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NO. 08-1-07536-9
COA# 64405-0-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JIN WOO KIM, Appellant, Defendant

AMENDED REPLY BRIEF OF APPELLANT

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I. SUMMARY OF REPLY ARGUMENTS

This reply contains three primary arguments. First, under *Freeman*, the State failed to *prove* that Mr. Kim's Second Degree assault charge for displaying a firearm was independent and distinct from his Robbery charge. Second, the "merely incidental doctrine" does apply when making apply the sufficiency of the evidence test to a kidnapping charge, and the under that doctrine, Mr. Kim's Kidnapping conviction was merely incidental to his Robbery conviction. Third, Mr. Kim's Robbery and Assault convictions merge into his Kidnapping conviction. Fourth, because Mr. Kim's counsel was ineffective, he did not waive his right to appeal his offender score.

II. AUTHORITY AND ARGUMENT

A. Assault Merged with the Robbery Conviction

In its response brief, the State has argued that although "in certain situations, convictions for first-degree robbery and second degree assault violate double jeopardy," but "such is not the case here where the defendant's assault on Na with a firearm was separate from his later robbery of Na's vehicle." Respondent's Response Brief at 6. This argument is wrong and ignores clearly established case law. The thrust of the State's argument relies upon the one of the exceptions to the Merger Doctrine as described in *State v. Freeman*, which "may operate to allow

two convictions even when they formally appear to be the same crime under other tests.” 153 Wn. 2d 765, 778, 108 P.3d 753 (2005).

The *Freeman* court described that issue in this way: “Did the commission of the ‘included’ crime have an independent purpose or effect from the other crime?” *Id.* Thus, two “offenses may in fact be separate when there is a separate injury to the “the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element.” *Id.*

After applying that doctrine here, it is clear that the State’s argument that these circumstances are different than those in *Freeman* is wrong for two reasons. First, it ignores the requirement as set in *Freeman* that requires the State to have *proven* a separate and distinct injury at trial, which the State failed to do here, just as it did in *Freeman*. In addition, the State cited no case law that Second Degree Assault and First Degree Robbery should not merge based solely on the passage of time alone, which was still, not even found by the jury. Second, even if the jury verdict were in doubt, the rule of lenity requires merger.

1. The State did not *prove* that the assault and robbery were separate & distinguishable crimes as required by *Freeman*.

The State here did not prove at trial that Mr. Kim committed two distinct crimes as it alleges in its Response brief. As the State correctly

noted in its brief, the factual inquiry behind the merger doctrine applies to a case “as charged and *proved*.” Respondent’s Response Brief at 9 (emphasis added) (citing *Freeman*, 153 Wn. 2d at 778). However, the State is incorrect in its conclusion that Mr. Kim’s crimes, “as charged and proved” in this case, constituted separate and distinguishable crimes.

The State wrongly equates the “as charged and proved” standard into a sufficiency of the evidence standard when it argues that “[t]he facts constituting the assault on Na with a firearm were not *needed* to prove and elevate the defendant’s robbery of Na.” Respondent’s Response Brief at 9 (emphasis added).¹ This statement misses the point and misconstrues the applicable law.

Our Supreme Court has made it quite clear that the facts *proved* at trial are only those decided by the jury. *See, e.g., State v. Arndt*, 87 Wn. 2d 374, 377-78, 553 P.2d 1328 (1976) (if a statute describes several separate and distinct offenses, there must be a unanimous verdict as to each separate crime described). Accordingly, the question before the court is not “whether the State presented sufficient evidence to prove each individual crime,” but instead whether the State *actually proved* that a separate crime occurred and obtained a jury verdict of guilty on it.

¹ Further, even if this was a sufficiency of the evidence standard, *State v. Brett* would be controlling and the Assault conviction would still not stand. *See* Section “C” *infra*.

In this case, the State failed to request a jury instruction to that effect—i.e. no jury instruction asked the jury to determine what acts constituted the assault and what acts constructed the separate. In rejecting the same argument that the State advances here, the *Freeman* court noted that although “the trial court noted in his oral ruling that Freeman may have shot Pitchford [the victim] to impress his friends, *it was not found by the jury*. Based on the crime charged and proved, Freeman shot Pitchford to facilitate the robbery. This exception would not apply.” *Id.* at 779.

