

No. 39103-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JAMES LEROY LINDSAY, SR.,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Brian Tollefson

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's act of accepting the jury's verdict after the courthouse had closed violated Mr. Lindsay's right to a public trial and the public's right to access to the court.

2. Pierce County Jail guards' seizure of Mr. Lindsay's legal materials from his jail cell violated his Sixth Amendment right to counsel.

3. The imposition of convictions for robbery, kidnapping and assault all as a result of the same act violated double jeopardy.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The right to a public trial is guaranteed by both the Sixth Amendment of the United States Constitution and article I, sections 10 and 22 of the Washington Constitution. Under the First Amendment, the public has a right of access to trial proceedings. To protect these rights, the trial court seeking to close all or part of a trial must weigh five requirements set forth by the Washington Supreme Court in *State v. Bone-Club*,¹ and enter specific findings justifying the closure order. A violation of this right is not susceptible to a harmless error analysis. Where the trial judge accepted the jury's verdict at approximately 9 p.m. after the

¹ *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

courthouse had been closed without weighing the five *Bone-Club* factors, must this Court reverse the ensuing convictions for a violation of Mr. Lindsay's right to a public trial and the public's right to access to the courts?

2. A defendant has the right under the Sixth Amendment and article I, section 22 to counsel which carries with it the right to confer and consult with counsel during the entirety of the criminal proceeding. The State violates the right to counsel when it seizes a jailed defendant's legal materials which include attorney-client correspondence without justification. Dismissal of the proceeding is the proper remedy for such a seizure. Is Mr. Lindsay entitled to dismissal of his conviction and sentence where the State unjustifiably seized and destroyed his legal materials including his correspondence with his attorney?

3. A defendant has the constitutional right to be free from being placed twice in jeopardy. Multiple punishments for the same act where the Legislature has not authorized such multiple punishment violates double jeopardy. Imposition of convictions for kidnapping and robbery where the kidnapping is incidental to the robbery violates double jeopardy. Where the kidnapping conviction here was merely incidental to the robbery of Mr. Wilkey, did the trial

court violate double jeopardy when it entered convictions for kidnapping and robbery?

4. The merger doctrine is a derivative of double jeopardy and provides that where one offense elevates the degree of another offense, imposing convictions for both violates double jeopardy. Here, the assault conviction provided the force to elevate the robbery allegation to first degree. Did the court violate double jeopardy when it imposed convictions for second degree assault and first degree robbery for the same act?

5. Where the assault conviction provided the force to prove abduction for the kidnapping conviction, did the trial court err in failing to merge the assault into the kidnapping, thereby violating double jeopardy?

C. STATEMENT OF THE CASE

Lawrence Wilkey and Jennifer Holmes were in a seven year romantic relationship beginning in 1998. RP 1745. The two initially lived on the Key Peninsula in Pierce County, and in March 2004 moved to a home in Ponderay, Idaho. RP 1768. In the summer of 2005, Ms. Holmes opened a massage business, where she ended up meeting appellant, James Lindsay. RP 1813, 6685-56. In the fall of 2005, Ms. Holmes and Mr. Lindsay's relationship became a

romantic one. RP 6656. On October 4, 2005, Ms. Holmes told Mr. Wilkey that their relationship was over; she had met someone else, and was getting married. RP 1818.

Mr. Wilkey continued to live in the Idaho home with Ms. Holmes. On November 5, 2005, Mr. Wilkey decided to move out of the home. RP 1822. On that day Ms. Holmes, her three daughters and Mr. Lindsay went on an all day railroad trip and returned home to a virtually empty house. RP 6710-16.

Over the course of eight separate trips, Mr. Wilkey moved items from inside the house he claimed were his, as well as a vehicle and trailer, and moved them to a storage area. RP 1843-61. Beginning on November 7, 2005, Mr. Wilkey moved the items in the storage area to Lakebay in Pierce County where he had rented a single wide trailer. RP 1863-65. During January and February 2006, Mr. Wilkey collected the items in storage in Idaho and moved them to Lakebay. RP 1871.

On October 22, 2005, Ms. Holmes called the Bonner County Sheriff and reported the loss of the items and named Mr. Wilkey as being responsible for their loss. RP 5346-49, 6742. After investigating, the sheriff decided to not to pursue the matter. RP

6744.² Ms. Holmes contacted a private investigator, who was able to locate several addresses for Mr. Wilkey. RP 6778. Through a further investigation, Ms. Holmes narrowed the addresses down to just a few. RP 6778.

On March 26, 2006, Ms. Holmes and Mr. Lindsay drove from Idaho to Pierce County and found the trailer in which Mr. Wilkey was residing. RP 6788. Sometime between 7:30 and 8:30 p.m., Ms. Holmes and Mr. Lindsay arrived at Mr. Wilkey's trailer. RP 1897-98. Mr. Lindsay knocked on the door. RP 7059. Mr. Wilkey answered the door, then turned and ran away. RP 7061. Ms. Holmes and Mr. Lindsay entered the trailer where Mr. Lindsay and Mr. Wilkey scuffled. RP 2970, 7072-73. Mr. Lindsay admitted using zip ties to restrain Mr. Wilkey in a chair so he could not interfere. RP 2974. Ms. Holmes walked through Mr. Wilkey's trailer, and then she and Mr. Lindsay began loading items into their own trailer. RP 7074-99. The two loaded up many of the items Mr. Wilkey had taken from Ms. Holmes' house, then drove back to Ponderay, Idaho. RP 2997-98. Ms. Holmes asserted she was merely using self-help to repossess her items. RP 7199.

