-69543-6

69543-6

No. 69543-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ZACHARY D. NGUYEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Bruce E. Heller

BRIEF OF APPELLANT

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2. The trial court erroneously failed to instruct the jury on its duty to unanimously agree on which "act" constituted the "substantial step" toward commission of attempted robbery in the first degree.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The constitutional prohibition against double jeopardy protects a defendant from multiple punishments for the same offense. Where an assault in the second degree elevates an attempted robbery to the first degree and serves no independent purpose, the assault merges into the robbery conviction and cannot be separately punished. When Mr. Nguyen was convicted for assault in the second degree and attempted robbery in the first degree by infliction of bodily injury, did his assault conviction merge into the conviction for attempted robbery, requiring vacation of the assault conviction?

2. The constitutional right to trial by jury requires jury unanimity beyond a reasonable doubt of every essential element of the crime charged. When evidence indicates several distinct acts, any one of which could form the basis of a crime, either the State must elect the specific act upon which it relies for a conviction, or the jurors must be instructed they all must agree beyond a reasonable doubt on the same act. When the jury was instructed the State was required to prove beyond a reasonable doubt the defendant "did an act that was a substantial step" toward the commission of robbery in the first degree, but it was not instructed on its duty to unanimously agree on the specific act and the State did not elect which act it was relying upon for a conviction, was Mr. Nguyen's right to unanimity violated?

C. STATEMENT OF THE CASE

Seventeen-year old Philip Maxie had a party at his house while his parents were on vacation out of the country. 8/20/12 RP 77. The following morning, fifteen-year old Miyama Mannan, a girl whom he knew slightly, came to his door, and asked if she had left her cellular telephone charger at his house the previous evening. 8/20/12 RP 80-81, 83-84, 110. He said "no" and Miyama left, but she returned several minutes later with fourteen-year old Brandi Crocket, another girl whom Philip knew slightly. 8/20/12 RP 80-81, 109-10. They briefly chatted at

the front door but then Philip heard a noise inside the house. 8/20/12 RP 84. He turned around and walked several steps inside where he was confronted by a man wearing a bandana over his face and holding a pistol. 8/20/12 RP 84. He also saw two other men in the house also wearing bandanas over their faces. 8/20/12 RP 87. The man with the pistol told Philip, "[G]et on the ground." 8/20/12 RP 87. Philip complied and was immediately struck on the back of his head with the weapon. 8/20/12 RP 85, 92. He heard the pistol click but it did not shoot. 8/20/12 RP 96-97. Philip got up and ran across the street to a neighbor's house and called 911. 8/20/12 RP 93; Ex. 33. Responding Officer Christopher Caron walked through the house with Philip and observed that several rooms had been "ransacked." 8/15/12 RP 175.

Two days later, Detective Thomas Healy arrested Zachary Nguyen. 8/15/12 RP 19. Pursuant to a search warrant, he searched Mr. Nguyen's apartment and found a silver Star model 9 millimeter gun, but he did not find any property associated with the burglary. 8/15/12 RP 20, 28, 77; Ex. 15. Detective Healy later fired the gun and it was operable and in working order. 8/15/12 RP 33. Detective Healy separately arrested Brandi and Miyama, took them to the police station, and interviewed them, then released them to their parents. 8/15/12 RP 39, 41, 42-43, 44.

Mr. Nguyen was charged with burglary in the first degree, robbery in the first degree by infliction of bodily injury, and assault in the second degree with a deadly weapon. CP 13-15. Brandi testified pursuant to an agreement for reduced charges. 8/16/12 RP 51-56; Ex. 27. According to Brandi, on the day after the party, she was picked up by Miyama, the driver whose name she did not know, Mr. Nguyen whom she vaguely recognized, and possibly one or two other young men, and they drove around smoking marijuana. 8/16/12 RP 61, 62, 65, 69, 73-74. Although at the time of the trial Brandi did not remember whether Mr. Nguyen spoke in the car, she said in a pre-trial statement that Mr. Nguyen said there was a safe with money at the Maxie's house and "if I had a gun this would be better." 8/16/12 RP 76, 78, 96, 111-12. One of the young men told Brandi and Miyama to knock on the Maxie's door to determine whether anyone was home. 8/16/12 RP 70, 74, 93. She thought the others planned to rob the Maxie's house later if no one was home. 8/16/12 RP 72.

