

NO. 36249-0-II

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

HOZIE LEE HOLLEY,

Appellant.

---

---

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

The Honorable Ronald E. Culpepper, Judge

---

---

BRIEF OF APPELLANT

---

---

LISE ELLNER  
Attorney for Appellant

LAW OFFICES OF LISE ELLNER  
Post Office Box 2711  
Vashon, WA 98070  
(206) 930-1090  
WSB #20955

**TABLE OF CONTENTS**

	<b>Page</b>
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
Issues Presented on Appeal .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. PROCEDURAL FACTS .....	2
2. SUBSTANTIVE FACTS.....	3
C. <u>ARGUMENT</u> .....	5
1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THE ELEMENTS OF INTENT TO KILL AND PREMEDITATION IN THE CHARGE OF ATTEMPTED MURDER IN THE FIRST DEGREE.....	5.
2. FOR PURPOSES OF CALCULATING APPELLANT’S OFFENDER SCORE HIS KIDNAPPING AND ATTEMPTED MURDER CONVICTIONS ENCOMPASS THE SAME CRIMINAL CONDUCT.....	16
3. APPELLANT SHOULD NOT HAVE BEEN PUNISHED SEPERATELY FOR HIS FIRST DEGREE KIDNAPPING AND ATTEMPTED MURDER IN THE FIRST DEGREE CONVICTIONS.....	20
D. <u>CONCLUSION</u> .....	33

## TABLE OF AUTHORITIES

Page

### WASHINGTON CASES

<u>In re the Personal Restraint of Burchfield,</u> 111 Wn. App. 892, 46 P.3d 840 (2002).....	21
<u>State v. Bingham,</u> 105 Wn.2d 820, 719 P.2d 109 (1986).....	14,15
<u>State v. Borrero,</u> 147 Wn.2d 353, 58 P.2d 245 (2007).....	29, 32
<u>State v. Borrero,</u> 161 Wn.2d 532, 167 P.3d 1106 (2007).....	22, 26
<u>State v. Brooks,</u> 97 Wn.2d 873, 651 P.2d 217 (1982).....	8
<u>State v. Caliguri,</u> 99 Wn.2d 501, 664 P.2d 466 (1983).....	10
<u>State v. Calle,</u> 125 Wn.2d 769, 888 P.2d 155 (1995).....	21
<u>State v. Corrado,</u> 81 Wn. App. 640, 915 P.2d 1121 (1996), <u>review denied,</u> 138 Wn.2d 1011 (1999).....	16
<u>State v. Dunbar,</u> 117 Wn.2d 587, 817 P.2d 1360 (1991).....	9

TABLE OF AUTHORITIES

Page

WASHINGTON CASES, Continued

State v. Edwards,  
45 Wn. App. 378, 725 P.2d 442 (1986)  
overruled on other grounds by  
Dunaway, 109 Wn.2d 207, 713 P.2d 1237 (1987).....18, 19

State v. Gallo,  
20 Wn. App. 717, 582 P.2d 558,  
review denied, 91 Wn.2d 1008 (1978).....11, 12

State v. Gentry,  
125 Wn.2d 570, 888 P.2d 1105,  
cert. denied, 116 S.Ct. 131 (1995).....8, 13, 15

State v. Green,  
94 Wn.2d 216, 616 P.2d 628 (1980).....7

State v. Haddock,  
141 Wn.2d 103, 3 P.3d 733 (2000).....16, 17, 20

State v. Hoffman,  
116 Wn.2d 51, 804 P.2d 577 (1991).....11-14

State v. Hutton,  
7 Wn. App. 726, 502 P.2d 1037 (1972).....12

State v. Loucher,  
22 Wn.2d 497, 156 P.2d 672 (1945).....9

State v. Luoma,  
88 Wn.2d 28, 558 P.2d 756 (1977).....15

State v. Neslund,  
50 Wn. App. 531, 749 P.2d 725,  
review denied, 110 Wn.2d 1025 (1988).....13

**TABLE OF AUTHORITIES**

**Page**

WASHINGTON CASES, Continued

State v. Odom,  
83 Wn.2d 541, 520 P.2d 152,  
cert. denied, 419 U.S. 1013,  
42 L. Ed. 2d 287, 95 S. Ct. 333 (1974).....11, 12

State v. Ollens,  
107 Wn.2d 848, 733 P.2d 984 (1987).....8, 13,14,15

State v. Ortiz,  
119 Wn.2d 294, 831 P.2d 1060 (1992).....13,15

State v. Pirtle,  
127 Wn.2d 628, 904 P.2d 245 (1995).....15

State v. Porter,  
133 Wn.2d 177, 942 P.2d 974 (1997).....18

State v. Rehak,  
67 Wn. App. 157, 834 P.2d 651 (1992),  
review denied, 120 Wn.2d 1022 (1993).....14

State v. Roberts,  
142 Wn.2d 471, 14 P.3d 713 (2000), amended (Feb. 2, 2001).....31

State v. Robtoy,  
98 Wn.2d 30, 653 P.2d 284 (1982).....8

State v. Saunders,  
120 Wn. App. 800, 86 P.3d 232 (2004).....18, 19

Seattle v. Slack,  
113 Wn.2d 850, 784 P.2d 494 (1989).....7

## TABLE OF AUTHORITIES

Page

### WASHINGTON CASES, Continued

<u>State v. Smith,</u> 115 Wn.2d 775, 801 P.2d 975 (1990).....	8
<u>State v. Taylor,</u> 90 Wn. App. 312, 950 P.2d 526 (1998).....	18, 19
<u>State v. Vike,</u> 125 Wn.2d 407, 885 P.2d 824 (1994).....	17
<u>State v. Williams,</u> 135 Wn.2d 365, 957 P.2d 816 (1998).....	17-20
<u>State v. Woo Won Choi,</u> 55 Wn. App. 895, 781 P.2d 505 (1989), review denied, 114 Wn.2d 1002 (1990).....	9, 10

