NO. 45143-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MEKO DEAUNTE JONES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda C.J. Lee

No. 13-1-00080-8

BRIEF OF RESPONDENT

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Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdictions

Constitutional Provisions

Statutes

Rules and Regulations

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

1. Whether the court's sentence on counts I and VI exceeded the 120-month statutory maximum where defendant was sentenced to 36 months in community custody in addition to 120 months in total confinement on those counts.

2. Whether the trial court properly found that neither defendant's second degree assault and first degree robbery convictions nor his first degree robbery and first degree kidnapping convictions merged where these convictions were based on separate criminal acts, separated in time and with separate purposes.

3. Whether defendant's assault, robbery, and kidnapping convictions were separate and distinct rather than the same criminal conduct under RCW 9.94A.589(1)(a), and hence, whether Defendant failed to show ineffective assistance for his counsel's failure to argue otherwise.

B. STATEMENT OF THE CASE.

1. Procedure

On January 7, 2013, Meko Deaunte Jones, hereinafter referred to as the defendant, was charged by information with first degree assault in count I, first degree kidnapping in count II, first degree robbery in count III, attempting to elude a pursuing police vehicle in count IV, and first degree unlawful possession of a firearm in count V. CP 1-4. *See* CP 5-6. Counts I, II, and III included a firearm sentence enhancement. CP 1-4.

On May 10, 2013, the State filed an amended information, which added count VI, first degree assault with a firearm sentence enhancement, count VII, felony harassment, and count VIII, tampering with a witness. CP 7-11. *See* CP 12-13.

Finally, on June 5, 2013, the State filed a second amended information, which added a firearm sentence enhancement to count VII. CP 14-18. *See* 06/05/2013 RP 13-15, CP 5-6.

The case was called for trial the same day, and recessed until June 10, 2013, 06/05/2013 RP 1-29, at which time the court conducted a CrR 3.5 hearing. 06/10/2013 RP 2-48. The State called Tacoma Police Detective Stuart Hoisington, 06/10/2013 RP 3-42. The defendant did not testify. 06/10/2013 RP 42-43. The court found the defendant's statements

to be admissible. 06/13/2013 RP 5-9; CP 187-91. *See* 06/13/2013 RP 14-15.

The parties argued motions in limine, 06/10/2013 RP 48-58, 60-65, and the court made its ruling thereon. 06/13/2013 RP 9-11, 13-14; 06/18/2013 RP 2-3.

The parties selected and the court swore in a jury 06/13/2013 RP 2, 13; 06/17/2013 RP 6-7.

The State gave its opening statement, 06/17/2013 RP 8, and called Tacoma Police Officer Thomas Perry, 06/17/2013 RP 8-35, Tacoma Police Officer Wayne Beals, 06/17/2013 RP 44-71, Tacoma Police Crime Scene Technician Tiffany Ryan, 06/17/2013 RP 71-88, Tacoma Police Officer Keith O'Rourke, 06/17/2013 RP 88-104, 06/18/2013 RP 4-14, Kayleigh Littlefield, 06/18/2013 RP 14-139, Tacoma Police Detective Stuart Hoisington, 06/18/2013 RP 139-67, 06/24/2013 RP 3-18, Thurlow Hernandez, 06/24/2013 RP 18-29, Mark Strohbusch, 06/24/2013 RP 30-58, Pierce County Sheriff's Deputy Don Carn, 06/24/2013 RP 64-75, Tacoma Police Officer William Blood, 06/24/2013 RP 75-88, and Nierra Hockett, 06/25/2013 RP 16-24.

The parties stipulated that the defendant had, on January 4, 2013, been previously convicted of a serious offense. CP 50-51; 06/17/2013 RP

3-6; 06/25/2013 RP 4-6, 33. The court read this stipulation to the jury at the close of the State's case-in-chief. 06/25/2013 RP 24.

The State then rested. 06/25/2013 RP 24.

The defense gave its opening statement, 06/25/2013 RP 24, and the defendant testified. 06/25/2013 RP 24-97, 06/25/2013pm RP 2-49. The defense then rested. 06/25/2013pm RP 49.

The court discussed jury instructions with the parties, and neither party took exception to the court's instructions. 06/24/2013 RP 90-97; 06/25/2013pm RP 49-51; 06/26/2013 RP 2-4. The court read those instructions to the jury. 06/26/2013 RP 5. *See* CP 52-119.

The parties gave their closing arguments. 06/26/2013 RP 8-49 (State's closing); 06/26/2013 RP 50-72 (Defendant's closing); 06/26/2013 RP 72-84 (State's rebuttal). *See* CP 148-86 (State's PowerPoint presentation).

On June 27, 2013, the jury returned verdicts of not guilty to first degree assault as charged in count I, guilty of second degree assault with a deadly weapon, a lesser included crime of count I, guilty of first degree kidnapping as charged in count II, guilty of first degree robbery as charged in count III, guilty of attempting to elude a pursuing police vehicle as charged in count IV, guilty of first degree unlawful possession of a firearm

as charged in count V, not guilty of first degree assault as charged in count VI, guilty of second degree assault, a lesser included crime of count VI, guilty of felony harassment as charged in count VII, and guilty of tampering with a witness, as charged in count VIII. CP 122, 124-25, 127, 129-30, 133-35, 137-39, 141, 143, 145; 06/27/2013 RP 5-19. The jury also found that the defendant was armed with a firearm at the time of the commission of the crimes charged in counts I, II, III, VI, and VII, CP 126, 132, 136, 142, 144, and that the crimes charged in counts I, II, III, VI, VII, and VIII were committed against a member of the same family or household. CP 146; 06/27/2013 RP 5-19.

On July 19, 2013, the court conducted a sentencing hearing. O6/19/2013 RP 2-16. The State and Defendant agreed that the defendant's offender score was 20 for counts I, II, III, and VI, 9 for counts IV and V, 13 for count VII, and 14 for count VIII. 07/19/2013 RP 5; CP 194-217.

The Defendant's attorney explained to the court that he had considered the issues of merger and same criminal conduct, but after studying the law, the facts, the jury instructions, and verdict forms, concluded that merger did not apply and that an argument urging a finding of same criminal conduct would be fruitless. 07/19/2013 RP 11-12.

The court sentenced the defendant to 84 months in total confinement on count I, 198 months plus a 60-month firearm sentence enhancement on count II, 171 months plus a 60-month firearm sentence enhancement on count III, 29 months on count IV, 116 months on count V, 84 months plus a 36-month firearm sentence enhancement on count VI, 60 months plus an 18-month firearm sentence enhancement on count VII, and 60 months on count VIII, to be served concurrently except for the firearm enhancements which run consecutively, for a total of 408 months in total confinement. 07/19/2013 RP 15-16; CP 199-217.

The defendant filed a timely notice of appeal the same day. CP 218. *See* 07/19/2013 RP 19.

2. Facts

Kayleigh Littlefield is a student at Bates Technical College. 06/18/2013 RP 15. She first met the defendant in May or June, 2008, and began a romantic relationship with him. 06/18/2013 RP 17. The two began living together, ultimately had a child together, 06/18/2013 RP 15-19, and were engaged to be married. 06/18/2013 RP 86.