When Brandi and Miyama went to the Maxie's house, Philip opened the door and "some guy with a red bandana over his face come up from behind him and hit him [sic] the head with a gun." 8/16/12 RP 83. Miyama and Brandi ran out of the house to the car. 8/16/12 RP 86-87.

Philip also ran out of the house but she did not know where he went. 8/16/12 RP 87.

Miyama Mannan also testified pursuant to an agreement for reduced charges. 8/20/12 RP 12-15; Ex. 28. According to Miyama, on the day after the party, she went with Mr. Nguyen, "Turtle," "Junior" who was the driver, and "El" to pick up Brandi. 8/20/12 18, 24. Miyama denied that anyone in the car smoked marijuana. 8/20/12 RP 22-23, 40. She testified that "Junior" said he needed to "hit a lick," and "El" said he thought the Maxie's had money and guns in a safe. 8/20/12 RP 23-24, 25, 45-46, 47. Mr. Nguyen then said he needed his gun. 8/20/12 RP 26-27. "Junior" parked the car about one block from the Maxie's house, and she and Brandi knocked on the front door to see if Philip was home. 8/20/12 RP 28-29. Philip opened the door and they chatted until they heard a noise inside the house. 8/20/12 RP 28, 29, 41, 66. Philip turned around and took a few steps into the house when "some boy with a red flag over his face" hit Philip with a gun. 8/20/12 RP 28, 30, 41-42. Philip, Brandi, and Miyama all ran out of the house. 8/20/12 RP 28, 31, 33. Brandi and Miyama ran to the car. 8/20/12 RP 33. "Junior" was at the car and the other young men walked up behind Brandi and Miyama. 8/20/12 RP 33-34. According to Miyama, they were mad because they did not get anything from the house. 8/20/12 RP 34, 35.

Angelia Hicks-Maxie, Philip's mother, testified that the doors to three rooms were kicked in and she was missing jewelry, keys, and a sports bag containing a camera, an I-Pod, and a note book computer. 8/20/12 RP 154-57, 159-63, `65-70; Ex. 35.

The jury was instructed on burglary in the first degree, robbery in the first degree by infliction of bodily injury, attempted robbery in the first degree, and assault in the second degree with a deadly weapon, all with a firearm enhancement. CP 50-69 (Instructions No. 11-29). The jury returned guilty verdicts on burglary in the first degree, attempted robbery in the first degree, and assault in the second degree, and special verdicts that he was armed with a firearm during the commission of the offenses. CP 74-80. At sentencing, the State conceded the attempted robbery and assault constituted the same criminal conduct for purpose of calculating his offender score. 10/26/12 RP 23; CP 89-90. The court imposed a standard range sentence and a firearm enhancement on each of the three convictions. CP 84.

D. ARGUMENT

1. Mr. Nguyen's conviction for assault in the second degree violated the prohibition against double jeopardy, when the assault merged into the attempted robbery conviction.

a. The prohibition against double jeopardy prohibits multiple punishments for the same criminal act.

The double jeopardy clauses of the Fifth Amendment to the United States Constitution and of Article I, section 9 of the Washington Constitution protect a criminal defendant from multiple punishments for the same offense. *Whalen v. United States*, 445 U.S. 684, 688-89, 100 S. Ct. 1432, 63 L.Ed.2d 715 (1980); *State v. Kier*, 164 Wn.2d 798, 803, 194 P.3d 212 (2008). The Fifth Amendment double jeopardy clause applies to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 787, 89 S. Ct. 2056, 23 L.Ed.2d 707 (1969). The state double jeopardy clause provides the same scope of protection as does the federal double jeopardy clause. *State v. Bobic*, 140 Wn.2d 250, 260, 996 P.2d 610 (2000).

