NO. 42305-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOSHUA NATHAN REESE, APPELLANT

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

No. 10-1-01902-4

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
BRIAN WASANKARI
Deputy Prosecuting Attorney
WSB # 28945

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. Whether the defendant's convictions should be affirmed where, viewing the evidence in the light most favorable to the State, there is sufficient evidence from which a rational trier of fact could have found the essential elements of the charged crimes beyond a reasonable doubt. 1

2. Whether the trial court properly denied the defendant's motion to suppress his statements to Pierce County Sheriff's Department detectives where Officer Klier's stop of the vehicle in which defendant was riding was lawful, and whether, the trial court did not abuse its discretion in denying an evidentiary hearing on the matter where the only fact in dispute was irrelevant to a proper suppression analysis. 1

3. Whether Defendant's exceptional sentence should be affirmed where, contrary to Defendant's assertions, the trial court's reasons for imposing that exceptional sentence are supported by the record and the length of that sentence is not clearly excessive. 1

4. Whether Defendant has failed to show ineffective assistance of counsel where he has failed to show that his trial counsel's performance was deficient. 1

5. Whether the trial court correctly determined that the second degree assault conviction of count V does not merge into the first degree robbery conviction of count IV and that the first degree robbery conviction of count II and/or IV does not merge into the first degree felony murder conviction of count I. 1

6. Whether the trial court correctly determined that (a) the assault, robbery, and burglary involving Charlene Sanders, (b) the robbery and burglary involving James Sanders, Sr., and (c) the assault and burglary involving James Sanders, Jr., were not the same criminal conduct. 1

7. Whether the trial court properly calculated Defendant's offender score and Defendant's sentence should be affirmed where Defendant's convictions are supported by sufficient evidence, none merge, and none are the same criminal conduct.......... 2

B. STATEMENT OF THE CASE.......... 2

1. Procedure.......... 2

2. Facts.......... 6

C. ARGUMENT.......... 21

1. THE DEFENDANT'S CONVICTIONS SHOULD BE AFFIRMED BECAUSE, VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THE CHARGED CRIMES BEYOND A REASONABLE DOUBT.......... 21

2. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS HIS STATEMENTS TO PIERCE COUNTY SHERIFF'S DEPARTMENT DETECTIVES BECAUSE OFFICER KLIER'S STOP OF THE VEHICLE IN WHICH DEFENDANT WAS RIDING WAS LAWFUL, AND THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING AN EVIDENTIARY HEARING ON THE MATTER BECAUSE THE ONLY FACT IN DISPUTE WAS IRRELEVANT TO A PROPER SUPPRESSION ANALYSIS.......... 37

3. DEFENDANT'S EXCEPTIONAL SENTENCE SHOULD BE AFFIRMED BECAUSE, CONTRARY TO DEFENDANT'S ASSERTIONS, THE TRIAL COURT'S REASONS FOR IMPOSING THAT SENTENCE ARE SUPPORTED BY THE RECORD AND THE LENGTH OF THAT SENTENCE IS NOT CLEARLY EXCESSIVE.......... 44

4. DEFENDANT HAS FAILED TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE HAS FAILED TO SHOW THAT HIS COUNSEL'S PERFORMANCE WAS DEFICIENT. 54

5. THE TRIAL COURT CORRECTLY DETERMINED THAT THE SECOND DEGREE ASSAULT CONVICTION OF COUNT V DOES NOT MERGE INTO THE FIRST DEGREE ROBBERY CONVICTION OF COUNT IV AND THAT THE FIRST DEGREE ROBBERY CONVICTION OF COUNT II AND/OR IV DOES NOT MERGE INTO THE FIRST DEGREE FELONY MURDER CONVICTION OF COUNT I. 60

6. THE TRIAL COURT CORRECTLY DETERMINED THAT (A) THE ASSAULT, ROBBERY, AND BURGLARY INVOLVING CHARLENE SANDERS, (B) THE ROBBERY AND BURGLARY INVOLVING JAMES SANDERS, SR., AND (C) THE ASSAULT AND BURGLARY INVOLVING INVOLING JAMES SANDERS, JR., WERE NOT THE SAME CRIMINAL CONDUCT. 66

7. THE TRIAL COURT PROPERLY CALCULATED DEFENDANT'S OFFENDER SCORE AND DEFENDANT'S SETENCE SHOULD BE AFFIRMED BECAUSE DEFENDANT'S CONVICTIONS ARE SUPPORTED BY SUFFICIENT EVIDENCE, NONE MERGE, AND NONE ARE THE SAME CRIMINAL CONDUCT. 71

D. CONCLUSION. 72

Table of Authorities

State Cases

City of Seattle v. Muldrew, 69 Wn.2d 877, 878, 420 P.2d 702(1966)..... 22

In Re Personal Restraint of Domingo, 155 Wn.2d 356, 364, 119 P.3d 816 (2005)........ 24, 34

In Re Personal Restraint of Rice, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992)........ 55, 56

Riofta v. State, 134 Wn. App. 669, 693, 142 P.3d 193 (2006).......... 56, 57

State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)........ 57

State v. Afana, 169 Wn.2d 169, 180, 233 P.3d 879 (2010)........ 38

State v. Aitken, 79 Wn. App. 890, 905 P.2d 1235 (1995)........ 23

State v. Ashcraft, 71 Wn. App. 444, 455-56, 859 P.2d 60 (1993) 31

State v. Bliss, 153 Wn. App. 197, 203, 222 P.3d 107 (2009)........ 38

State v. Bluehorse, 159 Wn. App. 410, 434, 248 P.3d 537 (2011)........ 45, 46

State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990)........ 55

State v. Bradford, 95 Wn. App. 935, 950, 978 P.2d 534 (1999)........ 62

State v. Branch, 129 Wn.2d 635, 919 P.2d 1228 (1996) 46

State v. Brockob, 159 Wn.2d 311, 336, P.3d 59 (2006)........ 21, 22

State v. Cannon, 120 Wn. App. 86, 90, 84 P.3d 283 (2004)........ 21

State v. Cienfuegos, 144 Wn.2d 222, 25 P.3d 1011 (2001) 55, 58

State v. Clinton, 48 Wn. App. 671, 678, 741 P.2d 52 (1987) 47

State v. Davidson, 56 Wn. App. 554, 784 P.2d 1268, *review denied*, 114 Wn.2d 1017, 791 P.2d 535 (1990)........ 67

State v. Davis, 90 Wn. App. 776, 781-82, 954 P.2d 325 (1998) 62, 67, 68, 69, 70

State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987) 67

State v. Ermels, 156 Wn.2d 538, 539, 131 P.3d 299 (2006) 47, 53

State v. Freeman, 153 Wn.2d 765, 778-79, 108 P.3d 753 (2005) 61, 65

State v. Frohs, 83 Wn. App. 803, 807, 924 P.2d 384 (1996) 61

State v. Garrett, 124 Wn.2d 504, 518, 881 P.2d 185 (1994) 56

State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009) 22

State v. Gibson, 152 Wn. App. 945, 951, 219 P.3d 964 (2009) 22

State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969) 56

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) 21

State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563, 571 (1996) 55

State v. Hovig, 149 Wn. App. 1, 8, 202 P.3d 318 (2009) 22

State v. Johnston, 143 Wn. App. 1, 177 P.3d 1127 (2007) 55, 56

State v. Kipp, 286 P.3d 68, 75 (2012) 42, 43

State v. Kolesnik, 146 Wn. App. 790, 805, 192 P.3d 937 (2008) 46

State v. Law, 154 Wn.2d 85, 93, 110 P.3d 7171 (2005) 47

State v. Lopez, 107 Wn. App. 270, 276, 27 P.3d 237 (2001) 21

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) 55, 56

State v. McKague, 172 Wn.2d 802, 806-07, 262 P.3d 1225 (2011) 31

State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) 57

State v. Munson, 120 Wn. App. 103, 83 P.3d 1057 (2004) 23

State v. Mutch, 171 Wn.2d 646, 653-54, 254 P.3d 803 (2011) 66, 67

State v. Myers, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997)................ 21, 22

State v. Parmelee, 108 Wn. App. 702, 710, 32 P.3d 1029 (2001) 60, 61

State v. Poston, 138 Wn. App. 898, 908. 158 P.3d 1286 (2007)............ 47

State v. Rice, 102 Wn.2d 120, 125, 683 P.2d 199 (1984)........................ 24

State v. Ritchie, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995) 45, 46

State v. Rogers, 146 Wn.2d 55, 61, 43 P.3d 1 (2002) 22

State v. Ross, 71 Wn. App. 556, 571-7, 861 P.2d 473 (1993)........... 46, 54

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)................ 22

State v. Saunders, 120 Wn. App. 800, 820-21, 86 P.3d 232 (2004)....... 61

State v. Snapp, 174 Wn.2d 177, 197, 275 P.3d 289 (2012) 38

State v. Stevenson, 128 Wn.2d 179, 114 P.3d 699 (2005) 22, 27, 35

State v. Sweet, 138 Wn.2d 466, 980 P.2d 1223 (1999) 62

State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) 55

State v. Tili, 139 Wn.2d 107, 122, 985 P.2d 365 (1999) 67

State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003) 46

State v. Townsend, 142 Wn.2d 838, 15 P.3d 145 (2001) 56

State v. Truong, 168 Wn. App. 529, 277 P.3d 74, 78 (2012) 25

State v. Walden, 69 Wn. App. 183, 188, 847 P.2d 956 (1993) 67

State v. Yarbrough, 151 Wn. App. 66, 89, 210 P.3d 1029,
1040-41 (2009)... 54-55, 56, 57, 60

State v. Zumwalt, 119 Wn. App. 126, 129, 82 P.3d 672 (2003),
aff'd sub nom. ***State v. Freeman***, 153 Wn.2d 765,
108 P.3d 753 (2005).. 62

State v. Zumwalt, 119 Wn. App. 126, 82 P.3d 672 (2003) 61, 63, 64

Federal Cases and Other Jurisdictions

Harrington v. Richter, 131 S. Ct. 770, 778, 178 L. Ed. 2d 624 (2011) 57

Mapp v. Ohio, 367 U.S. 643, 82 S. Ct. 23, 7 L. Ed. 72 (1961) 38

People v. Miranda, 17 Cal. App.4th 917, 926, 21 Cal, Rptr.2d 785 (1993) 40, 41

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 55, 56, 57

Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) 38

Constitutional Provisions

Article I, section 7, Washington State Constitution 37, 38

Article I, section 22 (amendment X), Washington State Constitution 54

Fourth Amendment, United States Constitution 37, 38

Sixth Amendment, United States Constitution 54, 56

Statutes

RCW 46.16.230 (2010) 40

RCW 46.16.240 (2010) 40

RCW 9.94A 44

RCW 9.94A.010 .... 44, 45, 53

RCW 9.94A.020 44

RCW 9.94A.535 44

RCW 9.94A.535(2)(3) 45

RCW 9.94A.535(2)(b)-(c) 45

RCW 9.94A.535(3)(a) 45

RCW 9.94A.535(3)(m) 45, 50

RCW 9.94A.585(2) 45

RCW 9.94A.585(4) 46

RCW 9.94A.589 66

RCW 9.94A.589(1)(a) 66, 68, 69

RCW 9A.04.110(4)(b) 31

RCW 9A.08.020 23

RCW 9A.08.020(3)(a)(i)-(ii) 24

RCW 9A.08.020(3)(a)(ii) 25, 35

RCW 9A.36.021(1)(a)(c) 31

RCW 9A.52.050 61

RCW 9A.56.190 .... 25, 27

RCW 9A.56.200(1)(a)(i) 25, 27

Rules and Regulations

CrR 3.5 .... 4, 42

CrR 3.6 42

Other Authorities

CVC 27315 .... 41, 43

CVC 5202 43

WPIC 35.12 31

WPIC 37.02 25

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

1. Whether the defendant's convictions should be affirmed where, viewing the evidence in the light most favorable to the State, there is sufficient evidence from which a rational trier of fact could have found the essential elements of the charged crimes beyond a reasonable doubt.

2. Whether the trial court properly denied the defendant's motion to suppress his statements to Pierce County Sheriff's Department detectives where Officer Klier's stop of the vehicle in which defendant was riding was lawful, and whether, the trial court did not abuse its discretion in denying an evidentiary hearing on the matter where the only fact in dispute was irrelevant to a proper suppression analysis.

