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No. 35428-4-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JAMES ERIN REID,

Appellant.

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COURT OF APPEALS  
DIVISION TWO

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
PIERCE COUNTY

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The Honorable Thomas P. Larkin, Judge

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to prove the offense of intimidating a witness.

2. Mr. Reid assigns error to CrR 6.1 Finding of Fact XVIII, which provides:

Howell intended to scare Pelt so that Pelt would not appear to testify against Howell and Reid in the drug case arising from the incident on 5/11/05.

CP 43, 114.

3. Mr. Reid assigns error to CrR 6.1 Conclusion of Law IX, which provides:

The court finds the defendant guilty of the crime of Intimidation of a Witness beyond a reasonable doubt as charged in Count VII under cause #05-1-02771-3 in that [on] or about 06/04/05 the defendant and/or a person to whom he was an accomplice, did threaten Chris Pelt and attempted to induce Chris Pelt, a prospective witness, to absent himself from court proceedings, and the court finds beyond a reasonable doubt that for purposes of the firearm sentencing enhancement the defendant and his accomplice were knowingly armed with a firearm during the commission of this crime.

CP 46-47, 117-18.

4. Mr. Reid's convictions for intimidation of a witness, second-degree assault and drive-by shooting for the same act violated the state and federal prohibitions against double jeopardy.

5. The sentencing court erred in counting the intimidation of a witness, second-degree assault and drive-by shooting separately in calculating the offender score, because those crimes were the "same criminal conduct."

6. Mr. Reid did not receive effective assistance of counsel at

sentencing.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove intimidation of a witness as charged, the prosecution had to prove a) there was a threat made, b) against a “current or prospective witness,” c) there were court proceedings going on and d) the threat was made in an attempt to induce the witness to absent himself from the court proceedings. Did the prosecution fail to present sufficient evidence to support the conviction for intimidation where a) there was no verbal communication, let alone any referring to staying away from court proceedings, b) there were no court proceedings going on and c) there was no evidence the acts the prosecution claimed constituted the “threat” were committed as an attempt to induce the witness to absent himself from any proceedings?

Further, were the trial court’s CrR 6.1 findings and conclusions to the contrary unsupported by substantial evidence in the record?

2. Mr. Reid was found guilty as an accomplice for intimidating a witness and second-degree assault (both with firearm enhancements) and drive-by shooting for the exact same incident in which he was in the car with a friend who fired a gun out the window of the car several times within a few moments. Was double jeopardy violated by the multiple convictions for the exact same “accomplice” act?

3. Did the sentencing court err in counting the intimidation, assault and drive-by offenses separately where they were all alleged to have been committed at the exact same time, by the exact same act, against the same witness at the same place? Further, was counsel ineffective in

failing to properly argue the “same criminal conduct” issue where the resulting sentence was higher than that which should have been imposed?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant James Reid was charged by third amended information under cause number 05-1-02271-3 with two counts of intimidating a witness with firearm enhancements, two counts of second-degree assault with firearm enhancements, and drive by shooting. CP 29-31; RCW 9A.36.021(1)(c), RCW 9A.36.045(1), RCW 9A.72.110(1)(c), RCW 9.41.010, RCW 9.94A.510, RCW 9.94A.530. He was separately charged by amended information under cause number 05-1-02318-1 with two counts of unlawful possession of cocaine with intent to deliver and firearm enhancements. CP 104-106; RCW 9.41.010, RCW 9.94A.510, RCW 9.94A.530, RCW 69.50.401(1)(2)(a).

The cases were joined together with each other and a separate set of cause numbers charging Quadaffi Howell with the same offenses. CP 14-15, 110-11.

After Mr. Reid waived his right to a jury trial, pretrial motions and a bench trial was held before the Honorable Thomas P. Larkin on May 18, 22-25, June 1, 5, 7-8 and 12, 2006.<sup>1</sup> CP 32, 106. Mr. Reid was acquitted 1) of being armed with a firearm during the cocaine delivery, 2) of

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<sup>1</sup>The 12 volumes of the verbatim report of proceedings will be referred to as follows: the 10 chronologically paginate volumes of May 18, 22-25, June 1, 5, 7-8 and 12, 2006, as “1RP”; October 6, 2006, as “2RP”; September 12, 2006, as “3RP”.

intimidation of a witness for an incident allegedly occurring at an “Olive Garden” restaurant and 3) of second-degree assault against Mr. Faniel. CP 45-47, 116-18. He was found guilty of all other offenses as charged. CP 45-47, 116-18.

On October 6, 2006, the court imposed a sentence of 168 months total for both cause numbers. CP 51-63, 122-34. Mr. Reid appealed, and this pleading follows. See CP 66-76, 139-50.

2. Relevant facts

a. The drug charges

By the time he was 28, Christopher Pelt had been dealing drugs for nearly half his life and had been involved in manufacturing “crack” cocaine for 10-12 years. RP 259. He spent time in an Arizona prison for drugs and knew it was illegal for him to possess a gun. RP 260, 61. He nevertheless was carrying one when he was caught delivering drugs. RP 187-88, 261. Mr. Pelt was facing “a lot of time” in prison, so he decided to avoid it by working a “contract” with the Tacoma Police Department, requiring him to set up others for drug convictions by buying drugs from them in “buys” monitored and recorded by TPD. RP 187-88.

One of Mr. Pelt’s “targets” for police was Quadaffi Howell. RP 192. Mr. Pelt had met Mr. Howell through a mutual friend and bought crack or cocaine from him in the past. RP 192-195. According to Mr. Pelt, Mr. Howell talked about drugs he could get ahold of and always seemed to have a “good amount of dope on him.” RP 192.

On May 11, 2005, Mr. Pelt orchestrated a “buy” from Mr. Howell. RP 196-97. The buy occurred in the afternoon in the parking lot of an

AM/PM market, and it was recorded and monitored by police. RP 196-97, 206.

Mr. Howell arrived at the lot in a "Suburban," which his friend, James Reid, was driving. RP 196-98. Mr. Howell got out of the car, walked over to Pelt's car, and got into the front passenger seat. RP 198. Mr. Howell then sold Mr. Pelt an ounce of crack cocaine. RP 199.

