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STATE OF WASHINGTON
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No. 36754-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

GARY KING, III,

Appellant.

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

The Honorable Thomas J. Felnagle (trial) and
the Honorables Frederick Fleming, Beverly Grant, James Orlando,
Katherine M. Stolz, Lisa Worswick (motions), Judges

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to support separate convictions for conspiracy to commit first-degree robbery and conspiracy to commit first-degree burglary and King's state and federal constitutional rights to be free from double jeopardy were violated when he was convicted of two counts of conspiracy for the same agreement.

2. There was insufficient evidence to support the conviction for felony harassment and the "to-convict" jury instruction for that count, Instruction 44, was constitutionally deficient. CP 208. A copy of the instruction is attached as Appendix B hereto.

3. The convictions for three counts of unlawful imprisonment must be reversed because the restraints relied on for those convictions were incidental to the first-degree robbery and first-degree burglary.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Double jeopardy and due process principles mandate that a defendant charged with multiple violations of the same statute may only be convicted of one unit of prosecution for one act. The unit of prosecution for conspiracy is the conspiratorial agreement. As a result, in State v. Bobic, 140 Wn.2d 250, 260, 996 P.2d 610 (2000), the Supreme Court held that a defendant can only be convicted of one count of conspiracy for a single agreement even if that agreement contemplates commission of more than one crime.

King was convicted of conspiracy to commit first-degree robbery and conspiracy to commit first-degree burglary based upon the very same conspiratorial agreement. Is reversal and dismissal of one of the

conspiracy counts required?

2. Under State v. J.M., 144 Wn.2d 472, 28 P.3d 720 (2001), to prove felony harassment, the prosecution was required to prove not only that King knowingly threatened to kill someone but also that the person threatened with that harm learned about the threat and was placed in reasonable fear that the threat will be carried out. The jury was nevertheless instructed that it could find King guilty for knowingly threatening to kill Jay Freed (the person threatened) if a third person, not Freed, heard the threat and was placed in reasonable fear that the threat would be carried out. Was this instruction constitutionally deficient?

Further, was there insufficient evidence to support the conviction for felony harassment of Jay Freed where the prosecution presented no evidence that Mr. Freed had heard about the threat or had any reasonable fear that it would be carried out?

3. Because many crimes involve some degree of restraint, to prove a separate "restraint" crime such as unlawful imprisonment, the prosecution is required to show that the restraint supporting the separate crime was not merely incidental to another crime but instead had a separate, distinct purpose. King was accused of restraining people within a house by pointing a gun at them and putting physical restraints on two of them in order to burglarize and rob the home. He was convicted of first-degree burglary, first-degree robbery and three separate counts of unlawful imprisonment for those very same acts. Should the unlawful imprisonment counts be reversed and dismissed where the restraint used was incidental to the burglary and robbery, was not for any independent

purpose, occurred at exactly the same time and place as the higher crimes and was essential to the proof of the commission of the higher crimes?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Gary Ray King III was charged by second amended information with first-degree robbery, first-degree burglary, first-degree kidnaping, two counts of unlawful imprisonment, three counts of theft of a firearm, felony harassment, taking a motor vehicle without permission, conspiracy to commit first-degree robbery and conspiracy to commit first-degree burglary. CP 253-58; RCW 9.41.010; RCW 9.94A.510; RCW 9.94A.530; RCW 9A.28.040; RCW 9A.40.030(1); RCW 9A.40.040; RCW 9A.46.020; RCW 9A.52.020; RCW 9A.56.020; RCW 9A.56.075(1); RCW 9A.56.190; RCW 9A.56.200(1)(a); RCW 9A.56.300(1)(a). All except for the theft of a firearm and conspiracy counts were charged with firearm enhancements. CP 253-58.

Pretrial proceedings were held before the Honorable Judges Frederick Fleming, Beverly Grant, James Orlando, Katherine Stolz and Lisa Worswick on September 27, 2005, January 25, April 12, 27, May 9, July 11, 26, November 2, 2006, January 16 and March 8, 2007, and jury trial was held before Judge Felnagle on March 8, 12, 15, 20-21, 26-29 and April 2-3, 2007.[1] On April 3, 2007, the jury acquitted King of the first-degree kidnaping but found him guilty as charged of all of the other offenses and of a lesser included offense of unlawful imprisonment for the

[1]References to the transcript are explained in Appendix A.

kidnaping. CP 218-231.

On September 7, 2007, Judge Felnagle imposed a standard-range sentence of 57 months for the offenses and 210 months of flat time for the enhancements. CP 259-72; SRP 25-27.

King appealed and this pleading follows. CP 275.

2. Testimony at trial

On August 3, 2005, Rita Freed, her husband's cousin Mariah Freed, Rita's 1 ½ year old son and Rita's[2] mom, Leola Johnston, went to Rita's home at about noon and noticed an air conditioner which had been in the bedroom window was missing. RP 148-52, 306. Rita and her son had spent the night at her mom's house the night before while her husband was out of town. RP 152, 274. Because they assumed the air conditioner had just fallen in, they all went inside the house. RP 152-53, 274.

Once inside, Rita thought she smelled cigarette smoke and, when she went back into her bedroom, saw that the room had been "torn apart," with the dresser drawers pulled out and the window open. RP 154-55, 274. She also noticed that her "TV room" was a mess. RP 156. When she started to walk into the kitchen, she saw a man there with a gun. RP 156. She screamed and ran past the others, out the front door. RP 156, 275.

The man ran after Rita, saying he was "police," that it was "okay" and she should "come on inside" with him. RP 157, 309. Once they got back in the home, the man asked Rita to lay down and, when she did, put

[2]Because they share the same last name, for clarity Rita Freed, Mariah Freed and Jay Freed will be referred to by their first names, with no disrespect intended.

duct tape over her eyes and handcuffs on her hands, also securing her feet. RP 158-59.

Rita described the man who had chased her as wearing a black mask, gloves and some type of "goggles." RP 157. She could not see his face, which was completely covered, and could not see his hair at all. RP 157. Mariah described the man as taller, white, wearing a ripped T-shirt over his face and carrying a small gun. RP 275-76, 301. Johnston described the gun as black and said the man had reddish hair and very pale skin, and that he was was wearing jeans and a black mask which covered him only from the nose down. RP 308-309, 351.

While the first man was chasing Rita outside Mariah and Johnston, who were in the hallway, saw another man come around the corner towards them. RP 275, 309-11. Mariah said this man was wearing dark jeans and a ski mask. RP 276, 293. The mask showed only his eyes and went down to beneath his chin. RP 294. All she could see was his eyes and skin color, but she did not notice his eye color. RP 294.

Rita said that, while she was being secured, she "kind of peeked up" and saw the second man, who she said had a mask which had "kind of fallen." RP 159. She did not recognize him but saw his hair. RP 159. In contrast, Mariah said that the ski mask never came off the second man. RP 301.

At trial, Johnston described the second man as shorter than the first one with dark hair and "slight medium build," wearing jeans and a "Terrycloth material" mask which covered only from his nose down. RP 310-11. In a pretrial statement, however, Johnston said the man was

wearing a mask which covered his entire face with only his eyes showing through slits. RP 335-36. Johnston also claimed that, at some point, she noticed that the second man had not only a black gun in his hand but another gun stuck in the back of his pants. RP 311, 347, 369-70.

According to Johnston, the shorter man told the other man what to do in securing Rita. RP 311. When Johnston asked if she could hold the child, who was crying, the shorter man said yes and Mariah handed the child to Johnston. RP 277, 312. Mariah was then bound with zip ties and had her eyes and possibly her mouth covered with duct tape. RP 277, 312. Johnston then asked if she could put the boy down for a nap and, when she was told that was fine, went with the second man to the kitchen to get a juice cup, after which they put the boy to bed. RP 166, 314.

Although she said her mouth was duct taped, Rita nevertheless said she was able to talk to the taller man, who asked if she knew about her husband's "other job" outside of the military and told her that her husband owed "a lot of money to us" and "owed people money." RP 168, 230. In contrast, Johnston said she was the only person who was able to talk to the men. RP 338. Johnston, who was now sitting on the couch after putting the child into his crib, was never bound in any way and said there was never any discussion between the two men about physically restraining her. RP 313, 315. When Johnston asked if Mariah could be moved up from the floor, the men agreed, allowing Mariah to sit on the couch and removing the covering from her eyes. RP 277, 280. Rita was also allowed to get up off the floor and sit in a chair, her feet unbound, after she had been helped to the bathroom by Johnston. RP 161, 170-71, 323.

