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No. 97066-1

(Court of Appeals No. 49337-3-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of:
AMANDA CHRISTINE KNIGHT,
Petitioner.

MOTION FOR DISCRETIONARY REVIEW

TIMOTHY K. FORD, WSBA #5986
MacDONALD HOAGUE & BAYLESS
705 2nd Avenue, Suite 1500
Seattle, WA 98104
(206) 622-1604

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

	Page
I. IDENTITY OF MOVING PARTY	1
II. RELIEF REQUESTED	1
III. FACTS UNDERLYING MOTION	1
<p>This case involves a classic instance in which, in response to a terrible crime, the prosecution “divided up [an ongoing offense] to support separate charges such that a defendant is, for all intents and purposes, punished twice for the same offense.” <i>State v. Farnworth</i>, 192 Wn.2d 468, 430 P.3d 1127 (2018). It also involves a direct conflict between Division 1 and Division 2 regarding the analysis of double jeopardy challenges to sentences for overlapping crimes.</p>	
IV. ARGUMENT	6
<p>Review should be granted here because the decision below conflicts with a published decision of another Court of Appeals, and decisions of this Court, regarding a significant question of law under the Constitution of the State of Washington and of the United States. RAP 13.4(b)(1), (2) and (3); RAP 13.5A(b).</p>	
V. CONCLUSION	10

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Apprendi v. New Jersey,
530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)..... 9

Blakely v. Washington,
542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)..... 9

Russell v. United States,
369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962)..... 9

STATE CASES

State v. Deryke,
110 Wash. App. 815, 41 P.3d 1225 (2002)..... 4

State v. Farnworth,
192 Wn.2d 468, 430 P.3d 1127 (2018)..... 1, 4, 5, 6

State v. Freeman,
153 Wash. 2d 765, 108 P.3d 753 (2005)..... 4, 7

State v. Kier,
164 Wash. 2d 798, 194 P.3d 212 (2008)..... 7, 8, 9

State v. Knight,
176 Wash.App..... 5

State v. Whittaker,
192 Wn. App. 395, 367 P.3d 1092 (2016)..... 5, 6, 7

State v. Zumwalt,
119 Wash. App. 126, 82 P.3d 672 (2003)..... 7

STATE STATUTES

RCW 9A.56.190..... 4

STATE RULES

RAP 13.4(b)..... 7

I. IDENTITY OF MOVING PARTY

Amanda Knight was the Petitioner in the Personal Restraint Petition filed below. She is serving a sentence which is currently set at 860 months (71 years 8 months) on convictions of first degree murder and several other crimes, all arising from a home invasion robbery in which she was an accomplice. The offenses occurred in April, 2010, when she was 21 years old.

II. RELIEF REQUESTED

Petitioner asks the Court to grant discretionary review of the Court of Appeals' decision (attached as Appendix A) insofar as it denied her double jeopardy challenge her duplicative convictions of second degree assault and first degree robbery of one of the victims, Charlene Sanders. See App. A at 15.

III. FACTS UNDERLYING MOTION

This case involves a classic instance in which, in response to a terrible crime, the prosecution "divided up [an ongoing offense] to support separate charges such that a defendant is, for all intents and purposes, punished twice for the same offense." *State v. Farnworth*, 192 Wn.2d 468, 430 P.3d 1127 (2018). It also involves a direct conflict between Division 1 and Division 2 regarding the analysis of double jeopardy challenges to sentences for overlapping crimes.

On April 28, 2010, Petitioner Knight, along with Joshua Reese, Kiyoshi Higashi, and Claybon Berniard committed a home invasion robbery of the home of James and Charlene Sanders. During the robbery, Mr. Sanders was killed and Mrs. Sanders and one of their sons were threatened and beaten by Ms. Knight's accomplices. A week later, after turning herself in and confessing, Ms. Knight was charged with one count of First-Degree Murder, one count of First-Degree Burglary, and two counts of First-Degree Robbery and Second-Degree Assault. CP 6-9. The charge 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. The State later amended the Information, adding firearm allegations to each count and allegations of two statutory aggravating circumstances. Amended Information, Appendix C.

Mr. Higashi was the first of the four co-defendants to stand trial. Ms. Knight was tried separately, after Mr. Higashi was convicted and sentenced.

At Ms. Knight's trial, it was undisputed that she participated in the robbery. Ms. Knight testified and admitted that she entered the home of the victims on April 28, 2010, together with Higashi. RP 909-15. She and Higashi gained access to the home on the pretext that they wished to buy a ring that the Sanders had advertised on Craigslist. RP 910-14. Once in the home, Higashi pulled a gun on Mr. and Mrs. Sanders and told them to get on the floor. RP 916-17.

Ms. Knight then tied Charlene Sanders's hands behind her back with a "zip tie" and took a ring from her hand. RP 610-11, 917-18. Then the two other co-defendants, Bernard and Reese, entered the home, went upstairs, and brought the two children downstairs at gunpoint. RP 918. Ms. Knight ran upstairs and began to gather valuables to steal RP 919. While Ms. Knight was upstairs, the co-defendants began to physically assault and threaten the victims downstairs, demanding to see their safe. RP 585-92. Bernard pointed a pistol at Charlene Sanders and then hit and kicked her to get her to divulge the safe's whereabouts and combination. RP 585- 87.

Bernard then began to assault the son, J.S. RP 587- 92. When he did, James Sanders broke free of his restraints and jumped up to join the fight. This occurred while Ms. Knight was still upstairs. RP 919-20, 596-98. As Ms. Knight gathered the items from upstairs, she heard a gunshot and ran out the front door. RP 920. It is not clear which of the codefendants shot and killed James Sanders, but Ms. Knight testified without contradiction that she never held a gun any time during the incident. RP 915.

In her testimony, Ms. Knight admitted she did most of the things the prosecution claimed, but said she did so under duress and threats by Mr. Higashi. See RP 900-04.

The jury was given standard instructions regarding the elements of accomplice liability for the various charges. With regard to the two counts at issue here, the charges of first degree robbery and second degree assault on Charlene Sanders, the jury was instructed as follows:

To convict the defendant of the crime of Robbery in the First Degree as charged in Count IV, each of the following six elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 28th day of April, 2010 *the defendant or an accomplice* unlawfully took *personal property from the person or in the presence of another (Charlene Sanders)*,

(2) That the defendant intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's or an accomplices use or threatened *use of immediate force, violence or fear of injury* to that person or to the person or property of another;

(4) That the force or fear was used by the defendant or an accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking; and

(5) (a) That in the commission of these acts the defendant or an accomplice was armed with a deadly weapon;

or

(b) That in the commission of these acts the defendant or an accomplice inflicted bodily injury;

and

(6) That any of these acts occurred in the State of Washington.

Appendix E, Instruction 26 (emphasis added).

To convict the defendant of the crime of Assault in the Second Degree as charged in Count V, each of the following two elements of the crime must be proved beyond a reasonable doubt:

(I) That on or about April 28, 2010, *the defendant or an accomplice*:

(a) intentionally assaulted Charlene Sanders and thereby recklessly inflicted substantial bodily harm: or

(b) assaulted Charlene Sanders with a deadly weapon, and

(2) That this act occurred in the State of Washington.

Appendix. E, Instruction 25 (emphasis added). The jury was given the common law definition of assault. *Id.*, Instruction 18.

The jury rejected Ms. Knight's defense of duress found her guilty on all counts. CP 376-93. See Verdicts, Appendix E. But the jury rejected the aggravating factors of deliberate cruelty and unusual sophistication as to all counts including the robbery and assault of Charlene Sanders. *Id.* Based on an offender score predicated on the five contemporaneous felony convictions and six firearm and weapon enhancements, Ms. Knight was sentenced to 860 months, over 71 years, in prison. CP 450, 502-16.

Ms. Knight's Opening Brief on appeal argued the overlapping convictions for the assault and robbery on Charlene Sanders (and the murder and robbery of James Sanders) constituted double jeopardy. It cited *State v. Freeman*, 153 Wash. 2d 765, 778, 108 P.3d 753 (2005) for the proposition that determining whether double jeopardy has been violated depends on how the charges were "charged and proved," and *State v. Deryke*, 110 Wash. App. 815, 41 P.3d 1225 (2002) for the proposition that in making that evaluation ambiguous jury verdicts must be interpreted in the defendant's favor under the rule of lenity. Brief of Appellant at 10-18, *State v. Knight*, No. 42130-5-II (App. F). The State's Response argued that there was no merger, and no double jeopardy, because "[t]he crime of robbery ... was not elevated by a named crime such as kidnapping or assault"—and then declared, without reference to the charges or jury instructions, that "[t]he robbery was complete" when "Defendant stole the ring off Mrs. Sanders' finger" so "[t]he assault of Mrs. Sanders occurred after the robbery" *Id.*, Respondent's Brief (App. G) at 30-32, 37.

The Court of Appeals accepted the State’s factual declaration—and added to it a critical mischaracterization of what the charging documents alleged with regard to the robbery of Mrs. Sanders:

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 by alleging that Knight, or her accomplice, was “armed with a deadly weapon” *while taking Charlene’s wedding ring.* 2 CP at 305.

State v. Knight, 176 Wash.App at 953-54 (emphasis added). In fact, the Amended Information said no such thing: it alleged only that Ms. Knight “did unlawfully and feloniously take *personal property belonging to another* with intent to steal from the person or in the presence of Charlene Sanders” See 2nd Amended Information (Appendix C) (emphasis added). The Information did not identify the “personal property belonging to another” The Certificate of Probable Cause said “The intruders took Charlene Sanders’ wedding ring off her finger ... and the four intruders left the residence with cell phones, a laptop computer, jewelry, and other items.” See CPC, Appendix D.

Based on this fundamental misconception about how the case was charged, the Court of Appeals then rejected the double jeopardy argument, basing its decision on its assessment of “the crimes as charged and instructed to the jury, the evidence in the case, and the closing arguments,” and holding that “under the facts here, (1) the second degree assault (Count V) and the first degree robbery (Count IV) do not merge.” *State v. Knight*, 176 Wash. App. at 956.

In February, 2016, Division I of the Court of Appeals issued an opinion in *State v. Whittaker*, 192 Wn. App. 395, 367 P.3d 1092 (2016) which squarely rejected the argument that trial evidence and arguments can “cure the problem of the ambiguous verdict” because an ambiguous verdict does not “exclude the possibility that the jury

convicted on [a] basis” that would violate double jeopardy. *Id.* at 416. Ms. Wright promptly retained new counsel and filed the Personal Restraint Petition below, challenging two of her convictions—the robbery of James Sanders and the assault on Charlene Sanders—as violations of double jeopardy on this basis.

The Court of Appeals initially rejected the double jeopardy arguments as to all the convictions, but Ms. Knight filed for reconsideration based on this Court’s subsequent decision in *State v. Farnworth*. Reconsideration was granted and the Court of Appeals issued a new opinion in which it determined that double jeopardy was violated by the overlapping charges of first degree robbery and first degree felony murder of James Sanders. App. A at 14. But even in the new opinion the appeals court declined to reconsider its decision denying Ms. Wright’s challenge to her multiple punishments for the robbery and assault on Charlene Sanders, specifically rejecting her argument that after *Whittaker* “the merger doctrine must be analyzed based on the jury instructions and the jury verdicts alone.” App. A 15.

IV. ARGUMENT

Review should be granted here because the decision below conflicts with a published decision of another Court of Appeals, and decisions of this Court, regarding a significant question of law under the Constitution of the State of Washington and of the United States. RAP 13.4(b)(1), (2) and (3); RAP 13.5A(c).

The decision below was explicit in its rejection of Division 1’s ruling in *State v. Whittaker* that courts should “no longer consider the individual facts of the case to determine whether specific counts should merge”: it said “We disagree.” App. A at 5, 15. It also gave no heed, with respect to the Charlene Sanders assault and robbery counts, to this Court’s dictum in *State v. Farnworth* that “an ongoing offense may not be arbitrarily divided up to support separate charges such that a defendant is, for all intents and purposes, punished twice for the same offense.” 192 Wash.2d at 475. It thus

extended a confusing line of cases regarding the analysis of double jeopardy issues arising from overlapping criminal charges—and particularly charges of first degree robbery and second degree assault.

“[S]ince 1975, courts have generally held that convictions for assault and robbery stemming from a single violent act are the same for double jeopardy purposes and that the conviction for assault must be vacated at sentencing.” *State v. Freeman*, 153 Wash. 2d at 774. “Vacation of the assault charge is so ubiquitous that the model form in Washington Practice for a motion to merge counts at sentencing lists assault and robbery in the text of the model form.... However, ... no *per se* rule has emerged; instead, courts have continued to give a hard look at each case.” *Id.*

In *Freeman*, the Court rejected a double jeopardy challenge to convictions of first degree robbery and *first* degree assault, but in a companion case called *Zumwalt* it simultaneously upheld the reversal of convictions of first degree robbery and *second* degree assault. 153 Wash.2d at 779. In *Zumwalt*, the Court of Appeals had said that, because the statutory elements of first degree robbery and second degree assault overlap, “[o]nly if there is proof of a second assault will both convictions stand”—and it held that the convictions had to merge because, in the bench trial below, “*the court found evidence of but a single assault*” *State v. Zumwalt*, 119 Wash. App. 126, 132, 82 P.3d 672 (2003) (emphasis added). *Whittaker* applied that same principle where the defendant was convicted in a jury trial, and the jury’s verdicts were not adequately specific to determine whether separate crimes were found or not:

While it is true there were multiple violations ... we cannot be certain which served as the basis for the jury to convict Whittaker The possibility that the jury could have convicted Whittaker on a basis that does not offend the double jeopardy protections to which he is entitled is simply not enough to cure the problem. The verdict is ambiguous. The rule of lenity applies. In this case, the conviction ... must merge

Whittaker, 192 Wash. App. at 417.

Whittaker cited as authority for its application of the rule of lenity in this context *State v. Kier*, 164 Wash. 2d 798, 194 P.3d 212 (2008), which held that charges of first degree robbery and second degree assault merged because “it is unclear from the jury’s verdict whether the assault was used to elevate the robbery to first degree.” *Id.* at 813. The Court in *Kier* so held even though there were two victims involved and the prosecution argued to the jury that the two charges applied to different victims. *Id.*

This is a much easier case than *Kier*, or *Whittaker*. Petitioner Knight is not challenging the State’s authority to punish her for the most serious crimes committed by her accomplices on each of the victims (in addition to First Degree Burglary). Her only challenge is to the infliction of multiple punishments on overlapping charges arising from the first degree robbery of one victim, Charlene Sanders.

