

64405-0

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NO. 64405-0

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JIN WOO KIM, Appellant,

v.

STATE OF WASHINGTON, Respondent,

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. THE TRIAL COURT ERRED WHEN IT CONVICTED MR. KIM OF ASSAULT IN THE SECOND DEGREE AND ROBBERY IN THE FIRST DEGREE BECAUSE THOSE TWO CRIMES MERGED INTO ONE AND THUS THOSE CONVICTIONS CONSTITUTE DOUBLE JEOPARDY.
2. THE TRIAL COURT ERRED WHEN IT CONVICTED MR. KIM FOR KIDNAPPING BECAUSE ANY KIDNAPPING WAS MERELY INCIDENTAL TO HIS ROBBERY CONVICTION.
3. THE TRIAL COURT ERRED WHEN IT CALCULATED MR. KIM'S OFFENDER SCORE BECAUSE HIS ROBBERY, KIDNAPPING, AND SECOND DEGREE ASSAULT CHARGES WERE THE SAME CRIMINAL CONDUCT UNDER RCW 9.94A.525 (5)(A).
4. THE TRIAL COURT ERRED WHEN IT DENIED MR. KIM'S MOTION FOR A NEW TRIAL.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it convicted Mr. Kim of Assault in the second degree and robbery when (1) those crimes arose out of the same sequence of events; (2) occurred at the same place, time, and victim; (3) the State did not argue that the assault had an “independent” purpose” aside from facilitating the robbery; and (4). the State Supreme Court has twice ruled that “second degree assault conviction merges into his first degree robbery conviction” under double jeopardy doctrine.¹ (Assignment of Error 1)
2. Whether the trial court erred when it convicted Mr. Kim of Kidnapping and Robbery when (1) no evidence suggests that Mr. Kim had any purpose other than to take property from Mr. Na; (2) some force was necessary to complete the taking because Mr. Na did not have any money or the title to his car on him; (3) the length of the detention and the amount of force used was limited to that necessary to complete the taking of the vehicle; and (4) Washington law states that “evidence of restraint that is merely incidental to the commission

¹ *State v. Kier*, 164 Wn. 2d 798, 803 194 P.3d 212 (2008).

of another crime is insufficient to support a kidnapping conviction.”²

(Assignments of Error 2)

3. Whether the trial court erred when it calculated Mr. Kim’s offender score when (1) all crimes took place during the same time and at the same place; (2) the State identified Mr. Na as the only victim of each of these crimes; and (3) the both of the kidnapping and second degree assault charges were part of the same scheme or plan as the robbery charges. (Assignments of Error 3)

4. Whether the trial court erred when it denied Mr. Kim’s motion for a new trial when the prosecutor impermissibly commented on previously suppressed statements in violation of *Miranda*, and the error was of constitutional magnitude, which requires the State to show error was harmless. (Assignment of Error 4).

² *State v. Saunders*, 120 Wn. App. 800, 817-18, 86 P.3d 232 (2004)

C. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On August 8, 2008, the State filed Information against Mr. Jin Woo Kim, defendant/appellant, which charged him with Assault in the Second Degree, Kidnapping in the First Degree, and Robbery in the First Degree. CP 1-2. On June 29, 2009, the State filed an Amended Motion that added four additional charges of Unlawful Possession of a Firearm in connection with the above cause. CP 10-12. However, at trial, the defendant moved to dismiss those four added counts because the State failed to prove that Mr. Kim did not have a valid permit. Page 52-54 (July 1st). The trial court granted that motion to dismiss.

On July 6, 2009, the jury returned a verdict of guilty as to the three remaining counts and found that Mr. Kim was armed with a firearm during each offense. CP 13-16. Just over a week later, on July 17, 2009, the defendant filed a motion for a new trial because during trial, the prosecutor referred to previously suppressed statements in front of the jury, but the court denied the motion. CP 17-18.

On October 9, 2009, the court sentenced Mr. Kim serve 15 months (plus 36 month firearm enhancement) for the second degree assault, 72 months and 51 months for Kidnapping and Robbery charges (plus 60-month firearms enhancements for each). CP 19-21. The court did not

make a finding as to whether these crimes constituted the “same criminal conduct.

