

FILED  
COURT OF APPEALS  
DIVISION II

NO. 38886-3-II

10 MAR 11 PM 4:44

STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

BY     *cm*      
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT RUFUS WILLIAMS, APPELLANT

Appeal from the Superior Court of Pierce County  
The Honorable Susan Serko

No. 07-1-03073-7

BRIEF OF RESPONDENT

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

1. Whether the defendant's convictions should be affirmed where, viewing the evidence in the light most favorable to the State, there was sufficient evidence from which a rational trier of fact could have found that the defendant was the person who committed these crimes.
2. Whether the trial court properly refused to vacate the defendant's verdict of guilty to first-degree assault where that verdict did not violate the defendant's double jeopardy rights because the trial court did not reduce that verdict to judgment and did not sentence him for that crime.

B. STATEMENT OF THE CASE.

1. Procedure.

On June 11, 2007, the defendant was charged, by information, with burglary in the first degree in count I, robbery in the first degree in count II, attempted murder in the first degree in count III, and, in the alternative, assault in the first degree in count IV pertaining to the crimes committed against Charlotte Budlong on May 30, 2007. CP 1-3.

The matter was called for trial on November 17, 2008, RP 3, and the State rested on January 13, 2009. RP 1578. *See* RP 1561.

The defense attorney moved to dismiss all charges for insufficient evidence at the conclusion of the State's case in chief. RP 1561-67. The State presented its argument against the motion, RP 1564-65, and the Court denied the motion. RP 1567-69.

On January 13, 2009, the defense rested. RP 1626, and on January 15, 2009, the jury found the defendant guilty of four crimes: burglary in the first degree as charged in count I, robbery in the first degree as charged in count II, attempted murder in the second degree, a lesser included crime of attempted murder in the first degree charged in count III, and assault in the first degree as charged in count IV. RP 1754-61; CP 93-97. The jury also returned special verdicts with respect to each count, indicating that the defendant was armed with a deadly weapon. CP 98-102.

The defense then moved for arrest of judgment, apparently due to insufficient evidence of identity. *See* RP 1769-71. The State responded and the Court denied the motion. RP 1771.

On January 30, 2009, the Court signed an Order Re: Sentencing, which noted that “[t]he conviction of Assault in the First Degree is a valid conviction”, but that the defendant “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.” CP 115-116.

The Court then sentenced the defendant to 48 months on count I, burglary in the first degree, 68 months on count II, robbery in the first degree, and 198.75 months on count III, attempted murder in the second degree. RP 1780-84; CP 117-131. The Court did not sentence the defendant on count IV, assault in the first degree, and did not mention that count in its judgment and sentence. RP 1780-84; CP 117-131. The defendant was sentenced to 24 months for the deadly weapon sentencing enhancements on counts I, II, and III, to be served consecutively to each other, for a total sentence of 198.75 plus 72 months. RP 1780-84; CP 117-131.

The defendant timely filed a notice of appeal. CP 132 -146.

## 2. Facts.

In May, 2007, Charlotte Budlong was, according to her daughter, in her early sixties. RP 399-400. Budlong had worked as a bus driver for Pierce Transit for 18 years, and raised five children. *See* RP 848-49. She lived in a house at 1744 South Fife Street in Tacoma, Washington, and enjoyed working in the yard. RP 404, 850, 1117. In May, 2007, Charlotte had just become engaged to be married to Roy Williams, a fellow bus driver. RP 825.

About "two or three weeks" before May 31, 2007, Budlong was out with her fiancé, "walking his dogs" when she received a call from the Appellant, Robert Rufus Williams, hereinafter "defendant". RP 870-71. The defendant, Budlong's ex-boyfriend of "approximately 11 years", RP 850-51, asked if she would "like to have company for the weekend", which she said "was a standard question of his." RP 870. Budlong testified, "I told him no, that I have company for this weekend and every other weekend and that he's a nice guy", in reference to Roy Williams. RP 870. The defendant replied, "Is that right?" RP 870.

After that initial rejection, the defendant suffered another shock. On May 27 or 28, 2007, he learned that Charlotte was actually engaged to Roy Williams. RP 1072. Michael Barker, a mutual friend of both Charlotte and the defendant, testified that on May 27 or 28, 2007, he mentioned to the defendant "that Roy and Charlotte were engaged." RP 1072. Barker indicated that though he thought the defendant "would know that by then", "evidently he didn't know", and that the defendant "got pretty upset." RP 1072. According to Barker, the defendant "just had a look on his face that he looked angry." RP 1073.

The defendant was not only emotionally isolated from Budlong, he was geographically distant from her. He lived at a “campground site” at the Lake Trask Timber Trails Association, RP 404-5, RP 1291, RP 1541, some 45 to 50 minutes by motor vehicle from Tacoma. RP 1378. David Gray, who works as a park ranger at the Lake Trask site, RP 1541, testified that he could only think of one time that the defendant had a visitor while living there. RP 1549.

On May 30, 2007, Budlong went to work around 1:00 p.m. and worked until around 11:30 p.m. RP 874. She left work at 11:46 p.m., RP 1138, and “stopped at the store” on her way home. RP 873; 876-77. Store surveillance video from the ARCO Service Station at 1006 South Tacoma Way, which was “three to four blocks from where she works”, RP 1469, showed Budlong “purchasing a chocolate milk and a cheeseburger and a couple packs of smokes” at that store at 11:57 p.m. RP 1473-74. She received a receipt for that transaction at that time and seemed to place that receipt in her right jacket pocket. RP 1510-11. Budlong testified that she then remembered coming home in her 2002 Ford Explorer Sport Track, setting a gas can on her front porch, and opening her front door. RP 877, 897. When Budlong parked her Ford Explorer that night, it was in “fine” condition with no broken windows. RP 881.

On May 31, 2007, at about 10:00 a.m., Galmon tried calling Budlong, but could not reach her. RP 416. She called back several times, but still could not reach her. RP 417. She called Pierce Transit’s dispatch

because Budlong was supposed to be reporting to work, but “dispatch had not heard from her either.” RP 417. Galmon then went to Budlong’s house where she found Budlong laying on her couch “covered in blood”, RP 419, 473-4, 485-6, 517, with blood throughout her home. RP 419; *See*, e.g., 441, RP 445, RP 518-520; RP 559, RP 647-51, 653; RP 774-6; RP 1121. Budlong was initially unconscious and unresponsive to her daughter. RP 446, 517, 521. Budlong’s cell phone, glasses, keys, and Ford Explorer were missing. RP 891-92.

On May 31, 2007, at 1:14 a.m., a 911 caller reported the sound of breaking glass “in the 2300-block of South 17<sup>th</sup>”. RP 1139. About four minutes later, at 1:18 a.m., Budlong’s Ford Explorer struck a fence, RP 1126-27, at 1541 South State Street “on the corner of South 17<sup>th</sup> and State”, RP 702, a short distance from where the sound of breaking glass was reported. RP 1139.

Charles Scott, the owner of the property and fence, RP 457, testified that the Explorer’s “back window was smashed out,” RP 459, and that there was “a big metal pipe... propped up on the seat in the window.” RP 461. *See* RP 719-20.

Jose Hernandez-Morenos, a neighbor of Mr. Scott, indicated that he heard Budlong’s Ford Explorer crash into the fence and then went to look at the scene. RP 718-19. He testified that he went back inside his residence, but that ten to fifteen minutes later, RP 721, saw a man who was driving a white “Infiniti J-30”, RP 724, slowly pull over, get out, walk

to Budlong's Explorer, and grab the pipe, which was at least ten inches long from inside the Explorer, RP 721-74. When asked how he knew it was an Infiniti J-30 that the man was driving, Hernandez-Morenos said that he was "trying to buy a car like that". RP 724. *See* RP 727.

