IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER COLEN BINGHAM, ERIC ARTHUR COOPER, DANIEL JAMES MILLER, Appellants, and ANTHONY BRIAN ROBLES, and each of them, Defendant.	)	No. 67469-2-I (consolidated with 67505-2-I & 67555-9-I) DIVISION ONE UNPUBLISHED OPINION FILED: November 13, 2012

BECKER, J. – Daniel Miller, Eric Cooper, and Christopher Bingham appeal their convictions for first degree burglary and first degree robbery, arguing that the trial court erred by denying a motion for a mistrial based on an alleged violation of an order in limine. Miller challenges the sufficiency of the evidence. Bingham contends he received ineffective assistance of counsel and challenges his sentence. Miller and Bingham also filed statements of additional grounds for review raising several claims. Because the appellants fail to

establish any error, we affirm.

FACTS

In October 2010, Darin Keatts was living in a house with Christopher Bingham and Anthony Robles. On November 1, Keatts moved out after he failed to pay his share of the rent and Robles took his truck. A few days later, after paying Bingham the rent he owed, Keatts returned to the house to get his truck. A person Keatts did not know gave him the truck keys but would not let him into the house to collect his belongings. Later in November, Bingham called Keatts and told him to come to the house because some things had been stolen. At the house, Keatts met Bingham and Eric Cooper. Keatts went with them into the garage to see whether his tools had been stolen. Bingham accused Keatts of reporting to the police that Robles had stolen his truck. Cooper punched Keatts repeatedly, and Bingham hit Keatts with a bat, telling him they would kill him if he went to the police. Keatts did not immediately report the incident.

In the early morning hours of November 30, Keatts woke to the sound of loud pounding on the front door of the house where he was staying with an acquaintance, Tyler Anway. When Keatts went to the front door and looked through the peephole, he saw Cooper and two others. Keatts asked what they wanted, and Cooper shouted that he should open the door so they could talk. As Keatts ran back through the house and out through the garage, he heard a loud bang, which he presumed was Cooper kicking in the front door. As he ran out through the garage, he saw Daniel Miller standing outside the door and then

entering the house. Keatts ran to a neighbor's yard and hid in the bushes until the neighbor brought a phone for him to speak with an emergency operator.

Meanwhile, Anway woke when he heard someone kicking open his front door. He opened his bedroom door to find Cooper standing in the house just outside his bedroom door. Anway also saw Bingham, Robles, and Miller inside his house. Cooper punched Anway and accused him of stealing an amp. Anway tried to run but was trapped in a back room by all four men who hit him repeatedly and took items out of the house. The men then ran out of the house, leaving Anway bleeding from his nose and sore. The police arrived moments later. Anway gave a statement and identified Bingham, Cooper, Miller, and Robles.

The State charged Miller, Cooper, and Bingham with first degree burglary and first degree robbery based on the events at Anway's house on November 30. The State also charged Bingham and Cooper with second degree assault and intimidating a witness based on the events at Bingham's house earlier in November.[1] Following trial, the jury found all three guilty of burglary and robbery, but acquitted Bingham and Cooper of assault and witness intimidation. The trial court imposed standard range sentences for Miller and Cooper, but gave Bingham an exceptional sentence.

Miller, Cooper, and Bingham appeal.

DISCUSSION

[1] The State also filed criminal charges against Robles, who entered a guilty plea before the other codefendants went to trial.

All three appellants contend that the trial court erred by denying their motion for a mistrial based on the testimony of Detective Theresa Schrimpsher. Prior to trial and without discussion on the record or objection by the State, the trial court granted the following defense motion:

> F. Motion To Admonish State Witness Regarding Origin of Montage Photos:
>
> The state's witnesses should refrain from testifying that any photo of the defendant used for the purpose of the photo montage in this matter were obtained from prior arrests. Allowing the state to mention any prior unrelated arrest is inadmissible pursuant to 404(b).

At trial, Detective Schrimpsher testified that Detective Thien Do, who was leading the investigation of the incidents at Anway's house, asked her to show Anway some photo montages. She testified that Detective Do gave her "some photo montage numbers to enter into the computer and have the computer print them out." Then the following exchange occurred:

> Q. All right. Now, I assume you can't just make a montage out of thin air. Do you need something to get started before you actually meet with a witness?
> A. Typically, you take a photograph, and normally, that's a booking photograph.
> [Defense Counsel]: Objection.
> [The Court]: Sustained.
> Q. A photograph of some type. I assume you make montages of different pictures?
> A. Yes, I do.
> Q. Without being specific, how do you get started, is what I'm saying, are you given a name from which to work or a description?
> A. I'm normally given the name of an individual, yes.
> Q. Okay. Do you remember what happened in this case?
> A. In this case, I was given the numbers of the booking -- of the montage forms that were already --
> [Defense Counsel]: Objection.

