IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27976-6-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
BRAD M. SELF,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Brown, J. – Brad M. Self appeals his convictions for first degree burglary, second degree assault, first degree robbery, and first degree kidnapping. The sentencing court imposed four firearm enhancements. Mr. Self contends the court erred in (1) failing to declare a mistrial based on discovery violations and juror misconduct, (2) certain evidence rulings, and (3) instructing the jury. He further contends (4) merger and double jeopardy principles are offended, (5) his offender score is miscalculated, (6) insufficient evidence supports the firearm enhancements, and (7) his counsel rendered ineffective assistance. We affirm.

FACTS

Mr. Self contacted Sharon McGuire from an advertisement on Craigslist for prostitution purposes. He arranged to come to her apartment. While in the bedroom, another person, later identified as Sean E. Boyle, came into the room with a gun. Mr. Self put his weight on Ms. McGuire so she could not get up. Mr. Self did not appear shocked or scared when he saw Mr. Boyle with a gun. Mr. Self appeared to be in charge, while Mr. Boyle appeared more timid and acted as if he did not know what he was doing.

Mr. Self bound Ms. McGuire's wrists together with twist ties, cut her telephone cord, and then the two men searched her apartment. The men took $500, a cell phone, and drugs. Before leaving, duct tape was placed over Ms. McGuire's mouth and she was told they would be watching her. After freeing herself, Ms. McGuire fled to a friend's house, and then to an extended family member's home. There, Ms. McGuire called the police after she received a disturbing e-mail from the two men.

The State charged Mr. Self with one count each of first degree burglary, second degree assault, first degree robbery, and first degree kidnapping, all while armed with a firearm. In exchange for his promise to testify against Mr. Self, Mr. Boyle pleaded guilty to first degree burglary, second degree assault, first degree robbery, and unlawful imprisonment, receiving a 130-month sentence plea recommendation.

Before trial, Mr. Self moved to suppress statements he made during a recorded interview at an Idaho police station. Present at the interview were Sergeant Joseph

Peterson of the Spokane Police Department and Sergeant Anne Kelleher of the Clearwater County (Idaho) Sheriff's Office. Sergeant Kelleher testified to Idaho's one-party consent law. Mr. Self argued that the interview was a result of an agency relationship between Spokane and Clearwater County officers and, thus, violated Washington's privacy act. He argued that both the recording and statements made during the interview should be suppressed. Partly agreeing, the court disallowed the recording, but admitted Mr. Self's statements.

During trial, Detective Marvin Hill testified that he had obtained call logs from Ms. McGuire's cell phone. These logs indicated there were 14 calls "from the suspect to the victim." Report of Proceedings (RP) at 402. Other testimony by Detective Hill indicated he had requested fingerprint analysis but that the available prints were not clear enough to analyze. Defense counsel argued the call log and the fingerprint analysis documents were not provided in discovery. The State responded by reading Detective Hill's police report submitted to counsel several months prior to trial, which indicated search warrants were issued for telephone records and a summary of the records. Counsel indicated Detective Hill summarized their procedures in identifying and tracking down the suspects in the report. After an overnight recess, the court denied Mr. Self's request for a further recess to analyze the materials.

At trial, Mr. Boyle testified pursuant to his plea agreement that he and Mr. Self planned to rob Ms. McGuire for money. Mr. Boyle explained his deal with the State and

was subjected to cross-examination. Mr. Boyle's testimony undermined Mr. Self's duress defense that he cooperated in the plan because he was afraid of Mr. Boyle.

On the fourth day of trial, trial testimony was interrupted to present testimony of Spokane County deputy prosecutor Anthony Hazel out of the presence of the jury. Mr. Hazel testified that the day before, in connection with an unrelated second degree murder case he was prosecuting, he came across a report indicating the defendant he was prosecuting was a suspect in a prior assault case. He contacted the victim of the assault and learned the victim was currently a juror on Mr. Self's case. On inquiry by the court, Mr. Hazel testified no conversation occurred about Mr. Self's trial and the juror did not indicate her opinion about the case. The court declined to voir dire the juror or to excuse her from the jury, instead the court designated her as an alternate.

