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A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Calhoun's unequivocal request to proceed pro se.

2. The trial court erred by refusing to grant a RCW 10.77 motion for a competency evaluation where the defendant exhibited behavior inconsistent with competency and where defense counsel repeatedly stated his belief that Mr. Calhoun could not assist with his defense.

3. The trial court erred by failing to suppress the show up identification.

4. Mr. Calhoun's assault convictions should have merged with his robbery conviction because they contain the same criminal conduct forming the basis of his robbery conviction.

5. Appellant assigns error to findings of fact/conclusion of law (order) number 4.

6. The trial Court erred by giving instruction 7 to the jury.

7. Appellant's offender score was improperly calculated using the assault conviction which should not have been counted separately.

Issues Presented on Appeal

1. Did the trial court err by refusing to grant Mr. Calhoun's unequivocal request to proceed pro se?

2. Did the trial court err by refusing to grant a RCW 10.77 motion for a competency evaluation where the defendant exhibited behavior inconsistent with competency and where defense counsel repeatedly stated his belief that Mr. Calhoun could not assist with his defense.

3. Did the trial court err by failing to suppress the show-up identification.

4. Did the trial court err by permitting Mr. Calhoun to be convicted of assault and robbery which contained the same criminal conduct?

5. Did jury instruction 7 relieve the state of its burden of proving each essential element of the crimes charged?

6. Was Appellant's offender score improperly calculated using the assault convictions which should not have been counted separately?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Abdul K. Calhoun was charged by amended information with one count of robbery in the first degree in count one contrary to RCW 9A.56.190; one count of assault in the second degree in count two contrary to RCW 9A.36.021, one count of assault in the second degree contrary to RCW 9A.36.021 in count three, and one count of burglary in the first degree contrary to RCW 9A.52.021 in count four. CP 4-7. The trial court denied Mr.

Calhoun's motion to suppress a show-up identification. Supp CP (Order Regarding Pre-Trial Motions 5-1-06).

Mr. Calhoun fired his first two attorneys. Supp CP (letter from defendant 8-22-05, 11-8-2005). Mr. Calhoun objected to a continuance to provide his third attorney Mr. Shoenberger time to prepare. CP 28. Mr. Calhoun objected to 9 orders of continuance beginning August 22, 2005 through April 18, 2006. CP 1; 19; 24; 26; 27; 28; 34; 41; 42. On April 25, 2006 Mr. Calhoun filed a petition for dismissal for violation of his speedy trial rights. (Petition 4-25-06).

Or March 27, 2005 Mr. Calhoun filed a motion for ineffective assistance of counsel. Supp CP (Affidavit of Termination Ineffective Assistance of Counsel 3-27-06). On April 5, 2005, Mr. Calhoun again filed a motion regarding ineffective assistance of counsel. Therein, he expressly waived his right to counsel and asserted his constitutional right to proceed pro se. CP 35-40. (See attached as Exhibit A).

Mr. Calhoun moved to suppress the show-up identification. The Court denied the motion and issued a written order as follows: "Defendant Calhoun and Frazier failed to establish that the show-up identification was suggestive under the totality of the evidence, there was not a substantial likelihood of irreparable misidentification considering factors listed in State v. Shea, 85

Wn. App. 56, 930 P.2d 1232 (1997).”

Following trial and verdicts of guilty as charged on all counts, Mr. Calhoun moved for an arrest of judgment based on a violation of his right to effective assistance of counsel. The court denied the motion. CP 77-80; 123-27. This timely appeal follows. CP 145.

Competency Hearing

Mr. Calhoun’s attorney formally requested a competency hearing due to his concerns that Mr. Calhoun was not competent to assist with his own defense. RP 33. Counsel for Mr. Calhoun informed the court that Mr. Calhoun had been unable to assist with his defense when working with his two prior attorneys and an investigator. Mr. Calhoun also insisted on following the UCC and using interrogatories. Mr. Calhoun demanded to know why the prosecutor has a “perfected security interest in the body of Mr. Calhoun and why the prosecutor believes that Mr. Calhoun is a vessel.” RP 35. Mr. Calhoun did not appear able to separate the concept of civil law and criminal law and seemed unable to make logical connections between the information presented to him and his best interests at trial. RP 33-36.

Counsel also informed the court that Mr. Calhoun had taken “Sherm” and likely suffered brain damage as a result. RP 35-36. In sum, counsel informed that court that “there are serious issues that affect my ability to

communicate with this man about his defense”. Id. Counsel also informed the court that Mr. Calhoun would not talk to him because he believed counsel breached his confidence by bringing the competency motion. Id. Counsel stated that in general Mr. Calhoun believes that he is working against Mr. Calhoun’s interests. RP 36.

When counsel first met Mr. Calhoun he was in court addressing Judge Worswick in the third person saying, “I am Abdul Khalif Calhoun representing third party intervenor on behalf of Mr. Abdul Calhoun who demands that the accused be present at all proceedings.” RP 34-45.

