

NO. 38378-1

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

STATE OF WASHINGTON, RESPONDENT

v.

DARYL BURTON, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Bryan Chushcoff

No. 05-1-05005-7

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**BRIEF OF RESPONDENT**

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

1. Did the trial court properly instruct the jury on voluntary intoxication and allow defendant to argue his theory of the case?
2. Do defendant's convictions for attempted murder in the first degree, assault in the first degree and vehicular assault violate double jeopardy?

B. STATEMENT OF THE CASE.

1. Procedure

On November 29, 2005, the Pierce County Prosecutor's Office charged DARYL BURTON, hereinafter "defendant," by amended information with two counts of attempted murder in the first degree, one count of assault in the first degree – domestic violence, one count of assault in the first degree, one count of vehicular assault – domestic violence, one count of assault in the second degree – domestic violence, one count of felony harassment – domestic violence – deadly weapon enhancement, one count of felony harassment – deadly weapon sentence enhancement. CP 5-10.

The case proceeded to trial in front of the Honorable Bryan Chushcoff on July 28, 2008. 1RP<sup>1</sup> 4. The State orally dismissed several counts and defendant went to trial on the amended information charging one count of attempted murder in the first degree, one count of assault in the first degree, one count of vehicular assault, one count of assault in the second degree, and one count of felony harassment with a domestic violence and deadly weapon enhancement. CP 203-207; 5RP 93-94; 10RP 684-85, 711. The jury found defendant guilty of all charges. CP 203-207; 13RP 1087-88. The jury answered yes to the special verdict forms finding that the defendant caused bodily harm to Ms. Bones and he was armed with a deadly weapon at the time of the crime of harassment. CP 203-207; 13RP 1087-88.

On September 26, 2008, defendant was sentenced to a total of 216 months of confinement to be followed by 24 to 48 months of community custody. CP 213-226; 14RP 19. Defendant filed a timely notice of appeal. CP 235.

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<sup>1</sup> The verbatim report of proceedings consists of 19 volumes, which will be referred to as follows:

October 12, 2005, as "15RP;" November 29, 2005, as "16RP;" January 18, 2007, as "17RP;" January 11, 2008, as "18RP;" March 21, 2008, as "19RP;" July 28, 2008, as "1RP;" July 29, 2008, as "2RP;" July 30, 2008, as "3RP;" July 31, 2008, as "4RP;" August 6, 2008, as "5RP;" August 7, 2008, as "6RP;" August 11, 2008, as "7RP;" August 12, 2008, as "8RP;" August 13, 2008, as "9RP;" August 25, 2008, as "10RP;" August 26, 2008, as "11RP;" August 27, 2008, as "12RP;" August 28, 2008, as "13RP;" September 26, 2008, as "14RP"

## 2. Facts

Jacqueline Bones and defendant had an on and off again relationship since 1995. 7RP 318. They have one son together. 7RP 318. In the years leading up to the incident resulting in criminal charges, there had been multiple other incidents where defendant assaulted and screamed at Ms. Bones after he had been drinking heavily. 7RP 339, 344, 346, 349, 385. On one occasion, Ms. Bones forgot to lock her door and woke up to see defendant entering her house. 7RP 351. He left, only to call her and threaten her: “see, I could have killed your ass and nobody would have even known.” 7RP 351. Ms. Bones did not report those incidents to the police because she did not want to get defendant in trouble. 7RP 349.

On October 11, 2005, around 7 a.m., defendant called Ms. Bones who was living elsewhere at the time. 7RP 353. He asked her to come pick him up so he could check himself into a hospital for treatment for his drinking habit. 7RP 353. Ms. Bones arrived at defendant’s house around 10 a.m. 7RP 354. Defendant was sitting on the stairwell waiting for her. 7RP 354. He got into the passenger seat of her Ford Taurus. 7RP 354.

Ms. Bones is a Certified Nursing Assistant and has worked at St. Joseph’s hospital for eight years. 7RP 316, 430. She has had alcohol-abuse training and a lot of exposure to it through work. 7RP 430. She testified at trial that on the day of the incident defendant did not appear

drunk to her even though she believed he had been drinking heavily the past week. 7RP 355.

