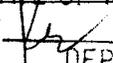


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DIVISION II

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STATE OF WASHINGTON

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

STATE OF WASHINGTON, RESPONDENT

v.

DARRIS STOKES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Felnagle (trial), Katherine M. Stolz, Ronald Culpepper and
Bryan Chuschcoff (motions and continuances), Judges

No. 07-1-01120-1

BRIEF OF RESPONDENT

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

1. Whether the State presented sufficient evidence that defendant committed two attempted assaults in the second degree when he burst into a living room of an apartment, where the two child-victims were sitting, brandishing a gun and yelling. (Appellant's Assignments of Error 1 and 3).
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B. STATEMENT OF THE CASE.

1. Procedure

The State charged Darris Stokes, hereafter “defendant,” and co-defendant Charles Tynes with robbery in the first degree (Count I), and two assaults in the second degree (Counts II and III), in Pierce County Superior Court Case No. 07-1-01120-1. RP (8/20/2008) 3; CP 1-2.

After multiple continuances, a pre-trial hearing was held on August 20, 2008, before the Honorable Bryan Chushcoff. RP (7/17/2007); RP (8/27/2007); RP (11/8/2007); RP (12/6/2007); RP (3/12/2008); RP (4/8/2008); RP (4/25/2008); RP (7/25/2008); RP (8/14/2008); RP (8/20/2008). At the hearing, the court denied defense’s motion for severance of defendants, but ruled that defendants’ expert on memory, perception, and attention would be allowed to testify at trial. RP (8/20/2008) 91, 97.

The case proceeded to a jury trial before the Honorable Thomas Felnagle. RP (10/29/2008) 1. The court denied the renewed motion for severance. RP (10/29/2008) 23. The court granted defense’s motion in limine to exclude evidence that defendant had given the police a false name when investigated for shoplifting on an outstanding warrant. RP (10/29/2008) 56, 60. The court also granted defense’s motion to admonish witnesses not to use a term “victim” as related to Ms. Martinez, or refer to defendant and co-defendant as gang members. RP (10/29/2008) 43, 67.

After the close of the State's case, defendant and co-defendant moved to dismiss the second-degree assault charges for the lack of the evidence. RP (11/5/2008) 326-327; RP (11/6/2008) 3. The court granted the motion. RP (11/6/2008) 29. The State then moved to instruct the jury on attempted assaults in the second degree. RP (11/10/2008) 360; 440-448, 454-458. The court granted the State's motion. RP (11/10/2008) 460-463. On the motion of defense, the court also instructed the jury on assault in the fourth degree as a lesser included of attempted assault in the second degree. RP (11/10/2008) 463-465; CP 168-204.

The jury found defendant guilty of the crime of robbery in the first degree and of the two attempted assaults in the second degree. RP (11/13/2008) 556-557; CP 205, 206, 207, 208, 209. The jury found the co-defendant not guilty of the charges. RP (11/13/2008) 556-557.

Defendant was determined to have an offender score of six. RP (11/14/2008) 3; CP 225-227. The State recommended the high end of the standard range on all counts. RP (11/14/2008) 4. The court followed the State's recommendation and sentenced defendant to 102 months for the robbery in the first degree, and 32.25 months for each attempted assault in the second degree, to be served concurrently. RP (11/14/2008) 4; CP 228-240.

Defendant filed a timely notice of appeal. CP 245.

2. Facts

In April 2006, Ms. Misty Martinez lived at 513 110th Street Court East, Apartment M101, Tacoma, with her two children, Tavian and Nyrel. RP (11/4/2008) 30, 31. Saturday, April 15, was Tavian's eighth birthday (Nyrel was five at the time). RP (11/4/2008) 32, 85-86. Ms. Martinez was getting ready for Tavian's birthday party when someone knocked on her door. RP (11/4/2008) 32-33, 34. Although Ms. Martinez looked through the peephole and did not recognize the man at the door, she opened it anyways thinking he was a solicitor. RP (11/4/2008) 34, 35.

Ms. Martinez saw a young black male of medium complexion with short hair and a lot of acne on his face. RP (11/4/2008) 35. He said something like, "Excuse me, ma'am," and then two other men suddenly pushed their way in through Ms. Martinez's door. RP (11/4/2008) 36, 67.

The second man was a lot taller than the other two and appeared to be the youngest out of the three. RP (11/4/2008) 40-41. His complexion was dark and his hair was short. RP (11/4/2008) 41. The third man, also a black male, had a "caramel complexion" and braided hair. RP (11/4/2008) 41. All three were teenagers or in their early twenties. RP (11/4/2008) 68. Ms. Martinez has never seen any of the three men before. RP (11/4/2008) 41.

After the three men pushed their way into the apartment, they yelled at Ms. Martinez to get on the floor. RP (11/4/2008) 42. Ms. Martinez was forced to kneel, and the man with the braids held the gun to her head. RP (11/4/2008) 43. Ms. Martinez subsequently described the gun as a black or dark gray revolver with a long barrel. RP (11/4/2008) 43-44, 70. In court, Ms. Martinez identified defendant as the man with the braids who had held a gun to her head, and co-defendant as the man who had knocked on her door. RP (11/4/2008) 50-51.

Defendant started hitting Ms. Martinez in the area of her temple and eye with the gun, asking “where’s the money?”. RP (11/4/2008) 45, 46. Ms. Martinez, scared for her two boys, who were sitting on the couch in the living room at the time, yelled that her two young sons were there. RP (11/4/2008) 42. At some point, the tallest man grabbed a Halloween cape from a coat rack and threw it on the boys, ordering them to cover their faces. RP (11/4/2008) 43.

