No. 97066-1

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

IN RE THE PERSONAL RESTRAINT PETITION OF: AMANDA CHRISTINE KNIGHT, Petitioner.	NO. 49337-3-II STATE'S RESPONSE TO PERSONAL RESTRAINT PETITION

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

1. Must the petition be dismissed because petitioner has failed to show that her convictions for the robbery and murder of James Sanders violate double jeopardy and merge as they fall within the well-established exception to the merger doctrine which the ***Whittaker*** opinion has not changed?

2. Must the petition be dismissed because this Court should decline to reach the merits of petitioner's claim that her convictions for second degree assault and first degree robbery of Charlene Sanders violate double jeopardy and should merge as it was previously raised and rejected in her direct appeal?

3. Must the petition be dismissed because this Court should decline to reach the merits of petitioner's claim that there was insufficient evidence presented for a

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rational trier of fact to find her guilty of two counts of second degree assault as it was previously raised and rejected in her direct appeal?

4. Must the petition be dismissed as the State presented sufficient evidence for a rational trier of fact to find petitioner guilty as an accomplice to the crime of first degree felony murder?

B. STATUS OF PETITIONER:

Petitioner, AMANDA CHRISTINE KNIGHT, is restrained pursuant to a Judgment and Sentence entered in Pierce County Cause No. 10-1-01903-2. Appendix A. Petitioner was convicted by a jury of first degree felony murder, two counts of first degree robbery, two counts of second degree assault and first degree burglary all of which included firearm enhancements. Appendix B. The judgment and sentence was entered on May 13, 2011, wherein the court sentenced petitioner to a total of 860 months of confinement. Appendix A.

Petitioner filed a direct appeal challenging the two second degree assault convictions arguing that there was insufficient evidence to support the convictions and that they constituted double jeopardy because "(1) the jury instructions were ambiguous, and (2) the assaults should have merged with her first degree robbery convictions committed against the same two victims." Appendix B. The Court of Appeals rejected petitioner's arguments and affirmed her convictions and sentence in a published opinion. Appendix B. A mandate issued on March 7, 2014. Appendix C.

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C. ARGUMENT:

1. PETITIONER'S CONVICTIONS FOR THE ROBBERY AND MURDER OF JAMES SANDERS DO NOT VIOLATE DOUBLE JEOPARDY AND MERGE AS THEY FALL WITHIN THE WELL-ESTABLISHED EXCEPTION TO THE MERGER DOCTRINE WHICH THE ***WHITTAKER*** OPINION HAS NOT CHANGED.

Personal restraint procedure has its origins in the State's habeas corpus remedy, guaranteed by Article 4, section 4 of the State Constitution. Fundamental to the nature of habeas corpus relief is the principle that the writ will not serve as a substitute for appeal. A personal restraint petition, like a petition for a writ of habeas corpus, is not a substitute for an appeal. ***In re Hagler***, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). "Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders." *Id.* (*citing* ***Engle v. Issac***, 456 U.S. 107, 126, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982)). These costs are significant and require that collateral relief be limited in state as well as federal courts. *Id.*

a. Petitioner's first claim falls under an exception to the one year time bar in RCW 10.73.100(3) and therefore, this Court should address the merits of this claim.

Because of the costs and risks involved, there is a time limit in which to file a personal restraint petition. RCW 10.73.090(1) subjects petitions to a one-year statute of limitation. The statute provides:

> No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

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RCW 10.73.090(1). The time bar is applicable to any petition filed more than one year after July 23, 1989. RCW 10.73.130. Under RCW 10.73.090(3), a judgment becomes final on the last of the following dates:

> (a) The date it is filed with the clerk of the trial court;
>
> (b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or
>
> (c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

Petitioner's judgment in this case became final on March 7, 2014, the date the mandate issued. Appendix C; RCW 10.73.090(3)(b). Petitioner had one year from that date to file a timely petition. Petitioner did not file this personal restraint petition until July 14, 2016. *See* Personal Restraint Petition (hereinafter "PRP"). Because that date is beyond the one year time limit allowed under RCW 10.73.090, the petition is time barred.

The statute of limitations set forth in RCW 10.73.090(1) is a mandatory rule that bars appellate consideration of personal restraint petitions filed after the limitation period has passed, unless the petitioner demonstrates that the petition falls within an exemption to the time limit under RCW 10.73.090 (facial invalidity or lack of jurisdiction) or is based solely on one or more of the following grounds:

> (1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;
>
> (2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;
>
> (3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, Section 9 of the state Constitution;

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> (4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;
>
> (5) The sentence imposed was in excess of the court's jurisdiction; or
>
> (6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

RCW 10.73.100; *See also*, ***State v. King***, 130 Wn.2d 517, 530-31, 925 P.2d 606 (1996); ***In re Detention of Aguilar***, 77 Wn. App. 596, 603, 892 P.2d 1091 (1995).

Petitioner in the present case first argues that her convictions relating to the first degree robbery and first degree murder of James Sanders merge thereby making the convictions barred by double jeopardy and an exception to the time bar under RCW 10.73.100(3). *See* PRP at 4-13. Although petitioner raised this argument during sentencing, it was not raised in her direct appeal. RP 1073-74; ***State v. Knight***, 176 Wn. App. 936, 309 P.3d 776 (2013). Because it falls within an exception to the time bar and has not been previously raised on appeal, this Court should reach the merits of this claim.

b. Petitioner's analysis of what the ***Whittaker*** opinion stands for is misleading and does not change the fact that her convictions for the first degree robbery and first degree murder of James Sanders do not violate double jeopardy as they fall within a well-established exception to the merger doctrine.

The double jeopardy clause guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The double jeopardy clause applies to the states through the due process clause of the

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Fourteenth Amendment, and is coextensive with article I, § 9 of the Washington State Constitution. ***State v. Gocken***, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995) (*citing* ***Benton v. Maryland***, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)). Washington's double jeopardy clause offers the same scope of protection as the federal double jeopardy clause. ***State v. Adel***, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998) (*citing* ***Gocken***, 127 Wn.2d at 107). The double jeopardy clause encompasses three separate constitutional protections:

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same crime.

Gocken, 127 Wn.2d at 100.

Appellate courts "review questions of law such as merger and double jeopardy de novo." ***State v. Zumwalt***, 119 Wn. App. 126, 129, 82 P.3d 672 (2003), *aff'd sub nom.* ***State v. Freeman***, 153 Wn.2d 765, 108 P.3d 753 (2005). When addressing a double jeopardy challenge, the court first considers whether the legislature intended cumulative punishments for the challenged crimes. ***State v. Freeman***, 153 Wn.2d 765, 771, 108 P.3d 753 (2005). Legislative intent can be explicit as in the antimerger statute where it provides that burglary may be punished separately from any related crime. ***Freeman***, 153 Wn.2d at 772-73; RCW 9A.52.050. However, there can also be sufficient evidence of legislative intent that the court is confident that the legislature intended to separately punish two offenses arising out of the same bad act. ***Freeman***, 153 Wn.2d at 772 (*citing* ***State v. Calle***, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995) (rape and incest are separate offenses)).

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If the legislative intent is not clear, then the court will turn to the test from ***Blockburger v. United States***, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932) to determine if double jeopardy has been offended by defendant's multiple convictions. ***Freeman***, 153 Wn.2d at 772. Under the ***Blockburger*** test the court examines each crime to determine if one crime contains an element that the other does not. *Id.* This analysis is not done on an abstract level, but "[w]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." ***Freeman***, 153 Wn.2d at 772 (*quoting* ***Blockburger***, 284 U.S. at 304). However, the ***Blockburger*** presumption may be rebutted by other evidence of legislative intent.

Finally, merger is a doctrine of statutory interpretation used to determine whether the legislature intended to impose multiple punishments for a single act that violates several statutory provisions. ***State v. Vladovic***, 99 Wn.2d 413, 419 n2, 662 P.2d 853 (1983). "The [merger] doctrine arises only when a defendant has been found guilty of multiple charges, and the court then asks if the Legislature intended only one punishment for the multiple convictions." ***State v. Michielli***, 132 Wn.2d 229, 238-239, 937 P.2d 587 (1997). With respect to cumulative sentences imposed in a single trial, the double jeopardy clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. ***Missouri v. Hunter***, 459 U. S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 1982).

The merger doctrine can be used to determine legislative intent even when two crimes have different elements. Under the merger doctrine, when the degree of one

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offense is raised by conduct separately criminalized by the legislature, the court will presume the legislature intended to punish both offenses through a greater sentence for the greater crime. ***Freeman***, 153 Wn.2d at 772-73 (*citing* ***Vladovic***, 99 Wn.2d at 419). However, the court may separately punish two crimes that otherwise appear that they should merge if there is an independent purpose or effect to each. ***Freeman***, 153 Wn.2d at 773 (*citing* ***State v. Frohs***, 83 Wn. App. 803 807, 924 P.2d 384 (1996), *see also* ***Vladovic***, 99 Wn.2d at 421-22).

Petitioner in the present case cites to the recent Court of Appeals Division I case, ***State v. Whittaker***, 192 Wn. App. 395, 367 P.3d 1092) (2016), to argue that its application of the merger doctrine is analogous to the facts of the present case. In ***Whittaker***, the defendant was convicted of one count of domestic violence felony violation of a court order and one count of felony stalking. 192 Wn. App. at 399. The jury was presented with evidence to support numerous instances where Whittaker violated the court order and because the stalking conviction was elevated to a felony by the violation of a court order, the merger doctrine was applicable. *Id.* at 399-400, 411. Division I found that because the stalking verdict form failed to specify which instance of violation of a court order the jury relied on to convict Whittaker of stalking, the rule of lenity required the court to assume that it was the same instance as the violation of the court order conviction thereby making the two crimes merge under the law. *Id.* at 417.

Petitioner in the present case was convicted of two counts of first degree robbery, one involving James Sanders[1] and the other involving Charlene Sanders, and one count of first degree murder for the murder of James Sanders. ***Knight***, 176 Wn. App. at 944. To

[1] Throughout this brief, the State refers to James and Charlene Sanders by their first names for clarity and means no disrespect.

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convict the petitioner of murder in the first degree, the State was required to prove that "the defendant or an accomplice committed Robbery in the First Degree." CP 325-375 (Instruction No. 9). The verdict form held that "We, the jury, find the defendant Guilty of the crime of Murder in the First Degree as charged in Count I." CP 376. Petitioner argues that like in ***Whittaker***, because the verdict form did not specify which robbery elevated the murder of James to first degree murder, the rule of lenity requires that the court presume the jury relied on the robbery of James and therefore, the two crimes must merge.

Petitioner attempts to further this argument by manipulating the analysis in ***Whittaker*** and narrowly constrain the Courts' analysis to just the verdict forms themselves. She argues that ***Whittaker*** has changed the way courts analyze the merger doctrine so as to focus more on the jury instructions and verdict forms, rather than the trial testimony or arguments of counsel. PRP at 6. This is only true however, in terms of the analysis of the verdict forms themselves to evaluate whether the merger doctrine is applicable. In other words, if the verdict form is silent about which robbery victim or which protection order violation elevates the charge to the greater crime, the State's closing argument which focused on only one robbery victim or only one protection order violation incident will not save the ambiguous verdict form. *See* ***Whittaker***, 192 Wn. App. at 416-17.

Whittaker itself reiterates a "well-established exception" to the merger doctrine and discusses that the analysis requires the court to look at the facts of each case. 192 Wn. App. at 411. The well-established exception allows for two convictions to stand even when they may formally appear to be the same crime under other tests. ***Freeman***, 153 Wn.2d at 778. ***Whittaker*** states:

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> "Where two offenses would otherwise merge but have 'independent purposes or effects,' separate punishment may be applied." When dealing with merger issues, we look at how the offenses were charged and proved, and do not look at the crimes in the abstract."

192 Wn. App. at 411. Stated another way, the offenses may be separate "when there is a separate injury to the 'the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element.'" ***Freeman***, 153 Wn.2d at 778 (*citing* ***State v. Frohs***, 83 Wn. App. 803, 807, 924 P.2d 384 (1996) (*citing* ***State v. Johnson***, 92 Wn.2d 871, 680, 600 P.2d 1249 (1979)). In evaluating this, courts must take a "hard look at each case" based on their facts and charged crimes. ***Freeman***, 153 Wn.2d at 774. ***Whittaker*** did not abolish or alter the analysis of this exception. It merely had facts in which the exception was not applicable as the violation of the protection order was incidental to the crime of stalking.

By contrast in the present case, even if you were to resolve any ambiguity in favor of the petitioner and assume that the jury relied upon the robbery of James Sanders (as opposed to the robbery of Charlene) to elevate the murder to murder in the first degree, the exception to the merger doctrine described above applies given the facts of the present case.

In the present case, the force used in the robbery of James Sanders was complete before the force used in shooting James came into being. Higashi pulled out a gun, ziptied James' hands behind his back, and either he or petitioner removed James' wedding ring from his finger. *See* Appendix B (***Knight,*** 176 Wn. App. at 942.); RP 581, 693. Afterwards, Berniard and Reese entered the home who secured the two young boys at gunpoint and all four of the co-defendants took turns gathering items from various places. ***Knight***, 176 Wn. App. at 942-43; RP 585, 625, 918-19. Berniard then held a gun to

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Charlene's head, assaulted her and demanded to know the location of a safe which she said was in the garage. ***Knight***, 176 Wn. App. at 943; RP 586-89, 640-41. Then Berniard forced James into the garage when he broke free of his zip-ties and was shot in his ear. ***Knight***, 176 Wn. App. at 943; RP 589, 628. James' body was drug into the living room where he was shot multiple times by either Reese or Berniard which caused fatal internal bleeding. ***Knight***, 176 Wn. App. at 943; RP 603-04, 630, 641-42.

Thus, the incident of force used in the robbery of James was an "injury to 'the person or property of the victim or others, which [wa]s separate and distinct from" the incident of force that became the homicide of which the robbery formed an element. ***Freeman***, 153 Wn.2d at 778-79. It would be different if the force or fear used to obtain or retain possession of the ring in the robbery of James was one in the same as the force used to kill James. If Higashi obtained or retained possession of the rings by shooting James then the injury at issue would be the same for both the robbery and the murder and the crimes would merge. Here, however, the force used in the robbery of James is "separate and distinct from and not merely incidental to the [the charged felony murder] of which [such robbery] forms an element.'" ***Freeman***, 153 Wn.2d 765, 778-79. Thus, the crimes do not merge.

State v. Peyton is an example similar to the present situation where felony murder and the predicate robbery did not merge. 29 Wn. App. 701, 630 P.2d 1362, *review denied*, 96 Wn.2d 1024 (1981). There, after a completed bank robbery, the robbers fled in one vehicle, abandoned it, fled again in another vehicle, then shot a deputy sheriff in a gunfight. *Id.* at 720. The court held that the robbery did not merge with the homicide because they were not "intertwined" and the underlying felony was "a separate and

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distinct act independent of the killing." *Id.* Likewise, the robbery of James was a separate and distinct act not intertwined with his later murder.

Petitioner argues that her case is like ***State v. Williams,*** where the defendant was convicted of first degree felony murder, with attempted robbery as the predicate felony. 131 Wn. App. 488, 128 P. 3d 98 (2006). But ***Williams*** is factually distinct from the present case. In ***Williams***, the defendant and others set up a robbery of another individual, thought to be carrying money and jewelry. *Id.*, at 493. They lured the intended victim to an alley and when Williams pulled out a gun, the victim became frightened and ran. *Id.* Williams then shot and killed him. *Id.* The Court found that those crimes merged because the robbery was factually integral to the killing. *Id.*, at 499. The exception to the merger doctrine did not apply to the ***Williams*** case because there was no independent purpose or effect to the force that was used, it was all related to the attempted robbery. In the present case, the initial force used by Higashi to take James' ring was separate and distinct from the force that Berniard or Reese used in killing him. The act of murdering James' had an independent purpose and effect and was separate and distinct from the act of taking his ring. These facts are not comparable to ***Williams***.

The facts of the present case fall within the exception to merger doctrine as the force used in the robbery of James Sanders was separate and distinct from and not merely incidental to the murder of James Sanders. Petitioner's claims regarding what the ***Whittaker*** opinion stands for are misleading and of no consequence when the facts of the present case are analyzed. ***Whittaker*** did not change the analysis, it just had a factual scenario where the exception was not applicable. As the trial court properly found during

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sentencing, petitioner's convictions for the first degree felony murder and first degree robbery of James Sanders do not merge.

2. THIS COURT SHOULD DECLINE TO REACH THE MERITS OF SEVERAL OF PETITIONER'S REMAINING CLAIMS AS THEY WERE PREVIOUSLY RAISED IN HER DIRECT APPEAL.