As noted above, the charging documents and the jury instructions defining those charges provided no basis for dividing them into separate parts based on different events that occurred during the robbery. On the first degree robbery charge, the jury was told that to convict it needed to find that “the defendant or an accomplice unlawfully took personal property from ... Charlene Sanders,” “the taking was ... by the ... use or threatened use of immediate force, violence or fear of injury” and “the defendant or an accomplice was armed with a deadly weapon” or “inflicted bodily injury”. Appendix E, Instruction 26. On the assault charge, the jury was told it had to find that “the defendant or an accomplice” “intentionally assaulted Charlene Sanders and thereby recklessly inflicted substantial bodily harm,” or “assaulted Charlene Sanders with a deadly weapon” Appendix D, Instruction 25. As in *Kier*, Ms. Knight’s jury was given the “common law definition of assault” which includes “an act done with the intent to create in another apprehension and fear of bodily injury” *Id.*, Instruction 18.

On these instructions, the jury could have convicted Ms. Knight of the assault on Charlene Sanders simply by finding that at some point during the robbery one of her accomplices threatened Ms. Sanders with a deadly weapon—and the jury quite likely did so, since that fact was uncontested. And that is just the most obvious of several ways the jury could have convicted of both crimes based on the same alleged acts. In so doing, the jury would have convicted Ms. Knight of assault without finding any fact that it didn't also find when it convicted her of first degree robbery.

Because the jury could have reached its verdicts that way, the rule of lenity requires courts to assume that it did so. Not to make that assumption is to forget that it is the jury's province, and not the courts', to find facts that are prerequisite to the infliction of punishment. *Cf. Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (facts prerequisite to increased punishment must be for a crime “must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt”); *accord*, *Kier*, 164 Wash. 2d at 814 (prosecutors' arguments cannot change what “the evidence and instructions allowed”). Division 2's announcement in the decision below that it will continue, despite this, to make its own evaluation of “the individual facts of the case to determine whether specific counts should merge” (App. A-15) directly contradicts this bedrock principle.

The *Whittaker* rule that the decision below rejected does not preclude multiple punishments for crimes that are truly separate, and imposes no real burden on prosecutors seeking to impose them. All that it requires is that the Information clearly allege, and the jury instructions clearly describe, separate offenses that require separate proof. This is consistent with the constitutional requirement that charging documents be sufficiently specific to protect against double jeopardy. *See Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962). Clear charges permit trial courts to

determine whether the prosecution has crossed *Farnworth's* line by improperly “divid[ing] up [one offense] to support separate charges.” And verdicts based on clear jury instructions insure that all aspects of a defendant’s punishment are based on facts that were actually found by a jury, not just those argued for by the prosecution or inferred from the cold record by an appellate court.

The Court of Appeals’ decision in this case directly conflicts with *Whittaker* and is inconsistent with *Kier* and *Farnworth*. Although unpublished, it adds confusion to a body of caselaw that is already full of apparent contradictions, and it invites prosecutors to continue hedging their bets by bringing vague, duplicative charges and then deciding later how the evidence could be construed to support all of them. For all these reasons it calls for this Court’s review.

V. CONCLUSION

The Court should grant review and reverse the Court of Appeals decision insofar as it left stand Ms. Knight’s convictions of second degree assault on Charlene Sanders.

DATED this 12 day of April, 2019.

Respectfully submitted,

MacDONALD HOAGUE & BAYLESS

By



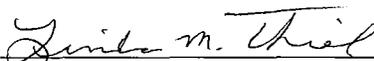
Timothy K. Ford, WSBA #5986
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on this 12th day of April, 2019, I filed the foregoing MOTION FOR DISCRETIONARY REVIEW using the Washington Appellate Portal which will serve a copy on the following:

Robin Khou Sand

rsand@co.pierce.wa.us



Linda M. Thiel, Legal Assistant

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APPENDIX A

March 14, 2019

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

UNPUBLISHED OPINION

MELNICK, P.J. — Amanda Christine Knight seeks relief from personal restraint. A jury convicted her of felony 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. Knight appealed and we affirmed her convictions.¹

In this personal restraint petition (PRP), Knight claims that one of her robbery convictions merges with her felony murder conviction because they involve the same victim, James Sanders. She also argues that because of a change in law since her appeal, her other robbery conviction merges with one of the assault convictions because they involve the same victim, Charlene Sanders². We conclude that the felony murder conviction merges with the robbery conviction.³

¹ *State v. Knight*, 176 Wn. App. 936, 963, 309 P.3d 776 (2013).

² James Sanders and Charlene Sanders were married and have the same last name. For purposes of clarity we refer to them by their first names in this opinion. I intend no disrespect.

³ Knight also argues that if we conclude the felony murder and robbery do not merge that insufficient evidence exists to support the charges. Based on our disposition of this issue, we need not decide this issue. Similarly, we need not address Knight's ineffective assistance of counsel claim.

We grant the PRP in part, deny it in part, and remand to the trial court for resentencing consistent with this opinion.

FACTS⁴

In April 2010, Knight, Kyoshi Higashi, Joshua Reese, and Clabon Berniard all participated in a home invasion robbery in Lake Stevens. Not long afterwards, Higashi contacted Knight and told her that he wanted to commit another robbery.

After finding a Craigslist advertisement for a wedding ring James had posted, Knight called him from a nontraceable disposable phone and asked if she and her boyfriend could see the ring. Wanting to arrive after dark, Knight arranged to meet James at the Sanders' house that evening.

Knight drove Higashi, Berniard, and Reese to the Sanders' house and parked so they could make a quick getaway. Higashi possessed Knight's firearm; Reese and Berniard also possessed firearms. They had zip ties and masks with them. Reese and Berniard remained in the car. Knight put on a pair of gloves. Higashi handed her several zip ties.

Knight and Higashi met James outside the house and then walked into the Sanders' kitchen. Once inside, James handed an old wedding ring to Knight and Higashi. James then called upstairs to his wife to come downstairs and help him answer Knight's and Higashi's questions about the ring. The Sanders' two sons remained upstairs.

Knight told James that she was interested in buying the ring. Higashi revealed a large amount of cash, but also displayed a gun and threatened James and Charlene. The Sanders told Higashi and Knight to take whatever they wanted and leave.

Knight zip-tied Charlene's hands behind her back and Higashi did the same to James. Knight then removed Charlene's wedding ring from her finger and either Knight or Higashi

⁴ Unless otherwise noted, the facts are taken from *Knight*, 176 Wn. App. 936.

removed James's wedding ring from his finger. Knight and Higashi ordered James and Charlene to lie face down on the floor.

Using a Bluetooth device, Knight signaled Reese and Berniard to enter the home. 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.

Once inside the house, Reese and Berniard went upstairs, and at gunpoint, they forced the Sanders' two sons to come downstairs and lie face down near the kitchen entryway. Charlene and one son watched as Knight and Higashi gathered items from the house. Knight also ransacked the main upstairs bedroom as she looked for expensive items to steal.

While Knight was upstairs, Berniard held a gun to Charlene's head, cocked the hammer, began counting down, and asked, "Where is your safe." *State v. Knight*, 176 Wn. App. 936, 963, 309 P.3d 776 (2013) (quoting 5 Report of Proceedings (RP) at 586). When Charlene responded that they did not own a safe, Berniard kicked her in the head and threatened to kill her and her children. Believing she was going to die, Charlene eventually admitted that they had a safe in the garage.

Berniard forced James into the garage. James broke free of his restraints and attacked Berniard. Berniard shot James in the ear, knocking him unconscious. One of the sons then jumped on Berniard who threw him off and hit him with the butt of his firearm.

Reese then dragged James's body through the kitchen and into the adjacent living room, where they were out of sight. Either Reese or Berniard shot James multiple times, causing fatal internal bleeding.

Immediately following the gunshots, the four intruders fled. After they left, Charlene found James on the living room floor and called 911. The police declared James dead at the scene.

The State charged Knight with felony murder in the first degree, two counts of robbery in the first degree, two counts of assault in the second degree, and one count of burglary in the first degree. Each count alleged accomplice liability, aggravating factors, and that one of the participants in the crime was armed with a firearm.

The trial court instructed the jury that to convict Knight of murder in the first degree, the State had to prove beyond a reasonable doubt that “the defendant or an accomplice committed Robbery in the First Degree [and] . . . the defendant or an accomplice caused the death of James . . . in the course of or in furtherance of such crime.” PRP, App. A (Instr. 9).

In closing argument, the State argued that the felony murder was based on the robbery of the rings.

With respect to murder in the first degree, which is Count I in your jury instructions, again, no issue that this occurred on April 28. Charlene testified that her wedding ring was stolen, [James’s] wedding ring was stolen. The state has to prove that the defendant or an accomplice caused the death of someone who is not a participant in the crime. Excuse me. Higashi shot and killed James . . . in the course of this robbery.

7 RP at 1007

At sentencing, Knight argued that the convictions for the two second degree assaults and the two robberies should merge, and that the conviction for the assault of James should merge into the felony murder conviction. She also argued that, for sentencing purposes, all of her convictions were based on the same criminal conduct and, therefore, she should only be sentenced on the first degree felony murder conviction. During Knight’s sentencing argument, she confirmed that the robbery of James was based on “the taking of the ring at gunpoint.” 8 RP at 1076.

In response, the State characterized Knight’s argument as a double jeopardy argument asserting that the convictions for the two counts of second degree assault should merge into the convictions for the robberies because the assaults elevated the degree of the robberies to first

degree robberies. During this argument, the State again emphasized that the robberies were completed “when the rings were removed from Charlene[’s] finger and James[’s] finger,” so that the robberies could not merge with the later assaults of Charlene and one of the children 8 RP at 1083.

The trial court rejected Knight’s arguments and ruled that

[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, [the first degree felony murder, the two robberies, and the assault of Charlene, did] not occur at the same time. The robbery of James[’s ring] was completed, as well as the robbery of Charlene[’s], 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 RP at 1090. Knight appealed her convictions and we affirmed. *Knight*, 176 Wn. App. 936. We decided numerous issues including that sufficient evidence supported the two assault convictions, and that the assault of Charlene did not merge with the robbery of Charlene. A mandate issued on March 7, 2014. Knight filed this PRP on July 14, 2016.

ANALYSIS

Knight argues that her convictions for the first degree robbery of James and the first degree felony murder of James violate double jeopardy because the convictions merge. We agree. She also argues that a change in the law necessitates our reconsidering our prior decision that her convictions for the first degree robbery of Charlene and the second degree assault of Charlene did not merge. We disagree.

I. PRP STANDARDS

In a PRP, the petitioner has the initial burden. RAP 16.4; *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004). “A personal restraint petitioner must prove either a (1)

constitutional error that results in actual and substantial prejudice or (2) nonconstitutional error that ‘constitutes a fundamental defect which inherently results in a complete miscarriage of justice.’” *In re Pers. Restraint of Monschke*, 160 Wn. App. 479, 488, 251 P.3d 884 (2010) (internal quotation marks omitted) (quoting *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 672, 101 P.3d 1 (2004)). The petitioner must prove the error by a preponderance of the evidence. *Lord*, 152 Wn.2d at 188. In addition, “[t]he petitioner must support the petition with facts or evidence and may not rely solely on conclusory allegations.” *Monschke*, 160 Wn. App. at 488; see RAP 16.7(a)(2)(i).

In evaluating PRPs, we can “(1) dismiss the petition if the petitioner fails to make a prima facie showing of constitutional or nonconstitutional error, (2) remand for a full hearing if the petitioner makes a prima facie showing but the merits of the contentions cannot be determined solely from the record, or (3) grant the PRP without further hearing if the petitioner has proven actual prejudice or a miscarriage of justice.” *In re Pers. Restraint of Stockwell*, 160 Wn. App. 172, 176-77, 248 P.3d 576 (2011).

A PRP is not a substitute for direct appeal and availability of collateral relief is limited. *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 328-29, 823 P.2d 492 (1992).

In general, there is a one-year time limit for filing PRPs. RCW 10.73.090(1). PRPs filed more than one year after a judgement and sentence becomes final are usually time barred unless an exception applies. RCW 10.73.090, .100. Because Knight filed this PRP more than one year after the mandate in her appeal issued, her PRP is time barred unless she demonstrates that an exception applies.

Exceptions to the time bar are contained in RCW 10.73.100, which provides in relevant part:

The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

.....

(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;

(4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;

Knight's judgment and sentence became final on March 7, 2014. Knight filed this petition in July 2016, more than one year after the direct appeal was final.

Knight's merger claims implicate double jeopardy and are an exception to the time bar. RCW 10.73.100(3). Knight's sufficiency of the evidence claim also falls within an exception. RCW 10.73.100(4). Because these claims fall under an exception to the one year time bar, we consider them on the merits.

II. MERGER

Knight argues that her robbery conviction merges with her conviction for felony murder. She also argues that we should reconsider our prior holding that the first degree robbery of Charlene and the second degree assault of Charlene convictions did not merge because *State v. Whittaker*, 192 Wn. App. 395, 367 P.3d 1092 (2016), changed the merger analysis.

The state and federal double jeopardy clauses prohibit the imposition of multiple punishments for the same offense. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004); *see* U.S. CONST. amend V; WASH. CONST. art. I, § 9. Double jeopardy involves questions of law that we review de novo. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

Freeman provided a three-part examination to be used when reviewing double jeopardy claims. 153 Wn.2d at 771-73. Knight only addresses the third part, which involves the merger doctrine. This doctrine is another aid used to determine legislative intent, even when the two

crimes at issue have different elements. *Freeman*, 153 Wn.2d at 772-73; *see also State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008).

“The merger doctrine, independent of double jeopardy concerns, evaluates whether the legislature intended multiple crimes to merge into a single crime for punishment purposes. The merger doctrine applies only when, in order to prove a more serious crime, the State must prove an act that a statute defines as a separate crime.” *State v. Novikoff*, 1 Wn. App. 2d 166, 172-73, 404 P.3d 513 (2017) (internal citation omitted) (assault providing factual basis for fourth degree assault was also element of no contact order violation). “Whether the merger doctrine bars double punishment is a question of law that we review de novo.” *State v. Williams*, 131 Wn. App. 488, 498, 128 P.3d 98 (2006), *adhered to on remand*, 147 Wn. App. 479, 195 P.3d 578 (2008).

