

NO. 37192-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

RYAN LEWIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 07-1-00235-7

FILED
COURT OF APPEALS
DIVISION II
00 NOV 26 PM 1:05
STATE OF WASHINGTON
BY _____

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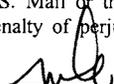
This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED November 26, 2008, Port Orchard, WA 
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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES iii

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....2

 A. PROCEDURAL HISTORY2

 B. FACTS2

III. ARGUMENT.....11

 A. BY ENTERING GUILTY PLEAS TO ALL FIVE CHARGES ON DECEMBER 10, LEWIS WAIVED HIS RIGHT TO CHALLENGE THE TRIAL COURT’S PREVIOUS DENIAL OF HIS MOTION TO WITHDRAW HIS SEPTEMBER 11 GUILTY PLEAS.11

 B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING LEWIS’ MOTION TO WITHDRAW HIS GUILTY PLEAS BECAUSE: (1) THE WRITTEN PLEA FORMS AND THE COURT ORAL COLLOQUY WITH LEWIS CREATED A PRESUMPTION OF VOLUNTARINESS THAT WAS “WELL NIGH IRREFUTABLE;” AND, (2) LEWIS’ SELF-SERVING CLAIM THAT HIS PLEAS WERE INVOLUNTARY WAS INSUFFICIENT BECAUSE THE WASHINGTON SUPREME COURT HAS STATED THAT MORE IS REQUIRED TO OVERCOME THE “HIGHLY PERSUASIVE” EVIDENCE OF VOLUNTARINESS THAN A “MERE ALLEGATION BY THE DEFENDANT.”13

 C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REJECTING LEWIS’ CLAIM THAT THE ROBBERY AND ASSAULT COUNTS CONSTITUTED THE SAME CRIMINAL CONDUCT BECAUSE THE ACT OF HITTING

THE VICTIM OVER THE HEAD WITH A HANDGUN WENT BEYOND WHAT WAS NECESSARY TO FURTHER THE ROBBERY AND THUS, AS IN *STATE V. FREEMAN*, DEMONSTRATED THAT THE LEWIS' INTENT, VIEWED OBJECTIVELY, WAS DIFFERENT FOR EACH OF HIS CRIMES.17

IV. CONCLUSION.....22

TABLE OF AUTHORITIES

CASES

<i>In re Goodwin</i> , 146 Wn. 2d 861, 50 P.3d 618 (2002).....	18
<i>In re Hews</i> , 108 Wn. 2d 579, 741 P.2d 983 (1987).....	14
<i>In re Keene</i> , 95 Wn. 2d 203, 622 P.2d 360 (1980).....	14
<i>In re Ness</i> , 70 Wn. App. 817, 855 P.2d 1191 (1993).....	14
<i>State v. Branch</i> , 129 Wn. 2d 635, 919 P.2d 1228 (1996).....	15
<i>State v. Frederick</i> , 100 Wn. 2d 550, 674 P.2d 136 (1983).....	15
<i>State v. Freeman</i> , 118 Wn. App. 365, 76 P.3d 732 (2003).....	18, 19, 20
<i>State v. Johnson</i> , 104 Wn. 2d 338, 705 P.2d 773 (1985).....	11
<i>State v. Kinard</i> , 21 Wash. App. 587, 585 P.2d 836 (1978),	11
<i>State v. Knight</i> , 162 Wn. 2d 806, 174 P.3d 1167 (2008).....	11
<i>State v. Lindsey</i> , 187 Wash. 364, 61 P.2d 293 (1936).....	12
<i>State v. Marshall</i> , 144 Wn. 2d 266, 27 P.3d 192 (2001).....	14

