IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 66661-4-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
DAVID DOUGLAS MOELLER,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: June 13, 2011
	)	

Lau, J. — On direct appeal, David Moeller challenges his jury trial convictions for first degree rape, second degree assault, and false imprisonment, arguing violations of his constitutional speedy trial rights, discovery violations, erroneous admission of evidence, confrontation clause violations, rape and assault convictions violate double jeopardy, prosecutorial misconduct in closing argument, and ineffective assistance by trial counsel. Because Moeller demonstrates no constitutional violations, prosecutorial misconduct, deficient performance, or discovery violations and his remaining claims lack merit, we affirm his judgment and sentence.

In a consolidated personal restraint petition (PRP), Moeller asserts ineffective

assistance of counsel based on his trial counsel's failure to adequately investigate exonerating evidence. But because Moeller offers no evidence and makes bare allegations of deficient performance, we deny the petition.

FACTS

Deborah Stegner and David Moeller began dating in May 2008. Several months later, they moved in together in a Lakewood, Washington apartment. On Friday, November 14, 2008, apartment management gave the couple a three-day notice to pay or vacate. When Stegner received the notice that day, she began packing. That same evening, Moeller "backhanded" Stegner in the head, causing a black eye.

On November 15, Moeller hit Stegner in the face and strangled her. While Moeller had his arm around her neck, Stegner believed she would die. Moeller later demanded sex, stating, "Bitch, just go spread your legs." 4 Report of Proceedings (RP) (Sept. 9, 2009) at 53. To avoid further physical abuse, Stegner submitted to vaginal intercourse.

On November 16, "[i]t was, basically, the same events, being hit, being strangled, having sex." 4 RP (Sept. 9, 2008) at 54-55. Moeller also ordered Stegner to douche. She believed Moeller ordered this act to eliminate evidence. She complied with a "half-hearted effort" because she did not want to eliminate the evidence. 4 RP (Sept. 9, 2009) at 55. Stegner wanted to leave, but the apartment's small size allowed Moeller to keep her in sight and prevent her from leaving.

On November 17, Stegner woke up and saw a basket, a stack of boxes, and a piece of furniture stacked in front of the door. She could not escape without "making a

bunch of noise" to move these items. 4 RP (Sept. 9, 2009) at 61. Moeller ordered her back to bed and said, "We are going to take a drive up to the mountains." This scared Stegner because Moeller previously told her that he had an ex-wife he wanted to take up to the mountains and push off a cliff. By this point, her "whole face was black and blue," and her "neck was black and blue down to the middle of [her] chest." 4 RP (Sept. 9, 2009) at 64. Moeller then said he would leave Stegner alone if she performed oral sex on him. She complied, hoping he would fall asleep and she could escape. Moeller fell asleep, and Stegner escaped through the living room window.

Stegner ran to neighbor Jim Hettich's apartment. He refused to let her in, but he called the apartment manager and police. Hettich testified that Stegner was hysterical and "her eyes were almost completely black and blue." 6 RP (Sept. 14, 2009) at 291. "She was sobbing, bawling, scared, [and] shaking." 6 RP (Sept. 14, 2009) at 293. On cross-examination, Hettich denied that he told "Mr. Sizemore, the apartment manager, that the day before David was arrested, [he] had seen [Moeller and Stegner] in an apartment having sex." 6 RP (Sept. 14, 2009) at 297. Apartment manager Bill Sizemore contradicted this testimony, responding, "Yes" when asked, "On the day of the arrest of David Moeller, did you have a conversation with James Hettich where Mr. Hettich told you that [Moeller and Stegner] were in James Hettich's apartment the day before David's arrest having sex." 6 RP (Sept. 14, 2009) at 310.

Lakewood Police Officers Greg Richards and Jason Cannon responded to the scene. Officer Richards found Stegner hiding in the bushes outside Hettich's apartment.

Richards testified that Stegner "appeared to be badly beaten" and "was very, very upset and appeared extremely scared." 4 RP (Sept. 9, 2009) at 122. She told Officer Richards that Moeller "beat the shit out of me" and made her perform oral sex. 4 RP (Sept. 9, 2009) at 123. Cannon knocked on the couple's door, and Moeller started to move the boxes behind the door to allow Officer Cannon inside. Officer Cannon did not want to lose sight of Moeller, so he used his shoulder on the door to force entry.

