

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

STATE OF WASHINGTON,

Respondent,

v.

CYNTHIA MARIE GUZMAN,

Appellant.

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

The Honorable Jeffrey P. Bassett

BRIEF OF APPELLANT

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A. INTRODUCTION

The State initially charged appellant, Cynthia Marie Guzman, with robbery in the first degree while armed with a deadly weapon and unlawful possession of a firearm in the second degree. When she declined to accept the State's final plea offer, the State increased the charges significantly to 18 counts, including multiple counts of kidnapping, robbery, and assault with deadly weapon and firearm enhancements.

Guzman exercised her constitutional right to a trial and the jury found her guilty on all counts and found that she or an accomplice was armed with a deadly weapon or firearm. The trial court sentenced her to 1016 months in confinement. Guzman is entitled to relief as a result of insufficient evidence, ineffective assistance of counsel, and errors by the trial court and the State.

B. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to prove beyond a reasonable doubt that Guzman was armed with a firearm at the time of the alleged kidnapping, assault, and robbery of Daniel Smith and Jessica Brackens.

2. There was insufficient evidence to prove beyond a reasonable doubt that Guzman committed robbery against the alleged victim, Jessica Brackens.

3. Guzman was denied her constitutional right to effective assistance of counsel where defense counsel's representation was deficient in failing to argue that the kidnapping, assault, and robbery offenses constitute same criminal conduct.

4. Guzman was denied her constitutional right to effective assistance of counsel where defense counsel failed to recommend an exceptional sentence below the standard range.

5. The trial court erred by entering separate convictions for second degree assault and first degree robbery in violation of double jeopardy.

6. The State failed to prove any prior convictions by a preponderance of the evidence.

7. In the event the State substantially prevails on appeal this Court should deny any request for costs.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The jury found Guzman guilty of kidnapping, assaulting, and robbing Daniel Smith and Jessica Brackens. The evidence established that a shotgun and two airsoft or pellet guns were recovered by police. Was the evidence insufficient to prove beyond a reasonable doubt that Guzman was armed with a firearm where there were several guns involved in the incident

and Smith and Brackens testified that they were threatened with a gun, but never said the gun was the shotgun, which was the only real gun?

2. A person commits the crime of robbery when she unlawfully and with intent to commit theft thereof takes personal property from the person and the taking was against that person's will by the use of immediate force, violence, or fear of injury to that person. Was the evidence insufficient to prove beyond a reasonable doubt that Guzman robbed Jessica Brackens, the alleged victim, where Brackens testified that she was not aware of anything that was taken from her and nothing that the police recovered belonged to her?

3. The jury found Guzman guilty of kidnapping, assaulting, and robbing four different victims. Was defense counsel's representation deficient in failing to argue that the offenses constitute the same criminal conduct as to each victim where in each instance the evidence established that the kidnapping, assault, and robbery were closely related, the criminal objective of acquiring property did not change, and the kidnapping and assault furthered the crime of robbery?

4. The trial court may impose a sentence outside the standard range if it finds there are substantial and compelling reasons justifying an exceptional sentence. Was defense counsel's representation deficient in failing to recommend an exceptional sentence below the standard range

where the mitigating circumstances, including multiple offenses resulting in a clearly excessive sentence, could be established by a preponderance of the evidence?

5. The jury found Guzman guilty of four counts of assault and four counts of robbery. Double jeopardy prohibits multiple convictions for the same offense. Did the trial court error in entering separate convictions for second degree assault and first degree robbery where the evidence established that Guzman or an accomplice committed assault in furtherance of the robbery and the assault had no purpose or effect independent of the robbery?

6. At sentencing, the State must prove any prior convictions by a preponderance of the evidence and must introduce evidence of some kind to support the alleged criminal history. Is a remand for resentencing required where the record reflects that the State failed to present any evidence at sentencing to support Guzman's alleged prior convictions and she did not affirmatively acknowledge the prior convictions asserted by the State?

7. If the State substantially prevails on appeal, should this Court exercise its discretion and deny costs because Guzman is presumably still indigent where there has been no evidence provided to this Court, and

there is no reason to believe, that her financial condition has improved or is likely to improve?

D. STATEMENT OF THE CASE¹

1. Procedure

On July 15, 2016, the State charged Cynthia Marie Guzman with one count of robbery in the first degree, alleging that she took personal property from Ryan Roy Watkins while armed with a deadly weapon and/or displaying what appeared to be a firearm or other deadly weapon. The State also charged Guzman with one count of unlawful possession of a firearm in the second degree. CP 1-2.

The State amended the information on February 13, 2017, charging Guzman with 18 crimes:

a. Count I - Burglary in the First Degree while armed with a firearm and other deadly weapon and/or assaulting Daniel James Smith.

b. Count II - Kidnapping in the First Degree, alleging that Guzman intentionally abducted April Kathleen Alvarez while she or an accomplice was armed with a deadly weapon.

¹ The trial was held on 2/13/17, 2/14/17, 2/15/17, 2/16/17, 2/21/17, 2/22/17, 2/23/17, 2/26/17, and 3/1/17. The verbatim report of proceedings for the trial are consecutively paginated and referred to as RP followed by the page number(s). The other verbatim report of proceedings are referred to by date followed by the page number (s).

c. Count III - Kidnapping in the First Degree, alleging that Guzman intentionally abducted Lamont William Matson while she or an accomplice was armed with a deadly weapon.

d. Count IV - Attempted Kidnapping in the First Degree, alleging that Guzman took a substantial step toward intentionally abducting Anthony James Harris while she or an accomplice was armed with a deadly weapon.

e. Count V - Kidnapping in the First Degree, alleging that Guzman intentionally abducted David Ray Garcia while she or an accomplice was armed with a firearm and other deadly weapon.

f. County VI - Kidnapping in the First Degree, alleging that Guzman intentionally abducted Daniel James Smith while she or an accomplice was armed with a firearm and other deadly weapon.

g. Count VII - Kidnapping in the First Degree, alleging that Guzman intentionally abducted Jessica Lorraine Brackens while she or an accomplice was armed with a firearm and other deadly weapon.

h. Count VIII - Robbery in the First Degree, alleging that Guzman took personal property from April Kathleen Alvarez while she or an accomplice was armed with a deadly weapon.

i. Count IX - Robbery in the First Degree, alleging that Guzman took personal property from David Ray Garcia while she or an accomplice was armed with a firearm or other deadly weapon.

j. Count X - Robbery in the First Degree, alleging that Guzman took personal property from Daniel James Smith while she or an accomplice was armed with a firearm and other deadly weapon.

k. County XI - Robbery in the First Degree, alleging that Guzman took personal property from Jessica Lorraine Brackens while she or an accomplice was armed with a firearm and other deadly weapon.

l. Count XII - Assault in the Second Degree, alleging that Guzman assaulted April Kathleen Alvarez while she or an accomplice was armed with a deadly weapon.

m. Count XIII - Assault in the Second Degree, alleging that Guzman assaulted David Ray Garcia while she or an accomplice was armed with a firearm and other deadly weapon.

n. Count XIV - Assault in the Second Degree, alleging that Guzman assaulted Daniel James Smith while she or an accomplice was armed with a firearm and other deadly weapon.

o. Count XV - Assault in the Second Degree, alleging that Guzman assaulted Jessica Lorraine Brackens while she or an accomplice was armed with a firearm or other deadly weapon.

p. Count XVI - Unlawful Possession of a Firearm, alleging that Guzman did knowingly own, possess, or have control of a firearm after having been convicted of manufacture/deliver/possession with intent to deliver.

q. Count XVII - Intimidating a Witness.

r. Count XVIII - Tampering with a Witness.