<i>State v. Maxfield</i> , 125 Wn. 2d 378, 886 P.2d 123 (1994).....	18
<i>State v. Nitsch</i> , 100 Wn. App. 512, 997 P.2d 1000 (2000).....	18
<i>State v. Oestreich</i> , 83 Wn. App. 648, 922 P.2d 1369 (1996).....	11
<i>State v. Osborne</i> , 102 Wn. 2d 87, 684 P.2d 683 (1984).....	14, 15, 16, 17
<i>State v. Perez</i> , 33 Wn. App. 258, 654 P.2d 708 (1982).....	12, 14, 15, 17
<i>State v. Ridgley</i> , 28 Wn. App. 351, 623 P.2d 717 (1981).....	14
<i>State v. S.M.</i> , 100 Wn. App. 401, 996 P.2d 1111 (2000).....	13
<i>State v. Smith</i> , 134 Wn. 2d 849, 953 P.2d 810 (1998).....	11, 12
<i>State v. Taylor</i> , 83 Wn. 2d 594, 521 P.2d 699 (1974).....	14
<i>State v. Taylor</i> , 90 Wn. App. 312, 950 P.2d 526 (1998).....	18
<i>State v. Williams</i> , 117 Wn. App. 390, 71 P.3d 686 (2003).....	15

STATUTES

RCW 9.94A.589	10, 18, 19
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether, by entering guilty pleas to all five charges on December 10, Lewis waived his right to challenge the trial court's previous denial of his motion to withdraw his September 11 guilty pleas?

2. Whether the trial court abused its discretion in denying Lewis' motion to withdraw his guilty pleas when: (1) the written plea forms and the court oral colloquy with Lewis created a presumption of voluntariness that was "well nigh irrefutable;" and, (2) Lewis' self-serving claim that his pleas were involuntary was insufficient because the Washington Supreme Court has stated that more is required to overcome the "highly persuasive" evidence of voluntariness than a "mere allegation" by the defendant?

3. Whether the trial court abused its discretion in rejecting Lewis' claim that the robbery and assault counts constituted the same criminal conduct when the act of hitting the victim over the head with a handgun went beyond what was necessary to further the robbery and thus, as in *State v. Freeman*, demonstrated that the Lewis' intent, viewed objectively, was different for each of his crimes?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Ryan Lewis was charged by fourth amended information filed in Kitsap County Superior Court with four charges: robbery in the second degree, unlawful imprisonment, delivery of a controlled substance and possession of a controlled substance. CP 18. On September 11, 2007 Lewis entered guilty pleas to these four charges. CP 18, 23. Prior to sentencing, Lewis filed a motion to withdraw his guilty pleas. CP 146. The trial court denied the motion to withdraw the guilty pleas and found that Lewis had breached his plea agreement by filing the motion. CP 185, 233. The State then filed a fifth amended information that charged the same four offenses found in the fourth amended information and added a fifth charge: assault in the third degree. CP 186. On December 10, 2007, Lewis entered a new amended plea agreement and a statement of defendant on plea of guilty and pled guilty to all five charges in the fifth amended information. CP 197, 205. The trial court imposed a standard range sentence. CP 222. This appeal followed.

B. FACTS

On February 6, 2007, Verice Carter was at a residence that she shared with Larue Hubbard on 14th Street in Bremerton when two males that she did not recognize entered her home. CP 5-6. Ms. Carter asked the men

what they were doing, and one of the men responded by pulling a handgun from out of his coat and ordering Ms. Carter get down on the floor. CP 6. The men then told her not to move and then removed her jacket and sweatpants, tied her hands behind her back, and told her that they were there for the money. CP 6. One of the men began rummaging around the house and both men both asked her, "Where's the stash?" CP 6. Ms. Carter told the men that she did not have anything. CP 6. Ms. Carter asked to use the bathroom, and the men then took her into the bathroom and tied something around her head and neck so that she could not see. CP 6. The men then asked when Mr. Hubbard was going to get home. CP 6. Ms Carter said she did not know, and the men said they would wait for Hubbard to get home. CP 6.

About thirty minutes later, Mr. Hubbard arrived at the house and said, "Hello." CP 6. Ms. Carter then heard the two men confront Mr. Larue. CP 6. The two men then brought Mr. Larue into the bathroom. CP 5-6. One of the men then hit Larue two times with a gun and then put a blindfold over his eyes. CP 5. Ms Carter heard the men hitting Mr. Larue and believed that he had been knocked out. CP 6. The men also threatened to break Mr. Larue's fingers at some point. CP 6.