The Court allowed Mary Tudor a jail mental health counselor to testify regarding a report of Penny Hobson another Mental Health Professional who met with Mr. Calhoun. Neither Ms. Tudor nor Ms. Hobson is qualified under RCW 10.77 to conduct a competency evaluation. CP 39, 41. Ms. Tudor expressly stated that Jail Mental Health Professionals “do not do competency evaluations”. RP 39, 41. Ms. Tudor stated that Ms. Hobson spent 30-45 minutes with Mr. Calhoun and did not observe any psychotic symptoms, but that he had “personality issues” and anxiety. RP 40.

After Ms. Tudor testified, the court asked Mr. Calhoun if he understood that “his role as the judge is that I’m not on anybody’s side in this case? My job is to make sure that you and Mr. Frazier and Ms. Banks get a

fair trial.” Mr. Calhoun responded by stating, “Findings of Fact and Conclusions of Law, yes, sir.” RP 42-44. Mr. Calhoun was able to tell the court that the prosecutor’s role was to present evidence to the jury to find guilt “by deduction and induction”. RP 43. When asked by the trial court, Mr. Calhoun stated that it was his attorney’s job to assist with his defense. RP 43-44. The Court ruled that Mr. Calhoun was competent to stand trial under State v. Lord, because he “understands the nature of the charges and is capable of assisting in his defense.” RP 44. The judge denied the request for a competency evaluation. RP 45.

The judge tried to explain to Mr. Calhoun that the UCC did not apply in criminal cases. RP 46. Thereafter, Mr. Calhoun asserted that his attorney told him that the constitution stops at the Washington-Idaho border and that the State of Washington was going to use the constitution to burn him at the stake. RP 48-49. Counsel for Co-defendant Banks moved for severance stating his belief that Mr. Calhoun was not competent. RP 50.

During trial, near the end of the cross examination of witness Isha Isaac, Mr. Calhoun burst out in court by telling the court that he filed a bar complaint and has a right to waive..... (counsel- Mr. Calhoun was unable to finish because the judge cut him off). Mr. Calhoun then fired his attorney in front of the jury stating “he has denied my constitutional rights”. RP 276. The

co-defendant's motion for a mistrial based on Mr. Calhoun's outburst was denied. RP 279-80.

After the testimony of Officer Eric Bell, Mr. Calhoun filed a pleading indicating that the witnesses lied and perjured themselves. RP 423. Mr. Calhoun also filed an Order of Disqualification of Judge and an Affidavit of Prejudice and asserted ineffective assistance of counsel. RP 425. After the state rested, Mr. Calhoun told the judge "I accuse you of treason". . . . "you are committing treason" RP 454-55. The court denied Mr. Calhoun's motion for disqualification of judge as "untimely". RP 455.

Defense counsel called Mr. Calhoun to testify. When asked if he would raise his right hand, he testified: Pursuant to Article 1, Section 6 of the Washington Constitution--...--which is most binding upon my conscience -- ...Mathew, Chapter 5, Verses 36 and 37, I will let, ...My yes mean yes and my no means no, because anything more than means is from the evil one.". RP 459. Counsel again requested the court order a RCW 10.77 competency evaluation for Mr. Calhoun. RP 461. The court denied the request. RP 461. Later during the questioning of Mr. Calhoun he reiterated his accusation against the judge as committing treason. RP 475. Mr. Calhoun also informed the court that "I'm under express duress and coercion". RP 476. After both parties rested, Mr. Calhoun again accused the judge of treason. RP 512. Mr.

Calhoun also told the jury and court that the judge told him “you stated to me that you would shock me with a shocker belt.” RP 513. Counsel for the co-defendant again moved for a mistrial. RP 514. The motion was denied. RP 516. A competency evaluation was never ordered.

Show-Up Identification

Mr. Calhoun moved to suppress the show-up identification as suggestive and impermissibly prejudicial for the following reasons. RP 53-54. First, one witness was only certain of the identification of a small truck which he believed was driven by the suspects due to their proximity to the truck after they fled the apartment. The other witness gave varied and contradictory descriptions of the suspects but was certain of the identity of the truck. RP 153, 178, 223. Second, the show-up identification was in front of the truck the witnesses identified, thus creating an impermissibly suggestive setting. Third, the only suspects presented to the witnesses were Mr. Calhoun, Mr. Frazier And Ms. Banks who was known to the witnesses. RP 52-54. Fourth, the witnesses’ identification of the suspects changed many times from the initial 911 call to the initial police interview to their testimony at trial. Finally, the defense argued that the witnesses were not able to identify either the co-defendant or the defendant until a third person, Ms. Banks stepped out of the truck. The Isaac sisters and Mr. Kimbrough knew Ms. Banks. RP 54-

55.

The court denied the motion for suppression finding that the show-up identification was “not impermissibly suggestive given the totality of the circumstances.” RP 66. Mr. Calhoun informed the court during the suppression motion that he wanted to fire his attorney. RP 91.