CP 27-45

Guzman was arraigned on the amended information and entered a plea of not guilty to all charges. 02/13/17 RP 13-25.

Following a trial before the Honorable Jeffrey P. Bassett, a jury found Guzman guilty as charged. CP 515-544; RP 1126-38.

On May 12, 2017, based on an offender score of 9+, the court sentenced Guzman to 1016 months in confinement, ordered 36 months of community custody, and imposed mandatory financial obligations. CP 571-85; 05/12/17 RP 16-18.

Guzman filed a timely notice of appeal. CP 587.

2. Facts

a. Response to 911 Call

Susan Bassett lives across the street from 1035 SE Oak Road. RP 350. On July 9, 2016, a man later identified as David Garcia ran up the stairs to her front porch. Appearing frantic and afraid, he told her to call

911. After she called 911, he ran into her backyard and hid behind a tree.
RP 350-52.

Deputy Stacy responded to the call made around 1:50 p.m. When he arrived at 1035 SE Oak Road, he saw a black Lancer, which matched the description given by dispatch, pulling out of the driveway. Dispatch warned that someone in the car may be armed with a shotgun so he called for backup. He followed the car at a safe distance for two to three minutes before it pulled into a driveway of a house on Marion Street. RP 362-67. Backup arrived shortly thereafter and the officers called out the occupants of the car one at a time. The driver, backseat passenger, and front seat passenger later identified as Cynthia Guzman came out of the car and were handcuffed. RP 367-69.

The officers checked the car and trunk to make sure nobody else was inside. They obtained a search warrant after seeing two pistols and a taser in the trunk. While searching the trunk, they seized the stock of a long gun, an air rifle, a taser, two airsoft or pellet guns, a 12-gauge shotgun, and other evidence. RP 369-80; Ex. 3-9, 16-20, 32, 61-62. An officer checked the taser and it was operable. RP 372, 431-33. The 12-gauge shotgun was the only real gun. RP 416-17. Stacy did not test-fire the shotgun and did not know if it was operable or tested for fingerprints. RP 417-18. Officers

brought one of the residents, Ryan Watkins, to the location to identify items that belonged to him. RP 419-20.

When Deputy Gundrum arrived at the house on Marion Street, several police cars were parked behind a black car in the driveway. He took custody of Guzman who was handcuffed and placed her in the backseat of his patrol car. After advising Guzman of her *Miranda* rights, she said she was stranded and Abe, the driver of the car, picked her up. They were at the house to visit Abe's father who lived there. RP 428-49.

Sergeant Bergeron followed up with Guzman when he arrived at the house on Marion Street. She said she was advised of her *Miranda* rights and they started talking. Guzman initially said she did not see any guns but eventually told him that she saw Abraham Galindo, the driver of the car, with a gun. She explained that because she had brain surgery scheduled she could not go to jail. At that point, Bergeron contacted Detective Keeler and drove her to the detective's office. RP 533-34.

b. House at 1035 SE Oak Road

The Sheriff's department was generally familiar with the house at 1035 SE Oak Road. It is a "flophouse, where there's a lot of traffic that comes and goes, most likely narcotics being sold there, always multiple people in and around the residence." RP 631.

Deputy Langlow arrived on the scene and initially spoke with David Garcia who was then secured in the back of Deputy Breed's patrol car. As the officers walked up the driveway, some people were outside of the house. They called out for any people in the house to come out. RP 263-64, 540. A person who gave the name Tim Smith, was later identified as Daniel Smith. He had blood on his face and scratches on his arms. RP 266-67, 542. When Langlow entered the house, he saw what appeared to be a broken doorjamb, blood on the kitchen floor, and the home was in disarray. RP 267-68. The officers inspected the house and other buildings on the property. RP 541-42.

Deputy Argyle interviewed David Garcia who remained in the patrol car. He described a male and female who were involved in the "robbery." RP 357-58. Argyle drove Garcia to a nearby location where he identified Guzman and Noah Robertson as the two people he saw earlier. RP 358-61. After interviewing Daniel Smith, Deputy Hanson transported him to the house on Marion Street because he said he would recognize the suspects. He identified Guzman and the males who were being detained. RP 548-50.

c. Detective Keeler

Detective Timothy Keeler interviewed Guzman on July 9, 2016, which was audio and video recorded. RP 615-17. During the interview, he

asked Guzman about her cell phone and she pulled it out of her pocket and handed it to him. After the interview, he informed Guzman that she was going to be taken to the jail for booking and he patted her down. RP 623-25. During the search, he found another cell phone and a plastic baggie containing what appeared to be methamphetamine. RP 625-27.

Keeler interviewed Noah Robertson the same day and conducted another interview with Guzman on July 11, 2016. When he confronted Guzman with what Robertson told him, she said she previously withheld some information about Robertson because she was afraid of him. She said Robertson put a gun to Daniel Smith's head. She had a taser but not a gun and she never assaulted anyone. RP 628-29, 655. Guzman also explained that she went to the "trap house" with Robertson and Abraham Galindo because Galindo said he was going to collect money from people there and she believed he would then pay back the money he owed her. RP 629-30. Within a week, Keeler returned to the house and interviewed people who either lived or stayed there. RP 631.

During his investigation, he listened to a recorded jail call between Guzman and Eric Brooks and another call between Guzman and Sheila Saxon. RP 637-42. He also listened to a recorded visit Guzman had with Tanya Verran, where Guzman said she wanted to talk to Robertson because she did not want him to testify against her. RP 650-52. Keeler also viewed

a video of when Guzman and Jessica Brackens were in the same cell at the jail. RP 643-45. The video had no audio. RP 646-48.

The only real gun that law enforcement recovered was Daniel Smith's short barrel shotgun. The others were airsoft or pellet guns. RP 656. The weapons were not examined for fingerprints or tested for DNA. RP 657, 659-60.

d. Co-defendant Noah Robertson

The court instructed the jury that it may consider any benefit Noah Robertson received for his testimony to evaluate his credibility. The court informed the jury that based on his agreement to plead guilty and cooperate, the State would not seek records for two prior convictions from Nevada "which could potentially have made his case a third strike." RP 672-73. Robertson admitted that he was convicted of robbery and forgery in Nevada. RP 703.

Robertson has known Cynthia Guzman for about two years and knew Abraham Galindo through Guzman. Their relationship involved using and selling drugs. RP 673-74, 703-04. On July 9, 2016, Guzman sent him a text asking for help to talk to some people about her nephew getting sick from doing drugs and she asked him to bring a taser. RP 674-75, 704-05. Galinda and Guzman picked him up and they got high before going to a house on Oak Road. They were going to the house to find a guy who was

“selling bad stuff” and teach him a lesson by beating him up and taking anything of value. RP 675-77, 706-07.

