SUPREME COURT NO. _____

NO. 76744-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO GUZMAN RODRIGUEZ,

Petitioner.

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

The Honorable G. Helen Whitener, Judge

PETITION FOR REVIEW

ERIC J. NIELSEN
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Francisco Guzman Rodriguez asks this Court to grant review of the court of appeals unpublished decision in State v. Guzman Rodriquez, No. 76744-5-I, filed July 31, 2017 (appendix).[1]

B. ISSUES PRESENTED FOR REVIEW

1. Did the judgments for both attempted second degree murder and first degree assault violate the constitutional prohibition against double jeopardy, warranting this Court's review under RAP 13.4(b)(3) as a significant question of constitutional law?

2. Does the decision of the Court of Appeals conflict with this Court's decisions in In re Orange, 152 Wn.2d 795, 817, 100 P.3d 291 (2004) and In re Borrero, 161 Wn.2d 532, 537, 167 P.3d 1106 (2007), warranting this Court's review under RAP 13.4(b)(1)?

C. STATEMENT OF THE CASE

1. Facts Relevant to Issues on Review

Guzman Rodriguez and Mejia Albino were in a relationship and lived together. 6RP 32. Their relationship ended, and Mejia Albino planned on finding another place to live with her children. 6RP 33-34.

[1] This appeal was initially before Division Two under cause number 48862-1-II but was transferred to Division One and it assigned it cause number 76744-5-I.

On June 3, 2015, Mejia Albino returned home from the drug store and she Guzman Rodriguez talked about her plan to move. Guzman Rodriguez told her that he planned on going back to Mexico. 6RP 38-39.

Mejia Albino went to bed and eventually fell asleep. 6RP 41-42, 101-102. A couple hours later she woke up to find Guzman Rodriguez kneeling on the bed with a scarf in his hands. 6RP 44. According to Mejia Albino, Guzman Rodriguez told her that she was not going to leave and he had to kill her. He put the scarf around her neck and started to strangle her. 6RP 44-46.

Mejia Albino grabbed the scarf and at the same time pushed Guzman Rodriguez. 6RP 46. The two fell to the floor. Guzman Rodriguez let go of the scarf and put his hands around her neck and squeezed. 6RP 47-48. Mejia Albino did not know if she fainted but the next thing she remembered was holding onto a table and then going into the bathroom and locking the door. 6RP 49-52.

Guzman Rodriguez knocked on the bathroom door and screamed at her to open it. 6RP 53, 81. After about 10 minutes, Mejia Albino heard her eldest daughter, 14 year-old A.P., ask Guzman Rodriguez what was going on and she heard Guzman Rodriguez respond that he did not know. 6RP 29, 82. Her eldest son, who was 10 years old, wanted inside the bathroom so Mejia Albino opened the door. 6RP 29, 83. After she opened

the door Mejia Albino told A.P. to call police. 6RP 84. Guzman Rodriguez then left. 6RP 86.

Police later found Guzman Rodriguez hiding behind some cars in an alley. 5RP 50-51. He appeared intoxicated. 5RP 51. He told police he was drinking Tequila when he saw Mejia Albino run out of the bedroom and into the bathroom with a scarf around her neck. 7RP 62-63. When he tried to find out what happened she pushed him away and yelled for someone to call police. 7RP 63. Guzman Rodriguez told police he thought maybe Mejia Albino's youngest son tied the scarf around her neck then he started to cry and said maybe he pushed her and pulled her to the floor and hit her. 7RP 65.

Guzman Rodriguez was charged with one count of attempted first degree murder (Count I), and one count of first degree assault (Count II) by the alternative means: 1) that the assault was committed with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death or 2) that the assault resulted in the infliction of great bodily harm. CP 27-29.

A jury acquitted Guzman Rodriguez of the first degree attempted murder but found him guilty of the lesser included offense of second degree attempted murder (Count I). CP 76-77. Guzman Rodriguez was also found guilty of the first degree assault charge (Count II). CP 82. The

jury was unable to agree on both alternative of means of committing first degree assault and was only unanimous that the assault was committed "with a deadly weapon or by any force or means likely to produce great bodily harm or death." Id. The State conceded, and the court agreed, the two offenses constituted the same criminal conduct because they were both were committed against the same victim at the same time and place, involved the same intent, and were a result of the "same act or series of acts." 12RP 15.

2. Appeal

On appeal Guzman Rodriguez argued that his convictions for both second degree attempted murder and first degree assault were barred by double jeopardy because both offenses were the same in law and in fact. Br. of Appellant. at 11-17; Reply Br. of Appellant at 1-17. The court of appeals rejected Guzman Rodriguez's argument.

The court of appeals recognized that the attempt statue and the assault in the first degree statute do not explicitly approve of the imposition of multiple punishments, but that by penalizing "an act constituting a substantial step towards causing the death of another and an act of assault against another suggests that the legislature intended the crimes be treated differently." Opinion at 7-8. It fond that when Guzman Rodriguez approached Mejia Albino holding the scarf, expressed his intent

to kill her, and wrapped the scarf around her neck and then tightened it, that evidence established the substantial step for attempted murder. Opinion at 11. It found that when Guzman Rodriguez tightened the same scarf and then wrapped his hands around her neck that these were separate acts that established an assault by means likely to inflict great bodily injury or death. Opinion at 12. On these facts it concluded that the two offenses were therefore not the same offense in fact for double jeopardy purposes. Opinion at 15.

