

**NO. 42579-3-II**

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

STATE OF WASHINGTON, RESPONDENT

v.

CLABON BERNIARD, APPELLANT

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

No. 10-1-01904-1

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**BRIEF OF RESPONDENT**

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

1. Whether the trial court abused its discretion in removing a distraught deliberating juror who had threatened to harm herself in order to get out of further deliberations?
2. Whether the trial court abused its discretion in admitting statements of accomplices, who were unavailable to testify due to exercising their rights against self-incrimination, under ER 804(b)(3)?
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17. Whether the special verdict instruction and forms complied with *State v. Nunez*?
18. Whether error in the special verdict instruction and forms was invited or harmless?
19. Whether, under the application of the statutory language, the alleged aggravating factors applied to the defendant as an accomplice and as a principal?

20. Whether the trial court had a lawful basis to impose an exceptional sentence under RCW 9.94A.535(2)(c), independent of the aggravating factors pleaded and proven by the State?

B. STATEMENT OF THE CASE.

1. Procedure

On May 4, 2010, the State charged defendant Clabon Bernard 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 defendant was originally listed as “John Doe.” CP 1. The three co-defendants were identified as Kiyoshi Higashi, Amanda Knight, and Joshua Reese. CP 1-3. An amended information was filed on May 5, 2010. CP 6-9. The amended information clarified that the defendant’s name was Clabon Bernard; 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 7, 2011, a second amended information was filed that added the aggravators of deliberate cruelty; high degree of sophistication or planning; and unscored criminal history that resulted in a presumptive sentence that was too low. CP 13-17.

On June 29, 2011, a corrected information was filed that corrected a scrivener's error in regards to the assault against Charlene Sanders. CP 99-103.

The case was assigned to Hon. Roseanne Buckner for trial. 1 RP 3. Before jury selection and testimony commenced, the court heard pretrial motions, including the defendant's motion to suppress evidence regarding a KOMO TV video (CP 37-51), and in-court identification by Charlene Sanders. CP 22-36. The court denied the motion to suppress the video. 3 RP 439. The court also denied the motion to suppress Ms. Sanders' in-court identification of the defendant. 4 RP 695.

After hearing all the evidence, the jury found the defendant guilty as charged. CP 392-397. The jury found that the defendant or an accomplice was armed with a firearm (CP 399, 401, 403, 405, 407, 409) and the alleged aggravating factors (CP 398, 400, 402, 404, 406, 408). The defendant filed a motion for a new trial. CP 500-607. The court denied the motion as untimely. CP 646.

The court imposed an exceptional sentence. CP 657-666.

## 2. Facts

James and Charlene Sanders lived at their home in Edgewood, Washington with Mr. Sanders' fourteen-year-old son, J.S., and Mrs. Sanders' eleven-year-old son, C.K. 6 RP 896-897. On April 28, 2010, Mrs. Sanders had worked the afternoon and arrived home around 8 p.m. 6 RP 899. Mr. Sanders told her that he had put a diamond ring of hers on Craigslist. 6 RP 900. He was expecting a woman to come look at the ring that night. *Id.* The woman had called twice, from two different phones. 6 RP 902. The family went upstairs to watch a movie in the bonus room. 6 RP 900. Mr. Sanders checked out the window for the people who were going to look at the ring to arrive. 6 RP 903.

Later that evening, the people arrived to look at the ring. 6 RP 903. When they arrived, Mr. Sanders went downstairs to meet them. 6 RP 902. He later called up for Mrs. Sanders to come downstairs because the people who wanted to buy the ring had questions. 6 RP 903. When she got downstairs, Mrs. Sanders saw a man and a woman looking at the ring. 6 RP 904. The man and the woman were later identified as Higashi and Knight. 6 RP 904. Mrs. Sanders took the ring, answered their questions and then handed the ring back to Knight. 6 RP 904. Higashi asked Knight if she wanted the ring and she said yes. 6 RP 904. Higashi then pulled out

a wad of cash and said, “How about this?” 6 RP 905. He then said, “How about this?” and pulled out a gun. *Id.*

Both Mr. and Mrs. Sanders told them to take whatever they wanted and they kept repeating that to Higashi and Knight. 6 RP 905. Mrs. Sanders was concerned for her children and wanted the robbers to just take everything and go. *Id.* Instead, Higashi zip tied Mr. Sanders and Knight zip tied Mrs. Sanders. *Id.* Their hands were tied behind their backs. 6 RP 969. While she was bound on the floor her wedding ring was ripped off of her hand. 6 RP 923. Mr. Sanders' wedding ring was also stolen. 6 RP 929.

Mrs. Sanders heard other persons rush into the house at that time. 6 RP 906-907. Two other men then brought the two boys downstairs. 6 RP 908. The two men had guns and told the boys to go downstairs. 6 RP 963, 983. The men had bandanas covering half of their faces. 6 RP 963, 981. The two boys were also told to lay face down with their hands behind their backs. 6 RP 966, 984.

One of the men who brought the boys downstairs demanded to know where the safe was. 6 RP 909. He screamed that the intruders were going to kill the parents and kill the boys. *Id.* The “mean one” held a gun to the back of Mrs. Sanders’ head. 6 RP 912. He then threatened her and

kicked her in the head. 6 RP 910, 966, 987. He also called her a bitch and threatened to kill both her and the kids. 6 RP 987.

The “mean one” again asked where the safe was, said he was going to kill her and then counted down from three. 6 RP 912, 971, 986. Mrs. Sanders told them that the safe was located in the garage. *Id.* Mrs. Sanders then saw Higashi and another man pick up her husband. *Id.*

C.K. stood up. J.S. went over by the laundry room. 6 RP 914. Mrs. Sanders then saw an arm with a gun in the hand come down repeatedly on J.S.’s head. *Id.* Mrs. Sanders then heard scuffling and 2-3 gunshots. 6 RP 914-915.

Mr. Sanders and J.S. began to fight the intruders. 6 RP 972, 988. Mr. Sanders began to punch Bernard. 6 RP 972. J.S. jumped on Bernard and tried to choke him. 6 RP 972. Bernard hit J.S. on the head with the gun multiple times. *Id.* Higashi and the tall, lighter male dragged Mr. Sanders into the living room. 6 RP 973. There, Mr. Sanders was shot 3-4 times. *Id.*

The intruders then ran out of the house, jumped in a car and left. 6 RP 974, 990. J.S. said, “They are gone,” and then locked the door. 6 RP 916. 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. 6 RP 990. Mrs. Sanders ran to the phone and called 911. 6 RP 917. Mr. Sanders

was all white, had his eyes closed and was gasping for air. 6 RP 916, 925, 989. It looked like his ear had been shot off. 6 RP 924.

Deputy Jerry Johnson was dispatched to the scene of the shooting at the house in Edgewood. 11 RP 1610. When he arrived at the residence, Deputy Johnson was approached by Mrs. Sanders. 11 RP 1611. Mrs. Sanders was upset, hysterical, and crying. *Id.* She yelled at him that her husband had been shot. *Id.* Deputy Johnson observed a man lying on the floor. 11 RP 1612.

Deputy Rawlins also arrived at the house. 6 RP 874. Deputy Rawlins contacted James Sanders who was nonresponsive. 6 RP 877. Deputy Rawlins determined that Mr. Sanders was not breathing and that he did not have a pulse. 6 RP 883-884. Deputy Rawlins noted that the master bedroom had been ransacked and was a mess. 6 RP 880. When medical aid arrived on the scene, they pronounced Mr. Sanders dead. 6 RP 885.

Detective Jimenez arrived and 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. 9 RP 1347, 1355. He later attended the autopsy of Mr. Sanders. 9 RP 1353.

Mr. Sanders had blunt force injuries and three gunshot wounds. 7 RP 1092, 1094, 1103, 1104. Death was caused by multiple gunshot

wounds. 7 RP 1101. Three bullets were removed from the body. 7 RP 1119. The three bullets were all fired from .380 pistol which was operable. 7 RP 1111, 1119, 1121. The cartridges were .380 Hornady. 7 RP 1123.

Higashi, Knight, and Reese were arrested in Daly City, California a few days later in Knight's car. 8 RP 1195. The car had a .22 revolver under the seat. *Id.* Knight had ammunition for the .22 and an empty 9 mm ammunition box. 8 RP 1197. Knight had sold Mr. Sanders' wedding ring to a San Francisco pawn shop. 8 RP 1204, 1206. She sold the .380 pistol to the manager of Cartunz at the B and I Store in Tacoma. 8 RP 1237. She tried to sell him a .22 revolver at the same time. 8 RP 1238. Knight sold the Playstation stolen from the Sanders' to another worker at Cartunz. 8 RP 1260, 1363.

Knight confessed to her participation in the crimes. 8 RP 1213-1215. She said that 4 of them were involved. *Id.* Knight admitted that she went to the Sanders' residence to steal property. 8 RP 1214. She had a "Bluetooth" receiver, which she kept on an open line so that her accomplices outside could hear what was going on. *Id.* She had zip-ties and used them to bind Mrs. Sanders. 11 RP 1540. She ransacked the master bedroom for valuables. *Id.* She took Mrs. Sanders' wedding ring. *Id.*

Higashi confessed to his participation in the crimes. 11 RP 1554. He admitted that the plan was to rob the people who had advertised the ring on Craigslist. *Id.* He pulled a gun on Mr. and Mrs. Sanders. *Id.* He ordered them to the floor. *Id.* He zip-tied Mr. Sanders. *Id.* He went to the garage to look for the safe. 11 RP 1555. He sold the rings in California. *Id.*

Reese confessed to his involvement in the crimes. 10 RP 1462-1463. He admitted that he entered the Sanders' residence armed with the .22 revolver. *Id.* He went upstairs to steal property. *Id.* He was one of the people who brought the two boys downstairs. *Id.*

The defendant admitted to his sister that he had participated in a robbery where a person had been killed. 9 RP 1292. He admitted that the crime had occurred in someone's house and that he had brought some kids downstairs. 9 RP 1295.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCUSING JUROR #2 AS UNFIT.

