IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERTA J. ELMORE, Appellant.	No. 34861-6-II PART PUBLISHED OPINION

Armstrong, J. — Roberta J. Elmore appeals her convictions for first degree felony murder, first degree burglary, first degree kidnapping, second degree assault, and second degree conspiracy to commit robbery. She argues (1) an officer's improper opinion testimony that she was evasive and untruthful in giving a statement violated her right to a jury trial, (2) her conviction of burglary, the predicate crime for felony murder, merged with her conviction of felony murder, and (3) the restraint that formed the basis for her kidnapping conviction was incidental to other crimes and, thus, insufficient to support a separate kidnapping conviction. She also contends (4) the post-*Blakely*[1] legislative amendments to the Sentencing Reform Act (SRA), chapter 9.94A RCW, do not apply to her pre-*Blakely* crimes, (5) the prosecution acted vindictively in amending the information after her two successful appeals, (6) the addition of aggravating factors to the amended information after her two previous appeals violated double jeopardy and the mandatory joinder rule, and (7) the sentencing court's findings of aggravating factors violated her right to a jury trial on the findings. The State argues that the law of the case doctrine precludes Elmore from raising issues she could have but did not raise in a previous

[1] *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

appeal. After considering the merits of Elmore's issues, we find no error and, therefore, affirm.

FACTS

A. Factual Background

The relevant facts have been previously litigated:

> In December 1996, Roberta Elmore was hired by an escort service. Elmore went on her first call to the home of Dennis Robertson, a quadriplegic man who shared his home with two other disabled gentlemen. But after a misunderstanding as to what was expected of her, Elmore left Robertson's home and the escort service forced Elmore to return Robertson's payment and fired her. Elmore expressed anger to various friends about the incident and reportedly enlisted Gordon Crockett and Thorsten Jerde to rob the Robertson residence, giving them details about the location of the safe she had seen in the bedroom and showing them where Robertson lived. In addition, Elmore reportedly gave Crockett and Jerde bullets for the gun that they planned to use during the robbery.
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> In the early morning hours of December 11, 1996, Crockett and Jerde enlisted two others to help with the robbery. After gaining entry to the house on a ruse, Crockett and Jerde entered Robertson's bedroom and Crockett ordered Scott Claycamp, Robertson's caregiver, to the floor. Jerde grabbed the safe and left the room. Crockett shot Claycamp in the back of the head and Claycamp died later that day.

State v. Elmore, 155 Wn.2d 758, 761-62, 123 P.3d 72 (2005); *see also State v. Elmore*, 121 Wn. App. 747, 749-50, 90 P.3d 1110 (2004).

The following additional details are important to the issues in this appeal. At 6:15 am, the morning of the burglary, Ernie Schaef, another caregiver, opened the door to a woman asking for directions. According to Schaef, he sensed something suspicious and tried to shut the door on the woman. Before Schaef could shut the door, a man forced his way inside, pulled out a revolver, and shoved Schaef to the ground, ordering him to remain there. Schaef continued to lie there as the man stood over him with a gun and the other accomplices searched for the safe. As soon as

the men left, Schaef called the police.

B. Procedural History

The State charged Elmore by second amended information with first degree felony murder (predicated on robbery in the first degree), first degree burglary, first degree kidnapping (predicated on robbery in the first degree), second degree assault, and first degree conspiracy to commit robbery. It charged all counts but conspiracy to commit robbery with firearm enhancements.

In 1997, following a plea agreement, the State filed a third amended information, charging Elmore with first degree felony murder only. Elmore pleaded guilty and was sentenced to 400 months' confinement. Elmore appealed and we reversed the conviction, allowing Elmore to withdraw her guilty plea.

Elmore proceeded to trial in 2001, based on a fifth amended information, charging first degree felony murder (predicated on first degree robbery and/or second degree robbery and/or first degree burglary), first degree burglary under RCW 9A.52.020(a),[2] first degree kidnapping (predicated on first degree robbery and/or second degree robbery and/or first degree burglary), second degree assault, and first degree conspiracy to commit robbery, all of which included firearm enhancements. The jury found Elmore guilty of all charges except conspiracy to commit first degree robbery, which it reduced to the lesser included offense of conspiracy to commit second degree robbery. The trial court found aggravating circumstances supporting exceptional sentences for first degree murder and first degree burglary, resulting in 797 months' confinement.

[2] RCW 9A.52.020(1) provides: "A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person."

Elmore appealed for a second time and we reversed and remanded for a new trial. *Elmore*, 121 Wn. App. 747. The Washington Supreme Court affirmed our decision in 2005. *Elmore*, 155 Wn.2d 758.

On remand in 2006, the State filed a sixth and then a seventh amended information. The case went to trial on the seventh amended information, which included the same base crimes as the fifth amended information (except for conspiracy to commit robbery, which the State charged in the second degree). The other differences between the fifth and seventh amended informations were: (1) felony murder was predicated on robbery in the second degree and/or burglary in the first degree; (2) first degree burglary was charged in the alternative under RCW 9A.52.020(a) (armed with a deadly weapon) or (b) (assaulting a person); (3) the felony murder, burglary, kidnapping, and conspiracy charges were aggravated by a "high degree of planning and/or sophistication"; (4) the burglary charge was aggravated because "the victim . . . was particularly vulnerable or incapable of resistance," and "the victim . . . was present in the residence when the crime was committed"; and (5) the conspiracy charge was aggravated by the fact that "the victim . . . was particularly vulnerable." Clerk's Papers (CP) at 386-390.

