

NO. 42289-1

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

STATE OF WASHINGTON, RESPONDENT

v.

REGINALD CHIEF GOES OUT, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Judge Edmund Murphy

No. 10-1-00368-3

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**BRIEF OF RESPONDENT**

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

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B. STATEMENT OF THE CASE.

1. Procedure

On January 25, 2010, based on an incident that occurred two days earlier, the State charged the defendant with three counts: Count I, kidnapping in the first degree; Count II, robbery in the first degree; and Count III, assault in the second degree. CP 1-2. All three counts included a firearm sentence enhancement allegation. CP 1-2.

On September 2, 2010, the State filed an Amended Information that added: Count IV, robbery in the first degree; Count V, burglary in the first degree; Count VI, assault in the second degree; Count VII, assault in the second degree; Count VIII, assault in the second degree. CP 3-6. Each of the counts also included a firearm sentence enhancement allegation. CP 3-6. These additional counts were based on a separate incident that occurred a little earlier the same day.

The case was assigned to the Honorable Judge Edmund Murphy on April 22, 2011. CP 165. A jury was empaneled on April 12, 2011. CP 164.

The jury found the defendant guilty of the following crimes:

Count I: Unlawful Imprisonment [lesser included offense];

Count II: Robbery in the First Degree;

Count III: Assault in the Second Degree;

Count IV: Robbery in the First Degree;

Count V: Burglary in the First Degree;

Count VI: Unlawful Display of a Weapon [lesser included offense]

Count VII: Assault in the Second Degree

CP 98, 100, 102, 104, 106, 108, 110.

The jury also found that the defendant was armed with a firearm as to counts" I, II, III, IV, V, and VII. CP 99, 101, 103, 105, 107, 109, 111.

The court held that there was insufficient evidence to support a conviction as to Count VIII, and that count was dismissed by order of the court. CP 118-120.

On June 17, 2011 the court sentenced the defendant to a total of 300 months, 210 months of which was for the consecutive firearm enhancement time. CP 124-137. In doing so, the court held that Count V merged with Count IV.

The lesser included count of unlawful display of a weapon that the jury found as to Count VI is a misdemeanor. So the court separately sentenced the defendant on that count to 365 days, with credit for 365 days already served, and concurrent to the felony counts. CP 138-139.

The defendant timely filed a notice of appeal on June 27, 2011.

## 2. Facts

Christina Roushey had been friends with Brandi Allen since about 2007.<sup>1</sup> RP 04-13-11, p. 91, ln. 12-17. In 2010 Brandi had lived in a residence at 1309 East Fairbanks Street and had been living there for about six years at the time. RP 04-13-11, p. 91, ln. 16-25. Fairbanks street was a very steep hill running up from Portland Avenue, which is so steep that usually causes people to be winded when they walk up it. RP 04-13-11, p. 137, ln. 4-18; p. 145, ln. 24 to p. 146, ln. 4.

Brandi Allen lived there at the house with her daughter N.A., mother, father, and older brother, Raymond Allen. RP 04-13-11, p. 93, n. 25 to p. 94, ln. 5; p. 133, ln. 10 to p. 134, ln. 5. On a daily basis Christina Roushey and Brandi would see each other with Christina Roushey going to Brandi's house. RP 04-13-11, p. 91, ln. 19-20; p. 92, ln. 1-5. Christina Roushey practically lived at Brandi's house. RP 04-13-11, p. 92, ln. 21.

On January 23, 2010, Christina Roushey was over at Brandi's house helping her clean the house. RP 04-13-11, p. 92, ln. 6-18. Christina Roushey first got there in the afternoon. RP 04-13-11, p. 93, ln. 5-7. Raymond Allen had returned early (about 5:00 a.m.) that morning from a trucking job to California. RP 04-13-11, p. 134, ln. 6-22; p. 135, ln. 20 to p. 136, ln. 1. He had returned home from his employer's office in a

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<sup>1</sup> Although Christina Roushey is not a minor, her initials are used because she was a victim of some of the crimes in this case.

company owned Dodge full-sized two-door pickup truck. RP 04-13-11, p. 134, ln. 9-18. He parked the truck outside the house. RP 04-13-11, p. 139, ln. 13-15.

Christina Roushey had been there cleaning a couple hours. RP 04-13-11, p. 93, ln. 8-13. Although it was January, it was a sunny, warm day and they had the door open. RP 04-13-11, p. 93, ln. 14-19; p. 139, ln. 9-10. Also at the house were Raymond Allen and Brandi's daughter N.A. RP 04-13-11, p. 93, ln. 20-24. N.A. was fifteen months old.<sup>2</sup> RP 04-13-11, p. 94, ln. 6-16. Christina Roushey was herself five months pregnant at the time. RP 04-13-11, p. 94, ln. 8-11.

Christina Roushey and Brandi had an arrangement where Christina Roushey would help Brandi with cleaning. RP 04-13-11, p. 92, ln. 19 to p. 93, ln. 4. Christina Roushey also helped Brandi with N.A. RP 04-13-11, p. 94, ln. 14-16. While they were cleaning, they had loud music playing. RP 04-13-11, p. 94, ln. 17-19; p. 140, ln. 9-16.

Raymond happened to be on the front porch looking out at the pickup truck when he saw two people walking up from the bottom of Fairbanks. RP 04-13-11, p. 145, ln. 22-146, ln. 6. They were taking their time and didn't seem as winded as he would have normally expected. RP 04-13-11, p. 146, ln. 4-23. The two guys approached the truck and stood

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<sup>2</sup> The implication appears to be that N.A. was Brandi's daughter.

in front of it, looking at it. RP 04-13-11, p. 146, ln. 25 to p. 147, ln. 1; p. 149, ln. 13-14.

One of the two [Vailtine] was chubby and a little shorter with shorter dark hair and he had a black left eye. RP 04-13-11, p. 149, ln. 18 to p. 150, ln. 9. The other [the defendant] was taller with dark braided hair and wearing a white jogging outfit, like a jumpsuit. RP 04-13-11, p. 149, ln. 19 to p. 150, ln. 3. Raymond thought they were both Native American. RP 04-13-11, p. 150, ln. 16-21.

The tall skinny guy with the braided hair [the defendant] came up to the house and started to approach the front porch. RP 04-13-11, p. 147, ln. 13-14; p. 150, ln. 22-24. He walked slowly up to the front porch, acted like he was breathing hard like he had been walking for a long time and put his hand on the house and was leaning like he was resting. RP 04-13-11, p. 151, ln. 2-9.

He asked Raymond if Raymond had a cigarette, to which Raymond responded, "No, I don't smoke." RP 04-13-11, p. 152, ln. 19-21. Raymond found it strange that a complete stranger would come up to his door and ask him this. RP 04-13-11, p. 152, n. 6-8. So after telling the guy that he didn't have a cigarette, Raymond asked him, "Do I even know you?" The guy answered, "No." RP 04-13-11, p. 152, ln. 10-15.

The other guy, the chubbier one [Vailtine], had come up behind the defendant and climbed up on the porch and said, "But check this out" and pulled out a gun and cocked it. RP 04-13-11, p. 152, ln. 19-21; p. 154, ln.

3. It was a black semiautomatic. RP 04-13-11, p. 153, ln. 16-18. He then told Raymond, "Give me the keys to the truck." RP 04-13-11, p. 153, ln. 21. Raymond was not expecting anything like that, didn't know if the gun was real and thought it was some kind of joke and was like, come on, are you guys serious. RP 04-13-11, p. 153, ln. 23 to p. 154, ln. 1.

Vailtine looked up at the defendant, then his arm came up toward Raymond's face so that Raymond turned his face away from him and heard a shot a large loud bang and then had a ringing in his left ear. RP 04-13-11, p.154, ln. 3-8.

While all this happened, Christina Roushey was in the living room with Brandi and N.A. when she noticed something that seemed a little unusual - someone walking up to the door. RP 04-13-11, p. 95, ln. 3-5; p. 96, ln. 2-3; p. 155, ln. 18-19. She looked out through the front door to see the person coming up. RP 04-13-11, p. 96, ln. 5-7. It was still daylight. RP 04-13-11, p. 95, ln. 24 to p. 96, ln. 1. At first she only saw one person coming up to the door who appeared to her to be a mixed race, black and white male with long, shoulder-length braided hair. RP 04-13-11, p. 96, ln. 14-24. He was a little taller than Christina Roushey who is five foot-four and appeared skinny and muscular. RP 04-13-11, p. 97, ln. 7-16. The person was out of breath, huffing and puffing as if he had just run a marathon. RP 04-13-11, p. 98, ln. 2-6. Raymond was at the front door asking the man what was wrong, so Christina Roushey went and turned down the music. RP 04-13-11, p. 98, ln. 8-14. Until she turned the music

off, Christina Roushey could only kind of hear what the man was saying but did see the man gesture or hold his arm on his head while talking to Raymond. RP 04-13-11, p. 98, ln. 22 to p. 99, ln 19.

After about 30 to 45 seconds a heavier set man walked up to the door and stood on the other side of the first man at the door. RP 04-13-11, p. 99, ln. 20 to p. 100, ln. 3. He was a little taller than the first man. RP 04-13-11, p. 100, ln. 25 to p. 101, ln. 2. He was wearing all black and a little bit of red and had short hair, that looked slicked back and he had a black eye that Christina Roushey recalled was his left eye. RP 04-13-11, p. 101, ln. 6-16. As the heavier set man walked up Christina Roushey heard him say something like “‘F’ this,” and then she saw a gun so she went running to the back room that was N.A.’s room. RP 04-13-11, p. 100, ln. 21-24. Christina Roushey was in the kitchen heading toward the back room when she heard the first gunshot. RP 04-13-11, p. 103, ln. 25 to p. 104, ln. 21.

