68679-8 68679-8

No. **68679-8**

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ROBIN DAVIS,

Appellant.

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

The Honorable Judge McKeeman

APPELLANT'S OPENING BRIEF

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Issues Pertaining to Assignments of Error

1. Attempts to contact the driver of a vehicle in

[1] In support of this Assignment of Error Mr. Davis joins in the brief filed on behalf of co-defendant Jeffrey Saunders in this Court's case number 68771-9-I.

an effort to repossess the vehicle did not provide a sufficient basis to instruct the jury that self-defense was not available to the defendant if the jury found that he was the initial aggressor.

2. Was it error to allow the State to call an "expert" on repossession to testify on the collateral issue of the standards of the industry?

3. When convictions merge, does it violate double jeopardy and/or is it cruel and unusual punishment to impose enhancement sentences for all counts?

II. STATEMENT OF THE CASE

Robin Davis and Jeffrey Saunders were partners in an automobile repossession business. On September 10, 2010 they were in western Washington having just delivered some vehicles, which had been repossessed. RP 385. Leobardo Rios contacted Jeff Saunders and hired his company to repossess two

vehicles purchased by Teresa Valdez and believed to be in her possession in Western Washington. RP 391 – 93. Jeff Saunders, Robin Davis, and Chet Davis, Robin Davis's adult son, drove from Auburn, Washington toward Mount Vernon where they hoped to locate one the vehicles. RP 394 – 95. Unbeknownst to Mrs. Valdez the seller installed GPS devices in both vehicles prior to delivering them to her. RP 377. Mr. Rios, located in Texas, was monitoring the GPS devices and giving directions to Jeff Saunders as to the current location of the vehicles. RP 377 – 78.

Jeff Saunders directed Robin Davis, who was driving the three, to a Kentucky Fried Chicken (KFC) restaurant located in Mount Vernon, Washington, where Mr. Rios told him the Explorer currently was located. Robin Davis parked his vehicle, a gray Ford pickup, near the exit of the drive thru to the Kentucky Fried Chicken. Jeff Saunders got out of the pickup and approached the Explorer, which was in the drive thru lane apparently waiting for the passengers to pick up an order. RP

397 – 98. Saunders knocked on the passenger side window of the Explorer and advised the occupants that the vehicle was wanted in Texas. He told the driver of the vehicle, later identified as Salvador Valdez, to pull over. Instead of pulling over Salvador Valdez floored the vehicle, causing it to almost strike Mr. Saunders. It then jumped the curb, crossed two lanes of traffic and sped away from the Kentucky Fried Chicken. RP 400 – 02.

Unsuccessful in that attempt, Saunders and Davis decided that they would try to repossess the second vehicle. RP 404. Mr. Rios, still monitoring the GPS devices, advised Saunders that the second vehicle was positioned in North Marysville. Robin Davis got onto Interstate 5 driving south, headed for Marysville. While en route, he observed the Valdez Explorer ahead of him also traveling southbound. RP 405. He followed the Explorer exiting I-5 at 172nd Avenue NE. He watched the Explorer turn right off of 172nd Avenue and pull into the Burger King parking lot where it parked quite far from

the entrance to the restaurant. Robin Davis drove his vehicle into the parking lot and parked not far from the Explorer. RP 407 – 08. Saunders got out of the pickup with the repossession paperwork in his hand and began to approach the Explorer. RP 409. At that point the driver of the Explorer started it up and began speeding toward the exit of the parking lot. By this time Chet Davis had exited the pickup and was in the path of the Explorer. RP 409 – 10. Believing that his son was about to be struck by the Explorer, Robin Davis reached behind the driver's seat of the pickup, grabbed an unloaded rifle, pointed it at the oncoming Explorer and ordered the driver to stop. The Explorer did stop. RP 547-49. Jeff Saunders approached the Explorer and ordered the occupants out of the Explorer. J. V., Salvador's 15 year old son, got out of the passenger side of the SUV followed by his father. Apparently the driver's side door was inoperable. RP 550.

