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

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STATE OF WASHINGTON,

Respondent,

v.

CYNTHIA MARIE GUZMAN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 16-1-00880-0

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BRIEF OF RESPONDENT

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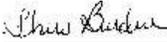
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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether there was sufficient evidence that Guzman was armed with a firearm during this incident and sufficient evidence that property was taken from victim Jessica Brackens.

2. Whether counsel was ineffective for failing to argue same criminal conduct with regard to the assault, robbery, and kidnapping convictions received for each of four victims and for failing to argue for a downward departure at sentencing?

3. Whether the various counts of second degree assault merge with the various counts of first degree robbery?

4. Whether the trial court erred in counting in the offender score four prior offenses that were not discussed at sentencing but were acknowledged by Guzman?

5. Whether should the state substantially prevail, Guzman should be assessed appellate costs? (CONCESSION)

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

Cynthia Marie Guzman was initially charged by information filed in Kitsap County Superior Court with first degree robbery and second degree unlawful possession of a firearm. CP 1. Later, a first amended

information charged nineteen counts:

Count I, first degree burglary with special allegations of armed with a firearm and armed with a deadly weapon;

Count II, first degree kidnapping (victim April Alvarez) with special allegation of armed with a deadly weapon;

Count III, first degree kidnapping (Lamont Matson) with special allegation of armed with a deadly weapon;

Count IV, attempted first degree kidnapping (Anthony Harris) with special allegation of armed with a deadly weapon;

Count V, first degree kidnapping (David Garcia) with special allegations of armed with a firearm and armed with a deadly weapon;

Count VI, first degree kidnapping (Daniel Smith) with special allegations of armed with a firearm and armed with a deadly weapon;

Count VII, first degree kidnapping (Jessica Brackens) with special allegations of armed with a firearm and armed with a deadly weapon;

Count VIII, first degree robbery (April Alvarez) with special allegation of armed with a deadly weapon;

Count IX, first degree robbery (David Garcia) with special allegations of armed with a firearm and armed with a deadly weapon;

Count X, first degree robbery (Daniel Smith) with special allegations of armed with a firearm and armed with a deadly weapon;

Count XI, first degree robbery (Jessica Brackens) with special allegations of armed with a firearm and armed with a deadly weapon;

Count XII, second degree assault (April Alvarez) with special allegation of armed with a deadly weapon;

Count XIII, second degree assault (David Garcia) with special allegations of armed with a firearm and armed with a deadly weapon;

Count XIV, second degree assault (Daniel Smith) with special allegations of armed with a firearm and armed with a deadly weapon;

Count XV, second degree assault (Jessica Brackens) with special allegations of armed with a firearm and armed with a deadly weapon;

Count XVI, second degree unlawful possession of a firearm;

Count XVII, intimidating a witness;

Count XVIII, tampering with a witness.

CP 27-44.

Guzman was found guilty on all counts. CP 515-519. The jury gave affirmative answers to all special allegations. CP 520-544. Other than firearm or deadly weapon enhancements, the jury announced special

verdicts finding that for each of the kidnapping counts Guzman or an accomplice held each of the victims as a shield or hostage, with intent to facilitate first degree robbery, and with intent to inflict bodily injury on her. CP 522 (Count II); CP 524 (count III); CP 526 (count IV); CP 528 (count V); CP 530 (count VI); CP 532 (count VII). Regarding count XII, second degree assault, the jury found that Guzman assaulted April Alvarez with intent to commit first degree robbery (CP 538); similarly with regard to the other second degree assaults count XIII against David Garcia (CP 540), count XIV against Daniel Smith (CP 542), and count XV against Jessica Brackens. CP 544.

The nineteen convictions and attendant enhancements placed Guzman's total standard range at 1015.25-1145 months. CP 554. She was sentenced to 1016 months. CP 575.

The present appeal was timely filed. CP 587.

## **B. FACTS**

Police responded to a call from David Garcia about a robbery in a home. RP 264, 355. The police contacted a number of people at the residence but the robbers had fled. RP 265. Police contacted Daniel Smith and observed that he had blood on his face and scratches on his arms. RP 266-67. The police observed a broken door-jam to the house

and the house in disarray with blood on the kitchen floor. RP 268. A door to a bedroom was broken off. RP 269.

David Garcia had gone to visit a friend. As he stood in his friend's house, an individual in with a bandana over his face holding a gun and a flashlight/taser told him to empty his pockets because "this is a robbery." RP 174 (description of taser at RP 179-80). He was told to empty his pockets and get on the ground. RP 176. The gun looked like a real 9mm pistol. RP 176.

As Garcia lay on the floor pulling things out of his pockets, another robber approached and asked about the whereabouts of Daniel. RP 178. Garcia said he did not know where Daniel was. Id. The person asking about Daniel was a female, wearing camo pants and a black shirt. RP 179. Mr. Garcia identified Guzman as this female robber. RP 182. When she asked about Daniel, Guzman was holding an item that "looked like a shotgun." RP 183.

