

No. 42289-1-II

IN THE
COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

REGINALD JOHN PAUL CHIEF GOES OUT,
Appellant.

APPELLANT'S BRIEF

Carol A. Elewski, WSBA # 33647
Attorney for Appellant
P.O. Box 4459
Tumwater, WA 98501
(360) 570-8339

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b) it failed to merge the conviction for display of a

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I. INTRODUCTION/SUMMARY OF THE ARGUMENT

The appellant in this case, Reginald John Paul Chief Goes Out, was charged as an accomplice with eight crimes arising from two incidents. During the first incident, the Fairbanks Street incident, Mr. Chief Goes Out's codefendant, Ricardo Vailtine, accompanied by Mr. Chief Goes Out, robbed a man of the keys to his truck at gunpoint, shooting his gun into a wall and TV in the victim's house in the process. Mr. Chief Goes Out was charged with two second degree assault counts, a first degree robbery count, and a first degree burglary count arising from that incident. In the second incident, the Dock Street incident, Vailtine and Mr. Chief Goes Out stole another man's car using a firearm, forced him into the backseat, and drove off with him in the car. Mr. Chief Goes Out was charged with first degree kidnapping, first degree robbery, and second degree assault. He was convicted of a total of seven crimes after a jury trial.

On appeal, Mr. Chief Goes Out challenges his convictions for five crimes. Regarding the Fairbanks Street incident, he argues the State failed to elect which of two acts it relied upon for one of the assaults; failed to prove robbery, assault, and burglary as charged to the jury; and failed to prove Mr. Chief Goes Out aided in the commission of any of those crimes. Regarding both incidents, he argues the trial court erred in failing to merge the Dock Street assault and robbery or, in the

alternative, to consider them the same criminal conduct; erred in failing to merge a conviction for a lesser-included offense, display of a weapon, with the Fairbanks Street robbery; and erred in merging the Fairbanks Street burglary and robbery convictions without dismissing one of the convictions.

II. ASSIGNMENT OF ERROR

A. Assignment of Error

1. The superior court erred in failing to require the State to elect which of two acts it relied upon to prove the alleged assault of Brandi Allen as charged in Count VII, or in the alternative, to provide a unanimity instruction regarding this count.

2. The superior court erred in allowing the Fairbanks Street robbery, burglary, and assault of Brandi Allen to go to the jury when the evidence was insufficient to convict on these crimes as charged to the jury.

3. The superior court erred in allowing the jury to decide Mr. Chief Goes Out's guilt for the Fairbanks Street crimes when the evidence was insufficient as a matter of law to convict him as an accomplice.

4. The superior court erred in failing to merge the Dock Street robbery and assault or, in the alternative, to consider them the same criminal conduct.

5. The superior court erred in failing to merge the Fairbanks Street robbery with the conviction for display of a weapon.

6. The superior court erred in merging the Fairbanks Street robbery and burglary and yet failing to vacate one of the counts.

B. Issues Pertaining to Assignment of Error

1. When Brandi Allen testified regarding two separate incidents, either of which could have been used to prove the assault charged in Count VII, the State failed to elect which act it relied upon, and the court failed to give a unanimity instruction, should this Court reverse because Mr. Chief Goes Out's right to a unanimous verdict was violated?

2. When the State specifically tailored the to-convict model jury instructions to fit this case, allowing some elements of some crimes to be proven through accomplice liability and requiring others to be proven through Mr. Chief Goes Out's actions alone, does this situation distinguish this case from State v. Teal, 152 Wn.2d 333, 96 P.3d 974 (2004), and compel the conclusion the State failed to prove as charged the robbery, assault and burglary arising from the Fairbanks Street incident?

3. Did the State fail to prove Mr. Chief Goes Out acted as an accomplice during the Fairbanks Street crimes when it proved only his physical

presence, assent, knowledge of the crimes, and acquaintance with the active participant? Prior to the crimes, Mr. Chief Goes Out walked up a hill with the active participant and asked a victim for a cigarette. He did and said nothing while the other man committed the crimes, although he may have entered the residence.

4. Did the trial court violate the prohibition against double jeopardy for the following reasons:

- a) it failed to merge or consider the same criminal conduct the Dock Street assault and robbery when the act relied on for the assault, beating the victim with a pistol at a certain point during the robbery, was the means employed from the beginning of the robbery until its end to maintain control over the victim;
- b) it failed to merge the conviction for display of a weapon with the Fairbanks Street robbery when both crimes relied on the same act and the display of a weapon did not have a separate victim; and
- c) it merged the Fairbanks Street robbery and burglary but failed to dismiss one of the convictions?

III. STATEMENT OF THE CASE

A. Procedural History

The State originally charged Mr. Chief Goes Out in January 2010, only with crimes arising from the Dock Street incident, allegedly occurring on January 23, 2010, and committed as an accomplice against Scott Little: **Count I:** Kidnapping in the First Degree with the intent to inflict extreme emotional distress in violation of RCW 9A.40.020(1)(d); **Count II:** Robbery in the First Degree while armed with a deadly weapon, a handgun, in violation of RCW 9A.56.190 and RCW 9A.56.200(1)(a)(i); and **Count III:** Assault in the Second Degree with a deadly weapon, a handgun, in violation of RCW 9A.36.021(1)(c). The State gave notice that all crimes were alleged to have been committed with a firearm, adding additional time to the presumptive sentences. Clerk's Papers (CP) 1-2. Valentine Tarzan Tirado was named as the codefendant.

The State amended the information eight months later, in September 2010, to add crimes arising from the Fairbanks Street incident, all also allegedly committed on January 23, 2010, as an accomplice: **Count IV:** Robbery in the First Degree of Raymond Allen, while armed with a deadly weapon, a handgun, in violation of RCW 9A.56.190 and RCW 9A.56.200(1)(a)(I); **Count V:** Burglary in the First Degree while armed with a deadly weapon in violation of RCW

9A.42.020(1)(a); **Count VI:** Assault in the Second Degree of Christina Roushey with a deadly weapon, a handgun, in violation of RCW 9A. 36.021(1)(c); **Count VII:** Assault in the Second Degree of Brandi Allen with a deadly weapon, a handgun, in violation of RCW 9A. 36.021(1)(c); and **Count VIII:** Assault in the Second Degree of Nevvia Allen with a deadly weapon, a handgun, in violation of RCW 9A. 36.021(1)(c). These charges were also accompanied with notice of firearm sentencing enhancements. In addition, the codefendant's name was corrected to Ricardo Tirado Vailtine. CP 3-6.

