IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DEANDRE LAMAR BECK, Appellant.	No. 41467-8-II Consolidated with
STATE OF WASHINGTON, Respondent, v. DARRYL ANTHONY HENDERSON, Appellant.	No. 41477-5-II UNPUBLISHED OPINION

Worswick, C.J. — Deandre Beck and Darryl Henderson were convicted of conspiracy to commit theft of a motor vehicle, theft of a motor vehicle, conspiracy to commit robbery in the first degree, and robbery in the first degree. Beck appeals all of his convictions[1] and Henderson appeals all of his convictions except for theft of a motor vehicle. Both Beck and Henderson argue that (1) the trial court erred by refusing to instruct the jury on fourth degree assault as a lesser included offense of first degree robbery, and Beck additionally argues that (2) insufficient evidence supports his four convictions. We agree that Beck and Henderson were entitled to the

[1] The sentencing court merged Beck's conviction for theft of a motor vehicle with his conviction for first degree robbery. Thus, the court did not enter convictions for theft of a motor vehicle on Beck's judgment and sentence. Nonetheless, because Beck challenges the sufficiency of the evidence supporting this conviction, we address it below.

lesser included offense instruction and that insufficient evidence supports Beck's conspiracy to commit theft of a motor vehicle conviction. Thus we reverse Beck's and Henderson's convictions for first degree robbery and remand for a new trial on those counts; and we reverse Beck's conviction for conspiracy to commit theft of a motor vehicle and remand for dismissal with prejudice of that count. We affirm the other convictions.

Because we affirm the remaining convictions, we address Beck and Henderson's additional arguments that (3) the trial court violated their right to be free from double jeopardy when it entered convictions for two counts of conspiracy that arose from the same unit of prosecution, (4) the State committed prosecutorial misconduct, (5) they received ineffective assistance of counsel, and that (6) cumulative error requires reversal of all of their convictions. We disagree with these arguments. And because the trial court may face the issue on retrial, we address Beck's and Henderson's arguments that (7) the trial court violated their right to a unanimous guilty verdict.[2] We hold that the trial court did not violate this right.

FACTS

I. The Crimes

A. *The Setting*

Shortly after midnight on July 22, 2009, in the parking lot of the Pine Street Landing in Tacoma, Vincent Ligon was attacked by a group of men who took his wallet, car keys, and his

[2] Because we reverse Beck's convictions for first degree robbery and for conspiracy to commit theft of a motor vehicle, we do not address Beck's additional argument (8) that the conduct underlying Beck's convictions is the same criminal conduct for sentencing purposes.

car.

Henderson and Beck had gathered with some of their acquaintances in the Pine Street Landing parking lot. These acquaintances included Curtis Hudson, Brandon Starks, and Trevor Green. Beck, Henderson, Hudson, Starks, and Green were all members of the Hilltop Crips.

Ligon drove to the Pine Street Landing in his 1971 Pontiac LeMans that was equipped with aftermarket tires, rims, stereo, and speakers. After Ligon entered the Pine Street Landing, Beck, Henderson, Starks, Green, and Hudson gathered around Ligon's car and looked inside. Henderson told Hudson that he needed the rims from Ligon's car.

B. *Conspiracy To Commit Theft of a Motor Vehicle*

In Henderson's but not Beck's presence, Hudson asked Starks if Starks could steal Ligon's car by using a screwdriver to start the ignition. Starks told Hudson that he could not steal Ligon's car because it had an alarm and it was not valuable enough to warrant a difficult theft.

Henderson, Beck, Starks, and Green again gathered around Ligon's car and looked inside. Henderson, Hudson, Starks, and Green then further discussed beating up Ligon, taking his car keys, and then stealing his car; Beck was not part of this conversation. Henderson said that he would knock Ligon out with one punch. As Ligon exited the Pine Street Landing, Henderson approached him and punched him. But Henderson did not succeed in knocking Ligon out; instead, Ligon walked away from Henderson toward another group of people.

C. *Conspiracy To Commit Robbery in the First Degree and Robbery in the First Degree*

Henderson then rejoined Hudson, Starks, and Green. They huddled together for a few moments and planned to beat Ligon up and take his keys. Moments later, Beck rejoined the group. Beck, Henderson, Hudson, Starks, and Green remained in a close group for three minutes and then began approaching Ligon one by one, with Beck in the lead. Ligon was standing between two parked cars. When Beck, Henderson, Hudson, Starks, and Green reached Ligon, they approached him from both sides and blocked his escape. Henderson, Beck, and Starks struck Ligon repeatedly. During this attack, Ligon fell to the ground and Green approached Ligon, took the keys out of Ligon's back pocket, and ran across the parking lot to Ligon's car. Then, less than one minute after Green stole Ligon's keys, Starks took Ligon's wallet, also out of his back pocket.

D. *Theft of a Motor Vehicle*

When Green reached Ligon's car, he got in and drove it away. As Green left the Pine Street Landing in Ligon's car, Henderson, Beck, Hudson, and Starks stopped attacking Ligon and fled.

The final altercation among Ligon, Beck, Henderson, Hudson, Starks, and Green lasted only one minute. Henderson and Beck left together in Henderson's van. Green drove Ligon's car to Hudson's garage where they stripped it and sold its aftermarket add-ons. Stark later gave Henderson around $30 as Henderson's share of the theft's proceeds. The Pine Street Landing's video surveillance captured the entire incident.

II. Investigation and Charges

Officers arrested Henderson and Beck in February 2010. Both Beck and Henderson identified themselves in the surveillance video. Both Beck and Henderson also acknowledged that they were members of the Hilltop Crips.

The State initially charged Beck and Henderson, along with more than 30 other codefendants, with one general count of conspiracy. Later, the State amended its information to add charges of first degree robbery and theft of a motor vehicle against Beck and Henderson based on the Pine Street Landing incident. After Beck, Henderson, and several of their codefendants filed *Knapstad* [3] motions, the trial court limited the State to charging conspiracy to particular crimes in which the defendants allegedly participated personally. In this pretrial order, the court also granted the codefendants' motions to dismiss the general conspiracy charge, stating, "In regard to the State having charged the defendants with a general conspiracy involving crimes in which a particular defendant did not allegedly personally participate, the defendants' motions [to dismiss are] granted." Clerk's Papers (CP) at 9-11; 253-55. Thus, the trial court ruled that the State could not charge the defendants with general counts of conspiracy based solely on their gang membership, rather than their own personal involvement.