When they drove to the house, Robertson and Guzman had airsoft guns and Galindo may have had a knife. RP 678. They brought the airsoft guns to scare the people at the house. RP 708. A male and female were outside the house. Robertson and Guzman got out of the car and he told the male who was in the back of a truck to lay down and Guzman appeared to have asked the female for her phone and kept it. Galindo watched the male and female while Robertson and Guzman went to the house. RP 678-81, 708-09.

Robertson pushed the door open and Guzman followed him. He saw a male running out the back of the house as they entered. They started searching the house and looking for Daniel Smith who had sold bad heroin to Guzman’s nephew. RP 682-83. The first person he saw in the house was David Garcia. Robertson pointed a taser and air pistol at him and asked about Daniel and the drugs. He told Garcia to get down on the ground and empty his pockets, while threatening him with the taser. He took Garcia’s wallet and cell phone before Garcia escaped by jumping out a window. RP 683-87.

Meanwhile, Guzman tried to get into a room but the door was locked so Robertson forced the door open. He saw a female who was half dressed

and scared her with the taser. He asked her where Daniel was but she did not know. RP 688-91. Guzman got into a tussle with the girl trying to find out where Daniel went. RP 700, 715. Then Galindo brought Daniel into the room and said he had jumped out a window. RP 691-92. Robertson slapped him around a little and asked him where he kept the money and drugs. RP 693.

In a rush to leave, the three of them began grabbing various things around the house and throwing them in bags. Someone took \$50.00 in cash from either Daniel or the girl. Guzman found a shotgun somewhere and had it for a second. She had no interaction with Daniel or the girl while she had the gun because he told her to get rid of it. Robertson told Galindo to put the gun in the car. RP 693-99, 712. “That was the whole point. Let’s get stuff and go.” RP 697. As they left, he saw a police car behind them. They were apprehended by the police shortly thereafter. RP 717.

e. Other Witnesses for the State ²

April Alvarez was outside the house talking to her husband, Lamont Matson, when a black car backed up the driveway behind their truck. RP 290-93. A male wearing a ski mask stepped out of the back seat of the car and pointed a gun in her face. He told her to get down on the ground and

² During their testimony, April Alvarez, Lamont Matson, David Garcia, Daniel Smith, and Jessica Brackens identified Guzman in the courtroom as the female allegedly involved in the incident. RP 182, 229-30, 320, 478-79, 558.

give up her phone. RP 295-97. As she was getting down on the ground, a female got out of the car. The female told her not to look up and took her phone. She had a gun or a taser and warned Alvarez not to make things difficult and be quiet to avoid getting hurt. While she was on the ground, the male struck her on the head with the butt of a gun. RP 298-300, 331. Then a third person got out of the car and yelled at Matson to get down in the truck. He was wearing a ski mask and carrying a knife. He told her to get in the back of the truck where Matson was and he stood right by the truck holding his knife in an intimidating manner. RP 302-05. The knife was about five or six inches long. RP 303.

While in the truck, Alvarez could hear yelling and the sound of tasers coming from the house but did not hear gunshots. She heard a female yelling, "Where is Dan's room?" RP 305, 326. She saw Daniel Smith jump out of a window in his room wearing only a T-shirt. RP 305, 309-311. When the male who was standing by them saw Smith, he ran after him and caught up to him. Then Matson jumped into the cab of the truck and drove off with her still in the back. As they drove away, she saw the female come out of the house and aim a shotgun at them. RP 311-13, 338-42, 344-45.

Lamont Matson recalled that he was working on his truck and talking to Alvarez when a black Mitsubishi Lancer pulled into the driveway. RP 556-57. A female got out of the truck. Then the driver and a passenger

got out wearing masks. RP 557-58. They approached April, hit her over the head, took her cell phone, and told her to get in the truck with him. RP 558-59. Guzman and one of the men went inside the house while the other man stayed behind holding a knife and what looked like a gun. She appeared to be carrying a pistol. RP 560. He heard a taser going off multiple times and saw Daniel Smith jump out of his bedroom window. The man standing by him and Alvarez chased after Smith and caught him. RP 561.

Matson thought about helping Smith but because he was not sure if the guns the people had were real or not, he jumped into the cab of his truck and took off with Alvarez still in the back. He did not see anyone pointing a gun at them as he drove away. He stopped about a mile down the road to let Alvarez inside the truck. RP 561-63.

Anthony Harris was living in a barn facing the back of the house. RP 578, 581. While having breakfast with April Alvarez in the living room, she left to go outside so he decided to return to the barn. While walking toward the back door of the house, he encountered a man wearing a ski mask. The man held a rifle to his head and ordered him not to move. At first Harris thought the man was joking but then ran to the barn as fast as he could and barricaded the door. RP 583-85, 588-89, 594. He looked out his window and saw two men wearing ski masks walk out the back of the house

and look around. A few minutes later, a black car sped out of the driveway onto Oak Road. Shortly thereafter, the police arrived at the house. RP 585-87.

David Garcia was at the house visiting his friend, Ryan Watkins. RP 172-74. While in Watkins's back bedroom, he heard a commotion in the living room. He looked up and saw a male with a bandana around his face holding a taser and handgun. The male said "this is a robbery" and told him to empty his pockets and get on the ground. RP 174-76. He got on the ground and took out his cell phone and wallet. While he was lying on the ground, a female came into the room asking for Daniel. RP 178-79. She was carrying what appeared to be a shotgun. RP 183, 189-90, 205-06.

While Garcia remained on the ground, the two people left the room. He heard them banging on Daniel Smith's bedroom door and people yelling and screaming. RP 187. The male returned and put the gun to Garcia's head and threatened him. He shocked Garcia with the taser, searched his pockets, and took his cell phone and wallet. RP 183-86. When the male left the room again, he jumped out the window and ran down the driveway. RP 189. He ran to a neighbor's home who called 911. RP 192-94. He then saw a car speeding out of the driveway of the house and a white Mercedes following it. The police arrived at the house and after speaking to the

officers, they took him to another location where he identified Guzman. RP 195-99.

Daniel Smith was charged with unlawful possession of methamphetamine and agreed to testify for the State in exchange for a recommendation of the bottom of the range sentence and he received immunity for his testimony. RP 506-10. He considers himself “a drug addict.” RP 457. He lived at the house owned by his friend, Ryan Watkins, where the people who either lived or stayed there used and sold drugs. RP 454-57.

Smith and Jessica Brackens were sleeping in his bedroom with the door locked. He awoke when he heard an unusual sound and David Garcia crying out in pain. RP 458-61. Then he heard people going up and down the hallway so he grabbed his sawed-off shotgun which was operable but not loaded. RP 461-63. The door suddenly came off the hinges and a male barged into the room. He recalled that he hit the male with the butt of his gun or threw the gun at him. RP 464-65, 514. He could not see what happened to the gun. RP 519. The male said “this is a pocket check,” which means robbery. To escape, Smith jumped out the window and landed hard on the ground. RP 465, 467-68, 477. Another male standing outside the house charged toward him with a knife. They began fighting and the male stabbed him several times. RP 468-70. The fight stopped when a female

came outside with a handgun and pointed it at him. She told the male to take him inside and followed them into the house. RP 477-80.

