

No. 40003-1-II

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

STATE OF WASHINGTON,
Respondent,
v.
ALLAN R. SIMMONS
Appellant.

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

The Honorable, Anne Hirsch, Judge
Cause No. 09-1-00693-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court erred in allowing Mr. Simmons' convictions for second degree assault with sexual motivation (Count II) and first degree rape (Count I).
2. Whether the trial court erred in calculating Counts I and II for the purpose of calculating Mr. Simmons' offender score.
3. Whether Mr. Simmons suffered from ineffective assistance of counsel when defense counsel failed to object to Mr. Simmons' charges of second degree assault with sexual motivation and first degree rape.
4. Whether the trial court erred in finding that Mr. Simmons' Illinois conviction for robbery was comparable to a "most serious offense" in Washington, for the purpose of sentencing as a "Persistent Offender" under RCW 9.94A.525(b)(ii).

B. STATEMENT OF THE CASE.

The State accepts the Appellant's statement of the case, with the following additions and clarifications:

The victim, G.S., was in downtown Olympia on April 11, 2009, to attend a cast party for Harlequin Productions, her employer. (10/12-5/09 RP 34). The cast party continued late into the night. (10/12-5/09 RP 35). When G.S. left the cast party with her friend, Darren, they walked back to their respective cars that were parked behind the theater. (10/12-5/09 RP 36). As Darren

drove away, Mr. Simmons approached G.S. and struck up a conversation. Id. Mr. Simmons seemed “very nice” and “friendly,” continuing to talk with G.S. for over an hour,. (10/12-5/09 RP 36-7). In the course of the conversation, Mr. Simmons introduced himself as “Allan” and showed G.S. his driver’s license to verify his age. (10/12-5/09 RP 37-8). At approximately 4 a.m., G.S. stated she had to go home to bed and started to leave. (10/12-5/09 RP 38). At this point, Mr. Simmons asked for a ride home, to which G.S. agreed after initial hesitation. Id. Towards the end of the drive, Mr. Simmons’ behavior changed, giving G.S. “the creeps.” (10/12-5/09 RP 39). His speech and manner became agitated and he was unclear about driving directions or where he lived. Id. At this point G.S. stopped in a driveway to let Mr. Simmons out of the car, her foot on the brake. (10/12-5/09 RP 40-1).

Mr. Simmons opened the door in the pretense of exiting the car; however he then turned around, punching G.S. directly in the face, multiple times. (10/12-5/09 RP 41). By the end of the attack, G.S.’s nose clogged with blood and her face “felt wet.” (10/12-5/09 RP 42). At trial it was adduced that this initial attack caused G.S. to release the brake, causing the car to crash through a wooden gate and continue 100 feet down a into a tree and a plastic pot. (10/12-

5/09 RP 85-7). The car then reversed, coming to rest atop a mailbox across the road. *Id.*

Following this attack, Mr. Simmons began to remove G.S.'s pants. (10/12-5/09 RP 42). When G.S. begged him not to rape her, he told her to "shut up." (10/12-5/09 RP 42-3). When G.S. attempted to fight back, Mr. Simmons repeatedly punched her in the face. (10/12-5/09 RP 43). Mr. Simmons' height is 6'5" and G.S. is 5'1". (CP 3, 6). G.S. realized that she lacked the physical strength to properly fight back, and risked even more injury if she attempted to do so. (10/12-5/09 RP 43). At this point, G.S. believed she was going to die at the hands of Mr. Simmons and repeatedly begged him not to kill her. *Id.* Mr. Simmons again told G.S. to "shut up" and removed her boots, pants and underwear. *Id.* G.S., terrified, asked Mr. Simmons if he was to rape G.S., would she be allowed to live, to which Mr. Simmons replied "yes." (10/12-5/09 RP 43). Consequently, G.S. allowed Mr. Simmons to rape her, all the while begging him to leave her alone. (10/12-5/09 RP 44). G.S. asked Mr. Simmons if he was using a condom, and he said yes, he was. (10/12-5/09 RP 60). However, the later medical examination revealed quantities of Mr. Simmons' semen inside G.S.'s vagina. (10/12-5/09 RP 248).

After an indeterminable amount of time, Mr. Simmons “agreed to let [G.S.] go.” (10/12-5/09 RP 45). Mr. Simmons then left G.S., her car parked in a ditch, saying he was going to go get help. (RP 45). At this point, G.S. was covered in blood, as was the front passenger compartment of her car. *Id.* at 45, 108. Despite her injuries, G.S. managed to call 911 on her cell phone. (10/12-5/09 RP 45). When police investigators found her, she was “bleeding all over her face, nose, [and] her mouth.” *Id.* at 97. Her hair was full of blood and one of her eyes was completely bloodshot from the blows. (10/12-5/09 RP 48, 55). A seasoned police investigator of 11 years testified that the severity of G.S.’s wounds rendered him “speechless.” *Id.* at 97.

G.S. provided the police with a description of Mr. Simmons, including his first name and that he worked at Taco Bell. (10/12-5/09 RP 273-4). The subsequent police investigation led to Mr. Simmons. When Mr. Simmons was first questioned by police as to his whereabouts on the night of April 11, 2009, he told police that he was with his girlfriend, Stacey Green. (10/12-5/09 RP 279). According to Detective Ivanovich’s testimony, Mr. Simmons “was adamant that he was with Stacey that entire time, from when she picked him up at 8:00 pm on Saturday until almost noon on

Sunday.” (10/12-5/09 RP 279). Mr. Simmons was specifically questioned as to whether he had sexual contact with anyone other than Ms. Green during that week, and he said he had not. (10/12-5/09 RP 281). When police sought to verify this alibi with Ms. Green, Ms. Green denied having been with Mr. Simmons that night.(10/12-5/09 RP 156, 161-2). Mr. Simmons later changed his alibi, stating that he went to downtown Olympia with his friend Tyrone, and that he eventually got in a fight with a bum, resulting in the wounded knuckle the police had observed on Mr. Simmons’ right hand. (10/12-5/09 RP 281-2, 290). At trial, Ms. Green testified this was the same story Mr. Simmons told her when he arrived home at 5:30 am on April 12th. (10/12-5/09 RP 157). Ms. Green also testified that Mr. Simmons was covered in blood, with a scratch on his face and his adrenaline “pretty high.” *Id.*

The police investigation yielded further evidence against Mr. Simmons, including the discovery of his cell phone in G.S.’s car, and a Taco Bell hat covered in G.S.’s blood (CP 94; 10/12-5/09 RP 287-8). Following arrest, Mr. Simmons changed his story for a third time in a letter to Ms. Green and her family. (10/12-5/09 RP 301-2). In this letter, Mr. Simmons admitted to sexual contact with G.S., but maintained that the sex was consensual and that it ended in a fight,

during which G.S. drove into a ditch and Mr. Simmons punched G.S. in the face. (10/12-5/09 RP 302). Mr. Simmons swore this was the first time he hit a woman. (10/12-5/09 RP 302).