Thereafter, the State and the trial court severed the proceeding into logical groupings of similarly situated defendants. The State charged Beck and Henderson as codefendants with conspiracy to commit first degree robbery, first degree robbery, conspiracy to commit theft of a motor vehicle, and theft of a motor vehicle.[4] The State alleged that Beck and Henderson were

[3] *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

[4] The State also charged Hudson, Starks, and Green for their involvement in the Pine Street

guilty of these charges either as principals or as accomplices. Under RCW 9.94A.535(3)(s), the State further alleged as an aggravating factor for each count that Beck and Henderson committed the alleged crimes in order to further their membership status in a gang.

III. Pretrial Proceedings

During pretrial hearings on motions in limine, the State announced that it intended to introduce ER 404(b) evidence of Beck and Henderson's affiliation with the Hilltop Crips. The State sought to introduce this evidence to prove the aggravating factor it alleged for each count that Beck and Henderson were affiliated with a gang and committed these crimes to further their status in the gang's hierarchy. In the State's offer of proof, the State said it intended to introduce expert testimony by Detective John Ringer and others regarding the hierarchy of gang structure, what it means to work with a gang, what happens at gang meetings, and Beck and Henderson's presence at a gang meeting shortly before the Pine Street Landing incident. The State further disclosed that it anticipated Detective Ringer would testify specifically about his knowledge of the structure of the Hilltop Crips.

Although Beck and Henderson moved to exclude Detective Ringer's expert testimony, neither objected to it on ER 404(b) grounds. However, Beck and Henderson objected to Detective Ringer's anticipated gang history testimony on ER 403 grounds as irrelevant, cumulative, and unduly prejudicial. Because both admitted their gang membership, they argued that Detective Ringer's anticipated testimony would turn the case "into a gang case, instead of a

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Landing incident; each of them pleaded guilty.

robbery case." 1 Report of Proceedings (RP) at 69-71. The State responded that it intended to limit its questioning of Detective Ringer to how gangs operate, including how committing crimes advances one's status within the gang, in order to establish the aggravating factor.

Moreover, the State said that any background gang testimony it elicited from Detective Ringer would be offered to establish his expert credentials. The State further agreed not to elicit this background gang testimony if Beck and Henderson would stipulate to Detective Ringer's expertise. But neither Beck nor Henderson stipulated to Detective Ringer's expertise. The trial court ruled Detective Ringer's anticipated testimony was admissible.

Finally, the State announced that it intended to argue, as the basis for the conspiracy charges, that Beck and Henderson were part of the same gang and that the Pine Street Landing surveillance video footage showed them coming together with other members of that same gang and acting in concert.

IV. Trial

At trial, the State introduced evidence as described above. The State also introduced gang evidence that it is common for Hudson's clique of Hilltop Crips to steal cars by beating up their owners and taking the keys. Further, presumably because neither Beck nor Henderson stipulated to Detective Ringer's expertise, the State examined him about his role on the South Sound Gang Task Force.

Detective Ringer testified that as a result of being on the South Sound Gang Task Force, he has many gang member informants, whom he contacts every day and who tell him the gangs'

"new ways of doing business . . . popular cars . . . where they hide guns . . . [and] cocaine in cars . . . how they were using cell phones [and] using pagers; [and] where their meetings were." 2 RP at 228-29. Detective Ringer emphasized the violent nature of gangs by discussing how people are courted into gangs by showing their worth through fighting or participating in certain crimes like drive-by shootings.

Detective Ringer also testified about how gang members achieve a higher status within the gang's hierarchy by putting in "work." 2 RP at 235. Detective Ringer said that "work" included committing crimes such as drive-by shootings, home invasion robberies, burglaries, and stealing and stripping cars. Specifically, Detective Ringer testified that "work" could include

> [j]oining the crew and going in [to a home-invasion robbery] at gunpoint and taking down the occupants of the house and robbing them; maybe putting in work by shooting somebody; it might involve shooting somebody and killing somebody and going away to prison . . . [with] your status greatly enhanced.

2 RP at 236. Detective Ringer then testified that stealing and stripping cars was very common "work" for the Hilltop Crips, though it was not as highly esteemed "work" as drive-by shootings.

Detective Ringer also testified that fellow gang members were expected to support each other, be ready to join in as backup, and help other members in their "work." Detective Ringer opined that Henderson, Beck, Hudson, Starks, and Green acted in conformity with this expectation in attacking Ligon at the Pine Street Landing. Then, in response to the State's question about whether the attack on Ligon conformed to the general way the Hilltop Crips would steal a car from someone, Detective Ringer stated:

> In a situation like this, at a club, this kind of behavior is repeated time after time, where a victim is targeted, might have just a gold chain on and somebody says,

> "Hey, that chain has a lot of value to it,["] so they'll snatch it. If the person tries to get it back, they may be on the bottom pile of three or four individuals. The person isn't going to snatch one on one [sic]. They're going to have backup close by there, same thing on vehicle thefts.
>
> There's other incidences [sic] that are very similar. They target a victim. One particular one, they chitchat with the victim, one guy shakes the hand, holds on to the hand and suddenly the guy is being assaulted and . . . beat down. While he's being beat down, somebody is going in his pocket taking his keys out, taking his wallet, snatching his chain. You can see the person run to the car. As soon as the car leaves the lot, everybody scatters.

2 RP at 239-40. Neither Beck nor Henderson objected to this testimony by Detective Ringer.

Henderson elected to testify in his own defense. He denied being an active gang member.[5] Henderson testified that Ligon had bumped into him in the parking lot and then had spoken to him "with aggression" in the bar. Henderson testified that he told Ligon, "I'm about to go outside, and if you want to beat me up, I'll be outside." 3 RP at 437. Henderson further testified that he wanted to fight Ligon, who had said he would beat up Henderson. Although Henderson admitted he threw the first punch at Ligon, he denied involvement in any plan to steal Ligon's keys, wallet, or car. He testified that he didn't really know Green, Hudson, or Starks. Green testified that he acted on his own in deciding to seize the opportunity to snatch Ligon's keys in order to steal his car.

The trial court denied Beck and Henderson's proposed fourth degree assault instruction as a lesser included offense of first degree robbery. The trial court ruled that, although fourth degree assault was the factual equivalent of first degree robbery as charged, fourth degree assault was not the legal equivalent of first degree robbery because robbery does not necessarily include all of the

[5] Henderson explained that an active gang member is known as a gang banger.

elements of fourth degree assault.