C. The Second Trial (2006)

At the second trial, Lieutenant Adamson testified about his initial interview with Elmore during which she denied participating in the robbery. The prosecutor asked about the interview process:

> [PROSECUTION]: Did you at some point during the interview confront the Defendant with regards to being a suspect?
> [LIEUTENANT ADAMSON]: Yes, I did.
> [PROSECUTION]: And what were the circumstances of that occurring?
> [LIEUTENANT ADAMSON]: We were at a point where the interview was going

> back and forth, and she was at points being evasive, being untruthful. I sensed deception, and I finally got to the point where I confronted her that I believed that she participated in the robbery, and that was based on the identification by Mr. Schaef.

IX Report of Proceedings (RP) at 687. Adamson also explained that he did not tape the interview because there were "a lot of . . . inconsistencies and evasiveness of the information that she was providing. . . ." IX RP at 688-89. Adamson confirmed, however, that Schaef's identification turned out to be incorrect. Adamson testified that, although he initially believed it was Elmore who had knocked on the residence door, it was in fact Carole Edwards. Defense counsel did not object during this questioning.

The trial court instructed the jurors that they were "the sole judges of the credibility of each witness" and were "not bound" by the expert witnesses' opinions. CP at 416, 422. The jury convicted Elmore of all five counts with firearm enhancements. The jury also found as aggravating factors that the victim was vulnerable and present in the residence during the burglary; it rejected that the crimes were committed with a high degree of planning or sophistication. The court again sentenced Elmore to 797 months' confinement.

ANALYSIS

I. Law of the Case Doctrine

As a threshold matter, the State contends the law of the case precludes our review of any issue Elmore could have raised in her previous appeals. Elmore counters that previous trial and appellate counsel were ineffective in not raising the issues and that to apply the law of the case doctrine would only perpetuate the claimed errors.

Under the "law of the case" doctrine, we may to refuse to address issues that were raised

or could have been raised in a prior appeal. *Folsom v. County of Spokane*, 111 Wn.2d 256, 263-64, 759 P.2d 1196 (1988); RAP 2.5(c)(2). We have discretion in applying the doctrine and will not do so if it would result in manifest injustice. *Folsom*, 111 Wn.2d at 264. There are at least two circumstances where we will not apply the doctrine: (1) where the prior decision was clearly erroneous and (2) where there has been an intervening change in controlling precedent between trial and appeal. *Roberson v. Perez*, 156 Wn.2d 33, 42, 123 P.3d 844 (2005). The Supreme Court has also refused to apply the doctrine after a de novo sentencing hearing, reasoning that to deny a defendant's challenge on the merits would deny him his rightful remedy and would not serve the ends of justice. *State v. Harrison*, 148 Wn.2d 550, 562-63, 61 P.3d 1104 (2003).

We are satisfied that we should exercise our discretion to reach the merits of Elmore's issues. As in *Harrison*, to refuse review of Elmore's sentence would deny her a meaningful appeal. The law of the case doctrine promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues. *Harrison*, 148 Wn.2d at 562. Here, Elmore's first appeal dealt solely with whether the State had breached its plea agreement; the second appeal dealt solely with the trial court's dismissal of a recalcitrant juror. *See Elmore*, 121 Wn. App. 747. We did not address any issue pertaining to the merits of Elmore's convictions or sentence. Thus, there are few, if any, settled issues and Elmore is entitled to a meaningful analysis of the merits of her issues.

II. Opinion Testimony

Elmore argues that Lieutenant Adamson explicitly stated his opinion about her guilt and credibility in violation of her Sixth Amendment right to have a jury decide these issues.

The right to a jury trial contained in the Sixth Amendment and article 1, section 21 of the Washington Constitution includes the right to have the jury be "'the sole judge of the weight of the testimony . . . .'" *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995) (quoting *State v. Crotts*, 22 Wash. 245, 250-51, 60 P. 403 (1900)). Thus, no witness may express an opinion about the defendant's guilt or credibility because such evidence violates the defendant's constitutional right to an impartial fact finder. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

We will consider a claim of improper opinion testimony raised for the first time on appeal only if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *Kirkman*, 159 Wn.2d at 926. "Manifest error" requires a showing of actual and identifiable prejudice to the defendant's constitutional rights at trial. *Kirkman*, 159 Wn.2d at 926-27 (citing *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)). In the case of improper opinion testimony, a defendant can show manifest constitutional error only if the record contains "an explicit or almost explicit witness statement on an ultimate issue of fact." *Kirkman*, 159 Wn.2d at 938. We construe this exception narrowly in part because the decision not to object to such testimony may be tactical. *Kirkman*, 159 Wn.2d at 934-35. Important to whether opinion testimony prejudices a defendant is whether the trial court properly instructed jurors that they alone were to decide credibility issues. *State v. Montgomery*, 163 Wn.2d 577, 595, 183 P.3d 267 (2008) (citing *Kirkman*, 159 Wn.2d at 937).

