IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27203-6-III**
	)	**(consolidated with**
Respondent,	)	**No. 27879-4-III)**
	)	
v.	)	
	)	
BENJAMIN B. BROCKIE,	)	
	)	**Division Three**
Appellant.	)	
----------	)	
In re the Personal Restraint of:	)	
	)	
BENJAMIN B. BROCKIE,	)	
	)	**UNPUBLISHED OPINION**
Petitioner.	)	
	)	

Sweeney, J. — This is the second appeal from a sentence for multiple counts of kidnapping. We have already concluded that the sentencing court erred when it departed downward from the presumptive range sentence. *State v. Brockie*, noted at 137 Wn. App. 1052, 2007 WL 914292. On remand, the court invited Benjamin Brockie to suggest other reasons that might justify a downward departure from the presumptive standard range for the sentence. Other than citing to the general purposes of Washington's Sentencing

Reform Act of 1981 (SRA), chapter 9.94A RCW, he could not do so. So the judge sentenced him within the standard range. We conclude that this was not an abuse of discretion and we affirm the sentence. We also deny Mr. Brockie's personal restraint petition.

FACTS

The trial court found Mr. Brockie guilty of 2 counts of first degree robbery, 15 counts of first degree kidnapping, and 2 counts of threats to bomb or injure property. The judge concluded that his sentence for all of these convictions resulted in a presumptive standard range sentence that was clearly excessive. And so the judge sentenced Mr. Brockie to an exceptional sentence below the standard range.

Mr. Brockie's first trial on these charges ended in a hung jury. The State elected to again put Mr. Brockie on trial. Before the second trial, the State recovered six hairs from a pair of nylons found in Mr. Brockie's truck. The resulting DNA[1] tests linked Mr. Brockie or his maternal relatives to the nylons.

Mr. Brockie appealed the convictions. He contended that the trial court should have suppressed some of the evidence against him and that the evidence was not sufficient to support the elements of kidnapping. *Brockie*, 2007 WL 914292, at *3-*4. The State cross-appealed the sentence. It contended that the so-called multiple offense

[1] Deoxyribonucleic acid.

policy of the SRA did not support a downward departure from a sentence within the presumptive range. We disagreed with Mr. Brockie but agreed with the State and remanded for resentencing. *Brockie*, 2007 WL 914292, at *7.

On remand, the State again requested a sentence within the standard range. Mr. Brockie again requested a downward departure from the presumptive range. Specifically, he asked that the court run his sentences for the multiple kidnapping convictions concurrently. Kidnapping is a violent crime and so the court would be required to impose consecutive sentences, absent some reason to depart from the presumptive sentencing range. RCW 9.94A.589(1)(b); RCW 9.94A.535. Our opinion in his first appeal notwithstanding, Mr. Brockie has again urged the court to depart from the presumptive range because the standard range for his convictions was too high because of the multiple offense policy. The court referred to our opinion, in the first appeal, and invited Mr. Brockie to come up with some other reason to depart from the presumptive range. He could not do so, other than to cite to the general purposes of the SRA. And the court sentenced him to a standard range sentence.

DISCUSSION

Mr. Brockie characterizes the judge's refusal to depart from the presumptive standard range as an abuse of discretion for a couple of reasons. First, he says that the sentencing court erroneously concluded that it had no discretion to depart from the

standard range sentence based on the court's reading of our opinion in his first appeal. And he notes the refusal to exercise discretionary authority is an abuse of discretion. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). Next, he contends that the presumptive range required by these multiple crimes justifies a downward departure.

We review the court's decision under the so-called abuse of discretion standard of review. *State v. Tili*, 148 Wn.2d 350, 374, 60 P.3d 1192 (2003).

First, the court certainly had authority to depart from a presumptive standard range sentence by imposing concurrent sentences for violent crimes, despite a legislative mandate for consecutive sentences for these crimes. *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 331, 166 P.3d 677 (2007). But the court's reasons for a downward departure must be substantial and compelling. RCW 9.94A.535; *Mulholland*, 161 Wn.2d at 329-30. Here, we have already concluded in Mr. Brockie's first appeal that the reasons were neither substantial nor compelling because Mr. Brockie did not show and the sentencing judge, accordingly, could not find that the "cumulative effects of subsequent criminal acts are nonexistent, trivial, or trifling." *Brockie*, 2007 WL 914292, at *5.

Mr. Brockie makes two essential arguments. First, he argues that the sentencing court erred by reading our opinion in his first appeal as eliminating any exercise of discretion. We read the judge's comments differently. We did conclude that the multiple

offense policy was not supported by the record and therefore was not grounds for an exceptional downward sentence. But, on remand, the sentencing court invited Mr. Brockie to suggest other grounds that might support an exceptional sentence. Mr. Brockie offered none.

