

NO. 34224-3

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DERRICK KIRKWOOD, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda CJ Lee

No. 01-1-01683-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Is the error in the calculation of defendant's offender score harmless where the correct score for the controlling burglary conviction is still greater than nine and defendant's sentence would be unchanged?

2. Is defendant precluded from raising his additional issues when the issues had already been decided by the Court of Appeals on his first appeal, and defendant has failed to provide argument or authority as to why the issues were not raised at his first appeal when they could have and should have been raised?

B. STATEMENT OF THE CASE.

1. Procedure

Defendant was convicted by jury of first degree burglary, attempted first degree robbery, three counts of second degree assault, and one count of second degree unlawful possession of a firearm. CP 57-58; Appendix A at 9-10. He appealed his judgment and sentence. CP 47; Appendix A at 5. The Court of Appeals affirmed his convictions, but remanded to correct defendant's offender score and sentence. CP 65; Appendix A at 23. Defendant claimed that his convictions for both attempted first degree robbery and second degree assault violated the

double jeopardy clause. CP 15; Appendix A at 19. However, the Court of Appeals found that these two convictions did not merge. CP 61-62; Appendix A at 19-20.

Defendant also claimed that the assaults should be treated as the same criminal conduct as the attempted robbery. CP 62; Appendix A at 20. Initially, the Court of Appeals did not agree with defendant, but changed its opinion after a motion for reconsideration. CP 45-46, 63, Appendix A at 3-4, 21. The Court of Appeals held that the assaults and attempted robbery involved the same victim and comprised the same criminal conduct. CP 46; Appendix A at 4. This is because the victims named in the charging document for the attempted robbery were “James Ultican, Eloise Ultican, Carol Coolidge, **and/or** Michael Hassenger, Jr.”. CP 45; Appendix A at 3 [emphasis added]. The named victims in the individual assaults were the latter three named in the attempted robbery. CP 45; Appendix A at 3. The Court of Appeals reasoned that it was unknown which victim or victims the jury convicted defendant of attempting to rob. CP 45; Appendix A at 3. Therefore, the Court of Appeals held that they assume the assaults and attempted robbery involved the same victim and thus, the attempted first degree robbery was the same criminal conduct as the assaults. CP 46; Appendix A at 4.

Defendant further claimed on appeal that the State failed to offer sufficient proof of the fact that he was on community placement at the time of the incident. CP 63; Appendix A at 21. The Court of Appeals

ruled against defendant on this issue; however, in light of Blakely¹, the State conceded error on resentencing. CP 109. Defendant also contended on appeal that his juvenile court conviction should not have been calculated in his offender score. CP 64; Appendix A at 22. The State agreed and conceded error on that point. CP 65; Appendix A at 23.

Defendant raised many other errors, but the Court of Appeals found none with merit. CP 52-60; Appendix A at 10-18. The case was remanded for resentencing consistent with the Unpublished Opinion of the Court of Appeals and the Order Granting Motion for Reconsideration. CP 46, 65; Appendix A at 4, 23.

Defendant then filed a Personal Restraint Petition (PRP). See CP 188-91. In his petition, defendant claimed (1) the trial court gave an incomplete accomplice liability instruction, (2) the sentencing court improperly imposed firearm enhancements consecutively, and (3) the court failed to give a nexus instruction on the unlawful possession charge. CP at 188. The Court of Appeals pointed out that sentencing enhancements are consecutive, even though the convictions are the same criminal conduct. CP 189-90. Finding no merit any of his claims, the Court of Appeals dismissed defendant's Personal Restraint Petition. CP 191.

¹ Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

At resentencing, the State sought a high end, standard range sentence of 320 months for Count I, which represented 116 months plus 204 months firearm sentencing enhancement. RP (11/04/05) 12. Defendant had not supplied the court with the trial transcripts and did not accept the factual statement in the Court of Appeals's opinion. RP (11/04/05) 15-17. However, when he argued the factual statement was erroneous, the court stated, "[w]hat the Court of Appeals ruled is what the Court of Appeals ruled, . . . I'm not going to be second-guessing the Court of Appeals' decision at this point in time except to the extent I'm hearing argument on your merger . . ." RP (11/04/05) 17.

Defendant then argued that Freeman² required the court to review the jury's findings to determine whether the assaults in this particular case were performed to facilitate the robbery. RP (11/04/05) 18. Because Freeman came out after the Court of Appeals decided the present case, defendant argued that the court had the authority to revisit the issue and to essentially overrule the Court of Appeals's decision. RP (11/04/05) 18-19. Defendant also argued that, when the Court of Appeals remanded the case for resentencing, that everything was open for reargument. RP (11/04/05) 26. Defendant argued that all the crimes should be considered same course of conduct, that additionally the crimes should merge, and that the court should not apply the burglary anti-merger statute. RP (11/05/04) 26.

² State v. Freeman, 153 Wn.2d 765, 780, 108 P.3d 753 (2005).

Defendant also argued that his offender score should have been determined by a jury beyond a reasonable doubt, and that his firearm sentencing enhancement was erroneous because there was no provision for a jury to find he was armed with a firearm. RP (11/04/05) 27-30.

The court held that the arguments defendant made “could have and should have been raised in the Court of Appeals.” RP (11/04/05) 37. The court did, however, agree to consider defendant’s merger argument in light of Freeman. RP (11/04/05) 37. Because Freeman requires the courts to “analyz[e] cases individually on its facts,” the court determined that it needed the trial transcripts to proceed. RP (11/04/05) 37. The court continued sentencing until December 2, 2005. RP (11/04/05) 38.

On December 2, 2005, the parties again appeared for resentencing. RP (12/02/05) 2. The court had reviewed the pleadings, case law, trial transcripts, the Court of Appeals’s opinion, and the order granting the motion for reconsideration. RP (12/02/05) 3. The court distinguished Freeman and held:

Proof of assault by the use of a gun to create apprehension in the victims will not always prove an attempted robbery because it may not include proof of an intent to rob.

Therefore, following the case of State v. Beals³, which is still good law in this state, this Court denies the defendant's request and this Court finds that the crime of attempted robbery in the first degree does not merge with assault in the second degree.

RP (12/02/05) 04.

Defendant again argued that there was no procedure by which the Court could impose a firearm sentencing enhancement. RP (12/02/05) 5-8. The court denied the motion. RP (12/02/05) 9.

The State again argued for a high end, standard range sentence on each count. RP (12/02/05) 9-11. Defendant argued that because he had been wrongfully accused and wrongfully convicted, the court should impose either an exceptional sentence downward, or the statutory minimum for each count. RP (12/02/05) 12-14.

The court held that, based on the Court of Appeals's decision and subsequent case law, the offender score was correctly calculated at 13. RP (12/02/05) 16. The court imposed a sentence of 112 months, with 60 months for the enhancement on Count I; 82 months with 36 months for the firearm enhancement on Count II; 80 months each, with 36 months for the enhancements on Counts IV, V, and VI; and 55 months for Count VII. RP (12/02/05) 16-17. Each sentence would run concurrent for a total of 316

³ State v. Beals, 100 Wn. App. 189, 997 P.2d 941, review denied, 141 Wn.2d 1006, 10 P.3d 1074 (2000).

months. See RP (12/02/05) 16-17. The court also imposed 18-36 months of community custody and \$500 for a crime victim penalty assessment. RP (12/02/05) 17-20.

2. Facts

The State hereby adopts the facts as set out in the Court of Appeals's opinion. See CP 43-65; Appendix A. However, the Court of Appeals stated in its factual analysis, that the jury returned special verdicts finding that defendant was armed with a deadly weapon on counts I-VI. CP 52; Appendix A at 10. A review of the record shows that the jury actually returned special verdicts finding that defendant was armed with a firearm on counts I-IV⁴. See CP 183-87.

