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SUPREME COURT NO. _____
COURT OF APPEALS NO. 36325-9-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FAULOLUA FAAGATA,

Petitioner.

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

The Honorable Ronald Culpepper, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Faulolua Faagata, the appellant below, asks this Court to review the Court of Appeals decision, referred to in Section B.

B. COURT OF APPEALS DECISION

Faagata requests review of the Court of Appeals published decision in State v. Faagata, ___ Wn. App. ___, ___ P.3d___ (2008) Court of Appeals No. 36325-9-II, filed October 21, 2008. The decision is attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Petitioner was charged and convicted of both first degree murder and second degree felony murder for the death of a single victim. The trial court entered a judgment and sentence on the first degree murder conviction only. The court, however, denied petitioner's motion to dismiss the felony murder conviction and instead orally conditionally dismissed that conviction allowing it to be reinstated if petitioner's first degree murder conviction was reversed on appeal or on a collateral attack. Do double jeopardy guarantees require the felony murder conviction be vacated?¹

¹ A similar issue is pending in a Petition for Review before this Court in State v. Turner, 144 Wn. App. 279, 182 P.3d 478 (2008), Sp. Ct. 81626-3, and this Court is scheduled to consider whether to grant review on February 3, 2009.

2. Does the trial court's ruling conditionally dismissing the felony murder conviction and the Court of Appeals decision affirming that ruling conflict with this Court's decision in State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007)?

3. Was the exceptional sentence invalid where the jury's finding of deliberate cruelty is not supported by the evidence and the Court of Appeals decision affirming the sentence conflicts with Division Three's decision in State v. Serrano, 95 Wn. App. 700, 977 P.2d 47 (1999)?

D. STATEMENT OF THE CASE

The facts of the case are set forth in the opening brief filed by petitioner and incorporated herein. Brief of Appellant (BOA) at 1-7. Additional facts will be addressed below to the extent necessary to provide context to the arguments presented.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED

During a struggle, Faagata shot Jason Outler five times in the back. Outler died and the State charged Faagata with first degree murder (Count 1) under RCW 9A.32.030(1)(a) and second degree felony murder based on assault (Count II) under RCW 9A.32.050(1)(b). CP 5-6. In addition, both counts alleged Faagata was armed with a firearm and both alleged as

an aggravating element that Faagata's conduct in the commission of the crimes manifested deliberate cruelty. CP 5-6.

A jury found Faagata guilty as charged. CP 78-82. The jury also found the aggravating element of deliberate cruelty. CP 83-84.

On May 4, 2007, the court entered a judgment and sentence on Count I, the first degree murder conviction. CP 107-118. The court, however, denied Faagata's motion to dismiss Count II, the second degree felony murder conviction, and instead orally conditionally dismissed the conviction "with the understanding" that should Count I be reversed Count II could be reinstated. 2RP 24. The felony murder conviction was not entered in the judgment. CP 107-118. Faagata received an exceptional sentence of 450 months. Id.

1. Double Jeopardy Claim

On appeal Faagata argued the trial court's ruling conditionally dismissing that the felony murder conviction violated double jeopardy. BOA at 7-11; Reply Brief of Appellant (RBA) at 1-6. And, specifically, Faagata argued dismissal of the felony murder conviction was required under this Court's holding in State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007). Id.

The Court of Appeals disagreed. It held that because the trial court did not reduce the felony murder conviction to judgment and did not sentence Faagata for the conviction, Faagata was not entitled to have the conviction vacated on double jeopardy grounds, citing its previous decision in State v. Turner, 144 Wn. App. 279, 182 P.3d 478 (2008) and Division One's decision in State v. Ward, 125 Wn. App. 138, 104 P.3d 61 (2005). Appendix at 10-22.

2. Exceptional Sentence

On appeal Faagata argued that even though Outler was shot five times in the back over a short period of time, that did not support the jury's finding of deliberate cruelty. BOA at 11-18; RBA at 6-8. Faagata cited Division Three's decision in State v. Serrano, 95 Wn. App. 700, 712-13, 977 P.2d 47 (1999), and the decision in State v. Payne, 58 Wn. App. 215, 220, 795 P.2d 134, 805 P.2d 247 (1990), where the courts held the infliction of multiple wounds does not support a finding deliberate cruelty because it does constitute gratuitous violence or show the infliction of physical, psychological or emotional pain as an end in itself.

