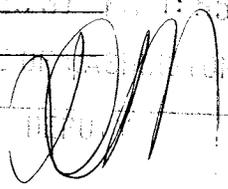


NO. 38662-3

COURT OF APPEALS
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STATE OF WASHINGTON
BY: 

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

STATE OF WASHINGTON, RESPONDENT

v.

DAVID ARLIN TAYES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Felnagle

No. 96-1-02166-2

BRIEF OF RESPONDENT

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

1. Whether, in classifying defendant as a “persistent offender”, the court properly counted defendant’s 1979 conviction for rape in the third degree as one of his strikes, when it is a prior most serious offense, and when it has not washed out.
2. Whether a double jeopardy violation occurred when the court entered judgment and sentence only on the greater offense of manslaughter in the first degree.

B. STATEMENT OF THE CASE.

1. Procedure

In 1979, David Arlin Tayes, hereafter “defendant”, pleaded guilty to a reduced charge of rape in the third degree. CP 67-146 (Charge: Rape in the Second Degree). In 1986, defendant was charged with and convicted of assault in the second degree and unlawful imprisonment. CP 67-146 (Judgment and Sentence 12/30/1986).

On May 31, 1996, the State charged defendant with intentional murder in the second degree and, alternatively, with felony murder in the second degree, the predicate felony being assault. CP 1-2. The jury found defendant guilty of murder in the second degree, and the verdict form did not specify a particular alternative. The court counted defendant’s two

prior convictions as strikes, found him to be a persistent offender, and sentenced defendant to life in prison without parole. CP 3-13.

On July 20, 2007, defendant's conviction and sentence were vacated as a result of the Supreme Court's decisions in *In re Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), and *In re Hinton*, 152 Wn.2d 853, 100 P.3d 801 (2004), wherein the court held that a felony murder conviction was invalid when the underlying felony was an assault, and the holding applied retroactively. CP 14-15, 16-17.

On October 17, 2007, the State charged defendant by amended information with intentional murder in the second degree (Count I), and with assault in the first degree (Count II). CP 18-19. Defendant waived his right to a jury trial, and the case proceeded to a bench trial in front of Judge Felnagle. CP 23; RP (10/1/2008) 4-24.

The court found that there was no dispute that defendant killed his sister by beating her to death. RP (10/23/2008) 768. The court also found that, although defendant had a mental illness, he was not legally insane when he killed his sister. RP (10/23/2008) 778, 783. Reasoning that it was not clear whether defendant had intended to kill his sister or inflict great bodily harm, the court found defendant not guilty of murder in the second degree. RP (10/23/2008) 786-787. The court found defendant guilty of the lesser offense of manslaughter in the first degree (Count I), and of assault in the first degree (Count II). RP (10/23/2008) 787-788; CP 66; CP 147-156 (Conclusion of Law V).

Over defense's objection, the court counted defendant's two prior convictions as strikes, found defendant to be a persistent offender, and sentenced defendant to life in prison without parole. CP 20; CP 41-52; RP (12/5/2008) 808, 820; Sentencing Exhibits 1, 2, 3. The court only included the manslaughter conviction in the judgment and sentence. CP 41-52. The court entered findings of fact and conclusions of law on both counts. RP(6/5/2009) 3-13; CP 147-156; CP 157-166.

Defendant filed a timely notice of appeal. CP 53-63.

2. Facts

In May of 1996, Ms. Alice Sauls allowed defendant - her brother - to temporarily stay in her apartment. RP (10/13/2008) 151; RP (10/14/2008) 236. However, shortly thereafter, Ms. Sauls became concerned about defendant's worsening behavior and refusal to take his medication. RP (10/13/2008) 188. On the evening of May 29, 1996, Ms. Sauls returned home from work and asked defendant to move out. CP 147-156 (Finding of Fact XII). Defendant reacted by beating her to death. *Id.*; RP (10/13/2008) 185.

After killing his sister, defendant took her television and her car, pawned the television, and used the money to buy crack cocaine. CP 147-156 (Finding of Fact XII).

In the early morning of May 30, 1996, defendant called 9-1-1, reporting that he discovered his sister in the bathtub, beaten up and not breathing. CP 147-156 (Finding of Fact I). The police responded to Ms.

Sauls' apartment and found it to have been the scene of a violent struggle with blood spatter, blood stains, and damaged property everywhere. CP 147-156 (Finding of Fact III).