According to Mr. Pelt, Mr. Howell mentioned he had a wet "half-ki" or "half-bird," meaning half of a kilo of cocaine in the process of being turned into crack. RP 199, 201. Mr. Pelt testified that it would lose weight when it dried and someone would "lose money" if they bought it based on the wet weight rather than the completed weight. RP 202. At Mr. Howell's request, Mr. Reid either stepped out of the car or rolled down his window and showed Mr. Pelt a shoe box with what appeared to be wet cocaine in it. RP 199-202, 208.

Mr. Pelt somehow suggested to the monitoring officers that they should "take" the two men right away because they had the "half-ki" with them. RP 203, 556. Officers made no moves, however, and Mr. Pelt drove away to the pre-assigned meeting location to provide information and the suspected drugs to his handlers. RP 211.

Mr. Howell and Mr. Reid were arrested later that day. RP 505-506. Officers went to a parking lot and watched as Mr. Howell got out of the car Mr. Reid was driving and walked over to a parked vehicle. RP 505-506. Between the parked car and the car the men had arrived in were several other cars and a traffic island with trees and bushes. RP 508. Because of the obstructions, an officer admitted, Mr. Reid could not have

seen Mr. Howell and what he was doing at the other parked car. RP 506, 529.

After Mr. Howell approached the parked car, police revealed themselves and ordered Mr. Howell to freeze. RP 506. He ran. RP 506. One officer decided not to engage in the chase and instead turned his attention to Mr. Reid. RP 507. It was unknown what Mr. Reid was doing when Mr. Howell was at the other car, because the focus had been on Howell. RP 530. When the attention turned to Mr. Reed, he was walking toward the strip mall of the parking lot, "nonchalantly." RP 507, 530. An officer admitted that Mr. Reid was headed towards a "teriyaki shop." RP 524. Mr. Reid did not appear to be trying to get to the street, nor did he run when approached by officers. RP 531-32.

No "half-kilo" of cocaine (approximately 18 ounces) was found in any of the subsequent police searches, including the search of Mr. Howell and Mr. Reid. RP 424. An officer admitted that the cumulative amount of evidence did not "even come anywhere close to a half-bird" in all of the searches from that day. RP 425. Earlier in the day, Mr. Howell had gone into a house on 110<sup>th</sup> Street, so officers searched that house and found some marijuana plants, some scales and almost an ounce of crack. RP 138, 166, 416, 595. An officer admitted, however, that there was no evidence Mr. Howell lived at the home, nor was there anything linking Mr. Howell to the address in any way, other than his visit that day. RP 417.

When Mr. Howell was asked why he had not stopped when ordered to, he said he would have "shot that mother fucker," referring to the arresting officer, if he had had his gun. RP 137, 144.

Mr. Howell admitted to police that they had “caught” him, saying he was just a small time dealer. RP 157. He joked that they had not found “the crack in his crack” when they searched him. RP 412. An officer did not search Mr. Howell further, knowing a more thorough search would happen at the jail. RP 413. When the men finally arrived at jail, Mr. Reid was seen trying to mess with his pants and, as he walked, some “rocks” fell to the ground. RP 537-39.

A gun was found underneath a bandana on the floor of the car which Mr. Howell and Mr. Reid were in just before the arrest. RP 511-16. An officer who got into the car to move it did not notice anything on the floorboards or any “evidence” in it. RP 478. He did not see a gun in the car’s center console, nor did his feet touch anything on the driver’s side floor. RP 483, 518. He did not see a gun and bandana on that floor at any point while he was driving the car to the impound lot, although he thought he would have seen it if it was indeed where officers later took a picture of it. RP 490. Another officer testified that the gun would be “pretty hard to miss” and “you would definitely see it if you got into the car” and it was where it was later photographed. RP 540. In addition to the guns, there was approximately 4.5 grams of crack inside some clothes in the very back of the Suburban. RP 604.

Mr. Reid was charged with unlawful possession of cocaine with intent to deliver and unlawful delivery, both with firearm enhancements. CP 104-105. The court found him guilty as charged except it did not find him guilty of being armed with a firearm for the delivery to Mr. Pelt. RP 935.

b. The other offenses

About a week after the arrests, Christopher Pelt claimed, he was at an Olive Garden restaurant dropping his “baby’s momma,” Shalotta Faniel, off at work when he saw Mr. Howell and Mr. Reid driving in a white Honda. RP 213. According to Mr. Pelt, the two men pulled up next to his car at a light and Mr. Howell said something like, “[t]here’s that snitch. I’m going to kill that mother fucker.” RP 215. Mr. Pelt said he even thought Mr. Howell was going to get out of his car, but Mr. Pelt pulled away. RP 213-14. Mr. Pelt said that, from his vantage point in a higher vehicle, he could see a gun in Mr. Howell’s lap, which he seemed to move when trying to get up. RP 215, 275.

Mr. Pelt first testified that he drove onto the freeway, weaving “in and out” of the bad traffic, which was moving “maybe 20, 30 miles per hour.” RP 216-19. He said he even drove outside the lane lines on the shoulder of the road, onto dirt and grass, because he was trying to get away from the two men he said were chasing him in the other car. RP 218-19. On cross-examination, however, Mr. Pelt said he was not driving in and out of traffic but was just on the side of the road or shoulder. RP 286-88. He was “quite sure” the other people on the road were honking their horns at him because of the way he was driving. RP 220. At some point, he said, the other car was no longer following behind. RP 224.

Mr. Pelt did not call the police emergency number in order to report the threats and alleged chase. RP 225. Instead, he called one of his supervising officers for “buy-bust” operations, leaving a detailed message. RP 225, 283-85. That officer ultimately told him to “lay low,” saying she

would deal with it the following day. RP 226.

Much of Mr. Pelt's testimony at trial was inconsistent with what he told his police handler. At trial, he was clear that he never saw Mr. Reid with a gun that day. RP 216, 281. When he called his police contact, however, he said Mr. Reid had a gun. RP 283. At trial, the car they were in was a white Honda. RP 214, 281-84. He told the officer, however, that it was a completely different color - gold. RP 284, 612.

Mr. Pelt thought maybe the officer had "got the message messed up." RP 284. Also "messed up" in the message he left for the officer was his claim about why he was at the restaurant. RP 284-85. In contrast to his testimony, the officer's report indicated he told her that he was at the restaurant to have dinner, not to drop his "baby's momma" off as he testified at trial. RP 285.