2. SUBSTANTIVE FACTS

Isha and Celia Isaac, sisters and Isha’s boyfriend Rolan Kimbrough and their children, lived in a small apartment in Lakewood in July 2005. Joy Banks a friend of Isha’s frequented the apartment and was aware that Isha kept a safe in the apartment with money and important documents. Ms. Banks was also aware that Celia usually kept the key to the safe in her bra. On the day before the incident, Ms. Banks brought her boyfriend to the apartment and introduced him as “Crème” (Zachary Frazier the co-defendant in the instant case). RP 210-214.

Officers Eric Bell and Joseph Kolp of the Lakewood Police Department were working the graveyard shift on July 11, 2005 when they independently heard a broadcast regarding a home invasion at 14436 Washington Avenue in Lakewood. RP 282, 284, 332, 335-36. Officer Bell contacted the complainants Celia and Isha Isaac¹ and Rolan Kimbrough. RP

¹ Isha Isaac and Celia Isaac will hereinafter be referred to by their first names to avoid

337. The complainants described the suspects as two black males wearing bandanas over their faces and dark clothing. RP 339. Celia and Rolan could not identify the intruders when describing them to the police, but Isha told the police she thought that the person later identified as Mr. Calhoun, was a homeless person names "Teas" who hung around the apartment building. 114, 130, 172, 192, 225.

Isha Isaac informed the police that her sister Celia had gone to bed first with two children and then she laid down on the floor in the living room while her fiancé and his daughter slept in the back bedroom. RP 139, 215. Isha heard a loud bang on the window and caught her entertainment center that had been in front of the window as it almost fell to the floor. .RP 215-16. Isha saw a person go into the back bedroom and another person stood in the middle of the living room and asked for the "safe". Id Isha had a safe that contained \$400 and important papers such as her children's social security cards and birth records. RP 211, 349.

The person later identified as Mr. Calhoun saw the safe and took it. RP 221. Isha ran outside and saw a red pickup truck pull away and drive in the direction away from I-5. RP 222-23. Mr. Kimbrough also saw a red pickup truck leave the scene but did not see anyone get into the truck. RP

confusion.

178. Mr. Kimbrough assumed that the defendants were in the truck because of the timing of their departure and because when they went to a show-up identification, the defendants were standing in front of the red pickup truck.

RP 178

During the intrusion there were no lights on in the living room or bedroom and the apartment was dark. RP 128-29, 167. One of the intruders stuck his hand down Celia's shirt looking for the key to the safe. RP 220. The other intruder stood around waiving his arms like he might have had a weapon although none was seen and according to Isha neither intruder did anything threatening. RP 222. According to Isha the same intruder who put his hand down Celia's shirt also went to the back of the apartment looking for the safe. RP 217-218.

Celia Isaac testified that she never saw either intruder before the incident and was unable to identify either of them. RP 114. On cross examination Celia testified that she did not feel threatened and was not injured during the incident. RP 116. On re-direct she said she felt "violated" when the man put his hand down her shirt. RP 120.

Rolan Kimbrough testified that he was asleep in the back bedroom when he heard a loud bang. He got up to investigate and saw two people coming through the window. One person came straight toward him. Mr.

Kimbrough turned to go back to where his daughter was sleeping and was struck by something. RP 141-42, 172. He was not hurt by whatever struck him but his face stung for a couple of minutes. RP 170. Mr. Kimbrough did not see who struck him but assumed it was the person who was asking for safe standing in the back bedroom. RP 143-44. Mr. Kimbrough only saw one of the intruders inside of the apartment. RP 151.

Mr. Kimbrough testified that he recognized Mr. Calhoun from his cloths and Jeri curl hair and. RP 157. Isha told the police that the person who struck entered the apartment and Mr. Kimbrough was "Teas", who braids, was only slightly taller than Isha who is 5'4", had a distinct nose and wore a fluffy jacket. RP 246-47, 260. At the show-up identification, Mr. Kimbrough identified Mr. Frazier as the person who hit him even though. Mr. Kimbrough also testified Mr. Calhoun hit him and that he only saw one of the intruders inside of the apartment. RP 151, 157, 342.

After the police arrived, Isha and Mr. Kimbrough were driven to a location where Mr. Calhoun, Mr. Frazier and Joy Banks had been detained in a red pick up truck. Mr. Kimbrough and Isha were brought to the location of the red pickup truck approximately 10 miles from the apartment and 30 minutes after the 911 call. RP 259, 359. During the ride to the show-up identification, officer Bell had a computer screen on in his patrol car that was

visible to the passengers and contained information about the suspects.(April 19, 2006) RP 55-56; (Trial) RP 262. Isha was not sure if she saw pictures of Mr. Calhoun on the computer screen before or after the show-up identification. RP 248.

