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Washington State
Court of Appeals
Division Two

March 8, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Personal Restraint Petition of DARRELL K. JACKSON, Petitioner.	No. 46411-0-II UNPUBLISHED OPINION

BJORGEN, A.C.J. — Darrell Kantreal Jackson seeks relief from personal restraint imposed following his convictions for two counts of aggravated first degree murder, two counts of felony murder, one count of first degree burglary, and one count of first degree robbery. He makes five claims in this timely personal restraint petition (PRP): (1) the prosecutor committed several instances of prosecutorial misconduct during his trial, (2) he received ineffective assistance of counsel based on his counsel's failure to object to the admission of a witness's plea agreement, to the prosecutor's vouching of that witness with the plea agreement, and to the alleged instances of prosecutorial misconduct, (3) he was entitled to a *Petrich*[1] jury unanimity instruction, (4) the

[1] *State v. Petrich*, 101 Wn.2d 566, 572, 883 P.2d 173 (1984).

first degree murder aggravators should have been submitted to the jury as part of the to-convict instruction, and (5) his convictions and aggravators subjected him to double jeopardy.

We hold that (1) Jackson fails to show prosecutorial misconduct, (2) he fails to demonstrate ineffective assistance of counsel, (3) he was not entitled to a jury unanimity instruction because he was not charged with a single criminal count based on several instances of criminal conduct, (4) the aggravators need not be incorporated into the to-convict instruction, and (5) he was subjected to double jeopardy when the sentencing court failed to vacate his felony murder convictions and strike the references to them.

Accordingly, we grant Jackson's PRP in part and order the sentencing court to vacate his convictions for felony murder and strike any references in the judgment and sentence to these convictions. We deny relief on his other claims.

FACTS

The facts underlying Jackson's convictions are set out in the following passage from our decision of his direct appeal:

> On September 23, 2007, police found Ruben Doria and Abraham Warren Abrazado stabbed to death in their apartment. . . .
>
> Doria, who had a medical marijuana license to grow marijuana for personal medicinal use, had also engaged in the illegal sale of marijuana to friends and acquaintances. . . . About two to three months before his murder, Doria had begun selling marijuana to Darrel Jackson almost daily. . . . Doria "front[ed]" marijuana to Jackson, who, consequently, owed Doria money.
>
> . . . .
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> The night before the murders, [Jackson along with Tyreek Smith and Pierre Spencer] met to discuss robbing Doria, whom, they believed, would not call the police because of his drug dealings. They planned that Jackson would call Doria under the pretext of purchasing marijuana, but in reality, they would be seeking an opportunity to gain entrance to Doria's apartment.
>
> . . . .

> The next morning, Spencer picked up Smith and drove him to an acquaintance's apartment, which Smith entered briefly; Smith returned with a rifle wrapped in a blanket.
>
> Spencer and Smith picked up Jackson, and they returned to Doria's apartment to commit the planned robbery. After they saw Doria's roommate, Warren Abrazado, drive away, Jackson called Doria . . . and Doria let Spencer, Smith, and Jackson inside his apartment. [Once inside, Jackson brandished a .357 revolver that Smith had previously purchased from Spencer.]. . . . Jackson [then] instructed Spencer to bind Doria's hands, legs, and mouth with duct tape. Jackson, Smith, and Spencer then put on gloves. Smith bound Doria as instructed. Smith turned up the stereo volume, pointed the rifle at Doria, and helped Spencer gather marijuana plants. Jackson instructed Spencer to look for "a little safe" in the bedroom. When Spencer could not locate Doria's safe, Jackson began looking for it.
>
> . . . .
>
> When Jackson returned to the front room with the safe, Smith said they had to "get rid of" Doria because he could potentially identify them. Someone knocked on the door, and Doria's phone began to ring. After the person at the door left, Spencer resumed carrying marijuana plants to the front room. When Spencer next returned, he saw Smith stabbing Doria. Because they "were in this all together," Smith handed the knife to Jackson, who stabbed Doria once; Jackson then handed the knife to Spencer, who also stabbed Doria once. 11 VRP at 1458. After checking Doria's pulse, Smith slit Doria's throat.
>
> Jackson, Smith, and Spencer were about to load the plants into their vehicle when they heard keys unlocking Doria's apartment door. Abrazado entered, saw Doria's body, and said, "Oh, my God, please don't kill me!" 11 VRP at 1464. Jackson and Smith grabbed Abrazado and pulled him into the apartment; Jackson slit Abrazado's throat. Jackson, Smith, and Spencer loaded into Doria's vehicle the marijuana plants, a video-game console, a laptop computer, and the safe; after unloading at Jackson's apartment, Jackson then drove Doria's vehicle to a local casino, with Spencer following him in his vehicle, where Jackson and Spencer abandoned the stolen vehicle.
>
> . . . .
>
> About four months later, police arrested Jackson and Smith on suspicion of the crimes. Jackson and Smith made incriminating statements against each other. Police also arrested and charged Spencer, who confessed and gave a statement implicating all three men.

State v. Smith, 162 Wn. App. 833, 836-39, 262 P.3d 72 (2011) (footnotes omitted) (citations omitted).