The Court of Appeals affirmed the exceptional sentence. It held because Faagata shot Outler in the back twice, waited a few seconds and shot him near his buttocks twice and the waited a few seconds and shot him

in the back of the head, the evidence showed the gratuitous infliction of pain as and end in itself "to hurt, humiliate and embarrass Outler." Appendix at 14. The Court of Appeals reasoned this case was different than Serrano because of the location of the wounds and the manner of the shooting. Id.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Double Jeopardy Projections And This Court's Holding in Womac Require Faagata's Felony Murder Conviction be Vacated.

The legislature did not intend to impose multiple punishments for first degree murder and second degree felony murder were there is only one victim and the crimes occurred at the same time and place. In State v. Gohl, 109 Wn. App. 817, 821, 37 P.3d 293 (2001); State v. Schwab, 98 Wn. App. 179, 184-85, 988 P.2d 1045 (1999).

Here there is only one victim and the crimes occurred at the same time and place, thus, Faagata's convictions for both first degree murder and second degree felony murder violate double jeopardy. State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995).

In Womac, this Court held where separate convictions violate double jeopardy the law requires the court to vacate one or more of the convictions. Womac, 160 Wn.2d at 660. The facts in Womac are similar to the

facts in this case. Womac was charged and convicted of both homicide by abuse (Count I), second degree felony murder (Count II), and first degree assault (Count III) for the death of his son. Id at 647. The trial court denied Womac's double jeopardy motion to dismiss Counts II and III. Id. The Court of Appeals affirmed Womac's conviction for Count I and "directed the trial court to 'conditionally dismiss Counts II and III,' allowing for reinstatement should Count I later be reversed, vacated, or set aside." Womac, 160 Wn.2d at 647 (citation omitted). This Court held a conditional dismissal was without legal support and the appropriate remedy was to vacate two of the three convictions. Id. at 658-660.

In Ward, the case relied on by the Court of Appeals here, the defendant was charged with second degree murder committed by the alternative means of intentional murder and felony murder. Ward, 125 Wn. App. at 141. A jury convicted Ward of the felony murder alternative, acquitted him of the intentional murder alternative, and convicted him of first degree manslaughter, a lesser included crime of the intentional murder alternative. The trial court sentenced Ward on the felony murder charge only and did not enter judgment on the manslaughter charge. The Ward court vacated the felony murder conviction under In re Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), and remanded for entry of

judgment and sentence on the manslaughter conviction. The court reasoned that outcome did not violate double jeopardy because Ward was charged with alternative means: thus, there could be only one conviction. Ward, 125 Wn. App. at 144-45. Furthermore, the court reasoned since the trial court did not enter judgment on the manslaughter alternative, Ward was "not convicted and sentenced" to both felony murder and manslaughter. Id. at 144.

In Womac, this Court distinguished Ward on two grounds. The first, unlike in Ward, Womac's judgment included all the convictions. The second was that Womac was charged with separate offenses, unlike Ward who was charged in the alternative.

Ward is distinguishable from the present case. Here, there was a double jeopardy violation because Womac's judgment included all three convictions; therefore, vacation of the convictions for Counts II and III is required. Also, Womac was never charged in the alternative; instead, he was charged with three separate offenses in a single proceeding. Womac correctly argues, a court has no authority to "take a verdict on another charge ..., find that it violates double jeopardy ..., not sentence the defendant ... on it [,] and just ... hold it in abeyance for a later time." (citations omitted and emphasis added).

State v. Womac, 160 Wn. 2d at 659.²

² In Turner, the defendant was convicted of assault and robbery. The trial court merged the assault into the robbery, did not enter the assault in the judgment but entered an order indicating the assault was a valid (continued...)

This Court further emphasized it agreed with Womac's attorney that it is unjust, "to find a double jeopardy violation and hold these convictions in a safe for a rainy day, in the event that the homicide by abuse gets reversed ... then they can sort of rise from the dead like Jesus on the third day and bite my client, and he can be sentenced on convictions that the court already ruled violated double jeopardy." Womac, 160 Wn. 2d at 651. Womac makes clear that where two separate offenses are charged, a conviction on both is punishment under double jeopardy jurisprudence regardless of a trial court's clerical decision not to "enter judgment" on it but instead hold it in abeyance, as it did in this case.