Here, because Elmore did not object to the testimony at trial, she must demonstrate a manifest constitutional error. But even if we deem Adamson's comments to be explicit

statements on Elmore's credibility, his testimony does not constitute a manifest error because Elmore has not shown actual prejudice.

In *Kirkman*, the Supreme Court rejected the defendant's claims of prejudice on the grounds that defense counsel had tactical reasons for not objecting and that the jury was instructed that they alone decide credibility issues. *Kirkman*, 159 Wn.2d at 937. Here too, the court instructed the jurors that they were "the sole judges of the credibility of the witnesses" and that they alone determine the credibility and weight of expert opinion testimony. CP at 416, 422; *see State v. Davenport*, 100 Wn.2d 757, 763-64, 675 P.2d 1213 (1984) (jurors are presumed to follow the court's instructions absent evidence proving the contrary). Moreover, defense counsel had a valid tactical reason for not objecting. Lieutenant Adamson testified that, based on another witness's identification, he believed that Elmore participated in the robbery and that he sensed deception when she denied her involvement during the interview. Although this was arguably an improper comment on her credibility, Adamson's subsequent admission—that the identification was incorrect—was in fact helpful to Elmore. *See Kirkman*, 159 Wn.2d at 937 (no actual prejudice when some of the opinion testimony was actually favorable to the defendant). Not only did his testimony affirm that Elmore, at least to some extent, was truthful in her interview, it also served to undermine Adamson's credibility given that he wrongly "sensed deception." Defense counsel had a tactical reason not to object to the testimony. Because Elmore has not shown actual prejudice, we will not review the error claimed for the first time on appeal.

III. Merger

Elmore next contends her burglary conviction should have merged with her first degree

felony murder conviction at sentencing to avoid the Fifth Amendment's prohibition on double punishment.

Elmore failed to challenge her sentence at the proceedings below and must again show that the alleged error is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *McFarland*, 127 Wn.2d at 333-34. Violations of the merger doctrine are of constitutional magnitude because the unauthorized imposition of multiple punishments is contrary to the Fifth Amendment's guarantee against double jeopardy. *State v. Frohs*, 83 Wn. App. 803, 811 n.2, 924 P.2d 384 (1996). Elmore must also demonstrate identifiable prejudice by showing the claimed error rests on a plausible argument; accordingly, we review the merits of the issue. *State v. WWJ Corp*., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

The merger doctrine is a rule of statutory construction courts use to determine whether the legislature intended to authorize multiple punishments for a single act. *State v. Vladovic*, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983); *see also State v. Freeman*, 153 Wn.2d 765, 771-72, 108 P.3d 753 (2005). Under the doctrine, when a particular degree of crime requires proof of another crime, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime. *See Freeman*, 153 Wn.2d at 772-73; *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979). But multiple punishments for crimes that appear to merge will not violate the prohibition on double jeopardy if the legislature expresses its intent to punish each crime separately. *State v. S.S.Y.*, 150 Wn. App. 325, 330, 207 P.3d 1273 (2009).

One exception to the merger doctrine is the burglary anti-merger statute, which states: "Every person who, in the commission of a burglary shall commit any other crime, may be

punished therefor as well as for the burglary, and may be prosecuted for each crime separately." RCW 9A.52.050. The plain language of RCW 9A.52.050 shows that the legislature intended that crimes committed during a burglary do not merge when the defendant is convicted of both. *State v. Sweet*, 138 Wn.2d 466, 478, 980 P.2d 1223 (1999); *see also State v. Bonds*, 98 Wn.2d 1, 15, 653 P.2d 1024 (1982) ("[T]he anti-merger statute is an express statement that the legislature intended to punish separately any other crime committed during the course of a burglary."); *State v. Michielli*, 132 Wn.2d 229, 237, 937 P.2d 587 (1997) (when the words in a statute are clear and unequivocal, a court must apply the statute as written). In *Sweet*, the Supreme Court held that, although the assault charged was also an element of first degree burglary, the unambiguous anti-merger statute allowed the State to charge the two crimes separately and the trial court to punish them separately. *Sweet*, 138 Wn.2d at 479. Although no Washington court has explicitly held that the burglary anti-merger statute allows for separate punishment when burglary is the predicate crime of the felony murder, under *Sweet*, the clear legislative intent behind the burglary anti-merger statute compels such a result.[3] Accordingly, Elmore is unable to show prejudice sufficient to raise a manifest constitutional error.

IV. Incidental Restraint doctrine

Elmore contends her kidnapping conviction should be dismissed because the restraint used against Schaef was "completely incidental to the burglary and robbery of the home." Br. of

[3] Other jurisdictions have reached similar results based on clear legislative intent. *See e.g.*, *State v. Contreras*, 118 Nev. 332, 337, 46 P.3d 661 (2002) (inappropriate to merge the predicate burglary conviction with felony murder conviction under the anti-merger statute); *People v. Farley*, 46 Cal. 4th 1053, 1118-19, 210 P.3d 361 (2009) (merger doctrine does not apply to first degree felony murder in light of the legislature's clear intent); *Todd v. State*, 884 P.2d 668, 678-79 (Alaska 1994) (where the double jeopardy question hinges on legislative intent, a majority of courts have upheld separate punishment for felony murder and the predicate crime).