Ms. Sauls' body was in the bathtub. CP 147-156 (Finding of Fact VI). She was soaked from head to toe in a way that suggested someone had tried to rinse her off. RP (10/9/2008) 99-100. She suffered severe injuries to her face and head; she had lacerations on her scalp, a broken rib, a broken bone in her neck, bruises on her arms, and wounds on her hands. CP 147-156 (Finding of Fact VI). Ms. Sauls died of blunt force trauma. *Id.*

When the police contacted defendant, he appeared calm and asked the officer, who informed him of his sister's death, about how she had died. RP (10/13/2008) 209-210. Initially, defendant denied killing his sister and tried to explain away the injuries on his hands. CP 147-156 (Finding of Fact VIII); RP (10/13/2008) 219; RP (10/14/2008) 278-279, 291-292, 305. But eventually defendant admitted to his family and psychiatrists that he had killed his sister. CP 147-156 (Findings of Fact IX-XII).

Two mental health professionals testified at trial: Doctor Hart, opining that defendant did not meet the legal requirements for insanity, and Doctor Whitehill, stating the opposite. CP 147-156 (Finding of Fact Relating to the Insanity Defense V); RP(10/20/2008) 462-463; RP (10/21/2008) 606-607, 609. The court found Doctor Hart's opinion more

credible, and, while acknowledging that defendant was mentally ill, concluded that defendant had not proven legal insanity by a preponderance of the evidence. CP 147-156 (Finding of Fact Relating to the Insanity Defense V); CP 147-156 (Conclusion of Law III).

Defendant did not testify at trial.

C. ARGUMENT.

1. THE COURT PROPERLY COUNTED
DEFENDANT'S CONVICTION FOR RAPE IN THE
THIRD DEGREE AS ONE OF DEFENDANT'S
THREE STRIKES

A sentencing court's determination of defendant's criminal history and whether defendant is a "persistent offender" is a question of law and is reviewed de novo. See *State v. Birch*, 151 Wn. App. 504, 515, 213 P.3d 63 (2009).¹

On appeal, defendant does *not* argue that the State failed to prove the existence of his prior conviction for rape in the third degree; rather, he argues that the sentencing court improperly counted his 1979 conviction for rape in the third degree as a strike offense, because it was not a "sex offense" and has washed out. See Brief of Appellant, p. 1 and 9.

¹ An issue of erroneous or illegal sentence can be raised for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477-478, 973 P.2d 452 (1999). In any case, defendant preserved the issue of his criminal history by specifically objecting during sentencing to the court's use of his prior rape conviction in classifying him as a "persistent offender". See *State v. Bergstrom*, 162 Wn.2d 87, 92-95, 169 P.3d 816 (2007). RP (12/5/2008) 796-810.

- a. Defendant's conviction for rape in the third degree was a strike offense, and defendant was properly found to be a persistent offender

In 1993, the people of the State of Washington passed Initiative 593, the Persistent Offender Accountability Act, commonly known as the "Three Strikes, You're Out" Initiative. RCW 9.94A.555 (formerly RCW 9.94A.392). As a result, the Legislature codified the terms "most serious offense" and "persistent offender", defined "offender", and amended the Sentencing Reform Act to include a mandatory sentence of life without possibility of parole for every persistent offender. RCW 9.94A.570 (formerly RCW 9.94.120); RCW 9.94A.030.

In 1996, at the time defendant killed his sister, RCW 9.94A.030(27) defined a "persistent offender" as an offender who:

- (a) Has been convicted in this state of any felony considered a most serious offense; and
- (b) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender of at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.360...

The definition of "most serious offense" included assault in the second degree and rape in the third degree. RCW 9.94A.030(23)(b)(n). Here, defendant had prior convictions for assault in the second degree and rape in the third degree. CP 67-146 (Charge: Rape in the Second Degree;

Judgment and Sentence 12/30/1986). The sentencing court properly counted defendant's 1979 conviction of rape in the third degree as a "most serious offense" and classified defendant as a "persistent offender".

b. Defendant's prior conviction of rape in the third degree has not washed out

Under the former wash-out provision, effective before 1990, a defendant's Class C felony conviction would wash out if defendant was crime-free for five years from the latest date of his release. RCW 9.94A.360(2). Rape in the third degree was and still is a Class C felony. RCW 9.79.190; RCW 9A.44.060. If, before the 1990 amendment - prohibiting sex offenses from washing out - defendant went five years out of custody with no new offenses, his rape conviction would have washed out. See *In re Cadwallader*, 155 Wn.2d 867, 123 P.3d 456 (2005); *State v. Smith*, 144 Wn.2d 665, 30 P.3d 1245 (2001); *State v. Cruz*, 139 Wn.2d 186, 985 P.2d 384 (1999).