Medical personnel transported Stegner to the hospital. Sexual assault nurse examiner Tara Lopez examined Stegner on November 17, 2008. Lopez observed extensive bruising, and "symptoms related to the strangulation." 5 RP (Sept. 10, 2009) at 230. Stegner told Lopez she had been slapped, choked, pushed, held down against her will, tripped, and forced to engage in sexual intercourse with Moeller. Lopez informed the emergency room physician about the bruising behind the left ear, due to concern about a basal or skull fracture. After the incident, Stegner moved to Florida.

On November 18, 2008, the State charged Moeller with first degree rape, second degree assault, and unlawful imprisonment.[1] The State also charged three aggravating factors: deliberate cruelty, lack of remorse, and domestic violence. Trial was scheduled for January 13, 2009. On January 6, 2009, Moeller's counsel, over Moeller's objection, moved for a trial continuance because the "complexity and seriousness of the case requires proper time to investigate and adequate[ly] prepar[e]."

[1] On September 9, 2009, the State amended the information to allege the crimes occurred during the period between November 14, 2008, and November 17, 2008.

The court granted the motion and continued the trial to April 30, 2009. On April 30, defense counsel and the prosecutor, over Moeller's objection, agreed to continue the trial to May 11 because the "assigned courtroom is in another trial" and an "out of state witness [Stegner] needs to be interviewed." On May 11, the morning of trial, defense counsel's office requested and the court granted a one-day trial continuance because "defense attorney is out ill today." On May 12,[2] the court granted the State's requested trial continuance to fly the victim to Washington for defense interview and to accommodate defense counsel's unavailability for the month of June. The trial was continued to July 1, 2009. On July 1, defense counsel withdrew and took an extended medical leave due to serious illness. Substitute defense counsel requested a trial continuance to prepare for trial. The court continued the trial to August 31, 2009. On August 31, the court granted a joint motion by the State and defense for a one-day continuance so the prosecutor could be with his family during his father's major surgery. But the court denied defense counsel's request for a longer trial continuance to review photographs of the victim that he had not previously seen. Trial commenced on September 1, 2009.

At trial, the State called the following witnesses: Deborah Stegner, Officer Greg Richards, Officer Jason Cannon, nurse Tara Lopez, and neighbor James Hettich. Defense called apartment manager Bill Sizemore. Moeller did not testify. A jury convicted Moeller as charged on all counts. On the assault charge, the jury also

[2] At the omnibus hearing on May 11, the court ordered the State to fly the victim from Florida to Washington state for a defense interview to be completed by May 29, 2009.

answered affirmatively to three special verdict forms, finding Moeller's conduct demonstrated an egregious lack of remorse, deliberate cruelty, and the victim was a member of Moeller's family or household. Moeller appeals.

Speedy Trial

Moeller argues that a nine and one-half month delay[3] between arraignment and trial violated his state and federal constitutional rights to a speedy trial. He does not argue a violation of the criminal time for trial rules. The State argues waiver and no constitutional violation occurred. This court reviews a claim of denial of constitutional rights de novo. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009).

In determining whether a defendant's constitutional speedy trial rights have been violated, courts balance four interrelated factors.[4] Iniguez, 167 Wn.2d at 283 (citing Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)).[5] As a threshold to the Barker inquiry, a defendant must show that the length of delay

[3] The record shows a 281-day delay—9 months and 11 days.

[4] The State argues that Moeller did not preserve this issue for appeal under RAP 2.5 because there is no manifest constitutional error. Although Moeller's counsel moved for most of the continuances, Moeller himself argued his constitutional speedy trial rights were violated in a lengthy motion for dismissal of the charges. And a recent State Supreme Court case presenting similar circumstances did not discuss any preservation problem and analyzed a defendant's arguments on the merits. Iniguez, 167 Wn.2d 273. Moeller preserved this issue for appeal.

[5] We refer to these factors as the Barker inquiry. "[T]he Court in Barker adopted an ad hoc balancing test that examines the conduct of both the State and the defendant to determine whether speedy trial rights have been denied. . . .

". . . .

". . . . Some of the factors relevant to this determination are the length and reason for delay, whether the defendant has asserted his right, and the ways in which the delay causes prejudice to the defendant." Iniguez, 167 Wn.2d at 283.

"crossed a line from ordinary to presumptively prejudicial." Iniguez, 167 Wn.2d at 283 (citing Doggett v. United States, 505 U.S. 647, 651-52, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992)).[6]

If a defendant demonstrates presumptive prejudice, the remainder of the Barker inquiry is triggered. Iniguez, 167 Wn.2d at 283. The remaining nonexclusive factors are the length and reason for the delay, whether the defendant asserted his right, and the ways the delay prejudiced the defendant. Iniguez, 167 Wn.2d at 283. No factor alone is necessary or sufficient. Iniguez, 167 Wn.2d at 283.