Next, Mr. Brockie argues that the court erred when it failed to recognize that it had discretion under RCW 9.94A.535 to order that he serve his kidnapping sentences concurrently. A sentencing court may order that multiple serious violent offenses run concurrently as an exceptional sentence only if it finds that mitigating factors justify a concurrent sentence. RCW 9.94A.535; *Mulholland*, 161 Wn.2d at 329-30. The sentencing court said:

> I asked [defense counsel] for some alternative theory. And he didn't give me one. He said there are many, but I didn't hear one other than the multiple offense policy.
>
> I feel that I have no discretion [under the statute] and that I must impose the range suggested by [the deputy prosecutor] which is 812 months. If I had discretion, I would certainly exercise it. Not one of those purposes of the SRA, in my opinion, [is] satisfie[d] [by] that sentence.

Report of Proceedings (RP) at 45.

Yes, the judge made the statement that he had no discretion under the SRA but in the same breath he solicited mitigating factors for a downward departure. And Mr. Brockie offered none other than the multiple offense policy we had already rejected. The judge did not then fail to exercise his discretion here. Mr. Brockie failed to offer

compelling reasons for a downward departure from the standard range.

Mr. Brockie also argued that the standard range sentence did not further the SRA's goals. However, "the purposes of the [SRA] enumerated in RCW 9.94A.010 are not in and of themselves mitigating circumstances. Rather, they may provide support for the imposition of an exceptional sentence once a mitigating circumstance has been identified by the trial court." *State v. Alexander*, 125 Wn.2d 717, 730 n.22, 888 P.2d 1169 (1995). Simply citing to the purposes of the SRA is not enough. Mr. Brockie must show specific mitigating circumstances that justify a downward departure. And this he failed to do.

We therefore affirm the sentence.

STATEMENT OF ADDITIONAL GROUNDS

Mr. Brockie raises several additional grounds for reversal.

Double Jeopardy/Merger

He contends that his kidnapping convictions merge into his robbery convictions. We rejected this claim in Mr. Brockie's first appeal. *Brockie*, 2007 WL 914292, at *4; *see also State v. Louis,* 155 Wn.2d 563, 120 P.3d 936 (2005) (rejecting argument that kidnapping merges as "incidental" to robbery). And we will not revisit the issue here. *State v. Worl*, 129 Wn.2d 416, 425, 918 P.2d 905 (1996).

Jury Instructions

Mr. Brockie next argues that the jury instruction defining "threat" misstated the

law and effectively reduced the State's burden of proof. Specifically, he contends that a threat to bomb a building requires a showing greater than merely a threat to cause bodily injury.

Instruction 30 defined "threat" as follows:

> Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person or to cause physical damage to the property of a person other than the actor.

Clerk's Papers (CP) at 204.

Jury instruction 30 defined "threat" according to the applicable statute. Former RCW 9A.04.110(25)(a) (1988)[2] defines "threat" as "to communicate, directly or indirectly the intent . . . [t]o cause bodily injury in the future to the person threatened or to any other person."

Mr. Brockie cites no authority nor does he argue that the trial court's definition of "threat" misstated the law. The instruction properly states the law set out in former RCW 9A.04.110(25)(a).

Ineffective Assistance of Counsel

Mr. Brockie appears to claim that defense counsel was ineffective for failing to object to the "threat" jury instruction. To show ineffective assistance of counsel, a

[2] Now RCW 9A.04.110(27)(a).

defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness, and that he was prejudiced by those failures. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999); *State v. Wilson*, 117 Wn. App. 1, 15-16, 75 P.3d 573 (2003). But often legitimate trial strategy or tactics justify counsel's conduct. *Aho*, 137 Wn.2d at 745-46. And competence is strongly presumed. *Wilson*, 117 Wn. App. at 16.

Defense counsel's failure to object to an erroneous jury instruction may show ineffective assistance of counsel if the jury instruction prejudiced the defendant. *Id.* at 17. Again, the trial court properly defined "threat." So defense counsel's failure to object to the instruction could not amount to ineffective assistance of counsel.

Mr. Brockie also argues that his attorney was ineffective because he failed to offer alternative mitigating factors for an exceptional downward sentence. But he does not tell us what those grounds might be. Mr. Brockie merely speculates that alternatives were available. That is not helpful and certainly does not support his claim of ineffective assistance.

PERSONAL RESTRAINT PETITION

Mr. Brockie also filed a personal restraint petition (PRP). We consolidated it with his second appeal. To obtain relief through this procedure, he must show actual and substantial prejudice resulting from alleged constitutional errors, or for alleged nonconstitutional errors, a fundamental defect that inherently results in a miscarriage of

justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). To avoid dismissal, the petition must be supported by facts, not merely conclusory allegations. *Id.* at 813-14.

Admission of Physical Evidence

Mr. Brockie argues that the trial court at his second trial erred by admitting DNA test results from hairs found on nylons recovered from his truck. He contends the nylons were contaminated by one of the detectives during the first trial when he put his bare hand inside the nylons to show them to the jury. He further contends the nylons could have been contaminated when they were supplied to the jury during the first trial. PRP Ex. F, RP at 2-4.

