

NO. 36249-0

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

STATE OF WASHINGTON, RESPONDENT

v.

HOZIE HOLLEY, APPELLANT

FILED
COURT OF APPEALS
DIVISION II
08 APR 25 AM 11:44
STATE OF WASHINGTON
BY DEPUTY

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 06-1-00050-3

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Was sufficient evidence adduced to support the jury's determination that defendant acted with the premeditated intent to kill?..... 1

 2. Must this court follow a controlling decision of the Washington Supreme Court and reject defendant's arguments that his convictions for attempted murder in the first degree and kidnapping in the first degree violate double jeopardy? 1

 3. Should the trial court's determination that defendant's two crimes constituted separate and distinct conduct be upheld when the crimes have different intents? 1

B. STATEMENT OF THE CASE..... 1

 1. Procedure..... 1

 2. Facts 2

C. ARGUMENT..... 14

 1. THE STATE ADDUCED SUFFICIENT EVIDENCE FOR THE JURY TO FIND THAT DEFENDANT ACTED WITH THE INTENT TO COMMIT PREMEDITATED MURDER WHEN HE ASSAULTED THE VICTIM. 14

 2. DEFENDANT'S CONVICTIONS FOR ATTEMPTED MURDER IN THE FIRST DEGREE AND KIDNAPPING IN THE FIRST DEGREE DO NOT VIOLATE DOUBLE JEOPARDY. 18

 3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THE DEFENDANT'S CRIMES WERE SEPARATE AND DISTINCT CRIMINAL CONDUCT..... 20

D. CONCLUSION. 23

Table of Authorities

State Cases

<i>In re Pers. Restraint of Borrero</i> , 161 Wn.2d 532, 167 P.3d 1106 (2007)	19
<i>In re Personal Restraint Petition of Goodwin</i> , 146 Wn.2d 861, 875, 50 P.3d 618 (2002)	21
<i>In the Matter of the Personal Restraint of Orange</i> , 152 Wn.2d 795, 815, 100 P.3d 291 (2004)	19
<i>Seattle v. Gellein</i> , 112 Wn.2d 58, 61, 768 P.2d 470 (1989).....	14
<i>State v. Baldwin</i> , 150 Wn.2d 448, 454, 78 P.3d 1005 (2003).....	18, 19
<i>State v. Barrington</i> , 52 Wn. App. 478, 484, 761 P.2d 632 (1987), <i>review denied</i> , 111 Wn.2d 1033 (1988)	15
<i>State v. Calle</i> , 125 Wn.2d 769, 776, 888 P.2d 155 (1995).....	18
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	15
<i>State v. Casbeer</i> , 48 Wn. App. 539, 542, 740 P.2d 335, <i>review denied</i> , 109 Wn.2d 1008 (1987).....	15
<i>State v. Cord</i> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985)	16
<i>State v. Delmarter</i> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980).....	15
<i>State v. Dunaway</i> , 109 Wn.2d 207, 214-15, 743 P.2d 1237 (1987)	20
<i>State v. Flake</i> , 76 Wn. App. 174, 180, 883 P.2d 341 (1994)	20
<i>State v. Gocken</i> , 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).....	18
<i>State v. Graham</i> , 153 Wn.2d 400, 404, 103 P.3d 1238 (2005).....	18, 19
<i>State v. Haddock</i> , 141 Wn.2d 103, 110, 3 P.3d 733 (2000).....	21

<i>State v. Holbrook</i> , 66 Wn.2d 278, 401 P.2d 971 (1965).....	15
<i>State v. Joy</i> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993).....	15
<i>State v. Lessley</i> , 118 Wn.2d 773, 777, 827 P.2d 996 (1992).....	20
<i>State v. Louis</i> , 155 Wn.2d 563, 568, 120 P.3d 936 (2005)	18
<i>State v. Mabry</i> , 51 Wn. App. 24, 25, 751 P.2d 882 (1988).....	14
<i>State v. Maxfield</i> , 125 Wn.2d 378, 402, 886 P.2d 123 (1994).....	21
<i>State v. McCullum</i> , 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).....	14
<i>State v. McGilvery</i> , 20 Wn. 240, 55 P. 115 (1898)	17
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)	15
<i>State v. Smith</i> , 115 Wn.2d 775, 782, 801 P.2d 975 (1990).....	16
<i>State v. Tili</i> , 139 Wn.2d 107, 123, 985 P.2d 365 (1999).....	20
<i>State v. Turner</i> , 29 Wn. App. 282, 290, 627 P.2d 1323 (1981).....	15
<i>State v. Vike</i> , 125 Wn.2d 407, 410, 885 P.2d 824 (1994).....	20, 22
<i>State v. Workman</i> , 90 Wn.2d 443, 450, 584 P.2d 382 (1978)	16-17

