

64405-0

64405-0

NO. 64405-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

JIN WOO KIM,

Appellant.

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COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE LAURA INVEEN

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**BRIEF OF RESPONDENT**

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. PROCEDURAL FACTS .....	1
2. SUBSTANTIVE FACTS .....	2
C. <u>ARGUMENT</u> .....	6
1. THE DEFENDANT'S CONVICTIONS FOR FIRST- DEGREE ROBBERY AND SECOND-DEGREE ASSAULT DO NOT VIOLATE DOUBLE JEOPARDY .....	6
2. CONVICTIONS FOR ROBBERY AND KIDNAPPING DO NOT VIOLATE DOUBLE JEOPARDY .....	12
a. Applying The Three-Part Test For Double Jeopardy .....	12
b. The Concept Of One Crime Being "Incidental" To Another Crime .....	15
c. Ample Evidence Supports The Defendant's Kidnapping Conviction .....	18
3. HAVING AGREED TO HIS OFFENDER SCORE BELOW, THE DEFENDANT IS BARRED FROM RAISING A SAME CRIMINAL CONDUCT CLAIM FOR THE FIRST TIME ON APPEAL. IN ANY EVENT, THE DEFENDANT'S CONVICTIONS ARE APPROPRIATELY COUNTED SEPARATELY .....	22

a.	The Issue Has Been Waived.....	22
b.	The Defendant's Convictions Do Not Constitute The Same Criminal Conduct.....	25
4.	THE DEFENDANT'S CLAIM THAT THE TRIAL COURT ERRED IN NOT GRANTING HIS MOTION FOR A NEW TRIAL IS NOT SUPPORTED BY THE RECORD .....	29
D.	<u>CONCLUSION</u> .....	33

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

United States v. Blockburger, 284 U.S. 299,  
52 S. Ct. 180, 76 L. Ed. 306 (1932)..... 7, 13

Washington State:

In re Personal Restraint of Fletcher,  
113 Wn.2d 42, 776 P.2d 114 (1989)..... 12-17, 20

In re Personal Restraint of Goodwin,  
146 Wn.2d 861, 50 P.3d 618 (2002)..... 23

In re Personal Restraint of Shale,  
160 Wn.2d 489, 158 P.3d 588 (2007)..... 23, 24

Rhinevault v. Rhinevault, 91 Wn. App. 688,  
959 P.2d 687 (1998)..... 31

State v. Allen, 94 Wn.2d 860,  
621 P.2d 143 (1980)..... 16

State v. Anderson, 92 Wn. App. 54,  
960 P.2d 975 (1998)..... 24

State v. Brett, 126 Wn.2d 136,  
892 P.2d 29 (1995)..... 17

State v. Calle, 125 Wn.2d 769,  
888 P.2d 155 (1995)..... 6, 7, 8, 9, 12, 13, 14

State v. Charlton, 90 Wn.2d 657,  
585 P.2d 142 (1978)..... 32

State v. Davenport, 100 Wn.2d 757,  
675 P.2d 1213 (1984)..... 31

<u>State v. Demery</u> , 144 Wn.2d 753, 30 P.3d 1278 (2001).....	26
<u>State v. Eaton</u> , 82 Wn. App. 723, 919 P.2d 116 (1996).....	8
<u>State v. Eliot</u> , 114 Wn.2d 6, 785 P.2d 440, <u>cert. denied</u> , 498 U.S. 838 (1990) .....	26
<u>State v. Freeman</u> , 153 Wn.2d 765, 108 P.3d 753 (2005).....	9, 10
<u>State v. French</u> , 157 Wn.2d 593, 141 P.3d 54 (2006).....	28
<u>State v. Frohs</u> , 83 Wn. App. 803, 924 P.2d 384 (1996).....	8
<u>State v. Gentry</u> , 125 Wn.2d 570, 888 P.2d 1105, <u>cert. denied</u> , 516 U.S. 843 (1995) .....	18
<u>State v. Grantham</u> , 84 Wn. App. 858, 932 P.2d 657 (1997).....	26
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	20, 21
<u>State v. Hopson</u> , 113 Wn.2d 273, 778 P.2d 1014 (1989).....	26
<u>State v. Jackson</u> , 150 Wn. App. 877, 209 P.3d 553, <u>rev. denied</u> , 167 Wn.2d 1007 (2009).....	24
<u>State v. Kier</u> , 164 Wn.2d 798, 194 P.3d 212 (2008).....	9
<u>State v. Korum</u> , 120 Wn. App. 686, 86 P.3d 166 (2004), <u>affirmed in part</u> , <u>reversed in part</u> , 157 Wn.2d 614 (2006).....	20

