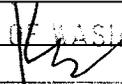


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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

STATE OF WASHINGTON, RESPONDENT

v.

GARY RAY KING, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas Feltnagle

No. 05-1-03813-8

BRIEF OF RESPONDENT

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

1. Do defendant's convictions for conspiracy to commit first degree robbery and conspiracy to commit first degree burglary violate double jeopardy where defendant and an accomplice had two separate agreements, one for the burglary and one for the robbery?
2. Has the State proved defendant committed the crimes of unlawful imprisonment and two separate conspiracies where the victims were restrained by masked men and held at gun point for two hours and established that there were two separate agreements and two distinct overt acts separated by more than 12 hours in time? Did the State fail to prove felony harassment beyond a reasonable doubt where it did not produce evidence that the person threatened was placed in fear that the threat would be carried out?

B. STATEMENT OF THE CASE.

1. Procedure

On August 4, 2005, the State charged Gary Ray King, III, hereinafter "defendant," with first degree robbery, first degree burglary, and three counts of first degree kidnapping. CP 1-5. On October 27, 2005, the State filed an amended information charging defendant with first degree robbery; first degree burglary; first degree kidnapping; two counts of unlawful imprisonment; four counts of theft of a firearm; second degree taking a motor vehicle without permission; felony harassment; conspiracy

to commit first degree robbery; and conspiracy to commit first degree burglary. CP 13-20. All crimes except the conspiracies and the theft of firearm counts were firearm enhanced. CP 13-20. A corrected amended information was filed on November 7, 2005. CP 22-27.

The parties appeared for trial before the Honorable Thomas Felnagle on March 8, 2007. RP 3¹. Defendant was rearraigned on a second amended information which eliminated one count of theft of a firearm. CP 253-258; RP 3-4. A 3.5 hearing was held on March 12, 2007, and the court found all of defendant's statements were admissible. RP 80.

On April 5, 2007, the jury returned verdicts of guilty on first degree robbery, first degree burglary, three counts of unlawful imprisonment, three counts of theft of a firearm, felony harassment; second degree taking a motor vehicle without permission; conspiracy to commit first degree robbery, and conspiracy to commit first degree burglary. CP 218, 219, 222-231; RP 1337-46. The jury also returned special verdicts finding defendant or an accomplice was armed with a firearm for first degree robbery, first degree burglary, the three counts of unlawful imprisonment, felony harassment, and second degree taking a motor vehicle without permission. CP 232-239; RP 1337-46.

¹ The Verbatim Report of Proceedings consists of 24 volumes. The trial transcripts consist of 14 consecutively paginated volumes and are referred to as 'RP.' The 9/7/07 sentencing proceedings are referred to as SRP. All other proceedings are referred to by the date of the proceeding "RP" and page number (DATE RP PAGE#).

Defendant's sentencing hearing was held on September 7, 2007. CP 259-272; SRP 2-42. The court found defendant had an offender score of five for the first degree robbery and the first degree burglary, and an offender score of four for all other crimes. CP 259-272; SRP 27, 40. The court imposed a low end standard range sentence on each count, plus the mandatory firearm enhancements, which totaled 267 months, plus standard fines and costs. CP 259-272; SRP 39.

This timely appeal followed.

2. Facts

Rita Freed² testified that she had met defendant prior to August 3, 2005, while he dated a friend of hers, Vanessa Perry. RP 150, 176. Rita Freed's husband, Charles, who was in the military and had been deployed, was out of town on August 3, 2005. RP 149, 151, 177. At the time of this incident, Rita and Charles had a one and one half year old boy they called Benjamin. RP 151, 153.

Rita, Benjamin, Rita's mother (Leola Johnston), and Mariah Freed all went to Rita's house at around noon on August 3, 2005. RP 150, 152. When they arrived at Rita's house, Rita noticed that the window air

² Because many of the witnesses in this case are related and share the last name "Freed" once I have referred to them by their full name, I have thereafter referred to them in this brief by their first names only. This is done solely for purposes of clarity; no disrespect is intended.

conditioner was no longer in the bedroom window. RP 152. This didn't concern her too much because she believed it had not been well secured and had fallen into the room. RP 152, 153. However, when she entered the house and went into her bedroom, she observed that her room had been ransacked and she could smell the odor of cigarette smoke. RP 153, 154, 155, 156. Rita said she started back down the hall and looked into the TV room and saw that the couch had a big hole in it. RP 156. After seeing the hole, Rita believed that her house had been "robbed." RP 156.

Rita testified that her mother, Benjamin, and Mariah followed her into the house. RP 153, 156. Rita and her mother looked to see if anything else had occurred. RP 156. When Rita entered the kitchen she saw a man wearing gloves and a mask that covered his face pointing a handgun at her. RP 156, 157. Rita testified that she screamed and ran out of the house and hid behind her vehicle. RP 156, 157. The man followed and said "Oh, ma'am, I'm police, it's okay, come on inside with me." RP 157.

Rita testified that she did not believe he was the police, but went back inside with him because he had a gun. RP 158. The man had her lay down on her stomach and he put duct tape over her eyes, handcuffed her hands behind her back, and secured her feet as well. RP 158, 159. Rita testified that there was another person in the house along with the masked man with the gun. RP 158-59. This person was also masked, but when Rita looked up his mask had fallen slightly and she could see his hair. RP

159. She did not immediately recognize the second man, but later realized he was the person she knew as Gary King. RP 159, 172. Rita recognized defendant's voice from prior conversations with him. RP 172-75. Rita testified that she was 100 percent confident that one of the two masked men was defendant. RP 175.

Rita testified that she pled with the masked men to not hurt her or her son. RP 160. She offered them the keys to her car to encourage them to leave without hurting her family. RP 160. The men told Rita they weren't going to hurt her, but wanted her to contact her brother-in-law, Jay Freed, to get him to come to the house. RP 161, 162, 163. The men said Jay owed someone some money and they were there to collect it from him. RP 162-63, 168. Rita told the men that she was not on speaking terms with Jay and she could not get him to come to the house. RP 163.