"'This court from its early days has been committed to the rule that questions determined on appeal or questions which might have been determined had they been presented, will not again be considered on a subsequent appeal in the same case.'" ***State v. Bailey***, 35 Wn. App. 592, 594, 668 P.2d 1285 (1983) (*quoting* ***Davis v. Davis***, 16 Wn.2d 607, 609, 134 P.2d 467 (1943)). A petitioner may not raise in a personal restraint petition an issue which "was raised and rejected on direct appeal unless the interests of justice require relitigation of that issue." ***In re Personal Restraint of Lord***, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). That burden can be met by showing an intervening change in the law "or some other justification for having failed to raise a crucial point or argument in the prior application. ***In re Personal Restraint of Taylor***, 105 Wn.2d 683, 688, 717 P.2d 755 (*quoting* ***Sanders v. United States***, 373 U.S. 1, 16, 83 S. Ct. 1068, 10 L. Ed. 2d 148 (1963)). On this issue, the Washington Supreme Court has stated:

> We take seriously the view that a collateral attack by a PRP on a criminal conviction and sentence should not simply be reiteration of issues finally resolved at trial and direct review, but rather should raise new points of fact and law that were not or could not have been raised in the principal action, to the prejudice of the defendant.

In re Personal Restraint of Gentry, 137 Wn.2d 378, 389, 972 P.2d 1250 (1999).

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a. Petitioner's claim that her convictions for second degree assault and first degree robbery of Charlene Sanders violate double jeopardy and merge was previously raised in her direct appeal.

As described in the previous section, this petition is time barred. Petitioner's second claim alleges that her convictions for the second degree assault and first degree robbery of Charlene Sanders violate double jeopardy and should therefore merge. PRP at 13-18. Although this claim falls within an exception to the time bar under RCW 10.73.100(3), this exact claim was already raised in petitioner's direct appeal. In her direct appeal, petitioner argued and this Court rejected her claim that her convictions for second degree assault and first degree robbery against Charlene Sanders (counts V and IV) violated double jeopardy and should merge. Appendix D at 9-18; Appendix B (***State v. Knight***, 176 Wn. App. 936, 951-56, 309 P.3d 776 (2013)).

Petitioner contends that this Court should revisit the merits of this claim by arguing that the interests of justice require relitigation of this issue because ***State v. Whittaker***, 192 Wn. App. 395, 367 P.3d 1092 (2016) has changed the analysis of the issue and petitioner's appellate attorney was ineffective. PRP at 19-22. But ***Whittaker*** has not effectuated a change in the law and the same argument petitioner claims ***Whittaker*** discusses was raised by petitioner's appellate attorney in the direct appeal. As described in the previous section, all that ***State v. Whittaker*** did was discuss an analysis of the merger doctrine to a very specific set of facts. *See* section 1(b). In those cases, where the State alleges multiple incidents support a conviction and that conviction in turn is used to elevate another charged crime to a felony, if the verdict is ambiguous about which incident was used to find that underlying conviction, the rule of lenity applies and the convictions must

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merge. ***Whittaker***, 192 Wn. App. at 415-17. ***Whittaker*** did not change the law; it applied the law to a very specific factual scenario.

Even putting aside the point that ***Whittaker*** did not effectuate a change in the law and the interests of justice do not require relitigation of the issue, the analysis in ***Whittaker*** is not applicable to the present case. Petitioner claims that ***Whittaker*** and the rule of lenity require the court to find that the jury could have found the second degree assault committed against Charlene occurred when Higashi pointed his gun at her and stole her wedding ring (as opposed to the later assault committed by Berniard). But "[n]o double jeopardy violation results when the information, instructions, testimony, and argument clearly demonstrate that the State was not seeking to impose multiple punishments for the same offense." ***State v. Hayes***, 81 Wn. App. 425, 440, 914 P.2d 788 (1996) (***State v. Noltie***, 116 Wn.2d 831, 848, 809 P.2d 190 (1991)).

In petitioner's case, the State never alleged or argued that Higashi's act of pointing the gun at Charlene amounted to an assault. Throughout the entire trial, the State presented evidence to the jury and argued that it was Berniard's assault of Charlene *after* Higashi stole her ring on which the State charged and proved the second degree assault conviction.[2] In closing argument, the State described the events as they occurred and went into specific detail about the Berniard's beating of Charlene and the injuries she sustained. 7RP 997-99. Then, in describing the second degree assault charges, the State said:

> An assault is an intentional touching or striking of another person with unlawful force that is harmful or offensive. Being kicked, struck with a

[2] Petitioner makes an argument that ***Whittaker*** now confines this Court's review of the issue to the jury instructions and verdict forms alone. This is a mischaracterization of what the analysis in Whittaker describes and is discussed in this brief in the previous section 1(b). Furthermore, case law has routinely held that in reviewing allegations of double jeopardy, the appellate court may and should review the entire record to establish what was before the court. ***State v. Noltie***, 116 Wn.2d 831, 848-49, 809 P.2d 190 (1991); *See also* ***State v. Freeman***, 153 Wn.2d 765, 774, 108 P.3d 753 (2005); ***State v. Mutch***, 171 Wn.2d 646, 664 254 P.3d 803 (2011).

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> fist or a gun is certainly an assault. The assault is also an act that is done with the intent to create fear of bodily injury and a person does in fact feel that fear, even though the actor doesn't intend to carry out the act that is threatened. So when YG[3] put the gun to Charlene's head and did a countdown, even if he never intended to pull the trigger and shoot her in the head, it was still an assault.

7RP 1004. Even defense counsel in closing discussed how it was Berniard's assault of Charlene which the second degree assault charge related to:

> The same is true of the assault with Charlene Sanders, and that's a completely different situation. The state has said that it's assault with a deadly weapon and causing serious bodily injury, and we know that that's Berniard. Clabon Berniard was absolutely brutal with what he did to Charlene in the kitchen. He kicked her. That's an assault. He put the gun to the top of her head and began a countdown. That's an assault.

7RP 1034.

Based on the evidence that was presented and the arguments of counsel, it was manifestly clear to the jury that the second degree assault of Charlene related to Berniard's actions against her. It was never alleged that Higashi's actions provided support for that charge. Unlike in ***Whittaker*** where the State alleged and argued multiple incidents could support the conviction for the underlying offense, there was no ambiguity in the jury verdict in the present case because the State only ever alleged and argued that it was Berniard's assault of Charlene that provided the evidence for the second degree assault charge. Petitioner's claim that the analysis discussed in ***Whittaker*** is applicable to the present case is wrong.

Furthermore, petitioner's attorney in her direct appeal made this exact same argument prior to the ***Whittaker*** decision and it was rejected. *See* Appendix D 9-18; Appendix B (***Knight***, 176 Wn. App. at 951-56). Petitioner attempts to circumvent the fact

[3] YG is another name Clabon Berniard went by. 6RP 796.

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that it was previously raised by arguing that her attorney was ineffective. PRP at 19-22. But the argument was not rejected because the attorney did a poor job of presenting it, it was rejected by this Court because it is a claim without merit. In addition, any claim about deficiency on the part of the appellate attorney is not properly before this Court as this is a time-barred petition and ineffective assistance of appellate counsel is not one of the statutory exceptions to the time bar. *See* ***In Re Personal Restraint of Yates***, 183 Wn.2d 572, 353 P.3d 1283 (2015).

Petitioner has failed to show that the interests of justice require relitigation of this issue. The claim that petitioner's convictions for second degree assault and first degree robbery of Charlene violate double jeopardy and should merge was already raised and rejected in petitioner's direct appeal. Appendix D 9-18; Appendix B (***Knight***, 176 Wn. App. at 951-56). This Court engaged in a lengthy analysis of the issue and there has been no intervening change in the law nor any other reason put forth by petitioner which in the interests of justice require relitigation of the issue. This Court should decline to reach the merits of the claim as it was previously raised in petitioner's direct appeal.

Even if this Court were to again reach the merits of petitioner's claim, the Court's analysis of the issue would not change. Much as described in the State's response regarding petitioner's first claim and the analysis in the preceding pages, the ***Whittaker*** opinion discussed an analysis of the merger doctrine in a very specific set of circumstances not applicable to the present case. The original analysis conducted by this Court properly found that the second degree assault and first degree robbery of Charlene fell within the well-established exception to the merger doctrine and did not violate double jeopardy. Petitioner's claim fails even if the Court reaches the issue.

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b. Petitioner's claim that there was insufficient evidence to support her second degree assault convictions was also previously raised in her direct appeal.

As stated above, this petition is time barred. Petitioner's third claim alleges that there was insufficient evidence to support her convictions for first degree felony murder and two counts of second degree assault (one against Charlene and one against J.S.). PRP at 22-24. Although this claim falls within an exception to the time bar under RCW 10.73.100(4), this claim as it relates to the two counts of second degree assault was already raised in petitioner's direct appeal. Appendix D at 5-9.

In the direct appeal, petitioner argued that there was insufficient evidence to support that she was an accomplice to the assaults because they occurred when petitioner was upstairs without her knowledge and without her assistance. Appendix D at 8. This is the same argument that petitioner makes in her personal restraint petition where she claims that she was only an accomplice to the robbery involving James and Charlene's rings and once that was completed, the robbery she was involved in had ended, thereby making the assaults separate from her original participation.

But this argument conflates using the term robbery in the colloquial sense with using it in terms of the unit of a prosecution and a merger doctrine analysis. "[T]he unit of prosecution for robbery is each separate forcible taking of property from or from the presence of a person having an ownership, representative, or possessory interest in the property, against that person's will." ***State v. Tvedt***, 153 Wn.2d 705, 714-15, 107 P.3d 728 (2005). Thus, while the State charged and argued that petitioner's robbery convictions for the acts of taking James and Charlene's rings were completed once the rings were acquired, the overarching home-invasion robbery planned by the petitioner was

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still ongoing. Indeed, after the rings were taken, petitioner is the one who signaled through her Bluetooth headset to Reese and Berniard who were waiting outside in a car to enter the home knowing they were both armed with loaded weapons. Appendix B (***Knight***, 176 Wn. App. at 949-50); *see also* RP 913-18, 951-52. As this Court stated, "[e]ach act placed the Sanders in a more vulnerable position and facilitated the commission of the assaults by allowing Knight's accomplices to gain entrance and to avoid resistance." *Id.* While the robbery of the rings was complete in terms of a unit of prosecution and merger doctrine analysis, petitioner's larger overall plan and actions to rob the Sanders family had just begun.

This Court has already analyzed and found that there was sufficient evidence for the jury to infer that petitioner promoted or facilitated the commission of the assaults by aiding another in planning or committing the assaults. When the robbery ended for purposes of a unit of prosecution and merger doctrine analysis does not change the fact that the overarching robbery planned by petitioner was still ongoing and she was an accomplice to the assaults. This Court should decline to reach the merits of this claim as it was previously raised in petitioner's direct appeal. Even if this Court does reach the merits however, petitioner's claim fails for the reasons discussed above.

3. THE STATE PRESENTED SUFFICIENT EVIDENCE FOR A JURY TO FIND PETITIONER GUILTY AS AN ACCOMPLICE TO THE CRIME OF FIRST DEGREE FELONY MURDER.

Although time-barred, petitioner's final claim alleges there was insufficient evidence presented at trial to support her conviction for first degree felony murder which is an exception to the time-bar under RCW 10.73.100(4). Therefore, this Court should reach the merits of petitioner's claim.

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Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. ***State v. McCullum***, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also* ***Seattle v. Gellein***, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); ***State v. Mabry***, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State met the essential elements of the crime beyond a reasonable doubt. ***State v. Joy***, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. ***State v. Barrington***, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988)(*citing* ***State v. Holbrook***, 66 Wn.2d 278, 401 P.2d 971 (1965)); ***State v. Turner***, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are considered equally reliable. *Id.*; ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (*citing* ***State v. Casbeer***, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)). The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is

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given. On this issue, the Supreme Court of Washington said "[G]reat deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity." ***State v. Cord***, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)(citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

Petitioner argues that there was insufficient evidence presented to convict her of first degree felony murder because the killing did not take place during the course of or in furtherance of the robbery as the robberies were "complete" once James and Charlene's rings were taken. But petitioner's argument rests solely on one sentence of dicta in a Division III Court of Appeals case that is incompatible with decades of established Supreme Court case law. *See* PRP at 23. Case law holds that "a homicide is deemed committed during the perpetration of a felony, for the purpose of felony murder, if the homicide is within the "res gestae" of the felony, *i.e.,* if there was a close proximity in terms of time and distance between the felony and the homicide." ***State v. Leech***, 114 Wn.2d 700, 706, 790 P.2d 160 (1990); *See also* ***State v. Dudrey***, 30 Wn. App. 447, 450, 635 P.2d 750 (1981), *review denied*, 96 Wn.2d 1026 (1982); ***State v. Diebold***, 152 Wash. 68, 72, 277 P. 394 (1929).

This understanding of what "in the furtherance of" or "in the course of" in felony murder means was discussed in ***State v. Anderson***, 10 Wn.2d 167, 116 P.2d 346 (1941). In that case, a man carrying a gun attempted to steal eggs from the victim's barn, heard a screen door open and ran out of the barn to hide in some nearby bushes. *Id.*, at 170. The victim, also carrying a gun, began searching the bushes with a flashlight and when he found the defendant, they both opened fire and the victim died. *Id.* Anderson argued, like

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the petitioner in the present case, that "the killing in this instance does not fall within the definition because, at the time of the shooting, he had abandoned his burglarious enterprise and was withdrawing from the scene", in other words, the crime was completed. *Id.* at 176.

The Washington Supreme Court engaged in a lengthy analysis looking at opinions from several other states and concluded that:

> [c]onsidering the evidence on this aspect of this case, the killing was clearly an incident, a part of the res gestae, to the burglary. Appellant went there to steal, armed and ready to shoot if necessary to protect himself. He anticipated the eventuality, and, when it transpired, he acted accordingly. The homicide cannot be disassociated from the burglary.

Id. at 178. Likewise, the homicide in the present case was part of the res gestae of the robbery and cannot be disassociated from it.

Although the act of taking James and Charlene's rings had occurred, the res gestae of the crime was still ongoing. After the petitioner and Higashi removed James and Charlene's rings, the petitioner let Berniard and Reese into the house who then retrieved the boys from upstairs and led them down at gunpoint. RP 584-85, 620-25, 917-18. The petitioner began searching the house for more valuables while James and Charlene remained tied up downstairs in the kitchen. RP 625-26, 919, 958. Berniard threatened Charlene and assaulted her in order to learn the location of the family safe. RP 585-91, 624-28. James was then taken to the garage to open the safe when a struggle ensued and he was shot. RP 589-91; 596-99, 629-30. James was brought into the living room where he was shot several more times before the petitioner and her co-defendant's fled the home. RP 598-601, 629-30. James died shortly after that on his living room floor. RP 604; RP 871-72.

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All of these actions occurred within a short period of time, approximately 20 minutes long. Petitioner testified that she and her co-defendants arrived at the home around 9 p.m. RP 914. The 911 call came in at 9:18 p.m. RP 535. The testimony also reflected that all of the actions also all took place at the Sander's home with the robbery of the rings occurring in the kitchen and James being murdered in the living room nearby. Thus, while the actual act of robbing James and Charlene of their rings was complete when the rings were taken off, the homicide clearly occurred and was perpetrated during the res gestae of the crime.

Indeed, the Washington Supreme Court has found a homicide was committed in the course of or in furtherance of a robbery and constituted felony murder on a far more separated time and place factual scenario. In ***State v. Ryan***, 192 Wash. 160, 165-66, 73 P.2d 735 (1937), a defendant driving away from a robbery was apprehended by police 40 minutes away and when he killed an officer in the ensuing shootout it was held to be felony murder. In discussing those facts in another case three years later, the Court described how:

> [t]he victim of the robbery need not be the same person as the victim of the homicide, and the robbery may be committed in one jurisdiction and the killing take place in another, the only connection between them being the circumstance of the defendant's flight from the place of the one to the scene of the other. The robbery is not necessarily directly included as an integral part of the murder, but is only incidentally related thereto.

State v. Barton, 5 Wn.2d 234, 239, 105 P.2d 63 (1940)(internal citations omitted). Although the act of the robbery in the ***Ryan*** case was completed, 40 minutes had passed and the defendant was no longer at the scene of the crime, because the homicide was committed as part of the res gestae of the robbery, it constituted felony murder. In the present case, the murder of James Sanders was committed minutes after the act of robbery

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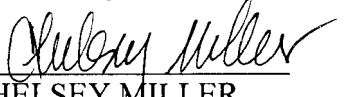
occurred, in the same place, and while the petitioner and co-defendants were continuing to execute their plan of robbing and burglarizing the Sanders family and their home. As such, the murder was committed as part of the res gestae of the robbery, even though the act of taking the rings themselves was completed. There was sufficient evidence presented for a rational trier of fact to find that the murder of James Sanders constituted felony murder as it was committed in the course of or in furtherance of the robbery.

D. CONCLUSIONS:

For the foregoing reasons, the State respectfully requests this Court dismiss this personal restraint petition.

