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NO. 69543-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ZACHARY NGUYEN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE E. HELLER

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Statutes

Washington State:

A. ISSUES PRESENTED

1. Whether Nguyen's convictions for attempted first-degree robbery and second-degree assault violate double jeopardy because, as charged and proved in this case, the assault was necessary to elevate the attempted robbery to a higher degree.

2. Whether Nguyen's right to a unanimous jury was violated due to the lack of a Petrich[1] instruction in a case where the prosecutor made an election and where Nguyen's actions constituted a continuing course of conduct that took place in the same location over a brief period of time.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Zachary Nguyen, with burglary in the first degree (count I), robbery in the first degree (count II), and assault in the second degree (count III). Each count included an allegation that Nguyen was armed with a firearm during the commission of the crime. CP 1-15.

A jury trial on these charges was held in August 2012 before the Honorable Bruce Heller. At the conclusion of the trial, the jury

[1] *See* State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).

convicted Nguyen of counts I and III as charged. CP 74, 77. As to count II, the jury found Nguyen guilty of the lesser-included offense of attempted robbery in the first degree. CP 76. As to each count, the jury found that Nguyen was armed with a firearm during the commission of the crime. CP 78-80.

At sentencing, the State agreed that Nguyen's convictions for attempted first-degree robbery and second-degree assault constituted the same criminal conduct for scoring purposes under RCW 9.94A.589(1)(a). CP 94-97. The trial court imposed a standard-range sentence totaling 212 months. CP 81-88. Nguyen now appeals. CP 119-27.

2. SUBSTANTIVE FACTS

On September 4, 2011, 17-year-old Philip Maxie's parents were on a Caribbean cruise, so he decided to have a few friends over to his house in south Seattle. RP (8/20/12) 76-77. The gathering "started getting out of hand" because "too many people started to come," so Maxie's older brother kicked everyone out of the house. RP (8/20/12) 77. 14-year-old B.C. and 15-year-old M.M. were at Maxie's house that evening, and they left when the party was broken up by Maxie's brother. RP (8/16/12) 57-58;

RP (8/20/12) 16-17. About 30 to 45 minutes after everyone left, Maxie noticed a white Ford Crown Victoria parked directly in front of his house. RP (8/21/12) 77, 79-80.

The next day, B.C. and M.M. met up with "Zach, Junior, Turtle, and this other boy" to smoke marijuana. RP (8/20/12) 18, 22. "Zach" was the defendant, Zachary Nguyen, and "Junior" was co-defendant Kenneth Wheeler.[2] RP (8/16/12) 61-63. While the group was driving around in Wheeler's white Crown Victoria, one of the young men in the car said that there was a safe with money in it in Philip Maxie's house. RP (8/16/12) 70; RP (8/20/12) 23. Wheeler said that he wanted to "hit a lick," which meant he wanted to go steal the safe. RP (8/20/12) 23-24. Nguyen said that he needed his "heat," which meant that he needed his gun. RP (8/20/12) 26-27.

When they arrived at Maxie's house, the young men told B.C. and M.M. to knock on the front door. RP (8/16/12) 70. Maxie answered the door. While Maxie was distracted by B.C. and M.M. at the front door, Nguyen and two male accomplices entered the house via a different entrance. RP (8/20/12) 28, 84-87. Maxie heard footsteps and started walking upstairs to investigate; he was

[2] Wheeler pled guilty prior to trial.

then "met with a pistol in [his] face" by Nguyen, who was wearing a red bandanna over the lower portion of his face. RP (8/20/12) 84, 86.

Nguyen pointed the gun at Maxie and ordered him to "get down" and "get on the ground." RP (8/16/12) 86; RP (8/20/12) 87. Nguyen pulled the trigger, and Maxie heard a "click." RP (8/20/12) 97. At that point, Maxie decided to run. As Maxie turned, Nguyen hit him in the back of the head with the gun. RP (8/16/12) 83-84; RP (8/20/12) 92. Maxie ran out the front door and went to a neighbor's house to call the police. RP (8/20/12) 92-95. He had a gash on the back of his head where Nguyen had hit him with the gun. RP (8/20/12) 86.

