NO. 32826-1-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER M. TASKER II,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error. These can be summarized as follows;

1. Was there sufficient evidence to support the firearm enhancements, because there was no proof of an operable firearm?
2. The court erred when it counted the convictions for Attempted First Degree Robbery and First Degree Kidnapping as separate offense for sentencing purposes.
3. The court erred when it determined that Appellant has the ability and/or the future ability to pay legal financial obligations. Did the trial court improperly restrict cross-examination of witness Stacey Melton?
4. The court erred when it imposed legal financial obligations.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. There was sufficient evidence to support the firearm enhancements.
2. The court properly counted the Attempted First Degree Robbery and the First Degree Kidnapping as separate crimes for sentencing purposes.
3. The court properly assessed the appellant's ability to pay legal financial obligations.
4. The legal financial costs were properly imposed.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to specific sections of the record as needed. Certain sections shall also be set forth in

the appendix to this document.

III. ARGUMENT

The evidence presented was more than sufficient to support the firearm enhancements against Appellant. The trial court sat through this entire trial, heard all of the testimony and sentenced the defendant based on that evidence. The two crimes were in fact separate and distinct, the trial court properly counted them as separate crimes for sentencing purposes.

The trial court in this case heard from the defendant regarding his ability to pay the costs of his criminal actions. The court determination that Tasker had the present and future ability to pay is supported by the record. The fact that a defendant is found to be "indigent" for purposes of trial or appeal does not preclude a determination that that defendant has the future ***ability*** to pay costs associated with the crimes that he committed. And in conformity with the information before the court the legal financial obligations which were imposed were done so properly.

RESPONSE TO ISSUE ONE – WEAPON ENHANCEMENT.

Appellant does not challenges the sufficiency of the evidence to support his convictions for First Degree Robbery, First Degree Kidnapping or Unlawful Possession of a Firearm. He does challenge the sufficiency of the evidence supporting the firearm enhancements that were

imposed.

In reviewing any challenge to the sufficiency of the evidence, this court will view the evidence in a light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

A defendant claiming insufficiency admits the truth of the State's evidence and all reasonable inferences drawn in favor of the State, with circumstantial evidence and direct evidence considered equally reliable. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The elements of a crime can be established by both direct and circumstantial evidence. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). One is no less valuable than the other. There is sufficient evidence to support the conviction if a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. Circumstantial evidence and direct evidence are equally reliable. State v. Dejarlais, 88 Wash. App. 297, 305, 944 P.2d 1110 (1997), *aff'd,* 136 Wash.2d 939, 969 P.2d 90 (1998).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850

(1990). "It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense." State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974).

The trial court was presented with an almost identical argument after the verdict was rendered and determined that there had been sufficient facts presented to support the jury's findings. (CP 45-54, RP 709-22, 725-27, 778-9, 780, 787- 92, 806)

The facts presented to the jury were without a doubt sufficient to meet the test set forth in, State v. Bucknell, 183 P.3d 1078, 1080 (WA 2008);

> In reviewing a sufficiency of the evidence challenge, the test is whether, after viewing the evidence in a light most favorable to the jury's verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-21, 16 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). (Emphasis mine.)

To convict Appellant of unlawful possession of a firearm or impose a firearm enhancement, the State had the burden of proving that Tasker was armed during commission of the crime with a "firearm, "i.e., "a weapon or device from which a projectile or projectiles may be fired by

an explosive such as gunpowder." RCW 9.41.010(9). Citing State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276(2008), and several other cases, Tasker contends this burden required the State to prove the firearm was "operable." See Recuenco, 163 Wn.2d at 437 "We have held that a jury must be presented with sufficient evidence to find a firearm operable ... in order to uphold the enhancement."; State v. Pam. 98 Wn.2d 748, 754, 659 P.2d 454 (1983) "A gun-like object incapable of being fired is not a 'firearm.'"; State v. Pierce, 155 Wn.App. 701, 714 n.11, 230 P.3d 237 (2010) "Where the firearm is not presented as evidence, there must be "other evidence of operability, such as bullets found, gunshots heard, or muzzle flashes."

The State would strongly disagree with Tasker's argument that there was insufficient evidence presented to support the enhancements. While not an enormous amount of evidence was present it was sufficient to allow the question to go to the jury and the jury found that evidence supported the State's position. Sufficient evidence shows Tasker possessed and displayed a real gun. State v. Raleigh, 157 Wn.App. 728, 734-5, 238P.3d 1211 (2010), review denied, 170 Wn.2d 1029, 249 P.3d 624 (2011) sets out that the firearm need not be operable during commission of crime to constitute a firearm; indicating that the language in Recuenco is dicta; State v. Padilla. 95 Wn.App. 531, 535, 978 P.2d

1113 (1999) "a disassembled firearm that can be rendered operational with reasonable effort and within a reasonable time period is a firearm", review denied at 139 Wn.2d 1003, 989 P.2d 1142 (1999)

State v. Faust, 93 Wn.App. 373, 380, 967 P.2d 1284 (1998) sets forth exactly what must be distinguished indicating that language in Pam on operability refers to the difference between a toy gun and a gun in fact; a gun incapable of being fired due to a mechanical defect is still a firearm.

