IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GERARD GRAY, Appellant.	No. 38197-4-II UNPUBLISHED OPINION

Van Deren, C.J. — Gerard Gray appeals his convictions for first degree kidnapping and second and fourth degree assault, arguing that the trial court violated (1) the prohibition against double jeopardy when it applied the deadly weapon enhancement to his second degree assault conviction, (2) his due process rights when it admitted a victim's prior inconsistent statement, and (3) his constitutional right to marry by refusing to temporarily lift the no contact order between him and the victim. Gray also argues that he received ineffective assistance of counsel. In his statement of additional grounds for review (SAG),[1] he contends that the trial court and prosecutor engaged in malicious conduct and that the trial court erred in determining that the child victim was competent to testify. We affirm.

[1] RAP 10.10.

FACTS

On November 12, 2007, deputies from the Clark County Sheriff's Office responded to a 911 call in Vancouver, Washington. Kathleen Streifel, Tiffany Wooster and Gray's neighbor, called 911 expressing concern for Wooster's well being. Deputies Jeremy Koch and Seth Brannan approached Wooster's door; Brannan knocked and announced "'Sheriff's Office'"; Gray responded, "'Go away.'" Report of Proceedings at 128. When Brannan asked him to "[c]ome to the door," Gray said, "'Go away or I'm gonna kill her.'" RP at 130. Through the window, Brannan saw a woman, a man, and a young girl standing in the hallway; the man was holding a large stick. Koch heard Gray yell through a window: "Get outta here. I'm going to f*** her up. Everyone leave or I'm going to kill her." RP at 131. Koch also heard Wooster ask Gray to "let us go"; she was sobbing and pleading: "Stop doing this. Why are you doing this?" RP at 131.

About 10 minutes later, Wooster and Gray's 12 year old daughter, TLH, came out of a second story window on to the roof. When Koch helped her off the roof, she told the officers that Gray had a pocket knife and was holding Wooster hostage. The special weapons and tactics team persuaded Gray to come outside and Koch placed Gray in Brannan's patrol car.

Wooster told Brannan that she and Gray argued that evening and, when she attempted to leave the house, Gray blocked the back door and hit her in the head three times. She also told Brannan that Gray, who was armed with a wooden stick, threw her down to the floor, threatened to kill her, and "stomp the baby out of her, as she was pregnant at the time." RP at 324. Wooster managed to get to the garage and call Streifel, who then called 911. Wooster also told Brannan that, when the police arrived, Gray, armed with a knife, forced TLH and her into the bedroom and

made Wooster sit in a chair while he held the knife and threatened her. Wooster convinced Gray to release TLH; Gray released Wooster when he surrendered to the police.

Wooster completed and signed a victim statement form that Brannan gave her. Wooster wrote in the statement that Gray barricaded her and TLH in the kitchen, bathroom, and bedroom; hit her three times; held a knife to her; threw a television at TLH; and would not let Wooster leave. The statement included the following language: "I, Tiffany, have written . . . this statement [and it] truly and accurately reflects my recollection of this incident. I . . . certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct." Ex. 22 at 2l. The State charged Gray with first degree kidnapping, second and fourth degree assault, and interference with reporting domestic violence.

At trial, contrary to her earlier statements, Wooster testified that, on the evening of the incident, she and TLH were in TLH's room when Gray became upset and pushed a television off a desk. She admitted that she told the deputies that Gray had thrown the television at TLH, but she said that Gray threw the TV "towards [TLH], but not at her." RP at 178. She also testified that she asked Gray to leave and that he told the police that he would kill her if they came in. But she stated that he only said that to "[k]eep the police out" and that "[h]e had no intentions of hurting [her.]" RP at 179. She said she did not fear Gray would harm her and she denied telling Brannan that Gray threatened to "stomp the baby out of [her.]" RP at 181.

Streifel testified that she called 911 in response to Wooster's call to her that evening. She stated that, following an incident wherein Gray kicked in Wooster's door, she and Wooster had agreed on the code word "prayer" as a means for Wooster to indicate that she wanted police assistance but she could not recall whether Wooster had used that word on November 12, 2007.

RP at 276. The trial court admitted the recording of Streifel's 911 call and the State played it for the jury.

Jennifer Barber, a hospital emergency room social worker, testified that she examined Wooster and TLH the day after the incident. Defense counsel objected to Barber's testimony because Barber did not have a waiver from Wooster to reveal medical information, but the court overruled the objection because defense counsel had "[n]o standing" to make such objection. RP at 148.