<u>State v. Korum</u> , 157 Wn.2d 614, 141 P.3d 13 (2006).....	12
<u>State v. Lessley</u> , 118 Wn.2d 773, 827 P.2d 996 (1992).....	23
<u>State v. Louis</u> , 155 Wn.2d 563, 120 P.3d 936 (2005).....	12, 14, 15, 17, 18, 20
<u>State v. Nitsch</u> , 100 Wn. App. 512, 997 P.2d 1000, <u>rev. denied</u> , 141 Wn.2d 1030 (2000).....	23, 24
<u>State v. Palmer</u> , 95 Wn. App. 187, 975 P.2d 1038 (1999).....	26
<u>State v. Post</u> , 118 Wn.2d 596, 826 P.2d 172 (1992).....	31
<u>State v. Rienks</u> , 46 Wn. App. 537, 731 P.2d 1116 (1987).....	31
<u>State v. Rodriguez</u> , 61 Wn. App. 812, 812 P.2d 868 (1991).....	27
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	18
<u>State v. Smith</u> , 31 Wn. App. 226, 640 P.2d 25 (1982).....	19
<u>State v. Tanner</u> , 54 Wn.2d 535, 341 P.2d 869 (1959).....	32
<u>State v. Tilton</u> , 149 Wn.2d 775, 72 P.3d 735 (2003).....	18, 21
<u>State v. Vermillion</u> , 112 Wn. App. 844, 51 P.3d 188 (2002), <u>rev. denied</u> , 148 Wn.2d 1022 (2003).....	9
<u>State v. Vike</u> , 125 Wn.2d 407, 885 P.2d 824 (1994).....	25, 26

<u>State v. Vladovic</u> , 99 Wn.2d 413, 662 P.2d 853 (1983).....	8, 12-17, 20
<u>State v. Washington</u> , 135 Wn. App. 42, 143 P.3d 606 (2006).....	19
<u>State v. Wheaton</u> , 121 Wn.2d 347, 850 P.2d 507 (1993).....	31

Statutes

Washington State:

RCW 9.94A.589 .....	22, 23
RCW 9A.36.021 .....	10
RCW 9A.40.010 .....	19
RCW 9A.40.020 .....	12, 13
RCW 9A.56.190 .....	11, 12, 13
RCW 9A.56.200 .....	11, 13
RCW 9A.56.210 .....	12

**A. ISSUES PRESENTED**

1. Do the defendant's convictions for first-degree robbery and second-degree assault violate double jeopardy?
2. Do the defendant's convictions for first-degree kidnapping and first-degree robbery violate double jeopardy?
3. Can the defendant challenge his offender score for the first time on appeal when he agreed to his offender score below?
4. Do the defendant's three convictions constitute the "same criminal conduct" for scoring purposes?
5. Has the defendant proven that the trial court erred in denying his motion for a new trial?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The defendant was convicted by a jury in count I of Second-Degree Assault, in count II of First-Degree Kidnapping, and in count III of First-Degree Robbery. CP 9-12, 13-14. Each conviction carried a firearm sentence enhancement. CP 15-16. The defendant received a low-end standard range sentence on each count, with three firearm enhancements, for a total sentence of 228 months. CP 61, 63.

## 2. SUBSTANTIVE FACTS

Sung Na is a 28 year old student living in an apartment near Northgate (30105 NE 143<sup>rd</sup> Street). 3RP<sup>1</sup> 7, 32, 37. The defendant is a drug dealer and bookie who deals drugs out of his store, Cellular Town, located at 50<sup>th</sup> and University Avenue in the University District of Seattle. 3RP 9; 4RP 21, 99, 149.

On May 30, 2008, between 12:00 and 1:00 in the afternoon, Na went to Cellular Town to pay off approximately \$100 in gambling debts and to buy \$20 worth of marijuana from the defendant. 3RP 11, 14. The defendant took Na into the back of the store where some of the defendant's friends were smoking Oxycontin. 3RP 11-12. Na gave the defendant his money, obtained his marijuana and left the store. 3RP 12-13.

As Na was driving home, he received a call from the defendant asking him to return to the store because he wanted to talk to him about something. 3RP 14. Na agreed. 3RP 15.

When Na entered the store, the defendant directed him to the back room. 3RP 15. The defendant's friend, Eric, was already in the back room. 3RP 16. The defendant then started angrily

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<sup>1</sup> The verbatim report of proceedings is cited as follows: 1RP--6/23/09, 2RP--6/25/09, 3RP--6/29/09, 4RP--6/30/09, 5RP--7/1/09, 6RP--10/9/09.

accusing Na of stealing drugs and money from him. 3RP 16-17. When Na denied it, the defendant pulled out a Ruger handgun, racked a round into the chamber, and placed the gun to Na's head and threatened to kill him. 3RP 18-19, 24. In fear, Na told the defendant to take whatever he wanted, all his money, his car, anything. 3RP 23.

The defendant then ordered Na out of the store and into Na's car. 3RP 26. The defendant directed Na to drive and Eric to sit in the front passenger seat as he sat in the back and directed Na to a Bank of America about three blocks away. 3RP 26-28. The defendant told Na he had a gun at his back so he had better not try anything. 4RP 43. At the bank, the defendant directed Na to get him some money from the ATM. 3RP 28. Na tried, but because he had withdrawn money earlier in the day, he was not able to obtain any money. 3RP 28-29. When Na showed the defendant the ATM receipt showing that he had tried to obtain money, the defendant responded that he would get the money the next day. 3RP 29.

The defendant then directed Na to drive to his apartment in Northgate. 3RP 28, 32. They arrived at Na's apartment between 4:00 and 5:00 p.m. 3RP 30. Once inside Na's apartment, the defendant began to ransack the place, taking papers with Na's

personal information, bank documents, and the title to Na's car.