Hernandez-Morenos, who was 25 years of age at the time, described the man driving the Infiniti as an "[b]lack" man, who was "an older person, older than 35", who "looked like he was off work because he looked kind of dirty, not clean, or maybe like kind of worn out clothes." RP 726.

The defendant is a man of apparent African heritage who was older than 35, *see* RP 621, who was known to keep "a steel bar in his car for protection," RP 1065, who owned an "off-white" Infiniti J-30 at the time, RP 409-10, and who was seen driving that Infiniti J-30 in Tacoma on May 30, just hours before Budlong's Explorer crashed into the fence at 1:18 a.m. on May 31, 2007. RP 1178-83.

About 76 minutes after Budlong's Explorer crashed into Scott's fence, the defendant's access card was used to gain entry into the Lake Trask campsite at which he lived. Lake Trask Office manager Margaret Conners explained that entry to the campsite required the use of an access card to raise an entry gate, RP 1250, and that the camp has maintained a "database in its computer that keeps track of the access cards that are coming in" from November 31, 2003 to present. RP 1283. According to that computer, one of the defendant's access cards was used to raise the campsite gate at 02:46:47 a.m. on May 31, 2007. RP 1284-86; RP 1362-

63; RP 1379. Detectives found that the computer was 11 to 12 minutes fast in recording the time the cards were used. RP 1381-82. So, the actual time that the card was swiped on May 31, 2007, would have been 2:34 to 2:35 a.m. RP 1382. According to Detective Turner, who made six round trips between Tacoma and the Lake Trask property, RP 1377, "it's 47.2 miles from the Tacoma Police Station at 38<sup>th</sup> and Pine to the property" and takes "45 minutes to 50 minutes" to travel by car. RP 1378. Turner testified that there was an alternate route which would take one "out via I-5, out towards Lacy, Olympia, Highway 101 through Shelton and back down that way" and that it was 61.58 miles in length. RP 1378.

Budlong was taken to St. Joseph Medical Center by ambulance, RP 448, where she underwent surgery, RP 591-2, 594, 600-601, 793, and remained incoherent for days. RP 451; RP 604-9; RP 800. Budlong was diagnosed with "a depressed skull fracture", RP 482, RP 797, RP 925-28, RP 1140, "a subdural hematoma", brain contusion, "a spleen laceration," "a left radius fracture", and "an ulnar fracture." RP 929. With respect to Budlong's skull fracture, Dr. Lori Morgan, "the Medical Director of trauma" at Tacoma General Hospital, St. Joseph Medical Center, and Mary Bridge Children's Hospital", RP 918, testified that Budlong had "a comminuted and depressed left temporal parietal junction skull fracture," RP 925, and said that "basically what that means is that she had a skull fracture that was in a lot of little pieces as well as a very depressed skull fracture." RP 926. In addition to the skull fracture, Budlong "had a

subdural hematoma which is blood inside of her head, she had the brain contusion”, “[s]he had a spleen laceration”, “left radius fracture as well as an ulnar fracture, so both of the bones of her forearms were broken as well as her left fifth finger.” RP 929-30. Dr. Morgan testified that Budlong’s injuries were life-threatening, stating, “I would consider her head injury life-threatening and splenic lacerations are always potentially life-threatening”. RP 932. Budlong stayed at the hospital for weeks. RP 451; RP 883. When she testified in December, 2008, Budlong told the jury “I can’t lift my left arm very far and I can’t close my left hand completely and... my little finger on my left hand doesn’t work and I have a lot of aching and pain in both my hands and my left shoulder... I can’t make a fist.” RP 884-5. Budlong testified that “they had to hold my head together with titanium mesh” and that she had “lots of little bumps and holes in my head” that will “never go away.” RP 885. She related that she had “stitches from my ear to almost the top of my head and on my forehead”, RP 886, and that she “lost the sense of taste and sense of smell” and “lost the feeling on the right side of [her] face,” though the latter “came back.” RP 888.

On the evening of May 31, 2007, Tacoma Police Detectives Graham and Wade went to St. Joseph Medical Center, but found that Budlong was still in surgery. RP 591. So, they met with and interviewed Budlong’s daughter, Sheryl Galmon, and Budlong’s fiancé, Roy Williams, who were both there waiting for Budlong. RP 591. Detective Graham

described Galmon as “distracted” with mom in surgery, RP 592, but “very” cooperative. RP 593; RP 606. Graham testified that Roy Williams was also distracted and “very concerned, want[ing] to know if we had any updates on Ms. Budlong’s condition, et cetera.” RP 593-94. Graham said that Roy Williams was also cooperative. RP 594. The defendant never went to the hospital to visit Budlong. RP 801-802; RP 888.

Detective Graham made contact with Budlong later on May 31, 2007, after she was out of surgery. RP 600.. She was “awake off and on”, but “wasn’t very alert.” RP 600. Graham testified that Budlong, “didn’t have any recollection of what took place.” RP 600. Detective Graham came back to the hospital “probably a dozen times over the next week or ten days,” RP 602, but she was “just way too medicated” for him “to get any kind of a coherent statement out of her.” RP 605-06. Graham noted that “[a]s the days wore on and... the more she was awake, the more combative she got.” RP 609. “She was always in pain,” he said. RP 610. Detective Graham said that June 10, 2007, was the first time that detectives “really found [Budlong] awake” and that “she was able to talk for more than just... a few sentences here and there.” RP 611. According to Graham, however, Budlong “had no recollection of the assault.” RP 619. *See* RP 877, 882.

Budlong's neighborhood was apparently not a high-crime area. Budlong said, "I don't know of any crime on the street that I lived on." RP 896. Budlong did not have any conflicts with anyone living next door to her in the six-seven months before the assault. RP 906.

Sheryl Galmon called the defendant a couple of days after the incident" to give him an update on Budlong's condition. RP 453-54. When she told the defendant how Budlong, who was still hospitalized, "medicated", and incoherent, *see, e.g.*, RP 605-06, was doing, the defendant said that "he really screwed up and he doesn't know how he's going to fix it." RP 454. The defendant continued by saying "something about going to South Carolina", RP 454, where he had family. RP 867.

On May 31, 2007, while at the hospital, Detective Graham called the defendant, who was still at his Lake Trask residence and arranged for an interview. RP 599. On June 1, 2007, the defendant was interviewed by Detectives Hill and Turner. RP 672-73. The defendant told detectives that he and Budlong had "dated on and off for about nine years," but had been "separated" for about a year. RP 675.

The defendant then gave the detectives inconsistent stories about when he had last seen Budlong. RP 677-9. He first told detectives that he had last seen her in March, 2007, some two months before the incident at issue here. RP 678. About twenty minutes later, however, the defendant told the detective that he had last seen Budlong on the day of the incident, May 30, 2007 at about 11:00 a.m. RP 678-9.

Detective Gene Miller interviewed the defendant later that same day, RP 1150-51, and the defendant told him that he met with Budlong “at a gas station at 74<sup>th</sup> and South Tacoma Way”. RP 1154. In an effort to confirm this last story, Detective Miller subsequently reviewed the gas station’s security video for the hours during which the defendant said that meeting occurred, but “was never able to locate the victim’s vehicle, his vehicle, him, the victim, anything.” RP 1166.

