State Of Washington, Respondent V. Anthony A. Moretti, Appellant

2017 | Cited 0 times | Court of Appeals of Washington | October 31, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, No. 47868-4-II

Respondent,

v.

ANTHONY A. MORETTI, UNPUBLISHED OPINION

Appellant.

MELNICK, J. Anthony Moretti appeals his conviction and sentence for robbery in the first degree and two counts of assault in the second degree. He argues that the prosecutor committed misconduct, that the trial court erred by denying a mistrial, and that his attorney provided ineffective assistance of counsel. As to his sentence under the Persistent Offender Accountability Act (POAA) of the Sentencing Reform Act of 1981 (SRA), ch. 9.9A RCW, Moretti argues that it constitutes cruel and unusual punishment, that he was entitled to prove his prior convictions to a jury, and that the State failed to meet its burden of proof. Moretti also argues that the sentencing c financial obligations (LFOs). 1

Additionally, Moretti raises a number of issues in his statement of additional grounds (SAG), including whether or not any of his convictions violate double jeopardy. We affirm, but remand for the trial court to strike all discretionary LFOs and to amend the

judgment and sentence to vacate the assault in the second degree conviction against Knapp.

1 Moretti asserts we should not impose appellate costs. Pursuant to RAP 14.2, a commissioner of this court will decide the issue if the State submits a cost bill and Moretti objects to it. Filed Washington State Court of Appeals Division Two

October 31, 2017 FACTS

I. THE INCIDENT

In the afternoon of September 11, 2014, Michael Knapp and his roommate, Tyson Ball,

drove to a boat launch in Oakville to buy methamphetamine from a woman, later identified as

Halli Hoey. Knapp had approximately $1,000 on him.

On route to the boat launch, Ball texted with an acquaintance, Jonathan Charlie,

Report of Proceedings (RP) (July 14, 2015) at

112. They discussed that a woman would meet Knapp and Ball at the boat launch. When Knapp

and Ball reached the boat launch, they saw Hoey. Because Hoey did not have drugs with her,

Knapp and Ball left. Ball thought Hoey looked nervous.

Approximately 20 minutes later, Hoey called Ball to ask if he and Knapp could help jump

start her car. When Ball and Knapp went back to the boat launch, a man approached them and

y 14, 2015)

at 117.

Ball and Knapp gave somewhat inconsistent testimony. Ball testified that as Knapp and

the man were speaking Ball pushed Knapp behind him and was hit with the bat on the arms. RP (July 14, 2015) at 119.

Once the man began attacking Ball with the bat, a second man came out of the bushes. The second

man, armed with an ASP, 2 hit Ball on the head multiple times. Ball escaped and ran off.

Knapp testified that no one asked for a cigarette before he and Ball were attacked. When

Ball got out of the truck to help Hoey, Knapp saw a man running out of the bushes with a baseball

2 bat. He immediately recognized the man as Samuel Hill, a person he knew. Knapp tried

to help Ball, when a second man jumped out of the bushes and began beating Knapp with an ASP.

Ball ran off and both assailants attacked Knapp.

y 14, 2015)

RP (July money. Knapp complied. Once they had the money, the assailants ran away. Hoey drove off

during the assault.

When law enforcement officers reached Knapp, he had a laceration above his left eye,

be defense wounds.

description of the Anthony Moretti. RP (July 15, 2015) at 217. The officers showed Ball a photo montage. Ball

identified Moretti as one of the assailants. The police also showed Knapp a photo montage. Knapp

identified Moretti as one of the assailants.

Officers contacted Moretti approximately two months later and arrested him. Moretti

stated he had no involvement in the incident and did not know anyone involved.

On March 23, 2015, the State charged Moretti with robbery in the first degree and two

counts of assault in the second degree, one for the assault against Knapp and one for the assault

against Ball. The State filed a notice that Moretti may be a persistent offender subject to total

confinement for life without the possibility of release. II. DETECTIVE KEITH PETERSON S TESTIMONY

At trial, Peterson testified that he did not include Charlie in the photo montages because

rsons who identified the defendant as the

person . . . y 14, 2015) at 93. Moretti objected based on hearsay and the court sustained

the objection.

After Peterson stated that he recognized Moretti from his investigation of the incident, the prosecutor asked him whether he had any prior dealings with Moretti. Moretti objected based on relevance and the court sustained the objection.

The prosecutor next asked Peterson what information he obtained from Hill regarding his involvement in the incident. Before Peterson responded, Moretti objected and the trial court

-defendant, co-conspirator

y 15, 2015) at 218.

Outside the presence of the jury, Moretti moved for a mistrial. In the alternative, he asked that he be able to tell the jury that Hill was acquitted of a robbery charge in a separate trial. The court denied both motions, stating:

I just have trouble with saying that in this case, the defendant has been severely prejudiced by the mention of co- that there were two actors and one was clearly Mr. Samuel Hill. So [the prosecutor]

kind of said co-defendant and then said co-conspirator and it just to me is not something where I would declare a mistrial.

RP (July 15, 2015) at 221-22.

Later, the prosecutor asked Peterson whether law enforcement officers attempted to identify other individuals involved in the incident. Moretti objected based on hearsay, but the trial able to identify a female named Halli Hoey who was acquainted with Mr. Hill . . . [and] another

person named Jon, who we

y 15, 2015) at 232.

When the prosecutor asked Peterson several other questions regarding version of events were different, and what information matched the evidence that he collected

during the investigation, Moretti objected to each question. The trial court sustained every

objection.