However, Littlefield began to have concerns about the defendant's behavior. 06/18/2013 RP 19. She testified that he would "not come home for a couple days at a time," and that when he did, he was irritable and

irrational. 06/18/2013 RP 19. So, she and her son moved from the residence she shared with the defendant to her mother's house in August, 2012. 06/18/2013 RP 19-20.

On January 4, 2013, Littlefield got up, took her son to daycare, and began her journey to school. 06/18/2013 RP 22. She parked her car in a parking lot on Earnest Brazill Street a little after 7:00 a.m. and began walking to the school. 06/18/2013 RP 22. As she reached for the handle of the school door, she was pushed from behind by the defendant. 06/18/2013 RP 23.

The defendant, who was "[v]ery hostile" and angry, started cursing at her, and told her she wasn't going to take his son from him. 06/18/2013 RP 23-24. He was yelling and put a gun to her head. 06/18/2013 RP 24-25. The defendant then asked her to walk with him, and Littlefield started to walk across Yakima Avenue, with the defendant staying within a foot of her. 06/18/2013 RP 25-26.

When they got across the street, the defendant asked Littlefield for her keys, and she said no. 06/18/2013 RP 25-28. Littlefield testified that she was "really unsure about that particular moment," that she knew the defendant shot her in the stomach, 06/18/2013 RP 28-29, but agreed that it was possible that she was shot as she grabbed for the gun, during the

struggle that ensued. 06/18/2013 RP 116. *See* 06/17/2013 RP 56; 06/18/2013 RP 116-17.

Regardless, she bled onto both of the shirts she was wearing at the time. 06/18/2013 RP 29-30. Littlefield testified that she gave the defendant the keys to her car, and that they got inside, the defendant in the driver's seat and Littlefield in the passenger seat. 06/18/2013 RP 30. The defendant still had the gun in his hand. 06/18/2013 RP 31. When asked why she got into the car with the defendant, Littlefield testified that she wasn't "going to argue with somebody that's got a gun." 06/18/2013 RP 35.

The defendant drove her to his mother's house in Tacoma. 06/18/2013 RP 35. He was still irate while driving. 06/18/2013 RP 36. He yelled at Littlefield for not letting him see their baby, and slammed the revolver against the dashboard of the car. 06/18/2013 RP 36. He then shot out the passenger-side window next to Littlefield. 06/18/2013 RP 36.

Littlefield testified that the revolver was close to her face, that she grabbed it to try to wrest it from the defendant, but that it got tangled in her hair. 06/18/2013 RP 38. The defendant told her to let go of it, and that he "came prepared." 06/18/2013 RP 39, Littlefield let go of the gun. 06/18/2013 RP 39,

When they arrived at his mother's house, the defendant continued to yell at her about their son, and she responded by suggesting that they get a "parenting plan." 06/18/2013 RP 39-41. He also took her cell phone. 06/18/2013 RP 46-47. He then looked through it with one hand while he held his revolver in the other. 06/18/2013 RP 47.

Littlefield told the defendant that her "skin was burning." 06/18/2013 RP 41. He called his mother inside the house and asked her for pain pills, but told her, "Don't come all the way out; the less you know the better." 06/18/2013 RP 41. The defendant retrieved the pills and brought them to Littlefield to take. 06/18/2013 RP 41. However, Littlefield testified that the two did not discuss the fact that the defendant had shot her. 06/18/2013 RP 43.

The defendant asked her how much money she had, and Littlefield replied that she had about $300 in a bank account. 06/18/2013 RP 42. The defendant wanted to know how much money she had because he wanted to use it to buy a shotgun to shoot Littlefield's mother. 06/18/2013 RP 43. The defendant then called people about buying a shotgun. 06/18/2013 RP 44.

Afterwards, the defendant drove them to a convenience store, and told her to give him her ATM card and PIN. 06/18/2013 RP 47. Littlefield testified that she gave him these things because she was afraid of what

might happen if she refused. 06/18/2013 RP 47-48. The defendant used her card to withdraw $200 from her bank account. 06/18/2013 RP 45.

They then returned to his mother's residence and went inside. 06/18/2013 RP 50. The defendant had her call their son's daycare to tell them that he would be picking their son up. 06/18/2013 RP 51-52. Littlefield testified that she did not want the defendant to pick up their son, but that she made the call because she didn't want him to hurt her. 06/18/2013 RP 53. The defendant was sitting in a rocking chair with the gun in his lap. 06/18/2013 RP 53-54. At one point the defendant said it was too late, and that he was going to hurt the baby, and then her and himself. 06/18/2013 RP 54. He specifically stated that he was going to shoot the baby. 06/18/2013 RP 55.

They later left his mother's residence so that the defendant could buy a shotgun at Hilltop Pawn. 06/18/2013 RP 61-65. He left the pawnshop without purchasing a firearm, and met with a man on the street before returning to Littlefield's car, crying. 06/18/2013 RP 65.

Only then did the defendant ask her if she wanted to go to the hospital. 06/18/2013 RP 66. He then drove by St. Joseph's Hospital, before suggesting that she drop him off first and then drive back to the hospital herself. 06/18/2013 RP 66. Once back at the residence, the defendant returned her phone and keys, gave her a hug, told her he loved

her, and asked her to call him if she was going to tell on him so that he could kill himself. 06/18/2013 RP 66. Littlefield told him she would not tell. 06/18/2013 RP 67. The defendant also returned most of the cash he had withdrawn from her account. 06/18/2013 RP 124-25.

After she got in her car and was driving to the hospital, she called her mom. 06/18/2013 RP 67. Littlefield ultimately told her mother that the defendant had shot her, and her mother called the police. 06/18/2013 RP 68. Littlefield testified that she made the call to her mother at about 1:00 p.m. 06/18/2013 RP 68.

Once she got to the hospital, she told staff she had been shot, but did not want to disclose who shot her. 06/18/2013 RP 69. Medical staff began treating her and police officers responded. 06/18/2013 RP 69-70. Littlefield ultimately told an officer what happened. 06/18/2013 RP 70-71.

On January 4, 2013, at about 2:57 p.m., Tacoma Police Officer Wayne Beals was dispatched to St, Joseph's Hospital in Tacoma to contact shooting victim Kayleigh Littlefield. 06/17/2013 RP 50-52. He found her in a hospital room crowded with medical personnel. 06/17/2013 RP 53. She appeared to be in shock, pale, and scared. 06/17/2013 RP 54. She was crying and had a gunshot wound in her stomach. 06/17/2013 RP 53.

Officer Beals told her that he needed to know what happened to her, but she told him that she "d[id]n't really want to say." 06/17/2013 RP

55. Littlefield indicated that she was worried about the safety of her family and children, but when the officer told her they would take steps to secure them, she began to open up to him. 06/17/2013 RP 55-56.