The male robber with the taser placed the gun against Mr. Garcia's head and threatened to kill him if he moved. RP 184. He tased Mr. Garcia and took Mr. Garcia's phone and wallet. Id. The assailant took the wallet from Mr. Garcia's back pocket. RP 185.

Mr. Garcia was driven to a different location where he saw the car he had seen at the house. RP 199. He was shown the suspects that had been detained and he reported that he recognized two of them. RP 199.

One of the two he recognized was Guzman. RP 200. He had noted at the house that Guzman was of Guamanian or pacific-islander descent. RP 200. She was not wearing a mask when Mr. Garcia saw her. RP 204.

Susan Bassett was a neighbor of the house where the robbery took place. She was contacted by Mr. Garcia when he fled the robbery. RP 350-51. He told her to call 911 and appeared to be scared because “They’re going to shoot me.” RP 351. He was trying to hide and had difficulty talking as Ms. Bassett spoke to 911. Id. After the call, Mr. Garcia ran to the back yard and hid behind a tree. Id.

Jessica Brackens was an on off and on girlfriend of Daniel Smith. RP 224. She was in Mr. Smith’s bedroom when she heard commotion in the house. RP 225. The bedroom door was locked. RP 225-26. When they heard someone get tased in the house, Mr. Smith jumped out the window and was chased by “some guy.” RP 227. The guy caught Mr. Smith; he was trying to block the guy from hitting him with a knife. Id. She described the guy as big and white. Id.

While this was happening outside, a big guy and a lady wearing a bandana broke into the bedroom. RP 228-29. Both were dark-skinned. RP 229. Ms. Brackens identified the female as wearing camo pants and black top and in court identified Guzman as the same person. RP 229-30. When the two broke into the room they asked Ms. Brackens where the money and the drugs were. RP 230. They forced Ms. Brackens to strip to

ascertain whether or not she had drugs on her. RP 232. One of the assailants was holding a gun and a taser; they were both armed. RP 234.

Ms. Brackens heard the female robber say that she had a sick child and that is why she needed the money. RP 234-35. Ms. Brackens was “freaking out” and the large male robber hit her and told her to shut up. RP 235. Guzman put a gun in Ms. Guzman’s face and threatened to kill her if she did not tell where the money and drugs were hidden. RP 235-36. The large male robber ripped her shirt as he tried to get it off quicker. RP 237. Ms. Brackens gave them some heroin that she had hidden in her bra. Id.

Someone brought Mr. Smith back in the room. RP 237. He was also naked. RP 238. Mr. Smith was hit in the face and told to be quiet. Id. When the robbers could not get more drugs and money, they “started destroying Daniel’s room” and taking anything of value, like the TV. RP 239-40. While the robbers were in the room, Ms. Brackens did not feel as though she was free to leave. RP 259. The robbers fled, another car came to the house, and Ms. Brackens and Mr. Smith jumped in the other car to follow the robbers. RP 241. They stopped and turned around when they saw a police car behind the robbers’ car. Id. Police transported Ms. Brackens and Mr. Smith to view the suspects and they identified the three robbers. RP 243.

Some months later, Ms. Brackens was in jail. RP 244-45. She was

placed in the same pod as Guzman. RP 245. She was approached by Guzman and told to not write statements or testify because Guzman knows who she is and where she lives. RP 246. Ms. Brackens took this as a threat and was frightened by Guzman. Id. She had intended to testify but after the threat she decided not to. RP 248. Guzman's contact with Ms. Brackens was seen by the jury from a jail video. RP 443 (video, state's exhibit 106, described by foundation witness), RP 444 (video published). It developed that Guzman had un-redacted incident reports in her cell that would include Ms. Brackens' information. RP 570-71.

April Alvarez was also at the house with her husband Lamont Matson when it was robbed. She is a friend of Daniel Smith. RP 290. Having been at the residence for some time, Ms. Alvarez went outside, where her husband was, to get a tape measure. RP 292. A black car approached, slowly circled, and parked near the truck that Ms. Alvarez and Mr. Matson were standing next to. RP 292-93. As the two were there talking, a man stepped from the black car with a mask on and pointed a gun at Ms. Alvarez's face. RP 295. She believed that it was a real gun. RP 297. The robber had darker, "caramel colored" skin. Id. She was told to get on the ground. RP 296.

A female robber exited the black car. RP 298. She was holding something that appeared to be a rifle. RP 328, 335. The robbers snatched the phone out of Ms. Alvarez's hand and the female robber said things like

“Don’t make this difficult” and “don’t make me hurt you.” Id. Ms. Alvarez was struck in the back of the head by the butt of a gun. RP 299. A third assailant came out of the car wielding a knife. RP 302.

The first two robbers went into the house and the man with the knife put Ms. Alvarez in the back of the truck with Mr. Matson. RP 303-04. As they were in back of the truck, the man with the knife stood near the truck. RP 304. He was holding the knife in an intimidating manner. RP 305. He stood there while Ms. Alvarez heard commotion, yelling, and tasers going off in the house. Id. She heard the female robber, Guzman, yelling “Where’s his room, where is Dan’s room.” Id. Soon, she saw Mr. Smith climbing out the window. Id.