The State charged Jackson by second amended information with two counts of first degree murder of Doria and Abrazado, two counts of felony murder based on the same victims, one count of first degree robbery as to Doria, and one count of first degree burglary as to Doria. The State also charged four aggravators on each first degree murder charge, two of which were that the murder was committed in the course of, in furtherance of, or in immediate flight from robbery in the first degree and/or burglary in the first degree.[2] The jury returned guilty verdicts on all counts and aggravators.

The sentencing court merged the felony murder convictions into the aggravated first degree murder convictions and sentenced Jackson based on the aggravated first degree murder, burglary, and robbery convictions. However, the sentencing court did not vacate the felony murder convictions and the statutory references to the felony murder convictions remain on his judgment and sentence. Jackson appealed to our court in *Smith*, 162 Wn. App. 833, and we affirmed all of his convictions. The Washington Supreme Court denied review and Jackson brought this timely PRP. RCW 10.73.090.

ANALYSIS

I. PRP LEGAL PRINCIPLES

"To be entitled to collateral relief through a PRP the petitioner must first prove error 'by a preponderance of the evidence.'" *In re Pers. Restraint of Crow*, 187 Wn. App. 414, 420-21, 349 P.3d 902 (2015) (quoting *In re Pers. Restraint of Monschke*, 160 Wn. App. 479, 490, 251 P.3d 884 (2010)). Second, if the petitioner is able to show error, he or she then must also prove

[2] The other two aggravators were that (1) Jackson committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime and (2) more than one person was murdered and the murders were part of a common scheme or plan.

prejudice, the degree of which depends on the type of error shown. *Crow*, 187 Wn. App. at 421.

If a constitutional error, the petitioner must demonstrate it resulted in actual and substantial prejudice to him. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 409, 114 P.3d 607 (2005). "Actual and substantial prejudice, which 'must be determined in light of the totality of circumstances,' exists if the error 'so infected petitioner's entire trial that the resulting conviction violates due process.'" *Crow*, 187 Wn. App. at 421 (quoting *In re Pers. Restraint of Music*, 104 Wn.2d 189, 191, 704 P.2d 144 (1985)). If a nonconstitutional error, the petitioner must meet a stricter standard and demonstrate the error resulted in a fundamental defect which inherently resulted in a complete miscarriage of justice. *In re Pers. Restraint of Schreiber*, 189 Wn. App. 110, ¶ 4, 357 P.3d 668 (2015); *Woods*, 154 Wn.2d at 409. If the petitioner fails to make a prima facie showing of either actual and substantial prejudice or a fundamental defect, we deny the PRP. *Schreiber*, 189 Wn. App. at 113.

We also deny the PRP when a petitioner renews an issue "that was raised and rejected on direct appeal, unless the interests of justice require the issue's relitigation." *Id.* "The interests of justice are served by reconsidering a ground for relief if there has been an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application." *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 17, 296 P.3d 872 (2013) (internal quotation marks omitted) (quoting *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 720, 16 P.3d 1 (2001). A PRP should not simply reiterate issues finally resolved at trial and on direct review, and instead, must raise new points of fact and law. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 750, 101 P.3d 1 (2004).

II. PROSECUTORIAL MISCONDUCT

Jackson argues four instances of misconduct during the prosecutor's closing argument: (1) using a jigsaw puzzle analogy to illustrate the meaning of "beyond a reasonable doubt", (2) asking the jury to "reach a verdict that represents the truth," (3) trivializing the "beyond a reasonable doubt" standard by a reference to mathematical certainty and a railroad analogy, and (4) appealing to the jury's passion and prejudice by asking them to do "justice" for the "people of Washington" and to act as the "conscience of the community." RP at 2001.

In summary, we first hold that the jigsaw puzzle analogy was not improper. Second, we hold that Jackson waived his challenges to the second and third comments just noted, because they were not objected to at trial and could have been remedied by a curative instruction. The fourth comment, which was objected to, we agree was improper, but hold that Jackson failed to meet his burden to show that it had a substantial likelihood of prejudicing his trial.

Jackson also argues that the prosecutor engaged in misconduct by improperly vouching for a witness during trial. However, because this argument was already addressed in his direct appeal, we do not reexamine it. Accordingly, we hold that all of Jackson's prosecutorial misconduct claims fail.

1. Legal Principles

To establish prosecutorial misconduct, the defendant must prove that the prosecuting attorney's remarks were both improper and prejudicial. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). "In analyzing prejudice, we do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury." *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

Depending on whether the defendant objected to the improper comments, we analyze prejudice in misconduct claims under one of two standards of review. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). If the defendant objected at trial, the defendant need only show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. *Id.* If, however, the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *Id.* at 760-61. "Under this heightened standard, the defendant must show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' *and* (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Id.* at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

2. Jigsaw Puzzle Analogy

Jackson first argues that the State's use of a jigsaw puzzle analogy was improper and prejudicial. At the end of closing argument, the prosecutor stated:

> I would submit to you that a reasonable doubt is very much like a puzzle. Let's say, one day, you are given a puzzle, and someone tells you, hey this is a puzzle of downtown Portland. Someone else says, it's downtown Seattle. Someone else says, no, it is downtown Tacoma. You have no idea. You can't be convinced beyond a reasonable doubt that it is any of the three cities.
> . . . .
> You continue putting the puzzle together, and there comes a point long before you have all of the pieces, long before every piece is in place, long before every question and every doubt is answered, and as long as the right pieces of the puzzle are there, you can be convinced beyond a reasonable doubt that what you are really looking at is Seattle with Mount Rainier in the background. And so it is with this case, from there, you can fill in the rest of the pieces.