What happened in *Freeman* is exactly the same thing that happened in this case. Here, the state has conceded that “as charged and convicted here, to find the defendant guilty of second degree assault, the jury was required to find that the defendant assaulted Na with a deadly weapon.” Response Brief at 10 (citing CP 9, 37; RCW 9A.36.021(1)(c)). Also, as charged and convicted here, to find the defendant guilty of first degree robbery, the jury instructions required the jury find in part that “the taking of the vehicle was against Na’s will by use or threatened use of immediate force, violence or fear if injury” the jury instructions did not require the it to find which act, or at what time, Mr. Kim assaulted Mr. Nah, just as the State failed to require of the jury in *Freeman*.²

² The only case upon which the State relies is one that is factually inapposite to the case at bar, *State v. Zumwalt*, the companion case to *State v. Freeman*, 153 Wn. 2d at 765. The State speculates that “if, for example, Zumwalt had punched his victim hours after he

In sum, as the court noted in *Freeman*, “the decision on what to charge is vested with the prosecutor, and the fact that violence was used in excess even in relation to the crime is not an appropriate basis for avoiding merger.” *Id.* Likewise here, the States own definition of the length of time of an assault is not sufficient to avoid merger absent a jury finding to support it. Here, such a finding is lacking, and thus, under *Freeman*, the court must vacate the Second Degree Assault charge because it merged with the First degree Robbery charge. *See id.*

2. The Rule of Lenity requires merger.

Even if the jury verdict were in doubt, the rule of Lenity would require this court to interpret the general jury verdict in favor of Mr. Kim. As established above, a crime is not *proved* unless a jury finds by unanimous verdict that he committed the crime. Accordingly, even if the “facts constituting assault were not *needed* to prove” the robbery, the burden lies upon the state to request such an instruction, not the defendant. This court has previously held that when a verdict form is ambiguous and the State has failed to request a jury instruction as to which specific acts constituted a particular element of a crime, the principle of lenity requires

robbed his victim, the two convictions would not have merged because the assault would not have been necessary to elevate the robbery. Such is the case here.” Response Brief at 10. This argument is pure speculation and is not supported by any case law; accordingly, it should be rejected.

the court to interpret that verdict in the defendant's favor. *State v. DeRyke*, 110 Wn. App. 815, 824, 41 P.3d 1225 (2002).

In another merger case decided by this court, *State v. DeRyke*, the defendant was convicted of both first degree kidnapping while armed with a deadly weapon and attempted first degree rape while armed with a deadly weapon after he abducted a young girl at gunpoint and took her to a wooded area where he attempted to rape her before he was frightened off by a passerby. *Id.* at 818. Forcible compulsion by use of a deadly weapon and kidnapping the victim can serve as independent bases upon which to elevate a rape charge to that of the first degree. *Id.* at 823. The jury was instructed that either kidnapping or display of a deadly weapon could elevate the alleged attempted rape to that of the first degree, but was not asked to find which act it used to reach its verdict on the attempted rape.

The court concluded that “[p]rinciples of lenity require [it] to interpret the ambiguous verdict in favor of DeRyke.” *Id.* at 824.³ In doing so the court noted that the State was free to “but chose not to, submit[] a proposed instruction that did not include kidnapping as a basis for finding DeRyke guilty of attempted rape in the first degree,” which would have alleviated any ambiguity in the verdict. *Id.* at 824.

³ See also *State v. Taylor*, 90 Wn. App. 312, 317, 950 P.2d 526 (1998) (interpreting ambiguous verdict in defendant's favor).

Here, just as is *DeRyke*, the jury instructions and verdict form were ambiguous at best and the trial court erred by failing to merge the Second degree Assault charge and the Robbery charge. In *DeRyke*, the State failed to request a jury instruction that specified which crime—kidnapping or use of a deadly weapon—elevated his attempted rape charge to a higher degree, so the court was forced to interpret that verdict in favor of the defendant. Likewise here, the State failed to request a specific instruction on which particular acts were grounds for the Robbery and which ones it found to establish the Second Degree Assault.