Lamont Matson, Ms. Alvarez’s husband, recalled the black car pulling up as he and Ms. Alvarez were talking outside the house. RP 557. Mr. Matson identified Guzman as the female robber that he saw getting out of the black car. RP 558. He saw the robbers hit Ms. Alvarez and then he and Ms. Alvarez were told to get down in the back of the truck. RP 558-59. They were guarded by the man with the knife. RP 560.

When the robbers exited the black car, Mr. Matson observed that the front passenger, Guzman came out holding what appeared to be a pistol. RP 560. Mr. Matson heard tasers going off in the house and Guzman asking about the location of Daniel Smith. RP 561. He saw Daniel Smith clamber out the window and the man with the knife chase

after him. Id. He saw the assailant catch Mr. Smith and then took the opportunity to jump in the truck and drive away. RP 561.

The man with the knife also saw Mr. Smith coming out the window and gave chase. RP 311. Mr. Smith tripped and the man with the knife caught up. RP 312. The man jumped on Mr. Smith and began to swing the knife at him. Id. Mr. Matson jumped from the back of the truck got in the cab and drove away. Id. As they drove away, Ms. Alvarez could see the female robber come out of the house and level a gun at them. RP 313. This gun looked like a rifle—bigger than the other weapons she had seen (Id.)—it had two barrels. RP 341. Ms. Alvarez identified the rifle in court (pictured in state’s exhibit 17). RP 339.

Daniel Smith lived at the house. He admitted to the jury that people used and sold drugs there. RP 457. From his locked room, Mr. Smith became aware that something was amiss when he heard the sound of someone being tased. RP 460. After hearing some other unaccustomed sounds, he told Ms. Bracken that they should leave. RP 460-61. Mr. Smith grabbed his unloaded sawed-off shotgun. RP 462. He looked around for ammunition. RP 463. Then, his “door came off the hinges.” Id. An individual entered and said that “this is a pocket check,” which Mr. Smith believed was slang for a robbery. RP 477.

Having failed to find ammunition, Mr. Smith hit a person coming into his room with the butt and then threw the gun at them. RP 464. Mr.

Smith went through and lost his pants on the way. RP 466. Outside, a person charged him with a knife. RP 468-69. The other person caught him and they fought. Id. Mr. Smith was cut on his head, down the side of his face, and several times on the arm. RP 469. Then someone put a gun in his face, the fighting stopped, and Mr. Smith was dragged back into the house. Id. The person who put the gun in his face was a female. RP 478. Mr. Smith identified Guzman in court as the female with the gun during the incident. RP 478-79.

Mr. Smith was deposited on the kitchen floor and the man with the knife was given a gun and told to keep Mr. Smith there as the other two destroyed his bedroom. RP 480. He heard Ms. Brackens screaming. RP 482. She sounded like she was in terror. RP 483. Mr. Smith was taken back to the bedroom where the assailants demanded money and drugs. Id. The woman put a gun to his head and demanded money and drugs. Id. He was tased. RP 484.

Anthony Harris was in the house with Ms. Alvarez that morning. RP 583. Not long after Ms. Alvarez went outside, the house door was kicked in and a man in a ski mask held a gun to his head not to move. Id. Mr. Harris immediately fled out the back door. Id. He hid in the barn. RP 585.

When police detained the three people in the black car, two pistols and a taser were found in the trunk. RP 369. A search warrant issued and

the car was searched. RP 370. In addition to the pistols and taser, a bag of suspected methamphetamine was found in the car. Id. The found taser was operational. RP 372. They also recovered a shotgun and a rifle with “strobe” on it from the car. RP 376-77. The pistols turned out to be pellet guns. RP 378. They appeared to be real pistols (the testifying officer said that he might use deadly force if one was pulled on him). RP 379. Gloves, masks, and bandanas were also recovered from the car. Many items taken in the robbery were in the car (RP 400 *et seq.*), including the TV that was taken from Mr. Smith’s room (RP 410) and Mr. Garcia’s driver’s license. There was also a Tupperware container with heroin in it. RP 409.

Detective Keeler of the Kitsap County Sheriff’s office interviewed Guzman after her arrest. RP 618. The detective provided foundation for the video recorded interview (state’s exhibit 82) which was played for the jury.<sup>1</sup> RP 619.

Codefendant Noah Robertson testified. RP 673. Around the time of the robbery, Guzman had contacted Robertson about her son having gotten sick from some drugs. RP 675. She wanted help going to talk to people about the drugs. Id. She asked him to bring a taser with him. Id. He was picked up later by the other male robber, Abraham, and Guzman

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<sup>1</sup> Neither exhibit 82 nor a transcript of it are in the record.

in the black car. RP 675-76. The three agreed to go to the house to get money and teach the dealer a lesson. RP 676. They intended to take drug, money, and anything of value. RP 677. Guzman was armed with one of the pellet guns. RP 678. At one point in the incident, Robertson saw Guzman with the shotgun. RP 696.

