No. 91554-7
COA No. 45143-3-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MEKO DEAUNTE JONES,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Linda C.J. Lee

PETITION FOR REVIEW

THOMAS M. KUMMEROW
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

RULES

A. IDENTITY OF PETITIONER

Meko Jones asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Meko Deaunte Jones*, No. 45143-3-II (March 10, 2015). A copy of the decision is in the Appendix at pages A-1 to A-15.

C. ISSUES PRESENTED FOR REVIEW

1. A defendant has the constitutional right to be free from being placed twice in jeopardy. The merger doctrine is a derivative of double jeopardy and provides that where one offense elevates the degree of another offense, imposing convictions for both violates double jeopardy. Here, the assault convictions provided the force to elevate the robbery allegation to first degree. Is a significant question under the United States and Washington Constitutions involved where the court violated double jeopardy when it imposed convictions for second degree assault and first degree robbery for the same act?

2. Application of the merger doctrine bars imposing convictions for robbery and kidnapping where the kidnapping is incidental to the robbery. Is a significant question under the United States and Washington Constitutions involved where the trial court's imposition of convictions for first degree kidnapping and first degree robbery violated double jeopardy where Mr. Jones' kidnapping was merely incidental to the robbery?

3. A defendant has a Sixth Amendment and article I, section 22 right to counsel and to the effective representation of counsel. A defendant who is denied the effective assistance of counsel and is prejudiced by that failure at sentencing is entitled to a new sentencing hearing. Here, counsel failed to argue the robbery, assault, and kidnapping convictions were the same criminal conduct. Is a significant question under the United States and Washington Constitutions involved where Mr. Jones was prejudiced by his attorney's deficient representation thus requiring reversal of his sentence and remand for resentencing?

D. STATEMENT OF THE CASE

Meko Jones and Kaylcigh Littlefield began a romantic relationship, and in 2009 began living together. 6/18/2013RP 17-18.

Mr. Jones fathered a son, who was 17 months old at the time of trial, with Ms. Littlefield. 6/18/2013RP 16. On August 20, 2012, Ms. Littlefield decided to move out of the residence she shared with Mr. Jones and took her son with her. 6/18/2013RP 19. Ms. Littlefield still allowed Mr. Jones to regularly visit with his son. 6/18/2013RP 19-20. Ms. Littlefield, Mr. Jones, and their son spent time together at Christmas 2012. 6/18/2013RP 20. Following Christmas, Mr. Jones alleged Ms. Littlefield stopped letting him see his son. 6/25/2013RP 28.

Mr. Jones' anger over his inability to see his son got the better of him and he decided to confront Ms. Littlefield at Bates Technical College in Tacoma, where she was a student. 6/18/2013RP 22; 6/25/2013RP 35. Mr. Jones admitted he did not have a plan when he confronted Ms. Littlefield, but he admitted he was armed with a firearm during the confrontation. 6/25/2013RP 30-37. Mr. Jones confronted Ms. Littlefield as she arrived at the school. 6/18/2013RP 23; 6/25/2013RP 37.

Mr. Jones was angry and began yelling and cursing at Ms. Littlefield while pointing the gun at her. 6/18/2013RP 23-24; 6/25/2013RP 37. At some point, the gun fired, striking Ms. Littlefield in the abdomen. 6/18/2013RP 28; 6/25/2013RP 38-41. The two walked

to Ms. Littlefield's car and Mr. Jones began driving with the gun in his lap. 6/18/2013RP 35; 6/25/2013RP 47. While driving and arguing with Ms. Littlefield, Mr. Jones began hitting the dashboard of the car with the gun in his hand. 6/18/2013RP 36; 6/25/2013RP 48. The gun went off a second time, this time striking the passenger window next to where Ms. Littlefield was seated. 6/18/2013RP 36; 6/25/2013RP 48-49.

Ms. Littlefield and Mr. Jones sat in the car outside Mr. Jones' mother's house talking. 6/18/2013RP 40. At some point, Mr. Jones asked Ms. Littlefield how much money she had in her bank account. 6/18/2013RP 42. When she responded that she had $300, Mr. Jones requested her Automatic Teller Machine (ATM) card and Personal Identification Number (PIN) and drove to a nearby convenience store. 6/18/2013RP 42-46. There, Mr. Jones withdrew $200 from Ms. Littlefield's account. 6/18/2013RP 45; 6/25/2013RP 56. The two then returned to Mr. Jones' mother's home where they again began to argue. 6/18/2013RP 50; 6/25/2013RP 59-60. Ultimately, Mr. Jones got out of the car and allowed Ms. Littlefield to drive to St. Joseph's emergency room where she was treated for the gunshot wound. 6/18/2013RP 67-68; 6/25/2013RP 79-81. Mr. Jones drove towards the hospital in his

own car but was arrested a short time later by the police. 6/17/2013RP 93-97; 6/18/2013RP 7-9.