Appellant at 34. Again, Elmore failed to argue this error below and must show a manifest error affecting a constitutional right. RAP 2.5(a)(3).

Evidence of restraint that is merely 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 State v. Greene*, 94 Wn.2d 216, 225-27, 616 P.2d 628 (1980); *State v. Korum*, 120 Wn. App. 686, 707, 86 P.3d 166 (2004), *rev'd on other grounds*, 157 Wn.2d 614, 141 P.3d 13 (2007). 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). Because the restraint used must be an integral part of the underlying crime, kidnapping is never incidental to a conviction for *conspiracy* to commit robbery, as it is generally completed before the actual robbery. Elmore must therefore show that the kidnapping was incidental to the burglary. *See Korum*, 120 Wn. App. at 705.

Elmore argues the facts in her case are similar to those in *Korum*, 120 Wn. App. 686; that the restraint of victims during home invasion robberies facilitated the robberies. In *Korum*, we found the kidnappings incidental to the robberies because (1) the restraint used was for the sole

purpose of facilitating the robberies; (2) forcible restraint is inherent in armed robberies; (3) the restrained victims were not moved away from their homes; (4) the duration of the restraint was not substantially longer than the commission of the robberies; and (5) the restraint did not create danger independent of the danger posed by the armed robberies themselves. *Korum*, 120 Wn. App. at 707. Here, unlike in *Korum*, Elmore was convicted of conspiracy to commit robbery, not the actual robbery.

And Elmore has not shown that the kidnapping restraint was incidental to the burglary. First, restraint does not inhere in the crime of burglary.[4] The burglary was completed when Elmore's accomplices entered the victims' home with intent to commit a crime. *See State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992) (defendant's objective intent for burglary was completed when he broke into the residence armed with a deadly weapon). The restraint of Schaef was at most incidental to the armed robbery, which occurred after the accomplices had entered the home; it was not necessary to and did not facilitate their entry. *Cf. Korum*, 120 Wn. App. at 707 (restraining the victims occurred contemporaneously with the robberies); *see also Saunders*, 120 Wn. App. at 818 (restraint used was above and beyond that required or even typical in the commission of a rape). Moreover, the danger to Schaef from being restrained at gun point on the floor was significantly greater than the threat posed by the burglary, which again

[4] To find Elmore guilty of first degree kidnapping, the jury had to find that the defendant or an accomplice abducted Schaef with the intent to commit a felony (in this case, either robbery or burglary). RCW 9A.40.020(b). "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." RCW 9A.40.010(2). A person is guilty of first degree burglary if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and is either armed with a deadly weapon or assaults any person while inside or in immediate flight therefrom. RCW 9A.52.020.

was completed when the accomplices entered the home. *Korum*, 120 Wn. App. at 707. Elmore has not shown that the kidnapping restraint was so incidental to the burglary that it could not support a separate conviction. Thus, she has again failed to demonstrate a manifest constitutional error.

V. Separation of Powers

Elmore next contends that because no constitutionally valid statute authorized the submission of aggravating factors to the jury, we must reverse and remand for resentencing within the standard range for each offense. Elmore reasons that under *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007), the exceptional sentencing scheme authorized by the 2005 amendments to the SRA does not apply to her *retrial*. She also argues that the 2007 amendments to the SRA, if applied, would violate the constitutional separation of powers doctrine because they clarify the law in contravention of the Supreme Court's interpretation of the statute.[5] Finally, Elmore claims the prosecution exceeded its authority by alleging the aggravating factors for all the charged crimes when, in her first trial, it alleged the aggravating factors only in connection with felony murder and burglary.

A. Background

In 2004, the U.S. Supreme Court decided *Blakely*, holding that a criminal defendant has a constitutional right to have a jury determine beyond a reasonable doubt any aggravating fact that

[5] In oral argument on November 30, 2009, defense counsel argued that the 2007 amendments could not be applied under *State v. Eggleston*, 164 Wn.2d 61, 187 P.3d 233 (2008). According to counsel, *Eggleston* held that the issue of retroactive applicability of the 2007 amendments cannot come before an appellate court where the statute was not applied at sentencing. Since Elmore was sentenced before the 2007 amendments were enacted, counsel maintains that the issue of the amendments' constitutionality is premature and not before this court. But in *Eggleston*, the trial court imposed, prior to *Blakely*, an exceptional sentence without a finding by the jury. *Eggleston*, 164 Wn.2d at 75. The Supreme Court declined to address the issue of the applicability of the post-*Blakely* amendments to the defendant's case because no jury had been empaneled and the court could only speculate as to whether the State would seek an exceptional sentence under the new statute if remanded. *Eggleston*, 164 Wn.2d at 76-77 (the court's jurisdiction over an issue cannot be invoked unless a justiciable controversy exists). *Eggleston* is easily distinguishable; here, the trial court imposed an exceptional sentence after the jury found certain aggravating factors beyond a reasonable doubt. The alleged error is not hypothetical and a justiciable controversy therefore exists. *Eggleston*, 164 Wn.2d at 76-77.

is used to impose a greater punishment than the standard range. In response to *Blakely*, the Washington legislature enacted RCW 9.94A.537. Laws of 2005, ch. 68, § 4, *codified as* RCW 9.94A.537. The 2005 amendments authorized a new procedure for juries to consider aggravating factors supporting an exceptional sentence. Former RCW 9.94A.537(2) (2005).