The defendant told Detective Miller that he had later gone to the liquor store on May 30, 2007 and “grabbed some beer.” RP 1155. The defendant told Detectives Hill and Turner and then Detective Miller that he was driving his white Ford Bronco while he was in Tacoma on May 30, 2007. RP 1156.

So, detectives “went to the Washington State Liquor Store there in the 5400-block of Hunter Street” and requested video of the time that the defendant claimed to be buying beer. RP 1173-74. The defendant was seen on that video purchasing two bottles of beer, RP 1179-80, but he was also seen driving his Infiniti J-30 to that liquor store at about 4:18 p.m. on May 30, 2007. RP 1178-83. This Infiniti J-30 was “consistent” with that seen by Hernandez, RP 1183, and obviously, not the Ford Bronco, the defendant claimed to be driving. RP 684; RP 1156. A paper bag containing the two 40-ounce bottles of Rainier Ale that he bought was found in the trunk of the Infiniti after the defendant’s arrest. RP 1458-59.

The Ford Bronco was found on the defendant's property and "appeared not to have been driven." RP 684. There were "cobwebs from the trees to the Ford Bronco, pine needles, tree debris. It just appeared not to have been driven or even driveable. I'm not even sure if it's driveable." RP 684. *See* RP 1455. Inside of the Bronco, there was "some type of spider web looking thing over on the passenger side". RP 1455. Detective Miller testified that when he got into the Bronco, he "wanted to get out" because "there's mold growing in this thing. It had a pretty strong odor to it." RP 1455. There was no key available "to see if it was operational." RP 1455. Budlong, David Gray, the Lake Trask park ranger, and Cynthia Jones, the defendant's other girlfriend, RP 1604, all testified that the defendant primarily drove the white Infiniti. RP 904; RP 1548; RP 1611.

The defendant told detectives Hill, Turner and then Miller that he was then at the "Caballeros Club" until about 8:00 p.m., picked up a prostitute named Joyce, had sex with her, and then slept in his vehicle until the next morning, RP 682, RP 1155-56, before going home around noon the next day. RP 1236.

This was inconsistent with Lake Trask computer records, which, as noted above, indicated that one of the defendant's access cards was used to raise the campsite gate at 2:46 a.m. on May 31, 2007, RP 1284-86, or,

adjusting for the 11 to 12 minute time difference, RP 1381-82, at 2:34 to 2:35 a.m. RP 1382.

The defendant was arrested on June 8, 2007. RP 1446-47; RP 1373-77. At the time of his arrest, he had the card which was used to access the campsite gate in the early morning of May 31, 2007, in his pocket, RP 1380-82, and he had \$7,052.00 in cash in his possession. RP 1309; RP 1243-44. The defendant also had the receipt that Budlong had gotten from the store at 11:57p.m. on May 30, 2007, in the center console of his Infiniti, RP 01/09/09 47, RP 1465-66, which he was in fact driving at the time of his arrest. RP 1373-76.

That receipt had a blood stain on it, RP 01/09/09 29, which was from the defendant. RP 01/09/09 48. The defendant had been injured, as well. He appeared to have “an abrasion on his forehead right at the hairline”, “some healing cuts and abrasions on his fingers right at the – like the nail bed area”, “what appeared to be faint scratch marks on his right cheek that appeared to be scabbed over”, RP 1413, and “some scabbed over abrasions” on his elbow area. RP 1414. The defendant admitted that he received these injuries on May 30, 2007, the same day as the assault on Charlotte Budlong. RP 1417. He claimed that he slipped on a pile of firewood. RP 1417.

There was also blood found throughout the defendant’s Infiniti, which he was driving in Tacoma on May 30, 2007. RP 01/09/09 18 – 33. Forensic Scientist Karen Green “found what appeared to be two blood

stains on the exterior of the vehicle. One was around the edge of the gas gap [cap], and the other was on the driver's side exterior door, the door handle." RP 01/09/09 18. She found another blood stain "on the interior panel of the driver's door" which "was right near the gas cap release button," RP 01/09/09 23-24, and another "small blood stain" inside of "the door pull", "[a]s you pull the door shut behind you, that recessed area where your hand would go, there is a small blood stain in there." RP 01/09/09 24. "Underneath the driver's seat was a white towel" that "had a small blood stain along one edge." RP 01/09/09 25. General swabs of the steering wheel and gearshift knob also had "positive phenolphthalein reaction[s]", RP 01/09/09 26, indicating that there may be blood on these surfaces. See RP 01/09/09 21. There was "another blood stain" on the center console of the defendant's vehicle. RP 01/09/09 27. There was a blood stain "at the driver's side door fold." RP 01/09/09 31. There "was a blue bag, a nylon bag" taken from the rear passenger area with "blood stains on it". RP 01/09/09 32.

On June 8, 2007, after the defendant was arrested and given the *Miranda* warnings, RP 1447-48, see RP 21-168 (CrR 3.5 hearing), Detectives Miller and Wade interviewed him for "[a] little over an hour." RP 1449; RP 1405.

While at that interview, the defendant "was wearing a gold ring on his left finger". RP 1408. Detective Wade noticed that "the design, the shape of the ring was flat and rectangular" and that it "looked similar" in

shape and size to “an injury” on Budlong’s “shoulder, back area.” RP 1408. That ring was found to have blood on it. RP 01/09/09 44.

During the interview, itself, the defendant acknowledged that he and Budlong had had “some arguments previously because of him cheating on her.” RP 1405-06. Police confronted the defendant with the fact that he was on surveillance video on the day of the this incident driving his Infiniti, but the defendant continued to insist that he was driving his Ford Bronco. RP 1406.

The defendant continued to deny that he was involved in the assault on Budlong, RP 1405. When detectives “told him that [they] didn’t think he went to Charlotte’s house on that day with the intention of hurting her,” but “that things just got out of control”, however, the defendant “nodded his head like he was in agreement”. RP 1406-7. The defendant said that “he considered Sheryl to be like a daughter to him.” RP 1407. Detectives then told the defendant that “if he truly did care for Sheryl like he said he did, and if he considered her to be like a daughter to him then... she deserved to know the truth about what happened to her mom.” RP 1407. While saying this, the defendant “seemed like he was getting emotional.” RP 1407-8. His “eyes were welling up and he was sitting there clenching his jaw”. RP 1408.

The defendant called three witnesses, but did not, himself testify at trial. *See* RP 1578-1626.

C. ARGUMENT.

1. THE DEFENDANT’S CONVICTIONS SHOULD BE AFFIRMED BECAUSE, VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FORM WHICH A RATIONAL TRIER OF FACT COULD HAVE FOUND THAT THE DEFENDANT WAS THE PERSON WHO COMMITTED THESE CRIMES.

In a criminal case, a defendant may challenge the sufficiency of the evidence before trial, at the end of the State’s case in chief, at the end of all of the evidence, after the verdict, and on appeal. *State v. Lopez*, 107 Wn. App. 270, 276, 27 P.3d 237 (2001). “In a claim of insufficient evidence, a reviewing court examines whether ‘any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,’ ‘viewing the evidence in the light most favorable to the State.’” *State v. Brockob*, 159 Wn.2d 311, 336, P.3d 59 (2006)(quoting *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). Thus, “[s]ufficient evidence supports a conviction when, viewing it in the light most favorable to the State, a rational fact finder could find the essential elements of the crime beyond a reasonable doubt.” .” *State v. Cannon*, 120 Wn. App. 86, 90, 84 P.3d 283 (2004). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (quoting *State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997)). All reasonable inferences from the evidence must

be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn. 2d 192, 201, 829 P.2d 1068 (1992). “Determinations of credibility are for the fact finder and are not reviewable on appeal.” *Brockob*, 159 Wn.2d at 336.