Mr. Jones was subsequently charged with two counts of first degree assault, one count of first degree robbery, one count of first degree kidnapping, one count of unlawful possession of a firearm, one count of attempting to elude, one count of felony harassment for threatening to kill Ms. Littlefield's mother, and one count of tampering with a witness for allegedly attempting to persuade Ms. Littlefield to change her testimony. CP 14-18. All of the counts except the attempting to elude, unlawful possession, and tampering counts also contained firearm enhancements. CP 14-18. The jury acquitted Mr. Jones of the two counts of first degree assault, but convicted him of the lesser degree offense of second degree assault. CP 122-24, 142-44. The jury otherwise convicted Mr. Jones as charged. CP 122-145.

The Court of Appeals agreed that Mr. Jones' sentence for second degree assault combined with the term of community custody exceeded the statutory maximum and remanded his sentence on that count. Decision at 4-5. The Court disagreed with Mr. Jones that his sentences for second degree assault and first degree robbery, and first degree robbery and first degree kidnapping violated double jeopardy

and affirmed the sentences on those counts. Decision at 5-8. Finally, the Court refused to find trial counsel rendered ineffective assistance for failing to argue the kidnapping, robbery and assault convictions constituted the same criminal conduct. Decision at 9-12.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

1. **The merger doctrine required striking several of Mr. Jones' convictions.**

a. *The Double Jeopardy Clauses of the United States and Washington Constitutions bar multiple punishments for the same offense.*

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that "[n]o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb." Article I, section 9 of the Washington State Constitution provides that "[n]o person shall ... be twice put in jeopardy for the same offense." The two clauses provide the same protection. *In re Personal Restraint of Borrero*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007); *State v. Weber*, 159 Wn.2d 252, 265, 149 P.3d 646 (2006). The State may bring multiple charges arising from the same criminal conduct in a single proceeding. *State v. Michielli*, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997). However, the double jeopardy provisions of the United States and Washington Constitutions bar multiple punishments for the same

offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *State v. Kier*, 164 Wn.2d 798, 803, 194 P.3d 212 (2008).

The Legislature can enact statutes imposing multiple punishments for the same conduct. "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). If the Legislature intended to impose multiple punishments, their imposition does not violate the double jeopardy clause. *Id.* at 368.

If, however, such clear legislative intent is absent, then courts apply the *Blockburger* test. *Id.; see Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Under this test, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* If application of the *Blockburger* test results in a determination that there is only one offense, then imposing two punishments is a double jeopardy violation.

The assumption underlying the *Blockburger* rule is that the Legislature ordinarily does not intend to punish the same conduct under two different statutes; the *Blockburger* test is a rule of statutory construction applied to discern legislative purpose *in the absence of clear indications of contrary legislative intent. Hunter,* 459 U.S. at 368.

b. The merger doctrine bars imposition of convictions for robbery and assault and robbery and kidnapping.

The merger doctrine applies at the time of sentencing and is designed to correct violations of double jeopardy. *State v. Parmelee,* 108 Wn.App. 702, 711, 32 P.3d 1029 (2001). Merger is a doctrine of statutory interpretation used to determine whether the legislature intended to impose multiple punishments for a single act that violates several statutory provisions. *In re Personal Restraint of Fletcher,* 113 Wn.2d 42, 50-51, 776 P.2d 114 (1989). Whether the merger doctrine bars double punishment is a question of law reviewed *de novo. State v. Williams,* 131 Wn.App. 488, 498, 128 P.3d 98 (2006).

Under the merger doctrine, when the degree of one offense is raised by conduct that the legislature has separately criminalized, courts presume that the legislature intended to punish both offenses once through a greater sentence for the greater crime. *Freeman,* 153 Wn.2d at 772-73. Two offenses merge under the merger doctrine if, "to prove

a particular degree of crime (*e.g.*, first degree rape) the State must prove not only, that a defendant committed that crime (*e.g.*, rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (*e.g.*, assault or kidnapping)." *State v. Freeman*, 153 Wn.2d 765, 777-78, 108 P.3d 753 (2005), *quoting State v. Vladovic*, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983). Thus, where a predicate offense is an underlying element of another crime, generally the predicate offense will merge into the second, more serious crime and the court may not punish it separately. *Vladovic*, 99 Wn.2d at 421.

i. The convictions for the two counts of second degree assault merged with the count for first degree robbery where the assault provided the force necessary to elevate the degree of robbery to first degree.

This Court has held that second degree assault merges into first degree robbery when there is no independent purpose for each crime. *Freeman*, 153 Wn.2d at 774.

Here the Court of Appeals ruled the assaults were not the force for the robbery and they had an independent purpose from the robbery. Decision at 8. Mr. Jones' contends the two assaults did in fact provide the force necessary to elevate the robbery to first degree. Thus, Mr.

Jones asks this Court to accept review and find the assaults should have merged with the robbery.

ii. The convictions for first degree robbery and first degree kidnapping merged where the kidnapping was incidental to the robbery.

