FILED

AUG 06 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By________

NO. 30672-1-III

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

MARQUIS JONES,

Appellant.

OPENING BRIEF

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(206) 224-8777
Attorney for Appellant
Marquis Jones

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ISSUES PRESENTED

1. Counts 4 and 5 both charge Marquis Jones with attempted robbery. Count 4 charges attempted robbery of victim Aaron Swedberg, by use or threat of "force, violence, and fear of injury" against Mr. Swedberg. Count 5 alleges robbery of victim D.J. Bordner, but states that the *actus reus* of that crime was the same as the *actus reus* of Count 4, that is, use or threat of "force, violence, and fear of injury" against the same "Aaron Swedberg" as listed in Count 4.

(a) Does conviction of these two separate crimes based on a single act directed towards only one victim violate double jeopardy clause protections of the state and U.S. Constitutions?

(b) Alternatively, if Count 5 is really based on robbery of Mr. Bordner via threats and/or violence against Mr. Swedburg, must it be vacated due to total insufficiency of evidence?

(c) Does the imposition of two separate firearm enhancements based on attempted robbery of the exact same items based on harm or threats of harm to the same victim violate double jeopardy clause protections of the state and U.S. Constitutions?

ASSIGNMENTS OF ERROR

1. The trial court erred in entering judgments of conviction against Mr. Jones on both Counts 4 and 5.

2. The state erred in charging Mr. Jones with both Counts 4 and 5.

3. The trial court erred in imposing firearm sentence enhancements on both Counts 4 and 5.

4. The state erred in charging firearm sentence enhancements on both Counts 4 and 5.

5. The trial court erred in entering a judgment of conviction against Mr. Jones on Count 5, given the insufficiency of evidence to convict on that charge.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This case arose from a January 23, 2000, home-invasion robbery in which Michael Guilbeault was shot and killed by one of the several people who forced their way into Mr. Guilbeault's home. The trial court initially arraigned Mr. Jones on the first Information charging him with premeditated first-degree murder. The Docket Sheet for this case, CP:295-99, shows an arraignment on that initial single charge, dated April 27, 2000 (Docket entry 5). CP:295.

On August 21, 2000, the state filed a motion to amend the Information.[2] That Amended Information charged Mr. Jones with felony murder in the first degree (Count 1) in violation of RCW 9A.32.030(1); first-degree robbery (Count 2) in violation of RCW 9A.56.200(1)(A); first-degree burglary (Count 3) in violation of RCW 9A.52.020(1)(A); attempted first-degree robbery (Counts 4 and 5) in violation of RCW 9A.56.200(1)(A); and first degree unlawful possession of a firearm (Count 7) in violation of RCW 9.21.020(1)(A) in Spokane County Superior Court. CP:25-27.

Count 4 charges robbery of victim Aaron Swedberg by use or threat of "force, violence, and fear of injury" against Mr. Swedberg. CP:26. Count 5 begins by seeming to charge robbery against a different victim, but continues by alleging that the *actus reus* was the same as the *actus reus* of Count 4, that is, use or threat of "force, violence, and fear of injury" against the same

[2] The Amended Information was then filed on August 31, 2000, according to the Docket Sheet. CP:295. But there was no arraignment on that date. The Docket Sheet contains no entry for an arraignment on the Amended Information. In fact, the documents in the court file for that date – all of which are located together at CP:300-04 – say nothing about an arraignment at all. This error was raised in a CrR 7.8 motion filed immediately after the recent resentencing, which was transferred to this Court to be treated as a PRP; it is the subject of the contemporaneously filed PRP Opening Brief.

"Aaron Swedberg" as listed in Count 4. *Id.* Counts 1 through 5 also alleged that Mr. Jones was armed with a firearm under the provisions of RCW 9.94A.125 and 9.94A.310(3). CP:25-26.