C. ARGUMENT.

1. THE STATE CONCEDES THAT DEFENDANT'S OFFENDER SCORE WAS MISCALCULATED FOR HIS BURGLARY AND UNLAWFUL POSSESSION OF A FIREARM COUNTS ONLY; HOWEVER, BECAUSE DEFENDANT'S CORRECT SCORE FOR THE BURGLARY IS STILL GREATER THAN NINE, THE ERROR IS HARMLESS AND THIS CASE SHOULD BE REMANDED FOR THE SOLE PURPOSE OF CORRECTING THE OFFENDER SCORE.

The Sentencing Reform Act (SRA) requires that a sentence be

⁴ The special verdict forms were presented to the Court of Appeals as part of the original clerk's papers. See CP 192-94, Clerk's Papers per Request of Appellant to the Court of Appeals Division II, filed April 26, 2002.

based on a proper offender score. RCW 9.94A.510; see also RCW 9.94A.525. The calculation of an offender score is reviewed de novo. State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). “When the sentencing court incorrectly calculates the standard range . . . remand is the remedy unless the record clearly indicates the sentencing court would have imposed the same sentence anyway.” Tili, 148 Wn.2d at 358.

To calculate a defendant's offender score, the sentencing court must determine a defendant's criminal history based on his or her prior convictions and the level of seriousness of the current offense. State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). Other current offenses are crimes for which a defendant is sentenced on the same date. RCW 9.94A.525(1). The SRA treats other current offenses as prior convictions for purposes of calculating an offender score. RCW 9.94A.589(1); see also Ross, 152 Wn.2d at 235.

- a. Defendant's offender score for his burglary conviction should be 11, his scores for his multiple assault and attempted robbery convictions were correctly calculated below, and his score for his unlawful possession of a firearm conviction should be eight.

Under the burglary anti-merger statute, “[e]very person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately.” RCW 9A.52.050. The plain language of the statute expresses the intent of the Legislature that any other crime committed in the

commission of a burglary would not merge with the offense of first-degree burglary when a defendant is convicted of both. State v. Sweet, 138 Wn.2d 466, 478, 980 P.2d 1223 (1999). The sentencing judge has discretion to count a crime committed at the same time as a burglary as separate for the purposes of calculating an offender score. See State v. Lessley, 118 Wn.2d 773, 776, 827 P.2d 996 (1992) (affirming the Court of Appeals in finding that “the burglary antimerger statute allows a sentencing judge discretion to punish, separately, a crime committed during a burglary regardless of whether it and the burglary encompassed the same criminal conduct.”); State v. Collicott, 118 Wn.2d 649, 658, 827 P.2d 263 (1992) (finding “[t]here is no conflict between the burglary antimerger statute and the SRA.”). Conversely, this statute gives the trial court discretion to decline separate punishments based on the facts of the case. State v. Davis, 90 Wn. App. 776, 783-84, 954 P.2d 325 (1998).

Where concurrent offenses contain the same criminal conduct, the crimes are treated as one crime for sentencing purposes RCW 9.94A.589(1)(a). “Same criminal conduct,” means “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). Therefore, multiple crimes affecting multiple victims are not to be considered the same criminal conduct. Lessley, 118 Wn.2d at 779.

In Tili, the defendant was convicted of three counts of first degree rape, one count of first degree burglary, and one count of second degree

assault. 148 Wn.2d at 356. The Court of Appeals affirmed Tili's convictions, but remanded for sentencing because it held the assault merged with the rapes, and the rapes were the same course of conduct. *Id.* at 357. In Tili's second appeal, the court found that his offender score was correctly calculated when the sentencing court counted the assault and each rape separately against Tili's burglary conviction. *Id.* at 358-59; see also *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999) ("While we agree with the State's position that under . . . RCW 9A.52.050, there is no merger of the assault and burglary convictions, the assault may be used in calculating the offender score for the burglary conviction only, and not for the rape charges.").

In the present case, defendant had an offender score of four from prior convictions. CP 1-18, 154-66. For his current offenses, he was sentenced as follows:

Crime	Current score	Total (current +4 prior)	Range ⁵ (months)
Burglary 1	9 ⁶ (Att. Rob./Assault x 3/UPOF)	13	87-116
Att. Robbery 1	3 (Burg./UPOF)	7	65.25-87
Assault 2	7 (Burg./Assault x 2/UPOF)	11	63-84
Assault 2	7 (Burg./Assault x 2/UPOF)	11	63-84
Assault 2	7 (Burg./Assault x 2/UPOF)	11	63-84
UPOF 2	5 (Burg./Att. Rob./Assault x 3)	9	51-60

⁵ The jury found firearm enhancements for each of the violent crimes, adding 60 months to the burglary and 36 months to the attempted robbery and each of the assaults. CP 154-66.

⁶ The burglary, attempted robbery, and assault convictions were all violent offenses and, as such, have a multiplier of two when counted against each other. RCW 9.94A.525(8).

CP 154-66.

Under the burglary anti-merger statute, the sentencing court had the discretion to count each of defendant's current crimes against his burglary conviction, even where the crimes would have merged with the burglary. RCW 9A.52.050. The Court of Appeals found that defendant's conviction for attempted robbery were the same course of conduct as the assaults. CP 45-46; Appendix A at 3-4. However, the assaults are not the same course of contact to each other, as they each involve a different victim. See CP 51-52; Appendix A at 9-10. Because defendant's convictions for attempted robbery and the assaults were the same course of conduct, only the assaults, which constitute separate conduct from each other, should be counted against defendant's burglary score. Therefore, defendant's offender score on the burglary count should be 11.

Because the standard range for defendant's burglary conviction will not change, the error does not require the court to vacate defendant's sentence. The appropriate remedy is to remand to correct the offender score and the judgment and sentence.

As stated above, the Court of Appeals found that defendant's conviction for attempted robbery was the same course of conduct as the assaults. CP 45-46; Appendix A at 3-4. As a result, the only crimes counted against the attempted robbery were the burglary and the unlawful possession of a firearm. See CP 154-66. The assaults involved different victims, and were therefore not the same course of conduct with each

other. See CP 51-52; Appendix A at 9-10. Because the assaults were the same course of conduct as the attempted robbery, the trial court did not count the attempted robbery against them, but properly counted the assaults against each other.

Finally, the State concedes that the court miscalculated defendant's score for the unlawful possession of a firearm charge. Because the attempted robbery and the assaults were the same course of conduct, defendant's offender score for the possession charge should be eight; one point for the burglary, one point for each of the assaults because they were not same course of conduct, and four points from prior offenses. However, because the controlling crime is the burglary charge, this error has no effect on defendant's sentence and the court should remand only to correct this score.

Defendant's offender score should be calculated as follows:

Crime	Current score	Total (current +4 prior)
Burglary 1	7 (Assault x 3/UPOF)	11
Att. Robbery 1	3 (Burg./UPOF)	7
Assault 2	7 (Burg./Assault x 2/UPOF)	11
Assault 2	7 (Burg./Assault x 2/UPOF)	11
Assault 2	7 (Burg./Assault x 2/UPOF)	11
UPOF 2	4 (Burg./Assault x 3)	8

This case should be remanded to correct defendant's offender scores on his burglary and unlawful possession of a firearm convictions only.

- b. The court properly exercised its discretion when it applied the burglary antimerger statute and counted each of defendant's crimes separately for calculating his offender score.

Defendant claims the court erred by failing to consider whether to exercise its discretion to not apply the burglary anti-merger statute on the record. See Appellant's Brief at 22. While defendant correctly asserts that the court did not state its position on the record, he fails to cite any authority to support his contention that the court must articulate its discretion. In fact, while case law states that courts have the option on whether or not to apply the anti-merger statute, no case implies that such discretion be exercised on the record. See Lessley, 118 Wn.2d at 781-82; Davis, 90 Wn. App. at 783-84 (Trial court properly exercised its discretion not to apply the burglary anti-merger statute with no discussion on the record); State v. Bradford, 95 Wn. App. 935, 950-51, 978 P.2d 534 (1999) (Defendant's offender score was calculated correctly because the court had the discretion to apply the burglary anti-merger statute even when the court did not exercise its discretion on the record).

