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FILED
October 7, 2016
Court of Appeals
Division I
State of Washington

NO. 74262-1-I

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

STATE OF WASHINGTON

Respondent

v.

RYAN BRETT JOHNSON,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

1. In a prosecution for first degree burglary was there sufficient evidence the defendant unlawfully entered the victim's bedroom to establish that element of the charge?

2. Did the tribal court have jurisdiction to issue a search warrant for cell phone records? If not was error in admitting testimony related to those records harmless?

3. Evidence that the defendant's name, his photo, and a photo of his vehicle were associated with a Facebook page that listed a specific phone number in the contact information was introduced at trial.

a. Did the defendant fail to preserve an objection to the testimony about the page on the basis of authentication?

b. Was there sufficient evidence to authenticate the Facebook page?

c. If the court admitted the limited testimony regarding the Facebook page in error, was it harmless?

4. A search of a police database revealed that the defendant's name and social security number were associated with a particular phone number.

a. Was the search of the database sufficiently authenticated?

b. If it was error to admit the results from the database search, was it harmless?

5. Where the second degree assault and first degree robbery had an independent purpose and effect did those two crime merge for double jeopardy purposes?

6. Did the trial court abuse its discretion when it found the second degree assault and first degree robbery charges did not constitute same criminal conduct?

7. Should this court remand for resentencing when the trial court treated the second degree assault and first degree robbery charges as serious violent offenses when they are not defined as such by the Sentencing Reform Act?

II. STATEMENT OF THE CASE

Anthony Williams lived with his father at 4428 79th Street N.W. on the Tulalip Indian reservation. His cousin Tashina Kona had been living with Mr. Williams and his father Jeremy for about two years as of December 31, 2014. Mr. William's bedroom was on the first floor just off the living room. Ms. Kona lived in a bedroom downstairs. Mr. Williams and Ms. Kona did not get along for the

entire time that she lived at that address. Mr. Williams objected to her involvement with people who regularly used controlled substances. He also objected to her failure to regularly pay his father the rent she was supposed to pay. 10/26/15 RP 52-53, 56-57; 10/27/15 RP 97-98, 193-194.

Just prior to New Year's Eve Ms. Kona took Mr. Williams's father's truck. His father was in the Philippines at the time. Mr. Williams posted a request on Facebook for information from anyone who had seen the truck. Ms. Kona became angry with Mr. Williams when she learned the day before New Year's Eve about the posting from another uncle who resided in Oregon. 10/27/15 RP 194.

On New Year's Eve Mr. Williams went to the Tulalip casino with some friends. He won \$2,500 at the casino and then joined his friends for some drinks and food. Mr. Williams was happy about his winnings so he posted about his winnings on Facebook. Mr. Williams got home around 2:30 a.m. and went to bed about 30 minutes later. 10/26/15 RP 53-56.

Ms. Kona spent New Year's Eve at a friend's house until about 4:00 a.m. She then drove around with her sister, arriving home about 5:00 a.m. When she went inside she noticed a tax

reporting form for Mr. Williams's gambling winnings in the kitchen. When she saw that he had won a large jackpot she decided to get even with him for his Facebook post about the truck. She called Billy Joe Arnold and told him about Mr. Williams's money. Mr. Arnold told Ms. Kona that he was on his way. 10/27/15 RP 194-198.

When Ms. Kona called, Mr. Arnold was with his girlfriend Danielle Garner, the defendant, Ryan Johnson, and the defendant's girlfriend Amy Lyons. Prior to Ms. Kona's call the four were getting high on heroin and methamphetamine. Mr. Arnold then left for Mr. Williams's home with the defendant and Ms. Lyons in the defendant's red Ford Explorer. When they arrived at Mr. Williams's house Ms. Kona went outside to greet them. Ms. Kona advised Mr. Arnold and the defendant that the front door was unlocked. She told them where Mr. Williams's room was and proved that he had won money that night. The defendant and Mr. Arnold went into the house to commit the robbery. 10/27/15 RP 200-201; 10/28/15 RP 266-270.

Mr. Williams was awakened when his dog started barking. The dog quieted down when he was told to do so. Mr. Williams had turned the light off in the kitchen when he went to bed but noticed

that the light was on when the dog woke him up. He assumed that Ms. Kona was there. He then saw the kitchen light go out and someone opening the front door and leaving the house. Mr. Williams turned out his light and then laid back down. 10/26/15 RP 58-60.