In 2007, the Washington Supreme Court confirmed its earlier decision in *State v Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005), that trial courts do not have inherent authority to empanel sentencing juries. *Pillatos*, 159 Wn.2d at 470. The court also held that under the 2005 statute's plain language, the amendments applied to criminal matters pending trial when the statute took effect, but not to cases where the trials had already begun or where the defendant had pleaded guilty before the statute's effective date. *Pillatos*, 159 Wn.2d at 470, 474. As a result of these decisions, the State had no procedure for applying the *Blakely* required procedures to defendants who had pleaded guilty or been tried before the effective date of the 2005 "*Blakely* fix" legislation.

In response to *Pillatos*, in 2007, the legislature amended former RCW 9.94A.537 to express its intent that superior court judges have authority to empanel sentencing juries to find aggravating circumstances *in all cases* that come before the court, regardless of the date of the original trial or sentencing. Laws of 2007, ch. 205, § 1; *see also* RCW 9.94A.537(2).

B. Separation of Powers

A sentencing court's statutory authority under the SRA is a question of law, which we review de novo. *State v. Murray*, 118 Wn. App. 518, 521, 77 P.2d 1188 (2003). We also review constitutional challenges de novo. *State v. Jones*, 159 Wn.2d 231, 237, 149 P.3d 636 (2006).

The separation of powers doctrine preserves the constitutional division between the three branches of government, ensuring that the activity of one does not threaten or invade the prerogatives of another branch. *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994) (quoting *Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975)). Separation of powers issues arise when the legislature attempts to perform judicial functions. While it is the function of the legislature to set policy and to draft and enact laws, it is ultimately for the courts to construe the law. *Marine Power & Equip. Co. v. Human Rights Comm'n Hearing Tribunal*, 39 Wn. App. 609, 615 n.2, 694 P.2d 697 (1985). A fundamental rule of statutory construction is that once the highest court construes a statute, that construction operates as if it were originally written into the statute. *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009) (quoting *Johnson v. Morris*, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976)). Thus, legislative clarifications construing or interpreting existing statutes are unconstitutional when they contravene prior judicial interpretations of a statute. *Marine Power*, 39 Wn. App. at 615 n.2.

A separation of powers conflict may be avoided, however, if the legislative intent was to amend, rather than clarify, an existing statute. *See Morris*, 87 Wn.2d at 926. We presume a new legislative enactment is an amendment rather than a clarification of existing law; a presumption that may be rebutted only if it is clear the legislature intended to interpret rather than change the law. *Morris*, 87 Wn.2d at 926. One indication of legislative intent to clarify exists when the statute itself is ambiguous; in contrast, legislative amendments generally change unambiguous statutes. *Marine Power*, 39 Wn. App. at 615. That the legislature adopts an amendment in response to a Supreme Court ruling does not alone render the amendment a clarifying one. *State*

v. Ramirez, 140 Wn. App. 278, 289, 165 P.3d 61 (2007); *see also Marine Power*, 39 Wn. App. at 616 (enactments that affirmatively change a court-interpreted statute are amendments, not clarifications).

Recently, in *State v. Mann*, 146 Wn. App. 349, 359-60, 189 P.3d 843 (2008), Division Three of this court held that former RCW 9.94A.537 was clear and unambiguous because "'*by its terms*, [it] applie[d] to all pending criminal matters where trials have not begun or pleas not yet accepted." (Citations omitted.) Given the clear terms of the 2005 amendments, the court reasoned that the 2007 amendments presumptively changed the law rather than clarified it. *Mann*, 146 Wn. App. at 360. Accordingly, the court found that the defendant failed to demonstrate a separation of powers violation. *Mann*, 146 Wn. App. at 360.

We agree with the reasoning in *Mann* and hold that the 2007 amendments changed, rather than clarified, the statute. In *Pillatos*, the Supreme Court recognized the amended sentencing procedures of Laws of 2005, chapter 68, specifically stating that they applied to any case "prior to trial or entry of the guilty plea." *See Pillatos*, 159 Wn.2d at 470; *see also* former RCW 9.94A.537. Elmore argues that "prior to trial" is an ambiguous phrase that does not make clear whether the legislature intended "trial" to include a "retrial." Br. of Appellant at 42. But a court may not add words or clauses to an unambiguous statute when the legislature has not included the language. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). And the 2007 amendments did not seek to clarify any ambiguity as to what the legislature intended "trial" to mean. Rather, the 2007 amendments affirmatively changed the 2005 statutes so that *Blakely*'s procedural requirements apply to *all cases* before the court, not just those where the defendant

had not pleaded guilty or been tried. Elmore has therefore failed to show that applying the 2007 amendments violates the separation of powers doctrine,[6] and we conclude that the 2007 amendments apply. *Marine Power*, 39 Wn. App. at 620 (where controlling law changes between judgment below and appeal, the appellate court applies the new or altered law, especially where no vested rights are involved and the legislature intended retroactive application). Thus, the trial court had power to convene a jury to hear the State's alleged aggravating factors in Elmore's 2006 trial, regardless of whether we characterize it as a trial or retrial.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

I. Applying Aggravating Factors

Elmore argues that under RCW 9.94A.537(2), her sentence was unauthorized to the extent it was not based on factors the superior court relied on in her prior sentencing proceeding. But this provision merely states that where a new sentencing hearing is required, the jury may consider only factors alleged and relied on at the previous sentencing hearing. RCW 9.94A.537(2).[7] The statute does not apply to sentencing after a new trial on remand. *See State v. Powell*, No. 80496-6, 2009 WL 4844354 (Wash. Dec. 17, 2009), at *3 (stating that RCW 9.94A.537(2) applies to cases already resolved through trial or guilty plea, but where resentencing

[6] Because the 2007 amendments apply, we need not decide whether the 2005 amendments apply on remand.