Rita remembered telling the men not to hurt her or her son and the men saying, "don't worry," that they were not going to hurt anyone. RP 160-61. According to Rita, the men said they were after her brother-in-law, Jay Freed, because he owed someone a lot of money and they were there to collect it. RP 162-63, 315-16. When they asked Rita to call Jay and tell him to come to the house, Rita told them that she and Jay were not "on speaking terms" and he would not come. RP 162-63. Johnston testified that, in contrast, Rita was unable to speak so it was Johnston, not Rita, who convinced the men that Jay would not come over if called. RP 316.

Mariah thought that Rita had actually telephoned Jay during the incident, claiming to have heard the call. RP 283-84. She did not say what she thought had been said. RP 283-84. Rita and Johnston were clear that no call had been made. RP 160-63, 315-16. Johnston also said the men said something about being part of the Japanese Mafia. RP 315. Mariah heard one of the men say something to Rita about being after her nephew or husband or something for money but did not remember much more than that. RP 279.

The two men were in the house at most a "couple of hours." RP 165. At some point, one of the men apologized for being there and for eating a popsicle. RP 280. Also at some point, Johnston noticed that the taller, red-haired man, who was wearing a shirt with short sleeves, had a tattoo on one arm which said "Ben," and a scar on the other arm. RP 331.

Johnston said that, once she repeated that Jay would not come over if called, the shorter man started to talk about other things, while the taller

man looked out the dining room window, holding his gun. RP 317-18. Johnston said the shorter man would occasionally gesture for the taller one to come over and they would then talk, but Johnston admitted that she could not hear any of what was said. RP 318. She nevertheless described what was occurring as "consultation," saying that the taller, red-haired man was nodding a lot. RP 324. Rita also thought the shorter man was talking more than the taller man and that it appeared the shorter guy was telling the other one what to do. RP 257-58.

According to Johnston, the shorter man started pacing, adjusting his hair and mask when he passed by a mirror in the living room and seeming nervous and maybe vain. RP 324-25, 339. Johnston admitted she never mentioned any of those actions or that demeanor in any of her statements, prior to trial. RP 340.

At some point, the shorter man took Johnston into the back room and talked to her. RP 321. Johnston talked about her religion and the man said he had to fulfill his agreement to the Japanese Mafia and if they did not they were in "deep trouble." RP 322. He also said they had been there all night waiting for Rita and that they needed money. RP 322. Johnston told him there was none in the house and they went back into the living room, with Johnston sitting on the couch again. RP 322.

Also at some point, Johnston's husband was supposed to pick her up and she wanted to prevent him from coming, so she told the men about it and was allowed to call and tell her husband she did not need a ride. RP 320.

Ultimately, Johnston said, the shorter man asked Johnston, "[w]hat

would you do if you were in my situation," and she told him she would lay down the guns and leave. RP 259, 325. The man just kept pacing, then, eventually, motioned for the red-haired man to come over. RP 326. Johnston heard the shorter man tell the taller man to go into the back room and get the bags that were there. RP 326. The shorter man then asked Rita for her car keys but Rita was bound, so Johnston gave them to him. RP 327.

The taller man went and got the bags from the back and took them out of the house. RP 327. Mariah said she saw both guys taking stuff out of the house and one of the men said he was going to take Rita's car to go to his car, so that the women would have wait at the house for 20 minutes or so before they could go retrieve Rita's car. RP 282.

According to Johnston, when the taller man returned, the shorter man took Mariah, Rita and Johnston into the bedroom. RP 328. He had Rita and Mariah lie on the bed facedown and had Johnston sit on the floor by the closet. RP 328. He then unbound Rita and Mariah, asking them not to look and to stay where they were for five minutes so the men could leave. RP 172, 328. According to Johnston, the shorter man had a trash bag and told the other man to "get everything" because he did not want to leave "evidence" behind. RP 328. The two men then left. RP 329.

Rita's car was recovered just where the men said it would be, with the keys inside. RP 178, 192. The car was undamaged. RP 192. Rita later also noticed items missing from her house, including an "X-Box" computer game and some guns. RP 177.

After the men left, Rita admitted, neither she nor anyone else at the

house called police right away. RP 187, 233. Instead, they called Rita's dad, who came over. RP 187, 233. They also tried to call a friend of the family who was a police officer. RP 187. Rita admitted that she, Johnston and Mariah talked about what they thought the men had looked like, who they thought the men might have been, and "identifications." RP 246. At that point, someone mentioned seeing the tattoo saying "Ben" and there was a discussion about that. RP 247.

A bunch of people came over, including someone named "Jennifer," Rita's mother-in-law, Mariah's husband, a woman named Vanessa Perry and Jay. RP 235, 261, 295, 340-41. All of these people talked about what happened and who the two men might have been. RP 190, 194, 235, 261, 295, 340-41. Indeed, there was "quite a bit of discussion and activity." RP 265. Rita admitted that she got information from what others said they had seen and from Perry about who they thought might have been the perpetrators. RP 266-67.

It was unclear whether some of the people arrived before or after the police who were eventually called. RP 188, 190. For example, Rita thought they did not try to contact Jay until after police arrived and a responding officer initially thought Jay was not there at first, but that officer said he would have noted Jay's arrival in his report and did not make such a note. RP 188, 373-74.

Rita ultimately claimed that, at some point during the incident, she had recognized the voice of one of the men as belonging to Gary King, a man she had met briefly six or seven months before through Perry, who worked with King at Wal-Mart and had dated King for a short time. RP

150, 172, 221-22. Rita had eaten lunch with Perry, King and Rita's son for about 20-25 minutes at some point many months before, and Perry and King had briefly babysat for Rita on another day, also months before. RP 174, 224. Rita admitted she had not seen or talked to King in the five or six months since. RP 225.

Rita could not explain or describe the "qualities" of King's voice which led her to believe that it was him but nevertheless claimed she was "[a] hundred percent" sure that one of the masked men was King. RP 175. Although she admitted her identification of him was based solely on his voice, she also said she saw his hair and it was "longer" and kind of hung into his face. RP 256-57. Rita said she did not recognize the other man. RP 177.

Officers never had Rita listen to the tape of King's voice to determine if it was the same voice as that of the man she had heard during the incident. RP 668.

Mariah said there was nothing distinctive about the voice of either man who was at the house that day. RP 296. Johnston admitted that, although she had met King in the past at Wal-Mart, she did not connect him as being one of the people in the house. RP 338.

Benjamin Harrison was known to have a distinctive tattoo on his arm, which said "The Ben." RP 594. Although Rita had never previously noticed such a tattoo when she met Harrison before, after the incident Rita told Perry that Harrison had been identified as being involved by his distinctive tattoo. RP 225, 246, 594. Perry then said she thought King would be wherever Harrison was because they were friends, and Rita

thought the same. RP 269, 595.

Perry said Rita told her it was King and Harrison who were involved, based on King's voice and seeing his eyes, which she had seen for maybe a second. RP 584, 590, 593. Perry admitted it was "confusing" to her how Rita could have seen the man's eyes when Rita's own eyes were covered. RP 594.

At trial, Perry admitted her belief that the assumption was that it was King who was involved in the incident with Harrison, because the men at the house that day wanted Jay and Rita knew Jay and King did not like each other because they had both dated Perry. RP 605.

Johnston, whose eyes were never covered during the incident, said the eyes of the man she had seen were "dark." RP 342. King's eyes were described as hazel. RP 1042.

Eventually, 9-1-1 was called and the incident reported. RP 188. In that phone call, Rita told police her thought that one of the men involved was someone who had dated Perry, whose first name was "Gary." RP 176, 220, 858-59.

