

FILED
SUPREME COURT
STATE OF WASHINGTON
3/19/2020 2:49 PM
BY SUSAN L. CARLSON
CLERK

FILED
SUPREME COURT
STATE OF WASHINGTON
3/30/2020
BY SUSAN L. CARLSON
CLERK

No. 97066-1

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Personal Restraint of

AMANDA KNIGHT,

Petitioner.

COLLATERAL ATTACK ON A JUDGMENT OF THE
PIERCE COUNTY SUPERIOR COURT
Honorable Roseanne Buckner

**BRIEF OF AMICUS CURIAE, WASHINGTON ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS**

James E. Lobsenz WSBA #8787
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215
*Attorneys for Amicus Curiae Washington
Association of Criminal Defense
Lawyers*

TABLE OF AUTHORITIES.....	iv
I. INTRODUCTION	1
II. ARGUMENT.....	4
A. The <i>Taylor</i> rule against relitigation is not applicable because Knight is not attempting to relitigate the same ground. Her PRP presented a distinct legal ground in support of her contention that she is entitled to judicial relief.	4
B. <i>Blakely</i> holds that any fact which increases the maximum sentence that the defendant can receive is a fact that must be determined by a jury. Judicial determination of any such fact violates the Sixth Amendment.	5
C. The Court of Appeals violated the Sixth Amendment rule of <i>Blakely</i> when it took it upon itself to decide the factual question of “completeness” versus continuity.....	8
D. The determination that the robbery was “completed” once Sanders’ ring was taken is contrary to this court’s decision in <i>Tvedt</i> regarding the proper “unit of prosecution” for robbery.	13
E. Even assuming, <i>arguendo</i> , that Knight’s PRP raises the same ground that was litigated in her direct appeal, it is in the interests of justice to permit relitigation because the Court of Appeals violated her constitutional rights in the prior appeal.....	17
III. CONCLUSION.....	20

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Washington Cases	
<i>Berger Engineering Co. v. Hopkins</i> 54 Wn.2d 300, 340 P.2d 777 (1959)	18
<i>Edwards v. Morrison-Knudsen Co.</i> 61 Wn.2d 593, 379 P.2d 735 (1963)	18
<i>In re Taylor</i> 105 Wn.2d 683, 717 P.2d 755 (1986)	2, 4, 5, 17, 20
<i>In re Yates</i> 177 Wn.2d 1, 296 P.3d 872 (2013)	1, 5
<i>State v. Bolar</i> 129 Wn.2d 361, 917 P.2d 125 (1996)	9
<i>State ex rel. Dickson v. Pierce Cty.</i> 65 Wn. App. 614, 829 P.2d 217 (1992)	18
<i>State v. Francis</i> 170 Wn.2d 517, 242 P.3d 866 (2010)	6, 7, 16, 20
<i>State v. Hall</i> 168 Wn.2d 726, 230 P.3d 1048 (2010)	16-17
<i>State v. Kier</i> 164 Wn.2d 798, 194 P.3d 212 (2008)	6
<i>State v. Kintz</i> 169 Wn.2d 537, 238 P.3d 470 (2010), affirming <i>State</i> <i>v. Kintz</i> , 144 Wn. App. 515, 521-22, 191 P.3d 62 (2008)	3, 8-11, 13
<i>State v. Knight</i> 176 Wn. App. 936, 309 P.3d 776 (2013).....	1, 12, 13
<i>State v. Sweet</i> 90 Wn.2d 282, 581 P.2d 579 (1978)	17

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<i>State v. Tvedt</i> 153 Wn.2d 705, 107 P.3d 728 (2005)	3, 13, 14, 15, 16
<i>Stringfellow v. Stringfellow</i> 56 Wn.2d 957, 350 P.2d 1003 (1960)	18
Federal Cases	
<i>Aetna Life Insurance, Inc. v. Lavoie</i> 475 U.S. 813 (1986)	19
<i>Apprendi v. New Jersey</i> 530 U.S. 466 (2000)	2, 6
<i>Blakely v. Washington</i> 542 U.S. 296 (2004)	2, 5, 6, 8, 18
<i>Bell v. United States</i> 349 U.S. 81 (1955)	17
<i>Ex Parte Snow</i> 120 U.S. 274 (1877)	17
Constitutional Provisions	
Wash. Const., art. I, §22	17
Wash. Const., art. IV, §6	18

I. INTRODUCTION

In this PRP, Knight argued below that she cannot be convicted and sentenced for both Assault 2 and Robbery 1 of Charlene Sanders because the Assault 2 was a part of the Robbery 1 charge. The Court of Appeals refused to address the merits of Knight's claim because it believed that it had already decided this same issue and had rejected this argument in her direct appeal. Citing to *In re Restraint of Yates*, 177 Wn.2d 1, 17, 296 P.3d 872 (2013) where this Court applied the relitigation rule of *In re Taylor*, 105 Wn.2d 683, 688, 717 P.2d 755 (1986), the Court noted that "a [PRP] petitioner may not renew a claim that was raised and rejected on the merits on direct appeal unless the petitioner shows that the interest of justice require reconsideration under RAP 16.4(d)." *Opinion* at 15.