The issue presented in the case, whether under the facts and law the convictions for both attempted second degree murder and first degree assault violated double jeopardy, is a significant question of constitutional law. The court of appeals analysis directly conflicts with this Court's holdings in In re Orange, 152 Wn.2d 795, 816, 100 P.3d 291 (2004) and In re Borrero, 161 Wn.2d 532, 537, 167 P.3d 1106 (2007).

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

GUZMAN RODRIGUEZ'S CONVICTIONS FOR ATTEMPTED SECOND DEGREE MURDER AND FIRST DEGREE ASSAULT VIOLATE DOUBLE JEOPARDY.

a. The Two Offenses Were the Same in Law and Fact

Under the double jeopardy provisions of the United States and Washington constitutions, a person may not be convicted or punished more than once for the same offense. U.S. Const. amend. V; Const. art. I,

§ 9; Brown v. Ohio, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977); State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005); State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). If an act supports charges under multiple statutes, the court must determine whether the Legislature intended to authorize multiple punishments. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). If the statutes do not expressly disclose legislative intent, the court considers whether the offenses are identical in fact and in law. Id. at 777; State v. Louis, 155 Wn.2d 563, 569, 120 P.3d 936 (2005) (citing Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180 (1932)). Double jeopardy claims are reviewed de novo. State v. Hughes, 166 Wn.2d 675, 681, 212 P.3d 558 (2009).

The court of appeals correctly recognized the plain language of the statutes at issue here does not explicitly authorize multiple punishment for the same conduct. In re Orange, 152 Wn.2d at 816. Where multiple punishment for the same conduct is not explicitly authorized, the courts must engage in the Blockburger analysis. Hughes, 166 Wn.2d at 682 n.6. To determine if the same act or transaction constitutes a violation of two distinct statutory provisions or only one, the test is whether each provision requires proof of a fact the other does not. In re Orange, 152 Wn.2d at 817. (quoting Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180 (1932)). In other words, double jeopardy is violated where the

evidence required to support a conviction for one of the crimes would have been sufficient to warrant a conviction for the other. Orange, 152 Wn.2d at 820 (citations omitted).

Generally, if each offense contains an element not contained in the other, the court presumes the offenses are not the same. Orange, 152 Wn.2d at 816–18. The court engages in a commonsense, rather than mechanical, comparison of elements. See, Orange, 152 Wn.2d at 817-18 (merely comparing elements at abstract level misapplies the Blockburger test). But, "[W]here one of the two crimes is an attempt crime, the test requires further refinement." In re Borrero, 161 Wn.2d at 537. This is because one of the elements of an attempt crime is that the defendant "'does any act which is a substantial step toward the commission of that crime.'" Borrero, 161 Wn.2d at 537 (quoting former RCW 9A.28.020(1) (1975)). The "substantial step" element is merely a placeholder until the facts of the particular case give it independent meaning. Borrero, 161 Wn.2d at 537; Orange, 152 Wn.2d at 819. "Only by examining the *actual facts* constituting the 'substantial step' can the determination be made that the defendant's double jeopardy rights have been violated." Borrero, 161 Wn.2d at 537 (emphasis added).

Guzman Rodriguez was acquitted of the first degree attempted murder charge but convicted of the lesser included offense of second

degree attempted murder. The issue is whether the evidence required to support a conviction for second degree attempted murder would have been sufficient to warrant a conviction for first degree assault. Orange, 152 Wn.2d at 820.

The jury was instructed that second degree murder requires the intent to cause the death of another person. CP 48, 49; see RCW 9A.32.050(1)(a). To convict Guzman Rodriguez of second degree attempted murder, the jury was instructed, consistent with the statute, that the state was required to prove that he engaged in an act "which is a substantial step toward the commission of that crime." CP 41; RCW 9A.28.020(1).

The jury was also instructed that to find Guzman Rodriguez guilty of the assault, the state was required to prove he acted with intent to inflict great bodily harm and the assault was committed with a deadly weapon or by any force or means likely to produce great bodily harm or death (RCW 9A.36.011(a)). CP 54. The jury only found Guzman Rodriguez guilty under this alternative means. CP 83.

Proof of first degree assault does not necessarily prove second degree murder because an intent to inflict great bodily harm with a deadly weapon or by any force or means likely to produce great bodily harm or death is not always proof of an intent to cause death. But, a person who

intends to cause death also necessarily intends to inflict great bodily harm by means likely to cause great bodily harm or death. See, State v. Read, 100 Wn.App. 776, 792, 998 P.2d 897 (2000) (second degree murder and first degree assault are the same in law); see also State v. Hart, 188 Wn.App. 453, 459, 353 P.3d 253 (2015) (second degree murder and second degree assault are the same in law). The intent element of second degree murder and first degree assault are the same in law. State v. Davis, 174 Wn.App. 623, 632, 300 P.3d 465 (2013).

In this case the offenses were also the same in fact. A substantial step must be "'strongly corroborative of the actor's criminal purpose.'" State v. Workman, 90 Wn.2d 443, 451-52, 584 P.2d 382 (1978) (mere preparation is not enough to show a "substantial step" quoting Model Penal Code § 5.01(2)). The jury was similarly instructed that a "substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation." CP 42.

