69767-6 69767-6

NO. 69767-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BINYAM B. YEMRU,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE LEROY MCCULLOUGH

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

The defendant was convicted of five felony offenses. On appeal, he contends that two of his convictions must be vacated on merger/double jeopardy grounds.

1. The State concedes that the defendant's convictions for second-degree assault (count II) and first-degree robbery (count III) violate the merger double jeopardy doctrine and therefore the second-degree assault conviction (the lesser offense) must be vacated.

2. The defendant's convictions for first-degree robbery (count III) and theft of a motor vehicle (count IV) do not violate double jeopardy.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant proceeded to trial on the following five counts:

Ct I: First-Degree Robbery (victim Paige Knight)

Ct II: Second-Degree Assault (victim Matthew Nordstrom)

Ct III: First-Degree Robbery (victim Matthew Nordstrom)

Ct IV: Theft of a Motor Vehicle (victim Matthew Nordstrom)

Ct V: Felony Harassment (victim Matthew Nordstrom)

CP 52-54. A jury found the defendant guilty as charged. CP 89-93.

At sentencing, the State agreed that counts II, III and IV constituted the "same criminal conduct" for scoring purposes. See RCW 9.94A.589(1)(a); CP 152-54. Under RCW 9.94A.589(1)(a), a sentence is imposed on each count that arises from the "same criminal conduct," but the counts do not score against each other, i.e., they are "counted as one crime" for scoring purposes. RCW 9.94A.589(1)(a).

Additionally, for scoring purposes, the defendant has two prior felony convictions for taking a motor vehicle without permission, and a current taking a motor vehicle without permission conviction under a different cause number. CP 103, 178-85. All three offenses counted in his offender score.[1]

The defendant also has two prior misdemeanor vehicle prowl convictions that counted in his offender score for his conviction on

[1] In the State's presentence report, the scoring forms do not list the defendant's current taking a motor vehicle conviction under cause number 11-1-05998-3. CP 155-71. It appears that the defendant pled guilty to the 11-1 cause number after the scoring forms were prepared in this case. Even though the scoring forms did not list the 11-1 offense, the judgment and sentence accurately reflects the additional point in his offender score. The court imposed sentence under both cause numbers at the same time. CP 96-106, 178-85.

count IV, the theft of a motor vehicle conviction. CP 96-106; CP 167, 169.

The defendant received a sentence at the bottom of the standard range on each count. CP 96-106. Because the defendant's first-degree robbery convictions have the highest standard ranges, and the two counts in which the defendant now claims constitute double jeopardy did not score against the robbery convictions under RCW 9.94A.589(1)(a), even if the defendant prevails on appeal on both his arguments, the defendant's overall sentence will remain the same. In other words, the standard ranges on the robbery convictions would be unchanged, he received sentences at the bottom of the standard ranges, and all sentences were ordered to run concurrently to each other.

2. SUBSTANTIVE FACTS

The double jeopardy issue raised by the defendant involves only counts II, III and IV. Double jeopardy is primarily a question of legislative intent in regards to the statutes at issue. Therefore, only a very limited summary of the facts is included here – the facts pertaining to counts II, III and IV.

On August 10, 2010, 21-year-old Matthew Nordstrom drove his Toyota Scion to Highline Community College where he was

going to edit and print his final exam paper. 6RP[2] 3-5. He parked his car in the parking lot out in front of the main entrance to the school. 6RP 6, 8.

After printing his paper, Nordstrom was walking back to his car when he noticed someone walking quickly through the parking lot while carrying a small samurai sword in a sheath. 6RP 8-10. The man was later identified as the defendant. 6RP 38.

Just as Nordstrom got into his car, the defendant came up to the passenger side and tried to get Nordstrom's attention. 6RP 12. Nordstrom lowered the passenger side window to see what the defendant wanted. 6RP 12. The defendant asked for a ride, but when Nordstrom determined that they were going in opposite directions, he told the defendant no. 6RP 16. The defendant responded by telling Nordstrom that he was indeed going to give him a ride. 6RP 17. Nordstrom said that he wasn't and started to raise the passenger window. 6RP 17. As he was doing so, the defendant pulled out a pistol and pointed it at Nordstrom.