In the present case, the jury found the defendant guilty of four crimes: burglary in the first degree as charged in count I, robbery in the first degree as charged in count II, attempted murder in the second degree, a lesser included crime of attempted murder in the first degree charged in count III, and assault in the first degree as charged in count IV. CP 93-97.

The elements of these crimes were set out in the court’s instructions, and specifically in instruction 8, which pertained to burglary in the first degree, instruction 16, which pertained to robbery in the first degree, instruction 26, which, pertained to attempted murder in the second degree, and instruction 29, which, pertained to assault in the first degree. CP 54-92. *See* Appendix A.

The defendant acknowledges that “what happened to Ms. Budlong is not in dispute” and that the only issue is “the identity of her attacker and the person who stole her keys, cell phone and truck.” Brief of Appellant, p. 16. Therefore, the defendant is conceding that the crimes of burglary in the first degree, robbery in the first degree, attempted murder in the second degree, and assault in the first degree were committed by someone, but arguing that there was insufficient evidence to show that they were committed by him. This is simply not the case.

There was more than sufficient evidence to identify the defendant as the perpetrator of these crimes.

First, the crimes were all committed in a very narrow window of time during which the defendant was the only person to have contact with the victim, Charlotte Budlong. With respect to the timeframe, the jury learned that, on May 30, 2007, Budlong went to work around 1:00 p.m. and worked until around 11:30 p.m. RP 874. She actually left work at 11:46 p.m. RP 1138. She testified that she “stopped at the store” on her way home, RP 873, 876-77, and store surveillance video showed Budlong “purchasing a chocolate milk and a cheeseburger and a couple packs of smokes” at that store at 11:57 p.m. RP 1473-74. So, Budlong must have arrived at her residence after 11:57 p.m. on May 30, 2007. Budlong testified that she remembered coming home in her 2002 Ford Explorer Sport Track, setting a gas can on her front porch, and opening her front door. RP 877, 897. When Budlong parked her Ford Explorer that night, it was in “fine” condition with no broken windows. RP 881. She testified, “I don’t remember anything else.” RP 877, 882, until “[w]aking up in the hospital”. RP 882. A 911 caller reported the sound of breaking glass in the area where Budlong’s vehicle was found at 1:14 a.m. on May 31, 2007. RP 1139. Budlong’s Ford Explorer was then found to have struck a fence at 1:18am on 5/31/07. RP 1127. Sheryl Galmon, Budlong’s daughter, found Budlong laying on couch “covered in blood”, RP 419, 473-4, 485-6, 517, with blood throughout her home later that day. RP

419; See RP 441, RP 445, RP 518-520; RP 559, RP 647-51, 653; RP 774-6; RP 1121. It would be reasonable for the jury to infer from these facts that the crimes which left Budlong “covered in blood” and resulted in her vehicle striking a fence occurred sometime between the time that she arrived home healthy with her truck in fine condition, and the time at which her truck was found, without her, to have struck the fence. Because, all reasonable inferences must be drawn in favor of the State, this inference must be drawn. Therefore, the evidence showed that the crimes were committed sometime between 11:57 p.m. on May 30, 2007, and 1:18 a.m. on May 31, 2007, a period of only 81 minutes.

The defendant was the only person shown to have had contact with Budlong during this 81-minute period. The jury heard that the receipt that Budlong had gotten at the ARCO Service Station at 11:57 p.m. on May 30, 2007, was later found, not in Budlong’s jacket, where she had apparently placed it, RP 1510-11, but in the center console of the defendant’s Infiniti. RP 01/09/09 47; RP 1465-66. Because that receipt could only have come into Budlong’s possession at 11:57 p.m., *see* RP 1510-11, RP 01/09/2009 5, RP 1473-74, and the defendant did not have any contact with Budlong after the 81-minute period during which the crimes were committed, RP 678-9, RP 801-802, RP 888, the defendant must have obtained that receipt from Budlong during that 81-minute period in which the crimes were committed. In other words, the defendant must have had contact with Budlong during the brief 11:57 p.m. to 1:18

a.m. period in which the crimes against her were committed. No one else was shown to have had any contact with her during that period. See RP 1 – 1785.

This conclusion is supported by the fact that the defendant admitted to being in Tacoma at the time of the crimes despite living elsewhere, and by the fact that he apparently returned home just after the crimes were committed. Specifically, although the defendant lived at a “campground site” at Lake Trask, RP 404-5, which was “45 minutes to 50 minutes” by car from Tacoma, RP 1378, he admitted to being in Tacoma, where the crimes took place, at the time of those crimes. *See, e.g.* RP 1154. Equally telling, the defendant appeared to have returned home immediately after the crimes were committed. According to the campsite’s computer system, the defendant’s Lake Trask access card was used to access the campsite gate at 2:46 a.m. on May 31, 2007. RP 1284-86; RP 1362-63; RP 1379. Detectives found that the computer was eleven to twelve minutes fast in recording the time the cards were used. RP 1381-82. So, the actual time that the card was swiped was 2:34 to 2:35 a.m. In other words, the defendant’s access card was used to enter the Lake Trask campsite 76 to 77 minutes after Budlong’s Explorer crashed in Tacoma. RP 1379-82, which assuming he took the 45 to 50-minute direct route, would have left him over twenty spare minutes. Given that the defendant had been in Tacoma and that it was his access card that was being used, the jury could easily have inferred that it was the defendant

who returned to his home at 2:35 a.m. The jury knew that the victim's truck collided with the fence at 1:18 a.m. RP 1127. According to Detective Turner's testimony, it was a 45 to 50 minute commute back to Lake Trask. RP 1379-80. Therefore, the jury could easily have inferred that the defendant was not only in Tacoma at the time of the crimes, but that he was in Tacoma to commit those crimes, because he returned home in the middle of the night almost immediately after those crimes were committed.

This inference is confirmed by testimony that a man matching the defendant's description, driving a car matching that of the defendant, was seen pulling the apparent attempted murder weapon from the victim's Explorer soon after it collided with the fence. Specifically, Jose Hernandez-Morenos, indicated that he heard the victim's Ford Explorer crash into his neighbor's fence and then went to look at the scene. RP 718-19. He testified that a man who was driving a white "Infiniti J-30", RP 724, pulled over, got out, went to Budlong's Explorer, and grabbed a pipe, which was at least ten inches long from inside the Explorer, RP 721-73. Because the jury heard that Budlong's injuries were "blunt force trauma", *see, e.g.*, RP 1121-22, it could infer that this pipe, found in her vehicle, was the weapon that caused such trauma.

Hernandez-Morenos, who was 25 years of age at the time, described the man as an "[b]lack" man, who was "an older person, older than 35", who "looked like he was off work because he looked kind of

dirty, not clean, or maybe like kind of worn out clothes.” RP 726. The defendant was a man of apparent African heritage who was older than 35. *See* RP 621; CP 1-3. Moreover, the man seen by Hernandez-Morenos retrieved a pipe from Budlong’s truck, and the jury knew that the defendant had told Michael Barker that “he kept a steel bar in his car for protection.” RP 1065. Further, the man seen taking the pipe from Budlong’s Explorer was driving a white Infiniti J-30. The defendant owned an “off-white” Infiniti J-30 at the time, RP 409-10, RP 902, and was seen driving that Infiniti J-30, on May 30, just hours before the Explorer crashed in the early morning of May 31. RP 684; RP 1156. The jury could, therefore, rightly infer that the man matching the description of the defendant, retrieving a pipe like that belonging to the defendant, driving a car exactly like that owned and being driven by the defendant, who entered a vehicle belonging to the ex-girlfriend of the defendant, was in fact the defendant. Indeed, for purposes of the Court’s analysis here, such an inference must be drawn. When it is, it becomes clear that the defendant was not only in contact with the victim during the 81-minute period in which the crimes were committed, but that he was seen retrieving what could be the attempted murder weapon from her wrecked vehicle just after they were committed. The jury could, therefore, rightly infer that the defendant’s removal of this pipe demonstrated his consciousness of guilt of the crimes with which he was charged and of which it found him guilty.

