

**F I L E D**  
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STATE OF WASHINGTON

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No. \_\_\_\_\_

Court of Appeals No. 61481-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN CHARLES FRANKLIN,

Petitioner.

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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

John Charles Franklin, defendant and appellant below, seeks review of the Court of Appeals decision terminating review designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Franklin seeks review of the Court of Appeals decision dated January 11, 2010, affirming his conviction and sentence for multiple charges. A copy of the decision is attached as Appendix A. A motion for reconsideration was denied on March 31, 2010, and a copy is attached as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. Both the United States and Washington Constitutions protect criminal defendants against double jeopardy. Multiple acts that constitute a continuing course of conduct encompass only one offense. Where the assaults in counts I and V were committed against the same victim, at the same place, and within moments of each other, do the two convictions violate the prohibition against double jeopardy?

2. The 6<sup>th</sup> Amendment guarantees criminal defendants the right to effective assistance of counsel. Was counsel deficient in failing to move for severance of the charges, failing to argue same criminal conduct at

sentencing, and failing to object to the admission of hearsay evidence? If so, was Mr. Franklin prejudiced by his counsel's deficient performance?

3. The Washington Constitution, article 1, section 7, prohibits searches without authority of law. Where a search is performed incident to an arrest, the fact of the lawful arrest provides the requisite authority of law for the resulting search. In this case, police arrested Mr. Franklin on a warrant, but the court found that the existence of the warrant was not proven. Even if there was probable cause to arrest Mr. Franklin for possession of drugs, where the police did not do so, was the resulting search of his person without authority of law?

4. Prior to undergoing custodial interrogation by the police, a suspect must be advised of and waive his 5<sup>th</sup> and 6<sup>th</sup> Amendment rights to silence and counsel pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Subsequent statements are admissible at trial only where the State proves that the suspect knowingly, intelligently, and voluntarily waived his Miranda rights. Did the lower courts err in finding the State had carried its burden of proving Mr. Franklin waived his rights?

5. Under the recently amended RCW 9.94A.701(8), which applies retroactively, when the term of confinement plus community custody exceeds the statutory maximum for the crime, the term of community

custody must be reduced. Did the Court of Appeals fail to apply this provision to Mr. Franklin's sentence in counts I and III?

D. STATEMENT OF THE CASE

On February 1, 2007, Mr. Franklin was arrested after a drug investigation. 10/15/07RP 199-200; 10/16/07RP 132. A search of his person revealed cocaine (count III charged possession of cocaine with intent to deliver). 10/16/07RP 57-63; 10/22/07RP 44. A search of his home revealed two firearms (count II charged unlawful possession of a firearm). 10/11/07RP 71; 10/17/07RP 30. There were also two women in the home, Charlene Nicholson, and Sara Shorr, who was visibly injured. 10/17/07RP 49. Ms. Shorr described two separate incidents where she was assaulted by Mr. Franklin, the first occurring around January 25, 2007 (10/15/07RP 45-48, 87, 153 - counts IV and VI), and the second several days later on approximately January 30, 2007 (10/15/07RP 55-65, 88 - counts I and V). Mr. Franklin was later charged with two counts of witness tampering (count VII regarding Ms. Shorr and count VIII regarding Ms. Nicholson). CP 26-29; CP 48-51. Mr. Franklin was found guilty on all charges. CP 106-07.

On appeal, Mr. Franklin argued that (1) his assault convictions in counts I and V violated the prohibition against double jeopardy; (2) he was provided ineffective assistance of counsel where his attorney failed to

move for severance of charges, failed to argue that the convictions in counts I and V and in counts IV and VI constituted the same criminal conduct, and failed to object to the admission of hearsay evidence; (3) the search of his person was conducted without “authority of law” in violation of the Washington Constitution; (4) the lower courts erred in finding that Mr. Franklin waived his Miranda rights; and (5) the Court of Appeals failed to apply the newly amended version of RCW 9.94A.701(8) to his sentence in counts I and III.

The Court of Appeals affirmed all of Mr. Franklin’s convictions, and he now seeks review in this Court.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THIS COURT SHOULD ACCEPT REVIEW TO DETERMINE IF THE CONVICTIONS IN COUNTS I AND V VIOLATED THE PROHIBITION AGAINST DOUBLE JEOPARDY.

The prohibition against double jeopardy protects a criminal defendant from multiple convictions and punishments for the same offense. United States Constitution, Fifth Amendment; Washington Constitution, article 1, section 9. The assault convictions in counts I and V constituted a continuing course of conduct encompassing only one offense, and therefore violate the prohibition against double jeopardy.

A double jeopardy violation is reviewed de novo. State v. Knutson, 88 Wn.App. 677, 680, 946 P.2d 789 (1997). The reviewing court must determine whether, in light of legislative intent, the charged crimes constitute a single offense. Blockburger v. United States, 284 U.S. 299, 303, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932).

The Court of Appeals suggested there is a presumption that the legislature intended for separate punishments. App. A at 13. In fact, just the opposite is true. A determination that the legislature intended to allow for separate convictions and punishments must be based on an express statement of legislative intent. Whalen v. United States, 445 U.S. 684, 691-92, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). If there is doubt as to the legislative intent, the rule of lenity requires the interpretation most favorable to the defendant. Id. at 694.

Mr. Franklin was charged in count I with assault in the third degree for hitting Ms. Shorr with a board. CP 1-3. 10/4/07RP 10-11; 10/23/07RP 17. Count V, added in an amended information, charged assault in the second degree for fracturing Ms. Shorr's nose during the same incident on January 30, 2007. CP 11-13; 10/4/07RP 10-11; 10/23/07RP 17. Ms. Shorr testified that both acts occurred in front of the residence on 35<sup>th</sup> Avenue South within minutes of each other. 10/15/07RP 88. The prosecutor admitted that these two acts took place "at the exact

same time,” and in closing argument, described the two counts together as one incident of assault. 10/4/07RP 11; 10/23/07RP 92-93.

The right against double jeopardy is violated where the State arbitrarily divides a single crime into multiple charges:

The United States Supreme Court has been especially vigilant of overzealous prosecutors seeking multiple convictions based upon spurious distinctions between the charges.

State v. Adel, 136 Wn.2d 629, 635, 965 P.2d 1072 (1998) (citing to Brown v. Ohio, 432 U.S. 161, 169, 97 S.Ct. 2221, 53 L.Ed.2d 187(1977) and In re Snow, 120 U.S. 274, 282, 7 S.Ct. 556, 30 L.Ed 658 (1887)). Mr. Franklin argued that these two assault convictions violated the prohibition against double jeopardy because the unit of prosecution for assault is the number of victims, and here there was only one victim. See State v. Graham, 153 Wn.2d 400, 406-08, 103 P.3d 1328 (2005); State v. Smith, 124 Wn. App. 417, 432, 102 P.3d 158 (2004), aff'd on other grounds, 159 Wn.2d 778 (2005).

The Court of Appeals rejected the “unit of prosecution” analysis because the convictions were for different degrees of assault. App. A at 11-12 n.9. Mr. Franklin maintains that this is irrelevant. It is illogical to argue that each blow to the same victim of a beating could form the basis for a separate assault charge. The two counts constitute one “continuous

act,” and encompass only one offense. State v. Petrich, 101 Wn.2d 566, 571, 683 P.2d 173 (1984).

However, even under a Blockburger analysis, the two offenses constitute the “same” offense. A violation of the prohibition against double jeopardy occurs where a defendant is convicted of two offenses and one is a lesser included offense of the other. Brown, 432 U.S. at 169; State v. Brett, 126 Wn.2d 136, 181, 892 P.2d 29 (1995). Since the crime of assault in the first degree necessarily includes the lesser crimes of second, third, and fourth degree assault, different degrees of assault constitute the “same” offense. State v. Marquez, 131 Wn. App. 566, 571, 127 P.3d 786 (2006); State v. Linton, 122 Wn. App. 73, 80, 93 P.3d 183 (2004), aff’d on other grounds, 156 Wn.2d 777 (2006). The Court of Appeals incorrectly determined there was no double jeopardy violation. App. A at 13. This Court should accept review under RAP 13.4(b)(1), (2), and (3) because this case raises significant constitutional issues, and the decision of the Court of Appeals conflicts with Graham, Adel, Brett, Petrich, Marquez, Smith, and Linton.