3RP 33. The whole time, the defendant was holding a gun in his hand. 3RP 33. After the defendant obtained the title to Na's car, he demanded that Na give him the keys. 3RP 33. He threatened that if Na called the police he would come looking for him and kill him. 3RP 33-34. The defendant and Eric then left, driving off with Na's car. 3RP 36.

In fear, Na did not call the police until the next day. 3RP 37. He then reported what had happened and told the police where he thought the defendant lived. 3RP 38. Later that evening, patrol officers located Na's car in a parking garage near the defendant's apartment. 5RP 40. The defendant then began sending Na threatening messages, calling Na a snitch and telling him he had better hide. 3RP 42; 4RP 50-51.

On July 30, officers conducted an operation, arresting the defendant and searching his store and apartment. 4RP 53-55. Located in the defendant's apartment were two fully loaded assault rifles, two handguns, including a Ruger, a clip with hollow-point bullets, over 40 grams of marijuana and a scale. 4RP 59, 67-69, 73, 75, 79; 5RP 14-15. Inside Cellular Town, officers found some

foil that appeared to have been used to smoke drugs. 4RP 135, 142.

Post arrest, the defendant admitted that he was a drug dealer and had sold marijuana to Na. 4RP 149. He said that after Na had left the store, he noticed that \$4500 was missing and he assumed Na had taken it, although he admitted that other persons had the opportunity to take the money as well. 4RP 150, 154. He admitted to calling Na back to the store and threatening him with a gun. 4RP 152. He said he forced Na to the bank, but only in an attempt to get his money back. 4RP 152. He claimed that Eric was like a little brother to him and that although he was present, he was not involved at all. 4RP 152.

The defendant told the police that the three then went to Na's apartment wherein Na gave him the title to his car, admitting that he may have done so in fear. 4RP 153-54. He then left with Na's car. 4RP 154. The defendant's taped statement to this effect was played for the jury. 4RP 154-55.

The defendant did not testify. Eric Park testified for the defendant. Contrary to the defendant's taped statement, Park testified that the defendant did not have a gun and that it appeared everything that happened after an initial argument was by

agreement, with the defendant and Na even joking together at one point. 5RP 62-64, 72-74. Additional facts are included in the sections they pertain.

**C. ARGUMENT**

**1. THE DEFENDANT'S CONVICTIONS FOR FIRST-DEGREE ROBBERY AND SECOND-DEGREE ASSAULT DO NOT VIOLATE DOUBLE JEOPARDY.**

In certain situations, convictions for first-degree robbery and second-degree assault violate double jeopardy because proof of the assault may be necessary to prove and elevate second-degree robbery to first-degree robbery, i.e., the crimes "merge." However, such is not the case here where the defendant's assault on Na with a firearm was separate from his later robbery of Na's vehicle. Thus, the merger doctrine does not apply.

Subject to constitutional constraints, the legislature has the absolute power to define criminal conduct and assign punishment. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). In many situations, a defendant's single act may violate more than one criminal statute. When a defendant's single act does violate more than one criminal statute, he may permissibly receive multiple

punishments. Calle, 125 Wn.2d at 858-60 (finding no double jeopardy violation where a single act of intercourse violated the rape statute and the incest statute). Double jeopardy is only implicated when the court exceeds the authority granted by the legislature and imposes multiple punishments where multiple punishments have not been authorized. Calle, at 776.

In Calle, the Supreme Court set forth a three-part test for determining whether multiple punishments were intended by the Legislature. The first step is to review the language of the statutes to determine whether the legislation expressly permits or disallows multiple punishments. Calle, at 776. Should this step not result in a definitive answer, the court turns to step two, the two-part "same evidence" or "Blockburger"<sup>2</sup> test. This test asks whether the offenses are the same "in law" and "in fact." Calle, at 777.

Offenses are the same "in fact" when they arise from the same act. Offenses are the same "in law" when proof of one offense would always prove the other offense. Calle, at 777. If each offense includes elements not included in the other, the offenses are considered different and multiple convictions can stand. Calle,

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

at 777. Failure under either prong creates a strong presumption in favor of multiple punishments, a presumption that can only be overcome where there is "clear evidence" that the Legislature did not intend for the crimes to be punished separately. Calle, at 778-80. This search for "clear evidence" of contrary legislative intent is the third step of the analysis.

Under this third part of the Calle test falls the merger doctrine. State v. Frohs, 83 Wn. App. 803, 811, 924 P.2d 384 (1996) (The "merger doctrine belongs squarely within the third prong of the Calle double jeopardy analysis"). Merger is simply another tool used to determine legislative intent for double jeopardy purposes. The doctrine:

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 (e.g., rape) but that the crime was accompanied by an act [that] is defined as a crime elsewhere in the criminal statutes (e.g., assault or kidnapping).

State v. Eaton, 82 Wn. App. 723, 730, 919 P.2d 116 (1996) (citing State v. Vladovic, 99 Wn.2d 413, 662 P.2d 853 (1983)).