2. SUBSTANTIVE FACTS

a. Mr. Na’s testimony at trial

At trial, the State called upon Mr. Na as its only eye-witness and victim of the alleged robbery, kidnapping and assault. The State called no other eye-witnesses. What follows is information taken from his testimony at trial that the State relied upon to prove its case.

On May 30 2008, Mr. Na went to Mr. Jin Woo Kim’s business, called Cellular Town, to pay off a gambling debt he owed to Mr. Kim and to buy 20 dollars worth of Marijuana. After purchasing a small amount of Marijuana from Mr. Kim, Mr. Na drove home. On his way home, Mr. Kim called him and asked him to come back to Cellular Town because he wanted to talk.

When Mr. Na arrived at Cellular Town, Mr. Kim accused him of stealing “his book bag or stealing money from him or drugs or something.” Mr. Na denied stealing anything from Mr. Kim. Mr. Kim then threatened Mr. Na and pulled out a gun and pointed it at his head. Because Mr. Kim believed that Mr. Na stole his property, Mr. Kim told Mr. Na he had “a choice to make. Give me your car. You got to repay me somehow. Give me your car. Empty your bank account.”

Mr. Kim forced Mr. Na to drive to the Bank in an Effort to take out cash, which was unsuccessful. After the effort to pay off the debt at the bank was unsuccessful, Mr. Kim forced Mr. Na to drive them to his apartment, where Mr. Kim found the title to Mr. Na's car and took it and the keys saying, "It belongs to me." Once Mr. Kim obtained the title and keys to Mr. Na's car, Mr. Kim allowed Mr. Na to get his jacket out of his car before Mr. Kim drove away with it.

Mr. Kim never physically harmed Mr. Na. In fact when the prosecutor asked if Mr. Kim "step[ed] into" Mr. Na, he replied, "No." On May 31, 2008, Mr. Na called the police and reported the incident. After the incident, Mr. Na did not see Mr. Kim again, until the trial.

b. Mr. Na's arrest and the searches of his home and business

On July 30, 2008, Seattle SWAT officers executed a search warrant for the arrest of the defendant for suspicion of Robbery of Mr. Na. Page 83. (Trial Date June 30th). Pursuant to the warrant, police arrested Mr. Kim and searched both Mr. Kim's place of business, Cellular Town, and his apartment. During the search of both places, police encountered a locked safe at each location. While in custody, police asked Mr. Kim to give them the combination to both safes because they could not open them otherwise. Mr. Kim complied and gave them the safe combinations. In the

safe in the apartment, police found two rifles and two handguns Page 59.
(Trial Date June 30th).

c. Police Interviews

After his arrest, police transported Mr Kim to the Robbery Unit office where police interviewed him. Mr. Kim told police officers that he did in fact sell Marijuana to Mr. Na on the day of the alleged Robbery. He also told police that Mr. Na stole about 4500 dollars from him while Mr. Na was at Cellular Town. According to police, Mr. Kim also admitted to pointing the gun at Mr. Na and admitted to talking his car, but he told police that he felt Mr. Na gave him the car because he had taken the money from Mr. Kim to repay the debt.

D. SUMMARY OF ARGUMENTS

First, this court should reverse Mr. Kim's Second Degree Assault conviction because that conviction merged with his robbery conviction; Second, this court should reverse Mr. Kim's First Degree Kidnapping charge because his kidnapping charge was "merely incidental" to his robbery charge. Third, in the alternative, the court should reverse Mr. Kim's sentence and remand this case to the trial court so it can recalculate Mr. Kim's sentence to accord with the appropriate offender score. Finally,

this court should reverse the trial court's denial of a new trial due to prosecutorial misconduct in eliciting previously suppressed statements.

E. ARGUMENTS

1. THE TRIAL COURT ERRED WHEN IT CONVICTED MR. KIM OF ASSAULT IN THE SECOND DEGREE AND ROBBERY IN THE FIRST DEGREE BECAUSE THOSE TWO CRIMES MERGED INTO ONE AND THUS THOSE CONVICTIONS CONSTITUTE DOUBLE JEOPARDY.