Double jeopardy jurisprudence recognizes "[w]ithin constitutional constraints, the legislative branch has the power to define criminal conduct and assign punishment." *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). However, even though the State may charge multiple offenses arising from the same criminal conduct, double jeopardy

prohibits a court from entering multiple convictions and punishments for the same offense. *Ball v. United States*, 470 U.S. 856, 860, 105 S. Ct. 1668, 84 L.Ed.2d 740 (1985); *Albernaz v. United States*, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L.Ed.2d 275 (1981); *State v. Michielli*, 132 Wn.2d 229, 238-39, 937 P.2d 789 (1997). Multiple convictions can stand only if proof of one offense does not necessarily prove the other offense. *State v. Vladovic*, 99 Wn.2d 413, 422-23, 622 P.2d 853 (1983).

A reviewing court is to determine what punishments the Legislature has authorized and whether those punishments exceed the Legislature's authority by imposing multiple punishments for the same offense. *Id.*; *accord State v. Louis*, 155 Wn.2d 563, 569, 120 P.3d 936 (2005) (a reviewing court is to determine whether the Legislature intended multiple punishments for conduct that violates multiple criminal statutes). Washington courts have developed a three-part test to determine whether the charged crimes constitute the same offense. *Kier*, 164 Wn.2d at 804. First, the court analyzes the relevant statutes for any express of implicit expression of legislative intent. *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005). Second, if it is not clear whether multiple punishments are authorized by statute, courts utilize the "*Blockburger* test" or "same elements" test to determine whether multiple convictions violate double jeopardy. *United States v. Dixon*, 509 U.S. 688, 697, 113

S. Ct. 2849, 125 L.Ed.2d 556 (1993); *State v. Gocken*, 127 Wn.2d 95, 101-02, 896 P.2d 1267 (1995). "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932).

Third, legislative intent may be clarified by the "merger doctrine," where, if the degree of one offense is elevated by conduct separately criminalized, courts presume the Legislature intended to punish only the elevated offense. *Freeman*, 153 Wn.2d at 772-73. Merger is "a doctrine of statutory interpretation used to determine whether the Legislature intended to impose multiple punishments for a single act which violates several statutory provisions." *Vladovic*, 99 Wn.2d. at 419 n.2. Offenses merge when proof of one offense is necessary to prove an element or a degree of another offense, and if one offense does not involve an injury that is separate and distinct from the other. *Id.* at 419-21. The doctrine applies:

> where the Legislature has clearly indicated that in order to prove a particular degree of crime (e.g., first degree rape) the State must prove not only that a defendant committed that crime (e.g., rape) but that the crime was accompanied

> by an act which is defined as a crime elsewhere in the criminal statutes (e.g., assault or kidnapping).

Id. at 421. Where, as here, one of the offenses is an attempt crime, courts must look to the actual facts constituting the "substantial step" to determine whether the defendant's double jeopardy rights have been violated. *In re Personal Restraint of Borrero*, 161 Wn.2d 532, 537, 167 P.3d 1106 (2007).

A double jeopardy violation is a manifest constitutional error that may be raised for the first time on appeal and is reviewed *de novo*. *Bobic*, 140 Wn.2d at 257; *Freeman*, 153 Wn.2d at 770. If there is doubt as to the legislative intent for multiple punishments, the rule of lenity requires the interpretation most favorable to the defendant. *Whalen*, 445 U.S. at 694.

b. <u>As charged and proven, Mr. Nguyen's conviction for assault in the second degree merged into his conviction for attempted robbery in the first degree, because the assault did not have an independent purpose or intent</u>.