If two crimes fall within the merger doctrine, this is an indication that the legislature may have intended only one punishment. However, even where the merger doctrine applies,

both convictions will be allowed to stand where the crimes involve "some injury to the person or property of the victim which is separate and distinct from and not merely incidental to the crime of which it forms an element." State v. Vermillion, 112 Wn. App. 844, 859-60, 51 P.3d 188 (2002), rev. denied, 148 Wn.2d 1022 (2003); Calle, at 780.

In State v. Freeman,<sup>3</sup> and State v. Kier,<sup>4</sup> the Supreme Court stated that under certain circumstances proof of second-degree assault may be necessary to prove and elevate second-degree robbery to first-degree robbery, thus constituting a violation of the double jeopardy clause if both convictions are allowed to stand. The Court, however, "refused to adopt a per se rule." Kier, 164 Wn.2d at 802. Rather, the Court "underscor[ed] the need to take a hard look at each case," to determine if this situation exists. Kier, at 802.

Specifically, the merger doctrine applies to a case "as charged and proved." Freeman, 153 Wn.2d at 778. If as charged and proved, the facts do not show that the State was required to prove one crime in order to prove and elevate the other crime, the

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<sup>3</sup> 153 Wn.2d 765, 108 P.3d 753 (2005).

<sup>4</sup> 164 Wn.2d 798, 194 P.3d 212 (2008).

two convictions do not merge. Id. For example, in Freeman, there was a companion case, State v. Zumwalt. In the course of committing robbery, Zumwalt punched his victim in the face. Freeman, at 768-70. It was this punch, during the course of the robbery, that elevated the robbery to first-degree robbery and thus Zumwalt's convictions for first-degree robbery and second-degree assault merged. Id. However, if, for example, Zumwalt had punched his victim hours after he robbed his victim, the two convictions would not have merged because the assault would not have been necessary to elevate the robbery. Such is the case here.

As charged and convicted here, to find the defendant guilty of second-degree assault, the jury was required to find that the defendant assaulted Na with a deadly weapon. CP 9, 37; RCW 9A.36.021(1)(c). As pertinent here, assault is defined as "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." CP 36.

As charged and convicted here, to find the defendant guilty of first-degree robbery, the jury was required to find that the

defendant unlawfully took Na's vehicle, that he intended to commit theft of the vehicle, that the taking of the vehicle was against Na's will by the defendant's use or threatened use of immediate force, violence or fear of injury, that the force or fear was used to obtain or retain possession of the vehicle or to prevent or overcome resistance to the taking, and that during the robbery the defendant was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon. CP 10, 43; RCW 9A.56.200(1)(a)(i); RCW 9A.56.190.

The defendant's assault upon Na with a firearm was not necessary to prove and elevate the robbery of Na's vehicle. It was mid-afternoon at the defendant's store that he pulled a gun on Na, racked a round into the chamber, put the gun to Na's head and threatened to kill him. No robbery occurred at this time or location.

At a much later time (approximately 3 hours), and in a different location (outside Na's apartment), the defendant drove away with Na's vehicle while armed with a firearm. The same facts do not prove both charges. In other words, the facts constituting the assault on Na with a firearm were not needed to prove and elevate the defendant's robbery of Na. Thus, while under certain

circumstances first-degree robbery and second-degree assault may merge, they do not here.

## **2. CONVICTIONS FOR ROBBERY AND KIDNAPPING DO NOT VIOLATE DOUBLE JEOPARDY.**

The defendant appears to contend that his convictions for first-degree robbery and first-degree kidnapping merge and thus violate double jeopardy.<sup>5</sup> He is incorrect. The Washington State Supreme Court has held that convictions for robbery and kidnapping do not merge or otherwise violate double jeopardy. See State v. Korum, 157 Wn.2d 614, 141 P.3d 13 (2006); State v. Louis, 155 Wn.2d 563, 120 P.3d 936 (2005); In re Fletcher, 113 Wn.2d 42, 776 P.2d 114 (1989); Vladovic, *supra*.

### **a. Applying The Three-Part Test For Double Jeopardy.<sup>6</sup>**

Step One: Neither the robbery statute (RCW 9A.56.210 and RCW 9A.56.190), nor the kidnapping statute (RCW 9A.40.020)

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<sup>5</sup> The defendant appears to mix multiple but separate concepts--a merger/double jeopardy claim, an "incidental crime" claim (the kidnap merger doctrine), and a sufficiency of the evidence claim. The State will address each concept separately as they are distinct separate legal theories.

<sup>6</sup> The three-part test of Calle is outlined in section C 1 above.

expressly allows or disallows multiple punishments for a single act. Thus the Court must turn to the "same evidence" test.

Step Two: The "same evidence" or "Blockburger" test asks whether the offenses are the same "in law" and "in fact." Calle, at 777. Here, the defendant's convictions are not the same "in law" or "in fact."