Defendant ordered Ms. Martinez not to look at him and pulled a darker blue bandana over his face. RP (11/4/2008) 46, 48-49, 49-50, 72, 136. Ms. Martinez also testified that the other two men had beanie hats on their heads that they rolled down on their faces like ski masks. RP (11/4/2008) 52, 136. Ms. Martinez also noticed that all three were wearing off-white surgical latex gloves. RP (11/4/2008) 47-48, 55.

Ms. Martinez's purse was on the love seat in the living room; so, she told the men the money was there. RP (11/4/2008) 53. However, defendant was not satisfied with the cash from the purse and kept asking Ms. Martinez where the money was. RP (11/4/2008) 53, 55.

According to Ms. Martinez, her two boys looked scared and in shock. RP (11/4/2008) 53-54, 78. They had removed the cape off their faces and were standing up, when one of the men ordered them to go into the bathroom. RP (11/4/2008) 54.

After the boys were in the bathroom, defendant told the other two men to check Ms. Martinez's bedroom. RP (11/4/2008) 56. They rummaged through the bedroom, and finally all three left, taking Ms. Martinez's camcorder, cell phone, and cigarettes, in addition to her money. RP (11/4/2008) 56.

After the men left, Ms. Martinez went to check on her boys and found them very upset. RP (11/4/2008) 58, 61. She then ran out of her front door to see if she could see the men's car, but discovered that two of the men were running toward the parking lot and one of them ran behind the buildings. RP (11/4/2008) 59, 83. Ms. Martinez ran back in, found her house phone, and dialed 911. RP (11/4/2008) 59.

At trial, Ms. Martinez could not precisely remember when and how many times the police had contacted her to identify the suspects. RP (11/4/2008) 62-63, 81-82, 94. She admitted that her memory has been affected by the passage of time. RP (11/4/2008) 64. At trial, she believed

that the first time the police had shown her a montage of suspects was on the day of the incident. RP (11/4/2008) 97.

Deputy Michael Rawlins confirmed that he had shown Ms. Martinez a six-picture photo montage on the day of the robbery with defendant's picture being one of the six. RP (11/5/2008) 220, 225-226, 284. Ms. Martinez picked out defendant as the man with the gun, and indicated that she was very confident, about 90 to 95 percent. RP (11/4/2008) 99-100, 102, 108, 129; RP (11/5/2008) 231-232, 233, 265-266, 284-285.

Several days later, the police showed Ms. Martinez two other montages. RP (11/4/2008) 104. She identified the co-defendant. RP (11/4/2008) 105; RP (11/5/2008) 238. When looking at the first montage, Ms. Martinez became very upset and started crying; she also became unsure whether defendant or co-defendant had had the gun. RP (11/5/2008) 240-241, 269, 271, 273-274, 288.

Tavian Burns, Ms. Martinez's oldest son, testified about the robbery at trial. RP (11/4/2008) 143-156. His testimony was consistent with his Ms. Martinez's testimony, except he described defendant's bandana as black. RP (11/4/2008) 150.

Deputy Patrick Davidson testified that on February 21, 2007, he had responded to an unrelated matter in a Tacoma apartment. RP (11/5/2008) 298-299. Defendant and co-defendant were among the ten young adults the police contacted inside the apartment. RP

(11/5/2008)300. Both of them had black bandanas around their waists. RP (11/5/2008) 319. Also present were co-defendant's sister and girlfriend, who subsequently gave him an alibi at trial. RP (11/10/2008) 433.

Ms. Joyce Humphries, co-defendant's sister, testified at trial that co-defendant had never had a bad complexion or braided hair. RP (11/5/2008) 330-331. She also testified that co-defendant had been shopping for groceries with her and his girlfriend when the robbery in question occurred. RP (11/5/2008) 335. Co-defendant's girlfriend, Ms. Oralee Holman, corroborated Ms. Humphries' testimony. RP (11/5/2008) 342-345. Ms. Holman admitted that she also knew defendant, was his friend, and that defendant and co-defendant had been friends. RP (11/5/2008) 347. Co-defendant testified at trial consistently with his girlfriend and sister. RP (11/10/2008) 423-437.

Dr. Geoffrey Loftus testified at trial for defense about the works of memory and perception. RP (11/10/2008) 462-422. Defendant did not testify at trial. RP (11/10/2008) 437.

C. ARGUMENT.

1. THE STATE PRESENTED SUFFICIENT EVIDENCE THAT DEFENDANT COMMITTED TWO ATTEMPTED SECOND-DEGREE ASSAULTS

The evidence is sufficient when, viewed in the light most favorable to the prosecution, it allows a rational trier of fact to find, beyond a

reasonable doubt, the essential elements of the crime. *See State v. Gentry*, 125 Wn.2d 570, 596-597, 888 P.2d 1105 (1995). However, when this Court reviews the sufficiency of the evidence, it “does not need to be convinced of the defendant’s guilt beyond a reasonable doubt, but must only determine whether substantial evidence supports the State’s case.” *State v. Potts*, 93 Wn. App. 82, 86, 969 P.2d 494 (1998). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff’d*, 95 Wn.2d 385, 622 P.2d 1240 (1980). Circumstantial evidence is as reliable as direct evidence. *See State v. Turner*, 103 Wn. App. 515, 520, 13 P.3d 234 (2000).

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) (citation omitted). The Supreme Court of Washington said that “great 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).