The jury instructions, which were requested by the State, as described above, do not require the jury to decide when, where or how Mr. Kim assaulted Mr. Na. Thus, the court must construe the jury verdict as finding that the same act that constituted the assault—or “the act done with the intent to create in another apprehension and fear of bodily injury”⁴—was also the same act that constituted the force required for robbery—“the defendant’s use or threatened use of immediate force, violence or fear of injury.”⁵

Just as the State was free in *DeRyke* to offer more specific jury instructions (but decided not to), the State here simply gave the jury the broadest instructions possible to obtain a conviction on all counts. Because

⁴ CP 36 (jury instructions for assault).

⁵ CP 10, 43 (jury instructions for robbery).

of this failure, the court should apply the rule of lenity to the ambiguous jury instructions and verdict, just as it did in *DeRyke*. Accordingly, the rule Lenity requires the court to merge the conviction for assault in the second degree with the robbery charge.

B. Mr. Kim’s Kidnapping conviction was merely incidental to his Robbery conviction.

Because he restrained Mr. Na only to facilitate the robbery, any restraint was “merely incidental” to the murder, and these facts do not establish the restraint the statute requires to prove kidnapping. First, contrary to what the State argues, a kidnapping charge may not stand if the evidence is not sufficient to establish that the restraint for that kidnapping was merely incidental to a concurrent robbery charge. Second, as applied here, the “totality of the circumstances” indicate that the restraint proved to support Mr. Kim’s kidnapping charge was merely incidental to the restraint for his robbery charge because there was no “independent purpose” to commit a separate crime.

1. The merely incidental doctrine applies to the sufficiency of the evidence analysis.

The Supreme Court held in *State v. Brett*, “This court has held and the State concedes that the mere incidental restraint and movement of the victim during the course of another crime which has no independent purpose or injury is insufficient to establish a kidnapping” 126 Wn. 2d

136, 166 (1995). While, the State correctly pointed out in its response brief that this *does* include sufficiency of the evidence analysis, it wrongly dismisses the “merely incidental” doctrine completely, arguing that our Supreme Court has rejected that doctrine completely. *See* Response Motion at 20-21 (claiming the “Supreme Court has rejected this notion”).

In accordance with *Brett and Green*, this court has rejected the same argument the State makes here and applied the merely incidental doctrine in the sufficiency of the evidence analysis. *See, e.g., State v. R.A.*, 129 Wn. App. 1030 (Div. 1 2005) (unreported); *State v. Peralta*, 146 Wn. App. 1021 (Div. 1 2008) (citing *Green*, 94 Wn. 2d at 227 and *Brett*, 126 Wn. 2d at 166 (“The restraint and/or movement of an alleged kidnapping victim are insufficient to prove kidnapping if they are merely incidental to the commission of another separately charged crime.”)). Accordingly, “The idea that one crime can be “merely incidental” to another comes from merger doctrine case law, but “courts reviewing kidnap charges as predicate offenses to other charges frequently borrow merger analysis in discussing sufficiency of the evidence and vice versa.” *Id.* (citing *Saunders*, 120 Wn. App. 800, 817 (2004)).

In an attempt to dismiss the merely incidental analysis completely and differentiate *State v. Green*, the State argues that “*Green* is a pure sufficiency of the evidence case. The test for sufficiency of the evidence

does not change just because one of the charged crimes happens to be kidnapping.” Response Brief at 21. The State cites no authority for that contention and even if it did, it would contradict the precedent in *Green* as this court has already acknowledged: “Whether restraint and movement are merely incidental to another crime or support kidnapping as a separate crime is a fact-specific determination based on the totality of the circumstances.” *See R.A.*, 129 Wn. App at 1033 (citing *Green*, at 94 Wn. 2d at 227). Accordingly, although this court is to apply the sufficiency of the evidence analysis to this case, the court must reverse Mr. Kim’s kidnapping conviction if the record reflects that the restraint of Mr. Na was “mere incidental restraint and movement . . . during the course of the” robbery without an “independent purpose or injury” to Mr. Na. *See Brett*, 126 at Wn. 2d 166.