After approximately 20 minutes, the men untied Rita's feet so she could use the bathroom. RP 170, 171. The men did not remove the tape from her eyes nor did they release her hands. RP 277. Rita's mother had to help her remove her pants so she could go to the bathroom because her hands were still bound. RP 170.

Eventually, the two men left Rita's residence. RP 172. They moved Rita and Mariah into Rita's bedroom. RP 172, 282, 328. The men had Rita and Mariah lie down on Rita's bed and then untied them. RP 172, 328. The men told Rita and Mariah not to look at them and to stay on

the bed for five minutes. RP 172. This was the first time during the entire ordeal that the tape was removed from Rita's eyes. RP 172.

After the men left, Rita checked with her mother, her son, and Mariah to make sure each of them were okay. RP 187. She then called her father and a family friend, who was a police officer, and then called 911. RP 187, 188. Rita testified that she was afraid for Jay Freed because the two men had told Rita that if they didn't get the money they said Jay owed within five days, they would kill him. RP 189.

Rita testified that after the incident she realized the two men took guns, an X-box, and a duffle bag of stuff from her house. RP 177. When Rita exited her house, she noticed that her vehicle had also been taken. RP 178. Rita testified that she had told the men they could take her car to the location where the men had left their vehicle. RP 178. The men were to leave Rita's car at that location with the keys inside the vehicle. RP 178.

At trial, Rita identified plaintiff's exhibit 2 as her husband's handgun. RP 183. She identified plaintiff's exhibits 3 and 4 as handguns consistent with the type that a family friend, Adam Tuzzo, kept at Rita's house. RP 177, 180, 181.

Mariah Freed³ testified similarly to Rita. Mariah said that she had spent the night at Leola Johnston's house on August 2, 2005. RP 271, 273. The following day she, Rita, Benjamin, and Ms. Johnston went to Rita's house. RP 273. As they approached the house, they noticed that the air conditioner was no longer in Rita's bedroom window. RP 274. They all entered the house and walked back toward Rita's bedroom. RP 274. Then Rita walked into the kitchen, screamed, and ran out of the house. RP 274-75.

Mariah testified she saw two men in the house with guns. RP 275. The first came out of the kitchen and followed Rita out of the house. RP 275. The second came around a corner and told Ms. Johnston and Mariah to get to the floor. RP 276. Mariah said she complied because the man held a gun. RP 276-77.

The men first tied up Rita and then Mariah. RP 277. Mariah was holding Benjamin, who was screaming for his mother. RP 277. Mariah gave Benjamin to Ms. Johnston. RP 277. Mariah testified that she was told to lay on the floor where she had her hands tied with a zip tie and her eyes and mouth were covered with duct tape. RP 277. Mariah testified that she was initially left on the floor, but was later moved to the living

³ Mariah Freed has married and changed her name since this incident. Her married name is Mariah Santana. 4 RP287.

room. RP 277. Mariah testified that the masked men gave Ms. Johnston permission to put Benjamin down for a nap. RP 278.

 Mariah testified that she could not see much because her eyes had been covered with duct tape, but she could see a little bit under the tape. RP 281. Mariah could hear the conversations going on around her. RP 278, 279, 280, 281. She could hear Rita asking why the men were doing this to them. RP 279. Mariah could hear the men say that Rita's husband or nephew owed money to someone else. RP 279.

 Near the end, Mariah heard the men go into the spare bedroom and load up a duffle bag with stuff and leave the house with it. RP 281, 282. One of the men said they were taking Rita's car and that she needed to wait 20 minutes before she could go retrieve it. RP 282. Before the men left, they took the women into Rita's bedroom and untied Mariah. RP 282. As directed, the three women waited approximately 20 minutes before coming out of the bedroom. RP 282. Mariah estimated the whole incident lasted for approximately two hours. RP 280.

 When they came out of Rita's bedroom, they called Ms. Johnston's husband, Bernie, who came to the house. RP 282. Ultimately, the police were called and responded to the scene. RP 284.

 Leola Johnston testified that she had met defendant once before this incident when she was with Rita at Wal-Mart. RP 303. Before August 3, 2005, Leola had not met co-defendant Ben Harrison. RP 303.

Like Mariah and Rita, Ms. Johnston also said that the three of them and Benjamin went to Rita's house on August 3, 2005. RP 304-5. They went inside the house and walked back to Rita's bedroom to see what had happened with the air conditioner. RP 306. Ms. Johnston was 5-10 steps behind Rita when Rita screamed and ran out of the house. RP 308. Ms. Johnston saw a tall man wearing a mask and holding a black handgun chasing after her daughter. RP 308-09. Ms. Johnston saw a second masked man walking toward them from the back of the house when the first man brought Rita back inside the house. RP 310, 311. The second masked man, later identified as defendant, was holding a gun and had a second gun stuck in the waistband in the back of his pants. RP 311, 331-32. Ms. Johnston testified that it appeared as though defendant was in charge because he kept telling the first masked man what to do. RP 312.

Ms. Johnston testified that both Mariah and Rita were tied up, gagged, and duct tape was placed over their eyes. RP 312. Mariah laid on the floor in the hallway and Rita laid on the living room floor. RP 315. Ms. Johnston, however, was never blindfolded nor were her hands or legs restrained. RP 314.

The men told Ms. Johnston they were part of the Japanese mafia, that they were there to take things, and asked about Rita's brother-in-law, Jay Freed. RP 315-16. Ms. Johnston told the men that Rita was not on speaking terms with Jay, and he would not come over to the house. RP

316. The masked men were insistent, however. RP 316. Eventually, they stopped requesting that Rita call Jay to come to the house. RP 317.

Prior to going to Rita's house, Ms. Johnston had made arrangements for her husband to pick her up. RP 319. However, Ms. Johnston called to tell him not to come because she was concerned about what would happen if he came into the situation. RP 319. When she called her husband, she did not try to give him a message because defendant was pointing a gun at her the whole time she was on the phone. RP 320-21.

