IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MONTEECE TRUSEAN SMITH-LLOYD, Appellant.	No. 39433-2-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Monteece Trusean Smith-Lloyd guilty of first degree robbery while armed with a firearm, first degree unlawful possession of a firearm, and third degree escape. Smith-Lloyd appeals, arguing that the trial court erred in allowing the State to amend the information and that the imposition of the firearm enhancement violated constitutional protections against double jeopardy. In a pro se statement of additional grounds, he contends that several instances of prosecutorial misconduct occurred, that the jury was prejudiced against him, that his speedy trial rights were violated, and that he did not receive effective assistance of counsel. Finding no issue of merit, we affirm.

Facts

Bryce Phinney listed a cell phone for sale on Craigslist. After a series of text messages, he and the potential buyer agreed to meet at a 7-Eleven store.

When he arrived, two young African-American men approached and asked if he was selling a phone. The shorter man wore diamond earrings while the taller man wore a "do-rag" or beanie on his head. Report of Proceedings (RP) (May 4, 2009) at 65. When Phinney gave the phone to the shorter man to examine, the other asked for a cigarette from a package in Phinney's truck.

As Phinney reached into his truck for a cigarette, the shorter man ran away with his cell phone. The second man leaned closer, lifted his shirt to display a gun in his waistband, and told Phinney to hand over his money and car keys. Phinney complied, and the man ran away in the same direction as the shorter man. Phinney went inside the 7-Eleven and the clerk called the police.

Deputy Douglas Maier responded and requested a canine unit. Phinney told Maier that one of the suspects was about six feet tall and the other slightly shorter. Phinney described their clothing as including a red hoodie, black sweatpants, and a white do-rag, and he said one man wore diamond earrings.

The dog followed the scent to a nearby residence where Smith-Lloyd, Melvin Shobey, Brianna Lewis, and Alissa Andrews were present. Smith-Lloyd and Shobey matched the overall physical descriptions that Phinney provided, but their clothing was different.

The officers arrested Smith-Lloyd and Shobey, but before they could take Smith-Lloyd to the station, he jumped out of a patrol car and ran away. Officers apprehended him a few minutes later.

The State charged Smith-Lloyd with first degree robbery, first degree unlawful possession of a firearm, and third degree escape.[1] Count I charged him with first degree robbery "as an

accomplice" for displaying what appeared to be a firearm and included a firearm sentence enhancement. Clerk's Papers (CP) at 1. The information listed Shobey as a codefendant. Shobey later pleaded guilty to an amended information charging second degree robbery and agreed to testify against Smith-Lloyd.

At his trial, Phinney and Deputy Maier testified to the facts cited above. Phinney also testified that $377 was stolen from him but acknowledged reporting initially that $500 was stolen. Phinney got the $377 figure from the State after it found that amount in Smith-Lloyd's wallet. Phinney also admitted that he could not identify Smith-Lloyd and Shobey as his assailants when a deputy drove him by the suspects before they were taken into custody.

Misty Stephens testified that she saw Smith-Lloyd and Shobey loitering near the apartments she managed shortly before the robbery and told them to leave. She said one man wore a white bandanna, red sweater, and corduroy pants, while the other wore a grayish-black top and black pants. When she was taken to see Smith-Lloyd and Shobey after their arrest, she identified them as the men she saw earlier but said they had changed clothes. Shobey wore diamond earrings at the time of his arrest.

Andrews wrote in a statement that Smith-Lloyd gave her a black bag containing a gun and told her to hide it before the police searched the house. She also put a cell phone that was on the table in a garbage bag. During their search of the home, officers found a loaded handgun in a black bag hidden in a closet. They also found Phinney's cell phone, a black knit cap, a white do-rag, a red jacket, and a black hooded sweatshirt in the residence. Lewis testified that she lived at the residence with Shobey and Andrews and that Smith-Lloyd stayed there occasionally.

[1] The State dismissed an additional charge of possession of a stolen firearm before trial.

Shobey testified that he went with Smith-Lloyd to the 7-Eleven to buy an iced tea, talked to a man about a cell phone, and left. He denied taking the phone but testified that when Smith-Lloyd returned home, he tossed a cell phone resembling Phinney's phone on the table. He also testified that Smith-Lloyd was wearing a black beanie with a white do-rag.

After the State rested, the defense moved to dismiss the robbery count on the ground that there was no evidence that Smith-Lloyd acted as an accomplice, which was the only basis of liability charged. The trial court described the State's evidence and concluded that although the existing information was sufficient to put Smith-Lloyd on notice of his culpability as a principal as well as an accomplice, an amendment would be reasonable. The State moved to file an amended information, with no objection from the defense, and the court granted the motion.