Mr. Self testified the plan originated with Mr. Boyle and that he was surprised and frightened when he saw Mr. Boyle come into the bedroom with a gun. Mr. Self related he moved from Pinehurst, Idaho to Orofino, Idaho in an attempt to avoid Mr. Boyle after the incident. Mr. Self started to testify about what Mr. Boyle told him in a call after the incident, but the court sustained a hearsay objection.

Without objection, the court instructed the jury, "A person commits the crime of kidnapping in the first degree when he or she intentionally abducts another person with intent to facilitate the commission of robbery or flight thereafter." Clerk's Papers (CP) at 71 (Jury Instruction 23). In the "to convict" instruction, the court instructed the jury

that it must find Mr. Self abducted Ms. McGuire "with [the] intent (a) to facilitate . . . first degree burglary, (b) to facilitate . . . second degree assault . . . or (c) to facilitate . . . first degree robbery." CP at 73 (Jury Instruction 25). The court further instructed, "[T]he jury need not be unanimous as to which of alternatives (2)(a) or (2)(b) or (2)(c) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt." *Id.*

The jury found Mr. Self guilty as charged. His offender score was calculated at six. The court imposed standard range sentences on each conviction, plus a 60-month firearm enhancement on the burglary conviction, 36-month firearm enhancement on the assault conviction, 60-month firearm enhancement on the robbery conviction, and 60-month firearm enhancement on the kidnapping conviction. Mr. Self appealed.

ANALYSIS

A. Mistrial Claims

The issue is whether the trial court erred by abusing its discretion in not granting *sua sponte* a mistrial based on alleged discovery violations and juror misconduct.

A trial court has broad discretion in deciding whether to declare a mistrial. *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). We will find discretion abused if no reasonable judge would have reached the same conclusion. *Id.* A trial court should grant a mistrial solely if the defendant has been so prejudiced that nothing short of a new trial can ensure a fair trial. We will deem errors prejudicial solely when they

affect trial outcome. *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010) (citing *Hopson*, 113 Wn.2d at 284). The errors alleged here do not meet this test.

First, the call log recorded calls from "suspect to the victim." RP at 402. It was undisputed that Mr. Self contacted Ms. McGuire. Thus, even assuming this evidence was improperly concealed by the State, no prejudice is shown. Likewise, Mr. Self admitted being in Ms. McGuire's apartment and the critical acts as part of his duress defense, thus no prejudice is shown. Moreover, the fingerprint analysis did not implicate Mr. Self. And, the prosecutor read the police report on the record, which referenced call logs and identification procedures. This evidence was sufficient for the court to make a decision thereby making a further recess unnecessary.

Next, Mr. Self contends he was prejudiced by the juror's failure to indicate she was a victim of a prior assault. We are unable to determine whether the juror failed to reveal this information because the jury questionnaires were not included in our record. Even so, no prejudice is shown because the juror was an alternate and did not deliberate on Mr. Self's guilt. Given the lack of prejudice, Mr. Self fails to persuade us that nothing short of a new trial would have ensured a fair trial. Accordingly, we conclude the court did not err by failing *sua sponte* to declare a mistrial. *Gamble*, 168 Wn.2d at 177.

B. Evidence Rulings

The issue is whether the trial court abused its discretion in two evidence rulings.

Mr. Self argues he did not waive his *Miranda* rights before his second interview under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Mr. Self contends his statements to police should have been suppressed while his testimony regarding what Mr. Boyle told him should have been allowed.

We review the trial court's decision after a CrR 3.5 hearing to determine if substantial evidence supports the trial court's findings of fact, and whether those findings support the conclusions of law. *State v. Broadaway*, 133 Wn.2d 118, 130-31, 942 P.2d 363 (1997). Unchallenged findings are verities on appeal. *State v. Hill,* 123 Wn.2d 641, 647, 870 P.2d 313 (1994). We review conclusions of law de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996). Here, the court concluded that even though it suppressed the recording, "this does not require suppression of derivative evidence, therefore the statements made during the interview are admissible." CP at 20.