DATED: November 9, 2016

MARK LINDQUIST
Pierce County
Prosecuting Attorney



CHELSEY MILLER
Deputy Prosecuting Attorney
WSB #42892

The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the petitioner true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/9/16 Johnson
Date Signature

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APPENDIX "A"

Judgment and Sentence

Case Number. 10-1-01903-2 Date: November 8, 2016
SerialID: DE06F1C6-EF09-4B63-95EFC28F707C3015
Certified By. Kevin Stock Pierce County Clerk, Washington

10-1-01903-2 36397982 JDSWCD 05-16-11

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff,	CAUSE NO 10-1-01903-2
vs.	
AMANDA CHRISTINE KNIGHT, Defendant.	WARRANT OF COMMITMENT 1) ☐ County Jail 2) ☒ Dept. of Corrections 3) ☐ Other Custody

MAY 16 2011

FILED
DEPT. 6
IN OPEN COURT
MAY 13 2011
Pierce County, WA
By
DEPUTY

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

[ ] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence (Sentence of confinement in Pierce County Jail).

[X] 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

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Telephone: (253) 798-7400

Case Number: 10-1-01903-2 Date: November 8, 2016
SerialID: DE06F1C6-EF09-4B63-95EFC28F707C3015
Certified By: Kevin Stock Pierce County Clerk, Washington

[ ] 3 YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above)

By direction of the Honorable

Dated: 05-13-2011

JUDGE

KEVIN STOCK
CLERK

By Melissa Engler
DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF

Date MAY 16 2011 By Melissa Engler

STATE OF WASHINGTON
ss
County of Pierce

I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this
_____ day of _____, _____

KEVIN STOCK, Clerk
By: _____ _____ Deputy

mms

FILED
DEPT. 6
IN OPEN COURT
MAY 1 1 2011
Pierce County Clerk
By
DEPUTY

Office of Prosecuting Attorney
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Tacoma, Washington 98402-2171
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Certified By: Kevin Stock Pierce County Clerk, Washington

FILED
DEPT. 6
IN OPEN COURT
MAY 13 2011
Pierce County, Clerk
By
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff,	CAUSE NO 10-1-01903-2
vs	JUDGMENT AND SENTENCE (FJS)
AMANDA CHRISTINE KNIGHT Defendant.	[X] Prison [ ] RCW 9 94A 712 Prison Confinement [ ] Jail One Year or Less [ ] First-Time Offender [ ] Special Sexual Offender Sentencing Alternative [ ] Special Drug Offender Sentencing Alternative [ ] Clerk's Action Required, para 4.5 (SDOSA), 4.7 and 4.8 (SSOSA) 4.15.2, 5.3, 5.6 and 5.8 [ ]Juvenile Decline [ ]Mandatory [ ]Discretionary
SID WA25657332 DOB 07/15/1985	

MAY 16 2011

I HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS

2.1 **CURRENT OFFENSE(S)** The defendant was found guilty on April 14, 2011 by [ ] plea [X] jury-verdict [ ] bench trial of

COUNT	CRIME	RCW	ENHANCEMENT TYPE	DATE OF CRIME	INCIDENT NO
I	MURDER IN THE FIRST DEGREE (D3)	9A.32.030(1)(c) 9.41.010 9.94A.533/9.94A.510 9.94A.530 9.94A.535(3)(a) 9.94A.535(3)(m) 9.94A.535(2)(c)	F	04/28/10	PCSO # 101181333
II	ROBBERY IN THE FIRST DEGREE (AAA1)	9A.56.190 9A.56.200(1)(a)(i) 9.41.010	F	04/28/10	PCSO # 101181333

11-9-05549-4

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COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO
		9.94A.533/9.94A.510 9.94A.530 9.94A.535(3)(a) 9.94A.535(3)(m) 9.94A.535(2)(c)			
III	ASSAULT IN THE SECOND DEGREE (E26)	9A.36.021(1)(a) 9A.36.021(1)(c) 9.41.010 9.94A.533/9.94A.510 9.94A.530 9.94A.535(3)(a) 9.94A.535(3)(m) 9.94A.535(2)(c)	F	04/28/10	PCSO # 101181333
IV	ROBBERY IN THE FIRST DEGREE (AAA1)	9A.56.190 9A.56.200(1)(a)(i) 9.41.010 9.94A.533/9.94A.510 9.94A.530 9.94A.535(3)(a) 9.94A.535(3)(m) 9.94A.535(2)(c)	F	04/28/10	PCSO # 101181333
V	ASSAULT IN THE SECOND DEGREE (E26)	9A.36.021(1)(a) 9A.36.021(1)(c) 9.41.010 9.94A.533/9.94A.510 9.94A.530 9.94A.535(3)(a) 9.94A.535(3)(m) 9.94A.535(2)(c)	F	04/28/10	PCSO # 101181333
VI	BURGLARY IN THE FIRST DEGREE (G2A)	9A.52.020(1)(a)(b) 9.41.010 9.94A.533/9.94A.510 9.94A.530 9.94A.535(3)(a) 9.94A.535(3)(m) 9.94A.535(2)(c)	F	04/28/10	PCSO # 101181333

*(F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom. See RCW 46.61.520, (JF) Juvenile present, (SM) Sexual Motivation, (SCF) Sexual Conduct with a Child for a Fee. See RCW 9.94A.533(8). (If the crime is a drug offense, include the type of drug in the second column.)

as charged in the CORRECTED SECOND AMENDED INFORMATION

[X] A special verdict/finding for use of firearm was returned on Count(s) I, II, III, IV, V, VI RCW 9.94A.602, 9.94A.533.

[ ] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):

[ ] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number)

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Certified By. Kevin Stock Pierce County Clerk, Washington

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J ADULT JUV	TYPE OF CRIME
1	MURDER 1ST	CURRENT	PIERCE CO	04/28/10	A	SV
2	ROBBERY 1ST	CURRENT	PIERCE CO	04/28/10	A	V
3	ASSAULT 2ND	CURRENT	PIERCE CO	04/28/10	A	V
4	ROBBERY 1ST	CURRENT	PIERCE CO.	04/28/10	A	V
5	ASSAULT 2ND	CURRENT	PIERCE CO.	04/28/10	A	V
6	BURGLARY 1ST	CURRENT	PIERCE CO	04/28/10	A	V

[ ] The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

2.3 SENTENCING DATA.

COUNT NO	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	10	XV	411 – 548 MOS.	60 MOS	471 – 608 MOS.	LIFE
II	10	IX	129 – 171 MOS	60 MOS.	189 – 231 MOS	LIFE
III	10	IV	63 – 84 MOS	36 MOS	99 – 120 MOS	10 YRS
IV	10	IX	129 – 171 MOS	60 MOS	189 – 231 MOS	LIFE
[illegible]	10	IV	63 – 84 MOS	36 MOS	99 – 120 MOS.	10 YRS
[illegible]	10	VII	[illegible] – 116 MOS	[illegible] MOS	147 – 176 MOS.	LIFE

2.4 [ ] EXCEPTIONAL SENTENCE Substantial and compelling reasons exist which justify an exceptional sentence.

[ ] within [ ] below the standard range for Count(s) _____

[ ] above the standard range for Count(s) _____

[ ] The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

[ ] Aggravating factors were [ ] stipulated by the defendant, [ ] found by the court after the defendant [illegible]

[illegible] attached. The Prosecuting Attorney [ ] did [ ] did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753

[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

_____

[ ] The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate.

_____

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2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are [ ] attached [ ] as follows.

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1

3.2 [ ] The court DISMISSES Counts _____ [ ] The defendant is found NOT GUILTY of Counts

IV. SENTENCE AND ORDER

IT IS ORDERED

4.1 Defendant shall pay to the Clerk of this Court (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

RTN/RJN $ 6,619.22 Restitution to: CVC #VM40106 & VM40104

$ _____ Restitution to: _____

(Name and Address--address may be withheld and provided confidentially to Clerk's Office).

PCV $ 500.00 Crime Victim assessment

DNA $ 100.00 DNA Database Fee

PUB $ 2000.00 Court-Appointed Attorney Fees and Defense Costs

FRC $ 200.00 Criminal Filing Fee

FCM $ _____ Fine

CLF $ _____ Crime Lab Fee [ ] deferred due to indigency

WFR $ _____ Witness Costs

JFR $ _____ Jury Fee

FPS/SFR/SFS

SFM/SFM/SFC $ _____ Service of Process

OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)

$ _____ Other Costs for: _____

$ _____ Other Costs for: _____

$ 9419.22 TOTAL

[ ] The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered RCW 9.94A.753. A restitution hearing

[ ] shall be set by the prosecutor

[ ] is scheduled for _____

[X] **RESTITUTION** Order Attached

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[X] Restitution ordered above shall be paid jointly and severally with.

	NAME of other defendant	CAUSE NUMBER	(Victim name)	(Amount-$)
RJN	JOSHUA REESE	10-1-01902-4	CVC	$6619.22
	KIYOSHI HIGASHI	10-1-01901-6	CVC	$6619.22
	CLABON BERNIARD	10-1-01904-1	CVC	$6619.22

[ ] The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction RCW 9.94A.7602, RCW 9.94A.760(8)

[X] All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein: Not less than $_____ per month commencing _____ RCW 9.94.760 If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested RCW 9.94A.760(7)(b)

[ ] **COSTS OF INCARCERATION** In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate RCW 10.01.160

COLLECTION COSTS The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute RCW 36.18.190, 9.94A.780 and 19.16.500.

INTEREST The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments RCW 10.82.090

COSTS ON APPEAL An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.1b **ELECTRONIC MONITORING REIMBURSEMENT.** The defendant is ordered to reimburse _____ (name of electronic monitoring agency) at _____, for the cost of pretrial electronic monitoring in the amount of $ _____

[X] **DNA TESTING** The defendant shall have a blood or other biological sample taken for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754

[ ] **HIV TESTING.** The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

4.3 **NO CONTACT**
The defendant shall not have contact with Charlene Sanders, DOB 2-6-63, C.A.K., DOB 7-14-99, J.A.S., DOB 4-19-96 (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for _____ years (not to exceed the maximum statutory sentence)

[ ] Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence.

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4.4 **OTHER**: Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law

All property forfieted

4.4a **BOND IS HEREBY EXONERATED**

4.5 **CONFINEMENT OVER ONE YEAR.** The defendant is sentenced as follows:

(a) **CONFINEMENT.** RCW 9.94A.589 Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

548	months on Count	I	171	months on Count	II
84	months on Count	III	171	months on Count	IV
84	months on Count	V	116	months on Count	VI

A special finding/verdict has been entered as indicated in Section 2.1, the defendant is sentenced to the following additional term of total confinement in the custody of the Department of Corrections:

60	months on Count No	I	60	months on Count No	II
36	months on Count No	III	60	months on Count No	IV
36	months on Count No	V	60	months on Count No	VI

Sentence enhancements in Counts [illegible]
[ ] concurrent [X] consecutive to each other
Sentence enhancements in Counts I, II, III, IV, V, VI shall be served
[X] flat time [ ] subject to earned good time credit

Actual number of months of total confinement ordered is: 860

(Add mandatory firearm, deadly weapons, and sexual motivation enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

[X] The confinement time on Count(s) I contain(s) a mandatory minimum term of 240 MOS.

CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589 All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm, other deadly weapon, sexual motivation, VUCSA in a protected zone, or manufacture of methamphetamine with

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juvenile present as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

_____

The sentence herein shall run consecutively to all felony sentences in other cause numbers imposed prior to the commission of the crime(s) being sentenced. The sentence herein shall run concurrently with felony sentences in other cause numbers imposed after the commission of the crime(s) being sentenced except for the following cause numbers. RCW 9.94A.589: _____

_____

Confinement shall commence immediately unless otherwise set forth here _____

_____

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court. Booked 05-04-2010

4.6 [ ] COMMUNITY PLACEMENT (pre 7/1/00 offenses) is ordered as follows:

Count _____ for _____ months;

Count _____ for _____ months;

Count _____ for _____ months;

[X] COMMUNITY CUSTODY. To determine which offenses are eligible for or required for community custody see RCW 9.94A.701.

(A) The defendant shall be on community custody for the longer of

(1) the period of early release, RCW 9.94A.728(1)(2), or

(2) the period imposed by the court, as follows.

Count(s) I _____ 36 months for Serious Violent Offenses

Count(s) II, III, IV, V, VI _____ 18 months for Violent Offenses

Count(s) _____ 12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)

(B) While on community placement or community custody, the defendant shall (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service), (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while in community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; (9) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706 and (10) for sex offenses, submit to electronic monitoring if imposed by DOC. The defendant's residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

The court orders that during the period of supervision the defendant shall

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[ ] consume no alcohol

[X] have no contact with Charlene Sanders, C.A.K., J.A.S

[ ] remain [ ] within [ ] outside of a specified geographical boundary, to wit: _____

[ ] not serve in any paid or volunteer capacity where he or she has control or supervision of minors under 13 years of age

[ ] participate in the following crime-related treatment or counseling services. _____

[ ] undergo an evaluation for treatment for [ ] domestic violence [ ] substance abuse [ ] mental health [ ] anger management and fully comply with all recommended treatment

[ ] comply with the following crime-related prohibitions _____

[ ] Other conditions: _____

[ ] For sentences imposed under RCW 9.94A.712, other conditions, including electronic monitoring, may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

PROVIDED, That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense.

4.7 [ ] **WORK ETHIC CAMP** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: _____

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V. NOTICES AND SIGNATURES

5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505. The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7605.

5.4 **RESTITUTION HEARING.**

[X] Defendant waives any right to be present at any restitution hearing (sign initials): _____.

5.5 **CRIMINAL ENFORCEMENT AND CIVIL COLLECTION.** Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means. RCW 9.94A.634.

5.6 **FIREARMS.** You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.7 **SEX AND KIDNAPPING OFFENDER REGISTRATION.** RCW 9A.44.130, 10, 11, 128.

N/A

5.8 [ ] *The court finds that Count _____ is a felony in the commission of which a motor vehicle was used.* The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

5.9 If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment, the defendant must notify DOC and the defendant's treatment information must be shared with DOC for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.

5.10 **OTHER** _____

_____

_____

_____

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
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Telephone: (253) 798-7400

Case Number: 10-1-01903-2 Date: November 8, 2016
SerialID: DE06F1C6-EF09-4B63-95EFC28F707C3015
Certified By: Kevin Stock Pierce County Clerk, Washington

DONE in Open Court and in the presence of the defendant this date May 13, 2011

JUDGE
Print name Bacon

Deputy Prosecuting Attorney
Print name MARY E. ROBNETT
WSB # 21129

Attorney for Defendant
Print name HANS STEINMETZ
WSB # 24643

Defendant
Print name Amanda Christine Knight

VOTING RIGHTS STATEMENT: RCW 10.64.140 I acknowledge that my right to vote has been lost due to felony convictions. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637, b) A court order issued by the sentencing court restoring the right, RCW 9.92.066, c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050, or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

Defendant's signature

FILED
DEPT. 6
IN OPEN COURT
MAY 13 2011
Pierce County, Clerk
By DEPUTY

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

Case Number: 10-1-01903-2 Date: November 8, 2016
SerialID: DE06F1C6-EF09-4B63-95EFC28F707C3015
Certified By. Kevin Stock Pierce County Clerk, Washington

CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 10-1-01903-2

I, KEVIN STOCK Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____.