“The merger doctrine applies when the legislature clearly indicates that it did not intend to impose multiple punishments for a single act that violates several statutory provisions.” *State v. Muhammad*, 4 Wn. App. 2d 31, 63-64, 419 P.3d 419, *review granted*, 191 Wn.2d 1019 (2018). “[W]hen the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime.” *Freeman*, 153 Wn.2d at 772-73 (legislature intended to punish assault in the first degree and robbery in the first degree separately). An exception to merger exists when a predicate crime results in a separate injury that is not merely incidental to the greater offense, but is distinct from it. *Freeman*, 153 Wn.2d at 778. “Generally a predicate offense will merge into the second crime, and the court may not punish the predicate crime separately.” *Muhammad*, 4 Wn. App. 2d at 63.

If each crime has “an independent purpose or effect” they may be punished separately. *Freeman*, 153 Wn.2d at 773. “An exception to the merger doctrine lies when the predicate and

charged crimes do not intertwine.” *Muhammad*, 4 Wn. App. 2d at 63. “Courts apply an exception to this merger doctrine on a case-by-case basis; it turns on whether the predicate and charged crimes are sufficiently ‘intertwined’ for merger to apply.” *State v. Saunders*, 120 Wn. App. 800, 821, 86 P.3d 232 (2004).⁵

The two crimes “may be punished separately if the defendant’s conduct forming one crime demonstrates an independent purpose or effect from the second crime.” *Muhammad*, 4 Wn. App. 2d at 63. “[I]f the predicate crime injures the person or property of the victim or others in a separate and distinct manner from the crime for which it serves as an element, the crimes do not merge.” *Muhammad*, 4 Wn. App. 2d at 64.

We look to the statutory elements of each crime to assess “whether the legislature intended to impose a single punishment for a homicide committed in furtherance of or in immediate flight from an armed robbery.” *Williams*, 131 Wn. App. at 498. “The offenses merge if the essential elements of the homicide include all the elements of the robbery, such that the facts establishing one necessarily also establish the other.” *Williams*, 131 Wn. App. at 498; *cf. In re Pers. Restraint of Schorr*, 191 Wn.2d 315, 325-26, 422 P.3d 451 (2018). Here, the robbery was an element of the felony murder and it was the predicate felony that elevated the crime to murder.

In *Schorr*, the defendant was convicted of both premeditated murder and felony murder.

The court concluded that,

even though first degree felony murder predicated on first degree robbery would merge with the first degree robbery on which it is predicated, that was not the only means of first degree murder to which Schorr pleaded guilty. He also pleaded guilty to the alternative means of premeditated murder. A first degree robbery conviction certainly does not merge with a first degree premeditated murder conviction.

⁵ *Saunders* relies on the language from *State v. Johnson*, 92 Wn.2d 671, 600 P.2d 1249 (1979), overruled in part on other grounds by *State v. Sweet*, 138 Wn.2d 466, 980 P.2d 1223 (1999). “Although proof of only one such element was necessary, both were intertwined.” *Johnson*, 92 Wn.2d at 681.

Schorr, 191 Wn.2d at 318.

Here, Knight's sole homicide conviction was felony murder predicated on robbery. Based on *Schorr*'s pronouncement, the felony murder and the robbery merge.

III. FELONY MURDER

A person is guilty of felony murder in the first degree if, in relevant part, she commits, or attempts to commit, "robbery in the first degree . . . and in the course of or in furtherance of such crime . . . , he or she, or another participant, causes the death of a person other than one of the participants." RCW 9A.32.030(1)(c). The murder must occur in furtherance of the predicate crime. In this case, the State charged only robbery as the predicate crime to the murder.

In a felony murder prosecution, the intent to commit the predicate felony substitutes for the mens rea that is otherwise necessary to establish murder. *State v. Craig*, 82 Wn.2d 777, 781, 514 P.2d 151 (1973); *Muhammad*, 4 Wn. App. 2d at 63. Where the predicate felony is robbery, it is immaterial if the property is taken before or after the killing, if the killing and the robbery are parts of the same transaction. *Craig*, 82 Wn.2d at 781-82; *State v. Coe*, 34 Wn.2d 336, 341, 208 P.2d 863 (1949).

The trial court instructed the jury that to convict Knight of murder in the first degree, the State had to prove beyond a reasonable doubt that "the defendant or an accomplice committed Robbery in the First Degree [and] . . . the defendant or an accomplice caused the death of James . . . in the course of or in furtherance of such crime." PRP, App. A (Instr. 9).

In closing argument, the State argued that the felony murder was based on the robbery of the rings.

With respect to murder in the first degree, which is Count I in your jury instructions, again, no issue that this occurred on April 28. Charlene testified that her wedding ring was stolen, [James's] wedding ring was stolen. The state has to

prove that the defendant or an accomplice caused the death of someone who is not a participant in the crime. Excuse me. Higashi shot and killed James . . . in the course of this robbery.

7 RP at 1007.⁶

Here, James's death occurred in the course of or in furtherance of the robbery.

IV. ROBBERY

Washington has adopted a “transactional” analysis of robbery. *State v. Handburgh*, 119 Wn.2d 284, 290, 830 P.2d 641 (1992); *State v. Truong*, 168 Wn. App. 529, 535-36, 277 P.3d 74 (2012). Until the defendant has escaped, the taking is considered to be ongoing. *Truong*, 168 Wn. App. at 535-36; *State v. Manchester*, 57 Wn. App. 765, 770, 790 P.2d 217 (1990). “The definition of ‘robbery’ thus includes ‘violence during flight immediately following the taking.’” *Truong*, 168 Wn. App. at 536 (quoting *Manchester*, 57 Wn. App. at 770). In *Handburgh*, the court noted, “Implicit in the *Manchester* holding is the assumption a taking can be ongoing or continuing so that the later use of force to retain the property taken renders the actions a robbery.” *Handburgh*, 119 Wn.2d at 290.

State v. Roberts, 142 Wn.2d 471, 512-13, 14 P.3d 713 (2000), and *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000), are also instructional. The court emphasized that for a defendant to be guilty as an accomplice, the state must show she possessed general knowledge she aided the commission of the crime, not just any crime. *Roberts*, 142 Wn.2d at 512-13; *Cronin*, 142 Wn.2d at 579. In this case, that crime was robbery.

⁶ The State's supplemental briefing argues, “There is ample evidence in the record to support the State's theory that the felony murder occurred based on the robbery of the safe and not of the rings, giving an independent purpose to each robbery.” Suppl. Br. of Resp't at 3. The State never argued this theory at trial, and the theory is contrary to the jury instructions. In addition, the State could not have argued this theory because there was only an attempted robbery of the safe. The State only charged and alleged a completed robbery, not an attempted robbery.

In the present case, the court instructed the jury that it must find that Knight, acting as a principal or an accomplice, caused the death of another in the course of and in furtherance of robbery in the first degree which, based on the transactional view of robbery was not completed until Knight and her accomplices escaped. **Therefore, the robbery was not separate and distinct** from the felony murder. They were intertwined.

V. FELONY MURDER AND MERGER

The felony murder statute and established precedent demonstrate how the robbery and the killing are intertwined. Knight was convicted of first degree felony murder which “expressly require[s] an associated conviction for another crime.” *Williams*, 131 Wn. App. at 499. A person is guilty of murder in the first degree when: “He or she commits or attempts to commit the crime of . . . (1) robbery in the first or second degree . . . *and in the course of or in furtherance of such crime or in immediate flight therefrom*, he or she, or another participant, causes the death of a person other than one of the participants.” RCW 9A.32.030(1)(c) (emphasis added). A separate conviction for the predicate crime is, therefore, contrary to the legislative intent and the offenses merge. *Williams*, 131 Wn. App. at 499. The plain language of RCW 9A.32.030 necessarily requires that the killing must be intertwined with, and not separate and distinct from the predicate felony, which in this case is robbery in the first degree.

In *Williams*, the court concluded that the predicate offense of attempted robbery merged with the felony murder conviction. 131 Wn. App. at 497. *Williams* rejected the state’s argument that the attempted robbery was factually disconnected from the felony murder or served a different purpose or intent from it. 131 Wn. App. at 498. In so doing, it ruled the robbery was integral to the killing.

If, as the State suggests, the jury found the attempted robbery was complete when Mr. Williams took some undefined substantial step earlier in the evening, then it

could not have found that the shooting was in furtherance of or in flight from that attempt. And the first degree murder conviction could not stand. Likewise, the State's assertion that the two crimes were completely unrelated is inconsistent with the felony murder charge.

Williams, 131 Wn. App. at 499.

Similarly here, if, as the State suggests and as the dissent concludes, the robbery was completed after Knight or her accomplices took James's ring, then the jury could not have found that the shooting occurred in furtherance of that robbery, and the murder in the first degree conviction could not stand. It would not be in the course of or in furtherance of the robbery. Furthermore, the State's assertion that the killing and robbery have unrelated purposes is inconsistent with the felony murder charge and its theory of the case at trial.

In addition, the facts of this case demonstrate that the robbery and killing were intertwined. Knight and her accomplices committed a home invasion robbery in Lake Stevens. One accomplice contacted Knight and said he wanted to commit another robbery. They targeted James and his family, arrived at his house, zip-tied Charlene and James and forced them to lie face down on the floor. One of Knight's accomplices held a gun to the back of Charlene's head, and repeatedly yelled at Charlene and James, demanding to know where their safe was located. Ultimately, Charlene told Knight's accomplices that there was a safe. James was led to the garage to open the safe. James told the intruders a code for the safe, and then broke free of the zip ties and began fighting with Knight's accomplice. At that time, the defendant's accomplice shot and killed James.

In short, the record demonstrates that during the commission of the home-invasion robbery, James fought with Knight's accomplices in an effort to stop the robbery, and Knight's accomplice shot James. Knight's accomplices' use of force was intertwined with, and not separate and distinct from, the ongoing robbery. See *Freeman*, 153 Wn.2d at 779 (noting that force used to intimidate a victim into providing property "is often incidental" to robbery); see also *Truong*, 168 Wn. App.

at 535-36 (holding that under Washington’s transactional analysis of robbery, “[t]he taking is ongoing until the assailant has effected an escape”). No independent purpose existed.

Our inquiry is whether the unnecessary use of force had a purpose independent from facilitating the robbery. *See Freeman*, 153 Wn.2d at 778-79. Knight’s accomplices restrained James at gunpoint in order to facilitate the ongoing robbery of the Sanders’s home. James broke free and attempted to fight back. In that process, Knight’s accomplice shot and killed James. There is no evidence that Knight’s accomplice shot James with some other motive than to facilitate the home-invasion robbery. Unlike *Schorr*, here the State did not charge both premeditated murder and felony murder. Because the felony murder and the robbery of James were intertwined and because James’s death occurred in the course of or in furtherance of the robbery, the charges merge.

VI. ROBBERY AND ASSAULT OF CHARLENE

Knight argues that *Whittaker* has changed the analysis for the merger doctrine as articulated in *Freeman*. Knight also argues that in the interests of justice under RAP 16.4(d), we should reconsider the holding on direct appeal that the convictions for the robbery of Charlene and the two assault counts did not merge. *Whittaker* does not change the merger doctrine analysis. We decline to reconsider our prior holding on direct appeal.

In *Whittaker*, the defendant was convicted of one count of felony stalking and one count of felony violation of a protection order. 192 Wn. App. at 400-01. On appeal, the defendant argued that his convictions merged because the stalking verdict failed to specify which violation of the court’s protection order elevated the conviction to a felony. *Whittaker*, 192 Wn. App. at 409-10. *Whittaker* applied the well-established rule for merger and recognized the exception to the merger doctrine articulated in *Freeman*. It explained,

Specifically, to convict [the defendant] of felony stalking, the jury had to find at least two instances of either harassment or following and at least one violation of the court order. To convict [the defendant] of violation of the court order, the jury had to find that [the defendant] violated the protection order at least once. But the jury verdict is silent on which incidents it chose to reach its verdicts.

For example, the jury could have found that [the defendant] repeatedly followed [the victim] on January 3 based on the incident we earlier described that occurred at her salon. One of these two “followings” could also have served as the basis for finding him guilty of violation of the court order protecting [the victim].

Of course, this incident at the salon does not exclude the possibility that the jury could also have based its stalking conviction on [the defendant’s] repeatedly harassing [the victim] by text and otherwise prior to January 3 and during the charging period. But this possibility does nothing to clarify what the jury actually did in this case. Thus, this alternative scenario does not cure the problem of the ambiguous verdict. We simply cannot exclude the possibility that the jury convicted on the basis of the first scenario that we described above. The rule of lenity applies. The convictions must merge.

Whittaker, 192 Wn. App. at 415-16 (footnote omitted).

Knight claims that the analysis in *Whittaker* demonstrates that the merger doctrine must be analyzed based on the jury instructions and the jury verdicts alone. Knight also claims that, by following *Whittaker*, we no longer consider the individual facts of the case to determine whether specific counts should merge. As has been previously pointed out, we disagree with Knight.

As to Knight’s claim that we should reconsider our prior holding, a petitioner may not renew a claim that was raised and rejected on the merits on direct appeal unless the petitioner shows that the interest of justice require reconsideration under RAP 16.4(d). *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 17, 296 P.3d 872 (2013). In her appeal, we addressed whether the convictions for the assault and the robbery of Charlene merged. *Knight*, 176 Wn. App. at 953. In rejecting Knight’s argument, we relied on the well-established principles for merger articulated in *Freeman* and held that the second degree assault was not necessary to elevate the degree of the robbery to first degree. *Knight*, 176 Wn. App. at 953-56. *Whittaker* does not change the law regarding the merger doctrine or its application here. Knight’s argument on this issue fails.

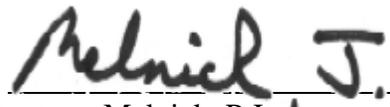
VII. SUFFICIENCY OF THE EVIDENCE

Knight next argues that if we reject her merger arguments, there was insufficient evidence to support her convictions for felony murder or the assaults because she was not an accomplice to those crimes. A petitioner claiming insufficiency of the evidence admits the truth of the State's evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All inferences from the evidence must be drawn in favor of the State and most strongly against the petitioner. *Salinas*, 119 Wn.2d at 201. Sufficient evidence exists to support a conviction if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006).

We reject Knight's merger arguments related to robbery and assault. Based on *Freeman* and its progeny, and our review of the record in this case, sufficient evidence supports the convictions for the assaults.

We grant the PRP in part, deny in part, and remand to the trial court for resentencing consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



Melnick, P.J.

BJORGEN, J.P.T.* (concurring in part/dissenting in part) — I agree with the result of the lead opinion and most of its analysis. However, I disagree with the test it uses to apply the independent purpose exception to the merger doctrine.