After a sidebar, the trial court instructed the jury:

> In terms of the montage testimony, we'll start over, all of that is stricken, the jury is to disregard totally what you have heard with respect to montage testimony up to this point. So let's just start over.

Detective Schrimpsher then testified that Detective Do created the montages and gave her montage numbers to input into the computer to print the montages. She identified the numbers appearing on the montage forms as the numbers given to her by Detective Do. Detective Schrimpsher explained that she did not know the names of any of the individuals pictured in the montages and she did not know the details of the incidents at Anway's house. She testified that she showed the montages to Anway, who identified Miller, Cooper, and Bingham in the montages.

Outside the presence of the jury, the defense moved for a mistrial, arguing that the detective's two references to "booking photos" violated the court's pretrial order, informed the jury that the defendants were in jail, and allowed the jury to infer that they were convicted felons. The trial court found that the detective's statements were not prejudicial and denied the motion for a mistrial.

Miller, Cooper, and Bingham now argue that Detective Schrimpsher violated the trial court's order in limine by telling the jury that the photos used in the montages were booking photos of the defendants, thereby unnecessarily and prejudicially allowing the jury to infer they had criminal records and/or were

convicted felons. Miller and Cooper rely particularly on State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987), to argue that their convictions must be reversed. In Escalona, despite an order in limine excluding mention of the defendant's prior conviction for assault with a knife, the victim testified that the defendant "already has a record and had stabbed someone." Escalona, 49 Wn. App. at 253. The trial court gave a curative instruction and denied a motion for a mistrial. This court reversed because the similarity between the prior crime and the charged crime, also assault with a knife, made the remark incurably prejudicial and the State's case was otherwise weak. Escalona, 48 Wn. App. at 256.

We review the denial of a mistrial motion for abuse of discretion. State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172, 837 P.2d 599 (1992). This standard recognizes that the trial judge is in a better position than we are to determine "whether the testimony, when viewed against the backdrop of all the evidence, so tainted the trial" that the defendants did not receive a fair trial. Post, 118 Wn.2d at 620. Here the trial court did not believe that the reference to "booking photos" was prejudicial. We cannot say that the trial judge, who was able to hear how the testimony was delivered, abused his discretion when he determined that the remarks would not have a prejudicial impact. Detective Schrimpsher initially said only that booking photos are typically used in photo montages. Her second use of the word "booking" appears to have been inadvertent and immediately corrected to "montage" to describe the numbers she

received from Detective Do.

Neither use of the word "booking" can be accurately described as a statement that the montages actually included photos of Miller, Cooper, or Bingham obtained from prior arrests in violation of the order in limine. And unlike Escalona, the reference to "booking photos" here was not specifically relevant to the charges. Finally, the trial court instructed the jury to "disregard totally what you have heard with respect to montage testimony up to this point." The jury is presumed to follow the court's instruction. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). Given the limited nature of the remarks, the clear curative instruction, and the broad discretion allowed the trial court to determine whether the trial was fair, we affirm the decision to deny the mistrial motion.

Miller next claims that the State failed to produce sufficient evidence to convict him of burglary and robbery. He claims that Anway failed to describe anything Miller might or might not have done in the house. He also claims that Keatts only testified that he had seen Miller outside Anway's house.[2]

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly

[2] This is incorrect. On cross-examination, Keatts also testified that when he came out of the garage, he saw Miller go into the house.

against the defendant. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

To convict Miller of first degree burglary, the jury had to find that, with intent to commit a crime against a person or property therein, Miller or an accomplice entered or remained unlawfully in a building, and in entering or while in the building or in immediate flight therefrom, Miller or an accomplice assaulted Anway. RCW 9A.52.020(1)(b). To convict Miller of first degree robbery, the jury had to find that he or an accomplice, with intent to commit theft, took personal property from Anway's person or in his presence by the use or threatened use of immediate force, violence or fear of injury, and in the course of these acts or immediate flight therefrom inflicted bodily injury. RCW 9A.56.190; RCW 9A.56.200(1)(iii).

Anway testified that he knew Miller and he saw Miller and three other men "rummaging through the house." Anway testified that while he was trapped in the back bedroom of the house, all four men "started beating me up." Anway testified that he had no doubt in his mind that all four men beat him. While he was being punched and kicked, Anway repeatedly saw them take turns carrying his belongings, such as an amp or speaker, out of the room and then return to continue beating him. When the men ran away, he was bleeding, confused and sore. A reasonable juror could infer from this evidence that Miller entered the house and at least aided the others in assaulting Anway and taking his personal

possessions. On this record, we conclude sufficient evidence supported Miller's burglary and robbery convictions.