2. THIS COURT SHOULD ACCEPT REVIEW TO DETERMINE IF MR. FRANKLIN WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

The state and federal constitutions guarantee criminal defendants effective representation by counsel at all critical stages of trial. United

States Constitution, Sixth Amendment; Washington Constitution, art. 1, § 22; State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); Strickland v. Washington, 466 U.S. 668, 685-87, 104 S.Ct. 1052, 80 L.Ed.2d 674 (1984). To obtain relief based on ineffective assistance of counsel, a criminal defendant must establish that (1) his counsel's performance was deficient and (2) his counsel's deficient performance prejudiced his defense. Id. at 687; Williams v. Taylor, 529 U.S. 362, 390-91, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000).

a. Defense counsel's failure to move for severance of the charges constituted ineffective assistance of counsel. Although CrR 4.4(a) provides that severance is waived if a motion is not timely made, a defendant may assert on appeal that counsel's performance was deficient for failing to make (or renew) a motion to sever. State v. Standifer, 48 Wn.App. 121, 125-26, 737 P.2d 1308, rev. denied, 108 Wn.2d 1035 (1987). Joinder is "inherently prejudicial." State v. Ramirez, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). Defense counsel's failure to move for severance constituted ineffective assistance of counsel.

It is reversible error to deny a severance motion when evidence of guilt on one count would not be admissible in a separate trial of the other counts. State v. Hernandez, 58 Wn. App. 793, 800, 794 P.2d 1327 (1990); Ramirez, 46 Wn. App. at 228; State v. Harris, 36 Wn. App. 746, 752, 677

P.2d 202 (1984). In a footnote, the Court of Appeals dismissed these cases as “inapposite” because the defendants were all charged with committing multiple violations of the same statute, whereas in this case, Mr. Franklin was charged with various crimes. App. A at 16 n.12. However, prejudice does not result only where the multiple charges are for violating the same statute. This Court recently reiterated that “[s]everance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant’s guilt for another crime or to infer a general criminal disposition.” State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). This is precisely why a motion to sever should have been granted if timely made.

In addition, a multitude of ER 404(b) evidence was admitted at trial.<sup>1</sup> Ms. Shorr described an incident that took place months before Mr. Franklin’s arrest where he assaulted Ms. Nicholson and pointed a gun at her head. 10/15/07RP 32-33.<sup>2</sup> When Ms. Shorr tried to intervene, he

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<sup>1</sup> This evidence was deemed admissible only as to the felony harassment charge (to prove that Ms. Shorr reasonably feared that Mr. Franklin’s threats would be carried out). RCW 9A.46.020(1)(b); 10/4/07RP 21-22; CP 244-47). The evidence was not admissible as to any of the other seven charges.

<sup>2</sup> Instruction 8 explained to the jury that the evidence of uncharged assaults could be considered for both the felony harassment charge as well as for the firearms charge in count II. CP 63. In its decision, the Court of Appeals held that any error in this instruction was harmless, since there was other sufficient evidence regarding the firearms charge. App. A at 17 n.13. This is not the point. There was no evidence in the record that showed the gun used in the uncharged assault against Ms. Nicholson was one of the guns found in the house. The weapons charge was alleged to have taken place between

assaulted her as well. 10/15/07RP 34. Afterwards, Mr. Franklin threatened to take Ms. Nicholson “to the track” to “pimp her out.” 10/15/07RP 36. Ms. Nicholson testified to this incident as well. 10/11/07RP 18-21. She explained how she was “was scared to fight back,” how “blood was all over the house because he kept kicking and hitting me,” and how when Mr. Franklin held the gun to her head she “cried and prayed and said good-bye to my little girl.” 10/11/07RP 19.

Ms. Shorr testified that she was afraid of Mr. Franklin in part because he told her about violence he had inflicted on other women. 10/15/07RP 39. She also testified regarding several uncharged assaults that Mr. Franklin committed against her: making her bend over with her pants down and threatening to whip her with electrical cords; hitting her with a gun, causing a “huge bruise” on her arm; chasing her down the street with his gun out; and assaulting her and causing her to twist and injure her ankle, requiring surgery. 10/15/07RP 40 – 41, 97, 149-50. Ms. Shorr also described an incident where Mr. Franklin hit and kicked her so hard, she stated: “If I had been beaten like that for more than five minutes I would have massive brain damage, probably.” 10/15/07RP 43-44.

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January 29, 2007 and February 1, 2007. CP 48-51. The assault on Ms. Nicholson was said to have taken place months earlier. 10/15/07RP 33. Neither Ms. Nicholson nor Ms. Shorr identified the gun used in the uncharged assault as one of the guns found in the house months later. 10/11/07RP 18-21; 10/15/07RP 122.

Finally, Ms. Shorr testified that on approximately January 30, 2007, Mr. Franklin was mad about her owing him money. 10/15/07RP 58. He threatened to “[guerilla] pimp” her in order to pay him back: “Pretty much let anybody come up and have sex with me and pay him and keep me there until I do what he says for these men until I broke even with him.” 10/15/07RP 58.

Because of a failure to sever charges, not only did Mr. Franklin have to defend against all eight charges, he also had to defend against the multitude of uncharged ER 404(b) evidence, all in a single trial. Count IV was the felony harassment charge based on the threat in the basement, and together with the assault charge in count VI, these two charges were removed in time from all other charges, occurring several days prior to the second assault incident, the drug investigation, and the search of the home. 10/23/07RP 44. Since the ER 404(b) evidence was properly admitted only as to the felony harassment charge, if counts IV and VI were heard in a separate trial, none of the ER 404(b) evidence would have been admissible regarding the remaining six counts. The ER 404(b) evidence was extremely graphic and highly prejudicial. Under CrR 4.4(b), a “fair determination” of Mr. Franklin’s guilt or innocence on the remaining six charges demanded that they be severed from counts IV and VI.

The Court of Appeals pointed to concerns for judicial economy as justification for a single trial. App. A at 18-19. Yet the eight charges were in many ways completely unrelated. Interests of judicial economy do not trump a defendant's due process rights or society's interest in seeing an accused person receive a fair trial with a just outcome. State v. Bryant, 89 Wn. Ap. 857, 865, 950 P.2d 1004 (1998), rev. denied, 137 Wn.2d 1017 (1999).

The Court of Appeals stated Mr. Franklin "cannot show that the outcome of the proceeding would have been different" if a motion to sever was made and granted. App. A at 19. However, a defendant can be prejudiced by joinder where use of a single trial invites the jury to cumulate evidence to find guilt or infer a criminal disposition. State v. Smith, 74 Wn.2d 744, 755, 446 P.2d 571 (1968), vacated in part on other grounds, 408 U.S. 934, 33 L.Ed.2d 747, 92 S.Ct. 2852 (1972). Here, no reasonable jury could help but be swayed by the cumulation of evidence regarding the eight charged offenses plus the uncharged evidence of additional assaults. The sheer number of charges and accusations may have resulted in feelings of hostility by the jury toward Mr. Franklin, and a single trial invited the jury to infer a criminal disposition on the part of Mr. Franklin. Id. The Court of Appeals decision conflicts with the

decisions in Sutherby, Smith, Hernandez, Ramirez, Harris, and Bryant.

This court should accept review under RAP 13.4(b) (1) and (2).

b. Defense counsel's failure to raise the issue of same criminal conduct constituted ineffective assistance of counsel. "Same criminal conduct" is defined as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). The offenses in counts IV and VI constitute the same criminal conduct, as do the offenses in counts I and V. Defense counsel's performance was deficient in failing to raise this issue at sentencing. See State v. Saunders, 120 Wn. App. 800, 825, 86 P.3d 232 (2004).

With regard to the crimes charged in counts IV and VI, the Court of Appeals cited to State v. Wilson, 136 Wn. App. 596, 150 P.3d 144 (2007). App. A at 24. In Wilson, the defendant entered the home with the intent to commit an assault, committed the assault, left, then returned to the home to threaten the victim. Id. at 614-15. The court held that the defendant had different intents in committing the two offenses, and they were separated in time. Id. at 615. In the case at hand, Count IV (felony harassment) and count VI (assault in the second degree) both occurred in the basement and at the same time. See also State v. Worl, 129 Wn.2d

416, 429, 918 P.2d 905 (1996) (the crimes of malicious harassment and attempted second degree murder comprised the same criminal conduct).