### FEDERAL CASES

<u>Austin v. United States,</u> 382 F.2d 129 (D.C. Cir. 1967).....	14, 15
<u>Blockburger v. United States,</u> 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed.2d 305 (1932).....	21, 22, 25
<u>Burks v. United States,</u> 437 U.S. 1, 57 L. Ed. 2d 1, 98 S. Ct. 2141 (1978).....	16
<u>Harris v. Oklahoma,</u> 433 U.S. 682, 97 S. Ct. 2912, 53 L.Ed.2d 1054 (1977).....	21, 23, 25
<u>In re Nielsen,</u> 131 U.S. 176, 9 S.Ct. 672, 33 L.Ed. 118 (1889).....	22

## TABLE OF AUTHORITIES

	<b>Page</b>
<u>FEDERAL CASES, Continued</u>	
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	7
<u>Jackson v. Virginia</u> , 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979).....	7
<u>Rutledge v. United States</u> , 517 U.S. 292., 116 S.Ct. 1241, 134 L.Ed. 419 (1996).....	24, 26
<u>Pirtle v. Morgan</u> , 313 F.3d 1160 (2002).....	15
<u>United States v. Dixon</u> , 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993).....	24,25,26
<u>Whalen v. United States</u> , 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980)).....	21.24.26.27
<u>STATUTES, RULES AND OTHERS</u>	
U.S. Const. amend. 5.....	16
U.S. Const. amend. 14.....	7
21 U.S.C. §§ 846, 848.....	24
RCW 9.94A.589.....	16
RCW 9A.08.010(1)(a).....	10
RCW 9A.28.020(1).....	8, 29
RCW 9A.32.020.....	13
RCW 9A.32.030(1)(a).....	8, 29

**TABLE OF AUTHORITIES**

**Page**

STATUTES, RULES AND OTHERS, Continued

RCW 9A.36.011.....	10
RCW 9A.36.021(a),(c).....	28
RCW 9A.40.010.....	27
RCW 9A.40.020.....	27
RCW 9A.46.020.....	27, 28

A. ASSIGNMENTS OF ERROR

1. The state failed to prove that Mr. Holley had a premeditated intent to kill Ms. Randolph.
2. The state failed to prove that Mr. Holley intended to kill Ms. Randolph
3. Appellant's kidnapping conviction should have merged with his attempted murder conviction because they contain the same criminal conduct.
4. Appellant's offender score was improperly calculated using the kidnapping conviction which should not have been counted separately from the attempted murder charge.
5. Mr. Holley's convictions for attempted first degree murder and kidnapping in the first degree violate double jeopardy.

Issues Presented on Appeal

1. Did the state fail to prove that Mr. Holley intended to kill Ms. Randolph?
2. Did the state fail to prove that Mr. Holley premeditated an intent to kill Ms. Randolph?
3. Did Mr. Holley's convictions for attempted murder in the first degree and kidnapping in the first degree violate double jeopardy?

4. Was Mr. Holley's offender score improperly calculated using the kidnapping conviction which should not have been counted separately from the attempted murder charge?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Hozie Lee Holley was charged with attempted premeditated murder in the first degree and kidnapping in the first degree with intent to harass or assault Lori Randolph. CP 1-4.1 Mr. Holley was tried by a jury, the honorable Judge Ronald Culpepper presiding. CP 25-37. Mr. Holley was convicted of attempted murder in the first degree and first degree kidnapping, but the jury found that he was not armed with a deadly weapon. RP 5-11. Judge Culpepper ruled that the attempted murder and kidnapping charges did not constitute the same criminal conduct and imposed consecutive sentences for the kidnapping and the attempted murder charges for a total of 291 months of confinement. CP 25-37; RP 19-26.2 This timely appeal follows. CP 38.

2. SUBSTANTIVE FACTS

Lori Randolph went to an S & M sex club called the "Wet Spot" on

---

1 CP refers to the clerk's papers designated from Pierce County Superior Court Cause number 06-1-00050-3.

2 RP refers to the Verbatim Report of Proceedings from Pierce County Superior Court Cause number 06-1-00050-3.

her birthday with her friend Brenda McDaniel. RP 93, 210-11. Ms. McDaniel engaged in “needle play” with Ms. Randolph which consisted of piercing Ms. Randolph’s chest with seven needles. RP 94, 96, 214. Mr. Holley had wanted to celebrate Ms. Randolph’s birthday but did not approve of the S & M club scene. RP 162, 193. He was furious about the bruises on Ms. Randolph’s chest from the S & M sex club. RP 106.

The day following Ms. Randolph’s return from the S & M club, a Sunday, she went downstairs to work as the assistant manager in the apartment building where she lived. RP 98-100. When she returned for lunch Mr. Holley was not in a good mood. RP 99 When Ms. Randolph returned home from work at 2:00PM she tried to use her computer but it would not function. She yelled at Mr. Holley, “stay the fuck away from my computer”. RP 101.

Mr. Holley attacked her and beat her severely over the course of six hours. RP 101. Mr. Holley strangled her, tied her up with computer wire, threatened to kill her by putting her in a bathtub with a hair dryer, and by pushing her out of the 14<sup>th</sup> floor window. RP 102, 104, 115, 124, 129, 131. Mr. Holley also hit Ms. Randolph with a vacuum cleaner. RP 118. Mr. Holley used a knife to examine Ms. Holley’s genitalia to determine if she had sex with someone else the night before and he threatened to cut off her breast.

RP 106, 117.