She told him that the defendant contacted her in front of Bates School and stuck a gun in her belly. 06/17/2013 RP 56-57. *See* 06/18/2013 RP 113-14. Littlefield stated that she followed the defendant's instructions and went to a nearby parking lot with him. 06/17/2013 RP 56. However, she got upset with what he was doing and grabbed at the barrel. 06/17/2013 RP 56. *See* 06/18/2013 RP 114. Littlefield told Beals that she then heard and felt the weapon discharge into her stomach. 06/17/2013 RP 56.

She told Beals that even after the defendant shot her, he continued to point the weapon at her, and demanded that she get inside her vehicle with him. 06/17/2013 RP 57. The defendant then started making threats to her, her family, and her children. 06/17/2013 RP 57.

The defendant then pointed the gun at her head. 06/17/2013 RP 57. Littlefield said she felt like the defendant was going to fire the gun, and ducked. 06/17/2013 RP 57. *See* 06/18/2013 RP 114. The defendant then fired a second shot, which blew out the window next to her. 06/17/2013 RP 57.

The defendant then called his mother, and told her to go into the bedroom. 06/17/2013 RP 57-58. The defendant continued to point the gun at her and have her explain why he wasn't seeing his children. 06/17/2013 RP 57-58. When they arrived at his mother's house, he took her inside, and held her at gun point for about five hours. 06/17/2013 RP 58.

Officer Beals broadcast the suspect information Littlefield had supplied to other Tacoma Police officers on patrol at that time. 06/17/2013 RP 58-59.

Officers and hospital security tried to locate the defendant, but could not. 06/17/2013 RP 61. However, hospital security saw him in the area shortly thereafter, and Tacoma Police officers converged on the area. 06/17/2013 RP 61.

Tacoma Police Officers were told that the defendant was driving a black 1997 Chevrolet S-10 pickup truck, bearing Washington license number B05095A, west on South 17th Street in Tacoma, Washington. 06/17/2013 RP 14-16, 95-96. The defendant was the registered owner of that truck. 06/17/2013 RP 15, 96. The defendant, himself, was described as a black man in his mid-30s with a medium height and build. 06/17/2013 RP 95.

Tacoma Police Officer Keith O'Rourke, who was on patrol at the time, also looked at a photo of the defendant. 06/17/2013 RP 96. As he

was driving south on J Street, in front of the St. Joseph's Hospital emergency room entrance, he saw the defendant's vehicle driving west on South 19th in front of him. 06/17/2013 RP 96. O'Rourke turned in behind the vehicle and confirmed that its license plate matched that which he had been provided. 06/17/2013 RP 96. He then called out on the radio and waited for a second officer to respond. 06/17/2013 RP 96.

After the stoplight at 19th and Martin Luther King Jr. Way turned green, the defendant turned north. 06/17/2013 RP 96. By this time, a second unit had joined O'Rourke, and O'Rourke activated his fully-marked patrol vehicle's lights and siren. 06/17/2013 RP 96. The defendant responded by speeding away. 06/17/2013 RP 96-97.

The defendant turned left onto the next street, South 17th, sliding around the corner, and nearly hitting parked vehicles as he did so. 06/17/2013 RP 97. He continued to flee west on South 17th Street. 06/17/2013 RP 97. Officer O'Rourke pursued the defendant, reaching estimated speeds in excess of 60 miles per hour. 06/17/2013 RP 97, 103.

Officers Perry and Hoffner were traveling east on South 17th when they saw the defendant's vehicle driving towards them over a hill on South 17th. 06/17/2013 RP 16.

Officer William Blood was traveling east on South 17th Street in a separate, fully-marked police vehicle, when he also saw the defendant's

vehicle crest a hill at such a high speed that its shocks extended. 06/24/2013 RP 81-82. Blood activated his patrol car's emergency lights and siren. 06/24/2013 RP 83-84.

Officer Perry estimated that the defendant was traveling 60 miles per hour in a residential area with a speed limit of 25 miles per hour. 06/17/2013 RP 17, 31-35. *See* 06/17/2013 RP 103-04.

The defendant made a left turn onto South Fife Street, but lost control, hit the curb, ran over a planting strip, struck the wooden rail of a house porch, and crashed through a fence, before stopping in the backyard of the residence located at 1702 South Fife Street. 06/17/2013 RP 18-20, 27; 06/18/2013 RP 7; 06/24/2013 RP 82, 86.

Officer Blood exited his vehicle to see the defendant jumping fences, running south. 06/24/2013 RP 82. Officers Perry and Hoffner also exited their vehicle, and began clearing the garages and corners of the alley, looking for the defendant. 06/17/2013 RP 22. They then saw him running away from them. 06/17/2013 RP 23-24.

Officer O'Rourke, who was advised via radio that the defendant was running south through the yards between Fife and the alley to the west, pulled up, got out, and started running south down Fife Street. 06/18/2013 RP 7. A man standing on Fife shouted to the officer, advising him of the defendant's location. 06/18/2013 RP 7. O'Rourke then saw the

defendant jump a fence from one yard to the next, going south, and ran after him. 06/18/2013 RP 7-8.

The defendant tried to jump over a four-foot picket fence, but got tangled up in it, and fell backwards to the ground. 06/17/2013 RP 23-24; 06/18/2013 RP 8. Officers O'Rourke, Olson, and Blood, after a brief struggle with the defendant, placed him in handcuffs. 06/17/2013 RP 23-24; 06/18/2013 RP 8-9; 06/24/2013 RP 86.

The defendant was taken to an interview room at the Tacoma Police Department headquarters where Tacoma Police Detective Stuart Hoisington read him the ***Miranda*** warnings and interviewed him. 06/18/2013 RP 148-50.

At trial, the defendant admitted that he possessed a handgun on January 4, 2013, and that he knew he was prohibited by law from doing so. 06/25/2013 RP 29-32, 94. The defendant told Littlefield that the firearm he was holding was a .32-caliber Colt revolver that was loaded with hollow-point cartridges. 06/18/2013 RP 37-38. The defendant denied that the bullets were hollow point. 06/25/2013 RP 97.

He testified that he confronted Littlefield at the school, pointed the gun at her, and asked, "Why would you take my son from me?" 06/25/2013 RP 37; 06/25/2013pm RP 3-4. The defendant told her he

wanted to spend the day with his son and asked her for her car keys, which she declined to give him. 06/25/2013 RP 38.

The defendant admitted that he might have then told her to walk with him, and that she crossed the street with him. 06/25/2013 RP 39. On cross-examination, the defendant testified that Littlefield did not want to come with him. 06/25/2013pm RP 5, 7.

The defendant stated that he put the gun in his coat pocket as they crossed the street, 06/25/2013 RP 40, but that he pulled it out again when they continued to argue about him seeing their son on the other side of the street. 06/25/2013 RP 40; 06/25/2013pm RP 4-5, 9.

The defendant testified that he had pulled back the revolver's hammer while it was in his pocket "to maybe put fear into her." 06/25/2013 RP 41-42. *But see* 06/25/2013pm RP 4. He testified that she said they would talk later, and grabbed at the gun, at which point he pulled back, and the revolver discharged. 06/25/2013 RP 41. The defendant testified that he did not know he had shot Littlefield. 06/25/2013 RP 41. However, he also testified that he had placed his finger on the trigger, 06/25/2013 RP 42-43; 06/25/2013pm RP 10, and that he had heard the gunshot. 06/25/2013 RP 43; 06/25/2013pm RP 10. The defendant testified that after the shot, he put the gun back in his pocket. 06/25/2013 RP 46.

