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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 29765-9-III
Respondent,	)	
v.	)	
MICHAEL J. RICE,	)	UNPUBLISHED OPINION
Appellant.	)	

Brown, J. • Michael J. Rice appeals his first degree robbery, first degree burglary and theft of a motor vehicle convictions. He contends insufficient evidence for all convictions, prosecutorial misconduct, and cumulative error. In his pro se statement of additional grounds for review (SAG), Mr. Rice contends numerous errors that he argues warrant reversal of his convictions. We reject all contentions, and affirm.

FACTS

In the early hours of April 7, 2010, two masked men wearing dark hooded jackets kicked in the door of Debra Vargas' apartment. Ms. Vargas' adult son, Jim Stethem, was

asleep on the couch. When awakened, he saw the men removing items from the residence. One of the men had what appeared to be a gun. Ms. Vargas called 911 and told the dispatcher she had been robbed by men with a gun and metal rod.[1] The men took a laptop computer and Mr. Stethem's DVD player. Ms. Vargas' green minivan was also missing. The police found a metal rod on the floor outside the kitchen in Ms. Vargas' apartment. Police also found a "Chucky" doll under Ms. Vargas' landing. The doll, along with two other Chucky dolls, had been stolen from her niece, Christina Morales, who lives in a nearby apartment complex and who collected such dolls. Police found Ms. Vargas' van in Portland, Oregon, along with two Chucky dolls and a computer tower.

About a week before the robbery, Mr. Rice asked his friend, Jerami Wilson, for help in stealing items from Ms. Vargas. Mr. Wilson was house-sitting for his then girl friend, Ms. Morales, on April 6, 2010. Mr. Rice and Nikolas Campbell came to Ms. Morales' apartment on the night of April 6. Cecilia Circo was at the apartment and she suspected Mr. Campbell and Mr. Rice were "looking to take stuff." Report of Proceedings (RP) at 178. Mr. Campbell had a gun; Mr. Rice had a metal pipe. Mr. Wilson fell asleep at Ms. Morales' apartment. When he woke up, Mr. Rice and Mr. Campbell were gone, and Ms. Morales' Chucky dolls were missing. Ms. Circo claimed

[1] Before trial, the trial court suppressed portions of the 911 call. The only statements allowed were Ms. Vargas' report that a robbery occurred and that two men entered her home with weapons.

Mr. Campbell put the gun in her face and abducted her in the van, with Mr. Rice driving it. The van had a safety switch, which people who had borrowed the van previously would have known about. Mr. Rice had previously driven the van. The three went to Portland. On the drive, the men discussed the robbery. Ms. Circo observed Mr. Campbell with a Chucky doll. The doll was found in Ms. Vargas' van when police located it in Portland.

The State charged Mr. Rice with first degree burglary, first degree robbery, and theft of a motor vehicle. Ms. Vargas passed away before the trial started and, therefore, was unable to testify.

Without objection, the prosecutor made the following comments:

> Two people broke into an apartment rented by Debra Vargas . . . . One of them had a pipe; one of them had what looked like a gun. The person with the gun came up to Mrs. Vargas, who was in her bed, told her to, you know, put her head next to the pillow so she couldn't see anybody and held it while the other person went through the apartment.
>
> . . . .
>
> What happens? Well, they make Mrs. Vargas put a pillow over her head so she can't see; can't identify them.

RP at 100.

After providing more details about the robbery and the evidence, the prosecutor assured the jury that a key witness, Stacy Felkel, would testify that the defendants showed up at her home in the van and talked about "doing a home-invasion robbery." RP

at 103. This witness did not show up to testify.

At trial, Ms. Vargas' and Ms. Morales' landlord, Roy Cochlin, testified he saw Mr. Rice and Mr. Campbell in dark hooded jackets going back and forth between Ms. Morales' and Ms. Vargas' residences.

Mr. Rice testified he went to Ms. Morales' apartment at Ms. Circo's invitation, but that he left between 9:30-10:00 p.m. and went to a friend's house where he stayed until the following morning. He denied any part in the charged events.

The prosecutor concluded his opening remarks by stating:

> [Mr. Rice] saw Mr. Wilson . . . , but *he denies doing the robbery.* That's where you come in, and that's why we are going to ask you, you know, to hold them accountable for their actions.
>
> *They won't admit their crimes,* their actions. That's why we're asking you to hold them accountable, and we are asking you to hold them accountable for robbery. Find that was done with a deadly weapon. Hold them accountable. Find them guilty of theft of a motor vehicle and hold them accountable. Find them guilty of burglary with a deadly weapon.

RP at 106 (emphasis added). During closing, the prosecutor stated:

> Now, the reason that you're here is not because this is a close case or because there's a real hard factual issue. You're here because the defendants do not want to be held accountable for their own actions. You know, *they are never going to admit* -- they are never going to come up and say, "Yeah. We did this. Please, I'll take my punishment for it." That's where you come in.