² The Bonner County Sheriff's Department considered the matter a civil dispute because Ms. Holmes and Mr. Wilkey had cohabitated together for six years and shared expenses. RP 5997. The Sheriff's Department urged Ms. Holmes to contact a civil attorney. RP 5983.

Mr. Wilkey was able to release himself from the restraints and made his way to a neighbor's home where he was able to contact the Pierce County Sheriff's Department. RP 1950. Mr. Lindsay and Ms. Holmes were subsequently arrested in Idaho at Ms. Holmes' residence by members of the Ponderay Police Department. RP 2766-70.

Ms. Holmes and Mr. Lindsay were charged in Pierce County with first degree burglary, first degree robbery, first degree kidnapping, first degree assault and four counts of theft of a firearm. CP 92-97. Following an extremely lengthy jury trial, the jury found Mr. Lindsay guilty of first degree burglary and first degree robbery, the lesser degree offenses of second degree kidnapping and second degree assault, and one count of a theft of a firearm. CP 382-85, 387, 394. The jury acquitted Mr. Lindsay of three of theft of a firearm counts, and refused to find Mr. Lindsay had used a firearm in the commission of the robbery, burglary, and kidnapping. CP 386, 388-89, 391-93.³

³ Ms. Holmes was similarly convicted of these offenses, but was convicted of the lesser offense of unlawful imprisonment. 3/6/09RP 45-49. Ms. Holmes was also acquitted the other three theft of a firearm counts. *Id.*

D. ARGUMENT

1. THE COURT'S ACT OF RECEIVING THE VERDICT AFTER BUSINESS HOURS OF THE COURTHOUSE VIOLATED THE CONSTITUTIONALLY PROTECTED RIGHTS TO A PUBLIC TRIAL AND TO PUBLIC ACCESS TO THE COURT PROCEEDINGS

On March 6, 2009, at approximately 8 p.m., the jury notified the court it had reached verdicts in the case. 3/6/09RP 28. Since it was after the courthouse had closed for the day, the court inquired about available access into the courthouse for members of the public. 3/6/09RP 30. Mr. Lindsay and Ms. Holmes urged the court to seal the verdicts until the next day when the courthouse would be open. 3/6/09RP 31-32. The State asserted that having a security guard check the entrance every few minutes would adequately protect the defendants' and public's rights to open proceedings. 3/6/09RP 32-33. The State also expressed no objection to Mr. Lindsay and Ms. Holmes' suggestion that the verdicts be sealed until the next day. 3/6/09RP 34. Over defense objection, after discovering one juror would be unable to return the next day, the court went ahead and received the jury's verdict. 3/6/09RP 35-54.

Mr. Lindsay and Ms. Holmes subsequently moved the court for a new trial on, among other bases, the court's receiving of the verdict after business hours which violated their rights to a public trial and the public's right to access to the courts. CP 404-50; RP 8939-50. The motion noted that the hours posted for the courthouse are 8:30 to 4:30, and that the court accepted the verdicts well after 8 p.m. RP 8941-42. Counsel for Ms. Holmes noted:

In this case, this was obviously an issue of great concern to the State. [Prosecutor] Robnett, when she appeared for taking the verdict in Mr. Sheeran's absence, immediately started talking about how the courthouse was in fact open and how her Deputy Mikey Sommerfield would stand by the door and let anybody in. And all of that is completely – I mean, that argument is a red herring because there's no way that the public and the police – or the public and the press would know the courthouse was open, they would know that they could come there, and so that was a denial of [Ms. Holmes'] constitutional rights.

...

Frankly, I think it's absurd to think that anybody in the general public would arrive at the courthouse after 9:00 p.m. on a Friday night or any night with the expectation of viewing legal proceedings in action. It's closed. It's closed. Says that on the door. Nobody's going to come to court then.

RP 8945-46. Mr. Lindsay specifically joined Ms. Holmes' motion regarding the courthouse closure issue. RP 8970-74.

The court summarily denied the motion:

All right. Well, let's start with the first motion, motion when the verdict was taken. I wasn't able to find a case from our state about limitations on taking verdicts to the business hours of the building. And in the limited amount of time I had, I wasn't able to find a federal case on that point either. There was a case cited in Ms. Corey's brief about a closed courtroom during the taking of a verdict but that doesn't apply here because the courtroom was open. The issue was whether or not the courthouse was open, and the Court made an extra effort to make sure that the courthouse was open during the taking of the verdict.

RP 8981.

a. The federal and state constitutions provide the accused the right to a public trial and also guarantee public access to court proceedings. Public criminal trials are a hallmark of the Anglo-American justice system. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564-73, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (plurality) (outlining history of public trials from before Roman Conquest of England through Colonial times). "A trial is a public event. What transpires in the court room is public property." *State v. Coe*, 101 Wn.2d 364, 380, 679 P.2d 353 (1984), *quoting Craig v. Harney*, 331 U.S. 367, 374, 67 S.Ct. 1249, 91 L.Ed.2d 1546 (1947).

Both the federal and state constitutions guarantee the accused the right to a public trial. The Sixth Amendment provides, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial” Article I, section 22 of the Washington Constitution also guarantees “[i]n criminal prosecutions, the accused shall have the right to . . . a speedy public trial.”