Mr. Larue stated that the intruders took a watch, a necklace, and a bottle full of change, but the men wanted more money. CP 5. Mr. Larue

told them that he did not have any, but told them that there was some money at his mother's house on 6th Street. CP 5-6. Mr. Larue also said that if the men took him to the house on 6th Street that he would get them the money. CP 5.

One of the suspects, later identified as the Defendant, Ryan Lewis, then made Mr. Larue drive to his mother's house at gunpoint. CP 5-6. The other man stayed with Ms. Carter. CP 6. After a period of time, Ms. Carter did not hear any noises so she began calling out for the intruder, and once she believed this man was gone she began to work her way out of the hand restraints. CP 6.

The police eventually received a call from the 6th Street residence informing them that a female was being held at gunpoint in a bathroom at the 14th Street residence. CP 5. The 911 operator reported that it was hard to understand all of the information being reported. CP 5.

Officer Renfro was the first to arrive at the 6th Street residence and he immediately found women and children fleeing the house and reporting that a male suspect was inside the house and that this person was going to shoot the kids. CP 5. Officer Renfro then saw Lewis exiting the house. CP 5. Lewis was then taken into custody and officer found that Lewis was carrying a handgun. CP 5.

Officers also went to the 14th Street residence where they found Ms. Carter who stated, "My house was just robbed, thank god you guys are here." CP 6. Ms Carter explained what had happened and gave a description of the suspects. CP 6. Officers then located the second suspect, later identified as Jose Stridiron walking on a street and the officers took Mr. Stridiron into custody. CP 7. During their search of Mr. Stridiron, officers found Mr. Larue's watch and driver's license in Mr. Stridiron's pocket. CP 7.

Lewis was initially charged with charged with robbery in the first degree and burglary in the first degree. CP 1-7. The charges were amended several times, and on September 11, 2007, Lewis entered guilty pleas to four charges contained in the Fourth Amended Information. CP 18, 23. *See also*, RP (9/11/07) at 16 (CP 125).¹ The four charges included robbery in the second degree (with Mr. Larue named as the victim); unlawful imprisonment (with Ms. Carter listed as the victim); delivery of a controlled substance; and possession of a controlled substance. CP 18-22.

At the change of plea hearing Lewis and his counsel signed a plea agreement and a statement of defendant on plea of guilty. CP 23, 30. The

¹ The appellant has not included the report of proceedings from the September 11, 2007 hearing as a stand alone document, but the report of proceedings is contained in the Clerk's Papers designated by the Appellant. See CP 110-140. At this hearing both Mr. Stridiron and Lewis entered guilty pleas to four felony counts. In order to be as clear as possible, citations to the report of proceedings from this hearing will list the page number found in the transcript itself as well as the Clerk's Papers designation.

written plea agreement stated that the State agreed to file no additional charges or sentence enhancements but also stated that Lewis understood that any attempt to withdraw his guilty pleas would constitute a breach of the plea agreement. CP 31,33. In addition, the plea agreement stated that Lewis agreed that upon a finding by the court that he had breached any term of the plea agreement the State would be released from its obligations under the agreement and could file any additional charges, greater offenses, and/or statutory enhancements that were not filed as part of the plea agreement and that neither double jeopardy nor mandatory joinder rules would be cause for dismissal of the new charges. CP 33-34. Lewis signed the plea agreement which also stated: that he was entering into the agreement freely and voluntarily; that no one had threatened him to enter the agreement; that he discussed the plea agreement with his attorney who explained it to him; and that he understood the plea agreement. CP 34.