As soon as the occupants were out of the Explorer Robin Davis put the rifle back into his car. RP 549. Saunders advised

Salvador Valdez that he was placing him under arrest for attempting to run him down at the KFC. RP 414. He also told him that they were repossessing the vehicle and that they were also going to repossess the second vehicle. He placed J.V. in the pickup with Robin and Chet Davis while he drove the Explorer, with Salvador in the passenger seat. Saunders began to lead the way to where he believed the second vehicle was located. RP 418-19.

While en route Salvador Valdez told Saunders that he was diabetic and needed sugar. Saunders stopped almost immediately at a convenience store. RP 420-21. Salvador Valdez went into the store to purchase juice while Robin Davis and Saunders conversed. As Salvador Valdez exited the convenience store the police arrived. With guns drawn they ordered everyone out of the vehicle. RP 421. After some preliminary investigation, they arrested Robin Davis, Jeff Saunders, and Chet Davis. RP 424.

Almost seven months later the Snohomish County Prosecutor charged Robin Davis with one count of Kidnap in the First Degree, one count of Kidnap in the Second Degree, and two counts of Assault in the Second Degree. CP 1. By the time of trial the State had amended its information to add a firearm enhancement to each of the four counts. CP 40. Jeff Saunders also was charged with those four counts plus an additional count of Unlawful Possession of a Firearm by a Convicted Felon. Chet Davis resolved his case prior to trial by entering a guilty plea to one count of Unlawful Imprisonment.

At the conclusion of the State's case the defense moved to dismiss the charge of Kidnap in the First Degree based on the failure of the State to introduce sufficient evidence to justify giving that count to the jury. The judge granted the motion to dismiss that charge, but allowed the State to amend to Kidnap in the Second Degree. RP 374. Following a four-day trial the jury found Robin Davis guilty of two counts of Kidnap in the Second Degree and two counts of Assault in the Second

Degree. The jury also returned a special verdict for each count finding that Robin Davis had been armed with a firearm. The jury found Jeffrey Saunders guilty of two counts of Kidnap in the Second Degree while armed with a firearm and acquitted him of two counts of Assault in the Second Degree and Unlawful Possession of a Firearm. CP 48 – 57.

Judge McKeeman imposed an exceptional sentence. CP 64. He did not impose any period of confinement on any of the four counts, but did impose three years for each firearm enhancement to run consecutively thereby sentencing Robin Davis to twelve (12) years in prison. CP 68. Mr. Davis filed a timely notice of appeal and the court granted him bail pending this appeal. CP 69.

III. ARGUMENT

A. The Court erred when it gave a first aggressor instruction.

Finding that the defense had presented sufficient evidence the Court gave its requested lawful use of force

instructions applicable to all four counts. Over defense objection the Court also gave an initial aggressor instruction. RP 646-47, CP 47 (Instruction 33). That instruction advised the jury:

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense or defense of another and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense or defense of another is not available as a defense.

Davis contends that the Court erred when it included this instruction to the jury. While the instruction is appropriate where there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense, State v. Hughes, 106 Wash.2d 176, 191-92, 721 P.2d 902 (1986); State v. Kidd, 57 Wash.App. 95, 100, 786 P.2d 847 (1990), this was not such a case. Furthermore, as

stated in State v. Riley, 137 Wash.2d 904, 910, footnote 2, 976 P.2d 624, 627 - 628 (1999):

> The Court of Appeals has commented that "[f]ew situations come to mind where the necessity for an aggressor instruction is warranted. The theories of the case can be sufficiently argued and understood by the jury without such instruction." State v. Arthur, 42 Wash.App. 120, 125 n. 1, 708 P.2d 1230 (1985). While an aggressor instruction should be given where called for by the evidence, an aggressor instruction impacts a defendant's claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt. Accordingly, courts should use care in giving an aggressor instruction.