Mr. Jones waived his right to a jury, and the case was tried to the court. The court convicted him of Counts 1, 3-5, and 7, as charged. CP:110. The court convicted him of attempted first-degree robbery, instead of robbery, on Count 2. *Id.* The court also found that a firearm was used on Counts 1 through 5. CP:110-11.

The Superior Court then imposed a sentence of 549 months on Count 1, including 120 months for the firearm enhancement; 120 months on Count 2, including 72 months for the firearm enhancement; 120 months on Count 4, including 72 months for the firearm enhancement; 120 months on Count 5, including 72 months for the firearm enhancement; and 116 months on Count 7. The base sentences run concurrently and the enhancements run consecutively, so the total sentence is 765 months. Judgment and Sentence, CP:118-30; Order Amending Section 4.5 of the Judgment and Sentence, CP:132.

II. THE TRIAL AND CONVICTION

A. Overview of Trial Evidence

Mr. Jones waived jury, and his case was tried to the court. After hearing testimony and considering the evidence presented, the trial court summarized the evidence with the following undisputed findings of fact: James Smith, Josh Campbell, Randy Powell, and a fourth man street-named "Frosty" were armed with firearms. CP:106. Their colleague, Tiffany Herboldt, knocked on the front door of the Guilbeault home to help the four young men gain entry and rob Mr. Guilbeault of drugs and money. CP:107. The four men then did enter and did demand money and drugs from the home's three occupants, Michael Guilbeault, Aaron Swedburg, and James McQueen. *Id.* In the course of this, one of the intruders shot Mr. Guilbeault numerous times, killing him. *Id.*

Tiffany Herboldt and the four men then left the Guilbeault home and drove together to the home of Dayleen Mills, who had no involvement in the incident. CP:107. Ms. Mills said "Frosty" was one of the five people who arrived at her home. CP:108-09. In court, Daylene Mills, Tiffany Herbolt, and Josh Campbell identified "Frosty" as Marquis Jones. CP:107-08.

B. The Trial Court's Findings

As a result of this evidence, the trial court found that Marquis Jones was the fourth man participating in these crimes. CP:108. That court also entered conclusions of law ruling that Mr. Jones was guilty of first-degree felony murder (Count 1); guilty of first-degree burglary (Count 3); guilty of three counts of attempted first-degree robbery (Counts 2, 4, and 5); and guilty of first-degree unlawful possession of firearm (Count 7). CP:110. The trial court also ruled that a firearm enhancement applied to each crime. CP:110-11. Further, that court concluded that Mr. Jones had a prior conviction for a most serious offense (as defined under RCW 9.41). CP:110.

C. Sentencing

The original Judgment, following the first sentencing hearing, states that Counts 1 and 3 – the first-degree murder and the first-degree burglary – are considered "same criminal conduct" and, hence, that they count as one crime for sentencing purposes under RCW 9.94A.400. CP:120. It then lists five prior convictions. *Id.* The offender score for all of them, taken together with other current offenses, is listed as 9+. CP:121.

The seriousness level for felony murder, Count 1, was XV and the sentencing range was therefore 411-548 months plus a firearm enhancement of 120 months. CP:121. On Counts 2, 4 and 5, the attempted robberies, the seriousness level was IX and the sentencing range was 96.75-128.25 months, plus a firearm enhancement of 72 months, for a total of 168.75-200.25 months (though the statutory maximum is 120 months). CP:121-22. On Count 3, the seriousness level was VII and the standard range was 87-116 months, plus a firearm enhancement of 120 months, for a total range of 207-236 months. CP:121. Finally, on Count 7, the seriousness level was VII, with a standard range of 87-116 months. CP:122.