The State charged Vailtine with all eight counts in January 2010. Pierce Co. Case No. 11-9-08992-5, information. Vailtine ultimately pleaded guilty to an amended information charging two counts of Robbery in the First Degree and one count of unlawful imprisonment. Pierce Co. Case No. 11-9-08992-5, second amended information. He was sentenced to a total of 138 months' imprisonment. Pierce Co. Case No. 11-9-08992-5, Judgment and Sentence.

Mr. Chief Goes Out proceeded to trial by jury, the Honorable Edmond Murphy presiding. During the nine-day trial, conducted in April 2011, the court dismissed Count VIII, the assault against Nevvia Allen. VRP 632; CP 118-20. It denied Mr. Chief Goes Out's motions to dismiss Counts I, VI, and VII. VRP 26-

29 & 633-49. It also denied his motion to dismiss the firearm enhancements on the grounds they were improperly charged. VRP 715-17.

The jury declined to convict Mr. Chief Goes Out of kidnapping, finding him guilty of the lesser-included offense of unlawful imprisonment instead; declined to convict him of assaulting Christina Roushey, finding him guilty of the lesser-included offense of unlawful display of a weapon; and returned guilty verdicts as charged on the remaining counts. Special verdicts regarding use of a firearm were returned as to all counts. CP 98-111.

Sentencing occurred on June 3 and June 17, 2011. Mr. Chief Goes Out argued the burglary and robbery of Raymond Allen, Counts IV and V, should merge or be considered the same criminal conduct, VRP 830-32; that the assault and robbery of Scott Little, Counts II and III, should also merge or be considered the same criminal conduct, VRP 832-39; and that the unlawful imprisonment conviction should merge either with the assault or the robbery. VRP 839-43. The court merged the robbery and the burglary, Counts IV and V, but no other counts. VRP 845-48. The State noted the merged crime had to be stricken entirely from the Judgment and Sentence. VRP 848-49. However, the Judgment and Sentence lists both crimes. CP 127.

The superior court imposed a sentence totaling 300 months in prison, including 210 months for the firearm sentencing enhancements. CP 130-31. It imposed 18 months in community custody, plus costs and fees. CP 131, 129-30.

Notice of Appeal was timely filed. CP 147-61.

B. Substantive Facts

a. The Fairbanks Street Incident

On January 23, 2010, Raymond Allen lived in a house on Fairbanks Street in Tacoma with his parents; younger sister, Brandi Allen; and her infant daughter, Nevia. VRP 133-34. After getting home from work that morning, he had parked his company's Dodge two-door pickup truck in front of the house, which was on a steep hill. VRP 134-37. Later that afternoon, he returned from some errands and went inside, leaving the front door open. The front door opened into the living room. His sister was there, listening to music with a friend; her baby was with her; his parents were away. VRP 140-41.

At some point Allen went out onto the front porch and looked at the truck. He saw two people, later identified as Mr. Chief Goes Out and codefendant Vailtine, walking up the hill. VRP 145-46. They stopped in front of the truck and looked at it. VRP 146-47. Mr. Chief Goes Out came up to the house and asked Allen for a cigarette. VRP 150-51. Thirty seconds to two minutes later, Vailtine

came to the door and said “but check this out,” pulling out a semi-automatic gun and cocking it. VRP 99-100; 152-53 & 551. Vailtine demanded the keys to the truck. VRP 153. When Allen did not immediately respond, Vailtine pointed the gun near Allen’s face and shot a bullet into the wall of Allen’s living room, near the ceiling. VRP 84-85; 154 & 251-52.

Allen, who was standing inside the house at this point, told the men to stay calm and not shoot anyone. He said he had to go to his bedroom for the truck keys and backed away toward his room, which opened off the living room. The men walked inside. Vailtine followed Allen into his room and Mr. Chief Goes Out stood outside the door. VRP 158-59. Allen gave Vailtine the keys, who tossed them to Mr. Chief Goes Out and told him to “check that out.” VRP 160. Mr. Chief Goes Out ran toward the truck. Vailtine then demanded Allen’s wallet, but left without getting it. VRP 160-61.

Once Vailtine left, Allen went to check on the safety of his sister and her friend. His sister had fled to the backyard and her friend was in the back bedroom, calling the police. VRP 161-66. When Allen realized the front door was still open, he went toward it, to close it, but Vailtine was coming back in, so Allen returned to his bedroom. VRP 167. Vailtine walked into the living room with the gun and started yelling, “You think I’m playing? You think this is a

game?” VRP 168. Looking upset, Vailtine waived the gun around and fired four shots at the TV. VRP 168. About a minute after the gunshots ended, Allen left his bedroom, looked out the front door, and saw that the truck was still there. VRP 169-70. Looking through the peephole of the front door, he saw the men in the truck, Vailtine driving. VRP 171-72.

Brandi Allen saw Vailtine come to the door with the gun in his hand. VRP 551-52. When he pointed the gun toward her brother’s face, she grabbed her baby and ran. VRP 552. She heard one gunshot when she was in the kitchen, found her friend, Christina Roushey, who had fled before her, and gave her daughter to Roushey, telling her to stay in the back bedroom. Ms. Allen remained in the kitchen. VRP 554-55 & 90-92. From the kitchen, she could see Vailtine pointing the gun at her brother and demanding his truck keys and wallet. VRP 556.

Ms. Allen’s memory of events was slightly different than her brother’s. She remembered Mr. Chief Goes Out never entered the house. She also recalled that, after Vailtine robbed her brother and while Mr. Chief Goes Out was outside on the porch, Vailtine pointed the gun at her and told her he was going to shoot her. He shot the gun into the TV five times and then left. VRP 557.