Judges are presumed to know and apply the law. State v. Cantu, 156 Wn.2d 819, 834, 132 P.3d 725 (2006). Additionally, the parties briefed this issue for both the original sentencing and the remanded sentencing. See CP 76, 108. Defendant informed the court at resentencing that the burglary anti-merger statute was permissive and the

court could find that the offenses did merge, even with a burglary. RP

(11/4/05) 26. At resentencing, the judge stated that:

In conducting its analysis, this Court has reviewed the pleadings filed by the parties, the case law cited by counsel, the transcript of the trial from which the conviction resulted, the opinion of the Court of Appeals filed on December 9, 2003, and the order granting the motion for reconsideration filed by the Court of Appeals on October 12, 2004.

RP (12/2/05) 3. The fact that the court reviewed the entire record indicates that it did consider the anti-merger arguments which were part of the briefings. Nothing in the record suggests that the court was unaware of its authority to apply, or decline to apply, the burglary anti-merger statute.

2. DEFENDANT IS PRECLUDED FROM RAISING HIS ADDITIONAL ISSUES WHEN THEY HAD ALREADY BEEN DECIDED BY THE COURT OF APPEALS ON HIS FIRST APPEAL, OR THE ISSUES COULD HAVE AND SHOULD HAVE BEEN RAISED AT THE FIRST APPEAL AND WERE NOT.

The “law of the case” doctrine generally “refers to the binding effect of determinations made by the appellate court on further proceedings in the trial court on remand” or to “the principle that an appellate court will generally not make a redetermination of the rules of law which it has announced in a prior determination in the same case.”

State v. Harrison, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003) (citing Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 113, 829 P.2d

746 (1992). The doctrine serves to “promote[] the finality and efficiency of the judicial process by ‘protecting against the agitation of settled issues.’” Harrison, 148 Wn.2d at 562. The law of the case doctrine generally precludes reconsideration of the same legal issues. The courts apply the doctrine in order “to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts.” Harrison, at 562.

Furthermore, questions “which might have been determined had they been presented, will not again be considered on a subsequent appeal if there is no substantial change in the evidence at a second determination of the cause.” Folsom v. Spokane County, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988). The doctrine is discretionary, not mandatory. Folsom, 111 Wn.2d at 264; RAP 2.5(c)(2).

Reconsideration of a substantially similar issue is limited to where the holding of the prior appeal is clearly erroneous and the application of the law of the case doctrine would result in manifest injustice. Folsom, 111 Wn.2d at 264. To meet this burden, defendant must show a new point of law that was not raised and could not have been raised in the first appeal. In re Pers. Restraint of Gentry, 137 Wn.2d 378, 388-89, 972 P.2d 1250 (1999).

Here, defendant makes several challenges to the sentencing court's determinations on remand. See Appellant's Brief at 1-2. Defendant's assertions that his attempted robbery conviction should merge with his convictions for assault and that his possession of a firearm conviction should be considered same criminal conduct as his assault convictions were either raised in his previous appeal and already addressed by the Court of Appeals, or, could have been raised and argued in his first appeal and were not.

- a. Defendant's convictions for assault and attempted robbery, while considered the same course of conduct, should not merge.
 - i. **The trial court correctly refused to merge defendant's assault and robbery convictions because defendant had already argued and lost on this issue on his first appeal and was unable to distinguish his case from State v. Beals, on which the Court of Appeals decided this issue.**

This court has already ruled that defendant's second degree assault convictions do not merge with his attempted robbery conviction. See CP 61-62; Appendix A at 19-20. On a motion for reconsideration, the court held that the crimes did embrace the same criminal conduct. See CP 46; Appendix A at 4. However, the court did not reconsider its previous decision that "the crimes of robbery and assault, as charged, include separate elements" and that they were committed for different purposes. See CP 62, Appendix A at 20. The court based its decision on State v.

Beals, which held that a completed second degree assault is not necessary to prove attempt to commit first degree robbery where the attempted robbery was completed at the time the defendant formed the requisite intent and took the weapon in hand. 100 Wn. App. 189, 193-94, 997 P.2d 941, review denied, 141 Wn.2d 1006, 10 P.3d 1074 (2000); CP 61; Appendix A at 19.

Additionally, the opinion indicates that the court did consider the facts of this individual case in making its determination, which is in accordance with the Supreme Court's ruling in State v. Freeman, 153 Wn.2d 765, 780, 108 P.3d 753 (2005) (holding "that a case by case approach is required to determine whether first degree robbery and second degree assault are the same for double jeopardy purposes"). Specifically, the court found that the "crimes of robbery and assault, as charged, include separate elements," because the "jury found Kirkwood guilty of attempting to rob his victims by ransacking the house and brandishing a weapon. This is separate from his conviction of assault where he intentionally brandished a weapon to create an apprehension in his victims." CP 62; Appendix A at 20.

Because defendant fails to show that the Court of Appeals's prior determination that his convictions for attempted first degree robbery and assault in the second degree do not merge is clearly erroneous or that a new point of law applies, defendant is precluded from raising this issue again under the law of the case doctrine.

- ii. **The sentencing court properly decided that the Court of Appeals's decision precluded review of defendant's merger claim where, because Freeman was distinguishable from defendant's case, the Court of Appeals's analysis was not clearly erroneous and no new point of law applied.**

Defendant argued for merger at resentencing. CP 66, RP (11/4/05) 17-25. Specifically, defendant argued that the three assaults should merge into the attempted robbery. RP (11/4/05) 25. The court agreed to hear defendant's merger argument in light of Freeman. RP (11/4/05) 37.

Before sentencing defendant, the court stated:

This Court finds the case of State v. Freeman to be distinguishable from the facts of this case. The most notable distinction is that State v. Freeman addressed the issue of whether the crime of robbery in the first degree merges with the assault in the second degree. The crimes in this case are attempted robbery in the first degree and assault in the second degree, which are the exact same crimes addressed by the court in State v. Beals.

In Beals the court found that a completed second degree assault is not necessary to prove attempt to commit first degree robbery. In other words, the State did not have to prove assault in order to elevate the attempted robbery to first degree. All the State had to do was prove that the defendant, with the intent to commit robbery, used a gun to the point of taking a substantial step towards committing a robbery.

Proof of assault by the use of a gun to create apprehension in the victims will not always prove an attempted robbery because it may not include proof of an intent to rob.

Therefore, following the case of State v. Beals, which is still good law in this state, this Court denies the defendant's request and this Court finds that the crime of attempted robbery in the first degree does not merge with assault in the second degree.

RP (12/2/05) 4.

Clearly the court considered the facts of this individual case in making its determination, which was in accordance with the Supreme Court's ruling in State v. Freeman, 153 Wn.2d 765, 780, 108 P.3d 753 (2005) (holding "that a case by case approach is required to determine whether first degree robbery and second degree assault are the same for double jeopardy purposes."). The court also found that Beals was the applicable standard; therefore, the Court of Appeals's analysis was not clearly erroneous, nor was there a new point of law to be applied. RP (12/2/05) 4.

c. The trial court properly imposed firearm sentencing enhancements.

i. **Defendant is precluded from raising this issue.**

Defendant argues that the court erroneously imposed a firearm sentencing enhancement because the legislature has not created a statutory process requiring juries to decide if a defendant was armed with a firearm. Defendant cites no authority, nor does he make any argument as to why he

did not raise this issue at the time of the first appeal, and the court should refuse to consider the matter.