To prove the two counts of the attempted assault in the second degree, the State, on both counts, had to show that (1) on April 15, 2006, defendant did an act which was a substantial step toward the commission of the assault in the second degree against the victim; (2) the act was done with intent to commit assault in the second degree; and (3) the acts

occurred in the State of Washington. *See* CP 168-204 (Instructions No. 19 and 20). “A substantial step is conduct, which strongly indicates a criminal purpose and which is more than mere preparation.” CP 168-204 (Instructions No. 18). Criminal intent “may be inferred from all the facts and circumstances.” *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). “Any slight act done in furtherance of a crime constitutes an attempt if it clearly shows the design of the individual to commit the crime.” *State v. Price*, 103 Wn. App. 845, 852, 14 P.3d 841 (2000).

Assault is defined as “an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.” CP 168-204 (Instructions No. 17). A person commits the crime of assault in the second degree when he assaults another with a deadly weapon. CP 168-204 (Instructions No. 16).

Defendant did an act that amounted to a substantial step toward the commission of the assault in the second degree. Defendant burst into Ms. Martinez’s apartment wielding a gun. Although the record is ambiguous as to whether defendant ever pointed his gun directly at the boys, it is clear that defendant pointed the gun at Ms. Martinez and hit her with it while

Tavian and Nyrel were just feet away, on the living room couch.¹ By bursting into the living room of Ms. Martinez’s apartment, and by wielding a gun within feet from Tavian and Nyrel, defendant’s conduct clearly intended to use fear to control the actions of the boys, and carried criminal purpose to create an apprehension and imminent fear of bodily injury.

Because defendant was charged with *attempted* assaults, the State did not have to prove that defendant actually put the boys in the apprehension of fear. *See State v. Luther*, 157 Wn.2d 63, 73, 134 P.3d 205 (2006) (“an attempt conviction does not depend on the ultimate harm that results or on whether the crime was actually completed”). However, the State showed that the boys suffered reasonable apprehension of fear and injury.

Generally, “[apprehension] may be inferred to exist when a gun is pointed at someone who does not know the gun is unloaded”. *State v. Johnson*, 29 Wn. App. 807, 816-817, 631 P.2d 413 (1981). Here, although the boys did not specifically testify that they were afraid for their life or limb, such fear can be reasonably inferred from the circumstances.

¹ Washington courts have held that when, within shooting distance, defendant menacingly points at another with a gun, he commits an assault in the second degree. *See, e.g., State v. Johnson*, 29 Wn. App. 807, 816, 631 P.2d 413 (1981); *State v. Murphy*, 7 Wn. App. 505, 511, 500 P.2d 1276 (1972). Therefore, had the State presented evidence that defendant pointed the gun at the boys, defendant could be convicted of two “completed” assaults in the second degree.

At the time of the robbery, when three strangers burst into their apartment wielding a gun, Tavian and Nyrel were eight and five years old respectively. RP (11/4/2008) 32, 85-86. Ms. Martinez testified that during the robbery, her sons appeared scared and in shock. RP (11/4/2008) 53-54, 78. According to Officer Smith, after the robbery, Tavian told him he had been scared and almost started to cry. RP (11/4/2008) 163-164. At trial, Tavian testified that he and his brother walked to the bathroom because they “wanted to cry in there.” RP (11/4/2008) 151. Ms. Martinez testified that the boys were still very upset when she went to get them from the bathroom after defendant and his accomplices had left. RP (11/4/2008) 58, 61. Nyrel was crying. RP (11/4/2008) 78.

Defendant intended to commit assaults in the second degree. In *State v. Murphy*, defendant grabbed a gun and held it in his hand while trying to eject two air pollution control officers from his property. 7 Wn. App. 505, 506-507, 500 P.2d 1276 (1972). In rejecting defendant’s argument that his use of force was justifiable, the *Murphy* court reasoned that “Mr. Murphy’s action in arming himself with a revolver was well calculated to excite apprehension of great bodily harm in the minds of the [officers]... There is recklessness...in the threatened use of deadly force ... The law forbids such a menacing of human life for so trivial a cause.” *Murphy*, 7 Wn. App. 505, 515.

From the fact that defendant burst into an apartment while armed with a gun, the jury could have reasonably inferred that defendant intended

to create apprehension and fear of injury in the occupants of the apartment, including the two children. Based on the evidence introduced at trial, the prosecutor made that argument to the jury. RP (11/12/2008) 484-485, 539-540. Contrary to defendant's assertion, the prosecutor did not call for a "mandatory presumption", but rather argued a permissible inference from the evidence introduced at trial. *See* Appellant's Opening Brief, p. 1-2. Similarly, the trial court never instructed the jury that it was required to presume specific intent to assault if the State proved that defendant burst into a dwelling while armed with a deadly weapon. *See* CP 168-204.

Finally, the State is not arguing that every time a defendant is holding a gun in his hand, without pointing it at the people around him, he commits an attempted assault in the second degree on anyone in close proximity. Rather, the State is arguing that the totality of the circumstances in this case - where defendant burst inside a small apartment brandishing a gun, and proceeded to hold the gun to Ms. Martinez's head and strike her with it on her face, while her two sons were huddled on the sofa just a few feet away, scared and in shock - shows that defendant took a substantial step to put the children in the reasonable apprehension of fear.

The evidence, viewed in the light most favorable to the prosecution, is sufficient to sustain the convictions for two attempted assaults in the second degree.

2. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE ATTEMPTED ASSAULTS IN THE SECOND DEGREE

Generally, the State must give defendant notice of the charge he will face at trial, and defendant cannot be convicted of an uncharged or inadequately charged offense. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). A jury may, however, find defendant guilty of a lesser degree offense or an attempt to commit the offense when the State charges the accused with a higher degree of a multiple degree offense. RCW 10.61.003, RCW 10.61.006, RCW 10.61.010. In such instances, the State does not have to notify the defendant that he may be convicted of the lesser included offense. *State v. Pelkey*, 109 Wn.2d 484, 487-88, 745 P.2d 854 (1987).