Before TLH testified, the trial court held a competency hearing based on Gray's competency objection. TLH and Sheri Peterson, an unlicensed "certified therapist" who treated TLH for anger, depression, and communication issues, testified. RP at 120. The trial court determined that TLH was competent to testify.

At trial, TLH testified to the following: Gray and Wooster fought the day of the incident; Gray hit Wooster; Gray, armed with a knife and stick, pulled Wooster's hair as she attempted to leave; Wooster begged Gray to let her and TLH leave; Gray shouted at the police, "Go away or I'll kill her"; and Wooster convinced Gray to let TLH leave. RP at 165. But TLH could not recall the statements she made to the deputies on the day of the incident.

Before the trial court instructed the jury, defense counsel brought to the trial court's attention that a juror had been seated in the courtroom "for five [to] ten minutes," while the trial court and counsel discussed jury instructions outside the presence of the other jurors. RP at 514. Neither the State nor the defense questioned the juror and he remained on the jury.

The jury found Gray guilty on all counts except for the charge that he interfered with reporting of domestic violence, which the court dismissed "for insufficient evidence." Clerk's

Papers at 79. At sentencing, the trial court considered Gray's four prior convictions from Oregon, namely, two counts of first degree burglary, one count of first degree rape, and one count of third degree robbery. The court imposed an exceptional sentence, as well as deadly weapon enhancements, sentencing Gray to total confinement of 360 months. It also denied Gray's request to temporarily lift the no contact order so that he could marry Wooster. Gray appeals.

ANALYSIS

I. Double Jeopardy

Gray argues that, under both the Washington and federal constitutions, the trial court violated the prohibition against double jeopardy when it applied the deadly weapon enhancement to the second degree assault conviction. Specifically, he argues that *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) compel us to disregard "no longer persuasive" prior decisions that hold no double jeopardy violation occurs when deadly weapon enhancements are applied to crimes predicated on the use of deadly weapons. Br. of Appellant at 14. The State argues that *Blakely* "does not implicate double jeopardy" and that the trial court correctly applied the enhancement. Br. of Resp't at 5. We agree with the State.

A. Standard of Review

We review a claim of double jeopardy de novo. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). Both *Blakely* and *Apprendi* held that any fact increasing the penalty for a crime beyond the prescribed statutory maximum, other than the fact of prior conviction, must be submitted to the jury, rather than the trial court, and proved beyond a reasonable doubt. *Blakely*,

542 U.S. at 301-02; *Apprendi*, 530 U.S. at 490. Our Supreme Court recently held that "[t]he decisions in *Apprendi* [and] *Blakely* . . . do not alter the double jeopardy analysis." *State v. Kelley*, No. 82111-9,2010 WL 185947, at ¶17-18, 25 (Jan. 21, 2010). Thus, Gray's argument based on *Blakely* and *Apprendi* fails.

B. No Double Jeopardy Arises from Deadly Weapon Sentencing Enhancement

The double jeopardy clauses of the federal[2] and Washington[3] constitutions protect a defendant against multiple punishments for the same offense.[4] *State v. Noltie*, 116 Wn.2d 831, 848, 809 P.2d 190 (1991). We first determine whether the legislature expressly or implicitly indicated its intent to authorize cumulative punishment. *Freeman*, 153 Wn.2d at 771-72. Subject to constitutional restraints, the legislature has the power to define crimes and assign punishment. *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). If the intent is clear and the legislature authorizes cumulative punishments then double jeopardy is not offended and our double jeopardy analysis is at an end. *Freeman*, 153 Wn.2d at 771-72.

Weapon enhancements do not implicate double jeopardy because these enhancements are not criminal offenses, but "merely limit[ ] the discretion of the trial court . . . in setting . . . minimum sentences." *State v. Ward*, 125 Wn. App. 243, 252, 104 P.3d 670 (2004) (first and

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[2] U.S. Const. amend. V provides: "No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb." The Fifth Amendment applies to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

[3] Wash. Const. art. I, section 9 provides: "No person shall be . . . twice put in jeopardy for the same offense."

[4] Because the double jeopardy clauses of the federal and state constitutions are identical in substance and purpose, we interpret them in the same manner. *In re Pers. Restraint of Davis*, 142 Wn.2d 165, 171, 12 P.3d 603 (2000).

second alterations in the orginal) (quoting *State v. Claborn*, 95 Wn.2d 629, 637, 628 P.2d 467 (1981)). Accordingly, Washington courts have rejected double jeopardy challenges to deadly weapon enhancements where the use of a deadly weapon was an element of the crime charged. *Kelley*, 2010 WL 185947, at ¶11.