Before police arrived, Rita, Mariah and Johnston started writing handwritten statements of their versions of events, as the 9-1-1 operator had suggested. RP 236, 297, 333. In her handwritten statement, Rita never once said that she believed someone named Gary was in any way involved, even though she knew police would be following up on whatever she wrote in their efforts to solve the crime. RP 238. In one of her statements, Mariah called the men "Ben" and "Gary" not because she recognized them but because Rita had said she thought that was who they

were so Mariah assumed that was correct. RP 300. At trial, Johnston claimed that she could identify King as one of the men involved. RP 343.

Rita also said that, at some point during the incident, the men said if they did not get their money in five days, they were going to kill Jay. RP 189. She said she was concerned they "might follow through with that threat." RP 189.

At trial, in exchange for what he admitted was a "great" plea deal with the prosecution, Harrison admitted being one of the men at the house and claimed that King was not only the other man involved but was actually the instigator. RP 387, 465. Harrison tried to distance himself from King by claiming that, while he knew King socially at the time, they "didn't hang out a lot." RP 385-86. In a pretrial statement, however, Harrison had said that he and King were, in fact, "best friends" and that they liked each other a lot. RP 504-506.

According to Harrison, King said he was a "hit man" who had killed over 300 people, making about $60,000 per hit. RP 507. Harrison knew King worked at Wal-Mart in the toy department and said he thought it was a "cover-up job." RP 507. Harrison said that, when King was about seven years old, someone walked up to King and gave him $10-20,000, then started training him to be an assassin. RP 494. Harrison said he did not initially believe what King had said but "later events" started making him believe that King was an assassin, such as King carrying a pistol and talking about it more openly. RP 495-96. But Harrison admitted he would not expect a trained assassin to do that because such a person would want to keep his profession more of a secret. RP 497.

Harrison said King had asked if Harrison wanted to get involved in the business, saying there was "good money" in it and claiming to have an expensive house in Tacoma, as well as an expensive sports car. RP 391-92. In a pretrial interview with the defense, Harrison said he had never seen this expensive house but in a statement to police, he claimed to have actually been there. RP 506. At trial, Harrison admitted that he had made statements on "both sides" on that issue, saying completely different things. RP 506. He admitted that he had not, in fact, seen or been to any such house. RP 506.

Harrison claimed that, on August 1st, he went to California in King's car to meet with King's "boss" for the "assassin" business. RP 388-89, 475. According to Harrison, King said he would pay Harrison $5,000 in cash just to go. RP 394, 497. They left for California at about 6:30 or 7 in the evening and, somehow, even they were not driving really fast, they got to the hotel in California by about midnight, despite the fact that it was a 9 hour drive. RP 475-76, 569.

Harrison said he heard a man and King talking in the hotel lobby about whether Harrison wanted to get involved in the "business." RP 396. When Harrison said he was not going to do so, the man, who was flanked by men in suits, got upset, so Harrison went to wait in the car. RP 396, 476-79. King came out to the car a little later and said that his boss was angry, so King was going to have to do a couple free jobs to make up for it. RP 397.

Harrison admitted that, in a previous statement, he had claimed that, about a week before this alleged trip to California, King had come

over to Harrison's house, drawn his pistol, pointed it at Harrison and pulled the trigger. RP 524. Harrison said he thought about calling police but did not do that because he did not want to "mess with" King. RP 524. Harrison could not explain why he would go to California with someone who had done that, especially as he claimed he was concerned about it at the time. RP 524.

Harrison said that, on the way to and from California, they stopped in Oregon for gas. RP 397, 480, 538. At trial, he claimed that King had paid with cash but, in a pretrial interview, Harrison had said that King paid with credit. RP 465, 479-80, 537, 569. In fact, Harrison had been specifically asked in that interview if King had paid with cash and had said no. RP 538. Harrison claimed he was not "intentionally" lying when he said that King had paid with credit, not cash. RP 465-66.

King's bank statement, showing credit/debit purchases during the relevant days, showed no purchases of gas or any other transactions in Oregon. RP 1000-1008, 1180-86.

Harrison claimed that, at some point before they stopped for gas, King pulled out a gun, pointed it at Harrison in a manner Harrison found threatening and asked if Harrison wanted "out." RP 399. Despite this alleged threat, Harrison admitted, he nevertheless made no effort to get out of the car or get away from King, even when Harrison was himself driving. RP 526-27. He also made no effort to get away when they got back to Puyallup and stopped at a gravel pit. RP 397-98, 481.

Harrison claimed that, at the pit, King said they had a "job" to do together and that it involved holding up a guy who was in the military and

owed a loanshark $1.2 million. RP 397-98. In a pretrial statement, however, Harrison had said that the discussion about the "job" actually occurred on the way home from California. RP 528.

Harrison said that, at the pit, King gave him a piece of white lined paper with a drawing of a house which he made Harrison memorize and then burned. RP 399-400. They stayed at the pit until around 11 at night, at some point going to a McDonald's, where Harrison again did not make any attempt to get away, even though he admitted it would have been possible to do so. RP 400-401, 482-83.

According to Harrison, at some point, King drove by and pointed out a house, then took them back to the pit where King said he had "all the supplies and equipment" they were going to be using. RP 402. Harrison said King had a Glock 17 gun with a shoulder holster, a mask made of a T-shirt with a hole cut out for the eyes, zip ties, duct tape, handcuffs, a flashlight, handcuff key and gloves. RP 402.

After that, they drove back to the house King had pointed out. RP 403. Once there, Harrison said, King told him to use a spark plug to break into the house. RP 405-11. Harrison tried a few times and ultimately got in, letting King in the front door. RP 405-11. Harrison admitted he could have walked away when told to go to the house, could have said he could not find it or that people were not home, or could have taken some other steps to walk away. RP 484. He did not. RP 484.

Once inside, according to Harrison, King started "rummaging" through the house. RP 412. They stayed in the house until about 12:30 in the afternoon, nearly 12 hours, before people came home. RP 412. When

Rita and the others arrived, Harrison had the Glock, which he said King had given him. RP 410-16. Harrison said that King had a firearm now, too, having found several pistols and an assault rifle in the house. RP 417.

Harrison said he pursued Rita when she ran out of the house after seeing him because King told him to. RP 419-21. Harrison also said it was King who told him to restrain Rita and tape her eyes and mouth and to do the same to Mariah. RP 422-23. It was, however, Harrison who had the handcuffs and key, not King. RP 489.

Harrison said that, after the baby was put down to sleep, King started talking to Johnston and told her that "the husband owed a loanshark 1.2 million" and that there were some drugs involved. RP 425-26. Harrison said that, halfway through the incident, Jay's name came up as someone who might be responsible for the money, and King asked Rita to call Jay and have him come over but Rita did not agree. RP 426. Harrison said that, at some point, King paced in the living room, trying to figure out what to do, but towards the end of the incident told Harrison there were two duffle bags with stuff in them he wanted to bring with them. RP 428. Harrison looked inside the bags and saw an X-Box, some games and controllers, a laptop, some ammunition, a couple of pistols and a camcorder. RP 429. At King's request, Harrison brought those items into the kitchen, where Harrison claimed that King wrote on a piece of paper, "[d]o we kill them?" RP 429. Harrison said no and King agreed. RP 429. King then asked Harrison to go grab everything they touched or brought with them and put it in a trash bag. RP 430.

Harrison admitted that, when he went to take the stuff to Rita's car,

he could easily have driven off and gone to the police to report what was going on at Rita's house. RP 493. He did not. RP 493.

After they left, they drove to a place in Puyallup where King said they were going to "sit tight" for a little while because he was concerned he might have been recognized and police might be at his house. RP 438-39. They waited 10-15 minutes and then King drove to his home, where they backed the car down the driveway and unloaded the stuff. RP 439. Harrison admitted that, when they stopped, he could have gotten out if he had wanted. RP 510. Again, he did not. RP 510.

Once in King's room, downstairs, Harrison said, King started going through the stuff in the bags, asking if Harrison wanted any of it. RP 440-41. Harrison claimed he declined and King told him to go take a shower. RP 441, 510. They stayed there for about an hour and went to meet King's friend at Starbucks, where King bought Harrison a drink and they talked for awhile. RP 443, 511. There was no discussion of what happened at Rita's house. RP 444. They then drove around for awhile listening to music with King's friend before King dropped Harrison off at his apartment. RP 512-13.

