IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL DAVID COLLINS, II, Appellant.	No. 40427-3-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Michael David Collins, II, guilty of attempted first degree felony murder, under RCW 9A.28.020 and RCW 9A.32.030(1)(c)(1), and first degree robbery, under RCW 9A.56.200(1)(a)(iii). Collins appeals his attempted first degree felony murder conviction, arguing that the State charged him with a nonexistent crime and asking that we preclude the State from filing additional charges resulting from the first degree robbery. In a statement of additional grounds (SAG),[1] Collins alleges that (1) the trial court erred when it denied his motion to compel the State to produce video evidence, (2) the trial court erred when it denied a motion to continue his trial, (3) he was denied his right to a fair and unbiased jury, (4) he received ineffective assistance of counsel, (5) he was denied access to the defense investigator,

[1] RAP 10.10.

and (6) the trial court entered a forged order assigning counsel. The State concedes that it erred by charging attempted first degree felony murder, a nonexistent crime. We accept this concession and vacate Collins's conviction for attempted first degree felony murder accordingly. We hold that Collins's SAG claims lack merit and we affirm his first degree robbery conviction and remand to the trial court for further proceedings consistent with this opinion.

FACTS

Background

On February 9, 2009, Robert Tracey prepared to go cross-country skiing at Dougan Creek Campground in Skamania County. As Tracey walked down the road from the campground gate where he had parked his truck, he was approached from behind by two men. The two men were later identified as Collins and Collins's son, Teven Collins.[2] One of the men initially spoke casually to Tracey, but then demanded that Tracey give him the keys to Tracey's truck; Tracey tossed the man his keys. The man then demanded Tracey's backpack and wallet, which Tracey provided. When both men began walking toward him, Tracey abandoned his skis and ran back toward his truck. The men tackled Tracey and began striking him repeatedly with a club.[3] One man wrapped a rope around Tracey's neck and began choking him. Tracey lost consciousness when the men began dragging him by the rope. Tracey later regained consciousness and crawled toward a nearby river. He lay hidden in a culvert until some hikers found him and summoned help. Tracey suffered serious head injuries but survived the attack.

[2] We use Teven Collins's first name for clarity.

[3] There are discrepancies between Tracey's and Teven's testimonies about who held Tracey down and who beat him.

Collins and Teven were apprehended in Ensenada, Mexico, shortly after Tracey's rescue.[4] The two were extradited to El Centro, California, where they were taken into custody by detectives from the Skamania County Sheriff's Office and transported back to Skamania County.

Procedure

On February 18, 2009, the State charged Collins with attempted first degree felony murder and first degree robbery. Count I, charging Collins with "Attempted Murder in the First Degree," read,

> That he, Michael David Collins II, in the County of Skamania, State of Washington, on or about February 9, 2009, with intent to commit MURDER IN THE FIRST DEGREE, to wit: committing the crime of robbery in the first degree and using a deadly weapon in an assault against another did take a substantial step towards the commission of MURDER IN THE FIRST DEGREE; contrary to Revised Code of Washington 9A.28.020 and 9A.32.030(1)(c)(1).

1 Clerk's Papers (CP) at 1. On February 22, 2010, the State filed an amended information.[5].

Originally, Collins and Teven were going to be tried together. But four days before their scheduled trial, Teven decided to plead guilty and agreed to testify against Collins. The next day, Collins filed a motion to continue his trial. In his declaration in support of his motion to continue, Collins stated that he needed more time to prepare because of the addition of Teven as a witness

[4] Collins and Teven drove Tracey's car from Skamania County to Mexico. The Skamania County Sheriff's Office tracked the use of Tracey's stolen credit cards, but this evidence was not admitted at trial. The record suggests that police found them in Mexico because Teven wrote about their location on his MySpace page.

[5] As a matter of Washington law, an accomplice has the same liability as a principal actor. *See* RCW 9A.08.020; *State v. Carter*, 154 Wn.2d 71, 78, 109 P.3d 823 (2005) (An accomplice is considered to have actually committed the crime on the basis that the liability of the accomplice is the same as that of the principal.). A person charged as a principal is also charged as an accomplice. *See State v. McDonald*, 138 Wn.2d 680, 688, 981 P.2d 443 (1999); *State v. Teal*, 117 Wn. App. 831, 838, 73 P.3d 402, *review denied*, 150 Wn.2d 1022 (2003).

for the State. Collins argued that, with Teven as a witness, his defense strategy changed and that he could not adequately prepare for trial in three days. The court denied Collins's motion to continue.