Federal and Other Jurisdictions

<i>Blockburger v. United States</i> , 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).....	19
--	----

Constitutional Provisions

Fifth Amendment, United States Constitution	18
Article I, section 9, Washington State Constitution	18

Statutes

Formerly RCW 9.94A.400(1)(a)20
RCW 9.94A.589(1)(a)20, 21
RCW 9A.28.020(1).....16
RCW 9A.32.030(1)(a) 16

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

1. Was sufficient evidence adduced to support the jury's determination that defendant acted with the premeditated intent to kill?
2. Must this court follow a controlling decision of the Washington Supreme Court and reject defendant's arguments that his convictions for attempted murder in the first degree and kidnapping in the first degree violate double jeopardy?
3. Should the trial court's determination that defendant's two crimes constituted separate and distinct conduct be upheld when the crimes have different intents?

B. STATEMENT OF THE CASE.

1. Procedure

On January 4, 2006, the Pierce County Prosecutor's Office filed an information charging appellant, HOZIE HOLLEY (defendant), with attempted murder in the first degree and kidnapping in the first degree in Pierce County Cause no. 06-1-00050-3. CP 1-4. The State also alleged deadly weapon enhancements on each count. *Id.*

The case was assigned to the Honorable Ronald E. Culpepper on March 21, 2007. RP 4. After a hearing the court, excluded the arresting officer's observations that Mr. Holley smiled and laughed when he was

informed of the charges against him. RP 45-50. After hearing the evidence the jury convicted defendant of attempted murder and kidnapping, as charged, but did not find that he was armed with a deadly weapon at the time of the crimes. CP 5, 7, 10, 11.

Defendant filed a sentencing memorandum asking the court to find that the two crimes constituted the same criminal conduct. CP 12-15. The State argued that the crimes constituted separate offenses. CP 16-24. After hearing oral argument, the court found that the crimes had different objective intents and counted them separately. 4/20 RP 19-21.

The court imposed a mid-range standard range sentence on the attempted murder conviction of 240 months and a consecutive low end standard range sentence of 51 months on the kidnapping conviction. CP 25-37. The court also imposed legal financial obligations, terms of community custody and a no contact order with the victim. *Id.*

Defendant filed a timely notice of appeal from entry of this judgment. RP 38.

2. Facts

Lori Randolph testified that she first met the defendant in October 1996 while they were both working for a manufacturing company in Seattle. RP 83, 148. They began to date in November 1996 and ultimately moved in together. RP 83-84. Between November 1996 and July 2005 they had an ongoing relationship although there were periods

where they were apart. RP 84. By July 2005, Ms. Randolph had become an apartment manager and when she moved to a new apartment complex, defendant did not come with her. RP 84.

In September 2005, defendant was living with his sister in Lacey when he called Ms. Randolph around three in the morning to say that he was working in Tacoma and couldn't catch a bus back to his sister's; he asked if he could come over until he could catch a bus home. RP 85. Ms. Randolph allowed him to come over. RP 85. Defendant told Ms. Randolph that it was hard commuting to Lacey in the early morning hours. RP 86. With Ms. Randolph's permission this developed into a pattern of defendant staying at Ms. Randolph's during the work week but going home to his sister's on the weekends. RP 86. Ms. Randolph gave him a key card to get into her apartment. RP 86-87. She did not renew her relationship with him. RP 87.

Defendant lost his job sometime in October or November; Ms. Randolph told him that he was not to stay at her apartment and that she wanted him to go back to his sister's. RP 88. Defendant did not comply with this demand and, apparently Ms. Randolph took no steps to evict him. RP 88

December 17, 2005 was Ms. Randolph's 43rd birthday. RP 91. Ms. Randolph was going to go to Seattle with her boss, Brenda McDaniel, to have lunch and sightsee and then go out to a club later in the evening to celebrate. RP 92, 210-211. Ms. McDaniel's boyfriend also went along.