If the evidence proving one crime is also necessary to prove a second crime or a higher degree of the same crime, the appellate court will consider whether the facts show that the additional crime was committed incidental to the original crime. *State v. Johnson,* 92 Wn.2d 671, 680, 600 P.2d 1249 (1979). If one crime was incidental to the commission of the other, the merger doctrine precludes additional convictions; but if the offenses have independent purposes or effects, the court may impose separate punishment. *Freeman,* 153 Wn.2d at 778; *Vladovic,* 99 Wn.2d at 421. To establish an independent purpose or effect of a particular crime, that crime must injure the person or property of the victim or others in a separate and distinct manner from the crime for which it also serves as an element. *Freeman,* 153 Wn.2d at 779; *Johnson,* 92 Wn.2d at 680.

The Court of Appeals ruled that this Court's decision in *State v. Berg,* 181 Wn.2d 857, 866, 337 P.3d 310 (2014), bars kidnapping and

robbery from ever merging. Decision at 8. Mr. Jones asks this Court to reexamine this holding in light of the facts here.

Here, the restraint of Ms. Littlefield and subsequent movement were merely incidental to the robbery. The restraint was ultimately for the purpose of robbing Ms. Littlefield. As a result, Mr. Jones asks this Court to find the kidnapping and robbery convictions should have merged.

2. Mr. Jones' trial attorney rendered constitutionally deficient representation when he failed to move the court to find that the assault, robbery and kidnapping convictions constituted the same criminal conduct.

a. *Mr. Jones had the right to the effective assistance of counsel.*

A criminal defendant has a Sixth Amendment and art. I, § 22 right to counsel. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 58, 77 L.Ed. 158 (1932). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct.

2052, 80 L.Ed.2d 674 (1984), *quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 275-76, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942).

The proper standard for attorney performance is that of a reasonably effective lawyer. *Strickland*, 466 U.S. at 687; *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). When raising an ineffective assistance of counsel claim, the defendant must meet the requirements of a two prong test:

> First, the defendant must show counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

"A claim of ineffective assistance of counsel presents a mixed question of fact and law reviewed *de novo*." *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

While a challenge to the failure to find counts to be the same criminal conduct cannot be raised for the first time on appeal, *State v. Nitsch*, 100 Wn.App. 512, 523-25, 997 P.2d 1000 (2000), the issue can be raised for the first time on appeal where such a failure is due to the deficient representation of defense counsel and a sufficient record

exists for the court to determine whether the counts are the same criminal conduct. *State v. McFarland,* 127 Wn.2d 322, 337-38 n.5, 899 P.2d 1251 (1995).

b. *Where multiple current offenses constitute the same criminal conduct the trial court must count them as a single offense.*

A person's offender score may be reduced if the court finds two or more of the criminal offenses constitute the same criminal conduct. RCW 9.94A.589(1)(a). Same criminal conduct "means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id.*

The "same criminal intent" element is determined by looking at whether the defendant's objective intent changed from one act to the next. *State v. Dolen,* 83 Wn.App. 361, 364-65, 921 P.2d 590 (1996). The mere fact that distinct methods are used to accomplish sequential crimes does not prove a different criminal intent. *State v. Grantham,* 84 Wn.App. 854, 859, 932 P.2d 657 (1997). The "same time" element does not require that the crimes occur simultaneously. *State v. Porter,* 133 Wn.2d 177, 185-86, 942 P.2d 974 (1997). Individual crimes may be considered the same criminal conduct if they occur during an uninterrupted incident. *Porter,* 133 Wn.2d at 185-86, *citing State v.*

Walden, 69 Wn.App. 183, 188, 847 P.2d 956 (1983) (court found a defendant's convictions for second degree rape and attempted second degree rape, committed by forcing the victim to submit to oral and attempted anal intercourse during one continuous incident, to be same criminal conduct).

c. *The offenses shared the same intent, were committed at the same time, and involved the same victim.*

The robbery, assaults, and kidnapping occurred at the same time and place and involved the same victim, Ms. Littlefield. Thus, the only issue was whether the offenses shared the same intent.

The Court of Appeals ruled the assaults were not committed at the same time or place nor were the assaults and the kidnapping. Decision at 11-13. But this ruling is far too formulistic and is contra to this Court's ruling in *Porter*. As such, this Court should accept review to determine whether under *Porter*, the assaults were in fact committed at the same time and place.

The Court of Appeals further ruled that the kidnapping and the robbery did not share the same intent. But, in the same criminal conduct context, intent is the offender's objective criminal purpose in committing the crime. *State v. Adame*, 56 Wn.App. 803, 811, 785 P.2d 1144 (1990). Crimes may involve the same intent if they were part of a

continuous transaction or involved a single, uninterrupted criminal episode. *State v. Deharo,* 136 Wn.2d 856, 858-59, 966 P.2d 1269 (1998). "This analysis may include, but is not limited to, the extent to which one crime furthered the other, whether they were part of the same scheme or plan and whether the criminal objectives changed." *State v. Calvert,* 79 Wn.App. 569, 578, 903 P.2d 1003 (1995).