After Mr. Holley threatened to kill Ms. Randolph by placing her in the bathtub with a hair dryer, she told him that she was afraid that she would slip and fall in the tub because she was still bound with wire and she said that ready to die. RP 132. After Ms. Randolph said she was ready to die, Mr. Holley walked her back into the bedroom and asked her how he could leave without killing her. RP 132-33. They agreed that Mr. Holley would leave and Ms. Randolph would wait 20 minutes before calling the police. Id.

Ms. Randolph testified that she and Mr. Holley were no longer boyfriend and girlfriend but had been together for 9 years. RP 83-84, 87. Mr. Holley went to stay with Ms. Randolph in September 2005 after complaining that his commute from his sister's to work in Tacoma was too long. RP 85 Although Ms. Randolph did not believe that she and Mr. Holley were back in a relationship, and she denied being intimate with him, both Mr. Holley and Ms. Randolph acted like they were in a relationship. RP 92, 87.

After Mr. Holley left the apartment, Ms. Randolph threw her drug paraphernalia, the tape and wire into a garbage bag and sent it down the incinerator. RP 138-38. She then went to the apartment of her friend Brenda who called the police. RP 139-40. Brenda was shocked at Ms. Randolph's appearance and said that she was "unrecognizable". RP 219. Ms. Randolph

went to the hospital and was treated by the Dr. Eggebroten at Tacoma General Hospital. RP 338, 341. Ms. Randolph was alert and stable. RP 343. After evaluating Ms. Randolph and reviewing the results of a number of diagnostic tests to determine the extent of her injuries, Dr. Eggebroten and Dr. Howard another attending physician determined that none of her injuries were life threatening and there were no internal injuries, but Ms. Randolph had significant facial swelling and bruising. RP 296-98, 301, 343-345.

Ms. Randolph denied using cocaine and marijuana the date of the incident, but when Ms. Randolph was treated at the hospital, she tested positive for both cocaine and marijuana. RP 346.

#### C. ARGUMENT

1. THE STATE FAILS TO PROVE BEYOND A REASONABLE DOUBT THE ELEMENTS OF INTENT TO KILL AND PREMEDITATION IN THE CHARGE OF ATTEMPTED MURDER IN THE FIRST DEGREE.

##### Summary of Facts

Hozie Lee Holley committed a terrible crime and deserves to be punished appropriately. Mr. Holley threatened to kill Lori Randolph and beat her badly during a 6 hour period in December 2005. RP 101. Ms. Randolph suffered terrible facial swelling and bruising and looked unrecognizable after

the beating. RP 219. None of Ms. Randolph's injuries were life threatening. RP 296-98, 301, 343-345. Ms. Randolph complained that her voice seemed to have changed to a slightly deeper tone following the beating. This seems to be the single physical remnant of her beating. RP 277.

Mr. Holley is guilty of assault in the first degree not attempted murder in the first degree. The state did not prove beyond a reasonable doubt that Mr. Holley premeditated an intent to kill Ms. Randolph. The trial court erred by sentencing him to a crime that the state failed to prove beyond a reasonable doubt.

If Mr. Holley intended to kill Ms. Randolph, he would have done so; instead, he chose not to. Instead, according to the testimony of Ms. Randolph, although she was terrified that Mr. Holley would kill her, when she finally told Mr. Holley that she had had enough of the beating and was ready to die, Mr. Holley immediately stopped beating her and began to take care of her and attempted to kill himself. When unsuccessful he and Ms. Randolph discussed how he could leave without having to kill Ms. Randolph. RP 132-33. Ultimately, Ms. Randolph and Mr. Holley agreed that Mr. Holley would leave the apartment and Ms. Holley would wait 20 minutes before calling the police. Id.

a. Criminal Convictions Must Be Supported By Sufficient Evidence.

In order to convict a defendant of a charged crime, the State bears the burden of producing evidence sufficient to prove every element of the offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Baeza, 100 Wn.2d 487, 490, 670 P.2d 646 (1983). A conviction unsupported by sufficient evidence violates a defendant's constitutional right to due process. U.S. Const. amend. 14;<sup>3</sup> Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989).

In considering a claim of insufficiency of the evidence, an appellate court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. at 323; State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

b. Proof of Attempted First Degree Murder Requires Proof Of An Intent To Kill And Premeditation.

---

<sup>3</sup>The Fourteenth Amendment provides that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. 14.

In order to convict Mr. Holley, the State was required to prove beyond a reasonable doubt that Mr. Holley, with a premeditated intent to cause Ms. Randolph's death, took a substantial step toward the commission of that crime. CP 1-4; RCW 9A.28.020(1); RCW 9A.32.030(1)(a); State v. Smith, 115 Wn.2d 775, 782, 801 P.2d 975 (1990). Evidence of an element of a charge is sufficient only if, viewed in the light most favorable to the state, a rational trier of fact could have found that element beyond a reasonable doubt. State v. Gentry, 125 Wn.2d 570, 596, 888 P.2d 1105, cert. denied, 116 S.Ct. 131 (1995).

Specific intent to kill and premeditation are not synonymous, but separate and distinct elements of the crime of first degree murder. See *RCW 9A.32.030(1)(a)*, *.050(1)(a)*; *State v. Brooks*, 97 Wn.2d 873, 876, 651 P.2d 217 (1982). Premeditation has been defined as "the deliberate formation of and reflection upon the intent to take a human life", *State v. Robtoy*, 98 Wn.2d 30, 43, 653 P.2d 284 (1982), and involves "the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." *Brooks*, at 876. Premeditation must involve more than a moment in point of time. *RCW 9A.32.020(1)*.

State v. Ollens, 107 Wn.2d 848, 850, 733 P.2d 984 (1987).

c. There Was No Evidence Of Intent To Kill.