- ii. **If the court does find that defendant can raise this issue on his second appeal, the trial court properly imposed a firearm sentencing enhancement based on a special verdict finding by the jury that defendant was armed with a firearm during the commission of the crime.**

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. State v. Recuenco, 154 Wn.2d 156, 161, 110 P.3d 188 (2005), overruled on other grounds, Washington v. Recuenco, ___ U.S. ___, 126 S. Ct. 2546, ___ L. Ed. 2d ___ (2006), citing Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

If a defendant is armed with a firearm when committing a felony, a mandatory sentencing enhancement must be imposed consecutive to any other sentencing provision, including other firearm or deadly weapon enhancements. See RCW 9.94A.533(3). All deadly weapon enhancements under this section are mandatory. RCW 9.94A.533(4)(e). The deadly weapon enhancements in this section shall apply to all felonies except possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony. RCW

9.94A.533(4)(f). Because the excluded felonies are crimes where having the weapon is the offense, the Legislature has clearly expressed its intent that a person who commits a felony while armed with a firearm will receive an enhanced sentence.

The Washington Supreme Court has never questioned the constitutionality of submitting special verdicts regarding a defendant's possession of a firearm to a jury. See State v. Wingate, 155 Wn.2d 817, 122 P.3d 908 (2005)(the jury returned a special verdict on the three convictions, finding that the defendant was armed with a firearm); State v. Louis, 155 Wn.2d 563, 102 P.3d 936 (2005)(the jury returned a special verdict that defendant was armed with a firearm); State v. Willis, 153 Wn.2d 366, 103 P.3d 1213 (2005)(by special verdict, the jury found that the defendant was armed with a firearm at the time of the commission of his crimes).

Defendant relies on the Court's ruling in Recuenco and State v. Hughes, 154 Wn.2d 118, 110 P.3d 188 (2005), overruled on other grounds, Washington v. Recuenco, ___ U.S. ___, 126 S. Ct. 2546, ___ L. Ed. 2d ___ (2006), in arguing that the Legislature has enacted no procedure for imposing a firearm enhancement. Appellant's Brief at 20-22. Defendant's reliance on Recuenco and Hughes is erroneous. In Recuenco, the Court vacated the defendant's firearm sentencing enhancement because the jury, by special verdict, found he had been armed with a deadly weapon at the time he had committed a crime. 154

Wn.2d at 164. Firearm sentencing enhancements are greater than deadly weapon enhancements. Compare RCW 9.94A.533(3)(b), (4)(b), and RCW 9.94A.602. Because that jury had found that Recuenco was armed with a deadly weapon, and not specifically a firearm, the judge could not impose the higher firearm enhancement. Recuenco, 154 Wn.2d at 162. Further, the Court held that the State was limited to Recuenco's deadly weapon enhancement on remand, because there is no procedure by which a jury can find sentencing enhancements on remand. Id. at 164.

Similarly, in Hughes, the trial judge found aggravating factors to impose an exceptional sentence in violation of Blakely. 154 Wn.2d at 141. The Court held that there was no procedure for a jury to find aggravating factors on remand. Hughes, 154 Wn.2d. at 150. The Court's focus was on the appropriateness of a judicially created procedure on remand. See Id. at 151 ("the exceptional sentence provisions of the SRA do not provide a mechanism by which a jury could be empanelled on remand to find aggravating factors warranting an enhanced sentence."). Additionally, the court distinguished the situation in Hughes from "those where a statute merely is silent or ambiguous on an issue and the court takes the opportunity to imply a necessary procedure." Id. at 151.

Here, a jury found, by special verdict for each count, that defendant was armed with a firearm during the commission of his crimes. See CP 183-87. RCW 9.94A.533(3) requires that, "additional times shall be added to the standard sentence range for felony crimes committed after

July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010[.]” Unlike former RCW 9.94A.535 as examined under Hughes, here the statute is silent as to whether the judge or jury should make a finding; just that the defendant must be armed with a firearm. RCW 9.94A.533(3). To conform with Blakely, the courts have taken the opportunity to imply the necessary procedure of a special verdict to aid the jury in finding a factor which increases the penalty of a crime beyond the statutory range.

d. Defendant’s convictions for unlawful possession of a firearm is not the same course of conduct as his convictions for Assault.

i. **Defendant is precluded from raising this issue.**

In arguing that the unlawful possession of a firearm should be considered the same course of conduct with his assault charges, defendant raises an issue which might have been determined had it been presented at his first appeal. Because defendant did not raise these issues and does not now cite any authority that was unavailable at the time of his first appeal, defendant is precluded from raising this issue now.

ii. **If the court does find that defendant can raise this issue on his second appeal, defendant’s conviction for unlawful possession of a firearm is not the same course of conduct as his convictions for assault.**

RCW 9.94A.400(1)(a) defines “same criminal conduct” as two or

more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. If any one of these elements is missing, the offenses must be individually counted toward the offender score. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). If two simultaneous crimes have different mental states then the offenses count as separate crimes. See State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868 (1991) (“If the intents are different, the offenses will count as separate crimes.”). Because the second degree assault and second degree unlawful possession of a firearm have different objective intents and involve different victims, they are not the same criminal conduct.

The objective intent required for unlawful firearm possession is voluntary possession of a gun. RCW 9A.41.040(1)(a). In contrast, second degree assault based upon pointing a gun at another requires intent to create in the victims' minds a reasonable apprehension of harm. RCW 9A.40.030(1). In State v. Thompson, 55 Wn. App. 888, 894, 781 P.2d 501 (1989), the court held that assault by pointing a gun at another and unlawful possession of that firearm do not share the same criminal intent because the objective intent for possession of a firearm is different from the objective intent for assault.

Unlawful possession of a firearm and assault are not the same course of conduct because they involve different objective intents.

Additionally, the victim of unlawful possession of a firearm is the public at large. Haddock, 141 Wn.2d at 110-11. Defendant relies on dicta within the opinion, where the Court analyzed the dissent, to imply that when the firearm that is unlawfully possessed is used to assault specific victims, the victims for both crimes are the same. Id. at 111; see also Appellant's Brief at 23-24. However, the Court went on to discuss the appropriateness of holding the general public as the victim of unlawful possession of a firearm:

holding that the victim of all eight counts of unlawful possession of firearms is the general public is consistent with the definition of "victim" in the Sentencing Reform Act of 1981 (SRA): "any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged." RCW 9.94A.030(40). Any injury Haddock's former girl friend and her friends may have suffered was a direct result of Haddock's brandishing the guns, not his unlawful possession of them.

Id. at 111.

Here, as in Haddock, the assault victims were placed in fear of harm as a direct result of defendant holding them at gunpoint as defendant and his accomplice searched their house for drugs, not for defendant's unlawful possession of that gun. See CP 47-48; Appendix A at 5-6.

Because the crimes involved different criminal intents and different victims, defendant has failed to demonstrate that the unlawful possession of firearm count and the assault counts were the same criminal conduct.

D. CONCLUSION.

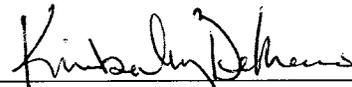
For the reasons stated above, the State respectfully requests that the court affirm defendant's convictions and sentence, and remand to correct defendant's offender score on the judgment and sentence.

DATED: July 25, 2006.

GERALD A. HORNE
Pierce County
Prosecuting Attorney



MICHELLE LUNA-GREEN
Deputy Prosecuting Attorney
WSB # 27088



Kimberley DeMarco
Rule 9 Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/25/06 
Date Signature

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DIVISION II
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STATE OF WASHINGTON
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APPENDIX "A"

Mandate filed 5/24/05



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A.M. MAY 24 2005 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

No. 28628-9-II

v.

MANDATE

DERRICK KIRKWOOD aka WARRICK
MARSHALL OWENS,
Appellant.

Pierce County Cause No.
01-1-01683-2

The State of Washington to: The Superior Court of the State of Washington
in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on December 9, 2003 became the decision terminating review of this court of the above entitled case on May 3, 2005, as amended October 12, 2004. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.



IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed the seal of said Court at
Tacoma, this 23rd day of May, 2005.

Clerk of the Court of Appeals,
State of Washington, Div. II

CP 43

Appendix A

1

CASE #: 28628-9-II, Mandate Pg 2
State of Washington, Respondent v. Derrick Kirkwood, Appellant

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

No. 28628-9-II

Respondent,

v.

DERRICK KIRKWOOD AKA WARRICK
MARSHALL OWENS,

ORDER
GRANTING MOTION FOR
RECONSIDERATION IN PART AND
DENYING IN PART AND
AMENDING OPINION

Appellant.

THE COURT, after reviewing the motion for reconsideration in the above-entitled case, hereby amends the opinion, filed on December 9, 2003, as follows:

The first paragraph should read:

Derrick Kirkwood appeals his judgment and sentence on one count of first degree burglary, one count of attempted first degree robbery, three counts of second degree assault, and one count of second degree unlawful possession of a firearm. He raises multiple assignments of error. We affirm the convictions, but we vacate the sentence and remand for resentencing.¹

¹ Kirkwood filed a motion for reconsideration raising several arguments. We grant the motion based on his "same criminal conduct" argument. Otherwise, we deny the motion.

The last paragraph under Sentencing, *Same Criminal Conduct*, slip opinion at 17, should read:

The jury did not convict Kirkwood of assaulting James Ultican (count III) but it did convict him of assaulting all of the other victims (counts IV, V, and VI). The jury also convicted Kirkwood of attempted robbery (count II).⁹ The general verdict form for count II, however, does not delineate the robbery victims.¹⁰ Instead, the form refers to the charging instrument, which lists Kirkwood's victims in the conjunctive and disjunctive as "James Ultican, Eloise Ultican, Carol Coolidge and/or Michael Hassenger, Jr." CP at 9. It is unknown, then, whether the jury convicted Kirkwood of attempted robbery on a single victim or on multiple victims. Accordingly, we assume that the assaults and attempted robbery involved the same victim.

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Motion

Because these crimes involved the same intent, same victim, and same time and place, the trial court erred in finding that the assault and attempted robbery did not comprise the same criminal conduct. Therefore, we vacate the sentence and remand for resentencing.

⁹ The to-convict instruction, instruction 15, reads in relevant part:

To convict the defendant, Derrick Kirkwood, of the crime of Attempted Robbery in the First Degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt: . . . (2) That the act was done with the intent to commit Robbery in the First Degree against JAMES ULTICAN, ELOISE ULTICAN, CAROL COOLIDGE, AND/OR MICHAEL HASSENGER, JR.

CP at 40. Like the charging document, the to-convict instruction is in the conjunctive and disjunctive.

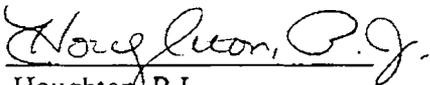
¹⁰ Verdict form B reads: "We, the jury, find the defendant guilty . . . of the crime of Attempted Robbery in the First Degree as charged in Count II." CP at 65.

The first full paragraph on page 19 that begins: "But the State further argues . . .", is hereby deleted.

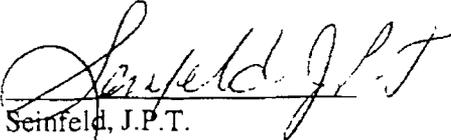
The last paragraph of the opinion should read:

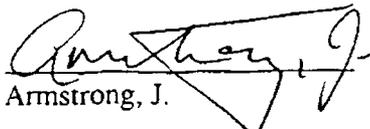
We affirm the convictions, but vacate the sentence and remand for resentencing in accordance with this opinion.

DATED this 12TH day of OCTOBER 2004.


Houghton, P.J.

We concur:


Seinfeld, J.P.T.


Armstrong, J.

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY 

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DERRICK KIRKWOOD AKA WARRICK
MARSHALL OWENS,

Appellant.

No. 28628-9-II

UNPUBLISHED OPINION

HOUGHTON, J. -- Derrick Kirkwood appeals his judgment and sentence on one count of first degree burglary, one count of attempted first degree robbery, three counts of second degree assault, and one count of second degree unlawful possession of a firearm. He raises multiple assignments of error. We affirm the conviction, but we remand to correct Kirkwood's offender score and judgment and sentence.

FACTS¹

On March 27, 2001, shortly after 3:00 A.M., two armed intruders kicked in the front door of the house where Eloise Ultican, her son James Ultican, his girlfriend Carol Coolidge, and Michael Hassenger, a 14-year-old friend of the Ultican family, slept. A man wearing a black ski mask entered the room where James and Carol slept. The man struck James on the head with his

¹ We set forth the facts elicited at the CrR 3.6 hearing and trial.

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gun, causing profuse bleeding and a depressed skull fracture. James later identified the assailant as a black male because, despite the mask, James could see the skin around the intruder's eyes.

The assailant ordered James and Carol into the living room where a second man wearing a gray ski mask stood by the front door. The man in the gray ski mask held Eloise and Michael at gunpoint.

Eloise described the individual wearing the gray mask as "light-skinned" or possibly white. 2 Report of Proceedings (RP) at 177. She also identified the person wearing the black mask as a black man. She stated that the man spoke with a distinctive accent and had a mole by one of his eyes.

The man in the black mask demanded money from the residents. Eloise responded that there was money in her purse. In response, the assailant demanded "the dope." 2 RP at 183. The man in the black mask then searched and ransacked the house. The other intruder held the residents at gunpoint, while they protested that the house contained no drugs.

A kitchen stove light illuminated the living room. Eloise held eye contact with the man in the black mask at least three times for approximately 15 to 30 seconds each time. She and the intruder stood about three feet apart from each other. The stove light lit the right side of the intruder's face. On further questioning about the mole near the intruder's eye, Eloise described the mark as near his left eye. At trial, she identified the mark near Kirkwood's left eye as the one she saw the night of the intrusion.²

The man in the black mask appeared to be in charge. He ordered the other intruder to leave the house and then followed him. A neighbor told Eloise that the intruders drove north on

² Kirkwood has a teardrop-shaped tattoo by his left eye.

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the Mountain Highway in a smaller, new car. Eloise then saw the car's taillights moving north on the Mountain Highway. Carol and Eloise relayed this information to the 911 operator at 3:17 A.M.

At 3:19 A.M., Pierce County Deputy Sheriff Jeff Reigle received a radio dispatch report about the armed robbery and assault at the Ultican residence. At that time, Reigle was driving his patrol car south on the Mountain Highway. He was about 20 to 30 blocks from the Ultican residence. Dispatch gave him the suspects' and vehicle's descriptions. He had patrolled the area for seven years, and he knew that the only road access to and from the Ultican residence at 232nd and the Mountain Highway was either northbound or southbound on the Mountain Highway.

Because he had the suspects' and the vehicle's descriptions and the vehicle's travel direction, Reigle continued southbound on the Mountain Highway and spotlighted each car heading north to see if any matched the description. First, Reigle saw a large Plymouth or Oldsmobile automobile. Approximately one minute after receiving the dispatch, Reigle saw two vehicles approaching him in the fast lane.

The second vehicle moved into the slow lane, passed the other vehicle on the right, and returned to the fast lane. When Reigle spotlighted the vehicle, he identified it as a compact teal-colored Ford Escort. He could not see inside the Escort because heavy tint obscured the windows. Reigle continued south to the crime scene. None of the five or six other vehicles he passed matched the description of the car that had left the Ultican residence.

Reigle radioed Sergeant Paul Schneider who was also driving south on the Mountain Highway toward the residence and asked him look at the Escort because Reigle could not discern the number of people in it. He also told Schneider that the vehicle was speeding. Schneider

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followed the Escort. Deputies Mike Yamada and Brian Bosser also heard the dispatch and followed Schneider.

