IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 67149-9-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
REAVY DORDY WASHINGTON,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: July 23, 2012
	)	
	)	

Cox, J. — Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, a rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt.[1] Here, there was sufficient evidence to support Reavy Washington's conviction for first degree attempted robbery. Washington raises a number of issues in his Statements of Additional Grounds for Review, none of which require reversal. Accordingly, we affirm.

Washington entered Season's Nursery, approached the counter, and asked an employee, J.N., if she had any money. J.N. said "no." Washington looked at the cash register behind her and asked if she was sure. She responded "yes." Washington then came around the counter toward her and asked "What if I just do this?" He then knocked her into the cash register and

[1] State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006).

began punching her. Once she was on the ground, he started hitting her with a chair. J.N. fought back and Washington eventually left the store. She called 911 and was able to identify Washington after police apprehended him a short time later. J.N. suffered multiple bruises and paramedics treated her at the scene.

The State charged Washington with one count of first degree attempted robbery. The case proceeded to trial and a jury convicted him as charged.

Washington appeals.

SUFFICIENCY OF THE EVIDENCE

Washington argues that the evidence was insufficient to sustain his conviction because there was no evidence that he intended to take money or property. We disagree.

Evidence is sufficient to support a conviction if, after viewing it in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[2] A defendant who claims insufficiency admits the truth of the State's evidence and all inferences that can be reasonably drawn from that evidence.[3]

A person is guilty of attempted robbery in the first degree if he attempts to take personal property unlawfully from another using force and inflicts bodily

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[2] Id.

[3] State v. Killingsworth, 166 Wn. App. 283, 287, 269 P.3d 1064 (citing State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)), review denied, 174 Wn.2d 1007 (2012).

injury in the commission of the robbery.[4] In these circumstances, attempt means that the person, with the intent to commit first degree robbery, does any act that is a substantial step toward the commission of that crime.[5]

Here, J.N. testified that Washington entered the nursery and asked her for money. She replied that she did not have any money, and he looked at the cash register and asked her if she was sure about that. After she stated "yes," Washington came around the counter and said "What if I just do this?" He then knocked her against the cash register and began beating her.

Viewed in a light most favorable to the State, the evidence of Washington's request for money and his focus on the cash register were sufficient to prove that he intended to take money, even though he did not actually do so. Therefore, there was sufficient evidence to permit a rational trier of fact to find that Washington intended to take property from J.N.

Washington argues that his conviction cannot stand because this case is distinguishable from State v. White.[6] In that case, this court determined that the defendant was guilty of attempted robbery even though no demand for money or property was made.[7] It held that the circumstances surrounding the crime—use of a weapon, the presence of a getaway car, and evidence of three prior

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[4] RCW 9A.56.200(1)(a)(iii); RCW 9A.28.020.

[5] RCW 9A.28.020(1).

[6] 4 Wn. App. 668, 483 P.2d 867 (1971).

[7] Id. at 670.

robberies showing a common scheme—amounted to substantial evidence of intent to commit a robbery.[8] Washington argues that here there was no evidence that he planned to commit a robbery, that he had participated in any prior robberies, or that he tried to get into the cash register or steal money from J.N.'s person. But the absence of these circumstances does not require reversal of his conviction. As described above, there was sufficient evidence to prove that Washington intended to take money from J.N.

Washington also argues that the State was required to present some kind of physical evidence that he intended to take property from J.N. This is incorrect. Circumstantial evidence may be used to support a criminal conviction.[9] The evidence that we previously discussed is sufficient circumstantial evidence to support the conviction in this case.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

In a Statement of Additional Grounds for Review, Washington raises several arguments. None require reversal.

Ineffective Assistance of Counsel

Washington argues that he was denied effective assistance of counsel because his attorney failed to call a witness, elicited improper opinion testimony on cross examination, and failed to object to the prosecutor's remarks during closing argument. We disagree

[8] Id.
[9] State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced his trial.[10] The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.[11] To show prejudice, the defendant must show that, but for the deficient performance, there is a reasonable probability that the outcome at trial would have been different.[12] If one of the two prongs of the test is absent, the court need not inquire further.[13] We review ineffective assistance of counsel claims de novo.[14]

First, Washington argues that defense counsel was ineffective because she failed to call an investigator to impeach J.N.'s testimony. A decision not to call witnesses is generally one of trial strategy.[15] Here, Washington explains

[10] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

[11] McFarland, 127 Wn.2d at 336.