The only "substantial step" that "strongly" indicated Guzman Rodriguez's criminal purpose (intent to cause Mejia Albino's death) was Guzman Rodriguez strangulating Mejia Albino. The assault was likewise committed by strangulating Mejia Albino, which is reflected in the jury's finding the assault was committed with a deadly weapon or force or means likely to produce great bodily harm or death. The evidence required to

support the attempted murder conviction was sufficient to support the first degree assault conviction and in fact was the same evidence.

That the evidence required to support the substantial step element of the attempted murder conviction was sufficient to support the first degree assault conviction was also the State's trial theory. Its theory was that strangling Mejia with the scarf was the substantial step that proved Guzman Rodriguez's intent to kill her (attempted murder) *and* his intent to inflict great bodily harm with a deadly weapon or by any force or means likely to produce great bodily harm or death (first degree assault).

The State argued that Guzman Rodriguez's statement he was going to kill Mejia coupled with his act of strangling her with the scarf *and* his hands established the necessary substantial step required to prove he attempted to kill her. 10RP 44[2], 10RP 48.[3] It argued that same evidence showed that Guzman Rodriguez intended to inflicted great bodily harm. 10RP 46-47, 49-51, 81-82. Reply Br. of Appellant at 7-8. Thus, the State's trial theory, consistent with the evidence, was that the same act --

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[2] "The defendant wrapped that scarf around his hands then wrapped it around her (Mejia's) neck and squeezed." He struggled with her. She fought with him. He kept the pressure on. She got away from him, and he grabbed her again and again squeezed her hands—her neck with his hands. All of these were substantial steps toward committing the crime of Murder in the First degree." 10RP 44.

[3] "So during this time, keeping that pressure on a person's neck while she is desperately trying to get him off her and the scarf off her, that resoluteness, those actions show exactly what the defendant wanted to do to Leonila (Mejia), that he wanted to and tried to kill her." 10RP 48.

strangling Mejia -- established the intent element for both murder and first degree assault, and the substantial step element of attempt to commit murder.[4]

This case is substantially similar to Orange. There, Orange fired multiple shots, killing one person and wounding Marcel Walker. Orange, 152 Wn.2d at 801. Orange was charged and convicted of both attempted first degree murder of Walker and first degree assault of Walker. This Court reasoned that shooting Walker was the substantial step to support the attempted murder and shooting Walker supported the first degree assault committed with a firearm. Thus, this Court held that under the Blockburger analysis the convictions for both attempted murder and first degree assault violated double jeopardy because the evidence required to support the conviction for first degree attempted murder was sufficient to convict Orange of first degree assault, thus the attempted murder and assault were the same in fact and in law. Orange, 152 Wn.2d at 820.

The Orange decision was not the first to hold that convictions for both attempted murder and assault violated double jeopardy. In State v. Valentine, 108 Wn.App. 24, 29 P.3d 42 (2001) the court also held

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[4] At sentencing, the State conceded the same acts proved both offenses. "They (attempted second degree murder and first degree assault) involve the same victim, they involve the same general intent, and they involve the same time and place." 12RP 15. "In fact, it was the same act or series of acts that constitutes the facts underlying both of these offense." Id. (emphasis added).

Valentine's convictions for second degree attempted murder and first degree assault (the same offenses in this case) violated double jeopardy. In that case Valentine attacked his girlfriend with a knife and almost killed her. A jury found him guilty of first degree assault and second degree attempted murder. Although the Orange Court noted the Valentine court misapplied the Blockburger analysis, it found the "Valentine decision arrived at the correct conclusion -- that prosecution for attempted murder and assault based on the same act violates double jeopardy..." Orange, 152 Wn.2d at 820. It reached that conclusion because the evidence required to support the attempted murder conviction was sufficient to support the assault conviction. Id. (citing State v. Reiff, 14 Wash. 664, 667, 45 P. 318 (1896).

Guzman Rodriguez's criminal purpose was to cause the death of Mejia Albino. The only conduct that "strongly" indicated his criminal purpose (to kill Mejia Albino) that was more than mere preparation (the "substantial step") was Guzman Rodriguez strangulating Mejia Albino (second degree attempted murder). It was that same act of strangulation that was the basis for the jury's finding Guzman Rodriguez intended to inflict great bodily harm with a deadly weapon or by any force or means likely to produce great bodily harm or death conviction (first degree assault). As in Orange and Valentine, the evidence required to support the

attempted murder conviction supported the first degree assault conviction. As in Orange and Valentine, Guzman Rodriguez's convictions for both those offenses violate double jeopardy.

The court of appeals disagreement that judgments on the two offenses violated double jeopardy stems from its misapplication of the Orange test as refined in Borrero. Instead of viewing the evidence required to support both convictions, it focused its analysis on the jury instructions. It found the jury was instructed that to prove the first degree assault the State was required to prove the assault was committed with a deadly weapon or by force or means likely to produce great bodily harm, which the jury did find. The court of appeals also found the jury was instructed that to prove attempted second degree assault the State was required to prove an act that was a substantial step toward the commission of that crime, also what the jury found. It concluded from these facts that the jury likely based its convictions on distinct evidence. Opinion at 12-13.