Mr. Williams's door had been shut. After he laid back down, the defendant and Mr. Arnold broke into his room. Mr. Williams did not know the defendant. He had not given the defendant, Mr. Arnold, or anyone else permission to enter his room that night. Mr. Arnold was wearing a mask. On the way into the house the defendant picked up a 2 X 2 from the driveway and handed it to Mr. Arnold. When they got into Mr. Williams's room they demanded Mr. Williams's money telling him that they knew that he had won money. Mr. Williams was afraid because Mr. Arnold was holding the 2 x 2 stick so he handed the defendant his wallet. The defendant removed the money from Mr. Williams's wallet and then grabbed Mr. Williams's cell phone. Mr. Arnold then hit Mr. Williams on the head. The two men then fled with Mr. Williams's money and his cell phone. As a result of the assault Mr. Williams suffered a 3-4" gash on his head that required 11 staples to close. 10/26/15 RP 61-63, 66; 10/27/15 RP 100-103, 195; 10/28/15 RP 272-274.

Mr. Williams then ran out of his house and to his sister's house. He was bleeding profusely from his head wound. Mr. Williams's sister called 911. Police and medical aid arrived around 6:30 a.m. After Mr. Williams was checked out he was transported to the hospital. 10/26/15 RP 65-65; 10/27/15 RP 103-104.

After the defendant, Mr. Arnold, and Ms. Lyon drove off Ms. Kona called the defendant's cell phone looking for Mr. Arnold. Ms. Kona asked Mr. Arnold what happened as she did not expect that Mr. Williams would be hurt in the robbery. The defendant and Mr. Arnold threw out Mr. Williams's phone after Ms. Kona suggested that the police could trace them through it. After the robbery the defendant and Mr. Arnold went to the Angel of the Winds casino and spent the proceeds from the robbery. 10/27/15 203-204; 10/28/15 RP 275-280.

The defendant was charged with first degree robbery (count I), first degree burglary (count II), and second degree assault with a deadly weapon allegation (count III). 1 CP 313. He was convicted of all counts at jury trial. The jury found the defendant was armed with a deadly weapon. 1 CP 120-124.

III. ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT TO PROVE FIRST DEGREE BURGLARY BEYOND A REASONABLE DOUBT.

In order to convict the defendant of first degree burglary the State was required to prove in part:

(1) That on or about the 1st day of January 2015, the defendant, or a person to whom the defendant was an accomplice, entered or remained unlawfully in a building; . . .

1 CP 42.

A person "enters or remains unlawfully" in a building when he is not then licensed, invited, or otherwise privileged to so enter or remain. RCW 9A.52.010(2). The defendant contends that because Ms. Kona was Mr. Williams's roommate, and she invited the defendant and Mr. Arnold into the home, there was insufficient evidence to prove that he entered or remained unlawfully in a building.

Evidence is sufficient to support the charge if after viewing the evidence in the light most favorable to the State any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). All reasonable inferences from the evidence are drawn in favor of the State and most strongly against

the defendant. State v. Garbaccio, 151 Wn. App. 716, 742, 214 P.3d 168 (2009), review denied, 168 Wn.2d 1027 (2010). When evaluating the sufficiency of the evidence a reviewing court will treat circumstantial evidence as probative as direct evidence. Id. A challenge to the sufficiency of the evidence he admits the truth of the State's evidence and all reasonable inferences that could be drawn from that evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The reviewing court gives deference to the trier of fact who resolves conflicting testimony, evaluates the credibility of the witnesses, and weighs the persuasiveness of the evidence. State v. Lubers, 81 Wn. App. 614, 619, 915 P.2d 1157, review denied, 130 Wn.2d 1008 (1996).

A license to enter a building may only be given by the person who resides or otherwise has authority over the property. State v. Grimes, 92 Wn. App. 973, 978, 966 P.2d 394 (1998). Authority to grant permission to enter the home may be limited. In Woods a juvenile charged with burglary of his friend's mother's home defended on the basis that his friend had given him permission to enter, and thus his entry was not unlawful. The friend had been excluded from the mother's home during the time of day that the entry occurred. Entry was gained by kicking down a locked door.

This court held the evidence was sufficient to prove unlawful entry, reasoning that the friend did not have a license to grant another to enter his mother's home at that time. In addition, even if the friend did have permission to enter, he was not permitted to enter in the manner in which he did. State v. Woods, 63 Wn. App. 588, 590-591, 821 P.2d 1235 (1991).

A person who is licensed to enter or remain in some parts of a building may nonetheless be excluded from other parts. Entering into those parts of the building where the license has not been granted can support a burglary charge. Thus where a tenant of a property was not permitted into the homeowner's bedroom he committed a burglary when he entered the bedroom and murdered the property owner. State v. Rio, 38 Wn.2d 446, 450-452, 230 P.2d 308, cert denied, 342 U.S. 867 (1951). A limitation on a person's license or privilege to be in a portion of a building may be implied from the circumstances. State v. Collins, 110 Wn.2d 253, 260-261, 751 P.2d 837 (1988).

