IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 30361-6-III
	)	Consolidated with
Respondent,	)	No. 30362-4-III and
	)	No. 30363-2-III
v.	)	
	)	
GREGORY SHARKEY, JR.,	)	OPINION PUBLISHED IN PART
	)	
Appellant.	)	
	)	

Brown, J. • Gregory Sharkey, Jr. appeals his bench trial convictions of 10 counts of first degree assault, second degree taking a motor vehicle without permission (TMV), attempted first degree robbery, and conspiracy to commit first degree robbery. In addition to challenging the evidence sufficiency for 4 of his 10 first degree assault convictions, Mr. Sharkey contends the trial court erred in its CrR 3.5 rulings and in deciding TMV was a lesser included offense of first degree robbery. We agree TMV is not a lesser included offense of first degree robbery, but affirm all other convictions. Because resentencing is required, we do not reach Mr. Sharkey's ineffective assistance claim based on his trial attorney's alleged deficient performance at sentencing. We reject

Mr. Sharkey's pro se statement of additional grounds (SAG). Accordingly, we affirm in part, reverse in part, and remand for resentencing.

FACTS

Because of the evidence sufficiency challenges, we relate the facts in a manner most favorable to the State. On the evening of December 22, 2009, Mr. Sharkey was walking down a Spokane street with Tony Dawson, Margaret Shults, Dominic Shaver, and Danniela Shaver. Someone in a nearby house pointed a laser at them. Ten people were in the house. An argument broke out between the groups. Evidence showed Mr. Dawson and Mr. Sharkey shot at the house. Mr. Sharkey used a .38 caliber revolver and Mr. Dawson used a .45 caliber handgun. Bullets passed through the house, and the people inside fled on foot. Charles Everett was shot in his side, but survived.

Early on December 23, 2009, Mr. Sharkey was walking along a street with Mr. Dawson and Ms. Shults while planning to steal a getaway vehicle. Mr. Sharkey was still carrying the .38 and Mr. Dawson was still carrying the .45. Jamie Cartwright was leaving her house for work when she noticed someone down the street pacing back and forth. She went inside and then returned to her vehicle. When Ms. Cartwright climbed in her vehicle, she noticed the person down the street was now closer to her. As she began to leave, a different person, Mr. Dawson, broke the driver window with a gun and tried to pull her out of the vehicle. Ms. Cartwright fled in her vehicle. Later, Ms. Shults stole a

different vehicle; Mr. Sharkey and Mr. Dawson were then present. Ms. Shults drove, Mr. Sharkey was the front passenger, and Mr. Dawson was a rear passenger. Officer Kristopher Honaker tried to stop the vehicle, but Mr. Dawson shot at and hit Officer Honaker's vehicle. The group escaped in the vehicle.

Police arrested Mr. Sharkey on December 25, 2009. At the police station, Detective Timothy Madsen took statements from Mr. Sharkey admitted by the court and more fully recounted in our analysis of the CrR 3.5 arguments.

The State charged Mr. Sharkey as a principal or accomplice to 10 counts of attempted first degree murder or, alternatively, 10 counts of first degree assault. The State charged Mr. Sharkey as a principal or accomplice to first degree robbery, attempted first degree robbery, and conspiracy to commit first degree robbery. The State did not charge Mr. Sharkey with second degree TMV.

At a bench trial, the superior court acquitted Mr. Sharkey of the 10 counts of attempted first degree murder, but found him guilty of 10 first degree assaults. The court acquitted him of first degree robbery, but found him guilty of second degree TMV as a lesser included offense. Finally, the court found Mr. Sharkey guilty of attempted first degree robbery and conspiracy to commit first degree robbery. Mr. Sharkey moved unsuccessfully to arrest the judgment or for a new trial. The court then issued three separate findings of fact and conclusions of law.

The superior court sentenced Mr. Sharkey to 2,215 consecutive months of incarceration for the 10 assaults, to run concurrently with 22 months of incarceration for TMV, and no incarceration for the attempted robbery and conspiracy. Mr. Sharkey was previously convicted of first degree robbery in early 2007, a fact the court considered when imposing each sentence. The court calculated Mr. Sharkey's offender score as seven for the first assault, zero for the other nine assaults, and nine plus for each of the other three crimes. Defense counsel did not argue Mr. Sharkey's current convictions for attempted first degree robbery and conspiracy to commit first degree robbery were the same criminal conduct for purposes of calculating his offender score.

Mr. Sharkey appealed.

ANALYSIS

A. Lesser Included Offense

Mr. Sharkey contends, considering the elements of the two crimes, the trial court erred in ruling Mr. Sharkey's second degree TMV conviction was a lesser included offense of first degree robbery. Mr. Sharkey argues the State was required to charge him with TMV. We agree with Mr. Sharkey.