On the way to the hospital, Ms. Bones went through the drive-thru of a McDonald's to get defendant something to eat. 7RP 358. She bought him a McMuffin meal and a coffee. 7RP 359. They got back on the road to go to the hospital. 7RP 359. Ms. Bones noticed defendant open his coat, reach inside and pull out a hammer. 7RP 359. Defendant said to her, "I'm going to kill you, bitch." 7RP 359. Defendant swung the claw end of the hammer at Ms. Bones repeatedly. 7RP 360. Ms. Bones tried to keep him from hitting her or wrecking the car as she was still driving. 7RP 360.

Using her right hand to block the hammer blows, Ms. Bones was able to pull the car over to the side of the road. 7RP 360. She continued to block the blows and try to get defendant to stop hitting her. 7RP 360. The hammer eventually dropped to the floor of the car and defendant and Ms. Bones continued to struggle. 7RP 361. At some point, defendant bent Ms. Bones' left pinky finger back so far that paramedics later had to re-set it. 7RP 361. Ms. Bones struggled to get out of the car, but was trapped by her seatbelt. 7RP 362. Defendant took his hot coffee and threw it in her face, burning her eye and cheek. 7RP 362.

Eventually Ms. Bones was able to get halfway out of the car and get the seatbelt off. 7RP 362-63. Ms. Bones' vision was impaired as the coffee was burning her eye and face. 7RP 363. She ran away, looking back to see defendant get out of the passenger side of the car and into the driver's seat. 7RP 363. As she was running, defendant chased her in the car. 7RP 364. Defendant struck Ms. Bones with the car. 7RP 364. She flew up and landed with her left hip on the ground a few feet away. 7RP 364.

Ms. Bones got up and started to run again. 7RP 365. She ran frantically in the street screaming "God, help me. Somebody help me." 7RP 365. She lost her shoes in the street. 7RP 367. Defendant continued to chase Ms. Bones in the car. 7RP 367. When he struck her again, with the car, she was wedged under the front tire of the car. 7RP 367. The tire was on top of her ribcage so she could not breathe. 7RP 368. Ms. Bones jawbone was pressed on the pavement while the top of her head was just below the undercarriage of the hood of the car. 7RP 368.

A male passerby helped pull Ms. Bones out from underneath the car. 7RP 369. They started to run towards the curb as defendant continued to chase them in the car. 7RP 369. The car hit a curb and flipped over, just missing Ms. Bones and the man. 7RP 370.

There were multiple witnesses to the events who testified at trial. One was Christine Spingola who was driving on the road and saw Ms. Bones running across the street towards a telephone pole. 6RP 190. Ms. Bones was followed by defendant slowly driving across the street. 6RP 186-87. Ms. Spingola heard the woman yelling "he is going to kill me. He is going to kill me." 6RP 187. Ms. Spingola saw the male passerby help Ms. Bones get out of the way as defendant backed up the car and then accelerated forward towards them. 6RP 193. The car flipped over a rock wall almost hitting Ms. Bones. 6RP 197.

Ms. Spingola saw defendant crawl out of the passenger door mumbling something. 6RP 199. She watched defendant calmly walk away. 6RP 199. Ms. Spingola described defendant as acting "messed up" on either drugs or alcohol. 6RP 201. A man chased after defendant while Ms. Spignola checked on Ms. Bones. 6RP 201. Ms. Bones was sitting on a porch scared, shaking and crying with blood everywhere. 6RP 202. Ms. Spignola could see some bones and some of her fingers dislocated. 6RP 202. Ms. Bones' shoes were lying in the road near drops of blood. 6RP 202.

When the police arrived, they set up a containment zone around the area. 8RP 463. Detective Ryan Larson saw defendant walking out of the backyard of a house. 8RP 464-65. He ordered defendant to the ground

and placed him in handcuffs. 8RP 464. Defendant cooperated with the police as he was arrested. 8RP 467.

The paramedics arrived and transported Ms. Bones to a hospital by ambulance. 7RP 351. Ms. Bones had an orbital fracture and laceration to her eye, multiple burns on the left side of her face, scraping on her jawbone and multiple fractures to her ribs. 7RP 372, 9RP 552. Ms. Bones also had to have surgery to put pins in her left finger after it did not heal properly in a splint. 7RP 373.