We first determine whether Moeller demonstrates that the length of delay "crossed a line from ordinary to presumptively prejudicial." See Iniguez, 167 Wn.2d at 283. Moeller argues that a nine and one-half month delay between the charging date and trial commencement presumptively prejudiced him, given the uncomplicated nature of the charges.

The passage of time is an important factor in the presumptively prejudicial analysis. However, there is no formulaic presumption of prejudice on the passing of a specific period of time. Iniguez, 167 Wn.2d at 292. And the constitutional speedy trial

[6] In Iniguez, our Supreme Court recently held that article I, section 22 does not afford a defendant greater speedy trial rights than does the federal Sixth Amendment. Iniguez, 167 Wn.2d at 289. Our state constitution requires a method of analysis substantially the same as the federal Sixth Amendment analysis in the speedy trial context. Iniguez, 167 Wn.2d at 290. The Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U .S. Const. amend. VI. The right to a speedy trial "'is as fundamental as any of the rights secured by the Sixth Amendment.'" Barker, 407 U.S. at 516 n.2 (quoting Klopfer v. North Carolina, 386 U.S. 213, 223, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967)). When a defendant's constitutional speedy trial rights are violated, the remedy is to dismiss the charges with prejudice. Barker, 407 U.S. at 522.

rights analysis is a fact-specific inquiry that is "'necessarily dependent upon the peculiar circumstances of the case.'" Iniguez, 167 Wn.2d at 292 (quoting Barker, 407 U.S. at 530-31). In addition to the length of delay, we consider other factors such as the complexity of the charges and reliance on eyewitness testimony. Iniguez, 167 Wn.2d at 292.

Here, the nine and one-half month delay was substantial and Moeller spent all of it in custody. Although the State alleged three aggravating factors related to the assault charge, Moeller was not facing complex charges involving factual complexities or multiple actors such as with conspiracy allegations, which might necessitate pretrial delays. Rather, Moeller faced rape, assault, and false imprisonment charges involving the same victim occurring over four days in their apartment. According to the omnibus order, Moeller asserted general denial, consent to the rape charge, and no mental defenses. The evidence included eyewitness testimony from Deborah Stegner, two police officers who responded to the 911 call, neighbor James Hettich, apartment manager Bill Sizemore and nurse Tara Lopez. Avoiding delays was important to prevent witness unavailability or faulty memories of the events in question. Based on these circumstances, we conclude that the over nine-month delay from arraignment to trial was presumptively prejudicial. See Iniguez, 167 Wn.2d at 292.[7]

Because we conclude the delay was presumptively prejudicial, we next consider the remainder of the Barker inquiry. The court considers the extent to which the length of delay stretches beyond the bare minimum required to trigger the inquiry. Iniguez,

[7] In Iniguez, an eight-month delay involving one count of robbery was presumptively prejudicial.

167 Wn.2d at 293. Stated another way, the longer the delay, the more scrutiny the court must apply to the circumstances surrounding the delay. Iniguez, 167 Wn.2d at 293. But the length of delay here requires little scrutiny. Although Moeller remained in custody for approximately nine and one-half months, long enough to satisfy the presumptively prejudicial threshold, this was not necessarily an unreasonable delay as discussed below. Iniguez, 167 Wn.2d at 293. Accordingly, the length of delay does not weigh against the State.

In considering the next factor, the reason for delay, the court looks to each party's responsibilities for the delay and assigns weight to those reasons. Iniguez, 167 Wn.2d at 294. The State and defense made a joint request to continue so that defense counsel could interview "out of state witness." The State requested a continuance to arrange defense counsel's requested in-person interview with the victim, who had moved to Florida for alcohol treatment. After the State scheduled the interview for May 29, within the deadline ordered by the court, defense counsel's office cancelled the interview one week before the victim's arrival due to defense counsel's major illness. And the State's only other continuance request was for one day based on family medical reasons. We conclude none of these continuances are unreasonable. Nothing in our record demonstrates dilatory conduct by the State in attempting to schedule a material witness who was receiving alcohol rehabilitation treatment out of state.

But the more significant delays were requested by defense counsel. The record shows that one lengthy continuance request was made in response to the "Class A

felony with indeterminate sentencing and aggravating circumstances alleged in Count II Class B felony. Complexity and seriousness of the case requires proper time to investigate and adequately prepare." Two defense requests for continuances were based on defense counsel's major illness, which required him to withdraw and substitute counsel appointed. Substitute counsel requested and received a two-month continuance. We conclude under the circumstances here that the reasons for delay weigh in the State's favor.