Following conviction of both second degree assault with sexual motivation and first degree rape, it was revealed that Mr. Simmons had three out-of-state convictions, two of which the State argued were comparable to “most serious offenses” under RCW 9.94A.030(34), by the Persistent Offenders Accountability Act (“POAA”). Mr. Simmons’ first “most serious” offense was not challenged by defense counsel; it was a conviction for aggravated assault and battery from DeKalb County, Illinois. (11/19/09 RP 4). This offense was committed against a work colleague of Mr. Simmons. (CP 81). Mr. Simmons placed his foot next to the victim’s head while riding in a car, and a fight commenced when the victim asked Mr. Simmons to move his foot. *Id.* The verbal altercation turned physical when Mr. Simmons grabbed the victim and began to punch him repeatedly, causing the victim to fall to the ground, where Mr. Simmons then proceeded to kick him in the face. *Id.* The victim, unable to speak or move his mouth, was transported to the hospital, where it was determined that his jaw was broken and was subsequently wired shut. *Id.*

Mr. Simmons' second Illinois conviction was challenged by defense counsel as insufficient to constitute a "most serious offense." (11/19/09 RP 4). The factual basis for the criminal charge was an assault which resulted in hospitalization of the victim as well as the destruction of her cell phone. (CP 88). The victim, Antoinette Spodark, was walking down the street in Winnebago County, Illinois, when Mr. Simmons approached her, placed his right arm around her neck, and dragged her 30 feet, punching her repeatedly in the back of the head. (07/20/07 RP 14). As Ms. Spodark yelled into her cell phone for someone to call the police, Mr. Simmons grabbed her phone and broke it in half. *Id.* He then slammed Ms. Spodark's head into the sidewalk approximately three times before fleeing. *Id.* Ms. Spodark was subsequently admitted to Swedish American Hospital. (07/20/07 RP 14). Mr. Simmons was apprehended and positively identified as the attacker. *Id.*

The Illinois court expressed reluctance when accepting Mr. Simmons' guilty plea, noting this resolution was only acceptable because the State was unable to find the victim. (07/20/07 RP 15-6). The court stated, "I would hope that the State has made a bona fide effort to find [Ms. Spodark] because, frankly . . . you have a bad record and this is a bad case." *Id.*

This conviction was challenged by defense counsel on the basis that the Illinois robbery statute was a crime of general intent, whereas the Washington statute articulated a crime of specific intent. (11/19/09 RP 19-20). The sentencing court considered and subsequently rejected this argument, concluding that the Illinois and Washington statutes were legally comparable for the purposes of the POAA. (11/19/09 RP 25). The court noted that both statutes contained "similar if not identical language," and that while the Illinois statute did not articulate a particular state of mind, it specified that any level of criminal culpability would apply absent specification. *Id.* Further, the factual basis of Mr. Simmons' Illinois conviction was found to meet Washington statutory requirements for second degree robbery. (11/19/09 RP 25). The sentencing court stated, "The record of the guilty plea that was taken from Mr. Simmons by the [Illinois] Court in July of 2007 show[s] . . . by a preponderance of the evidence that the Court was not only extremely concerned about the extreme violence . . . committed by Mr. Simmons on that victim, but the Court was also concerned about taking a plea at a lower level of culpability given the facts that were alleged. The Court in that case went in detail over Mr. Simmons' rights that he was giving up. They went over the facts in

the case that were alleged. Mr. Simmons stipulated to the facts. He acknowledged the rights he was waiving by entering his plea, and the Court accepted this plea.” (11/19/09 RP 25-6). On this basis, the sentencing court found Mr. Simmons’ robbery conviction to constitute a second “most serious offense.” *Id.* Mr. Simmons conviction for rape in the first degree was thus his third “most serious offense” and he was subsequently sentenced to life in prison pursuant to the POAA.

Mr. Simmons now appeals his convictions of second degree assault with sexual motivation and first degree rape, as well as the sentencing court’s finding of his Illinois conviction as a “most serious” offense.

C. ARGUMENT.

1. Mr. Simmons’ convictions for second degree assault with sexual motivation and first degree rape do not constitute double jeopardy.

The first issue on appeal is whether Mr. Simmons’ conviction for second degree assault with sexual motivation should be merged into his conviction for first degree rape. Mr. Simmons argues that the factual basis of his assault charge was incidental to his charge of rape in the first degree, and therefore these two convictions constitute double jeopardy. It is the State’s position there was

sufficient evidence to support two separate convictions, in light of the deferential standard imposed on the court for review of a jury's verdict.

The State may bring (and a jury may consider) multiple charges arising from the same criminal conduct in a single proceeding. *State v. Michielli*, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997). Courts may not, however, enter multiple convictions for the same offense without offending double jeopardy. *State v. Vladovic*, 99 Wn.2d 413, 422, 662 P.2d 853 (1983) (citing *Albernaz v. United States*, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981)).

Protection against double jeopardy is afforded by both state and federal constitutions. The Fifth Amendment to the United States Constitution provides “[n]o person shall ... be subject for the same offense to be twice put in jeopardy of life or limb” Article I, section 9 of the Washington Constitution mirrors the federal constitution stating “[n]o person shall be ... twice put in jeopardy for the same offense.” “Washington's double jeopardy clause offers the same scope of protection as the federal double jeopardy clause.” *In re Pers. Restraint of Percer*, 150 Wn.2d 41, 49, 75 P.3d 488 (2003) (citing *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)).

