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NO. 35428-4

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

Ann

STATE OF WASHINGTON, RESPONDENT

v.

JAMES REID, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Thomas P. Larkin

No. 05-1-02771-3

No. 05-1-02318-1

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**BRIEF OF RESPONDENT**

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

1. Is there sufficient evidence to support a conviction of intimidating a witness where the testimony was that defendant's accomplice identified the witness as a "snitch," threatened to kill the witness, chased the witness to the witness' residence, and fired several shots at the witness?
2. Was there substantial evidence in the record to support the trial court's findings of fact where such findings are based on testimony in the record, or reasonable inferences drawn there from?
3. Did Reid's convictions for intimidating a witness, second degree assault, and drive by shooting violate double jeopardy when the crimes are not identical in law and fact and the legislature did not intend for them to be punished by a single punishment?
4. Did the sentencing court correctly find that Reid's convictions for second degree assault, intimidating a witness, and drive by shooting were not the same criminal conduct when the three crimes require a different intent?

B. STATEMENT OF THE CASE.

1. Procedure

On May 12, 2005, James Amin Reid, hereinafter Reid, was charged in Pierce County Superior Court cause number 05-1-02318-1 with once count of unlawful possession of a controlled substance with intent to deliver and one count of unlawful possession of a controlled substance. Both counts were firearm enhanced. 1CP 82-85<sup>1</sup>. A corrected information was filed on May 13, 2005. 1CP 104-105.

On June 6, 2005, the State charged Reid in Pierce County Superior Court cause number 05-1-02771-3 with one count of intimidating a witness with a firearm enhancement. 2CP 1-2. On July 13, 2005, in an amended the information to add an additional count of intimidating a witness, two counts of first degree assault, and one count of drive by shooting. 2CP 3-7. The State filed a second amended information on October 12, 2005, which identified two alternative victims for the drive by shooting count. 2CP 8-12. The State filed a third amended information on May 18, 2006, reducing the two first degree assault counts to second degree assault and listing Christopher Pelt as the victim on the two witness intimidation counts. 2CP 29-31.

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<sup>1</sup> Reid's appeal is from a bench trial in which two of Reid's cases were consolidated and then joined with his co-defendant Qudaffi Howell's two cause numbers arising out of the same incidents. The clerk's papers for Reid are referred to as follows: Pierce County cause no. 05-1-02318-1 are referred to as 1CP and the clerk's papers from Pierce County cause no. 05-1-02771-3 are referred to as 2CP.

On May 4, 2006, Reid and his co-defendant Qudaffi Howell's cases were joined and consolidated for trial. 2CP 14-15.

On May 18, 2006, the parties appeared for trial before the Honorable Judge Thomas Larkin. RP 4-5<sup>2</sup>. Defense counsels stipulated that Reid and Howell were properly advised of their *Miranda* rights and all their statements were admissible. 1CP 156, 157; 2CP 82-83; RP 6, 8, 43-44. On May 22, 2006, the court denied Reid's Criminal Rule (CrR) 3.6 motion and Reid waived his right to a jury trial. 1CP 106; 2CP 32; RP 84, 85-90. After a bench trial, the court found Reid guilty of unlawful delivery of a controlled substance and possession of a controlled substance with intent to deliver with a firearm enhancement under cause number 05-1-02318-1; and guilty of one count of second degree assault with a firearm enhancement, one count of intimidating a witness with a firearm enhancement, and one count of drive by shooting under cause no. 05-1-02771-3. RP 935-36; 1CP 109-118, 122-34; 2CP 38-47, 51-63. Findings of fact and conclusions of law were entered on each cause number on October 6, 2006. 1CP 109-118; 2CP 38-47. Reid was sentenced to a total of 168 months, which included 108 months flat time for the three firearm enhancements. 1CP 122-134; 2CP 51-63. SRP 16.

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<sup>2</sup> There are 11 volumes of verbatim record of proceeding. Ten volumes are labeled 1-10. The remaining volume dated October 6, 2006, is labeled Sentencing. All references to volumes 1-10 are referred to as RP and the sentencing volume is referred to as SRP

This timely appeal followed.

## 2. Facts

On May 11, 2005, Christopher Pelt was working with Tacoma Police as a confidential informant. RP 190. Pelt had previously been charged with drug and firearm charges. RP 188. The police were interested in working with him because he had been around for a while and knew the local drug dealers. RP 188-89. Pelt worked with Officer Johnson, who he called "CJ" and Officer Kirk Martin, who he called "K Mart." RP 189, 190.