The trial court sentenced Mr. Jones to 765 months. Its original sentence lacked some clarity; the trial court therefore amended the written sentence with a ruling on January 30, 2001, to make that sentence more clear. CP:132. This amending order explains that the court's oral ruling was that the total sentence should be 765 months, calculated as follows: "549 months on Count 1; 120 months on Count II; 120 months on Count IV; 120 months on Count V; 116 months on Count VII; Count I includes a

120 month enhancement; Counts II, IV and V include a 72 month enhancement on each for a total sentence of 765 months." *Id.*

The court then ran all the base sentences concurrently, and ran all the enhancements consecutively. The base sentence from this first sentencing hearing was, therefore, 549 months (the sentence for count 1, with the other base sentences running concurrently, and one firearm enhancement included), plus 216 months. The 216 months is the total of three separate enhancements of 72 months each. The 72-month figure is derived from doubling the 36-month firearm enhancement for each of those three substantive crimes. Thus, 336 months of that 765-month sentence are attributable to consecutively-run firearms enhancements.

III. APPEAL AND POST-CONVICTION PROCEEDINGS

Mr. Jones' convictions and sentences were affirmed in an unpublished decision. *State v. Jones*, 2002 Wash. App. LEXIS 897 (2002). A petition for review was denied on October 29, 2002. *State v. Jones*, 60 P.3d 93; 2002 Wash. LEXIS 830 (2002).

Mr. Jones thereafter filed two personal restraint petitions (PRPs) based on newly discovered evidence. The first petition[3] contained an affidavit from Randy Powell, stating that Marquis Jones was not a participant in the crime and that Mr. Powell had improperly influenced others who did participate in the crime to implicate Mr. Jones. The second petition[4] contained an affidavit in which Tiffany Herboldt recanted her testimony incriminating Mr. Jones. Both petitions were dismissed, by orders filed January 3, 2005, and January 5, 2006, respectively. A motion for discretionary review[5] of the second PRP dismissal was denied on April 3, 2006.

Mr. Jones then filed a third PRP in the state Supreme Court on September 27, 2010 in Case No. 85108-5. He argued that the simultaneous convictions of felony murder based on the predicate felonies of first-degree robbery and first-degree burglary, plus the first-degree robbery and first-degree burglary crimes upon which that felony murder conviction was based, violated double jeopardy

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[3] *In re Jones*, Washington Court of Appeals Case No. Case No. 23103-8-III.

[4] *In re Jones*, Washington Court of Appeals Case No. 24469-5-III.

[5] *In re Jones*, Washington Supreme Court Case No. 78255-5.

clause protections[6] because the named victim of the felony murder and the predicate felonies was exactly the same. Mr. Jones also argued that doubling the sentences for each of his four firearms enhancements without proof or findings that he had previously received a deadly weapon enhancement violated the statutory and constitutional rights to proof beyond a reasonable doubt of the facts necessary to justify this increase.

In response, the State conceded that convictions on Counts 2 and 3, in addition to the Count 1 felony murder conviction, violated double jeopardy clause protections. But it argued that there was sufficient evidence to find that the petitioner had previously been sentenced for a firearm enhancement. The Supreme Court granted the PRP in part and remanded to the Superior Court with directions to vacate the first degree burglary and attempted first-degree robbery convictions, and to resentence Mr. Jones. CP:134. It rejected the firearm-enhancement claim, but it did not say whether it was rejecting that claim on the merits or on the timeliness grounds that had also been raised by the state. *Id.*

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[6] U.S. Const. amend. V, XIV; Wash. Const. art. 1, § 9.

IV. RESENTENCING

The resentencing occurred on February 10, 2012. His sentencing range essentially remained the same, despite vacature of those two convictions. VRP:56.

Mr. Jones, however, moved for a sentence below the range based on the following factors: (1) his criminal history was overstated given the emerging science and law on adolescent culpability and brain development and most of his prior crimes were as a juvenile; (2) the murder was principally accomplished by another, since Mr. Jones was not the triggerman; (3) his post-crime rehabilitation was exceptional; and (4) his sentence was disproportionately long when compared to the sentences of his co-defendants. VRP:26-34. Mr. Jones also argued that the firearm enhancements should not be doubled. VRP:34-35. Finally, Mr. Jones argued that Counts 4 and 5 should be merged to avoid double jeopardy problems and only one firearm enhancement should apply, because the counts are identical in charging attempted robbery of the exact same items based on harm or threats of harm to the same victim. VRP:35.