Multiple drunk voicemail messages left by defendant on Ms. Bones' phone were played at trial. 7RP 359. Ms. Bones testified that when defendant was drunk, he would sometimes take off in her car for two or three days at a time. 7RP 397. She said there were times he had blackouts and "couldn't function." 7RP 401. Defendant chose not to testify at trial.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AND ALLOWED DEFENDANT TO ARGUE HIS THEORY OF THE CASE.

The law concerning the giving of jury instructions may be summarized as:

We review the trial court's jury instructions under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not

misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law.

*State v. Fernandez-Medina*, 94 Wn. App. 263, 266, 971 P.2d 521, review granted, 137 Wn.2d 1032, 980 P.2d 1285 (1999) (citing *Herring v. Department of Social and Health Servs.*, 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996)).

A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. *State v. Rahier*, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984) (citing *State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967)). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 872-3, 385 P.2d 18 (1963).

The standard for review applied to a trial court's failure to give jury instructions depends on whether the trial court's refusal to grant the jury instructions was based upon a matter of law or of fact. *State v.*

*Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). The trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo. *Id.*

To maintain a diminished capacity defense, a defendant must produce expert testimony demonstrating that a *mental disorder*, not amounting to insanity, *impaired* the defendant's ability to form the culpable mental state to commit the crime charged. *State v. Atsbeha*, 142 Wn.2d 904, 921, 16 P.3d 626 (2001); *State v. Ellis*, 136 Wn.2d 498, 521, 963 P.2d 843 (1998) (emphasis added).

It is not enough that a defendant is diagnosed with a particular mental disorder. *Atsbeha*, 142 Wn.2d at 921. The pattern instruction should be given to the jury only if the defendant satisfies the following three elements: (1) the crime charged must include a particular mental state as an element; (2) the defendant must present evidence of a mental disorder; and (3) expert testimony must logically and reasonably connect the defendant's alleged mental condition with the asserted inability to form the mental state required for the crime charged. *Atsbeha*, 142 Wn.2d at 914, 921; *State v. Eakins*, 127 Wn.2d 490, 502, 902 P.2d 1236 (1995); *State v. Griffin*, 100 Wn.2d 417, 718-19, 670 P.2d 265 (1983); *State v. Guilliot*, 106 Wn. App. 355, 363, 22 P.3d 1266 (2001).

General instructions which solely discuss criminal intent are not sufficient to apprise a jury of mental disorders which may diminish a defendant's capacity to commit a crime. *Griffin*, 100 Wn.2d at 420. For instance, in *State v. Conklin*, 79 Wn.2d 805, 489 P.2d 1130 (1971), the defendant was charged with first degree forgery and his intoxication defense was refused. The reviewing court found error in that "while the instructions given did express that 'intent to defraud' is a necessary element, nowhere in the instructions is the jury informed as to the effect of intoxication upon the formation of criminal intent." *Griffin*, 100 Wn.2d at 420 (citing *Conklin*, 79 Wn.2d at 807-08).

In the present case, defendant called Dr. Brett Trowbridge as a witness. 10RP 754. Dr. Trowbridge is a licensed psychologist in Washington who evaluated defendant at the request of his counsel. 10RP 755. After describing his evaluation of the defendant, Dr. Trowbridge testified to the following:

DEFENSE COUNSEL: Dr. Trowbridge, I believe we left off where we were talking about chronic alcoholism. Is that's something that is in the DSM-IV?

DR. TROWBRIDGE: Well, It's – the term is alcohol dependence.

DEFENSE COUNSEL: And what is the DSM-IV?

DR. TROWBRIDGE: DSM stands for the Diagnostic and Statistical Manual, and it's Edition IV. It's basically the book that all psychologists and psychiatrists use to make diagnoses. Before we

had the DSM way back when, everybody made up their own definitions of what were the symptoms of different mental illnesses, so people used all different terminology, and people weren't always talking about the same thing when they used the same words, so now we've got a book that tells us exactly what the diagnostic criteria are for each of the different mental disorders, and we're supposed to follow it.

DEFENSE COUNSEL: And after going through the criteria, did [defendant] meet the criteria for alcohol dependence?

DR. TROWBRIDGE: Yes.

DEFENSE COUNSEL: And that's chronic alcoholism?

DR. TROWBRIDGE: Yes.

10RP 764-765.

Based on Dr. Trowbridge's testimony, defendant requested the jury be given the following instructions:

Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form the mental state of premeditation, intent or knowledge.

CP 95-153; WPIC 18.20.