A trial court has the duty to excuse a juror who is unfit for further jury service. RCW 2.36.110. Appellate courts review the trial court's determination of whether to dismiss a juror for abuse of discretion. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P. 3d 217 (2009); *State v. Elmore*, 155 Wn.2d 758, 778, 123 P.3d 72 (2005). A trial court abuses its discretion

when it bases its decision on untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

RCW 2.36.110 states:

It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

While the trial court must have a hearing to consider dismissing a sitting juror, the trial court is not required to interview the juror who is the subject of the inquiry. In *State v. Jordan*, 103 Wn.App. 221, 226, 11 P.3d 866 (2000), under RCW 2.36.110, a trial court properly removed a sitting juror who was sleeping during proceedings. The prosecutor had pointed out more than once to the court that the juror appeared to be sleeping. *Id.*, at 225. After declining the State's requests to remove the juror, the court itself observed the juror sleeping at different points during the trial and properly removed her for inattentiveness. *See Jordan*, at 230. The Court of Appeals specifically noted that the court did not err in failing to question the juror. *Id.*, at 228.

In the present case, the court properly exercised its discretion in excusing Juror No. 2 after Juror No. 2 disclosed that she had contemplated harming herself to extricate herself from further jury service. Once the court became aware of Juror No. 2's disclosures, the court took testimony

from Connie Janiga and Judy Snow as to their contact with Juror No. 2. 15 RP 2214, 2219. Connie Janiga is a jury administrator. 15 RP 2214. She related her observations of Juror No. 2's obvious mental distress, and Juror No 2's statements to her. Juror No. 2 was teary and emotional when getting her parking validated in jury administration. 15 RP 2214. Juror No. 2 told her that serving on the jury was extremely stressful; that she thought she could do it, but was unable to sleep the night before. 15 RP 2214. Ms. Janiga referred Juror No. 2 to Judy Snow. *Id.*

Ms. Snow is a county mental health professional who helps debrief and counsel jurors regarding the stress of service. 15 RP 2217. Juror No. 2 contacted Judy Snow, during which Juror No. 2 was very emotional and cried hysterically. 15 RP 2218. Juror No 2.'s statement to Ms. Snow that Juror No. 2 had intrusive thoughts about harming herself as a means of extricating herself from further jury service on this case. 15 RP 2219, 2223. When Ms. Snow met her the next day, Juror No. 2 was crying again and stated how difficult the decision-making process was for her to be on a jury in such a case. 15 RP 2223. Because Juror No. 2 had expressed thoughts of harming herself as a means of extricating herself from further jury service, the court properly concluded that Juror No. 2 was mentally unfit to serve as a juror under RCW 2.36.110.

There was no evidence that Juror No. 2 was a holdout juror. In fact, after hearing the testimony, defense counsel observed that the juror had not discussed the deliberations with Ms. Snow. 15 RP 2225. The court did not, and should not, have any information as to the status of jury deliberations, whether the jurors had voted on the counts, or even Juror No. 2's position on the evidence.

The defendant speculates that Juror No. 2's statement to Ms. Snow that Juror No. 2 "could see it getting to the point where everyone was against her" (15 RP 2220) to argue that Juror No. 2 was a holdout juror. However, the context in which the statement was made is consistent with the court's finding. When Juror No. 2 made that statement she was hysterical, crying, and thinking about harming herself. The statement was consistent with Juror No. 2's distraught and hysterical mental state at the time and not an assessment of the status of jury deliberations. Juror No. 2's statement is consistent with the desperate thought process of an individual who contemplated harming herself as a viable means of extricating herself from jury service. To infer more from Juror No. 2's statement would require the court to ignore the juror's obvious mental distress.

*State v. Elmore*, 155 Wn.2d 758, 123 P.3d 72 (2005) is distinguishable from the present case. *Elmore* was a case involving jury nullification, not the mental unfitness of a juror.

In *Elmore*, several jurors accused another juror of attempting jury nullification for refusing to deliberate and refusing to follow the law. Juror No. 12 sent a note out to the judge complaining that Juror No. 8 will not listen to deliberations and does not care what the law is. *Elmore*, at 763. Additionally, the presiding juror sent a note to the judge regarding Juror No. 8's conduct. The presiding juror told the judge the Juror No. 8 said that the law was "shit" and he didn't care what the judge said –he won't convict based on what the law says. *Id.* When the court questioned Juror No. 8, he explained his statements were about whether the jurors believed the witnesses. *Elmore*, 155 Wn.2d at 765. If they found the witness testimony credible, then they will vote one way; however, if they don't find the witnesses credible, then they vote another way. *Id.* The court excused Juror No. 8 for failing to follow the law. *Id.*, at 764.

The Supreme Court held that when there is an allegation of jury nullification, the trial court must use a heightened evidentiary standard to determine if there is any reasonable possibility that the impetus for dismissal is the juror's views of the sufficiency of the evidence. *Elmore*, at 761.

In the present case, there was no allegation of jury nullification. Unlike *Elmore*, none of the other jurors requested the court's assistance with Juror No. 2. There was no allegation that Juror No. 2 engaged in 'jury nullification', that she was refusing to follow the law, or any other juror misconduct. Instead, the present case deals with the issue of whether, due to concerns regarding her mental health, a juror could continue to deliberate. Juror No. 2 brought her extreme mental distress to the attention of the court by telling Judy Snow that she had thoughts of harming herself.

Most of the cases discussing removal of a deliberating juror involve some type of misconduct, usually reported by a fellow juror because it is occurring in the jury room.

In *Depaz, supra*, the presiding juror reported that another juror had made a phone call during deliberations, during which the juror discussed the deliberations. *Depaz*, 165 Wn.2d at 847. The juror was also a holdout. The Supreme Court ultimately reversed, holding that the trial court had abused its discretion. 165 Wn.2d at 860-861.

In *State v. Morfin*, 171 Wn. App. 1, 287 P. 3d 217(2012), the presiding juror reported that another juror refused to participate in discussions during deliberations. *Id.*, at 4. The trial court found out that the juror would vote, but not discuss. The trial had the deliberations continue, which ultimately resulted in a conviction. There was no error. *Id.*, at 12.

In *State v. Rafay*, 168 Wn. App. 734, 285 P. 3d 83 (2012), fellow jurors reported, during a months-long trial, that another juror was inattentive, sleeping, writing letters during trial, and had distracting personal attributes. *Id.*, at 818. The juror also had made a statement that she would do anything to get off the jury, using a descriptive obscenity. *Id.*, at 819. The trial court tried a number of corrective measures, but ultimately dismissed the juror. The Court of Appeals found that this was not an abuse of discretion. *Id.*, at 823.

Here, the trial court only made its decision after inquiring into the facts, hearing testimony, considering the law and argument from the parties. 15 RP 2248. The court dismissed her because Juror No. 2 demonstrated a mental defect that made her unfit for further jury service. It is clear that the court was concerned for the health and well-being of the juror, because the juror had thoughts of harming herself as a means of extricating herself from the pressure and stress of jury service on this case.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING STATEMENTS OF ACCOMPLICES UNDER ER 804(b)(3); AGAINST THEIR PENAL INTEREST.

ER 804(b)(3) provides an exception to the rule against hearsay for those statements that are contrary to the declarant's penal interests:

(3) Statement Against Interest. A statement which was at the time of its making so far contrary to the

declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statements unless the person believed it to be true. In a criminal case, a statements tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate trustworthiness of the statement.

Three basic requirements must be met before such statements can be admitted. First, the declarant must be unavailable. Second, the declarant's statement must so far tend to subject him to criminal liability that a reasonable person would not have made the statement unless he believed it to be true. Third, the statement must be accompanied by corroborating circumstances that indicate its trustworthiness. *See State v. St. Pierre*, 111 Wn.2d 105, 759 P.2d 383 (1988). The trial court's decision on the admissibility of a statement under ER 804(b)(3) is reviewed for abuse of discretion. *See State v. McDonald*, 138 Wn.2d 680, 696, 981 P.2d 443 (1999).

The trial court may admit the incriminating portions of the unavailable person's statement, as opposed to the "whole" statement. *See State v. Roberts*, 142 Wn.2d 471, 494, 14 P.3d 713 (2000), adopting the analysis of *Williamson v. United States*, 512 U.S. 594, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994). In *Roberts*, the Supreme Court held that the trial court erred in failing to consider portions of codefendant Cronin's police

confession as separate “statements” for the purposes of the statement against interest exception to the hearsay rule. For this reason, the Court reversed Roberts' aggravated first degree murder conviction and his death sentence. 142 Wn.2d at 499.

Here, through Detectives Johnson, Jiminez, and Donlin, the State introduced a very limited versions statements of Amanda Knight, Kiyoshi Higashi, and Joshua Reese against penal interest. These statements fall into the hearsay exception under ER 804(b)(3). All of these potential witnesses were unavailable by exercise of their rights under the 5th Amendment.

The limited statements in question were against penal interest. All the statements were clear admissions of guilt. Direct admissions of guilt constitute a statement against interest, as does any statement subjecting the declarant to accomplice liability. *See e.g., State v. Crawford*, 147 Wn.2d 424, 54 P.3d 656 (2002), *reversed on other grounds, Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

The statements admit significant participation in a conspiracy and coordinated action to commit a home invasion armed robbery with three co-defendants. Under either an objective or subjective standards, the statements subject the declarants to criminal liability both as a principals and accomplices, and in a felony murder.

These statements are testimonial, but the *Crawford* analysis does not stop there. See *In re Personal Restraint of Hegney*, 138 Wn. App. 511, 158 P.3d 1193 (2007). The original *Hegney* decision came out a few weeks before the United States Supreme Court decision in *Crawford v. Washington. State v. Hegney*, 121 Wn. App.1012 (Div II April 20, 2004). On direct appeal Hegney argued that the trial court’s admission of a co-defendant’s statement violated his constitutional right to confront witnesses. The Court of Appeals rejected Hegney’s argument relying on *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). Because the *Crawford* opinion came out after Hegney’s direct appeal had been decided, the Court of Appeals addressed the same issue in Hegney’s personal restraint petition.