After the first shot was fired, Raymond told the two guys to stay calm and don’t shoot anybody. RP 04-13-11, p. 158, ln. 20-24. He told them he would give them the keys. RP 04-13-11, p. 158, ln. 25. He also put his body in front of the doorway to block them and keep them from entering the house. RP 04-13-11, p. 158, ln. 25 to p. 159, ln. 2. As he looked over his shoulder he could see his sister and Christina going through the kitchen toward the back door. RP 04-13-11, p. 159, ln. 2-4.

About 15 to 30 seconds after Christina got to the back bedroom, Brandi brought N.A. to Christina in the back room and told Christina to stay there. RP 04-13-11, p. 103, ln. 16-19. Christina Roushey shut the door to N.A.'s room and sat in front of it. RP 04-13-11, p. 105, ln. 17-23.

Out on the front porch, Raymond told the two guys that his keys were in his room in his dresser drawer and that he would get the keys for them. RP 04-13-11, p. 159, ln. 11. He told the guys to just stay calm and started backing away from the door toward his room. RP 04-13-11, p. 159, ln. 11-12. As soon as Raymond started to back away the two guys walked into the living room. RP 04-13-11, p. 159, ln. 19. The chubby guy with the gun followed Raymond all the way into his room and Raymond handed him the keys. RP 04-13-11, p. 160, ln. 20 to p. 160, ln. 5. The other guy was standing right outside Raymond's door. RP 04-13-11, p. 160, ln. 6-8. The chubby guy tossed the keys to the taller thin guy and told him, "Go check that out." RP 04-13-11, p. 160, ln. 12-14.

The chubby guy with the gun then asked Raymond, "Where is your wallet at?" and lifted the gun up and pointed it at Raymond. RP 04-13-11, p. 160, ln. 19-20. Raymond's wallet was in the drawer and he was wearing shorts and a T-Shirt with no pocket in the shorts, so he told him, "I don't have anything," and started patting his legs and backside saying he didn't have anything. RP 04-13-11, p. 160, ln. 24 to p. 161, ln. 2. Raymond never gave him a wallet. RP 04-13-11, p. 161, ln. 3-5.

The chubby guy with the gun paused for a second, looked over toward the living room and slowly started walking out while still pointing the gun at Raymond, then he kind of stood in the living room with the gun pointed toward the door and looking out the front door. RP 04-13-11, p. 161, ln. 7-12. Then he kind of jolted out the front door. RP 04-13-11, p. 161, ln. 11-12.

At some point after the two guys left the house, Raymond did go toward the kitchen to see if Brandi and Christina made it outside safely and whether they were calling police. RP 04-13-11, p. 161, ln. 15-24. He ran into Brandi in the back yard. RP 04-13-11, p. 162, ln. 17-22. At some point close in time to this, someone called the police. RP 04-13-11, p. 162, ln. 18-20.

Raymond went back into the kitchen by himself looking for Christina because he didn't see her out back. RP 04-13-11, p. 165, ln. 4-10. Christina heard him from the bedroom and came into the kitchen, so he told Christina to go out back with Brandi and get away from the house. RP 04-13-11, p. 167, ln. 10-12.

The front door was still open, so he started approaching the front door to keep the two guys from coming back. RP 04-13-11, p. 167, ln. 15-16. As Raymond was coming through the kitchen and looking, the next thing he knew the guy with the gun was approaching the front door again. RP 04-13-11, p. 167, ln. 16-19. Raymond was already toward the living

room area and didn't know what the guy was going to do, so Raymond headed toward his bedroom. RP 04-13-11, p. 167, ln. 19-21.

The guy with the gun walked into the living room and started yelling, but not at anyone in particular. RP 04-13-11, p. 168, ln. 4-8. He said, "You think I'm playing?." "You think this is a game?" RP 04-13-11, p. 168, ln. 10-11. He looked really upset, was waving the gun around, then pointed it at the TV and fired of a round, then a second and a third and a fourth. RP 04-13-11, p. 168, ln. 13-16. Raymond slammed his door shut out of fear that the guy might point the gun at him and shoot him. RP 04-13-11, p. 168, ln. 16-17.

Raymond waited until he heard the gunshots stop firing and just stood there with his foot against the door bracing it to keep the guy from coming in. RP 04-13-11, p. 169, ln. 9-11. Raymond didn't know if the guy was trying to make his way into Raymond's room or not. RP 04-13-11, p. 169, ln. 11-12. After a minute or so Raymond kind of opened his door and looked out real fast into the living room and couldn't see the guy. RP 04-13-11, p. 169, ln. 13-14. Raymond didn't know what to do, and thought maybe the guy was playing a game of cat and mouse. RP 04-13-11, p. 169, ln. 16-17. Raymond was afraid to leave his room. RP 04-13-11, p. 169, ln. 17-18. After about thirty seconds to a minute Raymond came out of his room. RP 04-13-11, p. 169, ln. 19-22. Raymond then ran to the front door, closed it, and locked the deadbolt. RP 04-13-11, p. 170, ln. 16. He then went to the back door to the backyard at which point

Brandi came in, so he told her to call the police, which she was already doing. RP 04-13-11, p. 171, ln. 18-20.

Raymond went to the front door to see if the two guys were still in the truck, which they were. RP 04-13-11, p. 171, ln. 6-12. The truck had keyless ignition, which is a bit unusual, and Raymond figured the guys couldn't figure out how to use it to start the truck. RP 04-13-11, p. 171, ln. 20 to p. 172, ln. 2. The guy with the gun was in the driver's seat, and the other guy was in the passenger's seat. RP 04-13-11, p. 172, ln. 8-10. The truck sat there for about a minute, and then they got it started and it took off down the hill toward Portland Avenue. RP 04-13-11, p. 172, ln. 3-18. The police showed up some time after that. RP 04-13-11, p. 172, ln. 22 to p. 173, ln. 3.

As Christina remembered it, Brandi had gone back out toward the living room when Christina heard her stop walking and right when Brandi stopped, Christina heard five or six more gunshots. RP 04-13-11, p. 105, ln. 10-14.

As Christina recalled things, it was after this that, Brandi then returned and told Christina to call the police, which Christina did. RP 04-13-11, p. 105, ln. 25 to p. 106, ln. 6. Christina was hysterical when she was talking to the dispatcher. RP 04-13-11, p. 106, ln. 6-10. Christina then handed the phone to somebody else. RP 04-13-11, p. 107, ln. 1. Christina [mistakenly] thought that she had the only working phone in the house. RP 04-13-11, p. 108, ln. 5-17.

Christina brought N.A. with her out of the bedroom into the living room and only Raymond was there. RP 04-13-11, p. 107, ln. 19-24. It seemed to take about 15 or 20 minutes for the police to show up. RP 04-13-11, p. 109, ln. 1-3. Christina was trying to talk to her mom when the police showed up, and one of the officers wanted her to get off the phone, which upset her and she got in a bit of an argument with him, so he had her walk to the back room and cool off. RP 04-13-11, p. 112, ln. 1 to p. 113, ln. 7; RP 04-14-11, p. 263, ln. 16 to p. 264, ln. 8.

On January 23 of 2010, Scott Little resided in Puyallup, and had spent the day with some friends taking his boat up to Seattle to a dealer at Lake Union. RP 04-18-11, p. 349, ln. 5-11. A friend then drove them back to their cars at the Delin Docks Marina in Tacoma. RP 04-18-11, p. 349, ln. 14-22; p. 409, ln. 7-8. They arrived at the cars at about 4:00 p.m. to 4:30 p.m. when it wasn't quite dark yet. RP 04-18-11, p. 394, ln. 25 to p. 395, ln. 1. His friends left, but Scott hung around for a little bit, talking to another boat owner. RP 04-18-11, p. 395, ln. 17-19. The other boat owner left and Scott was going to back his car out and go home. RP 04-18-11, p. 395, ln. 19-20; p. 399, ln. 7. He had started the car up and was getting ready to back out when he heard a loud bang and thought someone had thrown a rock into his windshield, or something like that because there was a big hole in his windshield, close to and right below the mirror. RP 04-18-11, p. 399, ln. 9-24.

Right after that, two guys came running up to the car. RP 04-18-11, p. 401, ln. 8-9. One was of medium build, thin with long hair in a ponytail and had a moustache. RP 401, ln. 22-23. The other was shorter, more heavysset, kind of pudgy, and his hair wasn't quite as long and was more curly or wavy. RP 04-18-11, p. 402, ln. 6-12. Both were young, in their early twenties or late teens. RP 04-18-11, p. 401, ln. 24 to p. 402, ln. 3.

As the two males came running up to the car, they were yelling and screaming, "Get out of the car, mother fucker." RP 04-18-11, p. 402, ln. 15-18. Scott could only see one gun, which the short haired guy held in his hand. RP 04-18-11, p. 402, ln. 19 to p. 403, ln. 2. The long haired guy did put his hand toward the waistband of his slacks in such a way as to indicate that he had a gun under his shirt. RP 04-18-11, p. 403, ln. 2-11.

From the time he saw them until he got out of his car was less than five minutes. RP 04-18-11, p. 403, ln. 20-24. They told him to get out of his car and get in the back seat of the car, and while he did so they kept hitting him in the face with the gun. RP 04-18-11, p. 403, ln. 25 to p. 404, ln. 5. He got into the back seat passenger side of his car, and the guy with the shorter hair got in the back seat with him and was pointing the gun at him the whole time. RP 04-18-11, p. 404, ln. 21 to p. 405, ln. 2. They then left the marina and headed toward Puyallup Avenue. RP 04-18-11, p. 407, ln. 6-9; p. 408, ln. 22 to p. 409, ln. 2. However, just 100 to 300 yards

from Delin Docks, just past Johnny's Dock Restaurant, they picked up another kid. RP 04-18-11, p. 409, ln. 13 to p. 410, ln. 1.