But the Court was simply wrong about its prior direct appeal decision. It had not decided the same "claim" in the direct appeal. It had resolved a Fifth Amendment double jeopardy claim by making an appellate court finding of fact that the robbery of Charlene Sanders was "completed" before a subsequent assault was perpetrated against her. *State v. Knight*, 176 Wn. App. 936, 956, 309 P.3d 776 (2013). The Court of Appeals decided that instead of one continuous robbery offense, there was an "earlier completed robbery of Charlene's ring at gunpoint" followed by a subsequent assault committed for the "independent purpose" of finding more property to steal from her. The Court found that the "later assault of Charlene to locate the family safe 'was no part of the robbery' of her wedding ring by Knight and Higashi earlier." *Id.* Based on its own factual

finding that the robbery had been completed by the time Sanders was kicked in the head, the Court of Appeals rejected Knight's argument that she had been convicted and punished twice for what was but one crime.

In her PRP, Knight raised a *new* Sixth Amendment issue regarding the appellate court's *power* to make such a factual finding. Citing to *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2004), she argued that only a jury could make such a factual finding. Since the jury never made any finding that the robbery was "completed" before the assault was committed, the Court of Appeals violated her Sixth Amendment right to have a jury decide that factual question. The Court refused to decide her challenge to her robbery 1 and assault 2 convictions. Purporting to rely on the *Taylor* rule against relitigation of the "same claim that was raised and rejected on the merits on direct appeal" the Court never addressed Knight's Sixth Amendment claim.

But the Sixth Amendment issue was neither raised nor rejected on the merits in Knight's prior appeal. Indeed, it was not even possible to raise a *Blakely* claim until *after* the Court of Appeals issued its decision because the Sixth Amendment violation was committed by the Court of Appeals. While arguably Knight could have raised the issue in a motion for reconsideration, she did not do so. Since the issue was never raised, the Court of Appeals never rejected it on the merits. Thus, the Court of Appeals erred when it found the *Taylor* rule against relitigation applied.

It is settled law that whether there is one continuous crime or two separate crimes is a factual question that is to be decided by a jury. *State v.*

Kintz, 169 Wn.2d 537, 559, 238 P.3d 470 (2010). Ignoring *Kintz* and oblivious to the Sixth Amendment requirement that any fact upon which increased punishment depends must be decided by a jury, the Court of Appeals committed a new constitutional violation by taking it upon itself to decide the factual question of whether the robbery was completed before the Assault 2 was committed. Moreover, the Court of Appeals' completeness finding is directly contrary to this Court's decision in *State v. Tvedt*, 153 Wn.2d 705, 107 P.3d 728 (2005), regarding the proper "unit of prosecution" for the crime of robbery. *Tvedt* prohibits the division of one robbery into multiple crimes depending upon how many items of property the robber takes or attempts to take.

Since the Sixth Amendment claim was never raised and never decided on the merits in the prior direct appeal, it is not barred and should have been decided by the Court below. On direct appeal, the Court below agreed that ordinarily an assault and a robbery charge merge because an assault is a part of every robbery. The rejection of Knight's Double Jeopardy multiple punishment claim was rejected solely on the ground that the "independent purpose" exception to the merger rule applied and the finding of an independent purpose was made by the appellate court in violation of the Sixth Amendment. Since the Court of Appeals never considered its own constitutional violation – since Knight never even raised the issue of improper appellate fact finding – the raising of that issue in her subsequent PRP present no occasion for any *re*litigation of that issue. Resolution of the Sixth Amendment improper judicial fact finding issue

simply leads to the invalidation of the exception to the merger rule which was recognized in the direct appeal. In sum, the *Taylor* rule against relitigation of the same issue has no application whatsoever to this case.