The parties stipulated that the Olive Garden's business records indicated that Shalotta Faniel had not worked any hours between May 9 and May 22, 2005, the alleged time span of the "Olive Garden" incident. RP 742.

Mr. Reid was charged with intimidating a witness and second-degree assault for the alleged incident. CP 8-12. After hearing the evidence, the trial court found that the prosecution had not proved its case on the charges, beyond a reasonable doubt. RP 936.

Mr. Pelt also testified about another incident, which took place on June 4<sup>th</sup>. RP 235-36. He said he was driving in his car with his father-in-law, Charles Faniel, and they saw Mr. Howell and Mr. Reid drive by in a car driven by a female. RP 235-36. Mr. Howell was in the front

passenger seat and Mr. Reid was in the rear passenger seat. RP 236. Mr. Pelt said, "There's the guy." RP 689. Mr. Faniel testified that he asked what it was all about and Mr. Pelt said that was the guy who had pulled a gun on him two weeks earlier. RP 691-92. Mr. Faniel admitted, however, that he never told police anything about Pelt making such a statement. RP 692.

The car pulled off and Mr. Howell jumped out. RP 237-28. According to Mr. Pelt, Mr. Howell pulled a black gun from under his shirt, waved it like he was going to shoot, then jumped back into the car, this time into the back seat. RP 237-38. Mr. Faniel did not see a gun or anything in Mr. Howell's hands but just assumed there was a gun. RP 678.

The car then started following them and Mr. Pelt ran a few stoplights trying to get away. RP 240-42. He testified that he thought he lost them so he headed back to his "baby's mom's" house, where he lived with his two five-year old twins, his four week old baby and his baby's mother, Shalotta Faniel. RP 240-43.

When he got to the home, Mr. Pelt jumped out of the car, not even closing the doors. RP 246-47. He did not see what happened next but heard the sound of an engine revving, then "looked back" from where he was standing in the doorway. RP 248-49. Although there was a fence obstructing the view, Mr. Pelt testified that he could see through cracks and saw Mr. Howell "standing out of the passenger's back window over the top of the car with the gun in his arms." RP 248-49.

Mr. Pelt then heard shots fired. RP 249. Although he claimed Mr.

Reid and Mr. Howell both had guns, Mr. Pelt admitted that, in fact, he did not see who was shooting. RP 249-50. He was nevertheless sure that both Mr. Howell and Mr. Reed had "guns drawn" at him and thought they both shot at him. RP 258. Later, Mr. Howell told his police handler that Mr. Howell had been shooting out of the back passenger's window and Mr. Reid was shooting over the top of the car. RP 622.

Mr. Faniel only heard the shots but did not see who was firing the gun. RP 694.

Mr. Pelt testified that, when he heard the shots, his child was coming into the kitchen, so he grabbed him and went "to the ground." RP 252. He also said his daughter got down behind a "bar like thing." RP 252. Ms. Faniel, however, told police that she was upstairs with all of the children when she heard Mr. Pelt run into the apartment and shout for her to get down. RP 368.

Mr. Faniel testified that it was he who grabbed his grandson that day. RP 682-83. He heard a shot and pushed Mr. Pelt in, then grabbed the five year-old and "threw him across the living room floor, and then fell on top of him." RP 682-83.

When Mr. Pelt spoke to police he said nothing about his children being downstairs or grabbing any of them to protect them that day. RP 368, 398.

According to Mr. Pelt, when the shooting stopped, Mr. Faniel appeared with a big "assault rifle" and handed it to Mr. Pelt. RP 252, 254. Pelt then ran into the center of the street and fired a round at the departing car. RP 255. He and Mr. Faniel then got into Mr. Pelt's car to give chase.

RP 255. When they did not see the car within a few blocks they went back to the apartment, where police had already arrived. RP 256.

Mr. Pelt, a felon, knew he was not supposed to have guns. RP 260-61. He claimed that he did not know where Mr. Faniel had gotten the gun, but admitted that he had been in possession of a gun or had access to one every day since the "buy." RP 254, 261.

Mr. Faniel, in contrast, testified that they had no gun when they went "after" the other car. RP 694-99. Indeed, he said, they only followed to get a license plate number. RP 699. Mr. Faniel knew Mr. Pelt was not supposed to have guns or be around them. RP 700. He said there was no gun "accessible" at the residence and maintained he had never seen Mr. Pelt with a gun, not even that day. RP 700. He was "positive" about this until cross-examination, when he ultimately admitted it was "possible" Mr. Pelt had a gun that day, that he "may have," but that Mr. Faniel did not remember. RP 702. Mr. Faniel was still "for sure," though, that Mr. Pelt did not have a gun when they went to the car. RP 703.

The vast majority of the 15-20 bullets went into the car Mr. Pelt had been driving, the Expedition. RP 373, 375. The windows were shot out and there were shots to the body. RP 373-77. There were also bullet holes in the driver's side and trunk of another car parked nearby. RP 377.

In contrast, there were no bullet holes anywhere in the door or doorframe where Mr. Pelt had been standing when the shooting began. RP 373. There were no bullet fragments lodged in the door, frame, or on the stairs, although there was a single fragment three stairs up which was just resting there. RP 362. The only bullet hole in the house was under the

kitchen window, and there was some damage to the kitchen counter. RP 360-65, 683.

An officer who responded to the apartment said Ms. Faniel and the kids were very upset and Mr. Pelt just sort of hung by, uninvolved, until the officer confronted him about who he was and why he was in the “crime scene.” RP 350. Mr. Pelt was then “less than forthcoming” about what happened, first trying to whisper to the officer until the officer said, “Why don’t you just talk to me and tell me what happened?” RP 351. Mr. Pelt responded, “Well, I can’t,” and seemed to be acting “secretive,” unlike how victims usually are. RP 351.

The version of events Mr. Pelt gave the officer, the version he gave in interviews and the version he gave at trial were not consistent in several ways. At trial, he said the shooting only started when he was out of his car, in the doorway to the house. RP 247-58, 331. The day of the incident, he claimed there were shots fired earlier, when Mr. Howell and Mr. Reid were in the car behind his. RP 351. At trial, he admitted shooting after the retreating car. RP 379. When talking to the officer that day, he neglected to mention possessing and shooting a gun. RP 309. He did not mention it to his handling officer, either. RP 645.