The criminal intent for the assault was to cause harm, and the threat merely announced the intent. Whether two crimes share the same objective intent can be measured by determining whether one crime furthered another. State v. Lessley, 118 Wn.2d 773, 777-78, 827 P.2d 996 (1992). Inflicting harm on Ms. Shorr furthered the crime of felony harassment by creating the apprehension of fear. In this way, the assault furthered the crime of felony harassment.

The convictions in counts I and V for assault also constitute the same criminal conduct. The Court of Appeals cited to two cases in rejecting Mr. Franklin's position: State v. Lopez, 142 Wn. App. 341, 174 P.3d 1216 (2007), rev. denied, 164 Wn.2d 1012 (2008), and State v. Grantham, 84 Wn. App. 854, 932 P.2d 657 (1997). App. A at 23. However, their decision ignores this Court's decision in State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997) (the repeated commission of the same crime against the same victim over a short period of time falls within the "clear category of cases where two crimes will encompass the same criminal conduct"). See also State v. Tili, 139 Wn.2d 107, 124-25, 985 P.2d 365 (1999) (multiple acts of rape against the same victim occurring very close in time constituted same criminal conduct).

At trial, the prosecuting attorney discussed counts I and V together as one incident of assault. 10/23/07RP 92-93. Both counts involved assaults against Ms. Shorr in front of the residence within moments of each other. Based on this Court's decision in Porter, the two assaults in counts I and V encompass the same criminal conduct. The failure to argue same criminal conduct constituted ineffective assistance of counsel.

Because there was a reasonable probability that the trial court would have found counts IV and VI to be the same criminal conduct, as well as counts I and V, Mr. Franklin was prejudiced by his counsel's deficient performance. The decision of the Court of Appeals conflicts with this Court's decisions in Worl, Lessley, Tili, and Porter. This Court should accept review under RAP 13.4(b)(1).

c. Defense counsel's failure to object to inadmissible hearsay constituted ineffective assistance of counsel. ER 801(c) provides that hearsay is an out-of-court statement offered to prove the truth of the matter asserted. The testimony of Ms. Nicholson and Ms. Shorr (concerning what they were told by Mr. Benchero) was offered to prove a material fact: that Mr. Franklin (through Mr. Benchero) attempted to induce the two women to testify falsely. The Court of Appeals acknowledged that the statements were offered to prove a material fact, but held that under

ER 801(d)(2), the statements were not hearsay because Mr. Franklin authorized Mr. Benchero to act as his agent. App. A at 21.

ER 801(d)(2) requires that the “agent” be authorized to make the statement on behalf of the principal. Evidence independent of the hearsay must prove the speaker’s status as an agent and the nature and extent of his authority. Passovoy v. Nordstrom, Inc., 52 Wn.App. 166, 171-72, 758 P.2d 524 (1988), rev. denied, 112 Wn.2d 1001 (1989). Such authorization must appear in the record. Barrie v. Hosts of America, Inc., 94 Wn.2d 640, 645, 618 P.2d 96 (1980).

Here, the only evidence independent of the hearsay consisted of recorded telephone conversations between Mr. Franklin (in the King County Jail) and Mr. Benchero, as well as the testimony of Mr. Benchero himself. The telephone recordings suggest that Mr. Franklin asked Mr. Benchero to contact two individuals, but they fail to identify the two individuals or why they were to be contacted. Ex. 96-98. Mr. Benchero testified that he was never asked by Mr. Franklin to contact either Ms. Nicholson or Ms. Shorr. 10/22/07RP 12. The Court of Appeals decision mistakenly states that “Benchero testified that he had contacted those two individuals at Franklin’s request.” App. A at 21. Moreover, the requisite authority can only be established from the conduct of the principal, not by

the conduct of the agent. DBM Contractors, Inc. v. State, 40 Wn.App. 98, 110, 696 P.2d 1270, rev. denied, 103 Wn.2d 1039 (1985).

Finally, the Court of Appeals concluded that Mr. Franklin has not demonstrated prejudice from the failure of trial counsel to object to the hearsay evidence. App. A at 22. The crime of witness tampering requires an attempt to induce a witness to testify falsely. RCW 9A.72.120. The telephone recordings do not establish an attempt to induce a witness to testify falsely. Ex. 96-98. Neither does Mr. Benchero's testimony. Mr. Benchero testified he never contacted Ms. Nicholson. 10/22/07RP 22. He did speak with Ms. Shorr, but only to find out what she was going to say at trial. 10/18/07RP 74. He did not attempt to induce her to testify falsely. 10/18/07RP 74.

Since the hearsay statements were "key" to proving the witness tampering charges, "competent counsel would have objected." State v. Hendrickson, 138 Wn.App. 827, 831-33, 158 P.3d 1257 (2007), aff'd on other grounds, 165 Wn.2d 474 (2009). Counsel's performance was deficient and Mr. Franklin was prejudiced. Id. at 832-33. Without this evidence, there is a reasonable probability Mr. Franklin would not have been convicted on the witness tampering charges in counts VII and VIII. The decision of the Court of Appeals conflicts with Barrie, Passovoy, and

DBM Contractors. This Court should accept review under RAP 13.4(b)(1) and (2).

3. THIS COURT SHOULD ACCEPT REVIEW TO DETERMINE IF THE SEARCH OF MR. FRANKLIN'S PERSON WAS CONDUCTED WITHOUT AUTHORITY OF LAW IN VIOLATION OF THE WASHINGTON CONSTITUTION.

Article I, section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Article I, section 7 provides greater protection against search and seizure than does the Fourth Amendment. State v. Setterstrom, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008). This Court has interpreted the "authority of law" requirement to prohibit searches that would be allowable in other jurisdictions. State v. Ladson, 138 Wn.2d 343, 358, 979 P.2d 833 (1999).

In the context of a search incident to arrest, it is the fact of the lawful arrest that provides the requisite "authority of law" for the resulting search. State v. Grande, 164 Wn.2d 135, 139-40, 187 P.3d 248 (2008); State v. O'Neill, 148 Wn.2d 564, 585, 62 P.3d 489 (2003); State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). In the absence of an actual, lawful arrest, even where there is probable cause for the arrest, a search is without authority of law. O'Neill, 148 Wn.2d at 585-86.

The Court of Appeals found that even when the stated grounds for arrest are invalid, the arrest is lawful if there is probable cause to arrest the person for some crime. App. A at 6-7.<sup>3</sup> In support of its position, the court cites to State v. Huff, 64 Wn. App. 641, 645-46, 826 P.2d 698, rev. denied, 119 Wn.2d 1007 (1992) and City of Seattle v. Cadigan, 55 Wn. App. 30, 36, 776 P.2d 727 (1989). However, these cases were not analyzed separately under the Washington Constitution. Federal law may allow a search incident to arrest so long as probable cause for the arrest existed. However, under O'Neill, even with probable cause, the resulting search was without authority of law, since Mr. Franklin was not actually arrested on the drug charge. O'Neill, 148 Wn.2d at 585-86. The decision of the Court of Appeals is in conflict with this Court's decision in O'Neill, and raises a significant question of constitutional law. This Court should accept review under RAP 13.4(b)(1) and (3).

4. THIS COURT SHOULD ACCEPT REVIEW TO  
DETERMINE IF THE STATE FAILED TO PROVE  
A VALID MIRANDA WAIVER.

The prosecution may not use statements obtained from custodial interrogation unless procedural safeguards guarantee that the accused has been informed of and freely waived the constitutional privileges of the

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<sup>3</sup> Police arrested Mr. Franklin based on their belief that there was an outstanding warrant for his arrest. 10/8/07RP 63-64, 71; Pretrial Ex. 7 at 2. At the CrR 3.6 hearing, the trial court found that the State failed to prove the existence of the warrant. CP 104 (Conclusion of Law 9).

Fifth and Sixth Amendments to the United States Constitution. Miranda v. Arizona, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The State bears the “heavy burden” of proving by a preponderance of the evidence that he knowingly, voluntarily, and intelligently waived his Miranda rights. Id. at 475; State v. Robtoy, 98 Wn.2d 30, 35-36, 653 P.2d 284 (1982).