The proper analysis, however, requires an examination of the actual facts constituting the substantial step. Borrero, 161 Wn.2d at 537. And, if that examination shows the evidence required to support a conviction for the attempt offense would have been sufficient to warrant a conviction for the other conviction, the two offense are the same for

double jeopardy purposes. Orange, 152 Wn.2d at 820. Whether the jury was properly instructed on the elements of the crimes does not logically lead to the conclusion it based its decision on distinct or different evidence to support each offense. If that were true double jeopardy would never be violated if the jury was properly instructed on the elements of attempt and the elements of the other offense, even if the two offenses were the same in law and the facts supporting both were the same. That is not the law. More to the point, the court of appeals decision conflicts with both Borrero and Orange.

The court of appeals also looked at the evidence and concluded the State "...introduced evidence of Guzman Rodriguez's conduct that took place *before* he engaged in the assaultive conduct that could satisfy the substantial step element of the attempt crime." Opinion at 13-14 (citing the State's closing argument). The decision does not identify what conduct Guzman Rodriguez engaged in before he started to strangle Mejia Albino with the scarf that was more than mere preparation and that "strongly" corroborated the criminal purpose to kill Mejia Albino sufficient to satisfy the substantial step element to establish the intent to kill her. There was no such conduct.

Additionally, the State never relied on conduct separate from the conduct that supported the assault to establish the substantial step element

of attempted murder. The State's argument was that both wrapping the scarf around Mejia Albino's neck and squeezing her neck with his hands were the substantial steps towards committing attempted murder. Opinion at 14 (10RP 44[5]). Those were also the same acts that established the first degree assault "with a deadly weapon or by any force or means likely to produce great bodily harm or death." In sum, the State did not rely on separate and distinct acts to prove each offense as suggested by the court of appeals.

On this record there is no conduct Guzman Rodriguez engaged in before he started to strangle Mejia Albino with the scarf that was more than mere preparation and that "strongly" corroborated the criminal purpose to kill Mejia Albino, and no indication whatsoever that the jury relied on separate and distinct acts to prove each offense. The evidence required to support the conviction for second degree attempted murder was not only sufficient to support the assault conviction it was the same evidence the State argued proved Guzman Rodriguez committed the two offenses. Under the tests in Borrero and Orange, the two offense are the same in fact for double jeopardy purposes.

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[5] "The defendant wrapped that scarf around his hands then wrapped it around her (Mejia's) neck and squeezed." He struggled with her. She fought with him. He kept the pressure on. She got away from him, and he grabbed her again and again squeezed her hands—her neck with his hands. All of these were substantial steps toward committing the crime of Murder in the First degree."

Further, evidence that multiple acts are intended to secure the same objective supports a finding that the defendant's conduct was a continuing course of conduct. State v. Handran, 113 Wn. 2d 11, 17, 775 P.2d 453 (1989). For example, in State v. Rodriquez, 187 Wn.App. 922, 352 P.3d 200 (2015), Rodriquez went to Hendon's home, grabbed her by the throat and squeezed, threatened her. Id. at 926. Following that encounter Hendon followed Rodriquez upstairs to a hallway where he hit her in the jaw and choked her again. The two then moved to the kitchen and Rodriquez repeated his threat and hit Hendon and choked her a third time. Id. at 927.

Under these facts the Rodriquez court found the multiple acts of strangulation were the same continuing course of conduct because the assaults involved the same parties, occurred in the same place, were intended to achieve the same common objective, and they occurred over a short period of time. Rodriquez, 187 Wn.App. at 937; see State v. Villanueva-Gonzalez, 180 Wn.2d 975, 986-987, 329 P.3d 78 (2014) (assaultive acts were one continuous course of conduct because they took place in the same location over a short time period and no evidence the defendant had a different intention or motivation).

In this case the assault and attempted murder involved the same parties, occurred in the same place, were intended to achieve the same

common objective, and they occurred over a short period of time. Strangulating Mejia Albino with the scarf and hands was one continuing course of conduct that established the required elements of both the attempted murder and assault.

b. Under The Rule of Lenity the Two Offenses Were the Same

Even though the evidence shows the same acts required to establish the substantial step for attempted murder supported the elements of the assault, and that the acts were one continuing course of conduct, assuming, as the court of appeals did, that one could somehow reasonably parse out Guzman Rodriguez's acts, there is no indication in the record that is what the jury did. But, even if the jury's verdict was ambiguous regarding whether it relied on distinct acts to support each offense, under the rule of lenity judgments for both offense violate double jeopardy.

In the context of the double jeopardy merger doctrine, courts hold that where the verdict is ambiguous the rule of lenity requires merger. State v. Kier, 164 Wn. 2d 798, 808-14, 194 P.3d 212 (2008); State v. DeRyke, 110 Wn. App. 815, 823-24, 41 P.3d 1225 (2002), *aff'd on other grounds*, 149 Wn.2d 906, 73 P. 3d 1000 (2003).[6] Under the facts in this

[6] "Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime." State v. Freeman, 153

case, application of the rule lenity also requires holding the judgments for second degree attempted murder and the first degree assault violate double jeopardy.[7]

E. CONCLUSION

Because this case involves a significant question of constitutional law under the double jeopardy provision, this Court should grant review under RAP 13.4(b)(3). This Court should grant review under RAP 13.4(b)(1) because the court of appeals decision conflicts with this Court's decisions in Borrero and Orange. Guzman Rodriguez respectfully asks this Court to grant review and hold that the judgments for both second degree attempted murder and first degree assault violate double jeopardy.