Smith-Lloyd then testified on his own behalf and acknowledged that he sometimes stayed at the residence where Andrews, Lewis, and Shobey lived. He denied being at the 7-Eleven on the day of the robbery and seeing any cell phones at the house. He admitted trying to escape from the patrol car, but he said that the $377 in his wallet was his own money. He denied handing Andrews a black bag and denied knowing about the gun.

When his trial resumed the next day, the defense objected to the corrected information the State had filed earlier that day. Defense counsel asserted that he thought the information would be corrected to charge Smith-Lloyd as a principal only, and he argued that the correction charging his client as a principal and/or an accomplice was severely prejudicial. The court disagreed, indicating that it had ruled it would approve the amendment as filed, and it again granted the motion to correct and/or amend the information.

The parties stipulated that Smith-Lloyd previously had been found guilty of a felony

defined as a serious offense and was not permitted to possess a firearm. The jury found Smith-Lloyd guilty as charged and answered the special verdict form in the affirmative, finding that he was armed with a firearm at the time of the robbery. The court imposed concurrent standard range sentences on the underlying offenses and a 60-month firearm enhancement that ran consecutively to the sentence on the robbery conviction.

Discussion

Amendment of the Information

Smith-Lloyd argues on appeal that when the trial court allowed the State to amend the information to charge him with first degree robbery as a principal as well as an accomplice, it violated his constitutional right to know the nature and cause of the accusation against him.

A charging document must include all essential elements of a crime, statutory or otherwise, "to afford notice to an accused of the nature and cause of the accusation against him." *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). The purpose of the rule is to enable the defendant to prepare an adequate defense. *Kjorsvik*, 117 Wn.2d at 101.

We review a trial court's decision to allow the State to amend the charge for abuse of discretion. *State v. Ziegler*, 138 Wn. App. 804, 808, 158 P.3d 647 (2007). CrR 2.1(d) provides that a trial court may permit an information to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced. Washington case law adds that the State may not amend an information to charge a different crime after resting its case unless the amended charge is a lesser degree of the same charge or a lesser included offense. *State v. Pelkey*, 109 Wn.2d 484, 491, 745 P.2d 854 (1987). Mid-trial amendment also is allowed where the amendment merely specifies a different manner of committing the crime originally charged.

Pelkey, 109 Wn.2d at 490. "Anything else is a violation of the defendant's article I, section 22 right to demand the nature and cause of the accusation." *Pelkey*, 109 Wn.2d at 491.

The amendment at issue did not charge a different crime; the elements of a crime are the same for both a principal and an accomplice. *State v. Teal*, 117 Wn. App. 831, 838, 73 P.3d 402 (2003), *aff'd*, 152 Wn.2d 333, 96 P.3d 974 (2004). Whether a defendant participates in a crime as an accomplice or a principal, his culpability is the same. *State v. McDonald*, 138 Wn.2d 680, 688, 981 P.2d 443 (1999). At most, the amendment charging Smith-Lloyd as a principal as well as an accomplice added a different manner of committing first degree robbery to the information.

Although the amendment did not violate *Pelkey*, we still examine the issue of prejudice. *See Ziegler*, 138 Wn. App. at 809 (where the *Pelkey* rule does not apply, the defendant has the burden of establishing prejudice under CrR 2.1(d)). Defense counsel did not object when the trial court agreed with the State that an amendment charging Smith-Lloyd as a principal would not be prejudicial and granted the motion to amend. *See State v. Barnes*, 146 Wn.2d 74, 82, 43 P.3d 490 (2002) (assignment of error challenging a charging document may be raised for the first time on appeal). Counsel did object when the information was filed the following day, however, arguing that he had thought the amendment would charge Smith-Lloyd as a principal only and would not retain accomplice liability as an alternative. Counsel contended that charging his client in the alternative "severely prejudiced" the defense. 6 RP at 330.

We can find no basis for this claim of prejudice. Smith-Lloyd's defense was one of denial. Even if he misunderstood the form the amendment would take, we do not see how knowing that he was charged as an accomplice would have affected his testimony. *See also Teal*, 117 Wn. App. at 838 (charging the accused as a principal is adequate notice of the potential for accomplice

liability). Changing his theory of prejudice on appeal, Smith-Lloyd argues now that he was prejudiced because the added language charging him as a principal increased the State's burden of proof. Regardless of whether we agree about the increased burden of proof, we do not see how adding to the State's burden prejudiced the defense. The trial court did not err in allowing the State to amend the information to charge Smith-Lloyd in the alternative as a principal and/or accomplice after it rested.

Double Jeopardy

Smith-Lloyd argues here that the firearm enhancement violated the prohibition against double jeopardy because the enhancement is a lesser included offense of first degree robbery as charged.