Clerk of said County and State, by _____, Deputy Clerk

IDENTIFICATION OF COURT REPORTER

_____
Court Reporter

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

Case Number: 10-1-01903-2 Date: November 8, 2016
SerialID: DE06F1C6-EF09-4B63-95EFC28F707C3015
Certified By: Kevin Stock Pierce County Clerk, Washington

APPENDIX "F"

The defendant having been sentenced to the Department of Corrections for a:

_____ sex offense
__X__ serious violent offense
__X__ assault in the second degree
__X__ any crime where the defendant or an accomplice was armed with a deadly weapon
_____ any felony under 69.50 and 69.52

The offender shall report to and be available for contact with the assigned community corrections officer as directed

The offender shall work at Department of Corrections approved education, employment, and/or community service,

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions

An offender in community custody shall not unlawfully possess controlled substances,

The offender shall pay community placement fees as determined by DOC

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement

The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC

The Court may also order any of the following special conditions

_____ (I) The offender shall remain within, outside of, a specified geographical boundary _____

_____

__X__ (II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals, Charlene Sanders, 02-06-1963, C.A.K., 07-14-1999; J.A.K., 04-19-1996

_____

_____ (III) The offender shall participate in crime-related treatment or counseling services;

_____ (IV) The offender shall not consume alcohol, _____

_____ (V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or

__X__ (VI) The offender shall comply with any crime-related prohibitions.

_____ (VII) Other _____

_____

Office of Prosecuting Attorney
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Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

Case Number: 10-1-01903-2 Date: November 8, 2016
SerialID: DE06F1C6-EF09-4B63-95EFC28F707C3015
Certified By: Kevin Stock Pierce County Clerk, Washington

IDENTIFICATION OF DEFENDANT

SID No WA25657332 Date of Birth 07/15/1988
(If no SID take fingerprint card for State Patrol)

FBI No 697491HD6 Local ID No UNKNOWN

PCN No. 540108455 Other

Alias name, SSN, DOB. _____

Race:						Ethnicity		Sex	
[ ]	Asian/Pacific Islander	[ ]	Black/African-American	[X]	Caucasian	[X]	Hispanic	[ ]	Male
[ ]	Native American	[ ]	Other:			[ ]	Non-Hispanic	[X]	Female

FINGERPRINTS

Left four fingers taken simultaneously	Left Thumb

Right Thumb	Right four fingers taken simultaneously

I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto Clerk of the Court, Deputy Clerk [signature] Dated 05.12.11

DEFENDANT'S SIGNATURE Amanda Kugel

DEFENDANT'S ADDRESS _____

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone (253) 798-7400

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the aforementioned court do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said Court this 08 day of November, 2016

Kevin Stock, Pierce County Clerk

By /S/Linda Fowler, Deputy.
Dated: Nov 8, 2016 3:00 PM

SEAL OF THE SUPERIOR COURT OF PIERCE COUNTY WASHINGTON

Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:
https://linxonline.co.pierce.wa.us/linxweb/Case/CaseFiling/certifiedDocumentView.cfm,
enter **SerialID: DE06F1C6-EF09-4B63-95EFC28F707C3015.**
This document contains 15 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

APPENDIX "B"

Appellate Court Opinion

Presiding Judge

Mitch Harrison
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Seattle, WA, 98109-4928
mitch@mitchharrisonlaw.com

Melody M Crick
Pierce County Prosecuting Attorney
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FILED
COURT OF APPEALS
DIVISION II
2013 SEP 24 AM 9:23
STATE OF WASHINGTON
BY
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. AMANDA CHRISTINE KNIGHT, Appellant.	No. 42130-5-II PUBLISHED OPINION

HUNT, P.J. — Amanda Christine Knight appeals two convictions for second degree assault against two victims, JS[1] and Charlene Sanders, (Counts III and V) during a home invasion robbery[2]; she also appeals her sentences, arguing that they were based on an incorrect offender score. Knight argues that there was insufficient evidence to support these convictions and that they constitute double jeopardy because (1) the jury instructions were ambiguous, and (2) the assaults should have merged with her first degree robbery convictions committed against the same two victims (Counts IV[3] and II). She also asks us to remand for resentencing because

[1] It is appropriate to provide some confidentiality in this case. Accordingly, we use initials to identify the juveniles involved.

[2] Knight does not appeal her first degree felony murder and other convictions arising from this same home invasion.

[3] Knight is correct that the information named Charlene as a victim of both robbery (Count IV) and assault (Count V). But Knight mistakenly asserts that the robbery victim named in Count II (James, who was also the murder victim in Count I) was also the assault victim named in Count III (JS), which neither the information nor the facts support. At oral argument, Knight abandoned this latter argument.

the trial court erred in calculating her offender score when it counted several of the convictions as separate points instead of counting them as one point because they constituted the same criminal conduct under RCW 9.94A.589(1)(a). In her Statement of Additional Grounds (SAG), Knight asserts that the trial court erred in failing to give a nonunanimity jury instruction for the special verdicts that enhanced her sentence. We affirm.

FACTS

I. CRIMES

Amanda Christine Knight, Joshua Reese, and Kyoshi Higashi were acquaintances, who, with another acquaintance, Clabon Berniard, participated in a home invasion robbery in Lake Stevens on April 2010. Soon thereafter, on April 28, Higashi told Knight that he wanted to commit another robbery; Knight drove her car to Renton to pick up Higashi and then picked up Berniard. Higashi had found a Craigslist wedding ring advertisement posted by James Sanders. Using a non-traceable throw-away cell phone, Knight contacted Sanders that morning and asked whether she and her boyfriend could see the ring to buy for Mother's Day. Wanting to arrive after dark, Knight claimed that they were coming from Chehalis and could not be there until that evening.

Knight drove Higashi, Berniard, and Reese to the Sanders' house at 9:00 PM; she drove down the long driveway and backed in to park to facilitate a quick getaway. Higashi was in possession of Knight's firearm; Reese and Berniard were also armed. They had zip ties and masks with them. Before entering, Knight covered up her tattoos and put on a pair of gloves, and Higashi handed her several zip ties. They met James Sanders outside. The three walked together into the Sanders' kitchen.

Inside, James[4] handed an old wedding ring to Knight, who handed it to Higashi. When Knight and Higashi asked several questions about the ring, James called upstairs to his wife, Charlene, asking her to come down to help answer the questions. Their two children, JS and CK, remained upstairs. Knight told James she was interested in buying the ring.

Higashi revealed a large amount of cash and asked, "How is this?" He also pulled out a handgun and threatened, "How about this?" 5 Verbatim Report of Proceedings (VRP) at 580. Charlene and James told Higashi and Knight to take whatever they wanted and to leave. Knight zip tied Charlene's hands behind her back; Higashi zip tied James's hands behind his back. Knight removed Charlene's wedding ring from her finger. Knight or Higashi removed James's wedding ring from his finger. Higashi and Knight ordered James and Charlene to lie down on their stomachs on the floor.

Through Knight's Bluetooth headset connection to Reese and Berniard waiting in her car, they heard that the Sanders adults had been secured; and Knight signaled them to enter. Knight knew that Reese and Berniard possessed loaded guns and that using these guns was part of the group's plan to carry out the Sanders' home invasion robbery. Reese and Berniard went upstairs, brought down the two Sanders boys with their hands behind their heads at gunpoint, and forced them to lie down on their stomachs on the floor near the kitchen entryway; Knight walked between them. Charlene and JS saw Knight and Higashi gather up items from the house, including from the downstairs laundry room. Knight also ransacked the main bedroom upstairs, looking for other expensive items to collect.

[4] We use James and Charlene Sanders' first names for clarity. We intend no disrespect.

From upstairs, Knight heard the commotion and screams downstairs as her companions assaulted the Sanders family. Berniard held a gun to Charlene's head, pulled back the hammer, began counting down, and asked her, "Where is your safe?" 5 VRP at 586. Charlene responded that they did not own a safe. Berniard kicked Charlene in the head, called her a "b*tch," threatened to kill her and her children. 5 VRP at 586. According to Charlene, "[Berniard] kicked [her] so hard that [her] head went up and then [she] hit down on the ground"; it left a large "goose egg" on her left temple. 5 VRP at 587. Charlene believed she was going to die. Eventually, Charlene told the intruders that they kept a safe in their garage.

While Berniard was forcing James to the garage, James broke free of his zip ties and began beating Berniard. Berniard shot James in the ear, knocking him unconscious. JS jumped on Berniard, who threw JS off and began hitting him with the butt of his firearm. Reese then dragged James's body back through the kitchen and into the adjacent living room, where it was out of sight. Either Reese or Berniard shot James multiple times, causing fatal internal bleeding.

Following the gunshots, the four intruders fled immediately. Charlene went to the living room and found James lying on the floor; his body appeared white, and one of his ears had been shot off. Charlene called 911. The police declared James dead at the scene; autopsy investigators later recovered three bullets from his body. The police also took JS to the hospital, where he was treated for bruising and bleeding around his left ear; the beating left scars that were still visible a year later. In addition to the rings, among the items missing from the Sanders' home were a PlayStation, an iPod, and a cellular phone.

Knight dropped Higashi at a friend's house; Knight and Reese went to a hotel. Later that evening, Higashi called Knight; when they met up, Higashi told Knight and Reese that James

had been killed and that they needed to discard the clothing they had been wearing and to "get rid of" any remaining zip ties. 7 VRP at 922. Knight handed over her clothing.

The following morning, Knight, Reese, and Higashi began driving to California and sold the Sanders' PlayStation and Knight's firearm along the way. California police eventually pulled them over and arrested them on unrelated charges. Knight posted bail, pawned James's wedding band, and purchased a bus ticket to return to Washington. On hearing the news that she was a murder suspect, she turned herself in to the Sumner Police Department.

II. PROCEDURE

The State charged Knight with (1) first degree felony murder of James (Count I); (2) two counts of first degree robbery,[5][6] against James (Count II) and Charlene (Count IV); (3) two counts of second degree assault,[7] against Charlene (Count V) and JS (Count III); and (4) first degree burglary (Count VI). Each charge alleged accomplice liability and carried a firearm enhancement and other sentencing aggravators for manifest deliberate cruelty, a high degree of

[5] The legislature amended RCW 9A.56.190 in 2011. LAWS OF 2011, ch. 336, § 379. The amendments added gender neutral language which did not alter the statute in any way relevant to this case; accordingly, we cite the current version of the statute.

[6] The State charged Knight's robbery counts under RCW 9A.56.190, which provides that a person commits robbery "when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person." The corrected second amended information elevated these robberies to first degree under RCW 9A.56.200(1)(a)(i), alleging that Knight, or an accomplice, had been "armed with a deadly weapon." 2 Clerk's Papers (CP) at 305-06.

[7] The State charged Knight's assault counts under RCW 9A.36.021(1), which provides that a person is guilty if he or she "(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or . . . (c) Assaults another with a deadly weapon." The legislature amended RCW 9A.36.021 in 2011. LAWS OF 2011, ch. 166, § 1. The amendments did not alter the statute in any way relevant to this case; accordingly, we cite the current version of the statute.

sophistication or planning, and an offender score that would result in some of the current offenses going unpunished.

In its opening statement, the State explained that it would prove the following: (1) Knight and three accomplices, Higashi, Reese, and Berniard, planned to go to the Sanders' house, ostensibly to purchase a ring that James had advertised on Craigslist, "tie everybody up and steal the expensive stuff out of the house . . . ransack the place and take what they could";[8] (2) Knight had later told police that she "wore gloves so she wouldn't leave fingerprints [and] wore long sleeves because she ha[d] rather distinctive tattoos on her arms";[9] (3) once inside the house, Knight zip tied Charlene's hands behind her back, ordered her face down on the kitchen floor, and took Charlene's wedding ring off her hand; (4) Knight then used a Bluetooth to signal the others to enter; (5) later the intruders got the idea that there was a safe in the house, demanded the safe's location, kicked Charlene in the face, and demanded the combination; (6) they also beat Charlene's stepson JS when he tried to intervene to protect his father, James, who was also being beaten before being shot three times; and (6) Knight would claim at trial that she and Reese had been upstairs stealing valuables while JS, Charlene, and James were being beaten downstairs.

The jury instructions provided: (1) To elevate the robbery to first degree, the jury was required to find that, during the commission of the crime, "[Knight] or an accomplice [was] armed with a deadly weapon or inflict[ed] bodily injury." 2 Clerk's Papers (CP) at 339 (Instruction 12); *see also* CP at 354 (Instruction 26).

---

[8] 5 VRP at 517.

[9] 5 VRP at 528.

(2) "An assault is an intentional touching or striking of another person. . . . An assault is also an act done with the intent to create in another apprehension and fear of bodily injury." 2 CP at 346 (Instruction 18).

(3) "A person commits the crime of [a]ssault in the [s]econd [d]egree when she or an accomplice intentionally assaults another and thereby recklessly inflicts substantial bodily harm or assaults another with a deadly weapon." 2 CP at 347 (Instruction 19).

(4) "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." 2 CP at 334 (Instruction 7).

During closing argument, the State delineated the elements of each crime as set forth in the court's jury instructions and summarized the evidence supporting the elements of each crime. The State specifically argued that it had proved the first degree robbery of Charlene, Count IV, with evidence that Higashi had pointed a gun at Charlene, while Knight zip tied Charlene and took her wedding ring, facts that Knight herself later admitted.[10] The State then argued that it had proven Knight's involvement in the second degree assault of Charlene, Count V, when Berniard put a gun to Charlene's head and started the countdown, during which she was to reveal the safe's location and was kicked in the head.

In her closing argument, Knight expressly admitted her participation in the initial robbery of the Sanders' rings, including that she had "tie[d] up Charlene Sanders and put her down on the floor" to "secur[e] the people" so the four invaders could "go rob the house." 7 VRP at 1036, 1037. Knight claimed, however, that she had done so under duress from Higashi, who had

[10] The State also noted that Charlene was kicked and beaten.

coerced her to participate in the Sanders' home invasion, burglary, and robberies. In contrast, Knight clearly distanced herself from Berniard's later "brutal"[11] assaults of JS and Charlene: She argued that she had neither planned nor participated in these two assaults, which she did not even witness.[12]

The jury found Knight guilty on all counts. It returned special verdicts on the firearm enhancements, finding that Knight or an accomplice had been armed during the commission of the crimes. It did not return special verdicts finding Knight had committed the crimes with deliberate cruelty to the victims or with a high degree of sophistication.

At sentencing, Knight moved the court to find that her two assault convictions constituted double jeopardy under the merger doctrine; she also argued that, for sentencing purposes, all of her convictions were based on the same criminal conduct. The trial court denied the motion. Based on an offender score of 10, the trial court imposed high-end standard-sentences on all counts and ran them concurrently; the trial court added firearm enhancements and ran them

---

[11] 7 VRP at 1034.

[12] More specifically Knight argued:

> The [S]tate has said that it's assault with a deadly weapon and causing serious bodily injury, and we know that that's Berniard. Clabon Berniard was absolutely brutal with what he did to Charlene in the kitchen. He kicked her. That's an assault. He put the gun to the top of her head and began a countdown. That's an assault.

7 VRP at 1034. She then went on to argue that she had been in "an entirely different part of the house" and had not been involved in Berniard's assault of Charlene.

consecutively.[13]

ANALYSIS

I. SUFFICIENT EVIDENCE

Knight argues that there was insufficient evidence to support her two second degree assault convictions, against JS (Count III) and Charlene (Count V). We disagree.

A. Standard of Review

Evidence is sufficient if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt; evidence is viewed in the light most favorable to the State. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). A defendant claiming that the evidence was insufficient admits the truth of the State's evidence and all reasonable inferences that may be drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

B. Second Degree Assaults

To prove that Knight was an accomplice to the assaults on Charlene and JS, the State needed to show that she (Knight) knowingly "promote[d]" or "facilitate[d]" the commission of

[13] The trial court sentenced Knight as follows: (1) 548 months on Count I (first degree felony murder); (2) 171 months on Count II (first degree robbery of James); (3) 84 months on Count III (second degree assault of JS); (4) 171 months on Count IV (first degree robbery of Charlene); (5) 84 months on Count V (second degree assault of Charlene); and (6) 116 months on Count VI (first degree burglary), to run concurrently. The trial court imposed firearm enhancements of 60 months on Counts I, II, IV, and VI, and 36 months on counts III and V, to run consecutively (apparently to each other) for a total confinement period of 860 months.

these crimes (1) by soliciting, commanding, encouraging, or requesting another person to commit the crimes; or (2) by aiding or agreeing to aid another in the planning or committing of the crimes. RCW 9A.08.020(3)(a).[14] A person aids or abets a crime by associating himself with the undertaking, participating in it as in something he desires to bring about, and seeking by his action to make it succeed. *In re Welfare of Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979).

Knight does not dispute that Berniard's kicking Charlene in the head and hitting JS with the butt of his firearm satisfied the elements of second degree assault as to each victim. Instead, she argues that she cannot be culpable as an accomplice to the assaults because they occurred while she was upstairs gathering property in the Sanders' main bedroom. This argument fails: A person's physical presence during the offense is not required for accomplice liability. *See State v. Trujillo*, 112 Wn. App. 390, 398, 408, 49 P.3d 935 (2002) (defendant facilitated commission of murder by knowingly driving the shooters and their weapons to kill rival gang member, despite remaining in van during the shooting).

Knight is correct that "mere presence at the scene" cannot serve as the basis for accomplice liability. Br. of Appellant at 9 (citing *Wilson*, 91 Wn.2d at 491-92). But Knight was more than merely a present, uninvolved observer. The State presented the following evidence from which the jury could reasonably infer that Knight knowingly promoted or facilitated the commission of the assaults: (1) Knight called James to arrange a meeting under the pretense of purchasing a wedding ring advertised for sale; (2) she drove Higashi, Reese, and Berniard to the

[14] The legislature amended RCW 9A.08.020 in 2011. LAWS OF 2011, ch. 336, § 351. These amendments did not alter the statute in any way relevant to this case; accordingly, we cite the current version of the statute.

Sanders' home; (3) she knew that the plan to obtain the Sanders' ring involved using loaded guns; (4) once inside, she tied Charlene's hands behind her back with zip ties and forced her to the ground; and (5) after Charlene and James were on the ground, Knight used a Bluetooth to signal Reese and Berniard to enter the house, knowing that they were both armed. Each act placed the Sanders in a more vulnerable position and facilitated the commission of the assaults by allowing Knight's accomplices to gain entrance and to avoid resistance. Based on this evidence, we hold that a reasonable jury could infer that Knight promoted or facilitated the commission of these two assaults by aiding another in planning or committing the assaults.

II. DOUBLE JEOPARDY

For the first time on appeal, Knight argues that her two second degree assault convictions against Charlene and James[15] (Counts V and III) and two first degree robbery convictions, also against Charlene and James (Counts IV and II), constituted double jeopardy. Specifically, she argues that (1) the jury instructions for her second degree assault convictions were ambiguous, and (2) the trial court erred in failing to merge these assault convictions into her robbery convictions.[16] Again, we disagree.