3. Whether Defendant's exceptional sentence should be affirmed where, contrary to Defendant's assertions, the trial court's reasons for imposing that exceptional sentence are supported by the record and the length of that sentence is not clearly excessive.

4. Whether Defendant has failed to show ineffective assistance of counsel where he has failed to show that his trial counsel's performance was deficient.

5. Whether the trial court correctly determined that the second degree assault conviction of count V does not merge into the first degree robbery conviction of count IV and that the first degree robbery conviction of count II and/or IV does not merge into the first degree felony murder conviction of count I.

6.. Whether the trial court correctly determined that (a) the assault, robbery, and burglary involving Charlene Sanders, (b) the robbery and burglary involving James Sanders, Sr., and (c) the assault and burglary involving James Sanders, Jr., were not the same criminal conduct.

7. Whether the trial court properly calculated Defendant's offender score and Defendant's sentence should be affirmed where Defendant's convictions are supported by sufficient evidence, none merge, and none are the same criminal conduct.

B. STATEMENT OF THE CASE.

1. Procedure

On May 4, 2010, Joshua Nathan Reese, hereinafter referred to as the "defendant," was charged by information with first-degree felony murder, first degree robbery, and second degree assault. CP 3-5.

On May 10, 2010, the State filed an amended information, which charged defendant with first degree murder, two counts of first degree robbery, two counts of second degree assault, and first degree burglary. CP 9-12. All six counts alleged firearm sentence enhancements, and the information listed Clabon Berniard, Amanda Knight, and Kiyoshi Higashi as co-defendants. CP 9-12.

On January 4, 2011, defendant and co-defendants Knight and Berniard moved to sever, and the trial court granted those motions, allowing each defendant to be tried separately. RP 3-50. *See,* CP 50-66.

On January 7, 2011, the State filed a second amended information that added allegations of aggravating circumstances to each count, which included that the defendant's conduct during the commission of the

offenses "manifested deliberate cruelty to the victim," that "the offense involved a high degree of sophistication or planning," that the defendant's prior unscored misdemeanor or foreign criminal history resulted in a presumptive sentence that was clearly too lenient, and that "the defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." CP 137-41. *See* RP 51.

Finally, on June 6, 2011, the State filed a corrected second amended information, which appears to correct count V, the second degree assault charge pertaining to Mrs. Sanders, to allege that the assault was based on substantial bodily harm. CP 368-72. *See* RP 144-45.

On May 23, 2011, the defense attorney filed a motion for a change of venue based on extensive pre-trial publicity of the trials of the co-defendants. CP 167-277.

The present case was called for trial on June 1, 2011. RP 52.

On that date, the defense attorney indicated that his client had decided to waive his right to a jury trial and proceed by way of bench trial. RP 52-61; CP 363-64. Defendant's counsel indicated that he and his client had been discussing the waiver for about three weeks, and that the decision to waive the right to a jury trial was "truly his [client's] decision."

RP 53. The State indicated that it had just learned of the waiver that day. RP 53.

The court conducted a Criminal Rule (CrR) 3.5 hearing at which the State called Lt. Todd Karr and Detective John Jimenez, and the court found that the defendant's statements to these detectives were admissible at trial. RP 68-106. CP 445-51. The court subsequently conducted a CrR 3.5 hearing regarding the admissibility of a statement made to Officer Klier, and found that statement to be admissible, as well. RP 320-29.

The defendant moved to suppress evidence, including the statements made by the defendant to the detectives on the theory that they were precipitated by an unlawful stop, but the court, after a hearing, denied that motion. RP 106-135; CP 148-64.

The State gave its opening statement on June 2, 2011. RP 143-44. It then called Pierce County Sheriff's Deputy Jerry Lewis Johnson, RP 145-59, Deputy Michael S. Rawlins, RP 159-73, Charlene Sanders, RP 173-207, C.K., RP 207-20, Forensics Investigator Adam Anderson, RP 221-37, Detective John Jimenez, RP 237-84, Detective Timothy Donlin, RP 289-99, Kelly Hatch, RP 299-303, Daly City Police Officer Eddy Klier, RP 303-26, Larry Lundy, RP 329-34, J.S., RP 336-53, K.M.F., RP 354-58, James Jackson Matter, RP 358-72, Forensic Scientist Johan

Schoeman, RP 372-93, Thomas Clark M.D., RP 394-423, and Jenna Ford. RP 428-43.

The State rested on June 7, 2011. RP 444-45. The defendant did not present any testimony or other evidence. *See* RP 444-47.

The parties gave their closing arguments. RP 447- 64 (State's closing); RP 465-88 (Defendant's closing); RP 489-93 (State's rebuttal).

The court found the defendant guilty of first degree murder as charged in count I, first degree robbery as charged in count II, second degree assault as charged in count III, first degree robbery as charged in count IV, second degree assault as charged in count V, and first degree burglary as charged in count VI. RP 497-98. The court also found the firearm sentence enhancements and the aggravating circumstances of (1) deliberate cruelty, (2) high degree of sophistication and planning, (3) unscored misdemeanor history that results in a presumptive sentence that is clearly too lenient, and (4) the commission of multiple current offenses and a high offender score that results in some of the current offenses going unpunished. RP 497-98; RP 567-68. CP 594-608, 642-51. *See* CP 229-41. It therefore sentenced the defendant to an exceptional sentence of 1,200 months in total confinement on June 28, 2011. CP 594-608, 642-51.

The defendant filed a timely notice of appeal the same day. CP 590.

2. Facts

On April 28, 2010, Charlene Sanders lived in Edgewood, Washington, with her husband, James ("Jim") Sanders, Sr., and their two children, C.K., aged 10, and J.S., aged 14. RP 174, 178. Jim Sanders had posted an advertisement on "Craigslist" to sell one of Charlene's rings. RP 175-76. When Charlene arrived home that evening, Jim told her that he expected someone to come to the residence to purchase the ring. RP 175-76.

The couple then began to watch a movie with their children, when the purported buyers arrived at the home. RP 176-77; RP 209-10; RP 337-38. Jim Sanders went to greet them and Charlene stayed upstairs with the kids. RP 177-78; RP 209-10.

Charlene then heard Jim call her name, and tell her that the buyers had some questions about the ring. RP 178; RP 210. When she went downstairs, she found Jim talking to the couple in the kitchen. RP 178. The couple was composed of Kiyoshi Higashi and Amanda Knight. RP 183. Knight was holding the ring, when Charlene took it from her, answered some questions, and handed it back. RP 178-81.

Higashi asked Knight, do you want it, and she responded that she did. RP 181. Higashi then pulled out "a wad of cash," and said, how about this, before pulling out a gun, and saying, how about this. RP 182.

Charlene and Jim told the couple to "just take it" and "just take everything." RP 182. Higashi and Knight told them to get down, and

restrained them both with zip ties. RP 182. After they were placed on the floor, Charlene heard people rush into the house. RP 185.

C.K. and J.S. testified that they continued watching the movie until two men with guns came in. RP 210; RP 339. Both testified that the faces of the men were partially covered and that each held pistols. RP 210; RP 339. Both men had a darker complexion. RP 211; RP 340. They grabbed the boys by their wrists and "pulled [them] really fast downstairs." RP 211. The intruders placed the boys on their bellies in the entryway of the kitchen and had them place their hands behind their backs, though they did not secure their hands. RP 212; RP 185-87; RP 340.

The intruders removed the wedding rings from the fingers of both Charlene and Jim. RP 198-99.

A man began yelling at Charlene, asking her, "where is the safe?" RP 187; RP 212. Jim and Charlene again told them to take everything. RP 187.

The man told them, "I'll kill you; I'll kill them," and Charlene looked to see where her kids were. RP 187. The intruders then began repeating the command, "facedown," RP 187, and a man identified as Clabon Berniard kicked Charlene in the head. RP 187.

Berniard then continued to demand the location of a safe, and eventually placed a gun to the back of Charlene's head. RP 187. He began counting down from three. RP 187-88; RP 212-13, 218, 344-45. J.S. testified that Berniard was holding the gun to the back of Charlene's head

and that he had "the hammer cocked." RP 344. Charlene believed that when the man reached the end of the count down, he would shoot. RP 188. J.S. testified that the man was yelling and referring to his mother as a "bitch." RP 344.

When he reached "one," Charlene told him that they had a safe. RP 188. The man then announced, "[t]hey have a safe," and asked Charlene where the other one was. RP 188. Charlene responded that they did not have another safe. RP 188.

Two of the intruders got Jim up and led him into the laundry room by the garage RP 189. Both children also stood up and J.S. followed the men and his father into the laundry room area. RP 190.

J.S. testified that, as they were walking towards a gun safe, Jim Sanders broke free of the zip tie and began punching Berniard. RP 345. During the struggle that ensued, Berniard shot Sanders. RP 346. J.S. indicated that his father was shot in the ear and that a piece of his ear flew off. RP 351. He indicated that his father fell unconscious thereafter. RP 351. Charlene heard what she initially believed was two to three, and later learned was three, gunshots. RP 191. *See* RP 216. She said she did not hear Jim's voice at all during any of this.

J.S. testified that he then jumped on Berniard's back and tried to choke him, but that Berniard threw him off and pistol whipped him. RP 346. Charlene saw one of the intruders, who she described as "the stockier guy," bring his arm down on J.S. RP 190. She described the man pistol-

whipping the boy, testifying that the man was holding a gun, and struck the boy in the head with the arm that was holding the gun three or four times. RP 191.

J.S. testified that he suffered "a bunch of contusions and had a concussion as a result." RP 347. J.S. suffered a gash in his head and ear, RP 196, RP 216, and developed a scar behind his left ear. RP 347. He testified that his PlayStation 3, iPod touch, a cell phone, and an iPod charger were stolen. RP 349.

Two of the men dragged the unconscious Sanders into the living room, and then the intruders left through the home's front door. RP 247-48. J.S. testified that he then slammed that door shut and locked it. RP 348.

Charlene testified that she heard a lot of commotion and then J.S. began repeating, "they are gone, get up," before going over and locking the door. Charlene got up and asked the boy, "Where is dad?" RP 192. She found Jim Sanders lying on the living room floor, gasping for air. RP 193. "He was all white, and his ear looked like it was all shot off or something." RP 194.

Charlene called 911 with the zip tie still on her hands. RP 193-94; RP 217; RP 348. She told her husband to "stay with us," but his eyes were closed and he was gasping for air. RP 194.

Sheriff's deputies arrived a few minutes later, and Charlene met them at the door. RP 195. She told them that her husband had been shot

and they asked her if the intruders had left. RP 194. When Charlene told them she didn't know, they had her and the children wait outside while they went into the house. RP 195.

Deputies Jerry Johnson and Michael Rawlins were dispatched to investigate the shooting at 36100 106th Avenue East in Edgewood, Washington at about 9:18 p.m. RP 146-47; RP 161-62. As he exited his vehicle, Charlene Sanders came out the front door of the residence, yelling that her husband had been shot. RP 148-51. Deputy Johnson saw two little boys running through the house, and when he peeked inside, a man lying on the floor. RP 148-49.

Charlene Sanders was crying and hysterical. RP 151. She indicated that she and her husband had placed a ring for sell online and that a couple had come from Chehalis to purchase it. RP 151. She indicated that two people came in the house initially, followed by two more, and that her ring was taken off her finger by one of them. RP 152. Deputy Johnson noticed that there was a zip tie on her left wrist. RP 152.

Deputy Rawlins arrived at the scene and the deputies had Mrs. Sanders and her two boys step outside while they searched the residence to make sure no one was still inside. RP 152-57, 162-67. After entering, Deputy Rawlins told Mr. Sanders that they were not leaving him and that he was safe prior to the deputies clearing the residence. RP 167-68. No one else was found inside the house. RP 152-57, 162-67.

After the deputies concluded their sweep of the home, Deputy Rawlins returned to Mr. Sanders. RP 168. Mr. Sanders did not appear to be breathing and appeared to have no pulse. RP 169. Rawlins went out to his car to get a mask to perform CPR, when the Fire Department arrived. RP 169-70. Rawlins then assisted Fire Department personnel in attempting to revive Sanders, but their efforts were unsuccessful. RP 170. Fire and rescue personnel pronounced Sanders dead at the scene. RP 170.

A chaplain found Charlene by the garage of their home. RP 196-97. He told her that her husband, Jim, had died, and she "fell to the ground." RP 197.