After a while, defendant took Ms. Johnston back into one of the bedrooms to talk with her. RP 321. Defendant told Ms. Johnston that he had to fulfill their obligation to the Japanese Mafia and if they didn't fulfill those obligations, then they would be in trouble. RP 322. Defendant said they had waited all night for Rita to come home. RP 322. Ms. Johnston told defendant that it was not going to work, that there was no money here. RP 322. Defendant then took her back to the living room where he allowed Ms. Johnston to make Mariah and Rita more comfortable by unbinding their feet and moving them to chairs in the living room. RP 322, 323.

Finally, defendant told the other masked man to get their bags from the other room. RP 326. The other masked man got the keys to Rita's car from Rita and took the bags out to the car. RP 327. Defendant told the

other masked man to take Rita's vehicle to where they parked their vehicle, drop off the bags, and return. RP 327.

Defendant then took the three women into Rita's bedroom. RP 328. He put Rita and Mariah on the bed and removed their bindings and blindfolds. RP 328. He had the other masked man gather up duct tape, zip ties, etc, and place them in a garbage bag in an attempt to leave no evidence behind. RP 328.

Ms. Johnston testified that defendant was one of the two masked men and the other had BEN tattooed on his arm. RP 331-32, 328.

Ben Harrison testified that he met defendant around November, 2004. RP 386. They were friends and hung out socially through August, 2005, when they broke into Rita Freed's house and held Rita, Mariah, and Leola Johnston at gun point for several hours. RP 387.

Harrison testified that defendant claimed to be an assassin for hire. RP 389, 390, 391. Defendant tried to recruit Harrison to work as his apprentice assassin and offered to pay Harrison \$5,000 to go to California to meet defendant's boss. RP 389, 391, 393, 394. On August 1, 2005, Harrison and defendant drove to California and met with a man who defendant claimed was his boss. RP 388, 395, 396. Defendant told Harrison he would be paid the \$5,000 just for meeting the boss, even if he chose not to join the group of assassins. RP 394.

Harrison told defendant's boss that he had only come to meet him, not to join the group. RP 396. This made the man angry and defendant sent Harrison to the car while he remained in the hotel speaking with the boss. RP 397. When defendant joined Harrison in the car, he said the boss was angry and told defendant that defendant would have to do some jobs for free as a result. RP 397.

Defendant and Harrison drove back to Washington. RP 397. During the drive defendant told Harrison he was part of the assassin group whether he liked it or not. RP 398. When Harrison balked, defendant pulled out a gun and threatened him. RP 398-99. Later, they stopped in a gravel pit near Puyallup where defendant told Harrison they had to do a job. RP 398. Defendant said they had to go in and hold up this guy who was in the military and owed a loan shark 1.2 million dollars. RP 398. Defendant produced a diagram of Rita's house and told Harrison to memorize it. RP 400. Harrison said after he memorized it, defendant burned the paper and told Harrison to get some sleep. RP 400. They spent the balance of the day at the gravel pit and drove to the house⁴ that had been depicted in the diagram defendant showed Harrison earlier. RP 401. When they returned to the gravel pit, defendant told Harrison he had all the equipment they would need and later, when they returned to the

⁴ This house later turned out to be Rita Freed's house. RP406.

house to commit the burglary he showed Harrison the zip ties, duct tape, flashlight, gloves and handcuffs. RP 402, 404.

Defendant gave Harrison the Glock, a shoulder holster, a flashlight, some zip ties, a spark plug, and gloves. RP 405, 406. Harrison first tried to break in through a window, but when that was unsuccessful he removed the air conditioner from the bedroom window and crawled in the house. RP 409, 410-11. Gary came later through the unlocked front door. RP 411.

Harrison kept a lookout through the front window while defendant rummaged through the house. RP 411-12. Defendant checked the computer for messages to see when the military man was coming back from Iraq. RP 412-13. Defendant found a t-shirt and made a mask for himself out of it. RP 413. He also found some firearms and armed himself. RP 417. Defendant told Harrison to be ready for anything because the military man knew different kinds of martial arts. RP 414. Harrison and defendant waited 12 hours before anyone came home. RP 412. During this time, Harrison did not know it was Rita Freed's house. RP 415.

After 12 hours of waiting, Harrison observed a vehicle drive into the driveway. RP 415. It appeared that there were more people in the vehicle than just the military man, and Harrison wanted to leave. RP 415-16. Defendant said "No, we're going to stay here and hold them up." RP 416.

Harrison testified he heard female voices when the people came into the house. RP 419. He heard them walk down the hall, and when Rita entered the kitchen where he stood, he pointed a gun at her. RP 420. Rita screamed and ran out the front door. RP 420. Harrison chased after her and ordered her back into the house. RP 420-21. When they returned, Harrison observed defendant detaining Mariah, Benjamin, and Leola Johnston. RP 421.

Defendant told Harrison to handcuff Rita, who was now laying on the floor of her house. RP 421. He also zip tied her feet and placed duct tape over her eyes and mouth. RP 421. Defendant then told Harrison to do the same to Mariah, which he did using zip ties on her wrists instead of handcuffs. RP 423. Leola Johnston was not bound leaving her free to care for the baby. RP 423, 424, 425.

Leola Johnston asked to put the baby down and she was allowed to do so. RP 425. Defendant talked privately with Leola Johnston, but Harrison could not hear that conversation. RP 425. Harrison did hear defendant tell all three women that “the husband owed a loan shark 1.2 million dollars and that there was some drugs involved.” RP 426.

Later, defendant began talking about Jay as someone who might be responsible for the money. RP 426. Defendant asked Rita to call Jay and get him over to the house. RP 426. Rita refused saying that Jay was not on good terms with her and would not come to the house. RP 426, 427.

Harrison testified that he and defendant held the women for two hours. RP 428. During that time he was keeping a look out the window. RP 428. Defendant was pacing up and down the living room trying to figure out what to do. RP 428. Toward the end, defendant told Harrison there were two duffle bags that he had packed up in the other room that he wanted to bring. RP 428. Harrison got the bags, which were filled with X-Box, games, controllers, a camcorder, a laptop, a couple of pistols and a bag of ammo, and took them to the kitchen. RP 428-29.