Finally, even if this Court decided that the *Taylor* rule did apply, it is in the interests of justice to permit relitigation when the appellate court did far more than simply decide the prior appeal incorrectly. When an appellate court commits a new violation of a convicted defendant's constitutional rights, that new violation taints the prior appeal and provides a solid basis for concluding that it is in the interests of justice to allow relitigation of a previously decided issue.

II. ARGUMENT

A. The *Taylor* rule against relitigation is not applicable because Knight is not attempting to relitigate the same ground. Her PRP presented a distinct legal ground in support of her contention that she is entitled to judicial relief.

This Court's rule against PRP "relitigation" of the same issue previously decided in a direct appeal was adopted in *In re Taylor, supra*. Although the Court of Appeals used the word "claim" to describe the rule against relitigation, this Court did not use that word in *Taylor*. Instead, this Court formulated the rule against relitigation narrowly:

[W]e hold the mere fact that an issue was raised on appeal does not automatically bar review in a PRP. Rather, a court should dismiss a PRP *only* if the prior appeal was denied on *the same ground* and the ends of justice would not be served by reaching the merits of the subsequent PRP.

By 'ground' we mean simply a distinct legal basis for granting relief. Should doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor

of the applicant. In addition, the prior denial must have rested on an adjudication of the merits of the ground presented in the subsequent application.

Taylor, 105 Wn.2d at 688 (emphasis added).

Knight's Sixth Amendment ground provides a "distinct legal basis" for providing relief. In the direct appeal, Knight argued that she was being punished twice for the same criminal offense. In essence, the Court of Appeals held, "No, you're not, because the two offenses are not the same offense; we have examined the record and we are making a finding that they were two separate offenses because the robbery was completed before the assault was committed." In her PRP, Knight's argument to the Court of Appeals was essentially this: "You didn't have the power to make that factual finding, and by doing so you violated my Sixth Amendment right to have a jury decide the factual question of whether the robbery was 'completed' before the assault was committed."

By raising her Sixth Amendment *Blakely* claim, Knight has raised a "distinct legal basis for granting relief." *Taylor*, at 688. To fall within the scope of the *Taylor* rule, the same legal ground must have been raised *and* rejected on the merits. *Yates*, 177 Wn.2d at 17; *Taylor*, at 688. In this case because *neither* requirement is satisfied the rule simply doesn't apply.

B. *Blakely* holds that any fact which increases the maximum sentence that the defendant can receive is a fact that must be determined by a jury. Judicial determination of any such fact violates the Sixth Amendment.

In the present case, the factual issue of "separateness" – the question of whether there were two crimes or only one – was not decided by a jury.

And yet under *Apprendi* and *Blakely*, “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Blakely*, 542 U.S. at 301, quoting *Apprendi*, 530 U.S. at 490. The relevant statutory maximum “is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” *Id.* at 303.

In other words, the relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts “which the law makes essential to the punishment,” Bishop, *supra*, § 87, at 55, and the judge exceeds his proper authority.

Blakely, at 303-04.

“A court entering multiple convictions for the same offense violates double jeopardy.” *State v. Francis*, 170 Wn.2d 517, 523, 242 P.3d 866 (2010). *Accord State v. Kier*, 164 Wn.2d 798, 803, 194 P.3d 212 (2008). “Because the legislature has the power to define offenses, whether two offenses are separate offenses hinges upon whether the legislature intended them to be separate.” *Francis*, at 523. “[T]he merger doctrine is the most compelling consideration to determine legislative intent.” *Id.* at 524. In *Francis*, because a second degree assault elevated an attempted robbery to attempted robbery in the first degree, this Court found that the former offense merged into the latter. *Id.* at 524-25. This Court rejected the contention that the “independent purpose” exception applied. Both offenses

were committed against the same person (D'Ann Jacobsen):

[T]he sole purpose of the second degree assault was to facilitate the attempted robbery. The assault was not 'separate and distinct' from the attempted robbery, it was incidental to it."

Because as charged Francis' conviction for second degree assault merges into his conviction for attempted first degree robbery, the trial court violated double jeopardy when it entered convictions on both offenses. We thus vacate the conviction on the lesser offense – the second degree assault.

Francis, 170 Wn.2d at 525. The same result should apply in this case. The sole purpose of the second degree assault against Charlene Sanders was to facilitate the continuing robbery of Charlene Sanders; therefore it merges into the first degree robbery and must be vacated.

In this case, on direct appeal the Court of Appeals determined that the Assault 2 on Charlene Sanders committed by Knight's confederate Berniard had an independent purpose that was separate from the crime of Robbery 1 because it was committed after commission of the robbery offense had been "completed." Without this finding of fact, Knight could only be punished for one crime: Robbery 1. The finding of an assault with an independent purpose after completion of the robbery was the basis for the Court of Appeals' determination that there were two crimes, not one, and that accordingly there was no unconstitutional multiple punishment.