Here the direct and circumstantial evidence was sufficient to support the unlawful entry element of the first degree burglary charge. Mr. Williams testified that neither the defendant nor anyone else had permission to be in his bedroom that night. 10/26/15 RP

66. Ms. Kona was one of the people who had no license or privilege to be in Mr. Williams's room. Ms. Kona did have permission to be in a portion of the house including her downstairs apartment and the common areas. 10/27/15 RP 206-207. However, she did not testify that she was permitted to enter Mr. Williams's room any time she wanted. Since Mr. Williams kept his door shut when he was in his room and that there was animosity between Mr. Williams and Ms. Kona, she was impliedly excluded from his room. 10/26/15 RP 52; 10/27/15 RP 194-196.

If Ms. Kona had no authority to enter Mr. Williams's room on her own, then she had no authority to grant the defendant a license to enter that room. The defendant's entry was therefore unlawful. The burglary conviction should be affirmed.

B. THE TRIBAL COURT HAD JURISDICTION TO ISSUE A WARRANT FOR EVIDENCE OF A CRIME COMMITTED ON TRIBAL LAND. ANY ERROR FROM THE ORDER DENYING A MOTION TO SUPPRESS THE DEFENDANT'S CELL RECORDS WAS HARMLESS.

1. The Tribal Court Was Authorized To Issue A Warrant For Evidence Of A Crime Committed On Tribal Land.

Detective Sallee was assigned to investigate the robbery. As part of his investigation he interviewed Ms. Kona and got two warrants for her cell phone and cell phone records. Det. Sallee noticed that right before and right after the robbery there were a

number of calls made between Ms. Kona's phone and two different numbers. Detective Sallee recognized one number belonged to Billy Joe Arnold; i.e. (425) 268-5584. He did not recognize the second number, (509) 631-2672. He typed the number into the Google task bar and learned that it was listed as the defendant's contact number on a Facebook page. That page contained a photo of the defendant and his red Ford Explorer. Det. Sallee had previously been informed by Mr. Arnold's girlfriend, Ms. Garner, that the defendant had been involved in the robbery. Det. Sallee also conducted a search of the LexisNexis search engine using the (509) 631-2627 number. It returned with the defendant's name and social security number. 10/27/15 RP 133-140, 151-152.

Detective Sallee then obtained a search warrant for phone records associated with the (509) 631-2627 number from the carrier AT&T. The records provided did not list the subscriber's name. He also obtained cell records for Mr. Arnold's cell phone. A comparison between Ms. Kona's records, Mr. Arnold's records, and the AT&T records associated with the (509) number showed the same calls made between Ms. Kona's phone and the other two phones immediately before and after the robbery. 10/27/15 RP 153-156; 1 CP 386-391; Ex. 11, 72.

Prior to trial, the defendant moved to suppress the AT&T phone records associated with the (509) number and evidence derived from those records on the basis that the tribal court did not have jurisdiction to issue a search warrant for evidence located in Texas. 1 CP 378-381. The trial court denied the motion, finding the tribal court had jurisdiction to issue the warrant to the Texas company. 8/27/15 RP 15-16.

The defendant now argues that it was error to deny his motion to suppress because he is not a tribal member and since the tribal court had no jurisdiction over non-tribal members the tribal court lacked authority to issue a warrant for his phone records. He relies on State v. Clark, 178 Wn.2d 19, 908 P.3d 590 (2013) and Nevada v. Hicks, 533 U.S. 353, 121 S.Ct. 2304, 150 L.Ed.2d 390 (2001). Neither of these cases addresses the tribal court's authority to issue a search warrant for evidence of a crime committed on tribal land. Clark dealt with the State court's authority to issue a search warrant for tribal trust property to search for evidence of a crime committed on fee land within an Indian reservation. Clark, 178 Wn.2d at 23, ¶23. In Hicks the court considered the tribal court's authority to assert jurisdiction over civil claims against state officials who entered tribal land to execute a

search warrant for a tribe member suspected of having violated a state law outside the reservation. Hicks, 533 U.S. at 355. Since these cases do not address a tribal court's authority to issue a search warrant for evidence of a crime committed on tribal land they do not support the defendant's argument that the warrant was invalid.

Tribal courts do not have jurisdiction to try and punish non-Indians who commit crimes on tribal lands. State v. Youde, 174 Wn. App. 873, 875, 301 P.3d 749 (2013). Whether the court may adjudicate a claim against a non-tribal member does not answer what authority the tribal court has to issue a search warrant.