RP 93. That evening, Ms. McDaniel took Ms. Randolph to the Wet Spot, a private club for persons involved in sadomasochistic activities. RP 93-97, 211. Ms. Randolph participated in some temporary piercings with a needle going through her flesh just above her breast but was otherwise a spectator at the club. RP 95-96, 213. She returned home around two o'clock in the morning; defendant was there, asleep. RP 97-98. Ms. Randolph went to bed. RP 98.

The next morning she got up and went to work at 10:00 a.m. RP 98. Her office was in the same building as her apartment. RP 98. When she came upstairs for lunch defendant was there watching television. RP 99-100. She described defendant's mood as being "pissy," apparently upset that she had gone out the night before. *Id.* She went back downstairs and worked until 2:00 p.m. RP 100. When she got back to her apartment she tried to log onto her computer but it would not boot. RP 101. She asked defendant what he had done to it as she knew that he had used it earlier. RP 101. When defendant replied that he didn't know, she told him to stay away from it. RP 101. Defendant came over to her and started punching her face and head with his fists. RP 101-102. Ms. Randolph pleaded with him to stop but the blows kept coming. RP 102. Defendant then tried to strangle Ms. Randolph with his hands. RP 102. Ms. Randolph indicated that she couldn't breathe or make any noise; she believes that she eventually lost consciousness. RP 103-104.

Ms. Randolph recalls that defendant pulled her out of the chair and onto the living room floor where he started hitting her again. RP 104. He took her head into his hands and turned it - trying to break her neck. RP 104. Defendant told her that he was going to kill her because he knew that she would call the police. RP 104. Ms. Randolph believed that she was going to die. RP 104.

Defendant cut the speaker wires from the computer and wrapped them around her neck trying to strangle her with it. RP 104, 105. Defendant ripped Ms Randolph's shirt off to see where she had done the needle play the night before and then held a knife to her breast telling her that he was going to cut her breast off. RP 106-108. He also threatened to throw Ms Randolph out the window and indicated that, one way or another, she was going to die. RP 106. Ms. Randolph indicated that, to begin with, defendant used a pocket knife, but that he went to the kitchen and got a larger kitchen knife to use instead. RP 108. He took duct tape and placed it over her mouth and wrapped it around her head; Ms. Randolph used her tongue to push the tape away so she could continue to breathe. RP 104-105. She indicated that her nose was so full of blood that she could not breathe through her nose. RP 104-105. Defendant also used speaker wire to tie up her hands and feet. RP 105.

Ms. Randolph explained that she had a one bedroom apartment and that the bathroom was accessed through the bedroom. RP 111-113. At

one point, defendant dragged her into the bedroom by her ankles, indicating that she was making too much noise. RP 115, 130. The walls in the bedroom are exterior walls rather than ones shared with an adjoining apartment. RP 115. Once in the bedroom, defendant beat Ms. Randolph some more, then he pulled down her pants. RP 115. Defendant used the tip of the kitchen knife to examine Ms Randolph's genitalia to see if she had been "messing around." RP 116-117. Ms. Randolph indicated that defendant boxed her ears several times; one of her ears started bleeding. RP 117-118. Defendant also hit her in the back with an upright vacuum. RP 118-119, 385. Defendant repeatedly told her that she was going to die that day. RP 123-124.

Ms. Randolph had two phones in her apartment: her land line and a cell phone that she used for work. RP 124. Both phones rang while this beating was in progress. Ms. Randolph estimates that the phones rang three or four times total. RP 124. Defendant answered the phone once; he told Brenda McDaniel that Ms. Randolph wasn't home but that he would give her a message to call back. RP 125. Ms. McDaniel testified that she tried to reach Ms. Randolph by phone at her apartment that afternoon and the defendant answered. RP 217. Defendant was more friendly and cooperative than he usually was when she called. RP 218. He told her that Lori had gone to the store and that he would have her call when she

got home. RP 218. After hanging up, defendant told Ms. Randolph that if the phone rang one more time that he would kill her right then. RP 125.