Because the crime of murder is defined by the result of death, the crime of attempted murder requires the specific intent to cause the death of another person. State v. Dunbar, 117 Wn.2d 587, 590, 817 P.2d 1360 (1991). Specific intent to kill a person must be proved as an independent fact and cannot be presumed from the commission of the unlawful act. State v. Louthier, 22 Wn.2d 497, 503, 156 P.2d 672 (1945). This means that the defendant's act of beating by itself cannot constitute sufficient evidence of intent to kill, as opposed to intent to injure.

Although the evidence in this case allowed the jury to infer that Mr. Holley's act of beating Ms. Randolph included an intent to kill, the beating did not establish intent to kill beyond a reasonable doubt. The beating demonstrated an intent to injure and the threats to kill appeared intended to frighten Ms. Randolph. Neither the beating nor the threats to kill provided evidence of an actual intent to kill Ms. Randolph.

By contrast, in State v. Woo Won Choi, 55 Wn. App. 895, 906, 781 P.2d 505 (1989), review denied, 114 Wn.2d 1002 (1990), the evidence of intent to kill was sufficient where the defendant and the victim had an angry physical altercation during gambling at a casino, and the defendant immediately followed the victim in his car when he left the establishment. Choi then pulled his car up next to the victim's, raised a gun, and fired at

him, striking him.<sup>4</sup> State v. Woo Won Choi, 55 Wn. App. at 898-99. The Court of Appeals concluded that intent to kill was proved, stating that "[e]vidence of intent to kill is to be gathered from all of the circumstances of the case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats." State v. Woo Won Choi, 55 Wn. App. at 906.

In Holley's case, there was no shooting, no use of a deadly weapon and no act that caused any life threatening injury, Rather, Mr. Holley beat Ms. Randolph and then stopped as soon as she said that she was ready to die. Mr. Holley did not intend to kill Ms. Holley. The evidence in Mr. Holley's case is insufficient to prove that he intended to kill Ms. Randolph.

This evidence of Mr. Holley's conduct alone may have established intent to injure, but it did not show intent to kill any person. Intent exists only where a known or expected result is also the defendant's purpose or objective. State v. Caliguri, 99 Wn.2d 501, 505, 664 P.2d 466 (1983) (citing RCW 9A.08.010(1)(a)). Ms. Randolph testified that the defendant threatened to kill her throughout the beating but he never inflicted any life threatening or internal injury. RP 301, 344, 346. This evidence fails to show that the

---

<sup>4</sup> The Court in Won Choo analyzed former RCW 9A.36.011 which required proof of an intent to kill, rather than current version which only requires an intent to commit great bodily harm. Won Choo, 55 Wn. App. at 906

defendant acted with the desired purpose of causing Ms. Randolph's death.

While various cases have proclaimed that [p]roof that a defendant fired a weapon at a victim is, sufficient to justify a finding of intent to kill, a beating without the use of a weapon is not sufficient without more. State v. Hoffman, 116 Wn.2d 51, 84-85 and n. 45, 804 P.2d 577 (1991) (citing State v. Gallo, 20 Wn. App. 717, 729, 582 P.2d 558, review denied, 91 Wn.2d 1008 (1978); State v. Odom, 83 Wn.2d 541, 550, 520 P.2d 152, cert. denied, 419 U.S. 1013, 42 L. Ed. 2d 287, 95 S. Ct. 333 (1974)).

In Hoffman, the defendants transported multiple weapons to the scene, hid and waited for police officers to approach, and then opened fire on them. 116 Wn.2d at 83-84. In State v. Gallo, the defendant threatened "to take care of" the victim, and during the attack a few hours later he threatened to hurt her if she failed to cooperate, and then took careful aim before shooting her in the head. 20 Wn. App. at 729. And in Odom, the defendant arrived at a government employment office and became angry with a supervisor about having to fill out paperwork for benefits. He left, returning half an hour later, and announced an intention to settle this matter once and for all. Odom, 83 Wn.2d at 542-43. He then pointed a .44 caliber magnum pistol at the supervisor and fired twice. Outside the office, he was approached by two officers in a vehicle, whereupon he fired at one officer as

he exited the police vehicle, and then fired through the windshield of the vehicle while the other patrolman was still sitting in the front seat. Odom, 83 Wn.2d at 542-43. This was deemed sufficient evidence of intent to kill. Odom, 83 Wn.2d at 550.

Unlike in Hoffman, Gallo and Odom, nothing in Holley's case shows that Mr. Holley possessed the purpose or objective to take Ms. Randolph's life, and the mere act of beating someone is inadequate to prove intent to kill. The evidence in this case demonstrated that Mr. Holley intended to injure Mr. Randolph; as soon as Ms. Randolph said she wanted to die, Mr. Randolph stopped beating her and began taking care of her and negotiating how he could leave without killing her. RP 132-33.

Any conclusion that the defendant intended to kill Ms. Randolph was speculation, unsupported by independent evidence beyond a reasonable doubt. The existence of a fact cannot rest upon guess, speculation, or conjecture. In order to support a determination of the existence of a fact, evidence thereof must be substantial, i.e., it must attain that character which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed. State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). This Court should reverse the verdict of guilty on the attempted murder count.

d. There was insufficient evidence of premeditation.

Even if this Court deems that there was sufficient evidence of intent to kill, there was no evidence of premeditation. Premeditation is an essential element of murder in the first degree. RCW 9A.32.030(1)(a). It is defined as the deliberate formation of and reflection upon the intent to take a human life, and involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning, for a period of time, however short. State v. Neslund, 50 Wn. App. 531, 558, 749 P.2d 725, review denied, 110 Wn.2d 1025 (1988); State v. Ollens, 107 Wn.2d 848, 850, 733 P.2d 984 (1987). It must involve more than a moment in time. RCW 9A.32.020(1).