Gray's second degree assault was predicated on his use of "a knife and a large stick." RP at 680. The trial court added a deadly weapon enhancement to Gray's second degree assault sentence. Because we reject double jeopardy challenges to deadly weapon enhancements where the use of a deadly weapon was an element of the crime charged, we hold that the trial court did not violate the prohibition against double jeopardy.

II. Due Process Claim

Gray also argues that the trial court violated his due process rights under both our state[5] and federal[6] constitutions when it admitted Wooster's inconsistent written victim statement made on the day of the incident. Specifically, he argues that the statement was inadmissible because it was hearsay that did not fall under ER 801(d)(1)(i),[7] the prior inconsistent statement hearsay exception.

We review a challenge to a trial court's decision on the admissibility of evidence for abuse

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[5] U.S. Const. amend. XIV, section 1 provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law."

[6] Wash. Const. art. I, section 3 provides: "No person shall be deprived of life, liberty, or property, without due process of law."

[7] Under ER 801(d)(1)(i), a court may admit statements of a witness when "[t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is . . . inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition."

of discretion. *State v. Ellis*, 136 Wn.2d 498, 504, 963 P.2d 843 (1998). The due process clause of the Fourteenth Amendment[8] is violated when a trial is so fundamentally unfair that "the acts complained of must be of such quality as necessarily prevent a fair trial." *Lisenba v. People of the State of California*, 314 U.S. 219, 236-37, 62 S. Ct. 280, 86 L. Ed. 166 (1941); *see also Payne v. Tennessee*, 501 U.S. 808, 825, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991). "Due process does not permit a conviction based on no evidence, or on evidence so unreliable and untrustworthy that it may be said that the accused had been tried by a kangaroo court." *California v. Green*, 399 U.S. 149, 187 n.20, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970) (Harlan, J., concurring) (citations omitted).

If a prior inconsistent statement satisfies the elements of ER 801(d)(1)(i), the statement is admissible as substantive evidence. *State v. Smith*, 97 Wn.2d 856, 862-63, 651 P.2d 207 (1982). To determine whether a statement is admissible, the trial court considers whether: (1) the witness voluntarily made the statement; (2) there were minimal guarantees of truthfulness; (3) the statement was taken as standard procedure in one of the four legally permissible methods for determining the existence of probable cause; and (4) the witness was subject to cross-examination when giving the subsequent inconsistent statement. *Smith*, 97 Wn.2d at 861-63.

Wooster's victim statement meets all four *Smith* factors. First, Wooster voluntarily made the statement. She testified that she wrote the statement and signed it. Brannan also testified that he gave Wooster the form for the statement and that he saw her write and sign it.

Second, the statement had minimal guarantees of truthfulness. Wooster's signed victim

[8] When "analyzing challenges under the state and federal due process clauses, we have held [that] Washington's due process clause does not afford broader protection than that given by the Fourteenth Amendment to the United States Constitution." *State v. McCormick*, 166 Wn.2d 689, 699, 213 P.3d 32 (2009).

statement included the following language: "I, Tiffany, have written . . . this statement [and it] truly and accurately reflects my recollection of this incident. I . . . certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct." Ex. 22 at 2l. Such language supplies at least a minimal guarantee of truthfulness. *See State v. Binch Thach*, 126 Wn. App. 297, 308, 106 P.3d 782 (2005).

Third, the police took Wooster's statement shortly after the incident as standard procedure in domestic violence cases. Both the *Smith*, 97 Wn.2d at 861-63, and *Nelson* courts held that the use of such statements to determine probable cause constitutes an "'other proceeding'" in order to satisfy ER 801(d)(1)(i) and the third *Smith* prong. *State v. Nelson*, 74 Wn. App. 380, 387, 874 P.2d 170 (1994).

Finally, Gray had the opportunity to cross-examine Wooster about her prior statement at trial. Because Wooster's statement satisfies all four *Smith* factors, we hold that the statement was admissible and the court did not violate Gray's due process rights.[9]

III. Ineffective Assistance of Counsel

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[9] Gray also argues that the statement did not strictly adhere to the requirements of RCW 9A.72.085, which sets out the requirements for unsworn statements given the same "force and effect" of sworn statements. In support of this argument, he relies on *State v. Nieto*, 119 Wn. App. 157, 79 P.3d 473 (2003) and *State v. Sua*, 115 Wn. App. 29, 60 P.3d 1234 (2003).