The holding in Ward is narrow and only applies to situations where a defendant has been charged and convicted of a single count by alternative means. Outside that context, a court's decision not to enter judgment on a conviction but hold the conviction in abeyance is simply a sleight of hand clerical maneuver without constitutional significance. A court has no

²(...continued)

conviction and could be revived if the robbery conviction was ever set aside. State v. Turner, 144 Wn. App. at 281. The Court of Appeals, relying on Ward, held because the assault conviction was not made part of the judgment, failure to vacate the conviction did not violate double jeopardy or this Court's holding in Womac. Id. at 283. Like Ward, however, Turner was not charged with separate offenses of assault and robbery but rather the offenses were charged in the alternative.

authority to archive a double jeopardy conviction and "hold it in abeyance for a later time." Womac, 160 Wn. 2d at 659.

Here, Faagata was charged and convicted of two separate offenses, first degree murder and felony murder. The court took the verdict on the felony murder charge but did not enter a judgment or sentence Faagata on that charge instead, as in Womac, it ordered the conviction held it in abeyance for a later time. The trial court's failure to vacate the felony murder conviction violated double jeopardy guarantees and conflicts with this Court's decision in Womac. This Court should accept review and remand for dismissal of Faagata's felony murder conviction. Review is appropriate under RAP 13.4(b)(1) and RAP 13.4(b)(3) because it conflicts with this Court's decision in Womac raises and significant constitutional question.

2. Faagata's Exceptional Sentence Should be Reversed Because There is Insufficient Evidence to Support the Finding of Deliberate Cruelty.

The Sixth Amendment requires the State to prove, and a jury to find beyond a reasonable doubt, all facts necessary to support an exceptional sentence. U.S. Const. amend. 6; Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 2537, 159 L. Ed. 2d 403 (2004); Apprendi v. New Jersey, 530 U. S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); RCW

9.9A.537. Consequently, aggravating circumstances are treated as elements of the charged crime for constitutional purposes. Appendi, 120 S. Ct. at 2364-66. A conviction or special verdict should be reversed where no rational trier of fact, viewing the evidence in a light favorable to the State, could have found every element of the crime charged beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

The "deliberate cruelty" aggravating circumstance is defined by statute as follows: "The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim." RCW 9.94A.535(3)(a). As a matter of law "[d]eliberate cruelty consists of gratuitous violence, or other conduct which inflicts physical, psychological or emotional pain as an end in itself." State v. Serrano, 95 Wn. App. at 712-13 (quoting State v. Strauss, 54 Wn. App. 408, 418, 773 P.2d 898 (1989)). Moreover, the cruelty must be "'of a kind not usually associated with the commission of the offense in question.'" Serrano, at 713 (quoting State v. Payne, 45 Wn. App. 528, 531, 726 P.2d 997 (1986), and State v. Schantzen, 308 N.W.2d 484, 487 (Minn. 1981)). The evidence in Faagata's case does not support the deliberate cruelty finding.

In Serrano, Division Three held that shooting the victim in the back five times did not support a finding of deliberate cruelty. The Serrano

Court reasoned the infliction of five wounds in the back was not the gratuitous infliction of pain as an end to itself. State v. Serrano, 95 Wn. App. at 713; see also State v. Payne, 58 Wn. App. 215, 220, 795 P.2d 134, 805 P.2d 247 (1990) (even though the victim was shot six times in the back the court held the crime was not "heinous, cruel or depraved" and did not support a manifest injustice disposition for first degree murder).

Here Outler was shot in the back five times in the course of a few seconds. The State relied on the number and location of the gunshots to argue its theory to the jury that Faagata committed first degree murder. RP 734-736. Thus, the number and location of the gunshots are what established the crime itself. Evidence that Faagata repositioned himself between shots and two of the shots were near Outler's buttocks does not distinguish this case from Serrano. That evidence, as a matter of law, is insufficient to establish deliberate cruelty of a kind not associated with first degree murder.

This Court should accept review and reverse Faagata's exceptional sentence. Because the Court of Appeals decision conflicts with Serrano and raises the issue of whether there was sufficient evidence to support the aggravating circumstance element, review is appropriate under RAP 13.4(b)(1) and RAP 13.4(b)(3).

G. CONCLUSION

Faagata respectfully asks this Court to accept review in his case.

DATED this 27 day of October, 2008.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

FAULOLUA FAAGATA, Jr.,

Appellant.

No. 36325-9-II

PUBLISHED OPINION

PENYAR, A.C.J. – In August 2006, the State charged Faulolua Faagata, Jr., with first degree murder and second degree felony murder. A jury found Faagata guilty as charged. It also found by special verdict that Faagata was armed during the commission of the offenses and that his conduct manifested deliberate cruelty. The trial court entered judgment and sentence on the first degree murder conviction. It then orally conditionally dismissed the second degree felony murder conviction with the understanding that should the first degree murder conviction be reversed or vacated, it could be reinstated. The trial court then imposed a 450-month exceptional sentence for the first degree murder conviction. Faagata now appeals, arguing that (1) the trial court violated double jeopardy by conditionally dismissing his second degree felony murder conviction, and (2) insufficient evidence supports the jury's finding that his conduct manifested deliberate cruelty. We affirm.