Adjudicating a criminal charge involves an exercise of jurisdiction over a particular person which may subject that person to punishment. Washington Constitution Art. 4, §6, State v. Barnes, 146 Wn.2d 74, 81, 43 P.3d 490 (2002). A search warrant however is a civil in rem action that is distinct from a criminal prosecution against a person. Protect the Peninsula's Future v. City of Port Angeles, 175 Wn App. 201, 208-209, 304 P.3d 914, review denied, 178 Wn.2d 1022 (2013). Whether the trial court had personal jurisdiction over the owner of the property subject to the warrant does not bear on the validity of the warrant. For that reason it is not

a defense to the legality of a search warrant that owner of the property seized was in another state, outside the jurisdiction of the issuing court. State v. Twenty Barrels of Whiskey, 104 Wash. 382, 387, 176 P. 673 (1918).

The Tulalip Court had the authority to issue search warrants based on probable cause for evidence of crimes committed on tribal land. Tulalip Tribes Law & Order Code (Ordinance 49) 5.3.1 and 5.3.2.¹ The tribal court's jurisdiction extends to crimes committed on reservation land. Tulalip Tribe Law and Order Code 1.2.1, 1.2.2.

The authority conferred by these provisions on the tribal court is not limited to crimes that may only be prosecuted in tribal court. The tribal court had authority pursuant to 18 USC §2703 to issue the warrant.¹ CP 397-398. The tribal court also determined that it had authority to issue the warrant pursuant to RCW 10.96.020. 1 CP 386. That decision is entitled to full faith and credit to the same extent as a decree from a sister state. City of Yakima v. Aubry, 85 Wn. App. 199, 203, 931 P.2d 927, review denied, 132

¹ A copy of the Tulalip Tribal Code may be found on the tribe's website at https://www.tulaliptribes-nsn.gov/Portals/0/pdf/49_law_and_order.pdf. It may also be found on the National Indian Law Library (NILL) Website at <http://www.narf.org/nill/codes/tulalipcode/index.html>.

Wn.2d 1011 (1997). The trial court did not err when it refused to suppress evidence from the defendant's cell records.

2. If Evidence From The Search Of The Defendant's Cell Records Should Have Been Suppressed The Error Was Harmless.

If the court finds the tribal court issued the warrant for the defendant's cell records in error then the error was harmless. Admission of evidence obtained from an invalid search warrant is an error of constitutional magnitude. State v. Kedoara, 191 Wn. App. 305, 317, 364 P.3d 777 (2015), review denied, 185 Wn.2d 1028 (2016). Constitutional error is harmless if the court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. Id. The court will look to the untainted evidence to determine if that evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986).

Mr. Arnold identified the defendant as one of the robbers. He also identified Ms. Lyons as the defendant's girlfriend. 10/28/15 RP 265-266, 272-276. Ms. Garner corroborated Mr. Arnold's testimony that Ms. Lyons and her boyfriend were with Ms. Garner and Mr. Arnold on New Year's Eve 2014. Ms. Lyon, her boyfriend, and Mr.

Arnold left in a red SUV when Mr. Arnold got a call from Ms. Kona to do a robbery. 10/29/15 RP 314-316. Ms. Kona stated that the defendant looked like the guy that accompanied Mr. Arnold to her house to commit the robbery. 10/27/15 RP 200. Video surveillance photos showed the defendant with Mr. Arnold about one hour after the robbery. 10/27/15 RP 183-184, 187-188; 10/28/15 RP 277. Ms. Garner, Ms. Kona, and Mr. Arnold all testified to calls made between Mr. Arnold and Ms. Kona before and after the robbery. Both Mr. Arnold's phone and the defendant's phone were used to make those calls. Mr. Arnold identified the (509) number as belonging to the defendant. 10/27/15 RP 197, 203-204; 10/28/15 RP 278-280.

Evidence tying the defendant to the (509) 631-2672 phone number and calls made between that number and Ms. Kona's number corroborated Mr. Arnold's testimony that the defendant participated in the robbery. Police initially were alerted to that number when they obtained Ms. Kona's cell records. Police learned that the (509) 631-2672 number was associated with the defendant because it was listed as contact information on a Facebook page. That Facebook page contained photos of the defendant and a Ford SUV that was identified as belonging to the

defendant. 10/27/15 RP 140, 151. Police also confirmed that number was associated with the defendant by running it through a police database. That search returned with the defendant's name and social security number. 10/27/15 RP 153. Detective Sallee called the defendant and left him a message several times. The defendant did call the detective back on one occasion. 10/27/15 RP 186-187.