The third factor is the extent to which a defendant asserts his speedy trial right. Iniguez, 167 Wn.2d at 294-95. The court looks to the frequency with which the defendant asserts this right, in addition to the reasons for his assertions. Iniguez, 167 Wn.2d at 295. Moeller continuously maintained his speedy trial right. He filed a motion to dismiss, alleging speedy trial violations, and refused to sign continuance orders. This factor weighs in favor of Moeller and against the State. See Iniguez, 167 Wn.2d at 295.

The final factor under the Barker inquiry is the prejudice resulting from the delay. Iniguez, 167 Wn.2d at 295. The court assesses prejudice in light of the interests protected by the right to speedy trial, including preventing oppressive pretrial incarceration, minimizing the defendant's anxiety and worry, and limiting impairment to the defense.[8] Iniguez, 167 Wn.2d at 295. A defendant makes a stronger case for a speedy trial violation if he can demonstrate prejudice. Iniguez, 167 Wn.2d at 295.

[8] As to impairment to the defense, because it is difficult to demonstrate, courts presume that such prejudice intensifies with time. Iniguez, 167 Wn.2d at 295.

To show prejudice, Moeller attributes Hettich's and Sizemore's inconsistent testimony at trial to the trial delays. But Moeller offers no persuasive rationale why any delay caused the alleged inconsistent testimony. And the record supports none.

Moeller also argues the delay prevented him from securing evidence from a neighbor who drove the already beaten Stegner home and video footage from a hospital where Moeller claims he drove Stegner. This argument finds no support in the record. Instead, the record indicates the delay benefited defense counsel because it afforded him more time rather than less time to conduct discovery, secure exculpatory evidence, locate defense witnesses, and interview the out-of-state witness.

Similarly, Moeller claims Stegner's faulty memory about what happened is due to trial delay. But Moeller fails to demonstrate why weaknesses in Stegner's testimony prejudiced him given the overwhelming physical evidence unaffected by the delays and Stegner's statements to police immediately following the crimes. And while courts seek to limit a defendant's anxiety and oppressive pretrial incarceration, other courts have allowed longer delays than the approximately nine-month delay in this case. See, e.g., Barker, 407 U.S. at 534 (10-month pretrial incarceration not prejudicial). Likewise, in Iniguez, the court held defendant failed to demonstrate prejudice resulting from his eight-month pretrial delay, during which he remained incarcerated. Iniguez, 167 Wn.2d at 295. We also note Moeller makes no claim that defense witnesses died or became unavailable due to the delay. He makes no showing of impairment to his defense. And Moeller fails to demonstrate he was prejudiced by an unreasonable delay.

Considering the totality of circumstances, we find no constitutional speedy trial

violation. The trial court had legitimate reasons for granting each continuance. It balanced the competing interests of accommodating trial preparation, scheduling concerns, and securing Moeller's constitutional rights. We conclude Moeller suffered no violation of his constitutional right to a speedy trial.

Discovery Violations

Moeller argues that the State violated CrR 4.7[9] by failing to name nurse Tara Lopez on its witness list and withholding Lopez's report, victim photographs, and other medical records.[10] Moeller also argues the court abused its discretion by denying a remedy for these violations. The State responds that it met its discovery obligations and Moeller failed to preserve these issues for appeal. We agree Moeller failed to preserve these issues for review.

The trial court's power to dismiss under CrR 4.7 or CrR 8.3 is discretionary, and the decision is reviewable only for manifest abuse of discretion. State v. Blackwell, 120

[9] CrR 4.7(a)(1) requires the State to "disclose to the defendant . . . material and information within the prosecuting attorney's possession or control no later than the omnibus hearing" including, among other things, the names and addresses of witnesses, documents, statements, and photographs it intends to use at trial. Also, "[e]xcept as is otherwise provided as to protective orders, the prosecuting attorney shall disclose to defendant's counsel any material or information within the prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense charged." CrR(a)(3). "'Courts have long recognized that effective assistance of counsel, access to evidence, and in some circumstances, expert witnesses, are crucial elements of due process and the right to a fair trial.'" State v. Grenning, 169 Wn.2d 47, 55, 234 P.3d 169 (2010) (quoting State v. Boyd, 160 Wn.2d 424, 434, 158 P.3d 54 (2007)).

[10] Moeller assigns error based on a due process violation, but fails to discuss this argument in his brief. Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992); RAP 10(a)(4).