In this case, the officers never inquired of Mr. Franklin whether he wished to waive his Miranda rights; rather, they merely advised him of his rights and then proceeded to question him. 10/8/07RP 35-36, 53-60, 69. While a Miranda waiver need not be explicit, “a valid waiver will not be presumed simply from silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.” Miranda, 384 U.S. at 475; accord State v. Adams, 76 Wn.2d 650, 671, 458 P.2d 558 (1969), rev’d on other grounds, 403 U.S. 947 (1971).

The Court of Appeals decision holds that “Franklin knowingly, intelligently, and voluntarily waived his right by implication by agreeing to speak with the police officers.” App. A at 8. The court did precisely what Miranda clearly stated it could not do: presume a valid waiver of Miranda based solely upon Mr. Franklin’s confession following Miranda warnings. The Court of Appeals decision is in conflict with this Court’s

decision in Adams and raises a significant question of constitutional law.

This Court should accept review under RAP 13.4(b)(1) and (3).

5. THIS COURT SHOULD ACCEPT REVIEW TO DETERMINE IF THE COURT OF APPEALS DECISION CONFLICTS WITH IN RE PERS. RESTRAINT OF BROOKS AND RCW 9.94A.701(8).

On counts I and III, Mr. Franklin was sentenced to the statutory maximum period of incarceration plus community custody. CP 217, 274-75.<sup>4</sup> A subsequent order stated that “the total amount of incarceration and community custody shall not exceed” 60 months on count I and 120 months on count III. CP 276-77.

Mr. Franklin argued that under State v. Linderud, 147 Wn. App. 944, 947-48, 197 P.3d 1224 (2009), the trial court imposed an improper indeterminate sentence on counts I and III. The Court of Appeals rejected the argument, citing to In re Pers. Restraint of Brooks, 166 Wn.2d 664, 674, 211 P.3d 1023 (2009). App. A at 27. However, the court’s decision ignored the recent amendment to RCW 9.94A.701(8), cited to in Brooks, which reads as follows:

The term of community custody specified by this section shall be reduced by the court whenever an offender's

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<sup>4</sup> Assault in the third degree is a class C felony and carries a maximum statutory penalty of five years incarceration and/or a ten thousand dollar fine. RCW 9A.20.021; RCW 9A.36.031. Possession of cocaine with the intent to deliver is a class B felony and carries a maximum statutory penalty of ten years incarceration and/or a twenty five thousand dollar fine. RCW 69.50.401.

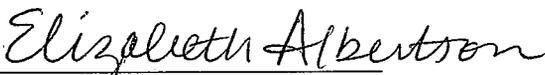
standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

Act effective July 26, 2009, ch. 375, § 5. This provision applies retroactively. Act effective July 26, 2009, ch. 375, §20. This Court should accept review under RAP 13.4(b)(1) and (4) because the decision of the Court of Appeals conflicts with Brooks and raises an issue of substantial public interest concerning the application of RCW 9.94A.701(8).

F. CONCLUSION

Mr. Franklin's case raises important issues. This Court should accept review.

Respectfully submitted this 28<sup>th</sup> day of April, 2010.

  
Elizabeth Albertson – WSBA #17071  
Washington Appellate Project (91052)  
Attorneys for Petitioner

# Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RECEIVED

STATE OF WASHINGTON, )  
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 Respondent, )  
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 v. )  
 )  
 JOHN CHARLES FRANKLIN, )  
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 Appellant. )  
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DIVISION ONE

No. 61481-9-1

UNPUBLISHED OPINION

FILED: January 11, 2010

JAN 11 2010

Washington Appellate Project

DWYER, A.C.J. — John Charles Franklin appeals, on various grounds, from his conviction of and sentence for eight felony counts. Finding his various contentions to be without merit, we affirm.

1

After listening to telephone conversations between Franklin and a cooperating suspect in which Franklin and the suspect arranged for a narcotics transaction to take place shortly after the last conversation, police officers staked out Franklin's residence. The officers stopped and arrested Franklin as he drove away from the residence en route to the arranged drug sale. At the time of his arrest, Franklin possessed approximately 40 grams, or roughly 1.4 ounces, of crack cocaine. Although the officers surveilled Franklin's movements and stopped him because of their belief that he was in possession of narcotics en route to an arranged drug sale, the officers told Franklin that the reason for his arrest was an outstanding arrest warrant.

Upon arresting Franklin, Officer David Bauer recited Miranda<sup>1</sup> warnings to Franklin from memory. Franklin was then transported to the precinct. There, Officer Bauer again advised Franklin of his Miranda rights, this time reading from a printed card. Other officers then interviewed Franklin. He told the police that they would find guns and more drugs at the residence, and he consented to a search of his house. After obtaining Franklin's consent, the police applied for and obtained a warrant to search Franklin's residence. Franklin was transported back to the house, where Officer Amy Branham advised him of his Miranda rights once again and then questioned him.

In searching the residence, police discovered numerous items, including additional suspected drugs, drug paraphernalia, two firearms, and ammunition. In addition, officers encountered two women who resided with Franklin: Sara Shorr and Charlene Nicholson. Shorr appeared to be injured. Shorr was photographed, interviewed, and taken to the hospital. She had recently suffered a fractured nose, a fractured rib, and prominent bruising on her left thigh. Shorr described to police multiple instances in which Franklin had assaulted her, on one occasion strangling her and on another punching her in the face and hitting her with a wooden board.

The State subsequently charged Franklin with (1) a violation of the Uniform Controlled Substances Act, chapter 69.50 RCW, (2) unlawful possession of a firearm, (3) assault in the second degree for strangling Shorr, (4) felony harassment, (5) assault in the second degree for punching Shorr and fracturing

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

her nose, and (6) assault in the third degree for hitting Shorr with the board. Franklin was held in the King County jail pending trial. During Franklin's detention, Shorr reported that she had been asked by someone on Franklin's behalf to testify falsely. The State amended the information against Franklin to add a count of tampering with a witness. The State later added another count of tampering with a witness based on Nicholson's statements that she had received a similar request.

Prior to trial, Franklin moved to suppress all of his statements to the police and the evidence found on his person and in his house. At a pretrial hearing, Officers Bauer and David Ellithorpe testified that they had arrested Franklin based both on probable cause to believe that Franklin possessed drugs and on the outstanding warrant. However, no outstanding arrest warrant was proved to exist. Officer Bauer further testified that he had twice advised Franklin of his Miranda rights and that, on both occasions, Franklin indicated that he understood those rights. The officers who had interviewed Franklin testified that he had answered their questions voluntarily and that no threats or promises were made to Franklin to obtain either his statements or his consent to search his residence. The trial court denied Franklin's motion to suppress.

At trial, Shorr testified that she dated Franklin off and on for roughly two years before his arrest on February 1, 2007. She described how Franklin would assault her, threaten her, and brag to her about his violent behavior toward other women. Shorr also testified that she once saw Franklin assault Nicholson by kicking her, dragging her, and putting a gun to her head while threatening to kill

her or to force her into prostitution.

Shorr then testified about the charged incidents of assault. The first incident took place four or five days prior to Franklin's arrest. According to Shorr's testimony, Franklin hit her, possibly kicked her, and then proceeded to strangle her with a bed sheet. She suffered a fractured rib and an injury to her collar bone. In addition, Shorr recalled that Franklin threatened to kill her and she testified that she took the threat seriously and feared for her life. Shorr fled the next morning but Franklin found her the day before he was arrested and drove her back to his house. According to Shorr's testimony, once Franklin parked outside the house, he punched her in the face, fracturing her nose. He then pulled her out of the car, dragged her up the stairs that led into the front yard, and ordered her to stay outside until she stopped bleeding. Then, he picked up a nearby wooden board and hit her in the leg three or four times with the board.

In support of the witness tampering charges, the State offered testimony from both Nicholson and Shorr. Over defense counsel's objection, the trial court allowed Nicholson to testify that a friend of Franklin's, Kelly Benchero, had asked her, on Franklin's behalf, to testify that the guns found inside the residence belonged to her. She explained that she had declined this request by responding either "hell no" or "fuck no." Shorr also testified at trial that Benchero had contacted her at Franklin's request and asked her to testify falsely that another woman was the one who broke her nose and hit her with a board. She explained that she had agreed to meet Benchero for coffee, but she skipped their planned

meeting. Franklin's attorney did not object to Shorr's testimony about Benchero's statements.