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[2] The verbatim report of proceedings is cited as follows: 1RP—9/9/12, 2RP—9/13/12, 3RP—9/14/12, 4RP—9/15/12, 5RP—9/16/12, 6RP—9/20/12, 7RP—9/21/12, 8RP—9/22/12, 9RP—9/23/12, 10RP—9/27/12, 11RP—9/28/12, 12RP—9/29/12, 13RP—9/30/12, and 14RP—12/19/12.

6RP 17-19. The gun hit the window and Nordstrom could tell that it was made of plastic, that it was a fake gun.[3] 6RP 19, 26, 47, 67.

The defendant then jumped into Nordstrom's car, pointed the gun at him, and told Nordstrom that he was going to drive him somewhere. 6RP 26-27. Nordstrom said he wasn't and told the defendant that he knew the gun wasn't real. 6RP 27. The defendant then pulled out the sword from its sheath and poked Nordstrom with it to show him that it was real.[4] 6RP 27.

Nordstrom grabbed his backpack and tried to grab his keys as the defendant jabbed at him with the sword to get him out of the car. 6RP 28. Nordstrom was able to escape from the vehicle uninjured but without his keys that were in the ignition. 6RP 28-29. As Nordstrom ran to the school to call 911, the defendant drove off in Nordstrom's car. 6RP 29-30.

C. ARGUMENT

The defendant contends that his convictions on count II (second-degree assault) and count III (first-degree robbery) violate double jeopardy. He also contends that his convictions on count III

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[3] An Airsoft BB gun was later recovered from a hotel room associated with the defendant. 5RP 100-08.

[4] A sword was later recovered from the same hotel room associated with the defendant. 5RP 100-07. The defendant had stolen the sword from an apartment in an earlier incident. 7RP 16-17.

(first-degree robbery) and count IV (theft of a motor vehicle) violate double jeopardy. The defendant is one for two. He is correct that his convictions on counts II and III violate double jeopardy, but he is incorrect that his convictions on counts III and IV violate double jeopardy.

1. THE TEST FOR DOUBLE JEOPARDY

In beginning an analysis of an alleged double jeopardy violation, the first step is to look at what the double jeopardy clause is intended to protect against, i.e., the purpose of the rule. Subject to constitutional constraints, the legislature has the absolute power to define criminal conduct and assign punishment. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). In many cases, a defendant's single act may violate more than one criminal statute. When this occurs, a defendant may be punished under both statutes so long as it is authorized by the legislature. Calle, 125 Wn.2d at 776 (finding no double jeopardy violation where the defendant's single act of intercourse violated both the rape statute and the incest statute – Calle could be punished under both statutes). Double jeopardy is only implicated when the court exceeds the authority granted by the legislature and imposes multiple punishments where multiple punishments have not been

authorized. Calle, at 776. Therefore, a reviewing court's role "is limited to determining what punishments the legislative branch has authorized," and determining whether the sentencing court has complied with this authorization. Calle, at 776.

In Calle, the Supreme Court set forth a three-part test for determining whether multiple punishments were intended by the legislature:

The first step is to review the language of the statutes themselves to determine whether the legislation expressly permits or expressly disallows multiple punishments. Should this step not result in a definitive answer, the court turns to step two, the two-part "same evidence" or "Blockburger"[5] test.

The "same evidence" or "Blockburger" test asks whether the offenses are the same "in law" and "in fact." Offenses are the same "in fact" when they arise from the same act. Offenses are the same "in law" when proof of one offense would always prove the other offense. If each offense includes an element that is not included in the other offense, the offenses are considered different and multiple convictions can stand, i.e., this shows that the legislature intended courts to impose punishment for violation of each offense. Failure

[5] Referring to United States v. Blockburger, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

under either the factual or legal prong of the same evidence test is conclusive. It creates a strong presumption in favor of multiple punishments, a presumption that can only be overcome where there is "clear evidence" that the legislature did not intend for the crimes to be punished separately. This search for "clear evidence" of contrary legislative intent is the third step of the analysis.