Defendant went into the bathroom and filled the bathtub with water. RP 131. He told Ms. Randolph that he was going to put her in the tub then throw her blow dryer in with her. RP 131. Hours after the beating had begun, defendant pulled Ms. Randolph to her feet and got her into the bathroom; Ms. Randolph indicated that, at that point, she had suffered so much that she was ready to die. RP 131-132. Ms. Randolph's hands were tied behind her back and she indicated that she was afraid that she would fall as she tried to get into the tub. RP 132. Defendant told her to go sit on the bed. RP 132. Defendant talked to her about how they could work this out so that she could live and so that he wouldn't have to go to jail. RP 132-133, 134. Ms. Randolph told him that she wouldn't call the police, but defendant was concerned that this would happen. RP 134. Defendant told Ms. Randolph that he was going to kill himself; he tried to cut his wrists with the knife and succeeded in cutting one wrist. RP 135-136. They began to talk about where he could go, including going out of state where he could not be found. RP 136. They made an agreement that he would leave and that she would wait 20 minutes before she sought medical aid. RP 137. Ms. Randolph believes that it was approximately 8:00 p.m. when he finally left the apartment. RP 137.

Ms. Randolph kept up her end of the bargain, she did not call the police. RP 139. After twenty minutes she went to Ms. McDaniel's apartment for help. RP 139. Ms. McDaniel started screaming when she saw Ms. Randolph's face. RP 139, 219. Ms. McDaniel described Ms. Randolph as being unrecognizable and that it was "like a monster at my door." RP 219. Ms. Randolph told Ms. McDaniel that Hozie had beaten her. RP 219. Despite Ms. Randolph not wanting her to, Ms. McDaniel called 911 and requested medical aid. RP 140, 220. Paramedics and police arrived shortly. RP 220-221. Ms. McDaniel spoke to the police and gave them what little information she knew. RP 221.

Officer Smalls of the Tacoma Police Department responded to the dispatch regarding Ms. Randolph's assault. RP 235. When he arrived medics were assisting Ms. Randolph. RP 235-236. When she looked up, he asked her what happened, but she declined to talk to him. RP 236. Officer Smalls asked to talk to Ms. McDaniel in the hallway. RP 236. After learning that Ms. Randolph's boyfriend was the suspect, he wanted to know whether he could still be in the building. RP 236. Officer Smalls waited for back up then did a sweep of Ms. Randolph's apartment. RP 236-237. There was no one in the apartment. RP 237. He secured the apartment and instructed Ms. McDaniel not to let anyone inside. RP 237. Officer Smalls contacted Ms. Randolph again, but she was still reluctant to

speaking with him. RP 237. He did manage to obtain some more information. RP 237. He learned that her boyfriend had been upset about what she had done the night before and that he started beating on her a few hours earlier and that the attack went on for most of the day. RP 237.

Ms. Randolph was taken to Tacoma General Hospital where she remained for two days. RP 141-144, 222. Ms. Randolph knows that she talked with a police officer at the hospital but that she was not cooperative as that was part of her deal with the defendant. RP 142-143. An officer took some pictures of her at the hospital. RP 146. While she did end up talking with the officer she is not certain what she told him as she was “pretty out of it.” RP 143-144. Officer Smalls contacted Ms. Randolph again at the hospital and asked why she wouldn’t give much information; Ms. Randolph indicated that she was afraid. RP 237. Ms. Randolph did not want to fill out the Domestic Violence Supplemental form, but did give the officer a medical release. RP 238. Officer Smalls described her as “cooperative, but very reluctant to give information.” RP 238. Because it was a weekend, no identification officers were available to take pictures of Ms. Randolph’s injuries. RP 239-241.

The next day Officer Smalls made sure that an identification officer went to the hospital to photograph Ms. Randolph’s injuries. RP 239-241, 311. Exhibits 1-6 and 8-12 were photographs taken that day.

RP 239-241, 312-313. Officer Smalls spoke with Ms. Randolph again that day; she gave him a name of a friend whom she had spoken to that day about what had happened. RP 242. Officer Smalls contacted that friend and got details about what Ms. Randolph had said to her. RP 242. Officer Smalls and the identification officer also went to the apartment to take photographs. RP 239, 243, 314-317. While there they collected some computer speaker wire that was found under the bed and some duct tape collected from the living room. RP 318-321. Officer Smalls began a daily search for defendant at various places in Tacoma. RP 244-245. Defendant was eventually arrested on January 13, in Lacey. RP 245, 397-401.