While an appellate court may usually refuse to review any claim of error that was not raised on appeal, a defendant may raise an issue for the first time when it constitutes a "manifest error affecting a constitutional right. RAP 2.5. Here, the court committed a manifest error by charging Mr. Kim with Assault in the Second Degree and Robbery in the First Degree in violation of the State and U.S. Constitutions' prohibitions against Double Jeopardy. The State may bring multiple charges arising from the same criminal conduct in a single proceeding. *State v. Kier*, 164 Wn. 2d 798, 803 P.3d 212 (2008). However, state and federal constitutional protections against double jeopardy prohibit multiple punishments for the same offense. *Id.*; see CONST. Art. I, § 9 ("No person shall be . . . twice put in jeopardy for the same offense."); U.S. CONST.

amend. V (same). An appellate court reviews double jeopardy challenges de novo. *Kier*, 164 Wn. 2d at 803.

The legislative intent is the touchstone of that review. *Id.* Within constitutional constraints, the legislature has the power to define criminal conduct and assign punishment to it. *Id.* (citing *State v. Calle*, 125 Wn. 2d 769, 776, 888 P.2d 155 (1995) (recognizing rape and incest as separate offenses). If a defendant challenges punishments under two separate criminal statutes because it violates double jeopardy, a court “must determine whether, in light of legislative intent, the charged crimes constitute the same offense.” *State v. Freeman*, 153 Wn. 2d 765, 771, 108 P.3d 753 (2005).

A defendant may suffer multiple punishments for the same criminal act where the legislature has elevated the degree of an offense—and the severity of its punishment—and the elevating circumstances are also defined as a separate criminal offense. *Id.* at 772-73 (double jeopardy protections are the basis behind merger doctrine). To determine whether the legislature intended multiple punishments where the degree of one offense is elevated by conduct constituting a separate offense, the court will apply the merger doctrine. *Kier*, 164 Wn. 2d at 804 (second degree assault conviction merged into first degree robbery conviction in prosecution arising out of carjacking incident, as completed assault was

necessary to elevate the completed robbery to first degree). In addition, in some rare instances, even if two convictions would appear to merge on an abstract level under this analysis, they may be punished separately if the defendant's particular conduct demonstrates an independent purpose or effect of each. *Id.*

Here, the State violated Mr. Kim's right to be free from Double Jeopardy when it charged him with Assault in the Second Degree and Robbery in the First Degree because (1) those two crimes merged together and (2) the State did not establish at trial that each crime had an independent purpose, i.e. the defendant committed the assault only to facilitate the robbery.

First, the state supreme court has twice ruled that Assault in the Second Degree merges into Robbery in the First Degree when the Assault was used in furtherance of the robbery. In *State v. Freeman*, the court concluded that the Second Degree Assault "merges" into First Degree Assault when the assault was used to facilitate the robbery. 153 Wn. 2d at 773-78. Additionally, the State recently challenged the validity of that reasoning in *State v. Kier*, but the court upheld its reasoning in *Freeman* and noted that "the legislature has amended the second degree assault statute since *Freeman* without taking any action in response to our decision." *Id.* (noting presumption of legislative acquiescence in judicial

interpretation where statute is amended following court decision without change to relevant portions).

This case thus, presents the same question as the court dealt with in *Kier* and *Freeman*: whether the defendant's "second degree assault conviction merges into his first degree robbery conviction." In that case, the court held that the two convictions did merge because

When the definitions of first degree robbery and second degree assault are set side by side, it is clear that both charges required the State to prove that Kier's conduct created a reasonable apprehension or fear of harm. Because Kier was also charged with being armed with or displaying a deadly weapon, this was the means of creating that apprehension or fear. The merger doctrine is triggered when second degree assault with a deadly weapon elevates robbery to the first degree because being armed with or displaying a firearm or deadly weapon to take property through force or fear is essential to the elevation.

Kier, 164 Wn. 2d at 806. Consequently, the two crimes merged into one and should not have been punished separately.

Second, Mr. Kim's particular conduct does not demonstrate "an independent purpose or effect" so as to allow the State to punish him separately for Robbery and Second Degree Assault. *See Freedman*, 153 Wn. 2d at 778. Two convictions may be valid,

"even when they formally appear to be the same crime under other tests. These 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. This exception is less focused on abstract legislative intent and more focused on the facts of the individual case. For example, when the defendant struck a victim *after* completing a robbery, there was a separate injury and intent justifying a separate assault conviction, especially since the assault did not forward the robbery."

Id. at 778-79.