Schneider tailed the Escort for approximately two miles and pulled alongside it, but he could not see into the windows to determine either the race or the number of occupants in it. He then told Yamada to make an investigatory stop.

Once the vehicle stopped, Kirkwood exited the car and turned to look at the detectives. Yamada instructed him to get back into the car, but Kirkwood fled. Apparently, no one else was in the car.

Deputy John Reding and his canine assistant, Ferro, arrived at the scene to track Kirkwood. Ferro first found a black revolver³ and then Kirkwood. Kirkwood fought the deputies and Ferro, but they subdued him.

Deputies Kevin Roberts and Anthony Messineo obtained more detailed descriptions of the intruders from the victims. Roberts also took the victims to where Kirkwood had abandoned the car. Roberts kept the car locked, but he allowed the victims to peer inside aided by his flashlight. The victims identified the gray ski mask on the front floorboard. The victims also identified the gun Ferro had recovered as the same revolver that the light-skinned intruder carried.

The deputies impounded the Escort. It was registered to Tekisha Greene. After obtaining a warrant, they searched the car and found a photograph of Kirkwood and Greene. The deputies recovered the gray ski mask from the car's front floorboard. They also found a Bucky's Muffler

³ The ground was wet from rain, but the gun was dry, indicating that it was recently discarded.

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Brakes Radiator Shop receipt made out to "Owens Warrick." RP at 520. And they found a prescription bottle labeled for Kirkwood's mother, Remona Kirkwood.

The State charged Kirkwood with one count of first degree burglary, one count of attempted first degree robbery, one count of first degree assault, three counts of second degree assault, and one count of second degree unlawful possession of a firearm.

Kirkwood moved under CrR 3.6 to suppress evidence obtained from the car, arguing that it was derived from an improper stop. After hearing Reigle, Schneider, and Yamada testify, the trial court determined that the totality of the circumstances justified an investigatory stop based on the officers' well-founded articulable suspicions. The trial court denied Kirkwood's motion to suppress.

At trial, the State called Joseph Waddington, Kirkwood's community corrections officer (CCO), who testified, over defense objection, about Kirkwood's various aliases. Waddington said that he knew Kirkwood as "Warrick Owens" and that he had been convicted under several aliases. 4 RP at 447.

Dr. Geoffrey Loftus, a defense expert witness on memory and mistaken identification, testified that observations made in poor lighting not only affect a person's ability to see clearly, but also his or her memory.

During deliberations, the jury requested instructional clarification. After discussion with the prosecutor and defense counsel, the trial court answered the jury's questions. It also offered the jury an opportunity to request a further clarification.

The jury convicted Kirkwood of first degree burglary (count I), first degree attempted robbery of James Ultican, Eloise Ultican, Carol Coolidge, and Michael Hassenger (count II), second degree assault on Eloise Ultican (count IV), second degree assault on Carol Coolidge

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(count V), second degree assault on Michael Hassenger (count VI), and second degree unlawful possession of a firearm (count VII). The jury also returned special verdicts finding that Kirkwood was armed with a deadly weapon on counts I-VI. The jury did not convict Kirkwood of count III, first degree assault on James Ultican.

Kirkwood moved posttrial to arrest the judgment or for a new trial based on jury misconduct. He submitted defense counsel's and an investigator's affidavits that the jurors improperly conducted a lighting experiment in the jury room. The trial court determined that the jury did not commit misconduct and denied the motion.

Kirkwood appeals his judgment and sentence.

ANALYSIS

Motion to Suppress⁴

Kirkwood first contends that the trial court erred in denying his motion to suppress evidence seized as a result of an improper investigatory stop. He asserts that the officers did not have a reasonable articulable suspicion to stop his car.

An investigatory stop, although less intrusive than an arrest, is nevertheless a seizure and therefore must be reasonable under the Fourth Amendment and article I, section 7 of the Washington Constitution. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). An officer may make an investigatory stop even though he lacks probable cause to believe that a suspect is involved in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 25-26, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *State v. Barber*, 118 Wn.2d 335, 342-43, 823 P.2d 1068 (1992); *State v. Glover*, 116 Wn.2d 509, 513, 806 P.2d 760 (1991).

⁴ We set forth the facts presented at the CrR 3.6 hearing.

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In the absence of probable cause to arrest, an investigatory stop is valid if a law enforcement officer has a well-founded suspicion based on objective facts that a suspect is connected to actual or potential criminal activity. *Terry*, 392 U.S. at 25-26; *Glover*, 116 Wn.2d at 513. A well-founded articulable suspicion exists when the officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21; *Glover*, 116 Wn.2d at 514. We consider the totality of the circumstances facing the investigating officer when we evaluate the reasonableness of an investigatory stop. *Glover*, 116 Wn.2d at 514.

Here, the findings support that the officers had a well-founded suspicion that the Escort might have been involved in the robbery. Dispatch told Reigle that the robbery suspects were heading north on the Mountain Highway in a smaller, new car. As he headed south on the Mountain Highway approximately one minute after receiving the report, Reigle saw the Escort that matched dispatch's description, speeding northbound past him.

And based on his experience, Reigle knew that the Mountain Highway was the only egress from the crime scene. This factor, plus others such as the time of night, the car size, the dispatch and Reigle's timing, the Escort's speed, the officers' familiarity with the area, and the limited number of vehicles on the road, supports the trial court's findings of fact and conclusions of law that the officers' articulable suspicions justified an investigatory stop of the Escort. The trial court did not err in denying Kirkwood's motion to suppress.

Evidence Rulings

Kirkwood next contends that the trial court abused its discretion in admitting certain evidence at trial. First, he asserts that the trial court should have accepted his stipulation to the Escort's ownership. Second, he asserts that the trial court improperly admitted alias testimony

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and documentary evidence (the Bucky receipt). Finally, he argues that these rulings prejudiced him.⁵

We review a trial court's evidentiary rulings for abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). A trial court abuses its discretion when it exercises it in an unreasonable manner or on untenable grounds or for untenable reasons. *Stenson*, 132 Wn.2d at 701.

An error in admitting evidence absent prejudice does not warrant reversal. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Prejudice does not exist ““unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.”” *Bourgeois*, 133 Wn.2d at 403 (quoting *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).

In pretrial proceedings, the prosecutor and Kirkwood's counsel discussed admitting the Bucky receipt. Defense counsel said that “if [the State] want[s] us to stipulate that the car belongs to Tekisha Greene, we would do that.” 1 RP at 59. To which the prosecutor replied, “No, we're not going to -- He is not entitled to stipulate to it. And we're going to prove our case.” 1 RP at 59. The trial court said that it would allow further discussion later.

Later, when the parties returned to the issue, Kirkwood argued that the Bucky receipt was not relevant. The prosecutor stated that Waddington would testify that Kirkwood used both names, the one on the receipt and the one used by him during trial, thus linking him to the getaway car. The court ruled: “I think [exhibit] 31 [the Bucky receipt] is clearly relevant if

⁵ The State argues that Kirkwood failed to preserve these issues for appeal. We address them in the interests of justice. RAP 1.2(a).

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there's evidence that he has or goes by a different name. So it would be admissible provided there is a proper foundation laid." 1 RP at 73.

The trial court did not abuse its discretion in not accepting Kirkwood's stipulation because he did not explicitly make such an offer. And the trial court properly admitted the receipt as relevant to Kirkwood's identity after Deputy James Loeffelholz, who executed the vehicle warrant, laid a foundation.