Even if this court were to assume proof of operability is required, this court has previously held that operability may be inferred from evidence showing a threat to use a real gun. In State v. Mathe, 35 Wn.App. 572, 668 P.2d 599 (1983), affirmed, 102 Wn.2d 537, 688 P.2d 859 (1984), this court held that the State had proven the defendant "used a real and operable gun" because eyewitnesses described the guns and the defendant's express or implied threat to use them. Mathe, 35 Wn.App. at 581-82. Similarly, this court in State v. Bowman. 36 Wn.App. 798, 803, 678 P.2d 1273 (1984), review denied. 101 Wn.2d 1015 (1984), held that eyewitness testimony describing a "real" gun and recounting a threat to use it was sufficient to establish "the existence of a real, operable gun in fact." The Bowman court goes on to state “[t]he State need not introduce the actual deadly weapon at trial. "The evidence is sufficient if a witness to the crime has testified to the presence of such a weapon, as happened

here.... The evidence may be circumstantial; no weapon need be produced or introduced." Tongate, at 754, 613 P.2d 121." Bowman at 803.

Faust, 93 Wn.App. at 381- n.6;

> "…when the Legislature adopted the definition of a firearm in 1983, the Washington Supreme Court had clearly set out the definition of firearm in both Tongate and Pam. And the definition did not limit firearms to only those guns capable of being fired during the commission of the crime. Rather, the court characterized a firearm as a gun in fact, not a toy gun; and the real gun need not be loaded or even capable of being fired to be a firearm.
> In addition, we have consistently held that an unloaded weapon is a deadly weapon. [6] See (State v. Sullivan, 47 Wash.App. 81, 733 P.2d 598 (1987); State v. Rahier, 37 Wn.App. 571, 681 P.2d 1299 (1984); State v. Beaton, 34 Wn.App. 125, 128, 659 P.2d 1129 (1983)).
> [6] The State also points out that eyewitness testimony to a real gun that is neither discharged nor recovered is sufficient to support deadly weapons and/or firearms penalty enhancements. See (State v. Bowman, 36 Wn.App. 798, 803-04, 678 P.2d 1273 (1984); State v. Mathe, 35 Wn.App. 572, 582, 668 P.2d 599 (1983); State v. Goforth, 33 Wn.App. 405, 411, 655 P.2d 714 (1982)).

The victim never wavered from her assertion that this was a "gun" not a toy not a wallet, it was a gun. And while she may not have been an expert in ascertaining the make, model and caliber of that weapon the following series of questions clearly support the jury's determination and the court's imposition of the weapon enhancements:

CHEN: Alright. And what happened next?

WHITE: He um, came up to me with a gun in his hand and demanded my purse.
CHEN: Now, when he demanded your purse with a gun, at that point itself did you see the gun or did he just say---did he mention anything about a gun?
WHITE: Did he mention?
CHEN: Did you see the purse or did he mention that he had a gun when he demanded your purse?
WHITE: He put the gun in my face.
RP 428
CHEN: Okay.
WHITE: And said, "Give me your purse."
CHEN: And uh, forgive me for asking this. Um, how did you feel when that gun was placed in your face?
WHITE: Just feels like the blood just drains.
RP 429
…
CHEN: Alright. And did he---what about the gun? Did he have the gun when he went inside and told you to drive?
WHITE: He did.
CHEN: Okay. Uh, at what point did you observe or see
PR 430
the gun again while in that---inside the car?
WHITE: Um, I didn't see it again. I at one point when we were actually driving I thought I heard the clicking of something behind my head.
CHEN: And what did you think it was?
WHITE: I just---I thought it was the gun.
CHEN: Okay. And what did you think was happening to the gun at that point?
WHITE: I just assumed he was getting ready to use it.
RP 431
…
SWAN: Okay. And during that conversation you had um, with Officer Martin, she asked you whether or not you could identify the gun that you thought you saw. Right?
WHITE: Uh, I don't remember that. But---
SWAN: Okay. You have familiarity to what talked to Officer Martin about back on June 17th, 2013?
WHITE: It was, again, a recounting of events similar to what I've---