The Court of Appeals ignored this principle in its ruling. As argued, the objective intent of Mr. Jones was to convince Ms. Littlefield to let him see his son. While Mr. Jones testified he did not have a specific plan when he first confronted Ms. Littlefield, clearly his anger arose from Ms. Littlefield's refusal to allow him to visit with his son and all of the subsequent offenses arose from that goal. The kidnapping was for the purpose of getting Ms. Littlefield to listen to him and the assaults were designed to further that goal when she argued with him. The robbery was to obtain a gun to further convince Ms. Littlefield to capitulate by threatening to use the gun to kill her mother. As such, the offenses constituted the same criminal conduct.

Further, defense counsel's failure to move the trial court to find the offenses to be the same criminal conduct constituted constitutionally deficient performance. There was no legitimate

strategic or tactical reason not to have requested the court to find the offenses were the same criminal conduct. Mr. Jones would only have benefited from such a request, and would not have suffered adverse consequences. In addition, counsel's performance was prejudicial where the sentencing court would likely have found the offenses were the same criminal conduct because it would have reduced Mr. Jones's offender score and resulted in a substantial reduction in his standard sentencing range.

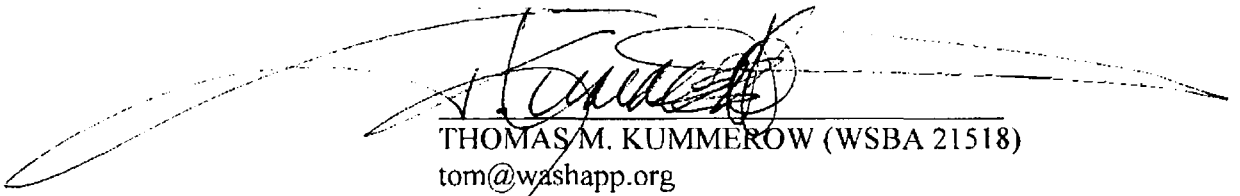
Mr. Jones asks this Court to find the offenses constituted the same criminal conduct, and as such, his attorney rendered constitutionally deficient representation mandating reversal of his sentence.

F. CONCLUSION

For the reasons stated, Mr. Jones asks this Court to accept review and reverse and remand his sentences.

DATED this 8th day of April 2015.

Respectfully submitted,



THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MEKO DEAUNTE JONES, Appellant.	No. 45143-3-II UNPUBLISHED OPINION

BJORGEN, A.C.J. — A jury found Meko Jones guilty of, among other offenses, two counts of second degree assault, one count of first degree kidnapping, and one count of first degree robbery. Jones appeals, contending that (1) his sentences for the assault convictions were unlawful because the combined term of confinement and community custody for each conviction exceeded the maximum allowed by statute, (2) his assault and robbery convictions merge, as do his kidnapping and robbery convictions, and (3) his counsel rendered ineffective assistance by failing to argue at sentencing that Jones's assault, kidnapping, and robbery offenses encompassed the same criminal conduct. In a pro se statement of additional grounds (SAG), Jones also alleges prosecutorial misconduct.

We hold that (1) the sentencing court erred in imposing a combined term of confinement and community custody that exceeded the maximum allowed for each of the second degree assault convictions, requiring a remand to correct the unlawful sentence, (2) none of Jones's convictions merge because of the way the State charged and proved each offense, and (3) Jones did not receive ineffective assistance of counsel because his assault, robbery, and kidnapping offenses did not encompass the same criminal conduct. We decline to address Jones's prosecutorial misconduct claim because he invited any error.

We affirm Jones's convictions, but remand to the sentencing court to correct his sentence for each of the second degree assault convictions so that the combined term of confinement and community custody for each conviction does not exceed the statutory maximum.

FACTS

Kayleigh Littlefield is the mother of Jones's son. Because of Jones's behavioral problems, she cut off his contact with their son around Christmas of 2012.

In early January 2013, Jones arrived at Littlefield's school and waited for her, carrying a pistol that he believed would enhance his persuasiveness in demanding to see his son. When Littlefield arrived, Jones accosted her, aimed his pistol at her, told her that she could not take his son from him, and demanded that Littlefield go on a walk with him. Littlefield assented, but when Jones demanded the keys to her car, Littlefield refused. Though the parties disagree on what exactly happened next, they do agree that the firearm discharged and the bullet struck Littlefield in the abdomen.[1] Littlefield then gave Jones the keys.

Jones demanded that Littlefield get into her car, and she complied out of fear that Jones would shoot her again. As Jones drove them toward his mother's house, he repeatedly struck the butt of his loaded pistol on Littlefield's dashboard. Again, Jones and Littlefield dispute exactly what happened, but they agree that at some point in the car ride the firearm discharged again and the bullet narrowly missed Littlefield as it flew past her, shattering the passenger side window.[2]

[1] Jones testified that the gun went off when Littlefield attempted to grab it. Littlefield testified that she could not remember exactly what happened, but that she had told the officer immediately after the incident that Jones had intentionally shot her.