In pretrial interviews, Mr. Pelt said he had gotten the gun from Shalotta Faniel, who threw it to him as she came downstairs with her baby. RP 317. At trial, he was sure it was from his father-in-law, instead. RP 317, 330.<sup>2</sup>

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<sup>2</sup>There was no testimony indicating if there would have been legal repercussions for Ms. Faniel to have had the gun, for example if she was a convicted felon.

Mr. Pelt also never told the officer he spoke to right after the incident anything about shielding a child with his body, nor did he say anything about the children being anywhere nearby. RP 397-98. Because of his failure to tell the officer he himself had been shooting, Mr. Pelt was not searched for guns, nor was Mr. Faniel. RP 379.

Maria Torres was driving the car Mr. Howell and Mr. Reid were in that day. RP 429-43. She had loaned Howell her car earlier that day and then agreed to drive him to run some errands that afternoon. RP 430-43. They were on the way home, making small talk, when Mr. Howell saw a red SUV and said, "There he is." RP 434-46. Mr. Howell told Ms. Torres to stop at an alley just ahead and she did so, at which point Mr. Howell got out of the car for a few seconds. RP 438. When he got back in, he drove her to drive around back and to a roundabout where there was a SUV with its car doors open. RP 438. At that point, Ms. Torres said, Mr. Howell sat on the windowsill of her car and started shooting over the roof. RP 438.

Ms. Torres said Mr. Howell was shooting towards the SUV. RP 439. When they were almost past it, she noticed two men in the doorway of the nearby house. RP 439. The men were facing out and had "objects" in their hands. RP 439, 451-52. She could not tell if the objects were guns but thought they were. RP 439-50.

Ms. Torres made it clear that Mr. Howell did not point the gun at either of the two men in the door. RP 452. He was pointing at the SUV. RP 439.

As they drove off, Mr. Howell yelled at Ms. Torres for accidentally slowing down and Mr. Reid said, "Did you see the big-ass hunting rifles

they had?" RP 440. Until that point, Ms. Torres had paid no attention to Mr. Reid. RP 438-49. He had been sitting in the back seat, not really saying anything. RP 430-43.

In fact, Ms. Torres said, Howell himself had not said much. RP 430-36. He never said anything about trying to find Mr. Pelt, or wanting to shoot him, or anything like that before the shooting started, and did not discuss it or say anything about it while it was going on. RP 430-46. Indeed, Ms. Torres had no idea Mr. Howell had a gun that day, as it was not common for him to carry one and he never said anything about it. RP 455. Even while it was happening, Mr. Howell was not directing Mr. Reid or even really talking, except to give Ms. Faniel directions on where to drive. RP 430-46. Mr. Howell did not even answer Ms. Faniel when she asked where they were going, instead just saying, "[d]on't worry about it." RP 460.

Mr. Howell testified that, a few weeks after his arrest, he ran into Mr. Pelt and approached him to talk about whether Pelt liked the drugs and why he had not called recently. RP 747. All of a sudden, Mr. Pelt pulled out a gun and said, "[y]ou play with big shit." RP 747. Mr. Howell was surprised and assumed from that incident that Mr. Pelt was the person who had set him up. RP 747. Before that day, Mr. Howell had considered Mr. Pelt a friend. RP 748. Indeed, Mr. Howell said, in the past he had bought drugs from Mr. Pelt when Pelt was dealing. RP 748. Mr. Pelt denied selling Howell drugs or having known him for awhile. RP 277.

Regarding the drugs, Mr. Howell explained that Mr. Reid was his friend and was just driving him around but was not involved in the sales at

all. RP 771-79. Mr. Reid had shown the wet cocaine to Mr. Pelt because Mr. Howell asked him to, not because he was involved in the deal in any way. RP 769-75.

Mr. Howell explained that, when they were driving on that day in June, he asked Ms. Torres to pull over because he thought he had seen Mr. Pelt, the man who had pulled a gun on him a few weeks before. RP 750. Mr. Pelt had Ms. Torres follow the car and, when they lost it, directed her where he thought it had gone. RP 751. When they got there he reached down, grabbed a gun and started firing at the parked SUV. RP 751-52. He wanted to show Mr. Pelt he was not scared of him even though Mr. Pelt had pointed a gun at him that previous day. RP 837.

Mr. Howell made it clear he was firing at the SUV, not at Mr. Pelt. RP 837-45. Howell did not even think he had hit the house and was not aiming at it or any people. RP 752. He stopped shooting after he had shot up the cars, because that was all he wanted to do. RP 840-42. After he shot the windows out of Mr. Pelt's car he saw some people coming out of the nearby house with something in their hands. RP 753. He heard a gunshot as they were driving away. RP 754.

Mr. Howell made it clear that Mr. Reid never had a gun that day. RP 753-54. Howell also said Reid did not know what Howell was going to do, because Howell himself had not known until he did it. RP 755. There was no "plan" to "get" Pelt or anything like that between Howell and Reid. RP 755-58.

Mr. Reid was charged with second-degree assault of Mr. Pelt and Mr. Faniel, both charged with firearm enhancements. CP 8-12. He was

also charged with intimidating a witness, with Mr. Pelt as the victim, also charged with a firearm enhancement. CP 8-12. An additional count of drive-by shooting was also charged. CP 8-12.

After hearing the evidence, the court found Mr. Reid not guilty of the second-degree assault of Mr. Faniel but guilty of the second-degree assault of Mr. Pelt and of being armed with a firearm at the time. RP 935-36. The court also found Mr. Reid guilty of the drive-by shooting and the intimidating a witness, and of committing the latter while armed with a firearm. RP 935-37.

D. ARGUMENT

1. THE CONVICTION FOR INTIMIDATING A WITNESS  
MUST BE REVERSED BECAUSE THERE WAS  
INSUFFICIENT EVIDENCE TO PROVE AN  
ESSENTIAL ELEMENT OF THE CHARGED CRIME

Under both the state and federal due process clauses, the prosecution is required to prove each essential part of its case, beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); 14<sup>th</sup> Amendment; Article I, § 3. Where the evidence is insufficient to support a conviction, reversal and dismissal is required. See Hickman, 135 Wn.2d at 103.