Bingham next contends he received ineffective assistance of counsel because his attorney failed to object when Keatts testified that he had been at Bingham's house "one day that the DOC came and Chris went to jail." Bingham argues that the remark informed the jury that he had a criminal record. He claims he was prejudiced because the jury would likely convict based on a propensity for criminal behavior.

To prove ineffective assistance of counsel, a defendant must show (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, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. 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). The court engages in a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335. Defense counsel's legitimate trial strategy or tactics cannot be the basis for a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

Here, defense counsel could have reasonably decided not to object in order to avoid calling unnecessary attention to the remark. See, e.g., State v.

Gladden, 116 Wn. App. 561, 567-68, 66 P.3d 1095 (2003) (failure to object to witness's unsolicited remark about time defendant "got out of prison" could be described as legitimate trial tactic to avoid drawing attention to information he sought to exclude). The remark was not directly responsive to the prosecutor's question, and the prosecutor did not further inquire into the matter or return to the subject. Moreover, Bingham cannot establish prejudice. The jury was clearly able to consider the charges without being improperly swayed by Keatts's reference to jail because it acquitted Bingham of the charges arising from the incidents Keatts described as occurring at Bingham's house. Bingham's ineffective assistance of counsel claim fails.

Bingham next challenges his sentence. In particular, he claims that the burglary and the robbery constituted the same criminal conduct and that his exceptional sentence is improper.

We will not disturb a trial court's decision about same criminal conduct unless the court clearly abused its discretion or misapplied the law. State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440, cert. denied, 498 U.S. 838 (1990); State v. Lopez, 142 Wn. App. 341, 351, 174 P.3d 1216 (2007), review denied, 164 Wn.2d 1012 (2008).

To constitute the "same criminal conduct," both crimes must involve: (1) the same criminal intent, (2) the same time and place, and (3) the same victim. RCW 9.94A.589(1)(a). We narrowly construe RCW 9.94A.589(1)(a) and disallow most assertions of same criminal conduct. State v. Wilson, 136 Wn.

App. 596, 613, 150 P.3d 144 (2007). In construing the "same criminal intent" requirement, the standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next. State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). Whether one crime furthered the other is relevant. Vike, 125 Wn.2d at 411, 885 P.2d 824.

Bingham contends that the trial court erred in determining that his crimes differed in criminal intent. He claims that his single intent was to steal Anway's property, he entered the house to commit the robbery, and the burglary furthered the robbery. Bingham's self-serving statement is not determinative of his intent. See State v. Freeman, 118 Wn. App. 365, 378, 76 P.3d 732 (2003) (trial court not legally bound to accept defendant's self-serving description of his subjective intent), aff'd, 153 Wn.2d 765, 108 P.3d 753 (2005). Viewed objectively, the intent for burglary is to commit any crime in the premises. RCW 9A.52.020(1). The intent of robbery is to take personal property. RCW 9A.56.190. Upon entering the house, Bingham and his accomplices damaged Anway's property, accused Anway of theft, assaulted Anway, and took his personal property. These facts allowed the trial court to reasonably conclude that Bingham entered the house to confront Anway and find his missing property, and then, when he failed to find his own property, formed a new criminal intent to beat Anway and take Anway's personal property. Bingham fails to demonstrate abuse of discretion or misapplication of the law in the trial court's determination that the burglary and robbery were not the same criminal conduct.

As to the exceptional sentence, Bingham argues the trial court lacked authority to impose an exceptional sentence under RCW 9.94A.535(2)(c)[3] because the burglary and robbery were the same criminal conduct. Because we affirm the trial court's rejection of his same criminal conduct argument, and because Bingham fails to establish any error in the exceptional sentence, we also affirm his exceptional sentence.

Miller and Bingham have each filed a statement of additional grounds for review. Bingham first contends that the trial court erred by failing to sever counts 1 and 2 from counts 3 and 4, and Miller first argues that he received ineffective assistance of counsel when his attorney failed to move to sever his trial from that of the other defendants. But the jury acquitted Bingham and Cooper of the counts arising from the incidents at Bingham's house, counts 3 and 4. Because Bingham and Miller fail to explain or establish prejudice, that is, how the outcome of the remaining charges would have been different had they had separate trials, we need not address these claims further.