As charged and convicted, robbery requires proof of intent to commit theft, an actual taking, the use or threatened use of immediate force, and display of a firearm, none of which are elements of the kidnap charge. CP 10, 43; RCW 9A.56.200(1)(a)(i); RCW 9A.56.190. As charged and convicted, kidnapping requires an intentional abduction, an element that is not an element of the robbery charge. CP 10, 40; RCW 9A.40.020(1)(b). In addition, first-degree kidnapping also requires proof of an intent to commit another felony, but it does not require the actual commission of that felony. See In re Fletcher, 113 Wn.2d at 53. With each charged crime having an element not contained in the other, the two offenses fail the same "in law" prong of the "same evidence" test. In re Fletcher, at 50; Vladovic, 99 Wn.2d at 423.

Additionally, the defendant's crimes are not the same "in fact" and thus any double jeopardy analysis fails completely. "A person is not subjected to double jeopardy because two charges arise from the same general incident unless the evidence required to support a conviction on one of them would have been sufficient to warrant a conviction on the other." In re Fletcher, at 48; Vladovic, at 423.

Here, the robbery charge necessarily included the intentional and actual taking of Na's vehicle while the kidnapping charge was based on Na being taken from the defendant's store at gunpoint with the intent to commit a later crime. Thus, the kidnapping was complete before the taking of Na's vehicle. Thus, the offenses differ "in fact" and there can be no double jeopardy regardless of statutory intent.

With the two crimes failing the "same evidence" test (failing to meet either prong is sufficient), the two offenses can be punished separately unless the defendant can prove by clear evidence a contrary legislative intent. Calle, at 780. Here, there is no such evidence and the defendant does not argue otherwise. Thus, consistent with In re Fletcher, Vladovic, and Louis (all cases finding robbery and kidnapping convictions do not violate double jeopardy),

the defendant's convictions for robbery and kidnapping do not violate double jeopardy

**b. The Concept Of One Crime Being “Incidental” To Another Crime.**

As stated above, in In re Fletcher, Vladovic and Louis, the Supreme Court rejected the argument that convictions for kidnapping and robbery violate double jeopardy. The Court also rejected the so called kidnap-merger doctrine, whereby the defense sought a rule that a second conviction violated double jeopardy if it was merely "incidental" to another conviction--one of the arguments the defendant is making here.

Vladovic arose from an incident at Bagley Hall on the University of Washington campus. An armed man entered Bagley Hall, gathered the five employees, made them lie on the floor and then bound their hands and taped their eyes shut. Other confederates were then brought into the building. The robbers then removed the employees' wallets. One employee, a Mr. Jensen, was then taken to a storeroom where he was instructed to open a safe containing platinum crucibles. Officers then arrived and arrested the men. Vladovic, at 415-16.

The defendant was convicted of attempted first-degree robbery for attempting to steal the contents of the safe, first-degree robbery for stealing money from Mr. Jensen's wallet, and four counts of first-degree kidnapping for restraining the other employees. Vladovic, at 416. The Supreme Court held that none of the convictions merged or otherwise violated double jeopardy.

The Court also addressed dictum from State v. Allen, 94 Wn.2d 860, 621 P.2d 143 (1980), which suggested that if a kidnapping was merely incidental to a robbery, the former offense would merge into the robbery. Vladovic, at 420. The court held that this statement in Allen was not in accord with the merger doctrine and that pursuant to the merger doctrine, "kidnapping does not merge into first degree robbery." Vladovic, at 421 (emphasis added).

Six years later, the Supreme Court reaffirmed the holding of Vladovic in In re Fletcher, supra. While Fletcher drove one car, his co-defendant forced his way into another car at gunpoint. The car was occupied by two women. The women were driven to a remote area where they were shot in the head. Fletcher was convicted of first-degree assault, first-degree kidnapping, and first-degree robbery for the stealing of the car. Fletcher, at 43-44. Just as the

defendant does here, and just as Vladovic did, Fletcher argued that his kidnapping of the two women was merely "incidental" to the robbery of the car. Id. at 52. The Supreme Court once again rejected this argument that somehow a kidnapping could be merely incidental to a robbery and therefore could not stand. Id. at 49-52.

Another fifteen years later, the defense again tried to persuade the Court to adopt an "incidental" merger rule. In State v. Louis, the defendant was convicted of robbery and kidnapping for a jewelry store heist in which he bound his victims in a back bathroom. The Supreme Court first rejected Louis' double jeopardy challenge and then addressed his argument that the kidnapping was merely incidental to his robbery and therefore the conviction could not stand. The Court rejected Louis' argument, stating, "[w]e see no reason to depart from our decisions in Vladovic and Fletcher." Louis, at 571. The defendant cites no controlling case law to the contrary.<sup>7</sup> *Stare decisis* requires this Court to hold firm to the well-reasoned and properly decided cases of Vladovic, Fletcher

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<sup>7</sup> The defendant's reliance on State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995) is of no moment. The Brett Court's reference to an "incidental" crime did not involve merger or double jeopardy. Rather, the Court's discussion about an incidental crime was made in reference to the Court's sufficiency of the evidence review of Brett's kidnapping conviction. See Brett, 126 Wn.2d at 166-67.

and Louis. State v. Gentry, 125 Wn.2d 570, 587 n.12, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995).