Collins also filed a pretrial motion to compel the State to provide surveillance videos[6] corresponding to debit card transactions referenced in the police reports. The State told the trial court that (1) it was not sure if the videos existed because they were not in the possession of the Skamania County Sheriff's Office, (2) defense counsel could obtain the videos independently, and (3) the State was not going to be presenting the videos as evidence at trial. As an aside, the State also asserted that the videos were not exculpatory and were not required to be turned over as *Brady*[7] material. The trial court denied Collins's motion to compel. The trial court also made oral findings that the surveillance videos were "not necessarily known to be exculpatory." 1 Report of Proceedings (RP) at 94.

Jury voir dire began on February 22, 2010. During voir dire, Juror 41 stated, "I also know of past charges against the Defendant, so. I mean, I'm a pretty fair person, but I have definitely formed an opinion." RP (Feb. 22, 2010) at 28. The State stopped questioning Juror 41 before any additional information about Collins's past criminal history was revealed to the rest of the jury pool. Defense counsel moved for a mistrial, arguing that Juror 41's comment had tainted the entire jury pool. The trial judge denied the motion. Jury voir dire continued and both parties extensively questioned the remaining jurors about their ability to remain fair and impartial.

[6] According to police reports, the police attempted to obtain surveillance videos from a Safeway in Madras, Oregon, a McDonalds in Madras, Oregon, and a USA Petroleum (the location was not specified in the report). The videos will be referred to collectively as the "surveillance videos."

[7] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

Opening statements were made that afternoon.

The next day, after the jurors returned from lunch, Juror 2 disclosed to the bailiff that a person from the community made a comment to him about the trial. In open court, but without the rest of the jury present, Juror 2 stated that when he was walking back to the courthouse, a man noticed his juror's badge and asked if he was on the jury. Juror 2 replied that he was on the jury and that he could not discuss the case. After the man got into his car, he drove past Juror 2 and yelled something out of his window. The comment was mostly indistinguishable to Juror 2, but he did hear the word "fuckers" in the man's comment. 2 RP at 236. The trial court asked Juror 2, "[W]as there anything about this contact that would in any way influence your ability to make a fair decision in this case?" 2 RP at 235-36. Juror 2 responded, "I don't believe so, no." 2 RP at 236. Collins moved for a mistrial and the trial court denied the motion.

At trial, Detective Timothy Garrity of the Skamania County Sheriff's Office testified. The State did not address the surveillance videos during its direct examination of Garrity. During cross-examination, the following exchange took place:

> [DEFENSE]: So, did you have—from this trail all the way down from Dougan Falls to Ensenada, did you have any DVD or surveillance video of Teven Collins or Michael Collins using the credit cards?
> [GARRITY]: I spent an entire day attempting to obtain some, but none was obtained.
> [DEFENSE]: So you didn't—there's no—no video—so you believe that these credit cards, Mr. Tracey's credit cards were used by somebody; is that correct?
> [GARRITY]: Correct.
> [Defense]: But there's—and in our high-tech age with all the computer –
> [STATE]: Your Honor, I'm going to object to the form of the question. It's been asked and answered.
> THE Court: Sustained. Well rephrase your question, Counsel.
> [DEFENSE]: So you attempted to track the use of Mr. Tracey's credit cards from Dougan Falls all the way down to Ensenada, correct?
> [GARRITY]: I would say I actually just tried to track his credit card usage. I

> wasn't trying to track to a certain location but where it was specifically used.
> [DEFENSE]: Okay. And so that doesn't – where it was used, you would go and try to see if they had surveillance video showing Teven Collins or Michael Collins using the card, correct?
> [GARRITY]: Incorrect. They [sic] would not go, because it was used down through Madras, Oregon, and into California. So I didn't physically have the resources or opportunity to go to each convenience store or McDonald's.
> [DEFENSE]: Did—
> [GARRITY]: But I did over the phone attempt to track and talk to managers, yes.
> [DEFENSE]: Okay. And so in all these stores that you contacted, you don't have a single DVD, surveillance video, whatever technology you want to call it, showing either one of these gentlemen using any kind of credit card.
> [GARRITY]: Do not.

