IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 65978-2-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
JEFFERY CURTIS MARBLE,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: March 5, 2012
	)	

Lau, J. — A jury convicted Jeffery Marble of unlawful imprisonment and first degree assault. Marble appeals his judgment and sentence. He claims that (1) under the incidental restraint doctrine, insufficient evidence supports his conviction for unlawful imprisonment as a separate crime from the assault and (2) defense counsel was ineffective for failing to argue that the assault and unlawful imprisonment constitute the same criminal conduct for sentencing purposes. Finding no error, we affirm.

FACTS

In 2009, Jeffery Marble lived in Everett with his wife, Catherine Dunne-Marble, and their son, Gavin.[1] On Friday, May 29, a man came to their house and told them the

[1] For clarity, we use the parties' first names. Jeffery and Catherine are now

house was in foreclosure and would be sold at auction. Surprised by this news, Catherine asked Jeffery about it. He told her there was a mistake and the house was not in foreclosure.[2]

On Monday, June 1, Gavin left for school around 6 a.m. Catherine felt too ill to go to work, but around 8 or 9 a.m. she decided to go to the bank to ask about the mortgage. She told Jeffery where she was going and he became "slightly agitated." Catherine started down the stairs to the carport and twice felt a hand push her. She asked Jeffery what he was doing, and he said he was not doing anything.[3] She continued down a few more steps and Jeffery grabbed her back, saying they were not going to the bank until they "had sorted this issue out about [Catherine] saying that he pushed [her] down the stairs." Report of Proceedings (RP) (Aug. 23, 2010) at 51.

Catherine testified that Jeffery knocked a cordless phone and a cell phone out of her hand as she attempted to call 911. She then felt a blow to her head, followed by more blows. She estimated the first blow occurred around 10 or 11 a.m. She realized Jeffery was hitting her with a barbell.

Catherine tried to run out the front door. Jeffery blocked the door and dragged her back. Catherine testified that Jeffery continued to attack her. He hit her with the barbell 30 to 40 times, pinned her down and bashed her head on the floor, and pushed her against iron railings in the hallway. Catherine said the attack was not continuous

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divorced.

[2] The couple had previously argued over finances.

[3] Jeffery denied pushing Catherine. During an interview with Detective Timothy O'Hara, he claimed he grabbed her to keep her from falling.

and Jeffery stopped hitting her at times due to exhaustion. She also testified that Jeffery hit himself in the head four or five times.

After a while, Catherine escaped to the bathroom, where the attack continued. Jeffery let her go for "a second" and she tried to escape through the bathroom window. He pulled her back and resumed hitting her with the barbell. Catherine testified Jeffery "would kind of like collapse in front of the bathroom door so [she] couldn't get out, then he would get back up again and start striking . . . [a]s soon as [she] made an attempt to get to the door." RP (Aug. 23, 2010) at 59. She yelled for help and used her car keys to set off her car alarm, but no one responded.[4]

Gavin returned home between 4:30 and 5:00 p.m. He heard Catherine yelling for help and saw blood in the house. Gavin went to the bathroom and found Jeffery pinning Catherine against the bathroom wall. Gavin saw a barbell on the bathroom counter. Gavin lifted Jeffery off Catherine. Catherine ran out of the house, and Gavin followed her and called 911.

Catherine went to the emergency room after the attack. Forensic nurse Paula Skomski examined her. Catherine was bloodied and her face, head, neck, torso, and limbs were bruised, cut, and swollen. A piece of metal was removed from her eyelid. Skomski said Catherine's injuries were consistent with the incident she described.