In deciding this issue post-*Crawford*, the Court of Appeals held that the co-defendant was not a “witness against” Hegney. The court reasoned that Hegney’s co-defendant’s statement:

(1) did not refer to Hegney by name or otherwise; (2) did not contain any blanks or obvious deletions; and (3) were accompanied by a limiting instruction. In other words, these redactions and limiting instructions effectively prevented [the co-defendant] from being a “witness against” Hegney, and the protections of the confrontation clause were not at issue. Therefore, Hegney’s confrontation clause rights were not violated.

*Hegney*, 138 Wn. App. at 547. “Although *Crawford* heightened the standard under which a witness’s statements can be admitted, it did not

overrule *Bruton, Richardson*[*v. Marsh*, 481 U.S. 200, 107 S. Ct. 1702, 95 L.Ed.2d 176 (1987)], and *Gray* [*v. Maryland*, 523 U.S. 185, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998)].” *Hegney*, at 546.

In this case, the State carefully elicited only very specific statements regarding each person, each of which had admitted their respective culpability. The State did not offer any extended statements, declarations, or narratives. The State was careful not to elicit any of the co-defendant's statements implicating the defendant.

The statements met the trustworthiness requirement of the ER 804(b)(3). The statements were made just a few days after the murder. The statements were made to police detectives and tape recorded. Amanda Knight, Kioshi Higashi, and Joshua Reese readily admitted their respective involvement, which was corroborated by other evidence, including the account given by Charlene Sanders. Under the totality of circumstances, these factors showed corroborating circumstances indicating trustworthiness of the statements

Here, the trial court carefully considered arguments regarding the confrontation issue. 6 RP 858. The court considered, and followed, the pre-*Crawford* analysis of the issue in *State v. Anderson*, 107 Wn.2d 745, 733 P. 2d 517 (1987). 8 RP 1219. As the defendant raised the issue of confrontation under *Crawford*, the court heard additional argument before

making a final decision. The court then considered, and followed, the confrontation analysis in *In re Hegney*. 8 RP 1227. The court denied the motion to exclude the statements, noting that, as in *Hegney*, here the statements had been properly redacted to be limited to the declarants' acts and to exclude any reference to the defendant. 10 RP 1442, 1458; CP 668-669. The court's decision was neither an abuse of discretion, nor an error of law.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE KOMO TV VIDEO.
  - a. A living room interview with a television news reporter and television cameraman is not a private conversation within the meaning of RCW 9.73.030.

The Privacy Act “puts a high value on the privacy of communications.” *State v. Christensen*, 153 Wn.2d 186, 200, 102 P.3d 789 (2004). Generally, recordings made in violation of the Privacy Act are inadmissible in a criminal proceeding. RCW 9.73.050. A trial court’s interpretation of a statute is a question of law that appellate courts review de novo. *Christensen*, at 194. However, an appellate court will review the trial court's ultimate decision to admit or exclude evidence for an abuse of discretion. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). A trial court abuses its discretion when it bases its decision on unreasonable

or untenable grounds. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009).

In reviewing a motion to suppress evidence, the appellate court examines whether substantial evidence supports the findings and whether the findings support the trial court's conclusions of law. *See State v. Kipp*, 171 Wn. App. 14, 25, 286 P. 3d 68 (2012).

The Privacy Act under RCW 9.73.030 applies only to private conversation or communications. *State v. Clark*, 129 Wn.2d 211, 224, 916 P.2d 384 (1996). RCW 9.73.030 states in the relevant part:

- (1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:
- (b) Private conversations, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

When a conversation is not private, the act does not apply. *See State v. D.J.W.*, 76 Wn. App. 135, 140, 882 P.2d 1999 (1994). *Clark* and *D.J.W.* both analyzed the factual circumstances of a conversation in the application of the privacy statute. Both cases held that conversations between drug dealers on a public street, where any passerby could overhear the conversation, were not "private communications." *Clark*, 129 Wn.2d at 224; *D.J.W.*, 76 Wn. App. at 141. *Clark* also found the presence

of a third party to be a significant factor in determining whether the conversation was expected to be private, because the third person(s) could reveal what transpired to others. *Clark*, at 226.

The first step in determining whether the Privacy Act applies to a particular recorded conversation is to determine if the conversation was "private." The statute does not define the term "private conversation," but appellate courts have given the term its ordinary and usual meaning:

Belonging to one's self...secret...intended only for the persons involved (a conversation)... holding a confidential relationship to something... a secret message: a private communication ... secretly: not open or in public.

*State v. Forrester*, 21 Wn. App. 855, 861, 587 P.2d 179 (1978) (some alterations in original) (quoting Webster's Third International Dictionary (1969)), *review denied*, 92 Wn.2d 1006 (1979), *cited by State v. Townsend*, 147 Wn.2d 666, 673, 57 P. 3d 255 (2002).

A communication is private (1) when parties manifest a subjective intention that it be private and (2) where that expectation is reasonable. *Townsend*, 147 Wn.2d at 673; *State v. Roden*, 169 Wn. App. 59, 64, 279 P. 3d 461 (2012). The courts look at several factors to determine a person's subjective intent including the duration and subject matter of the communication; the location of the communication and the potential presence of third parties; and the role of the nonconsenting party and his

or her relationship to the consenting party. *Townsend*, 147 Wn.2d at 673; *Clark*, 129 Wn.2d at 226-27. Determination of these factors is largely a question of fact for the trial court. *Roden*, 169 Wn. App. at 64.

In *State v. Christensen*, 153 Wn.2d 186, 102 P.3d 789 (2004), a mother used the speakerphone function of the family's cordless telephone system to surreptitiously listen to a conversation between her daughter and her daughter's boyfriend, Christiansen, in which a crime was discussed. Over objection, the mother testified against Christiansen at his trial based on what she had overheard. The Supreme Court found that the conversation was private because Christiansen manifested his desire for a private conversation by asking to speak with his girlfriend when he called the house. The girlfriend manifested her desire to have a private conversation with Christiansen by taking the cordless phone to her room and shutting the door. *Id.*, at 193. Under these circumstances, the court found that the parties' expectation that their telephone conversation would be private was reasonable. *Id.*

In *Townsend, supra*, the defendant set email messages to "Amber," a police officer posing as an underage girl. The Court found that such a "conversation" would ordinarily be private because the subject matter, which was sexual in nature, was private and Townsend manifested his subjective intent that the emails be kept private by asking Amber to keep 'us' a secret. 147 Wn.2d 674. However, despite finding the

communications were ordinarily private, the Court found no Privacy Act violation because Townsend implicitly consented to the recording of his emails by using a computer, which must record an email communication. 147 Wn. 2d at 676, 678.

Similarly, in *Roden, supra*, the "recording device" was a cellular telephone. Police had acquired the phone from a drug dealer, Mr. Lee. Roden had sent a text message to Lee's cell phone. Police arranged to meet Roden, purportedly to sell him drugs. He was subsequently prosecuted. 169 Wn. App. at 61.

The Court of Appeals held that, by sending messages to a cell phone, Roden impliedly consented to the recording of his text messages on Lee's phone. Roden voluntarily sent the text messages to Lee's phone with the expectation that Lee would read them. In doing so, he also anticipated that the phone would record and store the incoming messages to allow Lee to read them. The Court said that cell phones, like computers, are "message recording device[s]," a fact that Roden must have understood as a user of text messaging technology on cell phones. 169 Wn. App. at 67.

In *Kadoranian v. Bellingham Police Department*, 119 Wn.2d 178, 829 P.2d 1061 (1992), the Supreme Court refused to find a Privacy Act violation when a police informant inadvertently recorded a telephone conversation the informant had with a drug dealer's daughter, Alice

Kadoranian, who answered the phone when the informant called. Alice Kadoranian's conversation took place in her residence, but was not a private communication because she freely gave out information that her father was not home to a third party, did not seem to care who received that information. The court found that there was no evidence that Ms. Kadoranian intended to keep the information she shared over the telephone a secret and that she did not have a reasonable expectation that her conversation was private. Because Alice Kadoranian's conversation was not private, the court found there was no Privacy Act violation.

***Kadoranian***, 119 Wn.2d at 190.

As the holding in ***Kadoranian*** suggests, not all communications that occur in a residence are private. By analogy, where a person opens his home to outsiders for a transaction, such a transaction is not private, even when the transaction takes place in a private home. *See State v. Hastings*, 119 Wn.2d 229, 233, 830 P.2d 658 (1992). There, undercover officers entered the defendant's home to purchase drugs. The circumstances made it clear that Hastings' dealings, although in his home, were not private because he had invited other persons inside, knowing their intentions. *Id.*, at 232.

In the present case, the Berniards' interview recorded by KOMO 4 News on May 5, 2010, was not private. At no point during the 14 minute

interview did any of the Berniards manifest an intent that their comments were to be kept private. 2 RP 190. Several members of the family were present in the living room. 2 RP 314. During the interview with Joan Berniard, her daughters Bernadette, Sharelle, and Lacey were present, as well as Joan's young granddaughter and an unidentified teenaged male. 2 RP 184, 185, 186, 349. The subject matter of the communication was an existing high profile news event that involved the release of new information to the public regarding a relative of the individuals who were interviewed. The reporter specifically told the Berniards, including Lacey, that her and Strothman's purpose in coming to the residence was to find a family member who could speak on Clabon's behalf. 2 RP 308, 309, 310, 329. Clabon Berniard is Bernadette's nephew, Joan's son, and Lacey Berniard's brother. Each of these three individuals spoke at different times on the KOMO 4 News recording about their relationship to Clabon Berniard, their interactions with him over the last several weeks, and his potential involvement in the Craigslist case. Additionally, Joan talked of Clabon Berniard's prior newsworthy act of saving two women from a house fire that was also covered by KOMO 4 News. 2 RP 164, 191. These factors weigh against a finding that the communication was private.