**c. Ample Evidence Supports The Defendant's Kidnapping Conviction.**

What the defendant's argument appears to really boil down to is a claim that there was insufficient evidence of kidnapping. However, what the defendant would have to prove is that even when the evidence is viewed in the light most favorable to the State, no rational trier of fact could have found him guilty of kidnapping. Under the facts of this case, this claim cannot be supported.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). A reviewing court will draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A factual sufficiency review "does not require the reviewing court to determine whether it believes the

evidence at trial established guilt beyond a reasonable doubt but rather only whether any rational trier of fact could be so convinced." State v. Smith, 31 Wn. App. 226, 640 P.2d 25 (1982).

As charged and proved here, the jury had to find that the defendant intentionally abducted Na with intent to facilitate the commission of robbery. Abduct means "to restrain a person by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force." RCW 9A.40.010(2). A victim of kidnapping does not need to be chained to a wall, held for days, moved to a different location or have a gun placed to their forehead. Rather, to restrain a person means simply "to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his [or her] liberty." RCW 9A.40.010(1). This is an interference that is a "real or material interference" with the liberty of another as contrasted with "a petty annoyance, a slight inconvenience, or an imaginary conflict." State v. Washington, 135 Wn. App. 42, 50, 143 P.3d 606 (2006).

Here, Na had a loaded gun, with a round racked in the chamber, pointed at his head. He was told he would be killed if he did not comply with demands made of him. Upon threat of being

killed, Na was ordered out of the defendant's store, ordered into his car, ordered to drive to a bank, ordered to obtain money from the bank, ordered to drive to his apartment and ordered inside. Na complied with all these orders out of fear of being shot and killed by the defendant who remained armed with a loaded firearm. Under these facts, certainly a rational trier of fact could have found that the defendant restrained Na by use of a threat.

In arguing otherwise, the defendant cites to State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980), and again seems to argue that there is some different sufficiency of the evidence review involving "incidental" crimes. This is not correct. First, as stated in the section above, the Supreme Court has rejected this notion.<sup>8</sup> Second, Green is simply a sufficiency of the evidence case, a case where the Court found there was insufficient evidence of abduction as that term is defined.

In Green, persons in an apartment building heard screaming coming from an alley. Witnesses observed the defendant holding a

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<sup>8</sup> The defendant also cites to Division Two's decision in State v. Korum, 120 Wn. App. 686, 86 P.3d 166 (2004), affirmed in part, reversed in part, 157 Wn.2d 614 (2006). However, in stating that restraint that is "merely incidental" to another crime may not stand, the Court of Appeals in Korum, cited directly to the dissent in Vladovic, a position that was rejected by the majority in Vladovic, rejected again in Fletcher, and then once again--shortly after the Court of Appeals' Korum decision--in Louis.

young child while trying to silence her. He then carried her a “short distance” around the corner where he killed her. Green, at 222-23. Green was charged with kidnapping in aggravation of first-degree murder. The Supreme Court ruled that “after considering the evidence most favorable to the State, we conclude there is not substantial evidence to support a determination of kidnapping.” Id. at 219. In short, the Court found that Green did not try to secret the victim to a place she was not likely to be found, that the killing itself could not constitute restraint by means of deadly force, and thus the element of abduction was missing. Id.

Green is a pure sufficiency of the evidence case. The test for sufficiency of the evidence does not change just because one of the charged crimes happens to be kidnapping.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. Tilton, 149 Wn.2d at 786. The evidence was sufficient here.

**3. HAVING AGREED TO HIS OFFENDER SCORE BELOW, THE DEFENDANT IS BARRED FROM RAISING A SAME CRIMINAL CONDUCT CLAIM FOR THE FIRST TIME ON APPEAL. IN ANY EVENT, THE DEFENDANT'S CONVICTIONS ARE APPROPRIATELY COUNTED SEPARATELY.**

For the first time on appeal, the defendant claims his convictions constitute the "same criminal conduct" for scoring purposes. However, by affirmatively agreeing to his offender score below, this claim has been waived. In any event, the defendant cannot show that no reasonable judge would have found that his robbery, assault and kidnapping convictions, occurring at different times, different places, and with different intents, did not constitute the "same criminal conduct."

**a. The Issue Has Been Waived**

If two current offenses encompass the same criminal conduct, they count as one point in calculating a defendant's offender score. RCW 9.94A.589(1)(a). Crimes are considered the "same criminal conduct" if the trial court determines the crimes require the same criminal intent, are committed at the same time, the same place, and involve the same victim. RCW

9.94A.589(1)(a); State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

A defendant can waive a same criminal conduct claim. The Supreme Court has stated "that waiver can be found where the alleged [sentencing] error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion." In re Shale, 160 Wn.2d 489, 495, 158 P.3d 588 (2007) (citing In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002)).

In Shale, the defendant was informed when he pled guilty that the State calculated his offender score as a nine, like here, based solely on his current convictions. Shale, 160 Wn.2d at 495. Shale argued on appeal that the sentencing court erroneously failed to treat some of his crimes as the "same criminal conduct," even though he never asked the sentencing court to make this part factual, part discretionary, determination. Id. The Supreme Court rejected Shale's claim that he could raise a "same criminal conduct" claim for the first time on appeal. Shale, at 495; see also State v. Nitsch, 100 Wn. App. 512, 997 P.2d 1000, rev. denied, 141 Wn.2d 1030 (2000) (cited with approval in Shale at 494-95, the same criminal conduct inquiry involves factual determinations and the exercise of discretion, and the "failure to identify a factual dispute

for the court's resolution and... [the] failure to request an exercise of the court's discretion," waives the challenge to the offender score); and State v. Jackson, 150 Wn. App. 877, 209 P.3d 553 (Jackson's failure to raise a same criminal conduct claim at his sentencing constitutes waiver of the right to appeal), rev. denied, 167 Wn.2d 1007 (2009).