Defendant does not argue that the jury instructions on the attempted assaults in the second degree were legally insufficient, or that defendant was not adequately charged to be prosecuted for attempted assaults. *See* Appellant's Opening Brief, p. 1. Rather, defendant again challenges sufficiency of the evidence by arguing that the trial court erred in instructing the jury on the attempted assaults in the second degree "in the absence of sufficient evidence to support those counts." Appellant's Opening Brief, p. 1.

Defendant's argument fails. The trial court properly instructed the jury on attempted assaults in the second degree because the instructions were warranted by the evidence. *See* section one of this brief, *supra*.

3. THE SENTENCING COURT PROPERLY ENTERED A JUDGMENT AND SENTENCE ON ALL THREE CONVICTIONS, INCLUDING DEFENDANT'S ATTEMPTED SECOND-DEGREE ASSAULTS

This court reviews the issue of whether defendant's separate convictions of, and sentences for two attempted assaults in the second degree and robbery in the first degree violate double jeopardy *de novo*. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005); *State ex re. Eikenberry v. Frodert*, 84 Wn. App. 20, 25, 924 P.2d 933 (1996). The review "is limited to assuring that the court did not exceed its legislative authority by imposing multiple punishments for the same offense." *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995).

The State may bring multiple charges arising from the same criminal conduct in a single proceeding. *Ball v. U.S.*, 470 U.S. 856, 860, 105 S. Ct. 1668, 1671, 84 L. Ed. 2d 740 (1985); *Freeman*, 153 Wn.2d 765, 770 (citing *State v. Michielli*, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997)). Although, the Fifth Amendment of the United States Constitution and Article I, section 9 of the Washington State Constitution prohibit multiple punishments for the same offense, an unlawful act may be

punished twice if such was the legislative intent. U.S.C.A. Const. Amend. 5; RCW Const. Art. 1, §9; *State v. Roybal*, 82 Wn.2d 577, 512 P.2d 718 (1973); *see also Freeman*, 153 Wn.2d at 768 (whether double jeopardy clause has been violated turns on whether the legislature intended to punish the conduct that violates multiple statutes as separate crimes or as a single “higher” felony); *Calle*, 125 Wn.2d 769, 776 (“the question whether punishments imposed by a court, following conviction upon criminal charges, are unconstitutionally multiple cannot be resolved without determining what punishments the legislative branch has authorized”).

The Washington courts employ three means in determining implicit legislative intent: “same evidence” rule, the *Blockburger* test, and, under certain circumstances, the merger doctrine. *See State v. Frohs*, 83 Wn. App. 803, 809, 811, 924 P.2d 384 (1996). Under the Washington “same evidence” rule, double jeopardy attaches only if the offenses are identical in both law and fact, which is demonstrated when “the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other.” In *re Pers. Restraint of Fletcher*, 113 Wn.2d 42, 46, 776 P.2d 114 (1989); *State v. Reiff*, 14 Wash. 664, 667, 45 P. 318 (1896) (*quoting Morey v. Commonwealth*, 108 Mass. 433, 434 (1871)). Under the “same evidence” rule, if each offense, as charged, includes elements not included in the other offense, the offenses are different and multiple convictions can stand. *Calle*, 125 Wn.2d 769, 777; *Fletcher*, 113 Wn.2d 42, 49.

Under the *Blockburger* test, where the same act violates 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 fact which the other does not.” *Blockburger v. U.S.*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1931). The Washington Supreme Court has held that the “same evidence” rule and *Blockburger* test (also referred to as the “same elements” test) are “very similar”. *Calle*, 125 Wn.2d at 777; *see also State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008); *Freeman*, 153 Wn.2d at 772, 776-777 (treating the “same evidence” rule and *Blockburger* test as one and the same).

Even when the criminal statutes in question pass the *Blockburger* and/or same evidence tests, the merger doctrine may apply and merge the two offenses into one - but only if an offense was elevated to a higher degree by conduct that constitutes a separate crime. *Freeman*, 153 Wn.2d at 772-773; *Frohs*, 83 Wn. App. at 806, 809, 810, 811. Generally, when the degree of one offense is raised by conduct that is a separate crime, the courts “presume that the legislature intended to punish both offenses through a greater sentence for the greater crime”; but the presumption is rebutted when the “included” crime involves a “separate and distinct injury” or “independent purpose or effect”. *Kier*, 164 Wn.2d 798, 804; *Freeman*, 153 Wn.2d at 772-773; *Frohs*, 83 Wn. App. at 806, 807.

The Washington courts use a case-by-case approach to determine whether first-degree robbery and second-degree assault are the same for double jeopardy purposes. *Freeman*, 153 Wn.2d at 774, 779-780. Although typically conviction for assault in the second degree merges into conviction for robbery in the first degree, they are treated as separate crimes of conviction “when there is a separate injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element.” *Id.* at 778, 780. For example, the *Freeman* court held that the convictions will be treated as separate offenses when defendant strikes his victim after completing the robbery. *Id.* at 779.

“The test is whether the unnecessary force had a purpose or effect independent of the crime.” *Freeman*, 153 Wn.2d at 779. In other words, double jeopardy would not preclude two convictions if, for example, separate acts of force in committing first degree robbery and second degree assault are established, or the force inflicted separate injuries or was directed at different victims.

Here, regardless of whether the Court applies the *Blockburger* test, the “same evidence” rule, or the merger doctrine, the result is the same – the double jeopardy provision is not triggered, because the Legislature intended multiple punishments for an offender who, in committing the same act, inflicts separate injuries and directs his threatened use of force against different victims for different purposes.