However, premeditation can be inferred from circumstantial evidence, including evidence of motive, procurement of a weapon, stealth, and the method of killing. State v. Gentry, 125 Wn.2d 570, 598-99, 888 P.2d 1105 (1995); State v. Ortiz, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992). In Holley's case there is no evidence of motive, procurement of a weapon, or stealth, nor does the method of beating infer premeditation.

Cases such as State v. Hoffman, *supra*, State v. Ollens, 107 Wn.2d at 853, and State v. Neslund, 50 Wn. App. at 559, represent circumstances in which the factual record contained evidence that would allow the jury to reasonably conclude the defendants each premeditated a killing -- prior

threats by the defendant, the bringing of a number of deadly weapons to the scene by the defendant, multiple shots fired by the defendant, the shooting of a victim from behind, and statements clearly indicating premeditation.

In State v. Hoffman, 116 Wn.2d at 84-85, premeditation was proved where the defendants brought multiple guns to a location, fired on police officers, and continued to fire as the victims crawled away, coordinating their gunfire with flares they had brought to illuminate the scene of the shooting. Such conduct is evidence of calculated actions and premeditated intent to kill. State v. Hoffman, 116 Wn.2d at 84-85. For further example, evidence showing the victim was shot three times in the head, twice after he had fallen to the ground, supports a finding of premeditation. State v. Rehak, 67 Wn. App. 157, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022 (1993).

By contrast:

[V]iolence and multiple wounds, while more than ample to show an intent to kill, cannot standing alone support an inference of a calmly calculated plan to kill requisite for premeditation and deliberation, as contrasted with an impulsive and senseless, albeit sustained, frenzy.

Ollens, 107 Wn.2d at 987, quoting, Austin v. United States, 382 F.2d 129, 139 (D.C. Cir. 1967). Also, evidence of strangulation, alone does not support an inference of premeditation. State v. Bingham, 105 Wn.2d 820, 826, 719

P.2d 109 (1986). The opportunity to deliberate and premeditate is not sufficient to prove that the defendant did deliberate and premeditate. State v. Bingham, 105 Wn.2d at 826.

Moreover, it is inappropriate to let "[t]he facts of a savage [] [beating] generate a powerful drive . . . to crush the crime with the utmost condemnation available". Bingham, 105 Wn.2d at 827-28, quoting, Austin, 382 F.2d at 139. In Holley's case, he savagely beat Ms. Randolph and he had the opportunity to premeditate but there was no evidence that he did premeditate. Rather, evidence of deliberation indicated a conscious effort to figure out how to leave without killing Ms. Randolph. RP 132-33. The jury determined that Mr. Holley was not armed with a deadly weapon thus the fact that he had a knife may not be used as evidence of premeditation. Gentry, 125 Wn.2d at 599 citing, Ollens, 107 Wn.2d at 853; State v. Ortiz, 119 Wn.2d 294, 312-13, 831 P.2d 1060 (1992).

In Holley's case, there is insufficient evidence of premeditation. Premeditation can be proved by circumstantial evidence only where the inferences drawn by the jury are reasonable and the evidence supporting the jury's verdict is substantial. State v. Pirtle, 127 Wn.2d 628, 643, 904 P.2d 245 (1995), reversed on other grounds in Pirtle v. Morgan, 313 F.3d 1160, 1175 (2002); State v. Luoma, 88 Wn.2d 28, 33, 558 P.2d 756 (1977). The

fact that Mr. Holley beat Ms. Randolph does not allow a reasonable inference of deliberate formation of and reflection upon the intent to take a human life. Mr. Holley's conviction for attempted first degree attempted murder must be reversed.

e. Dismissal of the attempted murder conviction is required.

A finding of insufficient evidence in support of a verdict necessitates dismissal with prejudice rather than remand for a new trial. U.S. Const. amend. 5; Burks v. United States, 437 U.S. 1, 57 L. Ed. 2d 1, 98 S. Ct. 2141 (1978); State v. Corrado, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996), review denied, 138 Wn.2d 1011 (1999). Mr. Holley's conviction for attempted first degree murder must be reversed and the charge dismissed.

2. FOR PURPOSES OF CALCULATING APPELLANT'S OFFENDER SCORE HIS KIDNAPPING AND ATTEMPTED MURDER CONVICTIONS ENCOMPASS THE SAME CRIMINAL CONDUCT.

For offender score calculation purposes, crimes that have the "same criminal conduct" are not counted separately. "Same criminal conduct" is defined as crimes that have the same objective criminal intent, are committed at the same time and place and that involve the same victims are not counted separately. RCW 9.94A.589; State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d

733 (2000); State v. Williams, 135 Wn.2d 365, 368, 957 P.2d 816 (1998), citing, State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

If the criminal intent is the same, the second inquiry is whether the defendant committed the crimes for different purposes. If the purpose and intent of each crime was the same, the sentencing court must find that the crimes involved the same criminal conduct. State v. Haddock, 141 Wn.2d 103, 112-13, 3 P.3d 733 (2000).

Interpretation of a statutory provision is a question of law, and is reviewed de novo. Haddock, 141 Wn.2d at 110. However, an appellate court, reviews sentences under the Sentencing Reform Act for abuse of discretion. Id. In Haddock, the Supreme Court held that the trial court either abused its discretion or made an error of law or both in counting separately Haddock's 14 possession of stolen property and possession of stolen firearm counts. Therein, the crimes were committed at the same time and place, the mental element for the crimes was the same and the purpose for committing the crimes was also the same. Haddock, 141 Wn.2d at 111-16.

Similarly in Williams, the defendant's two deliveries of a controlled substance at the same time to two different buyers constituted "the same criminal conduct" even though Williams sold the drugs to two different

buyers. This is so because, the buyers are not the victims; the public is. Williams, 135 Wn.2d at 368, citing, State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997) (continuing, uninterrupted sale of 2 drugs encompasses same criminal conduct).