Charlene testified that she suffered an injury to the area of her left temple, which swelled and required her to undergo a CAT scan. RP 198.

Detective John Jimenez and other members of the sheriff's department homicide team received a page at about 10:35 on the night of April 28, 2010, and responded to the Sanders residence. RP 239, 290. He explained that Charlene had given the Sheriff's Department consent to process her home for evidence and that he walked through the home to get an idea as to what occurred there. RP 240. He walked through the upstairs and noticed the contents of a woman's purse had been dumped out on the furniture and floor. RP 240. He observed shell casings and blood stains near the body of Jim Sanders. RP 241. An island in the center of the kitchen had also been knocked out of place. RP 241. There was a plastic zip tie and a shell casing on the kitchen floor. RP 241.

Detective Jimenez and Lt. Karr interviewed Charlene Sanders that morning at the Edgewood Police Department, drove her to her parents house, and returned to the scene. RP 241-43.

Jimenez later observed the autopsy of Jim Sanders, during which bullets were removed from his body. RP 243-45. Jimenez observed injuries to Sanders' head, face, right shoulder, left knee, right buttocks, right thigh, and left arm, hand, and wrist. RP 244-46. Jimenez described the head injury as a "pattern wound." RP 245. He testified that the cartilage of Sander's ear had been "split open." RP 246.

Detective Jimenez returned to the scene and found hair and blood spatter stuck to a patterned molding "around the left side of the door casing" in the living room of the Sanders home. RP 248-49. Jimenez testified that the pattern of the molding was very similar in style to the pattern of James Sander's head wound. RP 248.

Charlene's cell phone had been taken during the robbery. RP 252. "[T]hrough confidential sources," the Sheriff's Department located the SIM card that had been in that phone at a house in Kent, Washington. RP 253. The phone itself was later found on an off-ramp along the Valley Freeway at Exit 272. RP 283-84.

Jenna Ford, who was Kiyoshi Higashi's girlfriend, testified that, on April 28, 2010, Higashi left her home in the morning with Amanda Knight. RP 431. He was dropped off at her residence that night between 10:30 and 11:00 p.m. RP 432. Higashi told her what happened that

evening in Edgewood, and then called Knight. RP 432. Knight and the defendant then returned to the house in a white Ford Crown Victoria, and Higashi, Knight, and the defendant discussed what happened, what they were going to do, and tried "to get a story together." RP 433. Knight and Higashi then cleaned out the car. RP 433-34. Ford gave them advice on what to get rid of and where to dispose it. RP 434. Higashi spent the night with Ford at her residence. RP 434. Ford noted that he had two pistols, a cell phone that was not his, a wallet, and a bunch of receipts in his possession. RP 435. Knight picked up Higashi the next day and Ford did not see Higashi again until after he was arrested. RP 436. He did call her on April 30, 2010 and told her that he was out of the state. RP 437. Ford called "Crime Stoppers" on May 1, 2010 and reported everything she knew. RP 437.

That same day, Daly City Police Officer Eddy Klier was on patrol in Daly City, California, when he noticed a vehicle in which the defendant was a passenger, traveling without a front license plate affixed to it. RP 303-05, 313. He also observed that the defendant was not wearing a seatbelt. RP 305. He specified that he noticed that the defendant was not wearing a seatbelt before he activated his emergency lights to make a stop. RP 306.

After Officer Klier stopped the vehicle, he noticed that the front passenger door opened and the defendant exited the vehicle. RP 306-07. The officer told the defendant to get back into the vehicle. RP 307. The

defendant sat back down in the car, but left the door open, with his feet on the ground. RP 307. So, Officer Klier contacted the defendant to insure that he didn't attempt to flee, and asked him for identification. RP 307. The defendant did not provide him with any identification. RP 307-08. Instead, the defendant told the officer that his name was "Nico Hatch." RP 308. A records check indicated that there was no record for the name and date of birth the defendant provided. RP 308.

Officer McCarthy then arrived to assist. RP 308. The defendant was wearing a large coat and bulky clothing, and continued to reach into his waistband area with his left hand. RP 308-09. So, the officers had him step out of the vehicle and performed a pat-down search for weapons or identification. RP 308-09. As the defendant stepped out of the vehicle, he took off his jacket, tossed it onto the right passenger seat, reached into his left rear pant pocket, and handed something to the rear passenger. RP 309. The rear passenger then tried to conceal what the defendant had given him. RP 309. The officers, concerned that the defendant had passed off a weapon or narcotics, detained both the defendant, and the rear-seat passenger, Higashi. RP 309.

This left only Amanda Knight, the driver of the vehicle, seated inside. RP 310. Officers had her step out of the vehicle, and got her consent to search the vehicle. Inside, they found a backpack, which had been located between Knight's legs on the driver's side floorboard, and a loaded black .22-caliber revolver with a red bandana tied around its

handle, which had been concealed directly under the seat on which the defendant had been sitting. RP 310-14. Inside the backpack was an empty box of ammunition, a partially-full box of ammunition, and a concealed weapons permit in the name of Amanda Knight. RP 311-12.

On May 3, Detectives Jimenez and Karr were notified that a police officer in Daly City California had stopped a vehicle containing three people who matched the descriptions of suspects in this case. RP 254. So, they traveled to California and interviewed the defendant, who was being held in San Mateo County Jail, following his arrests in Daly City. RP 255-58.

During his interviews, the defendant stated that he and his co-defendants saw an advertisement on Craigslist for a ring, and assumed that "if they got an expensive ring on Craig's List, obviously they got something more expensive inside the house." Exhibit 136; 137. The defendant stated that "the plan was to just go inside the house and take everything out of the house." Exhibit 136; 137. Although he told detectives that "the plan was for nobody to get hurt," he indicated that he and two other co-defendants came into the home with loaded firearms, and that all of them had zip ties to restrain the occupants. Exhibit 136; 137. The defendant indicated that it would be odd not to expect to encounter violent resistance from the residents of the home. Exhibit 137, p. 854-55.

The defendant stated that he and his co-defendants waited until nighttime because "[w]ho does a house lick during the day?" Exhibit 136,

p. 813-14. They then drove to the Sanders residence in Knight's Crown Victoria, and parked on the side of the house. Exhibit 136, p. 813. The defendant dressed in all-black clothing. Exhibit 136, p. 815. The defendant and two other co-defendants armed themselves with loaded firearms, Exhibit 136, p. 824-26, Exhibit 137, p. 847, and all had zip ties to restrain the occupants of the house. Exhibit 136, p. 820; Exhibit 137, p. 855. The defendant had a .Colt 22-caliber revolver, Berniard a .380-caliber pistol, and Higashi, a 9-mm pistol. Exhibit 136, p. 824-26; Exhibit 137, p. 847; RP 279.

Before approaching the residence, Knight and the defendant opened a telephone connection and Knight used a Bluetooth device so that the defendant could hear what was said between her and the occupants of the house. Exhibit 136, p. 819; Exhibit 137, p. 848-49. Knight and Higashi then went to the front door of the residence while the defendant waited in the car with Berniard. Exhibit 136, p. 812.

According to their plan, the defendant and Berniard were supposed to stay in the vehicle until the defendant heard Knight say the code words "get down" through the Bluetooth device. Exhibit 136, p. 812-14, 819. When the defendant heard these words, he and Berniard came into the house and went upstairs, where, according to the plan, they were supposed to "find everything expensive." Exhibit 136, p. 814.

When they got upstairs, they observed the Sanders children watching a movie on television using their "PS3." Exhibit 136, p. 814. The

defendant told them to go downstairs and Berniard dragged them downstairs. Exhibit 136, p. 814. The defendant then unhooked the PS3. Exhibit 136, p. 814. He also found Charlene's purse, and stole the cash from inside. Exhibit 136, p. 814-15. He then went to the children's room and stole an iPod and chargers. Exhibit 136, p. 814.-17.

The defendant stated that, when he heard gunshots downstairs, he ran downstairs. Exhibit 136, p. 814. He saw Jim Sanders, and C.K. sitting on the floor next to his mother, apparently in shock, and then ran out of the house along with his co-defendants. Exhibit 136, p. 814, 836.

Detective Jiminez assisted in the search of the vehicle in which the defendant had been riding when stopped. Inside, they found a backpack, jewelry, a camera, cell phones, electronic equipment, a laptop computer, a charger that appeared to be for an "iTouch" or and "iPad" with the initials "JAS" written on it, and an "iPod." RP 262. A .22-caliber Colt revolver had also been removed from the vehicle by Daly City police. RP 263.

Inside the backpack was a concealed pistol license in the name of Amanda Knight, a box or end flap for a box of Hornady .380-caliber ammunition, two Bluetooth wireless devices for cell phones, miscellaneous credit or store cards in various names, and a receipt. RP 264-65. The receipt was generated at a McDonald's restaurant located at 152nd and Pacific Highway South in Federal Way, Washington, and date-stamped April 29, 2010, at 12:21 a.m. RP 265.

Daly City Police Detective Shawn Begley checked local pawn shops and found that Amanda Knight had pawned or sold Jim Sanders' wedding ring to one of those shops. RP 267, 275. He also located the ring that Jim Sanders had placed for sale on Craigslist.com at a pawnshop in San Francisco. RP 279-80.

On May 12, 2010, detectives served a search warrant at the B&I shopping center in Tacoma, Washington. RP 269-70. During the execution of that warrant, detectives recovered a .380-caliber handgun, holster, magazine and ammunition that had been sold to James Matter, RP 270-71. That gun had originally been purchased by Amanda Knight. RP 271.

Detective Jiminez also collected store surveillance video from the B&I, which showed Amanda Knight, Kiyoshi Higashi, and the defendant.

Charlene indicated that her wallet was stolen from her, but ultimately recovered by police. RP 202. Detectives found Charlene Sanders' wallet, including her credit cards and ID, a cell phone, and the original jeweler's appraisal for the ring the Sanders were selling in the bedroom of Jenna Ford. RP 281-82. The cell phone was identified by J.S.'s mother as that stolen from J.S. during the robbery. RP 282-83.

Detective Timothy Donlin was also paged to the murder scene and then assigned to interview J.S. at Mary Bridge Children's Hospital. RP 291-92. He noted that J.S. was scared, and had bruises on his neck, face, and arms, as well as a cut on his left ear. RP 292-93.

Donlin also showed Charlene a photo montage, which included Amanda Knight. RP 294-95. Charlene identified the photo of Knight as a photo of one of the intruders to her home. RP 294-97.

James Matter, a manager at the "Cartunz" store located at the B&I shopping center in Tacoma testified that on April 29, 2010, Higashi, Knight, and the defendant came to the store and inquired if he was interested in purchasing a weapon. RP 358-61, 365. Matter then went to a vehicle with Higashi and Knight and purchased a .380-caliber AMT from them for $150. RP 362. Matter testified that they also wanted to sell the .22-caliber revolver to him, but that he did not purchase it. RP 363-64.

Larry Lundy, who was the manager of the "Cartunz" store at the B&I shopping center in Tacoma, testified that Amanda Knight, accompanied by Higashi and a second man sold him a "PlayStation 3" RP 331-32. *See* RP 364.

Detective Jiminez later showed Charlene two rings, which she identified as the wedding rings removed from her and her husband during the robbery. RP 200.

Washington State Patrol Crime Laboratory Forensic Scientist Johan Schoeman examined the .380-caliber AMT handgun and determined that it was operable. RP 383. Moreover, he found that the three spent bullets submitted with that handgun had, in fact, been fired from that gun. RP 385. Finally, Schoeman swabbed the gun's grips, slide and magazine for DNA. RP 387.

Dr. Thomas Clark, M.D., the Pierce County Medical Examiner, reviewed the autopsy performed by Dr. Menchel on the body of James Sanders, Sr. RP 400-01. Sanders had suffered "[a] laceration that involved much of the superior aspect of the left ear with fracturing of the underlying cartilage of the ear." RP 406. That laceration could have been caused by being struck by a gun. RP 407. Sanders also had bruising and an abrasion in the area of his left ear, "parallel linear abrasions" on the left side of his head, "a pattern injury of repetitive band-like areas of abrasion" on the top of the head with an underlying hemorrhage, and three gunshot wounds. RP 407-10. Sanders suffered gunshot wounds to his left knee, right groin, and the top right back. RP 410-11. Three bullets lodged in Sanders' body, one in the area of his left knee, one in his right buttock, and one in the left side of his chest. RP 410-13. The bullet that lodged in the chest damaged the right lung, the heart, and great vessels, including the aorta. RP 413. That bullet caused a fatal wound. RP 417. Clark concluded that Sanders died of multiple gunshot wounds and that the manner of his death was homicide. RP 416-17.