In the meantime, B.C. and M.M. ran to Wheeler's car. Nguyen and the two others were behind them. RP (8/16/12) 87; RP (8/20/12) 33. Everyone got in the car and drove away. RP (8/20/12) 33.

One of Philip Maxie's neighbors had been looking out his front window during the events in question, and he provided the police with suspect descriptions and a description of Wheeler's white Crown Victoria. RP (8/16/12) 14-21. Wheeler was arrested and his car was impounded that same day. RP (8/15/12) 18,

187-90. Nguyen was arrested two days later. RP (8/15/12) 18-19. Nguyen's apartment was searched pursuant to a search warrant, and the police found a backpack containing a 9mm pistol and an ammunition magazine under Nguyen's bed. RP (8/15/12) 20, 28.

C. ARGUMENT

1. THE STATE CONCEDES THAT NGUYEN'S CONVICTIONS FOR ATTEMPTED FIRST-DEGREE ROBBERY AND SECOND-DEGREE ASSAULT ARE THE SAME OFFENSE FOR DOUBLE JEOPARDY PURPOSES.

Nguyen first claims that his convictions for attempted robbery in the first degree and assault in the second degree violate double jeopardy because these convictions impermissibly punish him twice for the same offense. Brief of Appellant, at 7-17. The State concedes that, as charged and proved in this particular case, Nguyen is correct. This Court should remand this case to the trial court to vacate the assault conviction and to resentence Nguyen accordingly.[3]

[3] This will result in a 36-month reduction in Nguyen's total sentence (*i.e.*, the time imposed for the firearm enhancement on the assault conviction), because Nguyen's convictions for attempted robbery and assault were found to be the same criminal conduct under RCW 9.94A.589(1)(a), and thus, vacating the assault conviction on remand will have no effect on the sentence imposed for the other two crimes. CP 81-88, 94-97.

When a single act or transaction violates multiple criminal statutes, double jeopardy prevents multiple punishments if the legislature did not intend the crimes to be treated as separate offenses. Albernaz v. United States, 450 U.S. 333, 343-44, 101 S. Ct. 2221, 67 L. Ed. 2d 275 (1977). Double jeopardy in this context is purely a question of legislative intent. State v. Calle, 125 Wn.2d at 769, 776, 888 P.2d 155 (1995).

The Washington Supreme Court has set forth a three-part test for determining whether multiple punishments were intended by the legislature. State v. Freeman, 153 Wn.2d 765, 771-73, 108 P.3d 753 (2005). First, the court examines the language of the relevant statutes to determine whether the legislature has expressly permitted or disallowed multiple punishments. Freeman, 153 Wn.2d at 771-72. If this first step does not provide an answer, the court then turns to the two-part "same evidence" or "Blockburger"[4] test, which involves a determination as to whether the two offenses are the same "in law" and "in fact":

> In order to be the "same offense" for purposes of double jeopardy the offenses must be the same in law and in fact. If there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other,

[4] *See* Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932).

> the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses.

Calle, 125 Wn.2d at 777 (quoting State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983)). Finally, if applicable, the court considers the merger doctrine. Freeman, 153 Wn.2d at 772-73.

Merger is another tool used to determine legislative intent, and it applies to specific statutory situations where one crime elevates another crime to a higher degree. Under the merger doctrine, when the degree of one offense is raised by conduct that in itself is described as a crime in a separate statute, the court presumes that the legislature intended to punish both offenses through a greater sentence for the greater crime. Freeman, at 772-73. Put another way, 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).

State v. Eaton, 82 Wn. App. 723, 730, 919 P.2d 116 (1996) (citing Vladovic, 99 Wn.2d at 413). In addition, even in cases where the merger doctrine applies, both convictions are allowed to stand if

there is an independent purpose or effect for each. Freeman, at 773.