Thus, this appellate factual finding increased the maximum punishment imposed upon Knight in two ways. First, she was punished for two crimes when she should have been punished only for the robbery offense. Second, because her Assault 2 was counted in the offender score

used to generate her standard range for Robbery 1, the Assault 2 conviction also increased her punishment on the Robbery 1. Since Knight’s jury never was instructed to consider whether the Assault had an independent purpose, or whether the Robbery offense was completed before the Assault 2 occurred, the jury never made any such finding. While the appellate judges deciding her direct appeal made this finding, to paraphrase *Blakely*, since “the jury [did] not [find] all the facts ‘which the law makes essential to the punishment,’ Bishop, *supra*, § 87, at 55, . . . the judge[s] exceed[ed] [their] proper authority.”

C. The Court of Appeals violated the Sixth Amendment rule of *Blakely* when it took it upon itself to decide the factual question of “completeness” versus continuity.

Moreover, there is no question but that Knight is correct on the question of a Sixth Amendment *Blakely* violation. This Court has already held that whether criminal acts are “separate” or part of one continuing criminal incident is a factual determination that must be made by a jury. *State v. Kintz*, 169 Wn.2d 537, 559, 238 P.3d 470 (2010). Kintz was convicted of stalking one woman (Westfall) on December 21, 2005 and of stalking a second woman (Gudaz) on January 28, 2006. Stalking requires proof that the defendant followed another person “on two or more separate occasions.” RCW 9A.46.110. In the Westfall incident, the evidence showed Kintz drove past Westfall six times and during the Gudaz incident he drove past Gudaz four times. In both cases Kintz had several brief conversations with the women within a relatively short period of time.

Kintz raised two issues. First, he argued that there was insufficient

evidence to support the element of “separate occasions” because in each count all the acts of following occurred on the same day. The Court of Appeals concluded that “[w]hether the evidence is sufficient turns on the legal meaning of ‘separate occasion.’” *Kintz*, 169 Wn.2d at 544, quoting *State v. Kintz*, 144 Wn. App. 515, 521-22, 191 P.3d 62 (2008). The Legislature did not define the term “separate occasion.” 169 Wn.2d at 546. Relying upon dictionary definitions of separate and occasion, the Court of Appeals “concluded that a separate occasion is a “distinct, individual, noncontinuous occurrence or incident.” *Id.* at 546-47, citing *Kintz*, 144 Wn. App. at 522. The Court of Appeals held there was sufficient evidence and affirmed *Kintz*’s convictions. This Court granted review and affirmed.

He argued that under the Court of Appeals’ vague definition, “separate occasions” could mean acts occurring “within only a few minutes of each other.” 169 Wn.2d at 547. *Kintz* maintained that such a definition was ambiguous and that under the rule of lenity his acts of following could not be considered “separate occasions” of following. *Id.* This Court disagreed and held that the word “separate” was not ambiguous and endorsed the Court of Appeals’ definition of that term. *Id.* at 548, citing *State v. Bolar*, 129 Wn.2d 361, 366, 917 P.2d 125 (1996).

This Court then considered *Kintz*’s claim that the evidence was insufficient to prove that his acts of following were “separate.” First this Court rejected the argument that there was some minimum amount of time that must pass before two acts could be considered “separate.” *Id.* at 551. Next, this Court rejected *Kintz*’s argument that the evidence necessarily

showed only one continuous following:

First, [Kintz] asserts that the Westfall incident and the Gudaz incident are each “only one ongoing ‘following’ briefly interrupted by a short break in visual proximity,” and thus the State cannot show that Kintz stalked his victims “repeatedly.” The State responds that both incidents satisfy the requirement of two or more separate occasions because each involved “repeated contacts, separated by time and physical space.”

Kintz, 169 Wn.2d at 552 (citations omitted).

This Court reviewed the evidence in support of both counts and in each instance concluded that the jury, as the finder “of fact” could have rationally found that there were “separate” incidents of following and harassment:

The Westfall incident consisted of four distinct episodes, each separated by a significant interruption of Kintz's contact with Westfall . . . Viewed in the light most favorable to the State, a rational trier *of fact could easily have found* Kintz guilty of stalking Westfall by *following her on two or more separate occasions*.

Episodes two, three, and four also constitute separate occasions of “unlawful harassment” . . . Based on the breaks in contact between these episodes, *the jury could have found that they constituted two or more separate occasions* of harassment.