The show up took place in the dark with a spotlight shown on Mr. Frazier as he exited the truck first, then on Ms. Banks and last on Mr. Calhoun. RP 178, 229. The complainants stayed in the car and viewed the suspects from 20-25 feet away. RP 341-342. Isha identified both Mr. Calhoun and Mr. Frazier as the perpetrators. RP 229-30. Isha testified that she identified the perpetrators by their actions; she identified Mr. Calhoun as the person who went into the back bedroom, but told officer Bell that Mr. Frazier was the person who went into the back bedroom. RP 399-401. Isha also told the 911 operator that a person named "Teas" who wore braids and a fluffy jacket was the perpetrator. RP 241, 246-47. The red pick up truck was in full view during the identification process. RP 248-49. Mr. Kimbrough identified Mr. Calhoun as one of the perpetrators and testified that Mr. Calhoun was the person who struck him even though he also testified that he did not see who struck him. RP 144-45, 184-85. Mr. Kimbrough was certain of the identification because Mr. Calhoun was near the red truck. Even though Mr. Kimbrough never saw anyone enter the red truck, he believed that it was used

by the perpetrators. RP 178-79, 184-85. Contrary to his testimony, Mr. Kimbrough informed officer Bell that Mr. Frazier was the person who came to the back bedroom. RP 344.

Officer Bell took statements from all of the complainants and was 100 percent certain that Isha told him that Mr. Frazier was the person responsible for striking Mr. Kimbrough even though she testified that Mr. Calhoun was the person who struck Mr. Kimbrough. RP 402. According to officer Bell, Isha also told him that Mr. Calhoun was the person who put his hand down Celia's shirt and Mr. Frazier was the person who went to the back bedroom. RP 344. There were many other inconsistencies with the testimony.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY DENYING DEFENSE MOTION TO SUPPRESS THE PREJUDICIAL SHOW-UP IDENTIFICATION.

The Appellate Courts review the trial court's findings of fact on a motion to suppress to determine whether they are supported by substantial evidence, and if so, whether the findings support its conclusions of law. State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001). The findings and conclusions from the trial court were set forth in the form of an "Order on

Pretrial Motions”. Number “4” is at issue and reads as follows. “Defendant Calhoun and Frazier failed to establish that the show-up identification was suggestive under the totality of the evidence, there was not a substantial likelihood of irreparable misidentification considering factors listed in State v. Shea, 85 Wn. App. 56, 930 P.2d 1232 (1997).” Supp CP (Order on Pretrial Motions 5-1-06). Mr. Calhoun disagrees.

To establish a due process violation, a defendant must first show that an identification procedure is suggestive. If this threshold is met, the court must determine whether, under the totality of the circumstances, the suggestiveness created a substantial likelihood of misidentification. Manson v. Brathwaite, 432 U.S. 98, 116, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); State v. Linares, 98 Wn. App. 397, 40-03, 989 P.2d 591 (1999) (citing State v. Vaughn, 101 Wn.2d 604, 682 P.2d 878 (1984)) (rejects Division Two’s analysis in State v. Shea that merged the two-part test for determining the impermissibility of the identification procedure). Courts consider the following in making this determination: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time

between the crime and the confrontation. Brathwaite, 432 U.S. at 114; Linares, 98 Wn. App. at 401.

Generally, "courts have found lineups or montages to be impermissibly suggestive solely when the defendant is the only possible choice given the witness's earlier description." State v. Ramires, 109 Wn. App. 749, 761, 37 P.3d 343 (2002). In the instant case, the defendants were the only possible choices. The identification in the instant case was therefore suggestive under Ramires, 109 Wn. App. at 761.

The next question is whether the suggestiveness created a substantial likelihood of misidentification. For the following reasons, the answer is yes. First, the witnesses' opportunity to view the intruders at the time of the crime was limited to a few minutes in the dark. All of the witnesses testified that the intruders had bandannas over their faces and Celia could not identify anyone.

On direct Mr. Kimbrough testified that he was able to identify Mr. Calhoun from his hair and clothes. RP 157. On cross examination he testified that the intruders had bandannas covering their faces and wore dark clothing. RP 175-76 Mr. Kimbrough also admitted that Mr. Calhoun actually had light clothes on at the show-up identification and that he was only able to identify Mr. Calhoun because he was standing near the red truck under a spotlight

during the show-up identification. RP 178-79.. Mr. Kimbrough also testified that he could not identify Mr. Frazier because he did not see his face. RP 194. Even though Mr. Kimbrough testified that both intruders had their faces covered he was somehow able to identify Mr. Calhoun. Mr. Calhoun asserts that Mr. Kimbrough only identified him due to his proximity to the red pick-up truck.

Isha called 911 and told the dispatcher that a man named "Teas" whom she knew to be homeless had entered her home and robbed her. RP 245-47. Isha was sure at the time of the 911 call that the intruder was "Teas". RP 247. Isha identified Mr. Calhoun and Mr. Frazier as the intruders as they were individually removed from the red-pick-up truck. RP 248-49. The identification was clearly impacted by the suggestiveness of the proximity to the red pick-up truck.

The second factor undermining the reliability of the show-up is the brevity of the encounter and the witnesses agitated condition. RP 372. None of the witnesses were focused on the intruders for more than a few moments and Celia, the one who had the most contact with the intruders was not able to identify anyone. RP 114. Moreover, all of the witnesses were very upset

and their opportunity to view the suspects was additionally impeded by the darkness of the apartment. RP 173, 372.