When she was released on December 20, Ms. Randolph was too afraid to return home as she did not know where the defendant was located, so she went to stay with Ms. McDaniel for a few weeks. RP 144-145, 222. A couple of days later she spoke with a detective who took a statement and more photographs of her injuries. RP 145-146, 362-381. Ms. Randolph showed the detective the kitchen knife she believed defendant had used in the attack and it was taken into evidence. RP 382-384. This knife had a seven and half inch blade. RP 384. Ms. Randolph testified that she went back to the hospital on two occasions with complications and that as a result of the beating the sound of her voice has

changed and there is lasting damage to the left side of her face. RP 155-156.

Dr. Eggebroten treated Ms. Randolph in the trauma center at Tacoma General Hospital on December 18, 2005. RP 338-342. Ms. Randolph reported that she had been assaulted by her boyfriend for nearly six hours; she reported being beaten with a fist, choked, and struck with a vacuum cleaner. RP 344, 347-348. The doctor noted significant facial swelling, bruises, and evidence of injury to her trunk. RP 344. The doctor order a CAT scan of her head, neck, chest, abdomen, back, and pelvis to determine the extent of her injuries. RP 345. He administered morphine to alleviate her pain. RP 345. She was kept at the hospital for two days before being released. RP 349. She returned to the emergency room twice –once with a sinus infection that likely stemmed from injuries sustained from the beating and once with continuing neck pain. RP 349-350.

Dr. John Howard, Pierce County Medical examiner testified regarding the mechanism of strangulation. RP 270-278. Dr. Howard explained that strangulation can collapse the airway and also block the arteries and veins that supply blood to the brain and allow blood to drain from the head. RP 271-273. He indicated that it is the loss of blood flow to and from the head that is the primary problem of strangulation. RP 273.

It only takes three to ten seconds of loss of blood supply to the brain to result in loss of consciousness. RP 273-274. After two minutes of loss of blood supply there are signs of permanent brain damage. RP 274.

Constant pressure to the neck causing loss of blood supply to the brain for three to ten minutes typically results in death. RP 274. Thus the primary difference between a person who survives strangulation and one who dies is the length of time the compression lasts. RP 276.

Dr. Howard testified that it takes about three pounds of pressure to compress the jugular vein, about eleven pounds of pressure to compress the arteries and about 33 pounds to compress the airway. RP 274-275. Strangulation can affect a person's ability to speak. If the airway is compressed then a person's voice box changes shape and they cannot speak normally; if the airway collapses completely then they cannot move air in and out of their lungs to produce sound. RP 275. If the carotid arteries are collapsed then a person will lose consciousness and be incapable of speech as well. RP 276. It is common for the voice of a survivor of strangulation to sound raspier or hoarse afterward. RP 277. A permanent change in a voice would indicate that sufficient force had been used to damage the airway. RP 277-278.

Dr. Howard testified that there are many fatal cases of strangulation where there are no external injuries or very minimal external signs of injury, but internal dissection reveals the cause of death. RP 278.

Dr. Howard examined photographs of Ms. Randolph taken at the hospital and pointed out that she had ecchymosis, or bleeding under the skin on her neck, which is a common in strangulation cases. RP 280. Ms. Randolph had a linear pattern of bruising around her neck, consistent with ligature strangulation. RP 280-284. She also had pinpoint hemorrhages which are common when the veins of the neck are compressed. RP 284. Dr. Howard testified that these injuries would be consistent with strangulation leading to loss of consciousness. RP 285-287. Ms. Randolph also had a subconjunctival hemorrhage in the left eye which is also a common occurrence in cases of strangulation. RP 291.

Dr. Howard also testified that he has conducted autopsies where the cause of death was a fall from a tall building or electrocution in a bathtub. RP 288-290.

DNA samples were collected from both Ms. Randolph and the defendant, and submitted to the Washington State Patrol Crime Lab. RP 402-403. Testing of blood found on the vacuum revealed that it was a mixed sample and that it matched Ms. Randolph's DNA and that defendant could not be excluded as a contributor. RP 423-425. Testing

revealed that the blood found on the knife blade matched the defendant's. *Id.* Testing done on the DNA found on the knife's handle revealed that it was a mixed sample and that neither defendant nor Ms. Randolph could be excluded as contributing to this sample. *Id.* The probability of randomly selecting an unrelated individual from the U.S. population whose DNA would match the defendant's was one in 380 quadrillion. *Id.*

The defendant did not testify. RP 430-433. Defendant did present a declaration from Brigitte Beisner. RP 426. In closing defendant argued that the State had failed to prove premeditated intent to kill and that there was an abduction. RP 521, 524-525.