The trial court orally reviewed the plea agreement with Lewis and asked him if he had signed that document, if he understood it, and asked him whether he had gone over the document with his attorney. RP (9/11/07) at 17-18 (CP 126-27). Lewis indicated that he had signed the document and understood it and that he had gone over it with his attorney. RP (9/11/07) at 18 (CP 127). The trial court also reviewed with Lewis that, as part of the plea agreement, the State was agreeing not to charge additional crimes, but that if

Lewis changed his mind after pleading guilty and asked to withdraw the guilty plea the State would then be able to recharge him with additional crimes. RP (9/11/07) at 20, 23 (CP 129, 132). Lewis stated he understood this. RP (9/11/07) at 23 (CP 132). The court also asked Lewis if anyone had promised him anything that wasn't contained in the form and Lewis replied, "No." RP (9/11/07) at 23-24 (CP 132-33). The trial court then found that the Lewis had signed the plea agreement freely, voluntarily, and intelligently. RP (9/11/07) at 24 (CP 133).

A written statement of defendant on plea of guilty was also entered at the September 11 hearing. CP 23. That document stated that he was entering his pleas freely and voluntarily; no one had threatened him to enter the agreement; no person had made promises of any kind to cause him to enter his pleas except as was set out in the statement of defendant form. CP 28. In addition, the statement of defendant on plea of guilty form stated that Lewis's attorney had fully discussed the form with him and had explained it to him, and that Lewis understood the form. CP 28-29.

The trial court also orally reviewed the statement of defendant on plea of guilty form with Lewis and asked him if he had signed that document, if he understood it, and asked whether he had gone over the document with his attorney. RP (9/11/07) at 24 (CP 133). Lewis answered "yes" to each of these questions. RP (9/11/07) at 24 (CP 133). The court next discussed with

Lewis the numerous rights that he was giving up by pleading guilty, and Lewis stated that he understood. RP (9/11/07) at 24-28 (CP 133-37). Lewis then entered guilty pleas to each of the four counts and the court found that the Lewis entered the pleas freely, voluntarily and intelligently. RP (9/11/07) at 28-30 (CP 137-39). Sentencing was then set over until a later date. RP (9/11/07) at 30 (CP 139).

Prior to sentencing, Lewis filed a motion to withdraw his guilty plea arguing that his plea was involuntary and that he was coerced into pleading guilty by his trial attorney who had made false guarantees. CP 146, 150.

The trial court denied Lewis's motion to withdraw his guilty pleas and the court entered written findings of fact and conclusions of law regarding the motion. CP 233. Specifically, the trial court stated that the voluntariness of a guilty plea is determined by looking at the totality of the circumstances and that a written statement of defendant on plea of guilty and a defendant's acknowledgment that he or she read the form and understood it is prima facie evidence that the plea was voluntary. CP 236. The trial court pointed out that when a court conducts an oral colloquy with the defendant the presumption of voluntariness is "well nigh irrefutable" and that, to prove that a guilty plea was coerced, a defendant needs more than just make a bare allegation that the plea was coerced. CP 236.

The trial court's written findings stated that: Lewis signed a written statement on plea of guilty; Lewis had an opportunity to speak with his attorney prior to signing the document; the judge who took the guilty plea engaged in a lengthy oral colloquy with Lewis on the record; Lewis offered no proof other than his own statement that his plea was coerced; the judge explained to Lewis at the sentencing hearing that the actual sentence to be imposed was up to the court and that this fact was also explained in the guilty plea form; and, Lewis failed to overcome the strong presumption that his guilty plea was entered voluntarily. CP 234-35.

After the trial court denied Lewis's motion to withdraw his guilty plea, the court entered a written order finding that Lewis had breached his plea agreement based upon the fact that Lewis had attempted to withdraw his guilty plea. CP 185.

After Lewis was found to be in breach of the plea agreement, the State filed a fifth amended information that charged the four charges found in the previous information and added a fifth count: assault in the third degree. CP 186.

On December 10, 2007, Lewis entered a new amended plea agreement and a statement of defendant on plea of guilty regarding all five of the charges contained in the fifth amended information. CP 197, 205. The trial

court went through these documents on the record with Lewis and ultimately accepted his five guilty pleas. RP (12/10/07) 3-12, 24. Lewis has never sought to withdraw his five guilty pleas entered on December 10, 2007, and he has not challenged the voluntariness of his December 10 guilty pleas in the present appeal.