Benchero testified at trial that Franklin had asked him to contact two individuals. He testified that the first person was Trish, Franklin's girlfriend, and the second person was Benchero's niece, Angie. He explained that he and Franklin had referred to these two individuals as "number one" and "number two" in order to keep their identities anonymous. Benchero insisted that the two people were not Shorr or Nicholson. However, Benchero also testified that although Franklin and he had agreed to refer to the women anonymously, both men had referred to Trish and Angie by their first names in subsequent conversations. Also submitted into evidence were recordings of telephone calls placed between Franklin and Benchero while Franklin was in custody. One recorded telephone conversation revealed that Franklin did not want to discuss something with Benchero over the phone because the calls were recorded. In a later recorded telephone conversation, Benchero told Franklin that he had contacted "number one," who responded "[F]uck you. You're out of your fuckin' tree." Benchero also told Franklin that he had contacted the second person on Franklin's list and was meeting her for coffee the following morning. But "number two" apparently never showed up for coffee, because in a conversation a week later, Benchero had not talked with "number two." Benchero testified that he had planned to meet Angie for coffee, but that she did not show up. However, Benchero also admitted that he had contacted Shorr "to find out her position" and planned to meet her for coffee on a different day, but they never met.

The jury convicted Franklin of all eight felony charges, and the trial court subsequently sentenced him. The trial court initially sentenced Franklin to more than the statutorily-authorized maximum sentence on both his assault in the third degree conviction and his conviction for a violation of the Uniform Controlled Substances Act. The trial court then twice amended the sentence for each conviction in order to bring these sentences within the authorized maximum. The final amended sentence for each conviction imposed the maximum sentence of incarceration plus a range of time for Franklin to be in community custody, with the total amount of incarceration and community custody not to exceed the statutorily-authorized maximum sentence.

II

Franklin first contends that much of the evidence introduced at trial should have been suppressed because his arrest was based on an invalid warrant and was, therefore, unlawful. We disagree.

A warrantless arrest is lawful if there is probable cause justifying an intrusion into the defendant's constitutionally protected privacy. State v. Grande, 164 Wn.2d 135, 140, 187 P.3d 248 (2008); see also WASH. CONST. art. 1, § 7. We review de novo the existence of probable cause. Grande, 164 Wn.2d at 140. Probable cause exists where the facts and circumstances within the arresting officer's knowledge would be sufficient to cause a reasonable person to believe that the suspect has committed or is in the process of committing an offense. City of Seattle v. Cadigan, 55 Wn. App. 30, 36, 776 P.2d 727 (1989). Even when the stated grounds for an arrest are invalid, the arrest is lawful if, at the time of

the arrest, the police have probable cause to arrest the person for some crime. State v. Huff, 64 Wn. App. 641, 645–48, 826 P.2d 698 (1992); Cadigan, 55 Wn. App. at 36.<sup>2</sup>

Based on the content of the telephone conversations between Franklin and the cooperating suspect and the timing of Franklin's departure from the house, the officers had probable cause to believe Franklin possessed a controlled substance with the intent to deliver it to another person. In fact, Franklin does not argue that the police lacked probable cause to arrest him for this offense; rather, he asserts that the trial court failed to find that he had been arrested based on that probable cause. However, because the officers had probable cause to arrest Franklin for possession of a controlled substance with intent to deliver, their stated reliance on an outstanding warrant as the basis for the arrest is irrelevant. See Huff, 64 Wn. App. at 645–46. Therefore, the trial court did not err in denying Franklin's motion to suppress.

### III

Franklin also contends that his custodial statements were inadmissible because he did not expressly waive his Miranda rights. We disagree.

We review de novo whether a defendant waived his Miranda rights. State v. Johnson, 94 Wn. App. 882, 897–98, 974 P.2d 855 (1999). We review a trial court's factual findings for substantial evidence. State v. Solomon, 114 Wn. App.

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<sup>2</sup> Franklin argues that State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003), effectively abrogated the holding of Huff. However, O'Neill is readily distinguished because it concerned a search conducted *prior* to a formal arrest. 148 Wn.2d at 585–86.

781, 789, 60 P.3d 1215 (2002). A trial court's credibility determinations are not subject to review. State v. Haack, 88 Wn. App. 423, 435, 958 P.2d 1001 (1997).

Before a custodial statement may be admitted against the defendant at trial, "[t]he State bears the burden of showing a knowing, voluntary, and intelligent waiver of Miranda rights by a preponderance of the evidence." State v. Athan, 160 Wn.2d 354, 380, 158 P.3d 27 (2007). A valid waiver may be express or implied. State v. Terrovona, 105 Wn.2d 632, 646, 716 P.2d 295 (1986).

Implied waiver has been found where the record reveals that a defendant understood his rights and volunteered information after reaching such understanding. Waiver has also been inferred where the record shows that a defendant's answers were freely and voluntarily made without duress, promise or threat and with a full understanding of his constitutional rights.

Terrovona, 105 Wn.2d at 646–47 (citations omitted).

The trial court found that all of the officers were credible witnesses but that Franklin was not a credible witness. The trial court also found that Franklin had been twice advised of and understood his rights. Substantial evidence supports these findings. The trial court's findings and the testimony given at the pretrial suppression hearing support the conclusion that Franklin knowingly, intelligently, and voluntarily waived his rights by implication by agreeing to speak with the police officers. Because Franklin impliedly waived his Miranda rights, the trial court did not err by denying his motion to suppress.

#### IV

Franklin next contends that his separate convictions for Count I, assault in the third degree, and Count V, assault in the second degree, violate the

constitutional prohibition against double jeopardy because both arose out of the same incident. He is incorrect.

We review de novo whether multiple punishments violate constitutional protections against double jeopardy.<sup>3</sup> State v. Daniels, 160 Wn.2d 256, 261, 156 P.3d 905 (2007). To determine whether punishment under multiple statutes violates double jeopardy, we consider the multiple factors enumerated in State v. Freeman, 153 Wn.2d 765, 771-73, 108 P.3d 753 (2005). Thus, we must first determine whether the legislature expressly authorized multiple punishments under different statutes for the same act or transaction. If the language of the statutes reveals that the legislature expressly authorized multiple punishments, then further analysis is unnecessary. However, if we cannot ascertain from the language itself whether multiple punishments are authorized, we must next analyze the multiple convictions under the “same evidence” test.<sup>4</sup> Finally, we must consider whether there is any other indication that the legislature intended a violation of two statutes to be charged under only one statute or under both.<sup>5</sup>

We first consider whether the language of the statutory provisions under which Franklin was charged expressly authorize multiple punishments for the

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<sup>3</sup> The Fifth Amendment to the United States Constitution provides that no person shall be “subject for the same offense to be twice put in jeopardy of life or limb.” Article I, § 9 of the Washington Constitution provides that “[n]o person shall be . . . twice put in jeopardy for the same offense.” These two provisions provide identical protection against double jeopardy. State v. Womac, 160 Wn.2d 643, 650, 160 P.3d 40 (2007).

<sup>4</sup> This analysis follows the evaluation required by the United States Supreme Court in Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

<sup>5</sup> Freeman enumerates a four-factor test, but Freeman’s third factor relates to the merger doctrine. 153 Wn.2d at 771–73. The merger doctrine applies only when the degree of one offense is raised by conduct separately criminalized by the legislature. Freeman, 153 Wn.2d at 772–73. Because Franklin was not charged with a higher degree of an offense based on conduct separately criminalized, the merger doctrine is not applicable in this case.

same act. State v. Fuentes, 150 Wn. App. 444, 449–50, 208 P.3d 1196 (2009). Franklin was charged with assault in the second degree, a violation of RCW 9A.36.021(1)(a).<sup>6</sup> Franklin was also charged with assault in the third degree, a violation of RCW 9A.36.031(1)(d).<sup>7</sup> The legislature explicitly prohibited multiple punishments for the same act under both RCW 9A.36.021 and RCW 9A.36.031 by defining assault in the third degree as actions “not amounting to assault in the first or second degree.” RCW 9A.36.031.<sup>8</sup> Accordingly, the prohibition against double jeopardy is violated where the same act provides the basis for convictions of both assault in the second degree and assault in the third degree. However, because the statutory language does not provide a precise indication of that

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<sup>6</sup> RCW 9A.36.021(1)(a) provides:

A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree . . . [i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm.