The records from Ms. Kona's phone that were introduced into evidence showed calls and text messages made between her phone and the (509) 631-2672 phone starting shortly before the robbery to several hours after the robbery. Ex. 11, Ex. 72 (pages 3-5). 10/28/15 RP 249-259. The defendant's cell records obtained as a result of the warrant were not introduced into evidence. The only evidence introduced that was derived from the challenged search warrant was that records for phone number (509) 631-2672 did not indicate who the subscriber was, but that the call activity between that number and the records for Ms. Kona's number was the same. 10/27/15 RP 153-156. The accuracy of Ms. Kona's records was not challenged. 10/29/15 RP 399-403. Evidence derived from the challenged search warrant was minimal and cumulative of other unchallenged evidence. Considering all of the

untainted evidence if it was error to admit that minimal evidence the error was harmless.

C. EVIDENCE ADMITTED TO PROVE A PHONE NUMBER BELONGED TO THE DEFENDANT WAS SUFFICIENTLY AUTHENTICATED. THE DEFENDANT FAILED TO PRESERVE A CHALLENGE TO SOME OF THAT EVIDENCE. IF IT WAS ERROR TO ADMIT THAT EVIDENCE IT WAS HARMLESS.

The State introduced evidence that Detective Sallee conducted a Google search for the (509) phone number that linked to a Facebook page containing information that identified the page as the defendant's. It also sought to introduce evidence of a search into a law enforcement database called LexisNexis that tied the defendant to that phone number. The defendant challenges the admission of that evidence on the basis that evidence had been insufficiently authenticated.

The requirement for authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. ER 901(a). The proponent must produce enough proof for a reasonable fact finder to find in favor of authenticity. In re Detention of H.N., 188 Wn. App. 744, 751, 355 P.3d 294 (2015), review denied, 185 Wn.2d 1005 (2016). That evidence need not rule out all possibilities that are inconsistent with authenticity. Id.

The rule does not limit how the proponent meets its burden of proof. It does set out illustrative examples however, including the "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances. ER 901(b)(4). Since authenticity is a preliminary determination under ER 104 evidence that may otherwise be objectionable may be considered. Rice v. Offshore Systems, Inc. 167 Wn. App. 77, 86, 272 P.3d 865, review denied, 174 Wn.2d 1016 (2012). That evidence may include lay opinions, hearsay, or the offered evidence itself. H.N., 188 Wn. App. at 751. Once the proponent of the evidence has made a prima facie showing that the evidence is authentic it is admissible. Rice, 167 Wn. App. at 86.

A trial court's decision to admit evidence is reviewed for an abuse of discretion. City of Auburn v. Hedlund, 165 Wn.2d 645, 654, 201 P.3d 315 (2009). A court abuses its discretion when the decision to admit evidence is manifestly unreasonable or based on untenable grounds or reasons. State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

In Rice, police reports offered in evidence at a summary judgment hearing were sufficiently authenticated by the contents of the reports that included the police department logo that appeared

on the reports, the incident number, the investigating officers' signature, and the narrative report of the incident. Rice, 167 Wn. App. at 86. Similarly the content of text messages supported finding those message had been sent by a particular person in H.N. That evidence coupled with evidence that the phone number on the text messages matched the number associated with her on the medical chart and timing of the messages supported the trial court's finding that the messages were in fact those sent by H.N.. H.N., 188 Wn. App. at 758.

1. Facts Relating To Admission Of The Contents Of The Defendant's Facebook Page.

Detective Sallee testified that he did not know the subscriber for (509) 631-2672 that was listed in Ms. Kona's records from around the time of the robbery. He testified without objection

A: Initially, I just typed it into the Google® task bar and ended up popping up to Ryan Johnson's Facebook® page and listed under his personal information as his contact number.

Q: When you're speaking about Ryan Johnson, are you speaking about the defendant seated here?

A: Yes; that's correct.

10/27/15 RP 140

The detective also testified without objection that there were pictures on the Facebook page that matched the defendant. The

defendant objected to evidence that there was a picture of the red Ford Explorer that matched the description of the vehicle used in the robbery on that Facebook page on the basis of hearsay. That objection was overruled. In a hearing outside the presence of the jury, the defense objected to evidence of photographs identifying that Facebook page as the defendant's. He argued that the State had failed to authenticate the page as his. The trial court reserved on the question of whether there had been sufficient evidence to show the defendant had posted any information on that Facebook page. The court excluded evidence that a picture of the Ford Explorer was posted by the defendant on that page. The defendant did not ask the court to strike the prior testimony regarding the red Ford Explorer seen on that page. 10/27/115 RP 140-144.

2. The Defendant Has Not Preserved A Challenge To Evidence Regarding His Facebook Page.

The defendant now argues that the court erred when it allowed testimony regarding ownership of the Facebook page and photos found on that page. Generally to preserve an evidentiary error for review a party must timely object or move to strike evidence based on the specific ground asserted on appeal. State v. Wilbur-Bobb, 134 Wn. App. 627, 634, 141 P.3d 665 (2006). The

purpose of the rule is to encourage the efficient use of judicial resources, and to allow the trial court the opportunity to timely correct a trial error. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). "The rule comes from the principle that trial counsel and the defendant are obligated to seek a remedy to errors as they occur, or shortly thereafter." Id.