A sentencing hearing was held on December 14, 2007, and Lewis argued that the two drug convictions constituted same criminal conduct pursuant to RCW 9.94A.589. CP 192. The State acknowledged that the two drug convictions qualified as same criminal conduct and pointed out that the amended plea agreement took note of this fact and did not count both offenses for scoring purposes. CP 219. The trial court agreed with the parties and held that the two drug convictions constituted the same criminal conduct. RP (12/14/07) 5.

Lewis, however, also argued that his conviction for robbery in the second degree and assault in the third degree also constituted the same criminal conduct. CP 193-94, RP (12/14/07) 2-3. The State disagreed and argued that these two offenses did not constitute the same criminal conduct. CP 219-21, RP (12/14/07) 3-4. The trial court agreed with the State's argument and held that the robbery and assault conviction were not the same criminal conduct. RP (12/14/07) 5-7. The trial court ultimately imposed a standard range sentence. CP 222. This appeal followed.

III. ARGUMENT

A. BY ENTERING GUILTY PLEAS TO ALL FIVE CHARGES ON DECEMBER 10, LEWIS WAIVED HIS RIGHT TO CHALLENGE THE TRIAL COURT'S PREVIOUS DENIAL OF HIS MOTION TO WITHDRAW HIS SEPTEMBER 11 GUILTY PLEAS.

Lewis argues that the trial court erred in denying his motion to withdraw his guilty pleas entered on September 11, 2007. This claim, however, was not properly preserved for review because Lewis waived his right to appeal the trial court's denial of his motion when he later, on December 10, 2007, entered guilty pleas to the original four charges and one additional charge.

A voluntary guilty plea acts as a waiver of the right to appeal. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998); *State v. Johnson*, 104 Wn.2d 338, 342-43, 705 P.2d 773 (1985). Thus, a guilty plea generally insulates the defendant's conviction from collateral attack. *State v. Knight*, 162 Wn.2d 806, 811, 174 P.3d 1167 (2008), citing *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973).

In addition, under Washington law an amended information supersedes the original. *State v. Oestreich*, 83 Wn.App. 648, 651, 922 P.2d 1369 (1996), citing *State v. Navone*, 180 Wash. 121, 123-24, 39 P.2d 384 (1934); *State v. Kinard*, 21 Wash.App. 587, 589-90, 585 P.2d 836 (1978),

review denied, 92 Wash.2d 1002 (1979); *State v. Lindsey*, 187 Wash. 364, 369, 61 P.2d 293 (1936). Furthermore, when a defendant completes a plea statement and admits to reading, understanding, and signing it, this creates a strong presumption that the plea is voluntary. *Smith*, 134 Wn.2d at 852; *State v. Perez*, 33 Wn. App. 258, 261, 654 P.2d 708 (1982). Finally, “When the judge goes on to inquire orally of the defendant and satisfies himself on the record of the existence of the various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable.” *Perez*, 33 Wn. App. at 262.

In the present case, Lewis has never alleged that he did not voluntarily plead guilty on December 10 to the five charges in the fifth amended information. Rather, he alleges that his earlier plea, entered on September 11, was not voluntary. Lewis, however, waived his right to appeal this issue when he entered his guilty pleas on December 10. If Lewis had wanted to preserve the trial court’s earlier denial of his motion to withdraw his September 11 pleas, he should have gone to trial or requested a stipulated facts trial. Of course, under either of those scenarios the State might well have chosen to make a different sentencing recommendation or might have chosen to add additional charges or enhancements. When Lewis chose to accept the State’s plea agreement and entered guilty pleas on December 10, he waived his right to contest the trial court’s earlier rulings. Thus, he is

precluded from challenging the trial court's denial of his motion to withdraw his September 11 pleas.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING LEWIS' MOTION TO WITHDRAW HIS GUILTY PLEAS BECAUSE: (1) THE WRITTEN PLEA FORMS AND THE COURT ORAL COLLOQUY WITH LEWIS CREATED A PRESUMPTION OF VOLUNTARINESS THAT WAS "WELL NIGH IRREFUTABLE;" AND, (2) LEWIS' SELF-SERVING CLAIM THAT HIS PLEAS WERE INVOLUNTARY WAS INSUFFICIENT BECAUSE THE WASHINGTON SUPREME COURT HAS STATED THAT MORE IS REQUIRED TO OVERCOME THE "HIGHLY PERSUASIVE" EVIDENCE OF VOLUNTARINESS THAN A "MERE ALLEGATION BY THE DEFENDANT."