Defendant did not go crime-free for five years before the 1990 amendment took effect. Defendant was released from prison on October 18, 1982. CP 67-146 (Order of Parole and Conditions). His parole, however, was revoked on June 6, 1984. *Id.* (Parole Revocation Hearing: Findings and Conclusions; Order of Parole Revocation and Return to State Custody). On October 5, 1984, defendant was again released from incarceration. *Id.* (Release Funds). On June 24, 1986, defendant committed assault in the second degree and unlawful imprisonment, and

was subsequently convicted of those crimes. CP 67-146 (Judgment and Sentence). Although defendant was released from incarceration in 1988, CP 67-146 (Notification of Release), in 1990, the Legislature amended RCW 9.94A.360, mandating that “sex prior felony convictions” can never wash out and must always be included in the offender score. Laws 1990, ch.3, § 103; RCW 9.94A.360(2).

For defendant’s conviction of rape in the third degree to wash out, he had to be crime-free in the community for five years following his parole in 1982. Here, defendant was crime-free in the community for approximately two years before his parole was revoked. After his release, defendant again was crime-free in the community for only about two years before he was convicted of assault. After his release in 1988, defendant did not have sufficient time to be crime-free for five years before the 1990 amendment took effect.

In sum, prior to 1990, defendant did not go five years out of custody without committing another offense. After 1990, defendant’s conviction of rape in the third degree could never wash out. Thus, defendant’s rape conviction has not washed out.

On appeal, defendant is arguing that the 1990 amendment of RCW 9.94A.360(2) did not apply to him because his 1979 conviction of rape in the third degree did not fall under the definition of “sex offense”.

c. Defendant's prior conviction of rape in the third degree was a sex offense

In 1978, defendant raped sixteen-year-old Felecia Janetta Barnes. CP 67-146 (Memorandum to Sentencing Judge and Board of Prison Terms and Paroles). In 1979, the State charged defendant with rape in the second degree under RCW 9.79.180(1)(a). CP 67-146 (Information). Defendant pleaded guilty to a lesser included offense of rape in the third degree, RCW 9.79.190(1)(a). CP 67-146 (Charge: Rape in the Second Degree; Judgment and Sentence).

On July 1, 1979, a legislative bill went into effect that recodified RCW 9.79.140 to 9.79.220 as RCW 9A.44.010 to 9A.44.090, with rape in the third degree recodified as RCW 9A.44.060. *See* RCW 9A.44.900; RCW 9A.44.902; Laws of 1979, Ex. Sess., ch. 244, §§ 17-19.

In May of 1996, defendant killed his sister. At that time, "sex offense" was defined as:

- (a) *A felony that is a violation of chapter 9A.44 RCW or RCW 9A.64.020 or 9.68A.090 or a felony that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes;*
- (b) A felony with a finding of sexual motivation under RCW 9.94.127 or 13.40.135; or
- (c) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this subsection.

RCW 9.94A.030(33) (emphasis added).

This Court looks at the construction of a statute *de novo* as a question of law. *Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 515, 910 P.2d 462 (1996).²

Defendant argues that because in 1978 his rape in the third degree was codified as RCW 9.79.190, it does not fall under the 1996 definition of “sex offense”. Defendant’s argument, however, fails because RCW 9.79.190, rape in the third degree, had been recodified as RCW 9A.44.060 by the time the legislature wrote the definition of “sex offense”.

The legislative intent to include rape in the third degree within the category of “sex offenses” is clear. When in 1990 the Legislature forbade sex offenses from washing out, rape in the third degree was in chapter 9A.44, the chapter listed in the definition of “sex offenses”. In other words, the plain language of the statute dictated that “[a] felony that is a violation of chapter 9A.44 RCW” is a “sex offense.” By that time, chapter 9A.44 included rape in the third degree. Thus, rape in the third degree was a sex offense.

² The court first looks at the plain language of the statute and makes a “value judgment” on whether it is amenable to one or several reasonable interpretation. See *In re Sehome Park Care Ctr.*, 127 Wn.2d 774, 778, 903 P.2d 443 (1995); Philip A. Talmadge, A New Approach to Statutory Interpretation in Washington, 25 Seattle U. L. Rev. 179, 192 (2001). The inquiry ends if the court finds the statute unambiguous on its face because “where the meaning of the statute is clear from the language of the statute alone, there is no room for judicial interpretation.” *Kadoranian v. Bellingham Police Dep't*, 119 Wn.2d 178, 185, 829 P.2d 1061(1992). If the court finds that a statute is amenable to more than one reasonable interpretation, the statute is ambiguous, and the court can “resort to principles of statutory construction, legislative history, and relevant case law to assist in interpreting it.” *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001).