Scott pleaded with them, saying he had a family. The long haired guy who was driving the car [the defendant] said, "I don't give a fuck. I have a kid, too." Vailtine then struck Scott with the gun and Scott decided he would probably be better off if he just shut up. RP 04-18-11, p. 411, ln. 16-19.

The car made a right-hand turn going down Puyallup toward Pacific Avenue in Tacoma and some cop cars went by with their lights on. RP 04-18-11, p. 412, ln. 23-25. He thought the guys in the car were going to take him out, shoot him in the head and roll him out of the car, so on the spur of the moment he decided to act. RP 04-18-11, p. 411, ln. 25 to p. 412, ln. 2.

Scott told them he was hit,<sup>3</sup> it was pretty hot in the car and he was big and sweaty, so he got the window down, was able to get his hand out the passenger window and was waving it, trying to flag anybody down. RP 04-18-11, p. 412, ln. 2-12. The police must have seen him, because a cop in a Suburban blocked them off. RP 04-18-11, p. 412, ln. 4; p. 413, ln. 1. When the car stopped, Scott struggled with the guy in the back seat

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<sup>3</sup> "[H]it" appears to be a scrivener's error in the transcript. It appears that it should read "hot."

and took the gun away from him, at which point all three guys took off running. RP 04-18-11, p. 15-17.

Scott and the driver remained in the vehicle and were ultimately detained and handcuffed by officers until they could determine what happened. RP 04-18-11, p. 436, ln. 11-22; p. 457, ln. 6-18. The other front passenger and driver's side rear passenger both fled the vehicle. RP 04-18-11, p. 449, ln. 16-23; p. 451, ln. 3-9. As the officer started yelling at Scott to put down the gun Scott was now holding, the defendant said to the officer, "He's trying to rob us. He's trying to rob us." RP 04-18-11, p. 450, ln. 3-6; p. 455, ln. 2-6.

Scott was able to identify the defendant in court as the long-haired person who drove the car when he was assaulted and car-jacked. RP 04-18-11, p. 435, ln. 14 to p. 436, ln. 5; p. 440, ln. 21-24.

After it was starting to get dark, the police took Raymond by himself to a location at 24<sup>th</sup> and Pacific Avenue in the back of a squad car. RP 04-13-11, p. 173, ln. 16 to p. 174, ln. 4. The officers brought out two people, one at a time for Raymond to identify and Raymond got a real good look at him. RP 04-13-11, p. 174, ln. 17 to p. 175, ln. 18. Raymond recognized the first person as the guy he had described as the skinny person [the defendant]. RP 04-13-11, p. 175, ln. 19-25. They then drove Raymond to a second location around the corner from the first and asked Raymond if he could identify a second person. RP 04-13-11, p. 176, ln. 11-24. Raymond told the officer he didn't recognize that person. RP 04-

13-11, p. 176, ln. 23 to p. 177, ln. 1. The officer then took Raymond further down the block and asked Raymond if he could identify a third person. RP 04-13-11, p. 177, ln. 1-5. Raymond told the officer he wasn't sure if it was the guy or not, that he wasn't positive. RP 04-13-11, p. 177, ln. 1-14. Raymond had a suspicion it was the guy with the gun, but he wasn't sure. RP 04-13-11, p. 177, ln. 22. The officer then took Raymond a little farther to look at a fourth person, and Raymond told the officer he did not recognize that person. RP 04-13-11, p. 178, ln. 2-11.

In court, Raymond identified the defendant, Chief Goes Out, as the thin guy. RP 04-13-11, p. 178, ln. 19 to p. 179, ln. 5.

The police also took Christine in the patrol car to see if she could identify three persons they had detained. RP 04-13-11, p. 114, ln. 4-13; p. 117, ln. 5-8. She recognized two of them as the guys who came to the house, and was very sure that they were the same guys. RP 04-13-11, p. 117, ln. 9-19; p. 119, ln. 2-4. In court, Christine also identified the defendant, Chief Goes Out as one of the two guys. RP 04-13-11, p. 119, ln. 8-19. Similarly, in court Brandi Allen identified the defendant, Chief Goes Out, as the person at the house with the braids. RP 04-13-11, p. 560, ln. 6 to p. 561, ln. 2.

C. ARGUMENT.

1. THE DEFENDANT'S RIGHT TO A  
UNANIMOUS VERDICT WAS NOT VIOLATED  
WHERE HIS ACTIONS WERE PART OF A  
CONTINUING COURSE OF CONDUCT.

The defense claims that jury's verdict was not unanimous as to Count VII where in the jury found the defendant guilty of assault in the second degree with Brandi Allen as the victim. See, Br. App. 2 (Assignment of Error 1); Br. App. 14ff.

As a preliminary matter, it should be noted that where the defense did not request a unanimity instruction at the trial court level and failed to object to the trial court's failure to give such an instruction *sua sponte*, the defendant is not entitled to raise the issue for the first time on appeal unless he can make a showing that the lack of an instruction is a manifest error affecting a constitutional right. *State v. Knutz*, 161 Wn. App. 395, 406, 253 P.3d 437 (2011) (citing RAP 2.5(a)(3)). Under the "manifest error affecting a constitutional right" standard of RAP 2.5(a), it is not enough that the claimed error implicates a constitutional interest, but the error must be manifest such that the record on appeal is sufficiently complete to permit the court to determine whether the error had a practical and identifiable consequence at trial that actually prejudiced the defendant. *Knutz*, 161 Wn. App. at 407.

However, since the test for determining whether the alleged error is manifest is closely related to the test on the substantive issue of whether a unanimity instruction was required, where the record is adequate to permit review of the substantive issue, the court will conflate the two analyses. *Knutz*, 161 Wn. App. at 407.<sup>4</sup>

It is well established that in Washington, jury verdicts in criminal cases must be unanimous. *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984); *State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963). Washington courts have repeatedly affirmed that the right to a unanimous jury verdict in criminal cases is of constitutional magnitude and may be raised for the first time on appeal. See *State v. Kiser*, 87 Wn. App. 126, 129, 940 P.2d 308 (1977) (citing *State v. Holland*, 77 Wn. App. 420, 424, 891 p.2d 49 (1995)); *State v. Green*, 94 Wn.2d 216, 231, 616 P.2d 628 (1980)(citing Wash. Const. art. 1, § 21).

A defendant may be convicted only “when a unanimous jury concludes the criminal act charged in the information has been committed.” *State v. Crane*, 116 Wn.2d 315, 324–25, 804 P.2d 10 (1991) (citing *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984)). Where the State presents evidence of several distinct acts that could form

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<sup>4</sup> Where the record is not adequate to permit review, presumably the claim would need to be brought by way of a claim of ineffective assistance of counsel, most likely in a personal restraint petition.

the basis of the count charged, it must tell the jury on which act it must unanimously agree on to convict the defendant. *Crane*, 116 Wn.2d at 325.

The court has divided cases involving jury unanimity issues into two types: cases involving alternative means and cases involving multiple acts. See *State v. Kitchen*, 110 Wn.2d 403, 409-410, 756 P.2d 105 (1988).

In alternative means cases, a single offense may be committed in more than one way. *Kitchen*, 110 Wn.2d at 410. There must be jury unanimity as to guilt, but the jury need not be unanimous as to the means by which the crime was committed so long as substantial evidence supports each alternative means. *Kitchen*, 110 Wn.2d at 410.

Multiple acts cases are where the State presents evidence of several distinct acts that could form the basis of the count charged, it must tell the jury on which act it must unanimously agree on to convict the defendant. *Crane*, 116 Wn.2d at 325; See also *Kitchen*, 110 Wn.2d at 409. In multiple acts cases, the State must either tell the jury which acts to rely upon, or the court must instruct the jury that they must unanimously agree as to which act has been proved. *Kitchen*, 110 Wn.2d at 409 (citing *Petrich*, 101 Wn.2d at 570). See also WPIC 4.25; 4.26; and *State v. Moultrie*, 143 Wn. App. 387, 392-94, 177 P.3d 776 (2008) (approving the current version of WPIC 4.25).

In *State v. Hanson*, 59 Wn. App. 651, 800 P.2d 1124 (1990), the court held that when determining whether a unanimity instruction should be offered, the reviewing court should consider: first, what must be proven under the applicable statute; second, what the evidence disclosed; and third, whether the evidence disclosed more than one violation of the statute. *Hanson*, 59 Wn. App. at 656–57.

However, the courts have repeatedly held that a unanimity instruction is not required where the underlying conduct supporting the charge constitutes a “continuing course of conduct.” See, e.g., *Petrich*, 101 Wn.2d at 571. The court applies a commonsense evaluation of the facts to determine whether the conduct was “continuous.” *Petrich*, 101 Wn.2d at 571; *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989).

To determine whether criminal conduct constitutes one continuing act or several distinct acts, the court must evaluate the facts in a commonsense manner to decide whether the criminal activity shared a common purpose. See *State v. Knutz*, 161 Wn. App. 395, 408, 253 P.3d 437 (2011). “A continuing course of conduct requires an ongoing enterprise with a single objective.” *State v. Monaghan*, --- Wn. App. ---, 270 P.3d 6116 (2012) (quoting *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395 (1996)). Washington courts have found a continuing course of conduct in cases where multiple acts of assault were committed with a single purpose against one victim in a short period of time. *Monaghan*, -- - Wn. App. ---, 270 P.3d at 624 (citing *Love*, 80 Wn. App. at 361-62).