Both constitutions prohibit “(1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense imposed in the same proceeding.” *Percer*, 150 Wn.2d at 48-49 (citing *State v. Bobic*, 140 Wn.2d 250, 260, 996 P.2d 610 (2000); *Gocken*, 127 Wn.2d at 100).

There is statutory protection against double jeopardy afforded by RCW 10.43.050, which provides in part: “Whenever a defendant shall be acquitted or convicted upon an indictment or information charging a crime consisting of different degrees, he cannot be proceeded against or tried for the same crime in another degree, nor for an attempt to commit such crime, or any degree thereof.” However, the legislature can criminalize every step leading to a greater crime, if it so chooses. *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005).

“Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense.” *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004).

To fully assess legislative intent, Washington courts consider the four-part test enunciated in *State v. Freeman*, 153 Wn.2d. First, the court looks at the statutory language to determine if separate punishments are specifically authorized. *State v. Freeman*, 153 Wn.2d at 776. If nothing can be clearly ascertained from the language itself, the court applies then the “same evidence” or “same elements” test. *Id.* This is the indistinguishable from the test enunciated in *Blockberger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 816, 100 P.3d 291 (2005).

This test assesses whether one offense includes an element not included in the other and whether proof of one offense would not necessarily prove the other. *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). If the two charges differ on either the elements or the required proof, then the crimes are presumed to be different for double jeopardy purposes. *Id.* Third, the merger doctrine determines legislative intent even if two crimes have formally different elements. *Freeman*, 153 Wn.2d at 772.

Finally, even if the two convictions appear to be for the same offense or for charges that would merge at the abstract level, the court must determine whether there is an independent purpose or

effect for each offense based on the facts of the case. *Freeman*, 153 Wn.2d at 773. If so, each crime may be punished as a separate offense without violating double jeopardy. *Id.* This is a well established exception to the merger doctrine that courts will allow two convictions even when they formally appear to be the same crime under other tests. *State v. Freeman*, at 778. These offenses may in fact be charged separately when there is a separate injury to the "the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element." *Freeman*, 153 Wn.2d at 779, citing *State v. Frohs*, 83 Wn. App. 803, 807, 924 P.2d 384 (1996) (citing *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979)). It is on this basis that courts determine the existence of an independent purpose or effect to each, so that they may be punished as separate offenses. *State v. Frohs*, 83 Wn. App. at 807 (citing *Johnson*, 92 Wn.2d at 680).

In 1979, the Washington Supreme Court found that the Legislature intended that actions perpetuating a rape, without an independent purpose or effect, should be punished as an incident of the crime of rape and not as a separate crime. *State v. Johnson*, 92 Wn.2d 671, 681, 600 P.2d 1249 (1979). This exception does not

apply merely because the defendant used more violence than necessary to accomplish the crime. *Freeman*, 153 Wn.2d at 779. Rather, the test is whether the unnecessary force had a purpose or effect independent of the crime. *Id.*

Mr. Simmons was convicted of first degree rape and second degree assault with sexual motivation. Assault in the second degree is defined by RCW 9A.36.021(1)(a): "A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree, intentionally assaults another and thereby recklessly inflicts substantial bodily harm." This charge was elevated by a special allegation of sexual motivation under RCW 13.40.135(1) which states:

"The prosecuting attorney shall file a special allegation of sexual motivation in every criminal case, felony, gross misdemeanor, or misdemeanor, other than sex offenses as defined in RCW 9.94A.030 when sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding of sexual motivation by a reasonable and objective fact finder."

"Substantial bodily harm" is defined as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of

any bodily part or organ, or which causes a fracture of any body part.” RCW 9A.04.110(1)(b).

Division One held in *State v. Ashcraft*, 71 Wn. App. 444, 455, 859 P.2d 60 (1993), that serious bruising can constitute “substantial” bodily harm when the State produces sufficient evidence to persuade the trier of fact that the bruising rises to the level of “substantial disfigurement.” The jury found Ashcraft guilty of second degree assault for leaving bruise marks on a child after hitting the child with a shoe. *Ashcraft*, 71 Wn. App. at 450.

Mr. Simmons’ assault charge was predicated upon his initial physical attack on G.S. The assault was described to the jury as the attack made when Mr. Simmons opened the car door, pretending to leave. (10/12-5/09 RP 362). Mr. Simmons pretended he was going to exit the car, but instead turned around and punched G.S. in the face as she was preparing to back out of the driveway. *Id.*

It is the State’s position that Mr. Simmons’ initial attack illustrated an intention to inflict lasting physical harm to G.S., beyond the duration and scope of the rape. This was an attack of brutal physical force to an extent which encompassed not only

desire for sexual gratification but a clear intention to inflict substantial bodily injury.

Mr. Simmons was over a foot taller in height than his victim. (CP 3, 6). Given the disparity in size and strength between Mr. Simmons and G.S., Mr. Simmons' ability to physically subdue G.S. for the purpose of rape was not in question. Moreover, Mr. Simmons administered separate blows over the course of the rape, in order to "shut up" G.S. and stop her from struggling. (10/12-5/09 RP 43).

The severity of Mr. Simmons' initial attack demonstrates intent to cause long-lasting physical harm, rather than merely disable G.S. for the duration of the rape. The doctor who treated G.S. testified to two primary injuries resulting from the assault: the injury to G.S.'s eyes, namely the bruising, swelling, and bleeding, as well as the laceration to her nose and her "fat lip." (10/12-5/09 RP 185). Her nose was "sliced open" to the bone, and her nasal bone fractured. (10/12-5/09 RP 54-5). She was unable to open her mouth for the medical examination, on account of her injuries. (10/12-5/09 RP 186-7). She also suffered multiple chipped teeth. (10/12-5/09 RP 195). Her eyes were both blackened and swollen shut so that she could not open them the morning following the

attack. (10/12-5/09 RP 55). Her lips were so swollen that they lost definition (10/12-5/09 RP 55). It took a month and a half for her eyes to stop being bloodshot due to the severity of the blows. (10/12-5/09 RP 55). G.S.'s swollen black eyes did not heal for two weeks, and her chipped teeth were still not repaired by the time of trial. (10/12-5/09 RP 56; 11/19/09 RP 15). This initial assault inflicted discrete physical injuries requiring separate medical treatment, including a CAT scan. (10/12-5/09 RP 54). G.S. spent approximately two weeks in recovery on account of injuries unrelated to the rape, and was forced to miss work during this time as well. (11/19/09 RP 15). Thus the consequences of this assault extend beyond the rape in a clear and quantifiable way.