Howell became a target because he talked to Pelt about drugs he could get a hold of and he always kept a good amount of drugs on him. RP 191, 192. Pelt had purchased drugs from Howell three or four times before May 11, 2005. RP 192. Pelt saw Reid with Howell most of the time. RP 194. Generally, Reid would be driving. RP 194.

Reid arranged to meet Howell at the AM/PM on 112<sup>th</sup> and Steele St. RP 196, 206. Pelt was wearing a wire so the officers could hear what was going on. RP 197. Pelt got to the AM/PM first and then Howell arrived in a gray Suburban. RP 197. Reid was driving the Suburban. RP 198, 207. Howell exited the Suburban and got into Pelt's Expedition. RP 198. Reid remained in the Suburban. RP 198. Pelt purchased an ounce of cocaine from Howell. RP 199. Howell told Pelt he had a "half-bird," which is one half a kilo of cocaine, in the Suburban. RP 199, 207-08.

Reid picked up a shoe box and showed Pelt the cocaine. RP 200, 202, 209, 210, 211. The cocaine was wet and was in the process of being made into crack cocaine. RP 200-01. After purchasing an ounce of cocaine from Howell, Pelt met with his officers and gave them the drugs. RP 211-12. Howell and Reed were arrested later that day. RP 135, 531.

Officer Christopher Martin testified that he was working in a narcotics investigation on May 11, 2005. RP 123. He was using a confidential informant, Christopher Pelt, who had made several purchases in the past. RP 123-24, 192. On May 11, 2005, the police were going to attempt an arrest. RP 124. Officer Christopher Martin was part of the arrest team. RP 124. When Officer Kirk Martin attempted to contact Howell, Howell fled on foot. RP 128, 501. Officer Christopher Martin, gave chase. RP 129. Officer Christopher Martin yelled, "Police. Stop. Police. Stop." at Howell, who looked back and made eye contact, but continue to run. RP 129. Officers took Howell into custody and in a search incident to arrest, found a large amount of money and a package of suspected crack cocaine in Howell's pants' pockets. RP 130, 132, 133, 140. After being advised that he was under arrest for unlawful delivery of a controlled substance, Howell said "That is okay. When I get out, I'll really start dealing drugs." RP 135, 136. When asked why he did not stop when Officer Kirk Martin pointed a gun at him and ordered him to stop, Howell stated "If I would have had my gun, I would have shot that mother fucker." RP 136-37, 144.

Officer Christopher Travis testified he was also part of the arrest team on May 11, 2005. RP 147, 148. After Howell was detained, Officer Travis heard him state "I'm done. You got me dealing. I'm a small-time dealer. It is no big thing." RP 157. Howell told Officer Travis that he had purchased the Suburban for \$23,000.00 a few months before. RP 158. Howell told Officer Travis that "[a]ll of my shit is in other people's names because I have to...Shit. When I get out of here, I'll be selling big time." RP 158.

At the jail, Officer Travis searched Howell and found three plastic baggies that contained what appeared to be crack cocaine in his pocket. RP 159, 160. The combined weight was 25.5 grams. RP 160. An amount that size is not for personal use, but for sale. RP 161. Corrections staff advised Officer Travis that Reid, who had been arrested with Howell, appeared to be messing with the back of his clothing. RP 163, 164. Officer Travis saw a piece of rock cocaine lying on the ground in front of Reid. RP 163, 164. Later as Officer Travis observed Reid walk, two more pieces of rock cocaine fell from his pants. RP 165. The jail staff also recovered some rock cocaine hidden on Reid's person. RP 165. All together, there were approximately 10 pieces of rock cocaine, valued at \$200.00, recovered from Reid. RP 175. Reid and Howell bailed out of jail on May 13, 2005. RP 615.