2 RP at 280-81.

Teven testified that he and Collins were camping in the Dougan Falls area and after several days they ran out of supplies. He explained that, although his uncle was supposed to bring additional supplies, his uncle never came with help. He testified that Collins told him that they would steal somebody's car and then kill the car owner. Teven testified that Collins wanted him to do the killing because he "need[ed] to earn [his] bones." 3 RP at 392. Teven stated that after he obtained Tracey's car keys, he went back to Collins and told him, "We don't need to do this. We got the keys, let's go," but his father told him he had to kill Tracey. 3 RP at 394. Teven then testified about the details of Tracey's beating.

The jury returned verdicts of guilty on both the attempted first degree felony murder charge and the first degree robbery charge. The trial court sentenced Collins to 291 months on the first degree attempted felony murder conviction and 75 months on the first degree robbery conviction. Collins timely appeals.

ANALYSIS

Attempted First Degree Felony Murder Charge

Collins argues that his attempted first degree felony murder conviction should be vacated because attempted first degree felony murder is a nonexistent crime in the State of Washington. The State concedes that it charged Collins with a nonexistent crime and we accept its concession.

The State charged Collins with attempted first degree felony murder under RCW 9A.28.020 and RCW 9A.32.030(1)(c)(1). A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime. RCW 9A.28.020. In this case, the specific crime is first degree murder. The State alleged that Collins violated RCW 9A.32.030(1)(c)(1), the felony murder section of the statute. Our Supreme Court has clearly stated that the crime of attempted first degree felony murder does not exist in Washington. *In Re Pers. Restraint of Richey*, 162 Wn.2d 865, 870, 175 P.3d 585 (2008). Our Supreme Court explained,

> [A] charge of attempted felony murder is illogical in that it burdens the State with the necessity of proving that the defendant intended to commit a crime that does not have an element of intent.

In re Richey, 162 Wn.2d at 869. The State concedes that it charged Collins with a nonexistent crime. Accordingly, we vacate and remand Collins's conviction for attempted first degree murder.[8]

Collins also asks that on remand we instruct the trial court to preclude the State from filing any further charges against him. Collins argues that the mandatory joinder rule, CrR

[8] We note that the *Richey* analysis could differ had the State charged Collins with attempted premeditated murder in the course and furtherance or in immediate flight from the crime of robbery. *See In re Richey*, 162 Wn.2d at 871-72 n.4.

4.3.1(b)(3), bars the State from filing further charges that arise out of Collins's conduct in this case. We decline to speculate about what may happen on remand. *State v. Eggleston*, 164 Wn.2d 61, 76-77, 187 P.3d 233 (declining to consider an issue concerning proceedings on remand since it was entirely speculative whether the issue would arise), *cert. denied*, 129 S. Ct. 735 (2008); *State v. Davis*, 163 Wn.2d 606, 616, 184 P.3d 639 (2008) (declining to consider an issue that might not arise on remand).

We have no way of knowing what course of action the State may choose to take on remand. Any instructions we might give regarding the refiling of charges following the striking of a defective charging document would be based on hypothetical or speculative facts and be purely advisory. We do not issue advisory opinions. *Walker v. Munro*, 124 Wn.2d 402, 414, 879 P.2d 920 (1994).

Denial of Motion to Compel Video Evidence

In his SAG, Collins alleges that the court erred in denying his motion to compel video evidence that he asserts was in the State's possession. Collins also argues that the video evidence should have been turned over because it would have "been crushing to the States (sic) case." SAG at 2. We disagree.

We review a trial court's denial of a motion to compel discovery for abuse of discretion. *State v. Norby*, 122 Wn.2d 258, 268, 858 P.2d 210 (1993). A trial court abuses its discretion when its decision is based on untenable grounds or reasons. *State v. Lusby*, 105 Wn. App. 257, 262, 18 P.3d 625, *review denied*, 144 Wn.2d 1005 (2001). Here, the trial court did not abuse its discretion when it denied Collins's motion to compel evidence not in the State's possession and the record does not support Collins's apparent claim that the videos were *Brady* material.

In response to Collins's motion to compel, the prosecutor was clear that the surveillance videos were not in the State's possession. This statement was later clarified by Detective Garrity's testimony. Garrity testified that although he attempted to obtain copies of the surveillance videos, he was unable to do so. In addition, the State noted that the defense was equally able to request copies of the surveillance videos. Because the alleged surveillance videos were not in the State's possession or control, the trial court did not abuse its discretion when it denied Collins's motion to compel their production. *State v. Blackwell*, 120 Wn.2d 822, 826-27, 845 P.2d 1017 (1993).