Moreover, the trial court did not instruct the jury that it had to unanimously agree on which of the two possible acts Beck and Henderson committed in order to find them guilty of robbery. Instead, the trial court instructed the jury that, to find Beck and Henderson guilty of first degree robbery, they had to find the following beyond a reasonable doubt:

> (1) That on or about [July 22], 2009, the defendant[s], or person to whom the defendant[s were] acting as an accomplice, unlawfully took personal property from the person of another;
>
> (2) That the defendant[s], or person to whom the defendant[s were] acting as an accomplice, intended to commit theft of the property;
>
> (3) That the taking was against the person's will by the defendant[s], or person to whom the defendant[s were] acting as . . . accomplice[s], use or threatened use of immediate force, violence or fear of injury to that person;
>
> (4) That the force or fear was used by the defendant[s], or person to whom the defendant[s were] acting as . . . accomplice[s], to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
>
> (5) That in the commission of these acts or in the immediate flight therefrom the defendant[s], or person to whom the defendant[s were] acting as . . . accomplice[s], inflicted bodily injury[.]
>
> . . . .

CP at 322, 324.

The court instructed the jury that it had to reach its verdict based on the evidence presented, that statements by the lawyers were not evidence, and that "[g]ang membership in and of itself does not constitute a crime." CP at 301-03, 332.

In closing argument, the State reviewed the gang evidence. Specifically, the prosecutor argued that Beck and Henderson's theory of the case was that they

> just happened to get in a fight with the same person that some gang-bangers [sic] robbed and stole their car, but we don't know anything about that. We just were there for a fight . . . .

> We're ex-gang-bangers who just got into a fight . . . . That's their defense . . . [a]nd it's absurd.
>
> We know both Mr. Beck and Mr. Henderson admitted . . . that they were gang members [but denied being active gang members] . . . .
>
> If they admit that they're bangers . . . [then] they're involved in this criminal activity on a regular basis, they don't have a defense . . . . They don't have a defense if they're acknowledging: Hey, we're bangers with Green, Starks[,] and Hudson . . . . *Because Green, Starks*[,] *and Hudson all say there was a conspiracy*. So if they were bangers with those guys, then there's no issue for you to decide. So first they have to say they're not bangers.

5 RP at 770-71 (emphasis added). Neither Beck nor Henderson objected to this statement. The State further reviewed Detective Ringer's testimony on gangs, stating:

> [Is it] just a coincidence here that they execute, a group of Hilltop Crips, the exact same sort of theft and robbery [as they did in other instances]? Or when you join the gang, you get this stuff, right? You know what's going to happen. You're part of that conspiracy before there's ever a plan, right? If this goes down, I'm in. Because if I'm not in, there [are] repercussions.
>
> But in this instance, you have more than [just] that initial conspiracy [that] you're part of the gang [and] you're in for. *You have actual evidence they conspire to commit these acts in both the form of testimony and in the form of direct evidence on the video*.

5 RP at 785 (emphasis added). Neither Beck nor Henderson objected to this statement. The prosecutor also said, however, that Beck and Henderson were not charged

> because [they were] merely . . . Hilltop Crip[s]. [They are] sitting in trial because [they communicated] with the people who planned to commit this robbery, act[ed] in concert with the people who committed the robbery, [threw] punches against the person they're stealing the stuff from, and then [they leave together immediately after the robbery].

5 RP at 847. Thus, the prosecutor argued that Beck and Henderson were coconspirators because they knew the plans and acted in concert with Hudson, Starks, and Green.

Then, the prosecutor summarized the evidence against Henderson and Beck. When

summarizing the State's case against Beck, the prosecutor stated:

> Mr. Beck is actually a much simpler analysis for you . . . . Mr. Beck, the testimony is, has been a gang member for 15 years. Hilltop Crip gang member, right? Detective Ringer and . . . Mr. Hudson indicate that when you're there with other Hilltop Crip members and they commit crimes, you're in or you're out. If you're out, there [are] problems. Right?
>
> We know Mr. Beck was there with other Hilltop Crip members . . . . We know they committed crimes, and we know he's in. We know he's acting with them. He's seen going from group to group. We know he knows what's about to happen when he heads down [towards Ligon] . . . Mr. Ligon was jumped because [Beck's] the one who walked down there first. We know he knows what's going on. He's standing there watching what happened. And as Mr. Ligon gets up and starts making his way towards [his car, Beck] intervenes and punches [Mr. Ligon] twice . . . . [Beck's] present throughout. As soon as the fight's over, he hops in Mr. Henderson's car and he takes off.
>
> To suggest he's not part of the same conspiracy, he's not an accomplice [sic] is absurd . . . .
>
> Clearly he's not as much of an actor as Mr. Henderson, but the law doesn't distinguish . . . . If you're an accomplice and you do any act in furtherance of [the crime], you're as guilty as the person who commits the crime. Throwing punches to prevent or keep Mr. Ligon from getting his property, keep the property away from him, is part of the crime.

5 RP at 793-94. Neither Henderson nor Beck objected to the State's summary of its case, and neither requested an instruction to cure any possible prosecutorial misconduct or to limit the purposes for which the jury could consider Beck and Henderson's gang membership.

The State argued that the jury could find Beck and Henderson guilty of robbery in either of two separate ways: as accomplices to Green's stealing Ligon's keys and car or as accomplices to Starks's stealing Ligon's wallet. Although the State argued that Beck and Henderson were guilty of robbery in both possible ways, it did not specify which of the two possible means of committing robbery it relied upon in urging the jury to convict.

The jury found Beck and Henderson guilty on all counts. However, the jury did not find that Beck and Henderson committed any of those crimes to advance their position in a gang.

V. Sentencing

Beck and Henderson each stipulated to their criminal histories and offender scores. The sentencing court ruled that the theft of a motor vehicle conviction merged with the first degree robbery conviction as charged; however, the sentencing court ruled that Beck's and Henderson's conspiracy convictions did not merge and also were distinct from their first degree robbery convictions. Thus, the sentencing court entered judgment and sentence against Beck and Henderson for conspiracy to commit first degree robbery, first degree robbery, and conspiracy to commit theft of a motor vehicle. Beck and Henderson appeal.