FACTS

On July 3, and the early morning hours of July 4, 2006, Jason Outler, a couple of his co-workers, and his friend Kenneth Legary were drinking at the Hob-Nob, a Tacoma restaurant and bar. Shortly before the bar closed, Legary witnessed a car pull into the alley outside the Hob-Nob. Legary later identified the driver of the vehicle as Faagata. Outler complimented Faagata on the vehicle and asked whether Faagata would give him a ride home. Outler offered Faagata money in exchange for the ride. Faagata agreed and Legary watched as the two men left together at approximately 1:30 A.M.

At approximately 1:45 A.M., Anna Steele, whose home was located near the intersection of North 8th and Alder in Tacoma, awoke to the sounds of a struggle taking place outside her bedroom window. Steele then heard multiple "pop[s]" and someone say, "Oh my God." 4 Report of Proceedings (RP) at 231.

William Meeks, who also lived near North 8th and Alder, was standing at his parked car that morning when he observed two people standing beside another parked car. Meeks heard the people begin to argue and saw one push the other. He then heard someone say, "Look who's got the gun now, mother fucker." 4 RP at 253. Meeks returned to his apartment. From his apartment, Meeks watched as the two people began rolling around on the ground. Within a few minutes, Meeks heard gunfire. He observed that one man was standing and holding a gun, while the other man was on the ground. Meeks heard a total of five gun shots.

Lauren Carpenter, a guest at Meeks' home, also witnessed the altercation after someone pointed out that two men were arguing across the street from the apartment. Carpenter observed one of the men standing over the other. Carpenter then saw the man who was standing pull out a gun. She first saw the man fire three shots at the other man's body. After the first three shots,

Carpenter heard the wounded man screaming in pain. She then saw the armed man move over to the wounded man, place the gun "close up to his butt," and fire another shot. 4 RP at 279. Finally, she saw the armed man, who was still leaning over the other man's body, put the gun up to the man's head and shoot. Alex Milham, Meeks' roommate, also witnessed the incident. Milham saw the two men fighting on the ground and then witnessed the armed man shoot the other man three times in the back. Milham watched as the armed man repositioned himself between shooting the other man in the buttocks and again in the head.

Additionally, James Meyer and Teresa Connick, who were sitting outside of Meyer's apartment on North 8th, witnessed the incident. Meyer and Connick watched as a car pulled up across the street and Meyer heard the driver of the vehicle say, "Damn it[,] I want my money." 4 RP at 316. He then witnessed the driver force the passenger out of the vehicle. Connick heard someone say, "Now I've got the gun" or "I've got the gun now." 4 RP at 349. Meyer subsequently called 911 and, while he was on the phone, he too heard the driver indicate that he had a gun. Meyer yelled to the two men that the police had been called and heard one of the men say, "Come on, man. Didn't you hear him? The police have been called. Let's just stop. . . . Don't worry about it; you're the man. Let's just go." 4 RP at 317. Meyer then witnessed the armed man shoot the other man three times.

Outler ultimately died at the scene. A subsequent autopsy revealed that he was shot five times: twice in the back, twice in the buttocks, and once in the head.

A few days later, on July 6, Faagata went to the Tacoma Police Department.¹ When Detective David DeVault interviewed him, Faagata admitted that he was at the Hob-Nob on July 3 and 4 and indicated that Outler had approached him outside of the bar. Faagata claimed that Outler offered him \$80 in exchange for a ride home. Outler gave Faagata some cash, which Faagata threw on the dash of his car. When the men arrived at Outler's destination, Faagata counted the money and discovered that Outler had only given him \$15 or \$16. Faagata explained that after he confronted Outler, the two men began to argue over the money. He then claimed that Outler produced a gun, which went off while the men wrestled on the ground.²

On August 16, 2006, the State charged Faagata by amended information with first degree murder under RCW 9A.32.030(1)(a) (count I) and second degree felony murder under RCW 9A.32.050(1)(b) (count II). Both counts alleged that Faagata was armed with a firearm during the commission of the offense and that Faagata's conduct manifested deliberate cruelty. On March 21, 2007, both parties appeared for trial. The trial court held a CrR 3.5 hearing and ruled that Faagata's statements were admissible.