This exception does not apply merely because the defendant used *more* violence than necessary to accomplish the crime. *Id.* The test is not whether the defendant used the least amount of force to accomplish the crime; the test is whether the unnecessary force had a purpose or effect

independent of the crime. Id. In making such a determination, the courts must take a “hard look at how the case was presented to the jury,” which may include looking to the charging documents and the jury instructions. *See Kier*, 164 Wn. 2d at 804.

Here, it is clear that the State did not prove at trial that Mr. Kim used force sufficient to constitute an independent crime, nor did the jury instructions require the jury to make such a finding. The charging documents here reveal that the State intended to base its conviction for both crimes upon the same factual scenario, i.e. that Mr. Kim intimidated the victim by the threat of using a gun for the sole purpose of robbery. At no time does the Certification for Probable Cause indicate that Mr. Kim intimidated the victim for any reason other than to obtain property from him. In fact, the State admitted in the charging information that the Robbery charge and the Assault was “part of a common scheme or plan” and were so “closely related in time place and occasion, that it would be difficult to separate proof” on one from the other.

In addition, the jury’s to-convict instructions were boilerplate instructions did not require the jury to find that the actions justifying the Assault conviction were distinct from those acts justifying the Robbery. *See id.* at 812 (court found that jury instructions were too ambiguous to conclude that jury found that defendant’s conduct had an independent

effect on separate victims, which may have alleviated that double jeopardy issue). Thus, the jury instructions allowed the jury to convict Mr. Kim for both crimes, Robbery in the First Degree and Assault in the Second, without finding an “independent purpose or effect” for each crime, which clearly violates Supreme Court precedent as the court laid out in *Kier* and *Freeman*. Consequently, the court should vacate Mr. Kim’s sentence for Assault in the Second Degree and remand the case for resentencing.

2. THE TRIAL COURT ERRED WHEN IT CONVICTED MR. KIM FOR KIDNAPPING BECAUSE ANY KIDNAPPING WAS MERELY INCIDENTAL TO HIS ROBBERY CONVICTION.

This court should reverse Mr. Kim’s kidnapping conviction because there was insufficient evidence of restraint in that the kidnapping count was merely “incidental” to the robbery. *See State v. Korum*, 120 Wn. App. 686, 86 P.3d 166 (2004), *reversed on other grounds* by 157 Wn. 2d 614, 141 P.3d 13 (2006).³ Evidence of restraint that is merely

³ The court in *Korum* relied upon *State v. Green*. *Korum*, 120 Wn. App. at 706. In *State v. Green*, the State Supreme Court held that there was insufficient evidence of kidnapping because the restraint and movement of the victim was merely “incidental” to and not “an integral part of and was independent of the underlying homicide.” 94 Wn. 2d 216, 227 P.2d 628 (1980) (“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.”) *overruled on other grounds* by *Washington v. Recuenco*, 548 U.S. 212, S. Ct. 2546 (2006.)

incidental to the commission of another crime is insufficient to support a kidnapping conviction. *State v. Saunders*, 120 Wn. App. 800, 817-18, 86 P.3d 232 (2004); *see also State v. Whitney*, 108 Wn. 2d 506, 511, 739 P.2d 1150 (1987) (where such conduct involved in the perpetration of a crime does not have an independent purpose or effect, it should be punished as an incident of the crime and not additionally as a separate crime).

Although rooted in merger doctrine, courts reviewing kidnapping charges that are arguably merely incidental to another crime frequently borrow a sufficiency of the evidence analysis. *See Saunders*, 120 Wn. App. at 817. Thus, whether the kidnapping is incidental to the commission of other crimes is a fact-specific determination. *See Korum*, 120 Wn. App. at 707. In turn, the nature of the restraint determines whether the kidnapping will merge into a separate crime to avoid double jeopardy violations. *State v. Brett*, 126 Wn. 2d 136, 174, 892 P.2d 29 (1995).

In *State v. Korum*, the court held that the kidnappings were incidental to the robberies and thus, the evidence was insufficient to support the kidnapping charge:

- (1) The restraints were for the sole purpose of facilitating the robberies . . . ;
- (2) forcible restraint of the victims was inherent in these armed robberies;
- (3) the victims were not transported away from their homes during or after the

invasions to some remote spot where they were not likely to be found; (4) although some victims were left restrained in their homes when the robbers left, the duration of the restraint does not appear to have been substantially longer than that required for commission of the robberies; and (5) the restraints did not create a significant danger independent of that posed by the armed robberies themselves.