C. ARGUMENT.

1. THE DEFENDANT'S CONVICTIONS SHOULD BE AFFIRMED BECAUSE, VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THE CHARGED CRIMES BEYOND A REASONABLE DOUBT.

In a criminal case, a defendant may challenge the sufficiency of the evidence before trial, at the end of the State's case in chief, at the end of all of the evidence, after the verdict, and on appeal. ***State v. Lopez***, 107 Wn. App. 270, 276, 27 P.3d 237 (2001). "In a claim of insufficient evidence, a reviewing court examines whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,' 'viewing the evidence in the light most favorable to the State.'" ***State v. Brockob***, 159 Wn.2d 311, 336, P.3d 59 (2006) (*quoting* ***State v. Green***, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). Thus, "[s]ufficient evidence supports a conviction when, viewing it in the light most favorable to the State, a rational fact finder could find the essential elements of the crime beyond a reasonable doubt." ***State v. Cannon***, 120 Wn. App. 86, 90, 84 P.3d 283 (2004). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* (*quoting* ***State v. Myers***, 133 Wn.2d 26, 37, 941

P.2d 1102 (1997)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "Determinations of credibility are for the fact finder and are not reviewable on appeal." ***Brockob***, 159 Wn.2d at 336.

"After a bench trial," an appellate court "determine[s] whether substantial evidence supports the trial court's findings of fact, and in turn, whether the findings support the conclusions of law." ***State v. Stevenson***, 128 Wn.2d 179, 114 P.3d 699 (2005); ***State v. Hovig***, 149 Wn. App. 1, 8, 202 P.3d 318 (2009).

"Substantial evidence is ''evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.''" ***State v. Gibson***, 152 Wn. App. 945, 951, 219 P.3d 964 (2009); ***State v. Garvin***, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Courts "do not review credibility determinations on appeal." ***Gibson***, 152 Wn. App. at 951.

"When findings of fact are unchallenged, they are verities on appeal." ***State v. Rogers***, 146 Wn.2d 55, 61, 43 P.3d 1 (2002) (*citing* ***City of Seattle v. Muldrew***, 69 Wn.2d 877, 878, 420 P.2d 702(1966)). "Notwithstanding the absence of a challenge to findings of fact," however, "when the sufficiency of the evidence is challenged the appellate court

must still determine whether the unchallenged findings of fact support the trial court's conclusions of law." *Id.* (*citing* ***State v. Aitken***, 79 Wn. App. 890, 905 P.2d 1235 (1995)). In fact, in a challenge to the sufficiency of the evidence following a bench trial, when findings of fact are not challenged, "review is limited to whether the findings of fact support the trial judge's conclusions of law." ***State v. Munson***, 120 Wn. App. 103, 83 P.3d 1057 (2004).

In the present case, the defendant argues that "the trial court erroneously found that [he] was an accomplice in the... crimes of robbery, assault, and burglary." Amended Brief of Appellant, p. 20.

RCW 9A.08.020 provides in pertinent part:

> (1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.
> (2) A person is legally accountable for the conduct of another person when:
> (c) He is an accomplice of such other person in the commission of the crime.
> (3) A person is an accomplice of another person in the commission of a crime if:
> (a) With knowledge that it will promote or facilitate the commission of the crime, he
> (i) solicits, commands, encourages, or requests such other person to commit it; or
> (ii) aids or agrees to aid such other person in planning or committing it.

"[W]here criminal liability is predicated on the accomplice liability statute, the State is required to prove only the accomplice's general

knowledge of his coparticipant's substantive crime." ***In Re Personal Restraint of Domingo***, 155 Wn.2d 356, 364, 119 P.3d 816 (2005) (*quoting* ***State v. Rice***, 102 Wn.2d 120, 125, 683 P.2d 199 (1984)). However, "an accomplice need not have specific knowledge of every element of the crime committed by the principal, provided he has general knowledge of that specific crime." ***Domingo***, 155 Wn.2d at 365.

"Under RCW 9A.08.020(3)(a)(i)-(ii), an accomplice is one who, '[w]ith knowledge that it will promote or facilitate the commission of the crime… encourages… or aids' another person in committing a crime." *Id.* "In other words, an accomplice associates himself with the venture and takes some action to help make it successful." *Id.*

As charged in the present case, the elements of first degree robbery are (1) that the defendant or an accomplice unlawfully took personal property from the person or in the presence of another, (2) that the defendant or an accomplice intended to commit theft of the property, (3) that the taking was against the person's will by the defendant's use or an accomplice's use or threatened use of immediate force, violence or fear of injury to that person, (4) that 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) that in the commission of these acts or in immediate flight therefrom the defendant or an accomplice was

armed with a deadly weapon, to wit: a handgun, and (6) that any of these acts occurred in the State of Washington. CP 369; RCW 9A.56.190; RCW 9A.56.200(1)(a)(i). *See* WPIC 37.02; ***State v. Truong***, 168 Wn. App. 529, 277 P.3d 74, 78 (2012).

In the present case, the court found that each of these elements had been proven with respect to both counts of robbery. *See* CP 632-33, 638-40.

Preliminarily, in its finding of fact II, the court found that the defendant, Knight, Higashi, and Berniard "agreed to use a ruse to enter the house of James Sanders, Sr., restrain him with zip ties, assault him with a firearm, use force and the threat of force to steal the expensive ring that Mr. Sanders[] had listed for sale on Craigslist, and to take other expensive items in the house." CP 630. Moreover, in the same finding, it found that the four "planned to commit these crimes and actively participated in execution of their plans." CP 630.

In finding that the four co-defendants aided each other in planning and committing the robberies, under RCW 9A.08.020(3)(a)(ii), the court concluded in its conclusions of law IV and VI, that they were accomplices of the defendant in those crimes. CP 638-40.

Next, in its finding of fact V, the court found that the "defendant committed the crime of first degree robbery when one of his accomplices

unlawfully took personal property (a wedding ring) from the person of Charlene Sanders," that "the defendant intended to commit the theft of the Sanders' property, the taking of Charlene Sander[s'] wedding ring was against her will, and both force and fear were used by defendant's accomplice to obtain the property and overcome Charlene Sanders' resistance to the taking of her wedding ring." CP 632.

Similarly, in finding of fact VI, it found that the "defendant committed the crime of first degree robbery when one [of] his accomplices unlawfully took personal property (a wedding ring) from the person of James Sanders, Sr.," that "[t]he defendant intended to commit the theft of the Sanders' property," that "the ring was taken from his finger against his will," and that "both force and fear were used by defendant's accomplice to obtain the property and overcome James Sanders' resistance to the taking of his wedding ring." CP 633.

Specifically, the court found in both findings of fact V and VI that "Higashi pointed his firearm at Charlene Sanders [and James Sanders, Sr.]," and that both "Higashi and Knight ordered [James and] Charlene Sanders to get down on the kitchen floor, zip tied [their] hands behind [their] back[s], and [James and] Charlene Sanders' wedding ring[s] w[ere] forcibly removed from [their] finger[s] against [their] will." CP 632.

The court also specifically found that "Defendant's accomplice, Higashi, was armed with a firearm during the commission of these acts." CP 632-33 (finding of fact V & VI).

Moreover, it found that these acts occurred in the State of Washington. CP 630 (finding of fact III).

Thus, the court found that each of the six elements of first-degree robbery were proven with respect to both counts II and IV. *Compare* CP 632 *with* CP 369; RCW 9A.56.190; RCW 9A.56.200(1)(a)(i).

As a result, these findings support the court's conclusion of law IV that the defendant "is guilty beyond a reasonable doubt of the crime of Robbery in the First Degree as charged in Count II," and its conclusion of law VI that the defendant "is guilty beyond a reasonable doubt of the crime of Robbery in the First Degree as charged in Count IV. CP 638-40.

Moreover "substantial evidence supports the trial court's findings of fact" as required by the case law. *See, e.g.*, ***Stevenson***, 128 Wn.2d 179.

Specifically, the court's findings that "one of [the defendant's] accomplices unlawfully took personal property (a wedding ring) from the person of [James and] Charlene Sanders" are supported by Charlene Sanders' testimony that one of the defendant's accomplices took the wedding rings from the fingers of her and her husband. RP 198-99.

The court's findings that "the defendant intended to commit the theft of the Sanders' property" were supported by the defendant's statement that he and his codefendants assumed that "if [the Sanders] got an expensive ring on Craig's List, obviously they got something more expensive inside the house," and that "the plan was to just go inside the house and take everything out of the house." Exhibit 136; 137.

The court's findings that "the taking of [James and] Charlene Sander[s'] wedding ring[s] was against [their] will," CP 629, was supported by Charlene Sanders' testimony that the couple's rings were "ripped off" their fingers when their hands were bound behind their backs after a firearm was pointed at them. RP 182-199.

The court's findings that "both force and fear were used by defendant's accomplice to obtain the property and overcome [James and] Charlene Sanders' resistance to the taking of [their] wedding ring[s]," CP 629, were supported by this same testimony as well as by Charlene Sanders' testimony that Higashi pointed a gun at her and her husband, and that Higashi and Knight told them to get down, and restrained them with zip ties, prior to removing their rings. RP 182, 198-99. .

The court's findings that that "Higashi pointed his firearm at Charlene Sanders, Higashi and Knight ordered [James and] Charlene Sanders to get down on the kitchen floor, zip tied [their] hands behind

[their] back[s], and [their] wedding ring[s] [were] forcibly removed from [their] finger[s] against [their] will," CP 629, were supported by Charlene's testimony that Higashi and Knight did this to them. RP 182, 198-99.

The court's findings that "Defendant's accomplice, Higashi, was armed with a firearm during the commission of these acts," CP 629-30, are supported by Charlene Sanders' testimony that Higashi pulled out a gun, RP 182, and by the defendant's statement that Higashi was armed with a 9-mm pistol during the robbery. Exhibit 136, p. 824-26; Exhibit 137, p. 847; RP 279.

Finally, the court's finding that "these acts occurred in the State of Washington," CP 627, is supported by, *inter alia*, Charlene Sanders' testimony that these events occurred in her home located in the State of Washington. RP 174, 178.

Hence, substantial evidence supports the trial court's findings of fact with respect to the first degree robbery counts, and those findings in turn support its conclusions of law that the defendant was guilty of both counts of first degree robbery. Therefore, there was sufficient evidence to support his convictions of those counts and those convictions should be affirmed.

Although, the defendant argues that there is no evidence of accomplice liability for the robberies of Charlene or James Sanders because there was no evidence of any "discussion or plans to remove/steal property directly from the persons of anyone inside the house," Amended Brief of Appellant, p. 21-25, the record shows otherwise. Indeed, there is nothing to suggest that the defendants ever intended to limit their theft to property *not* on the persons of anyone inside the house. The defendant himself stated that their "plan was to just go inside the house and take ***everything*** out of the house." Exhibit 136; 137 (emphasis added). If the plan was to take everything out of the house, or at least everything expensive from the house, then it must have included the intent to take expensive property located on the occupants of that house.

Although the defendant argues that "[t]he defendants had determined there was only one person, Mr. Sanders, who could thwart their plan and their preentry plan focused on capturing and disabling only Mr. Sanders," he cites nothing in the record which supports this proposition. *See* Amended Brief of Respondent, p. 21, 1-66. Indeed, the record supports a contrary conclusion. The defendant and two of his co-defendants carried firearms into the house and all were equipped with zip ties. If they had expected to meet resistance from only Mr. Sanders, there would have been no need for each co-defendant to carry zip ties.

The defendant next argues that there was insufficient evidence to convict him of second degree assault. Amended Brief of Appellant, p. 25-28.

As charged in the present case, the elements of second degree assault are (1) that the defendant or an accomplice intentionally (a) assaulted another and thereby recklessly inflicted substantial bodily harm or (b) assaulted another with a deadly weapon (2) in the State of Washington. CP 368-72; RCW 9A.36.021(1)(a)(c). *See* WPIC 35.12.

> "Substantial bodily harm" means ***bodily injury which involves a temporary but substantial disfigurement***, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.