[15] In her brief, Knight mistakenly refers to James Sanders as the victim of one of the second degree assault convictions, even though the record shows that JS and Charlene were the only assault victims and James was the murder victim in Count I. But at oral argument, Knight withdrew this argument, conceding that she had mistakenly misstated the counts and victims for this part of her argument. Therefore, we do not further consider it.

[16] The State argues that Knight waived her merger claim. But the record shows that Knight timely raised this issue below, thus preserving this error for our review.

A. Failure To Preserve Jury Instruction Challenge

Generally, a party who fails to object to jury instructions below waives any claim of instructional error on appeal. *State v. Edwards*, 171 Wn. App. 379, 387, 294 P.3d 708 (2012). But a defendant does not waive a manifest error affecting a constitutional right by failing to object below. RAP 2.5(a)(3); *State v. Walsh*, 143 Wn.2d 1, 7, 17 P.3d 591 (2001). The initial burden is on Knight to demonstrate that the error is both manifest and is of constitutional dimension. RAP 2.5(a)(3); *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). The determination of whether an error is "manifest" requires an appellant to show "actual prejudice," which we determine by looking at the asserted error to see if it had "practical and identifiable consequences" at trial. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (internal quotation marks omitted). *See also State v. Bonds*, 174 Wn. App. 553, 569, 299 P.3d 663 (2013). We narrowly construe exceptions to RAP 2.5(a). *State v. Montgomery*, 163 Wn.2d 577, 595, 183 P.3d 267 (2008).

Our Supreme Court has held that a double jeopardy claim is an error of constitutional magnitude. But Knight fails to make any showing that the alleged ambiguous jury instruction error was manifest because she fails to show any prejudice resulting from the jury instruction that she alleges, for the first time on appeal, was ambiguous. *State v. Mutch*, 171 Wn.2d 646, 661, 254 P.3d 803 (2011); *State v. Bertrand*, 165 Wn. App. 393, 402, 267 P.3d 511 (2011), *review denied*, 175 Wn.2d 1014 (2012). We hold, therefore, that she has failed to carry her burden to trigger exercise of our limited discretion under RAP 2.5(a)(3) to entertain a non-preserved claim of error; thus, we do not address the merits of her instructional challenge. *Bertrand*, 165 Wn. App. at 402.

B. Merger; Double Jeopardy

The state and federal double jeopardy clauses provide the same protections. *In re Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004); *see* U.S. CONST. amend. V; WASH. CONST. art. I, § 9. If a defendant's acts support charges under two statutes, we ask whether the legislature intended to authorize multiple punishments for the crimes in question. *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005); *In re Pers. Restraint of Borrero*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007), *cert. denied*, 552 U.S. 1154, 128 S. Ct. 1098, 169 L. Ed. 2d 832 (2008). Double jeopardy principles also bar courts from entering multiple convictions for the same offense. *State v. Womac*, 160 Wn.2d 643, 650-51, 160 P.3d 40 (2007). We consider the elements of the crimes as charged and proved, not merely at the level of an abstract articulation of the elements. *Freeman*, 153 Wn.2d at 777 (citing *State v. Vladovic*, 99 Wn.2d 413, 421, 662 P.2d 853 (1983); *Orange*, 152 Wn.2d at 817-18). Double jeopardy is a question of law, which we review de novo. *Freeman*, 153 Wn.2d at 770.

In *State v. Calle*, our Supreme Court set forth a three-part test for double jeopardy claims. 125 Wn.2d 769, 776, 888 P.2d 155 (1995); *see also State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008). First, we search for express or implicit legislative intent to punish the crimes separately; if this intent is clear, we look no further. *Calle*, 125 Wn.2d at 776. Second, if there is no clear statement of legislative intent, we may apply the "same evidence" *Blockburger* test, which asks if the crimes are the same in law and in fact. *Calle*, 125 Wn.2d at 777-78 (citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). Third, we may use the merger doctrine to discern legislative intent where the degree of one offense is elevated by conduct constituting a separate offense. *Kier*, 164 Wn.2d at 804 (citing *Vladovic*, 99

Wn.2d 419). But even if two convictions appear to merge on an abstract level, the State may punish them separately if each conviction has an independent purpose or effect. *Kier*, 164 Wn.2d at 804; *Freeman*, 153 Wn.2d at 773.

Under the merger doctrine, when a criminal act forbidden under one statute elevates the degree of a crime under another statute, the courts presume that the legislature intended to punish both acts through a single conviction for the greater crime. *Freeman*, 153 Wn.2d at 772-74 (when assault elevates robbery to first degree, generally the two crimes constitute the same offense for double jeopardy purposes). The *Freeman* Court did not, however, adopt a per se rule; instead, it underscored the need for a reviewing court take a "hard look at each case" based on its facts and charged crimes. *Freeman*, 153 Wn.2d at 774.

Knight argues that her convictions for second degree assault and first degree robbery of Charlene (Counts V and IV) should merge.[17] Because the later second degree assault was not necessary to elevate the degree of the earlier robbery, this merger argument fails.[18] *See Freeman*, 153 Wn.2d at 772-73; *State v. Esparza*, 135 Wn. App. 54, 57, 143 P.3d 612 (2006).

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[17] Because Knight argues that her convictions constitute double jeopardy under only the merger doctrine, we confine our analysis to that issue. RAP 10.3(6).

[18] The instant case differs from *Kier*, in which our Supreme Court held that Kier's first degree robbery and second degree assault convictions merged. *Kier*, 164 Wn.2d at 801-02. Kier was also charged with being armed with or displaying a deadly weapon. Kier pointed a gun at the assault victims, forced them out of their car, and drove their car away. *Id.* at 802-03. The Court concluded that Kier's threatened use of force, a necessary element in both the second degree assault and the first degree robbery as charged and proved, was satisfied by only one act: Kier's being armed with or displaying a gun. *Id.* at 805-06. The Court explained,

> The merger doctrine is triggered when second degree assault with a deadly weapon elevates robbery to the first degree because being armed with or displaying a firearm or deadly weapon to take property through force or fear is *essential* to the elevation.

The information alleged that Knight was guilty of robbery under RCW 9A.56.190, which provides that a person commits robbery "when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person." The information elevated this robbery to the first degree[19] by alleging that Knight, or her accomplice, was "armed with a deadly weapon" while taking Charlene's wedding ring. 2 CP at 305. Consistent with the information, the jury instructions specified that to elevate robbery to the first degree, the jury had to find that, *during* the robbery, "[Knight] or an accomplice [was] armed with a deadly weapon *or* inflict[ed] bodily injury." 2 CP at 339 (Instruction 12) (emphasis added); *see also* CP at 354 (Instruction 26). The State charged and produced evidence for only the first alternative, armed with a deadly weapon; and the record shows that this first degree robbery was completed when Higashi threatened Charlene with a firearm and Knight removed Charlene's wedding ring, at which point no one had inflicted bodily injury on Charlene.

Id. at 806 (emphasis added).

Unlike *Kier*, where the deadly weapon element of the second degree assault conviction *necessarily* elevated the degree of the robbery (because there were no other acts that the jury could have used to enhance the degree of the robbery), here, the State proved the first degree robbery of Charlene and the second degree assault of Charlene based on *separate* criminal acts, separated in time and with separate purposes. As we discussed previously, Higashi's early use of a firearm to steal Charlene's wedding ring from her finger elevated the robbery to first degree, Count IV; the State proved the second degree assault based on Berniard's later kicking Charlene in the head, Count V, in an attempt to get her to divulge the location of the safe. Thus, Knight's second degree assault was *not* essential to the elevating of her robbery conviction to the first degree.

[19] RCW 9A.56.200(1)(a)(i).

The information also alleged that Knight was guilty of second degree assault in that she "intentionally assault[ed] Charlene Sanders, and thereby recklessly inflict[ed] substantial bodily harm, contrary to RCW 9A.36.021(1)(a), *and/or* did intentionally assault Charlene Sanders with a deadly weapon, to wit: a handgun."[20] 2 CP at 307 (emphasis added). The trial court instructed the jury on the first and third common law definitions of "assault"[21]:

> An assault is an intentional touching or striking of another person. . . . An assault is also an act done with the intent to create in another apprehension and fear of bodily injury.

and

> A person commits the crime of [a]ssault in the [s]econd [d]egree when she or an accomplice intentionally assaults another and thereby recklessly inflicts substantial bodily harm or assaults another with a deadly weapon.

2 CP at 346 (Instruction 18), 347 (Instruction 19), respectively. The "to convict" instructions for second degree assault contemplated Knight's or her accomplices' using a handgun as the means of proving second degree assault *or* an unlawful touching or striking, as provided as an alternative means under RCW 9A.36.021(1)(a).

Knight's merger argument would be compelling if the second degree assault of Charlene could have involved *only* Higashi's pointing Knight's gun at Charlene when they robbed Charlene of her wedding ring at the beginning of the home invasion; but such were the not the

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[20] RCW 9A.36.021(1) provides that a person is guilty if he or she "(a) [i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm; *or* . . . (c) [a]ssaults another with a deadly weapon." (Emphasis added).

[21] In the absence of a statutory definition of "assault," Washington courts use common law definitions, which include: "(1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm." *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009); *see also Kier*, 164 Wn.2d at 806.

facts here. On the contrary, accomplice Berniard's *later* assaults of Charlene (with a different firearm and by kicking her in the head) support the second degree assault conviction, independent of the firearm threat that Knight and Higashi had earlier used to take Charlene's ring during the robbery. Both the State's and Knight's closing arguments support the jury's treatment of Higashi's earlier firearm threat while removing Charlene's wedding ring from her finger as separate from Berniard's later threatening Charlene by pointing a gun at her head to force her to reveal the location of the safe and kicking her in the head. For example, two main points during Knight's closing argument were (1) her open admission that she had participated in the initial robbery of Charlene's ring while Higashi pointed the gun, claiming, however, that the others had forced her to participate in that robbery and the burglary; and (2) she had no prior knowledge of, she had been nowhere near, and she had not in any way participated in Berniard's later brutal assaults of Charlene, JS, and James.

As our Supreme Court admonished in *Freeman* and *Mutch*, when considering double jeopardy, we take a "hard look" at the facts[22] and a "rigorous" review of the "entire trial record."[23] We focus on the crimes as charged and instructed to the jury, the evidence in the case,

[22] *Freeman*, 153 Wn.2d at 774.

[23] *Mutch*, 171 Wn.2d at 664.

and the closing arguments.[24] Here, Berniard's pointing his gun at Charlene and kicking her in the head to force her to reveal the location of a safe provided an "independent purpose" and support for a separate conviction for this later second degree assault, independent of Knight's and Higashi's earlier completed robbery of Charlene's ring at gunpoint. *See Freeman*, 153 Wn.2d at 778-79 ("independent purpose or effect" exception is "less focused on abstract legislative intent and more focused on the facts of the individual case"); *State v. Prater*, 30 Wn. App. 512, 516, 635 P.2d 1104 (1981) (separate injury and intent justified separate assault conviction where defendant struck victim *after* completing a robbery). Berniard's later assault of Charlene to locate the family safe "was no part of the robbery"[25] of her wedding ring by Knight and Higashi earlier.

We hold, therefore, that under the facts here, (1) the second degree assault (Count V) and the first degree robbery (Count IV) do not merge; and (2) proof that Knight and/or her accomplices committed the crime of second degree assault was not necessary to elevate the robbery to first degree. *Esparza*, 135 Wn. App. at 66 (citing *Freeman*, 153 Wn.2d at 777-78).

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[24] As the Supreme Court explained in *Mutch*:

> While the court may look to the entire trial record when considering a double jeopardy claim, we note that our review is rigorous and is among the strictest. Considering the evidence, arguments, and instructions, if it is not clear that it was "*manifestly apparent* to the jury that the State [was] not seeking to impose multiple punishments for the same offense" and that each count was based on a separate act, there is a double jeopardy violation.

Mutch, 171 Wn.2d at 664 (alteration in original) (quoting *State v. Berg*, 147 Wn. App. 923, 931, 198 P.3d 529 (2008)).

[25] *Prater*, 30 Wn. App. at 516.

III. Effective Assistance of Counsel

Knight next argues that she received ineffective assistance when her trial counsel allegedly failed to inform the trial court that it could impose an exceptional sentence downward. Knight's argument fails.

A. Standard of Review

To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) her counsel's representation was deficient, falling below an objective standard of reasonableness; and (2) the deficient performance prejudiced her. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009) (citing *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984))). A petitioner's failure to prove either prong ends our inquiry. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996)[26].

A standard range sentence is generally not appealable. RCW 9.94A.585(1). Nevertheless, a defendant may appeal the trial court's procedure in imposing his sentence. *State v. Ammons*, 105 Wn.2d 175, 183, 713 P.2d 719, 718 P.2d 796 (1986). Here, Knight encompasses her sentencing challenge within an ineffective assistance of counsel claim.

[26] *Overruled on other grounds by Carey v. Musladin*, 549 U.S. 79, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006).

B. No Prejudice Shown

Even assuming, without deciding, that the trial court could have imposed an exceptional sentence downward under former RCW 9.94A.535 (2008)[27], we hold that (1) Knight fails to show that her counsel's failure to inform the court of this possibility prejudiced her,[28] and (2) her reliance on *State v. McGill*[29] is misplaced.[30] The trial court in *McGill* "erroneously believed it could not depart from a standard range sentence even though it expressed a desire to do so." *McGill*, 112 Wn. App. at 97. Here, in contrast with *McGill*, there is no indication that the trial court would have considered or imposed even a low end standard sentence, let alone an exceptional sentence downward.[31] Instead, the trial court's imposition of a ***high-end*** standard-range sentence expressed quite the opposite. Knight has failed to show that her counsel's failure

[27] The legislature has since amended this statute in 2013. LAWS OF 2013, ch. 256 § 2. The amendments did not alter the statute in any way relevant to this case; accordingly, we cite the current version of the statute.

[28] We agree with the State that defense counsel has no obligation to advocate for an exceptional sentence below the standard range in general, much less in every case.

[29] *State v. McGill*, 112 Wn. App. 95, 47 P.3d 173 (2002).

[30] A jury convicted McGill of three cocaine-delivery crimes. *McGill*, 112 Wn. App. at 98. The trial court imposed a low end standard sentence, stating it had "no option but to sentence [McGill] within the range." McGill's counsel failed to inform the trial court that there were other permissible bases for imposing an exceptional sentence downward. *McGill*, 112 Wn. App. at 97. On appeal, Division One held that McGill received ineffective assistance because the trial court's comments indicated that it *would have* considered an exceptional sentence had it known it could. *McGill*, 112 Wn. App. at 100-01.

[31] Moreover, there is nothing in the record to suggest that the court relied on an impermissible basis for refusing to impose an exceptional sentence, as was the case in *McGill*. *McGill*, 112 Wn. App. at 100 (citing *State v. Garcia-Martinez*, 88 Wn. App. 322, 329, 944 P.2d 1104 (1997), *review denied*, 136 Wn.2d 1002 (1998)).

to inform the court of the possibility of an exceptional sentence downward prejudiced her. Accordingly, her ineffective assistance of counsel challenge fails.

IV. Offender Score

Finally, Knight argues that the trial court erred in calculating her offender score because several of her current convictions were based on the "same criminal conduct" under RCW 9.94A.589(1)(a). We disagree.

A. Standard of Review

Where two or more offenses encompass the same criminal conduct, the sentencing court counts them as a single crime when calculating the defendant's offender score. RCW 9.94A.589(1)(a). "Same criminal conduct" for offender score calculation purposes means "two or more crimes" that (1) require the "same criminal intent," (2) were committed at the "same time and place," and (3) involved the "same victim." RCW 9.94A.589(1)(a). If any one of these elements is missing, the sentencing court must count the offenses separately in calculating the offender score. *State v. Maxfield*, 125 Wn.2d 378, 402, 886 P.2d 123 (1994); *see also State v. Dunaway*, 109 Wn.2d 207, 216, 743 P.2d 1237, 749 P.2d 160 (1988). But absent an abuse of discretion or misapplication of the law, we may not reverse a trial court's determination of what constitutes the same criminal conduct for offender score calculation purposes. *State v. Tili*, 139 Wn.2d 107, 122, 985 P.2d 365 (1999).

B. Crimes Not Based on Same Criminal Conduct

Knight argues that the trial court erred in failing to treat the following pairs of crimes as the "same criminal conduct" for offender score purposes because they occurred at the same time and place and her "objective intent throughout the incident never changed from completing the

robbery"[32]: (1) first degree robbery and felony murder of James (Counts II and I), and (2) first degree robbery and second degree assault of Charlene (Counts IV and V).[33] She also argues that first degree burglary should have counted as the same criminal conduct as her other crimes because it, too, occurred at the same time and place and her "objective intent throughout the incident never changed." Br. of Appellant at 31. At sentencing, the trial court rejected Knight's same criminal conduct argument, stating:

> [T]he robbery, that is, of the ring, was completed before the assaults and the murder occurred. Therefore, although they occurred in the same place, Counts I and II and IV and V do *not occur at the same time*. The robbery of James Sanders was completed, as well as the robbery of Charlene Sanders, at the time their rings were stolen. And therefore, the murder and the assaults would not be the same criminal conduct because of that.
>
> In addition, we have a different person involved in the assaults, which is Clabon Berniard, and therefore, it's a completely separate criminal act for that purpose.