In this case, this Court should reverse and dismiss the conviction for intimidation of a witness, because the prosecution failed to meet its burden of proof on the essential elements of the crime.

Evidence is only sufficient if, taken in the light most favorable to the prosecution and drawing all reasonable inferences therefrom, a rational

trier of fact could have found the essential elements of the crime, beyond a reasonable doubt. See State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). In Count VII, Mr. Reid was charged with intimidating a witness based on the incidents of June 4<sup>th</sup>. CP 10.<sup>3</sup>

The statute defining the crime provides several means of its commission. State v. Boiko, 131 Wn. App. 595, 598, 128 P.3d 143 (2006), review denied, \_\_\_ Wn.2d \_\_\_, 152 P.3d 347 (2007); State v. Chino, 117 Wn. App. 531, 539, 72 P.3d 256 (2003). RCW 9A.72.110 provides, in relevant part:

(1) A person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to:

(a) Influence the testimony of that person;

(b) Induce that person to elude legal process summoning him or her to testify;

(c) Induce that person to absent himself or herself from such proceedings; or

(d) Induce that person not to report information relevant to a criminal investigation or the abuse or neglect of a minor child, not to have the crime or the abuse or neglect of a minor child prosecuted, or not to give truthful or complete information relevant to a criminal investigation or the abuse or neglect of a minor child.

(2) A person also is guilty of intimidating a witness if the person directs a threat to a former witness because of the witness's role in an official proceeding.

Each of the subsections under (1) provide different means of committing the crime, as does subsection (2). See Chino, 117 Wn. App. at 539; State v. Marko, 107 Wn. App. 215, 217, 27 P.3d 228 (2001). The means with

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<sup>3</sup>The other charge of intimidating a witness, based upon the alleged "Olive Garden" incident, was Count III on the third amended information filed in 05-1-02771-3. CP 8-12 (3d info at 1). Mr. Reid was found not guilty of that charge. RP 936.

which Mr. Reid was charged was subsection (1)(c). The information set forth the charge as follows:

That JAMES ERIN REED, in the State of Washington, on or about the 4<sup>th</sup> day of June, 2005, did unlawfully and feloniously by use of a threat directed to Christopher Pelt, a current or prospective witness the defendant attempted to induce Christopher Pelt to absent himself from such proceeding, contrary to RCW 9A.72.110(1)(c)[.]

CP 10.

Thus, to prove Mr. Reid guilty of the crime as charged, the prosecution had to prove 1) that Mr. Pelt was a “current or former witness” under the statute, 2) that Mr. Reid issued a “threat” against Mr. Pelt, and 3) that his intent in issuing the threat was to induce Mr. Pelt to absent himself from “proceedings.” To prove him guilty as an accomplice under RCW 9A.08.020, the prosecution would have to prove that he knowingly aided, abetted, encouraged, or engaged in some other accomplice act, i.e., engaged in some act knowing that it would further intimidation of a witness. See, e.g., State v. Frost, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (2007) (2007 Wash. LEXIS 468 (June 28, 2007)) (slip op. at 17) (state has to prove elements of accomplice liability beyond a reasonable doubt); State v. Williams, 136 Wn. App. 486, 493, 150 P.3d 111 (2007) (elements of accomplice liability).

In finding guilt in this case, the trial court entered CrR 6.1 findings and conclusions, including Finding XVIII and Conclusion IX, relevant to this issue. In the Finding, the court stated that “Howell intended to scare Pelt so that Pelt would not appear to testify against Howell and Reid in the drug case arising from the incident on 5/11/05.” CP 43, 114. In

Conclusion IX, the court found Mr. Reid guilty of intimidation of a witness for what happened on 06/05/05, holding that Mr. Reid

and/or a person to whom he was an accomplice, did threaten Chris Pelt and attempted to induce Chris Pelt, a prospective witness, to absent himself from court proceedings[.]

CP 46-47, 117-18.

At the outset, the court's Conclusion contains findings of fact. A "finding of fact" is a statement that something occurred or existed, while a conclusion of law is a statement of the legal significance of a fact. State v. Niedergang, 43 Wn. App. 656, 658-59, 719 P.2d 576 (1986). Whether Mr. Reid or an accomplice threatened Mr. Pelt, whether they did so in an attempt to induce Mr. Pelt to absent himself from court proceedings, whether there were even "court proceedings" to absent himself from - these are all assertions of a fact.

Findings erroneously included in conclusions are nevertheless reviewed under the standard for findings on appeal. State v. CLR, 40 Wn. App. 839, 843, 700 P.2d 1195 (1985). To withstand review under that standard, a finding must be supported by substantial evidence in the record. State v. Echeverria, 85 Wn. App. 777, 782, 934 P.2d 1214 (1997). Substantial evidence is evidence of a sufficient quantity for a rational, fair-minded trier of fact to find the truth of the declared premise. Id.

There was not substantial evidence to support the court's findings in Finding XVIII and Conclusion IX here. As a threshold matter, there is no question that Mr. Pelt was a "current or prospective witness." For these purposes, that term is defined as

- (i) A person who testified in an official proceeding;

- (ii) A person who was endorsed as a witness in an official proceeding;
- (iii) A person whom the actor knew or believed may have been called as a witness if a hearing or trial had been held; or
- (iv) A person whom the actor knew or believed may have provided information related to a criminal investigation or an investigation into the abuse or neglect of a minor child.

RCW 9A.72.110(3)(b). There had been no charges filed or trial on the investigation of Mr. Howell and Mr. Reid, so (i), (ii) and (iii) did not apply. But clearly Mr. Pelt would be someone Mr. Reid had reason to believe “may have information relevant to a criminal investigation[.]”

It is not the “current or prospective witness” element which is at issue here, however. It is the other elements of the crime. The problem is that, regardless of Mr. Pelt’s status as a “current or prospective witness” because he had “information relevant to a criminal investigation,” the prosecution failed to present sufficient evidence to prove Mr. Reid or an accomplice made a “threat” and did so in order to induce Mr. Pelt to absent himself from “court proceedings,” as the trial court found. CP 46-47, 117-18.