Christina Roushey also saw Mr. Chief Goes Out come to the door and talk to Allen, followed by Vailtine. She could not hear what Mr. Chief Goes Out said, but heard Vailtine say something like “‘F’ this.” When she saw a gun, she fled the living room toward the back of the house. VRP 99-100, 103. She heard one shot when she was in the kitchen, went into a back bedroom, where Brandi Allen brought her the baby, and later heard five or six more gunshots. VRP 104-05.

b. The Dock Street Incident

This incident later the same day of the Fairbanks Street incident, after Mr. Chief Goes Out and Vailtine abandoned the Dodge truck when it apparently became stuck on a tidal flat. VRP 482.

Scott Little was in his parked car in a parking lot at Delin Docks in Tacoma around dusk, when he heard a loud bang on his windshield. VRP 393-399. A hole appeared in the windshield and Mr. Chief Goes Out and codefendant Vailtine ran up to the car. VRP 399-401. They yelled, “Get out of the car, mother fucker” and Vailtine “kept hitting” Little with a gun. VRP 402-03. Little was still in the car when this happened. VRP 403 & 405. In less than five minutes from their first appearance, Mr. Chief Goes Out ordered Little out of the car and into the backseat: “so I got out of the car and you know, they kept

hitting me with the gun. Sucks you are getting carjacked. Sucks even worse when you were getting hit in the face with a gun.” VRP 403-04.

After fewer than two minutes out of the car, Little got in the back seat of the car, entering the driver’s side door and sliding over to the passenger’s side. VRP 404-05. Vailtine continued hitting him with the pistol. VRP 411. Mr. Chief Goes Out got into the drivers’ seat and, after some difficulty, backed the car out and headed away. VRP 406-07. Little pleaded with the men, telling them he had a family. Mr. Chief Goes Out indicated he did not care; he had a family too. VRP 411. Soon after leaving the parking lot, the car stopped and another person got in. VRP 410.

A little later, Little was able to open the car window and waive his arm at a passing police officer. VRP 411-12. The officer pulled his vehicle in front of the car and blocked its movement. VRP 412-13. Little wrested the gun away from Vailtine and the carjackers fled. VRP 413. Police detained Little until realizing he was the victim. At that point, he was taken to the hospital and treated for his injuries. VRP 414-15.

c. The State’s Framing of the Act Relied Upon to Prove the Assault Regarding Brandi Allen

Brandi Allen testified regarding two acts, either of which could have constituted the crime charged in count VII. The first occurred when Vailtine

pointed the gun toward her brother's face. When Ms. Allen saw that happen, she grabbed her baby and ran, hearing one gunshot when she got to the kitchen. VRP 552 & 554. This alleged assault was virtually identical to the alleged assault on Roushey. VRP 99-100, 103 (when Roushey saw a gun, she fled the living room toward the back of the house and heard a gunshot in the kitchen). In fact, the State argued that both Roushey and Ms. Allen had been assaulted under the same legal theory, the theory that also underpinned the force used in the robbery of Raymond Allen. VRP 753. The other potential assault occurred when Vailtine pointed the gun at Ms. Allen, told her he was going to shoot her, and shot the gun into the TV. VRP 557.

In its closing argument, the State directed the jury's attention to the first alleged assault, stating:

Similarly [as to the assault on Roushey], Brandi Allen says, well, he had the pistol in his hand from when I first saw him. She[] . . . takes alarm, I guess, at the part where it gets pointed at her brother. She takes off, and the shot is fired about the time she hits the kitchen. So the question that you have to answer is was that shot fired with the intent to create that apprehension of imminent bodily harm.

VRP 753.

However, the State never told the jury it could not consider the second alleged assault in reaching its verdict. See VRP. Nor was a jury instruction given regarding the election. See CP 41-97. By comparison, in electing which

act it relied upon to prove the assault on Scott Little, the State told the jury it could only rely on the assault by battery with a pistol that took place in the car, not the earlier firing of a shot into Little's car: "[Y]ou are not to consider the firing of the shot. . . . Jury Instruction No. 33 limits your consideration on Count III to the events that took place inside the car. That is the allegation, the testimony from Scott Little that he's beat with that pistol. Okay?" VRP 752-53. This election was bolstered by a jury instruction that also made the election explicit. CP 76 (Jury Instruction No. 33).

After the State completed its case, Mr. Chief Goes Out moved to dismiss the assault charges against Roushey and Allen for insufficient evidence of intent to assault. VRP 633-39. The court denied both motions. VRP 653 & 639. The court's refusal to dismiss the charge regarding Allen was explicitly based on the testimony that Vailtine pointed the gun at Allen and threatened to shoot her. VRP 639.

IV. ARGUMENT

Point I: The State Failed to Elect the Act Upon Which it Relied to Prove Mr. Chief Goes Out's Guilt in Assaulting Brandi Allen, Violating His Right to a Unanimous Jury

Because it is unclear whether the jury was unanimous regarding the act that constituted the assault involving Brandi Allen, this Court should reverse that conviction. "A fundamental protection accorded to a criminal defendant is that a

jury of his peers must unanimously agree on guilt.” State v. Smith, 159 Wn.2d 778, 783, 154 P.3d 873 (2007); Wash. Const. art. 1, § 21. When a defendant is charged with multiple acts and any one of them could constitute the crime charged, either the State must elect which of such acts is relied upon for conviction or the court must instruct the jury to agree on a specific criminal act. State v. Coleman, 159 Wn.2d 509, 511-12, 150 P.3d 1126 (2007), *citing*, State v. Camarillo, 115 Wn.2d 60, 63-64, 794 P.2d 850 (1990). The election or instruction protects a defendant’s constitutional right to a unanimous verdict. *Id.*

In this case, the State failed to elect which of two acts it relied upon for the conviction and no unanimity instruction was given. The first act occurred when Vailtine pointed the gun at Allen’s brother, the other when Vailtine pointed the gun directly at Ms. Allen and said he was going to shoot her. VRP 551-52 & 557. In its closing argument, the State argued the jury should convict Mr. Chief Goes Out of the assault on Ms. Allen based on the first act. VRP 753. However, it did not prohibit the jury from convicting him based on the second. *Id.* Indeed, the trial judge used the second act to deny Mr. Chief Goes Out’s motion to dismiss this charge. VRP 639. Moreover, no jury instruction regarding the State’s election was given. In sum, the State failed to elect the act relied upon and no unanimity instruction was given regarding this charge, implicating Mr. Chief Goes Out’s right to a unanimous jury. *See* CP 41-97.