The prosecutor continued and asked whether, after speaking with Ball, other persons of

interest developed. Moretti again objected and the court sustained the objection. The prosecutor

then asked what identified Mr. Moretti as a . y 15, 2015) at 237. Moretti objected and the court sustained

the objection.

III. HALLI HOEY S TESTIMONY

On the day of the incident, Hoey was with Charlie and Hill. Charlie asked Hoey to take

him to Oakville to meet people at the river. He had a backpack with the end of a bat sticking out

of it.

Hoey drove Charlie and Hill to the boat launch. On the way, Charlie and Hill saw one of

[w] y 15, 2015) at 290.

When they arrived at the boat launch, no one was there. Charlie and Hill got out of the car.

Eventually, a truck with two men arrived. Hoey did not talk to the men from the truck. She heard

Charlie talking to the men, but they began yelling about money or drugs. When she saw a knife

on the older man, Hoey immediately drove off. The following morning, law enforcement officers contacted Hoey. She spoke with the

y 15, 2015) at 296. The statement said that Charlie asked Hoey to

give him a ride so he could sell [m]eth. RP (July 15, 2015) at 306. Hoey denied knowing she

was going to a drug deal and felt pressured into signing the document.

Hoey also testified that she never provided the law enforcement name. Peterson impeached her testimony when he testified that, approximately one week after the

incident, Hoey provided him with a description of the man she picked up RP (Jul. 15, 2015) at 320-21.

Hoey denied that she identified the unknown man, but later identified Moretti in court as

the man she picked up on the road while driving to the boat launch.

IV. MORETTI ASSERTS JUROR OBSERVED HIM IN RESTRAINTS

Near the close of trial, Moretti contended that during recess, a juror saw him in restraints

while being brought back to the courthouse. Moretti feared that the juror would relate her

observations to the other jurors and he moved for a mistrial. The court and the parties questioned

the juror.

The juror said that she did not see Moretti being brought back into the courthouse. She

stated that she was walking up the stairs and passed by Moretti on the second floor. The juror did

not notice whether or not he had restraints on. She mentioned to other jurors that she saw him, but

said nothing else. Moretti moved the court to excuse the juror. The court stated that Moretti could renew his

motions at the end of trial before deliberations. The court stated that it had no reason to disbelieve

the juror.

A courthouse security officer next addressed the court and stated that when Moretti exited

the elevator, he no longer had restraints on because they were removed in the elevator. If the juror

and to excuse the juror, and restated that Moretti could renew his motions at the end of trial.

At the close of th

y 16, 2015) at 379.

V. JURY INSTRUCTIONS

The trial court received proposed instructions submitted by the State. Moretti did not propose instructions, but objected to the order of the instructions and to the accomplice liability instruction. After addressing the objections, the parties agreed on the final instructions.

After the trial court read the instructions to the jury, the court noticed that the robbery in the first degree instruction did not include a deadly weapon element. Moretti moved for a mistrial, but the court denied the motion. It cured the error by informing the jury about the inconsistency, replacing the hard copy of the instruction with a corrected copy, and reading the corrected instruction to the jury. VI. PROSECUTOR S CLOSING ARGUMENT

During closing argument, t 3 in the case:

. . . . Everybody knew. It was a small community. . . . money on him. . . . These guys knew it. They wanted that money. They set him up, met him in a secluded area . . . both armed. Those are a given. Mr. Knapp was attacked. Mr. Ball was attacked. doubt.

RP (July 16, 2015) at 392.

Referring to Knapp and Ball, the prosecutor argued that based on the testimony, there was

y 16, 2015) at 392-93. She argued that it

y

16, 2015) at 393. The prosecutor continued:

And there's no doubt that the defendant was with Sam Hill and that he was involved And this case, Ladies and Gentlemen, there's no doubt that Mr. Moretti is guilty of all of the charges.

RP (July 16, 2015) at 395. In rebuttal, the prosecutor argued:

And Ms. Hoey, she has her own reasons for not testifying as clearly as she did, but

The fact that you may not like him doesn't give Mr. Moretti a pass for what he did. He's clearly implicated in this case. He's clearly identified. He's clearly involved. He clearly had assaulted Mr. Ball and Mr. Knapp. He clearly robbed Mr. Knapp along with Sam Hill. In this case all that matters is what happened and what he did. You shouldn't give [Moretti] a pass simply because there was some misinformation initially or simply because you don't like what they were there to do. But again, that's not what

guilty of the charges against him.

3 y 14, 2015) at 94. RP (July 16, 2015) at 403- [n] suspects in the assault and robbery. RP (July 16, 2015) at 402.

The jury returned a guilty verdict on all three counts.

VII. SENTENCING At sentencing, the State submitted certified copies of the judgment and sentences for

the respective charging documents and plea agreements.

The State argued that Morett

out, y 24, 2015) at

ase that

The trial court sentenced Moretti, a 32 year old, to a term of total confinement for life

without the possibility of release on all three convictions and imposed LFOs.

Moretti appeals.

ANALYSIS

I. PROSECUTORIAL MISCONDUCT

misconduct. We disagree.

trial. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). An

both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 759-61, 278 P.3d 653 (2012). To establish prejudice, the appellant must then show that the improper comments had a substantial

likelihood of affecting the verdict. Emery, 174 Wn.2d at 760-61.

But when the defendant failed to object to the improper comments at trial, the defendant

-intentioned that an instruction could

Emery, 174 Wn.2d at 760-61. The appellant must show

that (1) no curative instruction would have eliminated the prejudicial effect, and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict. Emery, 174 Wn.2d at 761. The focus of this inquiry is more on whether the resulting prejudice could have been cured, rather than the flagrant or ill-intentioned nature of the remarks. Emery, 174 Wn.2d at 761-62.