They sat Smith down on the kitchen floor and the other male who broke down his bedroom door brought the male he fought with a gun. Then the other male and female went to his bedroom where Brackens was and he heard her screaming. RP 482-83. He ended up back in the bedroom where the female put a gun to his head and the male threatened him with a taser and hit him with it. Brackens had only a bra on. They demanded that he show them where the money and drugs were but he refused. RP 483-86, 489-91. He had some methamphetamine and heroin in his room. RP 511-12.

They started ransacking the house and ripped a television off the wall. RP 487-89. The male and female kept yelling at him and he heard them say they were taking him with them. RP 491-92. He could see a black car parked outside with the trunk open. RP 492-93. Luckily, his friend, Casey Hawke, showed up unexpectedly. As Hawke drove up the driveway, they got spooked and took off in their car. RP 494.

Smith's adrenaline kicked in and he ran to his bedroom and told Brackens to get dressed. He grabbed a hatchet and they jumped into Hawke's Mercedes. 495. Another friend, Kim Howard, was also in the car. He ordered Hawke to go after the black car. Hawke drove onto Oak

Road but by then a police car was in front of them following the black car. He did not want to get involved with the police so he told Hawke to return to the house. RP 496-97. Within minutes, the police arrived at the house and questioned him about the incident. An officer transported him to the location where the suspects were apprehended and he easily identified Guzman because she did not wear a mask. RP 499-502, 516-17. Smith identified items that belonged to him that police found in the black car and seized as evidence. RP 502-06.

Jessica Brackens would hang out at the house where people used and sold drugs. RP 223-25. She was at the house using heroin on the morning of July 9, 2016. RP 225, 251- 52. She and Daniel Smith were in his bedroom when she heard a taser and someone yelling and screaming, who she thought was David Garcia. Then Smith jumped out the bedroom window. RP 225-27. She saw a male chase after him. The male caught up to Smith and he tried to fight off the male who had a knife. RP 227-28. Smith did not have a weapon. RP 252-53.

Suddenly two people broke down the bedroom door. A male dressed in black and a female wearing a bandana over her face asked her where the money and drugs were kept. RP 228-31. They were carrying a gun and taser, and the male told her to take off her clothes. She heard the female say she needed the money because she had a sick kid in the hospital.

RP 232-35. She was freaking out a little so the male hit her with the butt end of something and told her to shut up. The female put a gun to her face and threatened her but did not physically touch her. She gave them heroin she had in her bra. RP 235-37, 253-54.

A male brought Smith back into the bedroom and he was bleeding a little from fighting with the male outside. RP 237-38. When they could not find any money or drugs, they started destroying Smith's bedroom and taking everything of value, including a television. RP 238-40. She did not know of anything they took that belonged to her. RP 240, 254. They talked about tying her and Smith up and putting them in the trunk of their car but left when they realized David Garcia had escaped. RP 238-40.

After they left, Casey Hawke came up the driveway and she and Smith jumped in his car. Smith told Hawke to follow the black car but they turned around and returned to the house when they saw the police. RP 240-42. They waited expecting the police to show up at the house. The police arrived and an officer took her to a nearby location where she identified Guzman. RP 242-43.

In November, Brackens ended up being incarcerated in the same jail cell as Guzman. RP 244-45. Guzman approached her and asked her if she was Jessica Brackens and she said, "Yeah. Why?" RP 245-46. Guzman told her that she should not testify or write a statement because she knew

who Brackens was and knew where she lived. RP 246. Brackens took that as a threat but did not care at the time because she was “dope sick” and needed to sleep. RP 246-47. After she was moved to a different cell, she started thinking about what Guzman said and intended not to testify because she felt threatened. RP 247-48. She received immunity from the State for testifying at trial. RP 248.

Kimberly Howard used to do drugs with Casey Hawke and went along with him to the house. RP 523. Hawke was driving up the driveway when a black car took off past them. RP 524. Then Daniel Smith came running out of the house carrying a hatchet and Jessica Brackens was behind him. Smith was bloody and Brackens was hysterical. RP 524. Smith told Hawke to chase the black car so they sped down the driveway onto Oak Road. She could see the black car and thought “why is that car going so slow if they just robbed you guys and everything.” RP 525. When they saw a police car, they turned around and went back to the house. Smith and Brackens wanted to get out of there but the police arrived before they could leave. RP 526.

f. Cynthia Guzman

Cynthia Guzman had been living in Bremerton, Washington for about 12 years. She has two adult sons. RP 736. She was going to school but could not continue because she became ill and required kidney surgery.

Consequently, she returned to dealing drugs to make money. RP 739-40. She did not consider herself a very good drug dealer because she would always get ripped off. RP 797-99. Abraham Galindo worked for her selling drugs. RP 740. They had an arrangement where she provided him with the drugs and he would sell them for her and give her the money. RP 740-41. When she had to collect money that people owed her, Noah Robertson was her “go-to guy.” RP 741. She would send him or bring him with her to collect the money. RP 741-42.

Leading up to the day of July 9, 2016, because Galindo owed her a lot of money, she planned to hold his car for collateral. However, he told her that somebody who lived in Port Orchard wanted to buy drugs from him so she agreed to go with him. RP 742-43, 745-46. On the way to the house, she became skeptical and told Galindo to stop by Robertson’s home. Guzman intended to bring Robertson along in case Galindo was not able to sell the drugs she had already given him. She wanted Robertson to help her get her drugs back from Galindo or take possession of his car. RP 746-48.

They went to Robertson’s home and he wanted to accompany them because he also wanted drugs. They got high before they left. She borrowed a taser from Robertson to protect herself from her boyfriend who she had an argument with earlier that morning. She took the taser with her when Galindo drove to the house on Oak Road. RP 743-49. As they were

approaching the house, she started weighing dope and putting it into pipes for Galindo to sell. RP 749-50. When she saw the house, which looked like a drug house, she asked Galindo who lived there. He named a few people, including Daniel Smith. She recognized the name and asked if Smith sold heroin. When Galindo said he did, she knew Smith was the person who sold her son some bad heroin. RP 751-52. She told Galindo that if he went into the house and roughed up Smith, she would forgive his debt. He agreed and Robertson said he would help Galindo. Guzman had been looking for Smith because her son does not do drugs but he got the heroin only because his girlfriend was a heroin addict. RP 752-53, 805.

Galindo got out of the car first and talked to some people. Robertson then got out and ran to the house after Galindo said something to him. She got out of the car and saw somebody jump out the window and Galindo chased him. When she ran to the house to find out what was going on, Galindo was beating up somebody else just outside the house. RP 754-58, 816-19. She yelled at Galindo to stop as she heard yelling and screaming from inside the house. She went into the house and saw Robertson holding a male on the ground and tasing him and he had a pistol. She told Robertson to stop and asked him if the male was Smith because she was looking only for Smith. RP 759-61, 820-23. "Abe is outside, beating somebody up. Noah is inside, beating somebody up. That's not

what my intentions were.” RP 760. Then Galindo brought in a male from outside the house who he said was Smith. RP 761.