The victims were untied and taken into Rita's bedroom where Rita and Mariah were placed on the bed, and Leola Johnston was placed on the floor. RP 430. Harrison put the duffle bags in Rita's SUV and drove the car to where they had left defendant's vehicle. RP 433. He dropped off the duffle bags and returned to Rita's residence. RP 434. The women were told to not look at defendant or Harrison and to stay in the bedroom for five minutes. RP 434-35. Defendant and Harrison drove Rita's SUV to where defendant's vehicle was parked, abandoned her car, and drove away in defendant's vehicle. RP 435, 438.

Defendant and Harrison drove to the VFW building in downtown Puyallup. RP 436, 438. They then drove to defendant's house and defendant started going through the bags. RP 439, 440. After an hour or so, defendant called his friend Chris and they agreed to meet up at Starbucks. RP 443. Defendant then dropped Harrison off at Harrison's

house. RP 444. Shortly after Harrison got home, he looked into his bag and saw four rounds of assault rifle ammo, miscellaneous scopes, and military looking goggles. RP 444, 446. All of these items were taken from Rita's house during the robbery. RP 445.

When contacted by police, initially Harrison denied any involvement in the incident. RP 447-48, 454, 454. However, after several months Harrison gave a new statement to police and accepted a plea bargain for reduced charges in exchange for his truthful testimony at defendant's trial. RP 448-451, 458.

Defendant was arrested the day after the incident at Rita Freed's residence. RP 637. Initially, defendant denied any involvement, but after being told that Rita Freed identified hem as one of the armed, masked men, he gave a taped confession. RP 643. This confession was admitted into evidence as plaintiff's exhibit 56. RP 647. At trial, defendant claimed his confession was false and that he was not at Rita Freed's house during this incident. RP 1034, 1035-37.

C. ARGUMENT.

1. DEFENDANT'S CONVICTIONS FOR CONSPIRACY TO COMMIT FIRST DEGREE ROBBERY AND CONSPIRACY TO COMMIT FIRST DEGREE BURGLARY DO NOT VIOLATE DOUBLE JEOPARDY WHERE DEFENDANT AND AN ACCOMPLICE HAD TWO SEPARATE AGREEMENTS, ONE FOR THE BURGLARY AND ONE FOR THE ROBBERY.

The double jeopardy clause of the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington State Constitution prohibit the imposition of multiple punishments for the same offense. *Whalen v. United States*, 445 U.S. 684, 688, 100 S. Ct. 1432, 63 L.Ed.2d 715 (1980); *State v. Westling*, 145 Wn.2d 607, 610, 40 P.3d 669 (2002); *State v. Calle*, 125 Wn.2d 769, 772, 888 P.2d 155 (1995). The federal and state double jeopardy clauses provide identical protections. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Although the protection itself is constitutional, it is for the Legislature to decide what conduct is criminal and to determine the appropriate punishment. *Calle*, 125 Wn.2d at 776. The court's role is limited to determining whether the Legislature intended to authorize multiple punishments. *Id.* When the trial court has imposed cumulative punishment without legislative authorization, it has also violated the separation of powers doctrine. *See State v. Frohs*, 83 Wn. App. 803, 810, 924 P.2d 384 (1996).

“[W]hen a defendant is convicted of multiple violations of the same statute, the double jeopardy question focuses on what ‘unit of prosecution’ the Legislature intends as the punishable act under the statute.” *Westling*, 145 Wn.2d at 610. The “unit of prosecution” is the legislatively defined scope of the criminal act. *State v. Adel*, 136 Wn.2d 629, 634-35, 965 P.2d 1072 (1998). This inquiry is resolved by examining the relevant statute in order to ascertain what the Legislature intended. *Id.*; *In re Davis*, 142 Wn.2d 165, 172, 12 P.3d 603 (2000). If the statute is ambiguous as to the unit of prosecution, “the ambiguity should be construed in favor of lenity.” *State v. Adel*, 136 Wn.2d 629, 634-35, 965 P.2d 1072 (1998). Absent a threshold showing of ambiguity, a court derives a statute’s meaning from the wording of the statute itself, and does not engage in statutory construction or consider the rule of lenity. *State v. Tili*, 139 Wn.2d 107, 115, 985 P.2d 365 (1999).

The unit of prosecution in a conspiracy case is an agreement and an overt act. In *State v. Bobic*, 140 Wn.2d 250, 254, 996 P.2d 610 (2000), Mihai Bobic and Igor Stepchuck were involved in a sophisticated auto theft conspiracy. Bobic, Stepchuck or one of their associates would steal a vehicle, strip it, and store the parts in a storage facility. *Bobic*, 140 Wn.2d 250, 254. When the insurance company later sold the hulk of the car at auction, Bobic, Stepchuck or one of their associates would buy the hulk to gain clear title to the vehicle, reassemble it with the stolen parts, and then sell the vehicle. *Id.*

After police discovered the conspiracy, Bobic and Stepchuck were each charged and convicted of multiple counts of first degree possession of stolen property, conspiracy to commit first degree theft, conspiracy to commit first degree possession of stolen property, and conspiracy to commit first degree trafficking in stolen property. *Bobic*, at 256. For the first time on appeal, both Bobic and Stepchuck alleged that their convictions violated state and federal double jeopardy principles, or in the alternative, their conspiracy convictions constituted same criminal conduct and should have counted as one point for purposes of calculating their offender score. *Id.* at 255. The Court of Appeals found no double jeopardy violations and otherwise affirmed Bobic's and Stepchuck's convictions. *Id.* at 256.

However, the Supreme Court determined that "the Legislature intended the unit of prosecution for conspiracy, within the meaning of double jeopardy, to be an agreement and an overt act rather than the specific criminal objects of the conspiracy." *Bobic*, at 265-66. The court also held that "multiple conspiracies may be charged where the facts of the case support multiple criminal agreements." *Id.* at 266. To determine how many criminal agreements were reached, the courts must look to factors such as whether the time, persons, places, offenses and overt acts were distinct. *Id.*

Using this analysis, the Supreme Court determined that Bobic's and Stepchuck's plan to steal, strip, gain clear title, and then reassemble

and sell the vehicles was a single agreement that consisted of a series of crimes by the same conspirators, and that each individual crime was a step in the advancement of the scheme as a whole. *Bobic*, at 266. The conspiracy had multiple criminal components, but a single, overarching goal.