The interview took place in the Berniards' living room, the least private location in the residence. 2 RP 190. Before entering the residence for the interview, Sabra Gertsch identified herself and Mr. Strothman as employees of KOMO 4 News and asked to speak with members of the

Berniard family about Clabon Berniard. 2 RP 166, 307, 309. Sabra Gertsch was wearing a KOMO 4 News jacket with the logo prominently displayed in two locations on the jacket. 2 RP 305, 306, 311. Mr. Strothman carried a large, commercial quality camera with several microphones visible on the camera. 2 RP 344, 352. As stated above, there were several family members present during the interview in addition to the two KOMO 4 News employees. Bernadette Berniard remained in the living room during most of the interview and occasionally interjected comments that were recorded as part of the interview. Joan Berniard, who was the primary person being interviewed, asked and answered questions freely and included Lacey in the interview by following up on comments that Lacey made during the interview. *See* Exh. 20. Lacey and another teenager also came in and out of the video several times during the interview.

b. The Berniards implicitly consented to recording of the communication.

During the interview, the Berniards freely shared information about Clabon and his activities with two strangers, Gertsch and Strothman. 2 RP 189, 311. At the time the Berniards spoke with Gertsch and Strothman the Berniards knew that these persons were employees of KOMO 4 News who wanted to talk to relatives of Clabon, who was wanted for the murder of James Sanders. Such a conversation as was had

by the Berniards and KOMO 4 News employees was not intended to be private and the trial court properly found no privacy act violation.

Here, the Berniards knew they were being interviewed and recorded by KOMO 4 News employees and had no reasonable expectation that the interview would be private.

The presence of a large television video camera equipped with microphones mounted on the top of the camera and hand held microphone used by a reporter who identifies herself as a television news reporter, while wearing a jacket bearing the KOMO News 4 logo, constituted adequate notice that the conversation is being recorded.

Even if the Berniards' interview with Sabra Gertsch was a private communication, the Berniards consented to the recording of the interview. The Privacy Act requires that all parties consent before a private conversation is recorded. RCW 9.73.030(1). However, when the recording is made by an employee of a regularly published newspaper or television station acting in the course of news gathering, the subject of the recorded conversation is deemed to have consented when the recording device is readily apparent or obvious to the speaker. RCW 9.76.030(4). A violation of the Privacy Act subjects the person recording the conversation to both criminal and civil liability under RCW 9.73.050 and .080.

While there is no Washington case interpreting subsection four of the statute, some insight can be gained by looking at cases in which the courts have implied consent to private individuals. In *Townsend, supra*, the court found that the defendant who had used email to send messages to another person had impliedly consented to the emails being recorded. The court reasoned that because a computer must record and store the message to send the email, the defendant had therefore impliedly consented to the recording of his private communications by his use of email to communicate with “Amber.” Similarly, in *In re the Marriage of Farr*, 87 Wn. App. 177, 184, 940 P.2d 679 (1997), the court found that an ex-husband had impliedly consented to the recording of his message when he left a harassing voice mail message on his ex-wife’s answering machine. The sole function of an answering machine is to record messages and the ex-husband could have no expectation of privacy for a message left on an answering machine.

In both *Townsend* and *Farr*, the court applied the reasonable person standard to conclude that consent had been implied. Similarly, in the present case, a reasonable person would understand that a KOMO 4 News reporter and cameraman were recording the interview where the video recorder had two large microphones attached to it, and during part of the interview the reporter held the microphone to the speaker. This is

especially true where, as in this case, the microphones on the camera were prominently displayed on the top of the camera and, during part of the interview, the reporter held one of the microphones in her hand while conducting the interview.

The news photographer had a camera plainly marked as KOMO 4 TV. 2 RP 188, 310, 346. He initially held it on his shoulder. 2 RP 311. Then he set it on a tripod. 2 RP 318, 348. The camera was pointed at the person being interviewed. 2 RP 331, 350.

All of these obvious indicators of a TV interview can also be considered in the context of the Berniards' experience. Joan and other family members had been interviewed by reporters, including TV stations, previously. 2 RP 191. They had run a charity for Hurricane Katrina survivors. 2 RP 164, 165. Clabon had been interviewed in connection with helping a family during a house fire. Therefore, Joan and others were familiar with being recorded by the news media.

In the present case, absent obtaining express consent from each individual who was present during the interview on May 5, 2010, Sabra Gertsch and Dan Strothman did everything they could to put the Berniards on notice that the interview was audio and video recorded. Sabra Gertsch verbally advised the Berniards that she and Strothman worked for KOMO 4 News. Gertsch wore a jacket with the KOMO 4 News logo. Strothman

carried a large commercial grade camera with two large, visible microphones on top of the camera. Sabra Gertsch held the microphone in her hand during the relevant portion of the interview in which Lacey Berniard makes her disclosure of Clabon's participation in the burglary. 2 RP 169, 187, 312. To find that the recording or transmitting device in this case was not readily apparent or obvious to the speakers, would ignore the plain meaning of the "readily obvious and apparent" language in RCW 9.73.030(4).

As pointed out above, the trial court's factual determinations were supported by substantial evidence. In addition to the testimony, the court viewed the interview video, in whole or part, while narrated by a witness, at least 4 times. 2 RP 167, 315, 328, 331. The Privacy Act was not violated where KOMO 4 News' recording and/or transmitting device was readily apparent and obvious to the speakers.

4. THE TRIAL COURT DID NOT ERR IN ADMITTING THE EVIDENCE OF EYEWITNESSES, INCLUDING THAT OF MS. SANDERS.

Decisions regarding the admissibility of evidence are within the discretion of the trial court. It is well-recognized that an expert cannot comment upon the credibility of another witness. *See State v. Kirkman*, 159 Wn.2d 918, 155 P. 3d 125 (2007); *State v. Hayward*, 152 Wn. App.

632, 217 P. 3d 354 (2009). Testimony by a psychologist that a witness' testimony was factually accurate is inadmissible as it invades the province of the jury. *State v. Ciskie*, 110 Wn.2d 263, 280, 751 P. 2d 1165 (1988).

In *State v. Allen*, -Wn.2d-, -P. 3d-(2013)(2013 WL 259383), the Supreme Court recently discussed the issue of reliability of eyewitness testimony in detail. As in the present case, the *Allen* case discussed issues of cross-racial identification. *Id.*, e.g., slip op. at 2-3. As here, Allen argued that the current law on eyewitness identification is outdated. *Id.*, at 4.

In a plurality opinion, the Court held that a cautionary instruction was not required in such a case. *Id.*, at 6. The lead opinion pointed out that the defendant's rights were protected by confrontation of witnesses, vigorous cross-examination, and argument. *Id.*, at 5. The Court further pointed out that instructions on the State's high burden of proof and witness credibility, taken together, charged the jury with deciding whether the State has proven beyond a reasonable doubt that the defendant was correctly identified. *Id.*

Under Art. 4, § 16 of the State Constitution: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." The determination of the facts and the credibility of witnesses has been the sole responsibility of the jury for many years. *See*

e.g., *State v. Crotts*, 22 Wash. 245, 60 P. 403 (1900). There, also a murder case, the Supreme Court warned against the trial court commenting on witness credibility, in violation of Art. 4, § 16:

There are different ways by which a judge may comment upon the testimony, within the meaning of the constitution referred to above. The object of the constitutional provision, doubtless, is to prevent the jury from being influenced by knowledge conveyed to it by the court of what the court's opinion is on the testimony submitted. The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses[.]

*Id.*, at 250.

a. Impermissibly suggestive identification of the suspect.

Generally, due process protections apply to out-of-court identification procedures. See e.g., *Manson v. Braithwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); *State v. Hilliard*, 89 Wn.2d 430, 573 P.2d 22 (1977). If an identification procedure is “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification,” the procedure would violate due process. See *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), *Hilliard*, 89 Wn.2d 438; *State v. Hall*, 40 Wn. App. 162, 697 P.2d 597 (1985).

When an identification procedure is impermissibly suggestive, the court must weigh the suggestibility of the procedure against the factors

that are probative of the witness's reliability. *Brathwaite*, 432 U.S. at 114. The court must consider the totality of the circumstances. *Id.* at 113-114. Included in the factors the court should consider are the opportunity of the witness to view the suspect at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness and the time between the crime and the identification. *See e.g., Brathwaite*, 432 U.S. 114; *Biggers*, 409 U.S. 199.

Part of the rationale for disfavoring suggestive identification procedures is to discourage police from using such procedures when avoidable. *Brathwaite*, at 110; *Biggers*, at 199. The real crux of the due process protection is the protection from a "substantial likelihood of irreparable misidentification." *State v. Sanchez*, 171 Wn.2d 518, 573, 288 P. 3d 351 (2012).

- b. The identification in this case was not impermissibly suggestive.

The Washington Supreme Court has made it clear that there is no need to engage in the reliability test until it has been established that the identification procedure was impermissibly suggestive. *State v. Vaughn*, 101 Wn.2d 604, 682 P.2d 878 (1984); *see also State v. Vickers*, 107 Wn. App. 960, 29 P.3d 752 (2001), *affirmed*, 148 Wn.2d 91 (2002). The

defendant must first establish that the identification procedure is impermissibly suggestive. *Vaughn*, 101 Wn.2d 604; *State v. Linares*, 98 Wn. App. 397, 989 P.2d 591 (1999). Only if the procedure used is impermissibly or unnecessarily suggestive, the court must determine whether under the totality of the circumstances the identification has sufficient indicia of reliability. *Vickers*, 107 Wn. App. 960.

The same analysis as a visual identification procedure applies to a voice identification procedure. See *State v. Hoffauir*, 44 Wn. App. 195, 752 P.2d 113 (1986).

Here, Mrs. Sanders heard the defendant's voice during a news broadcast. The tape she heard was from an old interview with a television news crew. The tape of the defendant's voice had nothing to do with the police and was not provided by the police. The police had no way of being aware that any news source would play such a tape recording.

Mrs. Sanders testified that she heard the voice of Clabon Berniard and recognized the voice as the "mean one" who robbed and murdered her husband. 1 RP 74-75. She later told law enforcement this was the voice of the man who held a gun to her head, threatened her, and spoke to her throughout the robbery. 4 RP 643. Mrs. Sanders testified the voice was the man who gave her a "count down" while holding a gun to her head. 1 RP 89. Mrs. Sanders also testified that when she heard his voice she turned

her attention to the television and saw him speaking and recognized him as one of the assailants. 1 RP 94.