### **III. ARGUMENT**

#### **A. DIRECT TESTIMONY ESTABLISHED THAT GUZMAN HAD A SHOTGUN IN HER HANDS DURING THE INCIDENT AND ESTABLISHED THAT DRUGS AND PURSES WERE TAKEN FROM JESSICA BRACKENS DURING THE ROBBERY—THE EVIDENCE WAS SUFFICIENT.**

Guzman argues that there is insufficient evidence of Guzman's use of a firearm with regard to kidnapping, robbing, and assaulting Daniel Smith and Jessica Brackens and that there is insufficient evidence with regard to robbing Jessica Brackens. These claims are without merit because there was evidence from two witnesses, including one of Guzman's accomplices, that Guzman possessed the real gun, the shotgun, and in fact levelled it at two fleeing victims. In a light most favorable to the state, the evidence establishes that during this seamless crime spree,

Guzman was armed with a firearm. And, the evidence is clear that drugs and purses belonging to Ms. Brackens were taken while she was held at gun point.

It is well settled that

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt. On appeal, we draw all reasonable inferences from the evidence in favor of the State and interpret them most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences therefrom. We will reverse a conviction for insufficient evidence only when no rational trier of fact could have found that the State proved all of the elements of the crime beyond a reasonable doubt. In evaluating the sufficiency of the evidence, circumstantial evidence is as probative as direct evidence.

*State v. Garbaccio*, 151 Wn.App. 716, 742, 214 P.3d 168 (2009) (internal citation omitted). Appellate courts defer to the trier of fact on issues of “conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. Hernandez*, 85 Wn.App. 672, 675, 935 P.2d 623 (1997).

In this case the sufficiency of the evidence does not rest solely with proof of or failure of proof of Guzman’s actual behavior. That is, Guzman was also subject to accomplice liability for the acts of her confederates in the commission of these crimes. The jury was instructed that

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally

accountable. 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.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

CP 459 (instruction 9). As the WPIC comment suggests, the jury was given a general knowledge instruction to go along with the accomplice instruction. CP 460 (instruction 10). Each of the affirmative answers given by the jury to the special verdicts answered questions phrased in terms of "Did Cynthia Marie Guzman, *or an accomplice*" (possess a firearm/possess a deadly weapon/commit kidnapping with a certain intent/etc.). CP 520-544.

Accomplice liability has been established by statute, RCW 9A.08.020, which statute uses the term "complicity." Accomplice liability is a subset of complicity and the above quoted jury instruction tracks the

language of the statute. In *State v. Knight*, 176 Wn. App. 936, 309 P.3d 776 (2013) *review denied* 179 Wn.2d 1021 (2014), this court considered accomplice liability for crimes arising out of a home invasion robbery. On facts similar to the present case, one resident had been murdered and the others assaulted and robbed by Knight and two other robbers. The jury found Knight guilty of all charges. 176 Wn. App. at 947. On appeal she argued that there was insufficient evidence with regard to two second degree assault convictions.

Knight argued that she could not be liable for the assaults because when her confederate assaulted the victims, she was elsewhere in the house stealing things. *Id.* at 949. The argument was easily parried, “This argument fails: A person's physical presence during the offense is not required for accomplice liability.” *Id.*, *citing State v. Trujillo*, 112 Wn. App. 390, 398, 408, 49 P.3d 935 (2002) (defendant facilitated commission of murder by knowingly driving the shooters and their weapons to kill rival gang member, despite remaining in van during the shooting).

Knight asserted that mere presence at the scene was not enough. True, but this Court disagreed on the facts noting a number of instances that Knight was directly engaged in the planning of and committing of the assaults. “A person aids or abets a crime by associating himself with the undertaking, participating in it as in something he desires to bring about,

and seeking by his action to make it succeed.” 176 Wn. App. at 949. Guzman did just that in the present case. Guzman was in this for her own benefit and in fact the entire home invasion was her idea. She is liable for the acts of her confederates and this fact may control the sufficiency of the evidence.

***1. There is sufficient evidence that Guzman or an accomplice was armed with a firearm during this incident.***

There is no doubt in this record that a firearm was involved and that Guzman actually held the gun at at least two points in this incident. First, her own confederate, Noah Robertson, placed the gun in Guzman’s hands. RP 696. He says that she had it but briefly at that point, but Guzman makes no argument about fleeting or unknowing possession. Second, as Mr. Matson and Ms. Brackens fled the robbery in their truck, Mr. Matson saw the female robber, Guzman, level a gun with two barrels at them. RP 313. Moreover, the shotgun taken in the robbery ended up in the same black car in which Guzman was apprehended.