A similar inference could be drawn from the fact that the defendant apparently fabricated stories about his contact with the victim on the day of the crimes, about what he was driving, and about when he returned home. The defendant began by telling inconsistent stories to detectives about when he had last seen Budlong. RP 677-9. He first told detectives that he had last seen her in March, 2007, some two months before the incident at issue here. RP 678. Some twenty minutes later, however, the defendant told detectives that he had last seen Budlong on the day of the incident, May 30, 2007, at about 11:00 a.m. RP 678-9. The defendant then told Det. Miller that he met with Budlong “at a gas station at 74<sup>th</sup> and South Tacoma Way”. RP 1154. In an effort to confirm this last story, Detective Miller reviewed the gas station’s security video for the hours during which the defendant said that meeting occurred, but “was never able to locate the victim’s vehicle, his vehicle, him, the victim, anything.” RP 1166. The jury was left with at least two versions of events, which were utterly inconsistent with each other, and apparently inconsistent with the extrinsic evidence. The jury could properly infer that the defendant did not admit to such contact because he knew that the purpose and content of his contact with Budlong was criminal.

The defendant was also apparently untruthful about which vehicle he was driving on May 30 to 31, 2007. The defendant told Detectives Hill and Turner, and then Detective Miller that he was driving his white Ford Bronco. *See, e.g.*, RP 1156. He also told them that he had gone to the

liquor store on May 30, 2007, and “grabbed some beer.” RP 1155. So, Detectives “went to the Washington State Liquor Store there in the 5400-block of Hunter Street” and requested video of the time that the defendant claimed to be buying beer. RP 1173-74. The defendant was seen on that video driving not his Ford Bronco, but his white Infiniti J-30, RP 1178-83, a car “consistent” with that seen at one of the crime scenes by Hernandez-Morenos just hours later. RP 1183. A paper bag containing the two 40-ounce bottles of Rainier Ale that he bought were found in the trunk of the Infiniti after the defendant’s arrest. RP 1458-59. The Ford Bronco was found on the defendant’s property and “appeared not to have been driven.” RP 684. The defendant certainly would have no reason to be untruthful about which vehicle he had been driving that day unless he had in fact used the Infiniti to commit the crimes of which he was ultimately found guilty.

The defendant told detectives that he picked up a prostitute named Joyce, had sex with her, and then slept in his vehicle until the next morning, RP 682, RP 1155-56, before going home around noon the next day, RP 1236, but this story was inconsistent with Lake Trask records. Computer records indicated that the defendant’s gate access card was next used to access the campsite at 2:34 a.m. on May 31, 2007. RP 1379-82. In other words, these records indicated that the defendant came home almost immediately after the crimes at issue here were committed. Why would the defendant deny coming home in the middle of the night, right

after the crimes were committed, unless he had committed those crimes and was trying to avoid responsibility.

Indeed all of the defendant's fabrications, those regarding his contact with the victim on the day of the crimes, those regarding what he was driving, and those regarding when he returned home demonstrated his consciousness of guilt of the crimes of which he was ultimately convicted.

The defendant also had injuries consistent with the attack made on Budlong during the evening of May 30 to 31, 2007. He appeared to have "an abrasion on his forehead right at the hairline", "some healing cuts and abrasions on his fingers right at the – like the nail bed area", "what appeared to be faint scratch marks on his right cheek that appeared to be scabbed over", RP 1413, and "some scabbed over abrasions" on his elbow area. RP 1414.

The defendant's blood was also found on the receipt that he obtained from Budlong and throughout his car. Forensic Scientist Karen Green "found what appeared to be two blood stains on the exterior of the [defendant's Infinity] vehicle. One was around the edge of the gas gap [cap], and the other was on the driver's side exterior door, the door handle." RP 01/09/09 18. Investigators found another blood stain "on the interior panel of the driver's door" which "was right near the gas cap release button," RP 01/09/09 23-24, and another "small blood stain" inside of "the door pull", "[a]s you pull the door shut behind you, that recessed area where your hand would go, there is a small blood stain in there." RP

01/09/09 24. "Underneath the driver's seat was a white towel" that "had a small blood stain along one edge." RP 01/09/09 25. General swabs of the steering wheel and gearshift knob also had "positive phenolphthalein reaction[s]", RP 01/09/09 26, indicating that there may be blood on these surfaces. *See* RP 01/09/09 21. There was an item inside the center console that was also found to have a blood stain on it. RP 01/09/09 29. There was a blood stain "at the driver's side door fold." RP 01/09/09 31. There was a blue "nylon bag" taken from the rear passenger area with "blood stains on it" RP 01/09/09 32.

The defendant seems to have left a personal mark on the victim, as well. He "was wearing a gold ring on his left finger and the design, the shape of the ring was flat and rectangular" and "looked similar" in shape and size to "an injury" on Budlong's "shoulder, back area." RP 1408-9.

The jury could properly have inferred from the injuries seen on the defendant, the blood found on Budlong's receipt and the blood found throughout his car, that the defendant had been injured during his late-night contact with Budlong. Moreover, given the amount of blood found in the defendant's vehicle and the ring-shaped injury left on Budlong, it could properly have inferred that the defendant received his injuries while committing the crimes at issue here.

The defendant certainly had motives to commit those crimes. Money was one motive. The defendant mentioned Budlong owing him money, RP 410, and told Budlong herself that he said that he wanted the \$1,000.00, which he had given to her earlier. RP 871. He also said that “he had money stashed throughout [Budlong’s] house”, RP 410, RP 1312-13, and that he needed “to get back in the house because he had a quantity of money hidden in the house.” RP 1313. When the defendant was arrested after the crimes, he had \$7,052.00 in cash in his possession. RP 1309; *See* RP 1243-44. The jury could have properly inferred that this large sum of cash was taken by the defendant after he got back into Budlong’s house on the night of May 30 to 31, 2007, and committed the crimes at issue here.

Jealousy was another motive. Although the defendant had dated Budlong for “approximately 11 years”, *see* RP 850-51, he found out that Budlong had a new boyfriend just prior to the crimes at issue here. *See* RP 870-71. Apparently, the defendant discovered this just two to three weeks prior to the crimes at issue, RP 870-71, and only after his invitation to Budlong for “company for the weekend” was rejected. RP 870. Then, on May 27 or 28, 2007, just two to three days before Budlong was attacked, the defendant discovered that she was engaged to be married to another man. RP 1072. Michael Barker, a mutual friend, testified that on May 27 or 28, 2007, he mentioned to the defendant “that Roy and Charlotte [Budlong] were engaged.” RP 1072. Barker indicated that

although he thought the defendant “would know that by then”, “evidently he didn’t know” and that the defendant “got pretty upset.” RP 1072. According to Barker, the defendant “just had a look on his face that he looked angry.” RP 1073. The jury could certainly see this as an emotional fire sufficient to fuel the defendant’s commission of the crimes of which it convicted him.