Using the same analysis, in *State v. Walker*, 24 Wn. App. 78, 79, 599 P.2d 533 (1979), the court found multiple conspiracies and upheld Sidney Walker's convictions for three separate counts of conspiracy to possess with intent to deliver heroin, and one count of unlawful delivery of heroin. Mary Lester agreed to sell heroin for Walker in January 1977. *Walker*, 24 Wn. App. at 79. Walker asked Joe Hill to buy heroin for Walker in Los Angeles. *Id.* Additionally, Melvin Williams was fronting heroin for Walker. *Id.* The court found that each of these agreements to commit a criminal act was a separate conspiracy. *Id.* at 80. In reaching its decision, the court focused on the fact that the "agreements occurred between Walker and three separate persons, at different times, places, and for somewhat different purposes." *Id.* at 81.

Like *Walker*, in the present case defendant and Ben Harrison entered into two separate agreements and made two distinct overt acts to complete two separate conspiracies. Unlike *Bobic*, where there was an overarching plan to engage in multiple criminal acts to accomplish a single criminal objective, defendant's and Harrison's conspiracy to

commit first degree burglary was distinct from their later conspiracy to commit first degree robbery.

Here, the first conspiracy was formed in the car ride back from California and at the gravel pit in Puyallup. It was there defendant and Harrison agreed to enter into Rita Freed's house to confront the military man about the 1.2 million dollar loan shark debt. RP 398, 400. It was there they took an overt act toward the completion of that crime when Harrison reviewed the diagram of Rita's house and memorized it at defendant's request. RP 400. Later that evening, defendant drove them to Rita's house and pointed the house out to Harrison. RP 401, 402-03. Defendant then drove them back to the gravel pit, where he told Harrison about duct tape, handcuffs, zip ties, a flashlight, and gloves. RP 402. Later still they drove back to Rita's neighborhood and parked a distance from her house. RP 404. Defendant gave Harrison some of the equipment, including the gun, some zip ties, a spark plug to break the window, and gloves. RP 405, 406. Any or all of these steps were substantial steps toward the completed crime of first degree burglary.

The second conspiracy wasn't formed until more than 12 hours later after they had broken into Rita's house to confront the military man about the 1.2 million dollar loan shark debt. Defendant and Harrison waited in Rita's house for 12 hours before anyone came home. RP 412, 414. During that time, defendant rummaged through the house, found some guns and armed himself. RP 412, 413, 414, 417. Harrison, holding

defendant's Glock, kept watch out the dining room window as defendant had directed. RP 412.

After waiting through the night at Rita's house for the military man to return, a car finally drove into the driveway. RP 415. However, it appeared to Harrison that there were more people in the car than just the military man. RP 415. Harrison testified that he looked at the vehicle and became concerned because defendant had told him the military man might know they were coming to hold him up. RP 415.

When Harrison saw three doors open up, he told defendant they had a problem. RP 416. Harrison went to defendant, who was standing by the back door, and told him. "Let's get out of here. This isn't going as planned." RP 416. Instead of leaving, defendant replied, "No, we're going to stay here and hold them up." RP 416. Harrison testified that he wanted to leave, but defendant was in front of the back door and pointed an assault rifle at him. Harrison said "I just agreed with him that we were going to hold them up. I mean, I couldn't leave." RP 418.

Within minutes, Harrison took a substantial step toward the completed crime when he confronted Rita with a gun in her kitchen. RP 420. When Rita screamed and ran out of the house, Harrison chased after her and brought her back into the house. RP 246, 265, 301. At defendant's direction, Harrison secured her with handcuffs, duct tape. RP 312, 421.

Thus, in the present case there were two distinct conspiracies. The first one was to break into the military man's house (which was actually Rita's house) and demand that he pay the 1.2 million dollars he owed to the loan shark. There was no conspiracy to rob Rita at that time, nor could there have been such a conspiracy, because Harrison did not even know Rita would be at the residence. Nor, as defendant argues in his brief, was there a general conspiracy to break in and rob someone in the house. Brief of Appellant at 30. Rather, Harrison and defendant agreed to commit a specific crime involving the military man and a 1.2 million dollar debt. When the military man did not appear and Rita returned to the house with her family, Harrison wanted to leave because the crime they had planned to commit – breaking into the house and confronting the military man to get the loan shark money – could not be accomplished. Instead, more than 12 hours after they entered into their first conspiracy, they entered into a second conspiracy to rob Rita Freed.

Defendant's reliance on *State v. William*, 131 Wn. App. 488, 128 P.3d 98 (2006), and *State v. Knight*, 134 Wn. App. 103, 138 P.3d 1114 (2006) is misplaced. Williams and Knight were co-defendants in a conspiracy to rob Arren Cole. *Williams*, 131 Wn. App. 488, 491. Over the course of several days, they devised a plan to rob Cole of money, jewelry, and drugs. *Id.* at 492. The first plan was modified because Williams' group believed that Cole was armed with a gun. *Id.* They then

modified the plan so that a group member, Alyssa Knight, arranged to meet with Cole at a bar and go to his hotel room with him. *Id.* at 492-93. When Cole escorted Knight down to the alleyway to meet her ride, Williams exited the vehicle and confronted Cole. *Id.* at 493. As Cole tried to flee, Williams shot him in the back. *Id.* Williams and Knight were convicted of conspiracy to commit burglary and two counts of conspiracy to commit robbery. However, on appeal, the court determined there was really only one conspiracy to rob Cole and multiple crimes were committed to reach the conspirators' ultimate objective.

These cases are factually distinguishable from the present case. As argued above, the first conspiracy was to break in and extract money from the military man to repay his loan shark debt. This was abandoned when the military man did not appear. A second conspiracy was then entered into between defendant and Harrison to rob Rita. These two conspiracies were separated by time and had two different victims. Unlike *Williams*, *Knight*, and *Bobic* where the conspirators committed various crimes in executing their single conspiracy, here there was one conspiracy to break into a house and collect on a debt from one specific person and, hours later after it became apparent that the first criminal objective would not be achieved, the second conspiracy was formed that involved robbing a completely different individual. Defendant's claim that there was one single conspiracy with multiple criminal components is without merit and must fail.