RCW 9A.04.110(4)(b) (emphasis added).

The presence of bruises on the victim of an assault can constitute temporary but substantial disfigurement under RCW 9A.04.110(4)(b). ***State v. Ashcraft***, 71 Wn. App. 444, 455-56, 859 P.2d 60 (1993); ***State v. McKague***, 172 Wn.2d 802, 806-07, 262 P.3d 1225 (2011) (finding that "facial bruising and swelling lasting several days, and… lacerations to [victim's] face, the back of his head, and his arm were severe enough for the jury to find that the injuries constituted substantial but temporary disfigurement.").

suffevid-iac-excsent-offscore-Reese3.doc

With respect to element (1), the court, in its finding of fact VII, found that the "defendant committed the crime of assault in the second degree when his accomplice, Clabon Berniard, intentionally kicked Charlene Sanders in the head which recklessly inflicted substantial bodily harm while repeatedly demanding the location and combination to the family safe." CP 633. In this same finding, the court found that "Charlene Sanders sustained substantial bodily harm to her head when she developed bruising and a large "goose egg" [i.e., swelling] on her forehead as a result of Berniard kicking her in the head." CP 634. With respect to element (2), the court found that "[t]hese acts occurred in the State of Washington." CP 633.

Thus, the court found that each of the elements needed to prove second degree assault had been proven, and, as a result, its findings of fact supported its conclusion of law VII that the defendant "is guilty beyond a reasonable doubt of the crime of Assault in the Second Degree ([as to] Charlene Sanders) as charged in Count V." CP 640.

Moreover, its findings of fact are supported by substantial evidence in the record. Specifically, the court's finding that that the "defendant committed the crime of assault in the second degree when his accomplice, Clabon Berniard, intentionally kicked Charlene Sanders in the head is supported by the testimony of both Charlene Sanders and J.S. RP 187-88;

RP 212-13, 218, 344-45. Similarly, the court's finding that the "[d]efendant also committed second degree assault when Berniard held a deadly weapon, a semiautomatic pistol, to Charlene Sander's head," is supported by the testimony of both Charlene and J.S. that Berniard held the gun to the back of Charlene's head, that he had "the hammer cocked," RP 344, and that Charlene believed that when the man reached the end of the count down, he would shoot. RP 188.

While the defendant questions the court's finding that Berniard was an accomplice of the defendant, Amended Brief of Appellant, p. 25-29, this finding, made explicit in the court's finding of fact II, CP 630, is also supported by substantial evidence.

Contrary to Defendant's assertion, the trial court did not find that the defendant and his "codefendants intended to use force and threat of force ***only*** against Mr. Sanders." Amended Brief of Appellant, p. 27 (emphasis added). Rather, the court found that they agreed to "use force and the threat of force to steal the expensive ring that Mr. Sanders[] had listed for sale on Craigslist, and to take other expensive items in the house." CP 630. In other words, the court made no finding that the defendant's intended use of force was limited to Mr. Sanders. *See* CP 629-41. Rather, the court found that he intended to use force against anyone

that got in the way of stealing the ring and other expensive items in the house. CP 630.

This finding is supported by the defendant's statements that "the plan was to just go inside the house and take everything out of the house," Exhibit 136; 137, that he and two other co-defendants went into the home with loaded firearms, and that all of them had zip ties to restrain the occupants. Exhibit 136; 137. Indeed, the defendant indicated that it would be odd not to expect to encounter violent resistance from the residents of the home. Exhibit 137, p. 854-55.

Finally, the finding that the defendant agreed with Berniard to "use force and the threat of force to steal... expensive items in the house," supports the court's finding that the defendant and Berniard were accomplices in the assault on Charlene Sanders. CP 627. "[W]here criminal liability is predicated on the accomplice liability statute, the State is required to prove only the accomplice's general knowledge of his coparticipant's substantive crime," ***In Re Personal Restraint of Domingo***, 155 Wn.2d 356, 364, 119 P.3d 816 (2005), and here the State proved that the defendant had a general knowledge of Berniard's intent to commit assault. *See* Exhibit 136; 137.

Moreover, the defendant aided Berniard in assaulting Charlene Sanders by eliminating any resistance to his assault. There were two boys

in the house who, until the defendant entered and acted, were undetected and unrestrained. RP 210-11; RP 339-40; Exhibit 136, p. 814. At least one of them had a cell phone capable of calling for assistance. RP 349. *See* RP 193-94; RP 217; RP 348, and either could have done something to disrupt Berniard's assault of Charlene Sanders. The fact that the defendant assisted in locating and restraining these boys, CP 635, RP 210-12, RP 185-87, and ultimately stole a cell phone capable of summoning assistance, RP 349, CP 631-32, prevented either from interfering or summoning help. The defendant thereby aided Berniard in committing the assault in question with knowledge that such aid would promote or facilitate that assault. Hence, the defendant was, pursuant to RCW 9A.08.020(3)(a)(ii), an accomplice of Berniard.

Thus, substantial evidence supports the trial court's findings of fact with respect to the second degree assault charged in count V, and these findings in turn, support the court's conclusions of law number VII that the defendant "is guilty beyond a reasonable doubt of the crime of Assault in the Second Degree" against Charlene Sanders. CP 640. Therefore, there is sufficient evidence to support defendant's conviction of that crime, *see, e.g.*, ***State v. Stevenson***, 128 Wn.2d 179, 114 P.3d 699 (2005), and that conviction should be affirmed.

Defendant next argues that there was insufficient evidence to establish that he committed the crime of first degree felony murder because he was not an accomplice to the first degree robbery of James Sanders. Amended Brief of Appellant, p. 29.

Here, although the defendant again argues that there is no evidence of accomplice liability for the robberies of Charlene or James Sanders because there was no evidence of any "discussion or plans to remove/steal property directly from the persons of anyone inside the house," Amended Brief of Appellant, p. 21-25, 29, the record demonstrates otherwise.

There is nothing in that record to suggest that the defendants ever intended to limit their theft to property which was not located on the occupants of the house. The defendant himself stated that their "plan was to just go inside the house and take everything out of the house." Exhibit 136; 137. If the plan was to take everything out of the house, or at least everything expensive from the house, then it must have included the intent to take expensive property on the occupants of that house. Because Mr. Sanders' wedding ring was presumably or at least apparently expensive to the defendants, the theft of that ring by Higashi and/or Knight could not have exceeded "the 'general intent' of the enterprise," and, as discussed above, the defendant was an accomplice in the first-degree robbery of

James Sanders, and his conviction of first-degree felony murder should be affirmed.

Hence, viewing the evidence in the light most favorable to the State, there is sufficient evidence from which a rational trier of fact could have found the essential elements of the charged crimes beyond a reasonable doubt, and the defendant's convictions of those crimes should therefore be affirmed.

2. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS HIS STATEMENTS TO PIERCE COUNTY SHERIFF'S DEPARTMENT DETECTIVES BECAUSE OFFICER KLIER'S STOP OF THE VEHICLE IN WHICH DEFENDANT WAS RIDING WAS LAWFUL, AND THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING AN EVIDENTIARY HEARING ON THE MATTER BECAUSE THE ONLY FACT IN DISPUTE WAS IRRELEVANT TO A PROPER SUPPRESSION ANALYSIS.

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause." Article I, section 7 of the Washington State Constitution mandates that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."

Illegally obtained evidence is not admissible in court. ***Mapp v. Ohio,*** 367 U.S. 643, 82 S. Ct. 23, 7 L. Ed. 72 (1961); ***State v. Afana***, 169 Wn.2d 169, 180, 233 P.3d 879 (2010).

"A warrantless search is unreasonable under both the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington State Constitution, unless the search falls within one or more specific exceptions to the warrant requirement." ***State v. Bliss,*** 153 Wn. App. 197, 203, 222 P.3d 107 (2009).

"One such exception is that an officer may briefly detain a vehicle's driver for investigation if the circumstances satisfy the 'reasonable suspicion' standard under ***Terry v. Ohio***, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)." ***Bliss***, 153 Wn. App. at 203-04.

"A valid Terry investigative stop is permissible if the officer can 'point to specific and articulable facts which, taken together with rationale inferences from those facts, reasonably warrants the intrusion.'" ***State v. Snapp,*** 174 Wn.2d 177, 197, 275 P.3d 289 (2012). "A reasonable, articulable suspicion means that there 'is a substantial possibility that criminal conduct has occurred or is about to occur.'" ***Snapp***, 174 Wn.2d at 198. "***Terry***'s rationale applies to traffic infractions." *Id.*

In the present case, the defendant argues first that the trial court improperly admitted his statements to detectives because they "were the

product of [an] illegal stop, seizure and search of the vehicle [in which he was riding]" and second, that the court erred in failing to conduct an evidentiary suppression hearing. Amended Brief of Appellant, p. 39, 29-39. The record demonstrates otherwise.

First, although the defendant argues that "Officer Klier's stop was unlawful," he does not explain why this was the case. Amended Brief of Appellant, p. 29-39. Moreover, the record shows otherwise.

Specifically, the trial court found that

> on May 1st, 2010, Daly City Police Officer Klier observed Amanda Knight's white Ford Crown Victoria driving westbound down Geneva Avenue without a front license plate. He was traveling eastbound down Geneva Avenue. He made a U-turn to follow the vehicle. He stated in his narrative report that upon the initial sighting of the white Ford he also noted that the front passenger, later identified as the Defendant, Joshua Reese, was not wearing his seat belt.

RP 133-34. Based on these facts, the court concluded that "the stop was properly initiated" for the following reasons:

> A California officer may initiate a traffic stop upon suspicion of a traffic infraction having been committed. And in this situation, in both Washington and California, motor vehicles are required to have both a front and rear license plate affixed to the vehicle being operated on a public roadway. The correct California code is section 5202. And in this case, Office Klier was correct in citing Ms. Knight and her vehicle for violation of the California code because her vehicle was licensed in Washington. And we know from [RCW] 26.16.010 that a front license plate, as well as a rear license plate, is required to be displayed.

> So under these circumstances, the officer's belief was correct that it was a violation of California law....
>
> Also the court finds that the seat belt violation that Officer Klier noted at the initial sighting of the white Ford was and is the independent basis for a traffic stop....
>
> Given that the traffic stop was proper, there is no basis then to suppress any evidence discovered from the traffic stop, nor would there be any taint on any subsequent statements by [the defendant] to the Pierce County Sheriff's detectives

RP 134-35.

The trial court was correct. A California police officer may "stop a motorist *only* if the facts and circumstances known to the officer support at least a reasonable suspicion that the driver has violated the Vehicle Code or some other law." ***People v. Miranda***, 17 Cal. App.4th 917, 926, 21 Cal, Rptr.2d 785 (1993) (emphasis in the original).

The California Vehicle Code (CVC) requires all vehicles driven on the roads of that state to be in compliance with the licensing requirements of the state in which they are licensed. CVC 5202.

Amanda Knight's Ford Crown Victoria motor vehicle was licensed in Washington. CP 309-22; RP 109.

At the time of the stop, RCW 46.16.230 (2010) required that the Washington State Department of Licensing issue two identical vehicle license number plates for each vehicle to be displayed as required on the vehicle. RCW 46.16.240 (2010) required that the two license plates issued

for every vehicle be "attached conspicuously at the front and rear of each vehicle…in such a manner that they can be plainly seen and read at all times." The absence of a license plate on a vehicle was therefore a valid basis for a traffic stop.

Thus, when Officer Klier "observed Amanda Knight's white Ford Crown Victoria driving westbound down Geneva Avenue without a front license plate," RP 133, he knew of a fact that supported a reasonable suspicion that Knight had violated the California Vehicle Code, and properly initiated a traffic stop of that vehicle. *See* ***People v. Miranda***, 17 Cal. App.4th at 926.

Further, CVC 27315 required all persons over that age of 16 to be restrained by a seatbelt. CVC 27315(d)(1) and (e). Thus, when Officer Kiler observed that the defendant "was not wearing his seat belt," RP 133-34, he knew of another fact that supported a reasonable suspicion that Knight had violated the California Vehicle Code, and properly initiated a traffic stop of that vehicle. *See* ***People v. Miranda***, 17 Cal. App.4th at 926.

Hence, Officer Klier's stop of the defendant was lawful, and the court properly denied the defendant's motion to suppress evidence, including the defendant's statements to Pierce County Sheriff's Department detectives. Therefore, the admission of those statements was proper and the defendant's convictions should be affirmed.