The law deals with human conduct, in all its depth and subtleties. Lacking, fortunately, a precise, quantifiable tool to draw distinctions in the murky shades of that conduct, we use language as best we can. Words, though, are like the jaws of a vice that don't quite meet: good at grasping the easily defined, less so with the finer weave. For example, as figures of rhetoric, the metaphoric can sometimes evoke the folds of conduct and experience more surely and vividly than cold exposition. In illuminating distinctions or prescribing rules, though, the recourse to metaphor often only confuses, through its inherent vagueness or temptation to multiply categories. In its use of the notion of intertwining as the standard for applying the independent purpose exemption, the lead opinion does this.

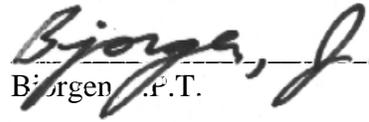
In *State v. Freeman*, 153 Wn.2d 765, 778-79, 108 P.3d 753 (2005), our state Supreme Court described the exception to merger here at issue in the following terms:

Finally, we turn to a well established exception that may operate to allow two convictions 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.” [*State v. Frohs*, 83 Wash.App. [803,] 807, 924 P.2d 384 [1996] (citing [*State v. Johnson*, 92 Wash.2d [671,] 680, 600 P.2d 1249[1979])]. . . . The test is whether the unnecessary force had a purpose or effect independent of the crime.

In this test, the key notions of independent purpose or effect and “not merely incidental” are relatively precise and straightforward to apply. Doing so leads me to agree with the lead opinion that the charges of felony murder and robbery of James merged. There is no need to

* Judge Thomas R. Bjorgen is serving as a judge pro tempore for the Court of Appeals, pursuant to RCW 2.06.150.

clutter the analysis with the vague category of intertwining, even if it has been used in other Court of Appeals opinions. The Baroque is best confined to music.


Bjorge, J.
Bjorge, J.P.T.

SUTTON, J. (dissenting in part) — In her personal restraint petition (PRP), Amanda Knight claims that her conviction for the first degree robbery of James Sanders merges with her felony murder conviction because they involve the same victim, James Sanders, and the robbery of the victims' rings was part of the same continuous course of conduct. The majority agrees with Knight and holds that the first degree robbery conviction merges with the felony murder conviction. Because the robbery of the victims' rings had an independent purpose and effect from the felony murder, I disagree that the robbery of James Sanders merges with the felony murder conviction. Therefore, I respectfully dissent in part on this basis. Knight also argues that the evidence is insufficient to support her convictions for felony murder and assault. I disagree.

Knight also argues that *State v. Whittaker*⁷ changed the law of merger since her appeal was filed and therefore, her other first degree robbery conviction merges with one of the first degree assault convictions because they involve the same victim, Charlene Sanders.⁸ I agree with the majority that *Whittaker*⁹ did not change the law regarding merger. Therefore, I would deny Knight's PRP for the reasons explained below.

Knight argues that in order to avoid a double jeopardy issue, the first degree felony murder and the first degree robbery of James convictions must merge. I disagree.

⁷ *State v. Whittaker*, 192 Wn. App. 395, 367 P.3d 1092 (2016).

⁸ James Sanders and Charlene Sanders were married and have the same last name. For purposes of clarity I refer to them by their first names in this opinion. I intend no disrespect.

⁹ Knight also argues that (1) if this court concludes that the felony murder and robbery do not merge, the evidence is insufficient to support the charges and (2) her appellate counsel was ineffective. I agree with the majority that we do not need to decide the ineffective assistance claim. But I address the sufficiency claim due to my disposition on merger.

A. LEGAL PRINCIPLES

The federal and state double jeopardy clauses prohibit the imposition of multiple punishments for the same offense. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004); *see* U.S. CONST. amend V; WASH. CONST. art. I, § 9. Double jeopardy involves questions of law that we review de novo. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). “The double jeopardy doctrine protects a criminal defendant from being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after conviction, and (3) punished multiple times for the same offense.” *State v. Fuller*, 185 Wn.2d 30, 33-34, 367 P.3d 1057 (2016) (quoting *State v. Linton*, 156 Wn.2d 777, 783, 132 P.3d 127 (2006)).

Freeman outlined a three-part inquiry to apply to double jeopardy claims. *Freeman*, 153 Wn.2d at 771-73. First, we search for express or implicit legislative intent to punish the crimes separately. *Freeman*, 153 Wn.2d at 771-72. Second, if there is no clear statement of legislative intent, we may apply the “same evidence” or *Blockburger*¹⁰ test, which asks if the crimes are the same in law and in fact. *Freeman*, 153 Wn.2d at 772. And 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.¹¹ *Freeman*, 153 Wn.2d at 772-73; *see State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008) (stating the inquiry is a “three-part test”).

¹⁰ *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

¹¹ Case law suggests that merger may be raised as a stand-alone claim. *See e.g. State v. Novikoff*, 1 Wn. App.2d 166, 172-73, 404 P.3d 513 (2017). But that is not the case here because Knight expressly raises her merger argument in the context of a double jeopardy claim and *Freeman* establishes that merger can be examined as part of a double jeopardy analysis. *Freeman*, 153 Wn.2d at 771-73.

Knight does not address the first two prongs of the *Freeman* inquiry and argues only that the merger doctrine applies here. Accordingly, I address only the applicability of the merger doctrine. See *Kier*, 164 Wn.2d at 805 n.1 (analyzing only the applicability of the merger doctrine where neither party suggested that the analysis under steps (1) and (2) would differ from *Freeman*).

Under the merger doctrine, we presume that “the legislature intended to punish both offenses through a greater sentence for the greater crime.” *Freeman*, 153 Wn.2d at 773.

Despite this presumption, *Freeman* recognizes an exception to the merger doctrine that focuses on the individual facts of the case. *Freeman*, 153 Wn.2d at 779. Even if two convictions appear to merge on an abstract level, the convictions may be punished separately if each conviction has an independent purpose or effect. *Freeman*, 153 Wn.2d at 773. In other words, offenses that might otherwise merge may be punished separately “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.’” *Freeman*, 153 Wn.2d at 778-79 (quoting *State v. Frohs*, 83 Wn. App. 803, 807, 924 P.2d 384 (1996)). *Freeman* underscored the need for a reviewing court to take a “hard look at each case” based on its facts, the charged crimes, and even the jury instructions in the case. *Freeman*, 153 Wn.2d at 774; *Kier*, 164 Wn.2d at 811-12 (examining the jury instructions when evaluating defendant’s merger argument).

B. THE ROBBERY AND FELONY MURDER

Knight argues that the conviction for the first degree robbery of James merges with the conviction for the felony murder of James. Specifically, she argues that because the jury instructions did not specify which first degree robbery charge was the predicate offense for the first degree felony murder charge, the rule of lenity requires us to assume that the predicate offense was the first degree robbery of James and there was “no ‘independent purpose’ between the

robbery and the felony murder.” PRP at 11. Even presuming, but not deciding, that the rule of lenity¹² requires that the robbery of the rings is the predicate offense for the felony murder, her argument fails because the robbery of the rings had an independent purpose or effect from the felony murder.¹³

Here, the evidence showed that Kyoshi Higashi pulled out a gun, zip-tied James’s hands behind his back, and either Higashi or Knight removed James’s ring. *Knight*, 176 Wn. App. 936, 942, 309 P.3d 776. The State argued and proved that the first degree robbery of the rings was completed when Higashi threatened Charlene with a firearm and either he or Knight removed James’s and Charlene’s rings. *Knight*, 176 Wn. App. at 954. Knight also admitted during closing argument that the purpose of the robbery was to obtain the Sanders’ property, the rings, and engage in a home invasion. *Knight*, 176 Wn. App. at 947.

The felony murder to convict instruction did not, however, specify which of the two charged first degree robberies was the predicate offense. To prove the felony murder charge, the State relied on the following facts and evidence: (1) the murder of James happened after the robbery of the rings was complete, (2) once Higashi or Knight took the rings, the charged robbery was complete, (3) the murder of James took place after Clabon Berniard kicked Charlene in the head, pointed a gun at her head, and started to countdown after threatening to kill her if she did not disclose the location and combination of the safe and Berniard forced James to the garage to open

¹² Although the rule of lenity generally applies when statutes are ambiguous, it may also apply in the context of merger. *See Kier*, 164 Wn.2d at 811-14 (applying the rule of lenity to appellant’s merger argument); *State v. Roberts*, 117 Wn.2d 576, 586, 817 P.2d 855 (1991) (when a statute is ambiguous, “The rule of lenity requires the court to adopt an interpretation most favorable to the criminal defendant.”).

¹³ To the extent Knight is arguing that *Whittaker* changes the independent purpose or effect test, I disagree. Although the *Whittaker* court addressed merger, it did not discuss the independent purpose or effect test. *Whittaker*, 192 Wn. App. at 409-16.

the safe, and (4) Berniard first shot James when James began to fight him, while they were in the garage and then he and/or Joshua Reese fatally shot James several more times after dragging him into the living room.

The subsequent felony murder of James resulted from the later actions committed by two other co-accomplices, Berniard and Reese, with Knight as an accomplice. The felony murder of James did not occur until after the robbery of the rings was complete and Knight's accomplices were attempting to rob the Sanders' safe.¹⁴ Further, the injury sustained by James during his murder (James's death) was distinct from the injury he sustained during the robbery of the rings (the loss of the rings). Thus, the robbery of the rings was an "injury to . . . 'the person or property of the victim or others, which [wa]s separate and distinct from" the force used in the murder of James. *See Freeman*, 153 Wn.2d at 778-79 (quoting *Frohs*, 83 Wn. App. at 807). Thus, under *Freeman*, I would hold that Knight's convictions for the first degree robbery of James and the felony murder of James do not merge and that Knight's double jeopardy claim on this basis fails. I respectfully dissent from the majority opinion on this basis.

¹⁴ By saying that the robbery of the rings was complete, I do not imply that the predicate offense for the felony murder was an uncharged attempted robbery. I am referring to the completed robberies of the rings in relation to the defendants' later acts to demonstrate that the predicate robbery was not sufficiently intertwined with the robbery of the rings to justify merger.

Under the majority's view, the independent purpose and effect test does not apply when the predicate robbery is considered a transactional crime, but that approach would mean that felony murders based on the predicate offense of robbery could never merge. Case law does not support that conclusion. *See e.g. State v. Saunders*, 120 Wn. App. 800, 820-24, 86 P.3d 232 (2004) (holding that defense counsel was not ineffective for failing to argue that the predicate offenses of rape, robbery, and kidnapping merged with the felony murder conviction because the predicate offenses were not sufficiently intertwined with the murder and were separate and distinct for purposes of merger analysis); *see also State v. Peyton*, 29 Wn. App. 701, 720, 630 P.2d 1362 (1981) (refusing to merge predicate robbery with felony murder).

C. SUFFICIENCY OF THE EVIDENCE

Knight also argues that if we reject her merger arguments, there was insufficient evidence to support her convictions for first degree felony murder (Count I) or the second degree assaults of Charlene (Count V) and of JS (count III) because she (Knight) was not an accomplice to those crimes. She further argues that if we hold that the robberies were complete when the rings were taken, there was insufficient evidence that the killing took place in the course of or in furtherance of the robbery. I disagree.

A petitioner claiming insufficiency of the evidence admits the truth of the State's evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All inferences from the evidence must be drawn in favor of the State and most strongly against the petitioner. *Salinas*, 119 Wn.2d at 201. Sufficient evidence exists to support a conviction if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). These standards are the same for appeals and PRPs. *See In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011).

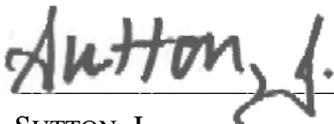
Knight argues that she was only an accomplice to the robberies and that if this court holds that those robberies were completed when the rings were taken from James and Charlene, she could not be an accomplice to the felony murder or the second degree assaults of Charlene and JS. I disagree.

Although the charged robberies were complete when the rings were taken, there was sufficient evidence to allow the jury to conclude that Knight agreed to participate in more than just the robbery of the rings. The fact that Knight continued to search the house for additional items to steal would allow the jury to conclude that Knight had also agreed to participate in a broader robbery, a home invasion, and that the later assaults of Charlene and JS and the later felony murder

of James were related to the broader robbery, the home invasion. Because the robberies were not all completed at the time when Charlene and JS were assaulted and when James was murdered, her sufficiency of the evidence claim fails.

In addition, even concluding that the robberies of the rings were the predicate offenses for the felony murder and that those offenses were completed, there was still sufficient evidence to prove that the killing took place during the course of or in furtherance of the robberies because “[a] homicide is deemed committed during the perpetuation 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). In *Leech*, the court held that although the crime of arson was complete when the defendant intentionally set a fire, the death of a firefighter that occurred while the fire was still burning was close enough in time and place to the arson to be within the res gestae of that felony. 114 Wn.2d at 708. Here, as in *Leech*, even presuming that the robberies were completed when the rings were taken, James’s death still occurred in close proximity in terms of time and distance to the felony. The death occurred shortly after the rings were taken and before Knight and her accomplices left the home where the robbery took place. Thus, I would hold that Knight’s sufficiency of the evidence argument fails.

Accordingly, I dissent in part.

A handwritten signature in black ink, appearing to read "Sutton, J.", written over a horizontal line.

SUTTON, J.

APPENDIX B

176 Wash.App. 936
Court of Appeals of Washington,
Division 2.

STATE of Washington, Respondent,
v.
Amanda Christine **KNIGHT**, Appellant.

No. 42130–5–II. | Sept. 24, 2013.

Synopsis

Background: Defendant was convicted in the Superior Court, Pierce County, Rosenne Nowak Buckner, J., of second-degree assault and other crimes arising out of home invasion robbery. Defendant appealed.

Holdings: The Court of Appeals, [Hunt](#), P.J., held that:

[1] evidence was sufficient to support convictions for second-degree assault as accomplice;

[2] separate punishments for second-degree assault and first-degree robbery did not violate prohibition against double jeopardy;

[3] defendant was not prejudiced by trial counsel’s failure to inform trial court of its authority to impose exceptional downward sentence;

[4] robbery and killing of one victim were not based on “same criminal conduct,” as required for offenses to be counted as single crime in calculating defendant’s offender score;

[5] second-degree assault and robbery were not based on same criminal conduct; and

[6] trial court had authority, under anti-merger statute, to punish burglary as separate offense, even if burglary and other crimes constituted same criminal conduct.

Affirmed.

West Headnotes (31)

[1]

Criminal Law

🔑 Evidence accepted as true

Criminal Law

🔑 Inferences or deductions from evidence

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.

[Cases that cite this headnote](#)

[2]

Criminal Law

🔑 Relative strength of circumstantial and direct evidence

Circumstantial evidence and direct evidence are equally reliable when considering a challenge to the sufficiency of the evidence.