In addition, our review of the record does not support Collins's claim that the videos were *Brady* material. Under *Brady*, the State has an obligation to disclose all material exculpatory evidence *in its possession*. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). In this case, the record is clear that the surveillance videos were not in the State's possession. Because the State did not have the surveillance videos, there was no *Brady* violation.

Although Collins alleges a *Brady* violation, it may be more appropriate to analyze whether the State improperly failed to preserve evidence under the *Youngblood*[9] test. But the surveillance videos were only potentially useful and Collins has failed to show that the State acted in bad faith. Accordingly, the record does not support Collins's claim that his right to due process was violated by the State's failure to preserve or obtain the surveillance videos.

The State's failure to preserve evidence that is "material and exculpatory" violates a defendant's right to due process regardless of whether the State acted in bad faith. *State v. Wittenbarger*, 124 Wn.2d 467, 475, 880 P.2d 517 (1994). In order for evidence to be considered

[9] *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988).

material exculpatory evidence, "the evidence must both possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Wittenbarger*, 124 Wn.2d at 475 (citing *California v. Trombetta*, 467 U.S. 479, 489, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)). Evidence that is not material exculpatory evidence is only potentially useful to the defense. *Wittenbarger*, 124 Wn.2d at 477. If the State fails to preserve only potentially useful evidence, the State has not violated the defendant's right to due process unless the defendant can show the State acted in bad faith. *Wittenbarger*, 124 Wn.2d at 477 (citing *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)).

Here, the surveillance video evidence is, at best, only potentially useful evidence. In the motion to compel, Collins argued that the surveillance videos *might* show someone other than Collins using Tracey's stolen debit card. In addition, Teven's testimony corroborates the assertion that any such videos would show Collins and Teven using Tracey's debit card as they drove from Skamania County to Mexico. Finally, the police reports contain enough information that Collins would have been able to obtain the videos independently, if they existed. Because there is nothing to show that any of these surveillance videos had exculpatory value and the surveillance videos were equally available to Collins, the surveillance videos are, at best, only potentially useful evidence.

Because any surveillance videos are only potentially useful evidence, Collins bears the burden of showing that the State acted in bad faith when it failed to preserve them. Based on Detective Garrity's testimony and the police reports Collins submitted with his motion to compel, the detectives made a good faith attempt to obtain the videos but were unsuccessful. Therefore,

the State did not act in bad faith when it failed to obtain and preserve these surveillance videos. Collins has not demonstrated that the State failed to preserve excuplatory surveillance videos or violated his right to due process.

Denial of Motion to Continue

In his SAG, Collins argues that the court erred by failing to grant his motion to continue. After Teven accepted the State's plea offer and agreed to testify at trial, defense counsel argued that the motion to continue was necessary for him to adequately prepare for trial.

We review a trial court's ruling on a motion to continue for an abuse of discretion. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). Under this standard, we will not disturb a trial court's decision unless the record shows that the decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *Downing*, 151 Wn.2d at 272-73 (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

Here, the trial court denied Collins's motion to continue because the State had no control over Teven's decision when to accept a plea bargain. Furthermore, as soon as the State was notified Teven would accept the plea bargain, it notified Collins's defense counsel who sat in on the State's interview and heard Teven's statements and prospective testimony. The court stated that it was denying the motion to continue because "I cannot find that the Defense of Mr. Michael Collins should be in any way surprised by what Teven Collins is going to be testifying to, since they already know, they sat in on the interview." 1 RP at 109. The trial court's finding that there was no reason for the defense to be surprised or unprepared by the addition of Teven as a witness was not unreasonable under the circumstances, and the trial court did not abuse its discretion in denying Collins's continuance request on this basis.

Fair and Unbiased Jury

In his SAG, Collins alleges that he was denied his Sixth Amendment right to a fair and unbiased jury when the trial court refused to grant his motion for a mistrial during jury voir dire and when the trial court failed to replace Juror 2 with the alternate.

Both the United States and Washington Constitutions guarantee criminal defendants the right to a fair and impartial jury. U.S. Const. amend. VI, XIV § 1; Wash. Const. art. I, § 22. The court must excuse prospective jurors if they hold views that make it impossible to be unbiased and fair. *See State v. Hughes*, 106 Wn.2d 176, 185, 721 P.2d 902 (1986) (citing *Spinkellink v. Wainwright*, 578 F.2d 582, 596 (5th Cir.1978), *cert. denied*, 440 U.S. 976 (1979)).