[2] Jones contended that the gun again discharged accidentally when he struck it on the dashboard of Littlefield's car. Littlefield testified that she could not remember exactly what happened, but that the gun was close by her face when fired and that she had told the investigating officer soon after the shooting that it was intentional.

Once at Jones's mother's house, Jones continued to harangue Littlefield about their son while they sat outside in Littlefield's car. Jones eventually asked Littlefield how much money she had. She replied that she had $300 in her bank account. Jones then told Littlefield that he wanted money to get a shotgun to "shoot [her] mom." V Verbatim Report of Proceedings (VRP) at 43.

Jones then drove Littlefield to a nearby convenience store where he demanded Littlefield's automated teller machine (ATM) card and her personal identification number (PIN). Since Jones was still armed with the pistol, Littlefield felt that she had no choice but to comply. Jones went inside the store and withdrew $200 dollars from Littlefield's account, watching Littlefield, who remained in the car, through the store's window to make sure she did not attempt to escape.

Jones let Littlefield go after several more hours. She then drove herself to a hospital, received treatment for the gunshot wound, and survived.

Among other crimes, the State charged Jones with one count of first degree assault for the shooting of Littlefield outside her school, one count of first degree assault for the shot fired in Littlefield's car, one count of first degree robbery for taking Littlefield's ATM card and PIN, and one count of first degree kidnapping. The State alleged that each of these offenses was a domestic violence offense and that Jones was armed with a firearm during the commission of each.

After a trial, the jury found Jones guilty of, among other crimes, first degree kidnapping, first degree robbery, and two counts of the lesser included offense of second degree assault. The jury also found that (1) the assault, kidnapping, and robbery offenses were domestic violence

offenses because Jones and Littlefield were members of the same household and (2) Jones was armed with a firearm during the commission of the assaults, robbery, and kidnapping.

The sentencing court imposed a high-end standard range sentence for each of Jones's convictions, running each sentence concurrently with the sentences for Jones's other convictions and consecutively to each of the firearm enhancements, which ran consecutively to each other. For the two second degree assault convictions, this amounted to a sentence of 84 months of confinement for each underlying charge and 36 months of confinement for each firearm enhancement, for a total of 120 months for each conviction. The sentencing court also imposed an 18-month term of community custody for each of the second degree assault convictions.

Jones now appeals.

ANALYSIS

I. SENTENCING

Jones first contends that the trial court imposed a sentence in excess of its statutory authority for each of his second degree assault convictions. Specifically, Jones argues that the term of confinement and community custody imposed for each conviction exceeds the statutory maximum for each offense. The State concedes error. We accept the concession and remand for correction of his sentence.

Thomas's second degree assault convictions are class B felonies. RCW 9A.36.021(2)(a). The maximum allowed term for a class B felony is 120 months. RCW 9A.20.021(1)(b). A sentencing court "may not impose a sentence providing for a term of confinement or community custody that exceeds the statutory maximum" prescribed by RCW 9A.20.021. RCW 9.94A.505(5). If the combined term of confinement and community custody for a standard range sentence exceeds the statutorily permissible time, the sentencing court must reduce the term of

community custody to ensure a lawful sentence. RCW 9.94A.701(9); *In re Pers. Restraint of McWilliams*, ___ Wn.2d ___, 340 P.3d 223, 225, 2014 WL 7338498 at *2 (2014).

The sentencing court imposed a term of confinement of 120 months for each of Jones's second degree assault convictions: a standard range sentence of 84 months of confinement with 36 months for each firearm enhancement. The trial court also imposed a term of community custody of 18 months for each conviction. The 138-month total term for each offense exceeded the 120-month term permitted by RCW 9A.20.021(1)(b). We therefore remand the matter to the sentencing court to amend Jones's term of community custody to comply with RCW 9.94A.505(5) and .701(9). *State v. Boyd*, 174 Wn.2d 470, 473, 275 P.3d 321 (2012) (per curiam).

II. DOUBLE JEOPARDY

Jones next contends that his sentence violated double jeopardy because several of his convictions merge together. Specifically, he argues that the assaults and robbery merge because the assaults were necessary to elevate the robbery to first degree. He argues also that the kidnapping and robbery merge because the restraint involved in the kidnapping was incidental to the robbery. We review Jones's double jeopardy claims de novo, *State v. Kelley*, 168 Wn.2d 72, 76, 226 P.3d 773 (2010), and hold that none of Jones's convictions merge.

Both the state and federal constitutions forbid the State from putting a person in jeopardy twice for the same offense. WASH. CONST. art. I, § 9; U.S. CONST. amend. V.[3] These constitutional provisions are coextensive, *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461

[3] Article I, section 9 of the Washington Constitution provides that "[n]o person shall be . . . twice put in jeopardy for the same offense." The Fifth Amendment to the United States Constitution provides the same guarantee, stating that "[n]o person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb."

(2010), and offer "three separate constitutional protections." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). They protect against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *Pearce*, 395 U.S. at 717; *Turner*, 169 Wn.2d at 454. Jones claims that his sentence violated the third protection offered by the prohibition on double jeopardy, because he received multiple punishments for the same offense by virtue of his separate convictions for assault, kidnapping, and robbery.