Even if Lewis were not precluded from now challenging the trial court's denial of his motion to withdraw his September 11 guilty pleas, Lewis has still failed to show that the trial court abused its discretion in denying his motion because the totality of the circumstances shows that Lewis' pleas were knowing, intelligent, and voluntary.

An appellate court reviews a trial court's decision on a motion to withdraw a guilty plea for abuse of discretion. *State v. S.M.*, 100 Wn. App. 401, 409, 996 P.2d 1111 (2000), *citing*, *State v. Padilla*, 84 Wn. App. 523, 525, 928 P.2d 1141 (1997).

A guilty plea may be withdrawn only when it appears that the withdrawal is necessary to correct a manifest injustice. CrR 4.2(f); *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974); *State v. Marshall*, 144 Wn.2d 266, 280-81, 27 P.3d 192 (2001). A manifest injustice is one that is “obvious, directly observable, overt, not obscure.” *Taylor*, 83 Wn.2d at 596. The defendant bears the burden of demonstrating manifest injustice. *State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984). The defendant’s burden is demanding because ample safeguards exist to protect the defendant’s rights before the court accepts his plea. *Taylor*, 83 Wn.2d at 596-97.

Where a defendant completes a written statement on a guilty plea and acknowledges that he or she has read and understood it and that its contents are true, “the written statement provides prima facie verification of the plea's voluntariness.” *State v. Perez*, 33 Wn. App. 258, 261-62, 654 P.2d 708 (1982) (citing *In re Pers. Restraint of Keene*, 95 Wn.2d 203, 206-07, 622 P.2d 360 (1980); *State v. Ridgley*, 28 Wn. App. 351, 623 P.2d 717 (1981)). Similarly, an information that notifies a defendant of the nature of the crime to which he is pleading guilty creates a presumption that the plea was knowing, voluntary, and intelligent. *In re Personal Restraint of Ness*, 70 Wn. App. 817, 821, 855 P.2d 1191 (1993); *In re Pers. Restraint Petition of Hews*, 108 Wn.2d 579, 596, 741 P.2d 983 (1987).

In addition, a defendant's signature on the plea form provides "strong evidence" that the plea is voluntary. *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). Furthermore, "When the judge goes on to inquire orally of the defendant and satisfies himself on the record of the existence of the various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable." *State v. Perez*, 33 Wn. App. 258, 262, 654 P.2d 708 (1982).

The Supreme Court has also held that when challenging the voluntariness of a plea, a defendant must present some evidence of involuntariness beyond his self-serving allegations. *State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984). Thus, after denying improper influence in open court, a defendant who later seeks to retract his admission of voluntariness bears a heavy burden in trying to convince a court that his admission was coerced. *State v. Frederick*, 100 Wn.2d 550, 557, 674 P.2d 136 (1983), *overruled on other grounds*, *Thompson v. State Dep't of Licensing*, 138 Wn.2d 783, 982 P.2d 601 (1999). A plea is coerced, and therefore involuntary, if the defendant's will was overborne. *State v. Williams*, 117 Wn. App. 390, 398, 71 P.3d 686 (2003).

In *Osborne*, the defendant claimed that he had pleaded guilty because his wife had threatened to kill herself if he went to trial. *Osborne*, 102 Wn.2d at 92. Other than this "bare allegation" in the defendant's affidavit, there was

nothing in the record to indicate the plea was coerced, and the court noted that the defendant had specifically stated several times during the plea process that the guilty plea was voluntary and free of coercion. *Osborne*, 102 Wn.2d at 97. The Supreme Court, therefore, found that the trial court did not err in denying the motion to withdraw as more was required to overcome the “highly persuasive” evidence of voluntariness than a “mere allegation by the defendant.” *Osborne*, 102 Wn.2d at 97.