2. The evidence was insufficient to *independently* convict Mr. Kim of Kidnapping and Robbery.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it allows any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 129 Wn. 2d 192, 201, 829 P.2d 1068 (1992). An insufficient evidence claim admits the truth of the State’s evidence, and the reviewing court draws all reasonable inferences from the evidence in the State’s

favor. *Id.* But, as established above, when “mere incidental restraint” during the course of a robbery without an “independent purpose or injury” is insufficient to establish a separate offense of kidnapping, the court must reverse the kidnapping conviction. *See Brett*, 126 at Wn. 2d 166.

To determine whether a kidnapping is incidental to another offense, courts consider the surrounding facts and circumstances and the relevant statutory definitions. *Green*, at 94 Wn. 2d at 224-28. Here, as applied here, the appropriate case law shows that Mr. Kim’s Kidnapping charge should be vacated because it was merely incidental to the robbery.

a. *State v. Korum* (Division 2)

In its Response Brief, the State did not directly address Mr. Kim’s arguments set forth in the Opening Brief with regard to *State v. Korum*. Instead, in a footnote, it summarily rejected Division Two’s analysis of state Supreme Court precedent. Thus, in addition to the arguments set forth in the opening brief, the next section responds to the State’s dismissive argument so that even if the court was not compelled by the reasoning in *Korum*, precedent this Court and by our State Supreme Court are on point with *Korum*. These cases show that under the sufficiency of the evidence analysis as laid out in *Britt* and *Green*, there was insufficient evidence to convict Mr. Kim of robbery and kidnapping

b. *State v. Green*

In *State v. Green*, the defendant was convicted of aggravated first degree murder. The State charged both first degree kidnapping and first degree rape as the aggravating factors. Green stabbed a young girl on a sidewalk adjacent to the ground floor of her apartment complex. Several residents heard screaming during the attack and looked outside to see Green pick the victim up and drag her about 20 to 50 feet around a corner to an exterior loading area clearly visible from the outside. One of the residents saw Green holding the then-unconscious victim in the loading area. Green left her on the lawn in the back of the complex. *Id.*

The Washington Supreme Court held that although [Green] lifted and moved the victim to the apartment's exterior loading area, it is clear these events were actually an integral part of and not independent of the underlying homicide. While movement of the victim occurred, the *mere incidental restraint and movement of a victim* which might occur during the course of a homicide *are not*, standing alone, indicia of a true kidnapping. *Id.* at 226-27. Like other state's Kidnapping statutes, under Washington's kidnapping statute, "a movement of the victim does not constitute an asportation unless it has significance independent of the" underlying crime, i.e. assault or robbery. *Id.* at 227.

Here, the State only called one eye witness to the alleged crimes, the victim, Mr. Na. Even taking his testimony as completely true, the State

did not establish that a Kidnapping, under the totality of the circumstances, had an *independent purpose or injury*, nor did the State argue that in its Response Brief.⁶

Just as the defendant's sole purpose in *Green* in moving the victim away from the initial encounter was to facilitate the murder, Mr. Na's testimony establishes that the sole purpose of the restraint was to facilitate the robbery. To convict Mr. Kim of first degree kidnapping, the jury had to find beyond a reasonable doubt that Mr. Kim intentionally abducted Mr. Na with the intent to facilitate the Robbery. Likewise, in *Green*, to find Green guilty of Aggravated First Degree Murder, the jury needed to find that he caused the death of the victim in the furtherance of the kidnapping.