C. ARGUMENT.

1. THE STATE ADDUCED SUFFICIENT EVIDENCE FOR THE JURY TO FIND THAT DEFENDANT ACTED WITH THE INTENT TO COMMIT PREMEDITATED MURDER WHEN HE ASSAULTED THE VICTIM.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is 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. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988)(citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)(citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)(citations omitted).

Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

In this case, defendant challenges the sufficiency of the evidence regarding his conviction for attempted murder in the first degree. Br. of Appellant at pp. 5-16. He contends that there is insufficient evidence that he acted with premeditated intent to kill the victim. Br. of Appellant at p. 6. His argument is that if he had intended to kill her – he would have done so, but instead he chose not to. *Id.*

In order to find defendant guilty of attempted murder in the first degree the jury had to find that: 1) on or about the 18th 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 defendant acted with the intent to cause the death of Lori Randolph; 4) that the intent to cause death was premeditated; and, 5) the acts occurred in Washington. CP 44-79 (Instruction No. 8); *see also* RCW 9A.28.020(1); RCW 9A.32.030(1)(a); *State v. Smith*, 115 Wn.2d 775, 782, 801 P.2d 975 (1990). Once a substantial step has been taken, and the crime of attempt is accomplished, the crime cannot be abandoned. *State v. Workman*, 90

Wn.2d 443, 450, 584 P.2d 382 (1978); *State v. McGilvery*, 20 Wn. 240, 55 P. 115 (1898).

The jury was also instructed as to the meaning of premeditated:

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take a human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

CP 44-79 (Instruction No 11). Defendant now claims that there was insufficient evidence to support a determination that he was acting with a premeditated intent to kill.

The evidence in this case shows that defendant repeatedly expressed his intention to kill Ms. Randolph that day. He followed these verbal statements with physical assaults that could lead to her death. He attempted to strangle her with his hands and with a ligature; he landed repeated blows to her head; he tried to snap her neck; he filled a bath tub with water and directed her to get into it so that he could throw in an electrical appliance to cause electrocution. His statement as to his intent coupled with his physical acts was more than enough evidence to support the jury's finding that he was acting with the premeditated intent to cause Ms. Randolph's death. This court should uphold the jury's verdict.

It does not matter that defendant later abandoned his decision to kill Ms. Randolph. He had already taken a substantial step toward his initial goal and the crime of attempted murder was complete.

2. DEFENDANT’S CONVICTIONS FOR ATTEMPTED MURDER IN THE FIRST DEGREE AND KIDNAPPING IN THE FIRST DEGREE DO NOT VIOLATE DOUBLE JEOPARDY.

The Washington State Constitution, article I, section 9, and the Fifth Amendment to the federal constitution prohibit multiple prosecutions or punishments for the same offense. *State v. Baldwin*, 150 Wn.2d 448, 454, 78 P.3d 1005 (2003). The state constitution provides the same protection against double jeopardy as the federal constitution. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Beyond these constitutional constraints, the Legislature has the power to define criminal conduct and to assign punishment. *State v. Louis*, 155 Wn.2d 563, 568, 120 P.3d 936 (2005); *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). When a claim of improper multiple punishments is raised, the appellate court must determine that the lower court did not exceed the punishment authorized by the legislature. *See Calle*, 125 Wn.2d at 776.

Where a defendant contends that he has been punished twice for a single act under separate criminal statutes, the question is “whether, in light of legislative intent, the charged crimes constitute the same offense.” *State v. Graham*, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005)(quoting *In*

the Matter of the Personal Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)). If the relevant statutes do not expressly authorize multiple convictions, courts apply the *Blockburger* and “same evidence” tests. *Graham*, 153 Wn.2d at 404, citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Under these tests, double jeopardy arises if the offenses are identical both in law and in fact. *Baldwin*, 150 Wn.2d at 454.