The legislature may, without offending the prohibition against double jeopardy, authorize cumulative punishments for acts that violate multiple criminal statutes. *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005). Consequently, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983). Thus, the resolution of Jones's claims require us to examine the legislature's intent.

We review de novo whether the legislature intended to permit multiple punishments using a three-part test. *State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008). "We first consider express or implicit legislative intent based on the criminal statutes involved." *Kier*, 164 Wn.2d at 804. Where the legislature's intent remains unclear, we apply the "same evidence" test announced in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). *Kier*, 164 Wn.2d at 804 (citations omitted). That test examines whether the crimes are "the same in law and in fact." *Kier*, 164 Wn.2d at 804. Finally, where applicable, we use the merger doctrine as a means of ascertaining legislative intent regarding multiple punishments "where the degree of one offense is elevated by conduct constituting a separate offense." *Kier*,

164 Wn.2d at 804. Jones concedes that the first two parts of this test show no double jeopardy violation. Therefore, like Jones, we limit our analysis to the question of whether his offenses merge. *State v. Knight*, 176 Wn. App. 936, 953 n.17, 309 P.3d 776 (2013), *review denied*, 179 Wn.2d 1021 (2014).

In *State v. Berg*, ___ Wn.2d ___, 337 P.3d 310, 314 (2014), our Supreme Court summarized the merger doctrine in the following terms:

> Essentially, the merger doctrine states that where crime A and crime B are charged separately and completion of crime A is also an element of crime B, crime A will definitely merge into crime B if crime A was incidental to the commission of crime B. If crime A was not incidental but rather had an independent purpose . . . courts may impose separate punishment. Thus, the incidental nature of the crime is relevant to the application of an exception to the general merger doctrine.

We examine Jones's merger claims under this test.

1. Assault and Robbery

Jones first contends that his two assault convictions merge into his robbery conviction because they "provided the force necessary to elevate the robbery to first degree." Br. of Appellant at 14. Jones's argument fails under *Berg*.

The legislature has provided that the infliction of bodily injury during the commission of a robbery elevates the robbery to first degree. RCW 9A.56.200(1)(a)(iii). To determine whether either of Jones's assaults merges with the robbery, we look to "the information, instructions, testimony and jury argument" to determine whether the State charged and proved that Jones committed first degree robbery because he inflicted bodily injury on Littlefield during commission of the robbery. *State v. Noltie*, 116 Wn.2d 831, 848-49, 809 P.2d 190 (1991).

The record before us shows conclusively that the State did not charge and prove first degree robbery by the infliction of bodily injury during the robbery. Instead, the record shows

that the State charged Jones with first degree robbery because he deprived Littlefield of personal property by use or threatened use of force and was armed with a deadly weapon when he did so. The evidence presented by the State at trial was consistent with this election. Littlefield testified that Jones committed the assaults some time before he robbed her. She testified also that she complied with Jones's demands for her ATM card and PIN, not because he assaulted her, but because he was armed with a firearm when he made the demands. Consistently with that evidence, the trial court instructed the jury that Jones committed first degree robbery if he deprived Littlefield of personal property while armed with a firearm. Significantly, the trial court *did not* instruct the jurors that the infliction of bodily injury during the robbery would elevate the robbery to first degree.

The charges, the evidence, and the jury instructions all show, therefore, that the assaults were not elements of the robbery and that the assaults had an independent purpose from that of the robbery. With that, these crimes do not merge under the characterization of merger in *Berg*, 337 P.3d at 314.

2. Kidnapping and Robbery

Jones next contends that the first degree kidnapping conviction merged into the first degree robbery conviction because the kidnapping was incidental to the robbery. As our Supreme Court stated in *Berg*, "[t]he law is now settled that just as kidnapping can never merge into robbery, neither can robbery merge into kidnapping." *Berg*, 337 P.3d 310, 314 (citing *State v. Louis*, 155 Wn.2d 563, 571 120 P.3d 936 (2005)). In light of this settled law, Jones's claim is without merit.

III. Ineffective Assistance of Counsel

Finally, Jones contends that his counsel rendered ineffective assistance by failing to argue at sentencing that the two assaults, robbery, and kidnapping convictions all encompassed the same criminal conduct. We review Jones's claim de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). Because none of Jones's offenses occurred at the same time or in the same place as the others, and because many of them involved different criminal intents, Jones's crimes do not encompass the same criminal conduct. We therefore reject Jones's claim, since counsel cannot have performed deficiently by declining to make a meritless argument. *State v. Brown*, 159 Wn. App. 1, 17, 248 P.3d 518 (2010).