This situation requires the Court to determine whether sufficient evidence exists to support each separate act presented to the jury. “Where there is neither an election nor a unanimity instruction in a multiple acts case, omission of the unanimity instruction is presumed to result in prejudice.” Coleman, 159 Wn.2d 509, 512, *citing*, State v. Kitchen, 110 Wn.2d 403, 411-12, 756 P.2d 105 (1988). “The presumption of error is overcome only if no rational juror could have a reasonable doubt as to any of the incidents alleged.” Coleman, 159 Wn.2d 509 *citing* Kitchen, 110 Wn.2d at 411-12. “The error stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” Kitchen, 110 Wn.2d at 411. It is only when all the alleged incidents equally prove the crime that a defendant is not prejudiced.

Here, a rational juror could reasonably doubt whether either act occurred.¹ The State failed to prove the first alleged assault because it failed to prove either codefendant intentionally assaulted Brandi Allen. The assault-to-convict instruction required the State to prove “the defendant intentionally assaulted Brandi Allen with a deadly weapon.” CP 90 (Jury Instruction No. 47) (emphasis

1. This argument assumes for argument purposes only that the State was free to prove this charge through accomplice liability. See Point II arguing the converse, below. Additional reasons a reasonable juror could doubt whether Mr. Chief Goes Out was guilty of this assault count are set forth in Points II & III, below.

added). “Intentionally” was defined as follows: “A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.” CP 55 (Jury Instruction No. 12). No instruction on transferred intent was provided. See CP 41-97. In the absence of a transferred intent instruction, law of the case doctrine required the State to prove Vailtine or Mr. Chief Goes Out actually intended to assault Brandi Allen. See State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (holding State required to prove venue when included as an element in jury instruction); State v. Medina, 112 Wn. App. 40, 45, 48 P.3d 1005 (2002) (where element of crime useful to State omitted from jury instruction without objection, holding law of the case doctrine required State to prove crime without that element).

The State failed to prove either defendant acted with this intent.

“Evidence of intent . . . is to be gathered from all of the circumstances of the case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats.” State v. Ferreira, 69 Wn. App. 465, 468–69, 850 P.2d 541 (1993), *quoted in*, State v. Frasquillo, 161 Wn. App. 907, 917, 255 P.3d 813 (2011). The first alleged assault occurred when Vailtine held the gun, pointed it at Raymond Allen, and fired a shot while Ms. Allen was in the kitchen. VRP 551-52 & 554. But these facts lack evidence of any intent directed toward Ms. Allen. Vailtine was attempting to steal Mr. Allen’s truck and

wallet; there was no evidence he even knew Ms. Allen was in the house at the time. Indeed, Ms. Allen was in another room when the shot was fired, further attenuating the situation.

Given the lack of any evidence whatsoever supporting an intentional assault on Brandi Allen, only a transferred intent instruction could have supported the conviction here. A different situation was present in Frasquillo, where this Court found actual intent to assault multiple people in a residence in the absence of a proper transferred intent instruction. In Frasquillo, two shots were fired into a residence and the defendants were charged with assault. The Court held intent toward all the occupants in the house was established by previous confrontations and threats between the defendants' group and the victims' group and the fact that two windows of the house were shot out, indicating an intent to shoot more than one victim. Because the shooter fired into the house intending to assault more than one person inside, the Court held there was sufficient evidence to find the intent to assault all likely occupants of the house. Frasquillo, 161 Wn. App. at 911-12 & 919.

No similar intent to assault any one in the Fairbanks Street residence besides Raymond Allen can be inferred in this case. In contrast to the situation in Frasquillo, Vailtine did not randomly fire into an occupied house. Nor did he have a previous relationship with any occupants of the house or have any other

reason to know someone other than Raymond Allen was present. While the evidence showed Ms. Allen was fully aware of Vailtine and his gun, it failed to establish he was aware of her. Indeed, Vailtine failed utterly to acknowledge Ms. Allen's presence in the house, indicating he did not even see her. Directing all his commands to Raymond, Vailtine was not apparently intending to threaten anyone but Raymond. Accordingly, this case is distinct from the situation in Frasquillo, the State failed to prove either Vailtine or Mr. Chief Goes Out intended to assault Ms. Allen, and a rational juror could doubt whether this act proved the assault of Brandi Allen.²

Next, a rational juror could also doubt that the second alleged assault occurred because Brandi Allen's testimony differed so dramatically from that of her brother. Ms. Allen said Vailtine pointed the gun at her and threatened to shoot her before shooting the TV. VRP 557. By contrast, Mr. Allen indicated Vailtine walked into the living room when no one was in it and started yelling, "You think I'm playing? You think this is a game?" VRP 168. It was then that he shot the TV. VRP 168. Only one of those witnesses could have been right. Accordingly,

2. Additional evidence that a rational juror could reasonably doubt that the first alleged assault proved the charged crime is the verdict regarding Christina Roushey. The State argued the first alleged assault proved two second degree assaults, one against Roushey, the other against Ms. Allen. But the jury declined to convict Mr. Chief Goes Out of the second degree assault of Roushey, indicating it did not believe that act proved her assault. Because the same act was relied on to prove both assaults, a rational juror could also have doubted that the first alleged assault proved the charged assault of Ms. Allen.

a rational juror could have concluded Ms. Allen was confused about the alleged second assault and find that that act did not prove the charged crime.

Under these circumstances, a rational juror could have had reasonable doubt as to whether either of the alleged incidents involving Brandi Allen proved Mr. Chief Goes Out assaulted her. For these reasons, the Kitchen and Coleman presumption of prejudice cannot be overcome and this Court should reverse Mr. Chief Goes Out's conviction as to Count VII.