The state essentially conceded this point in its Response brief, when it stated that "the robbery charge necessarily included the intentional and actual taking of Na's vehicle while the kidnapping charge was based on Na being taken from the defendant's store at gunpoint with the *intent to commit a later crime*." Response Brief at 14 (emphasis added). That "later crime" could only be the Robbery because the jury instructions required

⁶ The State now argues that "[u]nder these facts, certainly a rational trier of fact could have found that the defendant restrained Na by the use of a threat." Although that is true, it misses the point, because the State offered no alternate *purpose* of that threat aside from the intention to facilitate the robbery. The State's entire argument regarding the sufficiency of the evidence dismisses and ignores the "independent purpose or injury" analysis and thus, should fail assuming the court follows the Washington Supreme Court precedent set in *Green* and *Brett*.

the jury to find that Mr. Kim kidnapped Mr. Na to facilitate the Robbery. Thus, based on jury instructions that it requested, the State here made it quite clear that it only intended to prove the use of deadly force for one purpose: to facilitate the robbery, unlike in other cases in which there were multiple instructions on the means to facilitate the robbery. And as the record shows, there is no evidence that Mr. Kim committed the kidnapping for any other purpose than to facilitate the Robbery.

c. State v. Allen

The cases that have found that a kidnapping was not incidental to a robbery charge are not on point because in those cases, the robbery was clearly complete at the time of the kidnapping. For instance, in *State v. Allen*, the defendants accosted a convenience store clerk and held him in their car at gunpoint while one of the defendants emptied the store's cash register. 94 Wn. 2d 860, 621 P.2d 143 (1980). The defendants then drove several blocks before releasing the clerk. On appeal, the court affirmed the defendants' separate convictions for robbery and kidnapping, concluding that the kidnapping was not incidental to the robbery. *Id.* at 864.

In reaching this decision, the *Allen* court relied on the fact that although the two offenses occurred close in time, the *robbery had ended before the kidnapping began* and that the kidnapping was a separate and distinct event. *Id.* (emphasis added). Thus, in *Allen*, the length of time of

the robbery was not a dispositive issue; rather it was whether the robbery was *completed* prior to or independent of the kidnapping. Consequently, the purpose of the kidnapping could not be to facilitate the robbery because it was already completed.

Allen is legally and factually different. Unlike in *Allen*, the Robbery here was not completed until *after* Mr. Kim had “abducted” Mr. Na and eventually took possession of the vehicle, as the State conceded in its Brief. Response Brief (“The kidnapping was complete before the taking of Na’s vehicle.”) (State’s emphasis). In fact, the Robbery here was not completed until Mr. Kim obtained possession of Mr. Na’s car, after which, no restraint of Mr. Na occurred. *See id.* at 864 (“Once the money had been obtained by force, the robbery was completed.”).

Moreover, here, the jury instructions here negate a jury finding of an “independent purpose or effect” aside from the sole purpose of robbery, unlike those in *Allen*. In *Allen*, the jury was instructed on alternate means of committing the kidnapping. 94 Wn. 2d at 863. In contrast to *Allen*, here, the State only instructed the jury as to one means of abducting the victim. Statutorily, “ ‘Abduct’ means to restrain a person by secreting or holding the person in a place where that person is not likely to be found or using or

threatening to use deadly force.” *See* RCW 9A.40.101(2).⁷ However, the State here did not offer alternate means of committing the kidnapping, i.e. to hold Mr. Na in a secret place where he was not likely to be found. The likely reason for this was because there was insufficient evidence to support such an argument. In addition, the jury could not find, as the court noted in *Allen*, that Mr. Kim tried to hide Mr. Na in a secret place, which would be a distinct way of committing the robbery.

Accordingly, although this court is to apply the sufficiency of the evidence analysis to this case, the court must reverse Mr. Kim’s kidnapping conviction because the restraint of Mr. Na was “mere incidental restraint and movement . . . during the course of the” robbery and the State failed to establish an “independent purpose or injury” to Mr. Na. *Brett*, 126 Wn. 2d at 166.