A. EVIDENCE ISSUES

Moretti argues that the prosecutor elicited improper hearsay evidence over objection, and that the trial court erred by denying a mistrial on that basis. He argues that the prosecutor

of Appellant at 21. We disagree.

1. No Improper Evidence

If a witness testifies on the basis of his or her own observation, it is not hearsay. State v. Powell, 126 Wn.2d 244, 265, 893 P.2d 615 (1995). A prior statement by a witness is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement, and the statement is one of identification of a person made after perceiving the person. ER 801(d)(iii);

State v. Grover, 55 Wn. App. 252, 256, 777 P.2d 22 (1989).

When a statement is offered to show why an officer conducted an investigation, it is not

hearsay and it is admissible. State v. Iverson, 126 Wn. App. 329, 337, 108 P.3d 799 (2005). Nor is it hearsay if the testimony is offered to give context for the investigation. State v. Chenoweth,

188 Wn. App. 521, 534, 354 P.3d 13, review denied, 184 Wn.2d 1023 (2015).

As an initial matter, Moretti offers no substantive argument or authority to show why the

5.

We are not required to review issues without adequate briefing. RAP 10.3(a)(6); Satomi Owners

, 167 Wn.2d 781, 808, 225 P.3d 213 (2009). Even if we do review the issue,

Moretti cannot show that the prosecutor committed misconduct.

Here, the trial court properly sustained objections to hearsay or testimony that went beyond

the scope of an identification statement. But the admitted testimony was proper as it related to

testified as to the identification of the individuals were subject to cross-examination. Moretti offers

no evidence to suggest that the prosecutor attempted to elicit extremely prejudicial evidence. Even

t that the

2. Denial of Motion for Mistrial

In the same vein, Moretti argues that the trial court erred by declining to grant a mistrial

. Br. of Appellant at 25. We disagree.

We review a trial court's denial of a mistrial for an abuse of discretion. State v. Rodriguez,

146 Wn.2d 260, 269, 45 P.3d 541 (2002). We find an abuse of discretion only when no

reasonable judge would have reached the same conclusion. Rodriguez, 146 Wn.2d at 269

(quoting State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)) a motion for mistrial will only be overturned when there is a substantial likelihood that the error Rodriguez, 146 Wn.2d at 269-70 (internal

should grant a mistrial only when the

defendant has been so prejudiced that nothing short of a new trial can insure that the defendant

will be tried fairly. Rodriguez, 146 Wn.2d at 270 (quoting State v. Mak, 105 Wn.2d 692, 701,

718 P.2d 407 (1986)).

The evidence at trial established that Hill acted in concert with Moretti. The court also

ce to

that he was so prejudiced that nothing short of a new trial could insure he be tried fairly. Therefore,

we conclude that the trial court did not abuse mistrial.

B. OPINION TESTIMONY AND BOLSTERING WITNESSES

Moretti argues that the prosecutor repeatedly introduced improper opinion testimony from

law enforcement officers regarding his guilt, credibility, and veracity. He argues that the

arguments. 4

knowledge of the facts at is State v. Demery, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001)

(internal quotations omitted) mination

4 The State argues that Moretti did not object to any of the cited instances of improper opinion testimony and bolstering. Even though Moretti did not object at trial, we decide the issue on the merits. State v. Olmedo,

112 Wn. App. 525, 530-31, 49 P.3d 960 (2002) (internal citation omitted).

may be reversible error

because such evidence violates the defendant's constitutional right to a jury trial, which includes

State v. Kirkman, 159 Wn.2d 918, 927,

155 P.3d 125 (2007). Similarly, p]ermitting a witness to testify as to the defendant's guilt raises

a constitutional issue because it invades the province of the jury and the defendant s constitutional

Olmedo, 112 Wn. App. at 533. An error of constitutional magnitude is

presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a

reasonable doubt. State v. Spotted Elk, constitutional error is harmless only when the untainted evidence provides an overwhelming

Olmedo, 112 Wn. App. at 533.

defendant's guilt is

Olmedo, 112 Wn. App. at 531. We look to

factors, including the types of witnesses involved, the nature of the testimony, the nature of the

charges, the type of defense, and other evidence before the jury. Kirkman, 159 Wn.2d at 928.

otherwise helpful to the jury, and is based on inferences from the evidence, is not improper opinion

test State v. Smiley, 195 Wn. App. 185, 190, 379 P.3d 149, review denied, 186 Wn.2d

1031 (2016).

Moretti cites the following instances of the alleged improper opinion testimony or

bolstering: testimony from a law enforcement officer, who photographed injuries to his hands, that the injuries were consistent with defensive wounds from being struck with a blunt object; remember the details of the incident; demeanor that he seemed reluctant to talk to the police; testimony from a law enforcement officer

seemed to have good relocation of the incident; and testimony from Peterson that, other than Hill

and Moretti, no one else was suspected to be involved in the robbery and assault.

A review of the testimony shows that none constituted an impermissible opinion on

Olmedo, 112 Wn. App. at 531. The law

his direct knowledge and recollection

of the incident.

Even if Moretti could show error, when viewed within the context of the other evidence

admitted at trial. assailant involved in the incident. None of the specified testimony was a direct or indirect opinion

was proper because the

cited testimony was neither improper nor manifest.

C. CLOSING ARGUMENT

Moretti argues that the prosecutor committed further misconduct during closing argument.