Here the defendant did not object on the basis of authentication before the detective testified regarding the photos he saw on the Facebook page. When that specific objection was raised and sustained he did not move to strike the previously admitted testimony. The trial court generally agreed with the defense position, and did exclude some evidence based on the objection. Based on that ruling the defense could have sought an order striking the Facebook testimony. Because he did not timely object, and did not seek a remedy that would have cured the asserted error at the time of trial this court should find the claimed error is waived.

3. There Was Sufficient Evidence To Make A Prima Facie Showing That The Facebook Page Was The Defendant's.

If the court does consider the question it should reject the defendant's claim that he is entitled to a new trial on this basis. The

Facebook testimony was offered to show that the (509) number belonged to the defendant. That number was listed as the contact information for the "Ryan Johnson" Facebook page that returned in the Google search. That number appeared in another database that included the defendant's phone number and social security number. The page contained pictures of the defendant, his vehicle, and his house. The detective drove to the defendant's house and saw his vehicle in front of it so he was familiar with what those looked like. Evidence that photos of the defendant and a vehicle associated with him were seen on that page was evidence that confirmed that the Ryan Johnson associated with that contact information was the defendant. 10/27/15 RP 140, 151-152, 170.

The defendant argues that this was insufficient to authenticate that the Facebook page belonged to the defendant. He argues that the Facebook page could only be authenticated by someone with knowledge regarding ownership of the page. He acknowledges the contents of the page can serve to authenticate the proposed evidence. The detective did know what the defendant and his SUV looked like. Pictures of the defendant and his SUV coupled with his name on the Facebook page did provide prima facie evidence that he owned the page. His ownership of that page

was circumstantial evidence that he was connected with the (509) phone number listed on the contact information. Whether the defendant posted those pictures or not did not affect the authenticity of that evidence.

4. If Evidence Of The Facebook Page Was Admitted In Error It Was Harmless.

Finally, if it was error to admit evidence that the Facebook page belonged to the defendant because it had been insufficiently authenticated the error was harmless. When an error arising from violation of an evidentiary rule occurs the error is harmless unless within reasonable probabilities the outcome of the trial would have been materially affected had the error not occurred. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004).

The Facebook evidence was admitted as circumstantial evidence that the (509) number belonged to the defendant. That in turn was admitted as circumstantial evidence that the defendant participated in the robbery since it showed that the defendant or someone who had his phone had communicated with Ms. Kona both before and after the robbery. Other evidence, including Mr. Arnold's direct testimony and the LexisNexis search, tied the phone number to the defendant. Mr. Arnold identified the red SUV as the

defendant's. Ms. Kona and Ms. Garner corroborated Mr. Arnold's testimony that a red SUV was involved in the robbery. 10/27/15 RP 199; 10/28/15 RP 269; 10/29/15 RP 315. Mr. Arnold identified the defendant as his partner in the robbery. Testimony from Ms. Garner and Ms. Kona and photographs of the defendant and Mr. Arnold taken one hour after the robbery corroborated that testimony. 10/27/15 RP 200. The Facebook evidence therefore did not materially affect the outcome of the case. Any error in admitting it was harmless.

5. Facts Relating To Admission Of The LexisNexis Search.

In a hearing outside the presence of the jury Detective Sallee testified that he had been using LexisNexis for a few months. He described it as a search engine tool that was available to police agencies that subscribed to it. It was designed to locate people. In his experience the tool had been very reliable; when he located an address for a person he was looking for, he had gone to that addresses and verified the information in the database. 10/27/15 RP 145-147. In an offer of proof the State further said that the detective verified the information obtained related to the defendant because it included the defendant's social security

number that was previously known to the detective. 10/27/15 RP 148-149.

The court allowed the detective to testify to his search of that database and what the search returned, including the defendant's name and social security number. The court disallowed evidence that the phone number obtained from that search belonged to the defendant. 10/27/15 RP 150. Thereafter the detective testified consistently with the court's ruling. 10/27/15 RP 152-155.

6. The LexisNexis Was Sufficiently Authenticated.

Evidence of a process or system that produces a result may be authenticated by evidence describing that process or system and showing that the process or system produces an accurate result. ER 901(b)(9). Here the detective did testify regarding how the system worked, who had access to it, and that in his experience it did provide accurate results. Information that the defendant's social security number appeared in the results of that search further supported the conclusion that a search of the data base produced accurate results. The court did not err in admitting the limited evidence regarding the detective search of that database.