[Cases that cite this headnote](#)

[3]

Assault and Battery

🔑 Persons liable

Robbery

🔑 Persons liable

Defendant knowingly promoted or facilitated second-degree assaults on victims during course of home invasion robbery, as required to support convictions as accomplice, regardless of whether she was in different room of victims’ defendant was in when assaults were committed; defendant called victim’s husband to arrange meeting at his home under pretense of purchasing ring that victim had advertised for sale, she drove assailants to victim’s home, she tied one of two victims’ hands and forced her to ground, and defendant signaled assailants to enter home after victims’ were bound and on ground, knowing that both assailants were armed. [West’s RCWA 9A.08.020\(3\)\(a\)](#).

[Cases that cite this headnote](#)

[4] **Criminal Law**
🔑 Aiding, abetting, or other participation in offense

A person “aids or abets” a crime, and thus, is criminally liable as an accomplice, 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. West’s RCWA 9A.08.020(3)(a).

2 Cases that cite this headnote

[5] **Criminal Law**
🔑 Presence

A defendant’s physical presence during the offense is not required for accomplice liability. West’s RCWA 9A.08.020(3)(a).

1 Cases that cite this headnote

[6] **Criminal Law**
🔑 Presence

A defendant’s mere presence at the scene cannot serve as the basis for accomplice liability. West’s RCWA 9A.08.020(3)(a).

Cases that cite this headnote

[7] **Criminal Law**
🔑 Particular Instructions

Defendant was not entitled to “manifest error” review of claim, not asserted at trial, that instructions on charges for second-degree assault were ambiguous, absent any showing of prejudice. RAP 2.5(a)(3).

Cases that cite this headnote

[8] **Criminal Law**
🔑 Objections in General

Generally, a party who fails to object to jury instructions below waives any claim of instructional error on appeal.

Cases that cite this headnote

[9] **Criminal Law**
🔑 Plain or fundamental error

The determination of whether an otherwise unpreserved claim of instruction error is “manifest,” for the purposes of obtaining appellate review, requires the appellant to show actual prejudice, which the appellate court determines by looking at the asserted error to see if it had practical and identifiable consequences at trial. RAP 2.5(a)(3).

Cases that cite this headnote

[10] **Criminal Law**
🔑 Necessity of Objections in General

The “manifest error” exception to the waiver rule is narrowly construed. RAP 2.5(a)(3).

Cases that cite this headnote

[11] **Double Jeopardy**
🔑 Robbery

Convictions for second-degree assault on theory of accomplice liability committed during course of home invasion robbery did not merge with convictions for first-degree robbery, and thus,

separate punishments did not violate prohibition against double jeopardy; first-degree robbery based on finding that defendant or accomplice was armed with deadly weapon was completed when first assailant who entered victim's home with defendant threatened victim with gun and defendant removed victim's ring, whereas second-degree assault was based on subsequent act by second assailant who entered home after victims were bound and forced to ground and inflicted bodily injury on victim by kicking her in head. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9; West's RCWA 9A.36.021(1)(a), 9A.56.190.

[1 Cases that cite this headnote](#)

[12] **Double Jeopardy**
🔑 Constitutional and statutory provisions

The state and federal Double Jeopardy Clauses provide the same protections. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

[Cases that cite this headnote](#)

[13] **Double Jeopardy**
🔑 Several offenses in one act; separate statutory offenses and legislative intent

In considering a double jeopardy challenge when a defendant's acts support charges under two statutes, the court asks whether the legislature intended to authorize multiple punishments for the crimes in question. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

[Cases that cite this headnote](#)

[14] **Double Jeopardy**
🔑 Prohibition of Multiple Proceedings or Punishments

Double jeopardy principles bar courts from entering multiple convictions for the same offense. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

[Cases that cite this headnote](#)

[15] **Double Jeopardy**
🔑 Proof of fact not required for other offense

In reviewing a double jeopardy challenge to separate charges arising out of same criminal acts, the court consider the elements of the crimes as charged and proved, not merely at the level of an abstract articulation of the elements. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

[Cases that cite this headnote](#)

[16] **Criminal Law**
🔑 Review De Novo

Double jeopardy is a question of law, which the appellate court reviews de novo. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

[1 Cases that cite this headnote](#)

[17] **Double Jeopardy**
🔑 Several offenses in one act; separate statutory offenses and legislative intent
Double Jeopardy
🔑 Proof of fact not required for other offense

Washington courts apply a three-part test for evaluating double jeopardy claims based on separate charges arising out of the same criminal act: first, the court searches for express or implicit legislative intent to punish the crimes separately, and if this intent is clear, the court will look no further; second, if there is no clear

statement of legislative intent, the court may apply the “same evidence” *Blockburger* test, which asks if the crimes are the same in law and in fact; and third, the court may use the merger doctrine to discern legislative intent where the degree of one offense is elevated by conduct constituting a separate offense. U.S.C.A. Const.Amend. 5; West’s RCWA Const. Art. 1, § 9.

1 Cases that cite this headnote

[18] **Double Jeopardy**
🔑 Several offenses in one act; separate statutory offenses and legislative intent

Even if two convictions arising from a single criminal act appear to merge on an abstract level, for double jeopardy purposes, the State may punish them separately if each conviction has an independent purpose or effect. U.S.C.A. Const.Amend. 5; West’s RCWA Const. Art. 1, § 9.

Cases that cite this headnote

[19] **Criminal Law**
🔑 Merger of offenses

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.

Cases that cite this headnote

[20] **Assault and Battery**
🔑 Nature and Elements of Criminal Assault

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.

Cases that cite this headnote

[21] **Criminal Law**
🔑 Matters or Evidence Considered

When considering a double jeopardy challenge, the court takes a hard look at the facts and a rigorous review of the entire trial record, including the crimes as charged and instructed to the jury, the evidence in the case, and the closing arguments. U.S.C.A. Const.Amend. 5; West’s RCWA Const. Art. 1, § 9.

Cases that cite this headnote

[22] **Double Jeopardy**
🔑 Several offenses in one act; separate statutory offenses and legislative intent

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. U.S.C.A. Const.Amend. 5; West’s RCWA Const. Art. 1, § 9.

1 Cases that cite this headnote

[23] **Criminal Law**
🔑 Other particular issues

Defendant was not prejudiced by trial counsel’s failure to inform trial court of its authority to impose exceptional downward sentence, as required to support claim of ineffective assistance of counsel, in trial for felony murder

and related crimes arising out of home invasion robbery; even assuming trial court could have imposed exceptional sentence downward, it elected to impose sentence at high end of standard range, thus indicating that trial court would have rejected such request. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[24] **Criminal Law**
🔑 Requisites and sufficiency of judgment or sentence

Although a standard-range sentence is generally not appealable, a defendant may appeal the trial court's procedure in imposing his sentence. West's RCWA 9.94A.585(1).

Cases that cite this headnote

[25] **Sentencing and Punishment**
🔑 Acts or conduct connected by common objective or plan

Multiple offenses do not encompass the "same criminal conduct," and thus, the offenses must be counted separately when calculating the defendant's offender score, for sentencing purposes, if the offenses did not require the same criminal intent, if they were not committed at the same time and place, or if they did not involve the same victim. West's RCWA 9.94A.589(1)(a).

2 Cases that cite this headnote

[26] **Criminal Law**
🔑 Sentencing
Criminal Law
🔑 Sentencing

Absent an abuse of discretion or misapplication of the law, the appellate court may not reverse a

sentencing court's determination of what constitutes the "same criminal conduct" for offender score calculation purposes. West's RCWA 9.94A.589(1)(a).

Cases that cite this headnote

[27] **Sentencing and Punishment**
🔑 Acts or conduct connected by common objective or plan

Robbery and killing of victim did not occur at same time, and thus, offenses were not based on "same criminal conduct," as required for offenses to be counted as single crime in calculating defendant's offender score, for sentencing purposes; robbery and felony murder did not share same criminal intent, and murder did not facilitate robbery, as robbery was complete after defendant and accomplice took victim's ring, long before victim was fatally shot. West's RCWA 9.94A.589(1)(a).

Cases that cite this headnote

[28] **Sentencing and Punishment**
🔑 Single act or transaction

Second-degree assault and robbery did not occur at same time, and thus, offenses were not based on "same criminal conduct," as required for offenses to be counted as single crime in calculating defendant's offender score, for sentencing purposes; robbery was completed when defendant removed victim's ring while assailant who first entered victim's home with defendant pointed gun to victim's head, while assault was committed later when different assailant, who had entered home after victim and others were bound and forced to ground, kicked victim in head. West's RCWA 9.94A.589(1)(a).

Cases that cite this headnote

[29] **Criminal Law**

🔑 **Homicide**

Trial court had authority, under burglary anti-merger statute, to punish burglary as separate offense, even if burglary and other crimes, namely felony murder, first-degree robbery, and second-degree assault, constituted same criminal conduct. [West's RCWA 9.94A.589\(1\)\(a\)](#), [9A.52.050](#).

[2 Cases that cite this headnote](#)

[30] **Criminal Law**

🔑 **Robbery and burglary**

The burglary anti-merger statute grants the trial judge discretion to punish a burglary separately, even where the burglary and another crime encompassed the same criminal conduct. [West's RCWA 9A.52.050](#).

[2 Cases that cite this headnote](#)

[31] **Criminal Law**

🔑 **Particular Instructions**

Defendant was not entitled to review for manifest error challenge, not raised at trial, to instruction that allegedly violated her right to jury trial under Washington Constitution by failing to instruct jury that it could vote “no” on special verdict forms with respect to firearm enhancements to sentences for felony murder and related offenses, where she failed to show she was prejudiced by instruction. [West's RCWA Const. Art. 1, § 21](#); [RAP 2.5\(a\)\(3\)](#).

[Cases that cite this headnote](#)

****779 Mitch Harrison**, Seattle, WA, for Appellant.

Melody M. Crick, Pierce County Prosecuting Attorney, Tacoma, WA, for Respondent.

Opinion

HUNT, P.J.

940 ¶ 1 Amanda** Christine **Knight** appeals two convictions for second degree assault against *780** two victims, JS¹ 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 ***941** 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 IV³ and II). She also asks us to remand for resentencing because 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

¶ 2 **Amanda** Christine **Knight**, Joshua Reese, and Kyoshi Higashi were acquaintances, who, with another acquaintance, Clabon Bernard, 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 Bernard. 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.

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¶ 3 Knight drove Higashi, Berniard, and Reese to the Sanders' house at 9:00 pm; she drove down the long driveway *942 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.

¶ 4 Inside, James⁴ 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.

¶ 5 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.

¶ 6 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 **781 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 *943 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.

¶ 7 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.

¶ 8 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.

¶ 9 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.

*944 ¶ 10 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.

¶ 11 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

¶ 12 The State charged Knight with (1) first degree felony

murder of James (Count I); (2) two counts of first degree robbery,⁶ against James (Count II) and Charlene (Count IV); (3) two counts of second degree assault,⁷ against Charlene (Count V) and JS ****782** (Count III); and (4) first degree ***945** 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 sophistication or planning, and an offender score that would result in some of the current offenses going unpunished.

¶ 13 In its opening statement, the State explained that it would prove the following: (1) Knight and three accomplices, Higashi, Reese, and Bernard, 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.

¶ 14 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).

***946** ¶ 15 (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).

¶ 16 (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).

¶ 17 (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).

¶ 18 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 Bernard 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.

¶ 19 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 coerced her to participate in the Sanders' home invasion, burglary, and robberies. In contrast, Knight clearly distanced herself from Bernard's later ****783 *947** "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

¶ 20 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.

¶ 21 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 consecutively.¹³

***948 ANALYSIS**

I. SUFFICIENT EVIDENCE

¶ 22 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

^[1] ¶ 23 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 Wash.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 Wash.2d 192, 201, 829 P.2d 1068 (1992).

^[2] ¶ 24 Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wash.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 Wash.App. 410, 415–16, 824 P.2d 533 (1992).

B. Second Degree Assaults

^[3] ^[4] ¶ 25 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 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. ***949 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 Wash.2d 487, 491, 588 P.2d 1161 (1979).

****784** ^[5] ¶ 26 Knight does not dispute that Bernard'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 Wash.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).

^[6] ¶ 27 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 Wash.2d at 491–92, 588 P.2d 1161). 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 Bernard to the 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 Bernard to enter the house, knowing that they ***950** 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

¶ 28 For the first time on appeal, Knight argues that her two second degree assault convictions against Charlene and James¹⁵ (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.

A. Failure To Preserve Jury Instruction Challenge

^[7] ^[8] ^[9] ^[10] ¶ 29 Generally, a party who fails to object to jury instructions below waives any claim of instructional error on appeal. *State v. Edwards*, 171 Wash.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 Wash.2d 1, 7, 17 P.3d 591 (2001). The initial burden is on Knight to demonstrate that the error is *951 both manifest and is of constitutional dimension. RAP 2.5(a)(3); *State v. O'Hara*, 167 Wash.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 Wash.2d 671, 676, 260 P.3d 884 (2011) (internal quotation marks omitted). See also *State v. Bonds*, 174 Wash.App. 553, 569, 299 P.3d 663 (2013). We narrowly construe exceptions to RAP 2.5(a). *State v. Montgomery*, 163 Wash.2d 577, 595, 183 P.3d 267 (2008).

**785 ¶ 30 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 Wash.2d 646, 661, 254 P.3d 803 (2011); *State v. Bertrand*, 165 Wash.App. 393, 402, 267 P.3d 511 (2011), review denied, 175 Wash.2d 1014, 287 P.3d 10 (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 Wash.App. at 402, 267 P.3d 511.

B. Merger; Double Jeopardy

[11] [12] [13] [14] [15] [16] ¶ 31 The state and federal double jeopardy clauses provide the same protections. *In re Orange*, 152 Wash.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. *952 *State v. Freeman*, 153 Wash.2d 765, 771, 108 P.3d 753 (2005); *In re Pers. Restraint of Borrero*, 161 Wash.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 Wash.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 Wash.2d at 777, 108 P.3d 753 (citing *State v. Vladovic*, 99 Wash.2d 413, 421, 662 P.2d 853 (1983); *Orange*, 152 Wash.2d at 817–18, 100 P.3d 291). Double jeopardy is a question of law, which we review de novo. *Freeman*, 153 Wash.2d at 770, 108 P.3d 753.