The inquiry should be to look at the plain language of the definition of “sex offense” and then see if chapter 9A.44 RCW contained the crime of rape in the third degree – and not whether defendant was convicted under that chapter. Section captions do not constitute any part of the law. *See, e.g.*, RCW 9A.44.903; *see also State v. Albright*, 144 Wn. App. 566, 572, 183 P.3d 1094 (2008) (a court may remedy a numbering error when it creates an absurd result and undermines the law's purpose) (internal citation omitted). The crime of rape in the third degree has always existed: from the time defendant was charged and forward. The elements of the crime have not changed - the crime merely changed its location in the code. RCW 9.79.190; RCW 9A.44.060.

In sum, in classifying defendant as a “persistent offender”, the court properly counted defendant’s 1979 conviction for rape in the third degree as one of his strikes, when rape in the third degree fell under the definition of a “prior most serious offense”, and when it has not washed out.

2. DOUBLE JEOPARDY WAS NOT TRIGGERED
WHEN THE COURT ENTERED JUDGMENT AND
SENTENCE ONLY ON MANSLAUGHTER IN THE
FIRST DEGREE

This court reviews *de novo* the issue of whether defendant’s conviction of and sentences for manslaughter in the first degree and entry of findings of fact and conclusions of law on assault in the first degree

violate double jeopardy. See *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). 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, 809-811. 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.

This court need not engage in any of the aforementioned tests because double jeopardy was not triggered as defendant was only “punished” for manslaughter in the first degree.

- a. Mere entry of findings of fact and conclusions of law on Count II, assault in the first degree, does not amount to punishment, and thus, does not trigger double jeopardy

State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007), was a seminal case, in which the Supreme Court of Washington addressed what constitutes “punishment” for double jeopardy purposes. The *Womac* court made clear that punishment is not merely imposition of a sentence, but a conviction declared “valid” by the court. See *Womac*, 160 Wn.2d 643,

657-659. That is so because even when defendant is not sentenced for the other crime, that crime's remaining "valid" conviction "jeopardizes" defendant with societal stigma, potential use for impeachment, and increased sentence. *Womac*, 160 Wn.2d at 657, 658.

The *Womac* court further elaborated that what makes such remaining conviction "valid" and triggers double jeopardy, requiring that the conviction be vacated, is entry of judgment on that conviction by the trial court. *See Id.* at 658. The court offered *State v. Ward* as an example where there was no double jeopardy violation. *Id.* at 659. The jury found Ward guilty of felony murder in the second degree and alternatively of manslaughter in the first degree, but the trial court entered judgment and sentence only on the greater conviction, murder in the second degree, and "did not mention the jury's finding of guilt on the manslaughter conviction in the judgment and sentence." *Id.* at 658-659 (*discussing State v. Ward*, 125 Wn. App. 138, 104 P.3d 61 (2005)). "[B]ecause there was no violation of double jeopardy... the trial court was not required to vacate Ward's manslaughter charge." *Id.* at 659.³

The Court of Appeals, Division Two, subsequently followed the *Womac* court's reasoning. *See, e.g., State v. Faagata*, 147 Wn. App. 236, 193 P.3d 1132 (2008) (*review granted by* 165 Wn.2d 1041, 204 P.3d 215

³ In addition, the *Womac* court looked at *State v. Trujillo*, 112 Wn. App. 390, 411, 49 P.3d 935 (2002), and commented that the *Trujillo* court had also held that because the verdict for the lesser crime was not reduced to judgment and never referred to in sentencing, appellant was not subjected to "any future jeopardy." *Id.* at 659-660.

(2009) and consolidated with *Turner*); *State v. Turner*, 144 Wn. App. 279, 283, 182 P.3d 478 (2008) (review granted by 165 Wn.2d 1002, 198 P.3d 512 (2008)).

In *State v. Turner*, the court refused to vacate Turner's conviction for assault in the second degree, holding that double jeopardy was not triggered when the trial court reduced to judgment only Turner's conviction for robbery in the first degree and sentenced Turner only for that conviction. 144 Wn. App. 279, 283. The *Turner* court emphasized that the trial court had not included any information about assault in the second degree in the judgment and sentence. 144 Wn. App. at 283.