In State v. Saunders, 120 Wn. App. 800, 86 P.3d 232 (2004), this Court held in the context of an ineffective assistance of counsel claim, that the failure to argue that a rape and kidnapping were the same criminal conduct was ineffective assistance of counsel because the restraint was to further the rape and thus arguably the same criminal conduct. Saunders, 120 Wn. App. at 824-25.

In State v. Edwards, 45 Wn. App. 378, 382, 725 P.2d 442 (1986) overruled on other grounds by Dunaway, 109 Wn.2d at 215, the court held that a kidnapping and assault encompassed the same criminal conduct because they were "intimately related; there was no substantial change in the nature of the criminal objective . . . . [and] the assault was committed in furtherance of the kidnapping." State v. Edwards, 45 Wn. App. at 382.

In State v. Taylor, 90 Wn. App. 312, 321-22, 950 P.2d 526 (1998), this Court held that a kidnapping and assault encompassed the same criminal conduct where the assault and kidnapping happened at the same time and place and involved the same victim; and where the commission of the assault

furthered the kidnapping. *Id.* In Taylor, the defendant's objective intent in kidnapping was to abduct by the use or threatened use of a gun and the objective intent in assaulting the victim was to frighten the victim, to not resist the abduction. "Further, because the assault and kidnapping were committed simultaneously, it is not possible to find a new intent to commit a second crime after the completion of the first crime." Taylor, 90 Wn. App. at 322, citing, State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997

In the instant case, Mr. Holley's first degree kidnapping and attempted first degree murder convictions encompassed the same criminal conduct. First, they were committed at the same time and place, and the victim of both the kidnapping and attempted murder was the same. Second, the criminal intent was the same; third, the purpose was also the same; and fourth, proof of commission of assault, the crime the Mr. Holley should have been charged with and convicted of rather than attempted murder was required to elevate the kidnapping to first degree kidnapping.

As in Williams, Edwards, Saunders and Taylor, the evidence demonstrated that at all times during the incident, Ms. Randolph was restrained while beaten. The kidnapping of Ms. Randolph occurred in furtherance of the attempted murder/assault and for no other purpose. Mr.

Holley's intent at the time of the kidnapping was to injure Ms. Randolph. Thus, the kidnapping and attempted murder/assault encompassed the "same criminal conduct" and contained the same "intent" and should not have been counted separately for the calculation of Mr. Holley's offender score. Haddock, 141 Wn.2d at 115-16; State v. Williams, 135 Wn.2d at 368. This Court should reverse and remand for a reduction in Mr. Holley's offender score.

3. APPELLANT'S SEPARATE PUNISHMENT  
FOR FIRST DEGREE KIDNAPPING AND  
ATTEMPTED MURDER VIOLATE THE  
PROTECTIONS AGAINST DOUBLE  
JEOPARDY.

Mr. Holley was charged and convicted of attempted first degree murder and kidnapping in the first degree. The facts in support of the attempted first degree murder amount to an assault. The state labeled the assault as attempted murder, but this does not eliminate the reality that the conduct was an assault. The underlying felony raising the kidnapping to kidnapping on the first degree was assault and/or harassment. CP 1-4.

To determine whether multiple punishments for the same offense violate the constitutional guarantee against double jeopardy, the Court first determines the punishment that the legislative branch has authorized. State v.

Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995) (citing Whalen v. United States, 445 U.S. 684, 688, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980)). The legislature has not expressly authorized multiple punishments for conduct that violates the multiple statutes charged in this case. Thus, the Court uses accepted principles of statutory construction to determine whether conviction and punishment for both offenses is permissible. See, e.g., In re the Personal Restraint of Burchfield, 111 Wn. App. 892, 896, 46 P.3d 840 (2002).

This Court determines the legislative intent by applying the “same evidence” test to determine whether the offenses “are identical both in fact and in law.” Calle, 125 Wn.2d at 777. See also Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L.Ed.2d 305 (1932) (“where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not”).

Where, as here, the two crimes are different but one arguably includes the other, Double Jeopardy Clause protections will bar conviction of both a greater and lesser offense for the same incident. Harris v. Oklahoma, 433 U.S. 682 (1977) (Double Jeopardy Clause bars conviction of lesser crime, robbery with firearms (the underlying felony), where defendant convicted of

greater crime, felony murder, based on the same incident); In re Nielsen, 131 U.S. 176 (1889).

The question here is how to determine whether the attempt crime – with its very general “any act which is a substantial step” element – encompasses the kidnapping that occurred at the same time and that formed the basis for the attempt prosecution. The Washington Supreme Court in State v. Borrero, 161 Wn.2d 532, 540, 167 P.3d 1106 (2007) ruled that there was a “presumption” that the attempt crime’s generic, placeholder, “substantial step” element did not include the contemporaneous substantive crime of assault. *Id.* This decision is contrary to United States Supreme Court precedent.<sup>5</sup>

The United State’s Supreme Court’s decisions have held that there is no such presumption – in fact, the opposite interpretive rule of lenity applies. The Court’s decisions also make clear that when determining the content of such generic placeholders’ elements, for double jeopardy purposes, they actually incorporate by reference other crimes. This Court has come to these conclusions in three different lines of cases.

First, in the context of felony murder charges, the United States Supreme Court has held that the Blockburger test will be satisfied, and the

---

<sup>5</sup> Although the Court of Appeals is bound by the Washington State Supreme Court, Mr.

Double Jeopardy Clause will bar conviction of both charges, where the felony upon which the felony-murder is based is separately charged – even if there are many other, different, ways that the crime of felony-murder could have been proven. In other words, the “felony” element of felony murder is a placeholder and the court must substitute in the actual felony charged (and its elements) to determine if the separate felony conviction is a subset of the felony-murder charge.