A criminal defendant cannot be convicted of an offense not charged. Const. art. I, § 22; *State v. Nguyen*, 165 Wn.2d 428, 434, 197 P.3d 673 (2008). But the defendant "may be found guilty of an offense the commission of which is necessarily included

within that with which he is charged." Former RCW 10.61.006 (2008). An offense is lesser included if "(1) each element of the lesser offense is a necessary element of the offense charged (legal prong) and (2) the evidence, viewed most favorably to the defendant, supports an inference that only the lesser crime was committed (factual prong)." *State v. Hahn*, 174 Wn.2d 126, 129, 271 P.3d 892 (2012). Under the legal prong, an offense is not lesser included "if it is possible to commit the greater offense without committing the lesser offense." *State v. Harris*, 121 Wn.2d 317, 320, 849 P.2d 1216 (1993).

A defendant commits robbery if he or she "unlawfully takes personal property" from another's person or in the other's presence and against the other's will, "by the use or threatened use of immediate force, violence, or fear of injury" effected "to obtain or retain possession." Former RCW 9A.56.190 (2008). First degree robbery applies if, in commission or immediate flight from the robbery, the defendant "[i]s armed with a deadly weapon," "[d]isplays what appears to be a firearm or other deadly weapon," or "[i]nflicts bodily injury." RCW 9A.56.200(1)(a). A defendant commits second degree TMV occurs if he or she either "intentionally takes or drives away" another's vehicle without the owner's or possessor's permission, or "voluntarily rides in" another's vehicle "with knowledge" it was unlawfully taken. RCW 9A.56.075(1).

Second degree TMV requires an unlawful taking of another's motor vehicle. *State*

v. Crittenden, 146 Wn. App. 361, 367, 189 P.3d 849 (2008). But because it is possible to rob someone of personal property other than a vehicle, it is possible to commit first degree robbery without committing second degree TMV. *Cf. id.* (reasoning the same as to first degree theft and second degree TMV). Thus, the elements the trial court relied on to convict Mr. Sharkey of second degree TMV, namely, voluntarily riding in another's vehicle with knowledge it was unlawfully taken, are not necessary elements of first degree robbery. *Cf. id.* Therefore, the legal prong is not satisfied and second degree TMV is not a lesser included offense of first degree robbery.

The State mistakenly asserts Mr. Sharkey invited any error by arguing in closing the evidence supported second degree TMV in lieu of first degree robbery. Under the invited error doctrine, "a party who sets up an error at trial cannot claim that very action as error on appeal." *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). In Mr. Sharkey's closing argument, defense counsel stated, "The only thing that this defendant did . . . is that he actually rode in a vehicle knowing that it was stolen. . . . He may be guilty of riding in a stolen motor vehicle. And then the Court should find him not guilty of first-degree robbery." Report of Proceedings (RP) at 320-21. The context shows the argument was directed solely toward acquittal on the first degree robbery charge. Mr. Sharkey did not invite the trial court's error.

Affirmed, except Mr. Sharkey's second degree TMV conviction. Remanded for

resentencing.

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with RCW 2.06.040, the rules governing unpublished opinions.

B. Statements

The issue is whether substantial evidence supports the superior court's finding that Mr. Sharkey received full *Miranda*[1] warnings.

We review the adequacy of *Miranda* warnings de novo. *State v. Campos-Cerna*, 154 Wn. App. 702, 708, 226 P.3d 185, *review denied*, 169 Wn.2d 1021 (2010). We review challenged findings of fact entered upon a CrR 3.5 hearing for substantial evidence. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

"Prior to a custodial interrogation by the police, a defendant must be given *Miranda* warnings to protect the defendant's Fifth Amendment privilege against self-incrimination." *State v. Finch*, 137 Wn.2d 792, 827, 975 P.2d 967 (1999) (footnote omitted). At a minimum, the defendant must be warned "'that he has the right to remain

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.'" *Id.* at 827 n.9 (quoting *Miranda*, 384 U.S. at 479). If police give inadequate warnings, the prosecution cannot admit the defendant's statements made during the custodial interrogation as evidence in its case in chief. *Id.* at 828.

At the CrR 3.5 hearing, Detective Timothy Madsen related Mr. Sharkey gave an "unsolicited," unwarned statement in the police station immediately after Detective Madsen explained he was investigating some Spokane shootings and told Mr. Sharkey he was under arrest for obstruction. RP at 19. Detective Madsen responded he would interview Mr. Sharkey later because he was already interviewing Ms. Shults. Detective Madsen testified he later "read [Mr. Sharkey] his rights from a constitutional rights card word for word." RP at 20. Detective Madsen recounted warning Mr. Sharkey he had the right to remain silent and the right to have an attorney present. Mr. Sharkey indicated he understood his rights and waived them by voluntarily signing the card. He then gave additional statements. While Mr. Sharkey later declined to answer certain questions, he did not invoke his rights. Detective Madsen related he placed the card in his case file, but the file was later lost. Mr. Sharkey disputed none of this testimony. From this substantial evidence, a fair-minded, rational person could find Mr. Sharkey received full

Miranda warnings based on Detective Madsen's testimony, and we so conclude. The trial court did not err.