Under this third part of the Calle test falls the merger doctrine. Merger is simply a term used to refer to a specific part of the double jeopardy doctrine of statutory interpretation. State v. Vladovic, 99 Wn.2d 413, 419 n.2, 662 P.2d 853 (1983); State v. Sweet, 138 Wn.2d 466, 478, 980 P.2d 1223 (1999). The "merger doctrine belongs squarely within the third prong of the Calle double jeopardy analysis." State v. Frohs, 83 Wn. App. 803, 811, 924 P.2d 384 (1996).

The merger doctrine applies only in a very limited and specific situation. Specifically, the merger doctrine:

> *only 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

> [that] is defined as a crime elsewhere in the criminal statutes (e.g., assault or kidnapping).[6]

State v. Eaton, 82 Wn. App. 723, 730, 919 P.2d 116 (1996) (emphasis added) (citing Vladovic, 99 Wn.2d at 413). In other words, merger applies only "where the degree of one offense is elevated by conduct constituting a separate offense." State v. S.S.Y., 170 Wn.2d 322, 329, 241 P.3d 781 (2010). The premise is that this shows the legislature intended the punishment for the elevated crime to constitute the sole punishment for the commission of the act that violated both statutes. State v. Freeman, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005).

2. THE DEFENDANT'S CONVICTIONS FOR FIRST-DEGREE ROBBERY AND SECOND-DEGREE ASSAULT VIOLATE THE PROHIBITION AGAINST DOUBLE JEOPARDY

The State concedes the defendant's convictions for first-degree robbery (count III) and second-degree assault (count II) based on the same act violates the double jeopardy merger

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[6] To prove first-degree rape, the statute requires that the State prove that during the commission of the rape, the defendant "kidnaps the victim," "uses or threatens to use a deadly weapon" or "inflicts serious physical injury." RCW 9A.44.040(1)(a)(b) and (c).

doctrine. This issue is controlled by Freeman, supra, and State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008).[7]

Just like this case, Kier involved a carjacking. As pertinent here, Kier pointed a gun at the victim and stole the car he was sitting in. Kier was convicted of first-degree robbery and second-degree assault. As charged, to elevate the robbery to first-degree robbery, the State was required to prove that Kier "was armed with a deadly weapon or displayed what appeared to be a deadly weapon." Kier, 164 Wn.2d at 808-09; RCW 9A.56.200(1)(a)(i-ii). To prove second-degree assault, the State was required to prove that Kier assaulted the victim with a deadly weapon. Id.; RCW 9A.36.021(1)(c). The Supreme Court held that "the completed assault was necessary to elevate the completed robbery to first degree." Kier, at 807. More specifically, the Court said, "[t]he 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." Id. at 806. As a result of the application of the double jeopardy merger

[7] See also State v. Chesnokov, 175 Wn. App. 345, 305 P.3d 1103 (2013), and State v. Pierce, 155 Wn. App. 701, 230 P.3d 237 (2010).

doctrine, the lesser crime, the assault, needed to be vacated. Kier, at 807.

Here, as charged, to elevate the robbery to first-degree robbery, the State was required to prove that the defendant "displayed what appeared to be a firearm or other deadly weapon." CP 53, 137. Although the defendant possessed an Airsoft BB gun, the Information specified that the weapon used in the robbery was a sword. CP 53. Further, the victim was aware that the gun was a fake and thus he did not submit to the robbery based on the display of the fake gun.

To prove the second-degree assault, the State was required to prove that the defendant "assaulted Matthew Nordstrom with a deadly weapon." CP 53, 136. The Information specified that the deadly weapon was a sword. CP 53.

Just as in Kier, the completed assault was necessary to elevate the robbery to first-degree robbery. Thus, the two convictions violate the double jeopardy merger doctrine and therefore the second-degree assault conviction must be vacated.

3. THE DEFENDANT'S CONVICTIONS FOR FIRST-DEGREE ROBBERY AND THEFT OF A MOTOR VEHICLE DO NOT VIOLATE THE PROHIBITION AGAINST DOUBLE JEOPARDY

The defendant's convictions for first-degree robbery (count III) and Theft of a Motor Vehicle (count IV) do not violate double jeopardy. The crimes fail the "same evidence" test and thus the crimes can be punished separately.

