

COURT OF APPEALS, DIVISION II
19 JUN 20 11 10 AM '97
STATE OF WASHINGTON
BY CA

NO. 38886-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

ROBERT WILLIAMS, Appellant.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR	1
II.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	1
III.	SUMMARY OF THE CASE	2
IV.	STATEMENT OF THE CASE	3
V.	ARGUMENT	15
	ISSUE 1: THE CONVICTIONS AGAINST MR. WILLIAMS MUST BE REVERSED BECAUSE THE STATE DID NOT PRESENT EVIDENCE SUFFICIENT TO CONVINCE A FAIR-MINDED JUROR THAT HE WAS THE PERSON WHO COMMITTED THESE CRIMES AGAINST MS. BUDLONG	15
	ISSUE 2: THE TRIAL COURT ERRED WHEN IT FAILED TO VACATE THE FIRST DEGREE ASSAULT CONVICTION IN COUNT IV, BECAUSE A VERDICT OF GUILTY BY A JURY IS STILL A CONVICTION FOR DOUBLE JEOPARDY PURPOSES EVEN IF IT IS NOT INCLUDED IN THE JUDGMENT AND EVEN IF MR. WILLIAMS IS NOT SENTENCED ON THAT CONVICTION.....	17
VI.	CONCLUSION.....	25

TABLE OF AUTHORITIES

TABLE OF CASES

Washington Cases

<i>State v. Aver</i> , 109 Wn.2d 303, 310, 745 P.2d 479 (1987).....	15
<i>State v. Gohl</i> , 109 Wn. App. 817, 37 P.3d 293 (2001)	20, 23, 24
<i>State v. Green</i> , 94 Wn.2d 216, 221, 616 P.2d 628 (1980).....	16, 17
<i>State v. Trujillo</i> , 112 Wn. App. 390, 49 P.3d 935 (2002).....	22, 24
<i>State v. Turner</i> , 144 Wn. App. 279, 182 P.3d 478 (2008)	23, 24
<i>State v. Womac</i> , 160 Wn.2d 643, 650-51, 160 P.3d 40 (2007).....	
.....	19, 20, 21, 23, 24

CONSTITUTIONAL PROVISIONS

Article 1 § 9 of the Washington Constitution	19
Fifth Amendment to the United State’s Constitution	19

STATUTES

RCW 9.94A.030(12).....	19
RCW 9.94A.525.....	19

REGULATIONS AND RULES

ER 609	19
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I. ASSIGNMENTS OF ERROR

1. The trial court erred by convicting Mr. Williams of first degree burglary, first degree robbery, attempted murder in the second degree and first degree assault without evidence sufficient to convince a fair-minded jury of his guilt beyond a reasonable doubt.
2. The trial court erred by denying Mr. Williams' motion to dismiss for lack of evidence.
3. The trial court erred by denying Mr. Williams' motion to arrest judgment for lack of evidence.
4. The trial court violated the double jeopardy clause by failing to vacate the conviction for first degree assault.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The convictions against Mr. Williams must be reversed because the State did not present evidence sufficient to convince a fair-minded juror that he was the person who committed these crimes against Ms. Budlong.
2. The trial court erred when it failed to vacate the first degree assault conviction in count IV, because a verdict of guilty by a jury is still

a conviction for double jeopardy purposes even if it is not included in the judgment and even if Mr. Williams is not sentenced on that conviction.

III. SUMMARY OF THE CASE

Robert Williams and Charlotte Budlong dated happily for nearly ten years. No one ever saw Mr. Williams be angry or violent with Ms. Budlong in their long relationship. In the last couple of years of their relationship, Mr. Williams and Ms. Budlong began to date other people and formally ended their romantic relationship sometime in 2006, although they remained friends. In mid 2007, Ms. Budlong became engaged to someone else. On May 30, someone attacked Ms. Budlong as she arrived home from work and severely beat her. She has no memory of the attack or the attacker. There was no DNA or physical evidence to show who attacked Ms. Budlong. After a brief investigation, police arrested Mr. Williams and charged him with the attack on Ms. Budlong. This appeal arises from Mr. Williams' convictions on those charges.