We disagree.

e latitude to argue reasonable

State v. Thorgerson, 172 Wn.2d 438, 448, 258 P.3d 43 (2011). A prosecutor may argue that the evidence

does not support the defense theory. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

-intentioned that no curative instruction would

have eliminated the prejudicial effect, and that the misconduct resulted in prejudice that had a

substantial likelihood of affecting the verdict. Emery, 174 Wn.2d at 761.

reasonable

inferences from the evidence and made reasonable inferences regarding the credibility of the

defense theory was unsupported. Further, the trial court i remarks and arguments were not evidence, and to disregard any remark or argument not supported

arguments were proper.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Moretti argues that he received ineffective assistance of counsel because his attorney failed

onduct during closing argument. Br.

of Appellant at 36. We disagree.

The Sixth Amendment to the United States Constitution and article I, section 22 of the

Washington Constitution guarantee the right to effective assistance of counsel. Strickland v.

Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

We review claims of ineffective assistance of counsel de novo. State v. Sutherby, 165

Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on a claim of ineffective assistance of counsel, the deficient representation prejudiced the defendant. State v. Grier, 171 Wn.2d 17, 32-33, 246

P.3d 1260 (2011). Representation is deficient if after considering all the circumstances, the

performance falls below an objective standard of reasonableness. Grier, 171 Wn.2d at 33.

the proceeding would have differed. Grier, 171 Wn.2d at 34. If either prong is not satisfied, the

In re Pers. Restraint of Yates, 177 Wn.2d 1, 35, 296 P.3d 872 (2013).

Moretti references instances in the record where his lawyer did not object, but does not

he argue that an objection would have been successful or that the court would have excluded the

admitted evidence. Based on the discussion above, th

trial and closing argument. Therefore, we conclude that Moretti did not receive ineffective

III. PERSISTENT OFFENDER SENTENCE

reversed because it amounted to cruel and unusual punishment, the POAA procedure violated his

right to trial by jury and proof beyond a reasonable doubt, and because the State failed to meet its

burden of proving that he was a persistent offender. We conclude that the court correctly sentenced Moretti as a persistent offender.

As an initial matter, Moretti did not object to the POAA sentence at his sentencing hearing. 2.5(a)(3); State v. Rivers, 130 Wn. App. 689, 697, 128 P.3d 608 (2005) (illegal or erroneous sentences may be challenged for the first time on appeal). A persistent offender is a person who has been convicted in Washington of a most serious offense, and has on at least two other prior occasions been convicted of a most serious offense in this or any other state. RCW 9.94A.030(38)(a). The POAA states that a persistent offender shall be sentenced to life imprisonment without the possibility of release. RCW 9.94A.570. We review alleged constitutional violations de novo. State v. Siers, 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012).

The SRA requires the trial court to conduct a sentencing hearing. RCW 9.94A.500(1). State v. Knippling, 141 Wn. App. 50, 55, 168 P.3d 426, , 166 Wn.2d 93 (2009). Sentencing under the persistent offender section of the SRA raises two questions of fact, or whether certain kinds of prior convictions exist and whether the defendant was the subject of those convictions. Knippling, 141 Wn. App. at 55-56 (quoting State v. Lopez, 107 Wn. App. 270, 278, 27 P.3d 237 (2001) (quoting State v. Thorne, 129 Wn.2d 736, 783, 921 P.2d 514 (1996), , 147 Wn.2d 515 (2002))).

First, Moretti argues that imposing a POAA sentence violated his rights under the Eighth Amendment and article I, section 14 of the Washington State Constitution.

The Eighth Amendment bars cruel and unusual punishment while article I, section 14 of

the Washington State Constitution bars cruel punishment. The state constitutional provision is more protective than the Eighth Amendment in this context. Consequently, if we conclude that ze the sentence under the Eighth Amendment. State v. Witherspoon, 180 Wn.2d 875, 887, 329 P.3d 888 (2014). Moretti relies on a number of cases to propose that we should look beyond the factors set out in State v. Fain, 94 Wn.2d 387, 617 P.2d 720 (1980), and look at the offender himself. 5 However, the Fain factors are the appropriate method to measure proportionality:

> Fain provides four factors to consider in analyzing whether punishment is prohibited as cruel under article I, section 14: (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction.

Witherspoon, 180 Wn.2d at 887 (quoting State v. Rivers, 129 Wn.2d 697, 713, 921 P.2d 495 (1996)).

Rivers, 129 Wn.2d at 713. Here, a violent offense occurred. Both robbery in the first degree and assault in the second degree are classified as a most serious offense under the POAA. RCW 9.94A.030(33)(a), (b); RCW 9A.56.200(2).

The second factor is the legislative purpos [T]he purposes of the [POAA] includes deterrence of criminals who commit three most serious offenses and the segregation of those criminals from the rest of society. Rivers, 129 Wn.2d at 713 (quoting State v. Thorne, 129 Wn.2d 736, 775, 921 P.2d 574 (1996)). 6

5 Moretti cites to , 183 Wn.2d 680, 358 P.3d 359 (2015) for the proposition that we should look beyond the Fain factors and consider the def circumstance. Moretti argues that we should consider that he was only 20 years old when he committed his first predicate crime, and that he only has an eighth grade education. However, did not involve a POAA sentence which does not have a sentencing range.

does

level in this analysis, even though the dissent does. At the sentencing hearing, there is only evidence of his age as it relates to this issue. 6

of App The third factor is the punishment that the defendant would have received in other jurisdictions. Moretti provides no argument as to how his offenses might be punished elsewhere.