To be admissible, physical evidence of a crime must be sufficiently identified and demonstrated to be in the same condition as when the crime was committed. *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984). The trial court has wide discretion in ruling on the admissibility of evidence. *Id.* "Factors to be considered 'include the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.'" *Id.* (quoting *Gallego v. United States,* 276 F.2d 914, 917 (9th Cir. 1960)). But the proponent need not eliminate every possibility of alteration of the evidence. *Id.*

During Mr. Brockie's second trial a detective removed the same nylons from a

package and testified that the nylons were in substantially the same condition as when he seized them. The hairs recovered from the nylons were identified as head hair. Mr. Brockie makes no showing that the DNA was the detective's rather than his. And he only suggests the possibility that the nylons came into contact with the other clothing items given to the jury during deliberation. A mere possibility of contamination goes to the weight, not the admissibility, of the evidence. *State v. McGinley*, 18 Wn. App. 862, 867, 573 P.2d 30 (1977).

Mr. Brockie, thus, fails to show a miscarriage of justice with his argument that the State could not show the hairs were on the nylons prior to the first trial.

Failure to Rule

Mr. Brockie next argues that the trial court abused its discretion by failing to rule on the DNA evidence before admitting it. PRP at 5. The State counters that there was no need for a ruling because there was no objection. Resp. to PRP at 9. The trial court has considerable discretion to admit evidence and did not abuse its discretion here. *See State v. Kinard*, 39 Wn. App. 871, 874, 696 P.2d 603 (1985).

When a trial court reserves ruling on an issue, the moving party must "again raise the issue at an appropriate time to insure that a record of the ruling is made for appellate purposes." *State v. Noltie,* 116 Wn.2d 831, 844, 809 P.2d 190 (1991).

Here, the trial court reserved ruling

on Mr. Brockie's motion to exclude the DNA evidence found on the nylons. Mr. Brockie argued that the nylons were mishandled by the jury during the first trial and thus contaminated. The trial court reserved ruling on the motion. So Mr. Brockie had to object to the admission of the evidence during trial. *See id.* Mr. Brockie did not do so; the trial court did not abuse its discretion by not ruling on the motion. And the evidence appears to be easily admissible anyway.

Ineffective Assistance of Counsel

Failure To Renew. Mr. Brockie argues that the failure of his counsel to renew his objection to the admission of the hair evidence found on the nylons presented at trial constituted ineffective assistance of counsel denying him a fair trial. The State originally offered the nylons to illustrate that Mr. Brockie did, in fact, wear the nylon mask over his head during the robberies, as witnesses reported. The nylons were later tested and DNA evidence was offered by the State. Mr. Brockie's counsel objected to its admission, but did not renew his objection after the court reserved it's ruling on the issue.

Mr. Brockie bears the burden of showing ineffective assistance of counsel. An ineffective assistance of counsel claim requires a showing of deficient performance with resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We start with the presumption that counsel's performance was reasonable or effective. *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996);

State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990).

Here, defense counsel did not pursue the objection and allowed the DNA evidence to come in. Mr. Brockie does not explain, nor can we see, how this amounts to deficient performance. There may be a number of reasons why an attorney would choose not to renew an objection. Mr. Brockie only shows that there was a possibility that the nylons were contaminated. His attorney, then, was not required to object to the DNA evidence where a possibility of contamination would go only to the weight of the evidence.

As for the second prong of an ineffective assistance analysis, Mr. Brockie has failed to show that the error resulted in a reasonable probability that the outcome of the trial would have been different had the hair evidence not been admitted. *Bowerman*, 115 Wn.2d at 808. Mr. Brockie's assertion that the admission of the nylons and the resulting DNA testing was the *only* evidence against him in the second trial is wrong. A reasonable fact finder could have reached the same conclusions, absent the general DNA evidence, that Mr. Brockie was guilty of robbery and kidnapping.

Failure To Investigate. Mr. Brockie also contends his counsel's failure to investigate whether the nylons were contaminated amounted to ineffective assistance of counsel. An attorney's conduct cannot provide the basis for a claim of ineffective assistance unless "there is a probability that the outcome would be different but for the attorney's conduct." *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (1993) (emphasis

omitted) (citing *Strickland*, 466 U.S. at 687-88).

Here, Mr. Brockie fails to show that he was prejudiced by his attorney's purported investigatory failures. In fact, Mr. Brockie fails to provide any basis in the record or otherwise upon which to conclude his attorney's conduct was even deficient. Because Mr. Brockie fails to explain what exactly his counsel needed to investigate, he has failed to prove ineffective assistance of counsel.

We affirm the sentence and deny the PRP.

A majority of the panel has determined that 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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Sweeney, J.

WE CONCUR:

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Kulik, A.C.J.

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Brown, J.