Perhaps even more telling were the defendant’s own statements. Sheryl Galmon, Budlong’s daughter, testified that she called the defendant a couple of days after the incident to give him an update on Budlong’s physical condition. RP 454. At this point, Budlong was still hospitalized with life-threatening injuries. *See, e.g.*, RP 932-33. According to Galmon’s testimony, when she notified the defendant of Budlong’s condition, the defendant responded by saying that “he really screwed up and he doesn’t know how he’s going to fix it.” RP 454. At one point during this conversation with the defendant, the defendant “said something about going to South Carolina,” RP 454, where he had family. RP 867. Given the context of the defendant’s statements, a rational trier of fact could easily conclude that what the defendant meant when he said he “really screwed up” was that he “really screwed up” by causing Budlong’s life-threatening injuries. In other words, a rational trier of fact could infer that the defendant was admitting guilt to the crimes charged. This seems a particularly well-founded conclusion given that the defendant then spoke of going to South Carolina, where he might hope to avoid apprehension.

This conclusion is lent even further support by the defendant's behavior when interviewed by Detectives Wade and Miller. Specifically, the defendant "nodded his head like he was in agreement" when detectives "told him that [they] didn't think he went to Charlotte's house on that day with the intention of hurting her," but "that things just got out of control." RP 1406-7. A rational trier of fact could interpret the defendant's affirmative head nodding as an adoption of the detective's statements, and therefore, as an admission of his guilt to the crimes at issue. Because, for purposes of this analysis, all reasonable inferences must be drawn in favor of the State, the Court should make the same inference.

Although the defendant told Michael Barker he had pain in his back, RP 1074, Barker noted that "he moved faster than I did." RP 1086. Barker testified that he "saw a cane on [the defendant's] trailer" but that he "didn't see him actually walking with it that [he] could remember," and that the defendant "seemed to walk pretty normal." RP 1074. Barker said, "I always thought he was in great shape, better shape than me." RP 1074. The defendant also walked around with the detective without a cane. RP 684. Park Ranger Gray testified that although he knew the defendant, RP 1547, had "had coffee with him a couple of times," and had seen him walking around, RP 1548, that he had never seen him using anything to assist him in walking like a stick or a cane. RP 1548-49. He said the defendant "walks around pretty good." RP 1549. Budlong said, that the defendant only used his cane when he went to the VA. RP 892.

Although the defendant seems to argue that that the jury could have or should have considered that the defendant was “a man with no criminal record and no history of violence”, Brief of Appellant, p. 16, such evidence was not before the jury, *see* RP 1-1626; RP 01/09/09 1-72, would probably have been inadmissible, *see State v. Mercer-Drummer*, 123 Wn. App. 625, 116, P.3d 454 (2005), and would have been inaccurate in that the defendant apparently had “two felony convictions”. RP 1773.

The defendant admits that there is no dispute that the crimes at issue were committed by someone. Brief of Appellant, p. 16. Given the argument above, and viewing the evidence in the light most favorable to the State, there was sufficient evidence from which a rational trier of fact could have found that the defendant was the person who committed these crimes. Therefore, there is sufficient evidence of the crimes of which the defendant was convicted and the defendant’s convictions should be affirmed.

2. THE TRIAL COURT PROPERLY REFUSED TO VACATE THE DEFENDANT’S VERDICT OF GUILTY TO FIRST-DEGREE ASSAULT BECAUSE THAT VERDICT DID NOT VIOLATE THE DEFENDANT’S DOUBLE JEOPARDY RIGHTS WHERE THE TRIAL COURT DID NOT REDUCE THAT VERDICT TO JUDGMENT AND DID NOT SENTENCE HIM FOR THAT CRIME.

The double jeopardy clause of the Fifth Amendment to the United States Constitution provides that no person shall “be subject for the same

offense to be twice put in jeopardy of life or limb.” U.S. Const. Amend. V. It applies to the states through the due process clause of the Fourteenth Amendment. *State v. Wright*, 165 Wn.2d 783, 801, 203 P.3d 1027 (2009)(citing *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)). The Washington State Constitution similarly mandates that no person shall “be twice put in jeopardy for the same offense.” Wn. Const. Art. I, sec. 9. Washington’s double jeopardy clause “offers the same scope of protection as its federal counterpart.” *State v. Adel*, 136 Wn.2d 629, 632, 632, 965 P.2d 1072 (1998)(citing *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)). The double jeopardy clause encompasses three separate constitutional protections:

It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same crime.

*Id.*, 127 Wn.2d at 100.

With respect to the third protection, “[d]ouble jeopardy applies if the multiple punishments cannot survive the ‘same elements test’”, *State v. Trujillo*, 112 Wn. App. 390, 409-10, 49 P.3d 935 (2002), *see Blockburger v. U.S.*, 284 U.S. 299, 52 SCt. 180, 76 L.Ed. 306 (1932), or “if the court finds clear evidence that the Legislature intended to impose only a single punishment.” *State v. Valentine*, 108 Wn. App. 24, 28, 29 P.3d 42 (2001). Finding “it unlikely that the Legislature intended to

punish the same assaultive act both as assault and attempted murder,” *Id.*, Division One concluded that it was a double jeopardy violation to punish the same act as both a completed assault in the first degree and an attempted murder in the second degree. *Id.* at 26.

This Court agreed “that a defendant convicted of alternative charges may be judged and sentenced on one only, and that the verdict on the lesser merges into the greater when the judgment on the greater charge is final and no longer subject to appeal.” *State v. Trujillo*, 112 Wn.App. 390, 411, 49 P.3d 935 (citing *State v. Gohl*, 109 Wn. App. 817, 824, 37 P.3d 293 (2001)). “Therefore, where the jury returns a verdict of guilty on each alternative charge, the court should enter a judgment on the greater offense only and sentence the defendant on that charge without reference to the verdict on the lesser offense.” *State v. Trujillo*, 112 Wn.App. 390, 411, 49 P.3d 935 (Div. 2 2002); *State v. Womac*, 160 Wn. 2d 643, 660, 160 P.3d 40 (2007). *See State v. Ward*, 125 Wn. App. 138, 104 P.3d 61 (2005)(finding that there was no double jeopardy violation where the trial court entered judgment and sentenced the defendant on only the second-degree murder despite receiving verdicts of guilty to both second-degree murder and manslaughter). Thus, although, “a trial court must vacate a charge that it has reduced to judgment but chooses not to sentence”, that is not the case where the trial court never reduces the

alternate charge to judgment. *State v. Turner*, 144 Wn. App. 279, 282, 182 P.3d 478, review granted by 165 Wn.2d 1002, 198 P.3d 512 (2008)(citing *State v. Womac*, 160 Wn.2d 643, 660, 160 P.3d 40 (2007)).

In *Turner*, the defendant was found guilty of second-degree assault and first-degree robbery, but the trial court did not reduce the second-degree assault conviction to judgment. *Turner*, 144 Wn. App. at 280. Instead, the court entered a judgment and sentence pertaining to the first-degree robbery and signed an order

indicating that (1) a jury found Turner guilty of both the first degree robbery count and the second degree assault count, (2) the second degree assault charge merged into the robbery charge, and (3) the trial court would vacate the assault charge for purposes of sentencing.

*Id.* at 281. The Court found that, where “the trial court did not reduce Turner’s second degree assault conviction to judgment”, did not sentence him on that assault, and did not include any information about it in his judgment and sentence, “Turner’s second degree assault conviction did not subject him to double jeopardy” and affirmed that conviction. *Id.* at 283.