By all witness accounts, Mrs. Sanders reacted strongly to hearing the voice. 4 RP 626, 632, 637. This situation is tantamount to an accidental encounter, not an identification procedure orchestrated or controlled by law enforcement.

In *State v. Knight*, 46 Wn. App. 57, 59, 729 P.2d 645 (1986), a private citizen who was the victim of a burglary showed a witness photographs of man he suspected had committed the burglary. One of the witnesses identified the defendant. Later the police showed the same witness an array of five photographs, including the defendant. The defendant appealed his conviction claiming the procedure used by the citizen was impermissibly suggestive. Division II held that the suppression of a suggestive identification procedure was not applicable to a procedure used by the citizen and the claim had no merit.

In *State v. Birch*, 151 Wn. App. 504, 213 P.3d 63 (2009), the witness inadvertently saw the defendant outside of the court room in handcuffs. The court held that the out-of-court encounter did not meet the first prong of the test as being unnecessarily suggestive. The court reasoned that the encounter really goes to the weight of the identification rather than the admissibility of the identification. The record also showed

the witness was three feet from the defendant during the robbery, looked at his face for a few seconds, gave a description similar to his age and appearance and testified that she was sure he was the perpetrator. *Birch*, at 510.

One of the landmark United States Supreme Court cases involving identification procedures involves voice and sight recognition. *Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967), *overruled on other grounds*, *Griffith v. Kentucky*, 479 U.S. 314, 326, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). In *Stovall*, police brought a suspect into the victim's hospital room and the suspect was handcuffed to a policeman. There were five officers present, two people from the DA's staff, and it was two days after the stabbing. The suspect was directed to "say a few words for voice identification." The victim identified the suspect. The court held that the hospital identification and the in-court identification were admissible. *Stovall*, 388 U.S. at 302.

Similarly, a suspect handcuffed and standing next to a police car was held to be not unnecessarily suggestive. *State v. Guzman-Cuellar*, 47 Wn. App. 326, 335-36, 734 P.2d 966 (1987).

Hearing Clabon Berniard's voice on the television was tantamount to an accidental or inadvertent encounter. The news story was about the Craigslist homicide and he was identified as a suspect. Mrs. Sanders

reports that she was not even paying attention to the television when she suddenly became aware of the voice. The trial court did not abuse its discretion in finding the identification reliable and admissible.

5. THE DEFENDANT CANNOT RAISE AN ARGUMENT REGARDING MERGER OF FELONY MURDER AND ROBBERY FOR THE FIRST TIME ON APPEAL.

Under RAP 2.5, legal errors not raised in the trial court will not be heard on appeal. An exception to this rule is a "manifest error affecting a constitutional right." RAP 2.5(a)(3). The appellate court first determines whether the claimed error is truly of constitutional magnitude, and second, the court must determine whether the error is "manifest." To show that alleged error is "manifest," the defendant must show actual prejudice, meaning a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756, 761 (2009) (internal quotation marks omitted).

As pointed out in detail below, determining whether two charges merge for sentencing involves both a legal determination and a factual one. There is a legal question as to whether one crime is necessarily committed in completing another, and there is a factual question of whether one had an independent purpose or effect, or even happened at the

same time. See *State v. Vladovic*, 99 Wn.2d 413, 421, 662 P. 2d 853 (1983).

If an argument or challenge is to be made regarding the factual aspect of merger, it must be made in the trial court. The trial court, having heard the evidence and seen the witnesses, is in the best position to decide such factual issues. See *State v. Freeman*, 118 Wn. App. 365, 378, 76 P.3d 732 (2003), *aff'd*, 153 Wn.2d 765 (2005). In *Freeman*, the Court of Appeals considered these legal and factual determinations by the trial court in the context of the determination of "same criminal conduct." The Supreme Court subsequently further reviewed the case regarding double jeopardy and merger. *Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005). See also *State v. Burns*, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). There, the trial court found separate crimes defendant's drug sale to one person was completed when that person bought the cocaine; and the cocaine which remained in the defendant's possession after the sale manifested a separate instance to deliver cocaine in the future.

Here, the defendant had, and waived, the opportunity to argue whether the killing was factually independent from the robberies. The defendant argued that the assaults and robberies charged in Counts IV and V, and Counts II and III merged. CP 608-616; 15 RP 2264. Before leaving the issue, the State sought to clarify and confirm that the defendant was

not arguing merger regarding any other counts. 15 RP 2267. The defendant declined. He cannot now assign error to a determination that he failed to request from the trial court.

6. CONVICTIONS FOR BOTH FELONY MURDER AND ROBBERY IN THE FIRST DEGREE DO NOT VIOLATE THE DOUBLE JEOPARDY OR MERGER PRINCIPLES OF THE U.S. OR WASHINGTON CONSTITUTIONS.

- a. The defendant's convictions for two counts of first degree robbery and two counts of second degree assault violate neither double jeopardy nor the merger doctrine and are properly included in defendant's offender score.

The double jeopardy clause guarantees that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. Amend. V. The double jeopardy clause applies to the states through the due process clause of the Fourteenth Amendment, and is coextensive with article I, § 9 of the Washington State Constitution. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995) (citing *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)). Washington’s double jeopardy clause offers the same scope of protection as the federal double jeopardy clause. *State v. Adel*, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998) (citing *Gocken*, 127 Wn.2d at 107). The double jeopardy clause encompasses three separate constitutional protections:

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

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

When addressing a double jeopardy challenge, the court first considers whether the legislature intended cumulative punishments for the challenged crimes. **Freeman**, 153 Wn.2d at 771. Legislative intent can be explicit as in the antimerger statute where it provides that burglary may be punished separately from any related crime. **Freeman**, 153 Wn.2d at 772-73; RCW 9A.52.050. However, there can also be sufficient evidence of legislative intent that the court is confident that the legislature intended to separately punish two offenses arising out of the same bad act. **Freeman** at 772 citing **State v. Calle**, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995) (rape and incest are separate offenses).

If the legislative intent is not clear, then the court will turn to the test from **Blockburger v. United States**, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932) to determine if double jeopardy has been offended by defendants multiple convictions. **Freeman**, at 772. Under the **Blockburger** test the court examines each crime to determine if one crime contains an element that the other does not. *Id.* This analysis is not done on an abstract level, but “[w]here the same act or transaction constitutions

a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” *Freeman*, at 772, citing *Blockburger*, 284 U.S. at 304. However, the *Blockburger* presumption may be rebutted by other evidence of legislative intent.

- b. Although felony murder and first degree robbery have different elements for Double Jeopardy analysis, the two crimes may merge.

Merger is a doctrine of statutory interpretation used to determine whether the legislature intended to impose multiple punishments for a single act that violates several statutory provisions. *State v. Vladovic*, 99 Wn.2d 413, 419 n2, 662 P.2d 853 (1983). “The [merger] doctrine arises only when a defendant has been found guilty of multiple charges, and the court then asks if the Legislature intended only one punishment for the multiple convictions.” *State v. Michielli*, 132 Wn.2d 229, 238-239, 937 P.2d 587 (1997). With respect to cumulative sentences imposed in a single trial, the double jeopardy clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. *Missouri v. Hunter*, 459 U. S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1982).

The merger doctrine can be used to determine legislative intent even when two crimes have different elements. Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, the court will presume the legislature intended to punish both offenses through a greater sentence for the greater crime. *Freeman*, at 772-73 citing *Vladovic*, 99 Wn.2d at 419. However, the court may separately punish two crimes that otherwise appear that they should merge if there is an independent purpose or effect to each. *Freeman*, at 773 citing *State v. Frohs*, 83 Wn. App. 803 807, 924 P.2d 384 (1996), *see also Vladovic*, 99 Wn.2d at 421-22.

In *Vladovic*, the defendant was convicted of attempted robbery in the first degree, first degree robbery, and four counts of first degree kidnapping for an incident where Vladovic and several accomplices entered the chemistry department at the University of Washington, held five employees at gun point, secured their hands with duct tape and forced them to lie on the ground, removed the victims' wallets from their pockets, and stole \$12 dollars from Mr. Jensen, one of the victims. *Vladovic*, 99 Wn.2d at 415-16. One of the robbers took Mr. Jensen into another room where a safe was kept and directed Mr. Jensen to open the safe for him. *Id.*, at 416.

On appeal, Vladovic asserted that his convictions violated double jeopardy and/or the merger doctrine. *Id.* at 417. The court found there was no double jeopardy violation because both kidnapping and robbery include an element that is not included in the other. The elements of the robbery are 1) a taking of personal property; 2) from the person on in one's presence; 3) by the use or threatened use of force, or violence, or fear of injury; 4) such force or fear being used to obtain or retain possession of the property; and 5) displaying what appears to be a deadly weapon. *Id.* at 424. The elements of kidnapping are 1) intentionally abduct the victim; 2) to facilitate the commission of a felony. *Id.* Abduction means to restrain the victim's movements without his consent by use or threatened use of deadly force. *Id.* Because the state must prove 1) the taking of property in a robbery, but not in a kidnapping and 2) kidnapping requires the use or threatened use of deadly force whereas a robbery only requires a taking by force and the display of a deadly weapon each crime requires the proof of a different element the offense are not the same and double jeopardy is not violated. 99 Wn.2d. at 423-24.

The court also rejected Vladovic's merger argument because it found that the exception to the merger doctrine applied where each of the robberies had a different victim than the kidnappings. *Id.* at 421-22. The victim to the completed robbery was Mr. Jenson, whose money was stolen

from his wallet. The victim of the attempted robbery was the university itself, who owned the contents of the safe. The four kidnapping victims were chemistry department employees other than Mr. Jenson. The court held that “[b]ecause the injuries of the robbery and kidnappings involved different people, they clearly created separate and distinct injuries.” *Id.* at 421.

In a felony murder case, whether the predicate felony merges with the murder charge depends upon the facts of the case. In *State v. Williams*, 131 Wn. App. 488, 128 P. 3d 98 (2006), the defendant was convicted of first degree felony murder, with attempted robbery as the predicate felony. The defendant and others set up a robbery of another individual, thought to be carrying money and jewelry. *Id.*, at 493. They lured the intended victim to an alley. When Williams pulled out a gun, the victim became frightened and ran. Williams shot and killed him. *Id.*

In order to find Williams guilty of first degree murder, the jury had to find him guilty of attempted first degree robbery and of killing the victim in the course of or in furtherance of or in immediate flight from the robbery. The Court found that the crimes merged because the robbery was factually integral to the killing. 131 Wn. App. at 499.