RP at 1914-15.

We examine the State's use of the jigsaw puzzle analogy on a case-by-case basis, considering the context of the argument as a whole. *State v. Fuller*, 169 Wn. App. 797, 825, 282 P.3d 126 (2012). In *Fuller*, 169 Wn. App. at 828, we held that a prosecutor's jigsaw analogy was not improper when it identified "a puzzle with certainty before it was complete without purporting to quantify the degree of certainty required." Similarly, *State v. Curtiss*, 161 Wn. App. 673, 700, 250 P.3d 496 (2011) held that the State's use of a puzzle analogy was not improper, because it merely described "the relationship between circumstantial evidence, direct evidence, and the beyond-a-reasonable-doubt burden of proof." *State v. Johnson*, 158 Wn. App. 677, 682, 685, 243 P.3d 936 (2010), on the other hand, identified limits in using a jigsaw puzzle, holding an analogy improper when the prosecutor directly quantified the State's burden of proof by stating, "You add a *third* piece of the puzzle, and at this point even being able to see only *half*, you can be assured beyond a reasonable doubt that this is going to be a picture of Tacoma." (Emphasis added.)

Here, the prosecutor's arguments did not use the jigsaw puzzle analogy in a way that quantified the beyond a reasonable doubt standard. Similar to *Curtiss* and *Fuller*, the State simply told the jury that "as long as the right pieces of the puzzle are there, you can be convinced beyond a reasonable doubt." RP at 1915. This did not comment on the quantity of pieces needed or how much of the puzzle must be completed before the jury will be convinced beyond a reasonable doubt.

The closest the prosecutor came to quantification was with the comment: "[L]ong before you have all of the pieces . . . every piece is in place . . . and every question and every doubt is answered." RP at 1915. Although we recognize that this is borderline quantification, the comment did not, in the argument's context, quantify how much of the puzzle must be completed

for the jury to convict beyond a reasonable doubt as in *Johnson*. Accordingly, we hold the jigsaw puzzle analogy here was a proper argument.

3. Return a Verdict that Represents the Truth

Jackson next argues that the prosecutor improperly asked "the jury to reach a verdict that represents the truth." PRP at 9. Immediately after discussing the prosecutor's analogy to the jigsaw puzzle, the prosecutor argued:

> [I]f you follow the Court's instructions, we would urge you to *return a verdict in this case that represents the truth*, that is, a verdict of guilty of Count 1, Aggravated Murder; Count 2, Aggravated Murder. We would urge you *to return a verdict that represents the truth*, and that is a verdict of guilty to Counts 3 and 4, Murder in the First Degree, the Felony Murder; and, finally, we're urging you to return a verdict of guilty as charged to the Burglary and Robbery as well.

RP at 1916 (emphasis added). Jackson did not object.

A prosecutor's request that the jury declare or get to the truth is improper. *State v. Evans*, 163 Wn. App. 635, 641, 644-645, 260 P.3d 934 (2011) (prosecutor's statement of "I want you to peel back different layers of the onion to get to the truth" was improper because it "suggested to the jury that it had an obligation to determine the truth"); *State v. Anderson*, 153 Wn. App. 417, 424, 429, 220 P.3d 1273 (2009) (the prosecutor stated, among other improper comments: "The word 'verdict' comes from the Latin word 'veredictum,' which means to *declare the truth*. So, by your verdict in this case, you will *declare the truth* about what happened on August the 21st of 2007 at the Save A Lot.") (emphasis added).

In *State v. Walker*, 164 Wn. App. 724, 733, 265 P.3d 191 (2011), similarly to *Evans* and *Anderson*, we found a prosecutor's invitation to the jury to "declare the truth" improper. However, we distinguished *Curtiss*, 161 Wn. App. at 701, where the prosecutor asked the jury to "return a verdict that you know speaks the truth," which was found to be proper, from *Walker*, 164 Wn. App. at 733, where the prosecutor asked a jury to "decide the truth of what happened."

Here, the prosecutor twice stated that the jury should return a verdict that represents the truth. This comment was arguably improper in the same way as the admonitions in *Evans*, *Anderson*, and *Walker*. Even so, we find Jackson cannot demonstrate that no curative instruction would have remedied the alleged error that occurred here. In fact, the introductory jury instruction, WPIC 1.02,[3] and the beyond a reasonable doubt jury instruction, WPIC 4.01,[4] laid the basis for that cure. In that light, a special curative instruction could certainly have ameliorated any resulting prejudice from these comments. Accordingly, we hold that Jackson waived this error because a jury instruction could have remedied any prejudice derived from the prosecutor's comments.