The next time Pelt saw Howell and Reid was less than a month later at the Olive Garden restaurant. RP 213. Reid and Howell pulled up

on Pelt's driver's side at the stop light at 72nd and Hosmer. RP 213, 214. Reid was driving. RP 214. Howell said "There's that snitch. I'm going to kill that motherfucker." RP 215. Pelt noticed the gun in Howell's lap and sped away. RP 215. Pelt got on the freeway trying to get away from them. RP 216, 217. Pelt could see Reid and Howell chasing him. RP 219. Pelt was afraid for his life. RP 220. Pelt did get away. Pelt called Officer Johnson to see if she could do anything about Howell and Reid "chasing me around town, knowing where my girl lived." RP 225. Pelt believed Howell and Reid knew he was a confidential informant because they called him a snitch and threatened to kill him. RP 225. Pelt was afraid for himself and his family because of the threat. RP 226, 227. Within a couple of days he met with Officer Johnson to go over mug shots and identified Reid as the person driving the vehicle when Howell threatened Pelt. RP 227

Pelt crossed paths with Howell and Reid a couple of weeks later at 56<sup>th</sup> and Oakes. RP 228. Pelt was in his Expedition with his father-in-law, Charles Faniel. RP 235. Maria Torres was driving the Reid and Howell. RP 433. Howell was in the front passenger's seat and Reid was in the back passenger's side seat. RP 236, 434. Reid's and Howell's car stopped and Howell waved a gun in the air. RP 236. They pulled into a side street and Howell got into the back seat with Reid. RP 237. Howell had a black handgun at waist level. RP 238, 239. Pelt drove to his baby's mother's house to get away from defendants, but they followed him. RP

239, 240. Pelt ran to the house and was in the doorway as Reid and Howell shot at him and Faniel. RP 249-52.

After the shooting, Pelt and officers observed bullet holes in the fence in front of the residence, a bullet hole just under the kitchen window, a kitchen countertop that had been exploded by a bullet, and bullet fragments on the kitchen floor and on the stairs inside the residence. RP 253-57, 354-55.

C. ARGUMENT.

1. THERE IS SUFFICIENT EVIDENCE THAT REID COMMITTED THE CRIME OF INTIMIDATING A WITNESS.

In an insufficiency claim, the applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988)(citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d

1068 (1992). Circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In the present case, Pelt was working as a confidential informant for Officer Colleen Johnson. RP 579. As a confidential informant, Pelt wore a wire while making drug deals to assist police narcotics investigations. RP 197; 203-12, 583. As part of his work as a confidential informant, Pelt met with Reid and Howell on May 11, 2005, to purchase cocaine. RP 588-89. Pelt had purchased drugs from Howell many times in the past. RP 192, 584. Reid was frequently with Howell when Pelt purchased drugs. RP 194. On May 11<sup>th</sup>, Reid drove Howell to the AM/PM where Pelt and Howell had arranged to meet for the drug sale. RP 198, 207. Howell exited his car and got into the passenger's seat in Pelt's car. RP 198. Pelt purchased an ounce of cocaine. RP 199. During the transaction, Howell told Pelt that he had a half bird, or half kilo, of wet cocaine in his car. RP 199, 207-08. Reid, still sitting in his car, showed the half bird of wet cocaine to Pelt. RP 200, 202, 209, 210, 211. The cocaine was in the process of being made into crack. RP 200-01. After the sale, Pelt left the area to meet with Officer Johnson and Reid. RP 211-12.

As a result of Pelt's work with the police, Reid and Howell were arrested later that day. RP 135, 531. When Reid was in the booking area of the jail, he dropped numerous rocks of crack cocaine out of his pants leg. RP 163, 164, 165, 511, 512.

Reid and Howell bailed out of jail on May 13, 2005. RP 615.

Shortly after they bailed out of jail, Reid and Howell encountered Pelt and Howell identified Pelt as the snitch. RP 215. When Pelt was identified as the snitch, Reid was again driving Howell around. RP 213, 214. Pelt heard Howell say, "There's that snitch. I am going to kill that mother fucker." RP 215. When Howell threatened to kill him, Pelt could see that Howell had a gun in his lap. RP 216. Reid and Howell chased Pelt in their car, but Pelt got away that time. RP 219-23. Pelt felt his life was threatened. RP 220. Pelt contacted Officer Johnson and told her that Reid and Howell identified him as a snitch and threatened to kill him. RP 220.

On the day of the drive by shooting, Reid and Howell were in a car driven by Howell's girlfriend, Maria Torres. RP 433. Howell spotted Pelt driving Pelt's Expedition near the intersection of Oaks and 56<sup>th</sup> Street. RP 436, 458, 477. Howell said "there he is" and told Torres to pull into an alley. RP 436, 477, 459. Torres testified that she believed Howell was referring to the snitch when he said "there he is." RP 465. Howell directed Torres to drive down a few alleys and around a roundabout. RP 437, 438, 449. As they drove around the roundabout, they saw Pelt's vehicle parked outside Pelt's house. RP 437, 438, 449. Howell said "That is the guy who snitched." RP 465.