The Gudaz incident was similarly divided into four discrete episodes . . . These four episodes are again separated by a break in Kintz's contact with his target, this time, Gudaz. . . .

In our view, each of these episodes satisfies the statutory definition of “following”: “deliberately maintaining visual or physical proximity to a specific person over a period of time.” RCW 9A.46.110(6)(b). Each episode, moreover, was bounded by a break in contact between Kintz and Gudaz. Thus, *the jury could reasonably find that together, they make up two or more separate occasions* of following. *The jury could also find that they constitute two or more separate occasions* of harassment.

Id. at 555-57 (footnote omitted) (emphasis added).

The dissenters in *Kintz* felt that the majority was carving one continuous incident up into “microevents” which were actually simply part of one continuous incident. *Id.* at 558. The *Kintz* majority responded that the trier of fact – the jury – did not agree:

[T]he dissent accuses us of “artificially deconstructing the events in [a] single pattern to create multiple patterns,” and elsewhere of “cleav[ing] a single course of conduct into multiple courses of conduct.” *Id.* at 565-66. No artifice was necessary because the breaks in contact appear in the record. The dissent is simply unsatisfied with the length of those breaks and persists in its view that the totality of Kintz’s contacts with Westfall or Gudaz constituted but a single occasion. ***The jury saw things differently.***

Kintz, 169 Wn.2d at 558-59 (emphasis added).

In the case at bar, the Court of Appeals departed from the teaching of *Kintz* and usurped the jury’s role of deciding the factual question of “separateness” or “continuity” of criminal conduct. The Court of Appeals noted that after Higashi “pulled out a handgun and threatened” James and Charlene Sanders with it, “Knight zip tied Charlene’s hands behind her back . . . [and] Knight removed Charlene’s wedding ring from her finger, Knight or Higashi removed James’s wedding ring from his finger.” 176 Wn. App. at 942. This was not, however, the last act of securing and stealing property.

After ordering James and Charlene to lie down on their stomachs on the floor, Knight signaled two more accomplices, Reese and Bernard, who had been waiting outside, to enter the house. *Id.* After Reese and Bernard found the two Sanders children and tied them up as well, Charlene “saw Knight and Higashi gather up items from the house, including from the

downstairs laundry room. Knight also ransacked the main bedroom upstairs, looking for other expensive items to collect.” *Id.* at 942-43. At this point, one of Knight’s confederates assaulted Charlene Sanders in an attempt to get her to disclose the whereabouts of more property:

Berniard held a gun to Charlene’s head, pulled back the hammer, began counting down, and asked her, “Where is your safe?” Charlene responded that they did not own a safe. Berniard kicked Charlene in the head, called her a ‘bitch,’ threatened to kill her and her children. According to Charlene, “[Berniard] kicked [her] so hard that [her] head went up and then [she] hit down on the ground”; it left a large “goose egg on her left temple. Charlene believed she was going to die. Eventually Charlene told the intruders that they kept a safe in the garage.

State v. Knight, 176 Wn. App. at 943 (record citations omitted). In the garage, Berniard shot James Sanders once and then either Berniard or Reese shot James several more times. *Id.* Following the gunshots, all the robbers fled the house, Charlene called 911 and police responded. *Id.* Investigators found that “[i]n addition to the rings, among the items missing from the Sanders’ home were a PlayStation, an iPod, and a cellular phone.” *Id.*

The Court of Appeals then took it upon itself to decide where the robbery ended and which of the many acts committed by the four robbers constituted a part of that robbery. In the key passage of its opinion, the Court of Appeals found that Berniard’s assault of Charlene Sanders had an “independent purpose” that differed from the purpose motivating the Robbery 1, which warranted a “separate conviction” for Assault 2:

Here, Berniard’s pointing his gun at Charlene and kicking her in the head to force her to reveal the location of a safe provided an “independent purpose” and support for a *separate* conviction for this

later second degree assault, independent of Knight's and Higashi's earlier *completed robbery* of Charlene's ring at gunpoint. [Citations]. Berniard's later assault of Charlene to locate the family safe "was no part of the robbery" of her wedding ring by Knight and Higashi earlier.

Knight, 176 Wn. App. at 956 (emphasis added)(citations omitted).

As *Kintz* makes clear, this was a factual determination. Whether the gun/kick assault had an "independent purpose" was a factual determination and whether the robbery and the assault were "separate" crimes or one continuous crime was a factual determination. As such, it was a determination for a jury to make and thus the Court of Appeals had no basis making this factual finding.