The defendant testified that he and Littlefield then argued for another minute before they began to walk up the sidewalk towards the parking lot. 06/25/2013 RP 44. He testified that, as they were walking, Littlefield told him, "you don't have to do this; just stop; you don't have to do this." 06/25/2013 RP 44-45. When they got to the parking lot, they continued to argue. 06/25/2013 RP 45.

The defendant testified that Littlefield seemed to be injured and asked her if she was ok, to which she responded, "I think I've been shot, hit or shot." 06/25/2013 RP 25. According to his testimony, the defendant then asked to see the wound, realized Littlefield had been shot, and asked "What do we do?" 06/25/2013 RP 45; 06/25/2013pm RP 12. The defendant testified that he told her to give him her keys, and Littlefield threw them to him from the passenger side of the car. 06/25/2013 RP 45-46. He testified that the gun was still in his pocket at the time. 06/25/2013 RP 46.

The defendant testified that once he began driving, he removed the revolver and pulled back its hammer to show Littlefield he had more ammunition. 06/25/2013 RP 47-48; 06/25/2013pm RP 17-18. The defendant testified that he grew angry again in the car and hit the dashboard with the revolver until it discharged again. 06/25/2013 RP 48 - 50. He admitted that the revolver's hammer was back and that his finger

was on the trigger. 06/25/2013 RP 50. Nevertheless, he testified that firing the revolver was an accident. 06/25/2013 RP 50-51.

Given the relatively heavy trigger pull of a revolver, it is "very unlikely" to discharge accidentally. 06/17/2013 RP 29. See 06/17/2013 RP 62; 06/18/2013 RP 146-48; 06/24/2013 RP 9. Aside from weapon maintenance or testing, there is no functional reason for a person to cock the hammer of a revolver unless one intends to fire that revolver. 06/17/2013 RP 29-30, 48-49, 67-68; 06/18/2013 RP 146. A person must exert force on the trigger to fire the revolver, and there is no reason to place one's finger on the trigger unless that person is ready to fire the weapon. 06/24/2013 RP 17.

The defendant testified that after he shot the second time, they stopped at his mother's house, but that Littlefield requested to go to a store to buy cigarettes. 06/25/2013 RP 55; 06/25/2013pm RP 22-23. The defendant testified that he asked her how much money she had on her debit card, and when they got to the store, asked her for her debit card to get the cigarettes. 06/25/2013 RP 55. The defendant testified that Littlefield gave him her ATM card and PIN without being threatened in any way. 06/25/2013 RP 56-57; 06/25/2013pm RP 24. The defendant testified that he withdrew $200, purchased cigarettes, and kept the remaining cash in his pocket. 06/25/2013 RP 58. He wrapped the receipt

around the ATM card and placed it in a cup holder in Littlefield's car. 06/25/2013 RP 58. The defendant testified that he intended to use the remaining money to buy another gun. 06/25/2013 RP 58. The defendant testified that they then drove back to his mother's house, where he got Littlefield pain medication. 06/25/2013 RP 60. According to the defendant's testimony, Littlefield used the restroom and rested on the couch while he made calls about buying a gun. 06/25/2013 RP 61-62. The defendant testified that Littlefield was not free to leave. 06/25/2013pm RP 26.

The defendant testified that they then drove to a pawn shop on Martin Luther King, Jr. Way and 11th to buy a gun, but did not do so. 06/25/2013 RP 70; 06/25/2013pm RP 33. Afterwards, he met with a person he knew, but was again unsuccessful in buying a gun, and re-entered the car crying. 06/25/2013 RP 77; 06/25/2013pm RP 33.

The defendant testified that he then apologized to Littlefield and offered to take her to the hospital. 06/25/2013 RP 77. The defendant testified that, until this time, Littlefield was not free to leave. 06/25/2013pm RP 34.

Littlefield accepted his offer and he drove her to the hospital. 06/25/2013 RP 78. When she asked him if he was just going to "dump" her off, he offered to drive back to his mother's house, so that she could

drive herself to the hospital and keep possession of her car. 06/25/2013 RP 79. According to the defendant's testimony, Littlefield agreed to this, and he returned her money to her when she dropped him off. 06/25/2013 RP 80-81.

The defendant denied that he saw the police emergency lights. 06/25/2013pm RP 36. He also denied that he threatened to kill Littlefield, her mother, father, or their son. 06/25/2013 RP 67-68; 06/25/2013pm RP 30-31.

During his interview with Detective Hoisington, the defendant stated that he went to Bates Technical College at about 6:45 a.m. to speak to Littlefield about their son. 06/18/2013 RP 151-52. He said he was frustrated with the custody arrangements, and that he brought a revolver with him. 06/18/2013 RP 152-53. The defendant stated that he found Littlefield and that they argued outside the school. 06/18/2013 RP 153. The defendant said he was shouting and had the revolver in his hand at the time. 06/18/2013 RP 153. In fact, the defendant stated that he pulled the revolver's hammer back. 06/18/2013 RP 153. The defendant said that Littlefield tried to grab the weapon as he approached her with it, and that the weapon discharged. 06/18/2013 RP 153-54. Littlefield was struck by the bullet. 06/18/2013 RP 154.

The defendant said that, after Littlefield was shot, he took her to her car, which was parked in a student parking lot about half a block away. 06/18/2013 RP 154. The defendant continued to point the revolver at Littlefield as they walked to the parking lot. 06/18/2013 RP 154. The defendant said that he and Littlefield "continued to argue for a few moments," before he instructed her, with the weapon still in his hand, to allow him to use her car to drive to his mother's house. 06/18/2013 RP 154.

The defendant said that, as they were driving, they were shouting at one another. 06/18/2013 RP 155. He said that, in anger, he hit the weapon on the vehicle's dashboard, and that the weapon discharged accidentally. 06/18/2013 RP 155. The bullet struck the passenger's side window. 06/18/2013 RP 155. The defendant stated the revolver's hammer had been pulled back before the weapon discharged. 06/18/2013 RP 155.

The defendant said that, when they arrived at his mother's residence, they went inside and that he gave Littlefield some pain medication. 06/18/2013 RP 156. The defendant stated that he wanted to buy his own weapon, he took Littlefield to a convenience store ATM to use her ATM card to get cash for him to do so. 06/18/2013 RP 157. He said they then drove to a pawn shop on 11th and Martin Luther King, Jr. Way to buy the firearm, but that Littlefield talked him out of buying it.

06/18/2013 RP 157. The defendant then went to another convenience store to buy Littlefield a Gatorade. 06/18/2013 RP 157.

The defendant said that he then drove her to St. Joseph's Hospital, but that Littlefield did not want to get out and leave her car with him. 06/18/2013 RP 158. Instead, they drove back to his mother's house, at which time he got out of the car, and Littlefield left in the car. 06/18/2013 RP 158.