DATED this 11 day of August 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

ERIC J. NIELSEN
WSBA No. 12773
Office ID No. 91051
Attorneys for Appellant

Wn.2d 765, 772-773, 108 P.3d 753 (2005). Guzman Rodriguez does not argue the offenses merged but that there is no principled reason why the rule of lenity applies under the merger doctrine but not to a double jeopardy analysis under the Orange/ Borrero test.

[7] Although Guzman Rodriguez raised this issue, the court of appeals did not address it. See Reply Br. of Appellant at 12-14.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. FRANCISCO GUZMAN RODRIGUEZ, Appellant.	DIVISION ONE No. 76744-5-I UNPUBLISHED OPINION FILED: July 31, 2017

DWYER, J. — Francisco Guzman Rodriguez appeals from the judgment entered on a jury's verdicts finding him guilty of one count of assault in the first degree and one count of attempted murder in the second degree. On appeal, Guzman Rodriguez contends that, by entering judgment on the jury's verdicts, the trial court deprived him of his right against double jeopardy. This is so, he asserts, because the crimes for which he was convicted constituted the same offense.

We conclude that, because the State proved each crime with different evidence, the two crimes were not the same in fact for double jeopardy purposes. Accordingly, we affirm.

I

Guzman Rodriguez and Leonila Mejia Albino had been in a romantic relationship and were in the process of separation. They continued to live

together but Mejia Albino had informed Guzman Rodriguez that she intended to find another place to live with her children.

On the day in question, in the very early morning, Mejia Albino awoke to find Guzman Rodriguez on her bed kneeling over her with a scarf in his hands. Guzman Rodriguez told her that she was not going to leave and that he had to kill her. He wrapped the scarf once around her neck.

Guzman Rodriguez then pulled the loose ends of the scarf tight against her neck. Pain began to build in Mejia Albino's head. She pushed him off of the bed and they fell to the floor.

When they stood up, Guzman Rodriguez placed his hands around Mejia Albino's neck and squeezed with his fingers. Mejia Albino tried to push him away, feeling that she could not breathe. She lost consciousness for a time.

Upon regaining her awareness, Mejia Albino found herself holding onto a table. She fled into a bathroom and locked the door behind her.

The State, upon amended information, charged Guzman Rodriguez with one count of attempted murder in the first degree, pursuant to RCW 9A.28.020(1), 9A.32.030(1)(a), and one count of assault in the first degree, pursuant to RCW 9A.36.011(1)(a).

At trial, after the testimony had concluded, the trial court instructed the jury as to the crimes of assault in the first degree, attempted murder in the first degree, and attempted murder in the second degree. The jury returned verdicts finding Guzman Rodriguez guilty of assault in the first degree and attempted

murder in the second degree. The trial court entered judgment on the verdicts and imposed sentence.

Guzman Rodriguez now appeals.

II

Guzman Rodriguez argues that entering judgment on the convictions for attempted murder in the second degree and assault in the first degree violated his right against double jeopardy. He is incorrect.

A

"Article I, section 9 of the Washington Constitution, the double jeopardy clause, guarantees that, '[n]o person shall . . . be twice put in jeopardy for the same offense.' It mirrors the protections offered by the federal constitutional protection against double jeopardy." State v. Villanueva-Gonzalez, 175 Wn. App. 1, 4-5, 304 P.3d 906 (2013) (alterations in original) (citing State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)), aff'd, 180 Wn.2d 975, 329 P.3d 78 (2014). "The double jeopardy clauses of the Fifth Amendment and Const. art. I, § 9 protect a defendant against multiple punishments for the same offense." State v. Calle, 125 Wn.2d 769, 772, 888 P.2d 155 (1995).

> [T]he question whether punishments imposed by a court, following conviction upon criminal charges, are unconstitutionally multiple cannot be resolved without determining what punishments the legislative branch has authorized. Whalen[v. United States, 445 U.S. 684,] 688, [100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980)]. Our review here is limited to assuring that the court did not exceed its legislative authority by imposing multiple punishments for the same offense.

Calle, 125 Wn.2d at 776.

For the first time on appeal, Guzman Rodriguez contends that he is exposed to multiple punishments as a result of having the convictions of attempted murder in the second degree (of Mejia Albino) and assault in the first degree (of Mejia Albino) reduced to judgment with sentences for each imposed upon him.

Although the State may bring multiple charges arising from the same criminal conduct, "'[w]here a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense.'" State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005) (quoting In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)). "If the legislature authorized cumulative punishments for both crimes, then double jeopardy is not offended." Freeman, 153 Wn.2d at 771.

Our Supreme Court has adopted a four-part inquiry to determine if the legislature intended multiple punishments in a particular situation. Freeman, 153 Wn.2d at 771-73. First, we consider any express or implicit legislative intent based upon the criminal statutes involved. Freeman, 153 Wn.2d at 771-72.[1] If this intent is unclear, we may turn to the "same evidence" test set forth in Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932), to assess whether the two offenses are the same in both fact and law. Freeman, 153 Wn.2d at 771-72. "'If each crime contains an element that the

[1] See, e.g., RCW 9A.52.050 (legislature explicitly provided that burglary shall be punished separately from any related crime); Calle, 125 Wn.2d at 777-78 (legislature implicitly intended rape and incest to be treated as separate offenses).

other does not, we presume that the crimes are not the same offense for double jeopardy purposes.'" State v. Esparza, 135 Wn. App. 54, 60, 143 P.3d 612 (2006) (quoting Freeman, 153 Wn.2d at 772).