On this evidence, any rational trier of fact could find that at some point in this incident Guzman was armed with a firearm. In fact, Mr. Matson’s testimony is clear that she used the gun in an attempt to stop the two victims from getting away. On this issue, then, there is direct evidence, believed by the jury, that Guzman possessed the gun during this

crime spree. We need not look to the behavior of the accomplices to establish Guzman's liability for committing these crimes while armed with a firearm.

**2. *There is sufficient evidence that items possessed or owned by Ms. Brackens were taken from her person or in her presence while she was held at gun point.***

Next, Guzman claims insufficient evidence to sustain the robbery convictions with regard to Ms. Brackens. Here Guzman relies on Ms. Brackens' testimony that she never accounted for anything of hers that might be missing. RP 239-40. But Guzman does not seem to see passages in the record that are to the contrary.

First, Ms. Brackens testified that she did in fact give up possession of her property. In the process of being terrorized, assaulted and ordered to strip naked, Ms. Brackens clearly said that she reached into her bra and produced and gave over a bundle of drugs. RP 237. Second, Mr. Smith testified that there were four "Coach purses" hanging on the wall of the bedroom. RP 504-05. He said of these purses "They were taken. They were hers," referring to Ms. Brackens. Id.

Thus, Guzman's sufficiency argument is factually incorrect. Witnesses put a gun in Guzman's hands twice during the incident. Four purses and one bundle of drugs were stolen from Ms. Brackens by force of violence. The evidence was sufficient.

**B. THE JURY FOUND MULTIPLE INTENT ELEMENTS ON EACH CRIME AND AS A RESULT EACH CRIME IS SUPPORTED BY INTENT NOT FOUND IN THE OTHER OFFENSES AND THE CRIMES ARE NOT THEREFORE SAME CRIMINAL CONDUCT.**

Guzman next claims that she received ineffective assistance of counsel for trial counsel's failure to argue that the various combinations of assault, kidnapping, and robbery on each of the victims constituted same criminal conduct and for trial counsel's failure to move for a downward departure at sentencing. The claim is without merit because the sentence was lawful and there is no fact other than a lack of violent priors that might serve to mitigate the present crime spree.

To show ineffective assistance of counsel, Guzman first must show that counsel provided deficient performance, that is, performance that falls below an objective standard of reasonableness. *State v. Gier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Second, it must be shown "there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different." 171 Wn.2d at 34, *quoting State v. Kyllö*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* Guzman must overcome a strong presumption that counsel's performance was reasonable. 171 Wn.2d at 33. Legitimate trial strategy or tactics do not equate to deficient

performance. *Id.* Thus, Guzman must show that “there is no conceivable legitimate tactic explaining counsel's performance.” 171 Wn.2d at 33 (emphasis added), *quoting State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Ineffective assistance claims are reviewed de novo. *State v. Estes*, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). On review, “[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.” *Grier*, 171 Wn.2d at 34 (alteration by the court), *quoting Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

***1. Guzman’s counsel was not ineffective for not requesting a downward exceptional sentence.***

Guzman was sentenced at the low end of the standard range. Her arguments about merger and same criminal conduct, had those argument any merit, would change the range. But absent merger or same criminal conduct, she has no argument that there is a miscalculation of her offender score or that the range is otherwise incorrect. That is, Guzman was sentenced to the lowest sentence that the legislature has authorized under the circumstances of this case. Whether or not this sentence is “clearly excessive” is, then, a question for the legislature, not this court. The

sentence is in any sense substantial but it is lawful. Defense counsel knew it was lawful. Defense counsel could not avail himself of any statutory mitigating circumstance; at least Guzman refers to none herein.

Moreover, any assertion of mitigation would seem to be unavailing given the facts of the case. Guzman was convicted of six serious violent felonies and nine violent felonies as well as offenses against the due administration of justice—witness intimidation and witness tampering. CP 554. Victims were threatened with death; victims were seriously assaulted--hit in the head with gun butts and shocked by tasers--victims were held against their wills and terrorized. After the fact, a witness, Ms. Brackens, was threatened in an attempt to keep her from testifying. The incident occurred in a private residence where some lived. All involving deadly weapons and at least one firearm. The standard range reflects this conduct. A request for a downward departure may look good in hindsight, but under the facts of the case and the nature of the convictions it would have been a useless act.

***2. Guzman's four combinations of assault, robbery, and kidnapping against four victims are not the same criminal conduct for sentencing.***

Two or more crimes are considered to be same criminal conduct if they require the same intent, are committed at the same time and place, and involve the same victim. RCW 9.94A,589(1)(a). The rule is

construed narrowly. *State v. Saunders*, 120 Wn. App. 800, 824, 86 P.3d 232 (2004). All prongs of the statutory test must be met. *State v. Chenoweth*, 185 Wn.2d 218, 220, 370 P.3d 6 (2016). The burden of establishing same criminal conduct falls to the defendant. *State v. Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013). A trial court's determination of this question is reviewed for abuse of discretion. *Graciano*, 176 Wn.2d at 536.