The *Nieto* court held that an unsworn written statement will satisfy the requirements under RCW 9A.72.085 if "it is signed and contains language such as, 'I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct[.]'" *Nieto*, 119 Wn. App. at 161 (*quoting* RCW 9A.72.085). The *Sua* court held that statements did not comply with RCW 9A.72.085 requirements when they were not given under oath subject to the penalty of perjury. *Sua*, 115 Wn. App. at 48.

Both *Sua* and *Nieto* support our conclusion that Wooster's voluntarily signed statement which included the words, "I, Tiffany, have written . . . this statement [and it] truly and accurately reflects my recollection of this incident. I . . . certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct." Ex. 22 at 2l. Thus, Gray's argument fails.

Gray further argues that his counsel was ineffective because his counsel did not properly object to the unredacted recording of Streifel's 911 call. Specifically, he argues that the recording was not relevant and that the following content of the recording was prejudicial: (1) Gray had kicked in a door; (2) Gray had a history of prior violent acts; (3) Gray "knock[ed] the hell out of" Ms. Wooster; and (4) Gray should not have been in Washington. Br. of Appellant at 17. Gray also argues that his counsel elicited testimony from Streifel about the code word "prayer" when "there was no tactical reason" to do so. Br. of Appellant at 19. Gray further argues that, during sentencing, his counsel should not have conceded that Gray's prior convictions were committed against different victims, thus denying the trial court "the opportunity to make a ruling on whether these crimes encompassed same criminal conduct." Br. of Appellant at 26. Finally, in his SAG, Gray argues that his counsel was also ineffective because he failed to question a juror who was seated in the courtroom "for five [to] ten minutes" while the trial court and counsel discussed jury instructions. RP at 514.

The State argues that Gray's ineffective assistance claim fails because: (1) Gray's prior acts of violence against Wooster were admissible because Wooster is a domestic violence victim, (2) the cross-examination of Streifel on the code word "prayer" was a tactical decision by defense counsel, and (3) Gray's prior convictions are not "same or similar criminal conduct" because rape and robbery involve different conduct. Br. or Resp't at 11. Gray's arguments fail.

A. Standard of Review

Ineffective assistance of counsel is "a mixed question of law and fact" that we review de novo. *Strickland v. Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Binh Thach*, 126 Wn. App. at 319. Both the Washington[10] and federal[11] constitutions guarantee

effective assistance of counsel. We begin our analysis with a strong presumption that counsel was effective. *Strickland*, 466 U.S. at 689-90. "To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 687. In order to show prejudice, Gray bears the burden to show that "consider[ing] the totality of the evidence before the judge or jury," there is a reasonable probability that but for his counsel's failure to object the outcome would have differed. *Strickland*, 466 U.S. at 695.

B. 911 Recording

Gray argues that his counsel was ineffective because he did not object to the recording on grounds of relevance and that counsel "appeared to believe that the only objection available to him was as to authenticity." Br. of Appellant at 17. Specifically, Gray argues that the 911 recording was not relevant because Streifel had "no firsthand knowledge" of the occurrences she described in the call. Br. of Appellant at 18.

ER 401 defines "[r]elevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "The threshold to admit relevant evidence is very low." *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Even minimally

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[10] Wash. Const. art. I, section 22 (amend. 10) provides: "In criminal prosecutions the accused shall have the right to appear and defend . . . by counsel."

[11] U.S. Const. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

relevant evidence is admissible. *Darden*, 145 Wn.2d at 621. The requirement that a witness have firsthand knowledge to testify goes to the question of witness competency, not relevance. *See State v. Vaughn*, 101 Wn.2d 604, 611-12, 682 P.2d 878 (1984); *see also* ER 602; *cf.* ER 401.