C. Alternatively, both Mr. Kim’s Robbery and Assault convictions merge into his Kidnapping conviction.

The arguments in this section are brought in the alternative to those in sections “A” and “B” above. Petitioner is aware that he did not *specifically* raise the issues—whether Mr. Kim’s Robbery and Assault convictions merged into his kidnapping conviction—in his opening brief. This court does not ordinarily consider arguments raised for the first time

⁷ The instruction, therefore, became the law of the case and the State had the burden of proving the crime as set forth in the “to convict” instruction. *State v. Hickman*, 135 Wn. 2d 97, 102, 954 P.2d 900 (1998).

in a reply brief. *State v. McNeal*, 142 Wn. App. 777, 790, 175 P.3d 1139 (2008). However, under some circumstances courts have allowed the petitioner to bring new arguments within the reply brief. *Id.* Under these same circumstances, our Supreme Court has invited counsel to argue an alternate merger theory (actually, the *exact argument* made below) than one advanced in his original brief before. *See State v. Vladovic*, 99 Wn. 2d 413, 413, 662 P. 2d 852 (1983) (inviting counsel to argue that robbery merges into kidnapping even though he did not address it in his brief).

1. Robbery can merge into Kidnapping

In its response, the State went into great detail about how “The Washington Supreme Court has held that convictions for robbery and kidnapping do not merge or otherwise violate double jeopardy.” Respondent’s Response Brief at 12. That statement is only half true for and misconstrues the applicable case law.

The State wrongly asserts that “The Washington State Supreme Court has held that robbery and kidnapping do not merge or otherwise violate double jeopardy.” *See* Respondent’s Response Brief at 12 (citing *Vladovic*, 99 Wn. 2d at 413). The State appears to have misinterpreted the holding in *Vladovic*,⁸ which specifically stated,

⁸ The State’s brief appears to ignore the fact that one crime, i.e. kidnapping, may not merge into another, i.e. robbery, while it is possible for the reverse to happen. *See Vladovic*, 99 Wn. 2d at 420-21 (examining each issue separately and holding that while

The first degree kidnapping statute applicable in this case specifically requires proof of another felony in order to elevate the crime to first degree kidnapping. RCW 9A.40.020(1)(b). Accordingly, the merger doctrine *could* apply to preclude a conviction for such additional crime if the crime was merely incidental to the kidnapping.

Id. at 421 (emphasis added). Consequently, unlike the State contended, Robbery *can* merge into a Kidnapping so long as that charge did not have an “independent purpose or effect.” *See id.*

2. Robbery merged into his Kidnapping.

In *Vladovic*, although the petitioner refused to argue that the robbery charges merged into the kidnapping, the court stated

An exception to the merger doctrine expressed in *Johnson I* and applied in *Allen* is that if the offenses committed in a particular case have independent purposes or effects, they may be punished separately. The robbery conviction in the case before us ***cannot stand unless*** it involved “some injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element.”

Id. 421-22 (emphasis added) (quoting *State v. Johnson*, 92 Wn. 2d 671, 680-81, 600 P.2d 1249 (1979) (“*Johnson I*”). In determining whether a crime involved a *separate and distinct* injury, courts will consider whether there were multiple victims to the crimes or whether there were multiple and separate injuries to the same victim. *See Vladovic*, 99 Wn. 2d at 413

kidnapping does not merge into robbery as a matter of law, robbery may merge into kidnapping if the robbery “was merely incidental to the kidnapping”).

(multiple victims); *see Freeman*, 118 Wn. App. at 365 (multiple injuries).

Such is not the case here.

First, the facts of *Vladovic* are not the same as the facts here because *Vladovic* involved multiple victims and the State did not charge the Defendant with a kidnapping and robbery of *the same* victim, as is the case here. In applying this exception to the merger doctrine, the *Vladovic* Court noted the significant facts of that case:

Petitioner was charged with robbing Mr. Jensen. He was charged and convicted of kidnapping four people *other than Mr. Jensen*. The kidnapping charges involved forcing these four people to lie on the floor, binding their hands and taping their eyes. The robbery charge arose when money was taken from Mr. Jensen after the display of what appeared to be a deadly weapon.

Id. (emphasis added). Under these particular facts, the court stated that “[b]ecause the injuries of the robbery and kidnappings involved *different people*, they clearly created separate and distinct injuries.” *Id.* (emphasis added). Thus, the Court concluded that the “petitioner’s robbery conviction [did] not merge into his kidnapping convictions.” *Id.* The Court did not cite any other reason that the two crimes should not merge.