Wn.2d 822, 830, 845 P.2d 1017 (1993). Dismissal is an extraordinary remedy, one that the trial court should use only as a last resort. State v. Wilson, 149 Wn.2d 1, 12, 65 P.3d 657 (2003); Smith, 67 Wn. App. at 852. To justify dismissal, the defendant must show actual prejudice; the mere possibility of prejudice is insufficient. State v. Krenik, 156 Wn. App. 314, 320, 231 P.3d 252 (2010).

To properly preserve an alleged discovery violation for appeal, the defendant must make a timely objection and request a remedy from the trial court. State v. Wilson, 56 Wn. App. 63, 66, 782 P.2d 224 (1989); State v. Howell, 119 Wn. App. 644, 653, 79 P.3d 451 (2003); RAP 2.5(a). Our review of the record indicates Moeller never objected to or sought relief from the trial court relating to his perceived discovery violations. We conclude the challenged discovery violations are waived.[11]

Duplicative Photographs

Moeller argues the trial court abused its discretion under ER 403 by admitting 106 duplicative photographs showing Stegner's injuries. The State responds each photograph showed different aspects of the injuries and were relevant to the charges and issues at trial.

Moeller objected to 73 photographs depicting the victim's injuries.[12] He made no

[11] Moeller makes no argument the alleged discovery violations involve a manifest error affecting a constitutional right. RAP 2.5(a).

[12] Moeller claims there were 130 to 140 photos of the victim admitted, but our review of the record demonstrates that the State's count is accurate.

objection to 33 of these photographs. After reviewing each photograph, the court sustained his objections to eight photographs but denied objections to the others.

The admissibility of photographs is generally within the sound discretion of the trial court. And the trial court's ruling will not be disturbed on appeal, absent a showing of abuse of discretion. State v. Crenshaw, 98 Wn.2d 789, 806, 659 P.2d 488 (1983). Accurate photographic representations are admissible, even if gruesome, if their probative value outweigh their prejudicial effect. Crenshaw, 98 Wn.2d at 806. "[A] bloody, brutal crime cannot be explained to a jury in a lily-white manner . . . ." State v. Adams, 76 Wn.2d 650, 656, 458 P.2d 558 (1969). Photographs showing different angles and distances may not be cumulative. See State v. Pirtle, 127 Wn.2d 628, 654-55, 904 P.2d 245 (1995).

While the photographs here demonstrate some common features, they each show different angles—some closer, some further, some from the side, some straight on, and some with a ruler. A number of photographs were not objected to, and others were excluded by the court. The State bore the burden of proving the rape,[13] assault, and false imprisonment charges, including the assault aggravating factors—an egregious lack of remorse and deliberate cruelty. The State may introduce photographs to prove every element of the crime and to rebut all defenses. State v. Gentry, 125 Wn.2d 570, 609, 888 P.2d 1105 (1995). The court carefully reviewed each photograph on the record. It admitted some and not others. We conclude under the circumstances here that the trial court acted well within its discretion in admitting the

[13] And the omnibus order shows that Moeller claimed consent to the rape charge.

challenged photographs.

Confrontation Clause

Moeller next argues the court violated the Sixth Amendment confrontation clause by erroneously excluding clear evidence of bias against the State's key witness—Deborah Stegner. The State responds that the court excluded only irrelevant evidence.

"A defendant has a right to confront the witnesses against him with bias evidence so long as the evidence is at least minimally relevant." State v. Fisher, 165 Wn.2d 727, 752, 202 P.3d 937 (2009). "We uphold a trial court's ruling on the scope of cross-examination absent a finding of manifest abuse of discretion." Fisher, 165 Wn.2d at 752.

Moeller contends the court improperly excluded two exhibits offered to show Stegner's bias: (1) an October 2, 2008 letter written by Stegner to a city prosecutor prior to the offenses here that she may have falsely accused Moeller of an assault while under the influence of an alcohol blackout and (2) a police report stating that Stegner had cut her wrists after calling her ex-boyfriend. We decline to review Moeller's assertions about the police report because he neither included it in his assignment of error nor clearly disclosed it in the associated issue. RAP 10.3(a)(4); RAP 10.3(g). And inadequate briefing prevents meaningful review of the court's ruling on the police report. RAP 10.3(a)(6); State v. Wheaton, 121 Wn.2d 347, 365, 850 P.2d 507 (1993).

And contrary to Moeller's contention on appeal, the record shows that defense

counsel never sought to admit exhibit 159, Stegner's October 2, 2008 letter.