Gray was on trial for committing the crimes of second and fourth degree assault against Wooster and for the crime of first degree kidnapping of Wooster. Streifel made the 911 call after Wooster called her; she stated that Wooster was the victim of "domestic violence" and was "screaming her head off." Ex. 19 (00:23, 01.16, 06:34). While on the line with the 911 operator, Streifel says to a member of her own household that Gray was "knocking the hell out of [Wooster]." Ex. 19 (03:17-03:35). Streifel also related that Gray was switching off the lights and closing the bedroom windows, while Wooster was trying to switch on the lights. This portion of Streifel's 911 call appears to be based on her personal observations and is relevant to whether Gray assaulted and kidnapped Wooster. ER 401. Therefore, the 911 recording overcame the "very low" threshold for relevance. *Darden*, 145 Wn.2d at 621. Thus, it is unlikely that Gray's counsel could have "successfully . . . interposed" an objection for relevance. *State v. Lei*, 59 Wn.2d 1, 6, 365 P.2d 609 (1961). We hold that defense counsel's performance did not fall "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88.

Gray also argues that the 911 recording contained unfairly prejudicial statements about Gray's prior acts of violence to which his counsel did not object.[12] But Gray's counsel did object

[12] The State argues that, because Wooster partially recanted the statement she made on the day of the incident, evidence of prior acts of violence is admissible "to show the dynamic of the relationship and to explain why the victim may be testifying in that manner." Br. of Resp't at 7. But this argument applies only to "prior acts of domestic violence, involving the defendant and the crime victim" when such evidence is admitted "in order to assist the jury in judging the credibility of a recanting victim." *State v. Magers*, 164 Wn.2d 174, 186, 189 P.3d 126 (2008). Here, Gray's history of prior violent acts to which Streifel refers in the 911 recording did not involve domestic violence against Wooster. Further, the State did not offer the recording to assist the

to Streifel's testimony about Gray's character and moved to redact the recording to exclude the statement relating to Gray's prior history and to instruct the jury to disregard it. Thus, Gray's argument fails.

Moreover, the evidence here is overwhelming that Gray assaulted Wooster and kidnapped Wooster and TLH: (1) Brannan and Koch testified that they heard Gray say that he was going to kill or harm Wooster; (2) Koch heard Wooster pleading with Gray to "[s]top doing this," RP at 131; (3) TLH and Wooster testified that Gray hit Wooster and that Gray told the police that he would kill her if they came in and that he had a knife; (4) TLH and Wooster also stated that, when Wooster tried to leave the house, Gray grabbed her hair and pulled her back in through the patio door; (5) Wooster's written statement says that Gray barricaded her and TLH in the kitchen and bedroom, hit her three times, held a knife to her, threw a television at TLH and would not let Wooster leave. This evidence satisfies "all of the elements of [the first degree kidnapping and second and fourth degree assault] offense[s]." *Binh Thach*, 126 Wn. App. at 311. While arguing ineffective assistance, even Gray admits that "the evidence against [him] was substantial." Br. of Appellant at 20.

Based on the "totality of the evidence," we hold that there is no reasonable probability that the outcome of the case would have differed if defense counsel objected to the 911 recording on the grounds of relevance and unfair prejudice. *Strickland*, 466 U.S. at 695. We hold that counsel's performance was not deficient and Gray cannot show prejudice.

C. Cross-examination of Streifel

Gray also argues that his counsel was ineffective because he cross-examined Streifel about

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jury in judging Wooster's credibility but to show that Gray was committing a domestic violence crime against Wooster at that time. Thus, the State's argument fails.

the code word "prayer." But after the State elicited testimony from Streifel regarding the use of the code word, defense counsel attempted to minimize its prejudicial effect during cross-examination. Contrary to Gray's assertion that "there was no tactical reason to" cross-examine Streifel on the code word, his counsel's cross-examination tactic was to show that the event prompting Wooster and Streifel to develop a code word involved "not [Gray's] violence against people" but "violence against a door." RP at 292. Because counsel's performance "can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a[n ineffective assistance] claim." *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). Gray's argument fails.

D. Same Criminal Conduct Argument

Gray further contends that his counsel was ineffective when he "abandoned" the argument that Gray's prior convictions for rape and robbery constituted "same criminal conduct." Br. of Appellant at 25 (emphasis omitted). Specifically, Gray argues that counsel should not have relied on Gray's incorrect statement[13]—that the two crimes involved two separate victims—in conceding that there was no "same criminal conduct." But the record indicates that Gray's counsel did not rely on Gray's incorrect statement. Instead, counsel conceded that the two prior crimes do not constitute "same criminal conduct" because he could not point to any part of the relevant Oregon statutes indicating that intent to rob also means intent

[13] In his brief, Gray now argues that he "was evidently confused" when he made the incorrect statement. Br. of Appellant at 26. The two crimes did involve the same victim.

to rape.[14] Accordingly, this argument fails.