IV. STATEMENT OF THE CASE

1. *The Relationship Between Robert Williams and Charlotte Budlong:*

Robert Williams, in his seventies, and Charlotte Budlong, in her sixties, had dated for 10 years. RP6 400-1. During their time together, according to Ms. Budlong, they “got along very well and laughed a lot.” RP9 852. Toward the end of their relationship—the last two years—they just stopped doing things together and their relationship “dwindled away.” RP9 855. They remained friends, but formally ended their relationship at least six months before Ms. Budlong was assaulted. RP6 406; RP9 860. They still saw each other occasionally and Mr. Williams sometimes stayed over at Ms Budlong’s house. RP9 861.

During their very long relationship, according to Ms. Budlong, Mr. Williams was never intimidating or threatening to her and had never had a “jealous rage.” RP9 902.

Around the time Mr. Williams’ relationship with Ms. Budlong ended, she began dating a man named Roy Williams.¹ RP6 408-9. Roy

¹ Because the appellant and Roy Williams have the same last name and initials, the appellant will be referred to as Mr. Williams and Roy Williams will be referred to with his full name.

Williams told police that Ms. Budlong never told him that Mr. Williams had ever threatened her or that she was afraid of him. RP6 490.

Two to three weeks prior to this incident, Ms. Budlong told Mr. Williams she was dating someone else. RP9 870-71. Ms. Budlong said he sounded "a little surprised." RP9 870. Mr. Williams asked her if she would be paying back the \$1,000 loan he made her, but did not press it when she said she did not have the money. RP9 871. He never brought up the money to her again. RP9 871. Ms. Budlong could not remember when she last saw Mr. Williams. RP9 873.

2. *The Attack on Charlotte Budlong:*

On May 30, 2007, Ms. Budlong's daughter, Sheryl Galmon, last talked to her mother while Ms. Budlong was on her way home from work, around 11 p.m. RP6 412, 415. Ms. Budlong told her daughter she was going straight home to bed. RP6 415.

The next day, on May 31, Ms. Galmon tried all day to reach her mother, with no success. RP6 416-17. When she learned that Ms. Budlong did not report to work, Ms. Galmon went to Ms. Budlong's house to check on her. RP6 417.

When she arrived at her mother's house, Ms. Galmon saw the front door was ajar and her dog was running in and out of the house. RP6 417-

18. Ms. Galmon also noticed that her mother's truck was gone. RP6 417-18. Inside, she found Ms. Budlong laying on the couch in the living room—she had been brutally assaulted. RP6 418-19.

Ms. Budlong was still wearing her work pants, with a bathrobe over the top. RP6 440. Her work shirt, covered in blood, was in her bedroom. RP7 570. There was blood throughout the house, but the only missing property was the truck, and Ms. Budlong's keys and cell phone. RP9 891-92.

Ms. Budlong was taken to the hospital and treated for a depressed skull fracture and other serious injuries. RP6 482. Her injuries were severe and showed a "significant" use of force. RP10 929, 932. She was in the hospital for a few weeks. RP9 884.

Ms. Budlong had no memory of the assault. RP7 614. She did tell police that neither Robert Williams nor Roy Williams had committed the assault, but that it was a 50 year old white male who assaulted her.² RP7 608; RP9 795. The next day, Ms. Budlong said she could not describe her attacker. RP7 609.

Ms. Budlong's memory of the night of the assault was spotty—she remembers leaving work on the evening of May 30. RP9 873. It was

² Mr. Williams is African-American, and Roy Williams is a white male in his 50s. RP7 621.

established that she left work at 11:46 p.m. RP11 1138. When she arrived home, she remembered carrying a gas can from her truck to the front porch, setting it down, and opening the front door to let out the dog. RP9 878, 882. She remembers nothing else from that evening. RP9 877. She did testify that her usual practice was to let the dog out for a few minutes, then let him back in. RP9 882.