The issue in this case is whether the Legislature intended to allow multiple punishments for attempted murder in the first degree and kidnapping in the first degree. The Washington Supreme Court recently examined this issue and concluded that convictions for attempted murder in the first degree and kidnapping in the first degree do not violate double jeopardy. *In re Pers. Restraint of Borrero*, 161 Wn.2d 532, 167 P.3d 1106 (2007). While the language of these criminal statutes did not expressly disclose any legislative intent with respect to multiple punishments, the court applied principles of statutory construction to determine whether multiple punishments are authorized. *Id.* at 536. Under the “same evidence” or *Blockburger* test the court found that the two offenses were not the same in fact and law. *Id.* at 536-540.

The defendant acknowledges the controlling nature of the decision in *Borrero* and does not attempt to distinguish his case but only to argue that it contravenes decisions of the United States Supreme Court. *See* Brief of Appellant at p. 22, n.5. This court is bound to follow *Borrero* and

must reject defendant's arguments. Defendant has failed to show a violation of the protection against double jeopardy.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THE DEFENDANT'S CRIMES WERE SEPARATE AND DISTINCT CRIMINAL CONDUCT.

For the purposes of sentencing "same criminal conduct" involves crimes that (a) involve the same criminal intent; (b) were committed at the same time and place; and (c) involve the same victim. RCW 9.94A.589(1)(a) (formerly RCW 9.94A.400(1)(a)); *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999); *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). The absence of any one of these criteria prevents a finding of same criminal conduct. *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). The Legislature intended the phrase "same criminal conduct" to be construed narrowly. *State v. Flake*, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). To determine whether two or more criminal offenses involve the same criminal intent, the Washington Supreme Court established the objective criminal intent test, which requires a court to focus on "the extent to which a defendant's criminal intent, as objectively viewed, changed from one crime to the next." *State v. Dunaway*, 109 Wn.2d 207, 214-15, 743 P.2d 1237 (1987); *State v. Lessley*, 118 Wn.2d 773, 777-778, 827 P.2d 996 (1992)).

An appellate court will generally defer to a trial court's decision on whether two different crimes involve the same criminal conduct and will not reverse absent a clear abuse of discretion or a misapplication of the law. *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000); *State v. Maxfield*, 125 Wn.2d 378, 402, 886 P.2d 123 (1994). The presumption is that a defendant's current offenses must be counted separately in calculating the offender score unless the trial court enters a finding that they "encompass the same criminal conduct." RCW 9.94A.589(1)(a).

Defendant asserts that the trial court erred when it treated his conviction for attempted murder as a separate crime from his kidnapping conviction. Defendant raised this issue in the trial court thereby preserving it for appellate review. 4/20RP 13-19; CP 12-15; see *In re Personal Restraint Petition of Goodwin*, 146 Wn.2d 861, 875, 50 P.3d 618 (2002).

In this case the trial court found that the attempted murder and the kidnapping had the same victim and occurred at the same place, but found that the two crimes had separate intents and, therefore, were not the same criminal conduct. 4/20 RP 19-20.

The court did not abuse its discretion in making this determination. As the court noted, the jury was instructed that in order to convict defendant of attempted murder that it had to find that he took a substantial step with intent to commit premeditated murder. CP 44-79, Instruction No 8. In contrast, the intent for the crime of kidnapping was an intentional

abduction with the intent to commit felony assault or felony harassment. CP 44-79, Instruction 18. Intending to kill someone is a different objective intent than intending to abduct that person. As the court pointed out, and defense counsel conceded, it is possible to commit attempted murder without abducting the victim just as it is possible to abduct a person without intending to murder them. 4/20RP 16-17. The court found that, under *State v. Vike, supra*, this indicated that the intents changed from one crime to the next when viewed objectively. 4/20 RP 19-20.

Defendant has failed to show that the court abused its discretion in making this ruling, the court applied the correct legal standard, assessed the elements of the crime and concluded that the two crimes did not encompass the same objective intent. This court should affirm the trial court.

D. CONCLUSION.

For the foregoing reasons the State asks this court to affirm the convictions and sentence entered below.

DATED: APRIL 25, 2008

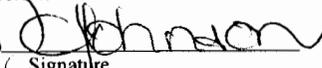
GERALD A. HORNE
Pierce County
Prosecuting Attorney



KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

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.

4/25/08 
Date Signature

FILED
COURT OF APPEALS
DIVISION II
08 APR 25 AM 11:44
STATE OF WASHINGTON
BY  DEPT