The defendant said that he then got into his own vehicle and that he went back to the area of St. Joseph's Hospital when he saw a police vehicle behind him. 06/18/2013 RP 158-59. The defendant stated that he saw the officer activate the patrol car's lights and that he tried to drive away. 06/18/2013 RP 158. The defendant said he knew the police officer wanted him to stop, but that he was scared of what would happen, and continued to drive away. 06/18/2013 RP 159. He couldn't remember his exact route, but told the detective he was trying to get away at a high speed. 06/18/2013 RP 161. He said that when he drove across the intersection with Sprague Avenue, he saw the police vehicle back off a bit, and he then threw the weapon from his vehicle. 06/18/2013 RP 161-62. He said that, after he crashed, he ran on foot, but officers caught up to him. 06/18/2013 RP 162.

The defendant submitted to a brief, approximately five-minute recorded interview. 06/18/2013 RP 165-67.

Officers tried, but were unable, to locate the revolver in the area in which defendant said he threw it. 06/24/2013 RP 4-5. Officers also searched the arrest area, but could not locate a firearm or anything else of evidentiary value. 06/18/2013 RP 10-11, 13-14.

Tacoma Police Crime Scene Technician Tiffany Ryan was dispatched to St. Joseph's Hospital to document Littlefield's injuries. 06/17/2013 RP 73. She took photographs of Littlefield's face and her gunshot wound, her clothing, and the damage done to her vehicle. 06/17/2013 RP 74, 81-86; 06/18/2013 RP 73-74. Ryan took the clothing that Littlefield had been wearing at the time of the shooting. 06/17/2013 RP 76; 06/18/2013 RP 73. She testified that Littlefield's top had blood on it and a hole in it, corresponding to the area of her injury. 06/17/2013 RP 76, 80-81, 83. Ryan also visited the scene where Defendant's vehicle collided with a residence, and took photos of it. 06/17/2013 RP 86-87.

Mark Strohbusch was a registered nurse working in the emergency department of St. Joseph's Hospital on January 4, 2013 at about 1:00 in the afternoon, when Littlefield walked into the hospital for treatment of a gunshot wound to the abdomen. 06/24/2013 RP 42. Strohbusch had

Littlefield lift her shirt up to the area of the wound, and observed a small hole right above her belly button. 06/24/2013 RP 45.

Strohbusch testified that Littlefield's treatment included an initial assessment, cleaning and irrigation of the gunshot wound, an IV, blood analysis, an x-ray and CAT scan, social-worker counseling, and administration of morphine. 06/24/2013 RP 46-48. Imaging showed that the bullet missed all of Littlefield's major organs, and remained in the subcutaneous fat layer. 06/24/2013 RP 47, 55. Medical staff decided not to remove it. 06/24/2013 RP 47. Strohbusch testified that a gunshot wound to the abdomen is a potentially life-threatening injury. 06/24/2013 RP 39.

Pierce County Sheriff's Deputy Don Carn was the Pierce County Jail safety deputy on January 7, 2013, in charge of, among other things, the inmate telephone system. 06/24/2013 RP 65. Carn testified that all calls made by inmates, aside from those made to their attorneys, are recorded. 06/24/2013 RP 71. Carn retrieved recordings of two of the defendant's calls, placed them on a CD, and printed a record summary report which included a call log, and billing name and address information for those calls. 06/24/2013 RP 72-73. The calls were made on January 7, 2013 at 1719 hours and January 8, 2013 at 1317 hours. 06/24/2013 RP 73.

The defendant testified that during one of these calls, he told his mother that she needed to tell the prosecutor that the shooting was an

accident. 06/25/2013pm RP 39. He also testified that he told his mother during one of these calls "that sometimes God wants you to be physical and you've got to put your hands on someone to stop them." 06/25/2013pm RP 40.

Littlefield testified that she later received text messages from the defendant's sister that seemed to be meant to influence her decision as to whether to testify. 06/18/2013 RP 81-85.

C. ARGUMENT.

1. THE TRIAL COURT'S SENTENCE ON COUNTS I AND VI EXCEEDED THE 120-MONTH STAUTORY MAXIMUM BECAUSE DEFENDANT WAS SENTENCED TO 36 MONTHS IN COMMUNITY CUSTODY IN ADDITION TO 120 MONTHS IN TOTAL CONFINEMENT ON THOSE COUNTS.

RCW 9A.20.021 provides that "for a Class B felony," no person "shall be punished by confinement... exceeding... (b) a term of ten years[.]" This "statute is not violated unless the total confinement ordered for any one offense exceeds 120 months." ***State v. Thomas***, 113 Wn. App. 755, 759, 54 P.3d 719 (2002).

> The punishment imposed for an offense cannot exceed the maximum term set by the Legislature. When several offenses are sentenced together, the statutory maximum is applied to each offense separately. Thus, the total confinement imposed for each offense, including any

> enhancement for that offense, must not exceed the maximum. The fact that base sentences are served concurrently, while firearm enhancements are served consecutively, does not affect this determination.

State v. Thomas, 113 Wn. App. 755, 757, 54 P.3d 719 (2002).

Moreover, the term of community custody associated with an offense "shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021." RCW 9.94A.701(9).

When a sentencing court fails to reduce the term of community custody to avoid a sentence in excess of the statutory maximum, the remedy is to "remand to the trial court to either amend the community custody term or resentence [the defendant]... consistent with RCW 9.94A.701(9)." ***State v. Boyd***, 174 Wn.2d 470, 275 P.3d 321 (2012).

In the present case, the defendant was sentenced on second degree assault, a class B felony, in both counts I and VI. CP 199-217; RCW 9A.36.021(2). On both of these counts, the court sentenced defendant to 84 months in total confinement for the assault conviction plus 36 months for the firearm sentence enhancement for a total of 120 months, *Id.*, a term equivalent to the statutory maximum. RCW 9A.20.021(1)(b).

However, because the court also imposed an additional term of 36 months in community custody under RCW 9A.94A.701(1)(b) on counts I and VI, its sentence on those counts exceeded the statutory maximum.

While not argued by defendant and rendered moot by the operation of RCW 9.94A.701(9), the sentencing court also appears to have erred by imposing 36 months of community custody under RCW 9.94A.701(1). That subsection applies only to sex and serious violent offences, and second degree assault is neither. *Compare* RCW 9.94A.701(1) *with* RCW 9.94A.030(45)-(46). Rather, because second degree assault is a "violent offence," under RCW 9.94A.030(54)(viii), the court was required to impose 18 months under RCW 9.94A.701(2), and then reduce that term to zero under RCW 9.94A.701(9) and RCW 9A.20.021(1)(b).

Because the trial court failed to do so, this Court should remand so that the trial court may reduce the community custody term imposed on counts I and VI from 36 months to zero, consistent with RCW 9.94A.701(9) and RCW 9A.20.021(1)(b). *See* ***Boyd***, 174 Wn.2d at 473.

The defendant's convictions and sentences should otherwise be affirmed.