The Washington Supreme Court's most recent decision on RCW 9.94A.589(1)(a) is *State v. Chenoweth, supra*. There, the Court had no problem with the idea that child rape and incest are crimes that show intent. And, "[t]he intent to have sex with someone related to you differs from the intent to have sex with a child." 185 Wn.2d at 223. Thus, "Chenoweth's single act is comprised of separate and distinct statutory criminal intents and therefore under RCW 9.94A.589(1)(a) do not meet the definition of same criminal conduct." *Id.* (emphasis added) (internal quotation omitted). Further, the Court found that the legislature intended to punish incest and rape as separate offenses. *Id.* at 224. Finally, the Court concluded that it was advancing a "straightforward analysis of the statutory criminal intent of rape of a child and incest." *Id.*; *see also State v. Wilson*, 136 Wn. App. 596, 150 P.3d 144 (2007) (Before *Chenoweth*, considering statutory intent elements in deciding same criminal conduct

(question).

Guzman correctly argues that the same time and place elements are not seriously in question. *See e.g., State v. Young*, 97 Wn. App. 235, 984 P.2d 1050 (1999) (same time established when all a part of a continuous transaction or uninterrupted criminal episode). The facts are that each offense against each victim happened at slightly different time but were all a part of the same incident. Each of the four victims suffered assault, robbery and kidnapping. Thus for each string of crimes, the victim is the same. However, with regard to same criminal intent, Guzman argues a test and analysis that was championed by the *Chenoweth* dissent. Brief at 41. Just as Justice Madson dissenting wanted the Supreme Court to do in *Chenoweth*, Guzman wants this court to seek some over-arching criminal purpose, separate from the statutory law applied to the case, and look to whether or not that over-arching criminal purpose changed from crime to crime. Since the incident was in fact a home invasion robbery, the court could find an overarching purpose to steal property and sustain her argument. But this approach ignores the command of the *Chenoweth* majority to consider the same intent question with a straight-forward analysis of statutory criminal intent. In this way, defendants do not escape punishment for various different crimes that are “closely related.” Brief at 41.

The jury was instructed with regard to first degree kidnapping that it must find that Guzman or an accomplice intentionally abducted each victim with intent “(a) to hold the person as a shield or hostage, or (b) to facilitate the commission of Robbery or flight therefrom, or (c) to inflict bodily injury on the person.” CP 474, 475, 476, 477, 478. The jury gave affirmative answers as to each of these intent elements.

Next, the jury was instructed with regard to first degree robbery that it must find that Guzman or an accomplice took property from the victim, in her presence, by the use of or threatened use of immediate force, and “(3) That the defendant or an accomplice intended to commit theft of the property.” CP 482, 484, 486, 488. The jury was instructed that theft entails “intent to deprive that person of such property.” CP 491.

With regard to second degree assault, the jury was instructed that this crime is established if the assailant assaults the victim with a deadly weapon or with intent to commit a felony. CP 494. The jury found, on each second degree assault conviction, both the armed with a deadly weapon and intent to commit a felony elements by special verdict. CP 538.

Same criminal conduct fails because of the myriad different intents found by the jury in this case. Moreover, here the testimony of Guzman’s accomplice should be recalled as well: It was not just a robbery that

Guzman planned, the incident was also intended to teach the drug dealer a lesson. RP 676. Any single victim may have been abducted for use as a hostage or shield, but the intent of the other two crimes as found by the jury can be seen as different. Thus, the intent to abduct for hostage use is different than assaulting with a deadly weapon, or committing theft by force (robbery), using a deadly weapon. The jury heard the evidence and concluded that Guzman and her accomplices acted with every sort of intent that the various statutes require. These intents differ one from another. There is not same criminal conduct in this record and thus counsel was not ineffective for failing to raise that issue..

**C. THE JURY FOUND THAT GUZMAN OR AN ACCOMPLICE WAS ARMED WITH A DEADLY WEAPON WITH REGARD TO EACH SECOND DEGREE ASSAULT AND INDEPENDENTLY WITH REGARD TO EACH FIRST DEGREE ROBBERY. THE SECOND DEGREE ASSAULT CONVICTIONS DID NOT RAISE THE LEVEL OF ROBBERY TO FIRST DEGREE AND MERGER DOES NOT APPLY.**

Guzman next claims that her various convictions for second degree assault and first degree robbery must merge or violate double jeopardy. This claim is without merit because each assault and each robbery are supported by an independent purpose and the assaults do not serve to

elevate the degree of robbery. Issues of double jeopardy/merger are reviewed de novo. *State v. Kier*, 164 Wn.2d 798, 803, 194 P.3d 212 (2008).

Under the merger doctrine “when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime.” *State v. Freeman*, 153 Wn.2d 765, 757, 108 P.3d 753 (2005) (page break and citation omitted). A reviewing court will look first to legislative intent that expressly or implicitly allows separate punishment for each crime. Failing such express or implicit intent, review turns to the *Blockburger*<sup>2</sup> or same elements test under which if each crime contains an element that the other does not, we presume that the crimes are not the same offense for double jeopardy purposes. *Id.* at 772, *citing State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). The merger rule, quoted above, is the third permutation of double jeopardy review. Guzman claims merger with regard to her second degree assault and robbery convictions just as appellate Zumwalt did in *State v. Freeman*.