On April 2, 2007, a jury found Faagata guilty as charged. The jury also found by special verdict that Faagata was armed during the commission of the offenses and that his conduct manifested deliberate cruelty. On May 4, 2007, the trial court entered judgment and sentence for

¹ Faagata later testified that his brothers told him that the police were looking for him and that he should "talk to the police before they [came] looking for [him]." 6 RP at 647.

² Faagata later testified that after Outler produced the gun and the gun "went off," he tackled Outler and the gun "went off" again. 6 RP at 646. He then testified that he stood up and shot Outler three times before fleeing the scene. He explained, "I don't remember [why I shot him] . . . Because [] I have an angry temper as to what happened that night . . . and [I] also had a couple of drinks." 6 RP at 646-47.

the first degree murder conviction.³ The trial court then orally conditionally dismissed the second degree felony murder conviction, stating:

Well, I'm going to dismiss Count II, but I'm going to do it conditionally. I'm going to follow [the Court of Appeals' decision in *State v. Womac*, 130 Wn. App. 450, 123 P.3d 528 (2005), *rev. in part*, 160 Wn.2d 643, 160 P.3d 40 (2007)] . . . [T]hat's kind of new law, but it does make a certain amount of sense to me procedurally to do that. We have a jury that entered a conviction, and I don't think that the jury's finding should be a nullity. I think it's entitled to some weight. So I'm going to dismiss it conditionally with the understanding that should Count I be reversed or something happened with that, collateral attack, it can be reinstated, and, of course, if that were ever to happen, then there would be entirely a new set of appeal rights starting at that time.

RP (May 4, 2007) at 24. The trial court then imposed a 450-month exceptional sentence⁴ for the first degree murder conviction. Faagata now appeals.

³ Both parties note that the trial court did not enter findings of fact or conclusions of law. Citing *In re Marriage of Griffin*, 114 Wn.2d 772, 791 P.2d 519 (1990), Faagata argues that we may look to the trial court's oral opinion to determine the basis for the trial court's resolution of the issue. Citing *In re Breedlove*, 138 Wn.2d 298, 313, 979 P.2d 417 (1999), the State contends that we should remand for entry of findings of fact and conclusions of law. Because the trial court's oral opinion provides a sufficient basis for appellate review, however, we need not remand for entry of written findings of fact and conclusions of law.

⁴ The trial court sentenced Faagata to 300 months, plus an additional 90 months for deliberate cruelty and 60 months for the firearm enhancement.

ANALYSIS

I. DOUBLE JEOPARDY

Citing the Washington Supreme Court's decision in *Womac*, 160 Wn.2d 643,⁵ Faagata argues that his convictions for both first degree murder and second degree felony murder violate double jeopardy and require that his second degree felony murder conviction be vacated. The State, also citing *Womac*, responds that although the jury found Faagata guilty of both first degree murder and second degree felony murder, the judgment and sentence is silent as to his second degree felony murder conviction; therefore, the trial court did not violate double jeopardy.⁶ We review questions of law de novo. *Womac*, 160 Wn.2d at 649 (citing *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).

Article I, section 9 of the Washington State Constitution provides the same protection against double jeopardy as the Fifth Amendment to the federal constitution. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). Both the state and federal double jeopardy clauses protect against multiple punishments for the same offense, as well as against a subsequent prosecution for the same offense after acquittal or conviction. *Orange*, 152 Wn.2d at

⁵ While the present case was on appeal, the Supreme Court issued its decision in *State v. Schwab*, 163 Wn.2d 664, 185 P.3d 1151 (2008), filed June 12, 2008. In that case, a jury convicted the defendant of first degree manslaughter and second degree felony murder predicated upon assault. The trial court sentenced him on both counts. The Court of Appeals vacated the manslaughter conviction on double jeopardy grounds and, after the Supreme Court ruled that a felony murder conviction could not be predicated upon assault, ordered that the murder conviction be vacated. The trial court reinstated the manslaughter conviction, which both the Court of Appeals and the Supreme Court ultimately affirmed. Although *Schwab* discusses the court's decision in *Womac*, it is procedurally unlike the present case. Furthermore, both of the defendant's convictions in that case were entered on the judgment and sentence. Therefore, *Schwab* does not change our analysis with respect to this issue. See *Schwab*, 163 Wn.2d 664.

⁶ The State concedes that the defendant cannot be sentenced for both first degree murder and second degree felony murder and that the trial court improperly relied on our decision in *Womac*.