Detective Timothy O'Hara searched the house on June 1. He saw blood on the

[4] Karen White, a responding police officer, testified that she walked through the house and found car keys on the bathroom counter. White also testified that an unidentified neighbor told her about hearing the car alarm going off repeatedly on the day of the attack.

floor, walls, stairs, and stair railings. He also found guns on the floor in Jeffery's office and a note signed by Jeffery stating that he was responsible for all financial debt incurred during his marriage to Catherine. On June 3, O'Hara interviewed Jeffery in the hospital. During the interview, Jeffery said he had blacked out during the incident and could not remember what happened. Jeffery also said he "couldn't believe what he had done to Catherine." He admitted having financial troubles and said "he pretty much sheltered Catherine from that, and she didn't know anything about it." RP (Aug. 24, 2010) at 208.

Catherine later discovered that the mortgage had not been paid in over a year, the house was in foreclosure, the car note had not been paid, and some household bills had not been paid for several months. She testified she had only seen "intermittent bills" for a year or more prior to the June 1 incident. RP (Aug. 23, 2010) at 69. After the incident, while cleaning out the garage, she found several large garbage bags filled with bills and other mail. She also found checks endorsed and cashed in her name, but she knew nothing about the checks and the handwriting on them was not hers.

The State charged Jeffery with first degree assault and unlawful imprisonment, each with a deadly weapon enhancement. A jury convicted him as charged. At sentencing, the court counted the two crimes as current offenses and scored them against each other, yielding an offender score of 1 for each crime. This resulted in a standard sentence range of 102 to 136 months for the first degree assault and 3 to 8 months for the unlawful imprisonment (served concurrently). The weapon enhancements added 24 months to the assault and 6 months to the unlawful

imprisonment (served consecutively). Thus, the total range, including weapon enhancements, was 132 to 166 months. Defense counsel agreed with the above calculation and requested a sentence at the low end of the range. The court imposed a mid-range sentence of 124 months for the assault, with a concurrent sentence of 8 months for the unlawful imprisonment. Adding the weapon enhancements (30 months) resulted in a total sentence of 154 months.

ANALYSIS

Sufficiency of the Evidence

Jeffery argues insufficient evidence supports his unlawful imprisonment conviction. Specifically, he contends the unlawful imprisonment was incidental to the assault and, thus, not supported by facts sufficient for a separate conviction for unlawful imprisonment. The State counters that under these circumstances, the unlawful imprisonment was not incidental to the assault.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. State v. Moles, 130 Wn. App. 461, 465, 123 P.3d 132 (2005). We defer to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. State v. Fiser, 99 Wn. App. 714, 719, 995 P.2d 107 (2000).

A person commits unlawful imprisonment if he or she knowingly restrains another person. RCW 9A.40.040(1). To restrain someone is to restrict his or her movements "without consent and without legal authority in a manner which interferes substantially with his [or her] liberty." RCW 9A.40.010(1). Restraint is without consent if it is accomplished by "physical force, intimidation, or deception." RCW 9A.40.010(1).

Jeffery relies mainly on State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). In Green, a prosecution for first degree aggravated murder based on kidnapping, witnesses observed the defendant carry the victim a short distance around the corner of an apartment building, where he stabbed her to death. Green, 94 Wn.2d at 222-23. On review, our Supreme Court considered whether the evidence was sufficient to establish the abduction element of the aggravating crime (kidnapping). Based on the short time and minimal distances involved,[5] the location of the participants when found, the clear visibility of the location, and the total lack of evidence of actual isolation, the court concluded that there was "no substantial evidence of restraint by means of secreting the victim in a place where she was not likely to be found." Green, 94 Wn.2d at 226. The court added that the mere "incidental" movement and restraint of the victim was, under the facts of the case, an integral part of the homicide and not "indicia of a true kidnapping." Green, 94 Wn.2d at 227.

Green and other incidental restraint cases generally involve kidnapping and an additional crime. See, e.g., State v. Korum, 120 Wn. App. 686, 703, 86 P.3d 166

[5] Only two to three minutes elapsed when the defendant was carrying the victim, and the victim was moved no more than 50 to 60 feet. Green, 94 Wn.2d at 224 n.4.