After identifying Pelt as the snitch, Howell leaned out the car window and fired numerous shots toward Pelt hitting Pelt's vehicle and house. RP 438, 439, 450, 460. Pelt testified that both Howell and Reid

were shooting. RP 249-52. Several windows were shot out in Pelt's vehicle, bullet holes were found in the body of Pelt's vehicle, and Pelt's house. RP 253-55.

Reid argues that the State has not produced sufficient evidence to prove he committed the crime of intimidating a witness. Brief of Appellant at 17. While he concedes Pelt was a prospective witness, Reid argues that there was insufficient evidence that Reid or an accomplice made a threat to induce Pelt to absent himself the court proceedings. Brief of Appellant at 21.

Reid's claim fails for two reasons. As stated above, in a sufficiency of the evidence claim, the reviewing court's applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d at 338. To prove count VII, the charge of intimidating a witness, the State had to prove that Reid or an accomplice, by use of a threat against Pelt, attempted to induce Pelt to absent himself from the proceedings. RCW 9A.72.110(1)(c); 2CP 108. Here, after Reid and Howell were arrested for selling cocaine to Pelt, Reid's accomplice identified Pelt as a "snitch," i.e. someone who would give information about Reid's and Howell's wrongdoing, and in that context, threatened to kill Pelt. Reid was driving the car when the defendants chased Pelt after Howell threatened to kill Pelt. On the day of the drive by shooting,

Howell again identified Pelt as the “snitch” and then Howell and Reid followed through on the earlier threat by shooting at Pelt, hitting his vehicle and house.

Second, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d at 201. The relationship between the defendants and Pelt was that of Reid and Howell selling drugs to Pelt not knowing Pelt was wearing a wire and working for police. A reasonable inference to be drawn from the threat and shooting incidents is that Reid or an accomplice shot at Pelt to eliminate or intimidate Pelt as a witness to keep him from testifying. Thus, there was ample evidence for a rational trier of fact to find Reid guilty of intimidating a witness.

Because there was significant evidence with which a rational trier of fact could find that Reid or his accomplice threatened to kill Pelt to keep Pelt from testifying against them, Reid’s sufficiency of the evidence claim must fail.

2. THERE WAS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE COURT’S FINDINGS OF FACT AND CONCLUSIONS OF LAW.

When a defendant assigns error to a finding of fact, this court reviews the challenged finding to determine whether there is substantial evidence in the record to support it. State v. Mendez, 137 Wn.2d 208,

214, 970 P.2d 722 (1999). Findings of fact that are not assigned error are viewed as verities on appeal. RAP 10.3(g); State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Findings are also viewed as verities if there is substantial evidence to support the findings. Hill, 123 Wn.2d at 644. “Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.” Id. Conclusions of law are reviewed de novo. Mendez, 137 Wn.2d at 214.

In the present case, Reid challenges finding of fact XVIII which states:

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.

1CP 109-118; 2CP 38-47. As argued above there is substantial evidence to support the court’s finding that Howell intended to scare Pelt so Pelt would not appear to testify against the defendants in the drug case stemming from the incident on May 11, 2005.

Reid also challenges conclusion of law IX, which states:

The court finds the defendant [Reid] 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...

1CP 109-118; 2CP 38-47. Reid argues that “there was not even a court proceeding pending, despite the court’s finding in Conclusion IX. Brief of Appellant at 25. This argument is not supported by the record. Howell and Reid were arrested on drug charges based on their sale of cocaine to Pelt on May 11, 2005. RP 135, 531. Charges were on May 12, 2005. 1CP 82-85. Reid’s accomplice, Howell, identified Pelt as a “snitch” and threatened to kill Pelt on May 16, 2005. RP 606. Reid and Howell followed Pelt and shot up Pelt’s car and house on June 4, 2005 while there were pending court proceedings under Pierce County cause no. 05-1-02771-3. RP 249-52.

The court’s findings of fact and conclusions of law are supported by the record. The State produced sufficient evidence for a reasonable trier of fact to find Reid guilty of intimidating a witness beyond a reasonable doubt.