C. Evidence Sufficiency

The issue is whether sufficient evidence supports the victims' identities in 4 of Mr. Sharkey's 10 first degree assault convictions. We hold the evidence is sufficient.

"Evidence is sufficient to support a finding of guilt if, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt." *State v. Rose*, 175 Wn.2d 10, 282 P.3d 1087, 1089 (2012). "A claim of insufficient evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn from that evidence." *State v. Caton*, 174 Wn.2d 239, 241, 273 P.3d 980 (2012). We defer to the trial court on credibility questions and evidence weight or persuasiveness. *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011).

A defendant commits first degree assault if he or she "assaults another with a firearm," and "with intent to inflict great bodily harm." RCW 9A.36.011(1)(a). The State must prove the identity of a named assault victim beyond a reasonable doubt. *Cf. State v. Rice*, 110 Wn.2d 577, 598, 757 P.2d 889 (1988) (noting the same as to a named homicide victim), *vacated in part on other grounds sub nom. Rice v. Wood*, 77 F.3d 1138 (9th Cir. 1996). Accomplice liability applies if the defendant "solicits, commands,

encourages, or requests," or "aids or agrees to aid" another to plan or commit a crime, and does so "[w]ith knowledge that it will promote or facilitate" the crime. Former RCW 9A.08.020(3)(a) (2008).

Mr. Sharkey argues no evidence shows Thomas Townsend was at the house during the shooting. This contention is unpersuasive because Mr. Townsend testified he was "at the scene of a shooting in December of 2009," and context indicates it was this shooting. RP at 258. No contrary evidence exists. We defer to the trial court's assessment of credibility and evidence weight.

Mr. Sharkey next argues while certain evidence shows a "Dennis," a "Roy," and a "Gordy" were present, insufficient evidence shows they were Dennis Ellsworth, Royal Horseman, and Gordon McGlynn. But "Gordy" is elsewhere identified as "Gordy McGlynn," RP at 295, and it is otherwise reasonable to infer "Dennis" referenced Dennis Ellsworth, "Roy" referenced Royal Horseman, and "Gordy" referenced Gordon McGlynn. Again, no contrary evidence exists. And again, we defer to the trial court's assessment of credibility and evidence weight. A rational trier of fact could identify the four alleged victims beyond a reasonable doubt.

D. Ineffective Assistance

Mr. Sharkey, by appellate counsel, contends his trial attorney was ineffective at sentencing for failing to argue his current convictions for attempted first degree robbery

and conspiracy to commit first degree robbery were the same criminal conduct for purposes of calculating his offender score. Because of our analysis reversing his TMV conviction, resentencing is required. Therefore, we do not discuss this contention.

E. SAG – Evidence Sufficiency

We do not discuss Mr. Sharkey's pro se contention concerning his TMV conviction because it is reversed above and this contention was adequately briefed by Mr. Sharkey's counsel. *See* RAP 10.10(a) (providing the purpose of a SAG is to "identify and discuss those matters which the defendant/appellant believes have not been adequately addressed by the brief filed by the defendant/appellant's counsel").

Mr. Sharkey contends the evidence is insufficient to support any convictions. The standard of review is given above.

We first address the 10 first degree assault convictions. First degree assault occurs if the defendant "assaults another with a firearm," and "with intent to inflict great bodily harm." RCW 9A.36.011(1)(a). Accomplice liability applies if the defendant "solicits, commands, encourages, or requests," or "aids or agrees to aid" another to plan or commit a crime, and does so "[w]ith knowledge that it will promote or facilitate" the crime. Former RCW 9A.08.020(3)(a) (2008). Essentially, Mr. Sharkey argues the trial court should have believed other non-inculpating evidence, but the trial court, exercising its fact-finding discretion, weighed all evidence against Mr. Sharkey.

For example, the court found Ms. Shults' inculpatory testimony "very credible, very believable," and "corroborated by the evidence and independent witnesses." RP at 338; Clerk's Papers (CP) at 37. Similarly, the court found Mr. Dawson's exculpatory testimony "not credible," and found Mr. Sharkey's testimony "corroborative" of his participation in the shooting. CP at 37; RP at 335, 338. The court noted the inconsistencies in the victims' testimonies were "not surprising given the chaos and fear o[r] confusion that would be expected." RP at 332. We defer to the trial court's assessment of credibility and evidence weight. A rational trier of fact could, after viewing the evidence in the light most favorable to the State, find the essential elements of 10 counts of first degree assault beyond a reasonable doubt.