In the present case, the record does not support Lewis' assertions that his plea was not voluntarily and intelligently made or that his plea was coerced. On the contrary, the record shows that Lewis signed and filed a statement of defendant on plea of guilty and a plea agreement that both indicated that he was making his pleas freely and voluntarily. CP 23, 30. In addition, the record demonstrates that the trial court went on to “inquire orally of the defendant and satisfies itself on the record of the existence of the various criteria of voluntariness,” as the trial court went over both documents with Lewis, asked him if he had read and understood the documents and the rights that he was relinquishing, and ultimately found that the Lewis was entering his pleas freely, voluntarily, and intelligently. RP (9/11/07) 17-30. In short, the verbatim report of the plea proceedings reflects the court's thorough questioning and Lewis' unequivocal answers about his volition and understanding of the consequences of pleading guilty.

Given these facts, totality of the circumstances shows that Lewis' plea was knowing, intelligent, and voluntary, and the presumption of voluntariness is the present case was "well nigh irrefutable." *Perez*, 33 Wn. App. at 262. In his challenge to his pleas, Lewis presented no evidence of involuntariness beyond his own self-serving allegations despite the fact that the Washington Supreme Court has stated that that more is required to overcome the "highly persuasive" evidence of voluntariness than a "mere allegation by the defendant." *Osborne*, 102 Wn.2d at 97. The trial court, therefore, did not err in denying Lewis' motion to withdraw his guilty plea and in holding Lewis to the terms of his plea agreement.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REJECTING LEWIS' CLAIM THAT THE ROBBERY AND ASSAULT COUNTS CONSTITUTED THE SAME CRIMINAL CONDUCT BECAUSE THE ACT OF HITTING THE VICTIM OVER THE HEAD WITH A HANDGUN WENT BEYOND WHAT WAS NECESSARY TO FURTHER THE ROBBERY AND THUS, AS IN *STATE V. FREEMAN*, DEMONSTRATED THAT THE LEWIS' INTENT, VIEWED OBJECTIVELY, WAS DIFFERENT FOR EACH OF HIS CRIMES.

Lewis next claims that the trial court erred in failing to find that the robbery and assault count constituted the same criminal conduct. This claim is without merit because Lewis' intent, viewed objectively, changed from one

crime to the other, and the assault went beyond what was necessary to further the robbery.

A trial court's determination on same criminal conduct is reviewed for an abuse of discretion or misapplication of the law. *State v. Maxfield*, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).²

“Same criminal conduct” means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589. With respect to questions regarding a defendant's intent, courts look to whether the defendant's intent, viewed objectively, changed from one crime to the other, and whether commission of one crime furthered the other. *State v. Taylor*, 90 Wn. App. 312, 950 P.2d 526 (1998).

In *State v. Freeman*, 118 Wn. App. 365, 76 P.3d 732 (2003) the defendant (Michael Freeman) and several others had been riding in a car with the victim. *Freeman*, 118 Wn. App. at 368. After parking in a driveway off

² Although a defendant generally waives his right to appeal by entering a guilty plea, the courts have held that even after a guilty plea a defendant may argue that the trial court miscalculated the defendant's offender score. See, *In re Goodwin*, 146 Wn.2d 861, 873-75, 50 P.3d 618 (2002). Even so, a defendant may still be found to have waived his right to appeal a trial court's ruling regarding same criminal conduct if he explicitly agrees to the State's offender score calculation or fails to ask a trial court to exercise its discretion in this regard. See, *Goodwin*, 146 Wn.2d at 875; *State v. Nitsch*, 100 Wn. App. 512, 520-23, 997 P.2d 1000, review denied, 141 Wn.2d 1030, 11 P.3d 827 (2000). In the present case, however, Lewis appears to have preserved this issue for appeal since he contested the State's calculation of his offender score in his written statement of defendant on plea of guilty and in his motion to “consolidate” several of the counts. CP 190, 198.