See also, State v. Douglas, 128 Wash.App. 555, 116 P.3d 1012 (2005)

In State v. Stark, 158 Wash.App. 952, 960, 244 P.3d 433, 437 (2010) the defendant was hiding in the kitchen when the victim charged at her, threatening to kill her. Ms. Stark used her gun to shoot him. The Court determined that it was error for the trial judge to give the initial aggressor instruction. The State sought to justify the instruction on the basis that Ms. Stark had obtained a restraining order and that constituted sufficient provocation. The Court disagreed stating: our Supreme Court

has held that spoken words are not sufficient; therefore, written words would likewise not be sufficient provocation for an aggressor instruction.

Mr. Saunders did nothing at the KFC that would justify the initial aggressor instruction. He knocked on the window of the Explorer as it sat in the drive through lane of the KFC and told the driver to pull over. He did not display a weapon, nor was he verbally abusive. Knowing that his car was going to be repossessed, Mr. Valdez fled almost striking Saunders. When the parties again met at the Burger King parking lot, Mr. Saunders again sought to effectuate the repossession. Again he got out of the vehicle with the repossession papers. Again, he approached the vehicle. Again, Valdez attempted to flee. It was only when Robin Davis believed that Valdez was going to run over his son, Chet, that he reached into his vehicle, pulled out an unloaded rifle, and pointed it at the Explorer hoping to bluff the driver into stopping.

Any attempt to repossess might be construed as an action that might provoke a belligerent response. People do not like to have their possessions repossessed. However, the actions of Saunders and Davis were not reasonably calculated to cause a situation in which they would have to use force to defend them. Salvador Valdez's response of twice driving in a manner that placed the defendants in harm of being run over was not only unexpected, but constituted the first act of aggression.

The initial aggressor instruction improperly allowed the jury to disregard the defendants' theory of the case. It deprived them of their defense. As stated by the Court in Stark:

> Notably, Washington courts have noted few situations exist necessitating an aggressor instruction. State v. Arthur, 42 Wash.App. 120, 125 n. 1, 708 P.2d 1230 (1985). This is because "[t]he theories of the case can be sufficiently argued and understood by the jury without such instruction." Id. Moreover, [w]hile an aggressor instruction should be given where called for by the evidence, an aggressor instruction impacts a defendant's claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt." Riley, 137 Wash.2d at 910 n. 2, 976 P. 2d 624.

158 Wn.App. at 960.

This Court should vacate the convictions and remand the matter for a new trial.

B. The Court erred when it allowed the State to introduce rebuttal evidence on a collateral issue.

1. Additional Facts relevant to Assignment of Error 1.

The defendants contend that their contact with the Valdezes was incidental to their attempt to repossess two vehicles, which had been taken out of Texas in violation of the retail sales agreement and on which they were delinquent in their payments. During his testimony Jeff Saunders, from time to time, would reference the standards of the industry (referring to those who repossess vehicles), or the standards of his company, as a reason why they did, or did not, do certain things. Examples of this include the following:

1. Saunders testified that when they initially pulled into the Burger King parking lot to again contact the Explorer it was not his intention to arrest the driver who he contended had attempted to run him down at the Kentucky Fried Chicken in Mt. Vernon. When asked "why," he replied: It's just not standard in the industry. RP 407.

2. He said that when they arrived at the KFC in Mt. Vernon Davis parked off to the side of the drive thru, stating "in this industry, you know, you can't block people.... RP 398

3. He testified that after stopping the Explorer in the Burger King parking lot that he separated Mr. Valdez from his son Jordan, and that Jordan was going to ride with Davis while he rode with Mr. Valdez. Asked why, he replied: "Well, it's standard in the industry, whenever we repossess a vehicle, that – if there's more than two people and there's – You don't want somebody sitting behind you. RP 417-18.

4. During cross-examination the prosecutor asked Mr. Saunders whether he was familiar with the term "breach of

peace." When explaining his understanding of the term, Mr. Saunders testified: To me it means that – In the industry anyways, it means that if there's a conflict, then the repossession stops. RP 448.