Here, the defense claims that there were two acts that could have formed the basis of the assault on Brandi Allen. *See* Br. App. 15 (citing VRP 551-52, 557). For convenience, they will be referred to as act (a) and act (b).

Act (a). The first instance was when Brandi Allen testified that the guy with the gun came onto the porch and put the gun in her brother's face, at which point she ran. RP 04-19-11, p. 551, ln. 16 to p. 552, ln. 11. She got to the kitchen when she heard a gunshot. RP 04-19-11, ln. 6-13.

Act (b). The second incident occurred when the guy with the gun pointed the gun at Brandi and told her he was going to shoot her, then he shot the gun into the TV five times. RP 04-19-11, p. 557, ln. 12-16.

The defense correctly notes that in closing the State argued that the jury should convict the defendant based upon the first act, but it did not prohibit the jury from convicting the defendant based upon the second act. Br. App. 15 (citing VRP 753).

What the prosecutor argued in closing was that the assaults in Counts VI and VII on Christina Roushey and Brandi Allen had a similar legal theory to the count [of assault] that involved Raymond Allen as the victim. RP 04-20-11, p. 753, ln. 3-7. He then noted that the jury would probably remember the testimony of Christina Roushey and Brandi Allen better than he did. RP 04-20-11, p. 753, ln. 7-8. He then described the same event as the basis for the assaults on both Christina and Brandi,

because he talks about each of them running to the kitchen and then hearing a gunshot as providing a basis for the assault.

As the defense correctly notes, nothing in the prosecutor's argument precluded the jury from finding the defendant guilty based upon either act (a) or act (b). Br. App. 15 ("However, it did not prohibit the jury from convicting him based on the second.") That is particularly so where the prosecutor made his argument in the context of discussing different definitions in the jury instructions that were applicable to different counts of assault. The prosecutor admitted to the jury that they likely remembered the testimony of Brandi Allen better than he did and referred to act (a) only briefly in passing essentially while simultaneously discussing the assault charge involving Christine Roushey, did not further discuss the facts pertaining to the assault on Brandi in Count VII, and made no express reference to act (b). RP 04-20-11, p. 752, ln. 4 to p. 253, ln. 24.

The essence of the defense argument is that act (a) and act (b) are each separate acts. However, here the defense argument claiming a lack of unanimity is without merit because both actions were part of a continuing course of conduct. As such, it really doesn't matter whether the jury relied on the first instance or the second instance.

Because the court's decision not to give a unanimity instruction is reviewed for an abuse of discretion, in determining whether a defendant's acts were the same course of conduct, the evidence is viewed in the light

most favorable to the state. See *Monaghan*, --- Wn. App. ---, 270 P.32 at 624. To determine whether criminal conduct here constituted one continuing act or several distinct acts, the court must evaluate the facts in a commonsense manner to decide whether the criminal activity shared a common purpose. See *State v. Knutz*, 161 Wn. App. 395, 408, 253 P.3d 437 (2011). It was a continuing course of conduct if it was an ongoing enterprise with a single objective. *State v. Monaghan*, --- Wn. App. ---, 270 P.3d 6116 (2012) (quoting *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395 (1996)).

Brandi Allen testified that she saw the second person come up with a gun in their hand and put the gun in her brother's face. RP 04-19-11, p. 552, ln. 7-9. At that point Brandi grabbed her daughter and ran. RP 04-19-11, p. 552, ln. 10-11. She got to the kitchen, when she heard a gunshot. RP 04-19-11, p. 554, ln. 10-13. Brandi gave her daughter to Christina who was in the back bedroom and told Christina to stay in the room. RP 04-19-11, p. 554, ln. 24 to p. 555, ln. 2. Brandi stayed in the kitchen to make sure her brother was okay. RP 04-19-11, p. 555, ln. 20-22. The guy with the gun pointed the gun at Brandi and told her he was going to shoot her, then he shot the gun into the TV five times. RP 04-19-11, p. 557, ln. 13-16.

Raymond Allen testified a bit differently than Brandi. He testified that out on the front porch the gunman looked up at the defendant and the next thing Allen knew, the gunman's arm came up in front of – towards

Raymond's face, so Raymond turned his head away from him and heard a shot, a large, loud bang and there was ringing in Raymond's left ear. RP 04-13-11, p. 154, ln. 3-8. The shot was fired up toward the right and toward and into the West wall, but was below the ceiling. RP 04-13-11, p. 155, ln. 1-3; RP 04-14-11, p. 252, ln. 10 to p. 253, ln. 15. Christine screamed and after Raymond turned his head away, he did like a spin move and looked back and could see his sister grabbing her daughter out of the playpen and heading toward the kitchen. RP 04-13-11, p. 155, ln. 18-22. Raymond told the two guys to stay calm and don't shoot anybody, that he would give them the keys, but also put his body in front of the doorway to block it and keep the two guys from entering the house. RP 04-13-11, p. 158, ln. 24 to p. 159, ln. 4. Looking over his shoulder to see Brandi and Christine going through the kitchen toward the back door. RP 04-13-11, p. 158, ln. 24 to p. 159, ln. 4.

Raymond testified that after contacting his sister and Christine at the back of the house, he saw that the front door was still open, so he started to approach the front door to keep the guys from coming back. RP 04-13-11, p. 167, ln 5-17. The next thing he knew, the guy with the gun [Vailtine] was approaching the front door. RP 04-13-11, p. 167, ln. 17-19. The guy with the gun had been gone less than five minutes before returning. RP 04-13-11, p. 169, ln. 24 to p. 170, ln. 4. Since Raymond was already towards the living room area, he didn't know what the guy was going to do, so Raymond headed into his bedroom. RP 04-13-11, p.

167, ln. 19-21. From his bedroom, Raymond could see the guy with the gun walk into the living room and start yelling, “You think I’m playing? You think this is a game?” RP 04-13-11, p. 168, ln. 1-11. He looked really upset and was waving the gun around, then he pointed it at the TV set in the living room and fired off [at least?] four rounds. RP 04-13-11, p. 168, ln. 13-17. Raymond was afraid and waited in his room for about a minute, and when he came back out of his bedroom there isn’t anyone else in the living room. RP 04-13-11, p. 169, ln. 12-22.

Here, there were two shootings that occurred within less than 5 minutes of each other, both shootings were done by Vailtine, and both were made in order to induce cooperation by the occupants of the house with the robbery of the truck. The time difference between the shootings occurred because the Vailtine thought he had obtained the keys to the truck, but he returned when it appeared he thought that they were not the correct keys because he and the defendant didn’t know how to use them.

As explained above, Washington courts have found a continuing course of conduct in cases where multiple acts of assault were committed with a single purpose against one victim in a short period of time.

*Monaghan*, --- Wn. App. ---, 270 P.3d at 624 (citing *Love*, 80 Wn. App. at 361-62).

In the context of an assault, there are many examples where the courts have determined that several ongoing acts of assault can constitute a continuous course of conduct. For example, in *State v. Craven*, 69 Wn.

App. 581, 849 P.2d 681 (1993), the court held a continuous course of conducted existed where the defendant had repeatedly assaulted a child over the course of a three-week period. *Craven*, 69 Wn. App. at 589. As a result of the extended assault, the child had suffered bruising on his arms, legs, head, one of his eyes, and head, whip marks on his back from a rope or telephone cord, multiple arm fractures, two burn marks, and abrasions to his ankle and nose. *Craven*, 69 Wn. App. at 584. The reviewing court held that the trial court did not err in failing to give a unanimity instruction because case authority amply “recognize[d] that the continuing course exception can be applied to an assault prosecution in a factually appropriate case.” *Craven*, 69 Wn. App. at 589. The court held that the unanimity instruction was “particularly appropriate where, as here, the child victim is preverbal, the abusive conduct occurred outside the presence of witnesses, and no one could testify to any single act of abuse [and the] evidence of the abuse [could] only come from a physical examination of the child.” *Craven*, 69 Wn. App. at 589 n.7.

In *State v. Crane*, 116 Wn.2d 315, 804 P.2d 10 (1991), the court found a continuous course of conduct existed where the defendant had repeatedly hit and violently shook a child several times over the course of two hours before the boy died from the injuries. *Crane*, 116 Wn.2d at 319–24, 330.

In *Handran*, the defendant was charged with burglary in the first degree, with assault as the underlying crime. *Handran*, 113 Wn.2d at 17.

Defendant had broken into his ex-wife's apartment in order to secure sexual relations with her. *Handran*, 113 Wn.2d at 12, 17. His ex-wife awoke to defendant leaning over her in the nude and kissing her. *Handran*, 113 Wn.2d at 12. When she asked him to leave immediately, he pinned her down and hit her in the face. *Handran*, 113 Wn.2d at 12. The court upheld the trial court's refusal to issue a unanimity instruction because the assaults (e.g., the kissing, restraint, and punch) occurred in one place during a short period of time, involved the same aggressor and victim, and occurred within the same location. *Handran*, 113 Wn.2d at 17. The Court also determined that even if the acts were to be characterized as "several distinct acts," that the error was harmless because the record provided sufficient evidence of each act. *Handran*, 113 Wn.2d at 17–18.

In *State v. Beasley*, 126 Wn. App. 670, 109 P.3d 849 (2005), the court held defendant's conduct "continual" for his conviction of second degree assault in a five minute skirmish where he hit a person in the stomach with the nose of his rifle, backed away to speak with the victim, hit her with the stock of his rifle, threatened to shoot her, and pointed the gun at her head and cocked it. *State v. Beasley*, 126 Wn. App. at 675, 681. Similar to the court in *Handran*, the court in *Beasley* also found that the error was harmless even if a unanimity instruction was warranted. *State v. Beasley*, 126 Wn. App. at 682–83.