Washington's privacy act, RCW 9.73.090, governs the recording of custodial interrogations. *State v. Mazzante*, 86 Wn. App. 425, 427, 936 P.2d 1206 (1997). It provides that video and/or sound recordings "may be made of arrested persons by police officers" before the arrested person makes his or her first appearance in court. RCW 9.73.090(1)(b). But, the recording may only be used if:

> (i) The arrested person shall be informed that such recording is being made and the statement so informing him shall be included in the recording;
> (ii) The recording shall commence with an indication of the time of the beginning thereof and terminate with an

> indication of the time thereof;
>
> (iii) At the commencement of the recording the arrested person shall be fully informed of his constitutional rights, and such statements informing him shall be included in the recording;
>
> (iv) The recordings shall only be used for valid police or court activities.

RCW 9.73.090(1)(b)(i)-(iv). The trial court found the Idaho recording violated Washington's privacy act and prohibited use of the recording. It, however, found the derivative statements admissible. Because the State did not appeal the privacy issue, our issue is whether the trial court erred in allowing Sergeants Peterson and Kelleher to testify to Mr. Self's statements.

Mr. Self argues the silver platter doctrine applies, but does not explain how it aids him. "'The crux of that doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter.'" *State v. Fowler*, 157 Wn.2d 387, 396 n.5, 139 P.3d 342 (2006) (quoting *Lustig v. United States*, 338 U.S. 74, 78-79, 69 S. Ct. 1372, 93 L. Ed. 1819 (1949)). In other words, evidence illegally obtained may still be admissible in a foreign jurisdiction if a state authority turned over the evidence to the other authority on a silver platter. This doctrine is not helpful in determining if the court erred in allowing Mr. Self's statements.

Instructive is *State v. Courtney*, 137 Wn. App. 376, 153 P.3d 238 (2007), *review denied*, 163 Wn.2d 1010 (2008). In *Courtney*, the recording of Mr. Courtney's custodial

interrogation was found to violate the privacy act, but the court held "violation of section .090 of the privacy act does not require suppression of derivative evidence." *Id.* at 383 (citing *Lewis v. Dep't of Licensing*, 157 Wn.2d 446, 472, 139 P.3d 1078 (2006)). The court further held, "The portion of the act requiring suppression of derivative evidence only applies to private conversations; and, as previously noted, custodial interrogations are not private conversations." *Id.* Following the reasoning in *Courtney*, the trial court here properly concluded the recording was inadmissible but not the derivative evidence.

Next, Mr. Self argues for the first time in his reply brief that his statements were made contrary to *Miranda*. Mr. Self assigned error to the recorded statements not the voluntariness of the statements. An issue may not be raised for the first time in a reply brief. RAP 10.3(c). Thus, the issue of whether the statements violate *Miranda* is not properly before this court. Even so, in the unchallenged court's findings of fact that are verities on appeal, the court found that before the interview in question, "the defendant was reminded of his rights. He acknowledged that he understood those rights and continued to waive those rights." CP at 19.

Turning to the court's hearsay ruling, Mr. Self contends his testimony regarding what Mr. Boyle told him was not hearsay. We review a court's hearsay ruling for an abuse of discretion. *State v. Strauss*, 119 Wn.2d 401, 417, 832 P.2d 78 (1992). Discretion is abused if it is exercised without tenable grounds or reasons. *State ex rel.*

Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is not admissible unless an exception applies. ER 802. Where a statement is not offered for the truth of its contents but for another relevant purpose, the statement is not hearsay and is admissible. *See State v. Iverson*, 126 Wn. App. 329, 336, 108 P.3d 799 (2005) (where self-identification of woman who answered police inquiry, and who did not testify at trial, was not offered to prove her identity but to explain why officers conducted further investigation, statement was not hearsay)).