4. Mathematical Certainty and Railroad Analogy

Jackson next argues that the prosecutor trivialized the reasonable doubt standard by asking the jury to equate it with mathematical certainty as well as using an improper railroad analogy. On rebuttal, the prosecutor made the following comments:

> I would like to start by discussing this topic of reasonable doubt. Mr. Weaver commented to you that, quote, you know, you all have your doubts, and he argued to you the opposite of a doubt is certainty, according, evidently, to the actress, Ms. Streep, although that is not in your jury instructions, that is not the standard, that the State has to prove a case to certainty, to any mathematical certainty, or 100 percent certainty.

RP at 1985.

The prosecutor continued comparing his burden of proof with a railroad analogy:

[3] WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 1.02, at 13-14 (3d ed. 2008) (WPIC) states that lawyers' statements are not evidence and the jury must disregard prosecutor's remarks, statements, or arguments that are not supported by the evidence or in the law of instructions.

[4] WPIC 4.01, at 85 (3d ed. 2008). WPIC 4.01 states that the State has the burden of proof and emphasizes the presumption of innocence given to the defendant.

> I would like you to try to picture in your mind two sets of railroad tracks, four iron rails, if you will, parallel to each other. Imagine that the iron rails are the elements of proof as you will find in the "to convict" instructions. Now, underneath the iron rails are the numerous ties, the pieces of wood that support the iron rails.
>
> Well, the rails are, in this analogy, they are the elements of proof. The ties are all of the myriad of facts and supporting issues of evidence that you are going to have. All right.
>
> Now, if you have concerns and issues about some of that supporting evidence, it is the equivalent of, if you will, removing one of the supporting railroad ties or maybe even several, but the iron rails remain. They are still adequate, more than adequately supported, even if you have concerns about some of the underlying evidence.

RP at 1987. Jackson did not object to these comments.

Similarly to our analysis above, we hold that even if the mathematical certainty and railroad analogy comments were improper, Jackson cannot demonstrate that a curative instruction would not have remedied the prejudice. As stated, since the jury was instructed on WPIC 1.02 and WPIC 4.01, then certainly a specially tailored instruction, if requested, would have remedied any impropriety. Accordingly, Jackson's claim fails.

5. Appeal to Jury's Passion and Prejudice

Next, Jackson argues that at the end of the prosecutor's rebuttal, he improperly appealed to the jury's passion and prejudice because he asked the jury to do justice for the people of Washington as the conscience of the community. The prosecutor stated,

> Ruben and Warren's lives deserve the protection of the law. Any life is precious, beyond measure. The defendants have received the due process of law with all of its protections. They have received a fair trial. Now, it is time for justice to be served for the people of Washington and for Ruben and for Warren. It is time that these defendants be held to account for the heinous crimes that they've committed. It is time for you, as the conscience of the community . . .
>
> [Jackson objects and the court sustains his objection]
>
> [I]t is time for you, as a jury, to return guilty verdicts as to every charge.

RP at 2000-01.

The prosecutor has a duty to seek verdicts that are free from appeals to passion or prejudice. *State v. Rafay*, 168 Wn. App. 734, 829, 285 P.3d 83 (2012); *State v. Hoffman*, 116 Wn.2d 51, 95, 804 P.2d 577 (1991). We have found a prosecutor's statement to return a "just verdict and "doing justice" as proper if it is "clearly made in the context of jury instructions that explained what 'justice' would be in this case." *Anderson*, 153 Wn. App. at 429. In *Anderson*, the prosecutor discussed justice "clearly made in the context of jury instructions" when he stated:

> [T]he purpose of closing argument [is] to take the facts that you heard from the witness stand and fill in the law as it has now been given to you.
>
> The goal of closing argument is to point you toward a just verdict; not just a verdict, but a just verdict.
> . . . .
> Lesser offenses, Theft in the Third Degree and Assault in the Fourth Degree, in this case, would not be justice
> . . . .
> If you water down the defendant's conduct to Robbery in the Second Degree or to Theft in the Third Degree, is that really doing justice?
> . . . .
> [I]s that really doing justice? You took an oath to do your duty to declare a verdict according to the evidence you heard and the law of the State. These facts, this law, Robbery [in the] First Degree for the threatened use of a weapon and the infliction of bodily injury; Assault in the Second Degree for the infliction of temporary but substantial disfigurement, that's the truth of what happened August 21st from the evidence that you were presented. And that's the verdict that I would ask you to return in this case.

Id. at 423, 425 (alteration in original).

In contrast to *Anderson*, the prosecutor here did not refer to the instructions or the facts of the case when he asked that justice be served. Rather, justice was to be done for the "people of Washington" and "the conscience of the community." RP at 2000-01. In light of *Anderson*, the prosecutor's invocation of justice here was improper. The State contends the prosecutor framed

"justice" as part of the beyond a reasonable doubt standard and as part of following the jury instructions. Br. of Resp't at 15. However, unlike in *Anderson*, the prosecutor here did not remind the jurors that "justice" means looking at the facts, evidence, jury instructions, or laws. An earlier call to follow the jury instructions or a reminder that the State must prove its case beyond a reasonable doubt does not save the prosecutor's comments.

Even though these comments were improper, we hold that Jackson fails to show a substantial likelihood of prejudice. The jury was instructed on WPIC 1.02, which specifically reminds a jury to not allow their emotions to override their rational thought process and to reach a decision based on the facts and law, not their personal sympathies, prejudices, or preferences. Although this instruction may not cure every appeal to passion or prejudice, it clearly lays out the jury's duties and was sufficient in this case, given the limited scope and nature of the offending comments. Accordingly, Jackson has not shown prejudice, and this prosecutorial misconduct claim fails.