5. The prosecutor asked Mr. Saunders if he had testified "the standard in the industry is to go after the vehicle that is …in motion? Mr. Saunders answered that it was with his company. RP 451.

6. She then asked Mr. Saunders whether he testified that it is the standard in the industry that you don't let someone be in the car behind you, correct? He responded: With our company, that's standard, yes. RP 452.

7. When asked on cross-examination whether it is the standard in the industry that when someone shows some resistance you supposed to back off and let it go, Mr. Saunders answered it was, but only at that time. (Meaning that you can attempt the repossession at a later time) RP 469.

8. Mr. Saunders testified that it was the standard in the industry when repossessing more than one vehicle from the same owner to first attempt to repossess the one that is on the move. RP 395.

Over defense objection the Court allowed the State to call Harlow Cody as a rebuttal witness. RP 611. Rejecting the defendant's argument that this was rebuttal on a collateral matter the Court allowed Mr. Cody to testify concerning "industry standards" insofar as he would impeach the testimony of Mr. Saunders. RP 614

Mr. Cody then testified that it was not industry standard to have someone, whose car you were repossessing, get in the car with you. RP 620. He was allowed to testify that it is not industry standard to attempt to repossess a car that has people in it. RP 621. When asked whether there is an industry standard as to when you can attempt to again repossess a vehicle when the first attempt failed, Mr. Cody was allowed to testify, over objection, that it would not allow a second attempt within 24

hours. RP 622. He was also allowed to testify that it is not industry standard for one repossessing a vehicle to use a weapon, abusive language, to order someone out of the car, or to allow intimidation or coercive tactics. RP 623.

2. Argument

The well-established rule as to rebuttal evidence is contained in State v. White, 74 Wash.2d 386, 394–95, 444 P.2d 661 (1968). Rebuttal evidence is admitted to allow a plaintiff to answer new matters presented by the defendant. Genuine rebuttal evidence is not simply a reiteration of evidence in chief, but consists of evidence offered in reply to new matters. However, those new matters must not be collateral. Any error in denying or allowing the evidence can be predicated only upon a manifest abuse of discretion. White, at 395, 444 P.2d 661. The purpose of the rule is basically two-fold: (1) avoidance of undue confusion of issues, and (2) prevention of unfair advantage over a witness unprepared to answer concerning matters unrelated or remote to the issues at hand.

State v. Fairfax, 42 Wash.2d 777, 258 P.2d 1212; 3 Wigmore on Evidence (3d ed.) § 1002, p. 656.

While that the State has the right to pursue the subject to clarify a false impression, rebuttal evidence is not admissible where it is unduly prejudicial or on a collateral matter. State v. Fisher, 165 Wash.2d 727, 750, 202 P.3d 937 (2009); See also ER 403; State v. Oswalt, 62 Wash.2d 118, 120, 381 P.2d 617 (1963) ("It is a well-recognized and firmly established rule in this jurisdiction, and elsewhere, that a witness cannot be impeached upon matters collateral to the principal issues being tried.)

This issue for the jury in this case was whether Mr. Davis committed assaults and kidnapping in Snohomish County. Whether or not he was acting consistent with the standards of the repossession industry was collateral to whether the defendants committed the crimes charged. The evidence allowed by the Court on rebuttal did not really rebut anything

said by Mr. Saunders. In those instances in which it did it was on collateral matters.

The prejudice to the defense relates to the initial aggressor instruction discussed in the first assignment of error. The State's rebuttal testimony improperly provided the jury with a basis to conclude that allowed the jury to find that by not following proper protocol in its attempts to repossess the defendants were the initial aggressors and not entitled to self-defense. It was error and prevented Mr. Davis from receiving a fair trial.