Chronic alcoholism is a mental illness or disorder.

CP 95-153; DSM-IV.

The trial court refused to give the instruction stating:

Although Dr. Trowbridge did say something about his -- that is, [defendant's] capacity, formerly requisite intent, was

substantially affected by alcohol intoxication and depression, it was clear from his – from the testimony provided on recross that Dr. Trowbridge to say that if he was sober during this incident, there cannot be diminished capacity defense because there would not have been an incapacitated condition, or words to that effect. So, therefore, he – **I did not understand Dr. Trowbridge to be saying that he had a mental condition that affected his capacity to intend; merely that his intoxication affected or impacted his ability to form intent.** And the Court has provided in its proposed Instruction No. 36 that no act committed by a person while in the state of voluntary intoxication is less criminal by reason of that condition; however, evidence of intoxication may be considered in determining whether the defendant acted or failed to act with premeditation, intent, knowledge or recklessness. I do think from that instruction, the defense is able to argue its theory of the case, that [defendant] was not able to form the intent to commit the crime. So I'll decline to give those instructions.

12RP 985-86 (emphasis added).

The trial court properly denied defendant's requested jury instruction based on Dr. Trowbridge's analysis and defendant's ability to argue his theory of the case without the diminished capacity instruction. During his testimony, Dr. Trowbridge stated "all I'm saying is that his intent was diminished by his alcohol intoxication and his depression."

15RP 794. The trial court properly understood and differentiated between one's intent being negated by an incapacitating condition versus one's intent being affected by such a condition. The diminished capacity instruction is proper if a mental disease or condition negated one's intent altogether. In the present case, the court understood Dr. Trowbridge's

analysis of defendant as saying that defendant's intent was affected by the alcohol, but such an intent was not negated by an incapacitating condition. Therefore, because there was no question that defendant possessed the requisite intent and rather the amount of intent was in question, the instruction on diminished capacity was properly withheld.

Furthermore, defendant was allowed to argue his theory of the case with the use of the voluntary intoxication instructions. Dr. Trowbridge's analysis discussed that defendant's intoxication likely affected the level of intent he acted with. 15RP 794. This analysis is properly understood through jury instruction No. 36 which reads "evidence of intoxication may be considered in determining whether the defendant acted or failed to act with premeditation, intent, knowledge or recklessness." CP 155-99, Instruction No. 36. This allows the jury to take into account defendant's level of intoxication in determining his level of intent in committing his crimes which is precisely defendant's theory of the case, that his level of intent was diminished by his intoxicated state.

This is analogous to *State v. Hansen*, 46 Wn. App. 292, 730 P.2d 706 (1986), *opinion affirmed and modified in another section by State v. Hansen*, 46 Wn. App. 292, 737 P.2d 670 (1987). In that case, defendant requested an instruction on diminished capacity in addition to voluntary intoxication during his trial for kidnapping and first degree rape. *Hansen*, 46 Wn. App. at 292, 298. The court evaluated the evidence and stated:

Without question, substantial evidence was presented in the case at bar to support Hansen's theory that his drug intoxication produced a mental disorder-schizophrenia-that bore upon his ability to form the requisite intent to commit the crimes. However, unlike *Edmon*<sup>2</sup>, the trial court admitted psychiatric evidence on that issue. Unlike *Griffin*, moreover, where no diminished capacity instruction whatever was given, here the jury was instructed that it could consider how Hansen's drug intoxication affected his ability to form the requisite specific intent.

*Hansen*, 46 Wn. App. at 299-300.

The Court of Appeals found the trial court had not erred by refusing to give diminished capacity instructions when the instruction on voluntary intoxication was sufficient. *Hansen*, 46 Wn. App. at 299-300.

Similarly, in the present case, the jury instruction on voluntary intoxication was sufficient to allow defendant to argue his theory of the case. Dr. Trowbridge's analysis and the evidence presented at trial showed defendant's intent may have been affected by his intoxication. But, the intent was not erased altogether by an incapacitating condition which would necessitate an instruction on diminished capacity. As such, like in *Hansen*, the trial court did not err as the jury was properly instructed and defendant was able to argue his theory of the case.

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<sup>2</sup> *State v. Edmon*, 28 Wn. App. 98, 621 P.2d 1310 (1981).