The defendant argues that results of the LexisNexis search were insufficiently authenticated because the detective had not

been using the system for a long time and was unfamiliar with how the data was collected in that system. He points out that the detective did not preserve a hard copy of his results, and that the information that came from the phone company did not corroborate the information in the database. Since the State as the proponent of the evidence was not required to produce evidence that ruled out all possibilities that the database did not produce accurate results the trial court did not abuse its discretion when it allowed the results of the search.

Finally, if the court did err in admitting the results of the LexisNexis search it was harmless. The evidence was cumulative of other evidence showing that number belonged to the defendant. There was also other evidence that directly and circumstantially tied the defendant to the robbery. The results of the proceeding would not have been different had the court excluded the results of the LexisNexis search.

D. SENTENCES ON THE ROBBERY AND ASSAULT CONVICTIONS DO NOT VIOLATE DOUBLE JEOPARDY.

At sentencing the court found the robbery had been completed at the time that the victim was "gratuitously assaulted by Mr. Arnold." It therefore found the convictions for first degree

robbery and second degree assault did not merge. 11/16/15 RP 430, 441. The defendant argues that the court violated his right to be free from double jeopardy when it refused to merge the two offenses.

The constitutional guarantee to be free from double jeopardy protects a defendant from multiple punishments for the same offense. State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983). Double jeopardy protections are not violated when the legislature authorized multiple punishments for both crimes. State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005). To determine whether the legislature intended multiple punishment the court may employ the merger doctrine. Id. at 772-773. That doctrine is a rule of statutory construction that applies where the Legislature has clearly indicated that to prove a particular degree of one crime the State must prove the defendant committed that crime and that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes. Vladovic, 99 Wn.2d at 420-421. Even if the charges would merge under that doctrine, the crimes may be punished separately if there is an independent purpose or effect to each offense. Freeman, 153 Wn.2d at 773.

When considering whether the merger doctrine applies the court looks at the nature of the charged offenses. In re Francis, 170 Wn.2d 517, 523-524, 242 P.3d 866 (2010). The court looks at how the State actually charged the offense, not all the ways in which the offense could have been charged. Id. Here the merger doctrine may apply because the first degree robbery count was charged under a theory that during the commission of the robbery or immediate flight therefrom the defendant inflicted bodily injury. He was charged with second degree assault on the theory that he inflicted substantial bodily harm. 1 CP 313. The jury did not decide under what theory the robbery charge had been proved. 1 CP 124. Since the harm caused the victim could be one theory under which the charge was elevated to first degree robbery the merger doctrine may apply. However, since the purpose and effect of the assault was independent of the robbery it was permissible to punish those two crimes separately.

Whether an assault is independent of a robbery is illustrated by State v. Knight, 176 Wn. App. 936, 309 P.3d 776 (2013), review denied, 179 Wn.2d 1021 (2014). There the defendant was charged with first degree robbery and second degree assault for her part in

a home invasion robbery². Knight and her accomplices tricked the Sanders into allowing them into their home. While inside one accomplice pointed a gun at Ms. Sanders to induce her to turn over her wedding ring. After she did so a second accomplice held a gun to Ms. Sanders' head demanding to know the whereabouts of the couples' safe. Under these facts the court held the two crimes were independent of each other, and therefore did not merge. The court reasoned that the robbery of the wedding ring had been completed when Ms. Sanders' turned the ring over to the first co-defendant. The assault occurred after that time. Knight, 176 Wn. App. at 942-943, 955-956.

Like Knight the second degree assault charge was completely separate from the first degree robbery charge. The original plan was to rob Mr. Williams without hurting him. Procuring the weapon and arming themselves with it was therefore meant to be used to intimidate Mr. Williams into giving up his money, not to injure him with it. The weapon was used consistent with that plan. Mr. Williams testified that he turned over his money because he saw the stick and was worried that he would be hurt if he did not do

² Knight was also charged with first degree felony murder and first degree burglary.

so. 10/26/15 RP 61-62; 10/27/15 RP 200; 10/28/15 RP 271-275, 285-286. As the prosecutor argued "merely coming into Anthony's room at 4:00 in the morning wearing masks and hold a stick, that's force" sufficient to satisfy that element of the robbery charge. 10/29/15 RP 393. Mr. Arnold struck Mr. Williams only after the money was taken and the wallet was discarded. Striking him did not facilitate the robbery in any way which had been completed by that point in time. Rather the evidence showed the act was done for an independent purpose; to relieve Mr. Arnold's fear or the adrenaline that he had built up in committing the robbery and to injure Mr. Williams. Under these facts the two crimes had an independent purpose and effect. The court did not err when it sentenced the defendant for each count.