The primary struggle appeared to have taken place at the front entry. RP11 1122-23. There was also sign that the front door had been opened forcefully, slamming into the adjoining wall. RP7 556. Nothing at the scene suggested Mr. Williams was there. His fingerprints were not there. RP7 661; RP11 1185-86.

Police testified that the evidence at Ms. Budlong's home was consistent with a "blitz-type attack where the person is approached from behind and they get knocked down" rather than a "verbal confrontation that escalates into a physical confrontation." RP11 1226.

3. *The Hit and Run Accident Involving Ms. Budlong's Truck:*

Sometime around 1:18 a.m. in the early morning of May 31, someone crashed Ms. Budlong's truck into a fence and left it there. RP6 459; RP11 1138. Two neighbors, Charles Scott and Jose Hernandez-Morenos, heard the crash and went to investigate. RP6 458, RP8-718.

They looked inside the truck and noticed some sort of metal pipe on the passenger seat—there was not blood on the pipe. RP6 461, 465; RP8 720. Mr. Scott’s wife called the police and both men returned to their houses. RP6 463.

Another neighbor, Marcus Grieder, also heard the crash, looked out and the only person he saw out was a medium-build African-American male walking casually nearby. RP9 809, 814.

Ten to fifteen minutes later, Mr. Hernandez-Morenos looked out his window and saw a car pull up slowly to the truck. RP8 721. A “dark-skinned” man, “older than 35” with “facial hair,” got out of the car, went to the truck and took something—he thought it was the pipe—from it, and drove away. RP8 721-22, 726. Initially, Mr. Hernandez-Morenos described the car as a white Nissan Sentra, but later said that it was an “Infinity J-30.” RP8 724, 727; RP11 1198.

Mr. Hernandez-Morenos could not identify the man he saw, and did not pick Mr. Williams out in a photo montage. RP8 726, 744. When shown a picture of Mr. Williams’ car, Mr. Hernandez-Morenos said the car was “very much the same,” but that the car he saw that night had tinted windows. RP8 745.

Mr. Hernandez-Morenos said that before giving his testimony, the prosecutor told him that Mr. Williams had hurt a woman and that if he testified, Mr. Williams would go to jail for a long time. RP8 758, 760.

Officer Robert Hannity arrived at the scene at 1:25 a.m., 14 minutes after the 9-1-1 call. RP8 707, 709. He did not see any weapons in the vehicle. RP8 704. He had the vehicle impounded. RP8 707.

The truck had damage to the front windshield, which appeared to have strike-marks. RP10 1036. The rear window was shattered. RP10 1036. It appeared that the rear window was broken from the inside. RP11 1129. There was no blood anywhere in the truck. RP10 1044. The ignition key was still in the truck. RP11 1137. Mr. Williams' prints were not found anywhere in the truck. RP11 1136.

4. *The Police Investigation:*

Ms. Galmon told police that there was a vacant house next door that was being used as a "drug house." RP7 626. The people squatting there had a dispute with Ms. Budlong over some stolen electricity and Ms. Budlong had reported them to the police. RP7 626. Ms. Budlong confirmed this. RP9 899-900. Ms. Budlong also remembered that she still saw one of the men living there, an African-American man in his 50s, on her bus from time to time. RP9 900-901. After the assault, the police

searched the house and found evidence of squatting, but no one was there. RP7 626.

Roy Williams testified that he last talked with Ms. Budlong sometime during the evening on May 30 while she was at work. RP9 832. He said he was home alone all evening and went to sleep around eight or nine p.m. RP9 832-33. Roy Williams' home and car were never searched. RP9 842. To Roy Williams' knowledge, Mr. Williams had never threatened Ms. Budlong. RP9 844.

Mr. Williams was fully cooperative when police called him and asked him for an interview. RP7 599; RP10 949. He already knew about the assault because Ms. Galmon had called Mr. Williams from the hospital to tell him about Ms. Budlong's injury. RP6 452. She said he sounded very upset about it. RP6 452.