> Court: . . . I don't think you can use those documents [letter and police report]. You can ask her, I think about whether or not she made prior false accusations about him abusing her. I think you can ask her that.
> [Defense counsel]: I can have her refer or look at the document.
> Court: I don't know about that. I suppose if it refreshes her recollection, that could be used.
> [Defense counsel]: I don't intend to attempt to admit it.
> Court: Well, that wasn't so clear to me.

5 RP (Sept. 10, 2009) at 203-04.

The record further indicates that following the court's ruling, defense counsel cross-examined Stegner about the letter, false allegations she made of past physical abuse, and her heavy alcohol use.

In Fisher, our Supreme Court rejected defendant's argument that the "confrontation right includes the right to put specific facts before the jury." Fisher, 165 Wn.2d at 752-53. The Fisher court reasoned,

> Although the trial court excluded evidence of the financial details of the divorce, it did allow counsel to elicit testimony from Ward about the prolonged nature of the divorce and whether she harbored ill will toward Fisher. Fisher's confrontation rights were not violated since the jury was apprised of the specific reasons why Ward's testimony might be biased.

Fisher, 165 Wn.2d at 753. Because Moeller was permitted to inquire into reasons why Stegner's testimony might be biased and because defense counsel never offered Stegner's letter into evidence, Moeller's confrontation clause challenge fails.

Double Jeopardy

Moeller argues that his convictions for rape and assault violate double jeopardy because they were the same offense. The State counters that where conduct involved

with the rape has an independent purpose or effect, an exception to the application of the double jeopardy/merger doctrine applies. This court reviews an alleged violation of double jeopardy de novo. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

Our Supreme Court "has repeatedly rejected the notion that offenses committed during a 'single transaction' are necessarily the 'same offense.'" State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983). The question is whether, in light of legislative intent, the charged crimes constitute the same offense. In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004).[14]

When an assault "involves some injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental" to a rape, punishment for both offenses does not violate double jeopardy. State v. Johnson, 92

[14] Our Supreme Court has set forth a multipart test for determining whether multiple punishments are allowed for the same criminal conduct. First, the court considers whether there is express or implied legislative intent based on the criminal statutes involved. State v. Martin, 149 Wn. App. 689, 698, 205 P.3d 931 (2009). When there is no such indicator, the court asks whether the two crimes are the same in both fact and law. Martin, 149 Wn. App. at 698-99. Offenses are the same in fact when they arise from the same act or transaction and are the same in law when proof of one would also prove the other. Martin, 149 Wn. App. at 699. The merger doctrine may also help determine legislative intent if the degree of one offense is elevated by conduct constituting a separate offense. State v. Kier, 164 Wn.2d 798, 803-04, 194 P.3d 212 (2008). Finally, a "well established exception" may allow two convictions to stand even when they otherwise appear to be the same offense according to the foregoing rules if there is an independent purpose or effect to each crime that is not merely incidental to the other crime. State v. Freeman, 153 Wn.2d 765, 778-79, 108 P.3d 753 (2005). Moeller's briefing does not discuss, let alone attempt to apply, this multipart test.

Wn.2d 671, 680, 600 P.2d 1249 (1979), overruled on other grounds by State v. Sweet, 138 Wn.2d 466, 980 P.2d 1223 (1999).

Our review of the record shows Moeller's acts of assault had an independent purpose or effect from and not merely incidental to the rape. The evidence shows the purpose of the assaults exceeded the force necessary to compel Stegner's submission to acts of intercourse. While each of the acts of force necessary to elevate the rape to first degree could also support the conviction for second degree assault, the evidence also indicates that the acts of force—multiple acts of strangulation and repeated beatings and punching—were not limited for the purpose of compelling Stegner to submit to sexual intercourse. The photographs corroborate the extent of injuries suffered as a result of these repeated assaults.

And while the assaults all occurred at the same place—the apartment—they did not occur contemporaneously in time with the rape. The evidence shows the repeated assaults happened throughout the weekend, beginning on Friday evening when Moeller "backhanded" Stegner's head causing a "black eye." Because the assaults had a purpose and effect independent of the rape, Moeller's double jeopardy claim fails.[15]

[15] Moeller argues for the first time in his reply brief that the State never made an election or sought jury unanimity on which act constituted the assault. But because Moeller inadequately briefed this issue, we decline to address it. State v. Thomas, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) ("[T]his court will not review issues for which inadequate argument has been briefed or only passing treatment has been made.").