The third factor undermining the reliability of the show-up is the lack of accuracy of the witnesses' prior description of the intruders. In the instant case, Celia told the police that the intruders were her height, about 5'7". Isha informed the police that the taller of the two males was 26 and the other male in his 20's. RP 384. Mr. Calhoun is 6'2" and weighs 175 pounds. RP 367. Mr. Frazier is 5'9" and 40 years old. RP 366. Isha did not provide an accurate height, weight or clothing description to the police. RP 385.

When the police arrived, Isha told the police that the taller one had on a black leather jacket and jeans, even though she testified that he had on a fluffy jacket. RP 246, 387. Isha testified that she recognized both "Teas" and Mr. Calhoun by their jackets which were the same even though her descriptions differed.. RP 387. Isha also told the police that Frazier was the one who entered the back bedroom and Mr. Calhoun was the one who put his hand down Celia's shirt. RP 402. Mr. Kimbrough also told the police that Mr. Frazier was the person who came to the back bedroom and hit him. RP 408.

Isha testified that she was able to identify the perpetrators by their actions in the apartment. RP 400-401. However, both Isha and Mr.

Kimbrough testified inconsistently, at one time identifying Mr. Frazier as the person who hit Mr. Kimbrough and put his hand down Celia's shirt and later identifying Mr. Calhoun as committing the same acts. RP 217-18, 144-45. The descriptions of the suspects and their actions changed many times and were far from convincingly certain.

By contrast in State v. Brown, 127 Wn. App. 307, 313, 1049 (2005), the witness was able to positively and accurately describe the height and weight of the suspect and describe with accuracy the color and length of his hair. In the instant case, Mr. Kimbrough testified that he did not see who struck him, he testified that Mr. Calhoun struck him, he told officer Bell that Mr. Frazier struck him, he changed the description of the clothing and he was never able to state the height and weight of the intruders. Moreover, he ultimately testified that he only saw one intruder in the apartment. RP 151. Due to the many discrepancies in the descriptions of the suspects, the minimal opportunity to observe the suspects and the poor lighting conditions, the testimony in the instant case was insufficient to overcome the irreparable probability of misidentification. Brown. 128 Wn. App. at 312.

The fourth factor undermining the reliability of the show-up was the fact that the witnesses were only certain of their identification of the suspects

due to their proximity to the red truck. RP 152-53, 156, 178, 224, . Isha called 911 and told the police that the intruder was “Teas”. She then informed the police that the intruders faces were covered and it was dark in the apartment. She was also unable to describe the intruders before the identification but was able to identify the red pick-up truck she believed the intruders used to leave the scene. RP 224. Isha was only able to describe the intruders as wearing dark cloths. Mr. Calhoun in fact had light cloths on. RP 179. Her degree of certainty regarding the identification was irreparably tainted by her certainty regarding the red pick-up truck and her identification of her friend Ms. Banks. RP 248-49, 231. Isha was also certain that one of the intruders, later identified as Mr. Calhoun, was Teas. She was certain at the time of the 911 call and when she spoke to the police. RP 247. This changed only when she was presented with the defendants in front of the red truck. RP 231-32.

The fifth and final factor undermining the reliability of the show-up is the time between the crime and the confrontation. Brathwaite, 432 U.S. at 114; Linares, 98 Wn. App. at 401. Approximately 30 minutes passed between the time of the incident and the time of the show-up. RP 226, 359. Although 30 minutes is not a long time, the change in the witnesses’ stories over thirty minutes was significant. Initially, Isha identified one of the intruders as “Teas”. RP 225. Mr. Kimbrough could not describe either intruder to the

police other than to say that one was taller than the other and both were African American. RP 339. Celia could not identify anyone. RP 114. Isha also could not describe or identify Frazier, even though she had seen him just a few hours before the incident. RP 254.

The findings presented in the Order on Pretrial Motions are not supported by substantial evidence and therefore are not verities on appeal. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Based on the facts presented, the trial court erred in denying the motion to suppress. The error denied Mr. Calhoun his constitutional right to due process and was not harmless beyond a reasonable doubt. The remedy is remand for a new trial with instructions to suppress the unconstitutional identification. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967).

2. THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR AN RCW 10.77 COMPETENCY EVALUATION.

An "incompetent person" may not be tried, convicted, or sentenced for an offense so long as their incapacity continues. RCW 10.77.060. A defendant is incompetent if he or she "lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect." RCW 10.77.010(14); In re

Fleming, 142 Wn.2d 853, 861-62, 16 P.3d 610 (2001). A competency evaluation is required whenever "there is reason to doubt" the defendant's competency. RCW 10.77.060(1)(a); State v. Marshall, 144 Wn.2d 266, 278 27 P.3d 192 (2001). The defense bears the threshold burden of establishing a reason to doubt the defendant's competency. State v. Lord, 117 Wn.2d 900, 903, 822 P.2d 177 (1991); State v. Woods, 143 Wn.2d 561, 604, 23 P.3d 1046, cert. denied, 534 U.S. 964, 151 L. Ed. 2d 285 (2001). A motion to determine competency must be supported by facts. Lord, 117 Wn.2d at 901. Whether a person is competent is a mixed question of law and fact that requires the reviewing court to independently apply the law to the facts. Marshall, 144 Wn.2d at 200 (citations omitted).