SWAN: Okay.
WHITE: Shared today.
SWAN: Okay. You recall telling Officer Martin the gun you thought you saw was small?
WHITE: Right.
SWAN: Okay. And that you thought it was dark grey or black.
WHITE: Right.
SWAN: Okay. Um, do you recall telling her you didn't know whether it was real or not?
WHITE: I've never seen a gun in real life.
SWAN: Okay. So, let's talk about that a moment. Um, you're not very familiar with guns. Probably seen them on TV or movies though, right?
WHITE: Yes.
SWAN: Okay. So, we think of a revolver as the kind of gun that you might see in a western. Something like that. Versus a
RP 451
semi-automatic which is a lot smoother. Do you know the difference between a revolver and a semi-automatic?
WHITE: No.
SWAN: They all look the same to you?
WHITE: They don't look the same.
SWAN: Okay.
WHITE: But I wouldn't know them by name.
SWAN: Okay. So, this particular handgun that you thought Mr. Tasker was holding, can you give us any kind of description at all besides that it was small and dark grey or black?
WHITE: No.
SWAN: Okay. Any chance it could've been anything besides a handgun?
WHITE: No.
SWAN: Could it have been somebody's wallet, cell phone, anything else?
WHITE: No, sir.
SWAN: Okay. You said the um, when describing the size of the gun you said it was palm sized.
WHITE: Like I said earlier, it was a size that he could hold in one hand.
RP 542

…
SWAN: Now you told us earlier that was the um, that was the only time you actually saw this gun. Is that right?
WHITE: Yes.
SWAN: You described for us that later you thought you heard something that sounded like a gun. Correct?
WHITE: I said that I heard a clicking behind my head.
SWAN: Okay. And so you made some assumptions that that might be a gun?
RP 453
WHITE: Yes.
…
SWAN: Okay. Any chance that the clicking that you're hearing now is perhaps something that never happened, but you're just thinking that must've happened? Any chance that's sort of a---maybe you just think it happened, but it didn't really?
WHITE: No.
SWAN: Okay. So you know that that happened? You heard the clicking and you thought that was the gun? Or could be?
WHITE: I knew that I heard a clicking.
SWAN: Okay.
RP 456
…
CHEN: Okay. Do you recall telling him about the clicking sound?
WHITE: I thought I had mentioned it then.
CHEN: Thank you. And um, he asked you about could it been a cellphone, or a wallet that you'd seen. Why did you tell the officers and why do you describe it as a gun and not a cell phone or wallet?
WHITE: It wasn't a cell phone or a wallet.
CHEN: Okay. It was a gun. Is that correct?
WHITE: It was a gun.
RP 459

The additional factor that must be considered by this court is what actions the victim took based on her belief that this was a gun, a real gun, she literally jumped from a moving vehicle to get away from Tasker. She

was willing to suffer the consequences of that action based on her belief that what he held in his hand was a gun, not a toy gun a real gun;

> CHEN: And when you unbuckled the seatbelt did he say anything at all to you about you unbuckling the seatbelt?
> WHITE: **As I unbuckled the seatbelt I also opened door. And as I was jumping out I heard him yell, "No. No."**
> CHEN: Okay. And why did you jump out of the vehicle?
> WHITE: All I could think about was my kids. I just needed to see my kids. I don't know what his intentions were. I don't care to know what his intentions were. At that moment I just needed to get away.
> CHEN: Alright. And uh, during that encounter did you get a look at that person?
> WHITE: Yes.
> CHEN: Okay. Is that person in this courtroom this afternoon, Miss Campos-White?
> WHITE: Yes.
> CHEN: And can you point him out, please?
> WHITE: He's right here.
> …
> CHEN: Okay. But as far as general vicinity of where you were being asked to---where he was leading you uh, direction wise, do you recall what would've---what would be on that area if you were to keep going where he was telling you to go?
> WHITE: Uh, I don't know what is there now. I just remember in that area of Selah, to my recollection, there are orchards.
> CHEN: Okay.
> WHITE: Um, up that little hill not much beyond those little houses in that area there. So, I can't imagine that there's anything else back there. But, I haven't been back there in a long time.
> CHEN: Alright. And believing that or knowing that **RP 447** that's the direction you may be going, how did you feel?
> WHITE: I just knew that there was nothing back there or I believed that there is nothing back there for him to be needing to take me up there.
> CHEN: Were you concerned for your safety?