"'[I]f applicable, the merger doctrine is another aid in determining legislative intent, even when two crimes have formally different elements. Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses as one crime through a greater sentence for the greater crime.'" Esparza, 135 Wn. App. at 60 (quoting Freeman, 153 Wn.2d at 772-73). Lastly, even if two convictions appear to merge on an abstract level under this test, they may be punished separately if an independent purpose or effect for each exists.[2] State v. Kier, 164 Wn.2d 798, 804, 194 P.3d 212 (2008).

"Where one of the two crimes is an attempt crime, the test requires further refinement." In re Pers. Restraint of Borrero, 161 Wn.2d 532, 537, 167 P.3d 1106 (2007). This is because, our Supreme Court has explained, one of the elements of an attempt crime is that the defendant "'does any act which is a substantial step toward the commission of that crime.'" Borrero, 161 Wn.2d at 537 (quoting former RCW 9A.28.020(1) (1975)). The "substantial step" element is merely a placeholder until the facts of the particular case give it independent

[2] As instructed by United States Supreme Court in United States v. Dixon, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993), it is *not* a proper double jeopardy analysis to engage in the "same conduct" test that was announced in Grady v. Corbin, 495 U.S. 508, 521, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), overruled by Dixon, 509 U.S. 688, overruling recognized by State v. Gocken, 127 Wn.2d 95, 101, 896 P.2d 1267 (1995). Thus, the "same conduct" test applies to neither a Fifth Amendment nor an article I, § 9 double jeopardy analysis. Gocken, 127 Wn.2d at 107.

meaning. Borrero, 161 Wn.2d at 537. "Only by examining the actual facts constituting the 'substantial step' can the determination be made that the defendant's double jeopardy rights have been violated." Borrero, 161 Wn.2d at 537.

However, the court explained, even where the same facts supporting the defendant's conviction for the separate offense could also constitute the substantial step of the attempt crime, double jeopardy is not violated when there are additional facts in the record that would also constitute the substantial step. Borrero, 161 Wn.2d at 538. The reviewing court should not presume "that the trier of fact relied on only the facts tending to prove both crimes." Borrero, 161 Wn.2d at 538. Instead, unless the facts providing the basis for the separate conviction are also necessary to prove the attempt crime, double jeopardy principles are not offended. Borrero, 161 Wn.2d at 538-39.

B

The criminal statutes at issue herein are attempted murder in the second degree and assault in the first degree. The criminal attempt statute reads, in relevant part, "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1). The criminal statute for murder in the second degree reads, in relevant part, "A person is guilty of murder in the second degree when: (a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person." RCW 9A.32.050(1).

The statute setting forth the crime of assault in the first degree reads, in pertinent part, "A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death." RCW 9A.36.011(1).

1

We now turn to the first step of the double jeopardy analysis. "Again, if the statutes explicitly authorize separate punishments, then separate convictions do not offend double jeopardy." Freeman, 153 Wn.2d at 773. "Evidence of legislative intent may be clear on the face of the statute, found in the legislative history, the structure of the statutes, the fact the two statutes are directed at eliminating different evils, or any other source of legislative intent." Freeman, 153 Wn.2d at 773 (citing Ball v. United States, 470 U.S. 856, 864, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985); Calle, 125 Wn.2d at 777-78).

The criminal attempt statute and the assault in the first degree statute do not explicitly approve of the imposition of multiple punishments. However, we note that the two offenses serve different purposes and that the legislature placed these criminal statutes in different chapters of the criminal code. Criminal attempt is set forth in chapter 9A.28 RCW, Anticipatory Offenses, whereas assault in the first degree is set forth in chapter 9A.36 RCW, Assault—Physical Harm. In addition, the criminal statute underlying the attempt crime herein, RCW 9A.32.050(1), is set forth in chapter 9A.32 RCW, concerning acts of homicide.

The primary intent of chapter 9A.28 RCW is to punish those actions taken in anticipation of committing a crime, such as criminal solicitation, RCW 9A.28.030, criminal conspiracy, RCW 9A.28.040, and, pertinent here, criminal attempt, RCW 9A.28.020. The legislature's intent, when read in light of the murder crime attempted herein, would be to punish those actions taken in anticipation of committing an unlawful homicide. By contrast, the primary intent of chapter 9A.36 RCW is directed at punishing assaultive conduct that may result in physical harm, including assault, RCW 9A.36.011-.041, drive-by shooting, RCW 9A.36.045, and reckless endangerment, RCW 9A.36.050.

That the legislature penalized an act constituting a substantial step toward causing the death of another and an act of assault against another suggests that the legislature intended that the crimes be treated differently. Furthermore, it is conceivable that the legislature envisioned punishing both conduct that strongly corroborates a criminal purpose to commit murder, while stopping short of an assaultive act, and conduct amounting to commission of a physically assaultive act. Thus, the explicit and implicit legislative intent tends to suggest that the legislature envisioned that the two offenses be treated separately.