Shale, Nitsch, and Jackson are directly on point.<sup>9</sup> A defendant cannot raise a same criminal conduct claim on appeal when he agreed to his offender score or did not alert the sentencing court to the factual discretionary issues involved. That is exactly what occurred here. The defendant never asked the sentencing court to make a "same criminal conduct" determination. In fact, he specifically agreed that the State's calculation of his offender score was correct.

At the sentencing hearing, the State provided the court with a sentencing document with the defendant's offender score and standard range calculated. CP 68-83. The prosecutor also orally recited the defendant's offender score and standard ranges for the

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<sup>9</sup> The defendant cites to State v. Anderson, 92 Wn. App. 54, 960 P.2d 975 (1998) for the proposition that he can raise this issue for the first time on appeal. Anderson, however, predates all of the above cited cases and is in direct conflict with Supreme Court precedent.

court and counsel. 6RP 6-7. Specifically, counting only current offenses, and with offenses counting as two because they are serious and violent offenses, the defendant had an offender score of four on each count. See CP 78-80. When the court turned to defense counsel for his sentence recommendation, counsel stated:

We believe Ms. Ungerman's calculation of the sentencing range is accurate. We join her recommendation for the low end of the standard range sentence.

6RP 10. With this agreement, this non-constitutional factual issue is waived.

**b. The Defendant's Convictions Do Not Constitute The Same Criminal Conduct.**

Even if the defendant could raise this issue, he cannot show that it would have been an abuse of discretion for the trial court to find his convictions did not constitute the same criminal conduct for sentencing purposes.

As stated above, two crimes encompass the same criminal conduct if the crimes involve the same criminal intent, are committed at the same time, the same place, and against the same victim. State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). In regards to the intent element, the court focuses on whether the

defendant's intent, viewed objectively, changed from one crime to the next. State v. Grantham, 84 Wn. App. 858, 932 P.2d 657 (1997).

The absence of any single factor precludes a same criminal conduct finding. Vike, 125 Wn.2d at 410. Further, the statute is purposely narrowly constructed to disallow most assertions of same criminal conduct. State v. Palmer, 95 Wn. App. 187, 190-91, 975 P.2d 1038 (1999).

A finding that two crimes do not arise from the same criminal conduct--necessarily a partly factual determination--will not be disturbed on appeal absent an abuse of discretion. State v. Eliot, 114 Wn.2d 6, 17, 785 P.2d 440, cert. denied, 498 U.S. 838 (1990). An abuse of discretion is shown when the reviewing court is satisfied that "no reasonable judge would have reached the same conclusion." State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). If the facts are sufficient to support a finding either way, then the matter lies within the trial court's discretion, and

an appellate court will defer to the trial court's determination. State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868 (1991).

Here, of all the required elements for a finding of same criminal conduct the only factor common to all three crimes is that each crime involved the same victim. Otherwise, all of the other factors differ.

When the defendant assaulted Na by putting a gun to his head, he did so at his place of business. At that time, the evidence shows the defendant did not intend to kidnap nor rob Na. Rather, the defendant believed Na had stolen money and drugs from him and he was attempting to get his possessions back by threatening to shoot and kill Na.

After repeated denials by Na that he stole the defendant's possessions, the defendant's intent changed. He told Na that he didn't care, he was going to get money from Na. He ordered Na out of his store and into Na's car. The defendant's intent, objectively viewed, had now changed. He went from intending to assault Na to intending to kidnap Na in order to obtain Na's money. Further, the defendant could have robbed Na of his vehicle at that location and point in time but did not. Instead, the defendant had the intent to obtain money from Na and ordered him to drive to a bank in an

attempt to obtain some. At this point, the defendant had kidnapped Na, with a different intent than his assault, at a different location, and at a different time.

When Na could not obtain money from the bank and returned to his car, the defendant ordered Na to yet another location--Na's apartment. There, they all exited the car, went into Na's apartment, wherein the defendant ransacked the place, taking financial documents, personal information, and the title to Na's car. The defendant then left the apartment and took Na's car--clearly at a different location, different time, and with a different intent than his other crimes.

While Na's car was used to transport the parties to the bank and to the apartment, the car was not used to facilitate the robbery--the car itself was the item stolen and it could have been stolen at any point during the incident. Further, the defendant had a long period of time to change intents and crimes. As the Supreme Court has noted, having time "to pause and reflect" between acts can defeat a claim of same criminal conduct. State v. French, 157 Wn.2d 593, 613-14, 141 P.3d 54 (2006). Having time to reflect shows that the crimes are "sequential, not simultaneous or continuous." French, 157 Wn.2d at 613.