> WHITE: I was concerned for my safety. Yes.
> CHEN: Okay. Thank you. What type of injuries did you sustain after you---when you jumped out of the---your car.
> …
> WHITE: Other than cuts and bruises I had a sprained ankle and a pretty severe concussion that let *(sic- It is clear this should be "led" not "let", this is just one of an innumerable number of errors in the transcription of this trial.)* to loss of taste and smell.
> **RP 448**

The observation of the Ms. Campos-White without doubt describe a "real gun" not some toy. She testified that she believed that the clicking noise was Tasker preparing to use this gun. If she believed that it was a toy gun there would have been no fear for her safety from the "use" of the toy and therefore no need to throw herself from a moving car, a jump that resulted in an injury that caused her to permanently loose her ability to taste and smell.

Obviously no person would risk their life jumping out of a moving care to get away from a toy gun.

RESPONSE TO ISSUE TWO – SAME CRIMINAL CONDUCT

Our State Supreme court stated in State v. Graciano, 176 Wn.2d 531, 535, 295 P.3d 219 (2013)

> …we reaffirm our precedent, holding that determinations of same criminal conduct are reviewed for abuse of discretion or misapplication of law. The Court of Appeals erroneously applied a de novo standard of review and in doing so, inappropriately placed the burden of proof on the

> State. Applying the correct standard, we hold that the sentencing court neither abused its discretion nor misapplied the law in refusing to treat Graciano's crimes as part of the same criminal conduct.

Graciano affirmed a long line of cases that supported that rule that a trial court's determination of what constitutes the same criminal conduct for purposes of calculating an offender score will not be reversed absent an abuse of discretion or misapplication of the law. State v. Till, 139 Wn.2d 107, 122, 985 P.2d 365 (1999). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. State v. Mehrabian, 175 Wn.App. 678, 710, 308 P.3d 660, review denied, 178 Wn.2d 1022, 312 P.3d 650 (2013).

RCW 9.94A.589(l)(a) provides:

> Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.

"A court will consider two or more crimes the 'same criminal conduct' if they: (1) require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim." State v. Price, 103 Wn.App. 845, 855, 14 P.3d 841 (2000). All three prongs must be met.

State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). It is clear that the legislature intended that courts construe RCW 9.94A.589(l)(a) narrowly to thereby disallow most assertions of same criminal conduct. State v. Wilson, 136 Wn.App. 596, 613, 150 P.3d 144 (2007).

In order for crimes to encompass the same criminal conduct, they must be committed against the same victim at the same time and place, and involve the **same criminal intent**. RCW 9.94A.589. State v. Deharo, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998). If one element is missing, multiple offenses cannot constitute same criminal conduct and must be counted separately in calculating the offender score. State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). "[l]n construing the 'same criminal intent' prong, the standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next." State v. Price, 103 Wn. App. 845, 857, 14 P.3d 841 (2000).

This court in State v. Bobenhouse, 143 Wn.App. 315, 330, 177 P.3d 209 (Wash.App. Div. 3 2008) set forth the law governing this issue as follows;

> Two or more current offenses that encompass the same criminal conduct may be counted as one crime in an offender score. RCW 9.94A.589(1)(a). "Same criminal conduct" means "crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). The offenses do not constitute the same criminal conduct and

> must be counted separately in the offender score if any one of these factors is missing. State v. Porter, 133 Wash.2d 177, 181, 942 P.2d 974 (1997); State v. Wilson, 136 Wash.App. 596, 613, 150 P.3d 144 (2007). The conclusion that crimes constitute the same criminal conduct is somewhat discretionary with the trial court. State v. Haddock, 141 Wash.2d 103, 110, 3 P.3d 733 (2000). We will reverse the sentencing court's conclusion of same criminal conduct, then, only for "abuse of discretion" or misapplication of the law. State v. French, 157 Wash.2d 593, 613, 141 P.3d 54 (2006).

RCW 9.94A.589(1)(a) treats all " current and prior convictions as if they were prior convictions for the purpose of the offender score." That section, however, recognizes an exception: "[l]f the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." RCW 9.94A.589(1)(a). Here the trial court indicated on the Judgment and Sentence and in its ruling addressing the motions filed on this issue in the trial court that these crimes were not the same criminal conduct. RP 842-45, CP 61-62. As the court stated;

> In the present case, the defendant asked for the purse, he got the purse, he never asked for anything more, he wasn't in the car when he did it. There was no, there was no evidence that there was any other effort to rob, uh, Ms. Campos-White, other than what happened when the Defendant was standing outside of the vehicle. Once he got into the vehicle and told her to drive, that's when the kidnapping started. And so we have the robbery had been completed or attempted robbery had been completed. It was, it was over because it was, there was no evidence of any continuing effort to rob her.