Harrison said that later, when he got home, he found four rounds of ammunition, miscellaneous scopes, laser points for a weapon and the "military goggles" Harrison had been wearing at Rita's house in his bag. RP 441-45, 553-57. Harrison claimed he took the stuff and went to a friend's apartment, telling the friend everything was from a crime and saying the friend could either hold onto or get rid of it. RP 446, 514.

In contrast, Harrison's friend testified that Harrison came over with

some stuff and asked him to hold it all until Harrison could get back to pick it up. RP 1153-56.

Harrison was arrested later at the home of his girlfriend's teacher. RP 446. Harrison's girlfriend had gotten the impression Harrison was involved in a crime, because Perry had called her after talking with Rita and the others after the incident at the house. RP 515, 572-73. When she confronted him, Harrison had lied and said he was not involved. RP 515, 572-73. The girlfriend's teacher nevertheless called the police. RP 515.

After his arrest, Harrison admitted, he repeatedly lied to police and others. RP 447, 563. Harrison said he did not tell police what had happened because he was afraid of King and did not himself want to go to jail. RP 574. He admitted, however, that if he had told police about his "fear," they would have protected him. RP 574.

In fact, Harrison conceded, over and over he lied to police, his friends, his sister, his girlfriend and others. RP 517-18, 563. He did so after repeatedly assuring them, as he did at trial with the jury, that what he was telling them was the truth. RP 569, 576-77. Harrison conceded that he had lied in order to benefit himself and had "twisted the truth" for that purpose. RP 464.

While still denying his involvement in the crimes, Harrison told police about King being an assassin and going to California to meet the "boss." RP 459. He told police he was with King in California "the whole time" and not involved at all. RP 448, 454. He also told the police King had shown him an expensive house in Tacoma, saying it was his - something he conceded at trial was a lie. RP 460.

Harrison was originally charged with all the same counts as King and would have faced many, many years in prison if he had not agreed to incriminate King and testify against him. RP 448-51. At trial, Harrison tried to minimize the "deal" he was getting, saying it meant he went from facing about 10 years in prison to about 90 months. RP 448-56. He ultimately admitted, however, that he had told the defense that he was charged with 35 years of weapons enhancements alone and would have had to serve every one of those years plus a sentence of probably 15-20 years on top of that if he had been convicted as charged, without the "blessing" of the plea offer from the state. RP 457. Thus, he conceded, the actual benefit he thought he was getting from incriminating King was reducing the possibility of spending 50 years in prison to 90 months, of which he expected to serve only maybe 41 months. RP 457, 565.

Harrison was not going to get the sentence he was hoping for unless the prosecutor was satisfied with what Harrison said at trial. RP 462. Harrison maintained he was now telling the truth, even though he had repeatedly lied before. RP 473, 518.

Harrison admitted that, right after the incident, he had talked to King and King said he had not spoken to police. RP 546-47. Harrison had later learned that King had given a taped interview incriminating Harrison. RP 546-47. Harrison claimed he had not "necessarily" felt betrayed by that but that he had not understood why King would have said they were involved when the police had no evidence against them. RP 547. King's statement incriminating Harrison was one of the reasons Harrison started looking into getting a plea deal. RP 547.

Ultimately, Harrison admitted, he was "upset" at King and decided to make a statement of his own, to help himself. RP 564.

Although Harrison claimed that he committed the crimes under "duress," he never pursued that line of defense or claimed it in the factual declaration made for his plea. RP 564, 566.

Harrison said that, at some point during the incident, he started to think it was not about money but was instead something personal against Perry and Jay Freed, neither of whom lived at Rita's house. RP 541. Harrison claimed that King had "gone obsessive about his ex-girlfriend," Perry, something which Harrison claimed to know from Perry herself. RP 542. Harrison admitted, however, that King had said he was "over" Perry and had mentioned another woman, Toni Stillman. RP 473-74. Indeed, King had told Harrison he had moved on from Perry. RP 474, 571.

Harrison said he thought King was mad at Perry because, several months before, she had left King and gone back to Jay. RP 542. Harrison denied that King had, from about March of 2005 on, been dating Stillman. RP 473-74, 571. Harrison admitted, however, that King could well have been dating someone at the time. RP 473-74, 571.

Harrison claimed he had started "figuring . . .out" that the incident was maybe about Perry and Jay because he heard Rita's name or other names said during the incident, inside the house. RP 500, 543. But Harrison also said he heard no one say any names during the incident, and that he could not remember whether Rita's name was used during the incident. RP 438, 498, 502. He also said it was only after he got home to his apartment that he decided there were names which sounded "familiar"

to him at the time. RP 574.

Perry testified that she dated King for about a month and a half, from January to March of 2005. RP 578. She had also dated Jay Freed before and after King. RP 578. Perry said that, before they started dating, King claimed to be an assassin. RP 580. She did not really believe him and never saw him with a gun. RP 580. Perry broke up with King because he did not call her for a whole day and then told her he had gotten into a fight but she did not believe it, so she went right back to Jay. RP 581-82.

Perry admitted that, after they broke up, she had moved on, as had King. RP 598.

King testified that he was not involved in the incident, was not an assassin, did not have an expensive house in Tacoma or a fabulous sportscar and had never told Harrison to the contrary. RP 980-81, 993 1025. He had not driven his car, which could not go above 45 m.p.h., to California with Harrison to see anyone, let alone a hit man boss. RP 994. King's sister confirmed that she had given King his car and it was junk. RP 888.

At the time of the incident, King was dating Stillman and had been since May. RP 988-89. He admitted having been a little jealous at first when Perry had gotten back together with Jay but was fully over it well before August. RP 989-90.

King freely admitted he played lots of video and role-playing games, including some which involved pretending to be an assassin and getting "money" for hits or assaults. RP 968-73. King liked to write

stories and had done it for many years. RP 960-83. He had written a bunch of stuff using the names of people he knew because it was easier than making them up. RP 979. He had also written stories based upon the hit man/assassin games, as well as some based on a gladiator theme, G.I. Joe and Star Wars. RP 975-76. He wanted to get something published but so far had not. RP 975.

Some of King's writings were introduced at trial and were in a journal-like form, saying things about being an assassin, hating it, dating Perry, telling her he was an assassin, wanting to kill Jay in March when Perry went back to him and other things. RP 869-74. King made it clear that the stuff about being a "hitman" was not real but was just a novel or idea he was working on, while some of the other stuff he wrote down was true. RP 980-81, 1128. The thing talking about wanting to kill Jay was just a "ventilation" because he was upset. RP 990-91. At some point, when the movie Revenge of the Sith came out, he stopped doing the "assassin thing" in his writings and started writing more Star Wars. RP 1131-37.

In that same book, King had noted, on May 1, meeting Stillman and thinking she was cool and beautiful. RP 989. He also said somewhere in there that his value had gone up to 6 million but that was just part of a game, not for real. RP 983. He had never told Perry he was an assassin because he was not; that was just a thought about a conflict or moral dilemma that the hitman character he was writing about would have. RP 983-1137.

There was something in the end of the journal saying that he had

just gotten an "apprentice" hitman named Harrison, but King said the writing was not his and he had not written such a thing. RP 871, 994. Also introduced at trial was a poetry "thing" a friend of King's had written, called the "assassin's code," which King had thought was cool and so had kept for a number of years. RP 977-78.

In the days before the incident, King had been partying with friends, drinking, doing "weed" and taking LSD. RP 993-95. He had fixed a headlamp on his car with his brother-in-law on Tuesday night, the night before the incident, and said he had gotten home about 10 in the morning Wednesday morning, trying to sleep or sleeping. RP 888, 891, 902-904, 1013-14, 1094.

Before the incident, Harrison had told King he had "some problems" and asked to borrow King's gun, which King had bought for protection after he had been robbed. RP 997, 1015. King thought about it and decided to loan it to Harrison because Harrison was not the kind of guy who would use a gun, instead beings a guy who "blew smoke up your butt" and was more "talk" than anything. RP 1124. King had gone to pick up his gun from Harrison on Tuesday but Harrison had not been around, so King had retrieved the Glock from Harrison on Wednesday afternoon. RP 1016.