Before a determination of competency is required, the court must make the threshold determination that there is a reason to doubt competency, and the trial judge has a large measure of discretion in making this threshold determination. City of Seattle v. Gordon, 39 Wn. App. 437, 693 P.2d 741, review denied, 103 Wn.2d 1031 (1985). A defense attorney's opinion regarding the competency of a client, is entitled to considerable weight, but ultimately the court must grant a request for a competency hearing if there is a "factual basis" to doubt the defendant's competency. Woods, 143 Wn.2d at 605; Seattle v. Gordon, 39 Wn. App. 437, 442, 693 P.2d 741 (1985).

In Gordon, quoting, Drope v. Missouri, 420 U.S. 162, 177 n.13, 43 L.

Ed. 2d 103, 95 S. Ct. 896 (1975), the Court stated:

Although we do not, of course, suggest that courts must accept without question a lawyer's representations concerning the competence of his client, . . . an expressed doubt in that regard by one with "the closest contact with the defendant," . . . is unquestionably a factor which should be considered.

Drope v. Missouri, 420 U.S. 162, 177 n.13, 43 L. Ed. 2d 103, 95 S. Ct. 896 (1975).

In Woods, the Court upheld denial of a request for a competency hearing because the defendant first asserted that he was incompetent at the penalty phase and according to his attorney and the two witness statements, Woods was merely despondent, depressed and emotional and there was ultimately insufficient evidence to meet the threshold determination that there was reason to doubt Woods competency. Woods, 143 Wn.2d at 606-08.

In the instant case unlike in Woods, there were substantial facts to support a finding of incompetency. Throughout the proceedings Mr. Calhoun exhibited bizarre behavior and disjointed thought processes that were not based in reality. From his own outbursts throughout the proceedings, it was clear that Mr. Calhoun did not understand the process and was unable to assist his attorney in his defense. The attorneys for the co-defendants were

equally as convinced of Mr. Calhoun's inability to stand for trial and joined Mr. Calhoun's attorney in his request for a competency hearing. Mr. Calhoun spouted nonsense from the UCC, maritime law, insisted on interrogatories, accused the judge of treason, and did not understand why the prosecutor had a "perfected security interest in his vessel" RP 35-36, 50, 454-61.

The trial court abused its discretion by repeatedly denying defense counsel's request for a competency evaluation, when faced with substantial evidence that Mr. Calhoun was not competent to stand trial. The trial court also erroneously relied on the testimony of a Pierce County Mental Health Professional (MHP) who repeatedly informed the court that she was not qualified to make competency determinations and merely opined based on her review of another person's report that Mr. Calhoun was not psychotic. RP 39-41, 45, 461.

After the testimony of the MHP the court asked Mr. Calhoun if he understood that "his role as the judge is that I'm not on anybody's side in this case? My job is to make sure that you and Mr. Frazier and Ms. Banks get a fair trial." Mr. Calhoun responded by stating, "Findings of Fact and Conclusions of Law, yes, sir". Mr. Calhoun was able to tell the court that the prosecutors' role was to present evidence to the jury to find guilt "by deduction and induction". RP 43. Mr. Calhoun responded that it was his

attorney's job to assist with his defense. RP 43-44. Largely ignoring the overwhelming and ongoing evidence of Mr. Calhoun's lack of competence to stand trial, the Court ruled that Mr. Calhoun was competent to stand trial under State v. Lord, because he "understands the nature of the charges and is capable of assisting in his defense." RP 44. The judge denied every request for a competency evaluation contrary to the statutory requirement. RCW 10.77.060(1). RP 45, 461.

The procedures of the statute are mandatory and not merely directory. State v. Wicklund, 96 Wn.2d 798, 805, 638 P.2d 1241 (1982). Thus, once there is a reason to doubt a defendant's competency, the court must follow the statute to determine his or her competency to stand trial.

Seattle v. Gordon, 39 Wn. App. at 441.

In Gordon, unlike the instant case, the attorney representing the defendant provided "little more than a cursory opinion concerning his client's competence." Seattle v. Gordon, 39 Wn. App. at 442. Moreover, for many months the defense attorney had adequate and successful communication with his client and "conferred with the defendant many times and had made other appearances before the court in the case." The trial court correctly characterized the motion as "a trial tactic than an indication of real concern as

to the defendant's competency.” Id. Also of significance was the fact that the defendant was able and willing to assist his attorney.

In the instant case, in spite of Mr. Shoenberg’s professionalism, Mr. Calhoun spouted to the court at every opportunity maintained that his attorney was working against him. RP 274-76, 425, 476, 513. Unlike either Gordon, or Woods, Mr. Calhoun presented facts to support the threshold concern that he was not competent to stand trial. When the threshold is met, the requirement of an evaluation is mandatory. RCW 10.77.061; State v. Wicklund, 96 Wn.2d 798, 805, 638 P.2d 1241 (1982). The trial court abused its discretion by disregarding the overwhelming evidence of Mr. Calhoun’s lack of competency. The trial court should be reversed and this case remanded with directions for a competency evaluation to determine if Mr. Calhoun is competent to stand trial.