Although Smith-Lloyd did not raise this issue below, he may raise it for the first time on appeal because it is a manifest issue affecting a constitutional right. RAP 2.5(a); *State v. Turner*, 102 Wn. App. 202, 206, 6 P.3d 1226 (2000), *review denied*, 143 Wn.2d 1009 (2001). Double jeopardy claims are issues of law that we review de novo. *State v. Kelley*, 168 Wn.2d 72, 76, 226 P.3d 773 (2010).

The double jeopardy clauses of the federal and state constitutions function identically to prevent defendants from receiving multiple punishments for the same offense. *State v. Aguirre*, 168 Wn.2d 350, 366, 229 P.3d 669 (2010). If the legislature intends to impose multiple punishments, however, their imposition does not violate the double jeopardy clause. *Kelley*, 168 Wn.2d at 77. Where there is clear legislative intent to impose multiple punishments for the same act or conduct, the inquiry ends. *Kelley*, 168 Wn.2d at 77. The *Kelley* court found clear legislative intent to impose cumulative punishment for crimes committed while the offender was

armed with a firearm, subject to express exceptions that do not include robbery. *Kelley*, 168 Wn.2d at 78-79; *see* RCW 9.94A.533(3)(f).

Without referring to *Kelley*, Smith-Lloyd acknowledges that prior Washington case law has rejected double jeopardy challenges to convictions of a substantive crime that include the use of a firearm as an element and a firearm enhancement for the same firearm. He argues, however, that this rejection must be revisited in light of United States Supreme Court decisions holding that any fact that increases the maximum penalty that may be imposed on a criminal defendant is akin to an element of the crime and must be proved to a jury beyond a reasonable doubt. *See, e.g.*, *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). According to Smith-Lloyd, a firearm enhancement is equivalent to an element. Consequently, punishment for a greater offense that contains the use of a firearm as an essential element and punishment for the lesser offense of possessing a firearm while committing the greater offense violates double jeopardy.

The Washington Supreme Court recently rejected this argument. In *Aguirre*, the court observed that Washington courts have held repeatedly that double jeopardy is not offended by weapon enhancements even when being armed with the weapon is an element of the underlying crime. 168 Wn.2d at 366. The court rejected the contention that these cases must be reconsidered following *Blakely*, noting that it had already rejected the argument in *Kelley*. *Aguirre*, 168 Wn.2d at 367.

In *Kelley*, the court held that *Apprendi*, *Blakely*, and related cases concern the Sixth Amendment right to a jury trial rather than the double jeopardy clause and do not alter the double

jeopardy analysis. *Kelley*, 168 Wn.2d at 81-84. In so holding, the court noted that it was important to lay to rest the meritless argument that the firearm enhancement is an element of a greater offense and therefore creates unintended and redundant punishment. *Kelley*, 168 Wn.2d at 81. Consequently, Smith-Lloyd's double jeopardy challenge fails.

Statement of Additional Grounds (SAG)[2]

A. Prosecutorial Misconduct

Smith-Lloyd first contends that the prosecuting attorney committed several acts of misconduct during his trial. To prevail on an allegation of prosecutorial misconduct, a defendant must show both improper conduct and prejudicial effect. *State v. Henderson*, 100 Wn. App. 794, 800, 998 P.2d 907 (2000). A defendant establishes prejudice by demonstrating a substantial likelihood that the misconduct affected the jury's verdict. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). Absent a proper objection, however, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill-intentioned that no curative instruction would have obviated the resulting prejudice. *Henderson*, 100 Wn. App. at 800. The defendant bears the burden of establishing both the impropriety of the prosecutor's conduct and its prejudicial effect. *Henderson*, 100 Wn. App. at 800.

Smith-Lloyd contends that misconduct occurred when the prosecuting attorney allowed Deputy Maier to "quote what an untestifying witness said." SAG at 1. The record shows that after the prosecutor asked the deputy "[w]hat happened next" at the 7-Eleven, the deputy responded, "When I initially contacted the clerk inside, he said that the suspects were regular

[2] RAP 10.10.

customers." 3 RP at 54. The prosecutor then said, "I'm going to stop you right there, and let's move on to, were these two individuals detained?" 3 RP at 54. The prosecutor did not invite this hearsay testimony and stopped the deputy from offering additional hearsay. The defense did not object, and we see no improper conduct in this regard.

Smith-Lloyd next contends that the prosecutor committed misconduct by releasing vital information to the victim, thus showing that the State coached Phinney before trial. Smith-Lloyd also argues that this coaching tainted Phinney's testimony.