Defendant's attempted assaults in the second degree were different in law and fact from robbery in the first degree. The *Zumwalt* court has already held that assault in the second degree is different in law from robbery in the first degree. *State v. Zumwalt*, 119 Wn. App. 126, 132, 82 P.3d 672 (2003); *see also State v. Cole*, 117 Wn. App. 870, 875, 73 P.3d 411 (2003) (attempted robbery in the first degree and assault in the second degree "involve different legal elements, including different elements of intent"). Robbery and attempted assault also have different intents: intent to steal and intent to commit assault respectively. *See* RCW 9A.28.020; *State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991).

Additionally, the attempted assaults were different in fact from the robbery because the offenses had different victims. *See State v. Womac*, 160 Wn.2d 643, 650, 653, 160 P.3d 40 (2007) (emphasizing that the offenses were the same in fact because they were based on the same act directed toward the same victim). Ms. Martinez was the owner of the property in the apartment and, therefore, the victim of the robbery in the first degree. Her two sons could not be the victims of the robbery because neither the money nor the personal property in the apartment belonged to

them. See *State v. Tvedt*, 153 Wn.2d 705, 714, 107 P.3d 728 (2005) (“for a robbery to occur, the person from whom or from whose presence the property is taken must have an ownership, representative, or possessory interest in the property”).²

Defendant used the gun on Ms. Martinez to effectuate the robbery: to have her tell him where she kept the money. Defendant took a substantial step in threatening the boys with the use of the gun to put them in the immediate apprehension of fear and exert compliance. The offenses resulted in different kinds of harm: Ms. Martinez was deprived of her property, and the two children were put in apprehension of fear.

Defendant also assaulted Ms. Martinez. However, double jeopardy provision prevented defendant from being convicted and sentenced for robbing *and* assaulting Ms. Martinez, because defendant’s conduct of beating Ms. Martinez with the gun while asking where her money was facilitated the robbery and was factually inseparable from it. Defendant’s assault on Ms. Martinez got properly subsumed in the robbery.

Finally, defendant’s reliance on *State v. Kier* is misplaced. *Kier*, 164 Wn.2d 798. Kier pointed a gun at Hudson, who had pulled over to talk to Kier and Alderman, thinking they were interested in buying his Cadillac. *Kier*, 164 Wn.2d at 802. Hudson ran away, and Kier then

² Similarly, because the attempted assaults were directed at different victims and had a different purpose and effect from the robbery, the merger doctrine does not merge attempted assaults with the robbery.

pointed the gun at Ellison, the passenger inside the Cadillac, told him to get out of the car, and took the Cadillac. *Id.* at 802-803. Kier was charged with first-degree robbery, and second-degree assault of Ellison, and found guilty on both counts. *Id.* at 803. The Supreme Court reversed Kier's conviction for second-degree assault, holding that it merged into his robbery conviction. *Id.* at 802.

First, the *Kier* court emphasized again that the issue of whether assault in the second degree merges with robbery in the first degree must be decided on a case-by-case basis. *Id.* at 802. Second, the court rejected the State's argument that the assault and the robbery had different victims based on the rule of lenity, where the court reasoned that it was unclear whether the jury considered Ellison the victim of robbery together with Hudson, held that the verdict was ambiguous, and resolved the issue in favor of defendant. *Kier*, 164 Wn.2d at 813, 814. Third, the court did not "rule out the possibility that, in the course of a robbery, a separate assault on a victim may occur"; it just found no evidence in support of it under the facts of that case. *Id.* at 814.

The facts in *Kier* are distinguishable from the facts of this case. Both Kier and Ellison had a possessory interest in the car because both occupied it.

The Supreme Court has stated that for a robbery to occur, the victim must have possessory or ownership interest in the property taken from his person or in his presence. *Tvedt*, 153 Wn.2d 705, 714. When holding that both Hudson and Ellison could be the victims of robbery, the *Kier* court relied on the unit of prosecution for robbery, which allows only one count of robbery where a single taking of property placed multiple victims in fear of harm – but the rule applies only where all victims have possessory interest in the property (e.g., tellers in a bank).

A broader reading of *Kier* would lead to an unprecedented expansion of robbery, where bystanders can suddenly become victims when someone else's property is taken in their presence. Surely, if five friends are walking on the street and a robber forcibly takes a purse from one of them, the Supreme Court does not mean all five of them to be the victims of that robbery. Here, the two boys could not be the victims of robbery, even if listed in the information, because they did not have ownership of their mother's property.

In sum, double jeopardy provision was properly applied in this case to defendant's assault on Ms. Martinez; but the provision was not triggered by defendant's attempted assaults on the two boys because the offenses had different victims, purposes, and injuries.

4. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

Ineffective assistance of counsel is a mixed question of law and fact and is reviewed by the appellate court *de novo*. *State v. Thach*, 126 Wn. App. 297, 106 P.3d 782 (2005).

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Cronin*, 466 U.S. 648, 656. “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

“The competence of counsel must be judged from the whole record and not from isolated segments of it.” *State v. Piche*, 71 Wn.2d 583, 591, 430 P.2d 522 (1967).

To show that the counsel’s assistance was so ineffective that a reversal is required, defendant must prove both prongs of the *Strickland* test: (1) that the counsel’s performance was deficient; and (2) that the

counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 686-687, 104 S. Ct. 2052; 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 337, 899 P.2d 1251 (1995).