Here, by contrast, the robbery and kidnapping charges involve only one victim—Mr. Na. Unlike in *Vladovic*, in which the State exercised restraint in charging the Defendant; here, on the other hand, the State

charged Mr. Kim with First Degree Robbery *and* Kidnapping in furtherance of *that* robbery. Thus, although *Vladovic* established the applicable rules, this case is factually distinguishable from *Vladovic*.

Second, this case did not involve multiple injuries. In interpreting *Vladovic*, this Court has held that separate and distinct injuries to the *same* victim—such as the infliction of actual physical injury—may preclude merger. *See State v. Freeman*, 118 Wn. App. 365, 76 P.3d 732 (Div. 1 2003) (holding that separate and distinct injuries to the same victim may preclude merger). However, such is not the case here either because the only basis for the assault and for “deadly restraint” was Mr. Kim’s display of a firearm. At no time did Mr. Kim inflict any bodily harm on Mr. Na that would establish a “separate and distinct injury” required to prevent merger here.

Instead, *Johnson I*, which *Vladovic* relied upon, *is* similar to this case. The convictions in *Johnson* were for first degree rape, first degree kidnapping and first degree assault. *See id.* This court has endorsed the view expressed in *Johnson I*, noting that in *Johnson*,

The sole purpose of the kidnapping and assault was to compel the victims to submit to sexual intercourse, and they suffered no injury that was greater than or that was separate and distinct from and not merely incidental to the rape. Accordingly, the kidnapping and assault of each victim merged with the rape.

Freeman, 118 Wn. App at 375 (citing *Johnson I*, 92 Wn. 2d at 680)

Similarly here, the sole purpose of the kidnapping was to effectuate the robbery. Moreover, just as in *Johnson I*, there was no injury caused to Mr. Na as a result of the kidnapping that was distinct from the robbery, i.e. a physical assault or restraint. Thus, just as in *Johnson I*, these two convictions should merge.

3. Mr. Kim's assault merges with his kidnapping conviction.

Even if Mr. Kim's Assault conviction did not merge with his Robbery conviction, the Assault merged with his Kidnapping conviction. Offenses are not constitutionally the same if there is any element in one offense not included in the other and proof of one offense would not necessarily prove the other. *Calle*, 125, Wn. 2d at 777-78. Washington courts, however, have found a violation of double jeopardy *despite* a determination that the offenses involved clearly contained different legal elements. *See Johnson*, 92 Wn. 2d at 679-80.

In *Johnson*, Johnson was convicted of rape, kidnapping, and assault, all in the first degree, for picking up two teenage hitchhikers, providing them with intoxicants, locking them in his home, and raping them while carrying a knife and making threats. Any given case charging first degree rape, the State must prove that the rape was accompanied by an act such as assault or kidnapping that is defined as a crime by a separate statute. *Johnson*, 92 Wn. 2d at 676. The Court held that, as to any

such offense which is proven, an additional conviction cannot be allowed to stand unless it involves some injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element.” *Id.* at 680.

In striking the kidnapping and assault convictions the court reasoned that, in that case, the proof of one element restraints and use of force “were intertwined with the rape. They occurred almost contemporaneously in time and place. The sole purpose of the kidnapping and assault was to compel the victims’ submission to acts of sexual intercourse. These crimes resulted in no injury independent of or greater than the injury of rape.” *Id.*

Similarly here, the jury instructions and the facts of this case make it clear that Mr. Kim was found guilty of Assault based upon the exact same acts that allowed him to “restrain” Mr. Na and made him guilty of Kidnapping. Thus, the facts that established the assault on Mr. Na were “so intertwined” with the facts that established the kidnapping, that the assault must be vacated. *See id.* As instructed, to find Mr. Kim guilty of Kidnapping, the jury had to find that Mr. Kim “abducted” Mr. Na, or in other words, “restrain[ed him] by using or threatening to use deadly force.” CP 40-43. Similarly to convict Mr. Kim of Assault the jury had to find that Mr. Kim assaulted Mr. Na with a deadly weapon, with assault

being defined in pertinent part as “an act done with the intent to create in another apprehension of fear or bodily injury. CP 36.