The record shows that the officers recovered $377 from Smith-Lloyd's wallet after his arrest. Phinney first testified that Smith-Lloyd took $377 from him, and then admitted that he wrote in a statement shortly after the robbery that $500 was taken. On direct examination, he explained that he got the $377 figure when the State told him what it found in Smith-Lloyd's wallet. Defense counsel objected, arguing that the State had erred in giving Phinney critical evidence regarding how much money was recovered, albeit inadvertently. Defense counsel acknowledged that the State had conceded, in examining Phinney, that the $377 figure came "from out of the State's mouth." RP (May 4, 2009) at 89. After an argument over whether the State could show Phinney photographs of the cash recovered and thereby inform him of the specific denominations as well, the State decided not to show Phinney those exhibits. On cross-examination, defense counsel explored in some detail the differing amounts of money Phinney said was stolen.

Thus, to the extent the State committed misconduct by disclosing to Phinney the amount of money it recovered, we conclude that this misconduct was inadvertent, fully disclosed, and nonprejudicial. Defense counsel had ample opportunity to explore the issue in cross-examining

Phinney, and we see no substantial likelihood that the misconduct affected the jury's verdict.

Smith-Lloyd's next claim of prosecutorial misconduct concerns a statement made in closing argument. In referring to Stephens, who testified that she saw Smith-Lloyd and Shobey in different clothing shortly before their arrest, the prosecuting attorney stated, "She says, in fact, they are the same two guys, but they have changed their clothing, which we know to be true in all respects." 6 RP at 346.

It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008), *cert. denied*, 129 S. Ct. 2007 (2009). Whether a witness has testified truthfully is for the jury to determine. *State v. Ish*, ___ Wn.2d ___, 241 P.3d 389, 393 (2010). With the above statement, the prosecutor focused on two witnesses' consistent identification testimony as evidence of its credibility and did not improperly vouch for the witnesses' veracity. Moreover, the defense did not object. Accordingly, no prosecutorial misconduct entitles Smith-Lloyd to relief.

B. Juror Misconduct

Smith-Lloyd argues here that he was prejudiced by vindictive jurors who victimized one fellow juror and possibly pressured others during their deliberations.

The record shows that during jury deliberations, Juror No. 1 approached the court clerk and told her she wanted to go home right away. The clerk explained to the court that Juror No. 1 said she could not pass judgment on Smith-Lloyd for moral and ethical reasons, and the clerk added that she had heard another juror criticizing Juror No. 1 for being emotional. When the court questioned Juror No. 1, she was upset and stated that she could not judge any person or perform the job of a juror. The court discharged Juror No. 1.

This record does not support Smith-Lloyd's assertion that the jury was vindictive and prejudiced against him. If anything, it shows that the jury was intent on fulfilling its responsibilities. We see no misconduct in this regard.

C. Speedy Trial

Smith-Lloyd next contends that his speedy trial rights were violated when the trial court allowed multiple continuances. The mere fact that the court allowed continuances, however, does not demonstrate that Smith-Lloyd's right to a speedy trial was violated. *See* CrR 3.3(e)(3) (delays granted for certain continuances are excluded in computing time for trial). Moreover, the record does not refer to continuances granted on either party's behalf and does not explain the scheduling of Smith-Lloyd's trial. We therefore decline to consider this argument further.

D. Ineffective Assistance of Counsel

Finally, Smith-Lloyd argues that he received ineffective assistance when his attorney failed to uphold his speedy trial rights, move for a new trial when the corrected information was filed, and object to crucial misconduct by the prosecutor.

To prevail on an ineffective assistance of counsel claim, a defendant must show both deficient representation and resulting prejudice. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Our scrutiny of counsel's performance is highly deferential; we presume that counsel provided reasonable assistance. *Thomas*, 109 Wn.2d at 226. A defendant shows prejudice if he demonstrates a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). If counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim of ineffective assistance. *State v. Day*, 51 Wn. App. 544, 553, 754 P.2d 1021, *review denied*, 111 Wn.2d 1016 (1988).

Given the lack of a record concerning the scheduling of his trial, we cannot consider Smith-Lloyd's claim of ineffective assistance regarding his speedy trial rights. *See McFarland*, 127

Wn.2d at 335 (where ineffective assistance claim brought on direct appeal, court will not consider matters outside the record). Furthermore, we see no likelihood that a motion for a new trial would have been granted as a result of the State's amendment of the information, and we therefore find no likelihood of prejudice from any failure to make such a motion. Finally, assuming that the "crucial misconduct" to which Smith-Lloyd refers to is the State's disclosure to Phinney of the amount of money recovered, the record shows that defense counsel did object and cross-examined Phinney thoroughly on the subject. We see no deficient performance in this regard and reject Smith-Lloyd's claim of ineffective assistance of counsel.

Affirmed.

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 pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

BRIDGEWATER, J.

PENOYAR, C.J.