*State v. Peyton*, 29 Wn. App. 701, 630 P.2d 1362 (1981) is an example where felony murder and the predicate robbery did not merge.

There, after a completed bank robbery, the robbers fled in one vehicle, abandoned it, fled again in another vehicle, then shot a deputy sheriff in a gunfight. The robbery did not merge with the homicide because it was disconnected in time, place, and circumstances. *Id.* at 720.

The facts in the present case separate the crimes factually. The robberies were completed just before the killing of Mr. Sanders. The defendants and Mr. Sanders left the kitchen, where the robberies had occurred, and moved to the next room, where the struggle ensued. There, one of the defendants shot Mr. Sanders, causing him to fall to the floor. The gunman then shot Mr. Sanders twice more in the back. The defendants then fled the house.

The defendant also argues that defendant's convictions for second degree assault in which Charlene Sanders is the victim (Count V) and her conviction for first degree robbery in which Charlene Sanders is the victim (Count IV) violates double jeopardy because the assault merges into the robbery. The defendant likewise argues that his second degree assault conviction in which Jimmy Sanders, Jr. is the victim (Count III) merges into the robbery conviction in which James Sanders, Sr. is the victim (Count II).

There is no express directive that the two crimes be punished separately or together in the statutes for second degree assault; RCW

9A.36.021, and first degree robbery, RCW 9A.56.190 and 9A.56.200.

Since there is no express authorization for separate punishments, the Court must apply the *Blockburger* “same evidence” test. Under this test, the Court should assume that the legislature did not intend to punish criminal conduct twice when “the evidence required to support a conviction upon one of [the charged crimes] would have been sufficient to warrant a conviction upon the other.” *Freeman*, 153 Wn.2d. at 776.

Second degree assault requires proof of an assault of another with a deadly weapon or an intentional assault in which he recklessly inflicts substantial bodily harm or, in the alternative, assaults another with a deadly weapon. RCW 9A.36.011(1)(a) and (c). A firearm is a deadly weapon. RCW 9A.04.110(6). First degree robbery requires proof of 1) a taking of personal property; 2) from the person in one’s presence; 3) by the use or threatened use of force, or violence, or fear of injury; 4) such force or fear being used to obtain or retain possession of the property; and 5) displaying what appears to be a deadly weapon. An assault requires either the reckless infliction of substantial bodily harm or an assault with a deadly weapon whereas a robbery does not require an assault with the deadly weapon, but merely the display of one, and has no requirement of substantial bodily harm. Conversely, an assault does not require the proof of a theft of personal property whereas the robbery does. Because the

proof of an assault is not necessary to prove the robbery and the elements of the two crimes are different, the “same evidence test” is satisfied.

Because the *Blockburger* test is not dispositive, the court must look at the history and intent of the statutes to determine if the presumption that the Legislature intended to punish both crimes separately is overcome. Here, as in *Calle*, the legislature indicated an intent to treat the two crimes differently by placing them in different chapters of the RCW: robbery is enumerated in 9A.52 whereas assault is enumerated in 9A.36. Additionally, the two crimes have different purposes. The purpose of an assault is to inflict bodily harm or to put another in apprehension of harm. *Frohs*, 83 Wn. App. 803, 814, citing *State v. Walden*, 67 Wn. App. 891, 893-94, 841 P.2d 81 (1992). The purpose of a robbery is to steal personal property from another.

Finally, the court looks to the merger doctrine which only applies when the Legislature has clearly indicated that in order to prove a particular degree of crime, the State must prove not only that a defendant committed that crime, but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes. *See Valdivic*, 99 Wn.2d at 421. While in some circumstances the court has held that a second degree assault will elevate a robbery from second degree to first degree, there is no per se rule to that effect. *Freeman*, 153 Wn.2d at 774-

75. The court will look at the facts of each case to determine if the assault is done to accomplish the robbery.

Here Amanda Knight and Kiyoshi Higashi committed the robbery of Charlene Sanders' wedding ring shortly after they enter the residence. The assault that elevates the robbery is Higashi pointing a firearm at Charlene and Jim Sanders and directing them down onto the kitchen floor and zip tying their hands behind their backs. It is at that point that Amanda Knight removed Charlene's wedding ring from her hand and that robbery is complete.

The assault that is charged in count V occurred later during the incident and was committed by the defendant, who assaulted Charlene Sanders by kicking her in the face and pointing a completely different firearm at Ms. Sanders. Because the assault occurred after the Charlene's ring is taken from her finger, and was committed by a different person and with a different gun, the second degree assault (count V) does not merge with the first degree robbery (Count IV).

Nor does count III, the second degree assault of Jimmy Sanders, Jr. merge with count II, the robbery of James Sanders, Sr. These do not merge because each crime has a different victim. Thus, as in *Vladovic*, the exception to the merger requirement applies because the crimes have different victims – and when there are different victims, there are separate

and distinct injuries that prevent the two crimes from merging. The trial court properly found that the second degree assault of Jimmy Sanders did not merge with the first degree robbery of James Sanders and that each crime should be counted separately when calculating defendant's offender score.

Even if the trial court found that one of defendant's convictions merged into another, the merged crime would still be counted as part of defendant's offender score for purposes of calculating defendant's offender score for the burglary count because the antimerger statute gives the sentencing judge discretion to punish a burglary even where it and an additional crime encompass the same criminal conduct. *State v. Lessley*, 118 Wn.2d 773, 781-82, 827 P.2d 996 (1992), and RCW 9A.52.050. The antimerger statute 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.

The trial court properly exercised its discretion under the anti-merger statute and found that, for purposes of calculating defendant's offender score on Count VI, first degree burglary, that none of defendant's crimes merges with any other.

7. THE DEFENDANT'S CONVICTIONS ARE NOT SAME CRIMINAL CONDUCT AND ALL SIX OF DEFENDANT'S CURRENT CONVICTIONS COUNT TOWARDS DEFENDANT'S OFFENDER SCORE.

RCW 9.94A.589 controls the calculation of a person's offender score when he is sentenced on two or more current offenses. RCW 9.94A.589 states in the relevant part:

(1)(a) [W]henever a person is sentenced to two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.... "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim..."

The absence of any one of the three prongs for "same criminal conduct" prevents a finding of "same criminal conduct." *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994); *State v. Price*, 103 Wn. App. 845, 855, 14 P.2d 841 (2000). The Legislature intended the phrase "same criminal conduct" to be construed narrowly. See *State v. Graciano*, - Wn.2d -, - P. 3d -(2013)(2013 WL 376076); *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). The trial court's determination whether current offenses encompass the same criminal conduct is reviewed for abuse of discretion. See *Graciano, supra*; *Price*, 103 Wn. App. at 855.

For example, abuse of discretion is possible if the trial court arbitrarily counted the convictions separately. See *State v. Haddock*, 141 Wn.2d 103, 110, 3 P. 3d 733 (2000).

For the purposes of determining defendant's offender score at sentencing, the trial court is in a better position than the court of appeals to answer the factual questions necessary to determine whether defendant's crimes constitute the same criminal conduct. When a question requires the weighing of evidence, and resolving conflicts in testimony, the Court of Appeals defers to the trier of fact whether it be the trial court or the jury. witnesses. See, e.g., *State v. Boot*, 89 Wn. App. 780, 791, 950 P.2d 964, review denied, 135 Wn.2d 1015 (1998). This is because the trier of fact has heard the testimony, seen the evidence, and is responsible for making determinations of credibility. The question of whether crimes took place at the same time and place is a question of fact, and while the test is an objective one, determining whether the defendant had the same criminal intent or had formed a new criminal intent during the commission of the crimes also involves weighing of facts, and resolving conflicts in testimony and evidence.

In some cases, the record is unclear; for example where it supports either a finding that the four acts of rape were separate and distinct from the two acts of molestation of the victim, or that they were not. Where the

record supports either conclusion, the trial court cannot be said to have abused its discretion in finding that crimes were in fact separate acts. *See Graciano, supra; State v. Rodriguez*, 61 Wn. App. 812, 816, 812 P.2d 868 (1991).

In the present case, the jury convicted defendant of six separate counts: first degree murder for the death of James Sanders, two counts of first degree robbery in which James Sanders and Charlene Sanders are the victims, two counts of second degree assault in which Charlene Sanders and J.S. are the victims, and first degree burglary in which Charlene Sanders, J.S., James Sanders, and C. K. are the victims. The trial court found that none of these six crimes are same criminal conduct because none of the crimes can satisfy the requirements of RCW 9.94A.589.

- a. The court cannot find that Count III, second degree assault in which J. S. is the victim and Count VI, first degree burglary are same criminal conduct with any other counts because Counts I, II, IV, and V do not have the same victim as Count III and Count VI has multiple victims.

RCW 9.94A.589 expressly states that to satisfy this prong of the “same criminal conduct” test the crimes must have the same victim. In the present case, the victim of Count I, first degree murder, is James Sanders. The victim of Count II, First Degree Robbery, is James Sanders. The

victim of Count III, second degree assault, is J. S. The victim of Count IV, first degree robbery, is Charlene Sanders. The victim of Count V, first degree robbery, is Charlene Sanders. The victims of Count VI are James Sanders, Charlene Sanders, J. S., and C. K.

“The Sanders family” is not a single victim. This argument was squarely rejected in *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987), see also *State v. Lessley*, 118 Wn.2d 773, 827 P.2d 996 (1992). *Dunaway* stated:

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.

109 Wn.2d 207, 215.

Neither Count III nor Count VI constitutes same criminal conduct with any other count because Count III is the only count in which J. S. is the sole victim and Count VI has multiple victims.

- b. Neither counts I and II nor counts IV and V can be considered same criminal conduct because they did not occur at the same time.

The second element that must be satisfied in order for the court to find same criminal conduct is that the crimes were committed at the same time and place. RCW 9.94A.589. In this case, the crimes all occurred at the same place, the Sanders residence; however, this prong cannot be satisfied because they did not all occur at the same time.