[17] [18] ¶ 32 In *State v. Calle*, our Supreme Court set forth a three-part test for double jeopardy claims. 125 Wash.2d 769, 776, 888 P.2d 155 (1995); see also *State v. Kier*, 164 Wash.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 Wash.2d at 776, 888 P.2d 155. 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 Wash.2d at 777–78, 888 P.2d 155 (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 Wash.2d at 804, 194 P.3d 212 (citing *Vladovic*, 99 Wash.2d at 419, 662 P.2d 853). 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 Wash.2d at 804, 194 P.3d 212; *Freeman*, 153 Wash.2d at 773, 108 P.3d 753.

[19] ¶ 33 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 Wash.2d at 772–74, 108 P.3d 753 (when assault elevates robbery to first degree, generally the two crimes constitute the same offense for double jeopardy *953 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 Wash.2d at 774, 108 P.3d 753.

¶ 34 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 **786 *Freeman*, 153 Wash.2d at 772–73, 108 P.3d 753; *State v. Esparza*, 135 Wash.App. 54, 57, 143 P.3d 612 (2006).

¶ 35 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 *954 to that person.” The information elevated this robbery to the first degree¹⁹ 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.

^[20] ¶ 36 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

*955 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 **787 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).

¶ 37 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 facts here. On the contrary, accomplice Bernard’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 Bernard’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 Bernard’s later brutal assaults of Charlene, JS, and James.

^[21] ^[22] ¶ 38 As our Supreme Court admonished in *Freeman* and *Mutch*, when considering double jeopardy, we take a “hard *956 look” at the facts²² 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, and the closing arguments.²⁴ Here, Bernard’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 Wash.2d at 778–79, 108 P.3d 753 (“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 Wash.App. 512, 516, 635 P.2d 1104 (1981) (separate injury and intent justified separate assault conviction where defendant struck victim *after* completing a robbery). Bernard’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.

¶ 39 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 Wash.App. at 66,

143 P.3d 612 (citing *Freeman*, 153 Wash.2d at 777–78, 108 P.3d 753).

*957 III. EFFECTIVE ASSISTANCE OF COUNSEL

^[23] ¶ 40 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

¶ 41 To prevail on a claim of ineffective assistance of counsel, a defendant must show **788 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 Wash.2d 870, 883, 204 P.3d 916 (2009) (citing *State v. McFarland*, 127 Wash.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 Wash.2d 61, 78, 917 P.2d 563 (1996)²⁶.

^[24] ¶ 42 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 Wash.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.

B. No Prejudice Shown

¶ 43 Even assuming, without deciding, that the trial court could have imposed an exceptional sentence downward *958 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 Wash.App. at 97, 47 P.3d 173. 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 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

¶ 44 Finally, Knight argues that the trial court erred in calculating her offender score because several of her current *959 convictions were based on the “same criminal conduct” under RCW 9.94A.589(1)(a). We disagree.

A. Standard of Review

^[25] ^[26] ¶ 45 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. **789 *State v. Maxfield*, 125 Wash.2d 378, 402, 886 P.2d 123 (1994); *see also State v. Dunaway*, 109 Wash.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 Wash.2d 107, 122, 985 P.2d 365 (1999).

B. Crimes Not Based on Same Criminal Conduct

¶ 46 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 *960 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.

1. Robbery and murder of James

^[27] ¶ 47 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*, **790 109 Wash.2d at 216, 743 P.2d 1237, 749 P.2d 160. In addition, here, James’s *961 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).

2. Robbery and assault of Charlene

^[28] ¶ 48 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, *962 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

^[29] ^[30] ¶ 49 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 Wash.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.

¶ 50 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

^[31] ¶ 51 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.

¶ 52 Knight fails to show how this alleged jury instruction error prejudiced her or that it was manifest for purposes *963 of the RAP 2.5(a)(3) exception to the preservation requirement. *Mutch*, 171 Wash.2d at 656, 254 P.3d 803; *Bertrand*, 165 Wash.App. at 402, 267 P.3d 511 (special verdict jury instruction incorrectly stating that jury must unanimously answer “no” is not of constitutional magnitude); *State v. Grimes*, 165 Wash.App. 172, 182–84, 267 P.3d 454 (2011), review denied, 175 Wash.2d 1010, 287 P.3d 594 (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); **791 *Bertrand*, 165 Wash.App. at 402, 267 P.3d 511.³⁶

¶ 53 We affirm.

We concur: PENOYAR and BJORGEN, JJ.

All Citations

176 Wash.App. 936, 309 P.3d 776

Footnotes

- 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.
- 4 We use James and Charlene Sanders’ first names for clarity. We intend no disrespect.
- 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.
- 8 5 VRP at 517.
- 9 5 VRP at 528.
- 10 The State also noted that Charlene was kicked and beaten.
- 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.
- 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.
- 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.
- 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.
- 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 Wash.2d at 801–02, 194 P.3d 212. 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, 194 P.3d 212. 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, 194 P.3d 212. 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.
[Id.](#) at 806, 194 P.3d 212 (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\(1\)\(a\)\(i\)](#).
- 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 Wash.2d 209, 215, 207 P.3d 439 (2009); see also *Kier*, 164 Wash.2d at 806, 194 P.3d 212.
- 22 *Freeman*, 153 Wash.2d at 774, 108 P.3d 753.

23 [Mutch](#), 171 Wash.2d at 664, 254 P.3d 803.

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 Wash.2d at 664, 254 P.3d 803 (alteration in original) (quoting [State v. Berg](#), 147 Wash.App. 923, 931, 198 P.3d 529 (2008)).

25 [Prater](#), 30 Wash.App. at 516, 635 P.2d 1104.

26 Overruled on other grounds by [Carey v. Musladin](#), 549 U.S. 70, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006).

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 Wash.App. 95, 47 P.3d 173 (2002).

30 A jury convicted McGill of three cocaine-delivery crimes. [McGill](#), 112 Wash.App. at 98, 47 P.3d 173. 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 Wash.App. at 97, 47 P.3d 173. 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 Wash.App. at 100–01, 47 P.3d 173.

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 Wash.App. at 100, 47 P.3d 173 (citing [State v. Garcia–Martinez](#), 88 Wash.App. 322, 329, 944 P.2d 1104 (1997), *review denied*, 136 Wash.2d 1002, 966 P.2d 902 (1998)).

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 Wash.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.

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 Wash.App. 474, 478–79, 726 P.2d 41 (1986); [State v. Edwards](#), 45 Wash.App. 378, 382, 725 P.2d 442 (1986); [State v. Calloway](#), 42 Wash.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 Wash.2d at 216–17, 743 P.2d 1237, 749 P.2d 160.

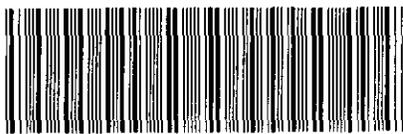
35 Even were we to consider the merits of Knight’s challenge to the special verdict instructions, the trial court here gave the proper instruction, as follows:

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 Wash.2d 707, 710, 719, 285 P.3d 21 (2012).

36 See also *O’Hara*, 167 Wash.2d at 98, 217 P.3d 756 (manifest constitutional errors “may still be subject to a harmless error analysis”).

APPENDIX C



10-1-01903-2 36220319 INFOC 04-14-11

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

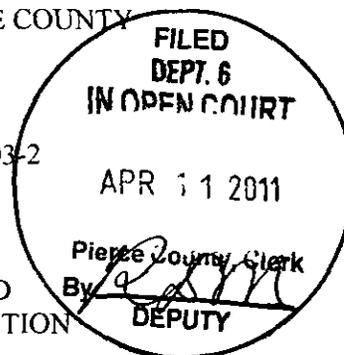
CAUSE NO 10-1-01903-2

vs.

AMANDA CHRISTINE KNIGHT,

Defendant

CORRECTED SECOND AMENDED INFORMATION



DOB: 7/15/1988
PCN#: 540108455

SEX : FEMALE
SID#. UNKNOWN

RACE: WHITE
DOL# WA KNIGHAC121MN

COUNT I

I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse AMANDA CHRISTINE KNIGHT of the crime of MURDER IN THE FIRST DEGREE, committed as follows

That AMANDA CHRISTINE KNIGHT, in the State of Washington, on or about the 28th day of April, 2010, did unlawfully and feloniously, while committing or attempting to commit the crime of Robbery in the first or second degree, and in the course of or in-furtherance of said crime or in immediate flight therefrom, did shoot James Sanders, and thereby causing the death of James Sanders, a human being, not a participant in such crime, on or about the 28th day of April, 2010, contrary to RCW 9A.32.030(1)(c), and in the commission thereof the defendant, or an accomplice, was armed with a firearm, to-wit a handgun, that being a firearm as defined in RCW 9 41.010, and invoking the provisions of RCW 9.94A.533/9.94A 510, and adding additional time to the presumptive sentence as provided in RCW 9.94A 530, and the crime was aggravated by the following circumstances: pursuant to RCW 9.94A.535(3)(a), the defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim, and/or pursuant to RCW 9.94A.535(3)(m), the offense involved a high degree of sophistication or planning, and/or pursuant to RCW 9 94A 535(2)(c), the defendant has

CORRECTED SECOND AMENDED INFORMATION- 1

ORIGINAL

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office (253) 798-7400

1 committed multiple current offenses and the defendant's high offender score results in some of the current
2 offenses going unpunished, and against the peace and dignity of the State of Washington

COUNT II

3 And I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the
4 authority of the State of Washington, do accuse AMANDA CHRISTINE KNIGHT of the crime of
5 ROBBERY IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on
6 the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,
and/or so closely connected in respect to time, place and occasion that it would be difficult to separate
proof of one charge from proof of the others, committed as follows:

7 That AMANDA CHRISTINE KNIGHT, in the State of Washington, on or about the 28th day of
8 April, 2010, did unlawfully and feloniously take personal property belonging to another with intent to
9 steal from the person or in the presence of James Sanders, the owner thereof or a person having dominion
10 and control over said property, against such person's will by use or threatened use of immediate force,
11 violence, or fear of injury to James Sanders, said force or fear being used to obtain or retain possession of
12 the property or to prevent or overcome resistance to the taking, and in the commission thereof, or in
13 immediate flight therefrom, the defendant or an accomplice was armed with a deadly weapon, to-wit: a
14 handgun, contrary to RCW 9A.56.190 and 9A 56 200(l)(a)(i), and in the commission thereof the
15 defendant, or an accomplice, was armed with a firearm, to-wit. a handgun, that being a firearm as defined
16 in RCW 9 41 010, and invoking the provisions of RCW 9 94A.533/9 94A 510, and adding additional time
17 to the presumptive sentence as provided in RCW 9.94A 530. and the crime was aggravated by the
18 following circumstances. pursuant to RCW 9.94A.535(3)(a), the defendant's conduct during the
19 commission of the current offense manifested deliberate cruelty to the victim, and/or pursuant to RCW
20 9.94A.535(3)(m), the offense involved a high degree of sophistication or planning, and/or pursuant to RCW
21 9 94A.535(2)(c). the defendant committed multiple current offenses and the defendant's high
22 offender score results in some of the current offenses going unpunished, and against the peace and dignity
23 of the State of Washington

COUNT III

24 And I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the
authority of the State of Washington, do accuse AMANDA CHRISTINE KNIGHT of the crime of
ASSAULT IN THE SECOND DEGREE, a crime of the same or similar character, and/or a crime based
on the same conduct or on a series of acts connected together or constituting parts of a single scheme or
plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to
separate proof of one charge from proof of the others, committed as follows:

1 That AMANDA CHRISTINE KNIGHT, in the State of Washington, on or about the 28th day of
2 April, 2010, did unlawfully and feloniously, under circumstances not amounting to assault in the first
3 degree, intentionally assault a minor child Sanders, and thereby recklessly inflict substantial bodily harm,
4 contrary to RCW 9A.36.021(1)(a), and/or did intentionally assault the child with a deadly weapon, to-wit:
5 a handgun, contrary to RCW 9A.36.021(1)(c), and in the commission thereof the defendant, or an
6 accomplice was armed with a firearm, to wit. a handgun, that being a firearm as defined in RCW
7 9.41.010, and invoking the provisions of RCW 9.94A.533/9.94A.510, and adding additional time to the
8 presumptive sentence as provided in RCW 9.94A.530, and the crime was aggravated by the following
9 circumstances pursuant to RCW 9.94A.535(3)(a), the defendant's conduct during the commission of the
10 current offense manifested deliberate cruelty to the victim, and/or pursuant to RCW 9.94A.535(3)(m), the
11 offense involved a high degree of sophistication or planning, and/or pursuant to RCW 9.94A.535(2)(c),
12 the defendant has committed multiple current offenses and the defendant's high offender score results in
13 some of the current offenses going unpunished, and against the peace and dignity of the State of
14 Washington.

15 COUNT IV

16 And I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the
17 authority of the State of Washington, do accuse AMANDA CHRISTINE KNIGHT of the crime of
18 ROBBERY IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on
19 the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,
20 and/or so closely connected in respect to time, place and occasion that it would be difficult to separate
21 proof of one charge from proof of the others, committed as follows:

22 That AMANDA CHRISTINE KNIGHT, in the State of Washington, on or about the 28th day of
23 April, 2010, did unlawfully and feloniously take personal property belonging to another with intent to
24 steal from the person or in the presence of Charlene Sanders, the owner thereof or a person having
dominion and control over said property, against such person's will by use or threatened use of immediate
force, violence, or fear of injury to Charlene Sanders, said force or fear being used to obtain or retain
possession of the property or to prevent or overcome resistance to the taking, and in the commission
thereof, or in immediate flight therefrom, the defendant or an accomplice was armed with a deadly
weapon, to-wit: a handgun, contrary to RCW 9A.56.190 and 9A.56.200(1)(a)(i), and in the commission
thereof the defendant, or an accomplice, was armed with a firearm, to-wit a handgun, that being a firearm
as defined in RCW 9.41.010, and invoking the provisions of RCW 9.94A.533/9.94A.510, and adding
additional time to the presumptive sentence as provided in RCW 9.94A.530, and the crime was
aggravated by the following circumstances: pursuant to RCW 9.94A.535(3)(a), the defendant's conduct
during the commission of the current offense manifested deliberate cruelty to the victim, and/or pursuant

1 to RCW 9.94A 535(3)(m), the offense involved a high degree of sophistication or planning, and/or
2 pursuant to RCW 9.94A.535(2)(c), the defendant has committed multiple current offenses and the
3 defendant's high offender score results in some of the current offenses going unpunished, and against the
4 peace and dignity of the State of Washington.