Point II: When the Jury Instructions Stated that Some Elements of Some Crimes Could be Proven by the Intent or Action of the Defendant or an Accomplice, While Other Elements Needed the Intent or Action of the Defendant, Law of the Case Required the State to Prove the Crimes as Defined in the Unobjected-to Instructions

The State failed to prove Mr. Chief Goes Out committed first the Fairbanks Street robbery, assault against Brandi Allen, and burglary because it failed to prove the elements charged in the to-convict instructions for those crimes. Law of the case doctrine requires the State to prove the crime as charged in unobjected-to jury instructions. "In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the "to convict" instruction." State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

When the State uses the model to-convict jury instructions that fail to refer to an accomplice's intent or action and also provides an accomplice liability instruction, a defendant can be convicted as an accomplice and law of the case doctrine does not apply. State v. Teal, 152 Wn.2d 333, 96 P.3d 974 (2004). However, the instant situation is distinct from that in Teal because of the myriad, specific amendments the State made to the model instructions in this case. Here, almost all the model to-convict jury instructions were tailored, without objection, to fit the case. Accordingly, the State should be required to prove the elements described in the instructions.³

For example, the State explicitly modified the model to-convict instruction for the Fairbanks Street robbery to suit this case. The model jury instruction for Robbery in the First Degree only uses the term "defendant," not "defendant or an accomplice." *See* 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 37.02 (3d ed. 2008) (WPIC). The State amended the instruction so that three of the elements refer to either the defendant or an accomplice: the taking from the presence of Allen, that the taking was against the person's will by the use or threatened use of force, and that force or fear was used to obtain or retain

3. The State put together the majority of the jury instructions and made amendments to the model instructions, including the amendments adding "or an accomplice" language to some of the instructions. *See, e.g.*, VRP 654; 656-57.

possession of the property. Significantly, however, it specified that only the defendant must have had the intent to commit the theft and have been armed with a deadly weapon:

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

(1) That on or about the 23rd day of January, 2010, the defendant or an accomplice unlawfully took personal property from the person or in the presence of Raymond Allen;

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

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

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

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

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

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

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

CP 70 (Jury Instruction No. 27) (emphases added).

The to-convict instructions involving assault were also tailored to the case.

While the model instruction does not refer to "an accomplice," 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 35.19 (3d ed. 2008),

three of the four assault instructions given in this case do. Only the instruction involving Brandi Allen required “the defendant,” not “the defendant or an accomplice” to have intentionally committed the assault. *Compare* CP 90 (Jury Instruction No. 47) with CP 75 (Jury Instruction No. 32), CP 79 (Jury Instruction No. 36), and CP 87 (Jury Instruction No. 44).

All four to-convict instructions regarding the unlawful display of a weapon were also modified from the standard version. The model instruction does not refer to “an accomplice,” 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 133.44 (3d ed. 2008), but the instructions given in this case do. CP 69, 72, 89 & 92 (Jury Instructions Nos. 26, 29, 46 & 49) (all containing one element either “the defendant or an accomplice” could commit and one element referring to “the defendant” only).

Similarly, the State altered the model to-convict instructions for both kidnapping and unlawful imprisonment to add accomplice language. *Compare* CP 53 (Jury Instruction No. 10) with 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 39.02 (3d ed. 2008) and CP 58 (Jury Instruction No. 15) with 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 39.16 (3d ed. 2008).

Two other to-convict instructions were based on the model instruction, without modification regarding accomplice language. CP 83 (Jury Instruction No.

40) (burglary instruction); CP 86 (Jury Instruction No. 43) (criminal trespass instruction).

Given the specific amendments the State made in this case, Teal does not apply. In Teal, the trial court had charged the jury with the WPIC standard instruction that did not refer to an accomplice. The court also gave a separate accomplice liability instruction. 152 Wn.2d at 335-36. The defendant argued that, under law of the case doctrine, the State was required to prove he, not an accomplice, committed the elements charged in the jury instruction. Teal, 152 Wn.2d at 337-38. The Court disagreed, holding accomplice liability is not an element of the crime that must be contained in the to-convict instruction. It held that the to-convict jury instruction, combined with the accomplice liability jury instruction, allowed the jury to convict the defendant as an accomplice. 152 Wn.2d at 337-39.

Here, by contrast, the State specifically amended almost all the model jury instructions to allow conviction when Mr. Chief Goes Out or his accomplice did something in some instances, and only if Mr. Chief Goes Out did something in others. Thus, those carefully-tailored instructions should mean what they say, whether it is that Mr. Chief Goes Out must have been responsible for an action or intention or either Mr. Chief Goes Out or his accomplice could have been responsible for an action or intention.

Taking the jury instructions as written, the State failed to prove Mr. Chief Goes Out guilty of the robbery of Raymond Allen, the assault on Brandi Allen, or the burglary. *See* Tonkovich v. Department of Labor & Indus., 31 Wn.2d 220, 225, 195 P.2d 638 (1948) (“It is the approved rule in this state that the parties are bound by the law laid down by the court in its instructions where, as here, the charge is approved by counsel for each party, no objections or exceptions thereto having been made at any stage. In such case, the sufficiency of the evidence to sustain the verdict is to be determined by the application of the instructions.”).

A challenge to the sufficiency of the evidence requires the Court to view the evidence in the light most favorable to the State. The relevant question is whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In claiming insufficient evidence, the defendant admits the truth of the State’s evidence and all reasonable inferences that can be drawn from it: “All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” Hosier, 157 Wn.2d at 8; Salinas, 119 Wn.2d at 201.

A. The State Failed to Prove Mr. Chief Goes Out Guilty as Charged of the Robbery of Raymond Allen

Viewing the evidence in the light most favorable to the State, the State failed to prove two elements of the charged robbery of Allen: a) that when Vailtine took the car keys from Allen, Mr. Chief Goes Out intended to commit theft of the property, and b) that Mr. Chief Goes Out was armed with a deadly weapon during the crime.

First, the State's evidence did not show Mr. Chief Goes Out intended to rob Raymond Allen, only that Vailtine did. Mr. Chief Goes Out walked up the Fairbanks Street hill with Vailtine. After stopping with Vailtine to look at Allen's truck, he went up to Allen and asked for a cigarette. Up to two minutes later, Vailtine came up with the gun. VRP 150-53; 99-100 & 551-52.

While Mr. Chief Goes Out stood by silently, Vailtine robbed Allen at gunpoint. All Mr. Chief Goes Out did was enter the house. He even stayed outside of Allen's bedroom when Vailtine followed him in with the gun. VRP 158-59; but see VRP 557 (Brandi Allen thought Mr. Chief Goes Out never entered the house). Thus, these facts fail to show Mr. Chief Goes Out's intent to rob Allen at the time the robbery occurred, that is, when Vailtine unlawfully took the truck keys against Allen's will with the use or fear of force.