3. FOR PURPOSES OF CALCULATING APPELLANT’S OFFENDER SCORE HIS ASSAULT CONVICTIONS ENCOMPASS THE SAME CRIMINAL CONDUCT AS HIS ROBBERY CONVICTIONS.

For offender score calculation purposes, crimes that have the “same criminal conduct” are not counted separately. “Same criminal conduct” is defined as crimes that have the same objective criminal intent, are committed at the same time and place and that involve the same victims are not counted

separately. RCW 9.94A.589; State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000); State v. Williams, 135 Wn.2d 365, 368, 957 P.2d 816 (1998), citing, State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

If the criminal intent is the same, the second inquiry is whether the defendant committed the crimes for different purposes. If the purpose and intent of each crime was the same, the sentencing court must find that the crimes involved the same criminal conduct. State v. Haddock, 141 Wn.2d 103, 112-13, 3 P.3d 733 (2000).

Interpretation of a statutory provision is a question of law, and is reviewed de novo. Haddock, 141 Wn.2d at 110. However, an appellate court, reviews sentences under the Sentencing Reform Act for abuse of discretion. Id. In Haddock, the Supreme Court held that the trial court either abused its discretion or made an error of law or both in counting separately Haddock's 14 possession of stolen property and possession of stolen firearm counts. Therein, the crimes were committed at the same time and place, the mental element for the crimes was the same and the purpose for committing the crimes was also the same. Haddock, 141 Wn.2d at 111-16.

Similarly in Williams, the defendant's two deliveries of a controlled substance at the same time to two different buyers constituted "the same

criminal conduct" even though Williams sold the drugs to two different buyers. This is so because, the buyers are not the victims; the public is. Williams, 135 Wn.2d at 368, citing, State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

In the instant case, Mr. Calhoun's two assault convictions encompassed the same criminal conduct as his robbery conviction. First, they were committed at the same time and place, and the victims of both the robbery and assaults were the same. Second, the criminal intent was the same and finally, the purpose was also the same.

The evidence demonstrated that at all times during the intrusion into the apartment where the assaults occurred, Mr. Calhoun or Mr. Frazier repeatedly demanded to know the whereabouts of the safe so that they could take it with them. The assaults occurred in furtherance of the robbery and for no other purpose. Mr. Calhoun's intent at the time of the assaults was to facilitate a robbery. Thus, the robbery and assaults encompassed the "same criminal conduct" and contained the same "intent" and should not have been counted separately for the calculation of Mr. Calhoun's offender score. Haddock, 141 Wn.2d at 115-16; State v. Williams, 135 Wn.2d at 368. This

Court should reverse and remand for a reduction in Mr. Calhoun's offender score by four points.

4. THE TRIAL COURT ERRED IN GIVING AN ACCOMPLICE INSTRUCTION THAT RELIEVED THE STATE OF ITS BURDEN OF PROVING EACH ELEMENT BEYOND A REASONABLE DOUBT.

Due process requires the state to prove beyond a reasonable doubt each essential element of the crime charged. In re Winship, 397 U.S. 358, 25 L.Ed.2d 368, 90 S. Ct. 1068 (197); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Instruction number 7, relieved the state of its burden of proving each essential element beyond a reasonable doubt by instructing the jury that if they determined that Mr. Calhoun participated in any one of the crimes charged, they need not determine whether he was guilty as a principal or an accomplice for any of the crimes charged. The instruction further instructed the jury to find Mr. Calhoun guilty if they merely found that a crime had been committed, rather than requiring the jury to find that Mr. Calhoun committed the crimes charged. Instruction 7 violated Mr. Calhoun's right to due process under Winship, supra and Green, supra.

Instruction 7 provided:

If you are convinced that both defendants participated in a crime or crimes charged in this case

and that the crime or crimes have been proven beyond a reasonable doubt, you need not determine which defendant was an accomplice or a principal.

CP 44. The “to-convict” instruction for all of the crimes also failed to require the jury to determine whether Mr. Calhoun committed the crimes as an accomplice or as a principal. CP 24, 30, 49, 59.

The evidence presented during trial regarding who was involved in the commission of the crimes charged was contradictory and weak. The witnesses contradicted each other and themselves. First, Isha informed the police that someone named “Teas” committed the crime. She described him as wearing braids and a fluffy dark jacket. RP 245. Mr. Calhoun did not wear braids. Second, Isaha and Mr. Kimbrough testified that Mr. Calhoun entered the bedroom and hit Kimbrough. RP. 144-45, 157, 217-18. In contrast to the testimony of Isha and Mr. Kimbrough, officer Bell testified with certainty that Mr. Frazier was the person who hit Mr. Kimbrough. RP 345. Isha also testified that Mr., Calhoun was approximately her size: 5’7”. Mr. Calhoun is 6’2” and weighs 175 pounds.