At that point, Harrison told King he had some problems and asked King to hold some stuff for him. RP 1016. King told him to just throw the stuff into the back seat or trunk, and Harrison did. RP 1016. One of the things Harrison left was a computer case and, when Harrison showed King what was inside, King saw some guns. RP 1017.

Harrison told King that Harrison "did a job," which King thought meant he had robbed someone. RP 1020. Harrison also said he had gotten bitten in the leg by a little dog in the process. RP 1020.

When King got to his house, he brought some of Harrison's stuff inside, including an empty plastic container for a gun holster which King just threw out. RP 1029-30. Police found the holster in a garbage can there later and in the back seat of King's car, a piece of black fabric with a hole cut out. RP 719-41. A handcuff key was found in the console in the front seat. RP 722. In the trunk of King's car, police found a duffle bag with an X-box game system, some games, a "Kleen-Bore" gun cleaning kit and some computer items. RP 720-41. In a bag that was inside King's house they found a Glock handgun, some magazines and accessories for the gun, a handgun lock, handcuffs, some zip ties, an "Uncle Mike's" shoulder holster and another holster and three other guns. RP 720-47. A soft-sided case with binoculars had some ammunition for two different calibers. RP 720-47. RP 742-47. King's older sister gave the items in the house to police at King's request after he called and told her where the bags were and to hand them over. RP 672-74. An officer who picked up the bags thought that King's sister had said King had "confessed" but King's sister said she never said any such thing. RP 686, 677-81.

After King was arrested, he initially said he was not involved. RP 641. He ultimately gave a statement saying he was involved, as was Harrison. RP 642. King explained that he was coming down from LSD and partying when he was interrogated and told police what he thought they wanted to hear because they made it seem like he should help them

"get" Harrison. RP 1028-37. King said he was given some details from Harrison and had seen some notes or a police report with information and that was how he knew what to say. RP 1037.

The officer who took King's statement never asked King if he had slept or was drunk or high at the time of the statement. RP 668-71. That officer also admitted he would not have known if King was coming down from an LSD trip at the time. RP 668-71. King did not say anything in a pretrial hearing about having gotten information both from officers and from Harrison because no one asked about Harrison at that time. RP 1122. King could not remember what the officers said that made him say what he said but said he was scared after having been arrested by the "SWAT dudes," being handcuffed and thrown in the back of the police car for so long. RP 1028-30. Although he initially said he had never been arrested or interrogated before, King ultimately remembered that he had been arrested before, in 2003, and said he had been confused about the question and thought it was whether he had been convicted before. RP 1026, 1039, 1106.

King said he assumed that, if he told police what they wanted to hear, he could go on with his life and they would go after Harrison. RP 1038. The officers present at the interview of King said that he was not given any police reports or statements of witnesses. RP 1127-28, 1223-24.

A partially smoked cigarette seen by police in the driveway was apparently never taken into evidence or tested. RP 357, 361-64. In addition to King's Glock, the three other guns found were never tested for fingerprints. RP 730-86.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR A SEPARATE CONSPIRACY TO COMMIT ROBBERY AND KING'S RIGHTS TO BE FREE FROM DOUBLE JEOPARDY WERE VIOLATED WHEN HE WAS CONVICTED OF TWO COUNTS FOR THE SAME AGREEMENT

Under the state and federal constitutions, the government is prohibited from subjecting a citizen to "double jeopardy." Fifth Amend.[3]; Art. I, § 9[4]; see State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995); North Carolina v. Pearce, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969), overruled in part and on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). Both the state and federal double jeopardy clauses are given the same interpretation, and both protect against, *inter alia*, multiple punishments and multiple convictions for the same offense. See State v. Bobic, 140 Wn.2d 250, 260, 996 P.2d 610 (2000); Pearce, 395 U.S. at 717. Where a conviction violates double jeopardy, it must be vacated. See State v. Womac, 160 Wn.2d 643, 658-60, 160 P.2d 40 (2007); Benton v. Maryland, 395 U.S. 784, 796, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

In addition, both the state and federal due process clauses require the prosecution to prove every element of a charged crime, beyond a reasonable doubt. U.S. Const. amend. 14; Wa. Const. Art. 1, § 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970);

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[3]"No person shall. . . be subject for the same offense to be twice put in jeopardy of life or limb."

[4]"No person shall . . .be twice put in jeopardy for the same offense."

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Evidence is sufficient to support a criminal conviction only where, taken in the light most favorable to the prosecution, a rational trier of fact could have found all of the elements charged beyond a reasonable doubt. Green, 94 Wash.2d at 221; see, Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). Where there is not such evidence, reversal and dismissal is required. Green, 94 Wn.2d at 221.

In this case, King was convicted of both conspiracy to commit first-degree burglary and conspiracy to commit first-degree robbery. CP 230-31. This Court should reverse and dismiss one of those convictions, because there was insufficient evidence to support two separate conspiracy convictions for the single agreement, and the separate convictions violated King's state and federal rights to be free from double jeopardy.

As a threshold matter, these issues are properly before the Court. An issue of constitutional magnitude may be raised for the first time on appeal if the error is "manifest." See RAP 2.5(a)(3). The Supreme Court has specifically held that the sufficiency of the evidence is just such an error and may be raised for the first time on appeal. State v. Hickman, 135 Wn.2d 97, 103 n. 3, 954 P.2d 900 (1998). A claim that multiple conspiracy convictions violate double jeopardy is also such an error. Bobic, 140 Wn.2d at 257.

On review, this Court should vacate one of the conspiracy convictions, both because there was insufficient evidence to prove two separate conspiracies and because the two convictions violated King's rights to be free from double jeopardy. When a defendant is charged with

multiple violations of the same statute such as conspiracy, the Court must determine the "unit or prosecution" the Legislature intended to serve as the "punishable act," in order to determine whether multiple convictions violate double jeopardy. Bobic, 140 Wn.2d at 261-62; State v. Adel, 136 Wn.2d 629, 633, 965 P.2d 1072 (1998); see Bell v. United States, 349 U.S. 81, 82-83, 75 S. Ct. 620, 99 L. Ed. 905 (1955). If the defendant commits "just one unit of the crime," multiple convictions may not be sustained. State v. Knight, 134 Wn. App. 103, 109, 138 P.3d 1114 (2006), affirmed, 162 Wn.2d 806, 174 P.3d 1167 (2008).

For criminal conspiracy, the "unit of prosecution" is the agreement to carry out a criminal scheme "along with a substantial step toward carrying out that agreement." RCW 9A.28.040(1); Bobic, 140 Wn.2d at 262; Knight, 134 Wn. App. at 109; State v. Williams, 131 Wn. App. 488, 496, 128 P.3d 98 (2006), remanded on other grounds, 158 Wn.2d 1006, 143 P.3d 596 (2006) (see 195 P.3d 578 (2008)). This is because criminal conspiracy is "an inchoate crime," with its focus on "the conspiratorial agreement, not the specific criminal object or objects." Bobic, 140 Wn.2d at 265; see Braverman v. United States, 317 U.S. 49, 53, 63 S. Ct. 99, 87 L. Ed. 23 (1943). While it is possible that a person could be found guilty of multiple conspiracies where he or she engaged in multiple criminal agreements, where the time, persons, places and overt acts of an agreement interlap, there is but *one* agreement, regardless whether the criminal scheme contemplates commission of *one* crime, or *many*. Bobic, 140 Wn.2d at 264-65.

Thus, in Bobic, there was a single agreement where the defendants

stole multiple vehicles, stripped them of their contents and parts, stored the stolen parts and then bought the stripped cars at auction after which they reassembled the cars with the stolen parts and sold them with clear title. 140 Wn.2d at 254. Regardless of the fact that there were multiple crimes committed in pursuit of the agreement, there was only a "single agreement to commit a series of crimes by the same conspirators," and "each crime was only one step in the advancement of the scheme as a whole." 140 Wn.2d at 266. Quoting Braverman, the Supreme Court declared:

> Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies [simply] because it envisages the violation of several statutes rather than one.

Bobic, 140 Wn.2d at 264-65, quoting, Braverman, 317 U.S. at 53.