The public also has a vital interest in access to the criminal justice system. The Washington Constitution provides, “Justice in all cases shall be administered openly, and without unnecessary delay.” Const. art. I, § 10; see *also* U.S. Const. amends. 1, 6. The clear constitutional mandate in article I, section 10 entitles the public and the press to openly administered justice. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); *Federated Publications Inc. v. Kurtz*, 94 Wn.2d 51, 59-60, 615 P.2d 440 (1980). Public access to the courts is further supported by article I, section 5, which establishes the freedom of every person to speak and publish on any topic. *Federated Publications*, 94 Wn.2d at 58. In the federal constitution, the First Amendment’s guarantees of free speech and a free press also protect the right of the public to attend a trial. *Globe Newspaper*, 457 U.S. at 603-05; *Richmond Newspapers*, 448 U.S. at 580 (plurality).

Although the defendant's right to a public trial and the public's right to open access to the court system are different, they serve "complimentary and interdependent functions in assuring the fairness of our judicial system." *Bone-Club*, 128 Wn.2d at 259.

The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.

Id., quoting *In re Oliver*, 333 U.S. 257, 270 n.25, 68 S.Ct. 499, 92 L.Ed. 682 (1948).

Open public access to the judicial system is also necessary for a healthy democracy, providing a check on the judicial process. *Globe Newspaper*, 457 U.S. at 606; *Richmond Newspapers*, 448 U.S. at 572-73 (plurality). Criminal trials may provide an outlet for community concern or outrage concerning violent crimes. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 509, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (*Press-Enterprise I*). When trials are open to the public, citizens may be confident that established, fair procedures are being followed and that deviations from those standards will be made known. *Press-Enterprise I*, 464 U.S. at 508. Openness thus "enhances both the basic fairness of the

criminal trial and the appearance of fairness so essential to public confidence in the system.” *Id.* at 501. The role of public access to the court system in maintaining public confidence was also noted by the Washington Supreme Court.

We adhere to the constitutional principle that it is the right of the people to access open courts where they may freely observe the administration of civil and criminal justice. Openness of courts is essential to the courts’ ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity.

Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993).

As stated recently by this Court in *State v. Paumier*, the federal constitution “resolves any question about what a trial court must do before excluding *the public* from trial proceedings, including *voir dire*.” 155 Wn.App. 673, 230 P.3d 212, 219 (2010) (emphasis added), *citing Presley v. Georgia*, ___ U.S. ___, 130 S.Ct. 721, ___ L.Ed.3d ___ (2010).

By shutting out the public without first considering alternatives to closure and making appropriate findings explaining why closure was necessary, the trial court violated Paumier’s *and the public’s right* to an open proceeding.

Paumier, 155 Wn.App. at 219. (emphasis added).

b. The court's actions violated Mr. Lindsay's right to a public trial. In order to protect the defendant's constitutional right to a public trial, a trial court may not conduct secret or closed proceedings "without, first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings justifying the closure order." *State v, Easterling*, 157 Wn.2d 167, 175, 137 P.3d 825 (2006). The five criteria are "mandated to protect a defendant's right to [a] public trial." *In re the Personal Restraint of Orange*, 152 Wn.2d 795, 809, 100 P.3d 291 (2004) (emphasis in original).

The test requires:

1. The proponent of closure or sealing must make some showing [of a compelling state interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right;
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests;
4. The court must weigh the competing interests of the proponent of closure and the public;
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59.

The presumption of openness may be overcome only by a finding that closure is necessary to “preserve higher values” and the closure must be narrowly tailored to serve that interest. *Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), citing *Press-Enterprise I*, 464 U.S. at 510. Moreover, the trial court must enter specific findings identifying the interest so that a reviewing court may determine if the closure was proper. *Waller*, 467 U.S. at 45.

Regarding whether a courtroom is closed, in *State v. Momah*, the Supreme Court rejected the Court of Appeals holding that there was no closure of the courtroom when the trial judge held portions of *voir dire* in chambers, stating “we find the trial court . . . closed the courtroom . . .” 167 Wn.2d 140, 145, 217 P.3d 321 (2009).

In Mr. Lindsay’s case, the trial court initially noted that *Waller* did not apply since the courtroom was open. The court misconstrued the rights violated. Although the trial court was correct that its *courtroom* was open, the court overlooked the fact the *courthouse* was closed, rendering irrelevant whether the courtroom was open since the public was excluded.

Further, as noted, the rendering of a verdict is a critical stage, one at which the defendant and the public have a right to attend. Contrary to the trial court's conclusion, the courthouse was closed. The sign announcing business hours for the court indicated the courthouse was closed at 4:30 p.m. and the court took the verdict some four hours later. In addition, the courthouse doors were locked and anyone wishing to gain entrance, was required to wait until the security guard arrived on his rounds, screened the individual, and then let them in. This despite the sign stating the courthouse was closed. Finally, there was no indication that there were security guards at *all* of the entrances to the courthouse rather than just a single entrance. As a consequence, the trial court's actions violated the Sixth Amendment and article I, section 10 since the courtroom was closed.

c. The court's actions of accepting the verdict after business hours violated the public's right to an open courtroom.

The requirements for protecting the public's right to open courtrooms "mirrors" the requirements used in criminal cases. *Easterling*, 157 Wn.2d at 175. The court may not close the courtroom without "first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings

justifying the closure order.” *Id.*, citing *Bone-Club*, 128 Wn.2d at 258-59; and *Ishikawa*, 97 Wn.2d at 37; see also *Easterling*, 157 Wn.2d at 174-75 (trial court must “resist a closure motion except under the most unusual circumstance.”) (emphasis in original).

A member of the public is not required to assert the public’s right of access in order to preserve this issue for appeal.

Easterling, 157 Wn.2d at 176 n.8. Further, the court has an independent duty to assure the public’s right to an open courtroom. *Presley*, 130 S.Ct. at 724-25.