The Superior Court denied the motion for an exceptional sentence below the range. VRP:54. It also interpreted the

appellate court's Order rejecting the firearm enhancement claim as a decision on the merits, and did not further consider the issue. VRP:55-56. It did not distinguish the double jeopardy/merger challenges to Counts 4 and 5 from the other firearm enhancement issue, and thus did not address the double jeopardy/merger issue at all. *Id.* It then imposed a sentence of 693 months, the same sentence that Mr. Jones received at his first sentencing hearing, minus the 72-month firearm enhancement on the vacated Count 2. VRP:58.

V. CrR 7.8 MOTION

Shortly after resentencing, Mr. Jones filed a CrR 7.8 motion to dismiss all charges based on the fact that he was never arraigned on the Amended Information, so he had no notice of the charges against him. CP:286-313. The state opposed that motion on the ground that it was untimely; it requested that the court either dismiss the motion or transfer it to this Court. CP:332; VRP:70-71.

The Superior Court applied *In re Skylstad,* 160 Wn.2d 944, 162 P.3d 413 (2007), and ruled that the motion was timely. VRP:82. It declined to make a decision on the merits of the motion, however; instead, that court transferred the motion to this Court to be considered as a PRP. VRP:83-84. The Superior Court stated

that since the Notice of Appeal had already been filed regarding Mr. Jones' resentencing, the Court of Appeals should be made aware of the contemporaneous PRP transfer for the purpose of judicial economy. VRP:85. (We are filing a contemporaneous motion to consolidate the two cases based on this suggestion.)

ARGUMENT

I. COUNTS 4 AND 5 – AND THEIR FIREARM ENHANCEMENTS – VIOLATE DOUBLE JEOPARDY CLAUSE PROTECTIONS OF THE STATE AND FEDERAL CONSTITUTIONS.

A. Count 4 and 5 Each Charge Mr. Jones With Attempted Robbery by Threats or Use of Force, Etc., Against the Same Victim – Aaron Swedberg

Counts 4 and 5 both charge Marquis Jones and the other codefendants with attempted robbery. Count 4 charges robbery of victim Aaron Swedberg, by use or threat of "force, violence, and fear of injury" against Mr. Swedberg. Count 5 begins by charging robbery of D. J. Bordner. But it alleges that the *actus reus* of that crime was the same as the *actus reus* of Count 4, that is, use or threat of "force, violence, and fear of injury" against the same "Aaron Swedberg" as listed in Count 4.

Both of those Counts are reproduced in full here. Count 4 provides:

> ATTEMPTED FIRST DEGREE ROBBERY, committed as follows: That the defendants, RANDY O. POWELL, MARQUIS JONES and TIFFANY HERBOLDT, as actors and accomplices to each other, in the State of Washington, on or about January 23, 2000, with intent to commit the crime of FIRST DEGREE ROBBERY as set out in RCW 9A.56.200, committed an act which was a substantial step toward that crime, by attempting FIRST DEGREE ROBBERY, with the intent to commit theft, did attempt to unlawfully take and retain personal property, lawful U.S. currency, and personal items, from the person and in the presence of *AARON SWEDBERG*, against such person's will, *by use or threatened use of immediate force, violence and fear of injury to AARON SWEDBERG, and in the commission of and immediate flight therefrom, the defendant was armed with a deadly weapon*, firearm, the defendants, RANDY O. POWELL, MARQUIS JONES and TIFFANY HERBOLDT, being at said time armed with a firearm under the provisions of RCW 9.94A.125 and 9.94A.310(3).