Similarly, in *State v. Faagata*, the court found no violation of double jeopardy when the trial court had entered judgment and sentence only on the greater of Faagata's counts. 147 Wn. App. 236, 247-248. The *Faagata* court also emphasized that the punishment concerns raised by the *Womac* court were inapplicable to Faagata since his lesser and greater convictions would count as one offense for the offender score purposes because they encompassed the same conduct, and since it was unlikely that Faagata - convicted of murder in the first degree - would be more exposed to societal stigma by virtue of his conviction of murder in the second degree. 147 Wn. App. at 248.⁴

⁴ The *Faagata* court also mentioned that "the difference between charging a defendant in the alternative and charging a defendant for separate offenses is insignificant for purposes of double jeopardy." *Id.* at 248, n. 9.

This case is like *Faagata* and *Turner* and satisfies the scrutiny under *Womac* because, although the court found defendant guilty on both counts, it entered judgment and sentence only on manslaughter in the first degree, thereby “declaring valid” only that one conviction. CP 41-52. The conviction for assault does not appear anywhere in the document. *Id.*

The court’s entry of findings of fact and conclusions of law on both counts did not trigger double jeopardy. A trial court’s findings of fact and conclusions of law after a bench trial are comparable to a jury verdict in a jury trial. *See State v. Graham*, 91 Wn. App. 663, 669, 960 P.2d 457 (1998) (a judge acts as sole factfinder in a bench trial). Under *Womac*, a guilty verdict does not trigger double jeopardy unless and until the court enters a judgment on it. *Supra*. It follows then that this trial court’s findings of fact and conclusions of law on Count II, assault in the first degree, did not trigger double jeopardy because the court never entered a judgment on that count.

Further, the punishment concerns raised by the *Womac* court do not apply to this defendant. Thus, defendant’s manslaughter and assault would count as one offense for sentencing purposes because they encompassed the same conduct. *See* RCW 9.94.589(1)(a); RCW 9.94A.525(5)(a). “Because parole no longer exists in Washington,” the potential impact of defendant’s second conviction on his parole eligibility is irrelevant. *Faagata*, 147 Wn. App. at 248. Even if the conviction for assault in the first degree were reduced to judgment, it would be highly

unlikely that defendant would ever be impeached with that conviction, because, under ER 609, the court would have to determine that the probative value of admitting conviction for assault in the first degree, if any, outweighs its very prejudicial effect.

In sum, the trial court properly entered findings of fact and conclusions of law on Count II, assault in the first degree, and their entry did not trigger double jeopardy because the court entered judgment and sentence only on the greater conviction, manslaughter in the first degree. A trial court must vacate a charge only if it has reduced it to judgment. See *Womac*, 160 Wn.2d at 660. That is not the case here, and therefore, this Court need not vacate the assault conviction.

b. Convictions for manslaughter in the first degree and assault in the first degree do not violate double jeopardy

Should this Court hold that double jeopardy was triggered when the trial court entered findings of fact and conclusions of law on Count II, it should, nevertheless, affirm both convictions because they do not violate double jeopardy as manslaughter in the first degree and assault in the first degree are different in law under the *Blockburger* “same evidence” test. *Supra*.

The crime of manslaughter in the first degree requires proof that defendant recklessly caused death of another person, while the crime of assault in the first degree requires proof of intent to inflict great bodily harm. RCW 9A.32.060; RCW 9A.36.011. The merger doctrine does not

apply here because manslaughter was not elevated to a higher degree by an assault. It should also be noted that, in 1996, manslaughter in the first degree was a Class B felony and had a seriousness level of 9, while assault in the first degree was a Class A felony and had a seriousness level of 12. RCW 9.94A.320; RCW 9A.36.011; RCW 9A.32.060.

D. CONCLUSION.

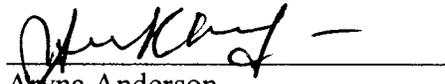
For the foregoing reasons, the State respectfully requests that this Court affirm defendant's conviction and sentence.

DATED: December 30, 2009.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



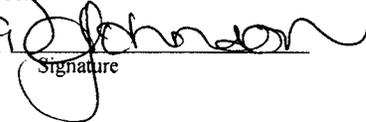
TOM ROBERTS
Deputy Prosecuting Attorney
WSB # 17442



Aryna Anderson
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.

12/31/09 
Date Signature

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STATE OF WASHINGTON
BY 
CLERK OF SUPERIOR COURT
COUNTY OF PIERCE