Second, although the defendant argues that the trial court erred in failing to conduct an evidentiary suppression hearing, Amended Brief of Appellant, p. 39, 29-39, the record shows otherwise.

"CrR 3.6 governs motions to suppress evidence in criminal trials (aside from motions to suppress a defendant's statements, governed by CrR 3.5)." ***State v. Kipp***, 286 P.3d 68, 75 (2012). It provides that "[t]he court shall determine whether an evidentiary hearing is required based upon the moving papers." CrR 3.6. Thus, "[t]he trial court has discretion whether to take oral testimony on a motion to suppress. ***Kipp***, 286 P.3d at 75. "[A] trial court abuses its discretion if its decision is manifestly unreasonable or rests on untenable grounds." *Id.*

In the present case, the trial court noted that "the procedural and factual history with regard to what happened [during the traffic stop] in Daly City, California, is largely agreed." RP 133. The court went on to find that

> [t]here is an issue with regard to [Officer Klier's] probable cause statement, that is, Officer Klier's probable cause statement, as cited by [defense counsel], in which Officer Klier wrote that [he] noticed [the defendant] was not wearing a seat belt upon conducting the initial traffic stop. ***I believe those two statements by him in his two different reports can be easily reconciled in this matter as being both true and would therefore find that there would not be a need for an evidentiary hearing with regard to any alleged discrepancy between the two statements.***

 suffevid-iac-excsent-offscore-Reese3.doc

RP 133-34 (emphasis added). In other words, the court found that Officer Klier's statements of precisely when he noticed that the defendant was not wearing a seatbelt, whether it was when he first saw the vehicle or after he completed his U-turn, were not inconsistent because both could logically be true. Because this was the only fact in dispute between the parties, the court therefore concluded that no evidentiary hearing was needed.

Such a conclusion is not unreasonable. Before the stop was made, Officer Klier had a reasonable suspicion to believe (1) that CVC 5202 had been violated by Knight's failure to attach a license plate to the front of her vehicle, and (2) that CVC 27315 had been violated by the defendant not wearing a seatbelt. Therefore, whether the officer discovered the defendant not wearing the seatbelt when he first saw the vehicle or when he turned to follow the vehicle is irrelevant to the validity of the subsequent stop. He had reasonable suspicion to stop that vehicle regardless. The decision not to engage in an evidentiary hearing to find an irrelevant fact cannot be considered "manifestly unreasonable" or said to "rest[] on untenable grounds." ***Kipp***, 286 P.3d at 75.

Therefore, the trial court did not abuse its discretion in denying an evidentiary hearing in this case, and the defendant's convictions should be affirmed.

3. DEFENDANT'S EXCEPTIONAL SENTENCE SHOULD BE AFFIRMED BECAUSE, CONTRARY TO DEFENDANT'S ASSERTIONS, THE TRIAL COURT'S REASONS FOR IMPOSING THAT SENTENCE ARE SUPPORTED BY THE RECORD AND THE LENGTH OF THAT SENTENCE IS NOT CLEARLY EXCESSIVE.

"The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of [RCW 9.94A] that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535.

The purpose of RCW 9.94A, better known as the Sentencing Reform Act (SRA), RCW 9.94A.020, is

> to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to:
> (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
> (2) Promote respect for the law by providing punishment which is just;
> (3) Be commensurate with the punishment imposed on others committing similar offenses;
> (4) Protect the public;
> (5) Offer the offender an opportunity to improve himself or herself;
> (6) Make frugal use of the state's and local governments' resources; and
> (7) Reduce the risk of reoffending by offenders in the community.

RCW 9.94A.010.

The SRA provides "an exclusive list of factors that can support a sentence above the standard range." RCW 9.94A.535(2)(3). Among these are the following:

> (b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.
>
> (c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

RCW 9.94A.535(2)(b)-(c).

> (a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.
>
> (m) The offense involved a high degree of sophistication or planning.

RCW 9.94A.535(3)(a), (m).

The trial court may exercise its discretion to determine the precise length of the exceptional sentence appropriate. ***State v. Bluehorse***, 159 Wn. App. 410, 434, 248 P.3d 537 (2011); ***State v. Ritchie***, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995).

"A sentence outside the standard sentence range for the offense is subject to appeal by the defendant or the state." RCW 9.94A.585(2).

> To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that

> those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585(4); ***State v. Tili***, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003).

"A 'clearly excessive sentence is one that is clearly unreasonable, i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken." ***State v. Bluehorse***, 159 Wn. App. 410, 434, 248 P.2d 537 (2011) (*quoting* ***State v. Kolesnik***, 146 Wn. App. 790, 805, 192 P.3d 937 (2008) (*quoting* ***State v. Ritchie***, 126 Wn.2d 388, 393, 894 P.2d 1308 (1995))); ***State v. Branch***, 129 Wn.2d 635, 919 P.2d 1228 (1996). "In order to abuse its discretion in determining the length of an exceptional sentence above the standard range, the trial court must do one of two things: [1] rely on an impermissible reason... or [2] impose a sentence which is so long that, in light of the record, it shocks the conscience of the reviewing court." ***State v. Ross***, 71 Wn. App. 556, 571-7, 861 P.2d 473 (1993).

The Washington State Supreme Court has

> construed this statute to establish three prongs, each with its own corresponding standard of review.
>
> An appellate court analyzes the appropriateness of an exceptional sentence by answering the following three questions under the indicated standards of review:

> 1. Are the reasons given by the sentencing judge supported by evidence in the record? As to this, the standard of review is clearly erroneous.
>
> 2. Do the reasons justify a departure from the standard range? This question is reviewed de novo as a matter of law.
>
> 3. Is the sentence clearly too excessive or too lenient? The standard of review on this last question is abuse of discretion.

State v. Law, 154 Wn.2d 85, 93, 110 P.3d 7171 (2005).

"The practical effect of th[e abuse of discretion] standard is to guarantee that an appellate court will 'rarely, if ever' overturn an exceptional sentence because of its length." ***State v. Clinton***, 48 Wn. App. 671, 678, 741 P.2d 52 (1987).

Moreover, "not every aggravating factor must be valid to uphold an exceptional sentence, so long as [the reviewing] court is satisfied that the trial court would have imposed the same sentence based on the factors that are upheld." ***State v. Ermels***, 156 Wn.2d 538, 539, 131 P.3d 299 (2006); ***State v. Poston***, 138 Wn. App. 898, 908. 158 P.3d 1286 (2007).

In the present case, Defendant argues (1) that "the trial court's reasons for imposing an exceptional sentence are not supported by the record" and (2) that "the trial court's exceptional sentence of 1200 months or 100 years was 'clearly excessive,'" Amended Brief of Appellant, p. 39-49. The record demonstrates otherwise.

First, the defendant argues that the trial court's finding that his conduct during the commission of the crimes "manifested deliberate cruelty to the victims" is not supported by the record, Amended Brief of Appellant, p. 44-45. It is.

The court found that

> Defendant's conduct during the commission of the crimes of first degree murder, first degree robbery (Charlene Sanders), second degree assault (Charlene Sanders), first degree robbery (James Sanders), second degree assault (James Sanders, Jr.) and first degree burglary manifested deliberate cruelty to the victims.
>
> Defendant was deliberately cruel to the victims of the burglary when he ordered the Sanders' children downstairs at gun point and then ordered them to lie on the floor where their parents were being threatened by a gun while zip tied and helpless on the kitchen floor. Defendant was deliberately cruel to the victims of the assaults when he positioned the children on the floor in such a location that the children could see and hear Berniard threaten to shoot the children and Charlene Sanders. Defendant was deliberately cruel when he placed the children in a position where they listened and watched Berniard bearing, yelling, and threatening Charlene Sanders with a gun. Defendant was deliberately cruel to Charlene Sanders and James Sanders, Sr. when defendant placed the children downstairs to witness them being beaten and helpless in front of their minor children during the burglary, the assaults, and the murder.

CP 635-36.

In its findings of fact and conclusions of law for exceptional sentence, the court found, with respect to each count, that "the defendant's

conduct during the commission of the current offense manifested deliberate cruelty to the victim." CP 643.

Contrary to Defendant's present assertion, these findings are supported by the record. Specifically, the court's findings were supported by the testimony of J.S. and C.K. that the defendant and Berniard grabbed them by their wrists, "pulled [them] really fast downstairs," placed them on their bellies in the entryway of the kitchen by their bound parents, and had them place their hands behind their backs. RP 212; RP 185-87; RP 340. Thus, the parents were forced to watch while the intruders threatened to kill their children, and the children were forced to watch while the intruders threatened to kill their bound, helpless parents. RP 187. The children were also forced by the defendant's actions to witness Berniard kick their mother in the head, and place a gun to the back of her head, while counting down from three. RP 187-88; RP 212-13, 218, 344-45. J.S. testified that the man was yelling and referring to his mother as a "bitch." RP 344.

Thus, contrary to Defendant's assertion, the trial court's finding that his conduct during the commission of the crimes "manifested deliberate cruelty to the victims" is supported by the record, and his exceptional sentence should be affirmed.

Second, the defendant argues that the trial court's finding that the present offenses "involved a high degree of sophistication and planning (RCW 9.94A.535(3)(m)[)]," CP 643, is not supported by the record. Amended Brief of Appellant, p. 45-46. The record shows otherwise.

The court found the presence of this aggravating factor on June 7, 2011, CP 643, when it found as follows:

> Defendant used a high degree of sophistication or planning when committing these crimes when he and his accomplices planned to steal expensive items on Craigslist. They planned to use the internet access on Knight's and Higashi's cellular phones to look on Craigslist for expensive items. When they found James Sanders' listing for an expensive diamond ring, they planned for Knight to pose as a potential buyer of the ring. They planned for Knight, the only female in the group, to use a track phone that was difficult to trace to call James Sanders, Sr. and arrange a meting at the Sanders' residence. Knight, Higashi, and defendant planned to use a ruse to gain access to the Sanders' house: As part of the plan, Knight told James Sanders, Sr., that she wanted to buy the ring he had listed for her mother as a Mother's Day gift. James Sanders gave Knight his address so she could come and view the ring.
>
> The defendant and his accomplices planned that Knight and Higashi would pose as a couple to gain entry into the Sanders' house while defendant and Berniard remained in the vehicle and wait[ed] for a prearranged signal to enter the residence. As part of the plan, Knight went into the Sander's residence with an open cellular phone line that allowed defendant to listen for the prearranged signal. Their plan to use blue tooth technology with an open cellular phone connection was sophisticated and required a high degree of planning to properly execute. They planned to wear dark clothing that would make defendant and Berniard difficult to see while they waited in Knight's vehicle for the prearranged signal –the phrase "get

> down." The[y] planned for the signal –"get down"- to be sent over the blue tooth device to signal defendant and Berniard to come into the residence to search for additional items to steal. They planned for each of the four accomplices to carry zip ties in their pockets to restrain the homeowners. Berniard and defendant planned to wear masks over the lower part of their faces to reduce the risk they could later be identified.

RP 639-40.

Contrary to Defendant's present assertion, these findings are supported by his own statements, as well as by the testimony of Charlene Sanders, C.K., and J.S. Specifically, the defendant stated that he and his co-defendants saw an advertisement on Craigslist for a ring. Exhibit 136; 137. The defendant stated that "the plan was to just go inside the house and take everything out of the house." Exhibit 136; 137. He indicated that he and two other co-defendants came into the home with loaded firearms, and that all of them had zip ties to restrain the occupants. Exhibit 136; 137.

The defendant stated that he and his co-defendants waited until nighttime, Exhibit 136, p. 813-14, parked on the side of the house, Exhibit 136, p. 813, and dressed in all-black clothing, Exhibit 136, p. 815. Before approaching the residence, Knight and the defendant opened a telephone connection and Knight used a Bluetooth device so that the defendant could hear what was said between her and the occupants of the house. Exhibit

136, p. 819; Exhibit 137, p. 848-49. Knight and Higashi then went to the front door of the residence while the defendant waited in the car with Berniard. Exhibit 136, p. 812. According to their plan, the defendant and Berniard were supposed to stay in the vehicle until the defendant heard Knight say the code words "get down" through the Bluetooth device. Exhibit 136, p. 812-14, 819. When the defendant heard these words, he and Berniard came into the house and went upstairs, where, according to the plan, they were supposed to "find everything expensive." Exhibit 136, p. 814. The children indicated that the defendant and Berniard were wearing masks. RP 210; RP 339.