ANALYSIS

I. Lesser Included Offense Instruction

Beck and Henderson first argue that the trial court erred in denying their request for a jury instruction on fourth degree assault as a lesser included offense of first degree robbery as charged. The State concedes that Henderson was entitled to a lesser included instruction. We accept this concession and hold that Beck was also entitled to a lesser included instruction.

When supported by the law and the evidence, a criminal defendant has an absolute right to have the jury consider lesser included offenses. *See State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). But a defendant is entitled to an instruction on a lesser included offense only if he or she meets the requirements of the *Workman* test. 90 Wn.2d at 447-48. Under the

Workman test, a party "is entitled to a lesser included offense instruction if (1) each of the elements of the lesser offense is a necessary element of the offense charged (legal prong) and (2) the evidence in the case supports an inference that only the lesser crime was committed (factual prong)." *State v. LaPlant*, 157 Wn. App. 685, 687, 239 P.3d 366 (2010).

First, the legal prong is satisfied if each element of the lesser offense is a necessary element of the charged offense. *State v. Berlin*, 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997). But, if it is *possible* to commit the charged offense without committing the lesser offense, the lesser offense is not included within the charged offense. *Berlin*, 133 Wn.2d at 546 n.1 (quoting *State v. Frazier*, 99 Wn.2d 180, 191, 661 P.2d 126 (1983)). We review the trial court's ruling on the legal prong of a request for a lesser included jury instruction de novo. *LaPlant*, 157 Wn. App. at 687. Second, the factual prong is satisfied if the evidence would permit a jury to rationally find the defendant guilty of the lesser offense but acquit the defendant of the greater offense. *LaPlant*, 157 Wn. App. at 687. However, we review a trial court's findings on the factual prong for an abuse of discretion. *LaPlant*, 157 Wn. App. at 687. A trial court abuses its discretion when it exercises it on untenable grounds or for untenable reasons. *McCoy v. Kent Nursery, Inc.*, 163 Wn. App. 744, 758, 260 P.3d 967 (2011), *review denied*, 173 Wn.2d 1029 (2012).

A. *Legal Prong*

Here, the State concedes that the legal prong of the *Workman* test is satisfied for both Beck and Henderson. We accept the State's concession and hold that both Beck and Henderson have met the legal prong of the *Workman* test.[6]

[6] We further note that we would reach the same result absent the State's concession. Where, as

B. *Factual Prong*

Here, the State concedes that Henderson has met the factual prong of the *Workman* test, but it argues that Beck has not. We accept the State's concession that Henderson has satisfied the *Workman* test's factual prong and hold that Beck has also satisfied the factual prong. The State presented evidence that Beck observed Henderson attacking Ligon and then joined the attack, punching Ligon twice. The State did not present any evidence that Beck took any property from Ligon. This lack of evidence supports an inference that Beck assaulted Ligon without committing first degree robbery. Because the evidence supports the inference that Beck committed only fourth degree assault, Beck has met the factual prong of the *Workman* test. *See LaPlant*, 157 Wn. App. at 687.

Accordingly, because Beck and Henderson have satisfied both the legal and factual prongs of the *Workman* test, and because they timely requested a lesser included offense instruction, we agree that they were entitled to an instruction on fourth degree assault as a lesser included offense of first degree robbery as the State charged it here. Because criminal defendants have a right to have the jury consider lesser included offenses that are supported by the law and the evidence, we reverse Beck's and Henderson's first degree robbery convictions and remand for retrial on this charge. *See Workman*, 90 Wn.2d at 447-48.

II. Sufficiency of the Evidence To Support Beck's Convictions

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here, the State charges a defendant with first degree robbery based on the infliction of bodily injury, fourth degree assault is a lesser included offense of first degree robbery because each of the elements required to convict a person for fourth degree assault is necessarily included in first degree robbery. *See* RCW 9A.36.041(1); RCW 9A.56.190, .200(1)(a)(iii); *Berlin*, 133 Wn.2d at 546 n.1; *Workman*, 90 Wn.2d at 447-48.

Beck further argues that there is insufficient evidence to convict him of robbery, theft of a motor vehicle, conspiracy to commit robbery, and conspiracy to commit theft of a motor vehicle. We hold that sufficient evidence supports his first degree robbery, theft of a motor vehicle, and conspiracy to commit first degree robbery convictions, but there is insufficient evidence to support Beck's conspiracy to commit theft of a motor vehicle conviction based on the State's theory of this charge.

In reviewing a challenge to the sufficiency of the evidence, we consider the evidence and all reasonable inferences from it in the light most favorable to the State. *State v. McPhee*, 156 Wn. App. 44, 62, 230 P.3d 284, *review denied*, 169 Wn.2d 1028 (2010). Evidence is sufficient to support a conviction if any rational fact finder could have found that the defendant committed the crimes charged beyond a reasonable doubt. *McPhee*, 156 Wn. App. at 62. A defendant admits the truth of all the State's evidence by challenging its sufficiency. *McPhee*, 156 Wn. App. at 62. In analyzing the sufficiency of the evidence, circumstantial evidence is equally reliable as direct evidence. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

A. *First Degree Robbery*

In order to convict Beck of first degree robbery here, the State had to establish beyond a reasonable doubt that Beck, or his accomplice, unlawfully took personal property from Ligon's person against Ligon's will by use or threatened use of immediate force, which was exercised to obtain or retain possession of the personal property, and that Beck or his accomplice inflicted bodily injury on Ligon in the commission of the robbery or in immediate flight therefrom. RCW

9A.56.190; RCW 9A.56.200(1)(a)(3). Because the State introduced evidence that Beck participated in the group attack that enabled Green to take Ligon's keys and Starks to take Ligon's wallet out of his pocket, the State introduced sufficient evidence to support Beck's first degree robbery conviction.

B. *Theft of a Motor Vehicle*

The State argued that Beck was liable as an accomplice for the theft of Ligon's motor vehicle. An accomplice may be found guilty of the same substantive crime as another person if,

> with knowledge that it will promote or facilitate the commission of the crime charged, he . . . either:
>
> (1) solicits, commands, encourages . . .; or
>
> (2) aids or agrees to aid another person in planning or committing the crime charged. . . . A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime charged.

CP at 320; *see* RCW 9A.08.020. In order to convict Beck of theft of a motor vehicle, the State had to prove beyond a reasonable doubt that Beck, or his accomplice, "wrongfully obtained or exerted unauthorized control over a motor vehicle . . . and [that Beck or his accomplice] intended to deprive the [owner] of the motor vehicle." CP at 328; *see* 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 70.26, at 76 (3d ed. 2008).