Under these facts, it would not have been an abuse of discretion for a sentencing judge to rule the defendant's crimes were not the same criminal conduct. As such, trial counsel can not be said to have abused its discretion and the defendant's argument fails.

**4. THE DEFENDANT'S CLAIM THAT THE TRIAL COURT ERRED IN NOT GRANTING HIS MOTION FOR A NEW TRIAL IS NOT SUPPORTED BY THE RECORD.**

Post trial, the defendant made a motion for a new trial based on what he claimed was prosecutorial misconduct. Specifically, he claimed that when he [defense counsel] was questioning Detective Jerome Craig about statements made by the defendant to him, the prosecutor objected and stated in front of the jury that counsel was trying to elicit "previously suppressed statements." The defendant claims the reference to previously suppressed statements constitutes misconduct and that the trial court abused its discretion in failing to grant him a new trial. This claim is not supported by the record and is factually and legally unsupportable.

Post trial, the defendant filed a written motion with the allegation as stated above. CP 17-18. At sentencing, the court

heard the defendant's motion. See 6RP 3-6. Defense counsel told the court that he recalled the prosecutor making such an objection at trial when he was questioning Detective Craig. 6RP 3. No transcript was provided to the trial court. The trial court denied the defendant's motion for a new trial.

In his brief to this Court, in arguing that the trial court abused its discretion, the defendant does not cite to anywhere in the report of proceedings wherein the prosecutor made this objection during defense counsel's questioning of Detective Craig. The State has attempted to find where this alleged transgression occurred but can find nothing in the record supporting the allegation.

On appeal, the defendant turns the factual allegation around, stating that during the prosecutor's direct examination of Detective Craig, the prosecutor impermissibly inquired into previously suppressed statements of the defendant. He claims he immediately objected. Def. br. at 16. There is no citation to the record. This factual assertion is in complete contrast to the factual assertion that formed the basis of the defendant's motion for a new trial. Still, the State has reviewed the record and again found nothing in the record that supports this allegation. The State can find no place in the testimony of Detective Craig wherein the

prosecutor sought to introduce suppressed statements of the defendant and no place in the record wherein defense counsel made such an objection.

Whether something happened that is not in the record, counsel's recall was faulty or the issue arose at sidebar and was not put on the record, the fact remains, the allegation is not supported by the record and matters not in the record will not be considered by the court on appeal. State v. Rienks, 46 Wn. App. 537, 544, 731 P.2d 1116 (1987). Further, failure to cite to the record can prevent this Court from considering the issue. See State v. Wheaton, 121 Wn.2d 347, 365, 850 P.2d 507 (1993); Rhinevault v. Rhinevault, 91 Wn. App. 688, 692, 959 P.2d 687 (1998).

While the State cannot respond directly and completely with no accurate reference or support from the record, even if the events had occurred as alleged, the trial court would not have been in error in denying the defendant's motion for a new trial.<sup>10</sup>

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<sup>10</sup> The granting or denial of a motion for a new trial is left to the sound discretion of the trial court and will be overturned only upon a showing of an abuse of discretion. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). A trial court has wide discretion in curing trial irregularities. State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172 (1992).

The cases relied upon by the defendant, State v. Charlton,<sup>11</sup> and State v. Tanner,<sup>12</sup> do not support his claim. In both cases, the prosecutor committed an act that brought before the jury knowledge that the defendant had exercised his marital privilege. This created an inference that the defendants were attempting to hide evidence disfavorable to themselves by the exercise of their lawful rights. Charlton, 90 Wn.2d at 662. The exact opposite exists here.

Here, it was defense counsel who was attempting to elicit testimony in front of the jury--presumably favorable testimony. By the State objecting, the inference is reversed, the appearance being that the State was attempting to keep from the jury evidence favorable to the defendant. This is the argument that was made to the trial court and the basis for the trial court's ruling--that under such circumstances, even if the misconduct occurred, there could be no prejudice to the defendant. 6RP 5-6. The defendant fails to show how this ruling is an abuse of discretion.

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<sup>11</sup> 90 Wn.2d 657, 662, 585 P.2d 142 (1978) (the prosecutor commented on the wife of the defendant's failure to testify and his exercise of his spousal privilege).

<sup>12</sup> 54 Wn.2d 535, 538, 341 P.2d 869 (1959) (the prosecutor called the defendant's wife to the stand for the purpose of having her exercise her spousal privilege not to testify in front of the jury).

D. **CONCLUSION**

For the reasons cited above, this Court should affirm the defendant's conviction and sentence.

DATED this 13 day of September, 2010.

Respectfully submitted,

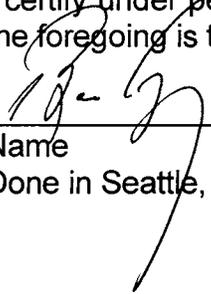
DANIEL T. SATTERBERG  
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By:   
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to John Crowley, the attorney for the appellant, at The Crowley Law Firm, 506 2<sup>nd</sup> Avenue, Suite 1015, Seattle, WA 98104, containing a copy of the Brief of Respondent, in STATE V. KIM, Cause No. 64405-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Name  
Done in Seattle, Washington

09-18-10  
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Date