencing." SAG at 12. The sole basis for this claim is the statement by the sentencing judge at Hem's sentencing that Hem was a young man "looking at a long prison sentence no matter what this court does." SAG at 12 (quoting RP (Sept. 7, 12 & Oct. 21, 2016) at 441). The claim does not support a reasonable inference that the trial court judge did not exercise its discretion.

B. Length of Sentence as Cruel or Unusual Punishment

Hem argues that his 360-month sentence violates article I, section 14 of the Washington Constitution. In support, Hem refers to *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980), and *State v. Witherspoon*, 180 Wn.2d 875, 887, 329 P.3d 888 (2014). However, Hem makes no effort to explain why the court should conclude that his sentence constitutes cruel or unusual punishment based on those cases. Unlike the defendant in *Fain*, the trial court did not sentence Hem to life on minor predicate offenses. Hem did not state any reason why his sentence offends "evolving standards of decency," as it did in *Fain*. 94 Wn.2d at 397 (quoting *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958)). Accordingly, Hem's challenge on this basis fails.

C. Same Criminal Conduct

Hem asserts that the trial court erred in finding that his convictions for robbery in the first degree, felony murder, and vehicular homicide are not the same criminal conduct for sentencing purposes.

We utilize an abuse of discretion standard when reviewing a trial court's determination of what constitutes the same criminal conduct. *State v. Knight*, 176 Wn. App. 936, 959, 309 P.3d 776 (2013). The trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). We narrowly construe the same criminal conduct analysis. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997); *State v. Wilson*, 136 Wn. App. 596, 613, 150 P.3d 144 (2007).

Generally, the trial court determines the sentencing range for each current offense by calculating the offender score based on other current offenses and prior convictions. RCW 9.94A.589(1)(a); *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). If the trial court finds that all or some of the current offenses encompass "the same criminal conduct," those offenses

count as one crime. RCW 9.94A.589(1)(a). The statute defines "same criminal conduct" as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). If any of these elements is not met, the trial court must score each offense separately. *Knight*, 176 Wn. App. at 959.

Hem asserts that the offenses occurred at the same place and time, involved the same victims, and that Hem's objective intent did not change from one crime to the next. He asks us to remand for rescoring of the convictions for robbery in the first degree, felony murder, and vehicular homicide as one offense.

Robbery in the first degree is not the same criminal conduct as the vehicular homicide or felony murder in this case. Hem robbed Sumey more than an hour and a half before Richie died. The time, place, and victim of the robbery differed from the time, place, and victim of the vehicular homicide and felony murder. It was not an abuse of discretion for the trial court judge to score the robbery separately from the felony murder and vehicular homicide.

Additionally, the trial court judge did not abuse his discretion by scoring felony murder and vehicular homicide separately. The judge concluded the two offenses did not constitute the same criminal conduct because Hem's intent was different for each offense. For the felony murder charge, Hem intended to elude the police. For the vehicular homicide charge, Hem had to drive recklessly. Hem's challenge on this ground fails.

D. Merger

Finally, Hem asserts the trial court erred in declining to merge the convictions for vehicular homicide, felony murder, and robbery in the first degree.

Whether the merger doctrine bars multiple sentences for two or more offenses is a question of law we review de novo. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). Courts merge convictions where "a criminal act forbidden under one statute elevates the degree of a crime under another statute," if the "legislature intended to punish both acts through a single conviction for the greater crime." *Knight*, 176 Wn. App. at 952.

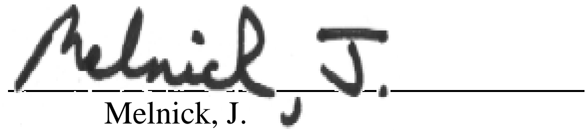
Initially, we note that the robbery in the first degree conviction in this case did not elevate either the vehicular homicide or felony murder charges. The assault underlying the conviction for robbery in the first degree is the assault of Sumey, and the State did not charge Hem separately for that assault. Merger doctrine does not bar a separate sentence for the robbery.

Additionally, merger does not bar multiple sentences for felony murder and vehicular homicide. In *In re Pers. Restraint of Percer*, 150 Wn.2d 41, 50, 75 P.3d 488 (2003), the court concluded that the legislature did not intent to punish vehicular homicide and felony murder through a single conviction for felony murder. The court held that "vehicular homicide and second degree felony murder are not the same offenses" because each "contains an element not included in the other;" specifically, vehicular homicide requires that "driving [ ] a vehicle" caused the victim's death, and felony murder requires that the defendant was acting "in the course of or in furtherance of a felony" when causing the victim's death. *Percer*, 150 Wn.2d at 50. Hem's challenge on this basis fails.

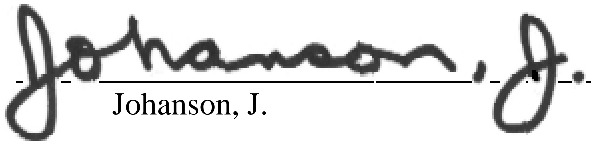
Accordingly, Hem's convictions for robbery in the first degree, felony murder, and vehicular homicide do not merge.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Melnick, J.

We concur: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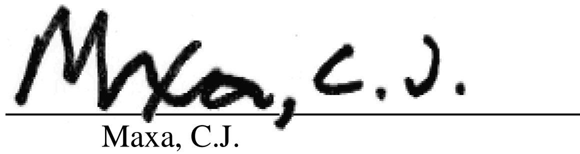
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