of a dark dead-end street, the defendant got out of the front seat, opened the backseat door and pointed a handgun and the victim. *Freeman*, 118 Wn. App. at 368. The defendant told the victim to get out with his “stuff” and the victim responded simply by saying, “Mike?” *Freeman*, 118 Wn. App. at 368. The defendant then responded by saying, “What, you think I won’t shoot you?” *Freeman*, 118 Wn. App. at 368. Without waiting for an answer, the defendant shot the victim. *Freeman*, 118 Wn. App. at 368. The victim then tried to get out of the car on the opposite side, but the defendant came around to that side and told the victim to get out with his “stuff” or he would shoot him again. *Freeman*, 118 Wn. App. at 368. The victim then handed over all of his money and the men drove off leaving the victim in the street. *Freeman*, 118 Wn. App. at 368.

A jury convicted the defendant of first degree robbery and first degree assault. *Freeman*, 118 Wn. App. at 369-70. At sentencing, the defendant argued that the two offenses were the same criminal conduct pursuant to RCW 9.94A.589. *Freeman*, 118 Wn. App. at 370. The trial court rejected this argument and noted that the shooting was not necessary to accomplish the robbery and that the defendant’s intent changed when what began as a robbery became a shooting. *Freeman*, 118 Wn. App. at 370.

On appeal, the defendant argued that the trial court erred by declining to find that the two crimes were the same criminal conduct. *Freeman*, 118

Wn. App. at 377. The defendant argued that his only intent was to rob the victim and that he shot the victim because he did not respond immediately to his demand for money, thus the assault was done in furtherance of the robbery as evidenced by his threat to shoot the victim again if he did not turn over his money. *Freeman*, 118 Wn. App. at 378. The court of appeals acknowledged that the evidence was sufficient to support the defendant's view of his own criminal conduct, but held that the evidence was also sufficient to support the trial court's finding that the assault went beyond what was necessary to further the robbery. *Freeman*, 118 Wn. App. at 378. The court noted that nothing that showed that the victim gave any resistance or gave any indication that he was not going to turn over his money; rather, he merely repeated the defendant's name in a questioning manner (as if to ask whether the defendant was simply making a bad joke or if he was, in fact, seriously demanding his money). *Freeman*, 118 Wn. App. at 378. The court of appeals noted that the trial court was not bound to accept the defendant's self-serving depiction of his subjective intent, and that the evidence, viewed objectively, was sufficient to support the conclusion that the assault went beyond what was required to accomplish the robbery. *Freeman*, 118 Wn. App. at 378. The court of appeals, therefore, affirmed the trial court's conclusions that the assault and robbery did not constitute the same criminal conduct. *Freeman*, 118 Wn. App. at 378-79.

In the present case, as in *Freeman*, the record does not show that the assault was necessary to further the robbery. There was nothing in the record below to suggest that Mr. Hubbard resisted the robbery in any way. In addition, Ms. Carter had already been subdued and tied up before the Mr. Hubbard arrived home, evidencing that Lewis and his accomplice were already in control of the situation. CP 6. Furthermore, Mr. Lewis and his accomplice outnumbered the victim and were armed with a firearm, while there was nothing in the record to suggest that Mr. Hubbard was armed in any way. Thus, the record supports the conclusion that merely pointing the gun was sufficient in and of itself to control Mr. Hubbard.³ The record, therefore, demonstrated that the act of hitting Mr. Hubbard not once, but twice, over the head with a handgun was not necessary to obtain his compliance or to further the robbery in some other way. Rather, as in *Freeman*, the record supports a conclusion that the assault went beyond what was necessary to support the robbery and, viewed objectively, the assault did not further the robbery. Thus, the assault and the robbery were not the same criminal conduct and the trial court did not abuse its discretion.

³ This conclusion is further supported by the fact that the presence of the gun was sufficient to control Mr. Hubbard during the drive to his mother's house

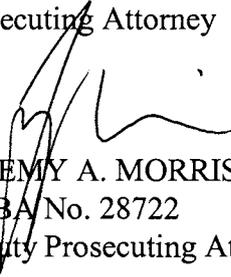
IV. CONCLUSION

For the foregoing reasons, Lewis's conviction and sentence should be affirmed.

DATED November 26, 2008.

Respectfully submitted,

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