815 (citing *State v. Gocken*, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995)). 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. *Orange*, 152 Wn.2d at 815 (citing *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995)).

Washington follows the "same evidence" rule. *Calle*, 125 Wn.2d at 777. "The same evidence rule controls 'unless there is a clear indication that the legislature did not intend to impose multiple punishment.'" *Womac*, 160 Wn.2d at 652 (quoting *State v. Gohl*, 109 Wn. App. 817, 821, 37 P.3d 293 (2001)). The defendant's double jeopardy rights are violated if he is convicted of offenses that are identical both in fact and in law. *Calle*, 125 Wn.2d at 777. "[O]ffenses are not constitutionally the same if there is any element in one offense not included in the other and proof of one offense would not necessarily prove the other." *Womac*, 160 Wn.2d at 652 (citing *State v. Trujillo*, 112 Wn. App. 390, 410, 49 P.3d 935 (2002)). Washington courts, however, have occasionally found a violation of double jeopardy despite a determination that the offenses clearly contained different legal elements. *Womac*, 160 Wn.2d at 652.

In this case, the jury found that Faagata committed both first degree murder and second degree felony murder. A person commits first degree murder when with premeditated intent he causes the death of another. RCW 9A.32.030(1)(a). A person commits second degree felony murder when he commits or attempts to commit any felony, including assault, and in the course of and in furtherance of the felony, he causes the death of another. RCW 9A.32.050(1)(b). Here, the trial court only entered judgment and sentence on the first degree murder conviction. In denying Faagata's motion to dismiss the second degree murder conviction, the trial court relied on our decision in *State v. Womac*, 130 Wn. App. 450. A few weeks after Faagata was

sentenced, the Washington Supreme Court issued its decision in *Womac*, which affirmed in part and reversed in part our decision. *See* 160 Wn.2d at 664.

In that case, Womac was charged and convicted of homicide by abuse (count I), second degree felony murder (count II), and first degree assault (count III) for the death of his four-month-old son. The trial court entered judgment on all counts but imposed an exceptional sentence on count I only. The trial court denied Womac's motion to dismiss counts II and III and left both on his record but, to avoid violating double jeopardy provisions, did not impose sentences on either count. We affirmed the conviction for count I, but remanded for resentencing within the standard range on that count. Additionally, we directed the trial court to conditionally dismiss counts II and III, allowing for reinstatement should count I later be reversed, vacated, or set aside. *Womac*, 160 Wn.2d at 647.

The Supreme Court ultimately affirmed our remand for resentencing on count I, but reversed the order conditionally dismissing counts II and III. Finally, it directed the trial court to vacate Womac's convictions for felony murder and first degree assault. *Womac*, 160 Wn.2d at 649. In making this determination, the court first noted that Womac remained exposed to danger as three separate convictions (arising from a single offense) remained on his record even after the trial court determined that sentencing on all three counts would violate double jeopardy. *Womac*, 160 Wn.2d at 650. In response to the State's argument that Womac's three convictions should stand since he was sentenced for count I only, the Supreme Court stated:

The trial judge also determined double jeopardy concerns are implicated *only when a defendant receives more than one sentence*. This determination is incorrect. That Womac received only one sentence is of no matter as he still suffers the punitive consequences of his convictions.

Womac, 160 Wn.2d at 656 (citations omitted). The court explained that *Womac*'s convictions for counts II and III, for example, would count in his offender score should he be charged with another crime in the future. *Womac*, 160 Wn.2d at 656. Additionally, it noted that the presence of multiple convictions on one's record may impact parole eligibility, may be used to impeach the defendant's credibility, and "certainly carries the societal stigma accompanying any criminal conviction." *Womac*, 160 Wn.2d at 657 (quoting *Ball v. United States*, 470 U.S. 856, 865, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985)).

In this case, the State argues that the trial court's oral ruling is irrelevant, as the judgment and sentence is silent regarding the second degree felony murder conviction. The State contends that the present case is similar to *State v. Ward*, 125 Wn. App. 138, 104 P.3d 61 (2005), in which the trial court entered judgment and sentence for only one of the charges. *Faagata* contends that the *Womac* court distinguished *Ward* on two grounds: (1) unlike *Ward*, *Womac*'s judgment included all his convictions, and (2) unlike *Ward* (who was charged in the alternative), *Womac* was charged with separate offenses. *Faagata* emphasizes that, like *Womac*, he was charged with separate offenses. We recently discussed the Supreme Court's *Womac* decision in *State v. Turner*, 144 Wn. App. 279, 182 P.3d 478 (2008).⁷