Whether assault in the second degree merges with robbery in the first degree is determined on a case-by-case basis. *Freeman*, 153 Wn.2d at 780. However, the *Freeman* Court concluded there was "no evidence that the legislature intended to punish second degree assault separately from first degree robbery when the assault facilitates the robbery," and "these two crimes will merge unless they have an independent purpose or

effect." *Id.* at 776, 780; *accord State v. Chesnokov*, No. 67924-4-I, 2013 WL 4321905, *2-3 (Wash.App.Div. I July 8, 2013). Thus, in the *Freeman* companion case of Mr. Zumalt, the Court found Mr. Zumalt's convictions for both first degree robbery and second degree assault violated double jeopardy where Mr. Zumalt and his accomplices offered to sell drugs to a women and met her in a parking lot to conduct the transaction, where Mr. Zumalt punched the woman in the face, knocked her to the ground and caused serious injuries, then robbed her of cash and casino chips. *Id.* at 770. The Court concluded that the assault and robbery of the women did not have an independent purpose or effect, even though the force used was excessive in relation to the crime charged. *Id.* at 779; *see also In re Personal Restraint of Francis*, 170 Wn.2d 517, 523-25, 242 P.3d 866 (2010) (conviction for second degree assault merged into conviction for attempted robbery in the first degree where State charged defendant with the assault was committed with a deadly weapon and the assault elevated the attempted robbery to the first degree); *State v. S.S.Y.*, 170 Wn.2d 322, 329-30, 241 P.3d 781 (2010) ("Washington courts have found legislative intent to impose only one punishment when first degree robbery and second degree assault are charged because the greater offense typically carries a penalty that incorporates punishment for the lesser includes offense." (internal quotations omitted)); *State v. Lindsay*, 171 Wn. App.

808, 288 P.3d 641 (2012) (convictions for second degree kidnapping and second degree assault merged into conviction for first degree robbery where the kidnapping was incidental to the robbery and the assault was committed with intent to commit robbery).

Where one offense merges into a greater offense, the one offense also merges into an attempt to commit the greater offense. In *State v. Valentine*, the defendant was convicted of both assault in the first degree and attempted murder in the second degree. 108 Wn. App. 24, 27, 29 P.3d 42 (2001). This Court vacated the conviction for assault, and noted:

> [W]e find it unlikely that the Legislature intended to punish the same assaultive act both as an assault and attempted murder. There is no reason to conclude that a stabbing should result in only one conviction if the victim dies, but should result in two convictions if the victim survives.

108 Wn. App. at 28, *cited with approval in In re Personal Restraint of Orange*, 152 Wn.2d 795, 817-20, 100 P.3d 291 (2004). It is equally illogical to impose two separate punishments for attempted robbery and assault in the second degree, where the offenses otherwise would merge if the robbery was completed.

Here, the jury was instructed on robbery in the first degree in relevant part as follows:

> A person commits robbery in the first degree when in the commission of a robbery or in immediate flight therefrom he or she inflicts bodily injury.

CP 58 (Instruction No. 19).

> To convict the defendant of the crime of Robbery in the First Degree, ... each of the following six elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about September 5, 2011, the defendant unlawfully took personal property from the person or in the presence of another;
> (2) That the defendant intended to commit theft of the property;
> (3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person or to that person's property or the person or property of another;
> (4) That force or fear of force was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking or to the prevent knowledge of the taking;
> (5) That in the commission of these acts or in immediate flight therefrom the defendant inflicted bodily injury; and
> (6) That any of these acts occurred in the State of Washington.

CP 59 (Instruction No. 20).

The jury was instructed on attempted robbery in the first degree in relevant part, as follows:

> A person commits the crime of attempted Robbery in the First Degree when, with intent to commit that crime, he or she does any act that is a substantial step toward the commission of that crime.

CP 62 (Instruction No. 22).

To convict the defendant of the crime of attempted Robbery in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about September 5, 2011, the defendant did an act that was a substantial step towards the commission of Robbery in the First Degree;
(2) That the act was done with the intent to commit Robbery in the First Degree; and
(3) That the act occurred in the State of Washington.

CP 63 (Instruction No. 23).

A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation.

CP 64 (Instruction No. 24.)

The jury was instructed on assault in the second degree in relevant part, as follows:

A person commits the crime of assault in the second degree when he or she assaults another with a deadly weapon.