In *Easterling*, even though the issue was raised for the first time in the petition for review, the Supreme Court reversed a criminal conviction due to the trial court’s closure of the courtroom during a pre-trial hearing that solely involved the co-defendant, whose case had previously been severed from the defendant’s. *Id.* at 174, 178, 180 n.11. There was no objection to the courtroom closure, yet the court’s failure to articulate a sufficiently compelling reason for closing the hearing to the public violated both the public’s and the defendant’s rights to an open and public trial. *Id.* at 179.

This decision to close a part of a criminal trial to the public runs afoul of the article I, section 10 guarantee of providing open access to criminal proceedings. It

also runs contrary to this court's consistent position of strictly protecting the public's and the press's right to view the administration of justice. *Accord Eikenberry*, 121 Wn.2d 205; *Ishikawa*, 97 Wn.2d 30.

Easterling, 157 Wn.2d at 179.

Easterling held the public has a right to access court proceedings unless there is a compelling need for closure. Generic, and even reasonable, concerns for juror privacy do not trump the constitutional right of public proceedings. *Presley*, 130 S.Ct. at 725.⁴

Two courts from the federal circuits have addressed similar issues, and in both cases, the circuit court has reversed the trial court's action after finding the trial court had violated both the defendant's right to a public trial and the public's right to open access. In *Walton v. Briley*, the trial court held two sessions of the trial, the sessions which encompassed the State's entire case, after the courthouse had closed, thus violating the First and Sixth

⁴ This Court's decision in *State v. Wise*, 148 Wn.App. 425, 442-43, 200 P.3d 266 (2009), *review granted*, ___ Wn.2d ___ (July 9, 2010), ruling that defendant lacks standing to challenge the public's right to open proceedings, has been overruled *sub silentio* by the United States Supreme Court in *Presley*, 130 S.Ct. at 723 (The Court has further held that the public trial right extends beyond the accused and can be invoked under the First Amendment. *Press-Enterprise, Co. v. Superior Court of Cal., Riverside County*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (*Press-Enterprise I*). This requirement, too, is binding on the States. *Ibid.*).

Amendments. 361 F.3d 431, 433-34 (7th Cir. 2004). The Court noted that:

The record of this case fails to show that the court even considered the four-part (*Waller*) test. While this may be due to the fact the closure was inadvertent and merely a result of trial court Judge Reyna's honorable desire to "get it done", nevertheless, the judge's devotion to work is not an interest sufficient to overcome Walton's constitutional guarantee of a public trial.

Id. at 433 (citation to the record omitted). The Court further noted that "[w]hether the closure was intentional or inadvertent is constitutionally irrelevant." *Id.*

Similarly, in *United States v. Canady*, the matter had been tried to the court as a bench trial after the defendant waived his right to a jury trial. 126 F.3d 352, 355 (2nd Circuit. 1997), *cert. denied*, 522 U.S. 1134 (1998). The trial court did not announce its verdict in open court, rather the court mailed its verdict to the parties. Despite the fact the defendant never objected to the court's failure to render the verdict in open court, the Second Circuit held the court's action violated the defendant's right to be present and the public's right to access to the courts. 126 F.3d at 362-63.

It is plain to us that the moment that the district court announces its decision is a "stage" of the trial, perhaps the most critical one from the defendant's perspective.

. . . .
We see no reason why a defendant's presence is less critical when the court instead of the jury, renders its decision as to the ultimate issue of whether the defendant is guilty or innocent.

Id. at 361-62.

Regarding the public's right to an open access and the defendant's right to a public trial, the *Canady* Court held:

In view of our long history of public open trials, we hold the failure to publicly announce in open court the decision following a criminal bench trial is an error of constitutional dimension which affects the framework of the trial itself and is not subject to harmless error review.

126 F.3d at 364.

As noted regarding Mr. Lindsay's right to an open trial, the rendering of a verdict is a critical stage, one at which the public had a right to attend. The trial court had an independent duty to assure the public's access to the courts. Having the security guard check the doors periodically is nonsensical in light of the notice provided by the business hours sign indicating the courthouse was closed. This is especially true since there was no indication the guard was checking more than one entrance to the courthouse rather than merely standing next to a single entrance. As a consequence, the

trial court's actions violated the First Amendment and article I,
section 10.

d. Mr. Lindsay is entitled to reversal of his convictions and remand for a new trial. The remedy for a violation of the public's right of access is remand for a new trial. *Easterling*, 157 Wn.2d at 179-80. In *Easterling*, the court rejected the possibility that a courtroom closure may be *de minimus*, even for a limited closure applicable to a limited hearing for a separately charged co-defendant. 157 Wn.2d at 180 ("a majority of this court has never found a public trial right violation to be *de minimus*."); accord, *State v. Erickson*, 146 Wn.App. 200, 211, 189 P.3d 245 (2008); *State v. Duckett*, 141 Wn.App. 797, 809, 173 P.3d 948 (2007). The *Easterling* Court further emphasized, "[t]he denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis." *Easterling*, 157 Wn.2d at 181; *State v. Frawley*, 140 Wn.App. 713, 721, 167 P.3d 593 (2007).

The trial court's error in taking the jury's verdict when the courthouse was closed requires reversal of Mr. Lindsay's conviction and remand for a new trial.