Counts I and II are the murder of James Sanders and the robbery of James Sanders respectively. The evidence adduced at trial established that the defendant's accomplices, Kiyoshi Higashi and Amanda Knight, entered the Sanders residence using a ruse that they wished to buy a ring James Sanders had advertised on Craigslist. After discussing the ring for a few minutes, Higashi brandished a firearm and directed Charlene and James Sanders to get down on the ground. The defendant and Joshua Reese, were given the signal via Bluetooth to come into the house to steal additional items from the home. During this time, Knight zip tied Charlene Sanders and removed the ring from her finger while Higashi zip tied James Sanders and his wedding ring was stolen from his finger. The robbery of James Sanders' was completed at this point.

James Sanders' murder occurred some time after he was robbed. There was time for the defendant and Reese to come into the house, go

upstairs, find the Sanders' children, and to bring the children downstairs. There was time for the defendant to beat and kick Charlene Sanders, demand the combination to the family's safe, and to threaten to kill Charlene by holding a gun to her head and counting backwards.

After James Sanders told the defendant and Higashi that he would give them the combination to the safe, they left the kitchen. Sanders was able to break free of his zip ties and a fight ensued. During the fight, James Sanders was shot, knocking him to the floor. 6 RP 972. Then he was shot twice more, which resulted in his death. 6 RP 973, 7 RP 1098-1099. The defendants left immediately after the shooting. 6 RP 974.

Because the robbery had been completed when the ring was taken from James Sanders hand and the murder did not occur until several minutes later, the same time and place prong cannot be met. Because same criminal conduct requires the presence of all three prongs, the trial court properly found that counts I and II are not same criminal conduct.

Similarly, counts IV and V, the robbery of Charlene Sanders and the assault of Charlene Sanders are not same criminal conduct. As argued above, the robbery was completed when Amanda Knight removed the ring from Charlene's finger as Charlene lay face down and zip tied on her kitchen floor. The assault occurred well after the initial robbery – after the defendant and Reese had come into the house on Knight's signal, found

and brought the Sanders' children downstairs, and Knight had gone upstairs to ransack bedrooms. In fact, it was the defendant who assaulted Charlene Sanders when he held a gun to her head and demanded the code to the safe. The defendant also kicked Charlene in the head causing significant bruising and swelling on Charlene Sanders' forehead.

Because the robbery was completed by Knight well before the defendant assaulted Charlene Sanders, the court properly found that counts IV and V were not committed at the same time. Counts IV and V are not same criminal conduct and were counted separately as part of defendant's offender score.

- c. Even if counts IV and V occurred at the same time and place, those counts, the robbery and assault of Charlene Sanders, did not have the same objective intent.

When considering whether crimes encompass the same criminal intent, courts must focus on the extent to which the criminal intent, viewed objectively, changed from one crime to the next. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987), *corrected*, 749 P.2d 160 (1988). Crimes may involve the same intent if they were part of a continuous transaction or involved a single, uninterrupted criminal episode. *State v. Deharo*, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998) (quoting *State v. Porter*, 133 Wn.2d 177, 185-86, 942 P.2d 974 (1997)). But when a defendant has 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).

Here it is clear that 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. Conversely, 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). Thus it is clear that robbery and assault do not have the same objective intent.

Likewise, the robbery and the assault of Charlene Sanders were not one continuous act that had the single subjective purpose of stealing property from the Sanders. It is clear that the robbery of Charlene Sanders was completed when Amanda Knight stole her wedding ring from her finger. Subsequently, the defendant assaulted Charlene Sanders by kicking her in the head and pointing a gun at Charlene Sanders' head while demanding the code to the safe. Because the objective intent for robbery and assault are different, and Knight had completed the robbery by the time the defendant started assaulting Charlene Sanders, the court found that counts IV and V are not same criminal conduct. These crimes were

properly counted separately when calculating defendant's offender score.

Based upon the above, the trial court found that none of defendant's six crimes constitutes same criminal conduct because none of them can satisfy all three prongs of the same criminal conduct test as require by RCW 9.94A.589.

- d. The defendant's prior criminal history and all the current convictions should count towards defendant's offender score.

When a defendant is sentenced for two or more current offense, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of calculating defendant's offender score. RCW 9.94A.589(1)(a).

In the present case, the defendant was convicted of six counts: 1) first degree murder; 2) first degree robbery; 3) second degree assault; 4) first degree robbery; 5) second degree assault; and 6) first degree burglary. First degree murder is a classified as a serious violent offense. RCW 9.94A.030(44)(a)(i). All of defendant's other current convictions are violent offenses. RCW 9.94A.030(53). The defendant also has prior felony convictions for robbery in the second degree, burglary in the second degree, and theft in the second degree. When a conviction is for a serious violent offense, other serious violent offenses count as 3 points whereas

violent offenses shall count as 2 points. RCW 9.94A.525(8). When a conviction is for a violent offense, count prior serious violent and violent offenses as 2 points. RCW 9.94A.525(8).

Because defendant has one conviction that is a serious violent offense and five other current convictions for violent offenses, one prior conviction for a violent offense and two other prior felony convictions, the defendant's offender score Counts I-V is fourteen. However, for Count VI, the defendant's offender score is fifteen because the prior conviction for burglary in the second degree counts as two points.

Because the offender score is over nine for each count, his high offender score results in at least two other current offenses going unpunished. Moreover, the defendant has unscored criminal history consisting of five gross misdemeanor crimes.

- e. The defendant's high offender score results in some of the current offenses going unpunished.

The defendant's high offender score and his multiple current convictions in this matter result in at least two of his current crimes going unpunished for each of defendant's convictions for first degree murder; first degree robbery, and first degree assault. The defendant's high offender score and his multiple current convictions in this matter result in

three of his current crimes going unpunished for defendant's conviction for first degree burglary. The defendant's high offender score, the defendant's un-scored criminal history is an aggravating circumstances that justifies an exceptional sentence in excess of the standard range.

8. WHERE THE DEFENDANT FAILED TO PROPOSE INSTRUCTIONS OR OBJECT TO THE INSTRUCTIONS GIVEN, HE MAY NOT NOW CHALLENGE THEM AS UNCONSTITUTIONALLY VAGUE.

A defendant who fails to object to an instruction at trial may not raise a due process vagueness challenge to the jury instruction for the first time on appeal. See *State v. Whitaker*, 133 Wn. App. 199, 233, 135 P.3d 923 (2006); see also *State v. Sao*, 156 Wn. App. 67, 79, 230 P.3d 277 (2010). While the constitution requires that the jury be instructed as to each element of the offense charged, definition of those elements is not a constitutional requirement. *State v. Scott*, 110 Wn.2d 682, 689, 757 P.2d 492 (1988). A criminal defendant who feels that an instruction is inadequate may propose a better one. The defendant may not raise the absence of a definitional instruction for the first time on appeal. *Scott*, 110 Wn.2d at 691. Vagueness analysis as applied to statutes and official policies, does not apply to jury instructions. *Whitaker*, at 233. Unlike citizens who must try to conform their conduct to a vague statute, a

criminal defendant who believes a jury instruction is vague has a ready remedy: proposal of a clarifying instruction. *Whitaker*, at 232.

Here, the defendant had no objections to the State's proposed instructions. 13 RP 2044. He had no objections to the limiting instructions. 13 RP 2050. He had no objections to the verdict forms. 13 RP 2098. As the Court pointed out in *Whitaker*, if the defendant desired additional, or different, instructions regarding "deliberate cruelty" or "sophistication and planning", or clarification of the special verdict instruction, his remedy was to propose these instructions in the trial court. He did not. He cannot challenge them for the first time on appeal.

9. THE JURY WAS PROPERLY  
INSTRUCTED REGARDING THE  
AGGRAVATING FACTORS.

The jury was instructed regarding the aggravating factors of "deliberate cruelty" (Instruction 41, CP 383) and "sophistication and planning" (Instruction 42, CP 384). The language of each of these was taken from pattern instructions. Instruction 41 is from WPIC 300.10, which is based upon RCW 9.94A.535(3)(a). Instruction 42 is from WPIC 300.22. *See* RCW 9.94A.535(3)(m). Each instruction goes beyond the statutory language to add further guidance for the jurors.

As pointed out above, the defendant did not object to these instructions, nor request additional language or clarification. These instructions are legally appropriate.

10. ANY ERROR IN THE SPECIAL VERDICT  
INSTRUCTION IS INVITED OR IT IS  
HARMLESS.

The Supreme Court has recently resolved a legal issue regarding unanimity in the special verdict instruction which began with *State v. Goldberg*, 149 Wn.2d 888, 892, 72 P.3d 1083 (2003). In *State v. Nunez*, 174 Wn.2d 707, 285 P.3d 21 (2012), the Court clarified that the jury may be unanimous to vote "no" regarding a special verdict. *Id.*, at 715. The Court also endorsed the instruction given in *State v. Brett*, 126 Wn.2d 136, 173, 892 P.2d 29 (1995), requiring a jury to leave a special verdict form blank if it could not agree, as a more accurate statement of the State's burden and better serve the purposes of jury unanimity. *Nunez*, at 719. *Nunez* overruled *Bashaw* and *Goldberg* by holding that the jury was properly instructed to be unanimous as to "yes" or "no" regarding the special verdict.

At the time of the trial in the present case, the state of the law on this issue was *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010). The

Court had held in part that a jury may reject a special finding on an aggravating circumstance even if the jurors were not unanimous.

As pointed out above, the defendant approved these instructions, including the verdict forms. He cannot now claim error to instructions that he approved of.

In *Goldberg, supra*, the jury had initially voted "no" on the special verdict form. 149 Wn. 2d at 891. Upon polling the jury, the court discovered that the special verdict was not unanimous. *Id.* The court sent them back to continue deliberating. Eventually, the jury voted "yes" to the special verdict. This created an issue of when a jury's determination is final on a special verdict. Because the jury's "determination" as "undecided" was final in the eyes of the law, it was error for the court to instruct them to continue to deliberate. *Id.*, at 894.