(2004) (restraint of victims during a robbery was solely to facilitate robberies and not kidnappings); State v. Saunders, 120 Wn. App. 800, 819, 86 P.3d 232 (2004) (kidnapping was not merely incidental to rape); State v. Harris, 36 Wn. App. 746, 754, 677 P.2d 202 (1984) (rational trier of fact could reasonably have found the abduction as a separate offense from the rape). These cases reason that "mere incidental restraint and movement of the victim during the course of another crime which has no independent purpose or injury is insufficient to establish a kidnapping." State v. Brett, 126 Wn.2d 136, 166, 892 P.2d 29 (1995). Thus, the question is whether the restraint has independent purpose or injury. Brett, 126 Wn.2d at 166. Unlawful imprisonment is a lesser included offense of kidnapping and requires knowing restraint. RCW 9A.40.040(1); State v. Hansen, 46 Wn. App. 292, 296, 730 P.2d 706 (1986). Thus, the restraint issue at the core of incidental kidnapping is also present in unlawful imprisonment.

In State v. Washington, 135 Wn. App. 42, 143 P.3d 606 (2006), we addressed incidental restraint in an assault case. Washington was charged with unlawful imprisonment and third degree assault stemming from an argument with his wife, Harmoni. Washington, 135 Wn. App. at 46-47. Washington became upset with Harmoni and asked her to accompany him outside, where he ordered her to get into a car. Washington, 135 Wn. App. at 46. Harmoni complied but left the car door open, further upsetting Washington, who ordered her to shut the door. Washington, 135 Wn. App. at 46. Harmoni attempted to leave, but Washington grabbed her clothing, pulled her into the car, and punched her. Washington, 135 Wn. App. at 46. He then pulled

the car door shut and began choking her. Washington, 135 Wn. App. at 46. On appeal, Washington relied on Green to argue that his unlawful imprisonment charge was "merely incidental to the ongoing assaults." Washington, 135 Wn. App. at 50. We disagreed, noting that the facts in Washington differed from those in Green:

> [T]he evidence indicates that the assaults on Harmoni were acts of rage triggered by her brief act of independence in leaving the car door open. In other words, the assaults were a reaction to Harmoni's resistance to the restraint. The evidence thus supports the conclusion that the restraint was not merely incidental to the assaults.

Washington, 135 Wn. App. at 50-51.

Jeffery argues his case is more like Green, not Washington. To the extent Green requires that the restraint sufficient to maintain a prosecution for unlawful imprisonment be distinct from the restraint inherent in another charged offense, that requirement is satisfied here. Viewing the evidence most favorably to the State, the facts support the jury's conviction for unlawful imprisonment independent of the assault conviction. The evidence shows that (1) Jeffery and Catherine had previously argued about finances, (2) Jeffery hid bills and other financial information from Catherine, and (3) Jeffery lied to Catherine about the home's foreclosure status. Jeffery prevented Catherine from leaving the house when she tried to go to the bank to check on the mortgage status. The bank visit would have disclosed that Jeffery falsely told her the house was not in foreclosure. When Catherine tried to escape, Jeffery blocked her way and prevented her from climbing out of the window. A rational jury could reasonably infer that his restraint of Catherine assumed an independent purpose and also resulted in a separate and distinct injury—to prevent Catherine from learning

about Jeffery's dishonesty regarding the couple's finances—while the assault was committed to cause her physical harm. Because the crimes had independent purposes, the unlawful imprisonment was not incidental to the assault. Brett, 126 Wn.2d at 166.

As in Washington, the evidence here supports a finding that the assault was a reaction to Catherine's resistance to the restraint. Catherine testified that she twice felt a hand push her when she initially tried to leave the house. And when she continued down the stairs, Jeffery grabbed her and prevented her from leaving. She felt the first blow after attempting to call 911. She later tried to escape through the front door and then the bathroom window. Like in Washington, a rational jury could find the assaultive conduct was an act of rage triggered by Catherine's attempts to escape. Thus, "the restraint was not merely incidental to the assaults."[6] Washington, 135 Wn. App. at 51. The evidence here is sufficient to permit a rational trier of fact to find the essential elements of unlawful imprisonment beyond a reasonable doubt.