120 Wn. App. at 706.

Here, like in *Korum*, the defendant was convicted of robbery and kidnapping based on the same sequence of events. In addition, the above factors when applied to this case indicate that when Mr. Kim restrained the victim here, that restraint here is “insufficient to establish a kidnapping.” *See id.* at 706 (citing *State v. Brett*, 126 Wn. 2d 136, 166, 892 P.2d 29 (1995)). First, there is no evidence that Mr. Kim restrained the victim here for any purpose other than to obtain money and property from the victim. Mr. Kim believed that the victim stole money from him. Based on this belief, the jury must have concluded that Mr. Kim forced the victim to drive to the a location in which he could obtain the money he believed was owed to him. Although he moved a bank to the victim’s

home, both the robbery and the kidnapping were ongoing, thus “restraining the victim[] was contemporaneous with the robbery.” *See id.* at 707. Second, forcible restraint was necessary to complete the robbery because he did not have the money on him; for that reason only did Mr. Kim take the victim to the bank and his home—two logical places where he could obtain the money and effectuate the robbery.

Third, Mr. Kim did not transport the victim to a place where he would not likely be found. In fact, Mr. Kim only transported the victim to places where he thought it was likely that he could obtain the money he was owed, including a bank and the victim’s home. Fourth, the length of the restraint was limited to the amount of time it took Mr. Kim to complete purpose of the robbery, i.e. to obtain the money or property worth the amount of money that Mr. Kim believed the victim owed him. As soon as Mr. Kim completed the robbery, he left the victim alone. Fifth, there was no increased danger to Mr. Kim that does not normally accompany an armed robbery. For instance, there is no evidence that Mr. Kim intended to commit any crime other than taking the property of Mr. Kim, i.e. to rape or physically injure the victim. *See, e.g., Saunders*, 120 Wn. App. at 800 (kidnapping was not incidental to rape where the defendant or accomplice handcuffed, shackled, and taped victim's mouth shut indicated restraint beyond that required in commission of rape).

As the above analysis shows, the court should reverse Mr. Kim's conviction for kidnapping because the kidnapping was merely incidental to his robbery charge.

3. THE TRIAL COURT ERRED WHEN IT CALCULATED MR. KIM'S OFFENDER SCORE BECAUSE HIS ROBBERY, KIDNAPPING, AND SECOND DEGREE ASSAULT CHARGES WERE THE SAME CRIMINAL CONDUCT UNDER RCW 9.94A.525 (5)(A).

If this court found that the trial court did not error in issues 1 or 2, this court should reverse Mr. Kim's sentence because the trial court erred when it calculated Mr. Kim's offender score without counting his current convictions of Robbery, Kidnapping and Second Degree Assault as the "same criminal conduct." Generally, when calculating a defendant's offender score for sentencing, the court must count all current and prior convictions. However, RCW 9.94A.525(5)(a) details one exception in which multiple prior offenses are counted as one offense: "those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a)."

Appellate courts will generally not address an issue which was not raised at trial but a party may challenge a sentence for the first time on

appeal on the basis that it is contrary to law. *State v. Anderson*, 92 Wn. App. 54, 61, 960 P.2d 975 (1998). Thus, under this rule, the defendant's failure to raise the issue of same criminal conduct in the trial court does not preclude appellate review of that issue. *Id.* While a trial court is allowed some discretion when determining whether multiple crimes constitute the same criminal conduct, if the trial court abuses its discretion or misapplies the law, the Court of Appeals must reverse the sentencing court's conclusion of same criminal conduct. *See id.* at 62. Review for abuse of discretion is a deferential standard; review for misapplication of the law is not. *Id.*

The trial court in this case failed to address whether Mr. Kim's current convictions encompassed the same criminal conduct. A sentencing court, *must* apply the same criminal conduct test to multiple prior convictions that a court has not already concluded amount to the same criminal conduct. RCW 9.9A.525(a)(i). The court has no discretion on this. *State v. Torngren*, 147 Wn. App. 556, 564, 196 P.3d 742 (2008); *State v. Reinhart*, 77 Wn. App. 454, 459, 891 P.2d 735 (1995). The "same criminal conduct" as defined in RCW 9.94A.589(1)(a) (formerly RCW 9.94A.400(1)(a)). That statute defines the "same criminal conduct," as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

In this case, all three of Mr. Kim's crimes happened at the same time and place and involved the same victim. As the information shows, the only victim here was Mr. Na. As the State argued, the Kidnapping and Assault took place over the same span of time as the Robbery: Mr. Kim continued to brandish the gun throughout the transaction (assault) which Mr. Kim exerted control over Mr. Na (kidnapping), for the sole purpose of taking Mr. Na's property (robbery).