In the present case, the jury did return verdicts of guilty to attempted murder in the second degree in count III and assault in the first degree in count IV. CP 95-97. Like *Turner*, however, the trial court did not reduce the defendant’s first degree assault conviction to judgment, did not sentence him for that assault, and, indeed, did not include any

information about it in the defendant's judgment and sentence. *See* CP 117-131. Because the trial court did not reduce the defendant's first-degree assault conviction to judgment, and did not sentence him for that conviction, under *Turner*, *Trujillo*, and *Ward*, the trial court did not violate the defendant's double jeopardy rights. Therefore, the Court should affirm the judgment entered below.

Although the defendant argues for the opposite conclusion, his argument is based on clearly distinguishable caselaw.

The defendant quotes Division One's decision in *Gohl* for the proposition that "conviction, and not merely imposition of sentence, constitutes punishment", *State v. Gohl*, 109 Wn. App. 817, 822, 37 P.3d 293, Brief of Appellant, p. 20, but this proposition only raises the question of what constitutes a "conviction" for double jeopardy purposes. In *Gohl*, the defendant was convicted of both two counts of attempted first degree murder and two counts of first degree assault, but sentenced on only the attempted murder convictions. *Id.* at 819. Although not explicitly stated, it appears that the jury's verdicts of guilty to the assault charges were reduced to judgment because the trial court imposed deadly weapon sentencing enhancements pertaining to both of them. *Id.* at 820. Given that the trial court in *Gohl* reduced the assault convictions to judgment, it

would seem that the “conviction” to which the *Gohl* Court referred was a jury verdict of guilty that had been reduced to judgment by the court.

This understanding of “conviction” for double jeopardy purposes is consistent with Division One’s later holding in *Ward*. The defendant there was found guilty by jury of second-degree felony murder and manslaughter. The trial court “sentence[d] Ward on only the second degree felony murder conviction” and “did not mention the jury’s finding of guilt on the first degree manslaughter charge.” *Ward*, 125 Wn. App. at 142. While Division One agreed that “convicting and sentencing a defendant for both second degree felony murder and first degree manslaughter for a single homicide would violate the state and federal guarantees against double jeopardy”, it found that “Ward was not convicted and sentenced to both” because “the judge entered judgment and sentenced Ward only on the second degree felony murder charge”. *Id.* In other words, the court concluded that there was no conviction of manslaughter for double jeopardy purposes because the trial court did not reduce the jury verdict pertaining to manslaughter to judgment.

Similarly, this Court in *Trujillo* dealt with a case in which defendant was found guilty by jury of both first-degree attempted murder and, in the alternative, first-degree assault, but in which the trial court “entered judgment and sentenced” the defendant “on the first degree

attempted murder charge only.” *Trujillo*, 112 Wn. App. at 400. The Court in *Trujillo* “agree[d] with *Gohl* that a defendant convicted of alternative charges may be judged and sentenced on one only”, but found that a jury verdict that is “not reduced to judgment” does not subject defendants to any future jeopardy. *Id.* at 411.

Thus, although “conviction, and not merely imposition of sentence, constitutes punishment”, *Gohl*, 109 Wn. App. at 822, a “conviction” for double jeopardy purposes requires that a jury verdict be reduced to judgment.

In the present case, the trial court did not reduce the defendant’s challenged first-degree assault conviction to judgment, did not sentence him on that assault, and did not include any information about it in his judgment and sentence. Therefore, under *Ward, Trujillo, and Turner*, that conviction did not subject him to double jeopardy and should be affirmed.

The defendant next discusses *State v. Womac*, 160 Wn. 2d 643, 160 P.3d 40 (2007), and notes that the Court found that the trial court’s failure to vacate two counts “violated Womac’s double jeopardy protections because he committed a single offense against a single victim, but received three convictions for that single offense.” Brief of appellant, p. 21. *Womac*, however, is clearly distinguishable from the present case. In *Womac*, the Supreme Court quoted *Trujillo* for the proposition that a

verdict not reduced to judgment “does not subject the appellants to any further jeopardy”, and therefore, that only “if the jury’s verdict *was in fact reduced to judgment*,” should the trial court enter an order vacating.

*Womac*, 160 Wn.2d at 660. The defendant in *Womac* was found guilty by jury of homicide by abuse, second degree felony murder, and first degree assault for the death of his son. *Id.* at 647. The trial court “entered judgment on all three convictions”. *Id.* Therefore, the Supreme Court found that “there *was* a double jeopardy violation because *Womac*’s judgment included all three convictions”. *Id.* at 659.

This is not so in the present case. In this case, the trial court did not reduce the disputed assault in the first degree guilty verdict to judgment. Therefore, this verdict does not subject the defendant to any further jeopardy and need not be vacated.

As noted above, this is the same result reached by this Court in *Turner*, 144 Wn. App. 279. Although the defendant criticizes this Court’s opinion in *Turner* as “incorrect”, his argument is unpersuasive.

The defendant first argues that *Turner* “ignored the express language in both *Womac* and *Gohl* that a conviction by itself is punishment for double jeopardy purposes.” Brief of Appellant at p. 23-24, but this is simply not the case. Rather, the Court in *Turner* agreed that “*Womac* makes it clear that in order to avoid double jeopardy, a trial court

must vacate a charge that it has reduced to judgment but chooses not to sentence.” *Turner*, 144 Wn. App. at 282. In other words, the Court in *Turner* acknowledged that a conviction by itself is punishment for double jeopardy purposes. What the Court in *Turner* did not do was adopt the idea that a verdict by itself is a conviction for double jeopardy purposes, *Id.* at 283, but neither did *Womac* or *Gohl* or any other case cited by the defendant.

Second, the defendant argues that the Court in *Turner* “dismissed the distinction that *Womac* made between cases where the crimes are charged in the alternative as opposed to separate numbered counts.” Brief of Appellant, p. 24 (citing *Turner*, 144 Wn. App. at 283, *Womac*, 160 Wn.2d at 658). The Court in *Turner* did not “dismiss” the distinction noted in *Womac*. It addressed it and properly determined that it was not dispositive in the Supreme Court’s analysis. Specifically, *Turner* found that “[t]he *Womac* court noted that the defendant in that case was not charged in the alternative, and then based its decision to vacate the conviction on the fact that the trial court reduced the defendant’s convictions to judgment.” *Turner*, 144 Wn. App. at 283 (citing *Womac*, 160 Wn.2d at 660). Indeed, *Womac* itself, at the page cited in *Turner*, held that “there *was* a double jeopardy violation because *Womac*’s judgment included all three convictions; therefore, vacation of the

convictions for Counts II and III is required.” *Womac*, 160 Wn.2d at 660. Only then did the Supreme Court note that “[a]lso Womac was never charged in the alternative”. *Id.*

Even assuming that this language is not dicta, however, it is irrelevant to the present case because the crimes at issue here, attempted murder in the first degree and assault in the first degree, were charged in the alternative. CP 1-3.

Lastly, the defendant argues that “*Turner, Ward, and Trujillo* also overlook the fact that a non-vacated second conviction can still be revived in the future,” Brief of Appellant, p. 24, but again, this is simply not the case. As noted above, the court in *Trujillo* held “that a defendant convicted of alternative charges may be judged and sentenced on one only, and that the verdict on the lesser merges into the greater when the judgment on the greater charge is final and no longer subject to appeal.” *State v. Trujillo*, 112 Wn.App. 390, 411, 49 P.3d 935 (Div. 2 2002)(citing *Gohl*, 109 Wn. App. at 824). Such a procedure eliminates the defendant’s concern over the future revival of any Constitutionally-objectionable verdict.