Thus, where there is a single agreement to commit criminal acts, regardless how many acts were committed or how many crimes were intended to be performed as part of the criminal scheme, "the punishable criminal conduct is the plan, not whatever statutory violations the coconspirators considered in the course of devising the plan." Knight, 134 Wn. App. at 109.

Here, there was only a single agreement, a single criminal scheme involving entering the home intending to use the guns to steal money once inside. The burglary and the robbery were both part of the same criminal scheme, agreed to by the same people as part of the same conspiracy, at the same time. There was thus only a single agreement to commit the criminal acts and, as a result, only one conviction for conspiracy can stand.

Williams, supra, and Knight, supra, are instructive. In both cases, the defendants were part of the same group of friends who planned to rob the victim of his valuables, which were in his hotel room. Williams, 131 Wn. App. at 491. Knight befriended the victim at a bar and then went to that room, where she had sex with him. Knight, 134 Wn. App. at 106. She then lured him into the alley behind the hotel, where Williams and others robbed and shot him. 134 Wn. App. at 106; Williams, 131 Wn. App. at 493. A jury found Williams guilty of, *inter alia,* conspiracy to commit first-degree robbery and conspiracy to commit first-degree burglary, while Knight pled guilty to, *inter alia*, conspiracy to commit first-degree burglary and conspiracy to commit second-degree robbery. Knight, 134 Wn. App. at 105; Williams, 131 Wn. App. at 493.

On appeal, Knight argued that the convictions for multiple counts of conspiracy violated her state and federal rights to be free from double jeopardy, while Williams challenged the multiple convictions as unsupported by insufficient evidence. Knight, 134 Wn. App. at 105-106; Williams, 31 Wn. App. at 495.

The Court of Appeals agreed with them both. Applying the maxim set forth in Bobic of "one plan, one count," the Court found, in Williams, that there was insufficient evidence to support both conspiracy convictions. 131 Wn. App. at 496-97. The same maxim compelled reversal in Knight. Knight, 134 Wn. App. at 109. Because there was but one criminal agreement, despite the number of crimes contemplated by that agreement, there could be only one conviction for conspiracy, the court of appeals held. 134 Wn. App. at 109. And the Supreme Court

agreed. See State v. Knight, 162 Wn.2d 806, 812, 174 P.3d 1167 (2008).

Notably, the courts in Knight and Williams reached these conclusions even though the conspiracy in both cases involved *days* of separate discussions about committing the crimes against the victim. See Williams, 131 Wn.2d at 492. Here, the discussion was all on the same day as the commission of the offense, at the same time.

The convictions for two counts of conspiracy for the same conspiratorial agreement violated King's state and federal rights to be free from double jeopardy and were unsupported by sufficient evidence. This Court should therefore reverse and dismiss one of those convictions. Under State v. Weber, 159 Wn.2d 252, 269, 149 P.3d 646 (2006), cert. denied, 127 S. Ct. 2986, 168 L. Ed. 2d 714 (2007), it appears the conviction which should be dismissed is the one which results in the lower sentence - here, apparently, the conviction for conspiracy to commit first-degree burglary. See CP 262.

2. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR FELONY HARASSMENT AND THE JURY INSTRUCTIONS WERE DEFECTIVE

This Court should also reverse and dismiss the conviction for felony harassment, because there was insufficient evidence to support it as required by due process. See U.S. Const. amend. 14; Wa. Const. Art. 1, § 3; Winship, 397 U.S. at 364; Green, 94 Wn.2d at 221.

As alleged here, felony harassment is defined in RCW 9A.46.020(1)(a)(i) and (b) and RCW 9A.46.020(2)(b)(ii). See CP 253-58. RCW 9A.46.020(1)(a)(i) and (b) provide, in relevant part:

> (1) A person is guilty of harassment if:
>
> > (a) Without lawful authority, the person knowingly threatens:
> >
> > (i) To cause bodily injury immediately or in the future to the person threatened or to any other person;
> >
> > . . .
> >
> > and
> >
> > (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

Under RCW 9A.46.020(2)(b)(ii), harassment committed under subsection (1)(a)(i) becomes a Class C felony if, *inter alia*, "(ii) the person harasses another person . . . by threatening to kill the person threatened or any other person."

In J.M., supra, the Supreme Court examined the harassment statute in the context of deciding whether the perpetrator was required to know that the threat he or she made would be communicated to the person threatened. 144 Wn.2d at 482. The Court concluded that the statute required the following to prove harassment under the statute:

> [1] [T]he perpetrator [must] knowingly threaten to inflict bodily injury by communicating directly or indirectly the intent to inflict bodily injury; [2] the person threatened must find out about the threat although the perpetrator need not know nor should know that the threat will be communicated to the victim; and [3] words or conduct of the perpetrator must place the person threatened in reasonable fear that the threat will be carried out.

144 Wn.2d at 482.

In reaching its conclusion, the Court specifically rejected the idea that the defendant could be found guilty of harassment if he communicated an intent to harm someone to a *third person* and that third person reasonably believed the threat to harm that third person would be carried

out. 144 Wn.2d at 488. Instead, the Court said, "the person threatened" is "the victim of the threat, i.e., the person against whom the threat to inflict bodily injury is made," who must learn of and have a reasonable belief about the defendant's threat. 144 Wn.2d at 488.

Thus, under J.M., to prove King guilty of the offense of felony harassment as charged and submitted to the jury here, the prosecution had to prove that 1) King knowingly threatened to kill Jay Freed, 2) that Jay Freed knew about the threat and 3) that, by King's words or conduct, Jay Freed was placed in reasonable fear that King's threat to kill him would be carried out.

That is not the case the prosecution presented to the jury here. The prosecution's theory was that King was guilty of felony harassment of Jay Freed because either *Rita*, *Mariah* or *Johnston* heard the threat to Jay and were placed in reasonable fear it would be carried out - not that Jay had heard the threat and had such a fear. See RP 1265; see CP 208.

Indeed, the "to convict" instruction reflected this theory, telling the jury that the prosecution had only to prove, *inter alia*, that King had "knowingly threatened to cause bodily injury immediately or in the future to Jay Freed" and "that the words or conduct of the defendant placed *Rita Freed and/or Mariah Freed and/or Leola Johnston* in reasonable fear that the threat would be carried out," without requiring proof that the threat was communicated to Jay or that Jay himself had a reasonable fear the threat would be carried out. CP 208 (emphasis added).

Nor was there any evidence which would have supported the required findings of those essential elements of the crime. Jay Freed

himself did not testify. Nor did Rita or any of the others testify that they had communicated the threat to Jay or that Jay had somehow expressed a reasonable belief based on King's conduct or words that the threat to kill Jay would be carried out. RP 148-195, 219-250, 254-270, 271-352. Indeed, neither Mariah nor Johnston ever testified that they had even *heard* such a threat, let alone conveyed it to Jay or had some indication that Jay reasonably believed it. See RP 271-352.[5] And Rita only testified that, after contacting a lot of other people after the incident, she thought she had contacted Jay but did not really remember. RP 189. While she said Jay was at her house sometime later, she said nothing about having told Jay about any threat to kill him, nor did she say anything about whether Jay seemed to believe any such threat. RP 189-90.

There was thus no evidence to prove the essential elements of the crime that 1) the threat was communicated to Jay and 2) Jay was placed in reasonable fear by King's words or conduct that the threat would be carried out.

State v. Kiehl, 128 Wn. App. 88, 113 P.3d 528 (2005), review denied, 156 Wn.2d 1013 (2006), is directly on point. In that case, the defendant was convicted of felony harassment for telling his mental health counselor that he was going to kill a judge. 128 Wn. App. at 90. The counselor was placed in reasonable fear that the defendant would carry out

[5]Johnston was asked about the people they spoke to about the incident and who came over, and never mentioned Jay. RP 315-18, 340-41. Mariah, Jay's cousin, remembered them saying something about being after Rita's *husband* for money. RP 279. Mariah thought Rita had actually called and asked Jay to come over during the incident but did not remember much about that alleged conversation. RP 284.

that threat when the defendant became very agitated, demonstrated how he was going to kill the judge and threatened to make the car they were in wreck. 128 Wn. App. at 90. As here, the "to-convict" in Kiehl told the jury it could convict based upon the threat to the judge if the third party who heard the threat (the mental health counselor) was placed in reasonable fear that the threat would be carried out, without requiring that the threatened party learn about the threat or have such a fear himself. 128 Wn. App. at 92.