This leaves the question of whether the offenses shared the same intent. Intent, as used in this analysis, "is not the particular mens rea element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime." *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). When determining if two crimes share a criminal intent, the courts will find a single intent when (1) the defendant committed one or more crimes to further another or (2) the defendant's intent, viewed objectively, was part of a scheme or plan and did not change substantially from one crime to the next. *State v. Flake*, 76 Wn. App. 854, 858, 932 P.2d 657 (1997); see *State v. Grantham*, 84 Wn. App. 854, 858, 932 P.2d 657 (1997). For instance, in *State v. Anderson*, 72 Wn. App. 453, 463-64, 864 P.2d 1001 (1994) the court determined that the crimes of escape and assault encompassed the same criminal intent, where

the assault was committed to effectuate the defendant's escape. The defendant's intent, throughout both crimes, was to escape custody. *Id.*

In this case, Mr. Kim's intent in committing each crime never changed throughout the entire length of the three crimes because his "objective criminal purpose" throughout the whole transaction was to take property from the victim. *See id.* In addition, the Assault and Kidnapping charges "furthered the commission" of his Robbery charge because the a reasonable juror would have found that Mr. Kim displayed his weapon (grounds for the assault) and confined the victim against his will (grounds for the kidnapping) for the sole purpose of obtaining the victim's property (grounds for the robbery charge). The analysis below shows how all three convictions, analyzed in pairs, are part of the same criminal conduct.

a. Kidnapping and Robbery

In *State v. Dunaway*, the Supreme Court held that if the defendant is charged with kidnapping in the furtherance of a robbery under RCW 9A.40.020(1)(b), then any subsequent robbery charges must be considered the same criminal conduct for sentencing purposes so long as each crime was committed against the same victim and at the same time. 109 Wn. 2d 207, 217, 743 P.2d 1237 (1987) (it is the "very intent to commit robbery that enabled the prosecutor to raise the charge from second degree to first degree kidnapping").

The situation here is nearly identical to that in *Dunaway*. In both cases, there was only one victim, and the crimes of kidnapping and robbery were committed at the same time and in the same place. In addition, Mr. Kim, just as Dunaway, was convicted of kidnapping with the intent to commit robbery under RCW 9A.40.020(1)(b). In fact, the jury was instructed that it could only find Mr. Kim guilty of Kidnapping if it found that he did so with the intent to commit robbery. Therefore, here, just as in *Dunaway*, “the kidnapping and robbery of a single victim should be treated as one crime for sentencing purposes.” *Id.*

b. Robbery and Assault

No Washington case law has directly dealt with whether second degree assault and first degree robbery are, under certain circumstances, the same criminal conduct. However, cases have found that convictions for first degree assault and first degree robbery can be based upon the same criminal conduct when there is not substantial change in the nature of the defendant’s criminal objective. *See, e.g., State v. Clark*, 46 Wn. App. 856, 732 P.2d 1029 (1987) (when the defendant was convicted of first degree assault and two counts of first degree robbery the trial court should have counted those crimes as part of the same criminal conduct for sentencing purposes because there was no substantial change in the nature of the defendant’s criminal objective.); *Tornngren*, 147 Wn. App. at 565

(suggesting that if the purpose of an assault is to rob the victim and not to physically harm him, then the criminal intent behind the assault is the same as that behind the robbery);

In this case, to find Mr. Kim guilty of assault in the second degree, the jury needed to find that Mr. Kim intentionally placed Mr. Na in fear of bodily injury, that established a reasonable apprehension and imminent fear in Mr. Na of bodily injury. Jury Instruction 11; *see State v. Harris*, 69 Wn. 2d 928, 936, 421 P.2d 662 (1966). Similarly, to find Mr. Kim guilty of first degree robbery under, the jury had to find that he intended to commit theft *by the use or threatened use of immediate force, violence, or fear of injury to that person*. Jury Instruction 18.

