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DIVISION II

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STATE OF WASHINGTON

NO. 42130-5-H *Kb*
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

AMANDA KNIGHT, Appellant,

v.

STATE OF WASHINGTON, Respondent,

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The court erred in enter a conviction for Assault in the Second Degree because the State failed to provide sufficient evidence that assaulted Charlene Sanders, as a principal or as an accomplice.
2. The court erred in enter a conviction for Assault in the Second Degree because the State failed to provide sufficient evidence that assaulted James Sanders, Jr., as a principal or as an accomplice.
3. The court erred when it failed to merge the Assault in the Second Degree Conviction with the Robbery conviction against Charlene Sanders.
4. The court erred when it failed to merge the Assault in the Second Degree Conviction with the Robbery conviction against Charlene Sanders.
5. Defense counsel was deficient at sentencing because he failed to inform the court that it could impose an exceptional sentence downward
6. The trial court erred when it calculated Ms. Knight's offender score because several of her convictions were the same criminal conduct as defined by RCW 9.94A.525 (5)(A).

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the State failed to provide sufficient evidence that assaulted Charlene Sanders, as a principal or as an accomplice. (Assignment of Error 1)
2. Whether the State failed to provide sufficient evidence that assaulted James Sanders, Jr., as a principal or as an accomplice. (Assignment of Error 2)
3. Whether the court erred when it failed to merge the Assault in the Second Degree Conviction with the Robbery conviction against Charlene Sanders. (Assignment of Error 3)

4. Whether court erred when it failed to merge the Assault in the Second Degree Conviction with the Robbery conviction against Charlene Sanders. (Assignment of Error 4)
5. Whether defense counsel was deficient at sentencing because he failed to inform the court that it could impose an exceptional sentence downward. (Assignment of Error 5)
6. Whether the trial court erred when it calculated Ms. Knight's offender score because several of her convictions were the same criminal conduct as defined by RCW 9.94A.525 (5)(A). (Assignment of Error 6)

III. STATEMENT OF THE CASE

1. **Procedural Facts**

On May 3, 2010, Joshua Reese, Kiyoshi Higashi, John Doe, and Amanda Knight were each charged as co-defendants with one count of Murder in the First Degree, two counts of Robbery in the First Degree, two counts of Assault in the Second Degree and Burglary in the First Degree. John Doe was later identified as Claybon Berniard. CP 451. The charges arose from the shooting death of Jim Sanders during an armed robbery in which Jim Sanders and Charlene Sanders were bound and beaten while their children remained in the house. CP 451-52.

On May 5, 2010, the State filed an amended information that charged Ms. Knight as an accomplice to First Degree Murder, First Degree burglary (two counts), First Degree Robbery (two counts), and

second degree assault (two counts). CP 6-9. The State alleged that Ms. Knight, acted as an accomplice to all of these crimes and that one of the participants in the crime was armed with a firearm when each of the crimes occurred. CP 6-9. On January 7, 2011, the State filed a second amended information that alleged that alleged each of the above counts were committed under one or more of the aggravating circumstances as defined by RCW 9.94A.535(3)(a). CP 87-91.

Mr. Higashi was the first of the four co-defendants to stand trial and the only one who stood trial before Ms. Knight. CP 452. Higashi's trial began on February 17, 2011. He was convicted on all counts and sentenced on March 11, 2011. CP 452.

2. Substantive Facts

At Ms. Knight's trial, it was essentially undisputed that Ms. Knight participated in the robbery. Ms. Knight admitted that she entered the home of the victims, on April 28, 2010, together with Higashi. RP 912. Higashi and Ms. Knight gained access to the home under the auspices of purchases a ring that the victims had advertised on craigslist. RP 910-14. Once in the home, Higashi pulled a gun out of his pocket and pointed it at Jim Sanders. RP 916-17.

Ms. Knight then, at Higashi's direction, "zip tied" Charlene Sanders's hands behind her back. RP 917-18. Then, the two other co-

defendants, Berniard and Reese, entered the home and went upstairs and brought the two children downstairs at gun point. RP 918. Ms. knight immediately ran upstairs and began to gather valuables from the home. RP 919.

While Ms. Knight was upstairs, the co-defendants began to physically assault the victims downstairs. RP 585-92. Berniard pointed a pistol at Charlene Sanders. RP 585. He then hit and kicked her in an attempt to get the combination to the safe in the house. 585-87. Berniard then began to assault James Sanders Jr. 587-92. James Sanders then broke free of his restraints and jumped up to join the fight. These assaults all occurred while Ms. Knight was upstairs. RP 919-25.

Throughout this entire incident, Ms. Knight was not armed. RP 915. As she gathered the valuable items from upstairs, Ms. Knight heard a gunshot, and ran out the front door. RP 920. After the shooting, each of the defendants except the shooter, Higashi, fled to California together and were apprehended a few days later. RP 923.

Ms. Knight testified in her defense. RP 894-1000. She did not deny most of the facts as argued by the state. Instead, Ms. Knight told the jury that she committed these acts while under duress. Specifically, she testified that co-defendant Higashi stole her gun from her when he was working on her stereo and threatened to shoot her and her family if she did

not participate in the robbery. RP 900-04. She further testified that she did not go to police immediately after the shooting because Higashi maintained possession of her gun and pointed it at her face on several occasions. RP 927.

Prior to the trial, Ms. Knight moved the court to allow her to present this defense not only for the robbery, assault, and burglary charges, but also the murder charges. CP 117-42. The court waited until the close of evidence to decide that while it would instruct the jury on duress as to the lesser charges, it would not allow Ms. Knight to argue that duress is a defense for the murder charge, instructing the jury that “Duress is not a defense to Murder in the First Degree.” CP 365 (Jury Instruction No. 34).

Ultimately, the jury found Ms. Knight guilty of all counts. CP 351. At sentencing, the State asked for a high end range sentence of 860 months. CP 450. In response, the defense asked for 723 months, what was essentially a life sentence. RP 1107. The court sentenced Ms. Knight to the 860 months as requested by the State. RP 1201.

IV. ARGUMENTS

- 1. The State failed to prove sufficient evidence that Ms. Knight committed assault in the second degree of either victim Charlene or James Sanders Jr.**

Evidence of a charge or an element of a charge is sufficient if, viewed in the light most favorable to the state, a rational trier of fact could have found guilt beyond a reasonable doubt. All reasonable inferences from the evidence must be drawn in favor of the state and interpreted most strongly against the defendant. *State v. Clark*, 143 Wn.2d 731, 769, 24 P.3d 1006 (2001). In this case, the State did not provide sufficient evidence that Ms. Knight, as a principle or as an accomplice, assaulted either of the victims by displaying a firearm or inflicting substantial bodily harm.

The jury was instructed as follows with regard to accomplice liability:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of a crime.

A person is an accomplice in the commission of a crime, if *with knowledge that it will promote or facilitate* the commission of *the crime*, he or she either: (1) solicits, commands, encourages, or requests another person to commit the crime, or (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the

criminal activity of another must be shown to establish that a person present is an accomplice.

CP 31.

These instructions are consistent with Washington case law, which states that to aid and abet another person's criminal act, one must associate oneself with the undertaking, participate in it with the desire to bring it about, and seek to make it succeed by one's actions. *In re Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979); *State v. Galisia*, 63 Wn. App. 833, 839, 822 P.2d 303, *review denied*, 119 Wn.2d 1003 (1992). "Mere knowledge or physical presence at the scene of a crime neither constitutes a crime nor will it support a charge of aiding and abetting a crime." *Wilson*, 91 Wn.2d at 491-92 (quoting *State v. J-R Distribs., Inc.*, 82 Wn.2d 584, 593, 512 P.2d 1049 (1973), *cert. denied*, 418 U.S. 949 (1974)).

Ms. Knight was convicted of assaulting (two counts) and robbing (two counts) two separate victims: James and Charlene Sanders. To convict Ms. Knight of Assault in the Second Degree for either Charlene or James Sanders Jr., the jury must have found that (1) on April 28, 2010, Ms. Knight or an accomplice (a) intentionally assaulted Charlene Sanders and thereby recklessly inflicted substantial bodily harm, ***or*** (b) assaulted Charlene Sanders with a deadly weapon. CP 345-47; CP 350. That assault could have been an intentional touching with unlawful force that was

harmful or offensive, or an act done to create a reasonable apprehension of fear in the victim. CP 345 (defining assault).

These convictions must have been based upon accomplice liability because the record does not show that Ms. Knight ever physically harmed any of the victims or that she ever even possessed a firearm. However, the state failed to prove that she (1) had knowledge that her actions would promote the assault, or (2)(a) that she solicited, commanded, encouraged, or requested another person to commit the assaults, or (2)(b) aided or agreed to aid another person in planning or committing the assaults.

The assaults in this case began while Ms. Knight was upstairs and without her knowledge. The assault of Charlene Sanders occurred when the co-defendants pulled out their weapons and physically assaulted the victims downstairs. RP 585-92. Bernard pointed a pistol at Charlene Sanders. RP 585. He then hit and kicked her in an attempt to get the combination to the safe in the house, while Ms. Knight was upstairs. 585-87. Bernard then began to assault James Sanders Jr. 587-92. Throughout this entire incident, Ms. Knight was not armed. RP 915. ,

Furthermore the assault against James Sanders Jr. was completed without the assistance or knowledge of Ms. Knight and was completed when she was upstairs. Because Co-Defendant Bernard had completed the act of the assault while Ms. Knight was upstairs and without her

knowledge, she could not have aided and abetted in the assault. She neither associated himself with the co-defendants' assaults, participated in them with the desire to bring them about, nor sought to make the crimes succeed by any actions of her own. *See Wilson*, 91 Wn.2d at 491; *Galisia*, 63 Wn. App. at 839.

Her mere presence at the scene cannot amount to accomplice liability for the co-defendants' assaults. *See Wilson*, 91 Wn.2d at 491-92. Likewise, Ms. Knight's subsequent fleeing from the scene after the gunshots could not have aided and the co-defendants to commit the physical assaults because by then, the codefendants had already completed that crime.

Because the state failed to prove that Ms. Knight had knowledge that her actions would facilitate the assaults that occurred outside her presence and because she did not solicit or aid in those assaults, this court should vacate her assault convictions.

- 2. Ms. Knight's convictions for Second Degree Assault and First Degree Robbery of both Ms. Sanders James Sanders Sr. violate double jeopardy and the assaults must merge into the robberies.**
 - a. Even if there was sufficient evidence that Ms. Knight facilitated the assaults, the jury instructions and the jury verdict were ambiguous and must be interpreted in favor of Ms. Knight.**

When a verdict form is ambiguous and the State has failed to request a jury instruction as to which specific acts constituted a particular

element of a crime, the principle of lenity requires the court to interpret that verdict in the defendant's favor. *State v. DeRyke*, 110 Wn. App. 815, 824, 41 P.3d 1225 (2002). In another merger case, *State v. DeRyke*, the defendant was convicted of both first degree kidnapping while armed with a deadly weapon and attempted first degree rape while armed with a deadly weapon after he abducted a young girl at gunpoint and took her to a wooded area where he attempted to rape her before he was frightened off by a passerby. *Id.* at 818. Just as use of a firearm can elevate a Robbery 2 into a Robbery 1, possession of a deadly weapon can elevate a robbery from second to first degree. *Id.* at 823. The jury was instructed that either kidnapping or display of a deadly weapon could elevate the alleged attempted rape to that of the first degree, but was not asked to find which act it used to reach its verdict on the attempted rape. *Id.*

In holding that the two counts merged, the *DeRyke* court concluded that “[p]rinciples of lenity require [it] to interpret the ambiguous verdict in favor of DeRyke.” *Id.* at 824.¹ In doing so the court noted that the State was free to “but chose not to, submit[] a proposed instruction that did not include kidnapping as a basis for finding DeRyke guilty of attempted rape

¹ See also *State v. Taylor*, 90 Wn. App. 312, 317, 950 P.2d 526 (1998) (interpreting ambiguous verdict in defendant's favor).

in the first degree,” which would have alleviated any ambiguity in the verdict. *Id.* at 824.

Here, just as is *DeRyke*, the jury instructions and verdict form were ambiguous at best and the trial court erred by failing to merge the Second Degree Assault convictions and the Robbery convictions.

Ms. Knight was convicted of assaulting (two counts) and robbing (two counts) two separate victims: James Sanders Sr. and Charlene Sanders. To convict Ms. Knight of Assault in the Second Degree for either Charlene or James Sanders Jr., the jury must have found that (1) on April 28, 2010, Ms. Knight or an accomplice (a) intentionally assaulted Charlene Sanders and thereby recklessly inflicted substantial bodily harm, ***or*** (b) assaulted Charlene Sanders with a deadly weapon. CP 345-47; 350. That assault could have been an intentional touching with unlawful force that was harmful or offensive, or an act done to create a reasonable apprehension of fear in the victim. CP 345 (defining assault).

Looking at both of these instructions together, it is clear that the jury instructions required either actual force or threatened force to accomplish each respective crime. However, the jury instruction for assault in the second degree allowed the jury to convict Ms. Knight on two separate bases: either by inflicting substantial bodily harm or by simply displaying a firearm. CP 345. Thus, just as the court did in *DeRyke*, this

court must construe the jury verdict as finding that the same act that constituted the assault—or “the act done with the intent to create in another apprehension and fear of bodily injury”—was also the same act that constituted the force required for robbery—“the defendant’s use or threatened use of immediate force, violence or fear of injury.”

Furthermore, in *DeRyke*, the State failed to request a jury instruction that specified which crime—kidnapping or use of a deadly weapon—elevated his attempted rape charge to a higher degree, so the court was forced to interpret that verdict in favor of the defendant. Likewise here, the State failed to request a specific instruction on which particular acts were grounds for the Robbery and which ones it found to establish the Second Degree Assault.

Just as the State was free in *DeRyke* to offer more specific jury instructions (but decided not to), the State here simply gave the jury the broadest instructions possible to obtain a conviction on all counts. Because of this failure, the court should apply the rule of lenity to the ambiguous jury instructions and verdict, just as it did in *DeRyke*. Accordingly, the rule Lenity requires the court to interpret the assault verdict as relying upon the type of assault that is most favorable to the defendant, which in this case would be a finding that the assault occurred when the co-defendant pointed the gun at Charlene Sanders, which also established the

force required to commit the robbery. As argued below, this interpretation will require merger just as in *DeRyke*.

b. The assault conviction merges into the robbery conviction.

The State may bring multiple charges arising from the same criminal conduct in a single proceeding. *State v. Kier*, 164 Wn. 2d 798, 803, 194 P.3d 212 (2008). However, state and federal constitutional protections against double jeopardy prohibit multiple punishments for the same offense. *Id.* An appellate court reviews double jeopardy challenges de novo. *Id.* A defendant may suffer multiple punishments for the same criminal act where the legislature has elevated the degree of an offense—and the severity of its punishment—and the elevating circumstances are also defined as a separate criminal offense. *Id.* at 772-73 (double jeopardy protections are the basis behind merger doctrine).

To determine whether the legislature intended multiple punishments where the degree of one offense is elevated by conduct constituting a separate offense, the court will apply the merger doctrine. *Kier*, 164 Wn. 2d at 804 (second degree assault conviction merged into first degree robbery conviction in prosecution arising out of carjacking incident, as completed assault was necessary to elevate the completed robbery to first degree). In addition, in some rare instances, even if two convictions would appear to merge on an abstract level under this analysis,

they may be punished separately if the defendant's particular conduct demonstrates an independent purpose or effect of each. *Id.*

Here, the Court violated Ms. Knight's right to be free from Double Jeopardy when failed to merge her Second Degree Assault convictions of Charlene Sanders into her Robbery in the First Degree convictions of the same victim because (1) those two crimes merged together on an abstract level in law and (2) the State did not establish at trial that each crime had an independent purpose on a factual level, i.e. that the assault was committed for any other purpose than to facilitate the robberies.

i. Each of the assault convictions merged on an abstract, factual level with the robbery convictions.

Our supreme court has twice ruled that Assault in the Second Degree merges into Robbery in the First Degree when the Assault was used in furtherance of the robbery. In *State v. Freeman*, the court concluded that the Second Degree Assault "merges" into First Robbery Assault when the assault was used to facilitate the robbery. 153 Wn. 2d at 773-78. Additionally, the State recently challenged the validity of that reasoning in *State v. Kier*, but the Court upheld its reasoning in *Freeman* and noted that "the legislature has amended the second degree assault statute since *Freeman* without taking any action in response to our decision." *Id.* (noting presumption of legislative acquiescence in judicial

interpretation where statute is amended following court decision without change to relevant portions).

Once the jury verdict is interpreted in her favor (or if this court finds that the assaults were based upon displaying the firearm rather than the physical assaults), this case thus, presents the same question as the court dealt with in *Kier* and *Freeman*: whether the defendant's "second degree assault conviction merges into [her] first degree robbery conviction." In *Kier*, the court held that the two convictions did merge because

When the definitions of first degree robbery and second degree assault are set side by side, it is clear that both charges required the State to prove that Kier's conduct created a reasonable apprehension or fear of harm. Because Kier was also charged with being armed with or displaying a deadly weapon, this was the means of creating that apprehension or fear. The merger doctrine is triggered when second degree assault with a deadly weapon elevates robbery to the first degree because being armed with or displaying a firearm or deadly weapon to take property through force or fear is essential to the elevation.

Kier, 164 Wn. 2d at 806.

Like in *Freeman* and *Kier*, the instructions for the assaults against Charlene and James Sanders Sr., interpreted in Ms. Knight's favor, required the jury to find that Ms. Knight's accomplice assaulted Ms. Sanders by pointing the gun at her. Accordingly, these crimes merged on an abstract level.

ii. The State failed to prove an independent purpose and effect between each of the assaults and the corresponding robberies as stated in *State v. Freeman*.

The second part of the merger test, as applied in *Freeman*, states that two convictions may be valid,

“even when they formally appear to be the same crime under other tests. These offenses may in fact be separate when there is a separate injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element. This exception is less focused on abstract legislative intent and more focused on the facts of the individual case. For example, when the defendant struck a victim *after* completing a robbery, there was a separate injury and intent justifying a separate assault conviction, especially since the assault did not forward the robbery.”

Freedman, 153 Wn. 2d at 778-79.

This exception does not apply merely because the defendant used *more* violence than necessary to accomplish the crime. *Id.* The test is not whether the defendant used the least amount of force to accomplish the crime; the test is whether the unnecessary force had a purpose or effect *independent of the crime*. *Id.* In making such a determination, the courts must take a “hard look at how the case was presented to the jury,” which may include looking to the charging documents and the jury instructions. *See Kier*, 164 Wn. 2d at 804.

To determine whether these crimes merged in fact, the court ***must*** look to the crime “as charged and *proved*.” *Freeman*, 153 Wn. 2d at 778.

According to *Freeman*, the question before the court is not “whether the State presented sufficient evidence to prove each individual crime,” but instead whether the State **actually proved** that a separate crime occurred and obtained a jury verdict of guilty as to that particular act. *See id.*

Here, the State here did not prove at trial that Ms. Knight the assaults committed against James Sanders Senior and of Charlene Sanders were two distinct crimes as required by *DeRyke*, because the State failed to request a jury instruction that would have established which acts (the substantial bodily harm or the display of the firearm) established the assault. Thus the court must interpret that in Ms. Knight’s favor. Reading the ambiguous jury verdict to find that Ms, Knight was an accomplice to an assault by the display of a deadly weapon, it is clear that the State failed to prove an “independent purpose or effect” of either assault because the State obviously argued that Ms. Knight’s accomplices pointed the gun at Charlene Sanders to commit the robbery. The State argued in closing that

It is against the person’s will by use of force, violence, or fear. Kyoshi Higashi pointed a gun at James Sanders. He pointed it as Charlene as well. She was beaten profusely, badly. The force or fear was used by the defendant or an accomplice to obtain or retain possession of the property. This was accomplished when he pointed the gun. It was facilitated when Amanda zip tied Charlene, put her on the ground, Higashi zip tied Jim Sanders, and his wedding ring was stolen.

RP 1002-03.

In sum, the jury instructions allowed the jury to convict Ms. Knight of both assault and robbery of the Sanders without finding an “independent purpose or effect” for each crime, contrary to Supreme Court precedent as the court laid out in *Kier* and *Freeman*. To hold that these crimes did not merge under the circumstances would allow the State to leave jury instructions vague and open ended so that they could always argue against merger because the jury “might have” convicted the defendant on separate grounds based upon separate harms. Yet, the Court could have rejected these same arguments as the court did in *Freeman*. *Id.* at 779. Consequently, the court should vacate Mr. Kim’s sentence for Assault in the Second Degree and remand the case for resentencing.

3. Defense counsel was deficient at sentencing because he failed to inform the court that it could impose an exceptional sentence downward.

To establish ineffective assistance of counsel, Ms. Knight must show that her trial attorney's performance was deficient and that she was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Failure to request an exceptional sentence downward may be objectively unreasonable and thus constitute ineffective assistance of counsel. In *State v. McGill*,² the defendant was sentenced to a prison term within the standard range for convictions on two cocaine delivery charges

² 12 Wn. App. 95, 98, 47 P.3d 173 (2002).

and one possession with intent to deliver charge. After McGill was convicted, his counsel failed to request an exceptional sentence below the standard range. *Id.* On appeal, McGill argued that his amounted to ineffective assistance of counsel. The court of appeals agreed with McGill, holding that failure to inform a sentencing court of the proper scope of its discretion when sentencing a defendant was both deficient and prejudicial. *Id.*

Here, like in *McGill*, defense counsel failed to inform the court that it would depart downward. Under the circumstances of this case, that failure was both deficient and prejudicial.

a. **Defense counsel was deficient when he failed to request an exceptional sentence downward.**

The first element of *Strickland* is met by showing that counsel's performance was not reasonably effective under prevailing professional norms. *Strickland*, 466 U.S. at 687. Counsel was deficient at sentencing because he failed to argue for an exception sentence downward under RCW 9.94A.535. The only reason for him to fail to do so would be that he falsely believed that RCW 9.94.A.010 prevented the court from imposing a lower sentence. Just as in *McGill*, the court here was not made aware that it had the authority to depart downward from the sentence when it did under RCW 9.9.94A.535.

i. The trial court could have granted an exceptional sentence downward under RCW 9.94A.535 and RCW 9.94A.589

RCW 9.94A.589 provides that when a person is sentenced for two or more serious violent offenses arising from separate and distinct criminal conduct, the sentences “shall be served consecutively to each other.” RCW 9.94A.589(a)(b). But, RCW 9.94A.535 grants a trial court the discretion to order sentences for multiple serious offenses to run concurrently as an exceptional sentence below the standard range if the court finds there are mitigating factors justifying such a sentence. RCW 9.94A.535. Prior to 2007, it was unresolved whether a court still had authority to impose an exceptional sentence downward. In *Mulholland*, the Supreme Court resolved the issue, holding that despite the seemingly mandatory language of RCW 9.94A.589(a)(b), a sentencing court has discretion to order multiple sentences for serious violent offenses to run concurrently, rather than consecutively, as an exceptional sentence under RCW 9.94A.535.³

In this case, if defense counsel had argued for an exceptional sentence downward, the court could have granted a lower sentence. At sentencing, the bulk of defense counsel’s argument was focused on whether any of Ms. Knight’s convictions should be vacated to avoid double jeopardy and merger concerns. *See* CP 401-12; CP 434-440; RP

³ *In Re Personal Restraint of Mulholland*, 161 Wn. 2d 322, 166 P.3d 677 (2007).

1072-75. In addition, defense counsel, inexplicably took the time to argue that Ms. Knight did qualify for an exceptional sentence *upward* even though the State did not argue for one in its Sentencing Memorandum or at the sentencing hearing. *See* CP 433; RP 1082. In fact, the State conceded that Ms. Knight's case was not one for which it could seek an exceptional sentence. As a result, the parties did not address whether an exceptional sentence *downward* was even possible or could have applied to the facts of this case. Under RCW 9.94A.535, at least two such circumstance could have been argued at Ms. Knight's sentencing.

First, defense counsel could have requested an exceptional sentence downward under RCW 9.94A.535 (1)(c), which allows departure for a failed defense if "the defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct." Under that statute, a trial court has broad discretion to grant a defendant's request for an exceptional sentence downward when he presents a valid and reasonable self-defense claim but falls short of convincing the jury of that defense by a preponderance of the evidence. *See State v. Pascal*, 108 Wn.2d 125, 136, 736 P.2d 1065 (1987).

Our Supreme Court has described how a “failed defense” can still allow a trial court to use its discretion to reduce the defendant’s sentence below the standard range:

The Guidelines contain a number of mitigating factors applicable in situations where circumstances exist which tend to establish defenses to criminal liability but fail. In all these situations, if the defense were established, the conduct would be justified or excused, and thus would not constitute a crime at all. The inclusion of these factors as mitigating factors recognizes that there will be situations in which a particular legal defense is not fully established, but where the circumstances that led to the crime, even though falling short of establishing a legal defense, justify distinguishing the conduct from that involved where those circumstances were not present. Allowing variations from the presumptive sentence range where factors exist which distinguish the blameworthiness of a particular defendant's conduct from that normally present in that crime is wholly consistent with the underlying principle.

Pascal, 108 Wn.2d at 136.

For instance, in *State v. Pascal*, the defendant asserted self defense (based on battered women’s syndrome) after she stabbed and killed her boyfriend. The jury convicted her of second -degree manslaughter.

Although Pascal’s presumptive sentence range was 31 to 41 months, the trial court sentenced defendant to only 90-days, consisting of 30-days of total confinement, 30-days of partial confinement, and 240-hours of community service. The State appealed the exceptional sentence, but both the appellate court and our Supreme Court affirmed the exceptional downward sentence.

The *Pascal* court held that although Pascal failed in presenting her defense and was convicted of manslaughter, “the trial judge in performing his sentencing function could evaluate the evidence of these mitigating factors and find that her actions significantly distinguished her conduct from that normally present in manslaughter.” *Id.*

That case could have been instructive for the trial court when sentencing Ms. Knight had counsel argued for an exceptional sentence downward. Here, like in *Pascal*, Ms. Knight’s actions here were much less culpable than most defendants convicted of murder, especially each other co-defendant in this case. As admitted by the State, Ms. Knight was not the shooter, nor did she physically harm any of the victims in this case because she was upstairs when the co-defendants beat and shot the victims. RP 1002-05. Ms. Knight even took the stand to assert such a defense, which ultimately failed. *See* RP 897-984.

Ms. Knight told the jury that she owned the gun that was used in the shooting, but that co-defendant Kyoshi has stolen the gun from her and used to force her to commit this robbery and one more prior to it in Lake Stevens, Washington. RP 900-01. Kyoshi told Amanda that if she did not participate in the robberies, then he was going to threaten Ms. Knight’s family and rob her. Although the jury ultimately found that the threats made by the co-defendant Kyoshi did not establish a full defense to the

crimes charged, it is very possible that the court could have found that these threats, if made, “substantially affected” Ms. Knight’s conduct, so that a below the standard range sentence would be appropriate under RCW 9.94A. 535(1)(c). But, because defense counsel never made such an appeal to the court, it is impossible to know how the court would have ruled, thus constructing ineffective assistance of counsel.

Second, defense counsel should have argued for an exceptional sentence downward under RCW 9.94A.535(1)(g), which states, “The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94.A.010.” This provision is rooted in the purposes of the SRA, which was enacted to “develop [] a system for the sentencing of felony offenders which *structures, but does not eliminate discretionary decisions* affecting sentences, and to:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve himself or herself;
- (6) Make frugal use of the state's and local governments' resources; and

(7) Reduce the risk of reoffending by offenders in the community.

RCW 9.94A.010.

In this case, Ms. Knight was convicted of numerous most serious crimes which resulted in that range. She was sentenced to a standard range sentence of 860 months. Ordinarily, a standard range sentence for this crimes—essentially a life sentence—would be appropriate. However, Ms. Knight’s case was not the typical Murder. She clearly was not the shooter and she actually used no violence throughout the crime. The record only makes clear that she knew that the robbery was going to take place and that the jury did not believe that she was acting under duress.

Yet, she still faced the same “life sentence” as all other defendants, each of whom was likely more culpable than her. Surely such a sentence could and should have been challenged at sentencing as contrary to the purposes of the SRA, namely the requirement that sentences “ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history,” and “be commensurate with the punishment imposed on others committing similar offenses.”

Moreover, a brief comparison to the applicable case law shows that the court could have granted a departure if properly informed. In *State v. Fitch*, for instance, Fitch pleaded guilty to two counts of delivery of

marijuana and one count of delivery of cocaine. *State v. Fitch*, 78 Wn. App. 546, 550, 897 P.2d 424 (1995). Each of those charges was the result of three separate controlled purchases between the Fitch and an undercover police officer, all within the span of four days. Although he had no prior criminal history, the current marijuana delivery charges increased Fitch's presumptive range to 67 to 89 months. The defendant requested an exceptional sentence downward arguing that the presumptive range was clearly excessive in light of the purposed of the SRA. The trial court agreed and imposed a sentence of 21 months, about 25% of the standard range. *Id.* at 551.

The *Fitch* court found that the courts reasons amply supported the sentence when "all three drug deliveries were controlled by the police [and] all involved small quantities of drugs delivered to the same person." *Id.*; see also *State v. Hortman*, 76 Wn. App. 454, 458, 886 P.2d 234 (1994) (purchases solicited by the police, deliveries all at the same location within a brief period of time, small amounts of cocaine); *State v. Sanchez*, 69 Wn. App. 255, 261, 848 P.2d 208 (1993) (drug buys initiated and controlled by the police, all involved the same buyer and seller, and all involved small amounts of cocaine).

By analogizing *Fitch*, *Hortman*, and *Sanchez* to this case, defense counsel could have made a convincing argument that Ms. Knight's

sentence was clearly excessive in light of the purposes of the SRA. For instance, in *Fitch*, Fitch's offender score was increased dramatically by actions that were not directly controlled by Fitch because the police conducted numerous controlled buys within a few days to obtain multiple convictions. *Fitch*, 78 Wn. App. at 550. Likewise here, Ms. Knight was found guilty of each of the crimes through accomplice liability, for the actions of her co-defendants. In fact, Ms. Knight was not the principal in any of the crimes for which she was charged. This fact alone would have lent itself as a compelling reason to justify an exceptional sentence downward, had defense counsel made such an argument.

ii. Failure to request an exceptional sentence downward was not a “tactical decision.”

As illustrated in *McGill*, it is not uncommon for the court and even defense counsel to mistakenly believe that they are entirely prevented from requesting an exceptional sentence downward because of the seemingly “mandatory language” of RCW 9.94A.589 as it applies to mandatory consecutive sentences. *McGill*, 12 Wn. App. at 95; *see also Mulholland*, 161 Wn. 2d at 331. Any attempt by the State to frame this mistake as a “tactical decision” would be meritless for several reasons.

First, given the length of time that Ms. Knight was facing (723 to months), defense counsel should have tried to use every viable legal

option to obtain a non-“box sentence,”—also known as a sentence which almost guarantees that the defendant will leave prison only when she is dead. Defense counsel specifically noted this fact at sentencing, “Unfortunately, the amount of time that is involved in these cases are effectively a life sentence.” RP 1107.

Second, this is not a case in which defense counsel is forced to choose between two conflicting arguments, and ultimately chooses the wrong one. Here, defense counsel could have (and should have) argued for an exceptional sentence downward, as detailed above, and was not prevented from asking for a low end sentence in the alternative—even though a low end sentence was still essentially a life sentence. Given the length of the low end sentence, failure to request for an exceptionally low sentence could not have been a tactical decision.

b. Ms. Knight was prejudiced by the failure to argue for an exceptional sentence downward, just as the defendant in *McGill*.

Prejudice is shown when the appellant establishes that there was a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *State v. Hendrickson*, 129 Wn. 2d 61, 77-78, 917 P.2d 563 (1996). In general, performance is deficient when it falls below an objective standard of reasonableness, but not when it is

undertaken for legitimate reasons of trial strategy or tactics. *Hortman*, 116 Wn. App. at 909.

Here, the Court imposed a sentence within the standard range. Had defense counsel argued for an exceptional sentence downward and the court granted or denied it, on appeal, this court would evaluate that decision using an abuse of discretion standard. *See State v. Batista*, 116 Wn. 2d 777, 808 P.2d 1141 (1991). However, as in *McGill*, defense counsel did not request an exceptional sentence downward. 12 Wn. App. at 95. In *McGill*, the court found that the defendant was prejudiced by his counsel's failure to not argue for a downward departure when it *could have* resulted in a lower sentence. *See id.* The court held that under similar case law, the trial court *could have* granted a downward departure, had it known that it was an option. *See id.* at 101. The State may attempt to differentiate *McGill* from the case at bar because the court expressly stated that it did not have the authority to depart downward, while the court here did not. However, such a distinction would ignore the court's reasoning in *McGill*:

A trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. Nor can it exercise its discretion if it is not told it has discretion to exercise.

Id.

The prejudice Ms. Knight suffered here is obvious. The court was not made aware that it even had the *option* of sentencing her to a lower sentence. Had the court been made aware of that option, it is entirely possible that the court could have sentenced Ms. Knight to a sentence that was below the standard range. However, because defense counsel failed to appraise the court of its discretion to impose an exceptional sentence below the standard range, the court was thus made unable to exercise that discretion, just as in *McGill*. Consequently, this court should vacate Ms. Knight's sentence and remand for resentencing, at which time, she could request an exceptional sentence downward.

4. The trial court erred when it calculated Ms. Knight's offender score because several of her convictions were the same criminal conduct as defined by RCW 9.94A.525 (5)(A).

Generally, when calculating a defendant's offender score for sentencing, the court must count all current and prior convictions. However, RCW 9.94A:525(5)(a) details one exception in which multiple prior offenses are counted as one offense: "those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a)."

While a trial court is allowed some discretion when determining whether multiple crimes constitute the same criminal conduct, if the trial court abuses its discretion or misapplies the law, the Court of Appeals

must reverse the sentencing court's conclusion of same criminal conduct. *State v. Anderson*, 92 Wn. App. 54, 62, 960 P.2d 975 (1998). Review for abuse of discretion is a deferential standard; review for misapplication of the law is not. *Id.*

RCW 9.94A.589(1)(a) defines the "same criminal conduct," as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." The trial court must determine whether *one crime individually constitutes the same criminal conduct as another*, rather than simply evaluating whether *all crimes together constitute the same criminal conduct*.

In this case, Ms. Knight was convicted of crimes against three different victims. Thus, under the "same criminal conduct analysis, those crimes against separate victims could not constitute the same criminal conduct. However, Ms. Knight was convicted of multiple crimes against each victim, and those crimes should have been counted as the "same criminal conduct" at sentencing because several crimes occurred (1) at the same time and place, (2) Ms. Knight's objective intent throughout the incident never changed from completing the robbery.

a. All crimes occurred at the "same time and place."

To constitute the same "time and place," Washington Courts have interpreted the phrase to span the length of a brief string of crimes, even

when they do not occur simultaneously. In *State v. Dunbar*, the defendant was charged with burglary in the first degree and first degree kidnapping after he broke into the victim's home, assaulted her, and then carried her off. *State v. Dunbar*, 59 Wn. App. 447, 798 P.2d 306 (1990) *abrogated on other grounds in State v. Lessley*, 118 Wn. 2d 773, 827 P.2d 996 (1992). The crime began somewhere in King County Washington when Dunbar took a hunting knife and broke into the house of his former girl friend. He waited for her to come home, and when she returned, attacked her, wrestled her to the floor, tied her up, and carried her to the trunk of her car. Dunbar drove the car toward Olympia and stopped several times. On appeal, the court reversed, holding that the two crimes encompassed the same criminal conduct for purposes of calculating defendant's offender score and remanded the case for resentencing. *Id.* at 455.

Likewise, in *State v. Green*, although a robbery and attempted murder would not merge for purposes of indictment, the court of appeals held that the crimes were part of a single, continuing sequence of events. *State v. Green*, 46 Wn. App. 92, 730 P.2d 1350 (1986) *rev'd on other grounds by State v. Dunaway*, 109 Wn. 2d 207, 743 P.2d 1237 (1987). In *Green*, the Defendant Green during the robbery of a donut shop shot an employee in the back twice, once during the initial part of the robbery and again when he returned to kill the store employee. The defendant was

convicted of first degree robbery and attempted first degree murder. All of these acts occurred during the course of the robbery and inside the store. The court of appeals held that the robbery and the attempted murder were “the same criminal conduct” and remanded the case for resentencing. *Id.*

In this case, all crimes for which Ms. Knight was convicted occurred in the same place and time. First, like in *Green*, each crime occurred within the confines of the victims’ home/place of work. *See id.* Here, each of the crimes was essentially completed while all of the co-defendants remained in the home (with the exception of the murder, which was complete upon the tragic death of James Sanders Sr.).

The string of crimes here, then, surely falls within the limits set by *Dunbar*, in which the court found that each crime occurred the same time and place even though the crimes spanned over several counties. Second, although the record here is unclear as to the amount of time that elapsed during the entire crime spree here, the record makes it clear that each of these crimes occurred either simultaneously or within a few short moments of each other. *See State v. Porter*, 133 Wn. 2d 177, 942 P.2d 974 (1997) (immediately sequential drug sales satisfy the “same time” element of Subsection (1)(a)).

Accordingly, each and every crime occurred within the same time and place as defined by RCW 9.94A.589(1)(a).

b. The intent for every crime remained the same.

Intent, as used in this analysis, “is not the particular mens rea element of the particular crime, but rather is the offender’s objective criminal purpose in committing the crime.” *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990); *In re Holmes*, 69 Wn. App. 282, 848 P.2d 754 (1993). When determining if two crimes share a criminal intent, the courts will find a single intent when (1) the defendant committed one or more crimes to further another or (2) the defendant’s intent, viewed objectively, was part of a scheme or plan and did not change substantially from one crime to the next. *State v. Flake*, 76 Wn. App. 854, 858, 932 P.2d 657 (1997); see *State v. Grantham*, 84 Wn. App. 854, 858, 932 P.2d 657 (1997).

For instance, in *State v. Anderson*, 72 Wn. App. 453, 463-64, 864 P.2d 1001 (1994) the court determined that the crimes of escape and assault encompassed the same criminal intent, where the assault was committed to effectuate the defendant’s escape. The defendant’s intent, throughout both crimes, was to escape custody. *Id.* In this case, the record establishes that Ms. Knight intended to facilitate the robbery and the burglary. However, that intent never changed throughout the entire encounter because her “objective criminal purpose” throughout the whole transaction was to take property from the victims. *See id.*

This intent is clear by an objective look at the record. At trial, many of the essential facts here were undisputed. It was undisputed that Ms. Knight entered the home of the victims, restrained one of the victims (Charlene Sanders), and then went upstairs to assist in taking valuables from the home. RP 910-14; RP 917-18. It is also undisputed that Ms. Knight did not carry a firearm and that she was the only defendant who did not. RP 920. Finally, it is undisputed that Ms. Knight was upstairs while the co-defendants physically assaulted two of the victims and killed another. RP 585-92. Once Ms. Knight heard the gun shots, she ran out of the home. RP 920.

These undisputed facts show that Ms. Knight only had one purpose throughout this brief encounter: to assist the codefendant's in stealing the run posted on craigslist and any other valuable items in the home. Corroborating this conclusion is the fact that Ms. Knight was upstairs while the violence occurred and was the only unarmed defendant in this case. Ms. Knight never physically harmed any of the defendants; she never carried a weapon. In short, she never evidenced any other objective intent than to commit a robbery inside the Sanders' family home.

c. Which crimes count against Ms. Knight's Offender score?

Based upon the analysis above, Ms. Knight's offender score should be affected by only three separate crimes, one for each victim.

First, Ms. Knight's conviction the Robbery of James Sander Sr. does not count towards her offender score because it is part of the same criminal conduct as her conviction for the Felony Murder of the same victim.

Second, Ms. Knight's conviction for the Robbery of Charlene Sanders counts towards her offender score, while her conviction as an accomplice to the assault of Ms. Sanders does not. As argued above, Ms. Knight in no way facilitated the physical assault of Charlene Sanders and the purpose of displaying the firearm was to facilitate the robbery of Charlene Sanders.

Third, because James Sanders Jr. was only listed as the victim of one crime, the assault 2, that crime counts against Ms. Knight's offender score as well unless the court finds that there was insufficient evidence of this crime, as argued above.

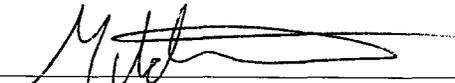
Finally, Ms. Knight's conviction for Burglary does not count, as it was part of the same criminal conduct of each of the other crimes. *See Green*, 46 Wn. App. at 92.

Because the trial court erred in not counting these crimes as the same criminal conduct, this court should vacate Ms. Knight's sentence and remand this case for resentencing.

V. CONCLUSION

For the reasons stated above, Ms. Knight respectfully requests that the court grant the relief as designated in his opening brief.

DATED this 8th day of February, 2012.



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On February 08, 2012, I filed the original copy of the attached document and proof of service upon the Court of Appeals, Division II, via U.S. Mail at 950 Broadway, Ste 300, MS TB-06, Tacoma, WA 98402-4454. In addition, a copy was also sent to the Pierce County Prosecuting Attorney's Office, Appellate Unit at County-City Building, 930 Tacoma Avenue South, Room 946, Tacoma, WA 98402-217. A copy of this brief was sent via the USPS to the appellant, Ms. Amanda Knight at DOC# 349443, Washington Corrections Center for Women, 9601 Bujacich Rd. NW, Gig Harbor, WA 98332-8300.

Dated this 8th day of February, 2012,



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