In *Turner*, the State charged the defendant in the alternative with first degree assault and first degree robbery. A jury convicted *Turner* of second degree assault and first degree robbery. *Turner* then moved to have the assault conviction merge with the robbery conviction under *State v. Freeman*, 153 Wn.2d 765, 778, 108 P.3d 753 (2005), and the State agreed. The State asked the trial court to sign an order indicating that (1) a jury found *Turner* guilty of both first degree

⁷ A petition for review of *Turner* was filed on May 23, 2008. The Supreme Court will consider whether it will grant review on February 3, 2009.

robbery and second degree assault, (2) the second degree assault charge merged into the robbery charge, and (3) the trial court would vacate the assault charge for purposes of sentencing. The State also asked the trial court, however, to indicate that the conviction for assault was valid and could be utilized for sentencing if the Court of Appeals set aside the robbery conviction. The trial court ultimately signed the order. *Turner*, 144 Wn. App. at 281.

On appeal, Turner asked this court to vacate the assault conviction. Our commissioner entered a ruling affirming judgment but after this court denied Turner's motion to modify the commissioner's ruling, the Washington Supreme Court remanded for reconsideration in light of *Womac*. *Turner*, 144 Wn. App. at 281. In determining whether there was a double jeopardy violation, we stated:

Womac makes clear that in order to avoid double jeopardy, a trial court must vacate a charge that it has reduced to judgment but chooses not to sentence. That is not the case here because the trial court never reduced Turner's second degree assault conviction to judgment.

Turner, 144 Wn. App. at 282 (citations omitted). After discussing the facts in both *Ward* and *Trujillo*, 112 Wn. App. 390⁸ we then stated:

The *Womac* court noted that the defendant in that case was not charged in the alternative and then *based its decision to vacate the conviction on the fact that the trial court reduced the defendant's convictions to judgment*. As such, the *Womac* court determined that the remaining counts [in that case] violated double jeopardy and . . . ordered the trial court to vacate both.

Turner, 144 Wn. App. at 283 (citations omitted; emphasis added). We then concluded that because the trial court did not reduce Turner's second degree assault conviction to judgment and

⁸ In *Trujillo*, a jury convicted four defendants of first degree assault and, in the alternative, first degree attempted murder. *Turner*, 144 Wn. App. at 283 (citing 112 Wn. App. at 408-09). We explained that in *Trujillo*, this court reasoned that because the trial court did not reduce the verdict for first degree assault to judgment, it did not subject the defendants to any future jeopardy. *Turner*, 144 Wn. App. at 283.

did not sentence him for the conviction (or include any information regarding this conviction in his judgment and sentence), Turner's second degree assault conviction did not subject him to double jeopardy. Accordingly, we declined to vacate Turner's second degree assault conviction. *Turner*, 144 Wn. App. at 283.

Although the State did not charge Faagata in the alternative,⁹ the jury in this case—like the juries in *Ward*, *Trujillo*, and *Turner*—found Faagata guilty on all counts. Furthermore, the trial court in this case—like the trial courts in *Ward*, *Trujillo*, and *Turner*—entered judgment and sentence for one of Faagata's counts. Faagata's judgment and sentence remained silent as to the second degree felony murder conviction. Consistent with these cases, we decline Faagata's request to vacate his second degree murder conviction as no double jeopardy violation occurred.

Furthermore, we note that the concerns addressed in *Womac* are inapplicable to the present case. *See Womac*, 160 Wn.2d at 656-57. First, should Faagata commit another offense in the future, his second degree felony murder conviction will not be factored into his offender score, as prior offenses which are found to encompass the same criminal conduct are counted as one offense under RCW 9.94A.525(5)(a)(i). Second, because parole no longer exists in Washington, the potential impact of Faagata's second conviction on parole eligibility is

⁹ The State argues, and we agree, that the difference between charging a defendant in the alternative and charging a defendant for separate offenses is insignificant for purposes of double jeopardy. Ultimately, juries are required to return verdicts on all counts, and trial courts, where appropriate, are required to either merge convictions or enter judgment and sentence on only one of multiple convictions so as to avoid double jeopardy. So while charging in the alternative versus charging for separate offenses is technically different, the practical result of doing so in this context is the same.

irrelevant. Lastly, we find that the court's concerns regarding credibility impeachment and societal stigmas are less pertinent in the present case. It is unlikely that Faagata, who has already been convicted of and sentenced for first degree murder, will be even more exposed to the aforementioned "dangers" by virtue of his simultaneous second degree felony murder conviction alone. For these and the above reasons, we affirm.