First, there was insufficient evidence to support the court’s finding that Mr. Howell or Mr. Reid threatened Mr. Pelt in an attempt to induce him to do anything, let alone absent himself from court proceedings. RCW 9A.72.110(3)(a) defines “threat” for the intimidation statute as follows:

- (a) “Threat” means:
  - (i) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or
  - (ii) Threat as defined in RCW 9A.04.110(25).

RCW 9A.72.110(3)(a)(ii). RCW 9A.04.110(25) does not, in fact, define “threat.” A 2005 amendment to the statute caused renumbering which changed the subsection defining “threat” to subsection (26). See Laws of 2005, ch. 248, § 3. Under that subsection, “threat” has many definitions, all based upon the intent of the actor. The statute provides, in relevant part:

‘[t]hreat’ means to communicate, directly or indirectly the intent:

- (a) To cause bodily injury in the future to the person threatened or to any other person; or
- ...
- (j) To do any other act which is intended to harm substantially the person threatened or another with respect to his health, business, financial condition, or personal relationships.

RCW 9A.04.110(26).<sup>4</sup>

Thus, a “threat” involves *communication* of an intent to do or cause something to happen. While it is immaterial whether the actor issues the threat directly (by talking to the person threatened) or indirectly (by communicating the threat to someone else), there must nevertheless have been *some* communication for a “threat” to have occurred. See e.g., State v. King, 135 Wn. App. 662, 668, 145 P.3d 1224 (2006) (noting a “true threat” is a “*statement* made in a context in which a reasonable person would foresee that the *statement* would be interpreted by a person

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<sup>4</sup>The other subsections define a threat as communicating directly or indirectly the intent to accuse someone of a crime or cause criminal charges to be tried against them, or to subject someone to physical confinement or restraint, or to bring about or continue a strike, boycott, or other “similar collective action” under some circumstances. RCW 9A.04.110(26).

to whom it is directed as a serious expression of intent”); State v. Anderson, 111 Wn. App. 317, 44 P.3d 857 (2002) (regardless whether it was intended for a threat to be communicated, it was and that was sufficient).

Here, the only “communication” Mr. Pelt claimed occurred was the statement Mr. Howell made, akin to “there’s that snitch, I’m going to kill him.” RP 215. That statement, however, allegedly occurred in May, during the “Olive Garden” incident, not in June on the day of the shooting. RP 213-19. Further, that is the incident for which the court did *not* believe Mr. Pelt and which the court found the prosecution had not proved beyond a reasonable doubt. RP 935-36. And Mr. Pelt admittedly gave differing versions of this incident, at one point saying nothing was actually said during the incident, before changing his mind. RP 279-80.

In addition, the statement in May was not a threat to Mr. Pelt intended to induce him to do anything. Mr. Howell was not saying he would kill Mr. Pelt if he appeared at some proceeding. He was saying he was going to kill Pelt for what Pelt had *already done*. The statement was a promise of retaliation, not a threat to induce Mr. Pelt to take some future act.

In any event, not every communication with a complaining witness amounts to intimidation, even when threats are involved. See State v. Jensen, 57 Wn. App. 501, 508-509, 789 P.2d 722 (1990), affirmed sub nom, State v. Howe, 116 Wn.2d 466, 805 P.2d 806 (1991). Instead, the threat must pertain directly to the intent of the specific subsection of the intimidation statute under which the defendant is charged. Jensen, 57 Wn.

App. at 508-509. Thus, in Jensen, when a son received notice that he had been charged with a crime based upon his mother's complaints, he offered her money to drop the charges, dismiss the case, or reduce the charges. 57 Wn. App. at 508-509. He also threatened to tear up her house when he did not get the answers he wanted. 57 Wn. App. at 508-509. The state charged him with intimidation of a witness under RCW 9A.72.110(1)(c), the same subsection at issue here. 57 Wn. App. at 509-10.

In reversing, the Jensen Court held that the defendant's communications with his mother were simply based upon his improper perception that she could control a prosecution and cause it to be discontinued. 57 Wn. App. at 509-510. That evidence, however, was insufficient to prove that the defendant had intended to induce his mother to "absent" herself from the upcoming legal proceedings by his acts. 57 Wn. App. at 509-510; see also, State v. Weisberg, 65 Wn. App. 721, 726-27, 829 P.2d 252 (1992) (to prove a threat as part of proving forcible compulsion in a rape case there must be evidence the defendant communicated an intention to "inflict. . . injury in order to coerce compliance").

Just as in Jensen, here, the communication in May included a statement of intent to harm. As in Jensen, however, that statement was insufficient to prove an intent to induce absence from a legal proceeding. Indeed, in Jensen, the evidence linking the threats to the proceedings were far stronger, because the defendant in Jensen had specifically threatened to tear up the house when his mother did not agree to "drop the charges." Jensen, 57 Wn. App. at 508-509. Further, in Jensen, there was, in fact, a

criminal proceeding pending, because charges had been filed. 57 Wn. App. at 508-509.

Here, unlike in Jensen, there was no reference to dropping charges or causing harm if the charges were not dropped. Indeed, there was not even a court proceeding pending, despite the court's finding in Conclusion IX. For the purposes of the chapter, the Legislature has defined "[o]fficial proceeding[s]" in relevant part as proceedings "heard before any legislative, judicial, administrative, or other government agency authorized to hear evidence under oath[.]" Although RCW 9A.72.110(1)(c) uses the term "proceedings" instead of "official proceedings," the Legislature gave a clear indication that it did not mean merely criminal investigation of an offense by using the word "proceedings" and by its choice of language in other subsections. In subsection (d) of the statute, the Legislature specifically defined the crime as it occurs when there was merely "criminal investigation" or reporting of information involved, i.e., no "proceedings" had yet begun. RCW 9A.72.110(1)(d). By using different terms in the same statute the Legislature clearly indicated an intent to describe different things, and courts so presume. State v. Roggenkamp, 153 Wn.2d 614, 625, 106 P.2d 196 (2005); State v. Nelson, 131 Wn. App. 175, 179, 123 P.2d 526 (2005).