Here, as charged, to prove first-degree robbery, the State was required to prove that the defendant (1) unlawfully took personal property from Matthew Nordstrom, (2) that the taking was from Matthew Nordstrom or in his presence, (3) that when he did so, the defendant intended to commit theft of the property, (4) that the taking was against Matthew Nordstrom's will by the defendant's use or threatened use of immediate force, violence or fear of injury, (5) that the force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking, and (6) that in the commission of these acts, the defendant displayed what appeared to be a firearm or other deadly weapon. CP 53; CP 137; RCW 9A.56.200(1)(a)(ii); RCW 9A.56.190.

To prove theft of a motor vehicle the State was required to prove that the defendant (1) wrongfully obtained or exerted unauthorized control over a motor vehicle of another, and (2) that the defendant intended to deprive the other person of the motor vehicle. CP 53; CP 140; RCW 9A.56.065; RCW 9A.56.020(1).

Under the first step of a double jeopardy analysis -- a review of the statutory language, neither the robbery statute nor the theft of a motor vehicle statute expressly states that multiple punishments are intended or disallowed. See RCW 9A.56.190; RCW 9A.56.200; RCW 9A.56.065; RCW 9A.56.020. Thus, the court turns to step two to determine legislative intent, the two-part "same evidence" test. Calle, 125 Wn.2d at 776.

The "same evidence" test asks whether the offenses are the same "in law" and "in fact." Offenses are the same "in fact" when they arise from the same act. Offenses are the same "in law" when proof of one offense would always prove the other offense. Id. In other words, if each offense includes an element not included in the other, the offenses are considered different and multiple convictions can stand. Id.

To prove theft of a motor vehicle, while the State was required to prove that a theft occurred, the State was also required

to prove as an element of the crime that the property taken was a motor vehicle. This is not an element of the crime of robbery.

To prove first-degree robbery, among other things, the State was required to prove that the defendant displayed what appeared to be a firearm or other deadly weapon, and that he used force or the threatened use of force to commit the taking of the property, and that the property was taken from Nordstrom or in his presence. These are not elements of the crime of theft of a motor vehicle. Thus, the convictions fail the "same evidence" test and the crime can be punished separately unless the defendant can show there is "clear evidence" that the legislature did not intend for the crimes to be punished separately. Calle, at 776.

The defendant does not provide any evidence to overcome this presumption. In fact, the theft of a motor vehicle act supports the presumption that the legislature intended that both crimes be punished separately.

In the statute's statement of intent, the legislature noted the importance of automobiles to "our everyday lives," that many times an automobile is the "second largest investment a person has next to the home," and that in Washington, "more than one car is stolen every eleven minutes," a "significant loss" to victims and their

everyday life. Findings--Intent--2007 c 199. The crime of automobile theft, the legislature added was "linked more and more to offenders engaged in other crimes," and deserves "tough laws," "[a]ppropriate and meaningful penalties," with the "intent of this act to deter motor vehicle theft." Id.

The only legal support cited by the defendant comes from a recent case out of Division Two, State v. Ralph.[8] However, the court in Ralph engaged in a completely flawed double jeopardy analysis, an analysis that directly conflicts with existing Supreme Court precedent. The case does not control the outcome here.

For the act of assaulting the victim and driving off with the victim's truck, Ralph was found guilty of second-degree robbery and second-degree taking a motor vehicle without permission (TMV). On appeal, Ralph argued that his two convictions violated double jeopardy.

To being its analysis, the court correctly noted that the statutes do not expressly provide for multiple or separate punishments. Ralph, 2013 WL 3999878 at 4 n.3. The court then applied the "same evidence test."

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[8] ___ Wn. App. ___, 308 P.3d 729, 2013 WL 3999878 (Div. 2, Aug. 7 2013).