Here, to advance his duress defense, Mr. Self argued Mr. Boyle forced him to participate in the criminal activity. He then testified that he moved out of fear of Mr. Boyle. Any testimony regarding statements from Mr. Boyle would go to the truth of the matter asserted. Thus, the statements would have been impermissible hearsay. Moreover, if Mr. Self became afraid of Mr. Boyle after the critical events, that is irrelevant to duress causing him to commit the crimes in the first place. The court, therefore, had tenable grounds to exclude the testimony and did not err.

C. Instructions

Mr. Self contends Jury Instructions 23 and 25 are inconsistent and that the court improperly instructed the jury regarding unanimity.

Initially, the State argues these issues cannot be raised for the first time on

appeal under RAP 2.5(a). "An objection to a jury instruction cannot be raised for the first time on appeal unless the instructional error is of constitutional magnitude." *State v. Dent*, 123 Wn.2d 467, 478, 869 P.2d 392 (1994). Regarding Mr. Self's argument that two of the jury instructions are inconsistent, our Supreme Court has clearly held when an appellant has not objected below that two instructions are inconsistent, "we will not consider it for the first time on appeal." *Young v. Group Health Co-op. of Puget Sound*, 85 Wn.2d 332, 339-40, 534 P.2d 1349 (1975); *see also State v. Livengood*, 14 Wn. App. 203, 207, 540 P.2d 480 (1975). But, a claim that the trial court failed to give a unanimity instruction is a constitutional error that may be raised for the first time on appeal. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

The court instructed the jury that to convict Mr. Self of kidnapping it must find he abducted Ms. McGuire with the intent to facilitate first degree burglary, second degree assault, or first degree robbery. The court further instructed, "[T]he jury need not be unanimous" as to which of the alternatives were proved beyond a reasonable doubt, "as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt." CP at 73.

The necessity for a unanimity instruction arises when the evidence establishes that a defendant committed multiple acts constituting more crimes than were charged. In such cases, the trial court must insure that all 12 members of the jury were unanimous as to what crime the defendant committed. *State v. Petrich*, 101 Wn.2d

566, 572, 683 P.2d 173 (1984). This is achieved either by expressly instructing the jury that all 12 must agree on the same act, or by the prosecutor electing what behavior the State is relying upon for conviction. *Id.* Here, the State charged Mr. Self with all the alternative crimes listed in the elements instruction based upon the evidence before the jury. Alternate means prosecutions do not require a unanimity instruction since the jury is agreeing that solely one crime occurred.

The jury was instructed it had to find beyond a reasonable doubt that Mr. Self committed the kidnapping to facilitate the commission of a felony as charged in the second amended information. The kidnapping elements instruction told the jury it had to find Mr. Self committed the kidnapping to facilitate any of the three enumerated felonies (i.e. first degree burglary, second degree assault, or first degree robbery). Considering the evidence, the court properly instructed the jury and did not err.

D. Merger, Double Jeopardy, and Punishment

The next issue is whether Mr. Self's convictions should be reversed based on merger, double jeopardy and cruel and unusual punishment principles. Mr. Self first contends his kidnapping and assault charges should have merged and that they also violate double jeopardy.

The merger doctrine avoids double punishment by merging a lesser offense "into the greater offense when one offense raises the degree of another offense." *State v. Collicott*, 118 Wn.2d 649, 668, 827 P.2d 263 (1992). Merger is based on the double

jeopardy clauses of the United States and Washington constitutions. *State v. Parmelee*, 108 Wn. App. 702, 710, 32 P.3d 1029 (2001). "The merger doctrine is relevant only when a crime is elevated to a higher degree by proof of another crime proscribed elsewhere in the criminal code." *Id.* When two crimes merge, the trial court convicts the defendant only of the one offense into which the other offenses merge. *Id.* at 711.

Mr. Self's argument that the kidnapping charge merges into the robbery fails because kidnapping does not elevate the crime of robbery. Robbery has no kidnapping component. RCW 9A.56.200. Mr. Self's argument that the assault offense merged into the robbery offense also fails. In *State v. Freeman*, 153 Wn.2d 765, 774, 108 P.3d 753 (2005), the Court held that a second degree assault committed in the course of a robbery can merge into the greater offense when it is a single act. But, here, the record shows multiple assaults. Mr. Self's initial assault held Ms. McGuire down as Mr. Boyle entered the apartment. The next assault occurred when Ms. McGuire faced the firearm. Mr. Self had already applied the force necessary to commit the first degree robbery by the time the next assault commenced. He had control of the victim and her property from that initial assault and thereafter she was secured by zip ties.