E. Juror's Presence in the Courtroom

We also address Gray's SAG argument that his counsel was ineffective. Gray asserts that his counsel failed to question a juror who was seated in the courtroom "for five [to] ten minutes" while the trial court and counsel discussed jury instructions outside the presence of the other jurors. RP at 514. Defense counsel did not personally question the juror but he brought the matter to the court's attention. The court gave both the State and defense counsel the opportunity to question the juror about what he had heard, however, both counsel turned down the opportunity. The trial court did not pursue the issue further and the juror was not removed from the jury. The juror may have been exposed to extraneous information in the discussion between the trial court and counsel.

Juror misconduct involving the use of extraneous evidence during deliberations will entitle the defendant to a new trial if there are reasonable grounds to believe the defendant was prejudiced. *State v. Lemieux*, 75 Wn.2d 89, 91, 448 P.2d 943 (1968). But because the content of the discussion to which the juror may have been exposed contained only a brief review of the jury instructions, which the trial court shortly thereafter gave to the jury, there are no "reasonable

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[14] The exchange between counsel and court follows:

> THE COURT: What in Oregon's statute says if one commits robbery they intend to rape somebody?
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> [GRAY]: They're not even the same -- it's not even the same victim, so how are we even comparing the two anyway?
>
> . . . .
>
> THE COURT: Well, that doesn't help . . . .
>
> . . . .
>
> DEFENSE COUNSEL: I guess Your Honor's right, . . . the Oregon Revised Statute . . . basically doesn't cover the issue that I raised.

RP at 697-98.

grounds to believe" that Gray was prejudiced. *Lemieux*, 75 Wn.2d at 91. In light of the nonprejudicial nature of the content of the discussion and the brief period in which the juror was in the courtroom during that discussion, defense counsel was not deficient in failing to question the juror. *See Strickland*, 466 U.S. at 687. Moreover, in light of the "totality of the evidence," there is no reasonable probability that, but for counsel's neglect in questioning the juror, the result would have differed. *Strickland*, 466 U.S. at 695. Thus, Gray's argument fails.[15]

IV. Right to Marry

Gray also argues that the trial court violated his constitutional right to marry by refusing to temporarily lift the no contact order entered between him and Wooster so they could marry. Specifically, he argues that, because he and Wooster are unmarried, TLH, who was "not a victim of this crime," is an "illegitimate" child and will be denied such rights as inheritance. Br. of Appellant at 28. We review a sentencing court's imposition of crime-related prohibitions for an abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993). We narrowly construe crime-related prohibitions affecting fundamental rights. *State v. Warren*, 165 Wn.2d 17, 34, 195 P.3d 940 (2008), *cert. denied*, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009).

"The rights to marriage and to the care, custody, and companionship of one's children are fundamental constitutional rights." *Warren*, 165 Wn.2d at 34. While a convicted defendant's

[15] In his SAG, Gray further argues that his counsel failed to research Gray's criminal history because he overlooked "a new point that [the State] found for . . . Gray back in 85" and failed to inform Gray on the possibility of receiving consecutive sentences. SAG at 6. Gray does not support this argument with any reference to the record. It is unclear what this "new point" is and how it prejudiced Gray's case. It is also unclear what, if any, conversations Gray had with his counsel regarding sentencing possibilities. Although "[r]eference to the record [is] not necessary or required, [we do not] review [the claim] if it does not inform the court of the nature and occurrence of the alleged errors." RAP 10.10(c). Thus, Gray's unsupported and conclusory arguments fail.

rights are subject to some restriction as a result of a criminal conviction, such restriction must be "'reasonably necessary to accomplish the essential needs of the state and the public order.'" *Warren*, 165 Wn.2d at 45 (*quoting State v. Riles*, 135 Wn.2d 326, 350, 957 P.2d 655 (1998)). The State has a compelling interest in preventing future crimes. *Westerman v. Cary*, 125 Wn.2d 277, 293, 892 P.2d 1067 (1994). Thus, former RCW 9.94A.505(8) (2006)[16] authorizes a sentencing court to impose crime-related prohibitions, including no contact orders, on conduct directly related to the circumstances of the crime. *Warren*, 165 Wn.2d at 32. The person protected by the no contact order must be reasonably related to the offender's convictions. *Warren*, 165 Wn.2d at 34.