C. *The Court erred when it imposed four consecutive three-year sentences based on firearm enhancements.*

1. Additional facts relevant to this assignment of error.

Salvador and his son's testimony at trial differed considerably from that of the defendants. According to them three people jumped out of the truck and ran at them. RP 151. One had a pistol and another had a shotgun. RP 97. They pointed the guns at Valdez and J.V. RP 147. The man with the

shotgun went to Valdez's side of the vehicle, pointed the gun in his face and told him to "Get the fuck out of the car." RP 98, 152, 215. Valdez claimed the other man with the pistol went to J.V.'s side and pointed the pistol in J.V.'s face. RP 98-99, 152. J.V. testified the man with the pistol stood in front of the Explorer, aiming it at the occupants. RP 215. Valdez maintained his son was pulled out of the car and pushed toward the truck. RP 99-100,

After Valdez got out, the man threw him against the car and searched him. RP 99-100. As he patted Valdez down for weapons, the man kept on telling Valdez that he was going to put him in jail. 1 RP 1 01-02, 156-57. The man asked Valdez if he realized that he was stealing the car. RP 171. He took Valdez's and threw it to the man with the pistol, saying something to the effect of just in case they tried to leave. RP 99-100. The man who searched Valdez got into the driver's seat of the Explorer and told Valdez to get in. RP 103, 105. The man told Valdez to tell him where the white Expedition was. RP

103, 173. Valdez said his wife had it. RP 103. The man ordered him to take him to the Expedition and said he was going to take both vehicles. RP 104-05, 129. The men were yelling that they were going to get -the other car. RP 224. The man said he would kick Valdez's ass if he did not take him to the Expedition. RP 105. Valdez was scared and felt threatened. RP 104-05. J.V. was confused and in shock about what was happening. 1 RP 217, 223. J.V. was searched and held for a minute. RP 217, 233. They said, "You're coming with us" and walked J.V. over to the truck. RP 218-19. When Valdez asked if J.V. could ride or stay with him, Valdez was told no or to shut up. RP 187-88, 218. At that point, a pistol was pointed at J.V. RP 218. He felt a gun at his back. RP 219. J.V. was afraid he was going to be shot and killed. RP 233-34. J.V., one of the men and "the kid" got into the truck. RP 220, 222-23. They followed the Explorer. RP 220.

Judge McKeeman clearly felt the presumptive sentences too severe for the conduct established at trial. The Court first

found that the assault and kidnap convictions for each "victim" encompassed the same criminal conduct and adjusted the defendant's offender score accordingly. CP 68. Next, he agreed with defense counsel that there was a basis for an exceptional sentence below the applicable sentencing range. CP 64. Scoring Mr. Davis as a "2" (because each crime was characterized as violent, it counted as a "2" in computing the defendant's offender score) the sentencing range for each count was 13 to 17 months. CP 68. The Judge imposed no confinement time for the substantive counts; instead he sentenced Mr. Davis to four consecutive terms of three years based on the four findings that Mr. Davis had been armed with a firearm. CP 68.

2. Argument

Mr. Davis asserts that the imposition of the four firearm enhancements violates his constitutional right to be free from double jeopardy (Washington Constitution, Article I, section 9 and the United States Constitution, Amendments 5 and 14) and

that it constitutes cruel and unusual punishment. (Washington Constitution, Article I, section 14 and the United States Constitution, Amendments 8 and 14). This assertion is based on his contention that not only did the assault and kidnap counts constitute the same criminal conduct, as found by Judge McKeeman, but also that the counts merged. Although Davis did not raise this issue at trial, the merger doctrine arises from the Fifth Amendment's prohibition against double jeopardy. State v. Frohs, 83 Wn.App. 803, 811 n. 2, 924 P.2d 384 (1996). Accordingly, Mr. Davis's challenge to his convictions and sentence is a constitutional claim that may be addressed for the first time on appeal. RAP 2.5(a)(3); State v. Kier, 164 Wn.2d 798, 803–04, 194 P.3d 212 (2008); State v. Zumwalt, 119 Wn.App. 126, 129, 82 P.3d 672 (2003), aff'd, State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005).