Mr. Self next contends his kidnapping and assault sentences violate double jeopardy. The United States Constitution provides that a person may not be "subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Washington State Constitution provides that a person may not "be twice put in

jeopardy for the same offense." Wash. Const. art. I, § 9. The constitutional guarantee against double jeopardy protects a person from receiving multiple punishments for the same offense. *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995).

"Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense." *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). "Washington courts look first to the statutory language to determine if it expressly permits multiple punishments for the applicable statutes." *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006). Kidnapping requires proof that the victim was abducted. RCW 9A.40.020(l). Second degree assault has no such element. RCW 9A.36.021. Accordingly, these crimes are not the same "in law" as each contains at least one element exclusive of the other crimes. These crimes are not the "same offense" for double jeopardy purposes. The fact that the offenses were committed contemporaneously does not change the elements of the offenses. Our case is similar to *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). There, the defendant was convicted of two counts of delivery of morphine and a third count of selling without a purchase order. 284 U.S. at 301. Mr. Blockburger argued that the second delivery and the purchase order offense, which arose out of the same single act, could not both be punished. *Id.* at 302. The Supreme Court disagreed, holding one act can violate multiple statutes as

long as the legislature so intended. *Id.* at 304. This is precisely the circumstance here.

Mr. Self next argues the multiple enhancements violate double jeopardy. But, he fails to cite legal authority or provide meaningful argument to support this contention contrary to RAP 10.3(a)(6). Allegations of constitutional error may not rely on "'[b]ald assertions and conclusory allegations.'" *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004) (quoting *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992)). Accordingly, we reject this claim.

Next, Mr. Self contends his sentence is cruel and unusual punishment. In *State* v. *Korum*, 157 Wn.2d 614, 641, 141 P.3d 13 (2006), the court reiterated the four factors to consider in analyzing claims of cruel punishment: "(1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions for the same offense, and (4) the punishment meted out for other offenses in the same jurisdiction."

Applying the first factor, Mr. Self offers no evidence why the nature of his offenses do not support the sentence imposed. All of Mr. Self's convictions are for violent and serious violent offenses and crimes against persons. Applying the second factor, the overarching purpose of the subject statutes and the offenses described was to significantly increase punishment for armed offenders and to provide "legislative guidance to courts in calibrating the appropriate punishment." *State v. Eaton*, 168 Wn.2d 476, 483, 229 P.3d 704 (2010). Mr. Self has failed to prove that his sentence

does not reflect this legislative purpose. Finally, Mr. Self has produced no evidence of how punishment in other jurisdictions compare to Washington. Thus, Mr. Self has not met his burden of proving that his sentence is disproportionate considering the crimes he committed. Accordingly, we reject his cruel and unusual punishment claims.

E. Offender Score

The issue is whether the sentencing court erred in determining his offender score was six. He contends the court should have found his current offenses encompass the same criminal conduct and, thus, count as one crime.

We review the court's calculation of an offender score de novo. *State v. Tili*, 139 Wn.2d 107, 122-23, 985 P.2d 365 (1999).

RCW 9.94A.589(1)(a) provides in relevant part, "if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." "[S]ame criminal conduct" as used in this subsection means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). We review for abuse of discretion the trial court's implicit assumption that the crimes were not the same criminal conduct because it included all convictions when calculating Mr. Self's offender score. No abuse exists here.

Although the crimes occurred at the same time, place and involved the same victim, the crimes involved different criminal intents. The purpose of the robbery was to

obtain Ms. McGuire's property; the purpose of the assault was to injure Ms. McGuire; and the purpose of the kidnapping was twofold -- one was to prove to Ms. McGuire that further infliction of emotional distress was possible at their hands and the other was to facilitate the robbery of her money and other property. Hence, while the crimes overlapped, they had their own independent purposes. Thus, the court had tenable grounds to count the crimes separately in calculating the offender score and did not err.