At best, here, there was a criminal investigation going on. Regardless whether court proceedings were likely or even imminent, they were not pending. There was not substantial evidence from which any rational trier of fact would have found to the contrary as the trial court found. There was insufficient evidence to support the findings in Finding

XVIII and Conclusion IX, that Mr. Howell intended to scare Mr. Pelt or Mr. Pelt was threatened in order to induce Mr. Pelt to not appear to testify in any court proceedings. This Court should so hold.

Reversal and dismissal is required. Without the erroneous findings, the conclusion of guilt as either a principal or an accomplice to Mr. Howell in the crime cannot stand. Those findings, made based upon insufficient evidence, cannot be made again on remand. Nor can the state now present additional evidence to support them. Instead, where, as here, there is insufficient evidence to support a conviction, it would offend double jeopardy prohibitions to permit retrial. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled in part on other grounds by, Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989).

Because the prosecution failed to present sufficient evidence to prove the essential elements of the crime and the court's findings to the contrary are improper, this Court should reverse and dismiss the conviction for intimidation of a witness.

2. MR. REID'S STATE AND FEDERAL RIGHTS TO BE FREE FROM DOUBLE JEOPARDY WERE VIOLATED

Both the state and federal constitutions protect citizens from being subjected to double jeopardy. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995); Whalen v. United States, 445 U.S. 684, 688-89, 100 S.

Ct. 1432, 63 L. Ed. 2d 715 (1980); Fifth Amend.; Art. I, § 9.<sup>5</sup> Both clauses provide the same protection, prohibiting 1) a second prosecution for the same offense after acquittal, 2) a second prosecution for the same offense after conviction, and 3) multiple punishments for the same offense. State v. Womac, \_\_\_ Wn.2d \_\_\_ (2007 Wash. LEXIS 462) (June 14, 2007) (slip opinion (“slip op.”) at 8).

As a result, while the state is free to charge and try to prove multiple charges arising from the same conduct, multiple convictions will offend double jeopardy unless it is clear the legislature has decided to provide for separate crimes and punishments. State v. Freeman, 153 Wn.2d 765, 770-71, 108 P.3d 753 (2005).

In this case, reversal is required, because Mr. Reid suffered multiple punishments for the same offense when he was convicted of drive-by shooting, second-degree assault and intimidation of a witness for the incident in June.

a. Relevant facts

Mr. Howell and Mr. Reid were sentenced separately, with Mr. Howell’s hearing occurring first. See 2RP 1; 3RP 1. There, Mr. Howell’s counsel argued that there was a double jeopardy violation or “merger” problem because the court was finding guilt for the drive-by shooting, the assault and the intimidation based upon the same act. 3RP 22, 26. The court found no double jeopardy problem because “[t]he elements are

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<sup>5</sup>The Fifth Amendment double jeopardy clause applies to the state through the Fourteenth Amendment. See Benton v. Maryland, 395 U.S. 784, 787, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

different on each.” RP 22, 25.

At the last minute, Mr. Howell’s counsel also added an argument on the counts being the “same course of conduct.” RP 33.

At Mr. Reid’s sentencing, his attorney asked to “adopt a lot of the argument” Mr. Howell’s counsel had made at Mr. Howell’s sentencing. 2RP 5. Mr. Reid’s counsel said he would not “rehash” every issue but wanted to raise them all on Mr. Reid’s behalf, and asked to make the sentencing of Howell a part of the record in Mr. Reid’s case. 2RP 5-6.

Counsel also argued a double jeopardy violation, stating the Legislature had clearly “spoken” and said the assault 2 and drive-by shooting were two separate charges but not that the assault and intimidation or drive-by and intimidation were separate. 2RP 5-8. The prosecution argued that the elements of the crimes were not the same, and the court ultimately agreed. 2RP 8-10.

b. Mr. Reid was subjected to double jeopardy by the multiple convictions and sentences

The separate convictions for intimidation, assault and drive-by shooting violated Mr. Reid’s rights to be free from double jeopardy. At the outset, the Supreme Court has recently made it clear that conviction alone amounts to a double jeopardy “punishment” for an offense, even without a sentence. Womac, \_\_\_ Wn.2d \_\_\_ (slip op. at 18-20). Where, as here, not only conviction but also punishment was imposed for all the offenses, there can be no question double jeopardy rights have attached.

As noted above, there was insufficient evidence to support the conviction for intimidation. In addition, the separate intimidation

conviction and sentence was also improper, because the imposition of that conviction, along with the convictions for assault and drive-by shooting, violated double jeopardy.

In general, in examining a double jeopardy claim, the Court applies the “same evidence” rule unless there is a clear indication that the Legislature did not intend to impose multiple punishments. Womac, \_\_\_ Wn.2d at \_\_\_ (slip op. at 8-14). Under that rule, offenses “are not constitutionally the same” if each requires proof of an element not required to prove the other, and proof of one would not necessarily prove the other. Id; see State v. Vladovic, 99 Wn.2d 413, 422, 622 P.2d 853 (1983). In making this determination, the Court does not look at the statutory definition of the crimes but rather at the specific “act or transaction” and whether each crime required proof of a fact the other did not. In re Personal Restraint of Orange, 152 Wn.2d 795, 818, 100 P.3d 291 (2004).

In this case, the prosecution relied on the same “act or transaction” as proving the intimidation of a witness, the second-degree assault and the drive-by shooting - the shooting at Mr. Pelt’s house. RP 922. And the court said it found Mr. Reid guilty as an accomplice for those acts when it found he was an accomplice for the drive-by shooting. 2RP 10.

Thus, the specific “act or transaction” for each crime here is not the underlying crime but rather the “accomplice act” of RCW 9A.08.040. Under that statute, a person is held “vicariously” liable for the criminal conduct of the other if, “[w]ith knowledge that it will promote or facilitate the commission of the crime,” he or she “solicits, commands, encourages, or requests [another] person to commit it” or “aids or agrees to aid

[another] person in planning or committing it.” State v. Carter 154 Wn.2d 71, 77, 109 P.3d 823 (2005), quoting, RCW 9A.08.020(3)(a)(i), (ii). It is the knowing soliciting, commanding, encouraging, requesting, aiding or agreeing to aid in the crime which is the criminal act of the accomplice. See, e.g., State v. Luna, 71 Wn. App. 755, 759, 862 P.2d 620 (1993).