CP:26 (emphasis added). Count 5 alleges:

> ATTEMPTED FIRST DEGREE ROBBERY, committed as follows: That the defendants, RANDY O. POWELL, MARQUIS JONES and TIFFANY HERBOLDT, as actors and accomplices to each other, in the State of Washington, on or about January 23, 2000, with intent to commit the crime of FIRST DEGREE ROBBERY as set out in RCW 9A.56.200, committed an act which was a substantial step toward that crime, by attempting FIRST DEGREE ROBBERY, with the intent to commit theft, did attempt to unlawfully take and retain personal property, lawful U.S. currency, and personal items, from the person and in the presence of DJ BORDNER (aka DJ MCQUEEN), against such person's will, *by use or threatened use of immediate*

> *force, violence and fear of injury to AARON SWEDBERG, and in the commission of and immediate flight therefrom, the defendant was armed with a deadly weapon*, firearm, the defendants, RANDY O. POWELL, MARQUIS JONES and TIFFANY HERBOLDT, being at said time armed with a firearm under the provisions of RCW 9.94A.125 and 9.94A.310(3).

CP:26 (emphasis added).

As the italics show, the state charged Mr. Jones (and other codefendants) with committing acts of violence, threats, or force against the same Mr. Swedberg twice – once in Count 4 and once in Count 5.

B. Counts 4 and 5 Are Attempt Crimes, and "Attempt" is a "Placeholder" For the Factual Allegations – Here, They Hold the Place For the Same *Actus Reus* of Taking a Substantial Step Towards Robbery of the Same Items By "Use or Threatened Use of ... Force, Violence and Fear" to the Same Victim – "Aaron Swedberg"

Clearly, under the double jeopardy clauses of the state and U.S. Constitutions[7] and under merger rules, the state cannot charge the same crime (attempted robbery) of the same items by the same means of force and threats to the same victim (Aaron Swedberg) against the same defendant (Marquis Jones) twice. The question here is whether Counts 4 and 5 contain that error.

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[7] U.S. Const. amend. V, XIV; Wash. Const. art. 1, § 9.

To begin this analysis, we start with the elements of attempted robbery, as charged. RCW 9A.56.190 defines "robbery" as follows:

> A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance ...

Under RCW 9A.56.200(1)(a)(i), the portion of the first-degree robbery statute charged here, robbery is a first degree offense when the perpetrator is "armed with a deadly weapon" during the robbery or in immediate flight from it.

If this were all that were charged, then to convict Mr. Jones of first-degree robbery in Counts 4 and 5, the State would have had to have proven that Jones (1) unlawfully took property in the presence of the victim and against his will with the intent to take it unlawfully by using or threatening to use immediate force or violence, (2) used force or fear to obtain that property, and (3) was armed with a deadly weapon at the time.

But Counts 4 and 5 were charged as *attempts*. The elements of attempt are intent to commit a crime, and taking a

"substantial step" towards it. *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003) ("An attempt crime contains two elements: intent to commit a specific crime and taking a substantial step toward the commission of that crime."); *State v. Chhom*, 128 Wn.2d 739, 742, 911 P.2d 1014 (1996) (same).

That makes the analysis of the elements of an intent crime a little different. The Washington Supreme Court made this clear in *In re the Personal Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004).

In that seminal *Orange* decision, the state Supreme Court ruled that when comparing the elements of two *attempt* offenses to determine if they violate double jeopardy or merger rules under the *Blockburger*[8] test, the court must look at the way the crime was actually charged in the Information. In that case, the arguably duplicative count was charged as attempted murder. When a Washington court considers whether an *attempt* crime is impermissibly duplicative of a separate count, the court cannot consider the "substantial step" that is a necessary element of

[8] *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932) ("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 a fact which the other does not").

attempt at an abstract level. Instead, the "substantial step" element is treated as a "placeholder" for the real acts it stands in for. Thus, when evaluating a double jeopardy challenge to a conviction of an attempt crime, *the actual facts alleged in the Information to describe the specific attempt steps* are the ones that must be considered. In other words, "substantial step" cannot "remain a generic term for purposes of the [double-jeopardy] 'same elements' test." *Orange*, 152 Wn.2d at 818. Instead, "the term 'substantial step' is a placeholder in the attempt statute having no meaning with respect to any particular crime, and acquiring meaning *only from the facts of each case*." *Id.* (emphasis added).