Both the state and federal constitutions guarantee criminal defendants the right to effective assistance of counsel.[4] *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011), *cert. denied*, 135 S. Ct. 153 (2014). A claim of ineffective assistance requires the defendant to show that counsel performed deficiently and that this deficient performance prejudiced the defendant. *Grier*, 171 Wn.2d at 32-33 (quoting *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984))). The deficient performance and prejudice showings are conjunctive, and we may resolve an ineffective assistance claim against a defendant failing to make the necessary showing on either. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

In deciding whether counsel's performance was deficient, we "strong[ly] presume[e] that counsel "provided proper, professional assistance" and "will not find deficient representation if

[4] Article I, section 22 of the Washington Constitution states that "[i]n all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel." The Sixth Amendment of the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

counsel's actions were tied to a legitimate strategic or tactical rationale." *State v. Saunders*, 120 Wn. App. 800, 819, 86 P.3d 232 (2004) (citing *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 117 (1991)). The failure to argue that several crimes encompass the same criminal conduct can constitute deficient performance. *Saunders*, 120 Wn. App. at 824-25.

Offenses "encompass the same criminal conduct" for sentencing purposes where they "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 interpret the "same criminal conduct" language of RCW 9.94A.589(1)(a) "narrowly to disallow most claims that multiple offenses constitute the same criminal act." *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). Accordingly, a defendant's failure to show that offenses involved the same criminal intent, same place and time of commission, and same victim "prevents a finding of same criminal conduct." *Porter*, 133 Wn.2d at 181.

The "same criminal intent" prong of RCW 9.94A.589(1)(a) "focus[es] on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next." *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). Whether a defendant's criminal intent changed, in turn, depends, in part, on "whether one crime furthered the other." *Dunaway*, 109 Wn.2d at 215. The fact that Jones's conduct as a whole may have been motivated by a desire to see his son is beside the point. We examine instead how Jones's intent, objectively viewed, may have changed from one specific crime to the next. *Dunaway*, 109 Wn.2d at 215.

The "same time and place" prong of RCW 9.94A.589(1)(a) requires that offenses completely overlap in terms of their times and places of commission in order to constitute the same criminal conduct. *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). For example, in *Lessley* the defendant broke into his ex-girlfriend's parent's house and then

kidnapped her and her mother. 118 Wn.2d at 775. Lessley forced the ex-girlfriend to drive him to different places over the course of the kidnapping. *Lessley*, 118 Wn.2d at 775. On appeal, Washington's Supreme Court held that Lessley's burglary and kidnapping offenses did not encompass the same criminal conduct because they had different criminal intents, did not occur at the same time or in the same place, and involved different victims. *Lessley*, 118 Wn.2d at 778. The court noted that the burglary was complete at the ex-girlfriend's parent's house, but that the kidnapping "was carried out over several hours' time" in numerous places. *Lessley*, 118 Wn.2d at 778. Accordingly, the court held that "[t]he burglary and the kidnapping were not confined to the same time and place." *Lessley*, 118 Wn.2d at 778.

A. The Assaults Do Not Encompass the Same Criminal Conduct

Generally, "there is one clear category of cases where two crimes will encompass the same criminal conduct— 'the repeated commission of the same crime against the same victim over a short period of time.'" *Porter*, 133 Wn.2d at 181 (quoting 13A SETH A. FINE, WASHINGTON PRACTICE § 2810, at 112 (Supp. 1996)) (emphasis omitted). That rule is not absolute, however, and repeated commission of the same completed crime against the same victim in a short period of time does not necessarily encompass the same criminal conduct. *State v. Grantham*, 84 Wn. App. 854, 858-60, 932 P.2d 657 (1997).

In *Grantham*, the defendant raped his victim twice in rapid succession. 84 Wn. App. at 856. The State charged Grantham with two counts of second degree rape for the offenses, a jury convicted him, and the trial court found that the two offenses did not encompass the same criminal conduct for sentencing purposes. *Grantham*, 84 Wn. App. at 857. We affirmed the trial court's findings because, after completing the first rape, Grantham "had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal

act." *Grantham*, 84 Wn. App. at 859. Because Grantham "chose the latter" option, he formed a new intent to commit a criminal act. *Grantham*, 84 Wn. App. at 859.

In light of *Grantham*, Jones's two assaults on Littlefield involved different criminal intents. Jones committed the first assault when he shot Littlefield. After shooting her, Jones obtained her car keys, ordered her into the car, drove off toward his mother's house, and continued to berate Littlefield loudly and violently for cutting off his access to his son. Jones had time to pause, reflect, and cease his criminal activity. He did not do so. Instead, he formed the criminal intent to assault Littlefield again. Under *Grantham*, the two assaults involved different criminal intents.

Jones's two assaults also did not occur at the same time or place. The first assault occurred around 7:00 a.m., when Jones shot Littlefield somewhere near her school. The second occurred sometime later in Littlefield's car after Jones drove her away from the school.

Because Jones's assaults involved different criminal intents, occurred at different times, and occurred in different places, they do not constitute the same criminal conduct. *Porter*, 133 Wn.2d at 181; RCW 9.94A.589(1)(a).