2. THE STATE PROVED DEFENDANT COMMITTED THE CRIMES OF UNLAWFUL IMPRISONMENT AND TWO SEPARATE CONSPIRACIES BEYOND A REASONABLE DOUBT. HOWEVER, THE STATE DID NOT PROVE FELONY HARASSMENT BEYOND A REASONABLE DOUBT WHERE IT DID NOT PRODUCE EVIDENCE THAT THE PERSON THREATENED WAS PLACED IN FEAR THAT THE THREAT WOULD BE CARRIED OUT.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). 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 that the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, challenging 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. Salinas*, 119 Wn.2d 192; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict; these determinations should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[G]reat deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, if the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

- a. Defendant committed the crime of unlawful imprisonment where he knowingly restrained Rita Freed, Mariah Freed, and Leola Johnston.

Defendant challenges the sufficiency of the evidence the State produced to prove the crime of unlawful imprisonment. A person commits the crime of unlawful imprisonment if "he knowingly restrains another person." RCW 9A.40.040(1). To restrain someone is to restrict their movements "without consent and without legal authority in a manner which interferes substantially with [her] liberty." RCW 9A.40.010(1). A substantial interference is a "'real' or 'material' interference with the liberty of another as contrasted with a petty annoyance, a slight inconvenience, or an imaginary conflict." *State v. Robinson*, 20 Wn. App. 882, 884, 582 P.2d 580 (1978), *aff'd*, 92 Wn.2d 357, 597 P.2d 892 (1979). The presence of a means of escape may help to defeat a prosecution for unlawful imprisonment unless "the known means of escape . . . present[s] a danger or more than a mere inconvenience." *State v. Kinchen*, 92 Wn. App. 442, 452 n.16, 963 P.2d 928 (1998).

In the present case, the State produced sufficient evidence that defendant unlawfully imprisoned Rita, Mariah and Leola Johnston. Both Rita and Mariah had their hands tied behind their backs. RP 158, 159, 277. Rita's hands were secured with handcuffs and Mariah's with a zip

tie. RP 158, 159, 277. Both of them had duct tape placed over their eyes and Rita had her feet secured. RP 158, 159, 230, 255, 277. In addition to the duct tape, zip ties, and handcuffs, Rita and Mariah were restrained by the guns the two masked men brandished. Rita had tried to run away, but she was chased and made to return by Ben Harrison who ran after her with a gun. RP 246. Similarly, Leola Johnston was restrained in Rita Freed's house along with Rita and Mariah. While Leola Johnston was not handcuffed or duct taped, she was held at gun point by defendant and his associate, Ben Harrison. RP 309-313. Leola was not allowed to leave the residence – her movements were restricted. Thus, the jury properly found defendant guilty of unlawful imprisonment of all three victims, Rita Freed, Mariah, and Leola Johnston, because defendant, without lawful authority, substantially interfered with their movements when he held them at gun point, prevented them from leaving Rita's house, and handcuffed, duct taped, and zip tied Rita and Mariah.

Defendant also argues that the unlawful imprisonment of Mariah and Leola Johnston was incidental to the robbery. However, this argument fails because neither Mariah nor Leola Johnston were the victims of the robbery; they were restrained for approximately two hours, which was far longer than necessary to accomplish the robbery of Rita, and the primary objective of their (and Rita's) restraint was to force Jay Freed to come to the residence.

In *State v. Vladovic*, 99 Wn.2d 413, 415, 662 P.2d 853 (1983), defendant was convicted of attempted first degree robbery and four counts of kidnapping. An armed man wearing a ski mask entered Bagley Hall at the University of Washington campus. *Vladovic*, at 415. He secured the five employees by binding their hands and taping their eyes. *Id.* The man then admitted his cohorts, who removed the victim's wallets, but left the wallets at the scene. *Id.* One of the victims, Mr. Jensen, discovered money missing from his wallet after the incident. *Id.* at 416. After being unable to open a safe, one of the robbers started to unbind Jensen to open the safe when the police arrived. *Id.* at 416. The jury found defendant guilty of attempted robbery for attempting to steal the contents of the safe, first degree robbery for stealing money from Mr. Jensen's wallet, and four counts of kidnapping for the four other individuals who were bound and blindfolded. *Id.*

In *Vladovic*, the court affirmed all the robbery and kidnapping convictions. In so doing, the court analyzed whether there was some injury to a person or property in the robbery that was separate and distinct from, and not merely incidental to, the crime of which it formed an element. *Id.* at 421. The court noted that Vladovic was convicted of robbing Jensen and kidnapping the four others. *Id.* Because there were different victims for both the robberies and the kidnappings, there were

separate and distinct injuries, and all convictions could stand. *Id.* at 421-22.

Like *Vladovic*, the unlawful imprisonment of Mariah and Leloa Johnston was not incidental to the other charged crimes. Instead, the victims were unlawfully imprisoned for approximately two hours in an attempt to terrorize Rita into luring Jay Freed to the residence. Defendant was charged and convicted of robbing Rita, who was the only person to have property stolen. Defendant was convicted of unlawful imprisonment for all three, Rita, Mariah, and Leola. While the State may disagree with the trial court's ruling that the unlawful imprisonment of Rita was captured within the robbery, it is clear that the restraint of Mariah and Leola were separate and distinct. SRP 25-26. Under *Vladovic*, court did not abuse its discretion in so finding.

Defendant relies on *State v. Korum* and *State v. Green* to support his argument that the unlawful imprisonments were incidental to the burglary or robbery or both. However, the facts in this case are clearly distinguishable from both *Korum* and *Green*.

In *State v. Korum* 120 Wn. App 686, 86 P.3d 166 (2004) *rev'd in part*, 157Wwn.2d 614, 141 P.3d 13 (2006). Defendant was convicted of multiple counts of first degree burglary, first degree kidnapping, first degree robbery, attempted first degree robbery, second degree assault, all of which were firearm enhanced, and one count of unlawful possession of a firearm. Among other issues on appeal, Korum alleged that there was

insufficient evidence of restraint because all of the kidnapping counts were incidental to the robbery counts. *Korum*, 120 Wn. App. 656, 702.