The only evidence of deadly force (means of restrain) argued by the State at trial and for which it provided evidence was based on the display of the firearm. *See* RP (June 29, 2009) at 23 (Q: Did he step into you?; A: No.”). In its Response Brief the state noted the facts that allowed the jury to find that Mr. Kim “restrained” Mr. Na based upon the gun:

Here, Mr. Na had loaded a gun, with a round racked in the chamber, pointed at his head. He was told he would be killed if he did not comply with demands made upon him. Upon threat of being killed [with the gun] . . . Na complied with all these orders out of fear of being shot and killed by the defendant who remained armed with a loaded firearm.

Response Brief at 19-20. Without those facts, the State failed to establish that Mr. Na was ever “restrained by the use of deadly force” as required for the Kidnapping charge, which is just like the situation in *Johnson*, in which the force necessary for the rape were so intertwined with the assault that those two charges must have been merged. In other words, once Mr. Kim displayed the gun and pointed it at Mr. Na’s head, he also exhibited the “intent to restrain Mr. Na by the use of deadly force.” *See id.*

The State tried to argue that the kidnapping was distinct from the assault because Mr. Kim put the gun to Mr. Na’s head while he was in Mr.

Kim's place of business and that the evidence shows that Mr. Kim did not intend to kidnap nor rob Mr. Na. Response Brief at 27. However, those facts show that Mr. Kim intended to "confine" Mr. Na at that point and not allow him to escape.

Furthermore, and more importantly, just as the court noted in *Freeman*, the jury never found specifically that Mr. Kim assaulted Mr. Na with the intent to cause any fear not necessary to effectuate a robbery. Although the State has argued that Mr. Kim's intent "changed" from "intending to assault Na to intending to Kidnap Na in order to take his money," the jury never made such a finding as to intent. Thus, the court must presume, as the Washington Supreme Court did in *Freeman*, that Mr. Kim displayed the weapon in order to effectuate the kidnapping. *Id.* at 779

D. Mr. Kim did not waive his right to appeal his sentence because his counsel was ineffective.

Although the State is correct that normally, a defendant may waive his right to appeal his sentence for multiple convictions when they are based on the same criminal conduct if he fails "to ask the court to make a discretionary call of any factual dispute regarding the issue of 'same criminal conduct' and he did not contest the issue at the trial level." *In re Shale*, 160 Wn. 2d 489, 496, 158 P.3d 588 (2007). However, as this court and others have declined to find waiver in cases in which the defendant

claims ineffective assistance of counsel. *See In re Dunn*, 2010 WL 3102681 (Div. 1 2010); *State v. Hewson* 155 Wn. App 1015 (Div. 2 2010).

In both of those cases the courts addressed the issue of ineffective assistance of counsel by determining whether the trial court would have, or should have found that the convictions in question constituted the “same criminal conduct” pursuant to RCW 9.94A.589(1)(a), as Mr. Kim argued in his Opening Brief. Here, like in *Dunn*, Mr. Kim admittedly received ineffective assistance of counsel when counsel failure to argue that his convictions for kidnapping, robbery, and assault constituted the “same criminal conduct.” Accordingly, Mr. Kim did not waive the issue and he is entitled to be resentenced.

DATED this 22nd day of October, 2010.



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PROOF OF SERVICE

On October 22, 2010, I filed with the Court of Appeals, Division I, at 600 University St, One Union Square, Seattle, WA 98101 the original and one copy of our Amended Reply Brief of Appellant via ABC legal Courier Service. On this same date, a copy of this Amended Reply Brief and proof of service was also sent via the ABC Legal Courier Service to the King County Prosecutor's Office, Appellate Unit, 516 Third Avenue W 554, Seattle, WA 98104-2312. A copy of this document was also mailed on today's date to Mr. Jin Woo Kim, Register #334978 at the Washington State Penitentiary, 1313 N 13th Ave, Walla Walla, WA 99362.



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