As pertinent to the case, second-degree robbery requires that the State prove an unlawful taking of personal property from the person or in their presence, and that the taking was against the person's will by use of or threatened use of force, violence, or fear of injury. RCW 9A.56.210; RCW 9A.56.190. Second-degree taking a motor vehicle requires the State prove a taking of personal property, and that the property is a motor vehicle. RCW 9A.56.075. Thus, second-degree robbery requires the State prove a taking from the actual victim or from their presence—an element not required to prove TMV. Under the TMV statute, the taking does not need to be from the victim or from the victim's presence, in fact, the victim need not even be aware of the taking. Also, robbery requires that the taking be by force or threat of force, another element not required to be proven for TMV. On the other hand, to prove TMV, the State is required to prove that the property taken is a motor vehicle, an element that is not required to prove robbery. Thus, the court correctly concluded that the crimes failed the "same evidence" test, the "two convictions are not the same crime in law because their statutory elements differ." Ralph, at 4. Because there is no "clear evidence" the legislature intended that the two crimes not be

punished separately, this should have ended the inquiry. (See the three-part Calle test outlined supra.)

Instead of ending in inquiry, however, the court deviated from any recognized double jeopardy analysis and continued. First, the court mistakenly reversed the legal presumption that exists when two crimes fail the "same evidence" test. The court stated that "absent clear legislative intent to the contrary" the two convictions that failed the same evidence test violate double jeopardy. This is incorrect. According to the Supreme Court, the outcome of "the Blockburger and same evidence tests control" unless "there is a clear indication of ***contrary*** legislative intent." Calle, 125 Wn.2d at 778-79 (emphasis added). Thus, in Ralph, just as in this case, once the convictions failed to meet the same evidence test, the convictions may be punished separately absent clear contrary legislative intent – something that does not exist in either case.

Next, the court mistakenly applied the merger double jeopardy doctrine. The court found that TMV "is the ***functional equivalent*** of a lesser included of the second degree robbery" and therefore, in an unexplained manner, the merger doctrine applied. Ralph, at 5 (emphasis added). The court cited no authority for this

"functional equivalent" double jeopardy/merger analysis because there is none. As the Supreme Court has held, the merger doctrine applies in only one situation.

> We reaffirm our holdings that the merger doctrine is a rule of statutory construction which ***only 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).

Vladovic, 99 Wn.2d at 420-21 (emphasis added). The legislature, in enacting the robbery statute, did not require that the State also prove TMV, and thus, the merger double jeopardy doctrine simply does not apply. In addition, the degree of one crime must be elevated by the required proof of the other – no degree of any crime was elevated in Ralph. See State v. Lust, 174 Wn. App. 887, 893, 300 P.3d 846 (2013) (degree of theft is not elevated by proof of a separate theft of an access device) (citing Vladovic, 99 Wn.2d at 420-21); S.S.Y., 170 Wn.2d at 329.

Next, the court suggests that because the TMV was merely "incidental" to the robbery, the two convictions violated double jeopardy. Ralph, at 4. The Supreme Court has repeatedly rejected arguments whereby the defense has sought a rule that a second

conviction violated double jeopardy if it was merely "incidental" to another conviction. See Vladovic, 99 Wn.2d 413, accord, State v. Louis, 155 Wn.2d 563, 120 P.3d 936 (2005); In re Fletcher, 113 Wn.2d 42, 776 P.2d 114 (1989).

Vladovic arose from an incident at Bagley Hall on the University of Washington campus. An armed man entered Bagley Hall, gathered the five employees, made them lie on the floor and then bound their hands and taped their eyes shut. Other confederates were then brought into the building. The robbers then removed the employees' wallets. One employee, a Mr. Jensen, was then taken to a storeroom where he was instructed to open a safe containing platinum crucibles. Officers then arrived and arrested the men. Vladovic, at 415-16.

The defendant was convicted of attempted first-degree robbery for attempting to steal the contents of the safe, first-degree robbery for stealing money from Mr. Jensen's wallet, and four counts of first-degree kidnapping for restraining the other employees. Vladovic, at 416. The Supreme Court held that none of the convictions merged or otherwise violated double jeopardy.

The Court also addressed dictum from State v. Allen, 94 Wn.2d 860, 621 P.2d 143 (1980), which suggested that if a

kidnapping was merely "incidental" to a robbery, the former offense would merge into the robbery. Vladovic, at 420. The court held that this statement in Allen was not in accord with the merger doctrine and that pursuant to the merger doctrine, "kidnapping does not merge into first degree robbery." Vladovic, at 421 (emphasis added).