2. THE SEIZURE OF MR. LINDSAY'S LEGAL MATERIALS BY JAIL GUARDS VIOLATED HIS CONSTITUTIONALLY PROTECTED RIGHT TO COUNSEL

During the presentation of Ms. Holmes' case, counsel for Mr. Lindsay moved the court for a mistrial because of a search by jail guards of Mr. Lindsay's cell and the guards' subsequent seizure and destruction of Mr. Lindsay's attorney-client correspondence. RP 5186. The jail guards seized a notebook from Mr. Lindsay's cell:

In going through with [Mr. Lindsay], and one of the things that [he] – without divulging any privileged information that [he] might have given to me, one of the things that [he] is indicating is missing is a small pad that's a legal-type pad but of smaller size that contained notes and questions that are pertaining to this case.

In particular, the questions that he had written down regarding the testimony of Darla Creveling appears to be missing and is not in the paperwork that he had. And that – it causes me a great deal of distress to understand that this is out there and that this is happening.

. . . .
It harms my ability to work with Mr. Lindsay in regard to eliciting cross-examination material regarding this witness that might have been on that pad, because we were preparing for witnesses that we were looking at for trial, makes me ineffective to a certain extent, in helping him try this case.

RP 5185-86.

The trial court denied Mr. Lindsay's motion for a mistrial without prejudice, noting:

[Mr. Franz] wasn't in custody. He was, I presume, taking notes and preparing his examination of the witness. And Mr. Lindsay is represented by an attorney, which means the person who asks all the questions is the lawyer. And the fact that Mr. Lindsay may have wanted some questions asked doesn't necessarily mean that Mr. Franz would ask the questions anyway.

RP 5190-91.

Later that day, defense counsel was able to clarify with the Pierce County Jail what was searched and seized from Mr.

Lindsay's cell:

[Correctional Officer] Lyon indicated he didn't see [Mr. Lindsay's legal binder]. If it was in the newspapers then it may have been thrown out, but [the officer] indicated that he didn't see it. And all I can tell you is that Mr. Lindsay has indicated to me that one of his notebooks is missing. And so we can't – and it's got – we've been through that notebook before. It does have trial materials in it and it's now missing. So I have no explanation for the Court as to where it is. Clearly, neither did [Correctional Officer] Lyon.

I will indicate to the Court that the information that was on the notebook when he and I – when Mr. Lindsay and I were talking had issues that deal with our trial preparation that not only was for witnesses that we've already gone over but also for witnesses that we intend to call or that we expect that Ms. Corey is going to call. So, I have no explanation.

RP 5302-03.

Several days later, defense counsel again raised the issue of the seizure and destruction of Mr. Lindsay's attorney-client communications and renewed the motion for a mistrial:

I've spoken to [Correctional Officer] Lyon and he could provide no further information regarding the materials that had been looked at in Mr. Lindsay's room, and he is still missing one of the notebooks I was told – I described to the Court before, a half-size notebook. There is no information further regarding where that could have gone or what happened to it.

So it is my understanding from Mr. Lindsay and that he had notes on it from this trial and for this trial, and in fact I had written some notes in it also and it does appear to be missing. So I just need to make sure that the Court understands that the record is out there regarding that.

RP 5582-83. The trial court again denied the motion for a mistrial, but incorrectly noted: “[t]he jail is not part of the prosecutor's office, and motion for mistrial is denied.” RP 5584.

a. A defendant has an unfettered right to confer and consult with counsel during the pendency of a criminal matter. The right to counsel is protected by article I. section 22 of the Washington State Constitution and by the Fifth and Sixth Amendments of the United States Constitution. *United States v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *State v. Cory*, 62 Wn.2d 371, 373, 382 P.2d 1019 (1963). This right is

fundamental and is not a luxury. *Cronic*, 466 U.S. at 653-54. So fundamental is this right that it has been recognized as the right to effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). This right to effective assistance cannot be disregarded by the State. *Reece v. Georgia*, 350 U.S. 85, 90, 76 S.Ct. 167, 100 L.Ed. 77 (1955).

A defendant cannot receive effective assistance of counsel without the right to confer with defense counsel in private. *Cory*, 62 Wn.2d at 373-74. The opportunity to confer is necessary to provide access to counsel. *State v. Sargent*, 49 Wn.App. 64, 75, 741 P.2d 1017 (1987), *rev'd on other grounds*, 111 Wn.2d 641, 762 P.2d 1127 (1988). Attorney-client conversations are constitutionally protected and cannot be invaded by the state. *In re Bull*, 123 F.Supp. 389 (D.Nev.1954); *Cory*, 62 Wn.2d at 373-74. Thus, the intrusion into the attorney-client private communications violates the right to counsel. *Cory*, 62 Wn.2d at 376-77.

The Fifth and Sixth Amendments “unqualifiedly guard the right to assistance of counsel, without making the vindication of the right depend upon whether its denial resulted in demonstrable prejudice.” *Cory*, 62 Wn.2d at 376, *quoting Coplton v. United States*, 89 U.S. App. D.C. 103, 191 F.2d 749, 759 (1951).

The jail guards' seizure and destruction of his attorney-client communications relating solely to this matter violated his right to confer with counsel thus violating his constitutionally protected right to counsel.

b. The seizure of Mr. Lindsay's attorney correspondence violated his right to counsel as it constituted an unconstitutional intrusion into the attorney-client relationship. In *Cory, supra*, the seminal Washington case on the issue of governmental intrusion into the attorney-client relationship, jail staff surreptitiously recorded Mr. Cory and his attorney's confidential consultations in a jail conference room. Once evidence of the recordings came to light, the trial court refused to dismiss the action but agreed to exclude from trial the confidential conversations and any evidence derived from the illegal eavesdropping. *Cory*, 62 Wn.2d at 372. The Supreme Court disagreed with this remedy and ordered the action dismissed based upon the outrageous actions of the State:

It is our conclusion that the defendant is correct when he says that the shocking and unpardonable conduct of the sheriff's officers in eavesdropping upon the private consultations between the defendant and his attorney, and thus depriving him of his right to effective counsel, vitiates the whole proceeding. The judgment and sentence must be dismissed.