CP 65 (Instruction No. 25)

To convict the defendant of the crime of assault in the second degree, ... each of the following elements of the crime must bed proved beyond a reasonable doubt:

(1) That on or about September 5, 2011, the defendant assaulted Phillip Maxie with a deadly weapon; and
(2) That the acts occurred in the State of Washington.

CP 66 (Instruction No. 26).

The evidence at trial established that the assault on Mr. Maxie had no purpose other than to further the robbery. One of the intruders displayed the gun as soon as they were discovered by Philip, ordered him

to get on the floor, and immediately struck the back of his head with the gun. 8/16/12 RP 83; 8/20/12 RP 28, 30, 41-42, 84, 85, 87, 92. The assaultive conduct occurred prior to the theft, and had no purpose other than to facilitate the taking of property. As such, the assault merged into the attempted robbery.

In other circumstances, courts have ruled that a conviction for second degree assault did not merge into a conviction for attempted robbery. For example, in *State v. Beaver*, Mr. Beaver and a co-defendant entered a jewelry store wearing bandanas over their faces, brandished guns at customers and employees, and immediately announced it was a robbery. 135 Wn. App. 54, 57-58, 143 P.3d 612 (2006). An employee shot Mr. Beaver and the co-defendant then shot the employee. Mr. Beaver was convicted of attempted robbery in the first degree, assault in the first degree based on his co-defendant's conduct, unlawful possession of a firearm, and assault in the second degree based on his conduct. 135 Wn. App. at 58. On appeal, Mr. Beaver argued the assault in the second degree merged into the attempted robbery. *Id.* This Court disagreed, and ruled:

> Here, it was charged and proved that Beaver was armed with a deadly weapon, therefore elevating the attempted robbery to first degree attempted robbery. Since it was unnecessary under the facts of this case for the State to prove that Beaver engaged in conduct amounting to second degree assault in order to elevate his robbery conviction, and because the State did prove conduct not amounting to

> second degree assault that elevated Beaver's attempted robbery conviction, the merger doctrine does not prohibit Beaver's conviction for both attempted first degree robbery and second degree assault.

Id. at 66; *accord State v. Esparza*, 135 Wn. App. 54, 66, 143 P.3d 612 (2006) (assault in the second degree did not merge into attempted robbery in the first degree, where the robbery, as charged and proven, was elevated to the first degree by use of a firearm or other deadly weapon).

Beaver and *Esparza* are not controlling here. In *Beaver* and *Esparza*, the attempted robbery was elevated to the first degree because of a deadly weapon, whereas here, the robbery, as charged and argued to the jury, was elevated to the first degree by the infliction of bodily injury only. CP 14; 8/21/12 RP 11-12. The jury was never instructed on the uncharged alternative means of committing robbery in the first degree, that is, while armed with a deadly weapon or while displaying what appears to be a firearm or other deadly weapon. *See* RCW 9A.56.200(1). Therefore, the firearm was irrelevant to the conviction for attempted robbery.

State v. Cole, 117 Wn. App. 870, 73 P.3d 411 (2003), is similarly distinguishable. Mr. Cole was charged and convicted of attempted robbery in the first degree and assault in the second degree based on a single incident in which he demanded money from the victim, tried to take the victim's wallet, he then pulled out a knife, cut the victim's hands, put

the knife to the victim's throat, and threatened to kill him. 117 Wn. App. at 873. On appeal, Mr. Cole argued the two convictions violated double jeopardy, including the merger doctrine. *Id.* at 875-76. This Court disagreed, and stated:

> The State did not have to prove assault, or any other offense, in order to elevate the attempted robbery to first degree. It had to prove that Cole, with intent to commit robbery, used the knife to the point of taking a substantial step toward one of the three ways first degree robbery can be committed.

Id. at 876.