Since this fact was determined by the Court of Appeals, the Court of Appeals violated the Sixth Amendment. Since this issue was never litigated in the prior direct appeal, the Court of Appeals erred by refusing to decide this issue on the merits in this PRP. At this juncture, therefore, this Court should hold that the Sixth Amendment was violated and the finding that the robbery had been completed and that the assault 2 was a separate offense must be vacated. Since that finding must be vacated, there is no basis for the holding that the Assault 2 did not merge into the Robbery 1. Consequently, this Court should vacate Knight's sentence, vacate her Assault 2 conviction, and remand for resentencing on Robbery 1 only.

D. The determination that the robbery was "completed" once Sanders' ring was taken is contrary to this court's decision in *Tvedt* regarding the proper "unit of prosecution" for robbery.

In addition to usurping the jury's power to find facts, the Court of Appeals' determination that the robbery ended with the taking of Charlene

Sanders' ring also usurped the Legislature's power to define the unit of prosecution. This Court has already determined that the Legislature defined the unit of prosecution for robbery in such a manner as to make it irrelevant how many items of property the robber takes from, or from the presence of, a specific person. In *State v. Tvedt*, supra, the defendant robbed two gas stations. During each robbery, there were two people present from whom the defendant took property. And in each robbery the defendant took property by force from both people. Analyzing the Legislature's definition of robbery, this Court concluded that "the unit of prosecution for robbery is each separate forcible taking of property from or from the presence of a person having an ownership, representative, or possessory interest in the property, against that person's will." *Tvedt*, 153 Wn.2d at 714-15.

At the same time, this Court rejected "Tvedt's assertion that the Court of Appeals" had erroneously "defined the unit of prosecution to mean that multiple convictions for robbery may be sustained based on the number of items of property" forcibly taken from the same person. *Id.* at 714. This Court illustrated the type of multiple count prosecution which would violate the Legislature's definition of the crime:

[F]or example, three convictions of robbery if a watch, wallet, and ring are taken at the same time from the same person. . . . Tvedt mischaracterizes the court's holding. The Court of Appeals properly rejected the premise that the number of robberies can be based merely on the number of items taken. [Citation]. The robbery statute does not support the premise that the number of items taken establishes the number of convictions that may be obtained."

Tvedt, 153 Wn.2d at 714.

In the present case, in Knight's prior direct appeal the Court of Appeals actually did commit the error which the Court of Appeals did not commit in the *Tvedt* case. The Court of Appeals made the number of crimes depend on the number of items of property that Knight and her confederates took, or sought to take by force. They took a wedding ring from Charlene Sanders. They also took other items they found in her house after they tied her up (the PlayStation, the iPod and the cell phone). Finally, they tried unsuccessfully to take property kept inside a safe by threatening her with a gun and by kicking her in the head. The fact that the robbers continued to threaten the use of force, and to use force, against Charlene Sanders, while they sought and obtained more items of property *after* taking her ring does not support the conclusion that multiple robberies were committed.

As a matter of law, *even if factually* the intent to take a second item of property is formed after some other item has already been taken, that fact is legally irrelevant. The legislature has decreed that it doesn't intend for this second factual purpose to support a second conviction because it doesn't care about the formation of multiple intents to steal multiple pieces of property. Since the unit of prosecution simply doesn't depend on the number of items taken (from the same victim), there can only be one continuing robbery no matter how many items are taken after the first item and thus there cannot be two robberies, nor can there be a robbery followed

by an attempted robbery if the effort to steal a second item fails.¹ Similarly, in this case, as a matter of law there was no “separate” assault motivated by an “independent purpose” to steal more items of property because the Legislature did not intend for takings of more than one item to be considered “independent” and manifested that intent by defining the unit of prosecution so that it did not matter how many items of property were taken from the person being robbed. Thus, the Court of Appeals’ conclusion that the Robbery 1 had been completed once the wedding ring was taken is legally insupportable because it conflicts with *Tvedt* and with the Legislature’s definition of the unit of prosecution. A court cannot permit a prosecutor to carve up one continuous crime into smaller separate crimes when the Legislature has defined the crime so that one “unit” includes all the pieces. *See, e.g., State v. Hall*, 168 Wn.2d 726, 734, 737, 230 P.3d 1048 (2010) (“The plain language of the statute supports the conclusion that the unit of prosecution is the ongoing attempt to persuade a witness not to testify in a proceeding.”); although Hall made three telephone calls to the witness, “Hall