When viewed in a common sense manner, the facts of this case establish that both the initial act of firing one shot, as well as the second act of firing four or five shots, were part of an ongoing enterprise with a single objective such that both acts were committed with a single purpose against the same victims in a short period of time. Thus, the facts in this case establish a continuing course of conduct rather than separate acts. This is where the defense claim fails because no unanimity instruction was required.

The defense claims that act (a) and act (b) constituted multiple separate acts so that the State was required to elect which act it relied upon, or the court was required to give the jury a unanimity instruction. Br. App. 15. The defense further argues that where there was no limiting instruction and the State did not elect the act, there is a presumption of prejudice to the defendant such that he is entitled to relief on this claim unless the State can prove that no rational juror could have a reasonable doubt as to any of the incidents alleged. Br. App. at 16. For the reasons indicated above, the test relied upon by the defense is incorrect because it does not apply to claimed multiple acts where they were in fact committed as part of a continuous course of conduct.

The standard cited by the defense only applies to cases involving multiple separate acts that are not part of the same course of conduct. Said otherwise, the standard claimed by the defense only applies to situations where multiple separate acts have been alleged as the basis for charge, the

State has not elected which separate act it is relying upon, and the jury was not given a special verdict to identify which act it relied upon in reaching its verdict.

Moreover, even if the court were to hold that acts (a) and (b) were not part of a continuous course of conduct, there was sufficient evidence to support the defendant's guilt under either act such that no rational juror could have a reasonable doubt as to either of the incidents alleged.

First the defense argues that the State failed to prove that the defendant acted with intent asserting that there was no evidence of intent directed toward Brandi Allen. Br. App. 17-19. This claim is legally incorrect.

A single shot fired into a house can support multiple counts of assault in the second degree based upon there being multiple victims if the suspects intended to create apprehension or fear to the likely occupants of the house. *State v. Ferreira*, 69 Wn. App. 465, 469-70, 850 P.2d 541 (1993) (citing *State v. Austin*, 59 Wn. App. 186, 193, 796 P.2d 746 (1990)). See also RCWA 9A.36.021.

Here, the jury was instructed as to Count VII that to convict the defendant, the jury must find that the defendant intentionally assaulted Brandi Allen with a deadly weapon. CP 90 (Instruction no. 47. The definition of assault given to the jury was in part that:

...

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which

in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 74 (Instruction no. 31). This instruction is consistent with the law as established in *Ferreira* and *Austin*.

From the facts of this case, the jury could readily infer that the shots were fired in both act (a) and act (b) in order to intimidate not only Raymond, but any occupant of the house, and to thereby secure everyone's cooperation. Thus, when the law is applied to the facts of this case, a transferred intent instruction was not required.

The defense makes a second claim that a rational juror could doubt act (b) because the testimony of Brandi differed so dramatically from that of Raymond, and only one of the witnesses could have been correct. Br. App. 19. However, that claim is incorrect.

The defense claims that "By contrast, Mr. Allen indicated Vailtine walked into the living room when no one was in it and started yelling, 'You think I'm Playing? You think this is a game?'" Br. App. 19 (citing VRP 168). [Emphasis added.] But this statement is inaccurate.

Raymond never said the living room was empty when Vailtine fired the shots. Rather, Raymond said that after talking to his sister in the back yard, and finding Christine in the back bedroom and telling her to get out of the house, he approached the front door that was still open. RP 04-13-11, p. 166, ln. 18 to p. 167, ln. 15. Upon seeing Vailtine again come up

to the house, Raymond headed toward his bedroom, where he stood in the doorway with his hand getting ready to close the door. RP 04-13-11, p. 167, ln. 17 to p. 168, ln. 3. He sees Vailtine upset waving the gun around and firing off rounds, so Raymond slammed his door shut fearing that Vailtine might point the gun and shoot at him. RP 04-13-11, p. 168, ln. 13-17. When specifically asked, whether he could tell if Vailtine's yelling was directed at anybody in particular, Raymond answered, "No." RP 04-13-11, p. 168, ln. 4-8. Raymond then said that he didn't come out of his room for about a minute. RP 04-13-11, p. 169, ln. 7-22. At the point after Raymond came back out, he said there was not anybody else in the living room. RP 04-13-11, p. 170, ln. 5-7. So Raymond ran up, closed the door and locked the deadbolt. RP 04-13-11, p. 170, ln. 16. Then he starts heading out to the back yard and Brandi came in or was back in the house. RP 04-13-11, p. 170, ln. 18-22.

Brandi on the other hand testified that she stayed in the kitchen to make sure her brother was okay. RP 04-19-11, p. 555, ln. 20-22. The guy with the gun pointed the gun at Brandi and told her he was going to shoot her, then he shot the gun into the TV five times. RP 04-19-11, p. 557, ln. 13-16.

As Christina remembered it, Brandi had gone back out toward the living room when Christina heard her stop walking and right when Brandi stopped, Christina heard five or six more gunshots. RP 04-13-11, p. 105, ln. 10-14.

Brandi never claimed she was in the living room when Vailtine shot at her. If she was in the kitchen, she would have potentially been out of sight of or unnoticed by her brother who had become focused on Vailtine. Any inconsistency between the testimony of Raymond and Brandi only highlights the fact that Raymond was focused on Vailtine and unaware of Brandi's location at various points. Further, the testimony of the two was completely consistent as to the relevant facts, namely that in act (a) Vailtine pointed the gun at Raymond and fired, and that in act (b) Vailtine was angry and fired four or five shots into the TV.

The only aspect of their testimony that was inconsistent was Raymond's claim that he went out to the back yard and saw Brandi after the first time Vailtine left and before he returned, and that she called the police. RP 04-13-11, ln. 162, ln. 22; p. 170, ln. 18-24. Brandi, on the other hand testified that she never went outside and did not try to call 911. RP 04-19-11, p. 558, ln. 12-17.

These facts are sufficient to support a conviction for assault of Brandi Allen under both act (a) and act (b) as charged in Count VII.

Finally, the court should note that defense counsel failed to either request a unanimity instruction as to Count VII, or object to the court's failure to give on *sua sponte*. After the State rested, defense counsel brought a motion to dismiss Count VII, claiming that there was not sufficient evidence that the gun was pointed at Brandi Allen during act (a), and that the television was not near her so that the evidence was also

insufficient to support a conviction as to act (b). RP 04-19-11, p. 612, ln. 19; p. 636, ln. 7-25. The court then briefly summarized both act (a) and act (b) when it concluded there was sufficient evidence to support Count VII and denied the defendant's motion to dismiss.<sup>5</sup> RP 04-19-11, p. 639, ln. 6-25. Despite defense counsel and the court each referring to both act (a) and act (b) in the motion to dismiss, the next day when jury instructions were discussed, there was no mention of the need for a unanimity instruction as to Count VII. *See* RP 04-20-11, p. 668-718.

When discussing jury instructions, there was extensive discussion of a unanimity instruction as to the assault alleged in Count III on Scott Little. RP 04-20-11, p. 673, ln. 22 to p. 674, ln. to p. 691, ln. 19. However, that discussion resulted in instructional language specific to that count only. No request for or objection to the lack of a unanimity instruction occurred with regard to count VII, which is the count at issue in this claim.

Where no objection was raised to the lack of a unanimity instruction, the defendant is not entitled to raise the matter for the first time on appeal where he has failed to show that he was prejudiced by the

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<sup>5</sup> The defense states, "Indeed, the trial judge used the second act to deny Mr. Chief Goes Out's motion to dismiss this charge." Br. App. 15. That sentence is ambiguous and could mistakenly be read as indicating that the court solely relied upon the second act to deny the motion. However, such a reading would be incorrect as the court in fact relied on both act (a) and act (b) to deny the charge, just as defense counsel argued both acts when making his motion to dismiss count VII.

alleged error. Moreover, where the two acts the defense claims were separate were actually part of a continuing course of conduct, and each act was supported by substantial evidence, the defendant was not deprived of his right to a unanimous jury.

Because act (a) and act (b) were part of a continuing course of conduct, a unanimity instruction was not required. Even if the court were to hold that act (a) and act (b) were separate acts and not part of a continuing course of conduct, no rational juror could have had any doubt as to either of the incidents, and for that reason, the defendant was not prejudiced by the lack of a unanimity instruction.

For both these reasons, the defendant's claim on this issue should be denied.

2. THE WORDING OF JURY INSTRUCTIONS, NOS. 27, 40, AND 47 DID NOT REQUIRE THE STATE TO PROVE RESPECTIVELY THAT THE DEFENDANT COMMITTED COUNT IV (ROBBERY OF RAYMOND ALLEN), COUNT V (BURGLARY), AND COUNT VII (ASSAULT OF BRANDI ALLEN) SOLELY AS A PRINCIPAL AND NOT AS AN ACCOMPLICE.

In order to establish accomplice liability, the State must show that the defendant knew he was aiding in the commission of the charged crime. *State v. Gallagher*, 112 Wn. App. 601, 608, 51 P.3d 100 (2002) (review denied *State v. Gallagher*, 148 Wn.2d 1023, 66 P.3d 638 (2003)).

In order to be convicted of a crime as an accomplice, the defendant need not be charged as an accomplice in the information. *State v. Bobenhouse*, 143 Wn. App. 315, 324, 177 P. 3d 209 (2008) (citing *State v. McDonald*, 138 Wn.2d 680, 688, 981 P.2d 443 (1999)). Accomplice liability is neither an element of the crime, nor an alternative means of committing the crime. *State v. Teal*, 152 Wn.2d 333, 338-339, 96 P.3d 974 (2004). Thus, the rule that all elements of a crime be listed in a single instruction is not violated when accomplice liability is described in a separate instruction. *Teal*, 152 Wn.2d at 339.