Thus, the trial court's finding that the present offenses "involved a high degree of sophistication and planning," CP 643, is supported by the record, and the defendant's exceptional sentence should be affirmed.

Third, Defendant argues that the trial court "improperly found as a basis for the exceptional sentence that [he] had eight prior misdemeanor convictions that were not counted as part of his offender score." Amended Brief of Appellant, p. 46-48. The record shows otherwise.

First, because it includes certified copies of the judgments and sentences from each of these eight convictions, CP 452-589, 645, the record supports the court's finding that "[t]he defendant has unscored

adult misdemeanor offenses that include[] 8 misdemeanor convictions over a two year period of time." CP 645.

Second, given that the defendant committed eight offenses within less than three years of the present offenses, at least one of which was violent in nature, and that none of them would otherwise be counted towards his offender score and standard range, CP 646, this history would "result[] in a presumptive sentence that is clearly too lenient." RCW 9.94A.010.

Therefore, the exceptional sentence should be affirmed.

Finally, it should be noted that the court found that "[e]ach aggravating factor [it found] is an independent and sufficient basis for the exceptional sentence imposed in this case." CP 647. Hence, the trial court made clear that it would have imposed the same sentence based on just one factor. Because, "not every aggravating factor must be valid to uphold an exceptional sentence," ***Ermels***, 156 Wn.2d at 539, and the trial court here made clear that it would have imposed the same sentence based on just one of the factors, even if all but one factor is found to be invalid, the court's exceptional sentence should be affirmed.

Last, the defendant argues that that the court's 1200-month exceptional sentence was clearly excessive. Amended Brief of Appellant, p. 48-49.

"In order to abuse its discretion in determining the length of an exceptional sentence above the standard range, the trial court must do one of two things: [1] rely on an impermissible reason… or [2] impose a sentence which is so long that, in light of the record, it shocks the conscience of the reviewing court." ***State v. Ross***, 71 Wn. App. 556, 571-7, 861 P.2d 473 (1993). The court here did neither.

First, as argued above, the court's exceptional sentence relied only on statutorily-authorized reasons supported by the record. Second, given that the defendant was found guilty of murdering a man in his own home while his wife and two minor children were forced to watch, a 100-year sentence is not "so long that, in light of the record, it shocks the conscience." ***Ross***, 71 Wn. App. 556.

Therefore, the exceptional sentence was not clearly excessive and should be affirmed.

4. DEFENDANT HAS FAILED TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE HAS FAILED TO SHOW THAT HIS COUNSEL'S PERFORMANCE WAS DEFICIENT.

"Effective assistance of counsel is guaranteed by both the United States Constitution amendment VI and Washington Constitution article I, section 22 (amendment X)." ***State v. Yarbrough***, 151 Wn. App. 66, 89,

210 P.3d 1029, 1040-41 (2009); ***State v. Johnston***, 143 Wn. App. 1, 177 P.3d 1127 (2007). A claim of ineffective assistance of counsel is reviewed de novo. ***Yarbrough***, 151 Wn. App. at 89.

"Washington has adopted the Strickland test to determine whether a defendant had constitutionally sufficient representation." ***State v. Cienfuegos***, 144 Wn.2d 222, 25 P.3d 1011 (2001) (*citing* ***State v. Bowerman***, 115 Wn.2d 794, 808, 802 P.2d 116 (1990)); ***State v. Thomas***, 109 Wn.2d 222, 743 P.2d 816 (1987). That test requires that the defendant meet both prongs of a two-prong test. ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *See also* ***State v. McFarland***, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). "First, the defendant must show that counsel's performance was deficient" and "[s]econd, the defendant must show that the deficient performance prejudiced the defense." ***Strickland***, 466 U.S. at 687; ***Cienfuegos***, 144 Wn.2d at 226-27. A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. ***State v. Hendrickson***, 129 Wn.2d 61, 78, 917 P.2d 563, 571 (1996); ***In Re Personal Restraint of Rice***, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992); ***State v. Thomas***, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). "A failure to establish either element of the test defeats an ineffective assistance of

counsel claim." ***Riofta v. State***, 134 Wn. App. 669, 693, 142 P.3d 193 (2006).

The first prong "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Specifically, "[t]o establish deficient performance, the defendant must show that trial counsel's performance fell below an objective standard of reasonableness." ***Johnston***, 143 Wn. App. at 16. "The reasonableness of trial counsel's performance is reviewed in light of all the circumstances of the case at the time of counsel's conduct." *Id.*; ***State v. Garrett,*** 124 Wn.2d 504, 518, 881 P.2d 185 (1994). "Competency of counsel is determined based upon the entire record below." ***State v. Townsend***, 142 Wn.2d 838, 15 P.3d 145 (2001) (*citing* ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); ***State v. Gilmore***, 76 Wn.2d 293, 456 P.2d 344 (1969).

"To prevail on a claim of ineffective assistance of counsel, the defendant must overcome a strong presumption that defense counsel was effective." ***Yarbrough***, 151 Wn. App. at 90. This presumption includes a strong presumption "that counsel's conduct constituted sound trial strategy." ***Rice***, 118 Wn.2d at 888-89. "If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of

counsel." ***Yarbrough***, 151 Wn. App. at 90 (*citing* ***State v. McNeal***, 145 Wn.2d 352, 362, 37 P.3d 280 (2002), ***State v. Adams***, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

An ineffective assistance of counsel claim must not be allowed to "function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the ***Strickland*** standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve." ***Harrington v. Richter***, 131 S. Ct. 770, 778, 178 L. Ed. 2d 624 (2011). "It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.'" *Id.* (*Quoting* ***Strickland***, 466 U.S. at 689). "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Id.* (*Quoting* ***Strickland***, 466 U.S. at 690).

This Court "defer[s] to an attorney's strategic decisions to pursue, or to forego, particular lines of defense when those strategic decisions are reasonable given the totality of the circumstances." ***Riofta***, 134 Wn. App. at 693. If reasonable under the circumstances, trial counsel need not investigate lines of defense that he has chosen not to employ." *Id.*

With respect to the second prong, "[p]rejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed." *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Cienfuegos***, 144 Wn.2d at 229.

In the present case, the defense attorney indicated that his client had decided to waive his right to a jury trial and proceed by way of bench trial. RP 52-61; CP 363-64. He went on to state that

> my client and I have been discussing it [i.e., the waiver of Defendant's right to jury trial] for about three weeks. It's not a new thing. We have been back and forth by the phone and in our jail visits. I have advised him of just about every possible pitfall, good and bad, of waiving the jury, especially in a case of this magnitude. ***I am satisfied that he has all the knowledge and information and that his decision to do this is truly his decision***, with obviously my counsel, and that it's a knowing, willing, voluntary, intelligent waiver

RP 53 (emphasis added).

Given this record, it is clear that the decision to waive the right to a jury trial was made by the defendant. There is nothing to suggest that defense counsel so much as recommended that defendant waive this right. *See* RP 52-61. Because there is nothing to attribute this decision to trial counsel, it cannot be the basis for a claim of deficient performance by counsel.

However, even if it were assumed that counsel advised the defendant to waive his right to a jury trial, the decision to do so could be considered a tactical one for at least two reasons.

First, by trying the case to the judge rather than a jury, the defense could minimize the effect of pre-trial publicity. Indeed, the defense attorney had earlier filed a motion for change of venue in which he noted that the prior codefendant trials had "received a huge amount of local, state, and national news coverage, including coverage on all major television stations and all major local newspapers," and that "[m]ost of the stories mention[ed the defendant] by name and either contained booking photos or courtroom video of [him] in jail clothes." CP 171, 169-277. Comments from readers of the local newspaper's website, included the following: "[t]o the gallows with this Puke," "[h]ang him and all the rest," "[m]ay you rot in hell for all eternity," "[p]ut a bullet in this waste of skins head," and "[w]hy is this maggot still breathing air?? Improve the gene pool and hang this maggot." CP 172. Moreover, as Defendant now notes, "[t]he juries in both of those [prior codefendant] cases had convicted those defendants as charged." Amended Brief of Appellant, p. 50. In this context, Defendant, in counsel with his trial attorney, could have decided to waive his right to jury trial to avoid the prejudicial effect of such pretrial publicity and the danger of a potentially-biased jury pool. Hence,

the decision to waive the right to jury trial can be characterized as a legitimate trial strategy.

Second, and similarly, the decision to waive the right to a jury trial, allowed defense counsel to make a complex legal argument during closing, which he could not have put to a jury. *See* RP 465-88.

Hence, even assuming *arguendo* that trial counsel advised the defendant to waive his right to a jury trial, such "conduct can be characterized as legitimate trial strategy or tactics." ***Yarbrough***, 151 Wn. App. at 90. Therefore, "it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel." *Id.*, and Defendant's convictions should be affirmed.

5. THE TRIAL COURT CORRECTLY DETERMINED THAT THE SECOND DEGREE ASSAULT CONVICTION OF COUNT V DOES NOT MERGE INTO THE FIRST DEGREE ROBBERY CONVICTION OF COUNT IV AND THAT THE FIRST DEGREE ROBBERY CONVICTION OF COUNT II AND/OR IV DOES NOT MERGE INTO THE FIRST DEGREE FELONY MURDER CONVICTION OF COUNT I.

"The double jeopardy clauses of the United States and Washington constitutions are the foundation for the merger doctrine." ***State v. Parmelee***, 108 Wn. App. 702, 710, 32 P.3d 1029 (2001).

"If, in order to prove a particular degree of a crime, the State must prove the elements of that crime and also that the defendant committed an

act that is defined as a separate crime elsewhere in the criminal statutes, the second crime merges with the first." ***State v. Zumwalt***, 119 Wn. App. 126, 82 P.3d 672 (2003); ***Parmelee***, 108 Wn. App. at 710. Hence, "[t]he merger doctrine is relevant only when a crime is elevated to a higher degree by proof of another crime proscribed elsewhere in the criminal code." *Id.*; ***State v. Saunders***, 120 Wn. App. 800, 820-21, 86 P.3d 232 (2004).

"Where offenses merge and the defendant is punished only once, there is no danger of a double jeopardy violation." ***Parmelee***, 108 Wn. App. at 710.

However, there is "a well established exception that may operate to allow two convictions even when they formally appear to be the same crime under other tests": such offenses are "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. Freeman***, 153 Wn.2d 765, 778-79, 108 P.3d 753 (2005) (*quoting* ***State v. Frohs***, 83 Wn. App. 803, 807, 924 P.2d 384 (1996)).

With respect to the crime of burglary, RCW 9A.52.050, the burglary anti-merger statute, provides that "[e]very person who, in the commission of a burglary shall commit any other crime, may be punished

therefore as well as for the burglary, and may be prosecuted for each crime separately."

Hence, the burglary anti-merger statute expresses the intent of the legislature that "any other crime" committed in the commission of a burglary does not merge with the offense of first-degree burglary when a defendant is convicted of both. ***State v. Sweet***, 138 Wn.2d 466, 980 P.2d 1223 (1999). Indeed, it "gives the sentencing judge discretion to punish for burglary, even where the burglary and an additional crime encompasses the same criminal conduct." ***State v. Bradford***, 95 Wn. App. 935, 950, 978 P.2d 534 (1999). "[A] trial court may, in its discretion, refuse to apply the burglary antimerger statute based on the facts of the case before it." ***State v. Davis***, 90 Wn. App. 776, 783-84, 954 P.2d 325 (1998).

Appellate courts "review questions of law such as merger and double jeopardy de novo." ***State v. Zumwalt***, 119 Wn. App. 126, 129, 82 P.3d 672 (2003), *aff'd sub nom.* ***State v. Freeman***, 153 Wn.2d 765, 108 P.3d 753 (2005).

In the present case, the defendant argues that the court erred in failing to merge two sets of convictions. Amended Brief of Appellant, p. 52-59.

First, the defendant argues that the court erred in not merging the second degree assault conviction of count V into the first degree robbery conviction of count IV. Amended Brief of Appellant, p. 55-56. The record shows otherwise.