[7] "In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing." RCW 9.94A.537(2).

is necessary). In Elmore's case, her second sentencing followed a new trial and was unrelated to the sentencing hearing after her first trial. RCW 9.94A.537(2), by its terms, does not limit a sentencing court's authority to base an exceptional sentence on aggravating factors alleged and found at a de novo trial.

II. Prosecutorial Vindictiveness

Elmore asserts that the State violated her due process rights when it vindictively increased the charges and allegations against her after her successful appeals. Specifically, Elmore argues that after she withdrew her guilty plea, the prosecution improperly (1) added new predicate crimes to the felony murder and kidnapping charges and (2) added a firearm enhancement to the conspiracy charge. Elmore also contends that after the successful appeal of her first trial, the prosecutor improperly (1) added an alternative means of committing burglary and (2) added aggravating factors for counts where the prosecutor had previously sought standard range sentences.

A prosecutor is entitled to amend an information before the verdict or finding if the substantial rights of the defendant are not prejudiced. CrR 2.1(d); *see also State v. Penn*, 32 Wn. App. 911, 914, 650 P.2d 1111 (1982) (the State has discretion to amend a complaint where evidence supports the additional charges). But constitutional due process principles prohibit prosecutorial vindictiveness. *State v. Korum*, 157 Wn.2d 614, 627, 141 P.3d 13 (2006); *United States v. Goodwin*, 457 U.S. 368, 373, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982). A prosecutorial charging decision is impermissibly vindictive only if it is intended to penalize a defendant for invoking legally protected rights. *Korum*, 157 Wn.2d at 627; *State v. Bonisisio*, 92 Wn. App.

783, 790-91, 964 P.2d 1222 (1998). A presumption of vindictiveness arises when a defendant can prove that all of the circumstances support a reasonable likelihood of vindictiveness. *Korum*, 157 Wn.2d at 627. The burden then shifts to the prosecutor to set forth an objective justification for the amendments. *Korum*, 157 Wn.2d at 627-28.

Elmore's argument assumes that the State must justify its amendments before the first trial. But increasing the charges after a defendant withdraws her guilty plea, without more, does not raise the presumption of vindictiveness. *Korum*, 157 Wn.2d at 631; *see also Bonisisio*, 92 Wn. App. 783 (no prosecutorial vindictiveness when the state charged 10 additional counts after defendant rejected a plea agreement). In *Korum*, the Supreme Court held that without independent evidence of vindictiveness, the increased number of charges and the consequent severity of the defendant's sentence did not support a finding of prosecutorial vindictiveness. *Korum*, 157 Wn.2d at 633. Like the defendant in *Korum*, Elmore has failed to allege additional facts giving rise to a presumption of vindictiveness.

Elmore has likewise failed to show circumstances supporting a reasonable likelihood of prosecutorial vindictiveness after her second successful appeal. *See Blackledge v. Perry*, 417 U.S. 21, 27, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974) (the due process clause is not offended by all possibilities of increased punishment upon retrial after appeal, only those that pose a realistic likelihood of vindictiveness). In its motion to amend the sixth information, the State explained it was deleting a number of aggravating factors and adding an aggravating factor to one of the counts to "more accurately reflect[] the defendant's alleged criminal conduct and simplif[y] the aggravators to be presented to the jury." CP at 244. Although it alleged aggravating

circumstances for counts where it previously sought sentences within the standard range, the State removed several allegations of aggravating factors charged in the sixth amended information. Furthermore, the allegation of an alternative means of committing burglary did not increase the burglary charge. *See State v. Powell*, 34 Wn. App. 791, 794, 664 P.2d 1 (1983) (no violation of a defendant's right when the amended information alleged an alternative means of committing the offense). And regardless of whether the charges were increased, the State ultimately requested the same sentence it sought in the first trial. These circumstances support the State's claim that it sought the amendments simply to better reflect the defendant's alleged criminal conduct rather than to punish her for appealing. Elmore has not demonstrated a reasonable likelihood the prosecution acted vindictively.

III. Double Jeopardy

Elmore maintains the State violated her right to be free from double jeopardy when, after her second successful appeal, the prosecution sought to convict her of "enhanced" versions of kidnapping, assault, and conspiracy by alleging aggravating factors not previously alleged for those counts. Br. of Appellant at 65-66. Elmore contends that under *Blakely* and its progeny, aggravating factors are no longer viewed simply as sentencing enhancers but as the functional equivalent of elements of a crime. Thus, according to Elmore, she was subjected to greater offenses than the offenses for which she was originally tried. *Blakely*, 542 U.S. 296; *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Elmore also relies on *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111-12, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003), for the

proposition that, for double jeopardy purposes, an underlying offense is a distinct, lesser included offense of a base offense plus one or more aggravating factor.