"Same Criminal Conduct" and Ineffective Assistance of Counsel

Jeffery argues defense counsel was ineffective for failing to argue that the

[6] Jeffery argues, "[T]he State may claim the restraint occurred before the assault when [I] attempted to push [Catherine] down the stairs as she walked toward the front door. But, the State charged [me] only for [my] conduct in restraining [Catherine] with the dumbbell." Appellant's Br. at 16. Jeffery is incorrect. Unlawful imprisonment requires only knowing restraint of another person. RCW 9A.40.040(1). Here the State charged Jeffery with knowingly restraining Catherine and added a deadly weapon enhancement: "[A]t the time of the commission of the crime, the defendant . . . was armed with a deadly weapon other than a firearm, to wit: a barbell . . . ." This charge is consistent with the restraint beginning when Jeffery pushed and grabbed Catherine on the stairs and continuing upstairs when Jeffery began hitting Catherine with the barbell.

charged offenses constituted the same criminal conduct for sentencing purposes. The State responds that defense counsel made a tactical decision and Jeffery was not prejudiced because the court would have rejected a same criminal conduct argument if counsel had made it.

To establish ineffective assistance of counsel, Jeffery must show both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). There is a strong presumption of effective representation. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Matters that go to trial strategy or tactics do not show deficient performance, and Jeffery bears the burden of establishing there were no legitimate strategic or tactical reasons behind his attorney's choices. State v. Rainey, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001).

Assuming without deciding that Jeffery's counsel was deficient for not making a same criminal conduct argument, we consider whether Jeffery was prejudiced by counsel's failure. To establish prejudice, the defendant must show a reasonable probability that the outcome of the trial or ruling would have been different absent counsel's deficient performance. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).[7]

[7] Normally, we disturb the sentencing court's determination as to whether current offenses encompass the same criminal conduct only in the event of a clear abuse of discretion or misapplication of the law. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). But when the claim is ineffective assistance of counsel, we must determine the likelihood that the crimes would have been found to be the same criminal conduct had the issue been argued.

When two or more crimes (1) require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim, they constitute the same criminal conduct and the sentencing court must count them as one offense when computing the defendant's criminal history at sentencing. RCW 9.94A.589(1)(a); State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). Courts narrowly construe the statutory language to disallow most assertions of same criminal conduct. State v. Price, 103 Wn. App. 845, 855, 14 P.3d 841 (2000); State v. Palmer, 95 Wn. App. 187, 191 n.3, 975 P.2d 1038 (1999). If any one of the above elements is missing, multiple offenses do not constitute the same criminal conduct and each conviction must be counted separately in calculating an offender score. Lessley, 118 Wn.2d at 778. The parties here dispute the intent and time prongs.

The standard for determining the same intent prong is the extent to which the criminal intent, viewed objectively, changed from one crime to the next. Lessley, 118 Wn.2d at 777. The fact that one crime furthered commission of the other may indicate the presence of the same intent. Lessley, 118 Wn.2d at 777. In State v. Dunaway, 109 Wn.2d 207, 216, 743 P.2d 1237 (1987), our Supreme Court cited to statutory intent requirements when determining whether robbery and attempted murder required the same objective intent:

> When viewed objectively, the criminal intent in these cases was substantially different: the intent behind robbery is to acquire property while the intent behind attempted murder is to kill someone. RCW 9A.56.190; RCW 9A.32.030. The defendants have argued that the intent behind the crimes was the same in that the murders were attempted in order to avoid being caught for committing the robberies. However, this argument focuses on the subjective intent of the defendants, while the cases make clear that the test is an objective one.

Dunaway, 109 Wn.2d at 216.