Even more compellingly, the evidence unequivocally showed Mr. Chief Goes Out did not possess a deadly weapon. It was undisputed that only Vailtine had a weapon. VRP 130 (Roushey's testimony); VRP 152-54 & 158-60 (Raymond Allen's testimony) & VRP 551-52 & 556-57 (Brandi Allen's testimony). Moreover, while the jury was instructed that either the defendant or his accomplice could have possessed the firearm for the special verdicts, CP 97 (Jury Instruction No. 53), no similar instruction was given regarding the regular verdicts. Thus, the State failed to prove Mr. Chief Goes Out was armed with a deadly weapon and, accordingly, that he was guilty of the robbery of Raymond Allen.

For all these reasons, this Court should reverse Mr. Chief Goes Out's conviction for the robbery charged in Count IV.

B. The State Failed to Prove Mr. Chief Goes Out Guilty as Charged of the Assault of Brandi Allen

Viewing the evidence in the light most favorable to the State, the State failed to prove the assault as charged of Brandi Allen. The jury was charged that to convict Mr. Chief Goes Out of the assault, it had to show he "intentionally assaulted Brandi Allen with a deadly weapon":

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

(1) That on or about January 23, 2010, the defendant intentionally assaulted Brandi Allen with a deadly weapon; and
(2) That this act occurred in the State of Washington.

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

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to either element (1) or (2), then it will be your duty to return a verdict of not guilty.

CP 90 (Jury Instruction No. 47).

Superficially, this instruction brings the situation closer to Teal than the robbery instruction did, because, as in Teal, here the to-convict instruction refers only to “the defendant” while a separate accomplice liability instruction was given. CP 50 (Jury Instruction No. 7). However, the context of the to-convict instructions as a whole, and the four to-convict instructions involving assault in particular, compel the conclusion that the State drafted this instruction to be different from the others. In particular, the other to-convict instructions all allowed conviction if “the defendant or an accomplice” assaulted the person. CP 75 (charging that “the defendant or an accomplice intentionally assaulted Scott Little with a deadly weapon”); CP 79 (charging that “the defendant, or an accomplice, assaulted Scott Little”); and CP 87 (charging that “the defendant or an accomplice intentionally assaulted Christina Roushey”) (emphases added).

In stark contrast, the instruction regarding Brandi Allen requires that Mr. Chief Goes Out himself “intentionally assaulted Brandi Allen with a deadly

weapon.” Thus, law of the case doctrine requires the State to prove what it specifically alleged. When no evidence established Mr. Chief Goes Out assaulted Ms. Allen, the State failed to prove Mr. Chief Goes Out guilty of the assault charged in Count VII and this Court should reverse his conviction.

C. The State Failed to Prove Mr. Chief Goes Out Guilty as Charged of the Burglary⁴

Viewing the evidence in the light most favorable to the State, the State failed to prove Mr. Chief Goes Out entered the building with the intent to commit a crime. The State gave the following to-convict burglary instruction:

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

- (1) That on or about the 23rd day of January, 2010, the defendant entered or remained unlawfully in a building;
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein;
- (3) That in so entering or while in the building or in immediate flight from the building the defendant or an accomplice in the crime charged was armed with a deadly weapon; and
- (4) That any of these acts occurred in the State of Washington.

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

4. As Mr. Chief Goes Out argues below, the burglary conviction should have been vacated under State v. Womac, 160 Wn.2d 643, 651, 160 P.3d 40 (2007). See Point IV(C), below. Accordingly, this and the portion of the argument related to burglary made in Point III, below, may be viewed as alternative arguments.

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

CP 83 (Jury Instruction No. 40).

This instruction brings this issue even closer to the situation in Teal than the previously-discussed instructions because this instruction was only modified regarding an accomplice as suggested by the model instruction. *See* 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 60.02 (3d ed. 2008). No individualized modifications (other than adding the count number and the date of the crime) were made. In addition, no other burglary instructions were given (the lesser-included criminal trespass instruction was also not modified regarding an accomplice) to provide a means of comparison.

Nevertheless, looking at the to-convict instructions as a whole, the State clearly aimed to tailor its instructions to the case by adding specific references to an accomplice where warranted. Because it did not add those references here, it can be inferred the State intended to prove Mr. Chief Goes Out entered the building with the intent to commit a crime, as the instructions specifically state. The State failed to prove Mr. Chief Goes Out's intent and thus, there was insufficient evidence to convict Mr. Chief Goes Out of burglary, requiring reversal.

POINT III: When The State Only Established Mr. Chief Goes Out's Presence During Valtine's Commission of the Fairbanks Street Crimes, it Failed to Prove Him Guilty as an Accomplice in the Commission of the Four Crimes

To the extent the Court rules against Mr. Chief Goes Out regarding Point II, and finds the State could prove the robbery, assault and burglary charges through accomplice liability theory, regardless of the specific language of the instructions, the State failed to prove Mr. Chief Goes Out was an accomplice.

The court gave the jury the following standard instruction on 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 the 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.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

CP 50 (Jury Instruction No. 7). Here, the State proved, at most, Mr. Chief Goes Out's presence and knowledge, facts insufficient to convict him.

Presence, assent, and personal acquaintance with the offender are not enough to establish liability as an accomplice. "Physical presence and assent alone are insufficient to establish accomplice liability." In re Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979). Similarly, knowledge of the crime, presence and a personal acquaintance with the active participant are also insufficient. *Id.* at 490. Instead, to prove Mr. Chief Goes Out was an accomplice, the State had to establish he "associate[d] himself with the undertaking, participate[d] in it as in something he desire[d] to bring about, and [sought] by his action to make it succeed." Wilson, 91 Wn.2d at 491 (citation omitted). The State failed to prove Mr. Chief Goes Out did any of these things such that he was an accomplice to the robbery, the burglary, the assault of Brandi Allen, or the unlawful display of a weapon.