The application of double jeopardy principles is a question of law, which we review de novo. *State v. Womac*, 160 Wn.2d 643, 649-50, 160 P.3d 40 (2007). In addition to barring multiple punishments for the same offense, double jeopardy principles protect a defendant against successive prosecutions for the same offense after acquittal or conviction. *Monge v. California*, 524 U.S. 721, 727-28, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998); *State v. Brown*, 127 Wn.2d 749, 756-57, 903 P.2d 459 (1995). The double jeopardy clause does not, however, prevent the State from retrying a defendant who has successfully overturned her convictions on appeal. *State v. Hall*, 162 Wn.2d 901, 909, 177 P.3d 680 (2008). Nor does double jeopardy restrict the length of a sentence imposed on retrial after a defendant's successful appeal. *State v. Jones*, 102 Wn. App. 89, 98, 6 P.3d 58 (2000); *see also North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *rev'd on other grounds by Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). While the United States Supreme Court has held that double jeopardy prevents retrying a defendant on previously rejected aggravating factors supporting the death penalty, *Bullington v. Missouri*, 451 U.S. 430, 446, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981), double jeopardy protections are generally inapplicable to sentencing proceedings. *Powell*, 2009 WL 4844354 at *8; *Eggleston*, 164 Wn.2d at 70-71.

We conclude the aggravating factors charged in the seventh amended information did not violate the prohibition against double jeopardy. *Apprendi*, *Blakely*, and *Ring* do not hold that aggravating factors are the same as elements of a crime in all instances; instead, they explain the

rationale for requiring the State to allege and prove aggravating factors to a jury beyond a reasonable doubt. *See Ring*, 536 U.S. at 609; *Apprendi*, 530 U.S. at 494 n.19. Second, *Sattazahn*, which discusses *Ring* and *Apprendi* in the context of the Fifth Amendment, is limited to cases involving the death penalty. Moreover, only a plurality adopted its proposition that what constitute elements of an offense under the Sixth Amendment should be the same as what are elements of an offense under the Fifth Amendment's double jeopardy protection and does not control. *See Sattazahn*, 537 U.S. at 116-17 (O'Connor, J. concurring in the judgment); *see also State v. Maestas*, 124 Wn. App. 352, 359, 101 P.3d 426 (2005). Thus, in the double jeopardy context, the addition of aggravating factors to certain charges does not amount to "enhanced" versions of the underlying crimes.

As such, the State did not place Elmore in jeopardy of a greater offense by alleging additional aggravating factors after the first trial. *Eggleston*, 164 Wn.2d at 70-71 (although initially sentenced within the standard range, defendant could be resentenced on aggravating factors without putting him in jeopardy for an "offense"); *see also Powell*, 2009 WL 4844354 at *8 (permitting a jury to consider aggravating factors upon resentencing does not expose a defendant to punishment for a greater offense). The double jeopardy rationale is that a defendant who has been convicted of a certain offense has also been implicitly acquitted of all higher degree crimes. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982); *see also Green v. U.S.*, 355 U.S. 184, 190-91, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957) (the jury's conviction of second degree murder was an implicit acquittal of murder in the first degree). But a jury's failure to find an aggravating factor does not constitute an "acquittal" of that factor for double jeopardy

purposes.[8] *State v. Benn*, 161 Wn.2d 256, 262-64, 165 P.3d 1232 (2007); *see also Powell*, 2009 WL 4844354 at *8 ("sentencing determinations generally cannot be analogized to an acquittal"), and *9 (double jeopardy does not bar resentencing involving aggravating factors) (Stephens, J., concurring). Under these cases, Elmore's double jeopardy argument based on the addition of aggravating factors after her first trial fails.

IV. Mandatory Joinder

Elmore next argues the amendments to the information violated the mandatory joinder rule, CrR 4.3.1. Specifically, she asserts that adding new predicate crimes to felony murder and adding a firearm enhancement to the conspiracy charge after the first appeal resulted in "related" offenses that the State should have charged in the first information. She further contends that adding an alternative means of committing first degree burglary violated the mandatory joinder rule.

We review the application of court rules de novo. *State v. Kindsvogel*, 149 Wn.2d 477, 480, 69 P.3d 870 (2003). Under the mandatory joinder rule, the State must join two or more offenses if they are within the jurisdiction and venue of the same court and are based on the same conduct. CrR 4.3.1(b)(1). Dismissal of a charge for failure to join a related offense is available as a remedy only after the defendant has been tried for one of the related offenses. CrR 4.3.1(b)(3). A defendant must then move to dismiss the other charge before the second trial. CrR 4.3.1(b)(3);

[8] Even still, the first trial court found "sufficient substantial and compelling reasons for [Elmore's] exceptional sentence" based on a high degree of planning and sophistication, the particular vulnerabilities of the victims, and the presence of the victims in the residence during the commission of the burglary. RP at 1233-38, 1255. Elmore cannot claim she had been "acquitted" of these factors in the first trial; the jury in the second trial found only aggravating factors that the first trial court had also recognized.