8 VRP at 1090 (emphasis added). We adopt the trial court's rationale as it pertains to our offender score analysis here.

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[32] Br. of Appellant at 31. Knight further argues that (1) she was upstairs when her accomplices committed the violent acts against Charlene and JS; (2) she had been unarmed during the earlier robbery of the Sanders' wedding rings; and (3) she never physically harmed any of the victims. This argument, however, has no bearing on the same criminal conduct/offender score issue. As the trial court properly instructed the jury, it could convict Knight based on her accomplice liability for all counts charged; and as we have already explained, the State's evidence supported her convictions as an accomplice. Because she was culpable for the acts and intentions of her accomplices, her contention that she personally did not intend their criminal acts does not support her "same criminal conduct" offender score argument. *See State v. McDonald*, 138 Wn.2d 680, 688, 981 P.2d 443 (1999) (an accomplice and principal are equally culpable regardless of which one actually commits the criminal act or the degree of participation of each).

[33] As Knight correctly concedes, "[C]rimes against separate victims could not constitute the same criminal conduct." Br. of Appellant at 31.

1. Robbery and murder of James

Our Supreme Court has previously addressed and rejected the notion that robbery and murder share the same criminal intent for "same criminal conduct" offender score purposes, holding, "When viewed objectively, . . . the intent behind robbery is to acquire property while the intent behind attempted murder is to kill someone."[34] *Dunaway*, 109 Wn.2d at 216. In addition, here, James's later murder did not further the commission of either earlier robbery because both robberies were completed once Knight's accomplice took James's and Charlene's wedding rings, well before Berniard's later assault of Charlene and before Berniard and Reese brought the children downstairs. Thus, Knight fails to show that the trial court abused its discretion in concluding that the murder and robbery of James did not occur at the "same time." RCW 9.94A.589(1)(a).

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[34] Our Supreme Court expressly noted in *Dunaway*:

> Green and Franklin each committed armed robbery and then each attempted to murder his victim. The murders were attempted after receiving the money but before leaving the premises. When viewed objectively, the criminal intent in these cases was substantially different: [T]he intent behind robbery is to acquire property while the intent behind attempted murder is to kill someone. RCW 9A.56.190; RCW 9A.32.030. The defendants have argued that the intent behind the crimes was the same in that the murders were attempted in order to avoid being caught for committing the robberies. However, this argument focuses on the subjective intent of the defendants, while the cases make clear that the test is an objective one. *State v. Huff*, 45 Wn. App. 474, 478-79, 726 P.2d 41 (1986); *State v. Edwards*, 45 Wn. App. 378, 382, 725 P.2d 442 (1986); *State v. Calloway*, 42 Wn. App. 420, 424, 711 P.2d 382 (1985). Additionally, neither crime furthered the commission of the other. While the attempted murders may have been committed in an effort to escape the consequences of the robberies, they in no way furthered the ultimate goal of the robberies. Clearly, the robberies did not further the attempted murders. Accordingly, we hold that these crimes did not encompass the same criminal conduct.

Dunaway, 109 Wn.2d at 216-17.

2. Robbery and assault of Charlene

In our evidence sufficiency analysis, we held that Knight was an accomplice to the assault on Charlene based on Berniard's kicking Charlene in the head. We rejected her argument that, because this assault occurred while Knight was upstairs gathering property in the Sanders' main bedroom, she could not be culpable as an accomplice. The robbery of Charlene was complete once Knight removed the ring from Charlene's finger while Higashi held the firearm. This later assault—Berniard's kicking Charlene in the head in an attempt to get the safe—does not constitute the same criminal conduct as the earlier robbery because, as the trial court similarly concluded, these two crimes did not occur at the same time. Thus, they could not count as the same criminal conduct for offender score purposes under RCW 9.94A.589(1)(a).

3. Burglary anti-merger statute

Knight's final argument—that the burglary constituted the same criminal conduct as all of her other convictions—ignores the trial court's independent legislative authority to punish the burglary separately under the burglary anti-merger statute:

> Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor[e] as well as for the burglary, and may be prosecuted for each crime separately.

RCW 9A.52.050. This statute gives a trial judge discretion to punish a burglary separately, even where the burglary and another crime encompassed the same criminal conduct. *State v. Lessley*, 118 Wn.2d 773, 781-82, 827 P.2d 996 (1992). The trial court here had authority under RCW 9A.52.050 to impose a separate sentence for Knight's burglary conviction, regardless of whether the burglary constituted the same criminal conduct as any of her other convictions.

We hold that Knight fails to show that the trial court abused its discretion in denying her request to treat any of her convictions as the same criminal conduct for offender score calculation purposes under RCW 9.94A.589(1)(a).

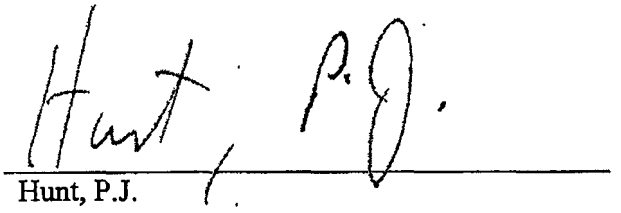
V. REMAINING SAG ISSUE: SPECIAL VERDICT UNANIMITY

In her SAG, Knight asserts for the first time that her sentence violated her right to a jury trial under the Washington Constitution, article 1, section 21, because the jury was not properly instructed it could vote "no" on the special verdict forms for her firearm enhancements. SAG at 1. She is incorrect.

Knight fails to show how this alleged jury instruction error prejudiced her or that it was manifest for purposes of the RAP 2.5(a)(3) exception to the preservation requirement. *Mutch*, 171 Wn.2d at 656; *Bertrand*, 165 Wn. App. at 402 (special verdict jury instruction incorrectly stating that jury must unanimously answer "no" is not of constitutional magnitude); *State v. Grimes*, 165 Wn. App. 172, 182-84, 267 P.3d 454 (2011), *review denied*, 175 Wn.2d 1010 (2012). Thus, she cannot raise this challenge for the first time on appeal, and we do not further

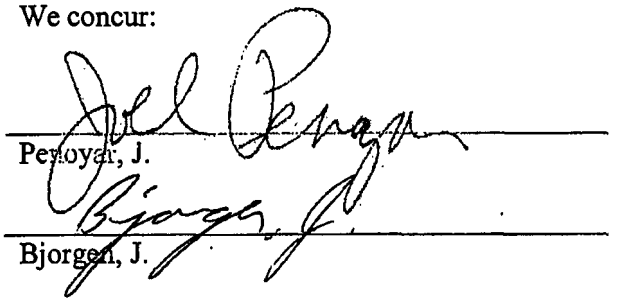
address it.[35] RAP 2.5(a)(3); *Bertrand*, 165 Wn. App. at 402.[36]

We affirm.



Hunt, P.J.

We concur:



Penoyar, J.

Bjorgen, J.

[35] Even were we to consider the merits of Knight's challenge to the special verdict instructions, the trial court here gave the proper instruction, as follows:

> You will also be given special verdict forms for the [charged crimes]. If you find the defendant not guilty of any of these crimes, do not use the special verdict forms for that count. If you find the defendant guilty of any of these crimes, you will then use the special verdict forms. In order to answer the special verdict forms "yes," all twelve of you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you do not unanimously agree that the answer is "yes" then the presiding juror should sign the section of the special verdict form indicating that the answer has been intentionally left blank.

2 CP at 365 (Instruction 35). Thus, contrary to Knight's assertion, the jury instruction properly informed the jury that (1) it should sign the special verdict forms only if it was unanimously satisfied that the answer was "yes"; and (2) if it was *not* unanimous, it should leave the form blank. This instruction comports with the instruction approved by our Supreme Court in *State v. Nunez*, 174 Wn.2d 707, 710, 719, 285 P.3d 21 (2012).

[36] *See also O'Hara*, 167 Wn.2d at 98 (manifest constitutional errors "may still be subject to a harmless error analysis").

APPENDIX “C”

Mandate

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NO: 10-1-01903-2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

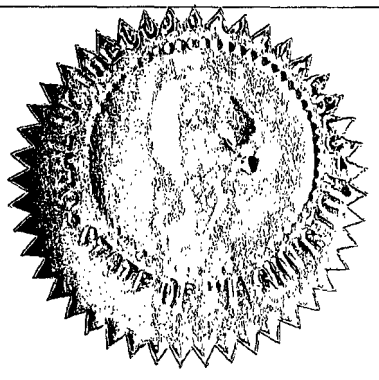
DIVISION II

STATE OF WASHINGTON, Respondent, v. AMANDA C. KNIGHT, Appellant.	No. 42130-5-II MANDATE Pierce County Cause No. 10-1-01903-2

The State of Washington to: The Superior Court of the State of Washington
in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on September 24, 2013 became the decision terminating review of this court of the above entitled case on February 5, 2014. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. Costs have been awarded in the following amount:

Judgment Creditor: State of Washington, $10.81
Judgment Creditor: Appellate Indigent Defense Fund, $5,084.78
Judgment Debtor: App., Amanda C. Knight, $5,095.59



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 7th day of March, 2014.

Clerk of the Court of Appeals,
State of Washington, Div. II

APPENDIX "D"

Brief of Appellant on Direct Appeal

Appellate Divison
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NO. 42130-5-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

AMANDA KNIGHT, Appellant,

v.

STATE OF WASHINGTON, Respondent,

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The court erred in enter a conviction for Assault in the Second Degree because the State failed to provide sufficient evidence that assaulted Charlene Sanders. as a principal or as an accomplice.

2. The court erred in enter a conviction for Assault in the Second Degree because the State failed to provide sufficient evidence that assaulted James Sanders, Jr., as a principal or as an accomplice.

3. The court erred when it failed to merge the Assault in the Second Degree Conviction with the Robbery conviction against Charlene Sanders.

4. The court erred when it failed to merge the Assault in the Second Degree Conviction with the Robbery conviction against Charlene Sanders.

5. Defense counsel was deficient at sentencing because he failed to inform the court that it could impose an exceptional sentence downward

6. The trial court erred when it calculated Ms. Knight's offender score because several of her convictions were the same criminal conduct as defined by RCW 9.94A.525 (5)(A).

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the State failed to provide sufficient evidence that assaulted Charlene Sanders, as a principal or as an accomplice. (Assignment of Error 1)

2. Whether the State failed to provide sufficient evidence that assaulted James Sanders, Jr., as a principal or as an accomplice. (Assignment of Error 2)

3. Whether the court erred when it failed to merge the Assault in the Second Degree Conviction with the Robbery conviction against Charlene Sanders. (Assignment of Error 3)

4. Whether court erred when it failed to merge the Assault in the Second Degree Conviction with the Robbery conviction against Charlene Sanders. (Assignment of Error 4)

5. Whether defense counsel was deficient at sentencing because he failed to inform the court that it could impose an exceptional sentence downward. (Assignment of Error 5)

6. Whether the trial court erred when it calculated Ms. Knight's offender score because several of her convictions were the same criminal conduct as defined by RCW 9.94A.525 (5)(A). (Assignment of Error 6)

III. STATEMENT OF THE CASE

1. Procedural Facts

On May 3, 2010, Joshua Reese, Kiyoshi Higashi, John Doe, and Amanda Knight were each charged as co-defendants with one count of Murder in the First Degree, two counts of Robbery in the First Degree, two counts of Assault in the Second Degree and Burglary in the First Degree. John Doe was later identified as Claybon Berniard. CP 451. The charges arose from the shooting death of Jim Sanders during an armed robbery in which Jim Sanders and Charlene Sanders were bound and beaten while their children remained in the house. CP 451-52.

On May 5, 2010, the State filed an amended information that charged Ms. Knight as an accomplice to First Degree Murder, First Degree burglary (two counts), First Degree Robbery (two counts), and

second degree assault (two counts). CP 6-9. The State alleged that Ms. Knight, acted as an accomplice to all of these crimes and that one of the participants in the crime was armed with a firearm when each of the crimes occurred. CP 6-9. On January 7, 2011, the State filed a second amended information that alleged that alleged each of the above counts were committed under one or more of the aggravating circumstances as defined by RCW 9.94A.535(3)(a). CP 87-91.

Mr. Higashi was the first of the four co-defendants to stand trial and the only one who stood trial before Ms. Knight. CP 452. Higashi's trial began on February 17, 2011. He was convicted on all counts and sentenced on March 11, 2011. CP 452.

2. Substantive Facts

At Ms. Knight's trial, it was essentially undisputed that Ms. Knight participated in the robbery. Ms. Knight admitted that she entered the home of the victims, on April 28, 2010, together with Higashi. RP 912. Higashi and Ms. Knight gained access to the home under the auspices of purchases a ring that the victims had advertised on craigslist. RP 910-14. Once in the home, Higashi pulled a gun out of his pocket and pointed it at Jim Sanders. RP 916-17.

Ms. Knight then, at Higashi's direction, "zip tied" Charlene Sanders's hands behind her back. RP 917-18. Then, the two other co-

defendants, Berniard and Reese, entered the home and went upstairs and brought the two children downstairs at gun point. RP 918. Ms. knight immediately ran upstairs and began to gather valuables from the home. RP 919.

While Ms. Knight was upstairs, the co-defendants began to physically assault the victims downstairs. RP 585-92. Berniard pointed a pistol at Charlene Sanders. RP 585. He then hit and kicked her in an attempt to get the combination to the safe in the house. 585-87. Berniard then began to assault James Sanders Jr. 587-92. James Sanders then broke free of his restraints and jumped up to join the fight. These assaults all occurred while Ms. Knight was upstairs. RP 919-25.

Throughout this entire incident, Ms. Knight was not armed. RP 915. As she gathered the valuable items from upstairs, Ms. Knight heard a gunshot, and ran out the front door. RP 920. After the shooting, each of the defendants except the shooter, Higashi, fled to California together and were apprehended a few days later. RP 923.

Ms. Knight testified in her defense. RP 894-1000. She did not deny most of the facts as argued by the state. Instead, Ms. Knight told the jury that she committed these acts while under duress. Specifically, she testified that co-defendant Higashi stole her gun from her when he was working on her stereo and threatened to shoot her and her family if she did

not participate in the robbery. RP 900-04. She further testified that she did not go to police immediately after the shooting because Higashi maintained possession of her gun and pointed it at her face on several occasions. RP 927.

Prior to the trial, Ms. Knight moved the court to allow her to present this defense not only for the robbery, assault, and burglary charges, but also the murder charges. CP 117-42. The court waited until the close of evidence to decide that while it would instruct the jury on duress as to the lesser charges, it would not allow Ms. Knight to argue that duress is a defense for the murder charge, instructing the jury that "Duress is not a defense to Murder in the First Degree." CP 365 (Jury Instruction No. 34).

Ultimately, the jury found Ms. Knight guilty of all counts. CP 351. At sentencing, the State asked for a high end range sentence of 860 months. CP 450. In response, the defense asked for 723 months, what was essentially a life sentence. RP 1107. The court sentenced Ms. Knight to the 860 months as requested by the State. RP 1201.

IV. ARGUMENTS

1. The State failed to prove sufficient evidence that Ms. Knight committed assault in the second degree of either victim Charlene or James Sanders Jr.

Evidence of a charge or an element of a charge is sufficient if, viewed in the light most favorable to the state, a rational trier of fact could have found guilt beyond a reasonable doubt. All reasonable inferences from the evidence must be drawn in favor of the state and interpreted most strongly against the defendant. *State v. Clark*, 143 Wn.2d 731, 769, 24 P.3d 1006 (2001). In this case, the State did not provide sufficient evidence that Ms. Knight, as a principle or as an accomplice, assaulted either of the victims by displaying a firearm or inflicting substantial bodily harm.

The jury was instructed as follows with regard to accomplice liability:

> A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of a crime.
>
> A person is an accomplice in the commission of a crime, if *with knowledge that it will promote or facilitate* the commission of *the crime*, he or she either: (1) solicits, commands, encourages, or requests another person to commit the crime, or (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the

> criminal activity of another must be shown to establish that a person present is an accomplice.

CP 31.

These instructions are consistent with Washington case law, which states that to aid and abet another person's criminal act, one must associate oneself with the undertaking, participate in it with the desire to bring it about, and seek to make it succeed by one's actions. *In re Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979); *State v. Galisia*, 63 Wn. App. 833, 839, 822 P.2d 303, *review denied*, 119 Wn.2d 1003 (1992). "Mere knowledge or physical presence at the scene of a crime neither constitutes a crime nor will it support a charge of aiding and abetting a crime." *Wilson*, 91 Wn.2d at 491-92 (quoting *State v. J-R Distribs., Inc.*, 82 Wn.2d 584, 593, 512 P.2d 1049 (1973), *cert. denied*, 418 U.S. 949 (1974)).