Unlawful imprisonment contains no statutory intent requirement, but occurs when a person knowingly restrains another person. RCW 9A.40.040(1). Viewed objectively, Jeffery's intent in unlawfully imprisoning Catherine was to keep her from leaving the house. First degree assault, on the other hand, occurs when a person acts with intent to inflict great bodily harm. RCW 9A.36.011(1). Here, Jeffery knowingly imprisoned Catherine and then, with intent to inflict great bodily harm, assaulted her. These crimes do not encompass the same criminal conduct. The trial court properly calculated Jeffery's offender score, and thus, Jeffery cannot show he was prejudiced by counsel's failure to make a same criminal conduct argument.[8]

Statement of Additional Grounds (SAG)

Jeffery raises eight issues in his pro se SAG. First, he argues the court imposed excessive bail of $2 million. Article I, section 14 of the Washington

[8] The evidence also supports a finding that the crimes were not committed at the same time. Two successive crimes may be separate criminal conduct if there is an interruption between them. See In re Pers. Restraint of Rangel, 99 Wn. App. 596, 599, 996 P.2d 620 (2000) (two first degree assaults constituted "separate and distinct criminal conduct" where the defendant fired at the victims from inside a car, continued driving, turned around, and fired at them again); State v. Lopez, 142 Wn. App. 341, 351-52, 174 P.3d 1216 (2007) (two second degree assaults were not the same criminal conduct where the defendant beat the victim, she escaped, and then he assaulted her with a knife). Here, the record contained evidence that during an approximately six-hour period, Jeffery prevented Catherine from leaving the house by grabbing her, blocking the front door, preventing her from escaping out the bathroom window, and blocking the bathroom door. The assault occurred at intermittent intervals within this time period. There was no "continuous, uninterrupted sequence of conduct over a very short period of time." State v. Porter, 133 Wn.2d 177, 183, 942 P.2d 974 (1997). Thus, the "same time" requirement is not satisfied under these circumstances.

Constitution provides, "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." When recommending bail in this case, the State based its $2 million request on the "allegations [against Jeffery], the nature of the charges, [and] the defendant's suicidal thoughts and use of deadly weapons including the poison ricin . . . ." These factors find support in the record, and the trial court could have reasonably concluded that Jeffery presented a substantial danger to the community or posed a flight risk. Jeffery argued the bail issue—he challenged the bail amount several

times, and the court held a bail reduction hearing. Jeffery argues his counsel refused to address the bail issue, but this assertion is flatly contradicted by the record. See RP (Aug. 23, 2010) at 21 (defense counsel explaining to the court Jeffery's position on the bail issue). We find no merit in this argument.[9]

Jeffery argues the prosecutor committed misconduct when during closing remarks she mentioned guns and talked about a fanny pack Jeffery wore the day he assaulted Catherine. A defendant cannot raise a claim of prosecutorial misconduct for the first time on appeal unless the misconduct is so "'flagrant and ill intentioned that it

[9] Jeffery cites a "comparison case" called "Washington State v. Earnest Chavez." SAG at 1. But he provides no case citation, and a diligent search revealed no case matching Jeffery's description. Jeffery also amended his SAG to assert that the court initially set bail at $100,000 on June 6, 2009, then raised it to $1 million on June 8, then raised it to $2 million on June 29—thus showing that the court initially found a lower amount to be appropriate. Our review of the record reveals no support for this assertion, and we decline to review it. See Lemond v. Dep't of Licensing, 143 Wn. App. 797, 807, 180 P.3d 829 ("This court will not consider allegations of fact without support in the record.").

cause[d] an enduring and resulting prejudice'" that a curative instruction could not have neutralized. State v. Warren, 134 Wn. App. 44, 69, 138 P.3d 1081 (2006) (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)). We review the propriety of a prosecutor's conduct in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. Russell, 125 Wn.2d at 85-86. In closing argument, the prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). Our review of the record shows the prosecutor's comments about Jeffery's guns and fanny pack expressed reasonable inferences from evidence presented at trial.[10]