State v. Holt, 36 Wn. App. 224, 229, 673 P.2d 627 (1983) (failure to move for a joinder is a waiver where defendant knows about all the charges).

After she withdrew her plea agreement, Elmore had yet to be tried for any offense and could not move to dismiss a related offense under CrR 4.3.1(b)(3). The prosecutor had discretion to amend the information, including adding new charges, under CrR 2.1(d). Elmore's claim relating to the addition of predicate crimes and enhancements to the fourth amended indictment therefore fails. *See also Powell*, 2009 WL 4844354 at *8 (resentencing does not violate the mandatory joinder rule because aggravating circumstances do not constitute an offense). In addition, Elmore never moved to dismiss any additional charges before the second trial. Thus, she did not preserve the alleged error with respect to the alternative means of burglary. *See* RAP 2.5. Elmore's only vehicle for addressing this error is her claim that counsel was ineffective for failing to move to dismiss the additional offenses, an issue we discuss below.

V. Proper Standard for Imposing an Exceptional Sentence

Elmore avers her right to trial by jury was violated when the trial court made findings of fact using a "preponderance of the evidence" standard and relied on those facts in imposing exceptional sentences. Br. of Appellant at 6. Elmore failed to object to this alleged error at sentencing and must show that it was a manifest constitutional error. RAP 2.5(a)(3).

A criminal defendant has a constitutional right to have a jury determine beyond a reasonable doubt any aggravating fact that the trial court can use to impose a greater punishment than the standard range. *Blakely*, 542 U.S. 296. Here, the jury found certain aggravating factors beyond a reasonable doubt in compliance with *Blakely*. For reasons that are not clear, the trial

court subsequently found by a preponderance of the evidence the same aggravating factors. The trial court imposed an exceptional sentence based only on the aggravating factors that the jury found beyond a reasonable doubt. Thus, the trial court's findings of fact were superfluous and the error, if any, is harmless. *See State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Because the jury found the aggravating factors beyond a reasonable doubt in accordance with *Blakely*, Elmore has not shown actual prejudice.

VI. Ineffective Assistance of Counsel

Elmore argues that prior counsel, both at trial and on appeal, were ineffective for failing to argue (1) the predicate crime of burglary merged into felony murder; (2) the court should have dismissed the kidnapping conviction because it was based on restraint that was incidental to other crimes; (3) the State vindictively amended the information after Elmore's successful appeals; and (4) the amendments to the information violated the mandatory joinder rule. She also faults counsel for not objecting to the sentencing court's findings of fact and the State's charging of greater offenses on remand.

We review de novo a claim that counsel ineffectively represented the defendant. *State v. Thach*, 126 Wn. App. 297, 319, 106 P.3d 782 (2005). To establish that counsel was ineffective, the defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) the deficient representation prejudiced his defense, i.e., there is a reasonable probability that but for the deficient performance the results of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). A defendant must also overcome a strong presumption that counsel's conduct was effective. *McFarland*, 127 Wn.2d at 335. We will not find counsel ineffective for decisions that can be fairly characterized as tactical. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). To establish prejudice, Elmore must show that if counsel had made the objections or arguments she now embraces, they would likely have succeeded. *See McFarland*, 127 Wn.2d at 327 n.4.

But as we have discussed above, Elmore has consistently failed to persuade us that her

claimed errors have merit. Specifically, we have rejected her arguments that (1) the burglary conviction merged with the felony murder conviction; (2) the kidnapping restraint was incidental to the burglary; (3) the prosecutor vindictively amended the information; (4) double jeopardy principles precluded the State from seeking aggravating factors it had not sought in earlier proceedings; and (5) the sentencing court's findings undermined the jury's findings of aggravating circumstances beyond a reasonable doubt. As to these claims, Elmore has not shown that counsel's representation fell below the acceptable standard or that it prejudiced her.

Elmore's argument that counsel should have moved to dismiss the related charges before the second trial under the mandatory joinder rule has merit. Counsel's failure to make the mandatory joinder objection cannot be characterized as legitimately tactical. *See State v. Carter*, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel's failure to raise mandatory joinder issue constituted deficient performance). Moreover, alleging an alternative means of committing a crime after the first trial violates the mandatory joinder rule. *See e.g.*, *State v. Russell*, 101 Wn.2d 349, 352, 678 P.2d 332 (1984); *State v. Anderson*, 96 Wn.2d 739, 740-41, 638 P.2d 1205 (1982). The determinative issue is whether the failure to move to dismiss the related offenses *actually* prejudiced Elmore.

The State contends that the error, if any, did not affect the outcome of the proceedings. We agree. By way of special verdict, the jury found beyond a reasonable doubt that Elmore, through her accomplices, committed burglary both while armed with a deadly weapon and by assaulting a person. Thus, even if the State had been precluded from arguing the alternative means of burglary—assaulting a person therein—Elmore still would have been convicted of first

degree burglary while armed with a deadly weapon. Accordingly, she has not demonstrated that the trial result would have been different if counsel had successfully moved to dismiss the added alternative means. Her claims that counsel ineffectively represented her fail.

Affirmed.

Armstrong, J.

We concur:

Bridgewater, J.

Penoyar, A.C.J.