Here, the State introduced evidence that Beck participated in assaulting Ligon. During that assault, Green removed Ligon's car keys from Ligon's pocket, then ran across the parking lot and drove off in Ligon's car. Immediately after Green drove out of the parking lot in Ligon's car, the group stopped assaulting Ligon, and everyone, including Beck, fled the scene. Taking the evidence in the light most favorable to the State, sufficient evidence supports Beck's conviction

for theft of a motor vehicle because any rational finder of fact could have concluded that Beck is liable for the crime as Green's accomplice because he participated in a coordinated assault on Ligon while Green stole Ligon's keys and because Beck fled immediately after Green left the parking lot in Ligon's car. Thus, Beck's argument fails.

C. *Conspiracies*

Additionally, the jury found Beck guilty of conspiracy to commit first degree robbery and conspiracy to commit theft of a motor vehicle. Washington's conspiracy statute states:

> A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.

RCW 9A.28.040(1). However, the State does not need to show a formal agreement among the conspirators to commit the crime. *State v. Barnes*, 85 Wn. App. 638, 664, 932 P.2d 669 (1997). Instead, the State may prove a conspiracy by the declarations, acts, and conduct of the parties, or by a concert of action. *Barnes*, 85 Wn. App. at 664. The State may show a "concert of action" by establishing that the parties worked together understandingly, with a single design for the accomplishment of a common purpose. *State v. Casarez-Gastelum*, 48 Wn. App. 112, 116, 738 P.2d 303 (1987).

1. *Conspiracy To Commit First Degree Robbery*

Here, the State introduced sufficient evidence to support Beck's conviction for conspiracy to commit first degree robbery. The State introduced evidence that Henderson, Hudson, Green, and Starks formulated a plan to attack Ligon in order to take his car keys. The State introduced

evidence that Beck joined Hudson, Green, and Starks, huddled with them for over two minutes, and then joined them in walking one by one toward Ligon, with Beck in the lead. When they closed in on Ligon, Henderson and Beck attacked Ligon. During this melee, Green and Starks stole Ligon's keys and wallet from his pockets. As soon as Green left in Ligon's car, everyone scattered and fled. Accordingly, construing the evidence presented and all reasonable inferences from it in the light most favorable to the State, we hold that the State presented sufficient evidence to support Beck's conspiracy to commit first degree robbery conviction.

2. *Conspiracy To Commit Theft of a Motor Vehicle*

However, in order for the jury to convict Beck of conspiracy to commit theft of a motor vehicle, the State had to prove that Beck agreed with Henderson, Hudson, or Starks that they would steal Ligon's car, that Beck entered that agreement with the intent that they steal Ligon's car, and that any one of them took a substantial step in furtherance of that agreement. The State argued below that the conspiracy to commit theft of a motor vehicle charge was based on Henderson, Hudson, and Starks's conversation evaluating whether they could steal Ligon's car with a screwdriver. For the first time on appeal, however, the State seems to abandon this argument and instead argues that sufficient evidence supports Beck's car theft conspiracy conviction because he participated in carrying out their plan to rob Ligon to get his car keys.

The State did not present sufficient evidence to support Beck's conspiracy to commit theft of a motor vehicle conviction based on the theory it argued at trial and the facts it presented below. The State based its conspiracy to commit theft of a motor vehicle charge on Henderson,

Hudson, and Starks's earlier discussion about whether they could steal Ligon's car with a screwdriver. Even considering the evidence in the light most favorable to the State, it shows only that Beck looked in the windows of Ligon's car and was in the vicinity, but he was not part of the conversation or agreement when Hudson asked Starks if Starks could steal Ligon's car with a screwdriver. The State failed to produce sufficient evidence to sustain Beck's conviction for the car theft conspiracy because it failed to introduce evidence that Beck was part of any agreement to steal Ligon's car with a screwdriver.[7] Instead, the evidence showed that Beck was not even present when Henderson, Hudson, and Starks entered this conspiracy.

Accordingly, we hold that, although sufficient evidence supports Beck's first degree robbery, theft of a motor vehicle, and conspiracy to commit first degree robbery convictions, there was insufficient evidence to support Beck's conspiracy to commit theft of a motor vehicle conviction.

III. Double Jeopardy

Next, Beck and Henderson argue that the trial court violated their right to be free from double jeopardy when it entered convictions and sentenced them on two counts of conspiracy that arose from a single unit of prosecution.[8] We disagree.

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[7] Because any conspiracy to commit theft of a motor vehicle is itself a distinct crime from the theft of a motor vehicle crime, it is possible, as here, for the State to have presented sufficient evidence of one crime but not the other. *State v. Gladstone*, 78 Wn.2d 306, 311, 474 P.2d 274 (1970).

[8] As a threshold matter, we acknowledge that neither Beck nor Henderson objected on double jeopardy grounds to the trial court's entering convictions for two counts of conspiracy. Beck and Henderson's right to be free from double jeopardy is a fundamental constitutional right that they may raise for the first time on appeal. U.S. Const. amend. V; Wash. Const. art. I, § 9; RAP 2.5(a)(3); *State v. Freeman*, 153 Wn.2d 765, 770-71, 108 P.3d 753 (2005).

Double jeopardy violations are questions of law, which we review de novo. *State v. Womac*, 160 Wn.2d 643, 649, 160 P.3d 40 (2007). Both our federal and state constitutions prohibit "being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after conviction, and (3) punished multiple times for the same offense." *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010) (quoting *State v. Linton*, 156 Wn.2d 777, 783, 132 P.3d 127 (2006)); U.S. Const. amend. V; Wash. Const. art I, § 9. Where a defendant is convicted of multiple crimes based on the same conduct, those multiple convictions violate double jeopardy principles if they constitute a single offense. *State v. Freeman*, 153 Wn.2d 765, 770-71, 108 P.3d 753 (2005).

For double jeopardy purposes, the unit of prosecution for conspiracy is the agreement accompanied by an overt act, not the specific criminal objectives of that conspiracy. *State v. Bobic*, 140 Wn.2d 250, 265-66, 996 P.2d 610 (2000). Thus, the punishable criminal conduct is the agreement itself and each agreement supports a separate conspiracy charge. *State v. Williams*, 131 Wn. App. 488, 496, 128 P.3d 98 (2006). Accordingly, the State may charge multiple counts of conspiracy when the facts show multiple criminal agreements. *Bobic*, 140 Wn.2d at 266.