Jeffery argues insufficient evidence supports his first degree assault conviction. He specifically claims the prosecution did not prove the intent element of the crime. Viewing the evidence in the light most favorable to the State, we conclude a rational jury could have found Jeffery guilty of first degree assault beyond a reasonable doubt. To the extent Jeffery argues the evidence showed Catherine was "controlling the situation," SAG at 5, he essentially contests witness credibility at trial. We defer to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. State v. Fiser, 99 Wn. App. 714, 719, 995 P.2d 107 (2000). Given the fact finder's opportunity to assess witness demeanor and credibility, we will not disturb those findings. See State v. Pierce, 134 Wn. App. 763, 774, 142 P.3d 610 (2006).

[10] Because this argument lacks merit, we need not reach Jeffery's ancillary argument that his trial counsel was ineffective in failing to object to the prosecutor's comments at closing argument.

Jeffery also argues insufficient evidence supports the deadly weapon enhancements. For the reasons discussed above, this claim lacks merit.

Jeffery argues counsel was ineffective because he (1) never required the prosecution to test the alleged weapon for fingerprints or the fanny pack for blood evidence, (2) made discovery violations by failing to disclose documents to Jeffery, (3) failed to discuss strategy with Jeffery, (4) failed to present character witnesses, and (5) failed to present evidence of Jeffery's medical conditions and injuries. As discussed above, matters that go to trial strategy or tactics do not show deficient performance. Rainey, 107 Wn. App. at 135-36. Because counsel's decisions on these matters constitute trial tactics, no deficient performance occurred. Our review of the record reveals no support for Jeffery's claim that he repeatedly asked counsel to test for fingerprints, test for blood evidence, disclose documents, or present medical records at trial.[11] We thus decline to review this claim. See Lemond, 143 Wn. App. at 807. Further, the evidence Jeffery relies on concerning his medical conditions and injuries is outside the record. On direct appeal, we do not consider matters outside the record. McFarland, 127 Wn.2d at 338 n.5.

Jeffery argues the photographic images introduced at trial were never disclosed to him prior to being entered into evidence. He cites to CrR 4.7(a)(1)(v), which requires

[11] Jeffery amends his SAG to assert that "when the prosecution added an additional 200 or so pages of discovery in May or June of 2009 counsel again failed to show or even discuss these additional pages of discovery with the defendant, despite multiple requests by the defendant." Amended SAG at 6. He later clarified that the additional discovery was added in 2010, not 2009. Amended SAG at 7. Nothing in the record supports these arguments and we decline to review them. See Lemond, 143 Wn. App. at 807.

the prosecutor to disclose to the defendant by the omnibus hearing any photographs that he or she intends to use at trial. But here, the parties stipulated to admissibility of the photographs before trial. To properly preserve an alleged discovery violation for appeal, the defendant must make a timely objection and request a remedy from the trial court. RAP 2.5(a); State v. Howell, 119 Wn. App. 644, 653, 79 P.3d 451 (2003); State v. Wilson, 56 Wn. App. 63, 66, 782 P.2d 224 (1989). Our review of the record indicates that neither Jeffery nor his counsel objected to his perceived discovery violations. The record shows that defense counsel told the court he had reviewed all the evidence and determined there was nothing that would prejudice Jeffery. And to the extent Jeffery argues his counsel failed to show him the photographs, nothing in the record supports this argument, and we decline to review it. See Lemond, 143 Wn. App. at 807.