…
And, in this case, he demanded and matter of fact, he got the purse, so the purse itself probably had some value in there. In theory, maybe that could have been charged as a completed robbery, I don't know, it was charged as an attempted robbery.
…
JUDGE: Um, and the act of demanding the purse was the, the act that, uh, that fulfilled that requirement, uh, to make an attempted robbery. So I think these are two distinct crimes. There was the attempted robbery, it was completed, he was still outside of the vehicle and then he got into the vehicle and the kidnapping started. So there are two separate crimes. So (inaudible) the two crimes do not constitute the same criminal intent. Okay, sentencing, Mr. Chen?
RP 821-2

The court addresses this issues again later in the same sentencing hearing;

I look at this case . . . and, and I think I mentioned this at the end of the trial too, the real question and, and some of the people have mentioned this. The real question is, where was he taking her? Obviously, none of us know the answer to that question, but I, I look at this and, and it seems to me that as, as kidnappings go . . . this was bad enough and it was only because of Ms. Campos-White had the courage to jump out of a vehicle, a moving vehicle, that that, that we don't know where, where he was taking her. But there's no way to look at this and not, not conclude, and I think it's a reasonable conclusion, that nothing good was going to happen. When he got to wherever he was taking her, nothing good was going to happen. It was going to be bad. Things were already bad and there's no way it wasn't gonna get worse and that's where he was headed. RP 845

In deciding whether crimes involve the same intent, we focus on whether the defendant's intent, objectively viewed, changed from one

crime to the next. State v. Dunaway, 109 Wash.2d 207, 215, 743 P.2d 1237 (1987). This is determined, in part, by whether one crime furthered the other. State v. Vike, 125 Wash.2d 407, 411, 885 P.2d 824 (1994).

State v. Mehrabian, 175 Wn.App. 678, 710, 308 P.3d 660 (2013)

> We narrowly construe the same criminal conduct analysis. State v. Porter, 133 Wash.2d 177, 181, 942 P.2d 974 (1997); State v. Saunders, 120 Wash.App. 800, 824, 86 P.3d 232 (2004). And we review the trial court's determination on the issue of same criminal conduct for an abuse of discretion or misapplication of the law. Haddock. 141 Wash.2d at 110, 3 P.3d 733; State v. Tili, 139 Wash.2d 107, 122-23, 985 P.2d 365 (1999). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. State v. Powell, 126 Wash.2d 244, 258, 893 P.2d 615 (1995).

In State v. Lessley, 118 Wn.2d 773, 778.827 P.2d 996 (1992) the defendant broke into a home where his former girlfriend was staying with her parents. He kidnapped both the daughter and her mother. Lessley argued that the burglary and kidnapping offenses encompassed the same criminal conduct and that they should have been treated as one crime for sentencing purposes. Our state supreme court disagreed and affirmed the court of appeals. "Same criminal conduct" crimes required a showing of the same objective criminal intent for both crimes, the same time and place for the crimes, and the same victim. The court in Lessley ruled that the defendant's objective intent of the burglary was completed when he

broke into the residence armed with a deadly weapon. As was the case here, Lessley's criminal intent changed when he moved from the burglary to the kidnapping. The time and place of the kidnapping extended well beyond the burglary. Therefore, the burglary and the kidnappings were not the same criminal conduct. State v. Lessley, 118 Wn.2d 773, 778.827 P.2d 996 (1992)

In this case, as the court stated above, the robbery concluded when the defendant took the purse from the victim. He then committed the act of Kidnapping when he entered the SUV and then ordered her to drive and go to a certain location. Even though these events occurred in the same date and the same victim, the criminal intent, objectively viewed, changed from one crime to the next. His initial intent was to unlawfully take/obtain her purse and concluded when he has her purse. The defendant's intent changed to intentionally abducting/restraining her when he entered the SUV and by taking her to a different location than the parking lot. The victim testified that the defendant was upset when she unbuckled her seat belt because he wanted the victim to remain restrained. In addition, the crime took place at a different time and place. The crime of robbery occurred at the parking lot area where the victim was waiting for her daughter's basketball practice to conclude and the crime of kidnapping occurred at the 1900 block of Pleasant Hill Road.

Similar to Lessley, here the kidnapping and the robbery were not confined to the same place; therefore, they do not arise from the same criminal conduct. While not separated by a great amount of time or distance when the facts are looked at in totality and objectively is it clear the attempted robbery was completed at the time the purse was handed to Tasker and the kidnapping started when he entered the car and forced the victim to drive away from the scene of the robbery.

Contrary to Tasker's assertion, the decision of the trial court does not constitute an abuse of discretion. 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, review denied, 114 Wn.2d 1030 (1990). Here, the crimes had different purposes: the attempted robbery was intended to take money and or the property of the victim and was accomplished from the exterior of the victim's car, the kidnapping was meant to remove the victim to an isolated area an area. The area that Tasker was ordering the victim to go to were "orchards" clearly he was not intending for the victim to access more money or her personal property in an orchard, there are no cash machines or banks in the middle of an orchard.