Excited Utterance

Moeller argues that Stegner's statements to Officer Greg Richards shortly after he arrived at the scene constitute inadmissible hearsay.[16] The State responds that the statements are admissible as excited utterances. This court reviews the trial court's determination whether a statement falls within an exception to the hearsay rule for abuse of discretion. State v. Strauss, 119 Wn.2d 401, 417, 832 P.2d 78 (1992).

The record shows that when Officer Richards arrived, Stegner was hiding unclothed in the nearby bushes. She appeared badly beaten with both eyes swollen nearly shut, very upset, extremely scared, and crying. She had very recently escaped from the apartment where for four days she was repeatedly choked, beaten, and raped. Our review of the record shows that her statements to police, made shortly after she escaped from the apartment and describing what happened, constitute excited utterances under ER 803(a)(2).[17] The court properly admitted this evidence as

[16] ER 803(a)(2) defines an excited utterance: "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Three requirements must be met for hearsay to qualify as an excited utterance: "(1) a startling event or condition must have occurred; (2) the statement must have been made while the declarant was still under the stress of startling event; and (3) the statement must relate to the startling event or condition." State v. Hardy, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997).

[17] Moeller argues that the statements were not spontaneous and were a recollection of past facts, and that Officer Richards had to coax Stegner to respond. But "[i]n State v. Labbee, 134 Wash. 55, 58, 234 P. 1049 (1925), the court concluded that a statement made by the declarant within 15 to 20 minutes after the event, even though in response to a question was spontaneous and instinctive, and 'was clearly a part of the res gestae.'" State v. Pugh, 167 Wn.2d 825, 841, 225 P.3d 892 (2009). Officer Richards clarified that any delay in responding to his questions was because she was extremely afraid.

nonhearsay excited utterances under ER 803(a)(2).

Medical Treatment Exception

Moeller argues that statements made by Stegner to sexual assault nurse examiner Tara Lopez constitute hearsay because as a forensic examiner, the purpose of her interview with Stegner was to collect evidence rather than to provide medical treatment. The State responds that the trial court correctly admitted the statements under ER 803(a)(4)'s hearsay exception for statements made for purposes of medical diagnoses or treatment.[18]

"Admissibility of evidence lies within the sound discretion of the trial court and the court's decision will not be reversed absent abuse of that discretion." State v. Hamlet, 133 Wn.2d 314, 324, 944 P.2d 1026 (1997). A party demonstrates that a statement is reasonably pertinent to medical treatment when (1) the declarant's motive in making the statement is to promote treatment and (2) the medical professional reasonably relied on the statement for purposes of treatment. State v. Williams, 137 Wn. App. 736, 746, 154 P.3d 322 (2007). Statements during a medical examination conducted for a combination of purposes—medical as well as forensic—are admissible. Williams, 137 Wn. App. at 746-47. And in domestic violence and sexual abuse situations, statements identifying the perpetrator are admissible. State v. Ackerman, 90

[18] ER 803(a)(4) provides: "Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

Wn. App. 477, 482, 953 P.2d 816

The record reveals that Lopez's examination served the dual purpose of collecting evidence and assisting the patient with obtaining additional care as necessary. During the examination, Lopez notified the emergency room physician about a potentially life-threatening strangulation and bruising behind her ear that indicated a possible skull fracture. The physician confirmed he had checked these injuries by CAT (computerized axial tomography) scan. Lopez also urged Stegner to extend her stay in the hospital based on the seriousness of her injuries. We conclude the court properly admitted Lopez's testimony under ER 803(a)(4)'s hearsay exception for statements of medical diagnosis and treatment.

Limiting Instruction

Moeller next argues that the court, on its own initiative, instructed the jury that it must consider apartment manager Dale Sizemore's testimony about what James Hettich told him "for the purpose of judging Mr. Hettich's credibility" only. The State counters that because it requested a limiting instruction,[19] the court properly instructed the jury on the limited purpose for the evidence. A trial court's decision whether to provide a limiting instruction is reviewed for abuse of discretion. See State v. Ramirez, 62 Wn. App. 301, 305, 814 P.2d 227 (1991). And if evidence is admitted for a limited purpose and an appropriate limiting instruction is requested, the limiting instruction is

[19] ER 105 provides, "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

available as a matter of right. State v. Redmond, 150 Wn.2d 489, 78 P.3d 1001 (2003) (trial court erred in failing to give instruction limiting the use of an out-of-court statement to a nonhearsay purpose).