Police drove out to talk with Mr. Williams at his home on June 1. RP10 975. Mr. Williams lived in a camping site near Lake Trask, which was over 61 miles from Ms. Budlong's house. RP13 1378. Police estimated that it would take around 85 minutes to drive from Ms. Budlong's house to Mr. Williams' campsite. RP13 1396.

To the officers, Mr. Williams genuinely seemed "concerned as to what had happened to Ms. Budlong." RP10 949. Officers observed that Mr. Williams' movement was "somewhat slow and deliberate." RP10

957. Mr. Williams had a disabled license plate. RP10 976. Police described Mr. Williams as “very cooperative, very helpful.” RP10 949. In his conversations with the police, Mr. Williams said he saw Ms. Budlong in March when she drove him to the airport. RP8 678. Then, he remembered that on May 30, he briefly saw Ms. Budlong at 11 a.m., before she went to work. RP8 679-80; RP10 954. He was retrieving keys and some money from under the seat in her truck, which he had stored there. RP8 681; RP10 955; RP12 1313. Then, he went to a doctor’s appointment at the VA at 3 p.m. RP8 680. Afterwards, he went to different stores, including a liquor store. RP11 1154-55. He spent the evening at a private club, and he left there at 8 p.m. RP8 681. From there, he met up with a woman named Joyce, a prostitute, and spent time with her. RP8 682. She left him in his car and he slept there because he could not drive after dark. RP8 682. He returned home in the morning after it got light, sometime around twelve, which police took to mean noon. RP8 682; RP10 979. Mr. Williams said he did not use his card key to enter because he entered behind another vehicle. RP10 979. A friend of his was staying in his trailer at Lake Trask that night. RP13 1387.

Mr. Williams lived at a gated campsite. RP11 1257. The front gate was card-operated. RP11 1257. Information on when a card key is used to enter or exit the gate is stored in a computer database. RP11 1258.

There is no way to tell who used the card. RP12 1292. Mr. Williams had four cards registered to him. RP12 1285. The database showed that someone used one of Mr. Williams' cards at 11:24 a.m. on May 30, 2007, and again at 2:46 a.m. on May 31, and then again at 9:11 a.m.³ RP 12 1286-87; RP13 1379.

Mr. Williams owned two cars, a Ford Bronco and a white four-door Infinity. RP8 683. He said the night of May 30 he was driving his Bronco. RP8 684.

Police were able to confirm much of Mr. Williams' story. The confirmed that he was at the VA at 3 p.m. for an eye appointment. RP11 1173. They also obtained video from the liquor store, showing him leaving at 4:18 p.m. RP11 1181. It turned out from the footage, that Mr. Williams had been driving his Infinity that night, not the Bronco. RP11 1181. They also confirmed that Mr. Williams was at the private club until 9 p.m., as he said. RP11 1213. Witnesses told the police that Mr. Williams seemed perfectly normal that night, not angry. RP13 1394.

Mr. Williams agreed to a search of his home, property, and cars. RP7 616; RP10 964; RP10 957. Police did not find anything to connect him to the assault. RP7 617, RP8 688. In Mr. Williams' cars and home,

³ Police testified that the time stamp on the card entry recorder was 11-12 minutes fast. RP13 1382.

they did not see blood or weapons. RP10 973. The officers did not see any cuts on Mr. Williams' hands or face. RP10 975.

On June 8, after police learned that Mr. Williams had been driving his Infinity the night of May 30, they arrested Mr. Williams. RP13 1402. At that time, one of the arresting officers thought she saw some faint "abrasions" on Mr. Williams' forehead, fingers and right cheek. RP13 1413. Mr. Williams said he got these minor scratches when he slipped and fell as he mended a tarp at his campsite. RP13 1417. Detective Miller testified that he did not see any of these scratches on Mr. Williams when he interviewed him on June 1 and he would have noticed if they had been there. RP13 1489-90.

A few small spots of blood were found in Mr. Williams' Infinity and it all turned out to be his own. RP 1/9/09 50. No blood from Ms. Budlong was found in the vehicle. RP 1/9/09 62. Police tested Mr. Williams' ring, his shoes, and the car interior, but did not find anything with Ms. Budlong's blood or DNA. RP 1/9/09 44, 45-46, 52.