In the victims own words;

CHEN: Okay. But as far as general vicinity of where you

were being asked to---where he was leading you uh, direction wise, do you recall what would've---what would be on that area if you were to keep going where he was telling you to go?
WHITE: Uh, I don't know what is there now. I just remember in that area of Selah, to my recollection, there are orchards.
CHEN: Okay.
WHITE: Um, up that little hill not much beyond those little houses in that area there. So, I can't imagine that there's anything else back there. But, I haven't been back there in a long time.
CHEN: Alright. And believing that or knowing that that's the direction you may be going, how did you feel?
WHITE: I just knew that there was nothing back there or I believed that there is nothing back there for him to be needing to take me up there.
RP 447-8 (Emphasis added.)

Moreover, even though the crimes were sequential, Tasker had the opportunity, after completing each offense, to reflect and form a new intent to commit an additional crime. See State v. Wilson, 136 Wn.App. 596, 615, 150 P.3d 144 (2007) (where the defendant had time to complete the assault and form a new intent to threaten the victim, the crimes of assault and felony harassment had different objective intents and were not the same criminal conduct); State v. Grantham, 84 Wn.App. 854, 859, 932 P.2d 657 (1997) (defendant had time after first rape to form intent to commit the second, so the two rapes counted separately).

The trial court did not abuse its discretion in rejecting Tasker's same criminal conduct argument.

RESPONSE TO ISSUE THREE – IMPOSITION OF LFO's.

This court has been inundated by similar claims regarding the imposition of legal financial obligations. In this instance the trial court did what it was supposed to do, it inquired of the defendant what his working history was including the type of employment and monetary compensation.

This court must remember that this question is not before the court having been raised because of some civil act by the appellant, this is not the debtors prison of decades past, this is the imposition of cost that are directly related to an illegal act by an individual against society. A society that is represented by the state legislature which set forth the law as follows:

RCW 10.01.160(3) - The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

What is now proposed is that the vast majority of those who commit crimes in this state should not be held accountable to the society they have harmed, to make whole that society for the costs of their actions. And yet in this state if you are sued in a "civil" court for actions that

amount to far less than the criminal act of Tasker a litigant who has lost their case would be subject to similar costs which including the costs of the "victory" and there will not be this exception, this out. They cannot claim they are at 125% of the federal poverty level therefore they should not be held accountable. See generally RCW title 6 et. seq. This is an absurd result, a civil litigant would be held to a more stringent standard than a convicted criminal.

Appellant states "Because the record shows that Mr. Tasker would likely not be able to pay costs, the court erred in imposing discretionary costs." This is not and has never been the standard to determine whether a court can impose costs.

If the trial court enters a finding in the judgment and sentence, this court will review it under the clearly erroneous standard. State v. Lundy, 176 Wn.App. 96, 105, 308 P.3d 755 (2013). Clear error exists when review of the record leads to a definite conclusion that a mistake was committed. Lundy, 176 Wn.App. at 105. The record demonstrates that Tasker agreed to the restitution he now complains that the trial court's discussion did not go into enough depth. The fact is if any costs are imposed there will literally never be an inquiry by a trial court that will satisfy a disgruntled defendant. The dialogue between Tasker and the trial court is set forth in Appendix A it is sufficient to meet the edict of

RCW 10.01.160 and the ruling in Blazina.

The dialogue between the court and Tasker indicates Tasker was employable, he has held jobs previously, and is employable in the future. Tasker states over and over that the court used "boilerplate" language in the judgment and sentence form. This is a standardized form the form of which is set out by the court system so that there will be uniformity in these forms. The use of "boilerplate" is an essential and everyday part of the law. The essential question is did the sentencing court inquire of the defendant as to his ability to pay these LFO's whether mandatory or discretionary.

This trial court did so here.

> JUDGE: Let, let me inquire, uh, Mr. Tasker, um, have you held jobs in the past? Do you work?
> TASKER: Have I ever held jobs? Yes.
> JUDGE: What kind of work do you know how to do?
> TASKER: Uh . . . labor and construction, uh, I've done Ace Hardware, Jack In The Box, to support my son and my wife.
> JUDGE: So . . .
> TASKER: And that's minimum wage.
> JUDGE: Minimum wage, okay.
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> …
> JUDGE: There are a number of conditions of community custody that Mr. Swan already mentioned and had no objection to. Uh, the restitution, I'm assuming the, that $142 figure, $142,000 figure, is, is medical bills, right?
> CHEN: Medical, Your Honor, mostly medical and part of it is the vehicle costs and damages.
> JUDGE: All right, medical and the vehicle costs and