Here, the State presented credible evidence that Henderson and his fellow Hilltop Crip members at the Pine Street Landing formed two distinct plans and entered into two distinct agreements, only the second of which Beck joined. First, the State introduced evidence that Henderson, Hudson, and Starks planned to steal Ligon's car by starting its ignition with a screwdriver. But they abandoned this initial plan when Starks said that it would be difficult

because Ligon's car had an alarm and the car was not valuable enough to warrant a difficult theft. Second, the State introduced evidence that Beck, Henderson, Hudson, Green, and Starks formed another plan and entered into a second agreement to rob Ligon in order to take his car keys, which they would then use to steal his car. The State's evidence supporting this second plan included (1) Hudson's and Starks's testimony that they planned to attack Ligon to get his keys and (2) surveillance video footage showing them huddling together with Beck for approximately three minutes, then approaching Ligon one by one, attacking him, stealing his keys and wallet, and then immediately stopping the attack and fleeing when Green drove Ligon's car out of the lot.

Accordingly, the State introduced evidence of two distinct, agreed plans. Because each agreed plan is punishable criminal conduct in itself, each plan supported a separate conspiracy charge. Therefore, the trial court did not violate Beck and Henderson's right to be free from double jeopardy when it entered judgment and sentence against them for both conspiracy to commit theft of a motor vehicle and conspiracy to commit first degree robbery. Thus, this argument fails.

IV. Prosecutorial Misconduct

Beck and Henderson further argue that the prosecutor committed misconduct requiring reversal by (1) eliciting improper gang affiliation evidence under ER 404(b), (2) arguing to the jury that Beck and Henderson were guilty because they were gang members, and (3) inciting the jurors' passions and prejudices. We disagree.[9]

[9] We further note that although the parties here filed their briefs before the Washington Supreme Court issued its opinion in *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012), we respond to the parties' arguments within the *Emery* framework.

A. *Gang Membership Evidence To Show Propensity To Commit Crimes*

As a threshold matter, we note that Beck and Henderson advance an evidentiary argument here but under the guise of a prosecutorial misconduct argument. We follow our precedent and address the trial court's admission of gang affiliation evidence under ER 404(b) as an evidentiary issue. *State v. Mee*, 168 Wn. App. 144, 153, 275 P.3d 1192 (2012); *State v. Yarbrough*, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009). We review a trial court's admission of evidence for an abuse of discretion. *Mee*, 168 Wn. App. at 153; *State v. Scott*, 151 Wn. App. 520, 527, 213 P.3d 71 (2009), *review denied*, 168 Wn.2d 1004 (2010). A trial court abuses its discretion if it exercises it on untenable grounds or for untenable reasons. *Mee*, 168 Wn. App. at 153.

Evidence of other crimes or past acts is inadmissible to prove a defendant's character and that he or she acted in conformity with that character. ER 404(b). But such evidence may be admissible for other purposes, including showing proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b). Before a trial court may admit evidence of other crimes or past acts, it must (1) find by a preponderance of the evidence that the other crimes or past acts occurred, (2) determine the evidence is relevant to a material issue, (3) identify the purpose for which the evidence is being introduced, and (4) weigh its probative value against the danger of unfair prejudice. *Mee*, 168 Wn. App. at 154. Thus, where there is a nexus between a defendant's gang affiliation and the crime charged, ER 404(b) allows a trial court to admit gang affiliation evidence. *Scott*, 151 Wn. App. at 527.

Here, the trial court did not abuse its discretion in allowing the State to present evidence

of Beck and Henderson's gang affiliation. Both Beck and Henderson admitted their longtime affiliation with the Hilltop Crips gang. The State charged Beck and Henderson with four crimes and alleged that they committed each crime to obtain or maintain their membership or advance their position within the gang hierarchy. The State sought to introduce evidence that Beck and Henderson were affiliated with the Hilltop Crips to prove its alleged gang sentencing aggravating factor. The trial court agreed, stating, "There is a gang enhancement. We aren't eliminating all reference to gang [affiliation]. That is relevant. . . . [The State] has to show" that Beck and Henderson committed the crimes charged to further their status within their gang. 1 RP at 84.

Based on the record before us, we conclude that evidence of Beck and Henderson's gang affiliation was highly probative of the State's theory of the case and establishing its alleged sentencing aggravating factors and therefore, relevant and presumptively admissible under ER 402. While certainly prejudicial, the high probative value of this gang affiliation evidence is not outweighed by the danger of unfair prejudice because the State limited its gang affiliation evidence to evidence required to establish its alleged gang motivation sentencing aggravating factor; therefore, ER 403 did not require exclusion of this relevant evidence. Accordingly, the trial court did not abuse its discretion in admitting evidence of Beck and Henderson's affiliation with the Hilltop Crips.

Because the trial court properly admitted evidence of Beck and Henderson's gang affiliation, the State properly introduced that evidence. Since the State properly introduced evidence of Beck and Henderson's involvement with the Hilltop Crips, the State did not commit

misconduct here. Because the State did not commit misconduct in eliciting this evidence, the State's actions in this regard cannot support a claim of prosecutorial misconduct. Thus, this argument fails.

We turn now to address the two other instances of alleged prosecutorial misconduct that Beck and Henderson raise.

B. *Prosecutorial Misconduct Standards of Review*

Prosecuting attorneys are quasi-judicial officers charged with the duty of ensuring defendants receive a fair trial. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Prosecutorial misconduct violates that duty and can constitute reversible error. *Boehning*, 127 Wn. App. at 518.

Where a defendant meets the burden of establishing both that (1) the prosecutor committed misconduct by making inappropriate remarks and (2) those remarks had prejudicial effect, we may reverse the defendant's conviction. *See State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). We review whether misconduct prejudiced the defendant under one of two different standards of review. *Emery*, 174 Wn.2d at 760-61.

First, if the defendant objected at trial, then we analyze whether there is a substantial likelihood that the State's misconduct prejudiced the defendant by affecting the jury's verdict. *Emery*, 174 Wn.2d at 760; *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009). But where the defendant failed to object to the State's misconduct at trial, we apply a different, heightened standard of review. *See Emery*, 174 Wn.2d at 760-61. Under this heightened standard of review, the defendant must show that the State's misconduct "was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Emery*, 174 Wn.2d at 760-761. This heightened standard of review requires the defendant to show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Emery*, 174

Wn.2d at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). But we "focus more on whether the resulting prejudice could have been cured." *Emery*, 174 Wn.2d at 762.