Nevertheless, Kirkwood asserts that the trial court should not have allowed Waddington to testify about aliases, in part because it also introduced Kirkwood's other convictions and prejudiced him. Proof of aliases is not per se inadmissible. *State v. Allen*, 57 Wn. App. 134, 143, 787 P.2d 566, 788 P.2d 1084 (1990) (quoting *State v. Cartwright*, 76 Wn.2d 259, 264, 456 P.2d 340 (1969)). "The test as to whether an alias may be proved or referred to by the state is whether the alias or other name is relevant and material to prove or disprove any of the issues in the case." *Cartwright*, 76 Wn.2d at 264. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

At trial, the State asked Waddington if he knew Kirkwood by different names. When asked about Kirkwood's true name, Waddington replied, "I believe it to be Warrick Owens." 4 RP at 447. Then, without being asked, Waddington volunteered: "Our records indicate he has been convicted under several different aliases." 4 RP at 447. Kirkwood's counsel asked to take the matter up outside the jury's presence.

Kirkwood argued that Waddington's statement regarding convictions under different aliases was inappropriate and prejudicial. After the State presented an offer of proof, the trial court determined that Waddington's second comment was non-responsive and it admitted the

No. 28628-9-II

alias testimony as relevant to Kirkwood's identity. The court asked Kirkwood's counsel whether he wanted the court to instruct the jury to disregard Waddington's non-responsive answer. Kirkwood's counsel declined, apparently because he thought that it would only emphasize the issue further.⁶

Admitting the alias testimony and the Bucky receipt were well within the trial court's discretion. Moreover, Kirkwood does not demonstrate prejudice on this record. Kirkwood's argument fails.

Jury's Questions

Kirkwood further contends that the trial court improperly responded to the jury's question about convicting an accomplice.

It is within the trial court's discretion to decide whether to give further instructions to a jury after it has begun deliberations. *State v. Ng*, 110 Wn.2d 32, 42, 750 P.2d 632 (1988). The court has no duty to answer the jury's question. *State v. Langdon*, 42 Wn. App. 715, 718, 713 P.2d 120, *review denied*, 105 Wn.2d 1013 (1986).

During deliberations, the jury asked: "Can the Instruction #12 be applied to Assault in the 1st Degree? Can an 'accomplice' be found guilty of this crime if the evidence indicated it?" Clerk's Papers (CP) at 18.

Instruction 12 stated:

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

⁶ We do not base our resolution on defense counsel not asking for a limiting instruction as it is a legitimate trial tactic not to call attention to potentially damaging testimony by repeating it. *State v. Donald*, 68 Wn. App. 543, 551, 844 P.2d 447 (1993).

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(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

CP at 37.

After consulting the parties, the court answered no to the first question ("Can the Instruction #12 be applied to Assault in the 1st Degree?"). CP at 19. It further noted that "[i]f a question remains, please clarify your second question. Use Revised Special Verdict Form C, Count III, Assault in the First Degree." CP at 19. The Revised Special Verdict Form C stated, "Was the defendant, DERRICK KIRKWOOD aka WARRICK MARSHALL OWENS, armed with a firearm at the time of the commission of the crime of Assault in the First Degree in Count III?" CP at 69. The jury did not ask any other questions and found Kirkwood not guilty of first degree assault. CP at 67.

Kirkwood now asserts that his first degree assault acquittal indicates that the jury did not believe that he was the man in the black mask who hit Ultican with a gun, who spoke with a distinct accent, demanded drugs and money, and ransacked the house. And, he argues, when the other verdicts are considered along with the jury's questions, it appears that the jury convicted him of an unidentified and uncharged accomplice's acts.

We find no abuse of discretion here. After answering the jury's first question, the trial court clearly advised the jury that it could request further clarification, if necessary. The jury did not request any further clarification.

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Juror Misconduct

Kirkwood next contends that he received an unfair trial because a jury experiment introduced new evidence. He also argues that the jurors tested a theory that the State did not offer that resulted in a guilty verdict on an uncharged crime. He raised this argument in his motion for arrest of judgment and new trial.

The trial court has wide discretion in ruling on motions for a new trial, and we do not disturb the ruling on appeal unless the trial court abused its discretion. *State v. Williams*, 96 Wn.2d 215, 221, 634 P.2d 868 (1981). Even if the trial court commits an error, the appellant must demonstrate that the error was prejudicial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Thus, error is not reversible unless it materially affects the trial's outcome. *State v. Linden*, 89 Wn. App. 184, 189-90, 947 P.2d 1284 (1997), *review denied*, 136 Wn.2d 1018 (1998).

As a general rule, we are reluctant to inquire into how a jury arrives at its verdict. *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). An appellant must affirmatively show misconduct to overcome the policy favoring stable and certain verdicts and the secret, frank, and free discussion of the evidence by the jury. *Balisok*, 123 Wn.2d 117-18 (citing *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 271-72, 796 P.2d 737 (1990), *review denied*, 116 Wn.2d 1014 (1991)).

The consideration of novel or extrinsic evidence by a jury is misconduct and can be grounds for a new trial. *Balisok*, 123 Wn.2d at 118. But “[w]here the jurors attempt to re-enact the crime during their deliberations in accordance with their own recollection of the testimony, their conduct constitutes nothing more than an application of everyday perceptions and common sense to the issues presented in the trial.” *Balisok*, 123 Wn.2d at 118; *see also State v. Everson*,

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166 Wash. 534, 536-37, 7 P.2d 603 (1932). In other words, we expect jurors to use their common sense and deductive reasoning to determine the truth from the evidence. *Balisok*, 123 Wn.2d at 119.

Here, Kirkwood submitted affidavits from his counsel and a Department of Assigned Counsel investigator to support his motion for new trial. The affidavits contained statements relayed to them by jurors regarding their conduct during deliberations.

Through these affidavits, Kirkwood explains that the jury turned off the jury room lights except for a fluorescent light over the sink and tried to recreate the limited lighting at the Ultican residence. One juror then put on the ski mask, which was admitted into evidence, and the others attempted to see a person's skin, eyes and other marks in the dimly lit room.

The court treated the affidavits as an offer of proof to determine whether the jury misconduct allegations necessitated a new trial. The trial court found that the jurors did not introduce extraneous evidence. We agree.

The jury scrutinized the evidence related to it by witnesses and it is allowed some latitude during deliberations to analyze evidence using their common sense. Here, the jurors' actions constituted a critical examination of the evidence presented. Eloise Ultican testified that the intruder by the door was light-skinned and the other who ransacked the house was black with a mole-like mark near his eye. She also stated that all other lights in the house were off, except for the kitchen stove light.

Also, Dr. Loftus, Kirkwood's witness, testified that poor lighting affects one's ability to perceive relevant visual aspects of the scene and might also affect one's memory. The jurors examined Eloise Utlican's and Dr. Loftus's testimony when they turned off the jury room lights. Although the jury room lighting might have differed from the actual crime scene, the jury is

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presumed to apply everyday perceptions and common sense in deliberating such evidence. *See State v. Brown*, 139 Wn.2d 20, 983 P.2d 608 (1999) (Although the jury used a different coat than the defendant's to determine whether she could pull out a knife from her coat, the court held that such a reenactment was a critical examination of the evidence and the difference in coat sizes was not material because the jury is presumed to use their common sense and reasoning power to compensate for the variable.). The trial court did not err in denying Kirkwood's motion.

Uncharged Crimes and Unanimity

Kirkwood further contends that the jury denied him the right to (1) know the crimes charged against him, (2) present evidence in his own defense, (3) confront the evidence against him, and (4) a unanimous verdict. Appellant's Br. at 47-53. In making this argument, Kirkwood seems to claim that because the jury acquitted him of assaulting James Ultican, it believed that Kirkwood was the white intruder who stood by the door brandishing a gun and not the man in the black mask who ransacked the house.

Kirkwood's argument lacks merit. He asserts that the State should have presented an accomplice liability instruction on his assault charges. We disagree.

The State charged Kirkwood as the principal who assaulted James Ultican, not as an accomplice.⁷ And the State did not pursue accomplice liability as a theory in its case on this count. Accordingly, Kirkwood's argument fails. *State v. Brown*, 45 Wn. App. 571, 576, 726 P.2d 60 (1986) (one cannot be tried for an uncharged offense).