2. THE COURT PROPERLY FOUND THAT NEITHER DEFENDANT'S SECOND DEGREE ASSAULT AND FIRST DEGREE ROBBERY CONVICTIONS NOR HIS FIRST DEGREE ROBBERY AND FIRST DEGREE KIDNAPPING CONVICTIONS MERGED BECAUSE THESE CRIMES WERE BASED ON SEPARATE CRIMINAL ACTS, SEPARATED IN TIME AND WITH SEPARATE PURPOSES.

The double jeopardy clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. It applies to the states through the due process clause of the Fourteenth Amendment. ***State v. Wright***, 165 Wn.2d 783, 801, 203 P.3d 1027 (2009) (*citing* ***Benton v. Maryland***, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)).

The Washington State Constitution similarly mandates that no person shall "be twice put in jeopardy for the same offense." Wn. Const. Art. I, Sec. 9.

"'Washington's double jeopardy clause is coextensive with the federal double jeopardy clause and 'is given the same interpretation the Supreme Court gives to the Fifth Amendment.'" ***State v. Turner***, 169 Wn.2d 448, 454, 238 P.3d 461 (2010); ***State v. Adel***, 136 Wn.2d 629, 632, 632, 965 P.2d 1072 (1998) (*citing* ***State v. Gocken***, 127 Wn.2d 95, 107,

896 P.2d 1267 (1995)); ***State v. Knight***, 176 Wn. App. 936, 309 P.3d 776 (2013).

> Both clauses have been interpreted to protect against the same triumvirate of constitutional evils: "being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after conviction, and (3) ***punished multiple times for the same offense***.

Turner, 169 Wn.2d at 454 (emphasis added). *See* ***Whalen v. United States***, 445 U.S. 684, 688, 100 S. Ct. 1432, 1436, 63 L. Ed. 2d 715 (1980).

"If a defendant's acts support charges under two statutes, [appellate courts] ask whether the legislature intended to authorize multiple punishments for the crimes in question." ***State v. Knight***, 176 Wn. App. 936, 951, 309 P.3d 776 (2013).

"In ***State v. Calle***[, 125 Wn.2d 769, 776, 888 P.2d 155 (1995)], our Supreme Court set forth a three-part test for double jeopardy claims:

> First, [courts] search for express or implicit legislative intent to punish the crimes separately; if this intent is clear, [courts] look no further. Second, if there is no clear statement of legislative intent, [courts] may apply the "same evidence" ***Blockburger***[1] test, which asks if the crimes are the same in law and in fact. ***Third, [courts] may use the merger doctrine to discern legislative intent where the degree of one offense is elevated by conduct constituting a separate offense. But even if two convictions appear to merge on an abstract level, the State***

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

> ***may punish them separately if each conviction has an independent purpose or effect.***

Knight, 176 Wn. App. at 952 (citations omitted) (emphasis added).

Hence, "[m]erger is a doctrine of statutory interpretation used to determine whether the legislature intended to impose multiple punishments for a single act that violates several statutory provisions." ***State v. Davis***, 177 Wn. App. 454, 460, 311 P.3d 1278 (2013) (*citing* ***In re Personal Restraint of Fletcher***, 113 Wn.2d 42, 50-51, 776 P.2d 114 (1989)).

> Under the merger doctrine, when a criminal act forbidden under one statute elevates the degree of a crime under another statute, the courts presume that the legislature intended to punish both acts through a single conviction for the greater crime. [***State v.***]***Freeman***, 153 Wash.2d at 772–74, 108 P.3d 753 (when assault elevates robbery to first degree, generally the two crimes constitute the same offense for double jeopardy purposes). The ***Freeman*** Court did not, however, adopt a per se rule; instead, it underscored the need for a reviewing court take a "hard look at each case" based on its facts and charged crimes. ***Freeman***, 153 Wash.2d at 774, 108 P.3d 753.

Knight, 176 Wn. App. at 952-53.

Indeed, where the crimes of conviction are "based on separate criminal acts, separated in time and with separate purposes," the first criminal act is not essential in elevating the degree of the other, and the crimes do not merge. ***Knight***, 176 Wn. App. at 953-56.

"Double jeopardy is a question of law, which [appellate courts] review de novo." ***State v. Knight***, 176 Wn. App. 936, 952, 309 P.3d 776 (2013). Likewise, "[m]erger issues involve questions of law reviewed de novo." ***State v. Davis***, 177 Wn. App. 454, 460, 311 P.3d 1278 (2013) (*citing* ***State v. Freeman***, 153 Wn.2d 765, 770, 108 P.3d 753 (2005) (*citing* ***State v. Johnston***, 100 Wn. App. 126, 137, 996 P.2d 629 (2000)).

Here, the defendant makes two arguments. First, he argues, based on ***State v. Freeman***, 153 Wn.2d 765,108 P.3d 753 (2005), and ***State v. Kier***, 164 Wn.2d 798, 194 P.3d 212 (2008), that "the two counts of second degree assault merged with the count for first degree robbery," because he contends these "assaults provided the force necessary to elevate the robbery to first degree." Brief of Appellant (BOA), p. 13-14. The law and record show otherwise.

Legally, in both ***Freeman*** and ***Kier***, "to prove first degree robbery as [there] charged and proved by the State, the State had to prove the defendants committed an assault in furtherance of the robbery," such that, "without the conduct amounting to assault, each [defendant] would be guilty of only second degree robbery." ***Freeman***, 153 Wn.2d at 778; ***Kier***, 164 Wn.2d at 804. That is not the case here.

Here, neither assault was necessary to elevate the robbery to first degree. *See* CP 14-18. While a person may commit first degree robbery by "[i]nflicting bodily injury" consistent with second degree assault, RCW 9A.56.200(1)(a)(iii), RCW 9A.36.021(1)(a), the defendant in this case was neither charged nor convicted of doing so. CP 14-18, 133. Rather, the jury convicted him of first degree robbery "as charged" in the second amended information, CP 133, which charged him with first degree robbery only because "he was armed with a deadly weapon, to wit, a revolver, contrary to RCW 9A.56.200(1)(a)(i) and 9A.56.200(1)(a)(i)." CP 14-18.

Thus, the defendant's actual use of that revolver, for which he was convicted of the two counts of second degree assault, was irrelevant to his first degree robbery conviction. Unlike in ***Freeman***, 153 Wn.2d 765, the second degree assaults, which in this case required use of the revolver, did not elevate the robbery to first degree. The simple possession of the revolver did.

Factually, the second degree assaults and the robbery at issue here were "based on separate criminal acts, separated in time and with separate purposes." ***Knight***, 176 Wn. App. at 953-56. While the defendant may have been charged and convicted of robbery for taking Littlefield's car, her cellular telephone, and/or her ATM card, and money, the State elected,

during its closing argument, to base the robbery count on the defendant's taking of Littlefield's ATM card and money. 06/26/2013 RP 25.

However, this robbery occurred well after both assaults at issue here were completed. It occurred after those assaults, after the defendant then drove Littlefield back to his mother's residence, after he engaged in an argument about custody of their son, 06/18/2013 RP 39-41,after he took her cell phone, 06/18/2013 RP 46-47, after he got her pain medication, 06/18/2013 RP 41, after called people about buying a shotgun, 06/18/2013 RP 44, and after he drove her to a convenience store. 06/18/2013 RP 47. Hence, the second degree assaults and the first degree robbery were "separate criminal acts, separated in time." ***Knight***, 176 Wn. App. at 953-56.