F. Evidence Supporting Firearm Enhancements

The issue is whether sufficient evidence supports the firearm enhancements. Mr. Self contends the jury should have been instructed regarding knowledge because he argues he did not have knowledge that Mr. Boyle would have a firearm.

First, "[k]nowledge of the presence of a firearm is not a requirement of a deadly weapon allegation and need not be included in a firearm enhancement jury instruction." *State* v. *Barnes*, 153 Wn.2d 378, 387, 103 P.3d 1219 (2005). We decline any invitation to disregard our Supreme Court's precedent.

Next, Mr. Self argues he was merely an accomplice without knowledge that a firearm was to be employed. But, the firearm enhancement applies "if the offender or an accomplice was armed with a firearm." RCW 9.94A.533(3). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of

insufficiency admits the truth of the State's evidence and all reasonable inferences that a trier of fact can draw from that evidence. *Id.* We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

Ms. McGuire testified Mr. Self did not appear shocked or scared when he saw Mr. Boyle with a gun. She further stated Mr. Self appeared to be in charge, while Mr. Boyle appeared more timid and acted as if he did not know what he was doing. Viewing this evidence in the light most favorable to the State, Mr. Self knew a firearm would be used during the commission of the crimes. Moreover, Mr. Self agreed to participate in the crimes, leaving the jury to decide his duress defense. His agreement created the risk that his co-participant, Mr. Boyle, would exceed the scope of the preplanned crimes. *State v. Gamboa*, 38 Wn. App. 409, 414, 415, 685 P.2d 643 (1984).

G. Counsel Assistance

The issue is whether Mr. Self was denied a fair trial based on ineffective assistance of counsel. Mr. Self contends his attorney was ineffective by (1) not properly cross-examining Mr. Boyle, (2) failing to respond to a hearsay objection, (3) failing to object to Jury Instruction 25 regarding unanimity, and (4) failing to raise issues regarding merger, enhancements, and Mr. Self's offender score.

Under the Sixth Amendment to the United States Constitution and article I,

section 22 of the Washington State Constitution, a defendant is guaranteed the right to effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Wash. Const. art. I, § 22. To prove ineffective assistance of counsel, Mr. Self must satisfy a two-part test: He must show that (1) his trial "counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances"; and (2) his trial "counsel's deficient representation prejudiced [his case], i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). A "reasonable probability" is that "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

We have discussed and rejected Mr. Self's error contentions he claims amounted to his attorney's deficient performance except one. Without deficient performance these rejected contentions cannot support a claim of ineffective assistance. His remaining issue is whether defense counsel should have asked Mr. Boyle more questions about his plea agreement to discredit him. Mr. Boyle testified that he agreed to testify against Mr. Self in exchange for a lesser sentence of 130 months and was cross-examined on that topic.

Mr. Self's attorney's decision to not extensively question Mr. Boyle is easily characterized as tactical in support of his duress defense strategy. "'[W]hether and

how much to cross-examine'" a witness is generally considered a trial tactic and is not grounds for an ineffective assistance claim. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 735, 16 P.3d 1 (2001) (quoting *State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967)). The jury was aware that Mr. Boyle's testimony was pursuant to a plea agreement. This evidence is sufficient to raise a credibility issue. It was then the province of the jury to weigh Mr. Boyle's credibility. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Thus, counsel's questioning did not amount to deficient performance.

Because Mr. Self fails to show deficient performance in any of his contentions, we do not address the prejudice prong of the ineffective assistance of counsel test. *See State v. Garcia*, 57 Wn. App. 927, 932, 791 P.2d 244 (1990) ("We need not address both prongs of the [*Strickland*] test if the defendant makes an insufficient showing on one.").

Affirmed.

A majority of the panel has determined this opinion will not be printed in the

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

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Kulik, C.J.

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Siddoway, J.