Stated simply, *Orange* held that when a potentially duplicative *attempt* crime is charged based on the same single act – there, the same shot and here, according to the charges, the same threat or violence against Aaron Swedberg – then there is one crime for double jeopardy purposes.

Applying this analysis, the convictions of the two crimes in *Orange* that were based on different gunshots in that alleged drive-by shooting – attempted murder of one person, the intended victim, and the actual murder of an unintended bystander, by *several shots* – survived the double jeopardy challenge. But the two crimes in

Orange that were based on the *same* gunshot – attempted murder and first-degree assault – did not. The state Supreme Court explained this application of double jeopardy clause analysis in an attempt case as follows:

> ... [A]pplying ... the *Blockburger* test, we reverse the Court of Appeals and hold that Orange's convictions for first degree attempted murder and first degree assault violated his constitutional protection against double jeopardy. ... Under the *Blockburger* test, the crimes of first degree attempted murder (by taking the "substantial step" of shooting at Walker) and first degree assault (committed with a firearm) were the same in fact and in law. The two crimes were based on the same shot directed at the same victim, and the evidence required to support the conviction for first degree attempted murder was sufficient to convict Orange of first degree assault.

Orange, 152 Wn.2d at 820 (citation omitted). This same test – using "substantial step" as a place-holder – still governs double jeopardy analysis today.[9]

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[9] *See In re Francis,* 170 Wn.2d 517, 242 P.3d 866 (2010) (double jeopardy violation found where state expressly used second degree assault conduct to elevate attempted robbery charge to the first degree; analysis depends on facts as charged); *In re Borrero,* 161 Wn.2d 532, 167 P.3d 1106 (2007), *cert. denied,* 552 U.S. 1154 (2008) (double jeopardy analysis of attempt crime is based on actual facts constituting the "substantial step"); *State v. Esparza,* 135 Wn. App. 54, 60-64, 143 P.3d 612 (2006).

C. Counts 4 and 5, as Charged Here – As Attempts to Take the Same Property, With Identical "Force, Violence and Fear" Against the Same Victim Mr. Swedberg – Are Therefore Identical Under *Blockburger*

When that "placeholder" analysis is applied to Mr. Jones' case, it is apparent that there was only one act of force alleged for both Count 4, robbery of Mr. Swedberg, and Count 5, robbery of Mr. Bordner (aka James McQueen). It was *the same act of force* – "by use or threatened use of immediate force, violence, and fear of injury to Aaron Swedberg, and in the commission of and in immediate flight therefrom, the defendant was armed ...." In fact, given that these are attempt charges, that is the *only* act alleged in Counts 4 and 5. No actual taking ever occurred. Thus, as charged in this case, every element of the attempted robbery charged in Count 4 was also an element of, or a substantial step towards, the attempted robbery charged in Count 5. The reason is that the only substantial step towards robbery charged in either count – that is, the unlawful act – was identical: it was "the use or threatened use of immediate force, violence, or fear of injury" against "Aaron Swedberg."

Under *Blockburger*, the two crimes, charged under the same statutes, are therefore "identical in ... law." They are also "identical

in fact" because in this case, the two crimes were based on the same attempt, using the same threat or actual "force, violence, or fear of injury," against the same victim, Aaron Swedberg.

D. They Are Also Identical Under "Unit of Prosecution" Analysis

The same result is compelled if we use unit-of-prosecution analysis, instead. "Unit-of-prosecution" analysis is typically used instead of *Blockburger* analysis where, as here, a defendant is charged with two counts of the same crime under the same statute, rather than with two crimes under two different statutes. *State v. Westling*, 145 Wn.2d 607, 610, 40 P.3d 669 (2002).