"Second degree assault is not identical in law to first degree robbery. ***State v. Zumwalt***, 119 Wn. App. 126, 132, 82 P.3d 672 (2003). Hence, "[i]t is possible to commit first degree robbery without committing second degree assault, and vice versa." ***Zumwalt***, 119 Wn. App. at 132. "[I]f separate acts of force are established, double jeopardy does not preclude two convictions." *Id.* Hence, "if there is proof of a second assault... both convictions stand." *Id.*

Here, the court found that the "defendant committed the crime of first degree robbery when one of his accomplices unlawfully took personal property (a wedding ring) from the person of Charlene Sanders." CP 632. The act of force used to accomplish this robbery occurred when Higashi pointed a firearm "at Charlene Sanders... to overcome any resistance she may have had to the theft of her wedding ring." CP 632. *See* CP 370-71.

The second degree assault charged in count V did not occur until after this robbery was accomplished when the defendant's "accomplice, Clabon Berniard, intentionally kicked Charlene Sanders in the head" and/or "held a deadly weapon, a semiautomatic pistol, to Charlene

Sanders' head and counted backward from 3 to 1 while threatening to kill her and her family." CP 633. *See* CP 371.

Because, in this case, "separate acts of force [were] established, double jeopardy does not preclude two convictions," ***Zumwalt***, 119 Wn. App. at 132, and the second degree assault conviction of count V does not merge into the first degree robbery conviction of count IV. Therefore, the trial court did not err in failing to merge these convictions, and the defendant's convictions and sentence should be affirmed.

Second, the defendant argues that the court erred in not merging the first degree robbery conviction of count II and/or IV into the first degree felony murder conviction of count I. Amended Brief of Appellant, p. 56-59. The record demonstrates otherwise.

Specifically, the court found that "[t]he robbery of Charlene Sanders' ring had been completed when Kiyoshi Higashi shot and killed James Sanders, Sr.," but that the defendant and Knight, were still stealing items from the residence at the time of that shooting. CP 635. In other words, the specific robberies of the rings, charged as counts II and IV, were completed before Higashi shot James Sanders, even though the uncharged robbery of other items from the Sanders' residence was ongoing. More important, the force used in the robberies charged as counts II and IV was complete before the force used in shooting Sanders

came into being. Thus, the incidents of force used in the robberies charged in counts II and IV were an "injury to 'the person or property of the victim or others, which [wa]s separate and distinct from" the incident of force that became the homicide of which the robbery formed an element. ***Freeman***, 153 Wn.2d at 778-79. As a result, the robbery and murder offenses are separate and not subject to merger.

It would be different if the force or fear used to obtain or retain possession of the rings in counts II and IV was one in the same as the force used to kill James Sanders. If Higashi obtained or retained possession of the rings by shooting Sanders then the injury at issue would be the same for both the robbery and the murder and the crimes would merge. Here, however, the force used in either *separately-charged* robbery is "separate and distinct from and not merely incidental to the [the charged felony murder] of which [such robberies] form[] an element.'" ***Freeman***, 153 Wn.2d 765, 778-79.

Hence, neither robbery conviction merges with the murder conviction, and the trial court did not err in failing to merge these convictions. Therefore, the defendant's convictions and sentence should be affirmed.

6. THE TRIAL COURT CORRECTLY DETERMINED THAT (A) THE ASSAULT, ROBBERY, AND BURGLARY INVOLVING CHARLENE SANDERS, (B) THE ROBBERY AND BURGLARY INVOLVING JAMES SANDERS, SR., AND (C) THE ASSAULT AND BURGLARY INVOLVING INVOLING JAMES SANDERS, JR., WERE NOT THE SAME CRIMINAL CONDUCT.

RCW 9.94A.589 provides in relevant part that

> whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That ***if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.*** Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. ***"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.***

RCW 9.94A.589(1)(a) (emphasis added).

Thus, multiple offenses are "considered 'the same criminal conduct' for sentencing purposes if they involved the same criminal intent, were committed at the same time and place, and involved the same victim." ***State v. Mutch***, 171 Wn.2d 646, 653-54, 254 P.3d 803 (2011).

"Criminal intent is the same for two or more crimes when the defendant's intent, viewed objectively, does not change from one crime to

the next, such as when one crime furthers another." ***State v. Davis***, 90 Wn. App. 776, 781-82, 954 P.2d 325 (1998); ***State v. Dunaway***, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987).

However, "two crimes cannot be the same criminal conduct if one involves two victims and the other only involves one." ***Davis***, 90 Wn. App. at 782. (*Citing* ***State v. Davidson***, 56 Wn. App. 554, 784 P.2d 1268, *review denied,* 114 Wn.2d 1017, 791 P.2d 535 (1990)).

Appellate courts "review the ''trial court's determination of what constitutes the same criminal conduct... [for] abuse of discretion or misapplication of the law.'' ***State v. Mutch***, 171 Wn.2d 646, 254 P.3d 803 (2011) (*quoting* ***State v. Tili***, 139 Wn.2d 107, 122, 985 P.2d 365 (1999) (*quoting* ***State v. Walden***, 69 Wn. App. 183, 188, 847 P.2d 956 (1993))).

In the present case, the defendant first argues that the second degree assault, first degree robbery, and first degree burglary involving Chalene Sanders, charged as counts V, IV, and VI respectively, were the same criminal conduct. Amended Brief of Appellant, p. 59-62. The record shows otherwise.

While these three offenses were committed at the same time and place, in the Sanders' residence, the criminal intent changed from the burglary and robbery to the assault, and the burglary involved a different victim than the robbery and the assault.

 suffevid-iac-excsent-offscore-Reese3.doc

Specifically, in the first degree burglary charged as count VI, the defendant and his codefendants "entered the Sanders' residence with the intent to steal the Sanders' property from inside the residence." CP 632. During the first degree robbery charged as count IV, "the defendant intended to commit the theft of the Sanders' property, the taking of Charlene Sander[s] wedding ring." CP 632. However, Berniard only kicked Charlene Sanders in the head, thereby assaulting her, after she looked to see where her children were, and after the intruders began repeating the command, "facedown." RP 187. It may therefore be inferred from such evidence that the intent of this assault was not to obtain property from the person of Charlene Sanders, but to prevent her from later identifying Berniard, whom she had not seen previously. *See* RP 173-87. Hence, "the defendant's intent, viewed objectively," did change from the burglary and robbery to the assault, and thus, the criminal intent was not the same for the assault as it was for the burglary and robbery. Therefore, under ***Davis***, 90 Wn. App. at 781-82, and RCW 9.94A.589(1)(a), the second degree assault charged as count V was not the same criminal conduct as the first degree robbery charged as count IV or the first degree burglary charged as count VI.

Moreover, although the defendant's intent from the burglary to the robbery may be considered largely unchanged, the victims of these two

crimes were not the same. As the defendant admits, the victim of the burglary was the entire Sanders family, Amended Brief of Appellant, p. 59, CP 631-32, but the victim of the robbery charged as count IV was Charlene Sanders individually. CP 632. Similarly, while the victim of the burglary was the entire Sanders family, the victim of the second degree assault charged as count V was Charlene Sanders only. Because two crimes cannot be the same criminal conduct if one involves multiple victims and the other only involves one, ***Davis***, 90 Wn. App. at 782, the burglary charged as count VI cannot be the same criminal conduct as the robbery charged as count IV or the assault charged as count V.

Therefore, the second degree assault, first degree robbery, and first degree burglary involving Chalene Sanders, charged as counts V, IV, and VI respectively, were not the same criminal conduct under RCW 9.94A.589(1)(a), and the trial court did not err in sentencing them separately.

Second, the defendant argues that the trial court erred in not finding that the robbery and burglary involving James Sanders, Sr., charged as counts II and VI respectively, were the same criminal conduct. Amended Brief of Appellant, p. 59-62. Again, the record demonstrates otherwise.

As the defendant admits, the victim of the burglary was the entire Sanders family, Amended Brief of Appellant, p. 59, CP 631-32, but the victim of the robbery charged as count II was James Sanders, Sr. individually. CP 633. Because two crimes cannot be the same criminal conduct if one involves multiple victims and the other only involves one, ***Davis***, 90 Wn. App. at 782, the burglary charged as count VI cannot be the same criminal conduct as the robbery charged as count II.

Therefore, the trial court did not err in sentencing these crimes separately, and the defendant's convictions and sentence should be affirmed.

Finally, the defendant argues that the trial court erred in not finding that the assault and burglary involving James Sanders, Jr., charged as counts III and VI respectively, were the same criminal conduct. Amended Brief of Appellant, p. 59-62. This contention runs counter to the record.

Again, as the defendant admits, the victim of the burglary was the entire Sanders family, Amended Brief of Appellant, p. 59, CP 631-32, but the victim of the assault charged as count III was James Sanders, Jr. individually. CP 633. Because two crimes cannot be the same criminal conduct if one involves multiple victims and the other only involves one, ***Davis***, 90 Wn. App. at 782, the burglary charged as count VI cannot be the same criminal conduct as the assault charged as count III.

Therefore, the trial court did not err in sentencing these crimes separately, and the defendant's convictions and sentence should be affirmed.

7. THE TRIAL COURT PROPERLY CALCULATED DEFENDANT'S OFFENDER SCORE AND DEFENDANT'S SETENCE SHOULD BE AFFIRMED BECAUSE DEFENDANT'S CONVICTIONS ARE SUPPORTED BY SUFFICIENT EVIDENCE, NONE MERGE, AND NONE ARE THE SAME CRIMINAL CONDUCT.

The defendant argues that, because "assuming the sufficiency of the evidence for the convictions, numerous convictions merge and/or court as same criminal conduct, [his] offender score must be recalculated." Amended Brief of Appellant, p. 65.

However, as demonstrated in sub-sections 1, 5, and 6 of the argument section of this brief, each of the defendant's convictions were supported by sufficient evidence, none merge, and none are the same criminal conduct.

Therefore, the trial court did not err in its calculation of Defendant's offender score, or its sentencing of these crimes, and the defendant's sentence should be affirmed.

D. CONCLUSION.

The defendant's convictions should be affirmed because, viewing the evidence in the light most favorable to the State, there is sufficient evidence from which a rational trier of fact could have found the essential elements of each of the charged crimes beyond a reasonable doubt.

The trial court properly denied the defendant's motion to suppress his statements to Pierce County Sheriff's Department detectives because Officer Klier's stop of the vehicle in which defendant was riding was lawful. Moreover, the trial court did not abuse its discretion in denying an evidentiary hearing of the matter because the only fact in dispute was irrelevant to a proper suppression analysis.

Defendant's exceptional sentence should be affirmed because, contrary to Defendant's assertions, the trial court's reasons for imposing that exceptional sentence are supported by the record and the length of that sentence is not clearly excessive.

Defendant has failed to show ineffective assistance of counsel because he has failed to show that his trial counsel's performance was deficient.

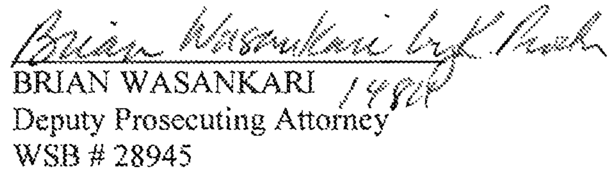
The trial court correctly determined that the second degree assault conviction of count V does not merge into the first degree robbery conviction of count IV and that the first degree robbery conviction of count II and/or IV does not merge into the first degree felony murder conviction of count I.

Finally, the trial court correctly determined that (a) the assault, robbery, and burglary involving Charlene Sanders, (b) the robbery and burglary involving James Sanders, Sr., and (c) the assault and burglary involving James Sanders, Jr., were not the same criminal conduct.

Therefore, the defendant's convictions and sentence should be affirmed.

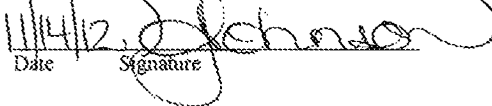
DATED: November 14, 2012.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



BRIAN WASANKARI
Deputy Prosecuting Attorney
WSB # 28945

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



11/14/12
Date Signature

PIERCE COUNTY PROSECUTOR

November 14, 2012 - 2:01 PM

Transmittal Letter

Document Uploaded: 423057-Respondent's Brief.pdf

Case Name: State v. Joshua Reese

Court of Appeals Case Number: 42305-7

Is this a Personal Restraint Petition? ○ Yes ● No

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ● Brief: Respondent's
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _______
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Petition for Review (PRV)
- ○ Other: _______

Comments:

No Comments were entered.

Sender Name: Heather M Johnson - Email: hjohns2@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

barbara@bcoreylaw.com