Police found a receipt from an AMPM store from May 30, 2007, at 11:57 p.m.⁴ RP 1/9/09 49. There was a small, diluted, spot of Mr. Williams' blood on the receipt. RP 1/9/09 48. Detective Miller testified

⁴ The defense objected to the admission of this evidence on the grounds that the chain of custody had not been established, because no witness testified to removing this receipt from Mr. Williams' car. RP14 1539.

that he got this receipt from forensic specialist Karen Green when she handed him a pile of papers. RP13 1484, 1466-67. Forensic specialist Karen Green testified that she emptied out the center console of Mr. Williams' car and gave the contents to Detective Miller. RP 1/9/09 29.

Police examined video surveillance from the AMPM store shown on the receipt and saw what appeared to be Ms. Budlong making a purchase at the time shown. RP13 1473. It appeared that she placed the receipt in her pocket. RP13 1510. Ms. Budlong's debit card was used to make the transaction. RP13 1475. Ms. Budlong had no memory of being at the store. RP13 1476.

Michael Barken, who was a friend to both Mr. Williams and Ms. Budlong for years, testified that he had never seen Mr. Williams be threatening or go into a "jealous rage." RP10 1085. Mr. Barken said he told Mr. Williams Memorial Day weekend, 2007, that Ms. Budlong was engaged and that Mr. Williams was upset. RP10 1072. Mr. Barken said that Mr. Williams had a back injury that would act up from physical exertion, such as rowing a boat and from sitting too long. RP10 1074, 1092.

Mr. Barken had never seen Mr. Williams with a weapon, but testified that Mr. Williams once told him that he keep a steel bar in his car for protection. RP10 1065-66. Neither Mr. Barken nor anyone else, even

Mr. Williams' other long-time friends, had ever seen Mr. Williams with this purported steel bar. RP14 1585, 1609.

Mr. Williams talked with Ms. Galmon on the phone a few times and during one conversation, he said: "he really screwed up and he doesn't know how he's going to fix it." RP6 454. Ms. Galmon did not know what Mr. Williams was referring to and did not ask him to clarify. RP6 454.

Another friend of Mr. Williams', Dr. Cynthia Jones, testified that she and Mr. Williams had been dating since 2005. RP14 1604. Other friends had seen them together and confirmed that they were dating. RP14 1582-83. She confirmed that Mr. Williams had a back injury. RP14 1608.

6. Procedural History:

Mr. Williams was charged with burglary in the first degree, robbery in the first degree, first degree attempted murder, and first degree assault. CP 1-3.

The defense moved at halftime to dismiss the charges for lack of evidence. RP14 1561-64. The motion was denied. RP14 1568-69.

At the close of evidence, the defense renewed its motion to dismiss/arrest of judgment based on insufficient evidence of identity. RP17 1769. This motion was also denied. RP17 1771.

Following the jury trial, Mr. Williams was convicted of first degree burglary, first degree robbery, second degree attempted murder and first degree assault. RP16 1754-55.

The court subsequently ruled that the attempted murder conviction merged with the first degree assault conviction and that therefore it would not sentence Mr. Williams on the assault conviction. RP17 1772. The court entered an order finding that the assault conviction “is a valid conviction,” but that it would violate double jeopardy if he were “sentenced” on this charge and its enhancement. CP 115. However, the court ordered that: “In the event the charge of Attempted Murder in the Second Degree is vacated by an appellate court, the defendant will be sentenced on the charge of Assault in the First Degree and the corresponding deadly weapon sentencing enhancement.” CP 115-16. The court did not vacate the conviction for assault in the first degree.

This appeal timely follows.

IV. ARGUMENT

ISSUE 1: THE CONVICTIONS AGAINST MR. WILLIAMS MUST BE REVERSED BECAUSE THE STATE DID NOT PRESENT EVIDENCE SUFFICIENT TO CONVINCE A FAIR-MINDED JUROR THAT HE WAS THE PERSON WHO COMMITTED THESE CRIMES AGAINST MS. BUDLONG.