Even if we did consider what kind of punishment would be given for the offenses in other

jurisdictions, this factor alone is not dispositive. Witherspoon, 180 Wn.2d at 888.

The final factor is the punishment meted out for other offenses in the same jurisdiction.

fenders convicted of three most serious offenses are sentenced to life

Witherspoon, 180 Wn.2d at 888.

Additionally, our Supreme Court has held that a life sentence imposed on a defendant convicted

of robbery and found to be a persistent offender was not cruel and unusual punishment. Rivers,

129 Wn.2d at 714.

Considering the Fain not violate his constitutional rights under the Washington State Constitution. Therefore, we do

not further analyze the sentence under the Eighth Amendment, and we sentence does not violate the constitutional prohibition against cruel and unusual punishment.

Next, Moretti argues that he was entitled to a jury trial to prove his prior convictions before

being sentenced to life without the possibility of release.

A defendant has a constitutional right to a trial by jury. U.S. CONST. amend VI; WASH.

CONST

a jury trial or due process. Witherspoon, 180 Wn.2d at 893-94. Thus, in the POAA context, prior

convictions need not be submitted to the jury to be proved beyond a reasonable doubt. State v.

is to reduce the number of serious offenders with tougher sentencing and put away the most dangerous criminals. RCW 9.94A.555(2). But it was also created to protect communities from not limited to those who pose the greatest danger to public safety. Wheeler, 145 Wn.2d 116, 120, 34 P.3d 799 (2001); State v. Smith, 150 Wn.2d 135, 143-56, 75

P.3d 934 (2003).

Moretti relies on a number of United States Supreme Court decisions that state that any

fact that increases the penalty for a crime must be submitted to a jury. This argument has been

rejected in Washington. In Witherspoon the State must prove previous convictions by a preponderance of the evidence and the defendant

convictions. It proved the convictions by a preponderance of the evidence and met its burden. We

conclude that under the POAA, Moretti is not entitled to a jury trial to prove his prior convictions.

Lastly, Moretti argues that the State failed to meet its burden of proof because the record

regarding his prior conviction for vehicular assault is insufficient to prove that the conviction was

valid. He specifically argues that because his guilty plea statement struck the boilerplate language

that the cr

consequences of entering the plea. Br. of Appellant at 62.

may,

but is not required to, give offenders who have been convicted of an offense that is a most serious

offense as defined in RCW 9.94A.030 either written or oral notice, or both, of the sanctions

State v. Crawford, 159

Wn.2d 86, 93-94, 147 P.3d 1288 (2006). Moretti provides no authority to support his argument that such notice was required when he signed his plea. Therefore, we conclude that the State met

nviction because the record was sufficient. 7

IV. LEGAL FINANCIAL OBLIGATIONS

Moretti argues that the sentencing court failed to consider his actual ability to pay before imposing LFOs and costs of incarceration. The State does not object to striking non-mandatory LFOs.

Before a sentencing court imposes LFOs on a defendant, the record must reflect that it

State v. Blazina, 182 Wn.2d 827, 837-38,

344 P.3d 680 (2015). This inquiry also requires the court to consider other factors, such as incarceration and a defendant's other debts when determining a defendant's ability to pay. Blazina, 182 Wn.2d at 839.

Here, the court indicated on the judgment and sentence order that Moretti had the ability or likely future ability to pay any imposed LFOs but it did not make an adequate inquiry on this subject. Accordingly, we remand for the court to vacate the discretionary LFOs.

7 establishing the invalidity of a prior conviction. State v. Inocencio, 187 Wn. App. 765, 776, 351 P.3d 183 (2015). A prior conviction cannot be collaterally attacked during the sentencing of an unrelated case. State v. Ammons, 105 Wn.2d 175, 188, 713 P.2d 719, 718 P.2d 796 (1986). To the extent Moretti attempts to collaterally attack his prior conviction of vehicular assault in this appeal, we conclude that Moretti must seek post-conviction relief. V. STATEMENT OF ADDITIONAL GROUNDS 8

A. RETUNING A VERDICT JURY INSTRUCTION

Moretti asserts that the jury was pressured into finding Moretti guilty because the jury instruction did not give them an option to be hung. He also asserts that the trial court pressured the jury to find him guilty as early as voir dire. We disagree.

As an initial matter, Moretti did not object to this instruction at trial. RAP 2.5(a). Under the Washington State Constitution, a unanimous jury verdict is required in all criminal trials. State

v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); see WASH. CONST. to a unanimous verdict is a fundamental constitutional right and may, therefore, be raised for the

first time on appeal. State v. Holland, 77 Wn. App. 420, 424, 891 P.2d 49 (1995); RAP 2.5(a).

Constitutional issues are reviewed de novo. Siers, 174 Wn.2d at 273-74. Alleged errors of law in

jury instructions are also reviewed de novo. State v. Fehr, 185 Wn. App. 505, 514, 341 P.3d 363

(2015).

After the parties conducted voir dire, the court informed the jury:

[I]n a criminal case we require that all 12 jurors are unanimous in their decision. If you've ever been on a civil case you can have a 10 to two verdict or 11 to one verdict. That cannot happen in a criminal case. All 12 jurors have to agree before you can render a verdict.

RP (July 14, 2015) at 11-12. At the close of trial before deliberations, the court instructed in

relevant part:

You must fill in the blanks provided in the verdict forms the words not guilty or the word guilty , according to the decisions you reach for each count. Because this is a criminal case, each of you must agree for you to return a verdict on each count. When all of you have so agreed, fill in each verdict form to express your decision on each count.