Six years later, the Supreme Court reaffirmed the holding of Vladovic in In re Fletcher, supra. While Fletcher drove one car, his co-defendant forced his way into another car at gunpoint. The car was occupied by two women. The women were driven to a remote area where they were shot in the head. Fletcher was convicted of first-degree assault, first-degree kidnapping, and first-degree robbery for the stealing of the car. Fletcher, at 43-44. Fletcher argued that his kidnapping of the two women was merely "incidental" to the robbery of the car. Id. at 52. The Supreme Court once again rejected this "incidental" crime argument. Id. at 49-52.

Another fifteen years later, the defense again tried to persuade the Court to adopt an "incidental" merger rule. In State v. Louis, the defendant was convicted of robbery and kidnapping for a jewelry store heist in which he bound his victims in a back bathroom. The Supreme Court first rejected Louis' double jeopardy

challenge and then addressed his argument that the kidnapping was merely incidental to his robbery and therefore the conviction could not stand. The Court rejected Louis' argument, stating, "[w]e see no reason to depart from our decisions in Vladovic and Fletcher." Louis, at 571.

Finally, the court in Ralph suggests that because the same facts could be used to prove both charges, the convictions violated double jeopardy. "As our Supreme Court has long acknowledged, the constitutional prohibition against double jeopardy is violated when 'the evidence required to support a conviction [of one crime] would have been sufficient to warrant a conviction upon the other.'" Ralph, at 5 (citing Freeman, 153 Wn.2d at 772). This is incorrect.

First, the quotation from Freeman cited by the court was discussing the "same evidence" test. Later in the opinion, the Court stated that "[T]he mere fact that the same conduct is used to prove each crime is not dispositive." Freeman, 153 Wn.2d at 777.

Second, the caveat that the same facts were used to prove both crimes is true of all double jeopardy claims—it is what gets your foot in the door. For example, a first-degree robbery and second-degree assault may violate double jeopardy where the

assault is part of the robbery, but if the assault occurred a day later, there is no double jeopardy issue.

And third, the same fact or same conduct test for double jeopardy was abandoned by the Supreme Court decades ago. See Calle, supra. Calle represented an affirmation of the rejection of the factual type analysis that was being conducted by some courts prior to the early 90's. In other words, courts were finding double jeopardy violations based on a simple finding that the same facts or conduct were used by the prosecution to prove both crimes. In 1993, the United States Supreme Court rejected the "same conduct" fact based test for determining double jeopardy. United States v. Dixon, 509 U.S. 688, 704, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). Two years later, the Washington Supreme Court did the same, recognizing that a fact analysis based test had been rejected by the United States Supreme Court and that the State double jeopardy clause did not provide broader protection than its federal counterpart. State v. Gocken, 127 Wn.2d 95, 896 P.2d 1267 (1995). This rejection of a fact-based double jeopardy/merger analysis makes sense when considering the question is one of legislative intent of which the facts of a particular

case tell us nothing. See State v. Vaughn, 83 Wn. App. 669, 924 P.2d 27 (1996), rev. denied, 131 Wn.2d 1018 (1997) (recognizing rejection of the "same conduct" rule in finding no double jeopardy for kidnap and rape).

For whatever reason, the court in Ralph went awry in its double jeopardy analysis. Along with dealing with different crimes than the case at bar, its flawed analysis does not apply here. The defendant's convictions for first-degree robbery and theft of a motor vehicle do not violate double jeopardy.

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction and sentence.

DATED this 16 day of October, 2013.

Respectfully submitted,

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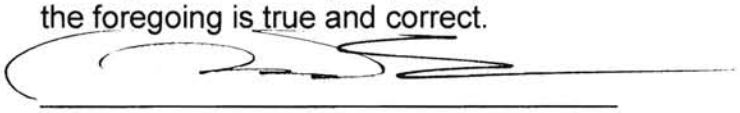
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric Nielsen, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. YEMRU, Cause No. 69767-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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10-16-13

Date

Done in Seattle, Washington