As a result, under the unique facts of this case, the “same elements” test is met regardless of any differences in the underlying offenses. The very same elements - knowledge and an “accomplice act” - were the elements creating liability for each of the crimes. And the court relied on exactly the same conduct in finding liability for all three crimes. The crimes were thus the same in both fact and law, under the circumstances of this case.

Womac, supra, is instructive, even though it did not involve an accomplice. In Womac, the prosecution relied on the same act - the killing of a child - for charges of assault of a child in the first degree, murder in the second degree (felony murder including assault as a predicate), and homicide by abuse. \_\_\_ Wn.2d at \_\_\_ (slip op. at 3-13). Even though the defendant was only sentenced for one offense, the Court reversed two of the convictions, finding they violated double jeopardy. Id. After first noting the general “same elements” rule, the Court then held that a violation of double jeopardy can occur even “despite a determination that the offenses involved clearly contained different legal elements.” \_\_\_ Wn.2d at \_\_\_ (slip op. at 9-14). Because Womac could not have committed felony murder in the second degree without committing assault in the first degree, and because the assault and homicide by abuse involved the same

victim and occurred at the same time and place, only one conviction could stand. \_\_\_ Wn.2d at \_\_\_ (slip op at 7-19).

Here, there can be no question that Mr. Reid could not have acted as an accomplice for the intimidation, assault or drive-by shooting without committing all three offenses, under the prosecution's theory of the case. The court relied on the very same conduct in finding accomplice liability for all offenses. The conduct occurred in the same time and place, with the same victim. And the elements creating the criminal liability - knowingly taking an "accomplice act"- were exactly the same.

The convictions for intimidation, assault and drive-by shooting and their resulting sentences violated Mr. Reid's constitutional rights to be free from double jeopardy. The remedy for such violations is dismissal of the crimes which result in the lowest standard range. State v. Weber, 159 Wn.2d 252, 269, 149 P.3d 646 (2006), cert. denied sub nom Weber v. Washington, 2007 U.S. LEXIS 7828 (June 18, 2007). In this case, the highest standard range is for the drive-by shooting and the standard range for that offense, calculated without the improper intimidation and assault convictions, is 26-34 months. See former RCW 9.94A.510 (2005). The assault and intimidation convictions violated double jeopardy, and this Court should so hold and should dismiss those counts and reverse and remand for resentencing within the 26-34 month range.

3. THE OFFENSES WERE THE SAME CRIMINAL  
CONDUCT AND COUNSEL WAS INEFFECTIVE

Even if the intimidation count is not dismissed based upon evidentiary insufficiency, and even if this Court were to find that the

convictions for intimidation, assault 2 and drive-by shooting did not violate double jeopardy, reversal for resentencing would still be required, because the trial court erred in refusing to count the intimidation, assault and drive-by shooting as the “same criminal conduct” at sentencing.

Under RCW 9.94A.589(1)(a), multiple offenses which encompass the “same criminal conduct” are counted as a single offense in the offender score. See State v. Lessley, 118 Wn.2d 773, 779, 827 P.2d 996 (1991). Offenses are the same criminal conduct if “they require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). Criminal intent is the same for crimes if the defendant’s intent, when viewed objectively, did not change from one crime to the next. State v. Anderson, 72 Wn. App. 453, 464, 864 P.2d 1001, review denied, 124 Wn.2d 1013 (1994).

Thus, in Anderson, a defendant was convicted of assaulting a police officer in order to escape from custody. Because the assault was committed to further the escape, the defendant’s criminal intent was the same from one offense to the other and they were the same criminal conduct. 72 Wn. App. at 464.

Here, there was no “change” in time, place, victim or criminal intent for any of the three crimes. The acts for each offense were exactly the same, as were the elements. As a result, even if the intimidation and assault are not dismissed, the offender score for those offenses and the drive-by should have been a “3,” not a “4.” With dismissal of the intimidation count for insufficient evidence, the offender score would dip lower, to a 2, resulting in significantly lowered standard ranges. See

former RCW 9.94A.510 (2005).

Further, if the “adoption” of the arguments from Mr. Howell’s sentencing was insufficient to preserve this sentencing issue, this Court should find counsel ineffective for failing to explicitly argue the “same criminal conduct” issue. Both the state and federal constitutions guarantee the accused the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); Sixth Amend.; Art. I, § 22. To show ineffective assistance, a defendant must show that counsel’s representation was deficient and the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a “strong presumption” of effectiveness, it is overcome where counsel’s conduct fell below an objective standard of reasonableness. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

There can be no question here that counsel’s performance fell below an objective standard of reasonableness and prejudiced his client. It is ineffective assistance to fail to argue “same criminal conduct” when it applies. State v. Saunders, 137 Wn.2d 533, 86 P.2d 232 (2004).

Further, here, the prejudice is especially strong, because Mr. Reid received the lowest sentence possible within the purported standard range. See 2RP 10-14. Even with the intimidation count still included, applying the “same criminal conduct” analysis, with an offender score of 3, the proper sentence ranges (without the enhancements) would have been 26-34 months for the intimidation, 31-41 months for the drive-by, and 13-17

months on the assault. Former RCW 9.94A.510 (2005). Without the intimidation count, the score reduces further to 2, so the standard ranges would be (without the enhancements) 21-27 months for the intimidation, 26-34 months for the drive-by, and 12-14 months for the assault. The court erred and counsel was ineffective regarding the same criminal conduct issue. Even if the Court does not reverse based upon the other arguments contained here, remand for resentencing is required.

E. CONCLUSION

The prosecution failed to present sufficient evidence to prove the essential elements of the crime of intimidating a witness. Further, the convictions for intimidation, assault and drive-by shooting violated Mr. Reid's rights to be free from double jeopardy. At a minimum, the offenses were the same criminal conduct, and resentencing is required. This Court should grant Mr. Reid the relief to which he is entitled in this case.

DATED this 7th day of July, 2007.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

STATE OF WASHINGTON  
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DEPUTY

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,  
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;  
to Mr. James Reid, c/o Gloucester County Dept. of Corrections,  
P.O. Box 376, Woodbury, N.J., 08096.

DATED this 7<sup>th</sup> day of July, 2007.

  
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