⁷ The State charged Kirkwood as "either" the principal or accomplice in Carol Coolidge's, Eloise Ultican's, and Michael Hassenger's assaults. But the State charged Kirkwood only as a principal in James Ultican's assault, the only charge at issue in this analysis.

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Double Jeopardy

Kirkwood also contends that assault is the unlawful force necessary to support the robbery conviction and to convict him both of assault and robbery violates the constitutional prohibition against double jeopardy. U.S. CONST. amend. V; WASH. CONST. art. I, § 9.

Under the “same evidence” test, a defendant’s double jeopardy rights are violated if he or she is convicted of offenses that are identical in fact and law. *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). But, “if each offense, as charged, includes elements not included in the other, the offenses are different and multiple convictions can stand.” *Calle*, 125 Wn.2d at 777; *see also State v. Vladovic*, 99 Wn.2d 413, 423, 662 P.2d 853 (1983).

Here, Kirkwood’s claim fails because proof that he committed first degree attempted robbery does not necessarily prove that he committed second degree assault.

First degree attempted robbery requires that a person take a substantial step toward committing robbery while armed with a deadly weapon. RCW 9A.28.020 and former RCW 9A.56.200(1)(a) (2000). A person commits second degree assault when he assaults another with a deadly weapon. RCW 9A.36.021. Assault is in this case is “committed merely by putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm.” *State v. Byrd*, 125 Wn.2d 707, 712, 887 P.2d 396 (1995) (citing *State v. Fazier*, 81 Wn.2d 628, 631, 503 P.2d 1073 (1972)).

In *State v. Beals*, 100 Wn. App. 189, 193, 997 P.2d 941, *review denied*, 141 Wn.2d 1006 (2000), the court discussed whether the defendant’s second degree assault conviction merged with the attempted robbery conviction where he assaulted the victim in order to effectuate the robbery. In the merger context, the court held that the “completed second degree assault is not necessary to prove *attempt* to commit first degree robbery.” *Beals*, 100 Wn. App. at 193-94.

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The court decided that the attempted robbery was completed when the defendant formed the requisite intent and took the weapon in hand. The court distinguished that act from the defendant's act of hitting the victim on the head to complete the second degree assault. *Beals*, 100 Wn. App. at 194. Here, the jury found Kirkwood guilty of attempting to rob his victims by ransacking the house and brandishing a weapon. This is separate from his conviction of assault where he intentionally brandished a weapon to create an apprehension in his victims. The crimes of robbery and assault, as charged, include separate elements and Kirkwood's argument fails.

Sentencing

Same Criminal Conduct

Kirkwood further contends that his assault should be considered the same criminal conduct as the attempted robbery. Thus, he asserts, the trial court improperly calculated his offender score.

Under the same criminal conduct test, a sentencing court counts two or more current offenses as one crime only if they (1) have the same objective criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. Former RCW 9.94A.400(1)(a) (2000); *State v. Palmer*, 95 Wn. App. 187, 190, 975 P.2d 1038 (1999). We construe same criminal conduct narrowly. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). "If any one element is missing, multiple offenses cannot be said to encompass the same criminal conduct, and they must be counted separately in calculating the offender score." *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). We defer to the trial court's determination of what constitutes same criminal conduct when assessing the appropriate offender score, and we will not reverse the court's decision absent a clear abuse of discretion or misapplication of the law. *State v. Collicott*, 112 Wn.2d 399, 404-05, 771 P.2d 1137 (1989).

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We have adopted the objective intent test to determine whether accompanying crimes encompass the same criminal conduct. *State v. Davison*, 56 Wn. App. 554, 558, 784 P.2d 1268, review denied, 114 Wn.2d 1017 (1990). A trial court must focus on the extent to which the defendant's criminal intent, as objectively viewed, changed from one crime to the next. And the court must also examine whether one crime furthered the other and whether the time and place of each crime remained the same. *Davison*, 56 Wn. App. at 558.

Here, the trial court determined that the crimes were not the same criminal conduct as they did not have the same victims or require the same intent. It is undisputed that the attempted robbery and assault happened at the same time and place. But objectively viewing the intent for both crimes, we can determine that the assaults furthered the attempted robbery. Thus, the issue here is whether the attempted robbery victim is the same as the assault victims.

The jury did not convict Kirkwood of assaulting James Ultican but it did convict him of assaulting all of the other victims. The jury also convicted Kirkwood of attempted robbery, with the intended victims being "James Ultican, Eloise Ultican, Carol Coolidge and/or Michael Hassenger, Jr." CP at 9. Although the trial court did not ask the jury to specify the intended victim or victims of the robbery, the assault and attempted robbery here involved multiple victims and, thus, should be counted separately in calculating the offender score. *Davison*, 56 Wn. App. at 558. Hence, the trial court did not err in finding that the assault and the attempted robbery did not comprise the same criminal conduct.

Community Placement

Kirkwood further contends that the court erred in adding one point to his offender score because he was on community placement when he committed the crimes. He asserts that the State did not provide sufficient proof to show that he was on community placement.

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Community placement means

that period during which the offender is subject to the conditions of community custody and/or postrelease supervision, which begins either upon completion of the term of confinement (postrelease supervision) or at such time as the offender is transferred to community custody in lieu of earned release. Community placement may consist of entirely community custody, entirely postrelease supervision, or a combination of the two.

RCW 9.94A.030(7) (formerly (8) (2000)).

Under the Sentencing Reform Act of 1981, the court adds one point to the offender score if “the present conviction is for an offense committed while the offender was under community placement.” RCW 9.94A.525(17) (formerly RCW 9.94A.360(17) (2000). And, “any term of community custody, community placement, or community supervision shall be tolled by any period of time during which the offender has absented himself or herself from supervision without prior approval” RCW 9.94A.625(2).

The State presented the court with an exhibit showing that on March 15, 1999, Kirkwood was sentenced to 14 months’ incarceration followed by 12 months of community placement. The State also presented an exhibit showing that while under community placement, Kirkwood failed to report to his CCO and failed to report a change of address.

These exhibits support the trial court’s determination that Kirkwood was on community placement on March 27, 2001. The trial court properly added one point to Kirkwood’s offender score.

Juvenile Conviction

Kirkwood finally contends that his juvenile conviction should not have been counted in calculating the offender score and he should be resentenced accordingly. The State correctly

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concedes that Kirkwood's juvenile conviction does not count in his offender score under *State v. Dean*, 113 Wn. App. 691, 54 P.3d 243 (2002), review denied, 149 Wn.2d 1009 (2003).⁸

But the State further argues that the error in calculating the offender score does not require us to vacate the sentence and remand for resentencing, rather than remand to correct the offender score and the judgment and sentence. We agree. Here, Kirkwood's offender score, including his juvenile convictions, is 16. Without the juvenile convictions, it is 14. In either case, Kirkwood's offender score exceeds the statutory maximum of 9. Thus, we remand to correct Kirkwood's offender score and his judgment and sentence.

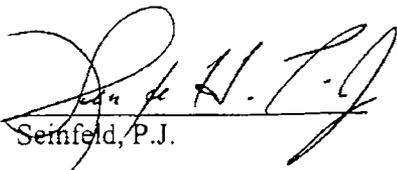
We confirm the convictions, but remand to correct the offender score and judgment and sentence without counting Kirkwood's juvenile conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

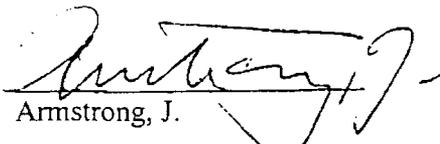


Houghton, G.

We concur:



Seinfeld, P.J.



Armstrong, J.

⁸ When the trial court imposed the sentence, the *Dean* opinion had not yet been filed.