The jury need not reach unanimity on whether a defendant acted as a principal or an accomplice. *Teal*, 152 Wn.2d at 339. So long as the jury is convinced that the crimes were committed and that the defendant participated in each of them, the jury need not be agreed as to whether the defendant acted as a principal or accomplice. *Teal*, 152 Wn.2d at 339.

The court has held it not to be error to insert “or an accomplice” in the definitional and “to convict” elements instructions in an assault case. *State v. Haack*, 88 Wn. App. 423, 430-31, 958 P.2d 1001 (1997). However, the fact that it is not error to include such language does not mean that such language is required.

Where there is evidence of accomplice liability, it is sufficient to give an accomplice instruction and it is not required to list the defendant’s status as an accomplice in the “to convict” elements instruction. *See, e.g., State v. Teaford*, 31 Wn. App. 496, 499-500, 644 P.2d 136 (1982). When

the court gives an accomplice liability instruction, it is also not necessary for the accomplice instruction to reference the crime(s) charged. *See State v. Mullin-Coston*, 115 Wn. App. 679, 64 P.3d 40 (2003).

“As long as there is sufficient evidence to support an accomplice instruction, jurors are not required to determine which participant acted as a principal and which acted as an accomplice.” *State v. Alires*, 92 Wn. App. 931, 935-36, 966 P.2d 935 (1998). Rather, “...jurors need only conclude unanimously that both the principal and the accomplice participated in the crime and need not be unanimous as to the manner of that participation.” *Alires*, 92 Wn. App. at 936.

Here, the defense claims that because some of the State’s “to convict” instructions include “or an accomplice” language, while others do not, those that do not include the “or an accomplice” language therefore required the State to prove the defendant’s guilt as a principal. Br. App. 20ff. In support of this claim, the defense misapplies a hybrid of “law of the case” doctrine combined with law relating to the assumption of the burden to prove unnecessary elements when they are included in the “to convict” instruction without an objection. *See* Br. App. 20.

The defense argument fails for a simple reason. Accomplice liability is not an element of the crime. *Teal*, 152 Wn.2d at 338-339. The omission of the “or an accomplice” language does not add an element to the crime. Indeed, it adds nothing to the elements. Its role is purely one

of clarifying the instruction. For that reason, it can never turn accomplice liability into an element of the crime. This is demonstrated by the fact that it is always sufficient to instruct on accomplice liability through a separate accomplice liability instruction. *See Teal*, 152 Wn.2d at 339.

Here, the court's instructions to the jury included the standard instruction on accomplice liability that mirrors the language of the complicity statute. *Compare* CP 50 (Instruction no. 7) with RCW 9A.08.020.

In this case, three of the court's "to convict" elements instructions omitted the "or an accomplice" language in at least one element where the defense argues the omission is of consequence.

In Instruction no. 27, the "to convict" instruction for Count IV, the robbery of Raymond Allen, the "or an accomplice" language was omitted from element (2) that the defendant intended to commit theft of the property; and element (5) that the defendant was armed with a deadly weapon. *See* Br. App. 26; CP 70.

In Instruction no. 40, the "to convict" instruction for Count V, burglary, the "or an accomplice" language was omitted from element (1) the defendant entered or remained unlawfully in a building. *See* Br. App. 29; CP 83.

In Instruction no. 47, the "to convict" instruction for Count VII, the assault of Brandi Allen, the "or an accomplice" language was omitted

from element (1) that the defendant intentionally assaulted Brandi Allen with a deadly weapon. *See* Br. App. 27; CP 90.

Both instruction no. 27 and instruction no. 47 contained other elements that included the “or an accomplice” language. Instruction no. 47 did not, at least in part because there was no other element to which the “or an accomplice” language pertained.

As to each of these counts, the defense argues that the State failed to establish sufficient evidence to show that the defendant acted as a principal as to each of the elements at issue. Because the State was not required to prove that the defendant acted as a principal as to any of those elements, and for the reasons argued in the following section below, there was sufficient evidence that the defendant acted as an accomplice, all the defendant’s claims with regard to this issue are without merit and should be denied.

There was, of course, a risk that the State accepted by including the “or an accomplice” language in some elements and not others. However, that risk was only that the jury would be mistakenly confused into believing that the State was required to prove the defendant acted as a principal as to each of those elements, and that it might acquit the defendant on any of those counts because it did not believe the State had proved that.

The accomplice liability instruction advised the jury in pertinent part that: “A person is legally accountable for the conduct of another

person when he or she is an accomplice of such other person in the commission of the crime.” CP 50 (Instruction No. 7). In this instance the jury was not confused by the occasional omission of the optional “or an accomplice” language and properly attributed accomplice liability to the defendant.

Because the omission of the optional “or an accomplice” language from some elements did not alter those elements such that the State was required to prove that the defendant acted as a principal, the defendant’s claims as to this issue are without merit and should be denied.

3. SUFFICIENT EVIDENCE SUPPORTED THE JURY’S FINDING THE DEFENDANT WAS AN ACCOMPLICE WHERE AN INFERENCE COULD BE MADE THAT HE WAS READY TO ASSIST AND ACTUALLY DID ASSIST IN THE CRIME.

The defense claims that there was insufficient evidence to support the jury’s findings of guilt as to the crimes committed at the Allen residence on Fairbanks Street. Br. App. 31. The defense argument is that the defendant was merely present and that there was not sufficient evidence to establish that he acted as an accomplice to the crime. Br. App. 31.

That claim is without merit where the defendant assisted in the crime from the beginning to the end.

Due process requires that the State bear the burden of proving each

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

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d

60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

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

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

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

In order to establish accomplice liability, the State must show that the defendant knew he was aiding in the commission of the charged crime. *State v. Gallagher*, 112 Wn. App. 601, 608, 51 P.3d 100 (2002) (*review denied State v. Gallagher*, 148 Wn.2d 1023, 66 P.3d 638 (2003)). Mere presence at the scene of the crime, or even presence plus knowledge of the crime is insufficient to establish accomplice liability. *State v. Everybodytalksabout*, 145 Wn.2d 456, 472, 39 P.3d 294 (2002)

Here, substantial evidence supported the jury finding that the defendant assisted or participated in the crime from the beginning to the end and was not merely present.

Raymond Allen happened to be on the front porch looking out at the pickup truck when he saw two people walking up from the bottom of Fairbanks. RP 04-13-11, p. 145, ln. 22-146, ln. 6. They were taking their time and didn't seem as winded as he would have normally expected. RP 04-13-11, p. 146, ln. 4-23. When they got up in front of the house, they approached the truck and stood in front of the it looking at it. RP 04-13-11, p. 146, ln. 25 to p. 147, ln. 1.

The tall skinny guy with the braided hair [the defendant] came up to the house and started to approach the front porch. RP 04-13-11, p. 147, ln. 13-14; p. 150, ln. 22-24.

He then asked if Raymond had a cigarette, to which Raymond responded, "No, I don't smoke." RP 04-13-11, p. 152, ln. 19-21. Raymond found it strange that a complete stranger would come up to his door and ask him this. RP 04-13-11, p. 152, n. 6-8. So after telling the guy that he didn't have a cigarette, Raymond asked him, "Do I even know you?" The defendant answered, "No." RP 04-13-11, p. 152, ln. 10-15.

The other guy, the chubbier one [Vailtine], had come up behind the first guy and climbed up on the porch and said, "But check this out" and pulled out a gun and cocked it. RP 04-13-11, p. 152, ln. 19-21; p. 154, ln.

3. It was a black semiautomatic. RP 04-13-11, p. 153, ln. 16-18. He then told Raymond, "Give me the keys to the truck." RP 04-13-11, p. 153, ln. 21. Raymond was not expecting anything like that, didn't know if the gun was real and thought it was some kind of joke and was like, come on, are you guys serious. RP 04-13-11, p. 153, ln. 23 to p. 154, ln. 1.

Vailtine looked up at the defendant and the next thing Allen knew, the gunman's arm came up in front of – towards Raymond's face, so Raymond turned his head away from him and heard a shot, a large, loud bang and there was ringing in Raymond's left ear. RP 04-13-11, p. 154, ln. 3-8.

Out on the front porch, Raymond told the two guys that his keys were in his room in his dresser drawer and that he would get the keys for them. RP 04-13-11, p. 159, ln. 11. He told the guys to just stay calm and started backing away from the door toward his room. RP 04-13-11, p. 159, ln. 11-12. As soon as Raymond started to back away the two guys walked into the living room. RP 04-13-11, p. 159, ln. 19. Vailtine followed Raymond all the way into his room and Raymond handed him the keys. RP 04-13-11, p. 160, ln. 20 to p. 160, ln. 5. The defendant was standing right outside Raymond's bedroom door. RP 04-13-11, p. 160, ln. 6-8. Vailtine tossed the keys to the defendant and told him, "Go check that out." RP 04-13-11, p. 160, ln. 12-14. The defendant caught the keys and ran toward the front door, toward the truck. RP 04-13-11, p. 160, ln. 12-17.

After demanding Raymond's wallet and being told that Raymond didn't have one, Vailtine paused for a second and looked over toward the living room, looking out the front door and then kind of jolted and went out the front door. RP 04-13-11, p. 161, ln. 7-12.