It was undisputed that Vailtine robbed Allen at gunpoint, that he entered the house to commit the crime, and that he brandished his gun. What was not proven is that Mr. Chief Goes Out aided Vailtine in the commission of these crimes. Mr. Chief Goes Out walked up the Fairbanks Street hill with Vailtine. He stopped with Vailtine and looked at the truck Allen had parked in front of the house. Apparently seeing Allen standing in the open doorway, he went up to him

and asked for a cigarette. Up to two minutes later, Vailtine came up with the gun. VRP 150-53; 99-100 & 551-52. These facts provide no evidence of joint action, agreement, or plan between the two men. Similarly, they provide no evidence Mr. Chief Goes Out solicited, commanded, encouraged or requested Vailtine to commit the crime. All these facts show is that Mr. Chief Goes Out and Vailtine knew each other. A personal acquaintance with the active participant is insufficient to establish accomplice liability. Wilson, 91 Wn.2d 487, 490.⁵

While Mr. Chief Goes Out stood by silently, making no threatening gestures or utterances toward Raymond Allen, Brandi Allen, Roushey, or any other occupant of the house, Vailtine pointed the gun at Allen, shot a bullet into the ceiling, demanded his wallet and truck keys, and followed him into his bedroom to get the keys. During this time, all Mr. Chief Goes Out did was enter the house. He even stayed outside of Allen's bedroom when Vailtine followed him in with the gun. VRP 158-59; but see VRP 557 (Brandi Allen thought Mr. Chief Goes Out never entered the house).

While, by his presence, Mr. Chief Goes Out may have associated himself with the crimes and must have known the crimes were occurring, the State failed

5. Notably, the relationship between the two men during the Fairbanks Street crimes was much less established than it was regarding the Dock Street crimes. By the time the Dock Street crimes occurred, Mr. Chief Goes Out had witnessed Vailtine commit the Fairbanks Street crimes and then driven away in a stolen truck with him. Conversely, prior to the Fairbanks Street crimes, all Mr. Chief Goes Out had done was walk up the hill with Vailtine and ask Allen for a cigarette.

to prove he was an accomplice because there was no evidence that he participated in the crimes “as in something he desired to bring about [or sought] by his action to make it succeed.” Wilson, 91 Wn.2d at 491 (citation omitted). None of the witnesses indicated Mr. Chief Goes Out said or did anything menacing that could assist with the crime. Indeed, he provided no “assistance whether given by words, acts, encouragement, support, or presence.” While he was present, there was no evidence he was “ready to assist by his . . . presence,” as opposed to just being present.

Thus, these facts are similar to the facts in Wilson, where the juvenile was present when the crime was committed, knew about the crime his friends were committing, neither prevented it nor disassociated himself from the crime, and yet was not an accomplice. Wilson, 91 Wn.2d 487. Just as the juvenile was not an accomplice in that case, Mr. Chief Goes Out was not an accomplice to the robbery, burglary, assault or unlawful display of a weapon.

Evidence of Mr. Chief Goes Out’s involvement in the second alleged assault of Ms. Allen was even more attenuated than his involvement in the other Fairbanks Street crimes. According to Brandi Allen, she was not assaulted as part of the burglary or robbery, but during a separate incident following the robbery, after Vailtine had obtained the truck key, when Mr. Chief Goes Out was outside of the house. VRP 160-61 & 557. There was no evidence Mr. Chief Goes Out

helped plan or commit the assault on Ms. Allen. No evidence that he solicited, commanded, encouraged, or requested Vailtine to assault her. Nor did he give assistance by words, acts, encouragement, support, or even presence. Given that the assault was completely separate from any arguable scheme to get the truck and that it happened after Mr. Chief Goes Out was already heading toward the truck with the keys, this situation presents an even more clear-cut lack of accomplice liability than the other Fairbanks Street crimes. In short, Mr. Chief Goes Out had no involvement in this crime and cannot be held responsible for Vailtine's spontaneous, unexpected action.

Mr. Chief Goes Out did catch the keys Vailtine tossed to him and got into the truck that Vailtine drove away. VRP 160; 171-72. Significantly, however, most of the Fairbanks Street crimes were already completed once Vailtine obtained the keys from Allen. The brandishing vis à vis Roushey occurred immediately upon Vailtine's arrival at the house. Roushey saw the gun and fled. VRP 99-100. Similarly, the first alleged assault on Brandi Allen occurred at the same time, when she saw the gun pointed at her brother and fled. VRP 753. As discussed above, the second alleged assault did not happen until after Mr. Chief Goes Out was on his way to the truck, attenuating his involvement even further.

The robbery was over when Vailtine got the keys, because “[O]nce the [property] had been obtained by force, the robbery was completed.” State v.

Allen, 94 Wn.2d 860, 864, 621 P.2d (1980) (holding kidnapping following robbery did not merge with the robbery because the robbery had ended before the kidnapping began), *abrogated on other grounds by* State v. Vladovic, 99 Wn.2d 413, 415-16, 662 P.2d 853 (1983); State v. Tvedt, 153 Wn.2d 705, 716, 107 P.3d 728 (2005) (holding robbery occurred when defendant forcibly took truck keys from the presence of another); *cf.* State v. Medina, 112 Wn. App. 40, 48 P.3d 1005 (2002) (holding where defendants put victim in the trunk of his car, robbery continued with the taking of victim's car). To the extent the robbery was continuing, the evidence showed Mr. Chief Goes Out did no more than ride along in the car. It was silent as to when he actively joined Vailtine's criminal activity.

Accordingly, Mr. Chief Goes Out's assistance to Vailtine began after the robbery of the truck keys, the brandishing of the gun and the assault on Ms. Allen were all completed. This evidence proves no more than Mr. Chief Goes Out was guilty of rendering criminal assistance after the crimes were completed.

The burglary, on the other hand, was continuing after Mr. Chief Goes Out walked away, because Vailtine remained inside the residence trying to obtain Allen's wallet. VRP 160-61. However, the State failed to prove Mr. Chief Goes Out assisted with this crime either before or after he caught the car keys and left the house.

In sum, there was no evidence of Mr. Chief Goes Out giving any aid to Vailtine during the crimes nor of any planning prior to the crimes' commission. The crimes, in fact, appear to be based on Vailtine's opportunistic, split-second decision: He saw the truck parked in front of Allen's house, saw Mr. Chief Goes Out talking to Allen in the open doorway, and decided to take the truck. For these reasons, the State failed to prove Mr. Chief Goes Out guilty of the crimes arising from the Fairbanks Street incident and this Court should reverse his convictions as to Counts IV, V, VI and VII.