This is clear from Whalen v. United States, 445 U.S. 684. It applied Harris to convictions of both rape and felony murder based on rape. The Court in Whalen rejected the argument that since felony murder could be proven in any number of alternative ways, rape was not a lesser included offense – because the felony murder could be based on another felony such as robbery. The Court in Whalen held that when doing a double jeopardy analysis in the context of felony-murder, it is the nature of the lesser included offense as charged and proven in the particular case that matters – not any other alternative manners of committing the greater crime that might have been possible – and that if there is any ambiguity in this regard, the rule of lenity applies. Whalen, 445 U.S. at 693-94.

---

Holley raises this issue to preserve it for further review.

Second, in continuing criminal enterprise (CCE) cases, the United States Supreme Court has ruled that a single agreement to commit the same acts cannot be separately punished as both a CCE and a conspiracy – even if there are many other ways that the continuing criminal enterprise conviction might have been proven. This is clear from Rutledge v. United States, 517 U.S. 292, in which the United States Supreme Court concluded that conspiracy was a lesser included offense of the CCE conviction, when they were based on the same agreement to distribute the same cocaine. Rutledge, 517 U.S. at 300 (construing 21 U.S.C. §§ 846, 848). Rutledge, like Whalen, focused on context.

Third, the United States Supreme Court has used a contextual approach to analyzing whether the double jeopardy clause was violated when one of the two crimes was contempt. In United States v. Dixon, 509 U.S. 688, 717, the Court held that following an initial conviction of contempt of court for violating conditions of a prior release order by commission of a new crime, a criminal defendant could not thereafter be convicted of the substantive crime upon which the contempt sanction had been based.

This holding is notable in that the formal elements of contempt did not include the actual elements of the later-committed substantive crime – contempt was based on violation of a court order, and it was only the court

order that barred commission of any future crime (without specification) while on release. The United States Supreme Court ruled that the contempt crime's placeholder, or "generic," language, barring violation of a court order, incorporated the court order's prohibition of any new crime as well as the elements of the later crime.

The Court explained that under its precedents, including Harris, the Court did not "depart[ ] from Blockburger's focus on the statutory elements of the offenses charged" when it "construed th[e] generic reference to some felony as incorporating the statutory elements of the various felonies upon which a felony-murder conviction could rest." Dixon, 509 U.S. at 717. The Court concluded, however, that those statutory elements were incorporated into the first contempt crime by its reference to the court order violated and that order's prohibition on committing any future crime. Thus, the Court construed the contempt statute's incorporation of the order barring commission of any new crimes as incorporating the elements of the entire criminal code, and hence also incorporating the elements of any new crime forming the basis for the contempt sanction. *Id*

The Court in Dixon explained with regard to this incorporation by reference approach: "The Dixon court order incorporated the entire governing criminal code in the same manner as the Harris felony-murder statute

incorporated the several enumerated felonies.” Dixon, 509 U.S. at 698. The same could be said of the Court in Whalen which referenced a felony murder statute incorporating unenumerated felonies, or the Court in Rutledge which referenced the CCE statute’s “in concert” element incorporating any agreement or conspiracy to commit its predicate acts.

The Washington Supreme Court’s decision in Borrero conflicts with these controlling cases by rejecting such a contextual approach to determining what the “attempt” or “substantial step” element in Mr. Borrero’s case incorporated. Instead, the Washington State Supreme Court erroneously adopted a presumption that the “substantial step” in the attempted murder crime did not duplicate the elements of the lesser, kidnapping crime. Borrero, 161 Wn.2d at 532; (“Under the same evidence test and the additional analysis provided for under Orange6 where one offense is an attempt crime, a presumption arises in this case that the first degree kidnapping as charged and the attempted first degree murder as charged are not the same in fact and in law.”).

This presumption conflicts with the contextual approach to determining what crimes are incorporated by reference, an approach mandated by Harris, Whalen, Dixon and Rutledge. Those cases require a

side-by-side comparison of the actual charges, but they substitute the crimes necessarily incorporated by reference into each greater charge for the generic placeholder elements of those greater charges. The Washington Supreme Court's presumption against the existence of a double jeopardy problem also conflicts with the rule of lenity required by Whalen for statutory interpretation in this situation.

When one performs an appropriate comparison of the elements of attempted first-degree murder and first-degree kidnapping in Mr. Holley's case, it is clear that the latter crime is a lesser included offense of the former crime, because of attempted murder's "any act which is a substantial step" element.

The elements of first-degree kidnapping under the portion of the statute charged in this case are intentional abduction of another person with intent to facilitate the commission of a felony – here, assault and/or harassment. RCW 9A.40.020(1)(b). "Abduct" means to restrain a person by either "(a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force." RCW 9A.40.010(2). "Restrain" means "to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his liberty." RCW

---

<sup>6</sup> In re the Personal Restraint of Orange, 152 Wash.2d 795, 100 P.3d 291 (2004).

9A.40.010(1).

“Assault” – as defined in jury instruction #21, the crime that the kidnapping allegedly furthered here – occurs when a person “intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or . . .

(c) Assaults another with a deadly weapon”. RCW 9A.36.021(a),(c).

“Harassment” as defined in jury instruction #21 defines harassment as one whom, “without lawful authority, knowingly threatens to kill another person, immediately or in the future and when he or she by conduct places the person threatened in reasonable fear that the threat will be carried out.”. RCW 9A.46.020.7

Under the Orange test, the first-degree kidnapping charged in this case consisted of intentional abduction (secreting and/or use of deadly force) with restraint (restriction on the person’s movements), secreting, and/or use of force, all with intent to further the commission of the charged felony assault and/or harassment (same facts supporting the attempted murder). Preventing Ms. Randolph from leaving her apartment by the use of physical beating and threats, constitutes the acts of abduction, restraint, and hence kidnapping. The elements and facts of attempted first-degree murder as charged here were also the same facts as those supporting the kidnapping.