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d

479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

In this case, what happened to Ms. Budlong is not in dispute. The sole issue in this case is the identity of her attacker and the person who stole her keys, cell phone and truck. There was no DNA, no fingerprints, no direct evidence of the identity of the person who attacked Ms. Budlong. No weapon was found or identified. The only evidence the State provided in support of its theory that Mr. Williams was the attacker was: one vague description of the person seen near the truck—African-American male; a car that loosely matches Mr. Williams' car—a white Integra; and the AMPM receipt that allegedly was found in Mr. Williams' car. This evidence is not sufficient, without more, to convince a fair-minded juror that Mr. Williams, a man with no criminal record and no history of violence, suddenly and without any warning attacked his friend, Ms. Budlong.

First of all, the alleged description of the person seen taking something from Ms. Budlong's truck was not specific to Mr. Williams or even very consistent with him. The witness said he saw a "dark-skinned"

man, “older than 35” with “facial hair.” RP8 721-22, 726. This description is very general and only loosely describes Mr. Williams’ general race, and is not accurate on his age. Mr. Hernandez-Morenos could not identify the man he saw, and did not pick Mr. Williams out in a photo montage. RP8 726, 744.

Furthermore, the car described by the witness was not identical to Mr. Williams’ car. Initially, Mr. Hernandez-Morenos described the car as a white Nissan Sentra, but later said that it was an “Infinity J-30.” RP8 724, 727; RP11 1198. When shown a picture of Mr. Williams’ car, Mr. Hernandez-Morenos said the car was “very much the same,” but that the car he saw that night had tinted windows (unlike Mr. Williams’ car). RP8 745.

As for the receipt allegedly found in Mr. Williams’ car, this is by no means conclusive proof of Mr. Williams’ guilt. The witnesses testified that Ms. Budlong’s home was covered in blood from her attack. Yet, police could not find even one small spot of Ms. Budlong’s blood on Mr. Williams or in the car they say he used to drive away from the attack. This is hard to believe.

The law says that evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime

beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). This is such a case. A rational jury could not have found Mr. Williams guilty beyond a reasonable doubt on these facts. Therefore, his convictions should be reversed.

ISSUE 2: THE TRIAL COURT ERRED WHEN IT FAILED TO VACATE THE FIRST DEGREE ASSAULT CONVICTION IN COUNT IV, BECAUSE A VERDICT OF GUILTY BY A JURY IS STILL A CONVICTION FOR DOUBLE JEOPARDY PURPOSES EVEN IF IT IS NOT INCLUDED IN THE JUDGMENT AND EVEN IF MR. WILLIAMS IS NOT SENTENCED ON THAT CONVICTION.

Mr. Williams was convicted of attempted murder in the second degree, count III, and first degree assault, count IV, both relating to the same act. RP16 1755, CP 96, CP 97. The State noted at sentencing that entering judgment and sentence on both counts would violate double jeopardy. RP17 1772. The trial court entered judgment and sentence on counts I-III only, but did not vacate count IV. CP 117-118. Instead, the court entered a document entitled "Order re: Sentencing," in which the court ruled:

2. The conviction of Assault in the First Degree is a valid conviction.

3. The defendant, however, will not be sentenced on the charge of Assault in the First Degree or the corresponding deadly weapon sentencing enhancement, as to do so would violate the double jeopardy provisions of the state and federal constitution.

4. In the event the charge of Attempted Murder in the Second Degree is vacated by an appellate court, the

defendant will be sentenced on the charge of Assault in the First Degree and the corresponding deadly weapon sentencing enhancement.

CP 115-116.

The double jeopardy provisions of Article 1 § 9 of the Washington Constitution and the Fifth Amendment to the United State's Constitution prohibit multiple punishments for the same offense imposed in the same proceeding. *State v. Womac*, 160 Wn.2d 643, 650-51, 160 P.3d 40 (2007).