Because the trial court did not reduce the defendant's verdict of guilty to first-degree assault to judgment, and did not sentence him for that crime, the trial court did not violate the defendant's double jeopardy rights by not vacating that verdict. Therefore, the trial court should be affirmed.

D. CONCLUSION.

As argued above, viewing the evidence in the light most favorable to the State, there was clearly sufficient evidence from which a rational trier of fact could have found that the defendant was the person who committed the crimes of which he was convicted. Moreover, because the trial court did not reduce the defendant's verdict of guilty to the first-degree assault to judgment and did not sentence the defendant for that crime, the trial court did not violate the defendant's double jeopardy rights by not vacating that verdict. Therefore, the defendant's convictions and the verdict of guilty to the assault in the first degree charge in count IV should be affirmed.

DATED: March 11, 2010.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney



Brian Wasankari  
Deputy Prosecuting Attorney  
WSB # 28945

FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY Cm  
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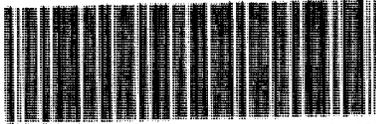
Certificate of Service:

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

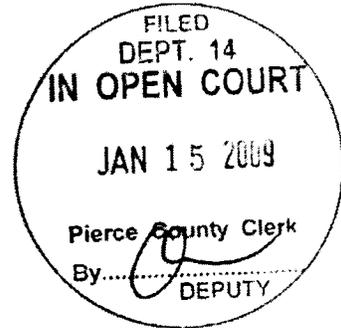
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Date Signature

## **APPENDIX “A”**

ORIGINAL



07-1-03073-7 31300748 CTINJY 01-15-09



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 07-1-03073-7

vs.

ROBERT RUFUS WILLIAMS

Defendant.

**COURT'S INSTRUCTIONS TO THE JURY**

DATED this 14 day of January, 2009.

JUDGE

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It *would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence.* I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 3

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 4

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 5

The defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way.

INSTRUCTION NO. 6

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 1

A person commits the crime of burglary in the first degree when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein, and if, in entering or while in the building or in immediate flight therefrom, that person or an accomplice in the crime is armed with a deadly weapon or assaults any person.

INSTRUCTION NO. 8

To convict the defendant of the crime of burglary in the first degree, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 30th day of May, 2007, the defendant entered or remained unlawfully in a building;
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein;
- (3) That in so entering or while in the building or in immediate flight from the building the defendant was armed with a deadly weapon or assaulted a person; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 9

A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.

INSTRUCTION NO. 10

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result, which constitutes a crime.

INSTRUCTION NO. 11

For the purposes of Counts I and II , deadly weapon means any weapon, device, instrument, substance, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

INSTRUCTION NO. 12

*Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.*

INSTRUCTION NO. 13

An assault is an intentional touching or striking of another person, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive, if the touching or striking would offend an ordinary person who is not unduly sensitive.

INSTRUCTION NO. 14

A person commits the crime of robbery in the first degree when in the commission of a robbery or in immediate flight therefrom he or she is armed with a deadly weapon or inflicts bodily injury.

INSTRUCTION NO. 15

A person commits the crime of robbery when he or she unlawfully and with intent to commit theft thereof takes personal property, not belonging to the defendant, from the person or in the presence of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial. The taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom it was taken, such knowledge was prevented by the use of force or fear.

INSTRUCTION NO. 16

To convict the defendant of the crime of robbery in the first degree, as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 30th day of May, 2007, the defendant unlawfully took personal property, not belonging to the defendant, from the person or in the presence of another;

(2) That the defendant intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person;

(4) That the force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5)(a) That in the commission of these acts or in immediate flight therefrom the defendant was armed with a deadly weapon, or

5(b) That in the commission of these acts or in the immediate flight therefrom the defendant inflicted bodily injury;

(6) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements (1), (2), (3), (4) and (6) and either of the alternative elements (5)(a) or (5) (b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (5)(a) or (5)(b) has been proved beyond a reasonable doubt. As long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), (5) or (6) then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 17

Theft means to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services.

INSTRUCTION NO. 18

Bodily injury, physical injury or bodily harm means physical pain or injury, illness or an impairment of physical condition.

INSTRUCTION NO. 19

A person commits the crime of attempted murder in the first degree when, with intent to commit that crime, he or she does any act which is a substantial step toward the commission of that crime.

INSTRUCTION NO. 20

To convict the defendant of the crime of attempted murder in the first degree as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 30<sup>th</sup> day of May, 2007, the defendant did an act which was a substantial step toward the commission of murder in the first degree;
- (2) That the act was done with the intent to commit murder in the first degree;
- (3) That the intent to cause the death was premeditated; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 21

A substantial step is conduct, which strongly indicates a criminal purpose and which is more than mere preparation.

INSTRUCTION NO. 27

A person commits the crime of murder in the first degree when, with a premeditated intent to cause the death of another person, he or she causes the death of such person.

INSTRUCTION NO. 23

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

INSTRUCTION NO. 2A

The defendant is charged in Count III with attempted murder in the first degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of attempted murder in the second degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

INSTRUCTION NO. 25

A person commits the crime of attempted murder in the second degree when, with intent to commit that crime, he or she does any act which is a substantial step toward the commission of that crime.

INSTRUCTION NO. 26

To convict the defendant of the lesser included crime of attempted murder in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 30th day of May, 2007, the defendant did an act which was a substantial step toward the commission of murder in the second degree;
- (2) That the act was done with the intent to commit murder in the second degree; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 21

A person commits the crime of murder in the second degree when with intent to cause the death of another person but without premeditation, he or she causes the death of such person.

INSTRUCTION NO. 28

A person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he or she assaults another by any force or means likely to produce great bodily harm or death.

INSTRUCTION NO. 29

To convict the defendant of the crime of assault in the first degree, as charged in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 30th day of May, 2007, the defendant assaulted Charlotte Budlong,

(2) That the defendant acted with intent to inflict great bodily harm;

(3) That the assault resulted in the infliction of great bodily harm upon Charlotte Budlong; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 30

Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

INSTRUCTION NO. 31

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 32

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the judicial assistant. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and five verdict forms. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

When completing the verdict forms, you will first consider the crime of Burglary in the First Degree as charged in Count I. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form I the words "not guilty" or the word "guilty," according to the

decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form I.

You will then consider the crime of Robbery in the First Degree as charged in Count II. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form II the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form II.

You will then consider the crime of Attempted Murder in the First Degree as charged in Count III. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form ~~II~~ the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form III

If you find the defendant guilty on verdict form III, do not use verdict form III-A. If you find the defendant not guilty of the crime of Attempted Murder in the First Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Attempted Murder in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form III-A the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form III-A.

You will then consider the crime of Assault in the First Degree as charged in Count IV. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form IV the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form IV.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror must sign the verdict form(s) and notify the judicial assistant. The judicial assistant will bring you into court to declare your verdict.

You will also be given special verdict forms for the crimes charged in counts I through IV. If you find the defendant not guilty of these crimes, do not use the special verdict forms. If you find the defendant guilty of these crimes, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."

INSTRUCTION NO. 33

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime in Counts I through IV.

A deadly weapon is an implement or instrument, that has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are examples of deadly weapons: blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, any knife having a blade longer than three inches, any razor with an unguarded blade, and any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.