There are instances in Washington case law where significant violence or lasting injury can stand alone as a separate crime even when it occurs in the course of another criminal act. For example, in *State v. Prater*, 30 Wn. App. 512; 635 P.2d 1104 (1981), the court found that the effect and purpose of a first degree assault prevented it from merging with a second degree robbery charge. *State v. Prater*, 30 Wn. App. In *Prater*, the injury sustained by the first victim, Mr. Ross, when he was shot in the face was found to be a separate criminal act apart from the robbery because

it was not conducted for the purpose of obtaining money. The court found that by disabling the victim, the Prater brothers effectively hindered rather than aided the commission of the crime. *Id.* In contrast, the striking of the second victim, Mrs. Ross, in the course of the robbery was found to facilitate the robbery, because the blows were intended to induce her cooperation. *State v. Prater*, 30 Wn. App. at 516.

The State presented evidence at Mr. Simmons' trial sufficient to demonstrate that Mr. Simmons inflicted separate and distinct serious physical injury upon G.S. First degree rape requires forcible intercourse in addition to an elevating element of a weapon, abduction, or serious physical injury. RCW 9A.44.040. There is no statutory definition provided for "serious physical injury." RCW 9A.44.040(1)(c).

"Serious physical injury" was demonstrated by Mr. Simmons' repeated punches to G.S.'s face while removing G.S.'s clothing in order to rape her. (10/12-5/09 RP 43). During the rape, Mr. Simmons punched G.S. multiple times to stop her from struggling and to get her to take her clothes off. *Id.* As Mr. Simmons forcibly removed G.S.'s pants, she struggled, and in response, Mr. Simmons "punched [her] some more." (10/12-5/09 RP 43).

According to G.S. it was only when "I asked him if I let him rape me would he let me live and would he let me go, and he said yes, so I stopped fighting back and I – I let him rape me." (10/12-5/09 RP 43-4). It was only under fear for her life that G.S. stopped fighting and Mr. Simmons' physical abuse relented.

At trial, G.S. testified that "I didn't have the strength to fight back properly, and if I kept trying I was just gonna get hurt worse." (10/12-5/09 RP 43). During the rape, G.S. repeatedly begged for her life; at sentencing, she reiterated her fear:

I thought this man was going to kill me. I was convinced he was going to kill me. I repeatedly begged him not to kill me. There is no doubt in my mind that I was going to die. I did nothing to this man but talk to him and give him a ride home, and in return he brutally beat me and raped me. I did not understand what fear truly was until that night. The fear I felt was overwhelming and indescribable and will never completely leave me.

[11/19/09 RP 16].

Due to the graphic and violent nature of the attack, G.S. also sustained physical harm to her vaginal area, including tissue injuries. (10/12-5/09 RP 221).

Forcible compulsion is "physical force which overcomes resistance, or a threat, express or implied, that places a person in

fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped." RCW 9A.44.010(6). It is force "used or threatened to overcome or prevent resistance . . ." *State v. McKnight*, 54 Wn. App. 521, 527, 774 P.2d 532 (1989) (quoting 3 CHARLES TORCIA, WHARTON'S CRIMINAL LAW § 288, at 34 (14th ed. 1980)). And, it is "more than the force normally used to achieve intercourse or sexual contact." *State v. Ritola*, 63 Wn. App. 252, 254, 817 P.2d 1390 (1991). The State presented separate evidence to establish forcible compulsion, namely that the physical force used by Mr. Simmons, both in his disproportionate size and strength to the victim, as well as his forcible removal of her clothing, reached the threshold of "forcible compulsion." To complete the rape, Mr. Simmons forcibly removed G.S.'s clothing and got on top of her. (10/12-5/09 RP 43-4). G.S. was five foot one inch, whereas Mr. Simmons was six foot five inches. (CP 3, 6). Mr. Simmons used this physical advantage to physically force himself upon G.S., as well as removing her pants, boots and underwear. (10/12-5/09 RP 43). In *State v. Atkins*, 130 Wn. App. 395, 402, 123 P.3d 126 (2005), the court recognized that a man using his disproportionate size and strength to force himself upon a woman, within the

confines of a car, was sufficient evidence to constitute "forcible compulsion." *Atkins*, 130 Wn. App. at 401.

Washington courts recognize that a finding of sexual motivation does not require proof of intercourse by "forcible compulsion," the element required to prove rape under RCW 9A.44.040. The purpose of "sexual motivation" as an aggravating factor is to distinguish and hold culpable those offenders who commit sexually motivated crimes from those offenders who commit the same crimes without sexual motivation. *State v. Thomas*, 138 Wn.2d 630, 636, 980 P.2d 1275 (1999), citing *State v. Halstien*, 122 Wn.2d 109, 124, 857 P.2d 270 (1993). "In the context of an offense that is inherently sexual -- for example, rape --the inherent sexual quality of the offense has necessarily been taken into account by the Legislature in setting the presumptive sentence." *State v. Thomas*, 138 Wn.2d 630, 980 P.2d 1275 (1999).

Accordingly, sexual motivation applies only to offenses that are not inherently sexual, ascribing additional culpability when it is proved that the crime was undertaken for the purpose of sexual gratification. *Id.* at 636. In *State v. Atkins*, 130 Wn. App., the court allowed the allegation of sexual motivation to stand independent of

the subsequent instance of rape. *State v. Atkins*, 130 Wn. App at 402. The court distinguished the purpose of the non-sex offense from the act of rape, noting that Atkins “confuses the purpose of the unlawful imprisonment with the necessary elements for second degree rape. The State recognized that the unlawful imprisonment here was sexually motivated and charged Mr. Atkins accordingly. But, even if the rape had never been accomplished--if Mr. Atkins had abandoned his rape--he would still be guilty of unlawful imprisonment with a sexual motivation.” *State v. Atkins*, 130 Wn. App. at 402. The State submits that likewise, an allegation of sexual motivation against Mr. Simmons’ assault stands independent of the evidence supporting his rape conviction.