The *Freeman* case involved two independent appeals from Freeman and Zumwalt. Freeman had been convicted of first degree robbery and first degree assault. Zumwalt had been convicted of first

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<sup>2</sup> *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932)

degree robbery and second degree assault. With regard to Freeman, the Supreme Court held that first degree assault does not merge with first degree robbery. But with regard to Zumwalt, the Supreme Court held that the second degree assault did merge with the first degree robbery. The analysis of Zumwalt's case is pertinent in the present case.

Zumwalt had arranged a drug deal. 153 Wn.2d at 770. Instead of delivering the drugs, Zumwalt punched his woman customer hard in the face, knocking her to the ground. *Id.* He fractured her eye socket and robbed her of money and casino chips. *Id.*

The merger doctrine includes the rule that “even if on an abstract level two convictions appear to be for the same offense or for charges that would merge, if there is an independent purpose or effect to each, they may be punished as separate offenses.” 153 Wn.2d at 773. The Supreme Court found no legislative intent, explicit or implicit, that second degree assault should be punished “separately from first degree robbery when the assault facilitates the robbery.” *Id.* 776. Nor did the same elements test apply in the *Freeman* case. *Id.* Further, it was noted that many courts had merged assault into robbery where both were “stemming from a single violent act.” 153 Wn.2d at 774.

On merger, the Supreme Court held that “assault committed in furtherance of a robbery merges with robbery and without contrary

legislative intent or application of an exception, these crimes [second degree assault and first degree robbery] would merge.” 153 Wn.2d at 778 (alteration added). But by the independent purpose rule: “The offenses may in fact be separate when there is a separate injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element.” An example is when a person strikes another after the robbery is completed, which evinces a separate intent and justifies a separate conviction, “especially since the assault did not forward the robbery.” *Id.* at 779. There is no per se rule regarding the merger of second degree assault with first degree robbery; reviewing courts are to “take a hard look at each case.” *State v. Kier*, 164 Wn.2d 798, 802, 194 P.3d 212 (2008) *citing Freeman, supra*, at 774.

In the present case, the jury provided the independent purpose by its findings on special verdicts. *See Freeman* at 779 (trial court’s supposition of independent purpose not supported by jury verdict). First each of the second degree assault charges, counts XII, XIII, XIV, XV, were charges in the alternative as either done with a deadly weapon “and/or” done with intent to commit a felony. RCW 9A.36.021 provides in relevant part that a person commits second degree assault if she “(c) Assaults another with a deadly weapon; or (e) With intent to commit a

felony, assaults another.” The jury found that both of these alternatives were true.

RCW 9A.56.190 defines 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.

In turn, first degree robbery is defined in relevant part as

(1) A person is guilty of robbery in the first degree if:

(a) In the commission of a robbery or of immediate flight therefrom, he or she:

(i) Is armed with a deadly weapon; or

(ii) Displays what appears to be a firearm or other deadly weapon; or

(iii) Inflicts bodily injury;

RCW 9A.56.200 (subsection (1)(b) and (2) omitted). Each count was alternatively charged under subsections (a)(i) and (a)(ii). CP 34-38. With regard to each count of robbery, the jury found that Guzman or an accomplice was armed with a deadly weapon (count VIII, (CP 533), or a firearm (count IX, both (CP 534); count X, both (CP 535); count XI, both (CP 536)).

Focus on these jury findings shows that it was proven that each second degree assault was done with intent to commit the robbery of each assaulted individual. As such, the assaults appear to satisfy the robbery statute's "use of or threatened use of force." The assaults merge under this alternative. Moreover, since the assaults were accomplished while armed with a deadly weapon, and since being armed with a deadly weapon is one way in which robbery is elevated to first degree robbery, under that permutation the offenses appear to merge.

But a closer look reveals that the possession of a deadly weapon as used to accomplish second degree assault was not necessary to raise the robbery to first degree robbery. The jury made the independent finding that the robberies themselves were done while armed with a deadly weapon. Thus the robberies would be charged as first degree robberies even if the second degree assaults had not occurred. Further, the fact that the weapon used in each robbery appeared to be a firearm was not a necessary fact in any of the second degree assault convictions.

Thus there is a distinction between the present case and *Freeman* in a legal sense. The cases are also factually distinct. In *Zumwalt*, both the assault and the robbery were accomplished with a punch to the face. This singular unarmed violent act was all there was to raise the degree of robbery. But in the present case, as the jury found, both crimes were

committed by the independent use of a deadly weapon. *But see State v. Chesnokov*, 175 Wn. App. 345, 305 P.3d 1103 (2013) (rejecting same argument on the facts of that case).