2. DEFENDANT’S CONVICTIONS FOR FIRST DEGREE ATTEMPTED MURDER, FIRST DEGREE ASSAULT, AND VEHICULAR ASSAULT DID NOT VIOLATE DOUBLE JEOPARDY.

The Washington State Constitution’s double jeopardy clause provides the same protection as the federal Constitution. *In re Pers. Restraint of Borrero*, 161 Wn.2d. 532, 536, 167 P.3d 1106 (2007); see U.S.Const. amend. V; Wash. Const. art. I § 9. The State can bring and a jury can consider “multiple charges arising from the same criminal conduct in a single proceeding.” *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). However, the double jeopardy principles bar multiple punishments for the same offense. *Borrero*, 161 Wn.2d at 536. “Where a defendant’s act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense.” *Freeman*, 153 Wn.2d at 771.

Traditionally when there is an absence of clear legislative intent, courts turn to the *Blockburger* test to determine whether the two crimes constitute the “same offense” for double jeopardy purposes. *Freeman*, 153 Wn.2d at 772 (see *State v. Calle*, 125 Wn.2d 769, 777-778, 888 P.2d 155 (1995); *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct.

180, 76 L. Ed. 306 (1932)). *Blockburger* states that if each crime contains an element that the other does not, the court should presume that the two crimes are not the same offense and do not violate double jeopardy. *Blockburger*, 284 U.S. at 304. In other words:

Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

*Blockburger*, 284 U.S. at 304 [citations omitted].

Defendant in the present case was charged and convicted of attempted murder in the first degree, assault in the first degree, and vehicular assault. CP 203-207.

To prove a defendant guilty of attempted murder in the first degree, the State had to convince a jury of the following elements beyond a reasonable doubt:

- (1) That on or about the 11<sup>th</sup> day of October, 2005, the defendant did an act which was a substantial step toward the commission of murder in the first degree;
- (2) That the act was done with the intent to commit murder in the first degree against Jacqueline Bones; and
- (3) That the acts occurred in the State of Washington.

CP 155-199, Instruction No. 12.

To prove a defendant guilty of assault in the first degree, the State had to convince a jury of the following elements beyond a reasonable doubt:

- (1) That on or about the 11<sup>th</sup> day of October, 2005, the defendant assaulted Jacqueline Bones;
- (2) That the assault was committed with a deadly weapon or by a force or means likely to produce great bodily harm or death;
- (3) That the defendant acted with intent to inflict great bodily harm; and
- (4) That the acts occurred in the State of Washington.

CP 155-199, Instruction No. 21.

To prove a defendant guilty of vehicular assault, the State had to convince a jury of the following elements beyond a reasonable doubt:

- (1) That on or about the 11<sup>th</sup> day of October, 2005, the defendant operated or drove a vehicle;
- (2) That the defendant's vehicle operation or driving proximately caused substantial bodily harm to another person;
- (3) That at the time the defendant
  - (a) operated or drove the vehicle in a reckless manner, or
  - (b) was under the influence of intoxicating liquor; and
- (4) That the acts occurred in the State of Washington.

CP 155-199, Instruction No. 27.

- a. Defendant's convictions of first degree attempted murder with first degree assault and vehicular assault do not violate double jeopardy.

Defendant incorrectly compares *State v. Valentine*, 108 Wn. App. 24, 29 P.3d 42 (2001), to the present case. In *Valentine*, the defendant stabbed his girlfriend with a knife and the state charged him with second degree attempted murder and first degree assault. *Valentine*, 108 Wn. App. at 26. The court held that it was a double jeopardy violation to punish a stabbing separately as an assault when it is also the substantial step used to prove attempted murder. *Valentine*, 108 Wn. App. at 26.

The court concluded this because the two convictions stemmed from the same act of the defendant stabbing his girlfriend once. *Valentine*, 108 Wn. App. at 26. The court specifically stated “we find it unlikely that the Legislature intended to punish *the same* assaultive act both as assault and attempted murder.” *Valentine*, 108 Wn. App. at 28 (emphasis added). It further described that “when the harm is the same for both offenses, as in this case, it is inconceivable the Legislature intended the conduct to be a violation of both offenses.” *Valentine*, 108 Wn. App. at 28 (quoting *State v. Read*, 100 Wn. App. 776, 792, 998 P.2d 897 (2000)).