Point IV: The Trial Court Violated the Prohibition Against Double Jeopardy in Its Merger Decisions

Mr. Chief Goes Out's constitutional right not to be put in jeopardy twice for the same conduct was violated by the court's merger decisions in this case. Both the state and federal constitutions prohibit multiple punishments for a single offense. State v. Kier, 164 Wn.2d 798, 803, 194 P.3d 212 (2008) (citations omitted); see Wash. Const. art. I, § 9 ("No person shall be ... twice put in jeopardy for the same offense."); U.S. Const. amend. V (same). "Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense." Kier, 164 Wn.2d 798, 803-04, *quoting*, State

v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005). This Court conducts de novo review. Kier, 164 Wn.2d 798, 804.

A. The Trial Court Violated the Prohibition Against Double Jeopardy When it Refused to Merge the Dock Street Assault and Robbery or, in the Alternative, to Consider them to be the Same Criminal Conduct

When the Dock Street second degree assault was a continuing assault committed as part of the continuing robbery of Scott Little, the assault should have merged with the robbery. When a defendant is charged with second degree assault and first degree robbery arising from a single incident and there is no independent purpose or effect to the assault, the assault generally merges with the robbery conviction. Freeman, 153 Wn.2d 765, 773-79. In this case, the assault was a continuing assault that occurred as part of the continuing robbery. Accordingly, there was no independent purpose or effect to the assault and it should have merged with the robbery.

To prove the charged assault, the State relied on the battery occurring while Mr. Chief Goes Out and Vailtine were in the car with the victim. VRP 752; CP 76. But this battery was part of the continuous assault Little endured during the entire robbery. Vailtine began hitting Little with a pistol when the men first approached the car, continued when Little was out of the car, and did not stop once Little was in the back seat. VRP 402-04 & 411. Under these circumstances,

when the assault did not stop during the duration of the robbery, it cannot be compartmentalized into separate segments, one used to commit the robbery and another merely a gratuitous assault. It was all one assault, and the means by which Vailtine both obtained the car from Little and secured it while the robbery continued. For these reasons, the assault served no purpose separate from the robbery and the trial court erred in refusing to merge the Dock Street assault and robbery. Accordingly, this Court should vacate the assault as charged in Count III.

Alternatively, the robbery and assault of Scott Little constituted the same criminal conduct and should have been considered one crime for sentencing purposes. RCW 9.94A.589(1)(a) requires that when two or more crimes can be considered the same criminal conduct, they must be treated as one crime if they were committed at the same time and place, involved the same victim, and involved the same objective criminal intent. State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999).

The crimes in this case meet this test as they were committed at the same time and place, against one victim, and involved the same objective criminal intent: to take and keep Scott Little's vehicle. For all these reasons, this Court should reverse and remand Mr. Chief Goes Out's sentence.

B. The Trial Court Violated the Prohibition Against Double Jeopardy When it Failed to Merge the Display of a Weapon Conviction with the Robbery of Raymond Allen

The Supreme Court's rationale in Freeman compels the conclusion that the display of a weapon conviction should have merged with the first degree robbery of Raymond Allen. Freeman held that second degree assault generally merges with a first degree robbery conviction, barring an independent purpose or effect to the assault. 153 Wn.2d 765, 780. For similar reasons, displaying a weapon should merge with robbery.

In this case, the conviction for displaying a weapon was based on the same fact that elevated the robbery to first degree: the use of a firearm. The display conviction was based on the defendant having "carried, exhibited, displayed or drew a firearm" "in a manner, under circumstances, and at a time and place that manifested an intent to intimidate another or warranted alarm for the safety of other [sic] person." CP 89 (Jury Instruction No. 46). Similarly, it was use of a firearm that elevated the robbery charge to first degree robbery. CP 70 (Jury Instruction No. 27).

Significantly, the State argued that the robbery of Raymond Allen, the assault on Roushey and the assault on Brandi Allen all arose from "a similar legal theory." VRP 753. That theory, and the question the State put before the jury, was, whether, when Vailtine displayed the gun and shot a bullet into the wall,

“was that shot fired with the intent to create that apprehension of imminent bodily harm, fear.” If so, the two assault convictions, as well as the robbery conviction, would follow.

When the two assault convictions were predicated on the same act, the only reason separate convictions would be permitted would be because they involved different victims. However, the jury did not convict Mr. Chief Goes Out of the charged assault on Roushey, but only of display of a weapon. Because that conviction does not have a victim, CP 89, it is not a separate crime from and should have merged with the robbery. Accordingly, this conviction, the conviction for Count VI, should also have merged with the robbery conviction, the conviction for Count IV.

C. The Trial Court Violated the Prohibition Against Double Jeopardy When it Merged the Fairbanks Street Burglary and Robbery , but Failed to Remove the Burglary from the Judgment and Sentence

Once a conviction is merged with another, the constitutional prohibition against double jeopardy is violated unless the conviction does not appear on the defendant’s judgment and sentence. State v. Womac, 160 Wn.2d 643, 651, 160 P.3d 40 (2007) (holding double jeopardy prohibition violated when a court refrains from imposing sentence on multiple conviction for double jeopardy reasons, but includes convictions in judgment and sentence).

In this case, the trial court merged Mr. Chief Goes Out's burglary and robbery convictions, VRP 845, but retained both convictions in the judgment and sentence. CP 127. This error violates the prohibition against double jeopardy and this Court should direct the trial court to vacate one of the convictions. Womac, 160 Wn.2d 643, 658-60 (remedy is to order trial court to vacate conviction).

V. CONCLUSION

For all of these reasons, Reginald John Paul Chief Goes Out respectfully requests asks this Court to vacate or reverse his convictions on Counts III, IV, V, VI, and VII.

Dated this 15th day of December 2011.

Respectfully submitted,

/s/ Carol Elewski
Carol Elewski, WSBA # 33647
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on this 15th day of December 2011, I caused a true and correct copy of Appellant's Brief to be served by e-filing, on:

Respondent's Attorney
Pierce County Prosecutor's Office at pcpatcecf@co.pierce.wa.us

and, by U.S. Mail, on:

Mr. Reginald Chief Goes Out
DOC # 350465
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98584

/s/ Carol Elewski _____
Carol Elewski

ELEWSKI, CAROL ESQ

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pccpatcecf@co.pierce.wa.us