RP at 324 (emphasis added).

The jury found Mr. Rice guilty as charged, including a special finding that he was armed with a deadly weapon. He appealed.

ANALYSIS

A. Evidence Sufficiency

Mr. Rice contends the evidence does not support any of his convictions because insufficient evidence connects him to the crime scene.

Evidence is sufficient if, viewed in a light most favorable to the prosecution, 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 inferences that reasonably can be drawn therefrom." *Id.* Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the fact finder on issues of witness credibility and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

To convict Mr. Rice of first degree burglary, the jury had to find that he entered or remained unlawfully in a building, that the entering or remaining was with intent to commit a crime against a person or property therein, that in so entering or while in the building or in immediate flight therefrom he was armed with a deadly weapon, and that

these acts occurred in Washington. RCW 9A.52.020(1)(a). To convict Mr. Rice of first degree robbery, the jury had to find Mr. Rice committed a robbery and, in committing or fleeing from the crime, was "armed with a deadly weapon" or "[d]isplays what appears to be a firearm or other deadly weapon." RCW 9A.56.200(1)(a)(i), (ii). And, to convict Mr. Rice of theft of a motor vehicle, the jury had to find Mr. Rice stole a motor vehicle. RCW 9A.56.065(1).

The trial evidence shows Mr. Rice asked Mr. Wilson, for help in stealing items from Ms. Vargas. Mr. Rice and Mr. Campbell went to Ms. Morales' apartment on April 6. Ms. Circo was at the apartment and suspected the men were "looking to take stuff." RP at 178. Mr. Campbell had a gun; Mr. Rice had a metal pipe. Mr. Wilson observed Ms. Morales' Chucky dolls were missing after Mr. Rice and Mr. Campbell left the apartment. Ms. Circo claimed Mr. Campbell put a gun in her face and abducted her in the van, with Mr. Rice driving it. The van had a safety switch, which people who had borrowed the van previously would have known about. Mr. Rice had previously driven the van. The three went to Portland. On the drive, the men discussed the robbery. Ms. Circo observed Mr. Campbell with a Chucky doll. The doll was found in Ms. Vargas' van when police located it in Portland. Additionally, Ms. Vargas' and Ms. Morales' landlord, Mr. Cochlin, testified he had seen Mr. Rice and Mr. Campbell in dark hooded jackets going back and forth between Ms. Morales' and Ms. Vargas' residences.

Viewing this evidence in the light most favorable to the State, a rational trier of fact could find the elements of first degree robbery, first degree burglary, and theft of a motor vehicle beyond a reasonable doubt. While Mr. Rice denies his involvement with these crimes, we defer to the fact finder on issues of witness credibility and persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874-75.

B. Prosecutorial Misconduct

The issue is whether Mr. Rice was denied a fair trial based on three prosecution comments during his trial that we discuss below.

To obtain reversal on the basis of prosecutorial misconduct, Mr. Rice must show (1) the impropriety of the prosecutor's comments and (2) their prejudicial effect. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). Because Mr. Rice failed to object to the prosecutor's misconduct at trial, we ascertain whether the prosecutor's misconduct was so flagrant and ill-intentioned that it caused an "enduring and resulting prejudice" incurable by a jury instruction. *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). This standard of review requires Mr. Rice to establish (1) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict" and (2) no curative instruction would have obviated the prejudicial effect on the jury. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). We review allegedly improper arguments in the context of the total argument, the issues in the case, the evidence

addressed in the argument, and the trial court's instructions. *Russell*, 125 Wn.2d at 85-86.

First, regarding comments on not admitting guilt and proceeding to trial, the State charged Mr. Rice with three crimes and he pleaded not guilty. For this reason, a jury was impaneled and the matter proceeded to trial. The contested comments were reasonable, common sense comments that did not undermine Mr. Rice's right to a jury trial or to confront witnesses. Moreover, the comments were not so flagrant or ill-intentioned that they caused enduring prejudice.

Second, regarding comments on the pillow, the prosecutor stated in his opening remarks that the evidence would show that the culprits put a pillow over Ms. Vargas' head to prevent her from identifying them. This evidence was apparently from the 911 call, which the trial court suppressed except for Ms. Vargas' statement that two men were in her home with weapons. The State conceded that the prosecutor should not have made this statement. The comment, however, requires reversal solely if it was flagrant and ill-intentioned and resulted in enduring prejudice. It did not. The dispute here was not whether Ms. Vargas was robbed, her home burglarized and her car stolen, but rather who committed the crimes. It was already established that the culprits were masked. Accordingly, evidence that a pillow blocked her view of the men's faces was not prejudicial.