3. REID’S CONVICTIONS FOR INTIMIDATING A WITNESS, SECOND DEGREE ASSAULT, AND DRIVE BY SHOOTING DID NOT VIOLATE DOUBLE JEOPARDY BECAUSE THE CRIMES ARE NOT IDENTICAL IN LAW AND FACT AND THE LEGISLATURE DID NOT INTEND FOR THE CRIMES TO BE PUNISHED BY A SINGLE PUNISHMENT.

Both the United States Constitution and the Washington State Constitution protect a person from twice being placed in jeopardy for the same offense. U.S. Const. amend. V (no person shall “be subject for the

same offense to be twice put in jeopardy of life or limb.”); Wash. Const. art. I, § 9 (no person shall “be twice put in jeopardy for the same offense). “The federal and state [double jeopardy] provisions afford the same protections and are ‘identical in thought, substance, and purpose.’” In re Pers. Restraint of Davis, 142 Wn.2d 165, 171, 12 P.3d 603 (2000) (quoting State v. Schoel, 54 Wn.2d 388, 391, 341 P.2d 481 (1959)). To determine if the defendant has been punished twice for a single act under separate criminal statutes, the courts apply the test laid out in Blockburger V. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Under the *Blockburger* test, double jeopardy arises if the offenses are identical both in law and in fact. Blockburger, 284 U.S. 299, 304. “[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” Blockburger, at 304; citing, Gavieres v. United States, 220 U.S. 338, 342, 31 S. Ct. 421, 55 L. Ed. 489 (1911). When convictions on two crimes for the same act would constitute double jeopardy, the remedy is to vacate the conviction for the “lesser” crime. In re Pers. Restraint of Burchfield, 111 Wn. App 892, 899, 46 P.3d 840 (2002).

In the present case Reid argues that he was placed in double jeopardy because he was convicted of second degree assault, drive by shooting, and intimidating a witness through accomplice liability. Brief of

Appellant at 29. He asserts that “the specific ‘act or transaction’ for each crime is not the underlying crime but rather the “accomplice act” of RCW 9A.08.040.” Brief of Appellant at 29. Reid’s argument fails for several reasons. First, Reid’s initial premise, that an individual cannot be convicted of more than one crime from a single act without violating double jeopardy is contrary to case law. See State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995). In Calle, the defendant was convicted of second degree rape and incest for the single act of intercourse with his stepdaughter. Calle, 125 Wn.2d 769, 771. Applying both the *Blockburger* test and same evidence test, the court determined that while the offenses were the same in fact, both occurred when defendant had sexual intercourse, they were different in law because rape required forcible compulsion and incest required proof of relationship. Calle at 778. The Calle court found that second degree rape and incest were separate offenses and defendant’s conviction for both did not violate double jeopardy.

Similarly, in State v. Rivera, Rivera fired 14 shots into a Pasco service station. State v. Rivera, 85 Wn. App. 296, 298, 932 P.2d 701 (1997). Rivera was convicted of three counts of first degree assault and seven counts of first degree reckless endangerment.<sup>3</sup> Rivera, 85 Wn. App.

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<sup>3</sup> In 1997, first degree reckless endangerment was renamed as drive by shooting. See LAWS OF 1997 ch. 338 § 44.

296, 298. Following the three step analysis set out in Calle, the Rivera court determined that: 1) neither the assault statute nor the reckless endangerment statute specifically authorized multiple punishments; 2) the same evidence test was not satisfied because reckless endangerment requires a disregard of substantial risk and a discharge of a firearm from, or in the area of, a motor vehicle and first degree assault only requires an intent to inflict great bodily harm; and 3) the legislature did not intend to punish both crimes by a single punishment because the reckless endangerment (now the drive by shooting) was created in 1989 in response to “drug-related crimes of violence by members of youth gangs...” whereas assault has been a crime for over 140 years and prohibits a different type of conduct. Rivera at 301-02. The court found that punishing Rivera for both first degree assault and reckless endangerment did not violate double jeopardy. Id. at 303.

In the present case, as demonstrated by Calle and Rivera, Reid’s underlying premise, that double jeopardy is necessarily violated when multiple crimes arise out of a single act is without merit. As set out in Rivera, assault and drive by shooting do not satisfy the same evidence test. RCW 9A.36.021(1)(c), RCW 9A.36.045(1). Intimidating a witness also does not satisfy the same evidence test because it requires an intent to induce a potential witness to absent himself from legal proceedings. RCW 9A.72.110(1)(c).