¹ In *Francis*, there was never a trial and no jury ever determined any fact because the defendant plead guilty to both Assault 2 and Attempted Robbery 1. This Court, expressly relying on *Tvedt*, again held that as a matter of law the unit of prosecution for robbery does not depend on the number of items taken (or attempted to be taken). 170 Wn.2d at 528, citing *Tvedt*, 153 Wn.2d at 720. Francis was trying to steal \$2,000 but he never obtained the money because he fled when a third person approached. *Id.* at 521. In this case, Knight and her confederates took one piece of property by force from Charlene Sanders and was seeking to obtain more (the property inside the safe). In both cases, as a matter of law there was only one robbery, or one attempted robbery, of the same female victim. In this case, since there was only one robbery as a matter of law, even if a jury had found that the assault 2 had an independent purpose (of obtaining property in the safe) that would not be legally relevant, as *Francis* shows.

committed one crime of witness tampering, not three.”).²

In sum, even if a jury were to find factually that there was an independent criminal purpose formed after taking the wedding ring, that *still* would not permit the entry of the multiple convictions in this case where the assault of Charlene Sanders by Berniard was simply a continuation of the robbery of Charlene Sanders.³

E. Even assuming, *arguendo*, that Knight’s PRP raises the same ground that was litigated in her direct appeal, it is in the interests of justice to permit relitigation because the Court of Appeals violated her constitutional rights in the prior appeal.

The *Taylor* rule is applicable only when *two* requirements are met: “[A] court should dismiss a PRP *only if* [1] the prior appeal was denied on the same ground *and* [2] the ends of justice would not be served by reaching the merits of the subsequent PRP.” 105 Wn.2d at 688. Assuming, *arguendo*, that the first requirement is met in this case, the second requirement is not.

Under Wash. Const., art. 1, §22, a criminal defendant has a constitutional right to an appeal. *State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579 (1978). It is the rare direct appeal where the appellate court violates the state and federal constitutions in the course of deciding the

² *Accord Ex Parte Snow*, 120 U.S. 274, 281 (1877) (“The offense of cohabitation, in the sense of this statute, is committed if there is a living or dwelling together as husband and wife. It is, inherently, a continuous offense”; division of one crime into three counts held improper); *Bell v. United States*, 349 U.S. 81 (1955) (transportation of two women over state lines for purpose of prostitution was only a single offense, not two; number of women transported not relevant to the unit of prosecution).

³ If Knight and her confederates had left the Sanders' residence after taking Charlene's wedding ring, and returned the next day, again threatened her with a gun, and had then taken more items of property from her – and if a jury had found that these events constituted a second robbery separated from the first by a significant intervening time period – then a second robbery conviction could be sustained.

appeal. But that is precisely what happened in Knight’s direct appeal.

First, as noted above, by making a finding of fact, the Court of Appeals violated the Sixth Amendment and the rule of *Blakely*.

Second, the Court of Appeals also violated the state constitutional prohibition against appellate judges making any findings of fact. Even in civil cases, where the Sixth Amendment does not apply, *appellate* judges are forbidden to make findings of fact.

This Court has held several times that Washington appellate judges have no power to make any findings of fact:

Factual disputes are to be resolved by the trial court. The Washington Constitution, by art. IV, §6, vests that power exclusively in the trial court.

Stringfellow v. Stringfellow, 56 Wn.2d 957, 959, 350 P.2d 1003 (1960).⁴ In direct violation of the art IV, §6, the panel judges in Knight’s direct appeal made a finding of fact, and then used that finding as the sole basis for sustaining her conviction for Assault 2.

An appellate court deciding an appeal in a criminal case violates both the federal and state constitutional prohibitions when it makes a finding of fact. Under these circumstances, its decision can never be deemed insulated from subsequent review. When such violations are committed, it is in the interests of justice to permit relitigation of the direct appeal.

⁴ *Accord Edwards v. Morrison-Knudsen Co.*, 61 Wn.2d 593, 598, 379 P.2d 735 (1963) (“fact finding is *exclusively* vested in the trial court”) (italics added); *Berger Engineering Co. v. Hopkins*, 54 Wn.2d 300, 308, 340 P.2d 777 (1959) (an appellate court “is not a fact-finding branch of the judicial system of this state.”); *State ex rel. Dickson v. Pierce Cty*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992) (“[a] tribunal with only appellate jurisdiction is not permitted or required to make its own findings . . .”).