2

We next consider the Blockburger "same evidence" test. Freeman, 153 Wn.2d at 772. "If each crime contains an element that the other does not, we presume that the crimes are not the same offense for double jeopardy purposes." Freeman, 153 Wn.2d at 772.

i

As a preliminary matter, there are several indications that the aforementioned crimes are not the same offense for double jeopardy purposes. First, the statutory elements are not the same. Each criminal statute requires proof of a distinct mental state—attempted murder in the second degree requires that an actor intend to cause the death of another whereas assault in the first degree requires an intent to inflict great bodily harm. Indeed, proof of intent to inflict great bodily harm is not sufficient to prove intent to cause the death of another. Conceivably, a person could act with the intent to cause great bodily harm to another without also intending to kill such person.

In addition to setting forth distinct statutory elements, the criminal statutes require proof of distinct conduct. Assault in the first degree requires that an assaultive act be proved. However, unlike attempted murder in the second degree, the assault crime is not necessarily proved by an act constituting a substantial step taken toward causing the death of another. Indeed, it is conceivable that a person could engage in conduct strongly corroborative of a murderous purpose (such as approaching an unsuspecting victim with the means to commit murder in hand), and yet stop short of committing an assaultive act "likely to produce great bodily harm or death." RCW 9A.36.011(1)(a); see Esparza, 135 Wn. App. at 63. In this way, proof of the crime of assault in the first degree is not required in order to prove attempted murder in the second degree. See Esparza, 135 Wn. App. at 64. Thus, we presume that the crimes are not the same offense for double jeopardy purposes.

We note, however, that when applying the Blockburger test, we do not consider the elements of the crimes at issue solely on an abstract level. Rather, "'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.'" Orange, 152 Wn.2d at 817 (quoting Blockburger, 284 U.S. at 304 (citing Gavieres v. United States, 220 U.S. 338, 342, 31 S. Ct. 421, 55 L. Ed. 489 (1911))).

To convict Guzman Rodriguez of attempted murder in the second degree, the State was required to prove that Guzman Rodriguez, with the intent to cause the death of Mejia Albino, took a substantial step toward causing the death of Mejia Albino. RCW 9A.28.020(1); RCW 9A.32.050(1). A "'substantial step'" for purposes of the criminal attempt statute is defined as conduct that is strongly corroborative of the actor's criminal purpose. Esparza, 135 Wn. App. at 63. Conduct strongly corroborative of an actor's criminal purpose includes, "'lying in wait, searching for or following the contemplated victim of the crime,'" and "'possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances.'" State v. Workman, 90 Wn.2d 443, 451-52 n.2, 584 P.2d 382 (1978) (quoting Model Penal Code § 5.01(2) (Proposed Official Draft, 1962)).

To convict Guzman Rodriguez of assault in the first degree, the State had to prove that Guzman Rodriguez, with intent to inflict great bodily harm, assaulted Mejia Albino "with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death." RCW 9A.36.011(1)(a).

As mentioned, we do not presume "that the trier of fact relied on only the facts tending to prove both crimes." Borrero, 161 Wn.2d at 538. Instead, unless the facts that provide the basis for the separate conviction are also *necessary* to prove the attempt crime, double jeopardy principles are not offended. Borrero, 161 Wn.2d at 538-39.

As demonstrated by the evidence adduced at trial, the instructions given to the jury, and the State's closing argument, the facts required to prove Guzman Rodriguez's assault in the first degree conviction were not necessary to prove his attempted murder in the second degree conviction. As mentioned, it was adduced at trial that Guzman Rodriguez, with a scarf in his hand, had approached Mejia Albino while she was sleeping, expressed his intent to kill her once she had awakened, and then wrapped the scarf around her neck. These facts would be sufficient to prove the requisite act constituting the substantial step for attempted murder in the second degree. See, e.g., State v. Davis, 174 Wn. App. 623, 632-34, 300 P.3d 465 (2013) (proof of retrieving the murder weapon and moving toward victim was sufficient to establish an act constituting a substantial step toward causing the death of another).

By contrast, this same conduct is not *necessary* to prove the assault in the first degree conviction and, moreover, the assault conviction is supported by

distinct facts adduced at trial. Indeed, the State had proffered evidence that Guzman Rodriguez had intentionally tightened the scarf around Mejia Albino's neck and, shortly thereafter, wrapped his hands around her neck to choke her. Proof of either of these physically harmful acts would suffice to establish an assault likely to inflict great bodily injury or death to Mejia Albino.

In this way, the evidence presented at trial providing the basis for Guzman Rodriguez's assault in the first degree conviction was not necessary to prove the attempted murder crime. This suggests that the jury relied on distinct evidence to convict Guzman Rodriguez of both crimes.[3]

The jury instructions and the jury's special verdict form further suggest that the jury convicted Guzman Rodriguez of the two crimes based on different evidence. "A jury is presumed to follow the court's instructions." State v. Foster, 135 Wn.2d 441, 472, 957 P.2d 712 (1998). The jury instructions regarding the crime of assault in the first degree defined assault as a harmful or offensive touching and indicated that it must be proved that the assault "was committed with a deadly weapon or by a force or means likely to produce great bodily harm or death." In addition, the jury returned a special verdict form which found that Guzman Rodriguez had committed assault "by a force or means likely to produce great bodily harm or death." In this way, the jury determined that Guzman

[3] Guzman Rodriguez relies upon Orange, 152 Wn.2d 795, and State v. Valentine, 108 Wn. App. 24, 29 P.3d 42 (2001), for the proposition that the crimes for which he was convicted are the same offense for double jeopardy purposes. His reliance is unavailing. In Orange and Valentine, unlike here, the proof supporting the assault in the first degree conviction and the attempted murder conviction was the same.