they're, judging from Mr. Swan's comments, there wasn't, uh, any real dispute about the validity of those numbers. Um, in addition to the $142,865.95 restitution, there is a $500 current penalty assessment, $200 criminal filing fee, $600 court appointed, uh, attorney (inaudible), $100 DNA collection fee, so the total is $144,265.95. With regard to cost of incarceration, Mr., uh, Tasker, he has some ability to work, but he obviously has no ability to earn any income for a very long time. I am going to require that he pay cost of
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incarceration, um, but as a practical matter, since the, when he does pay, my rec, my belief is that the, anything he pays goes first to restitution, isn't that correct, Mr. Chen?
CHEN: That's correct, Your Honor.
JUDGE: All right. So as a practical matter, he's probably never going to be able to pay the restitution.
SWAN: You mean, you mean cost of incarceration? You said restitution.
JUDGE: Well, restitution, right. I know, I said restitution.
SWAN: Okay.
JUDGE: He's probably never going to be able to pay that.
SWAN: Okay.
JUDGE: So the cost of incarceration on top of that, as a practical matter, he's probably never going to be able to pay those, so I'm going to cap those at $1,000, because it's just a bookkeeping entry that has to be maintained by the clerk for, for years and years and years and it ends up just costing the county money to maintain the books on it. Mr. Tasker, I'm sure you know, but I will advise you that being convicted of these offenses will cause you to lose whatever right you may have had to own or possess a firearm and will also cause you to lose your right to vote, to the extent that you may have had that right. Mr. Tasker, you have the right to appeal this conviction. You have a right to appeal a sentence outside the standard sentencing range, although this one is not outside the standard sentence range.
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The courts statements that Tasker probably would not pay the

assessed costs has nothing to do with a determination that he has the current and future ***ability*** to pay the costs imposed. In few cases is the defendant immediately able to pay anything because most are in jail or being shipped to the prison system. The law does not require the court to not impose either mandatory or discretionary costs because the defendant probably won't pay, the question is does that person have the ability to pay. The State clearly mandated this as the basis because to address it as Tasker would have this court look at it would result in almost no defendant ever having any costs impose.

The court in State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015) took an extremely expansive position on a very simple issue that had been presented to that court. It is the State's position that sections of that opinion such as the section that suggests that the trial court should "seriously question that person's ability to pay LFO's" if the persons income is 125% of the federal poverty level is dicta. This section of the ruling begins with the following "For example..." The issue of the federal poverty level was not before the court. It is the State's position that this is "Dicta - Opinions of a judge that do not embody the resolution or determination of the specific case before the court. Expressions in a court's opinion that go beyond the facts before the court and therefore are individual views of the author of the opinion and not binding in

subsequent cases as legal precedent. The plural of dictum." http://legal-dictionary.thefreedictionary.com/Dicta.

The Blazina court sets forth the issue and its determination as follows;

> At sentencing, judges ordered Nicholas Blazina and Mauricio Paige-Colter to pay discretionary legal financial obligations (LFOs) under RCW 10.01.160(3). The records do not show that the trial judges considered either defendant's ability to pay before imposing the LFOs. Neither defendant objected at the time. For the first time on appeal, however, both argued that a trial judge must make an individualized inquiry into a defendant's ability to pay and that the judges' failure to make this inquiry warranted resentencing.…
>
> …we reach the merits and hold that a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs. Because the trial judges failed to make this inquiry, we remand to the trial courts for new sentence hearings.

Blazina at 839, We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge make an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay. Because the records in this case do not show that the sentencing judges made this inquiry into either defendant's ability to pay, we remand the cases to the

trial courts for new sentence hearings.

Tasker has not demonstrated that the actions of the trial court were "clearly erroneous" therefore this court should deny this allegation.

IV. CONCLUSION

Appellant has not challenged the underlying convictions. His challenge of proof supplied to the judge and jury regarding the firearm he used to commit these crimes is not supported by the fact or the law. The trial court properly considered the facts and in its discretion determined that the crime of Attempted Robbery did not merge for sentencing with the kidnapping. Finally the trial court made sufficient inquiry into Tasker's financial future to allow the imposition of the discretionary costs he now challenges. For the reasons set forth above this court should deny this appeal.