Ms. Knight was convicted of assaulting (two counts) and robbing (two counts) two separate victims: James and Charlene Sanders. To convict Ms. Knight of Assault in the Second Degree for either Charlene or James Sanders Jr., the jury must have found that (1) on April 28, 2010, Ms. Knight or an accomplice (a) intentionally assaulted Charlene Sanders and thereby recklessly inflicted substantial bodily harm, ***or*** (b) assaulted Charlene Sanders with a deadly weapon. CP 345-47; CP 350. That assault could have been an intentional touching with unlawful force that was

harmful or offensive, or an act done to create a reasonable apprehension of fear in the victim. CP 345 (defining assault).

These convictions must have been based upon accomplice liability because the record does not show that Ms. Knight ever physically harmed any of the victims or that she ever even possessed a firearm. However, the state failed to prove that she (1) had knowledge that her actions would promote the assault, or (2)(a) that she solicited, commanded, encouraged, or requested another person to commit the assaults, or (2)(b) aided or agreed to aid another person in planning or committing the assaults.

The assaults in this case began while Ms. Knight was upstairs and without her knowledge. The assault of Charlene Sanders occurred when the co-defendants pulled out their weapons and physically assaulted the victims downstairs. RP 585-92. Berniard pointed a pistol at Charlene Sanders. RP 585. He then hit and kicked her in an attempt to get the combination to the safe in the house, while Ms. Knight was upstairs. 585-87. Berniard then began to assault James Sanders Jr. 587-92. Throughout this entire incident, Ms. Knight was not armed. RP 915. ,

Furthermore the assault against James Sanders Jr. was completed without the assistance or knowledge of Ms. Knight and was completed when she was upstairs. Because Co-Defendant Berniard had completed the act of the assault while Ms. Knight was upstairs and without her

knowledge, she could not have aided and abetted in the assault. She neither associated himself with the co-defendants' assaults, participated in them with the desire to bring them about, nor sought to make the crimes succeed by any actions of her own. *See Wilson*, 91 Wn.2d at 491; *Galisia*, 63 Wn. App. at 839.

Her mere presence at the scene cannot amount to accomplice liability for the co-defendants' assaults. *See Wilson*, 91 Wn.2d at 491-92. Likewise, Ms. Knight's subsequent fleeing from the scene after the gunshots could not have aided and the co-defendants to commit the physical assaults because by then, the codefendants had already completed that crime.

Because the state failed to prove that Ms. Knight had knowledge that her actions would facilitate the assaults that occurred outside her presence and because she did not solicit or aid in those assaults, this court should vacate her assault convictions.

2. Ms. Knight's convictions for Second Degree Assault and First Degree Robbery of both Ms. Sanders James Sanders Sr. violate double jeopardy and the assaults must merge into the robberies.

a. Even if there was sufficient evidence that Ms. Knight facilitated the assaults, the jury instructions and the jury verdict were ambiguous and must be interpreted in favor of Ms. Knight.

When a verdict form is ambiguous and the State has failed to request a jury instruction as to which specific acts constituted a particular

element of a crime, the principle of lenity requires the court to interpret that verdict in the defendant's favor. *State v. DeRyke*, 110 Wn. App. 815, 824, 41 P.3d 1225 (2002). In another merger case, *State v. DeRyke,* the defendant was convicted of both first degree kidnapping while armed with a deadly weapon and attempted first degree rape while armed with a deadly weapon after he abducted a young girl at gunpoint and took her to a wooded area where he attempted to rape her before he was frightened off by a passerby. *Id.* at 818. Just as use of a firearm can elevate a Robbery 2 into a Robbery 1, possession of a deadly weapon can elevate a robbery from second to first degree. *Id.* at 823. The jury was instructed that either kidnapping or display of a deadly weapon could elevate the alleged attempted rape to that of the first degree, but was not asked to find which act it used to reach its verdict on the attempted rape. *Id.*

In holding that the two counts merged, the *DeRyke* court concluded that "[p]rinciples of lenity require [it] to interpret the ambiguous verdict in favor of DeRyke." *Id.* at 824.[1] In doing so the court noted that the State was free to "but chose not to, submit[] a proposed instruction that did not include kidnapping as a basis for finding DeRyke guilty of attempted rape

[1] *See also State v. Taylor*, 90 Wn. App. 312, 317, 950 P.2d 526 (1998) (interpreting ambiguous verdict in defendant's favor).

in the first degree," which would have alleviated any ambiguity in the verdict. *Id.* at 824.

Here, just as is *DeRyke*, the jury instructions and verdict form were ambiguous at best and the trial court erred by failing to merge the Second Degree Assault convictions and the Robbery convictions.

Ms. Knight was convicted of assaulting (two counts) and robbing (two counts) two separate victims: James Sanders Sr. and Charlene Sanders. To convict Ms. Knight of Assault in the Second Degree for either Charlene or James Sanders Jr., the jury must have found that (1) on April 28, 2010, Ms. Knight or an accomplice (a) intentionally assaulted Charlene Sanders and thereby recklessly inflicted substantial bodily harm, ***or*** (b) assaulted Charlene Sanders with a deadly weapon. CP 345-47; 350. That assault could have been an intentional touching with unlawful force that was harmful or offensive, or an act done to create a reasonable apprehension of fear in the victim. CP 345 (defining assault).

Looking at both of these instructions together, it is clear that the jury instructions required either actual force or threatened force to accomplish each respective crime. However, the jury instruction for assault in the second degree allowed the jury to convict Ms. Knight on two separate bases: either by inflicting substantial bodily harm or by simply displaying a firearm. CP 345. Thus, just as the court did in *DeRyke*, this

court must construe the jury verdict as finding that the same act that constituted the assault—or "the act done with the intent to create in another apprehension and fear of bodily injury"—was also the same act that constituted the force required for robbery—"the defendant's use or threatened use of immediate force, violence or fear of injury."

Furthermore, in *DeRyke*, the State failed to request a jury instruction that specified which crime—kidnapping or use of a deadly weapon—elevated his attempted rape charge to a higher degree, so the court was forced to interpret that verdict in favor of the defendant. Likewise here, the State failed to request a specific instruction on which particular acts were grounds for the Robbery and which ones it found to establish the Second Degree Assault.

Just as the State was free in *DeRyke* to offer more specific jury instructions (but decided not to), the State here simply gave the jury the broadest instructions possible to obtain a conviction on all counts. Because of this failure, the court should apply the rule of lenity to the ambiguous jury instructions and verdict, just as it did in *DeRyke*. Accordingly, the rule Lenity requires the court to interpret the assault verdict as relying upon the type of assault that is most favorable to the defendant, which in this case would be a finding that the assault occurred when the co-defendant pointed the gun at Charlene Sanders, which also established the

force required to commit the robbery. As argued below, this interpretation will require merger just as in *DeRyke*.

b. The assault conviction merges into the robbery conviction.

The State may bring multiple charges arising from the same criminal conduct in a single proceeding. *State v. Kier*, 164 Wn. 2d 798, 803, 194 P.3d 212 (2008). However, state and federal constitutional protections against double jeopardy prohibit multiple punishments for the same offense. *Id.* An appellate court reviews double jeopardy challenges de novo. *Id.* A defendant may suffer multiple punishments for the same criminal act where the legislature has elevated the degree of an offense—and the severity of its punishment—and the elevating circumstances are also defined as a separate criminal offense. *Id.* at 772-73 (double jeopardy protections are the basis behind merger doctrine).

To determine whether the legislature intended multiple punishments where the degree of one offense is elevated by conduct constituting a separate offense, the court will apply the merger doctrine. *Kier*, 164 Wn. 2d at 804 (second degree assault conviction merged into first degree robbery conviction in prosecution arising out of carjacking incident, as completed assault was necessary to elevate the completed robbery to first degree). In addition, in some rare instances, even if two convictions would appear to merge on an abstract level under this analysis,

they may be punished separately if the defendant's particular conduct demonstrates an independent purpose or effect of each. *Id.*

Here, the Court violated Ms. Knight's right to be free from Double Jeopardy when failed to merge her Second Degree Assault convictions of Charlene Sanders into her Robbery in the First Degree convictions of the same victim because (1) those two crimes merged together on an abstract level in law and (2) the State did not establish at trial that each crime had an independent purpose on a factual level, i.e. that the assault was committed for any other purpose than to facilitate the robberies.

i. Each of the assault convictions merged on an abstract, factual level with the robbery convictions.

Our supreme court has twice ruled that Assault in the Second Degree merges into Robbery in the First Degree when the Assault was used in furtherance of the robbery. In *State v. Freeman*, the court concluded that the Second Degree Assault "merges" into First Robbery Assault when the assault was used to facilitate the robbery. 153 Wn. 2d at 773-78. Additionally, the State recently challenged the validity of that reasoning in *State v. Kier*, but the Court upheld its reasoning in *Freeman* and noted that "the legislature has amended the second degree assault statute since Freeman without taking any action in response to our decision." *Id.* (noting presumption of legislative acquiescence in judicial

interpretation where statute is amended following court decision without change to relevant portions).

Once the jury verdict is interpreted in her favor (or if this court finds that the assaults were based upon displaying the firearm rather than the physical assaults), this case thus, presents the same question as the court dealt with in *Kier* and *Freeman*: whether the defendant's "second degree assault conviction merges into [her] first degree robbery conviction." In *Kier*, the court held that the two convictions did merge because

> When the definitions of first degree robbery and second degree assault are set side by side, it is clear that both charges required the State to prove that Kier's conduct created a reasonable apprehension or fear of harm. Because Kier was also charged with being armed with or displaying a deadly weapon, this was the means of creating that apprehension or fear. The merger doctrine is triggered when second degree assault with a deadly weapon elevates robbery to the first degree because being armed with or displaying a firearm or deadly weapon to take property through force or fear is essential to the elevation.

Kier, 164 Wn. 2d at 806.

Like in *Freeman* and *Kier*, the instructions for the assaults against Charlene and James Sanders Sr., interpreted in Ms. Knight's favor, required the jury to find that Ms. Knight's accomplice assaulted Ms. Sanders by pointing the gun at her. Accordingly, these crimes merged on an abstract level.

ii. The State failed to prove an independent purpose and effect between each of the assaults and the corresponding robberies as stated in *State v. Freeman*.

The second part of the merger test, as applied in *Freeman*, states that two convictions may be valid,

> "even when they formally appear to be the same crime under other tests. These offenses may in fact be separate when there is a separate injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element. This exception is less focused on abstract legislative intent and more focused on the facts of the individual case. For example, when the defendant struck a victim *after* completing a robbery, there was a separate injury and intent justifying a separate assault conviction, especially since the assault did not forward the robbery."

Freedman, 153 Wn. 2d at 778-79.

This exception does not apply merely because the defendant used *more* violence than necessary to accomplish the crime. *Id.* The test is not whether the defendant used the least amount of force to accomplish the crime; the test is whether the unnecessary force had a purpose or effect *independent of the crime*. *Id.* In making such a determination, the courts must take a "hard look at how the case was presented to the jury," which may include looking to the charging documents and the jury instructions. *See Kier*, 164 Wn. 2d at 804.

To determine whether these crimes merged in fact, the court ***must*** look to the crime "as charged and *proved*." *Freeman*, 153 Wn. 2d at 778.

According to *Freeman*, the question before the court is not "whether the State presented sufficient evidence to prove each individual crime," but instead whether the State ***actually proved*** that a separate crime occurred and obtained a jury verdict of guilty as to that particular act. *See id.*

Here, the State here did not prove at trial that Ms. Knight the assaults committed against James Sanders Senior and of Charlene Sanders were two distinct crimes as required by *DeRyke*, because the State failed to request a jury instruction that would have established which acts (the substantial bodily harm or the display of the firearm) established the assault. Thus the court must interpret that in Ms. Knight's favor. Reading the ambiguous jury verdict to find that Ms, Knight was an accomplice to an assault by the display of a deadly weapon, it is clear that the State failed to prove an "independent purpose or effect" of either assault because the State obviously argued that Ms. Knight's accomplices pointed the gun at Charlene Sanders to commit the robbery. The State argued in closing that

> It is against the person's will by use of force, violence, or fear. Kyoshi Higashi pointed a gun at James Sanders. He pointed it as Charlene as well. She was beaten profusely, badly. The force or fear was used by the defendant or an accomplice to obtain or retain possession of the property. This was accomplished when he pointed the gun. It was facilitated when Amanda zip tied Charlene, put her on the ground, Higashi zip tied Jim Sanders, and his wedding ring was stolen.

RP 1002-03.

In sum, the jury instructions allowed the jury to convict Ms. Knight of both assault and robbery of the Sanders without finding an "independent purpose or effect" for each crime, contrary to Supreme Court precedent as the court laid out in *Kier* and *Freeman.* To hold that these crimes did not merge under the circumstances would allow the State to leave jury instructions vague and open ended so that they could always argue against merger because the jury "might have" convicted the defendant on separate grounds based upon separate harms. Yet, the Court could have rejected these same arguments as the court did in *Freeman. Id.* at 779. Consequently, the court should vacate Mr. Kim's sentence for Assault in the Second Degree and remand the case for resentencing.

3. Defense counsel was deficient at sentencing because he failed to inform the court that it could impose an exceptional sentence downward.

To establish ineffective assistance of counsel, Ms. Knight must show that her trial attorney's performance was deficient and that she was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Failure to request an exceptional sentence downward may by objectively unreasonable and thus constitute ineffective assistance of counsel. In *State v. McGill*,[2] the defendant was sentenced to a prison term within the standard range for convictions on two cocaine delivery charges

[2] 12 Wn. App. 95, 98, 47 P.3d 173 (2002).

and one possession with intent to deliver charge. After McGill was convicted, his counsel failed to request an exceptional sentence below the standard range. *Id.* On appeal, McGill argued that his amounted to ineffective assistance of counsel. The court of appeals agreed with McGill, holding that failure to inform a sentencing court of the proper scope of its discretion when sentencing a defendant was both deficient and prejudicial. *Id*

Here, like in *McGill*, defense counsel failed to inform the court that it would depart downward. Under the circumstances of this case, that failure was both deficient and prejudicial.

a. **Defense counsel was deficient when he failed to request an exceptional sentence downward.**

The first element of *Strickland* is met by showing that counsel's performance was not reasonably effective under prevailing professional norms. *Strickland*, 466 U.S. at 687. Counsel was deficient at sentencing because he failed to argue for an exception sentence downward under RCW 9.94A.535. The only reason for him to fail to do so would be that he falsely believed that RCW 9.94.A.010 prevented the court from imposing a lower sentence. Just as in *McGill*, the court here was not made aware that it had the authority to depart downward from the sentence when it did under RCW 9.9.94A.535.

i. The trial court could have granted an exceptional sentence downward under RCW 9.94A.535 and RCW 9.94A.589

RCW 9.94A.589 provides that when a person is sentenced for two or more serious violent offenses arising from separate and distinct criminal conduct, the sentences "shall be served consecutively to each other." RCW 9.94A.589(a)(b). But, RCW 9.94A.535 grants a trial court the discretion to order sentences for multiple serious offenses to run concurrently as an exceptional sentence below the standard range if the court finds there are mitigating factors justifying such a sentence. RCW 9.94A.535. Prior to 2007, it was unresolved whether a court still had authority to impose an exceptional sentence downward. In *Mulholland,* the Supreme Court resolved the issue, holding that despite the seemingly mandatory language of RCW 9.94A.589(a)(b), a sentencing court has discretion to order multiple sentences for serious violent offenses to run concurrently, rather than consecutively, as an exceptional sentence under RCW 9.94A.535.[3]

In this case, if defense counsel had argued for an exceptional sentence downward, the court could have granted a lower sentence. At sentencing, the bulk of defense counsel's argument was focused on whether any of Ms. Knight's convictions should be vacated to avoid double jeopardy and merger concerns. *See* CP 401-12; CP 434-440; RP

[3] *In Re Personal Restraint of Mulholland*, 161 Wn. 2d 322, 166 P.3d 677 (2007).

1072-75. In addition, defense counsel, inexplicably took the time to argue that Ms. Knight did qualify for an exceptional sentence ***upward*** even though the State did not argue for one in its Sentencing Memorandum or at the sentencing hearing. *See* CP 433; RP 1082. In fact, the State conceded that Ms. Knight's case was not one for which it could seek an exceptional sentence. As a result, the parties did not address whether an exceptional sentence ***downward*** was even possible or could have applied to the facts of this case. Under RCW 9.94A.535, at least two such circumstance could have been argued at Ms. Knight' sentencing.

First, defense counsel could have requested an exceptional sentence downward under RCW 9.94A.535 (1)(c), which allows departure for a failed defense if "the defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct." Under that statute, a trial court has broad discretion to grant a defendant's request for an exceptional sentence downward when he presents a valid and reasonable self-defense claim but falls short of convincing the jury of that defense by a preponderance of the evidence. *See State v. Pascal*, 108 Wn.2d 125, 136, 736 P.2d 1065 (1987).