6. Vouching

Jackson also argues that the prosecutor improperly vouched for witness Spencer in his opening statement and direct testimony. However, we do not address the merits of this issue because it was already raised in his direct appeal, *Smith*, 162 Wn. App. at 841-45, and Jackson fails to demonstrate that the "the interests of justice" require this court to relitigate the issue. *Schreiber*, 189 Wn. App. at 113. There is no intervening change in the law, since the leading case on vouching in this context still remains *State v. Ish*, 170 Wn.2d 189, 241 P.3d 389 (2010), discussed in his direct appeal. Therefore, we decline to readdress the merits of Jackson's prosecutorial misconduct vouching claim.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Jackson next argues that he received ineffective assistance of counsel because his defense counsel failed to object (1) to the State's admission of Spencer's plea agreement and its repeated eliciting that Spencer is bound to tell the truth to the jury based on that plea agreement and (2) to all of the alleged prosecutorial misconduct discussed above.

We hold that (1) Jackson's defense counsel was employing a legitimate tactic to not object to the plea agreement or the eliciting of the plea agreement in Spencer's direct examination, since defense counsel focused on the inconsistencies in Spencer's testimony in cross, re-cross, and his closing argument, and (2) even if it was deficient to not object to some of the arguably improper comments by the prosecutor, Jackson fails to demonstrate the requisite prejudice. Accordingly, Jackson's ineffective assistance of counsel claims fail.

1. Legal Principles

We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on an ineffective assistance of counsel claim, the defendant must show both that (1) defense counsel's representation was deficient, and (2) the deficient representation prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011), *cert. denied*, 135 S. Ct. 153 (2014). If a defendant fails to establish either prong, this court need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Representation is deficient if after considering all the circumstances, it falls below an objective standard of reasonableness. *Grier*, 171 Wn.2d at 33. To demonstrate deficient performance the defendant must show that, based on the record, there were no legitimate

strategic or tactical reasons for the challenged conduct. *Emery*, 174 Wn.2d at 755. The law affords trial counsel wide latitude in the choice of tactics. *Stenson*, 142 Wn.2d at 736.

Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the proceeding would have differed. *Grier*, 171 Wn.2d at 34. In the context of a PRP, a petitioner who shows prejudice under this standard effectively meets his burden in showing actual and substantial prejudice on collateral attack. *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 848, 280 P.3d 1102 (2012).

"The decision of when or whether to object is a classic example of trial tactics." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Therefore, we presume "that the failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption." *State v. Johnston*, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *Madison*, 53 Wn. App. at 763. To prove that failure to object rendered counsel ineffective, the petitioner must show that (1) not objecting fell below prevailing professional norms, (2) the proposed objection would likely have been sustained, and (3) the result of the trial would have been different if the evidence had not been admitted. *Davis*, 152 Wn.2d at 714.

2. Failure to Object to Witness's Plea Agreement and Prosecutor's Related Comments

Spencer, who was with Jackson and Smith on the night they killed Doria and Abrazado, entered into a plea agreement with the State to testify "truthfully" against Jackson and Smith at trial for reduced charges. *Smith*, 162 Wn. App. at 839. As such, he was one of the State's primary witnesses. At trial, the prosecutor had the plea statement admitted and referenced it several times throughout direct, redirect, and closing argument. *Id.* at 841-846. Jackson now

argues that it was ineffective for defense counsel not to object to the admission of Spencer's plea agreement and to the prosecutor's repeated insistence that the plea agreement required Spencer to tell the truth. We disagree.

In the context of plea agreements, "evidence that a witness has agreed to testify truthfully generally has little probative value and should not be admitted as part of the State's case in chief." *Ish*, 170 Wn.2d at 198 (plurality). However, if the State seeks to admit a plea agreement with the self-serving provision for the witness to testify truthfully, that provision should be excluded or redacted. *Id.* Four justices in *Ish* held that the State can elicit a plea agreement's provision to testify truthfully during direct examination in order to "pull the sting" from an anticipated cross examination from defense. *Id.* at 202, 206 (Stephens, J., concurring). However, four other justices in *Ish* stated that the defense must open the door first on cross examination, and then the State can elicit a plea agreement's "testify truthfully" provision on redirect examination. *Id.* at 199 (plurality).

We recognize that admitting the plea agreement and the State's repeated references to Spencer telling the truth may have been improper vouching under *Ish* and that objections by defense counsel may have been sustained. However, defense counsel had a legitimate tactic in declining to object.