Second, Reid's argument fails because the prohibition against double jeopardy protects an individual from twice being placed in jeopardy for the same offense and accomplice liability is not an offense. RCW 9A.08.020.<sup>4</sup> "Accomplice liability is not a separate crime; it is predicated on aid to another in commission of a crime, and is, in essence, liability for that crime." State v. Jackson, 87 Wn. App. 801, 944 P.2d 403 (1997). Reid's argument that, because he was convicted based upon accomplice liability, the "same elements" test is met because the elements of "knowledge and an accomplice act" were present for each crime, is without merit.

Finally, if Reid's argument is followed to its logical conclusion, then an accomplice could only be convicted of one crime – regardless of the number of victims, difference in underlying criminal acts, or dates on which those crimes were committed. This is clearly not the intent of the

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<sup>4</sup> (1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.  
(2) A person is legally accountable for the conduct of another person when:  
(a) Acting with the kind of culpability that is sufficient for the commission of the crime, he causes an innocent or irresponsible person to engage in such conduct; or  
(b) He is made accountable for the conduct of such other person by this title or by the law defining the crime; or  
(c) He is an accomplice of such other person in the commission of the crime.  
(3) A person is an accomplice of another person in the commission of a crime if:  
(a) With knowledge that it will promote or facilitate the commission of the crime, he  
(i) solicits, commands, encourages, or requests such other person to commit it; or  
(ii) aids or agrees to aid such other person in planning or committing it; or  
(b) His conduct is expressly declared by law to establish his complicity.

State and Federal double jeopardy clauses and Reid has offered no authority to the contrary.

Reid's argument that double jeopardy was violated when he was convicted of intimidating a witness, second degree assault, and drive by shooting based upon the same "accomplice acts" is without merit and must fail.

4. THE TRIAL COURT CORRECTLY FOUND REID'S SECOND DEGREE ASSAULT, INTIMIDATING A WITNESS, AND DRIVE BY SHOOTING CONVICTIONS WERE NOT SAME CRIMINAL CONDUCT BECAUSE THEY DO NOT REQUIRE THE SAME INTENT.

Same criminal conduct crimes committed against a single victim are the same criminal conduct for purposes of sentencing if they (a) involve the same criminal intent; (b) were committed at the same time and place; and (c) involve the same victim. RCW 9.94A.589(1)(a); State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). The absence of any one of these criteria prevents a finding of same criminal conduct. State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). A trial court's determination as to whether separate acts constitute the same criminal conduct will be reversed only for clear abuse of discretion or misapplication of the law. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

Relying on State v. Anderson, 72 Wn. App. 453, 464, 864 P.2d 1001 (1994), Reid argues that second degree assault, intimidating a witness, and drive by shooting are same criminal conduct because one crime furthers the other. Brief of Appellant at 32. However, in Haddock, the Supreme Court clarified that:

[T]he “furtherance test” was never meant to be and never has been the linchpin of this court’s analysis of “same criminal conduct.” See Dunaway, 109 Wn.2d at 215 (“part of this analysis [of criminal intent] will often include the related issues of whether one crime furthered the other”). Additionally, this court has stated that “the furtherance test lends itself to sequentially committed crimes, [but] its application to crimes occurring literally at the same time is limited.” State v. Vike, 125 Wn.2d 407, 412, 885 P.2d 824 (1994). Finally, requiring convictions to further each other would logically bar treating Haddock’s multiple, simultaneous convictions of the same crime as “same criminal conduct.”

Haddock at 114. Therefore, the furtherance test is limited in cases such as the present case.

Here, all three offenses involve the same victim, Pelt. All three offenses occurred at Pelt’s home. However, none of the offenses involve the same criminal intent. The offense of intimidating a witness requires the intent to induce the witness to absent himself or herself from the proceedings. RCW 9A.72.110(1)(c). The offense of second degree assault as charged herein requires the intent to harm or scare another. RCW 9A.36.021(c); State v. Hupe, 50 Wn. App. 277, 748 P.2d 263 (1988). The offense of drive by shooting as charged herein requires the

intent to recklessly discharge a firearm from a motor vehicle in a manner that creates a substantial risk of death or serious physical injury. RCW 9A.036.045. It is clear that each crime requires a different intent. Therefore, Reid's offender score was properly calculated and there was no error. His claim is without merit.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests that this court affirm defendant's convictions below.

DATED: NOVEMBER 8, 2007

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Certificate of Service:

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

11/8/07 [Signature]  
Date Signature