8 Because the SAG is inconsistently paginated, we re-paginate the SAG for citation purposes, starting with the yellow cover sheet as page one. CP at 56 (Instr. 20).

in criminal cases. Stephens, 93 Wn.2d at 190. Therefore, the court did not err by making that

WPIC 151.00. 9

Further, the law does not require jury instructions in a criminal trial to include that

a jury is allowed to be hung, nor is it error to preclude such an instruction. 10 State v. Thompson,

169 Wn. App. 436, 493-94, 290 P.3d 996 (2012). Therefore, we conclude that the trial did not err

instruction.

B. SHACKLES

Moretti asserts the trial court erred when it denied his motion for mistrial when a juror saw him in shackles. He also asserts that the court erred when it declined to dismiss the juror. We disagree.

As discussed above, we apply an abuse of discretion standard in reviewing a trial court's denial of a mistrial. Rodriguez [S]hackling an accused imperils that person's

State v. Elmore, 139

a threshold s

9 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTION CRIMINAL 151.00, at 622 (3d ed. 2008). 10 does not require treatment as a mistrial. State v. Daniels, 165 Wn.2d 627, 634, 200 P.3d 711

(2009). No instruction, standing alone, can instruct a jury how to hang. Judicial intervention is always required. Daniels, 165 Wn.2d at 635-36. State v. Monschke, 133 Wn. App. 313, 336, 135 P.3d 966 (2006) (quoting In Pers.

Restraint of Davis, 152 Wn.2d 647, 694, 101 P.3d 1 (2004)). But the mere fact that a jury sees a defendant wearing shackles does not mandate reversal. Rodriguez, 146 Wn.2d at 270.

Moretti appeared at trial free of shackles. However, he alleged that a juror saw him in restraints during recess. When the court questioned the juror, she stated that she did not see Moretti in restraints. A security officer told the court that if the juror saw Moretti, his restraints had already been removed. The court denied the motion for a mistrial based on this evidence. Moretti has not shown that anything occurred to affect the verdict. We conclude that the trial court did not abuse

C. TO-CONVICT JURY INSTRUCTION

Moretti asserts that the to-convict jury instruction for robbery in the first degree was

erroneous because it did not include the implied element that the victim had an ownership, representative, or possessory interest in the property taken. We conclude that while the omission of the implied element was error, it was harmless.

As an initial matter, Moretti did not object to this instruction at trial on the basis he now asserts. RAP 2.5(a). But the failure to instruct the jury on every element of a charged crime is a manifest error affecting a constitutional right that can be considered for the first time on appeal. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005); RAP 2.5(a)(3). Accordingly, we consider

We review alleged errors of law in jury instructions de novo. Fehr, 185 Wn. App. at 514.

A jury instruction is erroneous if it relieves the State of its burden to prove every element of a crime. State v. DeRyke, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003). Specifically, a to-convict instruction must contain all essential elements of a crime. DeRyke, 149 Wn.2d at 910. Whether a victim of robbery has ownership, representative, or possessory interest in the

State v. Richie, 191 Wn.

-convict

instruction, which relieved the State of its burden to prove every element of the crime of robbery in the first degree. The tria an essential element of the crime.

However, the omission of an essential element of a crime from the to-convict jury instructions may be subject to a harmless error analysis. Richie, 191 Wn. App. at 929. It is harmless when it is clear that [the omission] did not contribute to the verdict; for example, when

Richie

error is not harmless when the evidence and instructions leave it ambiguous as to whether the jury

could have convicted on improper grounds. Richie, 191 Wn. App. at 929 (quoting State v. Schaler, 196 Wn.2d 274, 288, 236 P.3d 858 (2010)).

Here, the uncontroverted evidence established that Knapp had approximately $1,000 on assault. Based on the evidence and instructions, the jury convicted Moretti on proper grounds. Therefore, we conclude that although omitting the essential element was error, it was harmless.

D. RECIDIVIST AGGRAVATOR UNCONSTITUTIONALLY VAGUE

the recent

recidivist aggravator statute is unconstitutionally vague. SAG at 9. He also asserts that allowing A review of the record shows that Moretti did not receive an exceptional sentence. He

received a sentence as a persistent offender.

In addition, Moretti asserts that the jury heard evidence that the incident occurred shortly after he was released from prison, but he does not inform us of the nature and occurrence of the

E. USE OF FALSE TESTIMONY

Moretti asserts that his due process rights were violated because the police coerced false testimony from Hoey and used it against him during trial. We disagree.

and must be set aside if there is any reasonable likelihood that the false testimony could have

State v. Larson, 160 Wn. App. 577, 594, 249 P.3d 669 (2011).

At trial, Hoey testified regarding her version of events of the incident. She testified that

y 15, 2015) at 334.

But Moretti has not shown, and the record does not support, that the officers lied or coerced false testimony from Hoey. Nor has Moretti shown that the State knowingly used perjured

testimony to obtain a conviction against him. Additionally, both Hoey and the law enforcement officers who spoke with her were subject to cross-examination. See State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (the jury determines the credibility of witnesses). Therefore, we F. DOUBLE JEOPARDY & MERGER

Moretti asserts that the State erred by convicting him separately of two counts of assault in the second degree, one against Knapp and one against Ball, in addition to robbery in the first degree. He appears to assert that both assault convictions should be merged with the robbery conviction to avoid violating double jeopardy. 11 We agree with Moretti that the robbery conviction merged with the assault conviction against Knapp. But we disagree that the robbery conviction merged with the assault conviction against Ball.