Cory, 62 Wn.2d at 371; accord *Stuart v. State*, 118 Idaho 932, 935, 801 P.2d 1283 (1990) (“We hold that the monitoring and recording of attorney-client conversations may deny a defendant the constitutional right of effective assistance of counsel [and] the constitutional right to due process[.]” (citations omitted)).

In *State v. Garza*, a case presenting a similar scenario to that presented here, the jail seized and read defendant’s legal documents which included private communications with his attorney. 99 Wn.App. 291, 296-97, 994 P.2d 868, *review denied*, 141 Wn.2d 1014 (2000). This Court followed the *Cory* decision and found the jail guard’s actions violated the defendant’s right to counsel. *Id.* In *Garza*, the jail officers discovered evidence of a possible escape attempt and conducted an extensive search of the jail pod where the evidence was discovered. As part of the search, “[t]he inmates’ personal property, including legal documents containing private communications with their attorneys, was seized and ‘gone through.’” *Garza*, 99 Wn.App. at 293. In concluding the State’s actions intruded into the private attorney-client relationship, the Court ruled:

The State's actions, although motivated by a legitimate concern over a serious security breach,

intruded into the defendants' private relationships with their attorneys. See *Bishop v. Rose*, 701 F.2d 1150 (6th Cir. 1983) (jail officers obtained defendant's statement to his attorney during a search of his cell and turned the statement over to the prosecutor); *State v. Granacki*, 90 Wn.App. 598, 601-02, 959 P.2d 667 (1998) (State conceded misconduct when detective looked at defense counsel's legal pad during courtroom recess); see also *Wolff v. McDonnell*, 418 U.S. 539, 576-77, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) (opening legal mail in presence of inmates, without reading it, accommodates prison's security concerns while protecting inmates' right to private communications with attorneys).

Garza, 99 Wn.App. at 296-297.

In crafting a remedy, the Court concluded the guards' actions were purposeful but remanded for a hearing to determine whether the guards' actions were justified. *Garza*, 99 Wn.App. at 301. Finally, the Court noted that "[i]f on remand, the superior court finds the jail's security concerns did not justify the specific level of intrusion here, there should be a presumption of prejudice, establishing a constitutional violation." *Id.*

Here, the materials seized from Mr. Lindsay contained his thoughts, legal theories, and ideas which he planned to submit to his attorney. The correspondence also contained items on which *defense counsel* had written notes to Mr. Lindsay containing legal theories. Clearly these were the types of items the cases such as

Cory and Garza were so concerned and constituted attorney-client communications.

Further, the jail guard's actions were identical to those of the staff in *Garza*, thus constituting purposeful action. The guards were specifically searching Mr. Lindsay's cell and came upon the items as part of that search. As the *Garza* Court noted:

In this case, the superior court's written and oral findings indicate the jail officer's examination of the defendants' legal materials was purposeful. The court concluded, however, that the examination of the legal materials was justified by the jail's legitimate concerns about the attempted escape. This conclusion misses the point. Certainly the escape attempt justified the search, *but the precise question is whether the security concerns justified such an extensive intrusion into the defendants' private attorney-client communications.* This determination requires a precise articulation of what the officers were looking for, why it might have been contained in the legal materials, and why closely examining or reading the materials was required. We conclude the superior court abused its discretion by failing to resolve these critical factual questions. Without more specific factfinding, it is impossible to determine whether the officers' actions were justified. If, on remand, the superior court finds the jail's security concerns did not justify the specific level of intrusion here, there should be a presumption of prejudice, establishing a constitutional violation.

Garza, 99 Wn.App. at 301.

As in *Garza*, the only issue that remained here was whether the guard's actions were justified. There was no claim Mr. Lindsay

was attempting to escape or otherwise disrupt the jail system. The fact that he exceeded the scope of the jail's rules regarding contraband did not justify the intrusion into the attorney-client relationship.

Although the jail guard arguably did not learn anything about Mr. Lindsay's case and arguably nothing was passed along to the prosecutor's office, this is of no moment under *Garza*. In *Garza*, the Court found an improper intrusion into the attorney-client relationship *despite* the fact there was no evidence the guards had read the materials, only an allegation they *may* have. But, there was no evidence that any of the information was passed on to the prosecutor. *Garza*, 99 Wn.App. at 293-94.

The trial court's flip comment here that defense counsel was the person who would be conducting cross-examination indicates an ignorance of the impact of such an unwarranted intrusion into the attorney-client relationship. By so ruling, the court was stating the Mr. Lindsay's communication with his attorney was irrelevant, thus there was no harm. Such a statement overlooks the core right protected by the Sixth Amendment, the right of the defendant to confer with counsel.

3. IMPOSITION OF CONVICTIONS FOR ROBBERY, KIDNAPPING AND ASSAULT VIOLATED DOUBLE JEOPARDY WHERE THE ASSAULT AND KIDNAPPING SHOULD HAVE BEEN STRICKEN

a. Multiple convictions for the same act violate double jeopardy. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that “[n]o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb.” Article I, section 9 of the Washington State Constitution provides that “[n]o person shall ... be twice put in jeopardy for the same offense.” The two clauses provide the same protection. *In re Personal Restraint of Borrero*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007); *State v. Weber*, 159 Wn.2d 252, 265, 149 P.3d 646 (2006). Among other things, the double jeopardy provisions bar multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

The Legislature can enact statutes imposing, in a single proceeding, cumulative punishments for the same conduct. “With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673,

74 L.Ed.2d 535 (1983). If the Legislature intended to impose multiple punishments, their imposition does not violate the double jeopardy clause. *Id.* at 368.