---

7 Under RCW 9A.46.060 kidnapping in the first degree is a crime included in

Under RCW 9A.32.030(1)(a), “A person is guilty of murder in the first degree when ... With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person.” But that is not what was charged – only attempted first-degree murder was charged. Attempt is defined as follows: “A person is guilty of an attempt to commit crime if, with intent to commit a specific crime, he does any act which is a substantial step toward the commission of that crime.” RCW 9A.28.020(1) (emphasis added). Thus, the elements of attempted first-degree murder are taking “a substantial step” – a placeholder phrase – towards homicide with premeditated intent, without completing the step.

On direct appeal, the State Supreme Court in State v. Borrero, 147 Wn.2d 353, 58 P.2d 245 (2007) held that the state did not need to specify what was the substantial step a “placeholder” for in this case, or even allege a step. Borrero, 147 Wn.2d 353, 58 P.3d 245. The consequence of that failure to specify is that the jury was not limited in the acts upon which it could rely to convict for attempted murder; the jury did not specify the acts that it used to satisfy the element of “substantial step”; and the jury could permissibly use the entire kidnapping or any part of it as that “substantial step.”

Given the evidence, argument, and instructions, that is the only

plausible explanation for what the jury did. The elements of Count II, first-degree kidnapping, were listed in Jury Instruction No. 18 as:

(1) That on or about the 18<sup>th</sup> day of December, 2005, the defendant *intentionally abducted* another person;

(2) That the defendant abducted that person with the *intent to facilitate* the commission of a felony assault or felony harassment; and

(3) That the acts occurred in the State of Washington. ...

Instruction No. 18 (emphasis added.) This correctly listed the acts constituting first-degree kidnapping as abduction and restraint (which were given their statutory definitions, cited above, in Instruction No. 21) with the intent to further commission of a separate crime.

Count I charged attempted first-degree murder. The elements of that attempt crime are contained in Jury Instruction No. 8:

(1) That on or about the 18<sup>th</sup> day of December, 2005, the defendant did *an act which was a substantial step* toward the commission of Murder in the First Degree;

(2) That the act was done with the *intent to commit Murder in the First Degree*;

(3) That the defendant acted with intent to cause the death if Lori Randolph;

(4) That the intent to cause the death was premeditated; and

(5) That the acts occurred in the State of Washington. ...

Instruction No. 8 (emphasis added.)

The “substantial step” referred to in that Instruction No. 8 is then defined in Instruction No. 10. But that definition is not limiting – it is expansive. It reads, in full: “A substantial step is conduct which strongly indicates a criminal purpose and which is more than mere preparation.”<sup>8</sup>

That definition of “substantial step” necessarily includes each element of Count II, first-degree kidnapping. As summarized above, the factual steps on the way to the attempted murder included restraining Ms. Randolph, beating her, and, in addition, “using or threatening to use deadly force” – by telling Ms. Randolph it was her day to die- all parts of the definition of kidnapping.

---

<sup>8</sup> Thus, the substantial step is defined in the instructions as encompassing not just any *act* that will lead to the eventual attempt to kill, but also an act indicative of “a criminal purpose.” Not necessarily the criminal purpose of premeditated intent to kill, but “*a* criminal purpose.” And recent state Supreme Court precedent holds that “*a* criminal purpose” is completely different from a specific, listed, “the” criminal purpose. State v. Cronin, 142 Wash.2d 568, 14 P.3d 752 (2000); State v. Roberts, 142 Wash.2d 471, 14 P.3d 713 (2000), amended (Feb. 2, 2001). An intent to kidnap for the purpose of facilitating an assault would therefore fit within this definition of the intent – the “criminal purpose” – portion of the “substantial step” definition.

The state did not segregate its proof on one crime from its proof on the other. Instead, it argued that the felony underlying the kidnapping was an assault (beating) or harassment (threat to kill). RP 478-80. The state then argued that the proof of intent to kill and premeditation were the same acts of threatening to kill and beating used to establish the underlying felony for the kidnapping. RP 484, 490. The prosecution argued that the evidence of premeditation was the “bad thoughts” plus the “steps he took after he formed that thought in his mind that makes it attempted murder.” RP 494.

The prosecution described the substantial step in the attempted murder charge as including the binding of Ms. Randolph’s hands and feet: “why else would he bind her hands and feet together? These are all substantial steps that he took, the twisting of her neck, and just the duration of the beating to the point that she’s ready to die.”. RP 495. The prosecutor never differentiated between facts supporting one crime and facts supporting the other crime – he merged them all together throughout his closing argument. RP 478-80, 484, 490, 494-95.

In Holley’s case, there was no independent intent to kidnap to effectuate anything other than to assault Ms. Randolph. Unlike in Borrero where the defendant hog-tied the victim and stuffed him in a trunk to steal

marijuana and later threw him in a river while tied up, in Holley's case, the intent, the acts, the victim and the time frame were all identical.

The convictions for attempted first degree murder and kidnapping violate double jeopardy; the kidnapping conviction should be reversed and dismissed with prejudice.

D. CONCLUSION

Mr. Holley respectfully requests this Court (1) reverse his attempted first degree murder conviction and dismiss with prejudice based on insufficient evidence; (2) recalculate Mr. Holley's offender score and (3) dismiss the kidnapping charge as violating Double Jeopardy.

DATED this 28<sup>th</sup> day of December 2007.

Respectfully submitted,



LISE ELLNER  
WSBA No. 20955  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Hozie L. Holley DOC# 735723 Washington State Penitentiary 1313 13<sup>th</sup> Avenue Walla, Walla, WA 99362 December 28, 2007. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

---

Signature