The evidentiary distinction between the two charges was consistently emphasized at trial. Police investigators testified to a temporal distinction between the physical assault and the rape, further defining these acts as separate and discrete. (10/12-5/09 RP 78-86). As Mr. Simmons opened the door to exit the vehicle, G.S. kept the car in place using the brake, while the car remained in drive. As a result of the assault, G.S.’s foot came off the brake, causing the car to lurch forward and travel approximately 100 feet, breaking through a wooden driveway gate, crashing into a potted

tree and a pile of dirt. (10/12-5/09 RP 86). The car then reversed with enough force to back into a ditch on the opposite side of the road and “high center” on several mailbox posts, breaking the mailboxes off in the process (10/12-5/09 RP 87, 99-100).

The distinction between these two attacks was also illustrated by the medical evidence adduced at trial. For example, the physical injuries sustained from the assault were distinguished from the injuries of the rape by separate testimony from medical experts. The doctor who examined G.S. testified that she had been assaulted in two distinct ways: physically and vaginally. (10/12-5/09 RP 177). The doctor testified that he examined and treated her head injuries. The Sexual Assault Nurse Examiner testified separately as to the injuries stemming from the rape. (10/12-5/09 RP 216). While it is possible this distinction reflected only standard examination procedure, the fact that the State continually emphasized the legal and factual distinctions between the assault and the rape in this case allows the separate testimony by each medical personnel to reinforce the distinction between the rape and the assault for the jury.

At closing, the State argued that the charges were predicated upon two separate attacks: “I’d submit to you there are

actually two separate assaults. There's the first assault that occurs at the beginning of the rape that enables the defendant to do that." (10/12-5/09 RP 362).

In his argument for a merger, Mr. Simmons relies upon *State v. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007), in which the defendant was charged and convicted of homicide by abuse, felony murder based on criminal mistreatment, and assault. Womac's convictions for assault in the first degree and homicide by abuse constituted the same criminal conduct in that "they involve[d] the same victim" and "occurred at the same time and place" and the finding that Womac could not have committed felony murder in the second degree without committing assault in the first degree. *Womac*, 160 Wn.2d at 656. The facts of *Womac*, as well as the application of the law, are different than the present case. Womac was convicted on the basis that he injured his child so severely that the child died as a result. In *Womac*, the Washington Supreme Court vacated the felony murder and assault convictions on the basis of double jeopardy.

The State does not dispute that charges may be merged in cases where a merger is supported by the facts. In *Womac*, the

singularity of the offense was reflected in both the findings of the jury and the sentencing court, and the State conceded there was same criminal conduct. *State v. Womac*, 160 Wn.2d at 656. While Womac killed his child, there was factually only one murder, despite convictions for two separate homicide charges, thus it was reasonable for the court to vacate the felony murder conviction. *Womac*, 160 Wn.2d at 656.

In the recently released Division III decision, *State v. Williams*, 2010 Wash. App. (COA No. 27924-3-III, filed 6-15-2010), the court relied upon *State v. Johnson*, 92 Wn.2d, to find that Mr. Williams' convictions of second degree assault with sexual motivation merged into his first degree rape conviction. *State v. Williams*, 2010 Wash. App. The Washington Supreme Court in *State v. Johnson*, 92 Wn.2d 671, 681, 600 P.2d 1249 (1979), held the legislature intended that actions committed in perpetration of a rape, without an independent purpose or effect, should be punished as an incident of the crime of rape and not as a separate crime.

Johnson was convicted of rape, kidnapping, and assault, all in the first degree, for picking up two teenage hitchhikers, providing them with intoxicants, locking them in his home, and raping them while carrying a knife and making threats. The court noted that in

any given case charging first degree rape, the State must prove that the rape was accompanied by an act such as assault or kidnapping that is defined as a crime by a separate statute:

We hold that, as to any such offense which is proven, an additional conviction cannot be allowed to stand unless it involves some injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element.

Johnson, 92 Wn.2d at 680.

In *Williams*, after smoking drugs together, the victim, K.W. turned to walk away from Mr. Williams, and Mr. Williams grabbed her from behind with his forearm around her neck. *State v. Williams*, 2010 Wash. App at 2. He strangled K.W. until she lost consciousness; when K.W. awoke, her shoes, pants, and underwear had been removed. *Id.* The court merged the second degree assault with sexual motivation and the first degree rape, stating: "The only assault here was the attack and strangulation of K.W. before and during the act of rape." The court found that the assault was used to effectuate the rape, and that it had no purpose or effect independent of the rape. *Williams*, 2010 Wash. App. at 13.

In both *Johnson* and *Williams*, the appellate courts found the crimes had been committed to compel the victims' submission to acts of sexual intercourse. *Johnson*, 92 Wn.2d at 680; *Williams*, 2010 Wash. App. at 13. These crimes were characterized as resulting in no injury independent of or greater to the injury of rape. By contrast, in the present case the State proved at trial that serious physical harm was done both during the rape and independent of the rape. In this vein, the present case may be contrasted to *State v. Martin*, 149 Wn. App. 689, 205 P.3d 931 (2009), where the question was whether a conviction for second degree assault and attempted third degree rape were the "same offense." *State v. Martin*, 149 Wn. App. at 698. In *Martin*, the defendant's offenses were held to merge because both the assault and attempted rape "were predicated on the same conduct: [his] assault with intent to rape." *Martin*, 149 Wn. App.. The defendant broke into a room where the victim was using the phone, pinned her arms above her head and started to pull down her pants before someone pulled him away. *Martin*, 149 Wn. App. The assault was the substantial step towards the rape; there was no independent purpose. The evidence required to support *Martin's* conviction for attempted third degree rape was the same evidence used to

convict him of second degree assault. Under the Blockburger test, the two crimes were the same offense.” *Martin* at 700-01. Unlike *Martin*, 149 Wn. App., the present case did not involve a single act of assault that elevated the rape charge to the first degree. Here, the evidence included two distinct brutal acts of assault. It cannot be said that the first assault to G.S.’s face, even if it were committed with intent to rape, was necessarily the “same offense” or the same injury as the act of forcible rape with “serious physical injury.”