One further illustration of this point is warranted. Consider the situation where a panel of appellate judges includes a judge who is actually biased against the appellant. It is a violation of due process for such a judge to participate in the appeal. Instead, due process requires his recusal. But suppose the judge fails to recuse himself, participates in the appeal, and votes with a majority to affirm the decision by rejecting the appellant's contentions on the merits. Suppose further that the appellant then challenges that judge's refusal to recuse and wins a determination that the judge *was* actually biased and *was* required to recuse himself.

In this situation, the U.S. Supreme Court held that the remedy is to give the Appellant a new appeal. *Aetna Life Insurance, Inc. v. Lavoie*, 475 U.S. 813, 828 (1986) ("the 'appearance of justice' will best be served by vacating the decision and remanding for further proceedings."). Although a new appeal means there will be a relitigation of the issues that were actually decided on the merits in the first appeal, that is no bar to a new appeal. In this situation it is in the interests of justice to relitigate the appeal.

If it is in the interests of justice to relitigate such a civil appeal when all that is at stake is money, then *a fortiori* it is in the interests of justice to relitigate the issues decided in a prior criminal appeal. In this case, the constitutional violation committed by the direct appeal judges was not a due process violation like the one committed in *Aetna*; it was instead a violation of a structural constitutional right to have a jury, rather than any judge (appellate or trial court) decide the facts dispositive of her case. But this is a distinction without a difference. When direct appeal judges violate the

appellant's constitutional rights, it is in the interests of justice to relitigate the issues decided in the direct appeal.

III. CONCLUSION

In conclusion, the judges who denied Knight relief on her PRP claim that her Assault 2 conviction was improper erred when they based that ruling solely on the application of the *Taylor* rule against relitigation of an issue allegedly decided on the merits in a prior direct appeal. For the reasons stated above, *amicus* urges this Court to reverse that portion of the Court of Appeals' decision which deals with Knight's two convictions for both an Assault 1 and a Robbery 1 committed against Charlene Sanders.⁵ *Amicus* submits that the Assault 2 conviction must be vacated because it merged with the Robbery 1, and that the case should be remanded for resentencing without that conviction.

Respectfully submitted this 19th day of March, 2020.

CARNEY BADLEY SPELLMAN, P.S.

By s/James E. Lobsenz

James E. Lobsenz WSBA #8787

*Attorneys for Amicus Curiae Washington
Association of Criminal Defense Lawyers*

⁵ *Amicus* also urges the Court to affirm that portion of the opinion which vacates Knight's conviction for the robbery of James Sanders because it merges into her conviction for Felony Murder committed in the course of robbery. In *Francis*, the prosecution dropped a count of Attempted Robbery 1 of Jason Lucas because it would have merged into the felony murder count for the murder of Lucas in the course of that attempted robbery. *Francis*, 170 Wn.2d at 520. The State should have done the same thing here with respect to the crimes of the robbery and the felony murder of James Sanders which was premised upon that same robbery.

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

ESERVICE to the following:

Timothy K. Ford	timf@mhb.com
Robin Khou Sand	rsand@co.pierce.wa.us
Anne Egeler	aegeler@co.pierce.wa.us

DATED this 19th day of March, 2020.

s/Deborah A. Groth

Deborah A. Groth, Legal Assistant

CARNEY BADLEY SPELLMAN

March 19, 2020 - 2:49 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 97066-1
Appellate Court Case Title: Personal Restraint Petition of Amanda Christine Knight
Superior Court Case Number: 10-1-01903-2

The following documents have been uploaded:

- 970661_Briefs_20200319144648SC891798_8570.pdf
This File Contains:
Briefs - Amicus Curiae
The Original File Name was Brief of Amicus Curiae Washington Association of Criminal Defense Lawyers.PDF
- 970661_Motion_20200319144648SC891798_5846.pdf
This File Contains:
Motion 1 - Amicus Curiae Brief
The Original File Name was Motion for Leave to File Amicus Brief.PDF

A copy of the uploaded files will be sent to:

- Anne.Egeler@atg.wa.gov
- PCpatcecf@piercecountywa.gov
- TimF@mhb.com
- anne.egeler@piercecountywa.gov
- lindamt@mhb.com
- lobsenz@carneylaw.com
- pcpatcecf@co.pierce.wa.us
- robin.sand@piercecountywa.gov

Comments:

Sender Name: Deborah Groth - Email: groth@carneylaw.com

Filing on Behalf of: James Elliot Lobsenz - Email: lobsenz@carneylaw.com (Alternate Email:)

Address:

701 5th Ave, Suite 3600

Seattle, WA, 98104

Phone: (206) 622-8020 EXT 149

Note: The Filing Id is 20200319144648SC891798