State v. Coleman, 155 Wn. App. 951, 959-60, 231 P.3d 212 (2010), rejected defendant's claim of ineffective assistance of counsel because even though his trial attorney pointed out that the witness was under an obligation to testify truthfully, he used the plea agreement to expose and emphasize the witness's repeated lying. Similarly, Jackson's counsel attempted to impeach Spencer's plea agreement to tell the truth and repeatedly emphasized Spencer's inconsistencies as a witness. For example, Spencer testified on cross examination that he never was called the

nickname "Mexico." RP at 1575. During closing argument, defense counsel highlighted this testimony to emphasize that the jury must be skeptical when they evaluate whether Spencer was telling the truth,

> Now, you know as well as I do that when people are in a situation where they have the opportunity to be completely honest or to start fudging a little bit and they want to get away with it, they get caught on the small details. That's where you can tell whether someone is telling you a lie about the bigger picture if they are caught in the small details.
>
> That's why we point out that Mr. Spencer lied to you when he got up there and said, " I have never been called Mexico." You are going, so, what? It means that he was willing to sit there and look at you and lie to you about a small detail, whether or not he was ever called Mexico. You know that for two reasons. One there's the people that testified that that is the only way that they knew him. The other one is that Detective Davis, during the interview, asked him specifically, do you go by the name Mexico? He was told yes. Who on the witness stand was being honest with you? Detective Davis or Pierre Spencer.

RP at 1976-77. At one point during cross examination of Spencer, defense counsel brought up the plea agreement and impeached Spencer asking: "Isn't it true that the person who decides whether or not you are being completely truthful is sitting right here, the prosecutor?" RP at 1599. Similar to *Coleman*, it was a legitimate tactic to purposely not object to the prosecutor's statements and then to impeach Spencer's testimony and put a question in the jury's mind as to whether he was indeed telling the truth.[5] Accordingly, Jackson's ineffective assistance of counsel claim based on the plea agreement fails.

3. Prosecutorial Misconduct

Jackson also argues that defense counsel was deficient in failing to object to all the alleged instances of prosecutorial misconduct discussed above in this opinion. As an initial

[5] For other examples of Jackson's counsel impeaching Spencer, see RP at 1579-80, 1587-90, and 1599-1600.

matter, we found the jigsaw puzzle analogy to be proper and defense counsel did object to the conscience of the community argument. Therefore, his ineffective assistance of counsel claim for failing to object to these two comments must fail.

Jackson's ineffective assistance of counsel claim, then, rests on the remaining comments: asking the jury to return a verdict that represents the truth and equating the beyond a reasonable doubt standard to a mathematical certainty and using a railroad analogy. Assuming that these comments were improper and that defense counsel was deficient for failing to object, we hold that Jackson does not meet his burden in demonstrating prejudice. As discussed above, the jury instructions, WPIC 1.02 and WPIC 4.01, would have helped to cure prejudice resulting from these comments. More importantly, with the extensive evidence presented at trial of Jackson's guilt, it cannot be said that even if defense counsel had objected, there was a reasonable probability that the result of the proceeding would have differed. *Grier*, 171 Wn.2d at 34. For these reasons, Jackson's ineffective assistance claim based on the failure to object to the alleged prosecutorial misconduct fails.[6]

IV. UNANIMITY INSTRUCTION

Jackson argues that his right to a unanimous jury verdict was violated and that he was entitled to a *Petrich* jury unanimity instruction because the jury did not have to agree on the same underlying act for each charge. Because he was charged with multiple counts pertaining to multiple acts, we reject this argument.

[6] Jackson also argues that defense counsel was deficient because he did not seek "alternative means instructions, unanimity instructions, [and] proximate cause instructions." PRP at 31. However, Jackson spends less than a paragraph briefing these issues. We find that these are "conclusory allegations" and do not further consider them them. *In re Pers. Restraint of Monschke*, 160 Wn. App. 479, 488, 251 P.3d 884 (2010) ("The petitioner must support the petition with facts or evidence and may not rely solely on conclusory allegations").

"'When the evidence indicates that several distinct criminal acts have been committed, but defendant is charged with only one count of criminal conduct, jury unanimity must be protected.'" *State v. Carson*, 184 Wn.2d 207, 217, 357 P.3d 1064 (2015) (quoting *Petrich*, 101 Wn.2d at 572). In these situations, the State, in its discretion, can either (1) elect the act upon which it will rely for conviction, or (2) have the jury instructed pursuant to *Petrich* that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt. *Id.* As the State points out, Jackson did not meet the threshold to receive a *Petrich* instruction because the State charged him with multiple counts for each alleged criminal act they sought to prove. He was not charged with only one count of criminal conduct that could have been met by several different criminal acts, which is a prerequisite to triggering the *Petrich* doctrine. Instead, each alleged criminal act had a corresponding charge. Following *Carson*, we hold that Jackson was not entitled to a *Petrich* instruction.[7]

V. AGGRAVATING FACTORS—TO CONVICT INSTRUCTION

Jackson next argues that "[b]ecause the aggravating factors were not defined and set out in the to convict instruction, the [S]tate was relieved of its burden to prove all essential elements of the crimes charged." PRP at 17. We hold that the to convict instruction was not required to contain the aggravators.

[7] Jackson's claim that the jury did not agree on the same underlying act is also without merit. The jury was instructed, "A separate crime is charged in each count. You must separately decide each count charged against each defendant. Your verdict as to one defendant should not control your verdict on any other count or as to the other defendant." Br. of Resp't, App. V, Instruction 4; RP at 1866. "'Juries are presumed to follow instructions absent evidence to the contrary.'" *State v. Lamar*, 180 Wn.2d 576, 586, 327 P.3d 46 (2014) (quoting *State v. Dye*, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013)). Jackson has failed to rebut this presumption.