Respectfully submitted this 28th day of August 2015,

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APPENDIX A

SWAN: Thank you. Uh, then going to . . . page three. Uh, that's where he, there's a proposed 144 months for Count 1 and 87 months for Count 2 and 54 months for Count 3. Those are all top of the range, if you run them concurrent with each other, they have to by statute. Um . . . the Court's gonna make a decision on where you want to go on that, but we suggest that this is not a case that requires top of the range. Mr. Tasker has asked the Court to consider something less, including potentially bottom of the range on these, so we would ask the Court to take his request into consideration. Then we get to . . . I did review Mr. Tasker on page four of the conditions of community custody. There's nothing about that that seems . . . out of the ordinary, so there's no, there's no issue there. However, page five, which is page four, excuse me, paragraph 4.B.3., uh, I had seen,

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uh, some time ago a request for the amount of restitution being requested, so there is, at least on the face of it, some evidence that that is a bill that is valid. Uh, in light of those, of restitution, I would ask the Court to take some consideration on the rest of the legal financial obligations to be imposed and they are not mandatory. The Court is allowed to take into consideration my client's ability to pay, even on, on any and all of the costs, but perhaps the Court would want to take that into account. On paragraph 4.D.4, the cost of incarceration, um . . . the Court can, if it finds my client has the ability to pay, charge him $50, a day, for State prison and almost $85, a day, for time he spent here in the county jail. I didn't do the $85, a day, I just did $50, a day, and if the Court, Court (inaudible) it would be $240. If I add that correctly, that's something like $355,000, my client would be charged for the time he's in prison. I did not exclude for good behavior or anything like that, 'cause I think that that's obviously (inaudible) my client would never be able to pay, even in light again of the restitution, which I expect the Court to oppose, um, I would ask the Court to consider halving the cost of incarceration. He does not have the present ability to pay really anything, but (inaudible). . .

JUDGE: What are you asking me to cap it at?

SWAN: Pardon?

JUDGE: What are you asking me to cap it at?

SWAN: Well, often the Courts, uh, not in these particular hearings, but often the Courts have been willing to limit

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or cap the costs at normally sometimes $500. Uh, sometimes less than that, sometimes more than that, but if the Court should consider capping it, again, because (inaudible). I also don't normally have clients who are charged this amount of restitution, so I don't know what it, what function it serves to charge him for the time of being in prison.

JUDGE: Let, let me inquire, uh, Mr. Tasker, um, have you held jobs in the past? Do you work?

TASKER: Have I ever held jobs? Yes.

JUDGE: What kind of work do you know how to do?

TASKER: Uh . . . labor and construction, uh, I've done Ace Hardware, Jack In The Box, to support my son and my wife.

JUDGE: So . . .

TASKER: And that's minimum wage.

JUDGE: Minimum wage, okay.

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…

JUDGE: There are a number of conditions of community custody that Mr. Swan already mentioned and had no objection to. Uh, the restitution, I'm assuming the, that $142 figure, $142,000 figure, is, is medical bills, right?

CHEN: Medical, Your Honor, mostly medical and part of it is the vehicle costs and damages.

JUDGE: All right, medical and the vehicle costs and they're, judging from Mr. Swan's comments, there wasn't, uh, any real dispute about the validity of those numbers. Um, in addition to the $142,865.95 restitution, there is a $500 current penalty assessment, $200 criminal filing fee, $600 court appointed, uh, attorney (inaudible), $100 DNA collection fee, so the

total is $144,265.95. With regard to cost of incarceration, Mr., uh, Tasker, he has some ability to work, but he obviously has no ability to earn any income for a very long time. I am going to require that he pay cost of

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incarceration, um, but as a practical matter, since the, when he does pay, my rec, my belief is that the, anything he pays goes first to restitution, isn't that correct, Mr. Chen?

CHEN: That's correct, Your Honor.

JUDGE: All right. So as a practical matter, he's probably never going to be able to pay the restitution.

SWAN: You mean, you mean cost of incarceration? You said restitution.

JUDGE: Well, restitution, right. I know, I said restitution.

SWAN: Okay.

JUDGE: He's probably never going to be able to pay that.

SWAN: Okay.

JUDGE: So the cost of incarceration on top of that, as a practical matter, he's probably never going to be able to pay those, so I'm going to cap those at $1,000, because it's just a bookkeeping entry that has to be maintained by the clerk for, for years and years and years and it ends up just costing the county money to maintain the books on it. Mr. Tasker, I'm sure you know, but I will advise you that being convicted of these offenses will cause you to lose whatever right you may have had to own or possess a firearm and will also cause you to lose your right to vote, to the extent that you may have had that right. Mr. Tasker, you have the right to appeal this conviction. You have a right to appeal a sentence outside the standard sentencing range, although this one is not outside the standard sentence range.

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DECLARATION OF SERVICE

I, David B. Trefry state that on August 28, 2015 emailed a copy, by agreement of the parties, of the Respondent's Brief, to Kristina Nichols at wa.appeals@gmail.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 28th day of August, 2015 at Spokane, Washington.

By: s/David B. Trefry

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