In State v. Zumwalt, a case consolidated under State v. Freeman, the Washington Supreme Court considered whether convictions for first-degree robbery and second-degree assault violated double jeopardy under the merger doctrine. Freeman, 153 Wn.2d at 778-80. Defendant Zumwalt was charged with both crimes after he punched the victim in the face and robbed her. Id. at 770. The first-degree robbery charge was based upon the infliction of bodily injury alternative means, and the second-degree assault charge was based upon the reckless infliction of bodily harm alternative means. State v. Zumwalt, 119 Wn. App. 126, 131, 82 P.3d 672 (2003), *aff'd sub nom.* State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005). The only facts that elevated the robbery to the first degree also established the separate assault charge. Id. at 132. Therefore, the court concluded that the two convictions merged for double jeopardy purposes because, "as charged and proved, without the conduct amounting to assault, Zumwalt would have been guilty of only second degree robbery." Freeman, 153 Wn.2d at 778. However, the court refused to adopt a *per se* rule,

and held that the question of whether the merger doctrine applied would be decided on a case-by-case basis. Id. at 778-80.

Since Freeman, this Court has addressed whether attempted first-degree robbery and second-degree assault violate double jeopardy under the merger doctrine. In State v. Esparza, 135 Wn. App. 54, 143 P.3d 612 (2006), rev. denied, 161 Wn.2d 1004 (2007), defendant Beaver and his accomplice Esparza entered a jewelry store, pointed their guns at the customers and store employees, and announced that it was a robbery. When a jeweler emerged from his office, Beaver pointed his gun at him. Id. at 57-58. Beaver was convicted of attempted robbery in the first degree and assault in the second degree. Id. at 58.

On appeal, Beaver claimed that these convictions violated double jeopardy. This Court rejected that claim, observing that "the State was not required to prove Beaver committed the crime of second degree assault in order to elevate the attempted robbery to attempted first degree robbery." Id. at 66. As the Court explained,

> Because the robbery involved that alleged use of a firearm, the State only had to prove that Beaver was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon. Here, it was charged and proved that Beaver was armed with a deadly weapon, therefore elevating the attempted robbery to first degree attempted robbery.

> Since it was unnecessary under the facts of this case for the State to prove that Beaver engaged in conduct amounting to second degree assault in order to elevate his robbery conviction, and because the State did prove conduct not amounting to second degree assault that elevated Beaver's attempted robbery conviction, the merger doctrine does not prohibit Beaver's conviction for both attempted first degree robbery and second degree assault.

Id. at 66 (footnote omitted).

The Court distinguished Freeman because of the different way the crimes were charged and proved at trial: "As charged and proved, Zumwalt was guilty of first degree robbery because he inflicted bodily injury (assaulted) the victim in furtherance of the robbery. In short, under the facts of the case, the State was required to prove that Zumwalt engaged in conduct amounting to second degree assault in order to elevate his robbery conviction to first degree robbery." Esparza, at 65-66.

In this case, State concedes that the situation is more like Zumwalt than Esparza. As charged and proved in this case, Nguyen's assault of Philip Maxie with a deadly weapon is what elevated his attempted robbery to attempted first-degree robbery.

Unlike defendant Beaver in Esparza, Nguyen was charged with robbery in the first degree under the infliction of bodily injury alternative means, and he was charged with assault in the second

degree under the assault with a deadly weapon alternative means. CP 14. The jury convicted Nguyen of attempted robbery in the first degree as a lesser-included offense of the completed crime of robbery in the first degree. CP 61, 75-76. This means that, in accordance with their instructions, the jury found beyond a reasonable doubt that Nguyen took a substantial step toward the commission of a robbery involving the infliction of bodily injury. CP 58-64.

Under the facts as proved in this case, the act that constituted a substantial step under the bodily injury alternative means of committing first-degree robbery was striking Maxie in the head with the gun. This act also constituted assault in the second degree under the assault with a deadly weapon alternative means.[5] Therefore, like defendant Zumwalt in Freeman, Nguyen's attempted robbery conviction was elevated to the first degree by the commission of the assault in the second degree. Accordingly, under the facts of this particular case, the State concedes that Nguyen's second-degree assault conviction merges with his

[5] The prosecutor argued in closing that the jury should find Nguyen guilty of first-degree robbery and second-degree assault based on the act of striking Maxie with the gun. RP (8/21/12) 11-12.

attempted first-degree robbery conviction. The case should be remanded to vacate the assault conviction and for resentencing.