"We consider challenges to jury instructions in the context of the jury instructions as a whole." *State v. Johnson*, 180 Wn.2d 295, 306, 325 P.3d 135 (2014). "'Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt.'" *Id.* (emphasis omitted) (quoting *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995)). "Specifically, the 'to convict [jury] instruction must contain all of the elements of the crime because it serves as a yardstick by which the jury measures the evidence to determine guilt or innocence.'" *Id.* (alteration in original) (quoting *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010)). We will not look to other jury instructions to supplement a defective to convict instruction. *Id.*

In *State v. Kincaid*, the Washington Supreme Court held that aggravators are not elements of the offense and need not be included in the "to convict" instructions. 103 Wn.2d 304, 307, 692 P.2d 823 (1985) (aggravating circumstances are not elements of premeditated first degree murder, and as such, "it is unnecessary that the aggravating circumstances alleged to exist be set forth as elements of the offense in the 'to convict' instruction on the underlying murder charged."); *see also State v. Siers*, 174 Wn.2d 269, 282, 274 P.3d 358 (2012) (aggravated sentencing factors are not the functional equivalent of essential elements and need not be included in a prosecutor's charging document or information).

However, Jackson argues that the *Apprendi* and *Alleyne* decisions by the United States Supreme Court have called the validity of *Kincaid* into question. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *Alleyne v. United States*, 133 S. Ct. 2151, 186 L. Ed. 2d 314. In *Apprendi*, the Court held the defendant's right to due process was violated when a trial judge enhanced the defendant's sentence without a jury determination and instead found by a preponderance of the evidence that the crime was committed with racial motivation.

530 U.S. at 471, 490, 497. Similarly, in *Alleyne*, the Court held that a defendant's right to trial by jury was violated when a sentencing court enhanced a defendant's sentence by making its own finding that the defendant had brandished a weapon, which increased his mandatory minimum sentence from five to seven years. 133 S. Ct. at 2156, 2163-64.

The principle to be derived from *Apprendi* and *Alleyne* is that the jury, not a judge, must find beyond a reasonable doubt any circumstances that could increase a defendant's punishment or sentence. If the sentencing judge had found Jackson's aggravating circumstances, for example, those decisions would require us to reverse his enhancements. However, here it was the jury who found Jackson's aggravators beyond a reasonable doubt. Even though the aggravators were not submitted as part of the to-convict instructions, this did not offend the principles underlying *Apprendi* and *Alleyne*. Accordingly, we hold that *Kincaid* is still sound law and that the aggravators need not be included in the to-convict instruction.[8]

VI. DOUBLE JEOPARDY

Jackson argues that he was subjected to double jeopardy based on (1) his two convictions for aggravated first degree murder and felony murder grounded in the same conduct, and (2) his two convictions for first degree murder with burglary and robbery aggravators and separate substantive burglary and robbery convictions. We agree with Jackson that although the sentencing court merged his felony murder and aggravated murder convictions, the court's failure to vacate the felony murder convictions, as well as to strike the statutory references to

[8] Jackson also argues that several jury instructions were not provided, including an alternative means instruction, a unanimity instruction, and a definition of "attempt." PRP at 12. On the contrary, a unanimity instruction and definition of "attempt" were provided. Br. of Resp't, App. V, Instruction 2, 24; RP at 1866 . An alternative means instruction was not required because he was not charged as such, but as separate counts that ended up merging.

felony murder on his judgment and sentence, subjected him to double jeopardy. However, we disagree that the burglary and robbery aggravated first degree murder and separate substantive convictions for burglary and robbery subjected him to double jeopardy. Accordingly, we remand and order the sentencing court to vacate the felony murder convictions and to strike any references to those convictions from his judgment and sentence.

1. Legal Principles

Whether a defendant's convictions violate double jeopardy is a question of law that we review de novo. *State v. Womac*, 160 Wn.2d 643, 649, 160 P.3d 40 (2007). Both our federal and state constitutions prohibit "'being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after conviction, and (3) punished multiple times for the same offense.'" *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010) (quoting *State v. Linton*, 156 Wn.2d 777, 783, 132 P.3d 127 (2006)); U.S. CONST. amend. V; WASH. CONST. art. I, § 9. Jackson's arguments implicate the third prohibition, in that he contends the trial court punished him multiple times for the same offense.

The term "punishment" encompasses more than just a defendant's sentence for purposes of double jeopardy. *Turner*, 169 Wn.2d at 454. Indeed, even a conviction alone, without an accompanying sentence, can constitute "punishment" sufficient to trigger double jeopardy protections. *Id.* at 454-55. Accordingly, our Supreme Court has held that a court may subject a defendant to double jeopardy when it fails to vacate a conviction that merges, *In re Pers. Restraint of Strandy*, 171 Wn.2d 817, 818-19, 256 P.3d 1159 (2011), when it fails to strike any references to vacated convictions in the judgment and sentence, *Turner*, 169 Wn.2d at 464-65, or when it otherwise improperly discusses the vacated conviction during the defendant's sentencing hearing. *Id.*

When analyzing a double jeopardy claim, we first examine whether the legislature intended to punish the crimes as separate offenses; if legislative intent is clear, we look no further. *State v. Freeman*, 153 Wn.2d 765, 771-72, 108 P.3d 753 (2005). Second, if the legislature has not clearly stated its intent, we may apply the "same evidence" or "same elements" test to the charged offenses.[9] *Id.* at 772, 776. Under this test, double jeopardy is present if the defendant is convicted of offenses that are identical both in fact and law. *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). If, however, "there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses." *State v. Vladovic*, 99 Wn.2d 413, 423, 662 P.2d 853 (1983).