Rodriguez had engaged in a harmful or offensive touching by a force or means likely to produce great bodily harm or death.

By comparison, to convict Guzman Rodriguez of attempted murder in the second degree, the jury was instructed to determine whether it was proved that "on or about the 4th day of June, 2015, the defendant did *an act* that was a substantial step toward the commission of murder in the second degree." (Emphasis added.) This was not an instruction to convict upon finding that Guzman Rodriguez had committed harmful or offensive touching by a force or means likely to produce great bodily harm or death. Rather, it directed the jury to convict if it found that Guzman Rodriguez committed an act that was a substantial step toward the commission of murder in the second degree. Taken together, the jury instructions further suggest that the jury convicted Guzman Rodriguez based on distinct evidence.

In addition, the State made clear in closing argument that it had introduced evidence of Guzman Rodriguez's conduct that took place *before* he engaged in the assaultive conduct that could satisfy the substantial step element of the attempt crime:

> So what did he do that was an actual substantial step, conduct towards committing the crime of Murder in the First Degree?[4] And here there are several substantial steps that he took.
>
> The defendant left the living room, where he was, and entered the bedroom with a scarf. The defendant crawled up into that bed with Leonila, where she was sleeping, her little girl beside her, and woke her up.

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[4] The State had charged Guzman Rodriguez with attempted murder in the first degree. At trial, after the testimony had concluded, the court instructed the jury on both attempted murder in the first degree and attempted murder in the second degree.

> The defendant wrapped that scarf around his hands and then wrapped it around her neck and squeezed. He struggled with her. She fought with him. He kept that pressure on. She got away from him, and he grabbed her again and again squeezed his hands - - her neck with his hands. All of those are substantial steps toward committing the crime of Murder in the First Degree.

With regard to the assault in the first degree charge, the State argued in closing that Guzman Rodriguez committed assaultive conduct as evidenced "[b]y the injuries, by the defensive wounds that Leonila exhibits on her body, specifically those wounds that she inflicted on herself when she's desperately trying to get that scarf off her neck." In its rebuttal to defense counsel's argument in closing that a lesser assault crime was committed, the State emphasized that, "[w]hat happened here was so much more serious. What happened here was the placing of a ligature on somebody's neck for a prolonged period of time, throughout a struggle, and then putting hands on the person's neck for a prolonged period of time."

In this way, the State's closing argument highlighted that the jury could convict Guzman Rodriguez of the two charged crimes and, in so doing, rely upon different evidence. Davis, 174 Wn. App. at 633. As to the attempt charge, the State indicated that it had introduced evidence of, not only assaultive acts by Guzman Rodriguez, but also of his criminal conduct occurring *prior* to the assaultive acts. The State suggested that, as to each of Guzman Rodriguez's acts that it had mentioned, the jury could rely upon *any* of them—including the nonassaultive acts—to determine that Guzman Rodriguez took a substantial step toward committing murder. By comparison, the State's closing argument for the assault charge highlighted only the evidence of Guzman Rodriguez's assaultive

conduct (strangulation by scarf and by hands). Thus, the State's closing argument informed the jury that it could convict Guzman Rodriguez of each charged crime using different evidence.[5] This was consistent with Borrero. 161 Wn.2d at 538-39.

C

The evidence adduced at trial, the jury instructions, and the State's closing argument demonstrate that the jury convicted Guzman Rodriguez of attempted murder in the second degree and assault in the first degree using different evidence. Thus, the two crimes were not the same offense in fact for double jeopardy purposes. Accordingly, the trial court did not violate the double jeopardy clauses of the state and federal constitutions by entering judgment on the jury's verdicts convicting Guzman Rodriguez of assault in the first degree and attempted murder in the second degree.[6]

III

Guzman Rodriguez requests that no costs associated with his appeal be assessed against him, as he was found indigent by the trial court.

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[5] The legislature did not intend that the merger doctrine apply to these circumstances. [T]he merger doctrine is a rule of statutory construction which only applies where the Legislature has clearly indicated that in order 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. Vladovic, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983). Here, the crime of attempted murder is not elevated to a higher degree by proof that Guzman Rodriguez committed assault in the first degree. Thus, the merger doctrine does not apply.

[6] Guzman Rodriguez relies upon the State's concession at sentencing that the acts underlying each crime for which he was convicted were the "same criminal conduct" for sentencing purposes. Guzman Rodriguez's reliance is unavailing. This concession at sentencing does not bear on the question of whether—for a double jeopardy claim based upon multiple *convictions*—the trial court violated Guzman Rodriguez's double jeopardy right by entering judgment on the jury's verdicts.

Should the State seek an award of costs, the matter will be resolved pursuant to RAP 14.2.

Affirmed.

We concur:

NIELSEN, BROMAN & KOCH P.L.L.C.

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