They were also committed "with separate purposes." *Id.* While the defendant committed the assaults while arguing with Littlefield about the custody of their child, he committed the robbery because he wanted to use the money obtained thereby to buy a shotgun to shoot Littlefield's mother. 06/18/2013 RP 43; 06/25/2013 RP 58.

Because, the second degree assault and robbery convictions are "based on separate criminal acts, separated in time and with separate purposes," ***Knight***, 176 Wn. App. at 953-56, they do not merge.

The defendant also argues that the count II first degree kidnapping conviction and the count III first degree robbery conviction should have merged because "[t]he restraint [of the kidnapping] was ultimately for the purpose of robbing Ms. Littlefield." BOA, p. 15-16. The law and record require otherwise.

Legally, while a robbery may provide proof of the "intent to inflict bodily injury" necessary to elevate a kidnapping to first degree, RCW 9A.40.020(1)(c), CP 14-18, 52-119, it did not do so in this case. CP 128. Here, the jury returned a special verdict indicating that its finding of guilt of first degree kidnapping was based only on its finding that the defendant abducted Littlefield "with intent to inflict extreme mental distress," and not on a finding that he intended to inflict the bodily injury that may be concurrent with a robbery. CP 128. Hence, the degree of kidnapping was not elevated by the conduct that constituted the first degree robbery. Because "the degree of one offense" was not "elevated by conduct constituting a separate offense," ***Knight***, 176 Wn. App. at 952, the first degree kidnapping conviction and the first degree robbery conviction do not merge.

Factually, the first degree kidnapping and first degree robbery convictions are "based on separate criminal acts, separated in time and with separate purposes." ***Knight***, 176 Wn. App. at 953-56.

The kidnapping began when the defendant confronted Littlefield at her school with a revolver and made her accompany him across the street, in her car to his mother's house, to at least one convenience store, to an alleyway, and back to his mother's house. *See e.g.,* 06/18/2013 RP 24-50; 06/25/2013pm RP 5, 7, 26. However, the defendant had effectively kidnapped Littlefield when they left the school together. 06/25/2013pm RP 5, 7.

The robbery did not occur until much later, after they had arrived at a convenience store and the defendant demanded Littlefield's ATM card and PIN. 06/18/2013 RP 24-48. Hence, the first degree kidnapping and first degree robbery convictions are "based on separate criminal acts, separated in time." ***Knight***, 176 Wn. App. at 953-56.

They also had separate purposes. Contrary to the defendant's present contention, he did not kidnap Littlefield for the purpose of robbing her of her ATM card or money. Indeed, he testified that his ultimate objective in confronting her that day, and in making her accompany him, was to spend the day with his son. 06/25/2013 RP 37-38; 06/25/2013pm

RP 3-4. The defendant had a separate purpose for robbing her. Littlefield testified that the defendant wanted her money so that he could buy a shotgun to shoot Littlefield's mother. 06/18/2013 RP 42-43. The defendant also testified that he intended to use most of the money he withdrew from Littlefield's account to buy a gun. 06/25/2013 RP 58. Hence, the first degree kidnapping and first degree robbery convictions had separate purposes.

Because, the second degree assault and robbery convictions are "based on separate criminal acts, separated in time and with separate purposes," ***Knight***, 176 Wn. App. at 953-56, they do not merge.

Therefore, the trial court properly found that neither Defendant's second degree assault and first degree robbery convictions nor his first degree robbery and first degree kidnapping convictions merged, and aside from the community custody provisions pertaining to counts I and VI, the defendant's convictions and sentences should be affirmed.

3. DEFENDANT'S ASSAULT, ROBBERY, AND KIDNAPPING CONVICTIONS WERE SEPARATE AND DISTINCT RATHER THAN THE SAME CRIMINAL CONDUCT UNDER RCW 9.94A.589(1)(a), AND HENCE, DEFENDANT CANNOT SHOW INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE CANNOT SHOW HIS TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT FOR FAILING TO ARGUE OTHERWISE.

"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).

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)).

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." ***Yarbrough***, 151 Wn. App. at 90. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Cienfuegos***, 144 Wn.2d at 229.

In the present case, the defendant argues that his trial counsel rendered ineffective assistance by failing to argue that the assault, robbery, and kidnapping convictions constituted the same criminal conduct. BOA, p. 17-22. The record shows otherwise.

At sentencing, a defendant's current offenses must be counted separately in calculating his or her offender score unless the trial court enters a finding that they "encompass the same criminal conduct." RCW 9.94A.589(1)(a).

"[S]ame criminal conduct" means "two or more crimes that require [1] the same criminal intent, [2] are committed at the same time and place, and [3] involve the same victim." RCW 9.94A.589(1)(a); ***State v. Walker***, 143 Wn. App. 880, 890, 181 P.3d 31 (2008); ***State v. Tili***, 139 Wn.2d 107, 985 P.2d 365 (1999).

The Legislature intended the phrase "same criminal conduct" to be construed narrowly, ***State v. Saunders***, 120 Wn. App. 800, 824, 86 P.3d 232 (2004); ***State v. Flake***, 76 Wn. App. 174, 180, 883 P.2d 341 (1994),

and the absence of any one of these criteria prevents a finding of same criminal conduct. ***Walker***, 143 Wn. App. at 890; ***State v. Haddock***, 141 Wn.2d 103, 110, 3 P.3d 733 (2000); ***State v. Vike***, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

"Intent in this context means the defendant's objective criminal purpose in committing the crime." ***Walker***, 143 Wn. App. at 891. To determine whether two or more criminal offenses involve the same criminal intent, the Washington Supreme Court established the objective criminal intent test, which requires a court to focus on "the extent to which a defendant's criminal intent, as objectively viewed, changed from one crime to the next." ***State v. Dunaway***, 109 Wn.2d 207, 214-15, 743 P.2d 1237 (1987); ***State v. Lessley***, 118 Wn.2d 773, 777-778, 827 P.2d 996 (1992). The Court also "consider[s] whether one crime furthered the other." ***State v. Grantham***, 84 Wn. App. 854, 858, 932 P.2d 657 (1997).

Thus, this Court has held that "evidence of a gap in time between" two or more crimes together with "the activities and communications that took place during that gap in time, and the different methods of committing the [crimes]" can be "sufficient to support a finding that the crimes did not occur at the same time and that [the defendant] formed a new criminal intent when he committed the second [or subsequent crime]." ***State v. Grantham***, 84 Wn. App. 854, 859, 932 P.2d 657 (1997).

"[D]eterminations of same criminal conduct are reviewed for abuse of discretion or misapplication of law." ***State v. Graciano***, 176 Wn.2d 531,535-38, 295 P.3d 219 (2013); ***State v. Maxfield***, 125 Wn.2d 378, 402, 866 P.2d 123 (1994) ("[t]he trial court's determination whether two offenses require the same criminal intent is reviewed by this court for abuse of discretion or misapplication of the law").