Third, regarding comments on Ms. Felkel, during an opening statement, a prosecutor may state what the State's evidence is expected to show. *State v. Brown*, 132 Wn.2d 529, 563, 940 P.2d 546 (1997). Here, the prosecuting attorney's office had been in touch with Ms. Felkel, had arranged for her to be personally served with a subpoena, and had even purchased a bus ticket for her transportation to Benton County. At the time of his opening statement, the prosecutor expected her to testify. She, however, failed to show. The jury was later instructed that counsel's remarks were not evidence and that they must decide the case based on the evidence produced in court. There is no reason to believe the jury did not follow those instructions. Indeed, this court presumes juries follow their instructions. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

Accordingly, none of the State's statements were of such flagrant nature that any potential prejudice could not have been obviated by a further curative instruction had Mr. Rice requested one. Based on our analysis this far, we do not reach his claim of cumulative error. Cumulative error may call for reversal, even if each error standing alone would be considered harmless. *State v. Weber*, 159 Wn.2d 252, 276, 149 P.3d 646 (2006). But, the doctrine does not apply where the defendant fails to establish how claimed instances of prosecutorial misconduct affected the outcome of the trial or how combined claimed instances affected the outcome of the trial. *Id.*

C. Statement of Additional Grounds

Mr. Rice raises several contentions in his SAG. One of his issues is prosecutorial misconduct. Since this issue was adequately addressed by counsel, it will not be reviewed again. *See* RAP 10.10(a) (purpose of SAG is to permit appellant, "to identify and discuss those matters which the defendant/appellant believes have not been adequately addressed by the brief filed by the defendant/appellant's counsel.") The remaining issues involve speedy trial, joinder, same criminal conduct, deadly weapon enhancement, ineffective assistance of counsel, and offender score calculation.

For the first time on appeal, Mr. Rice contends his speedy trial rights under CrR 3.3(b)(1) were violated. Under this rule, the State had 60 days to bring Mr. Rice to trial. But, violations of CrR 3.3 are not constitutionally based and cannot be raised for the first time on appeal. *State v. Smith*, 104 Wn.2d 497, 508, 707 P.2d 1306 (1985). Even assuming the issue could be raised, the record shows the delay in bringing Mr. Rice to trial was due mainly to defense-requested continuances. Under CrR 3.3(g)(3) and (h)(1), continuances are excluded in computing the time for trial. *State v. Jones*, 111 Wn.2d 239, 244, 759 P.2d 1183 (1988).

Second, Mr. Rice contends for the first time that the court erred in joining his trial with Mr. Campbell's. Under CrR 4.4(a)(1), "A defendant's motion for severance of . . . defendants must be made before trial . . . . Severance is waived if the motion is not made at the appropriate time." The trial court was not given a chance to rule on severance. Mr.

Rice, therefore, has waived his right to raise severance here.

Third, Mr. Rice contends his first degree robbery and first degree burglary convictions were the same criminal conduct and should have been considered as such when calculating his offender score. Defense counsel raised this issue during sentencing. The trial court found there was a break in the action to prevent a finding of same criminal conduct.

We review a trial court's determination regarding same criminal conduct under an abuse of discretion standard. *State v. Tili*, 139 Wn.2d 107, 122-23, 985 P.2d 365 (1999). 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).

Under RCW 9.94A.589(1)(a), multiple offenses are counted as a single offense for sentencing purposes if they encompass the same criminal conduct. "Same criminal conduct," for purposes of this statute, "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). Mr. Rice argues the burglary and robbery were committed at the same place, and involved the same victims. But, a break in violence, permitting the actor to complete one action and form a new intent to begin a new action, will prevent a finding of same criminal conduct. *State v. Grantham*, 84 Wn. App. 854, 859, 932 P.2d 657 (1997). Here, Mr. Rice broke into the home to commit a burglary. Upon finding

people in the home, his intent changed to robbing the individuals. This evidence provides tenable grounds for the court to deny his same criminal conduct argument. Consequently, the sentencing court properly calculated Mr. Rice's offender score.

Fourth, Mr. Rice contends the sentencing court erred in imposing a deadly weapon enhancement. Under *State v. Williams-Walker*, 167 Wn.2d 889, 898, 225 P.3d 913 (2010), when a jury finds by special verdict that a defendant used a deadly weapon in committing the crime, the trial court is bound by that determination to impose a deadly weapon enhancement; that is the case here.

Fifth, Mr. Rice contends he was denied effective assistance of counsel because defense counsel failed to locate and interview several possible alibi witnesses.

"To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice." *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Counsel's representation is presumed to have been reasonable, and all significant decisions by counsel are presumed to be an exercise of reasonable professional judgment. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Mr. Rice asserts his counsel was ineffective because he failed to interview witnesses, but we cannot determine the witnesses who might have been interviewed or even whether those witnesses would have been helpful to the defense. If Mr. Rice possesses evidence outside our record, the proper means would be a personal restraint

petition. *McFarland*, 127 Wn.2d at 338.

Accordingly, we conclude Mr. Rice's contentions lack merit.

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.

Brown, J.

WE CONCUR:

Korsmo, C.J.

Sweeney, J.