The state likely would not have been able to establish the identity of the suspects without instruction 7. With instruction 7, the state was merely required to prove that someone committed a crime rather than both Mr. Frazier and Mr. Calhoun, with one acting as an accomplice and the other as a

principal. Instruction 7 violated both Mr. Calhoun and Mr. Frazier's right to due process of law and should require reversal of Mr. Calhoun's convictions.

5. APPELLANT SHOULD NOT HAVE BEEN
PUNISHED SEPERATELY FOR HIS SECOND
DEGREE ASSAULT CONVICTIONS.

Mr. Calhoun was charged and convicted of two counts of assault in the second degree and one count of robbery in the first degree. CP 4-7. The assaults had the same purpose and intent as the first degree robbery and the assaults were an essential element of the first degree robbery charge and should have merged into the assault charge under State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005). In Freeman, the Court held that unless the legislature explicitly intended for separate punishments for crimes based on and in furtherance of the same purpose or effect, they merge. Freeman, 153 Wn.2d at 776. The to-convict jury instruction for robbery in the first degree provided in relevant part that:

To convict Abdul K. Calhoun of the crime of Robbery on the First Degree as charged in Count One, each of the following six elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 11th day of July 2005, Abdul K. Calhoun or an accomplice unlawfully took personal property belonging to

another from the person or in the presence of another;

(2) That Abdul K. Calhoun or an accomplice intended to commit theft of the property;

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

(4) That the force or fear was used by Abdul K. Calhoun 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 there from Abdul K. Calhoun or an accomplice inflicted bodily injury; and

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

CP 94.

The second degree assault jury instruction provided:

To convict Abdul K. Calhoun of the crime of Assault in the Second Degree as charged in Count One, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 11th day of July 2005, Abdul K. Calhoun or an accomplice assaulted Rolan Kimbrough.

(2) That the assault was committed with intent to commit robbery or Theft in the Second Degree; and

(3) That the acts occurred in the State of Washington.

CP 104.

The jury instructions do not set forth an independent purpose for the commission of the assault other than to effectuate the robbery, and the facts of the instant case made clear that the sole purpose of putting a hand down Celia's shirt was to rob the safe and similarly, the sole purpose of striking Mr. Kimbrough was to take the safe.

The Court in Freeman specifically undertook an analysis of whether the merger doctrine or Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932) required separate punishment for the separate crimes of assault and robbery. The Court concluded that the merger doctrine did not require separate punishment unless, "the degree of one offense intended is raised by conduct separately criminalized by the legislature". Freeman, 153 Wn.2d 772-72, citing, State v. Vladovic, 99 Wn.2d 413, 419 662 P.2d 853 (1983). Thus where an individual is charged with robbery in the first degree and assault in the first degree, there is no merger because the penalty for assault elevates the degree of robbery and has a higher standard range than the robbery. State v. Freeman, 153 Wn.2d at 775-76.

Alternatively when the individual is charged with robbery in the first degree and assault in the second degree, because the standard range for assault in the second degree is much lower than the standard range for robbery in the

first degree, “we find no evidence that the legislature intended to punish second degree assault separately from first degree robbery when the assault facilitates the robbery.” State v. Freeman, 153 Wn.2d at 776.

The Court in Freeman concluded that under Blockburger, the traditional analysis for determining if crimes are the same i.e. “whether each provision requires proof of a fact which the other does not” creates only a rebuttable presumption that the legislature intended for separate punishment unless the crimes are the same under the Blockburger test. Under Freeman, the courts must undertake an individual analysis of each case to determine whether separate punishment was intended by the legislature. Freeman, 153 Wn.2d at 772, quoting, Blockburger, 284 U.S. at 304.

After examining the Blockburger test and the merger doctrine, the Court in Freeman concluded that the determinative factor for whether punishment for two crimes was intended is whether there is an independent purpose or effect to each crime, rather than whether the crimes are the same at law. State v. Freeman, 153 Wn.2d at 779. Thus if there was a separate injury not incidental to the commission of the greater offense, then the merger doctrine would apply. “The test is whether the unnecessary force had a purpose or effect independent of the crime.” State v. Freeman, 153 Wn.2d at 779.

Considering the facts of the instant case, it is clear that the act of reaching down Celia's shirt did not have an independent purpose or effect distinct from the robbery and neither did striking Mr. Kimbrough. Both acts were in furtherance of the crime of robbery and did not have a purpose other than to gain access to the safe. Under Freeman, the assaults should merge with the robbery conviction. The assault convictions should be reversed.

D. CONCLUSION

Mr. Calhoun respectfully requests this Court (1) reverse his convictions and remand for a competency evaluation, and if competent (2) permit Mr. Calhoun to proceed prose, (3) recalculate Mr. Calhoun's offender score and (4) reverse and dismiss the assault convictions.

DATED this 27th day of November 2006.

Respectfully submitted,

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Attorney for Appellant

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BY [Signature]

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Abdul K. Calhoun Pierce County Jail 910 Tacoma Ave. S Tacoma, WA 98402" and Rita Griffith 1305 N.E. 45th No. 205 Seattle, WA 98105 a true copy of the document to which this certificate is affixed, on November 27, 2006. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.