We review double jeopardy claims de novo. State v. Kelley, 168 Wn.2d 72, 76, 226 P.3d

State v. Chouap, 170 Wn. App. 114,

122, 285 P.3d 138 (2012) (quoting U.S. CONST. amend. V). Similarly, article I, section 9 of the Washington State Constitution provides that a person may not be put in jeopardy twice for the same offense. Chouap, 170 Wn. App. at 122.

Assault in the second degree merges into robbery in the first degree when there is no independent purpose for each crime. State v. Freeman, 153 Wn.2d 765, 778, 108 P.3d 753 (2005).

the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms Freeman, 153 Wn.2d at 778 (quoting State v. Frohs, 83 Wn. App.

803, 807, 924 P.2d 384 (1996)).

11 issue. In its supplemental briefing, the S assault conviction against Knapp, but did not address the assault conviction against Ball. In his

supplemental briefing, Moretti argued for a merger of the robbery and assault charges against Knapp, but not for dismissal of the assault conviction against Ball. robbery against Knapp. The evidence established that Moretti assaulted Knapp with a deadly

weapon in order to rob him. Both Ball and Knapp testified that the attackers demanded money

from Knapp as they assaulted him. Ball testified that once the attackers had the money, they ran

away. But Knapp testified that after the attackers took his money, they kept beating him.

attackers robbed him to show that the assault had an independent purpose from the robbery. But

shor y had an independent purpose or

effect from the robbery.

The State also relies on State v. Prater, 30 Wn. App. 512, 516, 635 P.2d 1104 (1981), in

support of its argument. But the State mischaracterizes the facts in Prater, arguing that this court

declined after

In Prater, the defendants assaulted and robbed a couple in their home. 30 Wn. App. at

514. One of the defendants jabbed the female victim with a gun as she attempted to locate money.

Prater, 30 Wn. App. at 514. When she brushed the gun away, the defendant struck her head with

the gun. Prater, 30 Wn. App. at 514. As the female victim searched for money, one of the

defendants shot the male victim in the face while he was on the floor. Prater, 30 Wn. App. at 514.

conducted for the purpose of Prater, 30 Wn. App. at 516. We declined to

merge the conviction for assault against the male victim with the robbery conviction. Prater, 30 Wn. App. at 516. However, we merged the conviction for assault against the female victim with

the robbery conviction because one of the defendants struck the female victim to intimidate and

induce her to find money. Prater, 30 Wn. App. at 516.

This case is distinguishable because the evidence established that Moretti demanded money from Knapp as he assaulted Knapp. Even assuming Moretti continued to assault Knapp after he distinct from

the robbery. Further, it is possible that Moretti continued assaulting Knapp for a short period to induce him to give more money or prevent him from resisting the taking of his money. See CP at 54 (an element of robbery in the first degree

The State additionally relies on State v. Mahoney, 40 Wn. App. 514, 699 P.2d 254 (1985).

In Mahoney, the defendants assaulted a woman in her garage and, when they allowed her to use the bathroom, demanded her wallet. 40 Wn. App. at 515. When the defendants found only a small which they

took. Mahoney, 40 Wn. App. at 515. We declined to merge the conviction for assault against the assault, there was no attempt of a robbery against her husband. Mahoney, 40 Wn. App. at 517.

This case is distinguishable because Moretti demanded money from Knapp as he assaulted Knapp. The evidence established that Moretti assaulted Knapp in order to rob him. Knapp provided conflicting testimony that Moretti continued to assault him after Moretti took his money. motivation Moretti had for assaulting Knapp. But no other evidence in the record supports this conclusion and the State does not cite to any. attacked them. RP (July 14, 2015) at 123. But Ball testified that Moretti assaulted him because

y 14, 2015) at 119.

Accordingly, we conclude that the robbery in the first degree conviction merged with the assault in the second degree conviction against Knapp because there was no independent purpose

for each crime. But we affirm the conviction for assault in the second degree against Ball.

We affirm, but remand for the trial court to strike all discretionary LFOs and vacate the assault in the second degree conviction against Knapp.

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 in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

I concur:

Sutton, J. BJORGEN, C.J. (dissenting) This appeal presents the next step in the evolution of our law governing punishment of those with psychological traits of juveniles at the time of the offense. Moretti was sentenced as an adult under the Persistent Offender Accountability Act of the Sentencing Reform Act of 1981 (POAA), chapter 9.94A RCW, to mandatory life that was essential to this sentence when he was 20 years old, well within the age at which our Supreme Court has recognized the characteristics of youth persist. , 183 Wn.2d 680, 692 n.5, 358 P.3d 359 (2015). The question, then, is whether our law consigns one to imprisonment without hope of release, with no whisper of human discretion and no consideration of the characteristics of youth, based in part on a crime committed when our law recognizes those characteristics persist. After Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), ll, 183 Wn.2d 680, and State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017), the answer must be no.

In Miller, U.S. at 479. The court rested this holding on its recognition that

[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.

Miller, 567 U.S. at 479.

The characteristics of youth on which Miller relied were those first summarized in Roper

v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). Miller, 567 U.S. at 472. In

that decision the Court identified three general differences between adults and juveniles central -considered

Roper, 543 U.S. at 569 (quoting Johnson v. Texas, 509 U.S. 350, 367,

113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993)

Roper, 543 U.S. at

570 (quoting Thompson v. Oklahoma, 487 U.S. 815, 835, 108 S. Ct. 2687, 101 L. Ed. 2d 702

(1988)).

Roper, 543 U.S. at 569.

Id. at 570.