C. *Gang Membership as the Basis for Guilt*

Although they did not object below, Beck and Henderson argue that the prosecutor committed misconduct by violating a pretrial order in arguing that they were guilty of a general conspiracy based on their gang membership. But this argument misstates the record. The trial court actually entered a pretrial order dismissing the State's *general conspiracy charge* based solely on gang membership but specifically allowing the State to charge the defendants with conspiracies in which it alleged they were involved personally.

After the trial court entered this order, the State amended its information and prosecuted Beck and Henderson for conspiracy to commit first degree robbery, first degree robbery, conspiracy to commit theft of a motor vehicle, and theft of a motor vehicle. Each of these charges arose out of the July 22, 2009 attack of Ligon at the Pine Street Landing, and the State alleged that Beck and Henderson were both personally involved. Thus, the prosecutor did not violate the pretrial order. Accordingly, Beck and Henderson fail to show that the State committed misconduct by violating a pretrial order.

Nonetheless, in arguing that the prosecutor committed misconduct by asserting they were generally guilty of conspiracy because they were gang members, Beck and Henderson cite to several federal cases. But these cases do not support their argument.[10]

Here, moreover, the prosecutor did not argue that Beck and Henderson were guilty of conspiracy based solely on their gang affiliation. Instead, the State argued that Beck and Henderson committed the alleged crimes to further their status in the gang. Beck and Henderson admitted that they were both longtime gang members and the trial court found that their gang membership was relevant to establish the State's gang sentencing aggravating factor. Furthermore, the prosecutor stated that it was the defendants' concerted action that made them guilty of the conspiracies, not their gang membership. Thus, because the State did not argue that Beck and Henderson were guilty of conspiracy based on their gang affiliation, we do not consider whether the State generally can introduce evidence of gang affiliation to show conspiracy. This claim of prosecutorial misconduct fails.

[10] They cite to: *United States v. Hankey*, 203 F.3d 1160, 1173 (9th Cir. 2000) (holding that the district court did not abuse its discretion in admitting evidence of gang affiliation to impeach a testifying defendant); *United States v. Melchor-Lopez*, 627 F.2d 886, 891 (9th Cir. 1980) (holding that insufficient evidence supported the codefendants' convictions for conspiracy to import heroin and cocaine because they engaged only in preliminary discussions and never reached an agreement); *United States v. Avila*, 465 F.3d 796, 798 (7th Cir. 2006) (holding that the district court erred in increasing defendant's sentence for possession of marijuana based on its consideration of defendant's alleged involvement in a retaliatory gang shooting and a gang plan to cook and distribute crack cocaine where there was no evidence that defendant was a gang member or had any personal connection whatsoever to the shooting or the cocaine).

D. *Inciting Juror Passions and Prejudices*

Next, Beck and Henderson argue that the prosecutor improperly appealed to the jury's passions and prejudices by eliciting testimony from Detective Ringer that gang members, like Beck and Henderson, often commit violent crimes to improve their status within the gang. We disagree.

A prosecutor has wide latitude to comment on the evidence introduced at trial and to draw inferences from that evidence. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). A prosecutor commits misconduct, though, by asking jurors to convict based on their emotions, rather than the evidence. *State v. Bautista-Caldera*, 56 Wn. App. 186, 195, 783 P.2d 116 (1989).

Because Beck and Henderson did not object to this alleged misconduct below, we review any error to determine if its prejudice was incurable. *Emery*, 174 Wn.2d at 760-61. Here, the State did not ask the jury to convict Beck and Henderson based on their emotions rather than the evidence. Instead, in closing argument, the State repeatedly referred to Hudson's and Starks's testimonies that they planned to take Ligon's car and to the surveillance video footage showing Beck, Henderson, and the others huddling together and acting in concert to attack Ligon, take his keys and wallet, and steal his car. Although the State elicited and commented on testimony that gang members engage in violent behavior to increase their status within the group, this gang evidence was relevant to the gang motivation sentencing aggravating factor that the State charged. *See* RCW 9.94A.535(3)(s). Thus, this argument fails.

V. Ineffective Assistance of Counsel

Beck and Henderson next argue that they were deprived of their right to effective assistance of counsel when their counsel failed (1) to object to general gang evidence and alleged prosecutorial misconduct and (2) to request a limiting instruction and a curative instruction. We disagree.

A. *Standard of Review*

We review ineffective assistance of counsel claims de novo. *In re Pers. Restraint of Monschke*, 160 Wn. App. 479, 490, 251 P.3d 884 (2010). Both the federal and state constitutions guarantee criminal defendants effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. But our constitutions do not guarantee a criminal defendant successful assistance of counsel. *State v. Dow*, 162 Wn. App. 324, 336, 253 P.3d 476 (2011).

A person claiming ineffective assistance of counsel has the burden to establish that counsel's deficient performance both (1) deprived the defendant of his constitutional right to counsel and (2) prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 700. Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Prejudice occurs when, but for counsel's deficient performance, the outcome would have differed. *Reichenbach*, 153 Wn.2d at 130.

In reviewing claims of ineffective assistance, we begin with a strong presumption of counsel's effectiveness. *State v. Gerdts*, 136 Wn. App. 720, 726, 150 P.3d 627 (2007); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). If a person bases his ineffective assistance of counsel claim on counsel's failure to object, he must show that the objection would have succeeded. *Gerdts*, 136 Wn. App. at 726.

B. *Failure To Object*

Beck and Henderson argue that their counsel were ineffective for failing to object to gang evidence and to the prosecutor's allegedly improper gang arguments. Beck and Henderson have the burden of proving that (1) their counsel's failure to object fell below the prevailing professional standards, (2) the trial court likely would have sustained any objections, and (3) the verdict would have differed had their counsel successfully objected. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). But, here, evidence of Beck and Henderson's gang affiliation was relevant to establish the gang motivation sentencing aggravating factor. Additionally, as we discussed above, the State did not make improper comments in its closing arguments. Accordingly, Beck and Henderson have failed to establish that their counsel's performance fell below the prevailing standards by not objecting to general gang evidence or to any alleged prosecutorial misconduct. Beck and Henderson similarly fail to establish that any objection would necessarily have succeeded. Thus, their argument fails.