B. The Assaults and the Kidnapping Do Not Encompass the Same Criminal Conduct

Even if we were to assume that both assaults shared the same criminal intent with the kidnapping,[5] the assaults did not occur at the same time and in the same place as the kidnapping. The first assault began and was completed outside of her school. The second assault began and was completed in Littlefield's car between the school and Jones's mother's house. The

[5] The first assault, objectively viewed, may have furthered the kidnapping because Jones shot Littlefield to prevent her from resisting the abduction. *See State v. Edwards*, 45 Wn. App. 378, 382-83, 725 P.2d 442 (1986), *overruled on other grounds by Dunaway*, 109 Wn.2d at 215. Jones makes no substantial argument as to how the second assault did the same, and since Jones had Littlefield secured in her car and was driving away, such an argument could not be accepted.

kidnapping began outside the school and continued for six hours in places as diverse as inside Littlefield's car, outside Jones's mother's house, in a convenience store parking lot, inside Jones's mother's house, inside Littlefield's car again, outside a pawn shop, in the alley where Jones met an acquaintance, and back at Jones's mother's house, where the kidnapping ended. The complete overlap in space and time necessary for a finding that the assaults and kidnapping encompassed the same criminal conduct was simply not present here. *Porter*, 133 Wn.2d at 181; *Lessley*, 118 Wn.2d at 778; RCW 9.94A.589(1)(a).

C. The Assaults Do Not Encompass the Same Criminal Conduct as the Robbery

The assaults and the robbery had different criminal intents. Objectively viewed, Jones assaulted Littlefield to force her to comply with his commands to come with him or to instill fear in her. Objectively viewed, Jones committed robbery to "acquire property." *Dunaway*, 109 Wn.2d at 216.

Further, Jones's assaults and the robbery did not occur in the same place or at the same time. As noted above, the first assault took place at her school, the second happened later in Littlefield's car while Jones drove her to his mother's house, and the robbery occurred at some later time in a convenience store parking lot. None of the offenses occurred at the same time or in the same place as the others. *Lessley*, 118 Wn.2d at 778. For each of these reasons, the assault and robbery offenses did not encompass the same criminal conduct. *Porter*, 133 Wn.2d at 181; *Lessley*, 118 Wn.2d at 778; RCW 9.94A.589(1)(a).

D. The Kidnapping Does Not Encompass the Same Criminal Conduct as the Robbery

In *State v. Larry*, we held that a continuing kidnapping which shared some temporal overlap with a robbery did not require the same criminal intent or occur in the same place or at the same time as the robbery. 108 Wn. App. 894, 34 P.3d 241 (2001). In *Larry*, two men

kidnapped a restaurant manager, robbed him, returned to the restaurant and forced the manager to open its safe, which they looted. *Larry*, 108 Wn. App. at 899. The two men then took the manager to various locations before shooting him and leaving him for dead. *Larry*, 108 Wn. App. at 899. We held that the kidnapping and robbery involved different criminal intents. *Larry*, 108 Wn. App. at 916. We also held that the robbery and the kidnapping did not occur at the same place or time because "the kidnapping occurred over a period of time and in several locations, whereas the robbery occurred at a single time and place." *Larry*, 108 Wn. App. at 916.

Here, as in *Larry*, Jones's kidnapping and robbery offenses involved different criminal intents. As in *Larry*, the kidnapping began before the robbery and continued long after it, continuing in places where the robbery did not occur. The different intents, places, and times prevent a finding that the kidnapping and robbery encompassed the same criminal conduct. *Porter*, 133 Wn.2d at 181; *Lessley*, 118 Wn.2d at 778; *Larry*, 108 Wn. App. at 916; RCW 9.94A.589(1)(a).

IV. PROSECUTORIAL MISCONDUCT

In his SAG, Jones alleges that the prosecutor committed misconduct by ordering Littlefield and a police detective not to testify that Jones "was on a crack cocain[e] b[i]nge for day[s] [leading] up to the inc[i]dent." SAG at 2. The prosecutor told Littlefield and the detective not to mention Jones's drug use in order to comply with the trial court's order on a motion in limine. Jones moved for that order. Jones thus set up the error he now complains of, and we decline to review his claim under the invited error doctrine. *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002).

CONCLUSION

We affirm Jones's convictions, but remand to the sentencing court to correct his sentence for each of the second degree assault convictions so that the combined term of confinement and community custody for each conviction does not exceed the statutory maximum.

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.

Bjorgen, A.C.J.
BJORGEN, A.C.J.

We concur:

Worswick J.
WORSWICK, J.

Melnick J.
MELNICK, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 45143-3-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Brian Wasankari, DPA
[PCpatcecf@co.pierce.wa.us]
Pierce County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: April 8, 2015

WASHINGTON APPELLATE PROJECT

April 08, 2015 - 4:02 PM

Transmittal Letter

Document Uploaded: 4-451433-Petition for Review.pdf

Case Name: STATE V. MEKO JONES
Court of Appeals Case Number: 45143-3

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

■ Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: maria@washapp.org

A copy of this document has been emailed to the following addresses:

PCpatcecf@co.pierce.wa.us