On appeal, the Court held both that the "to-convict" was improper and that there was insufficient evidence to support the conviction for felony harassment. 128 Wn. App. at 92-93. Citing J.M., the Court rejected the prosecution's claim that the "person threatened" under the statute could be the person who simply heard the threat, not the person to whom the harm was threatened to be done. Kiehl, 128 Wn. App. at 92-93. Instead, the Court held, "contrary to the State's assertion, the harassment statute requires that the person threatened [must] learn of the threat and be placed in reasonable fear that the threat will be carried out." 128 Wn. App. at 93.

As a result, the Kiehl Court concluded, the state could not prove the defendant guilty unless it showed not only that the defendant had "knowingly" threatened to kill the judge but also that the judge had learned of the threat communicated to the mental health worker and, "upon learning of this threat," had been "placed in reasonable fear that the threat would be carried out." 128 Wn. App. at 93. The "to-convict" was a "misstatement of the elements needed to convict," because it did not

contain all the essential elements of the crime. 128 Wn. App. at 93-94. Further, the error was not harmless. Id.

In addition, the Court concluded, reversal and remand for a new trial with a corrected instruction would be improper, because the evidence was insufficient to support a conviction for felony harassment. The judge had not testified, nor had the prosecution presented any evidence that the judge was "placed in reasonable fear that the threat would be carried out." 128 Wn. App. at 94. The Court therefore reversed and dismissed the conviction for felony harassment with prejudice. Id.

Just as in Kiehl, in this case the instruction improperly misstated the essential elements of the crime, allowing the jury to convict King based upon communication of a threat to a third party and that third party's "reasonable belief," rather than requiring that the threatened person learn of and have a reasonable belief about the threat. Just as in Kiehl, here, reversal and dismissal of the conviction for felony harassment, with prejudice, is required.

In addition, here, additional remedies should be granted. Because the conviction cannot be upheld, the accompanying firearm enhancement of 18 months must also be reversed. Further, in sentencing King, the judge specifically counted the felony harassment as a separate point towards the offender score for each of the convictions. SRP 25-27.

As a result, King is entitled to 1) have the conviction for felony enhancement and the firearm enhancement for that conviction reversed and dismissed with prejudice, 2) have the 18 months of flat time imposed as a result of the enhancement stricken from his sentence, and 3) have the

base sentence recalculated based upon a corrected offender score with one less point based upon the removal of the harassment as one point. Calculated without the harassment count, the proper standard range for the count upon which the court here based its sentence (the first-degree robbery, which had the highest standard range) would be 51-68 months, not 57-75, upon which the court relied. See CP 259-72. The enhancements would have amounted to 192 months, not the 210 months imposed.[6] See CP 259-72. In addition to reversing and dismissing the felony harassment conviction and enhancement with prejudice, this Court should also order resentencing.

3. THE CONVICTIONS FOR UNLAWFUL IMPRISONMENT MUST BE REVERSED BECAUSE THE RESTRAINT WAS INCIDENTAL TO THE OTHER CRIMES AND THUS DID NOT SUPPORT SEPARATE CONVICTIONS UNDER DUE PROCESS AND DOUBLE JEOPARDY PRINCIPLES

Reversal and dismissal is also required for the convictions for the unlawful imprisonment of Rita, Mariah and Johnston, because there was insufficient evidence to support those convictions as a matter of law.

Many crimes involve some degree of "restraint." See, State v. Johnson, 92 Wn.2d 671, 676, 600 P.2d 1249 (1979), cert. denied, 446 U.S. 948 (1980); State v. Korum, 120 Wn. App. 686, 86 P.3d 166 (2004), affirmed in part and reversed in part, 157 Wn.2d 614, 141 P.3d 13 (2007). As a result, because the statutes defining "restraint" crimes such as kidnaping or unlawful imprisonment are generally "broadly worded," in

[6]Additional changes in the sentence are also required as a result of the insufficiency of the evidence for the counts of unlawful imprisonment, as argued, *infra*.

this state a separate conviction for a "restraint" crime cannot be upheld on appeal if the restraint used was merely "incidental" to the commission of another charged crime. See Green, 94 Wn.2d at 226-27; Johnson, 92 Wn.2d at 676. This is because the "mere incidental restraint and movement of the victim during the course of another crime which has no independent purpose or injury is insufficient to establish" a separate crime. See In re Brett, 126 Wn.2d 136, 166, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996).[7]

Put another way, if the restraint and movement of a victim are "merely incidental and integral to commission of another crime," the restraint and movement "do not constitute" an "independent, separate crime" of restraint and the conviction for the restraint crime must be dismissed. Korum, 120 Wn. App. at 703-704.

There are serious constitutional dimensions to the "incidental restraint" doctrine. Both the constitutional prohibition against double jeopardy and the constitutional due process right to be free from conviction upon less than sufficient evidence are implicated when a court examines whether a separate conviction for a "restraint" charge should stand. See Brett, 126 Wn.2d at 174 (noting it as an issue of "whether the kidnaping will merge into a separate crime to avoid double jeopardy"); Green, 94 Wn.2d at 226-27 (addressing it as an issue of the right to have the state prove all the essential elements of the crime beyond a reasonable

[7]Brett's convictions and sentence were later overturned based upon ineffective assistance relating to other issues, after he filed a personal restraint petition. See Personal Restraint of Brett, 142 Wn.2d 868, 871, 16 P.3d 601 (2001).

doubt); see Fifth Amend; Fourteenth Amend.; Art. I, §§ 3, 9. Because of its constitutional dimensions, the issue, like the related issue of "merger" at sentencing, may be raised under RAP 2.5(a)(3) for the first time on review as involving a manifest error affecting substantial constitutional rights. See, e.g., State v. Frohs, 83 Wn. App. 803, 811, 924 P.2d 384 (1996).[8]

In this case, all of the convictions for unlawful imprisonment - and their enhancements - must be reversed and dismissed, because the restraint of Rita, Mariah and Johnston was incidental to the separate convictions for first-degree robbery and first-degree burglary.

The question of whether restraint is "incidental" to another crime depends upon the facts of each case, but includes evaluation of 1) the relationship between the restraint and the other crime, 2) the distance the victim was moved while restrained, and 3) the time which passes between the act of restraint and the other crime. State v. Saunders, 120 Wn. App. 800, 817, 86 P.3d 232 (2004).

Thus, where the defendant grabbed the victim, picked her up, carried her 50 or 60 feet, placed her behind a building and then killed her, the restraint of grabbing and moving and secreting her did not support a separate kidnaping conviction because the "restraint" was incidental to the homicide. Green, 94 Wn.2d at 226-27. And in a case where two girls

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[8]In Frohs, Division One noted that caselaw previously holding that there was no constitutional component to the sentencing "merger" doctrine was no longer good law, because that caselaw was developed when multiple convictions were not deemed to violate double jeopardy prohibitions if the relevant sentences were ordered to run concurrent. Frohs, 83 Wn. App. at 811 n.2, 812. In Washington, it is now recognized that multiple convictions themselves are a double jeopardy violation, regardless how the sentences run. See Womac, supra.

voluntarily went to the defendant's home, the restraint was incidental to rapes where the defendant took the girls into separate rooms, bound them, raped them, left to buy cigarettes, returned, and then took one of the girls to a wooded area where he raped her again. Johnson, 92 Wn.2d at 672-73. The restraint was "incidental" because not only did the crimes occur at almost the same time and place but the sole purpose of the restraint was to facilitate the rapes. 92 Wn.2d at 673.

In this case, the restraint used for the alleged unlawful imprisonments of Rita, Mariah and Johnston were completely incidental to the burglary and robbery of the home. Evaluating the relationship between the restraint and the other crimes, the distance the victims were moved while restrained, and the time which passed between the acts of restraint and the other crimes make this clear. All of the restraint crimes were based upon the exact same incident, occurring in exactly the same place and during the same time, for the same purpose or objective - to facilitate the burglary and robbery. None of the restraints was for any other purpose, nor were the victims moved any significant distance over any period of time.