a. Merger and Double Jeopardy

Merger is a doctrine of statutory interpretation used to determine whether the Legislature intended multiple

punishments for a single act that violates several statutory provisions. In re Pers. Restraint of Fletcher, 113 Wn.2d 42, 50-51, 776 P.2d 114 (1989). A court entering multiple convictions for the same offense violates double jeopardy. State v. Freeman, 153 Wash.2d 765, 770–71, 108 P.3d 753 (2005). Because the legislature has the power to define offenses, whether two offenses are separate offenses hinges upon whether the legislature intended them to be separate. See id. at 771–72, 108 P.3d 753. In making this determination the Court must consider the nature of the charged offenses based on the charging language. In re Pers. Restraint of Orange, 152 Wash.2d 795, 817, 100 P.3d 291 (2004).

"Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime." Freeman, 153 Wash.2d at 772–73. It is appropriate to presume for purposes of this case that the legislature intended

to punish Davis' second degree assault through the greater sentence required for the kidnap in the second degree.

Also relevant under Freeman is whether the offenses committed by Davis had an independent purpose or effect. There was no other purpose in stopping the car at gunpoint other than to restrain its inhabitants. The assault was incidental to restraining and abducting the Valdezes.

In State v. Taylor, 90 Wn.App.312, 950 P.2d 526 (1998) the issue was whether an assault in furtherance of an unlawful imprisonment was the same criminal conduct. In Taylor, the victim was getting out of his car when the defendant struck him in the face, pushing him back into the driver's seat. The defendant then aimed a rifle at the victim's head, got into the car with an accomplice who also pointed a gun at the victim's head, and ordered the victim to drive. In reversing the sentencing counting the assault and kidnapping separately, the court found that Taylor's objective intent in committing the assault was to persuade the victim, by use of fear, not to resist the abduction,

and thus the crimes constituted same criminal conduct. Taylor, 90 Wn.App. at 321. The court also noted that the assault and kidnapping were committed simultaneously, precluding a finding of a new intent to commit a second crime after the completion of the first. Taylor, 90 Wn.App. at 322. While the Court in Taylor did not find the assault in the second degree merged with the kidnap in the second degree, 90 Wn.App. at 318.

Mr. Davis contends that the Court erred when it looked at the generic definition of the crimes, rather than how they were alleged. In this case the State alleged that the assault was committed with the firearm and that the abduction was accomplished through the threatened use of deadly force. The Taylor decision also ignores the holding in Freeman, supra., that discusses the Blockburger test. (When applying the Blockburger test, we do not consider the elements of the crime on an abstract level. " '[W]here the same act or transaction constitutes a violation of two distinct statutory

provisions, the test to be applied to determine whether there are two offense or only one, is whether each provision requires proof of a fact which the other does not.' " Orange, 152 Wash.2d at 817, 100 P.3d 291(quoting Blockburger, 284 U.S. at 304, 52 S.Ct. 180 (citing Gavieres v. United States, 220 U.S. 338, 342, 31 S.Ct. 421, 55 L.Ed. 489 (1911))). 153 Wash.2d at 772.

Although the State charged Mr. Davis with four counts, there were essentially two sets of crimes with two different victims. Therefore, the elements of the crimes, other than the name of the victim, were the same for each count of assault and each count of kidnap. The assault counts alleged that Mr. Davis assaulted the victim with a deadly weapon. The kidnap counts alleged that Mr. Davis intentionally abducted the victim. The Court defined "abduct" as follows: Abduct means to restrain a person by using or threatening to use deadly force. CP 47. There was no definition of "deadly force" contained in the Court's instructions to the jury. Suffice to say, pointing a

deadly weapon at a person would constitute a threat of deadly force.