Substantial bodily harm is defined as “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.” RCW 9A.04.110(4)(b).

<sup>7</sup> RCW 9A.36.031(1)(d) provides:

A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree . . . [w]ith criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm.

<sup>8</sup> Assault in the third degree could potentially be a lesser-included offense of assault in the second degree, depending on the subsection under which the defendant is charged. RCW 10.61.006. A lesser-included offense is one where each of the elements of the lesser offense is a necessary element of the greater offense. In addition, when an individual is charged with assault in the second degree, that defendant could be entitled to a jury instruction for assault in the third degree as an inferior degree offense, RCW 10.61.003, if the evidence tended to show that only the inferior third-degree assault was committed. State v. Tamalini, 134 Wn.2d 725, 732, 953 P.2d 450 (1998). Lesser-included offenses and inferior-degree crimes are not equivalents, as we explained in State v. Ieremia, 78 Wn. App. 746, 899 P.2d 16 (1995).

which constitutes the same act, this factor is not dispositive and we must proceed with the remainder of the Freeman analysis.

We next apply the “same evidence” test to determine whether Franklin was convicted of offenses that are identical in law and in fact, in which case double jeopardy principles are violated.<sup>9</sup> In re Pers. Restraint of Borrero, 161 Wn.2d 532, 536–37, 167 P.3d 1106 (2007), cert. denied, 128 S. Ct. 1098, 169 L. Ed. 2d 832 (2008). Where “each offense includes an element not included in the other, and each requires proof of a fact the other does not,” the double jeopardy bar does not apply. State v. Hughes, 166 Wn.2d 675, 682, 212 P.3d 558 (2009). A presumption arises that the legislature intended multiple punishments if the statutory provisions require separate proof. Fuentes, 150 Wn. App. at 449–50. Thus, we must compare the elements of the offenses as charged and also compare the evidence used to prove the crimes. In re Pers. Restraint of Orange, 152 Wn.2d 795, 820–21, 100 P.3d 291 (2004).

The two statutory provisions under which Franklin was charged required the State to establish different elements. Cf. State v. Linton, 122 Wn. App. 73, 80, 93 P.3d 183 (2004), aff’d on other grounds, 156 Wn.2d 777, 132 P.3d 127 (2006) (holding that double jeopardy principles were violated when defendant

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<sup>9</sup> Franklin argues that the “unit of prosecution” analysis, rather than the “same evidence” test, must be employed to determine whether his convictions violate the prohibition against double jeopardy. While our case law presents these two different approaches for determining whether convictions violate double jeopardy, State v. Graham, 153 Wn.2d 400, 404–05, 103 P.3d 1238 (2005), Franklin employs the wrong test. The “same evidence” is used to determine if convictions under different statutes for the same acts result in double jeopardy. Graham, 153 Wn.2d at 404–05. The “unit of prosecution” analysis is used to determine if multiple convictions under a single statute result in double jeopardy. Graham, 153 Wn.2d at 405. Franklin was charged under two different statutes, so the “same evidence” test is correctly utilized to determine whether his two assault convictions violate double jeopardy.

was convicted of the lesser-included offense of assault in the second degree and then the State moved for retrial on the charge of assault in the first degree because “the crimes of assault in the first degree and assault in the second degree do not each require proof of an additional fact that the other does not”). Assault in the second degree, charged pursuant to RCW 9A.36.021(1)(a), requires that the victim suffer “substantial bodily harm,” which is not an element of assault in the third degree. On the other hand, assault in the third degree, charged pursuant to RCW 9A.36.031(1)(d), requires that the assault be committed “by means of a weapon or other instrument or thing,” which is not an element of assault in the second degree. Therefore, the two crimes are not the same “in law.”

In addition, the evidence used to prove each crime was different. Proof of different acts established each of the crimes. Cf. State v. Godsey, 131 Wn. App. 278, 290, 127 P.3d 11 (2006) (“[T]he State recognized the overlap between the two offenses but did not rely on the same conduct to establish the [third degree] assault charge as used to prove the resisting arrest charge.”). Count V was based upon Franklin inflicting substantial bodily harm by breaking Shorr’s nose. In contrast, Count I was based on Franklin’s beating Shorr with a wooden board. The two crimes were not the same “in fact.”

The final consideration is to determine whether there are other clear indications that the legislature intended to disallow multiple punishments. Womac, 160 Wn.2d at 652 (quoting State v. Gohl, 109 Wn. App. 817, 821, 37 P.3d 293 (2001)). There is no evidence that the legislature intended for there to

be imposed only one punishment for actions such as Franklin's. Thus, Franklin has not rebutted the presumption produced by the "same evidence" analysis that his convictions do not violate the prohibition against double jeopardy.

Although it is true that we must "guard against the State's attempting to segment a singular criminal act to form the basis for multiple convictions," State v. Adel, 136 Wn.2d 629, 640, 965 P.2d 1072 (1998), here Franklin committed two criminal acts against Shorr. Thus, double jeopardy is not implicated.

V

Additionally, Franklin contends that he received ineffective assistance of counsel because his counsel did not move to sever the trial on the multiple counts in the information. We disagree.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance (1) was deficient and (2) prejudiced the defense.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).<sup>10</sup> Deficient performance is that which falls below an objective standard

of reasonableness. In re Det. of Moore, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009) (citing State v. Stenson, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997)).

Prejudice occurs where there is a reasonable probability that, but for the deficient performance, the outcome of the proceedings would have been different. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). With respect to the specific contention that defense counsel's failure to move to sever constituted

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<sup>10</sup> It is unnecessary for us to address both prongs of the Strickland test if the defendant makes an inadequate showing as to either prong. State v. Standifer, 48 Wn. App. 121, 126, 737 P.2d 1308 (1987) (citing Strickland, 466 U.S. at 697).

ineffective assistance, the defendant must demonstrate both that the motion would have been granted and that the outcome of the proceeding would have been different. State v. Sutherby, 165 Wn.2d 870, 884, 204 P.3d 916 (2009).

First, Franklin cannot demonstrate that the trial court would have granted a severance had such a request been made. Severance is to be granted whenever the trial court “determines that severance will promote a fair determination of the defendant’s guilt or innocence of each offense.” CrR 4.4(b).

To determine whether to sever charges to avoid prejudice to a defendant, a court considers “(1) the strength of the State’s evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial.”

Sutherby, 165 Wn.2d at 884–85 (quoting State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994)). “No one factor is preeminent; all must be assessed in determining whether potential prejudice requires severance.” State v. Warren, 55 Wn. App. 645, 655, 779 P.2d 1159 (1989) (citing State v. Watkins, 53 Wn. App. 264, 272 n.3, 766 P.2d 484 (1989)).

The State presented strong evidence as to each charge against Franklin. Where there is strong evidence on each charge, “there is no necessity for the jury to base its finding of guilt on any one count on the strength of the evidence of another.” State v. Bythrow, 114 Wn.2d 713, 721–22, 790 P.2d 154 (1990). Franklin’s defenses to each count were not made unclear by joinder, nor did he argue that he wanted to present inconsistent defenses as to different charges. In addition, the trial court properly instructed the jury to decide each count

separately and to not improperly infer guilt.<sup>11</sup>

Franklin, however, asserts that joinder resulted in inherent prejudice because the separate, factually unrelated counts and the evidence pertaining to each of the counts would not have been cross-admissible in separate trials. But “[t]he fact that separate counts would not be cross admissible in separate proceedings does not necessarily represent a sufficient ground to sever as a matter of law.” State v. Kalakosky, 121 Wn.2d 525, 538, 852 P.2d 1064 (1993). Even where the evidence on one count would not be admissible in a separate trial on the other count, severance is not required in every case. Bythrow, 114 Wn.2d at 720.<sup>12</sup> Rather, severance is required only where the defendant can demonstrate that specific prejudice results from joinder. Bythrow, 114 Wn.2d at 720; State v. Grisby, 97 Wn.2d 493, 507, 647 P.2d 6 (1982).