2. Felony Murder Convictions

Jackson was convicted of first degree murder of Doria and Abrazado and also of felony murder of Doria and Abrazado. The sentencing court properly merged the felony murder and aggravated murder convictions at sentencing and only sentenced him based on the aggravated murder counts. However, the sentencing court failed to vacate the felony murder convictions and improperly left the reference to the felony murder provision, RCW 9A.32.030(1)(c), under the "RCW" box in the judgment and sentence.

In a similar case, the Washington Supreme Court granted a PRP and ordered the sentencing court to vacate the felony convictions. *Strandy*, 171 Wn.2d at 818-19. Accordingly,

[9] This is also sometimes referred to as the "the *Blockburger*" test. *Freeman*, 153 Wn.2d at 772 (citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)).

we hold that the felony murder convictions must be vacated and references to Jackson's felony murder convictions on his judgment and sentence must be stricken.[10]

3. First Degree Murder with Burglary Aggravator and Separate Burglary Conviction

Jackson argues that his burglary aggravated first degree murder convictions and separate substantive burglary conviction subjected him to double jeopardy. However, the legislative intent is unequivocal that he can be punished by both the burglary aggravator and substantive burglary crime based on the same conduct. The legislature enacted the burglary anti-merger statute, which provides: "Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately." RCW 9A.52.050.

We have held that the "plain language of RCW 9A.52.050 shows that the legislature intended that crimes committed during a burglary do not merge when the defendant is convicted of both." *E.g.*, *State v. Elmore*, 154 Wn. App. 885, 900, 228 P.3d 760 (2010). Accordingly, we hold that the burglary aggravators and the substantive burglary conviction did not subject Jackson to double jeopardy.

4. First Degree Murder with Robbery Aggravator and Separate Robbery Conviction

Next, we hold that Jackson's first degree murder conviction with a robbery aggravator as to Abrazado and a substantive robbery conviction as to Doria do not subject him to double jeopardy because there were two different victims. *See In re Pers. Restraint of Francis*, 170

[10] Jackson also argued that his two felony murder convictions with robbery and burglary predicates and separate substantive robbery and burglary convictions subjected him to double jeopardy. However, we do not reach this issue since the felony murder convictions will be vacated and stricken from his judgment and sentence on remand.

Wn.2d 517, 528, 531, 242 P.3d 866 (2010) (in the felony murder context, if a defendant is convicted of the predicate felony as to one victim, but a felony murder of a different victim, double jeopardy is not offended.). Here, similarly to *Francis*, the robbery aggravated murder of Abrazado is not the same in fact as the substantive robbery conviction of Doria because there were different victims. Accordingly, Jackson's conviction for substantive robbery as to Doria and robbery aggravated first degree murder as to Abrazado do not subject Jackson to double jeopardy.

Finally, we hold that the robbery aggravator attached to the first degree murder conviction as to Doria and the substantive robbery conviction as to Doria do not subject Jackson to double jeopardy because they are not the same in law. The robbery aggravator attached to a first degree murder conviction requires that "[t]he murder was committed in the course of, in furtherance of, or in immediate flight from" first or second degree robbery. RCW 10.95.020(11). The aggravator thus does not necessarily require proof of an actual attempted or completed robbery as the substantive crime requires.[11] For example, one could commit murder "in furtherance of" a robbery before the attempted or completed robbery was deemed to have actually occurred. Therefore, because first degree robbery requires proof of an actual robbery, but only a robbery, and the robbery aggravator attached to the first degree murder conviction requires proof of an actual murder "in furtherance of" a robbery, but not necessarily an attempted or completed robbery, each offense includes an element that the other does not. Accordingly, we

[11] A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. RCW 9A.56.190.

hold that Jackson's convictions for robbery aggravated murder and substantive robbery are not the same in law, and therefore, he was not subjected to double jeopardy.[12]

CONCLUSION

We grant Jackson's PRP in part and order the sentencing court to vacate his convictions for felony murder and to strike any references in the judgment and sentence to these convictions. We deny all other claims.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

BJORGEN, J.

We concur:

JOHANSON, C.J.

MAXA, J.

[12] The State also contends that Jackson challenges the imposition of deadly weapon and firearm sentence enhancements pertaining to his burglary and robbery convictions. However, his PRP, while it references these firearm enhancements, does not argue that they violated double jeopardy. In any event, as the State correctly states, his previous argument in his direct appeal that deadly weapon and firearm sentence enhancements violated double jeopardy is incorrect based on *State v. Kelley*, 168 Wn.2d 72, 84, 226 P.3d 773 (2010) ("We hold that imposition of a firearm enhancement does not violate double jeopardy when an element of the underlying offense is use of a firearm.").