2. Mr. Simmons’ offender score was correctly calculated, and Mr. Simmons was not denied effective assistance of counsel at sentencing.

Mr. Simmons argues that the trial court erred in failing to find that Counts I and II encompassed the same course of criminal conduct for the calculation of Mr. Simmons’ offender score. Mr. Simmons also challenges this calculation on the basis of ineffective assistance of counsel. Mr. Simmons argues that because defense counsel failed to challenge Counts I and II on the basis of same criminal conduct, Mr. Simmons was prejudiced by an inaccurate offender score. Mr. Simmons fails to meet the second prong of the relevant legal test because there was no prejudice in this case.

If multiple crimes encompass the same objective intent, involve the same victim, and occur at the same time and place, they are considered to be the same course of criminal conduct for purposes of determining an offender score. *State v. Dunaway*, 109 Wn.2d 207, 217, 743 P.2d 1237 (1987). In general, a defendant may challenge an illegal or erroneous computation of an offender score for the first time on appeal. See *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (citation omitted). But where a defendant affirmatively agrees to his offender score calculation during sentencing, he may not argue that his criminal acts constituted the same criminal conduct for the first time on appeal. *State v. Nitsch*, 100 Wn. App. 512, 522, 997 P.2d 1000 (2000).

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. *State v.*

Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when “but for the deficient performance, the outcome would have been different.” *In the Matter of the Personal Restraint Petition of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel’s performance and the analysis begins with a strong presumption that counsel was effective. See *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995).

Mr. Simmons’ Judgment and Sentence does not include a clear offender score. (CP 160). Rather, the offender score for each count is merely listed “N/A” with a standard range of “life.” *Id.* Defense counsel calculated two separate offender scores within its submitted sentencing brief.¹ (CP 109-10). However, at sentencing, defense counsel requested only the low end of the standard range for rape in the first degree, 178 to life. (11/19/09 RP 21).

The State recognizes that the trial court in Simmons’ case did not engage in a same-criminal-conduct analysis on the record.

¹ There were two separate calculations offered in defense counsel’s sentencing brief, each based upon an offender score of seven. Defense counsel calculated an offender score of seven for first degree rape (178-236 months to life) and an offender score of seven for second degree assault with sexual motivation (43-57 months). (CP 109-10).

(11/19/09 RP 22-26). Presumably, because defense counsel challenged Mr. Simmons' Illinois conviction for robbery, and because either of Mr. Simmons' convictions in the present case would constitute a "third strike" under RCW 9.94A.030, the court did not feel it necessary to conduct a same-criminal-conduct analysis.

Likewise, it is unnecessary to consider an argument of ineffective counsel on appeal because it is clear there was no prejudicial effect on Mr. Simmons' offender score. Even if the two convictions were merged at sentencing, Mr. Simmons would still be sentenced under RCW 9.94A.525, based upon his prior Illinois convictions. Rape in the first degree and assault in the second degree with sexual motivation are listed as a qualification as a "persistent offender" at RCW 9.94A.030(b)(ii). Given Mr. Simmons' criminal history, this conviction would be calculated as a third strike regardless of his offender score, resulting in lifetime confinement. Based upon the facts laid out in this brief, there was a clear evidentiary basis to conclude that Mr. Simmons was guilty of rape in the first degree and assault in the second degree with sexual motivation. Thus there was no prejudice in this case and Mr. Simmons' argument fails.

3. Mr. Simmons' Illinois conviction for robbery is the equivalent of Robbery in the Second Degree and thus constitutes a "most serious crime" for the purpose of his "three strikes" calculation.

Finally, Mr. Simmons challenges his sentence of life without parole on the basis that his Illinois conviction for robbery is not equivalent to the Washington crime of robbery in the second degree. Mr. Simmons contends these two crimes are not legally comparable because the Illinois crime is a crime of general intent, whereas the Washington crime is a crime of specific intent. (Appellate Brief 18).

This argument was already raised at sentencing and the lower court found the two charges legally and factually comparable for the purpose of sentencing Mr. Simmons as a "persistent offender" per RCW 9.94A.030. (11/19/09 RP). It is the State's position that the trial court was correct in its finding, and that Mr. Simmons' disputed conviction for robbery is legally equivalent to a "most serious offense" under Washington law. Further, the facts of Mr. Simmons' previous conviction meet the statutory requirements of RCW 9A.56.210, Robbery in the Second Degree, under the test for factual comparability.

The Illinois statute states:

(a) A person commits robbery when he or she takes property, except a motor vehicle covered by Section 18-3 or 18-4, from the person or presence of another by the use of force or by threatening the imminent use of force.

(720 ILCS 5/18-1) (from Ch. 38, par. 18-1) Sec. 18-1. Robbery. [Emphasis added]

The Washington statute reads:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.210 [Emphasis added].

An out-of-state conviction may not be used as a strike unless the State proves by a preponderance of the evidence that the conviction would constitute a strike offense under the POAA. *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). To conduct a comparability analysis under the POAA, a trial court must first determine whether the prior out-of-state conviction is legally comparable to a Washington “strike” offense. *In re Pers. Restraint*

of *Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). “Legal comparability” requires the court to compare the statutory elements of the in-state strike offense to the out-of-state offense; if the elements are the same or similar, then the out-of-state conviction is a prior strike offense under the POAA. *Lavery*, 154 Wn.2d at 255. If the statutory elements of the crimes are not facially similar, *Lavery* precludes the trial court from examining the facts underlying the prior out-of-state conviction to determine whether the offender's conduct would have violated a comparable Washington statute, where those facts were not previously proven to a jury beyond a reasonable doubt or admitted by the defendant entering a guilty plea. *Lavery*, 154 Wn.2d at 256-58; see also *Apprendi*, 530 U.S. at 490. Mr. Simmons entered a guilty plea to his charge of robbery, and thus the underlying facts of his case can be reviewed to determine whether they meet the requisite legal threshold for the Washington crime of Second Degree Robbery.