Guzman called out to Robertson who kept searching the house that they found Smith, but he went crazy and broke down a door and started yelling at everybody to give him whatever they had. RP 762-63. Robertson took control of the situation. RP 772. At that point, David Garcia, Jessica Brackens, and Smith were in the house. Robertson slapped Brackens around and told her to shut up because she was screaming hysterically. Guzman repeatedly yelled at him to stop. When Smith tried to protect Brackens, Robertson hit him and tased him. RP 762-64, 767-68. Both Robertson and Galindo were holding guns. RP 826, 894-95. She asked Galindo to help her get Robertson out of the house so they could go but Robertson wanted to take the stuff in the house. RP 766-67. Robertson had a bag but she did not see what he put in the bag. Robertson and Galindo were carrying things out of the house but she did not know what they took. She did not take anything. RP 767-68, 769-70, 790.

While Guzman was in the house, she saw a 12-gauge shotgun in Smith’s room. She never picked it up and did not see anyone else with the shotgun. She also saw airsoft pistols in the house but never handled them. RP 765-66. Guzman was the first person out of the house. She saw a white Mercedes pulling into the driveway so she went back inside to get

Robertson and Galindo to leave. Galindo drove to a nearby house where they were apprehended by the police. RP 769-73. When she was removed from the car, an officer talked to her in a calm manner. At first she gave him a false name but eventually told him the truth. RP 774-75. After the officers placed her and Robertson in the same patrol car, he threatened her and told her not to tell the police anything. RP 775, 837-38.

The police arrested Guzman and booked her into the jail. RP 790-92. While in jail, she learned that Brackens was put in the same cell that she was in. As Brackens was laying down on her bunk, she asked her if she was Jessica Brackens. She then notified the jail guard that they should not be in the same cell and Brackens was moved. RP 792-94, 855-59.

During the time that she remained in jail, her friend Tanya Verran came to visit her. She wanted Verran to inform Robertson that the investigator in her case said Smith and Brackens were not going to testify. She was not going to write a statement against him and she wanted the same thing in return. RP 794-97, 861-62.

Guzman acknowledged that she made some statements that were not true during her interview with Detective Keeler. She was afraid because Robertson had threatened her and she was under the effect of drugs and medication. RP 738-39, 897-98.

E. ARGUMENT

1. A REASONABLE DOUBT IS ONE FOR WHICH A REASON EXISTS AND MAY ARISE FROM THE EVIDENCE OR LACK OF EVIDENCE. THE STATE FAILED TO PROVE ITS CASE BEYOND A REASONABLE DOUBT.

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); *In re Winship*, 397 U.S. 358, 362-63, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Evidence is sufficient if, after reviewing the evidence in the light most favorable to the prosecution, any rational juror could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If the evidence is insufficient, the conviction must be reversed and the case dismissed with prejudice. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Whether evidence is sufficient is a question of constitutional law reviewed de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

- a. There was insufficient evidence to prove beyond a reasonable doubt that Guzman was armed with a firearm at the time of the alleged kidnapping, robbery, and assault of Daniel Smith and Jessica Brackens.

The trial court instructed the jury on the firearm enhancement:

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crimes of Counts I, V through VII, IX, X, XI, XIII, XIV, XV.

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant or an accomplice. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether these connections between the firearm and the crime, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the weapon at the time of the crime and the type of the weapon.

If one participant in a crime is armed with a firearm, all accomplices to that participant are deemed to be so armed, even if only one firearm is involved.

A “firearm” is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

RP 514 (Instruction No. 59).

The record reflects that Deputy Stacy testified that while searching the trunk, the officers seized the stock of a long gun, an air rifle, a taser, two airsoft or pellet guns, a 12-gauge shotgun, and other evidence. RP 369-80. The shotgun was the only real gun. RP 416-17. He explained that the other guns were airsoft or pellet guns that expel air to fire pellets which are little pieces of lead. RP 417-18.

Daniel Smith testified that when he heard people going up and down the hallway he grabbed his sawed-off shotgun which was operable but not

loaded. RP 461-63. The door suddenly came off the hinges and a male barged into the room. He recalled that he hit the male with the butt of his gun or threw the gun at him, but his memory was a little fuzzy. RP 464-65, 514. He did not see what happened to the gun. RP 514, 519. Smith was uncertain whether someone else ended up with the gun:

Q. So did you keep hold of that shotgun?

A. I believe I let it go.

Q. Okay. And did you later see that shotgun in someone else's possession?

A. Like I said, he may have bought it to the gentleman while I was on the kitchen floor, but it's all vague. It's very vague. You're asking me details that I just know there was weapons and, you know, guns, and it could have -- like I said earlier, it could have been mine.

RP 514.

Smith said that when he was brought back into the house and in the bedroom, he had a gun put to this head, but he did not describe the gun. RP 483-84.

Jessica Brackens testified that the male and female were carrying a gun and taser. RP 232-35. When she starting freaking out, the male hit her with the butt end of something and told her to shut up. The female put a gun to her face and threatened her but did not physically touch her. RP 235-37, 253-54. Brackens never described the gun.

Noah Robertson testified that when they drove to the house, he and Guzman had airsoft guns. RP 678. They brought the guns to scare the

people at the house. RP 708. While they were in the bedroom, he saw Guzman with a shotgun that she found somewhere:

- Q. Now, you talked about the two from the bedroom?
A. Yeah. That was Daniel and -- I don't know the other girl's name.
Q. The girl that was with him?
A. Yeah.
Q. Being around -- did Ms. Guzman ever have the gun around them?
A. For a hot minute. For a second.
Q. Was there any kind of interaction?
A. Not really. Because I told her to just get rid of it, put that in the car, told Abraham to put that in the truck, and let's get out of there. That was the whole point. Let's get stuff and go.

RP 697.

Guzman testified that while she was in the house, she saw a 12-gauge shotgun in Smith's room. She never picked it up and did not see anyone else with the shotgun. RP 765. During the interview with Detective Keeler she said Robertson and Galindo took guns from the house but she did not say they used the guns. Ex. 83 at pages 10, 12-13, 24, 48-49.

When admitting the truth of the State's evidence and all inferences that reasonably can be drawn therefrom, the evidence proves that two airsoft or pellet guns and a shotgun, the only firearm, were recovered by the police. The male and female had guns while Smith and Brackens were restrained in the bedroom. Smith identified his shotgun admitted as evidence but throughout his testimony, he never said his shotgun was used to threaten

him. RP 463. Furthermore, he would not feel threatened by the use of his own shotgun because he knew it was not loaded. RP 462. Given the fact that there were several guns involved in the incident and Smith and Brackens said they were threatened with a gun, the evidence fails to prove that the gun was the shotgun and not an airsoft or pellet gun. Although Robertson claimed Guzman had a shotgun for a second, he said she had no interaction with Smith and Brackens while holding the gun because he told her to get rid of it and Galindo put the gun in the trunk.

Consequently, there was insufficient evidence to prove beyond a reasonable doubt that Guzman or an accomplice kidnapped, robbed, and assaulted Smith and Brackens while armed with a firearm. The firearm enhancements must be reversed and dismissed.

- b. There was insufficient evidence to prove that Guzman committed robbery against Jessica Brackens.

RCW 9A.56.190 defines the crime of robbery:

A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her 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.

The trial court instructed the jury as follows:

A person commits robbery the crime of robbery when he or she unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another who is the owner or in possession of the property and the taking was against that person's will by the use of immediate force, violence, or fear of injury to that person. A threat to use immediate force or violence may be either expressed or implied. The 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 case the degree of force is immaterial.