If, however, such clear legislative intent is absent, then the *Blockburger* test applies. *Id.*; see *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Under this test, “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” *Id.* If application of the *Blockburger* test results in a determination that there is only one offense, then imposing two punishments is a double jeopardy violation. The assumption underlying the *Blockburger* rule is that the Legislature ordinarily does not intend to punish the same conduct under two different statutes; the *Blockburger* test is a rule of statutory construction applied to discern legislative purpose *in the absence of clear indications of contrary legislative intent*. *Hunter*, 459 U.S. at 368.

In short, when a single trial and multiple punishments for the same act or conduct are at issue, the initial and often dispositive question is whether the legislature intended that multiple

punishments be imposed. *Id.*; *State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008). If there is clear legislative intent to impose multiple punishments for the same act or conduct, this is the end of the inquiry and no double jeopardy violation exists. If such clear intent is absent, then the court applies the *Blockburger* “same evidence” test to determine whether the crimes are the same in fact and law. *State v. Calle*, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995).

Double jeopardy challenges are reviewed *de novo*. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

b. Imposition of convictions for robbery and kidnapping where the kidnapping was incidental to the robbery violated double jeopardy. Mr. Lindsay submits the kidnapping was merely incidental to the robbery, thus imposition of the conviction for kidnapping violated double jeopardy.

This Court’s decision in *State v. Korum* provides an example of kidnappings which were incidental to robberies and which this Court concluded violated double jeopardy. 120 Wn.App. 686, 86 P.3d 166 (2004), *reversed on other grounds*, 157 Wn.2d 614 141 P.3d 13 (2006). In *Korum*, the State charged the defendant with several kidnapping charges stemming from a conspiracy to rob

drug dealers in a series of home invasions. 120 Wn.App. at 689.

The perpetrators restrained the victims with duct tape while searching the homes and stealing drugs, money, and other valuables. *Id.* at 690-92. This Court determined that this restraint of the victims did not constitute separate kidnappings:

[W]e hold as a matter of law that the kidnappings here were incidental to the robberies for the following reasons: (1) The restraints were for the sole purpose of facilitating the robberies--to prevent the victims' interference with searching their homes for money and drugs to steal; (2) forcible restraint of the victims was inherent in these armed robberies; (3) the victims were not transported away from their homes during or after the invasions to some remote spot where they were not likely to be found; (4) although some victims were left restrained in their homes when the robbers left, the duration of the restraint does not appear to have been substantially longer than that required for commission of the robberies; and (5) the restraints did not create a significant danger independent of that posed by the armed robberies themselves.

Id. at 707 (footnotes omitted, emphasis added), citing *State v. Green*, 94 Wn.2d 216, 227-28, 616 P.2d 628 (1980).

The unlawful restraint of Mr. Wilkey is almost identical to the restraint in *Korum*. Mr. Wilkey was restrained so that Mr. Lindsay and Ms. Holmes could complete the robbery and flee. Mr. Wilkey was not transported away from his home, and the restraints did not create a significant danger to him outside of the robbery. In

addition, the prosecutor during closing argument argued the assault conviction was the force for both the robbery and for the abduction for the kidnapping, further evidencing the kidnap was merely incidental to the robbery. RP 8696-98. Because the crime was not complete until Mr. Lindsay and Ms. Holmes departed with the property, Mr. Wilkey was not bound for longer than necessary to accomplish the robbery. Thus as a matter of law, Mr. Wilkey's restraint was incidental to the robbery and the imposition of a conviction for kidnapping violated double jeopardy. *Korum*, 120 Wn.App. at 707.

This Court should find the kidnapping incidental to the robbery and strike the kidnapping conviction.

c. Imposition of convictions for first degree robbery and second degree assault where the assault was the force for the robbery violated double jeopardy. Mr. Lindsay submits the conviction for assault should have merged with the robbery as the assault was the sole evidence of the force used to elevate the robbery to first degree.

The merger doctrine is another aid in determining legislative intent, even when two crimes have formally different elements. Under the merger doctrine, when the degree of one offense is

raised by conduct separately criminalized by the legislature, it must be presumed the Legislature intended to punish both offenses through a greater sentence for the greater crime. *State v. Vladovic*, 99 Wn.2d 413, 419, 662 P.2d 853 (1983).

A person commits robbery when he or she unlawfully takes property from the person of another by force or fear. RCW 9A.56.190. If a person commits robbery while armed with or displaying a deadly weapon, or inflicts bodily injury, the crime is robbery in the first degree. RCW 9A.56.200. An assault in the second degree is committed, by among other means, intentional assault resulting in reckless infliction of substantial bodily harm. RCW 9A.36.021.

In *Freeman, supra*, the Washington Supreme Court recognized that when an assault elevates a robbery to first degree, generally the two offenses are the same for double jeopardy purposes. *Freeman*, 153 Wn.2d at 758. See also *Kier*, 164 Wn.2d at 801-02.

Freeman controls the analysis here. There, defendant Zumwalt punched a woman and stole \$300 in cash and casino chips. He was convicted of first degree robbery and second degree assault. The Supreme Court held that the two crimes merged: “[T]o

prove first degree robbery as charged [,] . . . the State had to prove [Zumwalt] committed an assault in furtherance of the robbery. . . . [W]ithout the conduct amounting to assault, [Zumwalt] would be guilty of only second degree robbery.” *Freeman*, 153 Wn.2d at 778.

Here, the jury found Mr. Lindsay guilty of second degree assault under the intent to commit a felony prong. CP 385, 394. The jury rejected the prongs of assault by means of a deadly weapon and recklessly inflicting substantial bodily harm. CP 394. The jury also found Mr. Lindsay guilty of first degree robbery, but did not find Mr. Lindsay used a firearm during the robbery. CP 383, 391. During closing argument, the prosecutor argued the force used to commit the robbery and elevate to first degree robbery was placing the zip ties on Mr. Wilkey to restrain him and keep him from preventing Mr. Lindsay and Ms. Holmes from taking the items from Mr. Wilkey’s residence. RP 8969. Thus, the force used to elevated the robbery from second degree to first degree was the evidence of the assault. Thus the assault should have merged into the robbery count. The court erred in failing to merge the two offenses.

d. Imposition of convictions for kidnapping and assault where the assault was the force necessary for the abduction violated double jeopardy. The prosecutor argued several theories of kidnapping to support the first degree kidnapping charge, which were subsequently rejected by the jury when it found Mr. Lindsay not guilty of first degree kidnapping: that Mr. Lindsay used of a firearm or that he inflicted emotional distress on Mr. Wilkey. RP 8698-99. Instead, the jury found Mr. Lindsay guilty of second degree kidnapping, which merely required an abduction. RCW 9A.40.030(1); CP 339. The jury had been instructed that abduction was accomplished through the use or threatened of deadly force. RCW 9A.40.010(2); CP 333.

As argued *supra*, the merger doctrine is a tool of statutory construction used to determine when the legislature intends multiple punishments to apply to particular offenses. *State v. Saunders*, 120 Wn.App. 800, 820, 86 P.3d 232 (2004). The doctrine applies where the legislature has clearly indicated that in order to prove a particular degree of crime, the State must prove not only that a defendant committed that crime but also that the crime was accompanied by an act that is defined elsewhere in the criminal statutes. *Saunders*, 120 Wn.App. at 820; *State v. Deryke*,

110 Wn.App. 815, 823, 41 P.3d 1225 (2002), *affirmed*, 149 Wn.2d 906 (2003). "In other words, crimes merge when proof of one crime is necessary to prove an element or the degree of another crime." *State v. Beals*, 100 Wn.App. 189, 193, 997 P.2d 941 (2000). Here, the assault provided the proof of the force necessary for abduction, thus proving the kidnapping.

In his closing argument, the prosecutor also argued Mr. Lindsay used zip ties to keep Mr. Wilkey restrained in a chair, an action which constituted an assault but also proof of the abduction. RP 8900. Thus, Mr. Lindsay's assault of Mr. Wilkey with the zip ties provided the force for the abduction, an element of second degree kidnapping. The assault had no purpose or effect independent of the kidnapping. *Freeman*, 153 Wn.2d at 778-79.

As in the case of the robbery and assault counts, the assault should have merged into the kidnapping count. This Court should order the assault stricken from the judgment and sentence.

e. The remedy for a double jeopardy violation where the two offenses arose from the same conduct is to vacate the lesser conviction. In *State v. Womac*, the Washington Supreme Court ruled that the proper remedy for a violation of double jeopardy based upon imposition of two or more convictions founded upon the same evidence is to vacate the lesser conviction. 160 Wn.2d 643, 659-60, 160 P.3d 40 (2007); accord *State v. League*, 167 Wn.2d 671, 223 P.3d 493 (2009) (“When two convictions violate double jeopardy principles, the proper remedy is to vacate the lesser conviction and remand for resentencing on the remaining conviction.”). In *Womac*, the convictions involved were homicide by abuse, second degree felony murder, and first degree assault, all based upon the same act. The trial court ruled the convictions violated double jeopardy but conditionally dismissed them, allowing for reinstatement if the greater verdict and sentence were later set aside. The Supreme Court ruled that only the homicide by abuse conviction could stand and the other two convictions *must* be dismissed. *Id.*

Here, the kidnapping and the assault should have been stricken. The assault provided the force necessary for the robbery *and* the kidnapping, and the kidnapping was merely incidental to

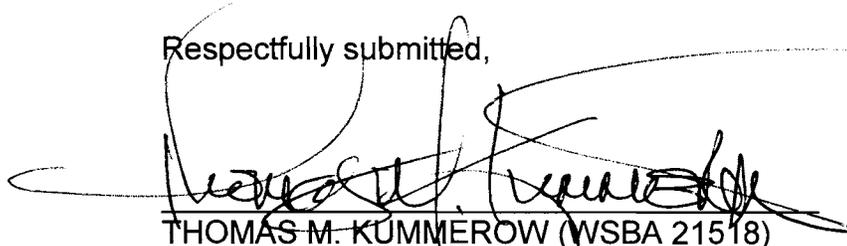
the robbery. Thus, the trial court should have stricken the assault and kidnapping counts. This Court should strike these two convictions, reverse Mr. Lindsay's sentence and remand for resentencing.

E. CONCLUSION

For the reasons stated, Mr. Lindsay submits this Court must either reverse his convictions and remand for a new trial, or remand for resentencing.

DATED this 28th day of July 2010.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over a horizontal line.

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Washington Appellate Project – 91052

Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 39103-1-II
)	<i>consolidated w/ No. 39113-9-II</i>
JAMES LINDSAY, SR.,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF JULY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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TACOMA, WA 98402-2171		
[X] JAMES LINDSAY, SR.	(X)	U.S. MAIL
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