When applying the *Strickland* test, the court must engage in a strong presumption that the counsel's assistance was reasonable and effective and scrutinize the counsel's performance with a high degree of deference. See *Strickland*, 466 U.S. 668, 699; *McFarland*, 127 Wn.2d 322, 335; *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

a. Defense counsel's performance was effective

To show that the counsel's performance was deficient, defendant must prove that his counsel made errors so serious that his representation "fell below an objective standard of reasonableness" so as to render it below the level of counsel representation guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687, 688; *State v. Davis*, 119 Wn.2d 657, 665, 835 P.2d 1039 (1992). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Washington courts have "refused to find ineffective assistance of counsel when the actions of counsel complained of go to the theory of the case or to trial tactics", and a defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *State v. Renfro*, 96 Wn.2d 902, 909, 639

P.2d 737 (1982); *see also* **McFarland**, 127 Wn.2d at 334-335, 336; **State v. Doogan**, 82 Wn. App. 185, 189, 917 P.2d 155 (1996). Moreover, criminal defense counsel need not pursue a defense which is not warranted by demonstrable facts, nor raise every conceivable point, however frivolous or inconsequential, that may seem important to the defendant. **Jones v. Barnes**, 463 U.S. 745, 754, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983); **Piche**, 71 Wn.2d 583.

For example, in **State v. Lottie**, defendant argued that he had been denied effective assistance of trial counsel because the counsel failed to argue, or ask for findings on, the defense of involuntary intoxication. **State v. Lottie**, 31 Wn. App. 651, 654, 644 P.2d 707 (1982). The court rejected defendant's argument, stating that the counsel's decision related to trial strategy and tactics and holding that "counsel acted reasonably in refusing to present a defense not warranted by demonstrable facts." **Lottie**, 31 Wn. App. 651, 654-655.

Defendant's claim of ineffective assistance based on counsel's failure to raise double jeopardy depends on viability of the double jeopardy claim. As shown above, double jeopardy was not triggered by defendant's separate convictions for robbery and two attempted assaults because the victims of defendant's assaults and robbery were different people. Because double jeopardy claim was not warranted under the facts of this case, defendant's counsel acted reasonably in not raising it.

More importantly, judging from the whole record of the case, defendant received an adequate, if not superior, representation. Defendant's trial counsel zealously represented him before trial, at trial, and during sentencing. For example, defense was granted its motion in limine to exclude evidence that defendant had given the police a false name when investigated for shoplifting on an outstanding warrant. RP (10/29/2008) 56, 60. Defense was allowed to have an expert testify at trial about memory, perception, and attention. RP (8/20/2008) 91, 97. Defense won the motion to admonish witnesses not to use a term "victim" as related to Ms. Martinez, or refer to defendant and co-defendant as gang members. RP (10/29/2008) 43, 67.

Defense counsel argued at length to exclude the evidence of various firearms found in defendant's possession during an unrelated incident and ultimately won that motion. RP (11/4/2008) 4-6, 9, 14, 138; RP (11/5/2008) 198-201, 205. He also made sure that the State witnesses were admonished not to mention that defendant had been a suspect in another crime, and that is why the police had a photo montage with his picture on hand. RP (11/5/2008) 209-210.

During trial, defense counsel thoroughly cross-examined the State witnesses. RP (11/4/2008) 84-110, 124-128, 177-181; RP (11/5/2008) 252-275, 294-297, 321-323. More importantly, at the close of the State's case, defense counsel moved to dismiss the assault charges for the lack of

the evidence, and the court granted the motion. RP (11/5/2008) 326-327; RP (11/6/2008) 3-9, 29. Counsel also argued against instructing the jury on attempted assaults in the second degree. RP (11/10/2008) 453-454, 458-459. Finally, on at least four occasions, defense counsel objected to the State's closing argument, thereby preserving the issue for appeal. RP (11/12/2008) 477, 482, 540, 548.

b. Defendant was not prejudiced

Even if defendant proves deficient representation, he must also prove that he was prejudiced by the counsel's error. *See Strickland*, 466 U.S. 666, 687. To prove that he was prejudiced, it is not enough for the defendant to show that the error had some effect on the outcome of the proceeding: defendant must show that his counsel's error was so serious that there is a reasonable probability that, absent the error, the result of the proceedings would have been different. *Id.* at 693, 694; *State v. Davis*, 119 Wn.2d 657, 665.

Here, defendant cannot show prejudice because, under the circumstances of this case, he would not have succeeded on a motion raising an issue of double jeopardy. Even if counsel raised the issue, the court would have denied the motion.

In sum, defendant did not meet his burden and prove that counsel was inefficient.

5. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING IMPROPER PROSECUTORIAL ARGUMENT

Generally, to establish prosecutorial misconduct, a defendant must show "that the prosecutor's conduct was both improper and prejudicial." *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). However, when defendant fails to object to alleged misconduct at trial, the issue of prosecutorial misconduct is waived unless the misconduct was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Weber*, 159 Wn.2d 252, 270, 149 P.3d 646 (2006).

The defendant bears the burden of showing that the prosecutor's remarks were improper. *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006). When deciding whether the prosecutor's remarks were improper or flagrant and ill-intentioned, the court should view the remarks in "context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).

Here, defense counsel objected to some, but not all, of the allegedly improper remarks. RP (11/12/2008) 476-495, 534-548. Therefore, on appeal, defendant must show that the prosecutor's remarks he had objected to were improper. Defendant waived the issue of prosecutorial misconduct

as related to all other allegedly improper remarks, unless he can show that the remarks were flagrant and ill-intentioned. Regardless of the test applied, however, defendant fails to show that any of the prosecutor's remarks were improper.

- a. The prosecutor did not shift the burden of proof.