A conviction, under Washington law, remains a conviction regardless of the trial court's decision not to enter judgment on it. The Sentencing Reform Act defines "conviction" as: "an adjudication of guilt pursuant to Titles 10 or 13 RCW, and includes a verdict of guilty, and acceptance of a plea of guilty." RCW 9.94A.030(12). And a conviction can still be counted in a future offender score under the above definition regardless of whether a court reduces it to judgment or whether sentence is imposed.

RCW 9.94A.525.

Similarly, ER 609(a) permits impeachment of a witness with evidence that the witness has been convicted of a crime. The time limit governing the use of such evidence is calculated from the witness' release from custody or from the date of conviction. ER 609(a). Entry of a judgment and/or sentence is not a requirement for impeachment under this rule.

Thus, a conviction, in and of itself, is punishment for purposes of double jeopardy, even if it is not included in the judgment and even if no sentence is imposed. For example, in *State v. Gohl*, the State argued that convictions for attempted murder and first degree assault did not violate double jeopardy because the sentencing court, finding that the crimes encompassed the same criminal conduct, imposed no sentence for the assault. 109 Wn. App. 817, 37 P.3d 293 (2001). The *Gohl* court disagreed, stating:

This argument contradicts the rule that conviction, and not merely imposition of sentence, constitutes punishment.

The fact of multiple convictions, with the concomitant societal stigma and potential to increase sentence under recidivist statutes for any future offense violated double jeopardy even where, as here, the trial court imposed only one sentence for the two offenses.

109 Wn. App. at 822 (citing *Ball v. United States*, 470 U.S. 856, 861, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985)).

In *Womac*, the State charged the defendant with homicide by abuse (Count 1), second degree murder (Count 2), and first degree assault of a child (Count 3), alleging that his single act of abuse caused the child victim's fatal brain injury. 160 Wn.2d at 647-48. *Womac* was not charged in the alternative, but rather with three separate counts as separate charges. 160 Wn.2d at 647, 660. A jury convicted on all three counts. 160 Wn.2d at 647.

At sentencing, Womac moved to dismiss Counts 2 and 3, claiming dismissal was necessary to avoid a double jeopardy violation. The State asked that the charges and verdicts on Counts 2 and 3 remain in place until Count 1 had survived post-sentence challenges. The trial court determined double jeopardy did not require dismissal of Counts 2 and 3 and left both convictions on Womac's record. *Womac*, 160 Wn.2d at 648.

The trial court imposed an exceptional sentence on Count 1 only, and entered an appendix to the Judgment and Sentence, which stated:

Count II, murder in the second degree, is a valid conviction and the court would sentence the defendant on Count II if it were not prohibited from doing so by the double jeopardy provisions of the state and federal constitutions. ... Count III is a valid conviction but no punishment will be imposed because of double jeopardy concerns.”

Womac, 160 Wn.2d at 655. The Supreme Court found that the trial court's failure to vacate Counts 2 and 3 violated Womac's double jeopardy protections because he committed a single offense against a single victim, but received three convictions for that single offense. *Womac*, 160 Wn.2d at 650.

The *Womac* Court also addressed and distinguished two cases where multiple convictions were not included on the judgment, as Womac's were, but also were not vacated. *Womac*, 160 Wn.2d at 658-60.

In *State v. Ward*, the jury found the defendant guilty of second degree felony murder and first degree manslaughter. 125 Wn. App. 138, 104 P.3d 61 (2005). The Court of Appeals found no double jeopardy violation in Ward's case, as the judge entered judgment and sentenced Ward only on the second degree felony murder charge, and did not mention the first degree manslaughter conviction in the judgment. 125 Wn. App. at 144. Because there was no violation of double jeopardy, reasoned the court, the trial court was not required to vacate Ward's manslaughter charge. 125 Wn. App. at 144.

In *State v. Trujillo*, a jury convicted four defendants of first degree assault, and in the alternative, first degree attempted murder. 112 Wn. App. 390, 49 P.3d 935 (2002). The Court of Appeals reasoned since the verdict for first degree assault was not reduced to judgment, it “does not subject the appellants to any future jeopardy.” 112 Wn. App. 411.