Based on the evidence introduced at trial it is clear that the use of force at the Burger King parking lot was designed to stop the car so that the defendants could seize the car and its inhabitants and force its inhabitants to take them to the location of the second car. Since the use of force was instrumental to the abduction of the two Valdez men, the assault merges into the Kidnap convictions. A sentence based on four, rather than two enhancements, violates Mr. Davis' right to be free from Double Jeopardy.

b. Cruel and Unusual Punishment

Mr. Davis also contends that the imposition of four consecutive sentences of three years violates the State and Federal constitutional provisions, which prohibit the imposition of cruel and unusual punishment. Washington Constitution, Article I, section 14; United States Constitution, Amendments 8 and 14.

Cruel and unusual punishment is punishment of disproportionate character to the offense so as to shock the general conscience and violate principles of fundamental fairness. State v. Gibson, 16 Wash.App. 119, 553 P.2d 131 (1976); State v. Rose, 7 Wash.App. 176, 498 P.2d 897 (1972). If this Court finds that while the assaults and kidnaps merge, but that double jeopardy does not prevent the imposition of four firearm enhancements, Mr. Davis nevertheless contends that such punishment is disproportionate and unfair.

Having found that the assault and kidnap counts for each victim encompassed the same criminal conduct, there were two sets of crimes that determined the applicable sentencing range. With kidnap being the more serious of the two, the standard sentencing range for each set of crimes was 13 to 17 months confinement. Since the crimes all were committed at the same time, the law presumed that the sentences would run concurrently. RCW 9.94A.589. With the sentences running currently the maximum amount of time that the Court could

impose was the statutory maximum. Since all of the crimes were Class B felonies the statutory maximum is ten years confinement. Yet Judge McKeeman sentenced Mr. Davis to twelve years in prison.

Allowing consecutive punishments under the facts of this case sends a message to prosecutors to charge as many counts as possible in situations in which can allege a weapons enhancement regardless of whether convictions will result in merger. While the defendant may not face additional time for the substantive offenses, under Judge McKeeman's reasoning he or she will face additional consecutive time for weapon enhancements. This simply is not fair.

The proportionality doctrine helps courts decide whether sentences of ordinary imprisonment are commensurate with the crimes for which such sentences are imposed. Carmona v. Ward, 576 F.2d 405 (2d Cir. 1978), cert. denied, 439 U.S. 1091, 99 S.Ct. 874, 59 L.Ed.2d 58 (1979); Downey v. Perini, 518 F.2d 1288 (6th Cir.), vacated and remanded, 423 U.S. 993, 96

S.Ct. 419, 46 L.Ed.2d 367 (1975); Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), cert. denied, 415 U.S. 938, 94 S.Ct. 1454, 39 L.Ed.2d 495 (1974). The Washington Legislature recognized the need for proportionality when it revised our criminal code. RCW 9A.04.020(1)(d) reads:

> (1) The general purposes of the provisions governing the definition of offenses are:
>
> (d) To differentiate on reasonable grounds between serious and minor offenses, and to prescribe proportionate penalties for each.

Mr. Davis contends that allowing enhancements returned on counts that have merged is disproportionate to others convicted of kidnap in the second degree. If the assault is incidental to the kidnap it must be vacated. If it is vacated the firearm enhancement should also be vacated. Another defendant charged only with kidnap, in which the restraint was accomplished by threatening the victim with a firearm might receive a firearm enhancement, but that would add only 3 years to the presumptive sentence, rather than the 6 years imposed in

this case. Doubling the length of the sentence by using an enhancement from a merged crime creates a disproportionate sentence.

IV. CONCLUSION

The Court deprived Mr. Davis of his defense when it gave the jury the initial aggressor instruction and when it allowed the State to introduce improper rebuttal evidence. For that reason the Court should vacate the convictions and order a new trial. The assault convictions merged with the kidnap convictions. Even if the Court does not find a basis for reversal it should vacate two of the four firearm enhancements and remand this matter for a new sentencing hearing.

DATED this 13 day of November, 2012.

Respectfully Submitted,

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V. CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Opening Brief was served upon the following by United States Postal Service, addressed to:

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DATED this 13 day of November, 2012.

Brandy L. Ellis, Secretary