Jeffery argues the court violated his right to a speedy trial. In determining whether a defendant's constitutional speedy trial rights have been violated, courts balance factors, including the length and reason for the delay, whether the defendant has asserted his right, and the ways in which the delay causes prejudice to the defendant. State v. Iniguez, 167 Wn.2d 273, 283-84, 217 P.3d 768 (2009). Considering the totality of the circumstances, we find no constitutional speedy trial violation. The record indicates several early defense requests to continue granted by the court to evaluate Jeffery's mental status. Jeffery specifically contests the trial court's grant of two later continuances, both of which his counsel requested but he opposed. The trial court had legitimate reasons for granting each continuance. It balanced the competing interests of accommodating trial preparation, scheduling

concerns, and securing Jeffery's constitutional rights. It stated explicitly that it granted the continuances over Jeffery's objection to ensure defense counsel had an adequate opportunity to prepare for trial. We conclude Jeffery suffered no violation of his constitutional right to a speedy trial.[12]

Citing State v. Ackles, 8 Wn. 462, 464, 36 P. 597 (1894), Jeffery argues that the prosecutor failed to indicate in the charging document that the alleged assault was unprovoked. In Ackles, the court based its holding on a statute under which "an assault with a deadly weapon with intent to inflict upon the person of another a bodily injury is made a felony only upon the express condition that the assault is without considerable provocation, or where the circumstances of the assault show a willful, malignant, and abandoned heart." Ackles, 8 Wn. at 465. The current first degree assault statute applicable to Jeffery's charge contains no such requirement. See RCW

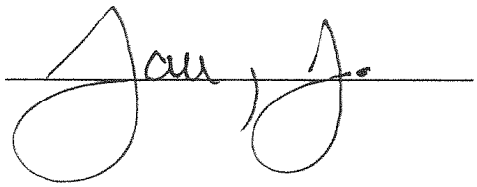
[12] Jeffery supplements his speedy trial argument in his SAG amendment. He argues that the State mismanaged the case when it claimed it was going to amend the information to add an additional charge but then decided not to amend, thus prejudicing his defense. He argues that the motion to amend was untimely. He also argues the State withheld several discs containing information obtained from his home computer. Our review of the record shows that the disputed discs were taken by the FBI (Federal Bureau of Investigation) from Jeffery's hard drive. The prosecution had not received those discs by May 28, 2010, and did not know what information they contained. The State did not obtain the information from the FBI until the week of July 2 and then decided not to amend. Because neither party knew what the discs contained until July 2010, the defense held off on conducting interviews. Upon learning that the State was not amending the information, defense counsel requested a continuance over Jeffery's objection. The court granted the continuance, noting its first responsibility was to ensure defense counsel had an opportunity to prepare for trial. Our review of the record shows that both the State and the defense were waiting on records held by the FBI. We find no bad faith in the State's management of the case or the court's decision to grant the requested continuances.

9A.36.011(1)(a).

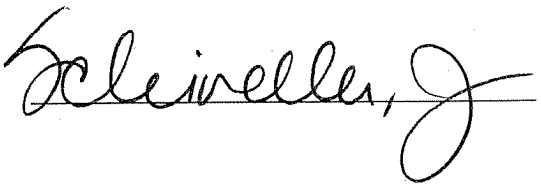
In his SAG amendment, Jeffery raises two additional grounds. He argues that jury instruction 18 violates the rule in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010).[13] Our review of the challenged instruction shows it complies with Bashaw. Jeffery also argues that his right to a public trial was violated when the trial court excluded the public from juror voir dire. Our record shows no voir dire transcript and Jeffery's claim is otherwise unsupported by the record. We decline to address this argument. See Lemond, 143 Wn. App. at 807.

CONCLUSION

For the reasons discussed above, we affirm the judgment and sentence.



WE CONCUR:



[13] In Bashaw, our Supreme Court held that for purposes of a special verdict, "a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence." Bashaw, 169 Wn.2d at 146. The court reasoned, "Though unanimity is required to find the presence of a special finding increasing the maximum penalty, it is not required to find the absence of such a special finding. The jury instruction here stated that unanimity was required for either determination. That was error." Bashaw, 169 Wn.2d at 147 (citation omitted).