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COUNT V

And I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the
authority of the State of Washington, do accuse AMANDA CHRISTINE KNIGHT of the crime of
ASSAULT IN THE SECOND DEGREE, a crime of the same or similar character, and/or a crime based
on the same conduct or on a series of acts connected together or constituting parts of a single scheme or
plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to
separate proof of one charge from proof of the others, committed as follows

That AMANDA CHRISTINE KNIGHT, in the State of Washington, on or about the 28th day of
April, 2010, did unlawfully and feloniously, under circumstances not amounting to assault in the first
degree, intentionally assault Charlene Sanders, and thereby recklessly inflict 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, contrary to RCW 9A.36.021(1)(c), and in the commission thereof the
defendant, or an accomplice, was armed with a firearm, to-wit: a handgun, that being a firearm as defined
in RCW 9.41.010, and invoking the provisions of RCW 9.94A.533/9.94A.510, and adding additional time
to the presumptive sentence as provided in RCW 9 94A 530, and the crime was aggravated by the
following circumstances: pursuant to RCW 9.94A 535(3)(a), the defendant's conduct during the
commission of the current offense manifested deliberate cruelty to the victim, and/or pursuant to RCW
9 94A.535(3)(m), the offense involved a high degree of sophistication or planning, and/or pursuant to
RCW 9 94A 535(2)(c), the defendant has committed multiple current offenses and the defendant's high
offender score results in some of the current offenses going unpunished, and against the peace and dignity
of the State of Washington

COUNT VI

And I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the
authority of the State of Washington, do accuse AMANDA CHRISTINE KNIGHT of the crime of
BURGLARY IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based
on the same conduct or on a series of acts connected together or constituting parts of a single scheme or
plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to
separate proof of one charge from proof of the others, committed as follows

That AMANDA CHRISTINE KNIGHT, in the State of Washington, on or about the 28th day of
April, 2010, did unlawfully and feloniously, with intent to commit a crime against a person or property

1 therein, enter or remain unlawfully in a building, located at 3610 106th Avenue Court East in Edgewood,
 2 and in entering or while in such building or in immediate flight therefrom, the defendant or another
 3 participant in the crime was armed with a handgun, a deadly weapon and/or the defendant or another
 4 participant in the crime did intentionally assault a person therein, contrary to RCW 9A.52.020(1)(a)(b),
 5 and in the commission thereof the defendant, or an accomplice, was armed with a firearm, to-wit: a
 6 handgun, that being a firearm as defined in RCW 9.41.010, and invoking the provisions of RCW
 7 9.94A.533/9 94a.510, and adding additional time to the presumptive sentence as provided in RCW
 8 9.94A.530, and the crime was aggravated by the following circumstances: pursuant to RCW
 9 9 94A.535(3)(a), the defendant's conduct during the commission of the current offense manifested
 10 deliberate cruelty to the victim, and/or pursuant to RCW 9.94A.535(3)(m), the offense involved a high
 11 degree of sophistication or planning, and/or pursuant to RCW 9.94A.535(2)(c), the defendant has
 12 committed multiple current offenses and the defendant's high offender score results in some of the current
 13 offenses going unpunished, and against the peace and dignity of the State of Washington.

14 DATED this 5th day of April, 2011.

15 PIERCE COUNTY SHERIFF
16 WA02700

17 MARK LINDQUIST
18 Pierce County Prosecuting Attorney

19 mms

20 By



21 MARY E. ROBNETT
22 Deputy Prosecuting Attorney
23 WSB# 21129

APPENDIX D

May 04 2010 8:30 AM

KEVIN STOCK
COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 10-1-01903-2

vs.

AMANDA KNIGHT,

DECLARATION FOR DETERMINATION OF
PROBABLE CAUSE

Defendant.

MARY E. ROBNETT, declares under penalty of perjury:

That I am a deputy prosecuting attorney for Pierce County and I am familiar with the police report and/or investigation conducted by the PIERCE COUNTY SHERIFF, incident number 101181331;

That the police report and/or investigation provided me the following information;

That in Pierce County, Washington, on or about the 28th day of April, 2010, the defendants, KIYOSHI ALAN HIGASHI, JOSHUA NATHAN REESE, AMANDA KNIGHT and JOHN DOE, did commit the crimes of **Murder in the First Degree-Firearm Enhancement, Robbery in the First Degree-Firearm Enhancement, Assault in the Second Degree-Firearm Enhancement.**

On April 28, 2010 at about 21:18 hours, Pierce County Sheriff's Deputy Jerry Johnson responded to a report of a shooting at 3610 106th Ave. Ct East in Edgewood. Upon arrival, Deputy Johnson contacted Charlene Sanders. Sanders reported that they had listed ring for sale on Craigs List. Potential buyers showed up at the house and shot her husband. Medical aid responded and confirmed that James Sanders was deceased and suffered from numerous apparent gunshot wounds.

Subsequent interviews with Charlene Sanders and her two sons, ages 10 and 14 years old, provided the following account of events: Four people, three men and one female, showed up at the Sanders' residence to purchase a ring that was advertised for sale on Craigs List. Two of the people, a male and female, came inside to look at the ring and agreed on a price. The male then pulled out a handgun and the male and female zip tied Charlene and James Sanders with their hands behind their backs. Two more men entered the house and one of the men went upstairs and brought the Sanders children downstairs. The Sanders children are boys, ages 14 and 10 years old. One of the men kicked Charlene Sanders at least twice in the head and told her to stop looking at them. One of the gunmen started hitting James Sanders in the head with the gun and the 14 year old tried to intervene. The gunman then pistol whipped the child causing bruising, abrasions, and a concussion to his head. James Sanders broke his hands free from the zip ties to try and defend his son, and the gunmen shot James Sanders three times, once in the knee, in the thigh and in the back of the right shoulder, which was a fatal round.

The intruders took Charlene Sanders' wedding ring off her finger. The female intruder had been ransacking various rooms of the residence and the four intruders left the residence with cell phones, a laptop computer, jewelry, and other items.

On May 2, 2010, Sgt. Chaput of San Mateo County contacted the Pierce County Sheriff's Department to report that Daly City Police Officer had arrested three people during a traffic stop. The vehicle was a

DECLARATION FOR DETERMINATION
OF PROBABLE CAUSE -1

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office (253) 798-7400

1 white passenger car with Washington license plates. The people were identified as Kiyoshi Alan Higashi,
2 born 01-06-1988, Amanda Christine Knight, born 07-15-1988, and Joshua Nathaniel Reese, born 05-21-
1989. The charges included weapons charges based on the officer finding firearms inside the vehicle.

3 On May 3, 2010, Pierce County Sheriff's Department received a tip from a caller who reported that she
4 was at the residence of Alan Higashi in Tacoma when Alan Higashi received a phone call from his son,
Kiyoshi Alan Higashi. The caller said K. Hihgashi was calling from a jail in California and told his father
5 that California law enforcement seized the gun that was used in the Edgewood robbery. According to the
tipster, K. Higashi told his family that Amanda Knight went to the door in Edgewood to "buy the ring."
6 Higashi told his family he and "Resse" pistol whipped the kid and another male shot the victim (James
Sanders). Kiyoshi Higashi told his family "it wasn't supposed to go that way." Alan Higashi went into
7 another room and told his son to quit talking about it on the phone.

8 On May 3, 2010, Pierce County Sheriff's Detectives showed a montage of photographs to Charlene
Sanders. The montage included the photographs of Joshua Reese, Amanda Knight and Kiyoshi Higashi.
Charlene Sanders identified Higashi and Knight as two of the intruders.

9
10 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF
WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

11 DATED: May 3, 2010
12 PLACE: TACOMA, WA

13 /s/ MARY E. ROBNETT
14 MARY E. ROBNETT, WSB# 21129

APPENDIX E



10-1-01903-2 36220407 CTINJY 04-14-11

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

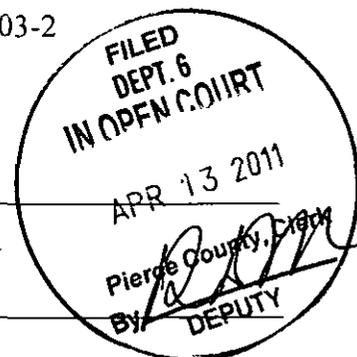
Plaintiff,

CAUSE NO. 10-1-01903-2

vs.

AMANDA CHRISTINE KNIGHT

Defendant.



COURT'S INSTRUCTIONS TO THE JURY

DATED this 12 day of March, 2011.

[Signature] JUDGE

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues, any bias or prejudice that the witness may have shown, the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value

of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 18

An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

INSTRUCTION NO 19

A person commits the crime of Assault in the Second Degree when she or an accomplice intentionally assaults another and thereby recklessly inflicts substantial bodily harm or assaults another with a deadly weapon.

INSTRUCTION NO 25

To convict the defendant of the crime of Assault in the Second Degree as charged in Count V, each of the following two elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about April 28, 2010, the defendant or an accomplice:
 - (a) intentionally assaulted Charlene Sanders and thereby recklessly inflicted substantial bodily harm: or
 - (b) assaulted Charlene Sanders with a deadly weapon, and
- (2) That this act occurred in the State of Washington

If you find from the evidence that element (2) and either alternative element (1)(a) or (1)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (1)(a) or (1)(b) has been proved beyond a reasonable doubt, as long as each juror finds that either (1)(a) or (1)(b) has been proved beyond a reasonable doubt

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to either element (1) or (2), then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 26

To convict the defendant of the crime of Robbery in the First Degree as charged in Count IV, each of the following six elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 28th day of April, 2010 the defendant or an accomplice unlawfully took personal property from the person or in the presence of another (Charlene Sanders),

(2) That the defendant intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's or an accomplice's use or threatened use of immediate force, violence or fear of injury to that person or to the person or property of another;

(4) That the force or fear was used by the defendant or an accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5) (a) That in the commission of these acts the defendant or an accomplice was armed with a deadly weapon;

or

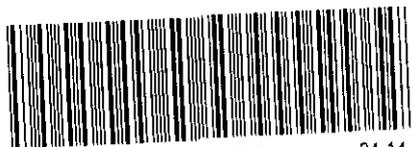
(b) That in the commission of these acts the defendant or an accomplice inflicted bodily injury;

and

(6) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements (1), (2), (3), (4), and (6), and any of the alternative elements (5)(a) or (5)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (5)(a) or (5)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), (5), or (6), then it will be your duty to return a verdict of not guilty.



10-1-01903-2 36220452 VRD 04-14-11



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
AMANDA CHRISTINE KNIGHT
Defendant.

CAUSE NO. 10-1-01903-2
VERDICT FORM D

We, the jury, find the defendant Guilty of the crime of
(Not Guilty or Guilty)

Robbery in the First Degree as charged in Count IV.

Debra Clippe
PRESIDING JUROR



10-1-01903-2 36220454 VRD 04-14-11



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

AMANDA CHRISTINE KNIGHT

Defendant.

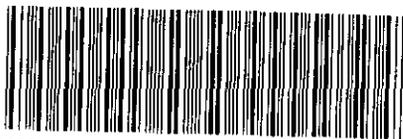
CAUSE NO. 10-1-01903-2

VERDICT FORM E

We, the jury, find the defendant Guilty of the crime of
(Not Guilty or Guilty)

Assault in the Second Degree as charged in Count V.

Dean C. Triple
PRESIDING JUROR



10-1-01903-2 36220469 SVRD 04-14-11

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY



STATE OF WASHINGTON,
Plaintiff,
vs
AMANDA CHRISTINE KNIGHT
Defendant

CAUSE NO. 10-1-01903-2

SPECIAL VERDICT FORM

We, the jury, return a special verdict by answering as follows:

QUESTION. Was the defendant Amanda Christine Knight or an accomplice armed with a firearm at the time of the commission of the crime of Robbery in the First Degree as charged in Count IV?

ANSWER: yes Write "yes" if unanimous agreement that this is the correct answer

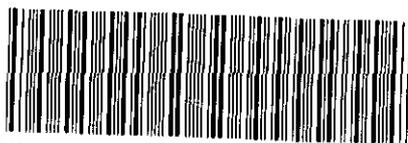
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PRESIDING JUROR

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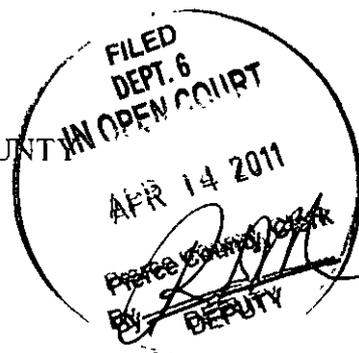
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[Signature]
PRESIDING JUROR



10-1-01903-2 36220478 SVRD 04-14-11

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY



STATE OF WASHINGTON,
Plaintiff,
vs.
AMANDA CHRISTINE KNIGHT
Defendant.

CAUSE NO 10-1-01903-2
SPECIAL VERDICT FORM

We, the jury, return a special verdict by answering as follows:

QUESTION: Was the defendant Amanda Christine Knight or an accomplice armed with a firearm at the time of the commission of the crime of Assault in the Second Degree as charged in Count V?

ANSWER: yes Write "yes" if unanimous agreement that this is the correct answer

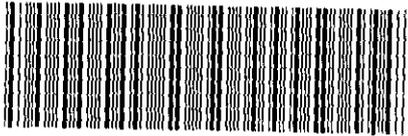
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PRESIDING JUROR

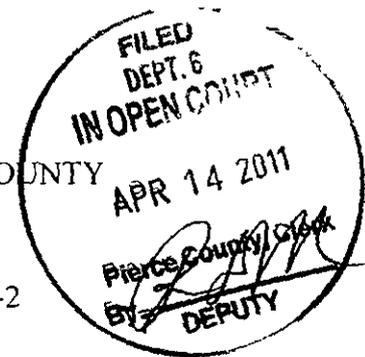
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PRESIDING JUROR



10-1-01903-2 36220507 SVRD 04-14-11



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs
AMANDA CHRISTINE KNIGHT
Defendant.

CAUSE NO. 10-1-01903-2

SPECIAL VERDICT FORM

We, the jury, having found the defendant guilty of Robbery in the First Degree as charged in Count IV and defined in Instruction 12, return a special verdict by answering as follows:

QUESTION 1: Did the defendant's conduct during the commission of the crime manifest deliberate cruelty to the victim?

ANSWER 1. Write "yes" if unanimous agreement that this is the correct answer.

QUESTION 2: Did the defendant use a high degree of sophistication or planning when committing this crime?

ANSWER 2. Write "yes" if unanimous agreement that this is the correct answer.