CP 490 (Instruction No. 36).

To convict the defendant of the crime of robbery in the first degree as charged in Count XI, each of the following seven elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about July 9, 2016, the defendant or an accomplice unlawfully took personal property from the person or in the presence of another: to wit Jessica Brackens
- (2) That the person from whom or in whose presence the property was taken had an ownership, representative, or possessory interest in the property taken;
- (3) That the defendant or an accomplice intended to commit theft of the property taken;
- (4) That the taking was against the person's will by the defendant or an accomplices' use or threatened use of immediate force, violence, or fear of injury to that person;
- (5) That force or fear was used by the defendant or an accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
- (6)
 - (a) That in the commission of these acts or in immediate flight therefrom the defendant or an accomplice was armed with a deadly weapon or
 - (b) That in the commission of these acts or in the immediate flight therefrom the defendant or an accomplice displayed what appeared to be a firearm or other deadly weapon; and
- (7) That any of these acts occurred in the State of Washington.

CP 488 (Instruction 35 in relevant part).

During her testimony, Jessica Brackens was asked about what the people took from the house:

Q. And did they start doing anything around the house because they couldn't get this money or drugs?

A. They started destroying Daniel's room and got whatever they could out of Daniel's room that was worth something. They took the TV and everything.

Q. Did you have stuff in the room?

A. Yeah.

Q. Did they take any of your stuff?

A. I'm not really sure.

Q. You don't remember for sure?

A. Yeah.

.....

Q. Did anybody steal -- besides the heroin, did anybody steal anything from you?

A. Not that I know of. I mean, I had stuff in the room.

Q. Okay. What kind of stuff?

A. Clothes and some things.

Q. Okay. Was there -- when you later went to where the people were identified, was there anything, to your knowledge, of yours that was in that vehicle?

A. No.

RP 239-40, 254.

Noah Robertson testified that they were quickly grabbing things in the house and someone took 50 or 60 dollars from Daniel or the girl. "It could have been either one." RP 494-95. During her interview with Detective Keeler, Guzman said she did not know about anyone taking 50 dollars from the girl. Ex. 83 at page 41. Daniel Smith testified that several Coach purses that he bought for Brackens were taken. RP 504-06.

The to convict instruction requires the State to prove that Guzman or an accomplice took personal property from or in the presence of Brackens against her will by the use or threatened use of immediate force, violence, or fear of injury to her while armed with a deadly weapon or what appeared to be a firearm or other deadly weapon. Brackens testified that she did not know of anything taken that was hers and there was nothing in the car that belonged to her. She never said that money or her purses were taken from her. It is more than reasonable to presume that she would know if personal property was taken from her or in her presence against her will by force. When asked several times, Brackens, the so-called victim of the alleged robbery, said nothing was taken from her. Based on her testimony, there was absolutely no evidence of robbery.

Consequently, where the victim of the alleged robbery denies that anything was taken from her, even when admitting the truth of the State's evidence and all inferences that reasonably can be drawn therefrom, the State failed to prove beyond a reasonable doubt that Guzman committed robbery against Brackens. The conviction must be reversed and dismissed. *Hickman*, 135 Wn.2d at 103.

2. GUZMAN WAS DENIED HER CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment to the United States Constitution and art. I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

To demonstrate ineffective assistance of counsel, a defendant must show that (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced defendant, i.e. there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceedings would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)(citing *Thomas*, 109 Wn.2d at 225-26)(applying the two-prong test in *Strickland*, 466 U.S. at 687)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Thomas*, 109 Wn.2d at 226 (quoting *Strickland*, 466 U.S. at 694).

There is a strong presumption that counsel has rendered adequate assistance and has made all significant decisions by exercising reasonable professional judgment. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177

(1991). A criminal defendant can rebut the presumption of reasonable performance by showing that there “is no conceivable legitimate tactic that explains counsel’s performance.” *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). If counsel’s conduct can be characterized as “legitimate trial strategy or tactics,” it cannot serve as a basis for a claim of ineffective assistance of counsel. *Lord*, 117 Wn.2d at 883.

- a. Defense counsel’s representation was deficient in failing to argue that the crimes of kidnapping, assault, and robbery constitute same criminal conduct.

The offender score establishes the standard range term of confinement for a felony offense. RCW 9.94A.530(1); RCW 9.94A.525. The sentencing court calculates an offender score for purposes of sentencing by adding current offenses and prior convictions. The offender score for each current offense includes all other current offenses unless the court finds “that some or all of the current offenses encompasses the same criminal conduct.” RCW 9.94A.589(1)(a). Where the court makes such a finding, those current offenses are counted as one crime for sentencing purposes. RCW 9.94A.589(1)(a).

Offenses constitute the same criminal conduct if they are (1) committed with the same criminal intent, (2) committed at the same time and place, and (3) involve the same criminal victim. RCW 9.94A.589(1)(a);

State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994); *State v. Chenoweth*, 185 Wn.2d 218, 219, 370 P.3d 6 (2016). Unless all elements are present, the offenses must be counted separately. *Id.* (citing *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997)).

Appellate courts review determinations of same criminal conduct for abuse of discretion or misapplication of the law. *State v. Graciano*, 176 Wn.2d 531, 535-36, 295 P.3d 219 (2013). “Under this standard, when the record supports only one conclusion on whether crimes constitute the same criminal conduct, a sentencing court abuses its discretion in arriving at a contrary result.” *Id.* at 537-38. The defendant bears the burden of proving the crimes constitute the same criminal conduct. *Id.* at 539.

Here, all the crimes took place at the same time and place at 1035 SE Oak Road on July 9, 2016, involving the kidnapping, assault, and robbery of four different victims. The evidence establishes that the crimes constitute the same criminal conduct as to each victim.

April Alvarez testified that a male wearing a ski mask stepped out of the back seat of the car and pointed a gun in her face. He told her to get down on the ground and give up her phone. RP 295-97. As she was getting down on the ground, a female got out of the car. The female told her not to look up and took her phone. She had a gun or a taser and warned Alvarez not to make things difficult and be quiet to avoid getting hurt. While

Alvarez was on the ground, the male struck her on the head with the butt of a gun. RP 298, 299-300, 331.

David Garcia testified that while he was in the back bedroom, he heard a commotion in the living room. He looked up and saw a male with a bandana around his face holding a taser and handgun. The male said “this is a robbery” and told him to empty his pockets and get on the ground. RP 174-76. He got on the ground and took out his cell phone and wallet. As he was lying on the ground, a female came into the room asking for Daniel and she was carrying what appeared to be a shotgun. RP 178-79, 183, 189-90, 205-06. While Garcia remained on the ground, the two people left the room, but the male returned and put a gun to Garcia’s head and threatened him. He shocked Garcia with the taser, searched his pockets, and took his cell phone and wallet. RP 183-87.