C. *Failure To Request Limiting and Curative Instructions*

Beck and Henderson argue that their counsel were ineffective because they failed to

request (1) an instruction limiting the purposes for which the jury could consider the gang evidence and (2) an instruction to cure the State's alleged improper comments in closing argument. We disagree.

"When counsel's conduct can be characterized as legitimate trial strategy or tactics, [his or her] performance is not deficient." *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). When a criminal defendant's trial counsel fails to request a limiting instruction, we presume counsel did not request that limiting instruction to avoid reemphasizing damaging evidence. *Dow*, 162 Wn. App. at 335.

Here, the State introduced relevant evidence of Beck and Henderson's gang affiliation in support of the alleged gang aggravating factors. It would be a reasonable trial strategy for Beck's and Henderson's counsel to decide not to reemphasize their gang affiliation by not requesting a limiting instruction. Indeed, we presume that counsel below elected not to request a limiting instruction here to avoid reemphasizing the undesirable gang evidence. Additionally, as we discussed above, the State did not make improper comments in closing argument and, thus, Beck's and Henderson's counsel were not ineffective for failing to object to those comments. Similarly, Beck's and Henderson's counsel were not ineffective for failing to request a curative instruction because there was no error to cure. Thus, Beck and Henderson cannot establish that each of their counsel's performance fell below an objective standard of reasonableness. Because Beck and Henderson cannot establish that each of their counsel's performance was deficient, we end our inquiry in accordance with *Strickland* and need not address the prejudice prong of the

test. Thus, their argument fails.

VI. Unanimity Jury Instruction

Beck and Henderson argue that they were deprived of their constitutional right to a unanimous jury verdict because (1) the State failed to elect whether taking Ligon's wallet or keys formed the basis of its conspiracy to commit robbery and robbery charges and (2) the trial court failed to instruct the jury that it had to be unanimous on which act formed the basis of the crimes in order to return a guilty verdict. We disagree.

We review alleged errors in jury instructions de novo, within the context of the instructions as a whole. *State v. Levy*, 156 Wn.2d 709, 719, 132 P.3d 1076 (2006). A defendant may be convicted only when a unanimous jury concludes that he or she committed the criminal act charged in the information. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 183 (1984), *abrogated on other grounds by State v. Kitchen*, 110 Wn.2d 403, 406, 756 P.2d 105 (1988). In general, where the State introduces evidence of multiple acts that could constitute the criminal act charged, the State must elect which of those acts it is relying on for the jury to convict, *or* the trial court must instruct the jury that it must unanimously decide that the State proved the same criminal act beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 411.

Although this rule applies when the State introduces evidence of multiple distinct acts, it does not apply when the evidence instead shows a continuing course of conduct. *Petrich*, 101 Wn.2d at 571. We apply common sense in analyzing whether the evidence shows a continuing course of conduct or several distinct acts, considering both (1) the time between each of the criminal acts and (2) whether the acts involved the same people, occurred in the same location,

and were done with the same ultimate purpose. *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395 (1996). Where the evidence shows a continuing course of conduct, the State need not elect which act it is relying on for the jury to convict; nor must the trial court instruct the jury that it must unanimously agree that the State proved the same criminal act beyond a reasonable doubt. *Love*, 80 Wn. App. at 361.

Here, Beck and Henderson argue that they were entitled to a unanimity instruction because the State argued that the jury could convict them of first degree robbery as accomplices based on either (1) Green's stealing Ligon's keys and car or (2) Starks's stealing Ligon's wallet. In order to convict a defendant of robbery, the jury must find that the defendant took personal property from the person of another. RCW 9A.56.190; RCW 9A.56.200(1)(a)(i). Thus, as the State observes, the jury could have convicted Beck and Henderson on proof that they, as principals or as accomplices, took any property from Ligon.

The State introduced evidence that, while Beck and Henderson assaulted Ligon, Green stole Ligon's keys and car and Starks stole Ligon's wallet. Although the evidence shows two distinct thefts, the evidence also establishes that the defendants engaged in a continuous course of conduct while robbing Ligon. Indeed, the entire assault and robbery lasted less than one minute. Further, Green stole Ligon's keys only seconds before Starks stole his wallet. Thus, the two thefts occurred within a short period of time as part of a single course of conduct: the robbery. Furthermore, both thefts involved the same group of people, occurred in the same location, and were done with the same ultimate purpose of attacking Ligon in order to rob him of his car keys.

Accordingly, even though the State could have established robbery with either the theft of the keys or the theft of the wallet, the evidence shows Beck and Henderson engaged in a continuous course of conduct involving both thefts during the robbery. Thus, the *Petrich* rule does not apply. Because the *Petrich* rule does not apply, the State was not required to elect which act it relied upon, nor was the trial court required to instruct the jury that it must unanimously concur on which act the State proved beyond a reasonable doubt. Therefore, Beck and Henderson's argument fails.

VII. Cumulative Error

Lastly, we consider Beck's and Henderson's arguments that the cumulative effect of errors at trial deprived them of a fair trial and requires reversal of all their convictions, even if those errors do not individually warrant reversal. Their arguments fail.

The cumulative error doctrine allows us to reverse a defendant's conviction if the combined effect of the errors at trial deprived the defendant of the right to a fair trial, even if each of the errors was harmless on its own. *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813, *review denied*, 170 Wn.2d 1003 (2010). However, cumulative error does not apply when a trial has few errors and any errors have only a minimal impact on the outcome. *Venegas*, 155 Wn. App. at 520. Although we agree that errors require us to reverse Beck's and Henderson's first degree robbery convictions and Beck's conspiracy to commit theft of a motor vehicle conviction, we find no error affecting their other convictions. Because no errors below affect their convictions for conspiracy to commit first degree robbery and Henderson's conviction for

conspiracy to commit theft of a motor vehicle, they were not deprived of their right to a fair trial. Accordingly, because they still received a fair trial, the cumulative error doctrine does not require us to reverse all of their convictions. Thus, this argument fails.

We affirm in part and reverse in part. We reverse Beck's and Henderson's convictions for first degree robbery and remand for a new trial. We reverse Beck's conviction for conspiracy to commit theft of a motor vehicle and remand for dismissal with prejudice. We affirm the other convictions.

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.

Worswick, C.J.

We concur:

Hunt, J.

Johanson, J.