But *Chesnokov* notwithstanding, the following seems to apply

Because it was not required for the State to prove facts sufficient to convict Beaver of second degree assault in order for it to prove Beaver committed the offense of attempted first degree robbery, and because it was unnecessary for the State to prove that Beaver engaged in conduct amounting to second degree assault in order to elevate his attempted robbery conviction, Beaver's convictions did not violate double jeopardy.

*State v. Esparza*, 135 Wn. App. 54, 57, 143 P.3d 612 (2006) *review denied* 161 Wn.2d 1004 (2007). The *Esparza* Court noted and followed the Supreme Court's *Freeman* analysis of double jeopardy claims. *Id.* at 60. Glossing on *In re the Personal Restraint of Orange*, 152 Wn.2d 795, 100P.3d 291 (2004), the *Esparza* Court noted that there first degree assault had merged with first degree attempted murder “[b]ecause the alleged crime of attempted murder took place “*at the same time*” as the alleged assault; the court apparently reasoned that the firing of the gun at Walker must be the substantial step Orange made towards commission of the crime of first degree murder.” 135 Wn. App. at 62 (emphasis by the court). Thus, “the evidence required to prove Orange committed first degree attempted murder would have been sufficient to support a conviction for first degree assault” and double jeopardy is offended. *Id.* at

63.

But the *Esparza* Court noted the same factual distinction that we have noted here. Analysis of Zumwalt’s case led to the fairly obvious conclusion that in that case “the State was required to prove that Zumwalt engaged in conduct amounting to second degree assault in order to elevate his robbery conviction to first degree robbery.” 135 Wn. App. at 65-66. But in the *Esparza* case, “the State was not required to prove Beaver committed the crime of second degree assault in order to elevate the attempted robbery to attempted first degree robbery.” The next sentence could be written for the present case: “Because the robbery involved that alleged use of a firearm, the State only had to prove that Beaver was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon.” There and here the robbery was done with a deadly weapon finding independent from the deadly weapon finding on the assault. *But see State v. Maynor*, 190 Wn. App. 1030, \_\_ P.3d \_\_, (2015) (UNPUBLISHED AND UNBINDING) (Distinguishing *Esparza* because that case dealt with attempted robbery and, it seems, finding no distinction between being armed with a deadly weapon with regard to assault and being armed with a deadly weapon with regard to robbery).

The facts of the assault did not elevate the degree of any crime in this record. The elements of first degree robbery were established by facts

pertinent to the robbery and separate from the assaults. Double jeopardy is not offended and merger is inappropriate.

**D. EXCISING ALL PRIORS FROM GUZMAN'S SCORE RESULTS IN AN OFFENDER SCORE OF 31 AND ALL THE SENTENCING RANGES REMAIN THE SAME AND GUZMAN ACKNOWLEDGED HER PRIOR HISTORY ON THE REORD.**

Guzman next claims that she should be resentenced because the state failed to prove her prior convictions. This claim is without merit because Guzman asserts no error in offender score calculation, she would have a massive offender score even if her priors were not counted, and her defense counsel acknowledged her priors in his sentencing argument.

First, it should be noted here that Guzman does not assert that there was anything incorrect in the offender score under which she was sentenced. She actually asserts no error, she just says that the offender score was not discussed at sentencing. Second, Guzman was sentenced on various counts with a 35 offender score. CP 573-74. The recited prior history includes four prior felonies. *Id.* Even if those four prior felonies were just excised from the calculation, Guzman ends up with a 31 offender score. None of the standard range calculations change. Guzman wants a new sentencing with the same standard range and enhancement numbers merely because, she maintains, no one addressed her priors out

loud at sentencing. Seems the parties and the court were more concerned with the 31 points Guzman earned out of the present crime spree.

Further, Guzman's assertion here is factually incorrect. At sentencing defense counsel allowed as how the range did not really matter. RP, 5/12/17, 7. The sentiment there was that with a range above 1000 months applied to a 45 year old woman, the actual number is somewhat unimportant. According to the defense, these crimes and the enhancements cause a higher sentence than a homicide would, particularly in light of her nonviolent criminal history. Here, defense counsel acknowledges that history: "She has convictions for drug offenses, possession, delivery of meth, theft, so she has lived the life of -- at least mostly of a drug user and then some ancillary crimes to that." CP, 5/12/17, 7. Drug possession and theft are Guzman's prior felonies.

The defense thus acknowledged the priors under circumstances where those priors and their attendant offender points had no effect on the sentencing range. There is no issue and certainly no prejudice to Guzman.

**E. THE STATE WILL NOT SEEK APPELLATE COSTS.**

Guzman next claims that if the state substantially prevails she should not be assessed appellate costs. The state concedes this claim. By

long standing policy of this office, we will not seek appellate costs should the state substantially prevail.

#### IV. CONCLUSION

For the foregoing reasons, Guzman's conviction and sentence should be affirmed.

DATED May 30, 2018.

Respectfully submitted,

TINA R. ROBINSON  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "John L. Cross", written over the typed name below.

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**KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION**

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