Here again, however, Mr. Nguyen was charged only with robbery by infliction of bodily injury, the assault elevated the robbery to the first degree and had no independent purpose, and the jury was not instruction on any of the other alternative means of committing robbery in the first degree. Therefore, the assault merged into the conviction for attempted robbery in the first degree.

c. <u>The proper remedy is to vacate the conviction for assault in the second degree and remand for resentencing</u>.

Where two convictions merge for purposes of double jeopardy, the proper remedy is to vacate the lesser offense. *State v. Womac*, 160 Wn.2d 643, 660, 160 P.3d 40 (2007); *State v. Hughes*, 166 Wn.2d 675, 686, 212 P.3d 558 (2009); *Chesnokov*, 2013 WL 3421905, *2. The lesser offense is

determined primarily by which offense carries the shorter sentence, as well as the seriousness level and the degree of the offense. *Hughes*, 166 Wn.2d at 686 n.13.

Assault in the second degree is a lesser offense than attempted robbery in the first degree because it carries a shorter sentence and has a lower seriousness level. Assault in the second degree is a Class B offense, with a seriousness level of IV. RCW 9.94A.515, 9A.36.021(2)(a). Robbery in the first degree is a Class A offense with a seriousness level of IX. RCW 9.94A.515, 9A.56.200(b). Attempted robbery in the first degree is a Class B felony, but the seriousness level remains IX. RCW 9.94A.533, 9A.28.020, 9A.56.200(b). Therefore, Mr. Nguyen's conviction for the lesser offense of assault in the second degree merged into his conviction for attempted robbery in the first degree.

At sentencing, the court found the assault and the robbery constituted the same criminal conduct for purposes of calculation of Mr. Nguyen's offender score. CP 84. However, the double jeopardy merger doctrine is distinguishable from "same criminal conduct." Multiple offenses deemed to constitute the "same criminal conduct" are counted as a single current offense for purpose of calculation of an offender score, but

the convictions remain intact. RCW 9.94A.589(1)(a).[1] By contrast, where multiple convictions merge into the greater offense, the lesser conviction is vacated. *Womac*, 160 Wn.2d at 660. Because Mr. Nguyen's conviction for assault in the second degree merged into the robbery, his conviction for assault in the second degree must be reversed and vacated.

2. The jury instructions failed to require unanimity as to what act constituted the "substantial step" toward commission of attempted robbery in the first degree, in violation of Mr. Nguyen's constitutional right to due process and a unanimous verdict.

a. A criminal defendant has a constitutional right to a unanimous verdict on every essential element of the crime charged.

The federal constitutional right to trial by jury and the state constitutional right to conviction only upon a unanimous jury verdict require jury unanimity on all essential elements of the crime charged. U.S. Const. amend. VI; Wash. Const. art. I, § 21; *State v. Camarillo*, 115 Wn.2d 60, 64, 794 P.2d 850 (1990); *State v. Kitchen*, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). When the evidence indicates several distinct acts, any one of which could form the basis for a conviction, either the State must elect which act it is relying on as the basis for the charge, or

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[1] RCW 9.94A.589(1)(a) provides in relevant part:

If the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.

the court must instruct the jury it must unanimously agree that the same act has been proven beyond a reasonable doubt. *State v. Coleman*, 159 Wn.2d 509, 511-12, 150 P.3d 1126 (2007); *Camarillo*, 115 Wn.2d at 64; *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Failure to follow either alternative is an error of constitutional magnitude due to the possibility some jurors may have relied on one act while other jurors relied on another, in violation of a defendant's right to a unanimous jury. *State v. Bobenhouse*, 166 Wn.2d 881, 893, 214 P.3d 907 (2009); *Coleman*, 159 Wn.2d at 511-12. "The error stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all elements necessary for a conviction." *Kitchen*, 110 Wn.2d at 411. Thus, when the State fails to elect which act it relying on for a conviction, a court's failure to give a unanimity instruction is a manifest error affecting a constitutional right that can be raised for the first time on appeal. *Bobenhouse*, 166 Wn.2d at 892 n.4; RAP 2.5(a).

b. <u>The State did not elect which act it was relying upon to establish a "substantial step," and the instructions did not inform the jury as to its duty regarding unanimity on the act</u>.