Jacob Korum and several of his friends planned a series of armed home invasion robberies of known Pierce County drug dealers. *Id.* at 690. The men planned to invade the drug dealer's homes after midnight and tie up anyone they encountered so they could steal the money and drugs in the residences. *Id.* at 690. In each of the robberies, the men wore masks, invaded the homes brandishing firearms, restrained the victims with duct tape, and stole drugs, money, and sometimes other items. In one of the robberies, the robbers "yelled at, kicked, hit, and threatened to burn the victim with acid if she did not disclose where the money and drugs were". *Id.* at 691.

In finding that the kidnappings were incidental to the robberies, the court noted (1) that the restraints were solely done to prevent the victim's interference with searching their homes for money and drugs to steal; (2) forcible restraint of the victims were inherent in these armed robberies; (3) the victims were not removed to a remote location where they were unlikely to be found; (4) the restraint did not appear to have been substantially longer than the amount of time required for the robbery; (5) the restraints did not create a significant danger independent of that posed by the armed robberies themselves. *Korum*, at 707.

In *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980), Michael Green grabbed a child who was playing outside an apartment building and pulled her onto an exterior loading area where he stabbed her with a butcher knife. Green was convicted of aggravated first degree murder for the killing of a minor in the furtherance of rape or kidnapping. *Green*, at 219. To prove the kidnapping, the State had to prove that Green abducted the child. *Id.* at 225. The court found that moving the child a short distance onto the exterior loading area of an apartment building for two to three minutes was not done for the purposes of abducting the child, but was an integral part of, and not independent of, the underlying homicide. *Id.* at 226. The court emphasized that this was a fact specific analysis.

In the present case, however, the restraint was done not to facilitate the burglary or the robbery. The burglary had been completed hours prior to the defendant and his associate confronting and restraining the victims. Ben Harrison testified that they broke into Rita's house almost 12 hours before Rita and her family returned to the residence. Defendant and Harrison laid in wait during that entire time. The sole robbery victim was Rita Freed. CP 253-258. Only Rita's property was stolen. In *Korum* and *Green*, on which defendant relies, the purpose of the restraint was to accomplish the robbery and murder, respectively. In *Korum*, the goal was to bind and secure the drug dealers and their families so Korum and his associates could steal the drugs, money, and jewelry. The court

specifically noted the victims were restrained only long enough to accomplish the robbery. Similarly, in *Green*, the victim was taken into an alley and restrained only long enough to accomplish the murder.

This case is factually dissimilar to both *Korum* and *Green*. Here, defendant's true goal was go get back at Jay Freed. The evidence at trial showed defendant was angry that his girlfriend, Vanessa Perry, had left him for Jay Freed and devised a plan to get back at him. To do this, he lied and manipulated Harrison into believing they were breaking into a house to confront a military man regarding a loan shark debt. Instead, the house they broke into was Rita Freed's, who is the sister-in-law of Jay Freed.

It is apparent that the purpose in restraining Rita, Mariah, and Leola Johnston was not to facilitate the robbery because defendant and Harrison spend much the next two hours trying to convince Rita to call Jay Freed to the house. Getting Jay Freed to the house has nothing to do with robbing Rita, and everything to do with defendant's anger toward Jay Freed. This is reinforced by the length of time the defendant and Harrison remained in the residence both before Rita and her family arrive, when they had 12 hours to ransack the house and steal whatever was there, but also after Rita and her family arrived home. Defendant and Harrison spend an additional two hours with Rita, Mariah, and Leola Johnston restrained trying to get Rita to get Jay Freed to come to the house.

Thus, here the true purpose of the restraint was to force Rita to call Jay Freed to come to the house. The length of time for the restraint was significantly longer than was necessary to commit the robbery. As the court noted at sentencing, there was no need to restrain Mariah and Leola Johnston to commit the robbery. SRP 25-26. That restraint was not incidental to the robbery.

It should be noted that the test defendant applies in this case is based upon cases where there was a kidnapping that was considered incidental to another crime and not an unlawful imprisonment. Brief of Appellant at 40. None of the cases relied upon by defendant, *Korum*, *Green*, and *State v. Saunders*⁵, involve an unlawful imprisonment. As a result, those cases all focus on whether there was an abduction, secreting, or movement of the victim as part of the analysis as to whether the kidnapping was incidental to the robbery or murder. Because defendant in this case was not convicted of kidnapping, the inclusion of this factor improperly increases the burden beyond what the legislature intended for the lesser crime of unlawful imprisonment.

⁵ 120 Wn. App. 800, 86 P.3d 232 (2004).

- b. Defendant entered into two separate agreements: (1) to commit first degree burglary; and (2) to commit first degree robbery.

In the present case, defendant alleges there was insufficient evidence that he entered into two separate conspiracies. Brief of Appellant at 28. Defendant argues that the conspiracy to commit first degree burglary should be dismissed. Brief of Appellant 32. Defendant's argument fails because, as argued in section I, defendant entered into a conspiracy to commit first degree burglary⁶ and a conspiracy to commit first degree robbery⁷.

A conspiracy is defined by RCW 9A.28.040(1) as follows:

A person is guilty of criminal conspiracy when, with the intent that conduct constitute a crime be performed, he or she agrees with one or more person to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such an agreement.

⁶ A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime is armed with a deadly weapon. *See* RCW 9A.52.020(1)

⁷ A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property. *See* RCW 9A.52.190. A person is guilty of robbery in the first degree if in the commission of a robbery or of immediate flight therefrom, he or she displays what appears to be a firearm or other deadly weapon. *See* RCW 9A.56.200(1)(a)(ii).