We next address the convictions for attempted first degree robbery and conspiracy to commit first degree robbery. A defendant commits robbery if he or she "unlawfully takes personal property" from another's person or in the other's presence and against the other's will, "by the use or threatened use of immediate force, violence, or fear of injury" effected "to obtain or retain possession." Former RCW 9A.56.190 (2008). First degree robbery applies if, in commission or immediate flight from the robbery, the defendant "[i]s armed with a deadly weapon," "[d]isplays what appears to be a firearm or other deadly weapon," or "[i]nflicts bodily injury." RCW 9A.56.200(1)(a).

Criminal attempt occurs if the defendant, "with intent to commit a specific crime,

. . . does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1). Accomplice liability applies if the defendant "solicits, commands, encourages, or requests," or "aids or agrees to aid" another to plan or commit a crime, and does so "[w]ith knowledge that it will promote or facilitate" the crime. Former RCW 9A.08.020(3)(a) (2008). A defendant commits criminal conspiracy if he or she, "with intent that conduct constituting a crime be performed, . . . 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).

Mr. Sharkey argues Ms. Cartwright's testimony conflicted on the time she prepared to leave for work, the perpetrators' races and genders, and what clothes the perpetrators were wearing. The superior court weighed all these inconsistencies against Mr. Sharkey. Again, we must defer to the superior court's assessment of credibility and evidence weight. A rational trier of fact could, after viewing the evidence in the light most favorable to the State, find the essential elements of attempted first degree robbery and conspiracy to commit first degree robbery beyond a reasonable doubt.

F. SAG – Prosecutor Misconduct

Mr. Sharkey contends prosecutors and investigators engaged in misconduct depriving him of a fair trial. He relies partly on evidence outside the record, including conversations with prosecutors and investigators, their actions, and his personal opinions

about them, to argue the prosecutor offered fabricated evidence and elicited false statements. To the extent Mr. Sharkey's contention relies on evidence outside the record, we do not address it. *See State v. Grier*, 171 Wn.2d 17, 29, 246 P.3d 1260 (2011) (stating "the reviewing court may consider only facts within the record," and a personal restraint petition is the proper means to introduce evidence outside it).

Proving prosecutorial misconduct requires the defendant to establish "the prosecutor's conduct was both improper and prejudicial." *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). "If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the [judgment]." *Id.* at 760. "If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Id.* at 760-61. "Under this heightened standard, the defendant must show that (1) 'no curative instruction would have obviated any prejudicial effect . . . and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the [judgment].'" *Id.* at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

Mr. Sharkey points to instances of alleged "word manipulation" during closing argument, in which the prosecutor changed Mr. Sharkey's statement "they" were shooting

to "we" were shooting. SAG at 20. But Mr. Sharkey did not object to the prosecutor's closing argument. While the prosecutor was likely mistaken, his error was not flagrant or ill intentioned. Any resulting prejudice could have been cured if Mr. Sharkey had informed the superior court of the prosecutor's error. Therefore, the error is waived. Even if the error had not been waived, it did not likely affect the judgment because the court did not appear to place any weight on it. Instead, the court correctly noted Mr. Sharkey stated "in the plural . . . that they were . . . dumping." RP at 335. In sum, Mr. Sharkey fails to show improper conduct or prejudice. Therefore, his misconduct contention is rejected.

G. SAG – Ineffective Assistance

Mr. Sharkey unconvincingly contends he was denied effective assistance of counsel at trial. He relies partly on evidence outside the record, including conversations with defense counsel, defense counsel's actions, and personal opinions on defense counsel's performance. We do not discuss contentions to the extent they rely on evidence outside the record. *See Grier*, 171 Wn.2d at 29.

Mr. Sharkey argues his defense counsel failed to object to particular evidence and impeach particular witnesses who testified inconsistently with their prior statements. But proving ineffective assistance of counsel requires the defendant to establish "deficient

performance and resulting prejudice." *In re Det. of Moore*, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009). "Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness." *Id.* "Prejudice occurs if, but for the deficient performance, there is a reasonable probability the outcome of the proceedings would have been different." *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Grier*, 171 Wn.2d at 34 (internal quotation marks omitted). "The failure to show either deficient performance or prejudice defeats a defendant's claim." *Emery*, 174 Wn.2d at 755. Mr. Sharkey cannot show prejudice.

Mr. Sharkey does not show how, in reasonable probability, the outcome of the trial would have been different. His assertions alone are not enough to undermine confidence in the outcome of his trial. The trial court was aware of evidence inconsistencies and weighed nearly every perceived weakness in the evidence Mr. Sharkey claims defense counsel failed to raise. Thus, Mr. Sharkey cannot show prejudice. It follows that his ineffective assistance claim fails.

_____
Brown, J.

WE CONCUR:

_____ _____
Korsmo, C.J. Siddoway, J.