"One unit of prosecution for robbery exists for 'each separate forcible taking of property from or from the presence of a person having an ownership, representative, or possessory interest in the property, against the person's will.' ... Thus, *a single count of robbery* results from taking one or more items from one person *or taking one item in the presence of multiple people, even if each has an interest in that item.*" *In re Francis*, 170 Wn.2d 517, 528, 242 P.3d 866 (2010) (citations omitted) (emphasis added).

Counts 4 and 5 charge "taking one item in the presence of multiple people, even if each has an interest in that item." It lists

the same property in Counts 4 and 5. It lists the same victim of threats or force in Counts 4 and 5. It alleges the same substantial step in Counts 4 and 5. Since Counts 4 and 5 charge violence against just one person for the same sought-after items, they duplicate each other. In fact, given that the state Supreme Court has interpreted the robbery statute as requiring the state to prove a taking from the same person against whom the threat is made, this is the only possible interpretation of the charges. *State v. Tvedt*, 153 Wn.2d 705, 711, 107 P.3d 728 (2005) ("Under the plain language of the statute, the crime of robbery requires that there be a taking of property and that the taking be forcible and *against the will of the person from whom or from whose presence the property is taken*. By describing the crime of robbery as it did, the legislature established an offense which is dual in nature-robbery is a property crime and a crime against the person.") (emphasis added).

And even if those two robbery charges could conceivably be construed some other way, also, the more punitive construction cannot be chosen over the less punitive one. *Tvedt*, 153 Wn.2d 705, 710-11 (applying rule of lenity to interpretation of robbery statute in unit of prosecution case).

So under unit-of-prosecution analysis, also, Counts 4 and 5 charge just one attempted robbery. One of Counts 4 or 5 should therefore be vacated. *State v. Turner*, 169 Wn.2d 1041, 238 P.3d 461 (2010) (to redress double jeopardy violation, court completely vacates the constitutionally impermissible conviction – conditional vacature impermissible). The accompanying firearm enhancement must also be vacated. *Id.*

E. **If This Court Instead Construes Count 5 as Charging a Taking From Mr. Bordner via Threats Against Mr. Swedberg, Then It Must Be Dismissed Due to Insufficiency of Evidence.**

If this Court instead construes Count 5 as properly charging a taking from Mr. Bordner via threats against Mr. Swedberg, then it must be dismissed due to insufficiency of evidence. There is no proof, and no finding (*see* CP:108-11), that Mr. Jones tried to rob the former by threatening only the latter.

In fact, Mr. Bordner specifically testified that the person in the kitchen, robbing him, was *not* Mr. Jones. Asked whether the robber in the kitchen was Mr. Jones, he stated: "I'm not sure. I don't think so." And then, "I mean, I doubt it was him. I don't think it was." 10/30/2000 VRP:68; CP:262. Thus, if this Court construes Count 5 as charging a taking from Mr. Bordner via threats against

Mr. Swedburg, that Count must be vacated due to insufficiency of evidence. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L. Ed. 2d 560 (1979).

II. CONCLUSION

Counts 4 and 5 charge attempted robbery. The charges purport to name two separate victims, but they rely on the same acts towards only one of the victims as the basis – the *actus reus* – for both crimes. This double charging violates double jeopardy protections of the federal and state constitutions. If Count 5 is not vacated based on this double jeopardy clause violation, then it should merge with Count 4 at sentencing because they are based on the exact same *actus reus*. Alternatively, Count 5 should be vacated and dismissed due to insufficiency of evidence. Finally, the 120-month firearm enhancement on Count 5 should also be vacated.

DATED this 2nd day of August, 2012.

Respectfully submitted,

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<u>CERTIFICATE OF SERVICE</u>

The undersigned hereby certifies that on the 2nd day of August, 2012, a copy of the OPENING BRIEF was served upon the following individual by depositing same in the U.S. Mail, first-class, postage prepaid:

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