The State incorporates by reference the facts, law, and argument in section I. As noted in section I, when viewed in the light most favorable to the State, the State produced sufficient evidence that defendant entered into two separate conspiracies with Harrison. First, the State produced evidence that defendant entered into an agreement with Harrison to break into a house, while armed with a firearm, and confront the military man regarding the loan shark debt, and they took a substantial step in pursuance of that agreement. Therefore, they committed the crime of conspiracy to commit first degree burglary. Second, the State produced evidence that twelve hours later, defendant and Harrison entered into a second conspiracy to rob Rita Freed and took a substantial step toward that when then confronted in her home at gun point and ultimately stole her property. Therefore, they committed the crime of conspiracy to commit first degree robbery.

Defendant's argument must fail because defendant entered into two separate agreements to commit two distinct crimes and, when viewed in the light most favorable to the State, the State produced sufficient evidence of both.

- c. The State failed to produce sufficient evidence to prove felony harassment where it did not produce evidence that the person threatened was placed in reasonable fear the threat would be carried out.

A person commits the crime of harassment when he, without lawful authority, knowingly threatens to cause bodily injury immediately, or in the future, to the person threatened or any other person. *See* RCW 9A.46.020(1). The crime becomes a felony if the person harasses another individual under RCW 9A.46.020(1) by threatening to kill the person threatened or any other person. RCW 9A.46.020(2)(b).

In *State v. J.M.*, 144 Wn.2d 472, 474, 28 P.3d 720 (2001), approximately one week after the Columbine shootings in Littleton, Colorado, J.M. was suspended from his middle school. J.M. was walking home with two other students from his school and was talking about his suspension. *State v. J.M.*, 144 Wn.2d 472, 474. J.M. told the other students how angry he was with Mr. Hashiguchi (the school principal), Mr. Boyd (the school official in charge of seventh grade discipline), and Mr. Sharper (a district security person). J.M. told the other students that he wanted to do a shooting at his middle school like the one in Colorado. *Id.* at 475. After one of the student's expressed concern that his sister

would be killed, J.M. said that he would only kill Mr. Hashiguchi, Mr. Boyd, and Mr. Sharper. *Id.*

The following day, a teacher overheard one of the students talking about J.M.'s statement. J.M.'s threats were eventually communicated to Mr. Hashiguchi. Mr. Hashiguchi testified that he was afraid for his personal safety after hearing of J.M.'s threats. Mr. Boyd testified that he was away at the time of the threat and only learned of it after J.M. had been arrested and detained. *Id.* at 476. Mr. Sharper did not appear as a witness, and there was no evidence presented at trial as to whether Mr. Sharper had any fear as a result of J.M.'s threats. *Id.*

J.M.'s sole conviction was for his threat to kill Mr. Hashiguchi because the trial court found that because Mr. Boyd was unaware of the threat until after J.M. was detained, he could not have been in reasonable fear that that threat would be carried out, and there was no evidence presented by Mr. Sharper at all. *Id.* at 476.

The court noted that

...the statute as a whole requires that the perpetrator knowingly threaten to inflict bodily injury by communicating directly or indirectly the intent to inflict bodily injury; the person threatened must find out about the threat although the perpetrator need not know nor should know that the threat will be communicated to the victim; and words or conduct of the perpetrator must place the person threatened in reasonable fear that the threat will be carried out.

J. M., at 482. The court later clarified that a person threatened with bodily injury is generally the victim of the threat. *Id.* at 488. The person to whom the threat is communicated may not be the victim of the threat. *Id.*

In *State v. Kiehl*, 128 Wn. App. 88, 90, 113 P.3d 528 (2005), Gary Kiehl was charged with felony harassment after he told his mental health counselor, Ms. Clark, that he was going to kill Judge Matheson. At trial, Ms. Clark testified that she told Judge Matheson of the threat, but there was no evidence from Judge Matheson that he was aware of the threat or reasonably feared the threat would be carried out.

On appeal, Kiehl challenged the sufficiency of the evidence and the felony harassment to convict jury instruction. *Kiehl*, at 90. Division Three found there was insufficient evidence to convict because the person threatened was Judge Matheson, but Judge Matheson did not testify, and there was no evidence that he was placed in reasonable fear that the threat would be carried out. The court also found that the to convict jury instruction was defective because it listed the person threatened as Judge Matheson, but did not include the element that Judge Matheson was placed in reasonable fear that the threat would be carried out.

In the present case, defendant was charged with one count of felony harassment based upon his threat to kill Jay Freed. CP 253-58. The State presented evidence that defendant, or an accomplice, threatened to kill Jay Freed if he did not pay a debt within a week. RP 189. This threat was communicated to Rita. RP 189, The State argued that this threat placed Rita in reasonable fear that the threat would be carried out. RP 1264-65. Jay Freed did not testify, and there was no evidence that he was placed in reasonable fear the threat was carried out. Based upon *J.M.* and *Kiehl*, without testimony that Jay Freed was placed in reasonable fear that defendant's threat would be carried out, there is insufficient evidence to prove felony harassment. The State concedes this was error and the court should reverse and remand for dismissal on this count only. Once this count has been dismissed, the trial court should resentence defendant based upon an offender score of four for both the first degree robbery and first degree burglary, and an offender score of three for all other crimes.

Because the State concedes there was insufficient evidence to support defendant's felony harassment conviction, the issue of whether the to convict instruction for that crime was deficient is moot. However, should this court reject the State's concession that there was insufficient evidence to convict defendant of felony harassment, the State also

concedes that, under *Kiehl*, the State's to convict instruction was defective as it failed to include the element that the State had to prove Jay Freed was placed in reasonable fear that defendant's threat would be carried out. CP 97. Like *Kiehl*, this misstatement as to the elements of felony harassment was prejudicial and the error was not harmless.

D. CONCLUSION.

The State respectfully requests this court to affirm all of defendant's convictions, with the exception of the felony harassment count. Additionally, the State asks this court to affirm the trial court's finding that the unlawful imprisonments of both Mariah Freed and Leola Johnston were not incidental to the robbery. Finally, this court should remand for resentencing without the felony harassment and its firearm enhancement.

DATED: April 10, 2009.

GERALD A. HORNE
Pierce County
Prosecuting Attorney


KAREN A. WATSON
Deputy Prosecuting Attorney
WSB # 24259

Certificate of Service:

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

4.10.09 Maiese K
Date Signature

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STATE OF WASHINGTON
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