After contacting his sister and Christine at the back of the house, Raymond saw that the front door was still open, so he started to approach the front door to keep the guys from coming back. RP 04-13-11, p. 167, ln 5-17. The next thing he knew, Vailtine was approaching the front door. RP 04-13-11, p. 167, ln. 17-19. Vailtine had been gone less than five minutes before returning. RP 04-13-11, p. 169, ln. 24 to p. 170, ln. 4. Since Raymond was already towards the living room area, he didn't know what Vailtine was going to do, so Raymond headed into his bedroom. RP 04-13-11, p. 167, ln. 19-21. From his bedroom, Raymond could see the guy with the gun walk into the living room and start yelling, "You think I'm playing? You think this is a game?" RP 04-13-11, p. 168, ln. 1-11. He looked really upset and was waving the gun around, then he pointed it at the TV set in the living room and fired off [at least?] four rounds. RP 04-13-11, p. 168, ln. 13-17. Raymond was afraid and waited in his room for about a minute, and when he came back out of his bedroom there wasn't anyone else in the living room. RP 04-13-11, p. 169, ln. 12-22.

Then Raymond went to the front door to see if the two guys were still in the truck, which they were. RP 04-13-11, p. 171, ln. 6-12. The truck had keyless ignition, which is a bit unusual, and Raymond figured

the guys couldn't figure out how to use it to start the truck. RP 04-13-11, p. 171, ln. 20 to p. 172, ln. 2. Vailtine was in the driver's seat, and the defendant was in the passenger's seat. RP 04-13-11, p. 172, ln. 8-10. The truck sat there for about a minute, and then they got it started and it took off down the hill toward Portland Avenue. RP 04-13-11, p. 172, ln. 3-18.

The jury could infer that prior to going up to the house the defendant conferred with Vailtine and formed a plan to attempt to rob the truck from the people in the Allen Residence. The jury could infer that the defendant then approached Robert and asked him for a cigarette as part of a ruse to buy time for Vailtine to approach and also to distract Raymond from Vailtine. The jury could find that the defendant actively assisted in the burglary and robbery when he entered the house after Vailtine demanded the keys to the truck and fired the shot, and when the defendant accepted the key[less entry] to the truck from Vailtine and left the house to go down to the truck with it. The jury could also infer that the defendant was an accomplice to the crimes at the Allen residence where he waited in the truck while Vailtine returned to the house angry, fired off the additional shots, and then returned to the truck, taking a minute before he was able to get it started and drive away. The jury could also infer the defendant's readiness to assist from the inception of the crime based upon his lack of surprise and willingness to assist one the crime commenced.

Substantial evidence supported the jury's finding that the defendant knew of Vailtine's intent to commit the robbery in advance, and

that the defendant was not only ready to assist, but that he in fact actually did assist.

For these reasons, the defendant's claim on this issue is without merit and should be denied.

4. THE COURT DID NOT VIOLATE DOUBLE JEOPARDY AT SENTENCING.

The defense raises three separate claims that the sentence imposed on this case violated double jeopardy: 1) the dock street assault and robbery should have merged or been same course of conduct; 2) The display of a weapon conviction should have merged with the robbery of Raymond Allen; 3) the court failed to remove the burglary conviction from the judgment and sentence even though it merged the burglary with the robbery of Raymond Allen. *See* Br. App. 37ff. Each of these claims is addressed separately below.

Claims of double jeopardy are questions of law that are reviewed de novo. *State v. Kelley*, 168 Wn.2d 72, 76, 226 P.3d 773 (2010) (citing *State v. Hughes*, 166 Wn.2d 675, 681, 212 P.3d 558 (2009)). The double jeopardy clauses of the Fifth Amendment to the United States Constitution and the double jeopardy clause of Article I, section 9 of the Washington Constitution provide the same protection. *Kelley*, 168 Wn.2d at 76 (citing *In Re Pers. Restraint of Borrero*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007); *State v. Weber*, 159 Wn.2d 252, 265, 149 P.3d 646 (2006)).

The constitutional prohibitions against double jeopardy protect a defendant from (1) a second prosecution following conviction or acquittal, and (2) multiple punishments for the same offense. *State v. Hescoek*, 98 Wn. App. 600, 603-04, 989 P.2d 1251 (1999). *See also Kelley*, 168 Wn.2d at 76 (citing *Borrereo*, 161 Wn.2d at 536; *N. Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969)); *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995).

“With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” *Kelley*, 168 Wn.2d at 77 (quoting *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983)). The legislature has authority to enact statutes that in a single proceeding impose cumulative punishments for the same conduct. *Kelley*, 168 Wn.2d. at 77.

To determine whether a defendant has received multiple punishments for the same offense, the court must determine the unit of prosecution that the legislature intended to constitute the prohibited act. *State v. Green*, 156 Wn. App. 96, 98, 230 P.3d 654 (2010) (citing *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998)). “The ‘unit of prosecution’ refers to the scope of the criminal act.” *Green*, 156 Wn. App. at p. 98 (quoting *Adel*, 136 Wn.2d at 634). When the legislature’s

intent is unclear any ambiguities must be construed in the defendant's favor pursuant to the rule of lenity. *Green*, 156 Wn. App. at 98 (citing *State v. Bobic*, 140 Wn.2d 250, 261-62, 996 P.2d 610 (2000)).

When a defendant's acts support charges under two statutes, "the court must determine whether the legislature intended to authorize multiple punishments for the crimes in question." *Borrero*, 161 Wn.2d at 536; *State v. Gaworski*, 138 Wn. App. 141, 156 P.3d 288, 291 (2007) (citing *State v. Vladovic*, 99 Wn.2d 413, 422, 662 P.2d 853 (1983) (quoting *Albernaz v. United States*, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981))). "If the legislature intended that cumulative punishments can be imposed for the crimes, double jeopardy is not offended." *Calle*, 125 Wn.2d at 776. (Citing *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005)).

Legislative intent is the foremost consideration. "The question of what punishments are constitutionally permissible is no different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution." *Missouri v. Hunter*, 459 U.S. 359, 386, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983) (emphasis in the original) (citing *Albernaz v. United States*, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981)).

If the legislature clearly intended to impose multiple punishments for the same act or conduct, there is no double jeopardy violation and the inquiry ends there. *Kelley*, 168 Wn.2d at 77. However, if the legislative intent is unclear, the court applies the *Blockburger* test to determine whether the legislature intended one or multiple offenses, and if the legislature intended only one offense, imposing multiple punishments violates double jeopardy. *Kelley*, 168 Wn.2d at 77 (citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932)).

Under the *Blockburger* test, “two offenses are not the same if each contains an element not contained in the other.” *State v. Corrado*, 81 Wn. App. 640, 649, 915 P.2d 1121 (1996) (citing *Blockburger*, 284 U.S. at 304). If the crimes meet this test, the court presumes that the legislature intended separate punishment. *Gaworski*, 138 Wn. App. at paragraph 8 (citing *Freeman*, 153 Wn.2d at 772). The *Blockburger* presumption may also be rebutted by evidence of contrary legislative intent. *Freeman*, 153 Wn.2d at 772.

The *Blockburger* test is a tool used to discern legislative intent, however, where the legislature has made its intent clear the *Blockburger* test is irrelevant.

Our analysis and reasoning in *Whalen* and *Albernaz* lead inescapably to the conclusion that simply because two criminal statutes may be construed to proscribe the same

conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes. The rule of statutory construction noted in *Whalen* is not a constitutional rule requiring courts to negate clearly expressed legislative intent. Thus far, we have utilized that rule only to limit a federal court's power to impose convictions and punishments when the will of Congress is not clear. Here, the Missouri Legislature has made its intent crystal clear. Legislatures, not courts, prescribe the scope of punishments.

*Missouri v. Hunter*, 459 U.S. 359, 368, 103 S.Ct.673, 74 L. Ed. 2d 535 (1983).

- a. The Court Properly Refused To Merge The Dock Street Assault And Robbery Or Treat Them As The Same Criminal Conduct Where The Assault Occurred After The Robbery Was Completed.

The court refused to merge Count III, the Assault in the Second Degree of Scott Little, with Count II, the Robbery in the First Degree of Scott Little. RP 06-03-11, ln. 15 to p. 847, ln. 12. The court made this determination by concluding that the degree of the robbery was not elevated by the assault because the conviction for assault was based on the defendant's accomplice striking Mr. Little in the back of the car at a time when the defendants had already taken possession of the car, and Mr. Little was compliant, asking for mercy and was not attempting to resist taking and possession of the vehicle by the defendants. See RP 06-03-11, p. 845, ln. 19 to p. 847, ln. 12. The court concluded therefore that the

assault was a gratuitous act that was not done to keep Mr. Little from resisting or the defendant's being able to retain the property. RP 06-03-11, p. 847, ln. 6-11.

The defense claims that the court's refusal to merge the two counts was error and that the court also erred when it failed to treat the two counts as same criminal conduct. Br. App. 38.

**i. The Court Properly Refused To Merge Count III, Assault In The Second Degree With Count II, Robbery In The First Degree.**

The Washington Supreme Court has previously held in *Freeman* that the statutes at issue here do not clearly indicate that the legislature intended to punish second degree assault separately from first degree robbery. *Freeman*, 153 Wn.2d at 776. Thus, the *Blockburger* test applies.

As it applies to this case, assault in the second degree is defined as: "A person is guilty of assault in the second degree if he or she assaults another with a deadly weapon. RCW 9A.36.021(1)(c); CP 75 (Instruction no. 32). The common law definition of assault applies to this case. *See State v. Rivas*, 97 Wn. App. 349, 984 P.2d 432 (1999) disapproved of on other grounds by *State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007).

As it applies to this case, robbery in the first degree is defined as: "A person is guilty of robbery in the first degree if in the commission of a

robbery or of immediate flight therefrom, he or she is armed with a deadly weapon. RCW 9A.56.200(1)(a)(i). 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. RCW 9A.56.190.