The *Womac* Court distinguished its facts from *Ward* and *Trujillo*, in part because the multiple crimes in those cases were charged in the alternative. 160 Wn.2d at 660. The Court found it notable that *Womac*'s crimes were charged as separate, individual numbered counts. 160 Wn.2d at 660.

In this case, the State did charge Mr. Williams two separate numbered counts, in the alternative. CP 37-38. However, the jury was

separately charged with both attempted murder and assault in the first degree, not in the alternative. CP 54-92.

Recently, in *State v. Turner*, the State charged Turner in the alternative with first degree assault and first degree robbery. A jury convicted Turner of second degree assault and first degree robbery. 144 Wn. App. 279, 182 P.3d 478 (2008).⁵ The trial court did not reduce the assault conviction to the judgment and sentence because it merged with the robbery conviction, and sentenced Turner only on the robbery conviction. 144 Wn. App. at 281, 283. The trial court also entered an order vacating the assault charge for purposes of sentencing, but indicating that the assault conviction was valid and could be taken to sentencing if the Court of Appeals found any problems with the robbery conviction. 144 Wn. App. at 281. On appeal, this court distinguished its facts from *Womac*, and held that a conviction that is not put to judgment is not a conviction for double jeopardy purposes. 144 Wn. App. at 283.

The court's opinion in *Turner* was incorrect. First, the court ignored the express language in both *Womac* and *Gohl* that a conviction

⁵ The Supreme Court has accepted review of *Turner*, but as of the writing of this brief, has not yet issued its opinion. See Supreme Court Case No. 81626-3.

by itself is punishment for double jeopardy purposes. *Womac*, 160 Wn.2d at 656-57; *Gohl*, 109 Wn. App. at 822.

Second, the court dismissed the distinction that *Womac* made between cases where the crimes are charged in the alternative as opposed to separate numbered counts. *Turner*, 144 Wn. App. at 283, *Womac*, 160 Wn.2d at 660. And *Turner* also ignored the *Womac* Court's express disapproval of conditionally vacating convictions that violate double jeopardy only to allow them to be revived and reinstated if the remaining conviction is later set aside. 160 Wn.2d at 658.

Moreover, *Turner*, *Ward* and *Trujillo* also overlook the fact that a non-vacated second conviction can still be revived in the future. But the Supreme Court specifically noted that, as "a court has no authority to 'take a verdict on another charge . . . find that it violates double jeopardy . . . not sentence the defendant . . . on it [,] and just . . . hold it in abeyance for a later time.'" 160 Wn.2d at 658. When a trial court simply ignores but does not vacate a second conviction for the same criminal act, the possibility of revival hangs over the head of that defendant, just as it does when the conviction is "conditionally vacated." Either procedure is improper, and violates a defendant's fundamental double jeopardy protections.

Under the State and Federal constitutions, the Sentencing Reform Act, and *Womac*, a guilty verdict is a “conviction” for double jeopardy purposes even if it is not reduced to judgment and even if no sentence is imposed. Therefore, the trial court’s failure to vacate Williams’ first degree assault conviction in count IV violates double jeopardy. That conviction must be unconditionally vacated.

V. CONCLUSION

The convictions against Mr. Williams should be reversed because the State failed to provide evidence sufficient to prove he was the person who attacked Ms. Budlong and stole her keys, cell phone, and truck. There is no evidence that Mr. Williams is anything other than a nice old man with a back problem. No one testified he had ever even raised his voice with Ms. Budlong over the course of their long relationship. The State’s evidence could not have convinced a fair-minded jury beyond a reasonable doubt that Mr. Williams was guilty. Therefore, his convictions should be reversed.

In the alternative, the trial court also erred by failing to vacate the conviction for first degree assault, which, together with the conviction for second degree attempted murder, violates double jeopardy. This requires remand for vacating the first degree assault conviction.

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CERTIFICATE OF SERVICE

I certify that on January 4, 2010, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

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