Mr. Simmons relies upon *State v. Bunting*, 115 Wn. App. 135, 61 P.3d 375 (2003) for the proposition that there is no comparable specific intent element in the Illinois robbery statute. *Bunting* was sentenced under former RCW 9.94A.120 as a persistent offender, based in part upon his prior conviction for

armed robbery in Illinois. *Bunting*, 115 Wn. App. at 137. Washington State Court of Appeals Division I found that Bunting's prior conviction for armed robbery was not comparable to the Washington statute and thus did not constitute a "strike" for sentencing purposes. *Bunting*, 115 Wn. App. at 143. Bunting is distinguishable for the following reasons.

First, the court's legal analysis in *Bunting* was based upon an evaluation of the law as it was in 1972. Relying upon *People v. Banks*, 75 Ill. 2d 383, 388 N.E.2d 1244, 27 Ill. Dec. 195 (1979), Division I stated "it is clear that in 1972, the Illinois formulation of the crime of armed robbery did not require proof of specific intent to steal or deprive." *State v. Bunting*, 115 Wn. App. 135, 61 P.3d 375 (2003).

However, the court's legal analysis in *Bunting* is limited because Illinois courts issued conflicting opinions a number of times with regard to whether there was a specific intent element to robbery. Confusion over the intent element of robbery in Illinois law has been traced back as far as 1874. *People v. White*, 67 Ill.2d 107, 112, 365 N.E.2d 337 (1977). Even following the 1961 enactment, the lack of specified mental element in the statute led to inconsistent interpretations of the requisite intent for robbery and

armed robbery. White sought to establish consistency in 1977, that “the intent to deprive the person from whom the property is taken permanently of its use or benefit is an element of the crimes of robbery and armed robbery.” *White*, 67 Ill.2d at 117. However, the Illinois Supreme Court reversed this decision a short time later, holding in *People v. Banks*, 75 Ill. 2d 383, 388 N.E.2d 1244 (1979), that the intent to permanently deprive a victim of the use or benefit of the property under *White* was no longer applicable, and that robbery was not a specific intent crime. *People v. Banks*, 75 Ill. 2d 383, 388 N.E.2d 1244 (1979). In *Banks*, two years after the robbery indictment was issued, the defendant moved to dismiss the charge. 75 Ill. 2d at 385. The circuit court granted dismissal on the basis that the indictment failed “to allege the necessary element of intent to permanently deprive the victim of the use or benefit of the property pursuant to *People v. White*.” *Id.* The court in *Banks* subsequently held that *White* was overruled and that robbery does not require specific intent. *Banks*, 75 Ill. 2d at 392.

However, *Banks* was distinguished on its facts shortly thereafter. The *People v. Jones*, 149 Ill. 2d 288, 300, 595 N.E.2d 1071 (1992). In *The People v. Jones*, 149 Ill. 2d 288, 595 N.E.2d 1071 (1992), the Illinois Supreme Court again recognized an

implied element of intent to permanently deprive the victim of the property. The court in *Jones* applied the “abstract elements” test to determine whether theft was a lesser included offense of armed robbery, an analysis frequently applied in Illinois law. *Jones*, 149 Ill. 2d. The court found the crime of theft, which included a defined “knowing” element under section 16-1 of the Criminal Code, to be a lesser-included offense to the crime of robbery. *Id.* at 300-1. The Court found that robbery shared a common element of intent with theft, noting that “when a robbery is committed or attempted, common sense dictates that the perpetrator either ‘intends to deprive the owner permanently of the use or benefit of the property’” *People v. Jones*, 149 Ill. 2d at 299-300 (citing Ill. Rev. Stat. 1987, ch. 38, pars. 16-1(d)(1), (d)(2), (d)(3)). The court distinguished *Banks* as a “highly unusual” fact pattern and noted that in “most robberies, permanent deprivation is intended.” *Id.* at 300.

The Washington courts recognize that the statutory elements of RCW 9A.56.190 presuppose an intent to deprive the victim of the property as a necessary element of robbery. See, e.g., *State v. Byers*, 136 Wash. 620, 622, 241 P. 9 (1925); *State v. Carter*, 4 Wn. App. 103, 109, 480 P.2d 794 (1971). It is the State’s position this

case law demonstrates that both Illinois and Washington recognize a specific intention to deprive the victim of property and thus there is a legal basis for finding legal comparability between these two statutes.

There are also significant procedural distinctions between the present case and *Bunting*. In *Bunting*, the sentencing court's "most serious offense" analysis was based upon the information contained in the "Official Statement of Facts." *Bunting*, 115 Wn. App. at 142-3. Because *Bunting* pled guilty, the facts of the criminal allegation were never proven before a jury. *Id.* In addition, *Bunting* admitted guilt only to those facts put forward in the indictment, which listed merely the elements of the charge.² The Statement of Facts was not presented at the time of the change of plea; this document was only provided to the Department of Corrections by the assistant state attorney after both the change of plea hearing and the sentencing hearing. *Id.* The Court found that because the State provided no evidence that *Bunting* adopted the facts of the case during the change of plea, and because he agreed only to the

² The Indictment charged that: ". . . Kenneth E. Bunting committed an offense of armed robbery in that he, by use of force and while armed with a dangerous weapon, took an amount of United States currency (the exact amount which is unknown to said Grand Jurors) from the person and presence of Daniel Taylor, in violation of Chapter 38, Section 18-2, of the Illinois Revised Statutes 1971.

indictment, the element of intent to deprive was neither proved nor conceded by Bunting. *Bunting*, 115 Wn. App. at 143.

By contrast, in the case of Mr. Simmons' Illinois conviction, the State's Statement of Facts was read in detail in open court at Mr. Simmons' change of plea hearing, before he pleaded guilty and before the court accepted his guilty plea to the robbery charge. (07/20/07 RP 13, 16).

Mr. Simmons was read both the indictment and a full statement of facts before pleading guilty. The Court first read the indictment:

. . . Mr. Simmons, my understanding is you wish to plead guilty to Count I of this bill of indictment that says that on or about the 31st day of December 2006, in the county of Winnebago and state of Illinois, Allen Simmons committed the offense of robbery in that the said defendant knowingly took property, namely a cell phone, from the person of Antoinette Spodark, by the use of force in violation of Illinois law.