Miller and Bingham both claim that their convictions for burglary and robbery violate double jeopardy principles because the two crimes happened at the same time and place and involved the same victim and criminal intent. But as discussed above, this is the test for same criminal conduct. It is not the test for double jeopardy. Miller and Bingham fail to establish a double jeopardy

[3] RCW 9.94A.535(2)(c) provides that the trial court may impose an exceptional sentence where the "defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished."

violation.

Miller and Bingham also contend that the accomplice liability instruction relieved the State of its burden to prove all essential elements of the charged offenses. But rather than articulating any explanation of this alleged error, they refer to counsels' briefing presented with a motion for a new trial. The briefing does not appear in the record before this court on appeal. At the sentencing hearing, defense counsel argued that two questions posed by the jury during deliberations demonstrated that the jury was confused about accomplice liability. The trial court determined that the jury instructions contained no error and denied the motion for a new trial. Because Miller and Bingham provide no reason to question the trial court's conclusion and fail to sufficiently inform this court of the nature of the error they allege, we will not consider it. RAP 10.10(c).

Miller and Bingham also argue that the trial court erred in denying a motion for mistrial based on juror misconduct. After the verdict, Bingham's attorney sought permission to withdraw as counsel so that he could provide testimony regarding an interaction with a juror outside the courtroom. The trial court questioned the identified juror. The juror heard the attorney talking to another man, saying, "My guy is looking at ten to fifteen." The juror thought the attorney saw her and assumed he was talking about some other case. The juror said that she did not think about the remark, did not tell any other juror about it, and only mentioned it to the attorney after the verdict had been read and the jury released. The trial court concluded that the attorney had no basis to withdraw,

finding the juror "assumed it was about someone else, so it had no bearing on anything that the jury did." At the sentencing hearing, the trial court denied the defense motion for mistrial based on juror misconduct for the same reason. The record does not provide any basis to question the trial court's determination.

Miller also contends that his speedy trial right was violated when the trial court continued the trial date over his objections at the request of counsel for his codefendants. Miller states that he cannot provide the dates of the continuances because he does not have copies of the clerk's papers or pretrial transcripts. But this court is not required to search the record in support of his claim. RAP 10.10(c). We decline to address it.

Bingham argues that his 258 month sentence was clearly excessive because his codefendants received significantly less confinement. The trial court imposed 171 months for the robbery for all three defendants, 116 months on the burglary to run concurrently for Miller and Cooper, and 87 months on the burglary to run consecutively for Bingham. The trial court based the exceptional sentence on Bingham's high offender score. Bingham claims the trial court failed to consider whether his sentence was proportionate to those of his codefendants. At sentencing, the State requested an exceptional sentence based on Bingham's high offender scores of 19 for the burglary and 18 for the robbery. Miller and Cooper had offender scores of 13 and 11 respectively. The State also pointed out that Bingham was unique among the three codefendants because he had recently pleaded guilty to unlawful possession of a firearm in

the second degree and had committed the current crimes while the firearm charge was still pending. Thus, the record reveals that the trial court considered the different circumstances of the codefendants. Bingham fails to establish any abuse of the trial court's discretion in the decision to impose an exceptional sentence in Bingham's case only.

Bingham contends he "received in essence what is a life sentence" constituting cruel and unusual punishment. But the trial court imposed standard range sentences for each count, both of which have a statutory maximum of life. RCW 9A.52.020(2); RCW 9A.56.200(2); RCW 9A.20.021(1)(a). Punishment is cruel and unusual if it "is of such disproportionate character to the offense as to shock the general conscience and violate principles of fundamental fairness." State v. LaRoque, 16 Wn. App. 808, 810, 560 P.2d 1149 (1977). Because Bingham fails to sufficiently inform this court of his reasons for believing his sentence to be disproportionate, shocking, or unfair, we will not address this claim.

Finally, Bingham contends the State failed to produce sufficient evidence that he inflicted "bodily injury" in the course of the robbery because Anway declined medical attention immediately following the crime. Bodily injury is defined as "physical pain or injury, illness, or an impairment of physical condition." RCW 9A.04.110(4)(a). Anway testified that he was bleeding, sore, and bruised after Bingham and the others beat him. Detective Mark Pike, who spoke to Anway immediately after the beating, testified that Anway was in a

daze, had a hard time breathing, and had fresh blood and bruises on his face. This evidence, viewed in a light most favorable to the State, was sufficient to permit a rational trier of fact to find that Bingham and the others inflicted bodily injury in the commission or while in immediate flight from a robbery.

Affirmed.

Becker, J.

WE CONCUR:

Dwyer, J.

Grosse, J.