Thus, to prove assault in the second degree in counts II and III under the facts of this case, the state was required to prove that:

- (1) That on or about January 23, 2010, the defendant or an accomplice intentionally assaulted Scott Little with a deadly weapon; and
- (2) That this act occurred in Washington.

CP 75. Assault under the facts of this case is defined in pertinent part as:

...

An assault is an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 74 (Instruction no. 31).

To prove robbery in the first degree in count I, under the facts of this case the State was required to prove that:

- (1) That on or about the 23<sup>rd</sup> day of January, 2010, the defendant or an accomplice unlawfully took personal property from the person or in he presence of Scott Little
- (2) That the defendant intended to commit theft of the property;

(3) That the taking was against Scott Little's will by the defendant or the accomplice's use or threatened use of immediate force, violence or fear of injury to Scott Little

(4) That the force or fear was used by the defendant or the accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5) That in the commission of these acts or in immediate flight therefrom the defendant or the accomplice was armed with a deadly weapon; and

(6) That any of these acts occurred in the State of Washington.

CP 66 (Instruction no. 23)

This comparison can be simplified by focusing on the elements of robbery that are similar to those in assault. The elements of the two crimes are not the same for several reasons. First, in robbery the threat or use of force must be immediate force, while in assault it need not be. Second, assault requires an act done to create apprehension and fear of bodily harm, that creates a reasonable apprehension or fear, while the robbery requires only a threat of force to overcome resistance to the taking. Third, the robbery can involve a threat of force to the victim, or another person, while in an assault, the force or threat of force can only be directed against the victim. Fourth, the robbery can also involve a threat of violence against property, while the assault only involves a fear of bodily injury. Additionally, the assault must be accomplished through the use of the deadly weapon, while in the robbery the defendant or accomplice merely need be armed with the deadly weapon in either commission, or immediate flight therefrom. Accordingly, in this regard

too, the assault has greater and more specific requirements than the robbery.

For all these reasons, the multiple convictions do not violate double jeopardy under the *Blockburger* test. Indeed, it appears that the reason the courts in both *Freeman* and *Keir* did not apply the *Blockburger* test was because it was obvious that *Blockburger* is not violated by multiple convictions for second degree assault and first degree robbery. See *Freeman*, 153 Wn.2d at 776-77; *Keir*, 164 Wn.2d at 804ff (relying on *Freeman*).

In *State v. Kier*, the court did hold that a second degree assault conviction merged with first degree robbery in prosecution arising out of carjacking incident as completed assault was necessary to elevate the completed robbery to first degree. *State v. Kier*, 164 Wn.2d 798, 805ff, 197 P.3d 212 (2008) (citing *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005)). Unlike *Kier*, in this case, the assault of beating Scott Little with the gun did not elevate the robbery to first degree. Rather, the robbery was elevated to the first degree by the fact that the defendant or an accomplice was armed with a deadly weapon when the robbery was committed.

For this reason, the defendant's claim on this issue is without merit and should be denied.

ii. **The Court Properly Refused To Treat Count III, Assault In The Second Degree As The Same Course Of Conduct As Count II, Robbery In The First Degree.**

A trial court's determination regarding same criminal conduct is reviewed for a clear abuse of discretion (including a misapplication of the law). *State v. Bobenhouse*, 143 Wn. App. 315, 177 P.3d 209 (2008); *See also State v. Taylor*, 90 Wn. App. 312, 321, 950 P.2d 526 (1998).

If the court makes a finding that some or all of the current offenses encompass the same criminal conduct, then those offenses shall be counted as one crime for purposes of determining the defendant's offender score and concurrent or consecutive sentences. *Bobenhouse*, 143 Wn.App. at 330 (citing RCW 9.94A.589(1)(a)). "Same criminal conduct" means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. *Bobenhouse*, 143 Wn. App. at 330 (citing RCW 9.94A.589(1)(a)). All three factors must be present. *State v. Wilson*, 136 Wn. App. 596, 612-13, 150 P.3d 144 (2007).

The courts construe the statute defining same criminal conduct narrowly to disallow most assertions of same criminal conduct. *Wilson*, 136 Wn. App. at 613. If any one of the three elements is missing, multiple offenses do not constitute the same criminal conduct and must be counted separately in calculating the offender score. *Wilson*, 136 Wn. App. at 613.

Here, Counts II and III were not the same criminal conduct because they did not involve the same intent. Nor did they occur at the same time and place.

The intent of the robbery was to deprive Scott Little of his vehicle. The assault occurred after the defendant and his accomplices had already completed the robbery by taking possession of the vehicle from Little. Nor was Little attempting to resist their taking of the vehicle. The intent of the assault was gratuitous because Little had asked not to be harmed because he had a family.

Additionally, because the assault occurred after the robbery had already been completed and they were in a moving vehicle, the assault did not occur at the same time or place as the robbery.

For all these reasons, the defense claim that the assault was the same criminal conduct as the robbery is without merit and should be denied.

b. The Display Of A Weapon Charge Did Not Merge With The Robbery Of Raymond Allen.

The elements of robbery as charged in Count IV are substantially similar to those discussed as to count II in section a.i. above. The only difference is the identity of the victim. For that reason, the analysis as to that count is not repeated here, but rather incorporated by reference.

The charge of display of a weapon in count VI was a lesser included offense to the Assault 2 against Christine Roushey. *See* CP 87, 88, 89. It

is a misdemeanor and was therefore sentenced on a separate judgment and sentence. *See* CP 138-139.

The charge of display of a weapon was also instructed as a lesser included offense to the charge of Robbery in Count IV. *See* CP 70, 71, 72. However, the jury never reached that lesser included offense where it found the defendant guilty as charged.

While the assault in the second degree in Count VI listed Christine Roushey as a victim, and the Robbery in Count IV listed Raymond Allen as a victim, the charge of unlawful display of a weapon does not name a victim as an element of the crime. But the crime does require that the unlawful display be done in a manner that manifested an intent to intimidate another or warranted alarm for the safety of another person.

The elements for unlawful display of a weapon are:

- (1) That on the date in question the defendant or an accomplice carried, exhibited, displayed or drew a firearm; and
- (2) That the defendant carried, exhibited, displayed or drew the weapon in a manner, under circumstances, and at a time and place that manifested an intent to intimidate another or warranted alarm for the safety of another person.

*See* RCW 9A.02.030; CP 89 (Instruction no. 46).

Robbery in the first degree clearly includes elements that are not elements of unlawful display of a weapon. The first such element is the

taking property of another, the second such is that the taking be with the intent to commit theft of the property.

The charge of unlawful display of a weapon includes an element that does not exist in robbery. That is that the defendant carried, exhibited, displayed or drew the weapon in a manner, under circumstances, and at a time and place that manifested an intent to intimidate another or warranted alarm for the safety of another person.

For purposes of robbery in the first degree, the defendant must be armed with a deadly weapon, not just any weapon. Further, the use or threatened use of force in robbery in the first degree need not involve the weapon at all. The robbery is elevated to the first degree by the mere fact of being armed with a deadly weapon. The deadly weapon in a robbery need not be used to intimidate, but the weapon in an unlawful display charge must be used in a manner that manifests an intent to intimidate another. For this reason, unlawful display of a weapon includes an element not contained in robbery in the first degree.

There is the additional question whether a lesser included offense to a crime as to one victim can merge with the crime committed as to a different victim.

For all these reasons, the unlawful display of a weapon charge does not merge with the charge of robbery in the first degree.

Accordingly, the defendant's claim as to this issue should be denied.

- c. The Court Exercised Its Discretion Under The Burglary Anti-Merger Statute And Merged The Burglary With The Robbery Of Raymond Allen, So That The Burglary Conviction Should Have Been Removed From The Judgment And Sentence And The Scrivener's Error Leaving It In Should Be Corrected

The Judgment and Sentence reflects a conviction on Count V for Burglary in the First Degree. See CP 127.

The State acknowledged that the Robbery in the First Degree in Count IV and the Burglary in the First Degree in Count V were the same criminal conduct for purposes of calculating offender scores and standard range sentences. RP 06-03-11, p. 824, ln. 21 to p. 825, ln. 3; p. 844, ln. 1-5. The court also exercised its discretion under the Burglary Anti-Merger Statute and merged the Burglary of the Allen residence with the Robbery of Ray Allen. RP 06-03-11, p. 845, ln. 4-14.

The State agreed with the defense that the court's ruling required that the burglary conviction be completely stricken from the Judgment and Sentence. RP 06-03-11, p. 848, ln. 25 to p. 849, ln. 1. Nonetheless, the burglary count was not removed from the original judgment and sentence. See CP 127.

However, on August 24, 2011, on the defendant's motion the court entered a Motion and Order Correcting Judgment and Sentence and fixed

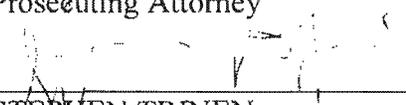
this scrivener's error, as well as another related error.<sup>6</sup> CP 174-77. Thus, the issue no longer exists, and there does not appear to be any need for further relief.

D. CONCLUSION.

For the foregoing reasons, the defendant's claims should be denied as without merit.

DATED: April 16, 2012

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
STEPHEN TRINEN  
Deputy Prosecuting Attorney  
WSB # 30925

Certificate of Service:

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

*4/16/12*  
Date  
*[Signature]*  
Signature

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<sup>6</sup> This occurred two days after the clerk's office prepared the clerk's papers, so the defendant's appellate counsel was likely unaware of the correction.

# PIERCE COUNTY PROSECUTOR

## April 16, 2012 - 2:13 PM

### Transmittal Letter

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Case Name: State v. Reginal Chief Goes Out

Court of Appeals Case Number: 42289-1

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Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

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