In closing argument, a prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Rose*, 62 Wn.2d 309, 312, 382 P.2d 513 (1963). It is not misconduct for a prosecutor "to argue that the evidence does not support the defense theory," and "the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel." *Russell*, 25 Wn.2d 24, 87. "The mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense." *State v. Jackson*, 150 Wn. App. 877, 885-886, 209 P.3d 553 (2009). Even improper remarks by the prosecutor are not grounds for reversal "if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." *Russell*, 125 Wn.2d at 86.

More specifically, while a prosecutor commits misconduct by shifting the burden of proof when (s)he argues to the jury that, to acquit a defendant, it must find that the State's witnesses are either lying or

mistaken, it is not misconduct to argue that the jury should convict when it believes in the truth of the State witnesses' testimony. *See State v. Miles*, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007); *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996); *State v. Casteneda-Perez*, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991); *State v. Graham*, 59 Wn. App. 418, 426-429, 798 P.2d 314 (1990).

For example, the *Fleming* court held that the prosecutor's remarks incorrectly informed the jury that it had "to find that [the victim] was mistaken or lying in order to acquit," while in reality the jury "was required to acquit *unless it had an abiding conviction in the truth of [the victim's] testimony.*" 83 Wn. App. 209, 213 (emphasis added). In *State v. Warren*, the Supreme Court held that the prosecutor's argument that the reasonable doubt standard did not entitle defendant to "the benefit of the doubt" improperly undermined the presumption of innocence. 165 Wn.2d 17, 27, 195 P.3d 940 (2008). Neither of the aforementioned cases have anything in common with the case at bar.

The prosecutor in this case did not shift the burden of proof when he talked about what defendant calls "the theme of truth." *See* Appellant's Opening Brief, p. 34³. When talking about the jury as the finders of truth

³ On appeal, defendant assigns error to multiple remarks by the prosecutor during his closing argument and rebuttal. *See* Appellant's Brief, p. 33-37. To avoid unnecessary repetition, the State addresses most of the remarks as a whole because they stem from the same premise.

and the makers of justice, the prosecutor merely expounded on the jury's role in the criminal justice system and that trial in particular as the judges of credibility and the finders of fact.

That the criminal trial is a truth-seeking process, and that the jury is charged with the truth-seeking function has always been the hallmark of the American justice system. *See, e.g., Carella v. California*, 491 U.S. 263, 265, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989) (holding that jury instructions relieving prosecution of the burden to prove every element of the charge beyond a reasonable doubt “subvert the presumption of innocence accorded to accused persons and also invade *the truth-finding task assigned solely to juries* in criminal cases”) (emphasis added); *Duckworth v. Eagan*, 492 U.S. 195, 210, 109 S. Ct. 2875, 106 L. Ed. 2d 166 (1989) (O'Connor, S., concurring) (noting that *Miranda* remedies did not apply retroactively because “the *Miranda* rule was unrelated to the truth seeking function of the criminal trial...”); *State v. Sabbot*, 16 Wn. App. 929, 931, 561 P.2d 212 (1977) (“[t]he purpose of a trial is to find the truth, and the verdict of a jury represents the truth as the jury finds it from the evidence or lack of it”) (emphasis added).

Justice Marshall, perhaps more eloquently, expressed the point the prosecutor in this case was making during his closing argument:

Law is not a process by which a society actually arrives at objective truth, but rather a means for structuring the truth-seeking process so that the answers it yields will be accepted as morally legitimate by the community; it is this

acceptance that enables the verdicts of the jury system to be treated as “true.”

Ford v. Kentucky, 469 U.S. 984, 987-988, 105 S. Ct. 392, 83 L. Ed. 2d 325 (1984) (dissenting from the court’s denial of the petition for a writ of certiorari).

Asking the jury to return the verdict that represents the truth does not amount to shifting the burden of proof. Rather, it amounts to asking the jurors to return the verdict that they believe in beyond a reasonable doubt. See *State v. Harris*, 74 Wash. 60, 64, 132 P. 735 (1913) (holding that when the court instructed the jury that ‘your verdict must be the truth’, the court asked the jury to find that defendant was insane beyond a reasonable doubt). Even the court’s instructions to the jury in this case mandated that if, from carefully considering all of the evidence or lack of it, “you have an abiding *belief in the truth of the charges*, you are satisfied beyond a reasonable doubt.” CP 168-204 (Instruction 3) (emphasis added).

When the State’s closing argument is read in its totality, it is abundantly clear that the prosecutor properly argued that the jurors were the ultimate finders of fact and judges of credibility, and to convict defendant they had to have an abiding belief that the State proved each element of the crime beyond a reasonable doubt (e.g., “are you convinced beyond a reasonable doubt in the truth of these elements”). RP (11/12/2008) 482, 476-495, 533-548. The prosecutor asked the jury to

“focus on the evidence. Through the evidence or lack of evidence, do you find a reasonable doubt in considering whether the State has met its burden?” RP (11/12/2008) 534.

Defendant takes the State’s remarks out of context. The end of the State’s rebuttal confirms that prosecutor’s remarks that defendant finds objectionable were directed at explaining to the jury the standard of proof and at responding to defense counsel’s implied argument that the State was diluting its burden to salvage an extremely weak case. For example, the prosecutor stated:

You’ve got evidence to consider. And now you are going back there and focusing on this truth issue. The instruction on beyond a reasonable doubt says, in legal terms, I guess, what it means. And it says it’s an abiding belief in the truth of the charge. If you are convinced beyond a reasonable doubt, you have an abiding belief in the truth of the charge.

....

Justice requires, of course, that the right people be convicted, the people who committed the crime be convicted, not just anybody, and nobody is standing here in front of you asking you to convict these two individuals on anything less than the proper standard and evidence. ...