Based on the jury instructions and evidence at trial, the jury must have concluded that the purpose behind the assault was to rob the victim because no evidence suggests an alternate finding. In addition, Mr. Kim did not use more force than necessary to accomplish his ultimate goal, to obtain property from the victim.

c. Assault and Kidnapping

In *State v. Taylor*, the court held that convictions for second degree assault and second degree kidnapping should have been treated as the same criminal conduct for sentencing purposes. 90 Wn. App. 312, 950

P.2d 526 (1998).⁴ In that case, those two charges arose out of the same incident, in which the defendant and an accomplice approached the victim at a gas station, hit him in the face, forced him into his car and pointed a gun at his head. The defendant then got into the victim's car and ordered the victim to drive to a nearby park, where the two defendants took some personal belongings from the victim and then left the scene.

The court found that the record supported only a finding that the offenses were part of the same criminal conduct:

The evidence established that Taylor's objective intent in committing the kidnapping was to abduct Murphy by the use or threatened use of the gun and that his objective intent in participating in the second degree assault was to persuade Murphy, by the use of fear, to not resist the abduction. The assault began at the same time as the abduction, when Taylor and Nicholson entered the car. It ended when the kidnappers exited the car and the abduction was over. And there is no evidence that Taylor or Nicholson engaged in any assaultive behavior during the

⁴ Although the defendant in *Taylor* was only convicted of Second Degree Kidnapping, that distinction is irrelevant in this analysis because the only difference between the first and second degree is that the kidnapping was in the furtherance of a crime, i.e. robbery.

kidnapping that did anything beyond facilitating and furthering the abduction.

Id. at 322-33.

Similarly, here, the jury found that Mr. Kim kidnapped the victim by abducting, or “restraining,” the victim through the use of threatened force, i.e. by the threatened use of the gun. Thus, the objective intent in kidnapping the victim here was also to abduct the victim “by the use or threatened use of the gun and that his objective intent in participating in the second degree assault was to persuade Murphy, by the use of fear, to not resist the abduction” *See id.* The assault here, began at the same time as the abduction, when Mr. Kim told the victim to go to the bank to withdraw money. That encounter ended when Mr. Kim receive the victim’s car and left him alone. For sentencing purposes, then, Mr. Kim’s criminal intent in committing the assault was objectively the same as it was for committing the kidnapping because both crimes were committed in the furtherance of the robbery.

Because Mr. Kim’s convictions for Robbery, Kidnapping and Second Degree Assault arose out of the same criminal conduct for determining his offender score, this court should reverse Mr. Kim’s sentence and remand it to the trial court for resentencing.

4. THE TRIAL COURT ERRED WHEN IT DENIED MR. KIM'S
MOTION FOR A NEW TRIAL.

During its direct examination of Detective Jerome Craig, the prosecutor impermissibly inquired into statements that the court had previously suppressed in a pre-trial motion because those statements were obtained in violation of *Miranda*. The defendant objected to these statements and the court admonished the prosecutor for the impermissible inquiry. However, the court improperly found that those comments did not require dismissal or a new trial under CrR 8.3(b).

Under CrR 8.3(b), a trial court may dismiss a criminal prosecution on its own motion when it furthers the administration of justice. That rule provides as follows:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

This power to dismiss is discretionary and is reviewable only for abuse of discretion. *State v. Cochran*, 52 Wn. App. 116, 123, 751 P.2d 1194 (1998). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Stenson*, 132 Wn. 2d 668, 701, 904 P.2d 1239 (1997).

To obtain a dismissal under CrR 8.3, the defendant must show two things: (1) arbitrary action or governmental misconduct, and (2) that the misconduct has prejudiced the rights of the accused in a way that materially affects his right to a fair trial and which cannot be remedied by granting a new trial. *Cochran*, 52 Wn. App. at 123; see *State v. Satterlee*, 58 Wn. 2d 92, 361 P.2d 168 (1961) (dismissal of an information charging the defendant again for a crime for which he already has pleaded guilty and has served the maximum sentence was consistent with the court's "fastidious regard for the honor of the administration of justice"). Here, when the State commented on previously suppressed statements which were obtained in violation of *Miranda*, the State committed misconduct that substantially affected Mr. Kim's ability to obtain a fair trial.