E. THE COURT ACTED WITHIN ITS DISCRETION WHEN IT FOUND THE ROBBERY AND ASSAULT CHARGES DID NOT CONSTITUTE SAME CRIMINAL CONDUCT. THE COURT ERRED WHEN IT TREATED THOSE TWO CRIMES AS SERIOUS VIOLENT OFFENSES.

The defendant argues that the court erred when it failed to find the first degree robbery and second degree assault charges constituted the same criminal conduct. He further argues that by treating them as separate offenses the court miscalculated his

offender score. He argues the court erroneously imposed an exceptional sentence by running the two counts consecutively.

The court acted within its discretion when it found the two crimes did not constitute same criminal conduct. The court did not declare an exceptional sentence, but rather erroneously treated the two charges as serious violent offenses, and sentenced the defendant accordingly.

When a person is sentenced for two or more current offenses the sentence range for each current offense is determined by using all other current and prior convictions as if they were prior convictions for purposes of calculating the offender score unless the court enters a finding that some or all of the current offenses encompass the same criminal conduct. RCW 9.94A.589(1)(a). "Same criminal conduct,' as used in this subsection means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id.*

Whether two or more crimes constitute same criminal conduct is a factual determination reviewed for an abuse of discretion. State v. Kloepper, 179 Wn. App. 343, 357, 317 P.3d 1088, review denied, 180 Wn.2d 1017 (2014). Courts construe the statute narrowly to disallow most assertions of same criminal

conduct. State v. Wilson, 136 Wn. App. 596, 613, 150 P.3d 144 (2007). If the facts support only one conclusion and the trial court comes to a contrary conclusion then it has abused its discretion. State v. Graciano, 176 Wn.2d 531 538, 295 P.3d 219 (2013). It does not abuse its discretion if the record adequately supports either conclusion. Id. The defendant bears the burden to establish two or more crimes constitute the same criminal conduct. Id. at 539-540.

In Knight the court upheld the trial court's determination that the first degree robbery and second degree assault of Ms. Sanders did not constitute same criminal conduct. The court found that since the robbery had been completed before the acts constituting the second degree assault had occurred the two crimes occurred at different times. Knight, 176 Wn. App. at 961-962.

Similarly the trial court here found the robbery had been completed before the Mr. Arnold struck Mr. Williams with the stick. 11/16/15 RP 441. The record supports this finding because the robbers had already accomplished the plan to rob Mr. Williams when they got his money. The assault was completely gratuitous and did nothing to facilitate the robbery. Because the record supports the trial court's finding that the two crimes did not occur at

the same time its determination that they did not constitute same criminal conduct should be affirmed.

The court did not declare an exceptional sentence as the defendant argues. 1 CP 13. Instead it stated that it was scoring the assault charge as zero and running the assault and robbery counts consecutively. 11/16/15 RP 443. That would be correct if both charges were serious violent offenses. RCW 9.94A.589(1)(b). Neither second degree assault nor first degree robbery are a serious violent offense. RCW 9.94A.030(46). The court found the defendant's offender score for first degree robbery and first degree burglary was 10. 11/16/15 RP 442. It should have likewise calculated his score on the second degree assault charge as 10 resulting in a standard range of 63 to 84 months, with 12 months for the firearm enhancement. 1 CP 4-10, 13, 22-83. The court should therefore remand to the trial court for correction of the offender score as to the second degree assault charge and resentencing on that charge.

IV. CONCLUSION

For the foregoing reasons the State asks the court to affirm the defendant's conviction. The State also asks the court to affirm and the trial court's determination that the first degree robbery and

second degree assault charges were not same criminal conduct and that the sentence on each charge did not violate double jeopardy. The State asks the court to remand to the trial court to correct the offender score on the second degree assault charge and to re-sentence him on that charge to a concurrent sentence within the standard range.

Respectfully submitted on October 6, 2016.

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

THE STATE OF WASHINGTON,

Respondent,

v.

RYAN B. JOHNSON,

Appellant.

No. 74262-1-I

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

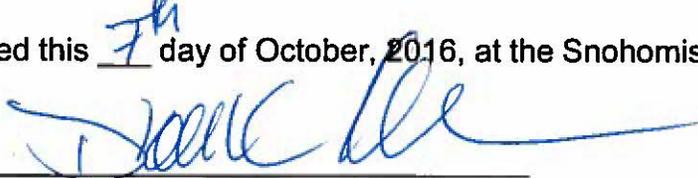
The undersigned certifies that on the 7th day of October, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Travis Stearns, Washington Appellate Project, travis@washapp.org; and wapofficemail@washapp.org.

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

Dated this 7th day of October, 2016, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office