Daniel Smith testified he and Jessica Brackens were sleeping in his bedroom with the door locked and he awoke when he heard an unusual sound and David Garcia crying out in pain. RP 458-61. Then he heard people going up and down the hallway so he grabbed his sawed-off shotgun which was operable but not loaded. RP 461-63. The door suddenly came off the hinges and a male barged into the room. RP 464-65, 514, 519. The male said “this is a pocket check,” which means robbery. To escape, Smith jumped out the window and landed hard on the ground. RP 465, 467-68,

477. Another male standing outside the house charged toward him with a knife. They began fighting and the male stabbed him several times. RP 468-70. The fight stopped when a female came outside with a handgun and pointed it at him. She told the male to take him inside and followed them into the house. RP 477-80. He ended up back in the bedroom where the female put a gun to his head and the male threatened him with a taser and hit him with it. They demanded that he show them where the money and drugs were and when he refused they started ransacking the house. RP 483-91.

Jessica Brackens testified that she and Daniel Smith were in his bedroom when she heard a taser and someone yelling and screaming, who she thought was David Garcia. She freaked out not knowing what to do and Smith jumped out the bedroom window. RP 225-27. Suddenly two people broke down the bedroom door. A male dressed in black and a female wearing a bandana over her face asked her where the money and drugs were kept. RP 228-31. They were carrying a gun and a taser. The male hit her with the butt end of something and told her to shut up. The female put a gun to her face and threatened her but did not physically touch her. RP 232-37, 253-54. When they could not find any money or drugs, they started destroying Smith's bedroom and taking everything of value, including a television. RP 238-40.

In determining whether multiple crimes constitute the same criminal conduct, courts consider “how intimately related the crimes committed are, and whether, between the crimes charged, there was any substantial change in the nature of the criminal objective” and “whether one crime furthered the other.” *State v. Burns*, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). In construing the same criminal intent prong, the standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next. *Vike*, 125 Wn.2d at 411 (citing *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987)).

In each instance, the evidence establishes that the crimes of kidnapping, assault, and robbery were closely related, the criminal objective of acquiring property did not change, and the kidnapping and assault furthered the crime of robbery. Based on the testimony of the alleged victims, the accomplices restrained, threatened, and assaulted them to take their property. Alvarez was told to get on the ground, hit on the head, and had her phone taken. Garcia was told “this is a robbery,” ordered to get on the ground, tased, and had his phone and wallet taken. Smith was captured, stabbed, and hit and the accomplices demanded drugs and money. Brackens was restrained, hit on the back of the head, and the accomplices wanted to know where the drugs and money were kept. When objectively viewed, the evidence shows a continuing criminal intent to acquire property.

If, as here, “one crime *furthered* another, and if the time and place of the crimes remained the same, then the defendant’s criminal purpose or intent did not change and the offenses encompass the same criminal conduct.” *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). There is a reasonable probability that the court would have found that the offenses encompassed the same criminal conduct had defense counsel so argued. Consequently, because defense counsel’s representation was deficient and Guzman was prejudiced by his deficient representation, a remand for resentencing is required. *State v. Phuong*, 174 Wn. App. 494, 547-49, 299 P.3d 37 (2013).

- b. Defense counsel’s representation was deficient in failing to request an exceptional sentence below the standard range.

RCW 9.94A.535 provides that the court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Under RCW 9.94A.535(1), the court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. Mitigating circumstances include the “operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is

clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.” RCW 9.94A.535(1)(g).

RCW 9.94A.010 expresses the purpose of the chapter as follows:

The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender’s criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve himself or herself;
- (6) Make frugal use of the state’s and local governments’ resources; and
- (7) Reduce the risk of reoffending by offenders in the community.

Here, the sentence imposed pursuant to RCW 9.94A.589(1)(b)³ resulted in a sentence that is clearly excessive when considering the purpose of the chapter. The record reflects that Guzman’s prior criminal history

3. Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender’s prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under this subsection (1)(b) shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

involved controlled substances and theft but no violent offenses. At the time of the incident, Guzman was under the effect of the combination of drugs and prescribed medication. RP 897-98. The trial court described her case as an “example of the destructiveness of drugs in people’s lives.” 05/12/17 RP at 17. The sentence of 1016 months, essentially a life sentence, gave Guzman no opportunity to seek treatment for her drug addiction to improve herself through rehabilitation. The sentence is excessive and unjust in light of the circumstances.

At sentencing, the court commented that “the impression that we are supposed to be unfeeling monoliths while sitting up here is wrong.” 05/12/17 RP at 16. The court was clearly sympathetic:

I will advise Ms. Guzman, you have always been very appropriate with me, but you’re a bit of an enigma. We had those recordings played in the Court, and the person on those recordings is nowhere near the person who is sitting before me. And I don’t know who the real Ms. Guzman is, but I am not the one who made the decision here; the jury did. And unfortunately because of that, my hands are pretty well tied as far as the range that I can and cannot impose.

05/12/17 RP at 16-17.

Given the court’s reluctance to impose the minimum standard range sentence of 1016 months, defense counsel’s representation was deficient in failing to recommend an exceptional sentence below the standard range where mitigating circumstances justified an exceptional sentence. As the court noted, defense counsel did not prepare a sentencing memorandum for

the court. 05/12/17 RP 2-3. Instead, defense counsel simply agreed with the State's recommendation of the bottom of the standard range, telling the court that "the sentencing range doesn't really matter." 05/12/17 RP at 7.

Guzman was clearly prejudiced by defense counsel's deficient representation where the court's comments indicate that it would have exercised its discretion and imposed an exceptional sentence if defense counsel had recommended one. She is entitled to counsel who "as advocate, conscientiously and ardently asserts the client's position." *Rules of Professional Conduct Preamble: Lawyer's Responsibilities*. A remand for resentencing is required because Guzman was denied her constitutional right to effective assistance of counsel.

3. THE TRIAL COURT ERRED BY ENTERING SEPARATE CONVICTIONS FOR SECOND DEGREE ASSAULT AND FIRST DEGREE ROBBERY IN VIOLATION OF DOUBLE JEOPARDY.

Double jeopardy claims raise questions of law which appellate courts review 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)).

"No person shall be . . . twice put in jeopardy for the same offense." CONST. art. I, section 9; accord U.S. CONST. amend. V. Double jeopardy prohibits multiple convictions for the same offense. *State v. Freeman*, 153 Wn.2d 765, 770, 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 Personal Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)(quoting *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995)). Double jeopardy is not offended if the legislature authorized cumulative punishments for both crimes. *Freeman*, 153 Wn.2d at 771.

A tool for determining legislative intent in the context of double jeopardy is the merger doctrine:

The merger doctrine is a rule of statutory construction which only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime (e.g., first degree rape) the State must prove not only that a defendant committed that crime (e.g., rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (e.g., assault or kidnapping).

Freeman, 153 Wn.2d at 777-78 (citing *State v. Vladovic*, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983)).

In *Freeman*, consolidated with *State v. Zumwalt*, the Washington Supreme Court concluded that the merger doctrine applied to Zumwalt’s first degree robbery and second degree assault convictions because he committed the assault in furtherance of the robbery. 153 Wn.2d at 778. The Court concluded that the exception that may operate to allow two

convictions did not apply where there was no evidence that the assault had a purpose or effect independent of the robbery. 153 Wn.2d at 778-79.