Unlike *Goldberg*, there was no issue of a hung jury regarding the special verdicts in the present case. The jury unanimously voted "yes." The defendant cannot show that the verdict would have been different if the jury had been instructed according to *Nunez*. Therefore, the defendant can show no harm from the instruction that did not comply with *Nunez*.

11. FACTORS FOR A SENTENCE OUTSIDE  
(ABOVE) THE STANDARD SENTENCING  
RANGE APPLY TO ALL PARTICIPANTS IN A  
CRIME.

- a. Caselaw holds that exceptional sentences may be imposed on accomplices.

One who is an accomplice to a crime is as guilty of committing the crime as the principal or other participant. *See State v. Carter*, 154 Wn.2d 71, 78, 109 P.3d 823 (2005). The law does not distinguish between exceptional sentences for accomplices and participants. In *State v. Hawkins*, 53 Wn. App. 598, 769 P.2d 856 (1989), the defendant was convicted of murder, under accomplice liability. The court imposed an exceptional sentence, aggravated by deliberate cruelty to the victim. *Id.*, at 606. Hawkins objected, arguing that the aggravating factor could not be applied to him, as he was “only” an accomplice. The Court of Appeals disagreed, saying: “[W]e will not split hairs in an effort to determine the greater or lesser roles of these three participants.” *Id.*

In *State v. Sweet*, 138 Wn.2d 466, 980 P.2d 1223 (1999), the defendant was convicted of first degree burglary and first degree assault under accomplice liability. Finding deliberate cruelty, particular vulnerability, and abuse of a position of trust, the trial court imposed an exceptional sentence above the standard range. He asserted that he stayed

in the vehicle and never entered the house. 138 Wn.2d at 479. He, like Hawkins, argued that the aggravating factor did not apply to him as an accomplice. 138 Wn.2d at 482. The Supreme Court rejected this argument and affirmed his exceptional sentence. *Id.*, at 484.

The defendant's argument assumes much. Given the facts in the present case, the distinction between "principal" and "accomplice" is a false one. None of the defendants were "mere" driver or lookout. The evidence shows that the crimes were committed by the coordinated efforts of 4 people, each taking an active role. Higashi and Knight posed as Craigslist buyers to gain access to the house and the diamond ring. The defendant and Reese waited outside for the moment when the ring was displayed. All four were armed. Higashi and Knight detained and bound the adults. The defendant and Reese went upstairs and rounded up the children. All 4 searched the house for valuables.

The defendant as identified as "the mean one" who terrorized the entire family. He threatened to kill the children. He held a gun to the back of Mrs. Sanders' head and counted down from 3 for her to tell him where the safe was. He kicked Mrs. Sanders in the face as she laid on the floor, face down, hands bound behind her back.

b. *McKim* and statutory application.

The defendant's reliance on *State v. McKim*, 98 Wn.2d 111, 653 P.2d 1040 (1982) is an incomplete analysis. *McKim* interpreted the language of a pre-SRA statute; former RCW 9.95.040, a deadly weapon sentence enhancement. The Court looked at the language of the complicity statute, former RCW 9A.08.020, to determine if the sentence enhancement was applicable to accomplices. *Id.*, at 116.

In *State v. Silva-Baltazar*, 125 Wn.2d 472, 886 P.2d 138 (1994) and *State v. Pineda-Pineda*, 154 Wn. App. 653, 226 P.3d 164 (2010), the Courts examined the statutory language of RCW 69.50.435, the school zone sentencing enhancement as it applied to accomplices. Based upon the statutory language and the facts of the respective cases, the same enhancement was affirmed against the accomplice in *Silva-Baltazar*, and reversed in *Pineda-Pineda*.

The analyses of *McKim* and *Pineda-Pineda* are also distinguishable due to the nature of how the sentence is extended beyond the standard range. Sentence enhancements, like those discussed in *McKim* and *Pineda-Pineda*, are different than exceptional sentences. Sentence enhancements under RCW 9.94A.533 (3)-(13) are mandatory; they "shall be added." *Id.* A sentence outside (above) the standard range under RCW 9.94A.535(2)(a)-(d) and (3)(a)-(cc) are discretionary; they

“may” be imposed. *Id.* In both *McKim* and *Pineda-Pineda* the Courts were concerned regarding the “strict liability” of the enhancement statutes. See *McKim*, 98 Wn.2d at 117; *Pineda-Pineda*, 154 Wn. App. at 662. Because the imposition of an exceptional sentence is discretionary, the danger of “strict liability” is avoided.

- c. The statutory language of RCW 9.94A.535(3)(a) and (m) permit application against the defendant as an accomplice.

The application of the exceptional sentence statute to an accomplice depends on which aggravating circumstance in RCW 9.94A.535 is being considered. The aggravating circumstances set forth in 9.94A.535 cover a broad range of factors. Some of the circumstances focus on the defendant’s actions such as when the defendant manifests deliberate cruelty to the victim, RCW 9.94A.535(3)(a), or uses his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the offense, RCW 9.94A.535(3)(n). Other circumstances discuss what the defendant knew or should have known about his victim, such as being particularly vulnerable, RCW 9.94A.535(3)(b), or pregnant, RCW 9.94A.535(3)(c). Other circumstances do not focus on the defendant’s actions or what he knew, but on the impact of the crime, i.e. a rape of child resulting in the victim’s pregnancy, RCW 9.94A.535(3)(i), or

the victim's injuries substantially exceeding the level of bodily harm necessary for the element of crime, RCW 9.94A.535(3)(y). Some aggravating circumstances simply describe some aspect of the offense: it involved a high degree of sophistication or planning, RCW 9.94A.535(3)(m), or an invasion of the victim's privacy, RCW 9.94A.535(3)(p).

Examination of the varied wording of these aggravating circumstances indicates that the Legislature intended some of them to apply to any participant in the substantive crime while others must be attributable to a particular defendant. Generally, the Legislature's use of the phrase "the defendant" in setting forth an aggravating circumstance signals its intent that the circumstance be assessed against the individualized defendant while use of the term "the current offense" signals its intent that the aggravating circumstance can be applied to any participant in the crime.

The language of RCW 9.94A.535(3)(a) applies to the defendant's actions:

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

RCW 9.94A.535(3)(m) applies the factor to the offense, not the particular defendant:

(m) The offense involved a high degree of sophistication or planning.

Thus, the language focuses on the crime, not on the “defendant.”

The analyses in *McKim* and *Pineda-Pineda* focus on the language and behavior regarding the defendant.

In this case, one aggravating factor pertains to the nature of the offense committed. There is no reference to “the defendant” or even an indirect reference to the entity committing the crime. Such factors do not change from one participant to the next. Once the jury finds the crime meets the criteria set forth in the aggravating circumstance, it is applicable to all the participants in the crime and need not be assessed on an individualized basis. Such an aggravating circumstance should apply equally to all participants in a crime regardless of whether they are the “principal” or “accomplice;” minor or major participant.

The defendant's "accomplice" argument can only apply to the felony murder count, because, as pointed out above, he was a full participant in all the other crimes. His argument regarding the felony murder count assumes, without basis, that someone other than he shot Mr. Sanders to death. Indeed, the evidence could just as well lead to the opposite conclusion: the defendant was the one who made separate threats to kill the adults and the children; with a gun to her head, he threatened to

shoot Mrs. Sanders on a count of 3; he was in the room when Mr. Sanders was shot.

Here, the State alleged sentencing aggravating factors that were supported by the evidence. Under RCW 9.94A.535(3)(a) and (m). The jury found the presence of factors (a) and (m). It was equally applicable to the defendant as an accomplice as a principal. The factual determinations as to the presence of the aggravating factors, and even the defendant's level of participation, are left to the jury, not the Court.

12. THE TRIAL COURT IMPOSED EXCEPTIONAL SENTENCES FOR LAWFUL REASONS.

An appropriate basis for an exceptional sentence is where, as here, the combination of a defendant's high offender score and multiple current offenses would result in “free crimes” absent departure from the standard range. RCW 9.94A.535(2)(c); see *State v. Smith*, 123 Wn.2d 51, 55-56, 864 P.2d 1371 (1993).

An exceptional sentence will be reversed only where the reviewing court finds that the reasons relied upon by the appellate court are not supported by the record under a clearly erroneous standard; that the reasons relied upon do not justify an exceptional sentence under a de novo standard of review; or that the sentence imposed is clearly excessive or clearly too lenient, under an abuse of discretion standard. *State v.*

*Jackson*, 150 Wn.2d 251, 273-274, 76 P.3d 217 (2003). Where the reviewing court is satisfied that the trial court would have imposed the same sentence based upon proper factors, it may uphold the exceptional sentence rather than remanding for resentencing. *See Jackson*, at 276.

Here, the evidence, as previously outlined, supported the jury's findings that the defendant acted with deliberate cruelty and participated in crimes that required sophistication and planning. The defendant used gratuitous violence on Mrs. Sanders and in terrorizing the family as a whole. The crimes required coordination and planning of four people in carrying out a well-organized strike on this family.

Even if the evidence did not support these findings, the defendant's offender score is well above the maximum of 9. The court was well within its discretion to impose an exceptional sentence under RCW 9.94A.535(2)(c).

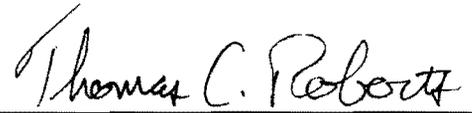
D. CONCLUSION.

The defendant received a fair trial where the court carefully considered the case law, court rules, and evidence when making a decision. The court properly determined the defendant's standard range sentence. The court imposed an exceptional sentence which the defendant

well deserved. For the reasons argued in this brief, the State respectfully requests that the conviction and sentence be affirmed.

DATED: FEBRUARY 21, 2013.

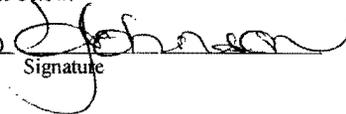
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Certificate of Service:

The undersigned certifies that on this day she delivered by <sup>efile</sup> ~~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.

2/21/13   
Date Signature

# PIERCE COUNTY PROSECUTOR

## February 21, 2013 - 11:23 AM

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