"Governmental misconduct," however, need not be of an evil or dishonest nature; simple mismanagement is sufficient. *State v. Sherman*, 59 Wn. App. 763, 801 P.2d 274 (1990) (trial court properly dismissed prosecution under CrR 8.3(b) where state failed to produce IRS records as

ordered at omnibus, amended the information 8 days after trial was to have commenced, made a late motion to reconsider the omnibus order, and attempted to expand its witness list to add an expert one day after the trial was scheduled to begin; the reasons collectively mandated dismissal).

In a case similar to this one, *State v. Curtis*, the court held that it was misconduct for the prosecutor to elicit testimony from an officer that after *Miranda* was given, the defendant “refused to speak” and “wanted an attorney present.” 110 Wn. App. 6, 37 P.3d 1274 (2002). Likewise, here, the during the examination of witness Jerome Craig, the prosecution inquired into certain statements made by Mr. Kim to detective Craig that the trial court had previously suppressed. The defendant immediately objected stating that counsel was inquiring into previously suppressed statements. The court then admonished the prosecution stating the impropriety of referring to any suppressed evidence. However, the trial court later denied the defense’s motion for a new trial. The trial court should have granted this motion because the State cannot be permitted to put forward an inference of guilt, which necessarily flows from an imputation that the accused has suppressed or is withholding evidence, when as a matter of constitutional law, he is not required to testify. *See State v. Carlton*, 90 Wn.2d 657, 662, 585 P.2d 142 (1978); *State v. Tanner*, 54 Wn.2d 535, 538, 341 P.2d 869 (1959). To hold otherwise

would render this constitutional privilege meaningless, for its exercise would result in a costly penalty to the accused. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229 (1965).

Finally, improperly eliciting testimony in violation of *Miranda* is of constitutional magnitude. *See Curtis*, 110 Wn. App. at 15. Constitutional error is presumed to be prejudicial, and the State bears the burden of proving the error harmless. *See id.* Here, just as the State tried, and failed to do in *Curtis*, the State attempts to shift the burden onto Mr. Kim to prove prejudice. To overcome the presumption of prejudice, the State must persuade this court that the untainted evidence overwhelmingly supports a guilty verdict. *Id.* Otherwise, what may or may not have influenced the jury remains a mystery beyond the capacity of three appellate judges. *See State v. Barker*, 103 Wn. App. 893, 904, 14 P.3d 863 (2000) (recognizing that jury's mental processes inhere in its verdict and therefore are not subject to impeachment because they are not subject to understanding).

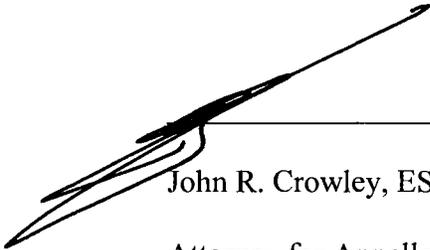
Because this comment alerted the jury to the fact of suppressed statements, Mr. Kim's right to a fair trial was compromised. Consequently, unless the court finds that a new trial will rectify the prosecutor's misconduct in this case, the court should vacate the

defendant's convictions and dismiss them with prejudice, or in the alternative, grant him a new trial.

F. CONCLUSION

The court should (1) reverse Mr. Kim's Second Degree Assault conviction because that conviction merged with his robbery conviction; and (2) reverse his First Degree Kidnapping charge because his kidnapping charge was "merely incidental" to his robbery charge. In the alternative, the court should reverse Mr. Kim's sentence and remand this case to the trial court so it can recalculate Mr. Kim's sentence to accord with the appropriate offender score. The Court should also grant a new trial due to the prosecutorial misconduct in violation of *Miranda*.

DATED this 6th day of July, 2010.

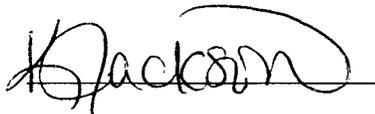


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PROOF OF SERVICE

On August 16th, 2010, I re-filed with the Court of Appeals, Division I, at 600 University St, One Union Square, Seattle, WA 98101 the original copy of our Brief of Appellant via ABC legal Courier Service. On this same date, a copy of this brief and proof of service was also sent via the USPS 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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