The facts here are similar to *Zumwalt*, where during the course of a drug transaction, the defendant punched the victim in the face and robbed her. 153 Wn.2d at 770. April Alvarez testified that a masked male pointed a gun at her and told her to get down on the ground and give him her cell phone. As she was getting down on the ground, the male hit her on the back of her the head with the butt of the gun. A female told her to stay down and snatched her phone out of her hand. RP 295-300. David Garcia testified a male put a gun to his head and threatened him. He shocked Garcia with a taser, searched his pockets, and took his cell phone and wallet. RP 183-86. Daniel Smith testified that he was held at gunpoint by a male and female who demanded money and drugs. The male also had a tasesr and hit him with it. RP 483-84. Jessica Brackens testified that a male and female barged into the bedroom carrying a gun and taser. They asked her where the money and drugs were kept. The male hit her in the face with the butt end of something. RP 228-30, 34-35. They ransacked the house and took whatever they could that was of value. RP 239-40, 487-89.

To prove first degree robbery, the State had to prove the defendant committed assault in furtherance of the robbery. *Freeman*, 152 Wn.2d at 778. As in *Zumwalt*, the evidence established that Guzman or an

accomplice committed assault in furtherance of the robbery and the assault had no purpose or effect independent of the robbery.

The remedy for a violation of double jeopardy protections is to vacate the lesser offense. *State v. Albarran*, 187 Wn.2d 15, 21, 383 Wn.2d 15 (2016). A remand for resentencing is required for the trial court to vacate the second degree assault convictions.⁴ *Freeman*, 152 Wn.2d at 780.

4. A REMAND FOR RESENTENCING IS REQUIRED BECAUSE THE STATE FAILED TO PROVE THE ALLEGED PRIOR CONVICTIONS BY A PREPONDERANCE OF THE EVIDENCE.

At sentencing, the State must prove any prior convictions by a preponderance of the evidence and must “introduce ‘evidence of some kind to support the alleged criminal history.’ ” *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012)(quoting *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999)). A certified copy of the judgment is the best evidence of a prior conviction but the State may offer “ ‘other comparable documents of record or transcripts of prior proceedings to establish criminal history.’ ” *In re Personal Restraint of Adolph*, 170 Wn.2d 556, 566, 243 P.3d 540 (2010)(quoting *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999)).

⁴ If this Court concludes there was sufficient to prove beyond a reasonable doubt that Guzman committed robbery against Brackens, this Court should vacate the second degree assault conviction

The State is relieved of its burden only if the defendant affirmatively acknowledges the facts and information introduced for the purposes of sentencing. *State v. Mendoza*, 165 Wn.2d 913, 928, 205 P.3d 113 (2009), *disapproved on other grounds*, *State v. Jones*, 182 Wn.2d 1, 338 P.3d 278 (2014). “The mere failure to object to a prosecutor’s assertions of criminal history does not constitute such and acknowledgment.” Nor is a defendant deemed to have affirmatively acknowledged the prosecutor’s asserted criminal history based on her agreement with the ultimate sentencing recommendation. *Mendoza*, 165 Wn.2d at 928. “Bare assertions” as to criminal history do not substitute for the facts and information a sentencing court requires. *Id.* at 929.

The judgment and sentence lists Guzman’s criminal history as follows:

DWLS 3, sentenced on 09/27/13 in Kitsap
Theft 3, sentenced on 09/10/09 in Lynnwood
VUCSA (attempt), sentenced on 09/10/09 in Pierce
Manuf/Delvr/Poss w Int Meth, sentenced on 06/29/05 in Kitsap
VUCSA, sentenced on 02/10/05 in Kitsap
VUCSA, sentenced on 04/30/04 in Kitsap
Theft 2, sentenced on 04/30/04 in Kitsap

CP 573.

At trial, Guzman stipulated that she was convicted on June 29, 2005, of a felony in Washington. RP 734-35. At sentencing, the State did not present any evidence to support Guzman’s alleged prior convictions and she

did not affirmatively acknowledge the prior convictions asserted by the State. In fact, there was no discussion of Guzman's criminal history. 05/12/17 RP at 2-19. Consequently, a remand is required for a new sentencing hearing. *Mendoza*, 165 Wn.2d at 930.⁵

5. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD EXERCISE ITS DISCRETION AND NOT AWARD COSTS BECAUSE GUZMAN REMAINS INDIGENT.

Under RCW 10.73.160 and RAP Title 14, this Court may award costs to a substantially prevailing party on appeal. RAP 14.2 (amended effective January 31, 2017) provides in relevant part:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.

National organizations have chronicled problems associated with legal financial obligations (LFOs) imposed against indigent defendants. These problems include increased difficulty in reentering into society, the

⁵ "On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented." RCW 9.94A.530(2).

doubtful recoupment of money by the government, and inequity in administration. *State v. Blazina*, 82 Wn.2d 827, 835, 344 P.3d 680 (2015)(citing, et al., AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTOR’S PRISONS (2010)). In 2008, The Washington State Minority and Justice Commission issued a report that assessed the problems with the LFO system in Washington. The report points out that many indigent defendants cannot afford to pay their LFOs and therefore the courts retain jurisdiction over impoverished offenders long after they are released. Legal or background checks show an active court record for those who have not paid their LFOs, which can have negative consequences on employment, on housing, and on finances. *Blazina*, 182 Wn.2d at 836-37.

In *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000), the Washington Supreme Court concluded that an award of costs “is a matter of discretion for the appellate court, consistent with the appellate court’s authority under RAP 14.2 to decline to award costs at all.” The Court emphasized that the authority “is permissive” as RCW 10.73.160 specifically indicates. *Nolan*, 141 Wn.2d at 628. The statute provides that the “court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs.” RCW 10.73.160(1)(emphasis added).

In the event the State substantially prevails on appeal, this Court should exercise its discretion and not award costs where the trial court determined that Guzman is indigent. The trial court found that Guzman is entitled to appellate review at public expense due to her indigency and entered an Order of Indigency. CP 588-90. This Court should therefore presume that Guzman remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

Continued Indigency Presumed. A party and counsel for the party who has been granted an order of indigency must bring to the attention of the appellate court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefit of an order of indigency throughout the review unless the appellate court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

There has been no evidence provided to this Court, and there is no reason to believe, that Guzman's financial condition has significantly improved. Guzman is therefore presumably still indigent and this Court should exercise its discretion to not award costs where there is no basis for the commissioner or clerk to determine by a preponderance of evidence that her financial circumstances have significantly improved since the last determination of indigency.

D. CONCLUSION

For the reasons stated, this Court should reverse and dismiss the firearm enhancements, reverse and dismiss the robbery conviction against Jessica Brackens, and in any event, remand for resentencing.

Should the State prevail on appeal, this Court should exercise its discretion and not award costs because Guzman remains indigent.

DATED this 25th day of April, 2018.

Respectfully submitted,

/s/ Valerie Marushige

VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant Cynthia Maria Guzman

DECLARATION OF SERVICE

On this day, the undersigned sent by email, a copy of the document to which this declaration is attached to the Kitsap County Prosecutor's Office and by U.S. Mail to Cynthia Marie Guzman, DOC # 870436, Washington Corrections Center for Women, 9601 Bujacich Road NW, Gig Harbor, Washington 98322-8300.

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

DATED this 25th day of April, 2018.

/s/ Valerie Marushige
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