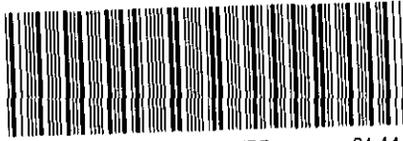
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PRESIDING JUROR

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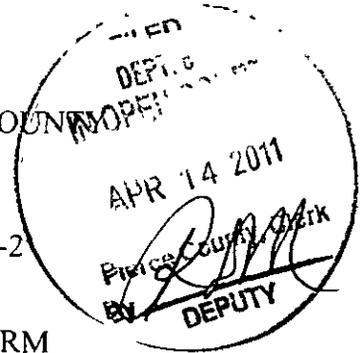
4/13/2011
DATE

Dean C. Type
PRESIDING JUROR



10-1-01903-2 36220511 SVRD 04-14-11

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY



STATE OF WASHINGTON,
Plaintiff,
vs
AMANDA CHRISTINE KNIGHT
Defendant

CAUSE NO. 10-1-01903-2
SPECIAL VERDICT FORM

We, the jury, having found the defendant guilty of Assault in the Second Degree as charged in Count V and defined in Instruction 9, return a special verdict by answering as follows.

QUESTION 1: Did the defendant's conduct during the commission of the crime manifest deliberate cruelty to the victim?

ANSWER 1: _____ Write "yes" if unanimous agreement that this is the correct answer

QUESTION 2: Did the defendant use a high degree of sophistication or planning when committing this crime?

ANSWER 2: _____ Write "yes" if unanimous agreement that this is the correct answer

DATE

PRESIDING JUROR

In the section above, the unanswered questions, if any, were deliberately left blank.

DATE

PRESIDING JUROR

4/13/2011

Dean C. Tyler

APPENDIX F

ORIGINAL

COURT OF APPEALS
DIVISION II

12 FEB 10 PM 12:32

STATE OF WASHINGTON

NO. 42130-5-H *Kb*
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

AMANDA KNIGHT, Appellant,

v.

STATE OF WASHINGTON, Respondent,

BRIEF OF APPELLANT

Mitch Harrison & John Crowley

Attorneys for Appellant

The Crowley Law Firm, P.L.L.C.

Smith Tower

Suite 1015

506 Second Avenue

Seattle, Washington 98104

Tel (206) 625-7500 ♦ Fax (206) 625-1223

pm 2/8/12

TABLE OF CONTENTS

I.	<u>ASSIGNMENTS OF ERROR</u>	1
II.	<u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>	1-2
III.	<u>STATEMENT OF THE CASE</u>	2-5
IV.	<u>ARGUMENTS</u>	5-36
	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.	5-9
	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	9-18
	3. Defense counsel was deficient at sentencing because he failed to inform the court that it could impose an exceptional sentence downward.	18-30
	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).	30-36
V.	<u>CONCLUSION</u>	36

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 be 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).

APPENDIX G

NO. 42130-5

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

AMANDA C. KNIGHT, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Rosanne Buckner

No. 10-1-01903-2

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
MELODY CRICK
Deputy Prosecuting Attorney
WSB # 35453

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

 1. Was there sufficient evidence to convict defendant of two counts of assault in the second degree where defendant was an active participant who provided aid and encouragement? 1

 2. Do defendant's convictions violate double jeopardy where the jury was properly instructed, the verdicts were not ambiguous and defendant's convictions are not the same in law and fact?..... 1

 3. Did the trial court abuse its discretion in determining that defendant's crimes do not constitute the same criminal conduct after it conducted proper analysis?..... 1

 4. Did defendant receive constitutionally effective assistance of counsel where defendant cannot show deficient performance or prejudice? 1

B. STATEMENT OF THE CASE..... 1

 1. Procedure 1

 2. Facts..... 4

C. ARGUMENT...... 17

 1. THERE WAS SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF ASSAULT IN THE SECOND DEGREE WHERE SHE WAS AN ACTIVE PARTICIPANT AND PROVIDED AID AND ENCOURAGEMENT. 17

 2. DEFENDANT'S CRIMES DO NOT VIOLATE DOUBLE JEOPARDY WHERE THE JURY WAS PROPERLY INSTRUCTED, THE VERDICTS WERE NOT AMBIGUOUS AND THE CONVICTIONS ARE NOT THE SAME IN LAW AND FACT 22

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT DEFENDANT'S CONVICTIONS DO NOT CONSTITUTE SAME CRIMINAL CONDUCT 32

4. DEFENDANT RECEIVED CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL AS DEFENDANT CANNOT SHOW DEFICIENT PERFORMANCE OR PREJUDICE. 39

D. CONCLUSION..... 44

died after sustaining multiple gunshot wounds. RP 560, 603-4, 867-68, 883. There was sufficient evidence of both alternative means.

Unanimity as to the alternative means was not required and the jurors were unanimous that defendant was guilty of assault. RP 1060-61, 1064-65, CP 376-381. The jury was properly instructed according to the law, there was sufficient evidence for the alternative means and the verdict was not ambiguous. There is no error and no indication that defendant was subject to double jeopardy.

- b. The crimes of assault in the second degree and robbery in the first degree are not the same in law and fact.

Where the legislature's intent is not expressly stated in the statutes in question, courts turn to the "same evidence" or *Blockburger* test. *In re Borrereo*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007) (citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). Under the same evidence test, double jeopardy is violated if a defendant is convicted of offenses that are identical in fact and in law. *Borrereo*, 161 Wn.2d at 537 (citing *State v. Louis*, 155 Wn.2d 563, 569, 120 P.3d 936 (2005)); *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). "If each offense contains an element not contained in the other, the offenses are not the same; if each offense requires proof of a fact that the other does not, the court presumes the offenses are not the same." *Id.* (citing *In re*

Orange, 152 Wn.2d 795, 816-18, 100 P.3d 291 (2004)); *Calle*, 125 Wn.2d at 777-78.

The Supreme Court in *Freeman* reviewed if second degree assault and robbery were intended to be punished separately. 153 Wn.2d at 758. The Court found that there was no evidence that the legislature intended to punish the crimes separately when the second degree assault facilitated the robbery. *Id.* at 760. However, the Court then turned to an analysis of whether the “included” crime has an independent purpose or effect from the other crime. *Id.* The Court found that the two crimes would merge unless there was an independent purpose or effect. *Id.* The Court determined that in the case of assault in the second degree and robbery, a case by case approach was necessary to determine double jeopardy and merger. *Id.*

In the instant case, the assault on Mrs. Sanders did not further the robbery where Mrs. Sanders was the victim. The robbery was complete prior to the assault. Defendant stole the ring off Mrs. Sanders' finger after Higashi pulled out a gun and defendant zip tied Mrs. Sanders' hands. RP 610-11, 693. Defendant then went to ransack the house while Bernard assaulted Mrs. Sanders in an effort to locate the safe. RP 585, 586, 587, 588, 625, 627, 640, 642, 919, 958; Ex. 150. The assault of Mrs. Sanders occurred after the robbery, was committed by a different person and with a different gun. In addition, the assault on J.S. and the robbery of Mr.

Sanders do not violate double jeopardy as the crimes have two different victims. There are separate facts to support all four crimes. The convictions for assault in the second degree and robbery in the first degree do not violate double jeopardy.

The convictions also do not merge. The merger doctrine is a judicial doctrine designed to prevent cumulative punishments where lesser included offenses do not include conduct that lies outside of the greater offense's definition. *State v. Collicott*, 112 Wn.2d 399, 410-11, 771 P.2d 1137 (1989). The Washington Supreme Court defined the concept of merger:

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

State v Vladovic, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983). This doctrine is to be narrowly construed. *Collicott*, 112 Wn.2d at 410. As already illustrated above, defendant did not have to commit an assault in order for defendant to commit robbery in the first degree. The crime of robbery was elevated to the level of first degree by either defendant or an accomplice being armed with a deadly weapon or defendant or an accomplice inflicting bodily injury. It was not elevated by a named crime

such as kidnapping or assault. Further, the element of inflicting bodily injury is not a crime on its own as assault requires an intentional act where robbery does not. Again, as noted above, the assault of J.S. and the robbery of Mr. Sanders have different victims and so do not merge. The crimes of assault in the second degree and robbery in the first degree do not merge.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT DEFENDANT'S CONVICTIONS DO NOT CONSTITUTE SAME CRIMINAL CONDUCT.

Under RCW 9.94A.589(1)(a), two crimes shall be considered the "same criminal conduct" only when all three of the following elements are established: (1) the two crimes share the same criminal intent; (2) the two crimes are committed at the same time and place; and (3) the two crimes involve the same victim. *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). The Legislature intended the phrase "same criminal conduct" to be construed narrowly. *State v. Flake*, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). If one of these elements is missing, then two crimes cannot constitute the same criminal conduct. *Lessley*, 118 Wn.2d at 778. An appellate court will generally defer to a trial court's decision on whether two different crimes involve the same criminal conduct, and will not

reverse absent a clear abuse of discretion or a misapplication of the law. *State v. Haddock*, 141 Wn.2d 103, 3 P.2d 733 (2000).

Defendant argues that her conviction for robbery in the first degree and murder in the first degree where Mr. Sanders was the victim constitute the same criminal conduct. Defendant also argues that the robbery in the first degree and assault in the second degree of Mrs. Sanders constitute the same criminal conduct. While she argues that the assault in the second degree of J.S. should count in her offender score, she then argues that all five convictions merge for the burglary in the first degree. The trial court heard argument on same criminal conduct and rejected defendant's arguments after listening to argument and reading briefing. RP 1089-1091, CP 400-433, CP 435-450. The trial court did not abuse its discretion.

a. Defendant's crimes do not share the same intent.

Two crimes share the same intent if, viewed objectively, the criminal intent did not change from the first crime to the second. *Lessley*, 118 Wn.2d at 777. To find the objective intent, the courts should begin with the intent element of the crimes charged. *See Flake*, 76 Wn. App. at 180; *State v. Dunaway*, 109 Wn.2d 207, 216, 743 P.2d 1237 (1987). A defendant's subjective intent is irrelevant. *Lessley*, 118 Wn.2d at 778. "In deciding if crimes encompassed the same criminal conduct, trial courts should focus on the extent to which the criminal intent, as objectively

viewed, changed from one crime to the next.” *Dunaway*, 109 Wn.2d at 215. The Supreme Court of Washington has held that objective intent is “measured by determining whether one crime furthered another.” *Lessley*, 118 Wn.2d at 778. When a defendant has the time to “pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act,” and makes the decision to proceed, the defendant has formed a new intent to commit the second act. *State v. Grantham*, 84 Wn. App. 854, 859, 932 P.2d 657 (1997).

Defendant argues that the intent was the same for all crimes in that the purpose was to rob the Sanders family. However, defendant’s argument improperly focuses on the subjective intent which is contrary to case law. Defendant’s argument also assumes that all six convictions were a continuous act which is also incorrect.

The intent to commit first degree robbery is different than the intent to commit second degree assault. The crime of first degree robbery requires the intent to take personal property of another from the person or presence of another. *See* RCW 9A.56.190. However, second degree assault requires the intent either to cause bodily harm or to create apprehension of bodily harm. *State v. Byrd*, 125 Wn.2d 707, 711, 887 P.2d 396 (1995). The plain language of the two crimes shows clearly that the objective intent is not the same.

In the instant case, defendant’s objective intent during the robbery of Mrs. Sanders was to steal her wedding ring. Once the ring was

removed, the robbery was complete. Defendant had time to pause and reflect before engaging in further criminal activity. Defendant did not release Mrs. Sanders after robbing her. On the contrary, defendant consciously made the choice to leave Mrs. Sanders tied up and helpless on the floor in the presence of three armed men, two of which defendant herself had called into the house. Bernard then assaulted the bound and helpless Mrs. Sanders. Bernard's assault on Mrs. Sanders was a completely separate criminal act. The trial court did not abuse its discretion in finding that the two crimes did not constitute the same criminal conduct.

Similarly, the crimes of robbery and murder do not share the same intent. This issue has been decided by the Supreme Court. The court in *Dunaway* found,

When viewed objectively, the criminal intent in these cases was substantially different: the intent behind robbery is to acquire property while the intent behind attempted murder is to kill someone. 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.

Dunaway, 109 Wn.2d at 216. The two crimes do not share the same objective intent. Further, the robbery was complete when Higashi removed Mr. Sanders' wedding ring. RP 693. The murder happened at the end of the incident when Mr. Sanders decided to try and fight back

against the intruders. RP 628, 630, 641-42. There was time to pause and reflect after the robbery before committing the murder. The trial court did not error in finding that these two crimes did not constitute the same criminal conduct.

b. Defendant's convictions were not committed at the same time.

While it is true that all crimes took place at the Sanders' residence, not all of the crimes took place at the same time. First, the two crimes where Mr. Sanders is the victim took place at different ends of the incident. The robbery of Mr. Sanders took place soon after Higashi and defendant entered the residence. Higashi pointed his gun at Mr. Sanders, zip tied him and removed his ring from his finger. The robbery was complete at that point.

The murder of Mr. Sanders took place some time later. After the robbery was complete, Berniard and Reese came into the house and brought the two children downstairs. Berniard also beat and kicked Mrs. Sanders, threatened her with a gun to her head and counted down while asking her to tell him where the safe was. After Mr. Sanders was lead away to help them locate the safe, he struggled with Berniard and Higashi and it was during this fight that Higashi shot Mr. Sanders and killed him. There was a good amount of time and many things that transpired between the robbery and the murder. They did not occur at the same time and the trial court did not abuse its discretion in making this finding.

As already discussed above, the robbery and assault of Mrs. Sanders did not occur at the same time. The robbery was complete prior to the assault. Defendant stole the ring off Mrs. Sanders' finger after Higashi pulled out a gun and defendant zip tied Mrs. Sanders' hands. RP 610-11, 693. Defendant then went to ransack the house while Bernard assaulted Mrs. Sanders in an effort to locate the safe. RP 585, 586, 587, 588, 625, 627, 640, 642, 919, 958; Ex. 150. The assault of Mrs. Sanders occurred after the robbery, was committed by a different person and with a different gun. The trial court did not abuse its discretion in finding that these two crimes were not the same criminal conduct.

- c. The burglary conviction has multiple victims and is not the same criminal conduct and does not merge.

Defendant argues that the robbery charge is the same criminal conduct of all of the other crimes because it was part of a continuing series of events. At trial, defendant argued that it was the same criminal conduct because the Sanders family was one victim and so all crimes then had the same victims. CP 400-433. Neither of these positions is correct. First, the concept that crimes involving multiple victims equal same criminal conduct has been rejected.

Convictions of crimes involving multiple victims must be treated separately. To hold otherwise would ignore two of the purposes expressed in the SRA: ensuring that punishment is proportionate to the seriousness of the

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