....

Do you always come back to that same conclusion in the truth of the charge? And if you don’t come back to that, then they are not guilty. If you do come back to it time and time again, considering all of the evidence, and you are confident that ten years from now, ten days from now, for the rest of your time, you’re going to come back to that same conclusion, then you are on the track, of course, and have completed the decision of proof beyond a reasonable doubt.

RP (11/12/2008) 547-548.

Contrary to defendant's assertion, the prosecutor never declared that *defendant* had to create doubt, or that the jury had to decide who was telling the truth or vindicate justice. Rather, the prosecutor argued that the evidence supported the guilty verdict, but emphasized that the jurors were to acquit if defendant's witnesses – *evidence* - made them doubt the strength of the State's evidence. *See* RP (11/12/2008) 495. Further, the prosecutor's use of the words "truth" and "justice" aimed at stressing to the jurors the importance of their roles in the justice system as the ultimate fact-finders and judges of credibility. *See* RP (11/12/2008) 477, 478, 479, 487, 495, 544, 547.

Defendant's argument on appeal that the prosecutor committed misconduct by "telling the jurors their job was to decide and declare the "truth" about what happened and to ensure that "justice" happened" flies into the face of our justice system - because that *is* the jury's job. *See* Appellant's Opening Brief, p. 37. A holding that this prosecutor committed misconduct would unfairly impede on an advocate's right to explain to a jury the terms of art in lay-man's terms. It would make the closing argument largely superfluous, if not a legal mine field, when the only words and expressions a prosecutor would be able to use are those found in the court's instructions to the jury, and when words like "justice" and "truth" make opposing counsel scream foul.

b. Defendant was not prejudiced by the prosecutor's remarks.

"Prejudice is established only if there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict." *State v. Evans*, 96 Wn.2d 1, 5, 633 P.2d 83 (1981). Prejudice to defendant, if any, can be cured when the jury is properly instructed as to the burden of proof because the jury is presumed to follow the instructions. See *Graham*, 59 Wn. App. at 427-428.

For example, in *State v. Warren*, the prosecutor committed misconduct by repeatedly misstating the burden of proof in her closing argument and suggesting that defendant did not enjoy the benefit of any reasonable doubt. 165 Wn.2d 17, 24, 27. Even though Warren's defense counsel objected at trial and thus had a lower burden of proof on appeal, the Supreme Court held that defendant failed to show that he was prejudiced. *Warren*, 165 Wn.2d at 28. The court held that defendant was not prejudiced, despite the prosecutor's flagrant remarks, because the judge gave a timely and appropriate curative instruction to the jury. *Id.* at 28.

Here, defendant was not prejudiced by the prosecutor's remarks because the victim described defendant to the police immediately after the incident and definitively identified him as the perpetrator from a photo montage only hours later. RP (11/4/2008) 99-100, 102, 108, 129; RP

(11/5/2008) 231-232, 233, 265-266, 284-285. The jury would have convicted defendant on the weight of that evidence, regardless of the State's closing argument.

Further, any prejudice was cured by the parties' and the court's constant emphasis on the State's burden of proof and defendant's presumption of innocence.

Throughout the entire trial, the jury was continuously reminded about the State's burden of proof. Thus, during the *voir dire*, the court instructed the potential jurors about the State's burden of proof, defendant's presumption of innocence, and the meaning of "reasonable doubt". RP (10/30/2008) 45. At the start of the trial, the court instructed the jury that the lawyers' remarks and arguments were not evidence. RP (11/4/2008) 25.

During the State's closing argument and rebuttal, the prosecutor continuously emphasized his burden of proof and specifically stated: "If you don't believe the State has met its burden, you do not convict." RP (11/12/2008) 477, 478, 482, 483, 534, 545, 546, 547, 548. Both defense counsel made the standard of proof the theme of their closing arguments and repeatedly brought up the State's burden and defendants' presumption of innocence. RP (11/12/2008) 497, 498, 499, 501, 502-503, 505, 507, 508, 517, 520, 523, 532, 533. For example, defense counsel for co-

defendant emphasized the importance of “reasonable doubt” by pointing out to the jury that the standard appeared in the court’s instructions 38 times. RP (11/12/2008) 501.

More importantly, after defense counsel made his first objection, the court overruled the objection, but, in the abundance of caution, gave a curative instruction:

...ladies and gentlemen of the jury, remember the instructions are as I have set them out in the written form that you’ve received, and you are reminded that the arguments of counsel are not evidence and are not the laws. The evidence is as you decide it. The law is as I have given it to you. You can disregard anything that’s contrary to either of those things.

RP (11/12/2008) 477-478. The court repeated a similar instruction during the State’s rebuttal. RP (11/12/2008) 540.

Lastly, in the jury instruction packet, the court included the standard instructions on the burden of proof and the presumption of innocence. CP 168-204 (Instructions 1 and 3). This Court should presume that the jury properly followed the instructions. *Warren*, 165 Wn.2d 17, 28; *Graham*, 59 Wn. App. at 427-428.

D. CONCLUSION.

Defendant has failed to show that his counsel's performance was deficient or that the prosecutor made an improper argument. The State presented sufficient evidence that defendant committed two attempted assaults in the second degree, and the court properly instructed the jury on attempted assaults and properly entered judgment on three convictions. For the foregoing reasons, the State respectfully requests that this Court affirm defendant's convictions and sentence.

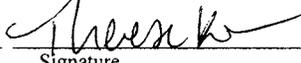
DATED: December 9, 2009.

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Rule 9 Intern

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.

12/09/09 
Date Signature

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