The court admitted Sizemore's testimony about Hettich's comments for the purpose of impeaching Hettich. After the close of evidence, the court explained, in response to a discussion with counsel about a limiting instruction, "It has been a request. I think that I need to give it. I will."[20] 7 RP (Sept. 15, 2009) at 326. We conclude the court properly gave a limiting instruction in response to the State's proper request.[21]

Prosecutorial Misconduct

Moeller next argues, "The prosecutor violated the presumption of innocence by including a 'fill-in-the-blank' reasonable doubt argument in closing." Appellant's Br. at 2. While the State acknowledges that the prosecutor's argument was improper, it argues that Moeller cannot show prejudice in the absence of an objection at trial.

Prosecutorial misconduct requires a showing that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). A defendant who alleges

[20] The court may, in its discretion, defer a limiting instruction until the close of all evidence. State v. Ramirez, 62 Wn. App. 301, 304, 814 P.2d 227 (1991).

[21] Moeller also argues that the testimony was admissible for its truth under the open-the-door doctrine. He did not make this argument below, and it is waived on appeal. RAP 2.5.

prosecutorial misconduct must "first establish the prosecutor's improper conduct and, second, its prejudicial effect." State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). The court reviews a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). Where the defense fails to timely object to an allegedly improper remark, the error is deemed waived unless the remark is "so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

The prosecutor here argued,

> Now, when you go back there, what you, essentially have to say to yourself is, I find the defendant not guilty, and my reason is blank. That is a reasonable doubt. I have a reasonable doubt that I'm able to articulate. To have a reasonable doubt, you have to be able to fill in the blank. You have to say here is my reasonable doubt. Here is why.
>
> It is my burden to prove to you every element of this crime charged. I'm the one that has to provide evidence. For a doubt to be reasonable, you have to be able to articulate it. Your instructions tell you when you have an abiding belief in the truth of the charge, it is proven to you beyond a reasonable doubt.

7 RP (Sept. 15, 2009) at 346.

We conclude the comment here was isolated and curable. Moeller, therefore, waived any misconduct claim.

Ineffective Assistance of Counsel

Moeller argues that his counsel was ineffective for failure to adequately investigate his defense and for his advice to him that he should not testify. Moeller

makes these arguments in both his direct appeal and a consolidated PRP. We first address his direct appeal. The State counters that the record shows no failure by defense counsel to pursue leads and that the decision whether to testify is a legitimate trial tactic.

A criminal defendant has the right under the Sixth Amendment to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686,104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If a defendant fails to satisfy either prong, the court need not inquire further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). There is a strong presumption of effective assistance, and defendant bears the burden of demonstrating the absence of a strategic reason for the challenged conduct. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

On direct appeal, Moeller fails to state the exculpatory evidence or essential witness that would have "refut[ed] the State's case." Appellant's Br. at 45. An appellant must provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(6). Arguments that are not supported by any reference to the record or by any citation of authority need not be considered. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

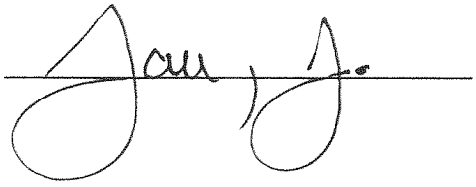
That Moeller's counsel advised him not to testify is a tactical decision. "'If defendant accepts this tactical advice and is not acquitted of the charges, he cannot

later allege that he was denied effective counsel because he accepted the advice of his attorney and did not testify.'" State v. Hardy, 37 Wn. App. 463, 467, 681 P.2d 852 (1984) (quoting State v. King, 24 Wn. App. 495, 499, 601 P.2d 982 (1979)). Here, the court asked Moeller whether he wished to testify. Moeller responded, "Your Honor, I have experience with my attorney. I'm going with his [recommendation]." 6 RP (Sept. 14, 2009) at 315. Moeller demonstrates no deficient representation by trial counsel in his direct appeal.

Moeller makes similar claims in his PRP. He claims that an unnamed woman who brought the already beaten Stegner home was living in his complex but now cannot be located. His petition contains no affidavit or other evidence from this unnamed woman. Moeller also argues that there may be a hospital video showing that he went to the hospital with Stegner. His "mother is checking this for" him, but there is no video submitted with the petition. PRP at 3. Moeller provides no evidence to support his PRP and makes bare allegations of deficient performance. The personal restraint petition is denied.

CONCLUSION

Because Moeller demonstrates no constitutional violations, prosecutorial misconduct, deficient performance, or discovery violations and his remaining claims lack merit, we affirm his judgment and sentence. And because Moeller presented no evidence to support his personal restraint petition and makes bare allegations of deficient performance, the personal restraint petition is denied.



WE CONCUR:

Schindler, J.

Cox, J.