Where the offense is an attempt crime, "[t]he 'substantial step' element is ... a 'placeholder' in the statute defining attempt, lacking

meaning until the facts of the particular case are considered." *Borrero*, 161 Wn.2d at 537 (citing *Orange*, 152 Wn.2d at 818). Here, the prosecutor never elected which act or acts it was relying upon to establish a "substantial step" for the inchoate offense. In fact, in closing and rebuttal argument, the prosecutor mentioned attempted robbery only once, to argue that Mr. Nguyen committed attempted robbery only if he did not actually take any property from the Maxie's house. 8/21/12 RP 53.

The lack of meaning is illustrated by *State v. Beals*, in which the defendant was convicted of attempted robbery in the first degree robbery and assault in the second degree, based on evidence that he hit the victim in the head with a hammer, demanded money, and threatened to kill the victim if he did not comply. 100 Wn. App. 189, 191-92, 997 P.2d 941 (2000). On appeal, the defendant argued, *inter alia*, the assault merged into the robbery 100 Wn. App. at 193. This Court disagreed, and stated:

> The attempt to commit first degree robbery required only a single substantial step, and **could have been** satisfied by proof of something far less than second degree assault (e.g., merely "displaying" what appears to be a deadly weapon). ... [A]ll that was required to satisfy the elements of attempted first degree robbery was a substantial step, which **may or may not have** included actual injury to the victim.

Id. at 193-94 (emphasis added). Clearly, without an election, there is no assurance of jury unanimity, and reviewing courts must simply guess at

what evidence the jury relied upon to find the "substantial step" element of an attempt crime.

c. The proper remedy is reversal of the conviction for robbery in the first degree.

"Prejudice is presumed in a multiple acts case where there is neither an election nor a unanimity instruction." *Coleman*, 159 Wn.2d at 510; *accord State v. Jones*, 71 Wn. App. 798, 822, 863 P.2d 85 (1993). The presumption is overcome and the instructional error harmless only if no rational trier of fact could have a reasonable doubt as to whether the evidence of each act established the offense. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967); *Camarillo*, 115 Wn.2d at 65 (*citing Kitchen*, 110 Wn.2d at 411).

The error was not harmless here. As already noted, the "substantial step" element has no meaning until the facts of particular case are considered. *Borrero*, 161 Wn.2d at 537. Here, the "not guilty" on the charge of robbery in the first degree demonstrates that the jury did not believe all of the State's evidence beyond a reasonable doubt. Yet the jury was given absolutely no guidance regarding which act to consider or which act the State was relying upon for a conviction. In the absence of either a particularized statement of unanimity or an instruction informing the jury of its duty to unanimously agree on the same act, Mr. Nguyen's

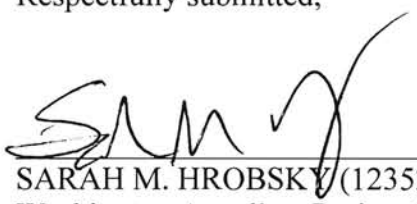
conviction must be reversed. *See State v. Kinchen*, 92 Wn. App. 442, 452, 963 P.2d 928 (1998).

E. CONCLUSION

Mr. Nguyen's conviction for assault in the second degree must be vacated because it merged into the conviction for attempted robbery. In addition, his conviction for attempted robbery in the first degree must be reversed for failure to lack of unanimity as to the "substantial step" element of the offense. For the foregoing reasons, Mr. Nguyen respectfully requests this court reverse his conviction for attempted robbery in the first degree and vacate his conviction for assault in the second degree.

DATED this 5th day of August 2013.

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 69543-6-I
v.	)	
	)	
ZACHARY NGUYEN,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF AUGUST, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] ZACHARY NGUYEN 361840 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 5TH DAY OF AUGUST, 2013.

X_____

Washington Appellate Project
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Phone (206) 587-2711
Fax (206) 587-2710