Specifically, Franklin argues that ER 404(b) evidence regarding several uncharged assaults was admitted at trial and such evidence would not have been admissible in a trial that did not include the felony harassment charge. Under ER 404(b), evidence of other crimes, wrongs, or acts cannot be used to prove conduct on a particular occasion, but such evidence is admissible to show “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence

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<sup>11</sup> “Your verdict on one count should not control your verdict on the other count.”  
Instruction 4.

<sup>12</sup> For the proposition that it is reversible error to deny a severance motion when evidence of guilt on one count would not be admissible in a separate trial of the other count under ER 404(b), Franklin relies on three cases. See State v. Hernandez, 58 Wn. App. 793, 794 P.2d 1327 (1990); State v. Ramirez, 46 Wn. App. 223, 730 P.2d 98 (1986); State v. Harris, 36 Wn. App. 746, 677 P.2d 202 (1984). However, these decisions are inapposite as the defendants in each of these cases were charged with committing multiple violations of the same statute and the defendants were thus able to demonstrate that specific prejudice (propensity evidence) resulted from joinder.

of mistake or accident,” ER 404(b), or “[t]o show, by similar acts or incidents, that the [charged act] was not performed inadvertently, accidentally, [or] involuntarily.” Bythrow, 114 Wn.2d at 718–719 (quoting EDWARD W. CLEARY, MCCORMICK ON EVIDENCE, § 190, at 561 (3d ed. 1984)). In addition, when a defendant is charged with felony harassment, evidence of a prior bad act or threat may be admitted to show that the victim’s fear was reasonable. State v. Binkin, 79 Wn. App. 284, 286–87, 902 P.2d 673 (1995), overruled on other grounds by State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002).

The evidence of uncharged assaultive conduct, which included Shorr’s testimony that Franklin pointed a gun at Nicholson, was admitted at trial to support Count IV, felony harassment, and Count II, unlawful possession of a firearm. In Instruction 8, the trial court provided the jury with a limiting instruction, explaining that the evidence of uncharged assaults could be considered only as pertaining to whether Shorr reasonably feared for her life and whether Franklin knowingly possessed firearms.<sup>13</sup> “Juries are presumed to have followed the trial

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<sup>13</sup> Franklin assigned error to Instruction 8, arguing that the evidence of his uncharged assault against Nicholson with a gun could not properly be considered to prove that he knowingly possessed a firearm during the period charged given both that the assault against Nicholson occurred three months prior to that time and that there was no evidence that the gun used against Nicholson was one of the guns found in the search of Franklin’s house. However, Franklin did not object to this instruction at trial.

The general rule is that we will not consider issues raised for the first time on appeal. RAP 2.5(a); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). However, if the error claimed is a manifest error affecting a constitutional right, the defendant may raise it for the first time on appeal. RAP 2.5(a)(3). In that event, the claimed error is subject to harmless error analysis. Kirkman, 159 Wn.2d at 926–27. An error is harmless if it appears beyond a reasonable doubt that the error did not contribute to the verdict obtained. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004).

Franklin does not identify which of his constitutional rights was affected. Regardless, any error was harmless. The record affirmatively demonstrates that no prejudice resulted from Instruction 8 because there was overwhelming evidence presented that Franklin had knowingly

court's instructions, absent evidence proving the contrary." Kirkman, 159 Wn.2d at 928. Therefore, the jury is presumed to have considered the ER 404(b) evidence for only the limited purposes for which it was introduced. Considering the strong evidence on each charge, Franklin's harmonious defenses as to each charge, and the limiting instruction, Franklin has not demonstrated that undue prejudice resulted from joinder of the eight charges against him.

Moreover, even had Franklin demonstrated that undue prejudice resulted from the joinder of the counts against him, he had also to demonstrate that the joint trial was so prejudicial as to outweigh concerns for judicial economy. State v. Philips, 108 Wn.2d 627, 640, 741 P.2d 24 (1987).

Foremost among these concerns is the conservation of judicial resources and public funds. A single trial obviously only requires one courtroom and judge. Only one group of jurors need serve, and the expenditure of time for jury voir dire and trial is significantly reduced when the offenses are tried together. Furthermore, the reduced delay on the disposition of the criminal charges, in trial and through the appellate process, serves the public.

Bythrow, 114 Wn.2d at 723.

Franklin asserts that the charges against him should have been severed into a minimum of three separate jury trials. If the charges had been severed, many of the same witnesses—including Shorr, Nicholson, Benchero, and many of the officers—would have been required to testify in each of the trials in order to present substantially the same evidence. In addition, three juries would have

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possessed the weapons discovered in the search of his residence, including a police officer's testimony that Franklin had stated during questioning that guns were present in the house and the testimony of both Nicholson and Shorr that the guns discovered during the search of Franklin's house were Franklin's guns.

had to be impaneled. Franklin's proposal is greatly inconsistent with judicial economy.

Given that the State's evidence on each count was strong, that the charges were not difficult to distinguish, that the trial court instructed the jury to consider the crimes separately, and that considerations of judicial economy would have been offended by Franklin's proposal, Franklin has not demonstrated that a severance would have been granted if such a request had been made.

In addition, Franklin cannot satisfy the second requirement for showing that his counsel's failure to file a motion to sever constituted ineffective assistance of counsel. He cannot show that the outcome of the proceeding would have been different. Franklin argues that the evidence of the uncharged assaults would not have been admissible in a trial that did not include the felony harassment charge and that the outcome of trials on the other charges would have been different without such evidence. Franklin asserts that the evidence of uncharged assaults may have indicated criminal propensity, especially with regard to the charged counts of assault. However, Shorr described each assault in detail and medical records confirmed that Shorr was severely injured. Strong evidence was presented on the charges of possession of cocaine and a firearm and the multiple assault charges. Franklin has not demonstrated that the evidence of uncharged assaults likely altered the jury's findings on any of those counts. Because Franklin has not established that the severance motion would have been granted or that the outcome of the proceeding would have been different, he has failed to demonstrate that his counsel provided ineffective

assistance by not filing a severance motion.

VI

Franklin next asserts that he received ineffective assistance of counsel because his attorney did not object to hearsay statements regarding Benchero's attempts to tamper with witnesses Nicholson and Shorr on Franklin's behalf. Once again, we disagree.

There is a strong presumption that counsel provided effective assistance and "made all significant decisions in the exercise of reasonably professional judgment." State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). If defense counsel's conduct can be characterized as a legitimate trial strategy or tactic, it does not constitute deficient performance. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Franklin bears the burden of establishing there were no legitimate strategic or tactical reasons behind his attorney's choices. State v. Rainey, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001).

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). However, statements that are offered against a party that were made by "a person authorized by the party to make a statement concerning the subject," ER 801(d)(2)(iii), or that were made by "the party's agent . . . acting within the scope of the authority to make the statement for the party" are not hearsay. ER 801(d)(2)(iv). The fact and the scope of the agency authority cannot be proven from the hearsay statements alone. Passovoy v. Nordstrom, Inc., 52 Wn. App. 166, 171-72, 758 P.2d 524 (1988). However, if the fact of the agency may be inferred from other evidence, then the hearsay

statements are admissible under ER 801(d)(2). Passovoy, 52 Wn. App. at 171–72.

Both Nicholson and Shorr testified about statements made by themselves and by Benchero in conversations in which Benchero asked the women to testify falsely. These statements were offered to prove a material fact: that Benchero, acting on Franklin's behalf, contacted Shorr and Nicholson and requested that they testify falsely. However, they were not hearsay because Franklin authorized Benchero to contact two individuals on Franklin's behalf. Benchero testified that he had contacted those two individuals at Franklin's request. The recordings of the telephone conversations between Benchero and Franklin, Benchero's incredible testimony that the two anonymous individuals were Trish and Angie, and Benchero's testimony that Shorr was supposed to meet him for coffee, provide strong circumstantial evidence that Shorr and Nicholson were the two individuals that Franklin asked Benchero to contact. This evidence provides proof the agency relationship between Franklin and Benchero independent from the challenged statements. Therefore, the statements made by Benchero to Shorr and Nicholson were admissions of a party under ER 801(d)(2). Because the statements made by Benchero to Shorr and Nicholson were not hearsay, Franklin's counsel did not perform ineffectively by declining to object to such testimony.<sup>14</sup>

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<sup>14</sup> There is an indication that defense counsel did, in fact, object to this testimony and that the trial court did, in fact, overrule the objection on this basis. The record on this question, however, is unclear.