Fina personality traits of juveniles Id. at 570

that even a heinous crime committed by a juvenile is evidence of irretrievably depraved

Id. at 570.

In finding these differences, the Court in Roper, Miller, and the intervening Graham v.

Florida, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), drew on developments in

Miller, 567 U.S. at

471-72 (quoting Graham, 560 U.S. at 68). These differences, the Court recognized, both

Roper, 543 U.S. at 571, and enhanced the prospect of

reformation, Miller, 567 U.S. at 472. With these differences, each decision recognized that the

penological justifications for imposing the harshest sentences were diminished for

juveniles. See Miller, 567 U.S. 472. Our state Supreme Court has embraced the reasoning of the Roper line of cases and

extended that reasoning to hold that

[t]he Eighth Amendment [r]equires [s]entencing [c]ourts [t]o [c]onsider [t]he [m]itigating [q]ualities of [y]outh at [s]entencing, [e]ven in [a]dult [c]ourt.

Houston-Sconiers, 188 Wn.2d at 18. The court read the Sentencing Reform Act (SRA), chapter

9.94A RCW, to allow courts to comply with this mandate. The court also held that the

mandatory nature of the sentencing enhancements imposed violated the Eighth Amendment

under the same reasoning. Houston-Sconiers, 188 Wn.2d at 25-26.

Roper, Graham, Miller, and Houston-Sconiers all dealt with crimes committed while the

defendant was a juvenile. committed while an adult, the first at

age 20. Thus, the specific holdings of these three decisions do not disclose any flaw in his

POAA sentence, but their rationales and empirical bases do.

ome abrupt and mystic

translation into the mind of an adult. In Roper, 543 U.S. at 574, the United States Supreme

when an in Consistently with that recognition, the Washington Supreme

Court held in , 183 Wn.2d at 698-99, that

range applicable to an adult felony defendant, and that the sentencing court must exercise its discretion to decide when that is.

(Emphasis added.) reasoned that the same characteristics of youth based on the same

scientific findings relied on by Miller, Roper, and Graham require a sentencing court to consider whether a youthful defendant should receive an exceptional sentence below the standard range under the SRA, even if the defendant was over 18 when he or she committed the offense. , 183 Wn.2d at 689, 691-92, 695. In reaching this holding quoted A. Rae Simpson, MIT Young Adult Development

Project: Brain Changes, Mass. Inst. of Tech. (2008),

fully mature at . . . 18, when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are all , 183 Wn.2d at 692 n.5. The court also quoted the finding in Jay N. Giedd, Structural Magnetic Resonance Imaging of the Adolescent Brain important for controlling impulses, is among the latest brain regions to mature without reaching

, 183 Wn.2d at 692 n.5. These neurological characteristics also formed the substrate of the constitutional reasoning in Roper, Graham, Miller, and Houston-Sconiers.

, in other words, is instructing us that the very characteristics that underlie Miller and Houston-Sconiers characteristics that led to the Eighth Amendment analyses and holdings of Roper, Graham, and Miller and to the constitutional and statutory analyses and holdings of Houston-Sconiers, would That is the ineluctable result of recognition of the psychological and neurological realities of the maturing mind.

The application of these principles to the POAA is more vexing. On one hand, these holdings apply to sentencing, and Moretti was sentenced under the POAA at age 32, well beyond

the age at which demands that we heed the characteristics of youth. However, Moretti

was not sent as indispensable as the rest to the POAA sentence. Without that first conviction, he could not

have been sentenced under the POAA. His POAA sentence, therefore, was as much a

In some ways, life imprisonment without possibility of rele more deeply than does execution. It condemns the prisoner to a captivity from which the only

release is death. It disinherits the prisoner once and for all from the hope of freedom, the

common inheritance that lies near the heart of what it is to be human.

Public safety may show the need for even that forfeit. Miller holds, though, that the

mandatory imposition of that punishment for crimes committed while a juvenile is not tolerated

by the Eighth Amendment. Houston-Sconiers holds that the Eighth Amendment requires that the

characteristics of youth be considered in sentencing for crimes committed while a juvenile,

whether or not mandatory. requires that the same characteristics of youth that underlie

Miller and Houston-Sconiers be considered in sentencing for crimes committed at an age these

characteristics generally persist. The studies on which relied show that range extends at

least to age 20. , 183 Wn.2d at 689, 691-92, 695.

Moretti was mandatorily sentenced to life imprisonment without possibility of release, a

mandatory sentencing involved not a shred of human discretion or consideration of the

individual. Nor did it require that any heed be paid to the characteristics of youth at the time of

his offense at age 20. recognized that the same characteristics of youth that led to

Miller ry life without parole and Houston-Sconiers requirement that

youth be considered in sentencing generally are also present in young adulthood, certainly

including age 20. thus demands the same conclusions as in Miller and Houston-Sconiers for crimes committed at age 20. Under the confluence of Miller, Houston-Sconiers, and , 12

_____ BJORGEN, C.J.

12 In State v. Thorne, 129 Wn.2d 736, 921 P.2d 514 (1996), State v. Rivers, 129 Wn.2d 697, 921 P.2d 495 (1996), and State v. Witherspoon, 180 Wn.2d 875, 329 P.3d 888 (2014), our Supreme Court upheld the POAA against various challenges, including those based on the Eighth Amendment to the United States Constitution and article I, section 14 of our state constitution. None of these decisions, though, involved issues relating to the characteristics of youth, and each -breaking opinions in and Houston- Sconiers, which touch directly on the present issues. Thus, these prior POAA cases do not speak to this case.