II. EXCEPTIONAL SENTENCE FOR DELIBERATE CRUELTY

Faagata argues that the jury's deliberate cruelty finding is unsupported by the evidence and as a matter of law cannot support the trial court's exceptional sentence. Thus, Faagata contends, we should remand for resentencing within the standard range. We disagree.

The trial court may impose an exceptional sentence if it finds that there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535 Deliberate cruelty during the commission of the offense is included in the list of factors that may support an exceptional sentence. RCW 9.94A.535(3)(a). The aggravating factor of deliberate cruelty must be determined by a jury under the Sixth Amendment. RCW 9.94A.537(3); *State v. Borboa*, 157 Wn.2d 108, 118, 135 P.3d 469 (2006) (citing *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)).

Deliberate cruelty is defined as "gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself." *State v. Copeland*, 130 Wn.2d 244, 296, 922 P.2d 1304 (1996) (quoting *State v. Scott*, 72 Wn. App. 207, 214, 866 P.2d 1258 (1993)). The conduct must be significantly more serious or egregious than typical in order to support an exceptional sentence. *Scott*, 72 Wn. App. at 214 (citing *State v. Holyoak*, 49 Wn. App. 691, 696, 745 P.2d 515 (1987)). It must involve cruelty of a kind not usually associated

with the commission of the offense in question. *State v. Crane*, 116 Wn.2d 315, 334, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). When the sufficiency of evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in the State's favor and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (en banc). Credibility determinations are for the trier of fact and are not subject to review. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)). We must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874-75 (citing *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)).

In this case, the jury found by special verdict that Faagata's conduct during the commission of the crimes manifested deliberate cruelty to the victim. Based on this finding, the trial court imposed an exceptional sentence of 450 months for Faagata's first degree murder conviction. Faagata argues that the present case is analogous to *State v. Serrano*, 95 Wn. App. 700, 977 P.2d 47 (1999), where Division Three of this court held that a finding of deliberate cruelty was not justified where the defendant shot the victim five times. In *Serrano*, however, the defendant shot the victim in the back five times. 95 Wn. App. at 711. In determining that the

multiple gunshot wounds in that case did not manifest deliberate cruelty, however, the Division

Three noted:

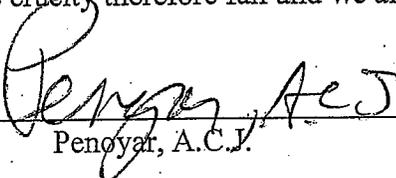
Some Washington cases have upheld exceptional sentences on the basis of the number of wounds inflicted. In each of those cases, however, the sheer number of wounds demonstrated *a cruelty not usually associated with the offenses*. *Mr. Serrano shot [the victim] five times. This fact itself does not suggest he gratuitously inflicted pain as an end in itself.*

Serrano, 95 Wn. App. at 713 (citations omitted; emphasis added).

Although Faagata also shot Outler a total of five times, the locations of the wounds and the manner in which Faagata shot Outler suggest that he gratuitously inflicted pain as an end in itself and that his conduct involved cruelty of a kind not usually associated with first degree murder. Unlike the defendant in *Serrano*, Faagata shot Outler twice in the back, waited a few seconds, shot him twice in the buttocks—in close proximity to his genitals—and then waited a few more seconds before shooting him directly in the head. Carpenter's testimony reveals that Outler was conscious and screaming in pain after Faagata shot him twice in the back. Furthermore, other eyewitness testimony reveals that Faagata actually repositioned himself before shooting Outler in the buttocks. This evidence supports the jury's finding that Faagata gratuitously inflicted pain as an end in itself—to hurt, humiliate, and embarrass Outler—and that this violence was significantly more egregious than typical of first degree murder. We affirm Faagata's exceptional sentence.

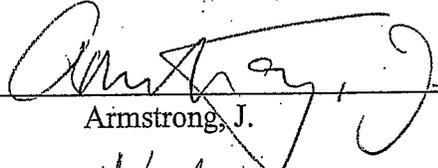
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Faagata's arguments that the trial court violated double jeopardy by conditionally dismissing his second degree felony murder conviction and that insufficient evidence supports the jury's finding that his conduct manifested deliberate cruelty therefore fail and we affirm.

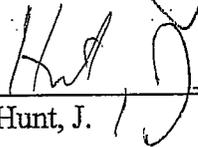


Penoyar, A.C.J.

We concur:



Armstrong, J.



Hunt, J.