Moreover, Franklin has not demonstrated prejudice arising from his attorney's decision not to object to Nicholson's and Shorr's testimony. Even had such an objection been made and, for some reason, sustained, each witness would have nevertheless been allowed to testify as to the fact of Benchero's contact with her and as to her perception of that contact. Thus, the damaging effect of the two witnesses' testimony would still have been felt. In addition, the State played for the jury the telephone conversations between Franklin and Benchero, wherein Benchero reports to Franklin regarding his progress in contacting the two individuals whom Franklin had asked Benchero to contact. During these conversations, the two men refer to "Trish" and "Angie" by their first names while also referring to "number one" and "number two." The reference to "Trish" and "Angie" by their first names weakens Benchero's claim that "Trish" and "Angie" were "number one" and "number two." A successful hearsay objection would in no way have necessitated a result at variance with the jury's ultimate determination on these charges. Hence, for this reason also, Franklin fails to establish that he received ineffective assistance of counsel. See McFarland, 127 Wn.2d at 337.

## VII

Franklin further contends that he received ineffective assistance of counsel because his lawyer failed to argue at sentencing that, for purposes of calculating Franklin's offender score, both Count I and Count V constituted the same criminal conduct and Count IV and VI constituted the same criminal conduct. We disagree.

RCW 9.94A.589(1)(a) treats all “current and prior convictions as if they were prior convictions for the purpose of the offender score.” However, “if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.” RCW 9.94A.589(1)(a). “Same criminal conduct” is defined as “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). If any of these elements is missing, the offenses must be individually counted toward the offender score. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

Uncertainty over whether two acts constitute the same criminal conduct for sentencing purposes does not allow Franklin to succeed on an ineffective assistance of counsel claim. Rather, for Franklin to prevail, he has to show that his counsel’s performance was deficient and that this deficient performance prejudiced his defense. Again, there is a strong presumption that counsel’s representation was effective. McFarland, 127 Wn.2d at 335. This presumption can be rebutted if the defendant proves that his attorney’s representation “was unreasonable under prevailing professional norms.” In re Pers. Restraint of Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004) (quoting Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)). The reasonableness of counsel’s performance is to be evaluated in light of all the circumstances. Davis, 152 Wn.2d at 673. Whether there is controlling authority on an issue is relevant to an evaluation of the attorney’s performance. An attorney is not ineffective merely because he or she failed to argue novel theories

of law. See, e.g., Anderson v. United States, 393 F.3d 749, 754 (8th Cir. 2005) (“Counsel’s failure to raise [a] novel argument does not render his performance constitutionally ineffective.”). Therefore, where controlling case law arguably indicates that certain criminal offenses are not properly considered to be the same criminal conduct, counsel’s performance will not be found deficient for declining to raise such a claim at sentencing. In addition, in order to show prejudice, the defendant must show that the trial court would have exercised its discretion so as to find that the actions encompassed the same criminal conduct. See State v. Hernandez, 95 Wn. App. 480, 483, 976 P.2d 165 (1999) (“We review for abuse of discretion . . . a trial court’s determination of whether two crimes constitute the ‘same criminal conduct.’”).

Both Count I, assault in the third degree (hitting Shorr with the board), and Count V, assault in the second degree (fracturing Shorr’s nose), undisputedly involved the same victim.

However, regardless of whether these two acts occurred at the same time, Franklin’s counsel could have reasonably concluded that these two crimes entailed different criminal intents based on the holdings in State v. Lopez, 142 Wn. App. 341, 174 P.3d 1216 (2007), review denied, 164 Wn.2d 1012 (2008), and State v. Grantham, 84 Wn. App. 854, 932 P.2d 657 (1997). In Lopez, the defendant was convicted of assault in the second degree with a deadly weapon and assault in the second degree by recklessly inflicting substantial bodily harm based on conduct occurring over a four-hour period. 142 Wn. App. at 351. The assaults were held not to constitute the same criminal conduct because Lopez’s

intent had changed between incidents. Lopez, 142 Wn. App. at 352–53.

Likewise, in Grantham, the defendant was convicted of two counts of rape which were held not to constitute the same criminal conduct. 84 Wn. App. at 857. In that case, Grantham had completed the first rape and “then formed a second, new objective intent” to force the victim to perform oral sex. Grantham, 84 Wn. App. at 859.

In this case, Franklin first punched Shorr in the face while in the car. He then exited the car and dragged Shorr from the car up the stairs to the front yard. Franklin demanded that Shorr stay outside until she stopped bleeding. Only then did Franklin grab a board and hit her with it several times. Thus, after breaking Shorr’s nose, Franklin “had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act.”

Grantham, 84 Wn. App. at 859. He decided to beat Shorr with a board, thereby committing a separate offense. In light of the holdings in Lopez and Grantham, it was not unreasonable for Franklin’s lawyer to decline to argue in the sentencing proceeding that Count I and Count V represented the same criminal conduct.

Similarly with respect to Count IV, felony harassment, and Count VI, assault in the second degree (strangulation), each crime involved the same victim and took place at the same time. However, it was reasonable for Franklin’s counsel to conclude that these two crimes entailed different criminal intents based on the holding in State v. Wilson, 136 Wn. App. 596, 150 P.3d 144 (2007). In Wilson, the court held that felony harassment and assault in violation of a no-contact order were not offenses involving the same criminal conduct

because the defendant did not have the same criminal intent in committing the two offenses. 136 Wn. App. at 614–15. Rather, the court stated that the criminal intent differed in part because one act was intended to physically harm the victim while the other act was intended to verbally harass her. Wilson, 136 Wn. App. at 615. In light of the holding in Wilson, it was not unreasonable for Franklin's lawyer to decline to argue in the sentencing proceeding that Count IV and Count VI constituted the same criminal conduct.

Further, to prevail on his ineffective assistance of counsel claim, Franklin must establish that there was a reasonable probability that the outcome of the proceeding would have been different. However, Franklin has not demonstrated that the trial court would have exercised its discretion in his favor by ruling that any or all of these counts constituted the same criminal conduct, notwithstanding the above-cited authority. Therefore, Franklin has not demonstrated prejudice. Thus, he has not established that he was afforded the ineffective assistance of counsel at sentencing.

## VIII

Finally, Franklin argues that the trial court improperly imposed an indeterminate sentence on both his conviction for assault in the third degree and his conviction for a violation of the Uniform Controlled Substances Act. Again, he is incorrect.

A sentence is not indeterminate if the trial court imposed a sentence that has both a defined range and a determinate maximum, even if the exact amount of time to be served in confinement and in community custody is not specified in

the written sentence. In re Pers. Restraint of Brooks, 166 Wn.2d 664, 674, 211 P.3d 1023 (2009). For both his conviction of assault in the third degree and his conviction of a violation of the Uniform Controlled Substances Act, the trial court sentenced Franklin to the statutory maximum of incarceration plus a period of community custody, but limited the total amount of incarceration and community custody to the statutory maximum. Because these sentences establish a maximum amount of time that Franklin will serve in confinement and the maximum amount of time he will serve in totality, these sentences are not indeterminate.

Affirmed.

Dwyer, A.C.J.

We concur:

Appelwick, J.

Cox, J.

# Appendix B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 JOHN CHARLES FRANKLIN, )  
 )  
 Appellant. )  
 \_\_\_\_\_ )

DIVISION ONE

No. 61481-9-1

RECEIVED

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Washington Appellate Project

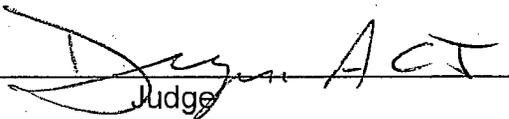
ORDER DENYING  
APPELLANT'S MOTION  
FOR RECONSIDERATION

The appellant having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 31<sup>ST</sup> day of March, 2010.

FOR THE COURT:

  
\_\_\_\_\_  
Judge

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STATE OF WASHINGTON  
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**DECLARATION OF FILING & MAILING OR DELIVERY**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 61481-9-I** and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to each attorney or party or record for  **respondent: James Whisman - King County Prosecuting Attorney-Appellate Unit**,  **appellant** and/or  **other party**, at the regular office or residence as listed on ACORDS or drop-off box at the prosecutor's office.

  
MARIA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: April 28, 2010

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