First, the trial court did not err when it denied Collins's mistrial motion in response to Juror 41's comment during voir dire. Juror 41 was excused for cause, jury voir dire continued after this comment, and every juror who was ultimately seated assured the court and counsel that he or she was able to be fair and impartial. The record does not support Collins's claim that Juror 41's comment tainted the entire jury pool as the defense initially argued and the trial court properly denied Collins's mistrial motion on that ground. *See State v. Hightower*, 36 Wn. App. 536, 549, 676 P.2d 1016 (holding the trial court did not err in refusing to grant a mistrial because prospective juror's comment about defense counsel did not taint the rest of the jury pool), *review denied*, 101 Wn.2d 1013 (1984).

Second, Collins argues that his right to a fair and impartial jury was violated when the trial court refused to grant his motion for a mistrial after a passerby yelled something to Juror 2 outside of the court. The trial court questioned Juror 2 after the incident and determined that Juror 2 was able to remain fair and impartial and the comment did not affect his ability to render a

just verdict. The trial court properly denied Collins's motion for a mistrial on this basis. *State v. Moe*, 56 Wn.2d 111, 115, 351 P.2d 120 (1960) ("There is a presumption that [a juror] will be faithful to his oath and follow the court's instructions.").

Ineffective Assistance of Counsel

In his SAG, Collins also argues that he received ineffective assistance of counsel because his defense counsel was unprepared for trial. As sole evidence of this claim, Collins relies on defense counsel's declaration in support of the motion to continue. In the declaration, defense counsel stated that, as a result of Teven's decision to testify, he was "forced to choose between waiving the right to a speedy trial or being woefully unprepared." 3 CP at 478. But on the day of trial, defense counsel renewed the motion but did not state that he was currently unprepared for trial.

We begin a review of an ineffective assistance of counsel claim with the strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To establish ineffective assistance of counsel, Collins must show that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced him. *Strickland*, 466 U.S. at 687; *McFarland*, 127 Wn.2d at 334-35. Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome of the trial would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

Our review of the record in this case discloses that, despite defense counsel's concerns that he would not be able to prepare for a trial in which Teven would testify, his performance was not deficient. As the trial court noted in denying the motion for a continuance, when the State

interviewed Teven to learn the substance of his proposed testimony, defense counsel was present. Accordingly, defense counsel had the same knowledge of Teven's testimony as did the State. Moreover, we note that this was not a situation in which the State produced a previously unknown surprise witness to the crime. The only possible surprise was that the co-defendant decided to testify at trial. We note that the decision whether to testify is one any co-defendant can delay making until the defense puts on its case during trial. In this case, defense counsel fully represented Collins making several motions, appropriate objections, and extensively cross-examined all of the State's witnesses, including Teven. Collins's bare allegation that defense counsel initially thought he would not be able to be prepared without a continuance is not supported by our review of the record and does not overcome the strong presumption that his counsel's assistance was effective.

No Access to Defense Investigator

In his SAG, Collins also argues that he was denied access to his defense investigator. The record contains only a brief pretrial reference by Collins's counsel to some difficulty in working with the defense investigator. But nothing supports Collins's claim that he was denied access to an investigator and the trial court did not make any findings regarding the effect of this difficulty on Collins's defense. On direct appeal, we do not consider matters outside the record. *McFarland*, 127 Wn.2d at 335, 338 n.5.

Forged Order Assigning Counsel

Finally, in his SAG, Collins alleges that his signature was forged on a November 3, 2009 order appointing counsel. We do not review matters raised for the first time on appeal unless the issue affects the manifest constitutional right. *McFarland*, 127 Wn.2d at 332-33. If the facts

necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest. *McFarland*, 127 Wn.2d at 333 (citing *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)).

The record before this court does not contain transcripts of the date the order was signed. Therefore, the record contains no information regarding a deficiency in the order appointing counsel to represent him.

We hold that Collins's challenges to his robbery conviction lack merit and affirm his conviction for first degree robbery. We accept that portion of the State's concession regarding charging Collins with the nonexistent crime of attempted first degree felony murder, vacate Collins's conviction for that nonexistent crime and remand for further proceedings consistent with this opinion.

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:

ARMSTRONG, P.J.

VAN DEREN, J.