[12] In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

[13] Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

[14] In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

[15] State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981).

that defense counsel did not present the investigator's testimony because she did not want to appear to be attacking the witness. Because this is a reasonable trial strategy, this argument fails.

Second, Washington argues that defense counsel was ineffective because she allowed and elicited improper opinion testimony from a police officer that Washington intended to obtain access to the cash register. The general rule is that witnesses are to state facts, and not to express inferences or opinions.[16] But, given J.N.'s testimony that Washington asked for money and also looked at the cash register, Washington cannot show that there is a reasonable probability that the trial would have turned out differently if the police officer's testimony were excluded. Therefore, he has not shown ineffective assistance of counsel.

Third, Washington argues that defense counsel was ineffective because she failed to object to the prosecutor's statements regarding the credibility of both Washington and J.N. during closing argument. While it is improper for a prosecutor to vouch for the credibility of a witness, she has reasonable latitude to draw inferences from the evidence, including inferences about witness credibility.[17] Here, the prosecutor's remarks about credibility to the jury were

[16] State v. Madison, 53 Wn. App. 754, 760, 770 P.2d 662 (1989) (citing State v. Dukich, 131 Wash. 50, 53, 228 P. 1019 (1924)).

[17] State v. Gregory, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006) (citing State v. Johnson, 40 Wn. App. 371, 381, 699 P.2d 221 (1985)).

drawn from the evidence. Therefore, defense counsel's failure to object was not unreasonable.

Prosecutorial Misconduct

Washington argues that the prosecutor committed prosecutorial misconduct. We disagree.

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial.[18] We evaluate a prosecutor's conduct by examining it in the full trial context, including the evidence presented, the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions.[19] A defendant suffers prejudice only where there is a substantial likelihood that the prosecutor's misconduct affected the jury's verdict.[20] The defendant bears the burden of showing both prongs of prosecutorial misconduct.[21]

First, Washington argues that during closing argument the prosecutor improperly vouched for J.N.'s credibility and indicated that Washington was not credible. But, as noted above, the prosecutor has reasonable latitude to draw inferences from the evidence about witness credibility and, therefore, her

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[18] State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551 (2011).

[19] Id. (quoting State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997))).

[20] Id. (quoting State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007) (quoting McKenzie, 157 Wn.2d at 52; Brown, 132 Wn.2d at 561)).

[21] State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003).

remarks were not misconduct.[22]

Second, Washington argues that the prosecutor improperly encouraged the jury to render a verdict on assumptions and facts not in evidence because she asked them to determine what he was thinking during the crime. But, intent is an essential element of first degree attempted robbery.[23] Therefore, the prosecutor's argument to the jury that they must determine whether Washington intended to commit robbery was not improper.

Finally, Washington argues that the prosecutor committed misconduct during closing argument by stating that the evidence showed he intended to commit a robbery. As discussed above, there was sufficient evidence of Washington's intent. Therefore the prosecutor had reasonable latitude to draw inferences about that intent and did not commit misconduct by doing so.

Motion to Dismiss

Washington argues that the trial court abused its discretion in denying his motion to dismiss based upon his right to a speedy trial. We disagree.

The trial court may dismiss an action under Criminal Rule 8.3(b), if "due to arbitrary action or governmental misconduct . . . there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." We review a trial court's decision of whether to dismiss under this rule for an abuse of discretion.[24] The trial court abuses its discretion when it bases its

[22] See Gregory, 158 Wn.2d at 810.

[23] RCW 9A.28.020(1).

decision on untenable grounds or on untenable reasons, or its decision is manifestly unreasonable.[25]

Violation of the speedy trial right is not a constitutional violation in and of itself absent a showing that the defendant suffered some prejudice as a result of the delay.[26] Because Washington offers no substantive argument that he was prejudiced, he fails to show that the trial court abused its discretion in denying his motion to dismiss.

Cumulative Error

Washington argues that cumulative error deprived him of a fair trial. Under the cumulative error doctrine, a defendant may be denied a fair trial where the combined effect of errors committed by the trial court, none of which standing alone require reversal, prejudices the defendant.[27] Here, there is no showing that Washington was denied a fair trial by cumulative error because there were not multiple errors.

We affirm the judgment and sentence.

Cox, J.

[24] State v. Ramos, 83 Wn. App. 622, 636, 922 P.2d 193 (1996).

[25] Id.

[26] State v. Wieman, 19 Wn. App. 641, 645, 577 P.2d 154 (1978) (the accused must proffer a showing of prejudice in order to show a violation of his or her right to a speedy trial).

[27] State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

WE CONCUR: