

NO. 42130-5

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

STATE OF WASHINGTON, RESPONDENT

v.

AMANDA C. KNIGHT, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Rosanne Buckner

No. 10-1-01903-2

BRIEF OF RESPONDENT

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

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2. Do defendant's convictions violate double jeopardy where the jury was properly instructed, the verdicts were not ambiguous and defendant's convictions are not the same in law and fact?

3. Did the trial court abuse its discretion in determining that defendant's crimes do not constitute the same criminal conduct after it conducted proper analysis?

4. Did defendant receive constitutionally effective assistance of counsel where defendant cannot show deficient performance or prejudice?

B. STATEMENT OF THE CASE.

1. Procedure

On May 4, 2010, the State charged defendant Amanda Knight and three co-defendants with one count of murder in the first degree for the murder of James Sanders, one count of robbery in the first degree, and one count of assault in the second degree. CP 1-3. All three counts also had a firearm enhancement. CP 1-3. The three co-defendants were identified as

John Doe (later identified as Clabon Berniard), Kiyoshi Higashi and Joshua Reese. CP 1-3. An amended information was filed on May 5, 2010. CP 6-9. The amended information clarified that the victim in count II, robbery in the first degree, was James Sanders; and that the victim of count III, assault in the second degree, was minor child Sanders. CP 6-9. The amended information also added a second count of robbery in first degree with the victim of that count being Charlene Sanders; a second count of assault in the second degree with the victim of that count being Charlene Sanders; and a count of burglary in the first degree. CP 6-9.

On January 4, 2011, defendant moved to sever her case from her co-defendants. RP 3, 39-49¹. The court initially reserved ruling on defendant's motion to sever. RP 49. However, on January 7, 2011, the State stipulated to severing defendant's case from co-defendants Higashi and Reese. RP 53. The court had previously severed defendant Berniard's case and denied the State's motion to reconsider this decision. RP 62-83. On January 7, 2011, a second amended information was filed that added the aggravators of deliberate cruelty and high degree of sophistication or planning. CP 87-91.

¹ The State will refer to the sequentially paginated volumes of the Verbatim Report of Proceedings as RP. The remaining volume will be referred to with the date of the proceeding prior to RP.

On January 4, 2012, defendant's defense of duress was discussed. RP 25. The court reserved any ruling at that time. RP 26. A CrR 3.5 hearing was held on March 28, 2011. RP 104-147. The court found all statements to be admissible. RP 147, CP 212-218.

On April 11, 2011, a corrected information was filed that corrected a scrivener's error in regards to the assault against Charlene Sanders. 4/11/11RP 3, CP 304-308. A second CrR 3.5 and a CrR 3.6 hearing were both held on April 11, 2011. 4/11/11RP 5-26. The court ruled that all statements were admissible and denied defendant's suppression motion. 4/11/11RP 26, CP 394-397. Defendant also moved to dismiss both assault in the second degree charges as well as the aggravating factors of deliberate cruelty and high degree of planning. 4/11/11RP 69-74. The court denied defendant's motions. 4/11/11RP 88.

Defense counsel advised the court that it needed to hear defendant's testimony before ruling on the issues surrounding the duress offense. 4/11/11RP 95. After defendant testified, the trial court heard argument on the proposed duress instructions. 4/12/11PM RP 13-17. The trial court ruled that the duress instruction could not be given in regards to the murder charge. 4/12/11PM RP 17.

The jury found defendant guilty of all six counts as charged. RP 1060-61, CP 376-381. The jury also found firearm enhancements on all counts. RP 1061-62, CP 382-393.

Sentencing was held on May 13, 2011. RP 1070, CP 502-516. Defendant argued that the two assault charges merged with the robbery charges and that all of the crimes were the same criminal conduct. RP 1072-77, CP 400-433. Defendant also argued that the burglary anti-merger doctrine was discretionary. RP 1078, CP 400-433. The court denied defendant's motions and found defendant's offender score to be a 10. RP 1089-91, CP 502-516. The trial court adopted the State's recommendation and sentenced defendant to the high end of the standard range. RP 1111, CP 502-516.

Defendant filed a timely notice of appeal. CP 455-456.

2. Facts

James and Charlene Sanders had been married since December of 2002. RP 573. They lived at their home in Edgewood with Mr. Sanders' fourteen-year-old son, J.S.² and Mrs. Sanders' eleven-year-old son C.K. RP 572, 575, 617-18, 635. On April 28, 2010, Mrs. Sanders had gotten home from work around 8pm. RP 573-4. Mr. Sanders told her that he had put her wedding ring from a previous relationship on Craigslist and a woman had called and said she wanted to buy it for her mother for Mother's Day. RP 574. The woman had called twice. RP 576. The

² The state will refer to the two juvenile victims' by their initials.

woman was supposed to come from Chehalis that night to purchase the ring. RP 577-78. Mr. Sanders kept checking out the window for the people who were going to buy the ring to arrive. RP 577, 619, 636.

The family was upstairs watching a movie in the bonus room. RP 618, 635-36. Around nine or ten in the evening, the people arrived to buy the ring. RP 619. When they arrived, Mr. Sanders went downstairs to meet them. RP 578, 620, 636. He later called up for Mrs. Sanders to come downstairs because the people who wanted to buy the ring had questions. RP 579, 620, 637. When she got downstairs, Mrs. Sanders saw a man and a woman with the ring. RP 578. The man and the woman were later identified as Higashi and defendant. RP 612. Mrs. Sanders took the ring, answered their questions and then handed the ring back to defendant. RP 579. Higashi asked defendant if she wanted the ring and defendant said yes. RP 579. Higashi then pulled out a wad of cash and said, "How's this?" RP 580. He then said, "How about this?" and pulled out a gun. RP 580. Both Mr. and Mrs. Sanders told them to take whatever they wanted and they kept repeating that to Higashi and defendant. RP 580-81. Mrs. Sanders was concerned for her children and wanted them just to take everything and go. RP 584-85. Instead, Higashi zip tied Mr. Sanders and defendant zip tied Mrs. Sanders. RP 581. Their hands were tied behind their backs. RP 582, 614. Mrs. Sanders does not remember Higashi ordering defendant to do anything, the two of them just started moving. RP 615. Mrs. Sanders indicated that at this point, defendant's eyes got

cold and mean and her demeanor changed. RP 582. Defendant scared Mrs. Sanders. RP 615. Defendant told Mrs. Sanders to get down on the floor. RP 583, 614. Mrs. Sanders observed something dangling from defendant's ear that could have been a Bluetooth. RP 616. While she was bound on the floor her wedding ring was ripped off of her hand. RP 610-11, 693. Mr. Sanders' wedding ring was also stolen. RP 693.

The two boys were then brought downstairs by two other men. RP 585. The two men had guns and told the boys to go downstairs. RP 620, 637. The men had bandanas covering half of their faces. RP 621, 637. The boys were told not to run or they would be shot. RP 622. The two boys were also told to lay face down with their hands behind their backs. RP 585, 622, 639. One of the men did a lot of yelling and seemed to be in charge. RP 585. That man was later identified as co-defendant Bernard. RP 585-86. Defendant was ransacking the house. RP 625.

Bernard had a gun and he had it at the back of Mrs. Sanders' head. RP 585, 625. Bernard kept asking her where the safe was. RP 586, 625, 641. He then threatened her and kicked her in the head. RP 586, 627, 640. He also called her a bitch and threatened to kill both her and the kids. RP 586, 640. J.S. described Bernard as brutal. RP 625. Bernard kicked Mrs. Sanders so hard her head went up and then hit the ground. RP 587, 627. She ended up with a large goose egg on her right temple. RP 587, 608. The zip ties were so tight that she felt like her hands had been cut off. RP 586. Bernard asked where the safe was, said he was going to kill

her and then counted down from three. RP 588, 627. Mrs. Sanders told them that they had a safe. RP 588. Mrs. Sanders then saw Higashi and Reese pick up her husband. RP 589. The safe was located in the garage. RP 590.

C.K. stood up and J.S. went over by the laundry room. RP 591. Mrs. Sanders then saw an arm with a gun in the hand come down on J.S. RP 592. J.S. was hit in the head. RP 592. Mrs. Sanders then heard scuffling and then a gunshot. RP 597. C.K. testified that Mr. Sanders began to fight the intruders. RP 641-42. J.S. testified that Mr. Sanders began to beat Bernard and that Mr. Sanders was then shot in the ear. RP 628. J.S. jumped on Bernard and tried to choke him. RP 628, 642. Bernard hit J.S. on the head with the gun multiple times. RP 628. There was a lot of movement and then two more gunshots. RP 597-98. Mr. Sanders was drug away and then shot several times. RP 630, 641-42. Mrs. Sanders did not hear her husband's voice. RP 598. The intruders then ran out of the house, jumped in a car and left. RP 630. J.S. said, "They are gone," and then locked the door. RP 598, 631, 643. He asked where his dad was and then the family saw him laying in the living room. RP 598, 631-32. C.K. cut the zip ties off his mom. RP 631, 643. Mrs. Sanders ran to the phone and called 911. RP 598, 601, 643. Mr. Sanders was all white, had his eyes closed and was gasping for air. RP 600. It looked like his ear had been shot off. RP 600.

When the police arrived, Mrs. Sanders was screaming at them to get an ambulance because her husband had been shot. RP 602. The deputy asked if the shooter had left and J.S. said yes. RP 602. J.S. was injured and had to go to the hospital. RP 603, 628. He had bruising to the left side of his head, blood behind his ear and marks on his right jaw and cheek. RP 698-99. Mrs. Sanders was informed of this by a Chaplin that Mr. Sanders had died at the scene. RP 603-4.

Deputy Jerry Johnson was dispatched to the shooting at the house in Edgewood. RP 535. When he arrived at the residence, Deputy Johnson was approached by Mrs. Sanders. RP 536. Mrs. Sanders was upset, hysterical and crying. RP 536. She yelled at him that her husband had been shot. RP 536. Deputy Johnson observed a man lying on the floor. RP 537. Initially Mrs. Sanders said there had been two people but later clarified and said four people and was not sure if the shooter was still in the house. RP 537. Mrs. Sanders also told the Deputy that her two boys were in the house. RP 538. Mrs. Sanders said she had placed an ad to sell a ring and a couple from Chehalis had come to purchase the ring. RP 538-39. She described the couple as a light skinned male and female. RP 539.

Deputy Rawlins also arrived at the house. RP 552. Deputy Rawlins contacted James Sanders who was nonresponsive. RP 558. Deputy Rawlins determined that Mr. Sanders was not breathing and that he did not have a pulse. RP 559. Deputy Rawlins noted that the master

bedroom had been tossed and was a mess. RP 552. When aid arrived on the scene, they pronounced Mr. Sanders dead. RP 560.

Deputy Jimenez observed Mr. Sanders deceased in the living room, blood spatter in the entryway, shell casings next to the body and in the living room, and a second floor in disarray. RP 720-21. He also attended the autopsy of Mr. Sanders. RP 723. Mr. Sanders had blunt force injuries and three gunshot wounds. RP 867-68. Death was caused by multiple gunshot wounds. RP 883. Three bullets and some zip ties were removed from the body. RP 724. The three bullets were all fired from .380 pistol which was operable. RP 835, 839. The cartridges were .380 Hornady. RP 841.

Deputy Donlin showed Mrs. Sanders a photomontage. RP 699. Mrs. Sanders had a distinct reaction to the photomontage. RP 710. She was agitated, distraught and appeared to be reliving the attack. RP 711. Mrs. Sanders picked defendant out of the montage. RP 711.

In addition to the wedding rings, J.S.'s Play Station, Ipod and cell phone were stolen. RP 632. Mrs. Sanders is not completely sure what all was taken since she stayed away from her house for a month and even then could not make herself go upstairs. RP 610. Mrs. Sanders' wallet and J.S.'s phone were located at Michelle Ford's house. RP 737, 887. A ring appraisal was also found at the Ford house in Jenna Ford's bedroom. RP 738.

Higashi and Jenna Ford were in a relationship. RP 777, 885, 4/11/11 RP 29-30. It was normal for Higashi to spend the night at Ms. Ford's house. RP 886, 4/11/11RP 32. Higashi would get rides from defendant. 4/11/11RP 32. On April 28th, Higashi left the house in the morning and did not come back until 10:30 that night. 4/11/11RP 33. Higashi told her he had killed a man. 4/11/11RP 33. Higshi said that he, Reese, defendant and YG (Berniard) had seen an ad on Craigslist, chose to go and rob the family and that the robbery had gone bad. 4/11/11RP 33. She turned on the TV and the shooting was breaking news. 4/11/11RP 34. Higashi called defendant and defendant and Reese came to Ms. Ford's house. 4/11/11RP 34. The four of them came up with a story in case they were caught. 4/11/11RP 34. Defendant did not look like she was just going along with Higashi; defendant looked like she was doing what she needed to do. 4/11/11RP 44. They then cleared out the car and got rid of the zip ties, receipts and trash. 4/11/11RP 35. They also changed their clothing. 4/11/11RP 35. Ms. Ford told them to dispose of everything in a dumpster down the street. 4/11/11RP 35. Defendant rented a room at the Sea Tac Motel 6 on April 28, 2010. RP 853. The next morning, defendant called and then came and picked up Higashi. 4/11/11RP 35-6. Ms. Ford did not see Higashi again. 4/11/11RP 36.

The Monday after the shooting, Deputy Jimenez received a call from authorities in Daly City, CA where Higashi, Reese and defendant were all in-custody. RP 739, 751. On May 1, 2010, Officer Eddy Klien had conducted a traffic stop on defendant's car in Daly City, CA. 4/11/11RP 47. Defendant was driving. 4/11/11RP 48. Defendant said they were on vacation from Washington. 4/11/11RP 50. Defendant consented to the search of her car and said there was nothing illegal in the car. 4/11/11RP 50. A handgun was located under the front passenger seat. 4/11/11RP 54.

Officer Klien interviewed defendant and the videotape of that interview was played for the jury. Exhibit 170. Defendant told the officer that she knew Higashi and Higashi knew Reese. Ex. 170. She said that she had a .380 but that she left it at home. Ex. 170. She was conversational with the Officer and said she had stopped selling weed, gotten some money and decided to go on vacation. Ex. 170. She also said that this arrest seemed like the end of the world since the worst thing she had back in Washington was some speeding tickets. Ex. 170.

Deputy Jimenez traveled to Daly City and executed a search warrant on defendant's car. RP 754. A red bandana, clothing, tools, and an Ipod with a charger with J.S.'s initials were also recovered. RP 756-

57. A backpack with .380 Hornady ammunition was also recovered. RP 764, 4/11/11RP 53. The backpack contained defendant's concealed pistol license and social security card. RP 766.

Mrs. Sanders' wedding ring and the ring that had been advertised on Craigslist were located in California. RP 771. Defendant sold Mr. Sanders' wedding ring in California. RP 762, 820-21, 826. A .380 gun that had previously belonged to defendant was located at the B & I in Tacoma. RP 773. Defendant was located on B& I surveillance as being at B & I on April 29, 2010. RP 774-75. Defendant was the one who brought the .380 in to the store and did the negotiating. RP 802-03. She also sold a Play Station and again did most of the negotiating. RP 815, 817.

On May 4, 2010, defendant was interviewed by Detective Lynelle Anderson. RP 778. The interview was recorded and was played for the jury. Exhibit 150. Defendant said she turned herself in after she was notified her picture was on TV. Ex. 150. She said that she had known "Cosh" (Higashi) for a couple of months and Reese was also a friend. Ex. 150. The third person she had just met. Ex. 150. She said while they were driving around wasting gas they started talking about doing a robbery. Ex. 150. They were looking for expensive stuff on Craigslist to steal. Ex. 150. They used a throw away phone to call the phone number in the ad. Ex. 150. She called the number 2-3 times and spoke with Mr. Sanders about the ring for sale. Ex. 150. They chose that ad because the ring was

expensive. Ex. 150. She told Mr. Sanders that she wanted the ring for Mother's Day and got his address. Ex. 150. She drove them to the address. Ex. 150. She and Higashi went to the door. Ex. 150. They wore gloves as part of the plan. Ex. 150. The other two were supposed to enter the house after they had tied up the owners. Ex. 150. She had a Bluetooth and Reese had the other Bluetooth and they were connected by a phone line. Ex. 150. Once inside, Higashi pulled out the money as a distraction. Ex. 150. He then pulled out her .380 gun. Ex. 150. She did not have a gun because Higashi had taken the gun out of her backpack. Ex. 150. She knew he had the gun because it was part of the plan. Ex. 150. She secured Mrs. Sanders with the zip ties. Ex. 150. Reese and the other guy got the boys. Ex. 150. She then ran past everyone to get upstairs to find more stuff to take. Ex. 150. She wore long sleeves to cover her tattoos. Ex. 150. She ran downstairs when she heard the shots. Ex. 150. No one said anything when they got in the car. Ex. 150. She drove toward Kent and just drove around before dropping everyone off. Ex. 150. She went to the Motel 6 by herself. Ex. 150. Higashi called the next day and said he needed to talk to her in person. Ex. 150. Higashi said he had shot Mr. Sanders. Ex. 150. Reese had the idea to go to California so they left. Ex. 150. She said this was the only robbery she had been on. Ex. 150.

Defendant testified as trial. Defendant said she met Higashi and Reese when she was selling weed. RP 899. Defendant said that Higashi,

whom she described as a friend, came to her house to wire her car stereo with stolen speakers and found her .380 pistol, pulled it out and asked her what it was for. RP 901, 962, 967. She got nervous, said she wanted it back and Higashi said he wanted to go steal a TV. RP 901. Higashi told her that either she agree to take him or he would point the gun at her family. RP 902. She started driving and he told her to go to Sea Tac and meet up with YG. RP 902. She participated in a robbery in Lake Stevens with them. RP 903. Defendant said she did it because she was afraid Higashi would hurt her. RP 903. Defendant also testified that she never kept the gun loaded herself and was asked at trial why she feared someone with an unloaded gun. RP 954. She said that Higashi had the clip in the gun but did not say when that happened or how. RP 954. The items they stole during the Lake Stevens robbery were in her car. RP 906. She did not call police because she was scared. RP 906. Higashi kept her gun and told her not to tell anyone. RP 907. He called her the next day and she helped him pawn the jewelry from the robbery and then dropped him off at the transit center. RP 908-9. She still did not call police because she was scared. RP 909.

On April 28th, Higashi called her and said he wanted to hit another lick. RP 909. She went and got him. RP 909. Higashi told her to pick up Reese and YG. RP 910. She did because she was afraid and Higashi had

the gun on his lap. RP 910, 912. Higashi pulled out a throw away cell phone and told her to call Mr. Sanders. RP 912. Defendant said that she talked to Mr. Sanders but that it was Higashi who told her what to say. RP 913. They drove around wasting gas for a few hours before going to the house. RP 914. She knew that Higashi had a loaded gun with him when they went into the house. RP 915. She also knew that Reese and YG had loaded guns. RP 915-16, 957. She knew that using guns was part of the plan. RP 954. Defendant called Mr. Sanders again to make sure they had the right house. RP 916. She set him up for the robbery. RP 951. Higashi handed her the zip ties before she got out of the car and she planned to use them. RP 913, 952. Defendant covered up the tattoos on her arms so that she would not be recognized. RP 952. She also wore gloves so she would not leave fingerprints. RP 952. She had a Bluetooth to an open line with Reese. RP 952.

Inside the house, Mr. Sanders handed her the ring. RP 918. Higashi started asking questions and Mr. Sanders called for Mrs. Sanders to come down. RP 917. Higashi gave Mr. Sanders the money and then pulled out a gun. RP 917. She told Mrs. Sanders to stay calm and just get down. RP 918. She zip tied Mrs. Sanders' arms. RP 918, 953. She then told Reese and YG to come in via the Bluetooth she had on. RP 918. Reese and YG had guns and pointed them at the boys. RP 918. She ran

upstairs and started going through the master bedroom, looking for items to steal. RP 919, 958. She then heard gunshots so she stopped what she was doing and ran to the car. RP 920. She drove to Sea Tac and dropped off YG and Higashi. RP 920. She and Reese then went to a hotel. RP 921. Higashi called and she and Reese went to meet him at Ms. Ford's house. RP 921-22. Higashi told them that Mr. Sanders was dead. RP 922. He also told them to change clothes and get rid of everything. RP 922. Then she and Reese went back to the hotel. RP 922. The next morning, she and Reese went and picked up Higashi. RP 923. Reese had the idea to go to California. RP 923. She agreed to go with them. RP 923. They did not threaten her to go to California. RP 923. She drove the three of them to California. RP 970. They stopped first at the B & I to sell things. RP 923.

After she bailed out of jail in California, she went to the hotel room, found the gold band ring and pawned it to get a bus ticket home. RP 924-25. She turned herself in one day after she got home because people had told her she was wanted for murder. RP 926.

Defendant gave inconsistent statements to both Officer Kiley and Detective Anderson, and those inconsistencies were highlighted at trial. RP 934-946. Defendant also told Detective Anderson that she was not afraid of YG and that neither Reese nor Higashi threatened her. RP 982-

83. Despite claiming at trial to be afraid for her family, defendant never warned her family about Higashi. RP 972.

C. ARGUMENT.

1. THERE WAS SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF ASSAULT IN THE SECOND DEGREE WHERE SHE WAS AN ACTIVE PARTICIPANT AND PROVIDED AID AND ENCOURAGEMENT.

When reviewing sufficiency of the evidence, the court must view the evidence in the light most favorable to the prosecution and determine if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Rangel-Reyes*, 119 Wn. App. 494, 499, 81 P.3d 157 (2003), *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Challenging the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from the evidence. *State v. Gerber*, 28 Wn. App. 214, 217, 622 P.2d 888 (1981), *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). All reasonable inferences from the evidence must favor the State and must be interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Both circumstantial and direct evidence are equally reliable. *State v. Lubers*, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996). In the case of conflicting evidence or evidence where reasonable minds might differ, the jury is the one to weigh the evidence, determine

credibility of witnesses and decide disputed questions of fact. *Theroff*, 25 Wn. App. at 593. Credibility determinations are for the trier of fact and not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

RCW 9A.08.020(3) addresses accomplice liability and in relevant part states:

A person is an accomplice of another person in the commission of a crime if: (a) With knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it.

More than physical presence and knowledge of the criminal activity of another must be shown to establish a person is an accomplice. *In re Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979). Defendant must give aid in order to be considered an accomplice. Aid is defined as any assistance given by words, acts, encouragement, support or presence. *State v. Galista*, 63 Wn. App. 833, 839, 822 P.2d 303 (1992). “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.” *Id.* “The State need not show that the principal and accomplice share the same mental state.” *State v. Bockman*, 37 Wn. App. 474, 491, 682 P.2d 925, *review denied*, 102 Wn.2d 1002 (1984). As long as the jury is unanimous that the defendant was a participant, it is not necessary that the jury be unanimous as to whether the defendant was a principal or an accomplice where there is evidence of both manners of participation. *State v. Carothers*, 84 Wn.2d 256, 262, 525 P.2d 731 (1974), *overruled on other grounds in State v. Harris*, 102 Wn.2d 148, 685 P.2d 584 (1984), *see also State v. Munden*, 81 Wn. App. 192, 196, 913 P.2d 421 (1996). The jury was given instructions consistent with the statute and case law. CP 325-375. Defendant did not object to these instructions.

“An accomplice need not have specific knowledge of every element of the crime committed by the principal, provided that he, the accomplice, has general knowledge of that specific crime.” *Sarausad v. State*, 109 Wn. App. 824, 835, 39 P.3d 308 (2001) (citing *State v. Roberts*,

142 Wn.2d 471, 511-12, 14 P.3d 713 (2000)). “The crime” means the crime charged, but it does not mean the specific degree charged. *See Sarausad*, 109 Wn. App. at 835, *State v. Cronin*, 142 Wn.2d 568, 581-82, 14 P.3d 752 (2000). In fact, in *State v. Bui*, which was consolidated with *Cronin*, the court said that in order for the State to prove that defendant was an accomplice to assault in the first degree with a deadly weapon, the State had to prove that defendant possessed general knowledge that he was facilitating an assault. *See Sarausad*, 109 Wn. App. at 835, *Cronin*, 142 Wn.2d 580.

In other words, “an accused who is charged with assault in the first or second degree as an accomplice must have known generally that he was facilitating an assault, even if only a simple misdemeanor-level assault, and need not have known that the principal was going to use deadly force or that the principal was armed.” *Sarausad*, 109 Wn. App. at 836. The accomplice takes the risk that the principal will exceed the scope, i.e.: escalate the degree of the planned crime. *See State v. Davis*, 101 Wn.2d 654, 658, 682 P.2d 883 (1984) (court found defendant could be convicted as an accomplice to first degree robbery without proof that the accomplice knew the principal was armed with a deadly weapon during the crime).

In the instant case, defendant only challenges the sufficiency of the evidence in regards to the two counts of assault in the second degree. Specifically, defendant alleges that the State did not prove that defendant

aided in the assaults in any way and that she was only present at the scene. The record does not support this argument.

There was sufficient evidence for the jury to determine that defendant was acting as an accomplice in the assaults of both J.S. and Mrs. Sanders. A review of the record shows that defendant was a very active participant in the crimes that took place and was not merely present at the scene. Defendant knew the plan was to rob the family and to use weapons to do so. RP 915-16, 951, 954, 957; Ex. 150. Further, defendant actively participated in securing Mrs. Sanders so that she was unable to defend herself. RP 581, 582, 614, 918, 953; Ex. 150. Defendant is the one who secured Mrs. Sanders' arms with zip ties and forced her to lie down on the ground with her hands tied behind her back. RP 581, 582, 583, 614, 918, 953; Ex. 150. This facilitated the assault by Berniard as he was able to pump her for information about the safe and kick her head and face and threaten her with a gun to the back of her head all while she was unable to fight back or defend herself. RP 585, 586, 587, 588, 625, 627, 640, 641. Defendant knew that Reese, Berniard and Higashi were all armed with loaded weapons. RP 915-16, 957; Ex. 150. In fact, using guns was part of the plan. RP 915; Ex. 150. She had this information before she tied up Mrs. Sanders. Defendant aided and facilitated the assault.

In terms of the assault on J.S., defendant gave the signal for Reese and Berniard to come into the house after she and Higashi had tied up Mr. and Mrs. Sanders. RP 918; Ex. 150. Again, she knew they were armed

and she aided and encouraged their entry into the house and participation in the events by giving them the signal. Whether or not defendant herself wielded the gun that increased the level of the crime is irrelevant. According to well-settled case law, the fact that the degree was ratcheted up by one participant having a deadly weapon means all are as guilty as the one with the gun. See *Davis*, 101 Wn.2d at 658. Whether or not defendant actually physically harmed Mrs. Sanders is irrelevant. What is relevant is that defendant actively provided aid to those who did assault J.S. and Mrs. Sanders. Defendant was not a passive observer. She knew the plan, knew loaded weapons would be involved, signaled two of the participants as to when it was time to come into the house and subdued one of the occupants and rendered her unable to assist either herself or her children. Defendant played an active role in both assaults. There was sufficient evidence for the jury to find her guilty of both counts of assault in the second degree.

2. DEFENDANT'S CRIMES DO NOT VIOLATE DOUBLE JEOPARDY WHERE THE JURY WAS PROPERLY INSTRUCTED, THE VERDICTS WERE NOT AMBIGUOUS AND THE CONVICTIONS ARE NOT THE SAME IN LAW AND FACT.

The double jeopardy clause bars multiple punishments for the same offense. *In re Borrereo*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007) (citing U.S. Const. amend. V; Wash. Const. art. I, sec. 9; *State v. Calle*,

125 Wn.2d 769, 776, 888 P.2d 155 (1995)). When a defendant's act supports charges under two statutes, the court must determine whether the legislature intended to authorize multiple punishments for the crimes in question. *Id.* "If the legislature intended that cumulative punishments can be imposed for the crimes, double jeopardy is not offended." *Id.* (citing *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005)).

Defendant alleges that her conviction for robbery in the first degree and her convictions for assault in the second degree violate double jeopardy. As the jury instructions were correct, there was sufficient evidence for the verdicts and the crimes are not the same in law and fact, the convictions do not violate double jeopardy.

- a. The jury instructions were correct and the jury's verdicts were not ambiguous.

A trial court's jury instructions are reviewed under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law. *State v. Fernandez-Medina*, 94 Wn. App. 263, 266, 971 P.2d 521, review granted, 137 Wn.2d 1032, 980 P.2d 1285 (1999), citing *Herring v. Department of Social and Health Servs.*, 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal

defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. *State v. Rahier*, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing *State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 872-3, 385 P.2d 18 (1963). The Court of Appeals will not consider an issue raised for the first time on appeal unless it involves a manifest error affecting a constitutional right. RAP 2.5(a); See *State v. Brewer*, 148 Wn. App. 666, 673, 205 P.3d 900 (2009).

Defendant did not object to the instructions that she now claims are ambiguous on appeal. The only objection defendant made to the jury instructions was in light of her halftime motion to dismiss. RP 988. The objection was that defendant was renewing her halftime motion and was

objecting to any jury instructions that pertained to the charges defendant had wanted dismissed. RP 988. There was not a specific objection to preserve an argument about the jury instructions on appeal. Further, defendant did not assign error to the jury instructions. Where no assignment of error has been made, the court will generally not consider a claimed error. See *Painting and Decorating Contractors of America v. Ellensburg School District*, 96 Wn.2d 806, 814-815, 638 P.2d 1220 (1992) (applying RAP 10.3(g)). As such, this Court should decline to consider defendant's argument that the jury instructions were ambiguous.

However, should this Court decide to address this issue, the jury instructions in this case were proper and the jury's verdict was supported by sufficient evidence. Criminal defendants have a right to a unanimous jury verdict. Const. art. 1, § 21; *State v. Goldberg*, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003). A defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Jury unanimity issues can arise when the State charges a defendant with committing a crime by more than one alternative means, *State v. Arndt*, 87 Wn.2d 374, 553 P.2d 1328 (1976). In an alternative means case the threshold test is whether sufficient evidence exists to

support each of the alternative means presented to the jury. *State v. Randhawa*, 133 Wn.2d 67, 74, 941 P.2d 661 (1997). If the evidence is sufficient to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction. *State v. Ortega-Martinez*, 124 Wn.2d 702, 708, 881 P.2d 231 (1994); *State v. Whitney*, 108 Wn.2d 506, 739 P.2d 1150 (1987). Unanimity is required as to the guilt of the single crime charged. *State v. Kitchen*, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). Unanimity is not required as to the means by which the crime was committed as long as substantial evidence supports each alternative means. *Id.*

The jury was instructed appropriately. The jury was instructed that they did not have to be unanimous as to which of the alternative means, as long as each juror found one of the alternative means beyond a reasonable doubt. CP 325-375, Instructions numbers 13, 20, 25, 26. This is an appropriate statement of the law and mirrors the case law presented above. The jury instructions were clear and unambiguous. A jury is presumed to follow the trial court's instructions. *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). There is no error.

Further, the jury's verdicts are not ambiguous. Defendant cites to *State v. DeRyke*, 110 Wn. App. 815, 41 P.3d 1225 (2002) for the

proposition that the rule of lenity must be applied in this case because the alternative means render the jury verdicts ambiguous. Defendant's reliance on *DeRyke* is misplaced. First, in *DeRyke*'s case, the crime of attempted rape in the first degree was elevated by either the crime of kidnapping (for which defendant was also convicted) or a deadly weapon. *Id.* at 823. The instant case is distinguishable. The crime of robbery was elevated to the level of first degree by either defendant or an accomplice being armed with a deadly weapon or defendant or an accomplice inflicting bodily injury. Inflicting bodily injury is not a crime on its own. Assault requires an intentional act where robbery does not. The laws and crimes dealt with in this case are different than the crimes in *DeRyke* and as such, the same analysis does not apply. *See State v. Freeman*, 118 Wn. App. 365, 372-74, 76 P.3d 732 (2003). An assault was not required to elevate robbery to the first degree. The fact that the accomplices carried a gun was sufficient to elevate the robbery to a first degree and there is no dispute that the accomplices were carrying guns as the jury answered yes to the firearm enhancements on all six convictions. CP 1061-62. Regardless, assault was not required to elevate the crime of robbery, the jury verdicts were not ambiguous and the *DeRyke* case does not apply. There is no error.

Finally, there was sufficient evidence to support the alternative means. Mrs. Sanders was assaulted. She was kicked in the head by Berniard. RP 586, 627, 640. She was kicked in the head so hard that her head went up and then hit the ground. RP 587, 627. She sustained a large goose egg on her right temple. RP 587, 608. The injury continued to get worse. RP 605, 609. Mrs. Sanders also had a gun pointed at her by Higashi and a gun held to her head while Berniard threatened her. RP 580, 585, 588, 625, 627. As to the assault on J.S., J.S. was deliberately attacked with a gun and was beaten with it. RP 592, J.S. was hit in the head with the gun multiple times. RP 592, 628. J.S. sustained bruising to the left side of his head, blood behind his ear and marks on his cheek and jaw and had to go to the hospital. RP 603, 628, 698-99. There was sufficient evidence of both an intentional act of assault that resulted in reckless infliction of substantial bodily harm and assault with a deadly weapon.

For the robbery of Mrs. Sanders, it's undisputed that Higashi, Reese and Berniard were armed with deadly weapons. RP 580, 620, 637, 915-16, 957, Ex. 150. It is also clear that Mrs. Sanders sustained bodily injury in that she had a head wound. RP 587, 608. For the robbery of Mr. Sanders, again, the intruders being armed with deadly weapons is undisputed. It is also clear that Mr. Sanders sustained bodily injury as he

died after sustaining multiple gunshot wounds. RP 560, 603-4, 867-68, 883. There was sufficient evidence of both alternative means.

Unanimity as to the alternative means was not required and the jurors were unanimous that defendant was guilty of assault. RP 1060-61, 1064-65, CP 376-381. The jury was properly instructed according to the law, there was sufficient evidence for the alternative means and the verdict was not ambiguous. There is no error and no indication that defendant was subject to double jeopardy.

- b. The crimes of assault in the second degree and robbery in the first degree are not the same in law and fact.

Where the legislature's intent is not expressly stated in the statutes in question, courts turn to the "same evidence" or *Blockburger* test. *In re Borrereo*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007) (citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). Under the same evidence test, double jeopardy is violated if a defendant is convicted of offenses that are identical in fact and in law. *Borrereo*, 161 Wn.2d at 537 (citing *State v. Louis*, 155 Wn.2d 563, 569, 120 P.3d 936 (2005)); *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). "If each offense contains an element not contained in the other, the offenses are not the same; if each offense requires proof of a fact that the other does not, the court presumes the offenses are not the same." *Id.* (citing *In re*

Orange, 152 Wn.2d 795, 816-18, 100 P.3d 291 (2004)); *Calle*, 125 Wn.2d at 777-78.

The Supreme Court in *Freeman* reviewed if second degree assault and robbery were intended to be punished separately. 153 Wn.2d at 758. The Court found that there was no evidence that the legislature intended to punish the crimes separately when the second degree assault facilitated the robbery. *Id.* at 760. However, the Court then turned to an analysis of whether the “included” crime has an independent purpose or effect from the other crime. *Id.* The Court found that the two crimes would merge unless there was an independent purpose or effect. *Id.* The Court determined that in the case of assault in the second degree and robbery, a case by case approach was necessary to determine double jeopardy and merger. *Id.*

In the instant case, the assault on Mrs. Sanders did not further the robbery where Mrs. Sanders was the victim. The robbery was complete prior to the assault. Defendant stole the ring off Mrs. Sanders' finger after Higashi pulled out a gun and defendant zip tied Mrs. Sanders' hands. RP 610-11, 693. Defendant then went to ransack the house while Bernard assaulted Mrs. Sanders in an effort to locate the safe. RP 585, 586, 587, 588, 625, 627, 640, 642, 919, 958; Ex. 150. The assault of Mrs. Sanders occurred after the robbery, was committed by a different person and with a different gun. In addition, the assault on J.S. and the robbery of Mr.

Sanders do not violate double jeopardy as the crimes have two different victims. There are separate facts to support all four crimes. The convictions for assault in the second degree and robbery in the first degree do not violate double jeopardy.

The convictions also do not merge. The merger doctrine is a judicial doctrine designed to prevent cumulative punishments where lesser included offenses do not include conduct that lies outside of the greater offense's definition. *State v. Collicott*, 112 Wn.2d 399, 410-11, 771 P.2d 1137 (1989). The Washington Supreme Court defined the concept of merger:

The merger doctrine is a rule of statutory construction which only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime (e.g., first degree rape) the State must prove not only that a defendant committed that crime but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (e.g., assault or kidnapping).

State v Vladovic, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983). This doctrine is to be narrowly construed. *Collicott*, 112 Wn.2d at 410. As already illustrated above, defendant did not have to commit an assault in order for defendant to commit robbery in the first degree. The crime of robbery was elevated to the level of first degree by either defendant or an accomplice being armed with a deadly weapon or defendant or an accomplice inflicting bodily injury. It was not elevated by a named crime

such as kidnapping or assault. Further, the element of inflicting bodily injury is not a crime on its own as assault requires an intentional act where robbery does not. Again, as noted above, the assault of J.S. and the robbery of Mr. Sanders have different victims and so do not merge. The crimes of assault in the second degree and robbery in the first degree do not merge.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT DEFENDANT'S CONVICTIONS DO NOT CONSTITUTE SAME CRIMINAL CONDUCT.

Under RCW 9.94A.589(1)(a), two crimes shall be considered the "same criminal conduct" only when all three of the following elements are established: (1) the two crimes share the same criminal intent; (2) the two crimes are committed at the same time and place; and (3) the two crimes involve the same victim. *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). The Legislature intended the phrase "same criminal conduct" to be construed narrowly. *State v. Flake*, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). If one of these elements is missing, then two crimes cannot constitute the same criminal conduct. *Lessley*, 118 Wn.2d at 778. An appellate court will generally defer to a trial court's decision on whether two different crimes involve the same criminal conduct, and will not

reverse absent a clear abuse of discretion or a misapplication of the law. *State v. Haddock*, 141 Wn.2d 103, 3 P.2d 733 (2000).

Defendant argues that her conviction for robbery in the first degree and murder in the first degree where Mr. Sanders was the victim constitute the same criminal conduct. Defendant also argues that the robbery in the first degree and assault in the second degree of Mrs. Sanders constitute the same criminal conduct. While she argues that the assault in the second degree of J.S. should count in her offender score, she then argues that all five convictions merge for the burglary in the first degree. The trial court heard argument on same criminal conduct and rejected defendant's arguments after listening to argument and reading briefing. RP 1089-1091, CP 400-433, CP 435-450. The trial court did not abuse its discretion.

a. Defendant's crimes do not share the same intent.

Two crimes share the same intent if, viewed objectively, the criminal intent did not change from the first crime to the second. *Lessley*, 118 Wn.2d at 777. To find the objective intent, the courts should begin with the intent element of the crimes charged. See *Flake*, 76 Wn. App. at 180; *State v. Dunaway*, 109 Wn.2d 207, 216, 743 P.2d 1237 (1987). A defendant's subjective intent is irrelevant. *Lessley*, 118 Wn.2d at 778. "In deciding if crimes encompassed the same criminal conduct, trial courts should focus on the extent to which the criminal intent, as objectively

viewed, changed from one crime to the next.” *Dunaway*, 109 Wn.2d at 215. The Supreme Court of Washington has held that objective intent is “measured by determining whether one crime furthered another.” *Lessley*, 118 Wn.2d at 778. When a defendant has the time to “pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act,” and makes the decision to proceed, the defendant has formed a new intent to commit the second act. *State v. Grantham*, 84 Wn. App. 854, 859, 932 P.2d 657 (1997).

Defendant argues that the intent was the same for all crimes in that the purpose was to rob the Sanders family. However, defendant’s argument improperly focuses on the subjective intent which is contrary to case law. Defendant’s argument also assumes that all six convictions were a continuous act which is also incorrect.

The intent to commit first degree robbery is different than the intent to commit second degree assault. The crime of first degree robbery requires the intent to take personal property of another from the person or presence of another. *See* RCW 9A.56.190. However, second degree assault requires the intent either to cause bodily harm or to create apprehension of bodily harm. *State v. Byrd*, 125 Wn.2d 707, 711, 887 P.2d 396 (1995). The plain language of the two crimes shows clearly that the objective intent is not the same.

In the instant case, defendant’s objective intent during the robbery of Mrs. Sanders was to steal her wedding ring. Once the ring was

removed, the robbery was complete. Defendant had time to pause and reflect before engaging in further criminal activity. Defendant did not release Mrs. Sanders after robbing her. On the contrary, defendant consciously made the choice to leave Mrs. Sanders tied up and helpless on the floor in the presence of three armed men, two of which defendant herself had called into the house. Bernard then assaulted the bound and helpless Mrs. Sanders. Bernard's assault on Mrs. Sanders was a completely separate criminal act. The trial court did not abuse its discretion in finding that the two crimes did not constitute the same criminal conduct.

Similarly, the crimes of robbery and murder do not share the same intent. This issue has been decided by the Supreme Court. The court in *Dunaway* found,

When viewed objectively, the criminal intent in these cases was substantially different: the intent behind robbery is to acquire property while the intent behind attempted murder is to kill someone. The defendants have argued that the intent behind the crimes was the same in that the murders were attempted in order to avoid being caught for committing the robberies. However, this argument focuses on the subjective intent of the defendants, while the cases make clear that the test is an objective one.

Dunaway, 109 Wn.2d at 216. The two crimes do not share the same objective intent. Further, the robbery was complete when Higashi removed Mr. Sanders' wedding ring. RP 693. The murder happened at the end of the incident when Mr. Sanders decided to try and fight back

against the intruders. RP 628, 630, 641-42. There was time to pause and reflect after the robbery before committing the murder. The trial court did not error in finding that these two crimes did not constitute the same criminal conduct.

b. Defendant's convictions were not committed at the same time.

While it is true that all crimes took place at the Sanders' residence, not all of the crimes took place at the same time. First, the two crimes where Mr. Sanders is the victim took place at different ends of the incident. The robbery of Mr. Sanders took place soon after Higashi and defendant entered the residence. Higashi pointed his gun at Mr. Sanders, zip tied him and removed his ring from his finger. The robbery was complete at that point.

The murder of Mr. Sanders took place some time later. After the robbery was complete, Berniard and Reese came into the house and brought the two children downstairs. Berniard also beat and kicked Mrs. Sanders, threatened her with a gun to her head and counted down while asking her to tell him where the safe was. After Mr. Sanders was lead away to help them locate the safe, he struggled with Berniard and Higashi and it was during this fight that Higashi shot Mr. Sanders and killed him. There was a good amount of time and many things that transpired between the robbery and the murder. They did not occur at the same time and the trial court did not abuse its discretion in making this finding.

As already discussed above, the robbery and assault of Mrs. Sanders did not occur at the same time. The robbery was complete prior to the assault. Defendant stole the ring off Mrs. Sanders' finger after Higashi pulled out a gun and defendant zip tied Mrs. Sanders' hands. RP 610-11, 693. Defendant then went to ransack the house while Bernard assaulted Mrs. Sanders in an effort to locate the safe. RP 585, 586, 587, 588, 625, 627, 640, 642, 919, 958; Ex. 150. The assault of Mrs. Sanders occurred after the robbery, was committed by a different person and with a different gun. The trial court did not abuse its discretion in finding that these two crimes were not the same criminal conduct.

- c. The burglary conviction has multiple victims and is not the same criminal conduct and does not merge.

Defendant argues that the robbery charge is the same criminal conduct of all of the other crimes because it was part of a continuing series of events. At trial, defendant argued that it was the same criminal conduct because the Sanders family was one victim and so all crimes then had the same victims. CP 400-433. Neither of these positions is correct. First, the concept that crimes involving multiple victims equal same criminal conduct has been rejected.

Convictions of crimes involving multiple victims must be treated separately. To hold otherwise would ignore two of the purposes expressed in the SRA: ensuring that punishment is proportionate to the seriousness of the

offense, and protecting the public. RCW 9.94A.010(1), (4). As one commentator has noted, “to victimize more than one person clearly constitutes more serious conduct” and, therefore, such crimes should be treated separately. D. Boerner, *Sentencing in Washington* § 5.8(a) at 5-18 (1985). Additionally, treating such crimes separately, thereby lengthening the term of incarceration, will better protect the public by increasing the deterrence of the commission of these crimes. For these reasons, we conclude that crimes involving multiple victims must be treated separately.

State v. Dunaway, 109 Wn.2d at 251, *see also*, *Lessley*, 118 Wn.2d 773.

Because the burglary conviction has multiple victims, it must be treated separately. The trial court did not abuse its discretion.

Second, even if the trial court had found that one of defendant’s convictions merged, the burglary anti-merger statute gives the court discretion to punish a burglary conviction even where the burglary and another conviction encompass the same criminal conduct. RCW 9A.52.050 states, “Every person who, in the commission of a burglary shall commit any other crime, may be punished therefore as well as for the burglary, and may be prosecuted for each crime separately.” *See also Lessley*, 118 Wn.2d at 781-82. The trial court followed the case law and statute and did not abuse its discretion in finding that the burglary conviction was not the same criminal conduct as any other crime and did not merge with any other crime.

4. DEFENDANT RECEIVED CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL AS DEFENDANT CANNOT SHOW DEFICIENT PERFORMANCE OR PREJUDICE.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution, and in Article 1, Sec. 22 of the Constitution of the State of Washington. The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* The court has elaborated on what constitutes an ineffective assistance of counsel claim. The court in *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986), stated that “the essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial rendered unfair and the verdict rendered suspect.”

The test to determine when a defendant’s conviction must be overturned for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674

(1984), and adopted by the Washington Supreme Court in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986). The test is as follows:

First, the defendant must show that the counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. See also *State v. Walton*, 76 Wn. App. 364, 884 P.2d 1348 (1994), *review denied*, 126 Wn.2d 1024 (1995); *State v. Denison*, 78 Wn. App. 566, 897 P.2d 437, *review denied*, 128 Wn.2d 1006 (1995); *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995); *State v. Foster*, 81 Wn. App. 508, 915 P.2d 567 (1996), *review denied*, 130 Wn.2d 100 (1996).

State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 56 (1992), further clarified the intended application of the *Strickland* test.

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable

professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

Citing *Strickland*, 466 U.S. at 689-90.

Under the prejudice aspect, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. Because the defendant must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a finding of lack of prejudice without determining if counsel’s performance was deficient. *Strickland*, 466 U.S. at 697, *Lord*, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. *McFarland*, 127 Wn.2d, at 335 (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Strickland*, 466 U.S., at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993), *cert. denied*, 510 U.S. 944 (1993). Defendant has the “heavy burden” of showing that counsel’s performance was deficient in light of all surrounding circumstances. *State v. Hayes*, 81 Wn. App. 425, 442, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996). Judicial scrutiny of

a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S., at 689.

In the instant case, defendant claims that his counsel was ineffective for failing to advise the court that it could have imposed an exceptional sentence downward. Defendant cites *State v. McGill*, 112 Wn. App. 95, 47 P.3d 173 (2002) for the proposition that defense counsel was required to inform the trial court that it could impose an exceptional sentence downward. However, defendant's interpretation of *McGill* is incorrect. In *McGill*, the trial court wanted to impose an exceptional sentence below the standard range but believed that it did not have the authority to do so. *McGill*, 112 Wn. App. 98-99. Defense counsel failed to correct the trial court. *Id.* at 97. Because the trial court erroneously believed it could not impose an exceptional sentence downward despite its express desire to do so, the court remanded for the trial court to consider an exceptional sentence downward. *Id.*

The instant case is distinguishable. The trial court in this case sentenced defendant to the high end of the standard range. RP 111, CP 502-516. The trial court did not question its authority to impose any type of sentence and never expressed confusion as to the sentence it imposed. The trial court did not sentence defendant to the low end of the standard range and did not even suggest that it was an option it was considering, let alone a departure downward. The facts of the instant case are in no way similar to the facts in *McGill*. Defense counsel had no obligation to

advocate for an exceptional sentence below the standard range. Defendant has cited no case law or statute that requires counsel to request such a sentence in every case. Defense counsel argued for a low end sentence and the court imposed a high end sentence. There is absolutely no evidence in the record that the court would have imposed an exceptional sentence downward, and no evidence that the court had any confusion as to its sentence. Defendant cannot meet her burden of showing deficient performance or prejudice.

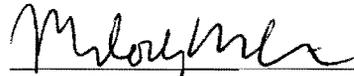
Further, a review of the entire record shows that counsel was an advocate for his client. Counsel filed and argued several motions both at pre-trial and throughout the trial, successfully got defendant's case severed from the other three co-defendants, cross-examined witnesses, made numerous objections, put on a defense case and made several arguments at sentencing. Defendant cannot prove that counsel's performance was deficient or that she was prejudiced by it. The record does not support a finding of ineffective assistance of counsel. Defendant's claim cannot prevail.

D. CONCLUSION.

The State respectfully requests this Court affirm defendant's convictions and sentence.

DATED: August 6, 2012.

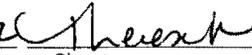
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Certificate of Service:

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

8.6.12 
Date Signature

PIERCE COUNTY PROSECUTOR

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