[07/20/07 RP 9]

Then, prior to entering Mr. Simmons guilty plea (07/20/07 RP 16), the Court read a Statement of the Facts, which recounted in detail the factual basis underlying Mr. Simmons' charge.

On December 31st of 2006, Antoinette Spodark was walking west on State Street and Fourth Street while talking on her cell phone. Ms. Spodark saw a black male later identified as Allen Simmons in the corner –

out of the corner of her eye. She looked to her left where she had seen him. And at that point, he was directly beside her.

He placed his right arm around her neck and dragged her about 30 feet north on 4th Street. While he dragged her, he punched her in the back of the head numerous times. Ms. Spodark yelled into [the] phone for someone to call the police. Mr. Simmons then grabbed the phone from her and broke it in half.

Mr. Simmons then grabbed Ms. Spodark by the shoulders and slammed her head into the sidewalk approximately three times. The defendant left this area after a witness yelled at him to stop and that she was calling the police. He was located at 100 North Madison and transported to Swedish American Hospital, where he was positively identified by the victim and the witness. All these events happened in the county of Winnebago, state of Illinois.

[07/20/07 RP at 13].

Thus the procedure at Mr. Simmons' change of plea was clearly different than that in Bunting. This is significant because the court in Bunting found the Statement of Facts and complaint to be inapplicable because they were brought by the State after Mr. Bunting had already plead guilty and been sentenced. *Bunting*, 115 Wn. App. at 142. Therefore, the court found that based on the indictment alone, there was no clear indication that intent to deprive was either proved or conceded to by Bunting's guilty plea. *Id.* at 143. By contrast, because the Statement of Facts was read in full to Mr. Simmons prior to any plea being entered, there existed a

sufficient evidentiary basis to demonstrate that Mr. Simmons, in admitting guilt, conceded to the facts underlying the robbery charge. It is the State's position that these facts sufficiently prove intent to deprive Ms. Spodark of the permanent use of her phone. By breaking Ms. Spodark's phone in half, Mr. Simmons demonstrated a clear intent to render this phone permanently unusable.

Because the facts of Mr. Simmons' charge were read in to the record before the Mr. Simmons pleaded guilty and before the court accepted the change of plea, unlike in Bunting, Mr. Simmons had the opportunity to dispute and object to these facts serving as the basis for the guilty plea. Mr. Simmons did not dispute or object to the statements of facts and instead entered his plea after the court considered those facts. The inclusion of the statement of facts in this case distinguishes it from Bunting and permitted both the Court and Mr. Simmons to critically consider the details of Mr. Simmons' case before the court accepted Mr. Simmons' guilty plea.

It bears further consideration that the Illinois court expressed reluctance when accepting Mr. Simmons' guilty plea, noting this resolution was acceptable only because the State was unable to find the victim. (07/20/07 RP 15-6). The court stated, "I would hope

that the State has made a bona fide effort to find [Ms. Spodark] because, frankly . . . you have a bad record and this is a bad case.” Id. Thus the facts of the case were not only fully recited in open court, but they were in fact emphasized.

The Thurston County sentencing court also found that Mr. Simmons’ actions met the factual comparability test. (11/19/09 RP at 25) It is clear from the record that the use of force applied by Mr. Simmons was sufficient to meet the standard set by Washington law. In *State v. Larson*, 60 Wn.2d 833, 376 P.2d (1962), the defendant was prosecuted for a robbery where there was evidence that the victim was knocked down and kicked. *State v. Larson*, 60 Wn.2d . In *Larson*, despite the fact that the victim could not remember the robbery because of intoxication, there was sufficient evidence to show that the property was taken "against his will." *State v. Larson*, 60 Wn.2d. In the present case, Mr. Simmons exercised a clear use of force when he placed his right arm around the neck of the victim, Antoinette Spodark, and proceeded to drag her 30 feet, while punching her repeatedly in the back of the head. (07/20/07 RP 14). Mr. Simmons then forcibly removed the phone from the victim’s hand while she was attempting to use it to call the police in response to his assault. Id. The fact that the victim was

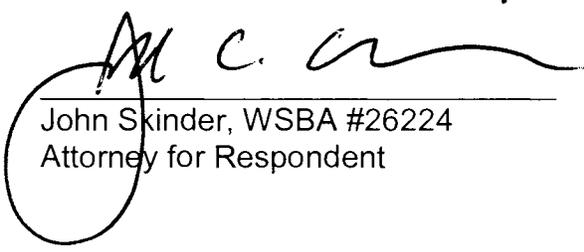
attempting to use the phone when it was taken suggests that she did not desire this property to be taken from her possession.

The requisite mental element of "intent to deprive" was met by the fact that after Mr. Simmons physically took possession of Ms. Spodark's phone and then subsequently broke it in half. (07/20/07 RP 14). It is reasonable to conclude that destroying the property of another demonstrates the intention to prevent any future use of this property. Because there is sufficient evidence to support the conclusion that the cell phone was intentionally taken by Mr. Simmons against Ms. Spodark's will and subsequently destroyed, there is a strong factual basis to prove a charge of second degree robbery under RCW 9A.56.210. The State thus respectfully urges this Court to affirm the comparability of Mr. Simmons' Illinois conviction for sentencing under the POAA.

D. CONCLUSION.

For the above reasons, the State respectfully requests this court to affirm Mr. Simmons' convictions and sentence.

Respectfully submitted this 16 day of JULY, 2010.



John Skinder, WSBA #26224
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the BRIEF OF RESPONDENT, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by to Supreme Court

TO: DAVID C. PONZOHA, CLERK
COURT OF APPEALS, DIVISION II
950 BROADWAY, SUITE 300
MS-TB-06
TACOMA, WA 98402-4454

--AND--

TO: PATRICIA A. PETHICK
ATTORNEY AT LAW
PO BOX 7269
TACOMA, WA 98417

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COURT OF APPEALS
10 JUL 19 AM 9:50
STATE OF WASHINGTON
BY ems
CLERK

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

Dated this 16th day of July, 2010, at Olympia, Washington.


Chong McAfee