Our Supreme Court has described how a "failed defense" can still allow a trial court to use its discretion to reduce the defendant's sentence below the standard range:

> The Guidelines contain a number of mitigating factors applicable in situations where circumstances exist which tend to establish defenses to criminal liability but fail. In all these situations, if the defense were established, the conduct would be justified or excused, and thus would not constitute a crime at all. The inclusion of these factors as mitigating factors recognizes that there will be situations in which a particular legal defense is not fully established, but where the circumstances that led to the crime, even though falling short of establishing a legal defense, justify distinguishing the conduct from that involved where those circumstances were not present. Allowing variations from the presumptive sentence range where factors exist which distinguish the blameworthiness of a particular defendant's conduct from that normally present in that crime is wholly consistent with the underlying principle.

Pascal, 108 Wn.2d at 136.

For instance, in *State v. Pascal*, the defendant asserted self defense (based on battered women's syndrome) after she stabbed and killed her boyfriend. The jury convicted her of second -degree manslaughter. Although Pascal's presumptive sentence range was 31 to 41 months, the trial court sentenced defendant to only 90-days, consisting of 30-days of total confinement, 30-days of partial confinement, and 240-hours of community service. The State appealed the exceptional sentence, but both the appellate court and our Supreme Court affirmed the exceptional downward sentence.

The *Pascal* court held that although Pascal failed in presenting her defense and was convicted of manslaughter, "the trial judge in performing his sentencing function could evaluate the evidence of these mitigating factors and find that her actions significantly distinguished her conduct from that normally present in manslaughter." *Id.*

That case could have been instructive for the trial court when sentencing Ms. Knight had counsel argued for an exceptional sentence downward. Here, like in Pascal, Ms. Knight's actions here were much less culpable than most defendants convicted of murder, especially each other co-defendant in this case. As admitted by the State, Ms. Knight was not the shooter, nor did she physically harm any of the victims in this case because she was upstairs when the co-defendants beat and shot the victims. RP 1002-05. Ms. Knight even took the stand to assert such a defense, which ultimately failed. *See* RP 897-984.

Ms. Knight told the jury that she owned the gun that was used in the shooting, but that co-defendant Kyoshi has stolen the gun from her and used to force her to commit this robbery and one more prior to it in Lake Stevens, Washington. RP 900-01. Kyoshi told Amanda that if she did not participate in the robberies, then he was going to threaten Ms. Knight's family and rob her. Although the jury ultimately found that the threats made by the co-defendant Kyoshi did not establish a full defense to the

crimes charged, it is very possible that the court could have found that these threats, if made, "substantially affected" Ms. Knight's conduct, so that a below the standard range sentence would be appropriate under RCW 9.94A. 535(1)(c). But, because defense counsel never made such an appeal to the court, it is impossible to know how the court would have ruled, thus constructing ineffective assistance of counsel.

Second, defense counsel should have argued for an exceptional sentence downward under RCW 9.94A.535(1)(g), which states, "The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94.A.010." This provision is rooted in the purposes of the SRA, which was enacted to "develop [] a system for the sentencing of felony offenders which *structures, but does not eliminate discretionary decisions* affecting sentences, and to:

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

> (7) Reduce the risk of reoffending by offenders in the community.

RCW 9.94A.010.

In this case, Ms. Knight was convicted of numerous most serious crimes which resulted in that range. She was sentenced to a standard range sentence of 860 months. Ordinarily, a standard range sentence for this crimes—essentially a life sentence—would be appropriate. However, Ms. Knight's case was not the typical Murder. She clearly was not the shooter and she actually used no violence throughout the crime. The record only makes clear that she knew that the robbery was going to take place and that the jury did not believe that she was acting under duress.

Yet, she still faced the same "life sentence" as all other defendants, each of whom was likely more culpable than her. Surely such a sentence could and should have been challenged at sentencing as contrary to the purposes of the SRA, namely the requirement that sentences "ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history," and "be commensurate with the punishment imposed on others committing similar offenses."

Moreover, a brief comparison to the applicable case law shows that the court could have granted a departure if properly informed. In *State v. Fitch*, for instance, Fitch pleaded guilty to two counts of delivery of

marijuana and one count of delivery of cocaine. *State v. Fitch*, 78 Wn. App. 546, 550, 897 P.2d 424 (1995). Each of those charges was the result of three separate controlled purchases between the Fitch and an undercover police officer, all within the span of four days. Although he had no prior criminal history, the current marijuana delivery charges increased Fitch's presumptive range to 67 to 89 months. The defendant requested an exceptional sentence downward arguing that the presumptive range was clearly excessive in light of the purposed of the SRA. The trial court agreed and imposed a sentence of 21 months, about 25% of the standard range. *Id.* at 551.

The *Fitch* court found that the courts reasons amply supported the sentence when "all three drug deliveries were controlled by the police [and] all involved small quantities of drugs delivered to the same person." *Id.*; *see also State v. Hortman*, 76 Wn. App. 454, 458, 886 P.2d 234 (1994) (purchases solicited by the police, deliveries all at the same location within a brief period of time, small amounts of cocaine); *State v. Sanchez*, 69 Wn. App. 255, 261, 848 P.2d 208 (1993) (drug buys initiated and controlled by the police, all involved the same buyer and seller, and all involved small amounts of cocaine).

By analogizing *Fitch*, *Hortman*, and *Sanchez* to this case, defense counsel could have made a convincing argument that Ms. Knight's

sentence was clearly excessive in light of the purposes of the SRA. For instance, in *Fitch*, Fitch's offender score was increased dramatically by actions that were not directly controlled by Fitch because the police conducted numerous controlled buys within a few days to obtain multiple convictions. *Fitch*, 78 Wn. App. at 550. Likewise here, Ms. Knight was found guilty of each of the crimes through accomplice liability, for the actions of her co-defendants. In fact, Ms. Knight was not the principal in any of the crimes for which she was charged. This fact alone would have lent itself as a compelling reason to justify an exceptional sentence downward, had defense counsel made such an argument.

ii. Failure to request an exceptional sentence downward was not a "tactical decision."

As illustrated in *McGill*, it is not uncommon for the court and even defense counsel to mistakenly believe that they are entirely prevented from requesting an exceptional sentence downward because of the seemingly "mandatory language" of RCW 9.94A.589 as it applies to mandatory consecutive sentences. *McGill*, 12 Wn. App. at 95; *see also Mulholland*, 161 Wn. 2d at 331. Any attempt by the State to frame this mistake as a "tactical decision" would be meritless for several reasons.

First, given the length of time that Ms. Knight was facing (723 to months), defense counsel should have tried to use every viable legal

option to obtain a non-"box sentence,"—also known as a sentence which almost guarantees that the defendant will leave prison only when she is dead. Defense counsel specifically noted this fact at sentencing, "Unfortunately, the amount of time that is involved in these cases are effectively a life sentence." RP 1107.

Second, this is not a case in which defense counsel is forced to choose between two conflicting arguments, and ultimately chooses the wrong one. Here, defense counsel could have (and should have) argued for an exceptional sentence downward, as detailed above, and was not prevented from asking for a low end sentence in the alternative—even though a low end sentence was still essentially a life sentence. Given the length of the low end sentence, failure to request for an exceptionally low sentence could not have been a tactical decision.

b. Ms. Knight was prejudiced by the failure to argue for an exceptional sentence downward, just as the defendant in *McGill.*

Prejudice is shown when the appellant establishes that there was a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *State v. Hendrickson*, 129 Wn. 2d 61, 77-78, 917 P.2d 563 (1996). In general, performance is deficient when it falls below an objective standard of reasonableness, but not when it is

undertaken for legitimate reasons of trial strategy or tactics. *Hortman*, 116 Wn. App. at 909.

Here, the Court imposed a sentence within the standard range. Had defense counsel argued for an exceptional sentence downward and the court granted or denied it, on appeal, this court would evaluate that decision using an abuse of discretion standard. *See State v. Batista*, 116 Wn. 2d 777, 808 P.2d 1141 (1991). However, as in *McGill*, defense counsel did not request an exceptional sentence downward. 12 Wn. App. at 95. In *McGill*, the court found that the defendant was prejudiced by his counsel's failure to not argue for a downward departure when it *could have* resulted in a lower sentence. *See id.* The court held that under similar case law, the trial court *could have* granted a downward departure, had it known that it was an option. *See id.* at 101. The State may attempt to differentiate *McGill* from the case at bar because the court expressly stated that it did not have the authority to depart downward, while the court here did not. However, such a distinction would ignore the court's reasoning in *McGill*:

> A trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. Nor can it exercise its discretion if it is not told it has discretion to exercise.

Id.

The prejudice Ms. Knight suffered here is obvious. The court was not made aware that it even had the *option* of sentencing her to a lower sentence. Had the court been made aware of that option, it is entirely possible that the court could have sentenced Ms. Knight to a sentence that was below the standard range. However, because defense counsel failed to appraise the court of its discretion to impose an exceptional sentence below the standard range, the court was thus made unable to exercise that discretion, just as in *McGill*. Consequently, this court should vacate Ms. Knight's sentence and remand for resentencing, at which time, she could request an exceptional sentence downward.

4. The trial court erred when it calculated Ms. Knight's offender score because several of her convictions were the same criminal conduct as defined by RCW 9.94A.525 (5)(A).

Generally, when calculating a defendant's offender score for sentencing, the court must count all current and prior convictions. However, RCW 9.94A.525(5)(a) details one exception in which multiple prior offenses are counted as one offense: "those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a)."

While a trial court is allowed some discretion when determining whether multiple crimes constitute the same criminal conduct, if the trial court abuses its discretion or misapplies the law, the Court of Appeals

must reverse the sentencing court's conclusion of same criminal conduct. *State v. Anderson*, 92 Wn. App. 54, 62, 960 P.2d 975 (1998). Review for abuse of discretion is a deferential standard; review for misapplication of the law is not. *Id.*

RCW 9.94A.589(1)(a) defines the "same criminal conduct," as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." The trial court must determine whether ***one crime individually constitutes the same criminal conduct as another,*** rather than simply evaluating whether ***all crimes together constitute the same criminal conduct***.

In this case, Ms. Knight was convicted of crimes against three different victims. Thus, under the "same criminal conduct analysis, those crimes against separate victims could not constitute the same criminal conduct. However, Ms. Knight was convicted of multiple crimes against each victim, and those crimes should have been counted as the "same criminal conduct" at sentencing because several crimes occurred (1) at the same time and place, (2) Ms. Knight's objective intent throughout the incident never changed from completing the robbery.

a. All crimes occurred at the "same time and place."

To constitute the same "time and place," Washington Courts have interpreted the phrase to span the length of a brief string of crimes, even

when they do not occur simultaneously. In *State v. Dunbar*. the defendant was charged with burglary in the first degree and first degree kidnapping after he broke into the victim's home, assaulted her, and then carried her off. *State v. Dunbar*, 59 Wn. App. 447, 798 P.2d 306 (1990) *abrogated on other grounds in State v. Lessley*, 118 Wn. 2d 773, 827 P.2d 996 (1992). The crime began somewhere in King County Washington when Dunbar took a hunting knife and broke into the house of his former girl friend. He waited for her to come home, and when she returned, attacked her, wrestled her to the floor, tied her up, and carried her to the trunk of her car. Dunbar drove the car toward Olympia and stopped several times. On appeal, the court reversed, holding that the two crimes encompassed the same criminal conduct for purposes of calculating defendant's offender score and remanded the case for resentencing. *Id.* at 455.

Likewise, in *State v. Green*, although a robbery and attempted murder would not merge for purposes of indictment, the court of appeals held that the crimes were part of a single, continuing sequence of events. *State v. Green*, 46 Wn. App. 92, 730 P.2d 1350 (1986) *rev'd on other grounds by State v. Dunaway*, 109 Wn. 2d 207, 743 P.2d 1237 (1987). In *Green*, the Defendant Green during the robbery of a donut shop shot an employee in the back twice, once during the initial part of the robbery and again when he returned to kill the store employee. The defendant was

convicted of first degree robbery and attempted first degree murder. All of these acts occurred during the course of the robbery and inside the store. The court of appeals held that the robbery and the attempted murder were "the same criminal conduct" and remanded the case for resentencing. *Id.*

In this case, all crimes for which Ms. Knight was convicted occurred in the same place and time. First, like in *Green*, each crime occurred within the confines of the victims' home/place of work. *See id.* Here, each of the crimes was essentially completed while all of the co-defendants remained in the home (with the exception of the murder, which was complete upon the tragic death of James Sanders Sr.).

The string of crimes here, then, surely falls within the limits set by *Dunbar*, in which the court found that each crime occurred the same time and place even thought the crimes spanned over several counties. Second, although the record here is unclear as to the amount of time that elapsed during the entire crime spree here, the record makes it clear that each of these crimes occurred either simultaneously or within a few short moments of each other. *See State v. Porter*, 133 Wn. 2d 177, 942 P.2d 974 (1997) (immediately sequential drug sales satisfy the "same time" element of Subsection (1)(a)).

Accordingly, each and every crime occurred within the same time and place as defined by RCW 9.94A.589(1)(a).

b. The intent for every crime remained the same.

Intent, as used in this analysis, "is not the particular mens rea element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime." *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990); *In re Holmes*, 69 Wn. App. 282, 848 P.2d 754 (1993). When determining if two crimes share a criminal intent, the courts will find a single intent when (1) the defendant committed one or more crimes to further another or (2) the defendant's intent, viewed objectively, was part of a scheme or plan and did not change substantially from one crime to the next. *State v. Flake*, 76 Wn. App. 854, 858, 932 P.2d 657 (1997); *see State v. Grantham*, 84 Wn. App. 854, 858, 932 P.2d 657 (1997).

For instance, in *State v. Anderson*, 72 Wn. App. 453, 463-64, 864 P.2d 1001 (1994) the court determined that the crimes of escape and assault encompassed the same criminal intent, where the assault was committed to effectuate the defendant's escape. The defendant's intent, throughout both crimes, was to escape custody. *Id.* In this case, the record establishes that Ms. Knight intended to facilitate the robbery and the burglary. However, that intent never changed throughout the entire encounter because her "objective criminal purpose" throughout the whole transaction was to take property from the victims. *See id.*

This intent is clear by an objective look at the record. At trial, many of the essential facts here were undisputed. It was undisputed that Ms. Knight entered the home of the victims, restrained one of the victims (Charlene Sanders), and then went upstairs to assist in taking valuables from the home. RP 910-14; RP 917-18. It is also undisputed that Ms. Knight did not carry a firearm and that she was the only defendant who did not. RP 920. Finally, it is undisputed that Ms. Knight was upstairs while the co-defendants physically assaulted two of the victims and killed another. RP 585-92. Once Ms. Knight heard the gun shots, she ran out of the home. RP 920.

These undisputed facts show that Ms. Knight only had one purpose throughout this brief encounter: to assist the codefendant's in stealing the run posted on craigslist and any other valuable items in the home. Corroborating this conclusion is the fact that Ms. Knight was upstairs while the violence occurred and was the only unarmed defendant in this case. Ms. Knight never physically harmed any of the defendants; she never carried a weapon. In short, she never evidenced any other objective intent than to commit a robbery inside the Sanders' family home.

c. Which crimes count against Ms. Knight's Offender score?

Based upon the analysis above, Ms. Knight's offender score should be affected by only three separate crimes, one for each victim.

First, Ms. Knight's conviction the Robbery of James Sander Sr. does not count towards her offender score because it is part of the same criminal conduct as her conviction for the Felony Murder of the same victim.

Second, Ms. Knight's conviction for the Robbery of Charlene Sanders counts towards her offender score, while her conviction as an accomplice to the assault of Ms. Sanders does not. As argued above, Ms. Knight in no way facilitated the physical assault of Charlene Sanders and the purpose of displaying the firearm was to facilitate the robbery of Charlene Sanders.

Third, because James Sanders Jr. was only listed as the victim of one crime, the assault 2, that crime counts against Ms. Knight's offender score as well unless the court finds that there was insufficient evidence of this crime, as argued above.

Finally, Ms. Knight's conviction for Burglary does not count, as it was part of the same criminal conduct of each of the other crimes. *See Green*, 46 Wn. App. at 92.

Because the trial court erred in not counting these crimes as the same criminal conduct, this court should vacate Ms. Knight's sentence and remand this case for resentencing.

V. CONCLUSION

For the reasons stated above, Ms. Knight respectfully requests that the court grant the relief as designated in his opening brief.

DATED this 8th day of February, 2012.

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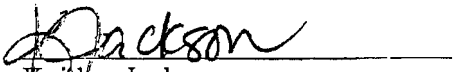
PROOF OF SERVICE

On February 08, 2012, I filed the original copy of the attached document and proof of service upon the Court of Appeals, Division II, via U.S. Mail at 950 Broadway, Ste 300, MS TB-06, Tacoma, WA 98402-4454. In addition, a copy was also sent to the Pierce County Prosecuting Attorney's Office, Appellate Unit at County-City Building, 930 Tacoma Avenue South, Room 946, Tacoma, WA 98402-217. A copy of this brief was sent via the USPS to the appellant, Ms. Amanda Knight at DOC# 349443, Washington Corrections Center for Women, 9601 Bujacich Rd. NW, Gig Harbor, WA 98332-8300.

Dated this 8th day of February, 2012,



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