Defendant incorrectly contends that based on *Valentine*, his first degree attempted murder and first degree assault and/or vehicular assault convictions violate double jeopardy. It does not. *Valentine* is unlike the present case. In the present case, defendant was charged with separate crimes for separate acts. He was convicted of attempted murder for the act of trying to strike Ms. Bones with a hammer while saying “I’m going to kill you, bitch.” This is a separate and distinct action from everything else that occurred during the incident. The prosecutor makes this clear in his discussion of facts relating to the attempted murder charge when he quotes the defendant and says “‘I’m going to kill you, bitch,’ and hitting her – trying to hit her with the hammer is evidence of [defendant’s attempt to kill Ms. Bones].” 12RP 996-97. 7RP 359-60. He also explained that the first degree assault and vehicular assault charges related to the actions “after defendant got behind the wheel of the vehicle and repeatedly ran Jacqueline over.” 12RP 992.

As a result, the comparison to *Valentine* is incorrect because the act of swinging the hammer and threatening Ms. Bones was a separate act that gave rise to the first degree attempted murder charge and conviction. The acts that occurred when defendant drove his car at Ms. Bones gave rise to the first degree assault and vehicular assault charges and convictions. These are separate and distinct acts with different results.

They are separate criminal acts. Thus, the present case does not violate double jeopardy with respect to the conviction of attempted murder and the convictions of assault and vehicular assault.

- b. Defendant's convictions of first degree assault and vehicular assault do not violate double jeopardy.

By applying the *Blockburger* test to the elements of first degree assault and vehicular assault, it is clear that each contains an element that the other does not and do not violate double jeopardy. Intent to inflict great bodily harm must be shown as a separate element in the crime of first degree assault. *State v. Peter*, 63 Wn.2d 495, 387 P.2d 937 (1997). But in vehicular assault, there is no requirement that any intent be present, but that the person acts recklessly or under intoxication and that defendant causes substantial bodily harm to another person. This difference in mental state was even described in the present case by the defense attorney in closing arguments when she said, "for the vehicular assault, there's substantial body harm, but don't confuse it with the other charges that requires substantial body harm with no mental state. [The State has] to prove everything." 12RP 1041. Thus, first degree assault contains the element of intent that vehicular assault does not.

A person commits vehicular assault if they operate a vehicle in a reckless manner that causes substantial bodily harm to another, or, while

under the influence of intoxicating liquor. RCW 46.61.522(a)(b).

Essentially, vehicular assault requires someone operate a vehicle recklessly or while intoxicated. First degree assault requires neither of those. Thus, vehicular assault contains an element first degree assault does not.

The two crimes also contain elements of different degrees of harm. First degree assault requires great bodily harm while vehicular assault requires only substantial bodily harm. RCW 9A.36.011(1)(a); RCW 46.61.522(a)(b). Because each crime contains an element that the other does not, defendant's convictions of first degree assault and vehicular assault do not violate double jeopardy and are each valid. *Blockburger*, 284 U.S. at 304.

Furthermore, the evidence presented to the jury supported findings of two separate and distinct acts in the incident thereby allowing two separate convictions. The vehicular assault conviction relates to the initial contact where defendant drove the car on the sidewalk hitting Ms. Bones. 7RP 364. She was thrown a few feet from the car and landed on her hip. 7RP 364. Defendant stipulated that he was intoxicated at the time. CP 154. The first degree assault conviction relates to the event when defendant accelerated toward Ms. Bones as she crossed the street, hit her and Ms. Bones was stuck underneath the front tire of the car. 7RP 367-68. That time, a stranger had to help her get out from beneath the car. 7RP

367-68. Ms. Bones suffered a scraped jaw and multiple rib fractures as a result of defendant's actions. 7RP 367-68; 9RP 552.

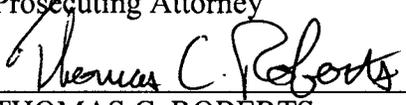
This evidence supports the jury verdicts that these two convictions related to these two separate and distinct acts. Therefore, unlike in *Valentine* where defendant stabbed the victim once; here two convictions arose from different actions and therefore do not violate double jeopardy. *Valentine, supra.*

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions and sentence.

DATED: JULY 23, 2009

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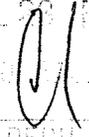
Certificate of Service:

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

7/24/09   
Date Signature

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