In this case, the assaults, robbery, and kidnapping, while committed against the same victim, were not committed at the same time and place, and were not committed with the same criminal intent.

The assaults, kidnapping, and robbery all occurred at different places. The initial kidnapping occurred at the door of Bates Technical College, the first assault occurred across the street therefrom, the second assault occurred on the road somewhere between the parking lot and the defendant's mother's residence, and the robbery occurred at a convenience store.

None of these crimes were committed at the same time. Each occurred at a different time during the defendant's nearly six-hour interaction with Littlefield. *See* 06/18/2013 RP 14-139.

Nor can these crimes be considered parts of an uninterrupted incident. *See e.g.*, ***State v. Porter***, 133 Wn.2d 177, 185-86, 942 P.2d 974 (1997).

Between the initial kidnapping, accomplished by pointing the revolver at Littlefield, and the first assault, accomplished by shooting her with that revolver, the defendant placed the revolver in his pocket, walked across the street with Littlefield, engaged in conversation with her, pulled back the revolver's hammer, again withdrew it from his pocket, placed his finger on the trigger, and only then did he fire that weapon, thereby assaulting Littlefield for the first time. 06/25/2013 RP 37, 40-42; 06/25/2013pm RP 3-9; 06/18/2013 RP 23-29, 116.

Between this first assault and the second in the car, the defendant put the gun back in his pocket, 06/25/2013 RP 46, argued with Littlefield for another minute, walked up the sidewalk to the parking lot with her, 06/25/2013 RP 44, continued to argue in the parking lot, 06/25/2013 RP 45, inspected her wound, 06/25/2013 RP 45, 06/25/2013pm RP 12, got in Littlefield's car with her, began driving, 06/25/2013 RP 45-46, removed the revolver, pulled back its hammer, 06/25/2013 RP 47-48, and hit the revolver on the dashboard before again firing at Littlefield, and thereby committing the second assault. 06/25/2013 RP 48 -50.

Finally, between this second assault and the robbery, the defendant drove to his mother's house, 06/25/2013 RP 55, 06/25/2013pm RP 22-23, engaged in another argument with Littlefield about their son, 06/18/2013 RP 39-41, took her cell phone and looked through its contents, 06/18/2013

RP 46-47, called his mother inside the house and asked her for pain pills, retrieved the pills and brought them to Littlefield to take, 06/18/2013 RP 41, asked Littlefield how much money she had, 06/18/2013 RP 42, called people about buying a shotgun, 06/18/2013 RP 44, drove to a convenience store, and only them committed the robbery by telling Littlefield to give him her ATM card and PIN. 06/18/2013 RP 47.

Thus, these crimes cannot be considered parts of an uninterrupted incident, and were, in fact, not "committed at the same time" within the meaning of RCW 9.94A.589(1)(a). *See* ***Porter***, 133 Wn.2d at 185-86.

Because the assaults, kidnapping, and robbery were not "committed at the same time and place" as required by RCW 9.94A.589(1)(a), they could not have been the same criminal conduct. *See* ***Walker***, 143 Wn. App. at 890, RCW 9.94A.589(1)(a).

Therefore, trial counsel's performance cannot be considered deficient for failing to argue otherwise.

However, even were these times and locations considered to be legally the same, the defendant formed a new criminal intent between each of the crimes at issue.

Specifically, his intent to engage in kidnapping was complete before he crossed the street from Bates Technical College, *see, e.g.*, 06/25/2013pm RP 5, 7, and certainly before he committed the first

charged assault. Indeed, between the commission of these crimes, the defendant put the gun in his pocket, walked across the street with Littlefield, engaged in argument with her, pulled back the revolver's hammer, again withdrew it from his pocket, and placed his finger on the trigger. 06/25/2013 RP 37, 40-42; 06/25/2013pm RP 3-9; 06/18/2013 RP 23-29, 116. Thus, here, as in ***Grantham***, the defendant, after completing the first crime, "had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act." ***Grantham***, 84 Wn. App. at 859. When, as this Court held in ***Grantham***, the defendant chose the latter he "form[ed] a new criminal intent to commit the second act," *Id.*, i.e., the first assault.

The defendant also completed the first assault before commencing the second, and between those assaults, had the presence of mind to put the gun back in his pocket, 06/25/2013 RP 46, argue with Littlefield for another minute, walk up the sidewalk to the parking lot with her, 06/25/2013 RP 44, argue again in the parking lot, 06/25/2013 RP 45, inspect her wound from the first assault, 06/25/2013 RP 45, 06/25/2013pm RP 12, get in Littlefield's car with her, begin driving, 06/25/2013 RP 45-46, remove the revolver, pull back its hammer, 06/25/2013 RP 47-48, and hit the revolver on the dashboard repeatedly. 06/25/2013 RP 48 -50. Thus, the defendant again "had the time and opportunity to pause, reflect, and

either cease his criminal activity or proceed to commit a further criminal act." ***Grantham***, 84 Wn. App. at 859. Because he chose the latter, he formed a new criminal intent to commit the second assault. *See Id.*

Finally, it is clear the defendant completed this second assault before commencing the robbery, and that between these crimes, he drove to his mother's house, 06/25/2013 RP 55, 06/25/2013pm RP 22-23, engaged in another argument with Littlefield about their son, 06/18/2013 RP 39-41, took her cell phone and searched its contents, 06/18/2013 RP 46-47, called his mother inside the house and asked her for pain pills, retrieved the pills and brought them to Littlefield to take, 06/18/2013 RP 41, asked Littlefield how much money she had, 06/18/2013 RP 42, called people about buying a shotgun, 06/18/2013 RP 44, and drove to a convenience store. 06/18/2013 RP 47. Hence, the defendant again "had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act." ***Grantham***, 84 Wn. App. at 859. When he chose the latter, he formed a new criminal intent to commit the robbery. *See Id.*

Thus, the assaults, kidnapping, and robbery involved different criminal intents and could not have been the same criminal conduct under RCW 9.94A.589(1)(a).

Therefore, trial counsel's performance cannot be considered deficient for failing to argue otherwise, *See e.g.,* ***State v. Cienfuegos***, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001), and the defendant's convictions and sentences should be affirmed except for the community custody terms pertaining to the assault convictions.

D. CONCLUSION.

The trial court's sentence on counts I and VI exceeded the 120-month statutory maximum because defendant was sentenced to 36 months in community custody in addition to 120 months in total confinement on those counts.

However, the trial court properly found that neither Defendant's second degree assault and first degree robbery convictions nor his first degree robbery and first degree kidnapping convictions merged because these crimes were based on separate criminal acts, separated in time and with separate purposes.

The sentencing court also properly found that defendant's assault, robbery, and kidnapping convictions were separate and distinct rather than the same criminal conduct under RCW 9.94A.589(1)(a), and hence, defendant failed to show ineffective assistance for his counsel's failure to argue otherwise.

Therefore, this case should be remanded for re-sentencing on counts I and VI so that the trial court may reduce the community custody terms pertaining to those counts to zero.

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

DATED: April 28, 2014.

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.

4/28/14
Date Signature

PIERCE COUNTY PROSECUTOR

April 28, 2014 - 2:51 PM

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