Gray concedes "the compelling state interest in preventing continuing contact [with] Wooster," but he also argues that the no contact order should not affect his daughter, TLH, because TLH "was not a victim of this crime." Br. of Appellant at 28. But Gray misperceives his convictions. He was convicted of kidnapping both TLH and Wooster and of assaulting Wooster. Here, both were entitled to protection from contact with Gray since their relationships to him were "reasonably related to [Gray's] convictions."[17] *Warren*, 165 Wn.2d at 34. Accordingly, we hold that the trial court did not violate Gray's constitutional rights when it refused to lift the restraining order to allow him to marry Wooster.

[16] Former RCW 9.94A.505(8) provides: "As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter."

[17] Moreover, Gray may make provision for TLH to inherit from him by will or by placing his name on her birth certificate as her biological father if his concern is her inheritance rights.

V. Additional SAG Issues

A. Prosecutorial and Judicial Misconduct

In his SAG, Gray seems to argue that both the State and the trial court engaged in malicious conduct when the court (1) let stand the State's "prejudicial" testimony of the social worker, Jennifer Barber, who examined Wooster and stated that she did not have a waiver from Wooster to reveal medical information and (2) allowed the State to pursue "a 3.5 hearing with . . . Brannan after he already took the stand." SAG at 7. "In a claim of prosecutorial misconduct, the defendant bears the burden of establishing that the conduct complained of was both improper and prejudicial." *State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995). We will reverse a conviction "only if there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict." *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991).

Gray does not explain why Barber's testimony was prejudicial, requiring reversal of his conviction, and our review of the record does not reveal unfairly prejudicial testimony by Barber. Similarly, because the State sought to caution Brannan to avoid inadmissible information about Gray, including his past criminal history, Gray cannot demonstrate that allowing the State to address these issues in the absence of the jury prejudiced his trial.

B. TLH's Competency

Finally, Gray argues that TLH was not competent to testify because Peterson's testimony was insufficient to establish TLH's competency and Wooster did not give permission to TLH to testify. We review a trial court's determination of witness competency for abuse of discretion. *State v. Perez*, 137 Wn. App. 97, 104, 151 P.3d 249 (2007). "To be competent to testify as a witness, a person must be of sound mind and discretion and must appear to the trial judge to be

capable of receiving just impressions of the facts they are to be examined about and capable of relating them truly." *Perez*, 137 Wn. App. at 103. *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967).

Before a young child is found competent to testify the child must demonstrate "(1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his or her memory of the occurrence; and (5) the capacity to understand simple questions about it." *Allen*, 70 Wn.at 692. Determining a witness's competency rests primarily with the trial court who sees the witness, notices their manner, and considers their capacity and intelligence. *Allen*, 70 Wn.2d at 692.

Gray challenged TLH's competency as a witness; thus, the trial court conducted a competency hearing. During this hearing, both the State and Gray questioned TLH about her willingness and ability to tell the truth, her recollection of the incident, and her use of medications the day of the incident. Then Gray had Peterson testify. Peterson testified that she was an unlicensed, "certified therapist" who treated TLH for anger, depression, and communication issues.[18] RP at 120. Peterson first stated that TLH should not testify, but

[18] Peterson primarily discussed TLH's treatment but she later attempted to invoke a privilege and stated that she was not comfortable discussing the treatment.

Peterson later stated that she did not know if TLH was capable of testifying.[19]

Based on the testimony at the competency hearing and its opportunity to observe the witnesses, the trial court ruled that TLH was competent, stating, "There's no doubt about it that she's competent from the testimony that I heard." RP at 122. We hold that this competency hearing was sufficient to establish TLH's competency because the hearing gave the trial court the opportunity to observe TLH as she testified, her understanding of the questions, and her responses to them. Finally, Gray fails to point to any authority supporting his contention that permission from a parent is required before a child testifies and we reject such a suggestion.

[19] The exchange between the trial court and Peterson follows:

> THE COURT: You don't agree with her being required to testify --
> [PETERSON]: Yeah.
> THE COURT: -- because it's hard for her?
> [PETERSON]: Yeah.
> THE COURT: Not that she's mentally ill and incapable of testifying.
> . . . .
> [PETERSON]: I don't really know.
> THE COURT: I'm asking you [a] question -- you don't know?
> [PETERSON]: Not if she's capable. I think there[are] a lot of factors.

RP at 121-22.

Accordingly, Gray's claim fails.

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 pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Houghton, J.

Penoyar, J.