Korum, supra, is instructive. In that case, the defendant was charged with "home invasion" robberies during which the victims were bound and one victim was moved from a house to another location for the purpose of facilitating the robberies. 120 Wn. App. at 689, 707. This Court found the restraint used was "incidental" to the robberies and thus did not support separate convictions for restraint crimes because:

(1) The restraints were for the sole purpose of facilitating the

> robberies--to prevent the victims' interference with searching their homes for money and drugs to steal; (2) forcible restraint of the victims was inherent in these armed robberies; (3) the victims were not transported away from their homes during or after the invasions to some remote spot where they were not likely to be found; (4) although some victims were left restrained in their homes when the robbers left, the duration of the restraint does not appear to have been substantially longer than that required for commission of the robberies; and (5) the restraints did not create a significant danger independent of that posed by the armed robberies themselves.

Korum, 120 Wn. App. at 689, 707.

Here, just as in Korum, the restraints of Rita, Mariah and Johnston were solely for the purpose of facilitating the robbery and burglary. No one was transported away from the home and the restraints did not themselves create an independent danger. Indeed, Johnston was never bound in any way and the restraints of Rita and Mariah were loosened or removed in part within a few minutes of being put on.

Indeed, unlike in Korum, *no one* was ever transported away from the home during the incident. And Rita, Mariah and Johnston were not *left* restrained after the robbery and burglary but instead had their restraints completely removed once the robbery and burglary was complete. These facts further illustrate that the restraint used in this case was completely incidental to the robbery and burglary and insufficient to support separate convictions for "restraint" crimes.

At sentencing, the court in this case apparently agreed that the restraint of Rita was incidental to the robbery, finding that restraint was "a matter of the robbery process" and not counting the conviction for unlawful imprisonment of Rita as a separate point towards the offender score. SRP 26. But the court did not *dismiss* the separate conviction, nor

did it dismiss the attendant firearm enhancement. Instead, it added 18 months of flat time to the ultimate sentence, even though that enhancement time was based upon an improper conviction. CP 265. Under Green, Johnson and their progeny, however, the separate conviction and all its consequences - including the enhancement for that conviction - should have been dismissed.

In response, the prosecution may attempt to rely on State v. Vladovic, 99 Wn.2d 413, 662 P.2d 853 (1983), in arguing that separate convictions and enhancements for the counts involving Mariah and Johnston were proper. Such an attempt would not be surprising, as that is the position the prosecution took at sentencing. When the trial court expressed its serious concern about the separate convictions for unlawful imprisonment and robbery, the prosecutor argued that it had named only Rita as the "victim" of the robbery, so that the restraint of Mariah and Johnston could support convictions for separate restraint crimes. SRP 18. The court apparently accepted that theory in deciding to add separate points to the offender score for the unlawful imprisonment convictions with Mariah and Johnston as the victims. SRP 26.

There is a serious flaw with this reasoning, however, and with reliance on Vladovic in this case, because the facts and allegations here are far different than those in Vladovic. In Vladovic, a defendant entered a multiple office building on the campus of a university, rounded up people by taking them from separate offices into one room, taped their eyes and bound their hands, then took one of them to another room where they tried to force him to open a safe at gunpoint and then took money from him. 99

Wn.2d at 415. Vladovic was charged with kidnaping the people that had been rounded up and bound, as well as robbery for taking the money from the man who had tried to open the safe. 99 Wn.2d at 415-16. Because the victims of the kidnap crimes and the harm caused by those restraints were *not* the same as the restraint used to rob the man of his money, the Court held, the restraint crimes did not "merge" into the robbery. 99 Wn.2d at 415-16.

The flaw with relying on Vladovic here is that, in this case, the restraints used against Mariah and Johnston, just as the restraint used against Rita, were, in fact, the same restraints used for commission of the robbery of the home. The "to-convict" for the robbery makes this clear. That instruction provided, in relevant part, that to prove King guilty of the first-degree robbery crime, the prosecution had to prove:

> (1) That on or about the 3rd day of August, 2005[,] the defendant unlawfully took personal property, not belonging to the defendant, from the person or in the presence of Rita Freed;
>
> (2) That the defendant intended to commit theft of the property;
>
> (3) That the taking was against the person's will by the defendant's *use or threatened use of immediate force, violence or fear of injury to Rita Freed and/or members of her family;*
>
> (4) That the force or fear was used by the defendant to obtain or retain possession of the property, *or to prevent or overcome resistance to the taking*, or to prevent knowledge of the taking; [and]
>
> (5) That in the commission of these acts or in immediate flight therefrom the defendant displayed what appeared to be a firearm or other deadly weapon[.]

CP 198 (emphasis added). The prosecution's theory was that the robbery

was committed when "Gary and Ben pointed the guns *at them*," i.e., all of the people in the house, tied up Rita, "did the same thing to Mariah," and kept everyone there at gunpoint. See RP 1256-60 (emphasis added).

Thus, the use of force (pointing the gun), the threat of force (the threat implicit in pointing a gun), the threat of violence (the gun, the tying up, the situation), the fear of injury (the gun, the tying up, the situation) - all of these things was not based upon the restraint to Rita alone but rather the restraint of *all* the women there - Rita, Mariah and Johnston. There was no "independent purpose" for restraining Mariah and Johnston, either with the gun or with the physical restraints.

Thus, while in Vladovic the "force or fear" used to commit the robbery was the use of the gun against the robbery victim, here the "force or fear" used was the use of the gun against the robbery victim *and* the restraint of that victim *plus* Mariah and Johnston. Further, while in Vladovic the defendant took people out of their separate offices in a larger building and moved them into a single room, here, there were no such independent movements of individuals from different separate spaces. All of the people involved were in the same area, restrained for the same purpose - the robbery of the house they were in.

As a result, the restraints of Mariah and Johnston were not separate, independent crimes but rather incidental to the crimes of robbery and burglary with which Mr. King was separately charged and convicted. This Court should so hold.

Removing the two points added for the counts involving Mariah and Johnston further reduces the offender score from the corrected number

which is required after dismissal of the improper harassment conviction. Further, because the three unlawful imprisonment counts included three separate firearm enhancements which were ordered to run consecutively, additional amendment to the sentence to remove that "flat time" is required. This Court should reverse, dismiss the separate convictions for the three counts of unlawful imprisonment, and order resentencing based upon the corrected number of convictions and enhancements.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 5th day of December, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, Washington, 98402;

to Mr. Gary R. King, DOC 310269, Clallam Bay Corr. Center, 1830 Eagle Crest Way, Clallam Bay, WA. 98326.

DATED this 8th day of December, 2008.

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APPENDIX A

The verbatim report of proceedings consists of 24 volumes.

Unfortunately, some of the volumes contain several different days, which are separately paginated, while some are chronologically paginated.

The volumes will be referred to as follows:

-the 14 volumes containing the trial proceedings of March 8, 12, 15, 20, 21, 26-29 and April 2-3, 2007, as "RP;"

-September 27, 2005, as "1RP;"

-January 25, 2006, contained in the volume with May 9 and July 11, 2006, but separately paginated, as "2RP;"

-April 12, 2006, as "3RP;"

-April 27, 2006, contained in the volume with November 2, 2006, but separately paginated, as "4RP;"

-May 9, 2006, contained in the volume with January 25 and July 11, 2006, but separately paginated, as "5RP;"

-July 11, 2006, contained in the volume with January 25 and May 9, 2006, but separately paginated, as "6RP;"

-July 26, 2006, as "7RP;"

-November 2, 2006, contained in the volume with April 27, 2006, as "8RP;"

-January 16, 2007, as "9RP;"

-March 8, 2007, as "10RP;"

-June 1, 2007 as "11RP;"

-Sentencing proceedings of September 7, 2007, as "SRP."

INSTRUCTION NO. 44

To convict the defendant of the crime of Harassment, as charged in Count IX, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 3rd day of August, 200~~6~~5, the defendant knowingly threatened to cause bodily injury immediately or in the future to Jay Freed;

(2) That the words or conduct of the defendant placed Rita Freed and/or Mariah Freed and/or Leola Johnston in reasonable fear that the threat would be carried out;

(3) That the defendant acted without lawful authority; and

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

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.