2. THE PROSECUTOR MADE AN ELECTION, AND NGUYEN'S ACTIONS CONSTITUTED A CONTINUING COURSE OF CONDUCT; THUS, NO UNANIMITY INSTRUCTION WAS REQUIRED.

Nguyen also claims that his right to a unanimous jury was violated because the jurors were not instructed that they had to be unanimous as to the specific act that constituted a substantial step for purposes of attempted robbery in the first degree. Brief of Appellant, at 19-22. This claim should be rejected for two reasons. First, the prosecutor made an election as to the act that formed the basis for the attempted robbery conviction. Second, Nguyen's conduct constituted a continuing course of conduct, not multiple discrete acts. Therefore, no unanimity instruction was required and this Court should affirm.

As a preliminary matter, contrary to Nguyen's claim, the prosecutor made an election of a single act as the basis for the attempted robbery conviction. Specifically, as discussed in the previous argument section, the prosecutor argued that the act of striking Philip Maxie in the head with the gun was the basis for the

charge of robbery in the first degree. RP (8/21/12) 11. Accordingly, there is no reason to believe that this was not the act that the jury agreed upon as the basis for the lesser-included offense of attempted robbery in the first degree. Thus, because the State elected a particular act as the basis for the conviction, Nguyen's jury unanimity claim fails. *See* State v. Bland, 71 Wn. App. 345, 351-52, 860 P.2d 1046 (1993).

But even if this Court finds that other actions could have constituted a substantial step toward the commission of first-degree robbery, Nguyen's claim fails because his actions constituted a continuing course of conduct.

When a defendant has committed multiple separate acts, each of which may serve as the basis for the charged offense, the trial court can ensure that the defendant's right to jury unanimity is preserved by instructing the jurors that they must agree on a specific act as the basis for a conviction. This jury instruction is known as a "Petrich instruction." State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). Alternatively, the State may elect to rely upon a single specific act as the basis for a conviction, which ensures jury unanimity as well. State v. Bland, 71 Wn. App. 345, 351-52, 860 P.2d 1046 (1993). However, neither a Petrich

instruction nor an election is necessary to ensure jury unanimity when the charge is based upon a continuing course of conduct rather than multiple, discrete acts. Petrich, 101 Wn.2d at 571.

To determine whether a defendant's criminal actions constitute a continuing course of conduct or multiple separate acts, the facts much be evaluated in a commonsense manner. Petrich, at 571. When the evidence "involves conduct at different times and places, or different victims, then the evidence tends to show several distinct acts." State v. Garman, 100 Wn. App. 307, 313, 984 P.2d 453 (1999), rev. denied, 141 Wn.2d 1030 (2000). On the other hand, "evidence that a defendant engages in a series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct rather than several distinct acts." State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995) (citing State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989)). Put another way, a continuing course of conduct is "an ongoing enterprise with a single objective." State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395, rev. denied, 129 Wn.2d 1016 (1996). Viewing the facts of this case in a commonsense manner, Nguyen's actions constituted a continuing course of conduct.

B.C. and M.M. got out of Kenneth Wheeler's car, knocked on Philip Maxie's front door, and engaged Maxie in conversation. RP (8/20/12) 28; RP (8/20/12) 80-81. Meanwhile, while Maxie was distracted, Nguyen and two accomplices entered the house through a different entrance, snuck up on Maxie, and then Nguyen pointed a 9mm pistol at Maxie and told him to "get down." RP (8/16/12) 61-67, 70, 75; RP (8/20/12) 30-31, 87, 92, 97. Nguyen pulled the trigger, and Maxie heard a "click." RP (8/20/12) 97. When the gun failed to fire, Maxie got up to flee and Nguyen hit him in the back of the head with the gun. RP (8/16/12) 81; RP (8/20/12) 84-86, 92. Both Maxie and the perpetrators fled the house through the front door, and the perpetrators drove away in Wheeler's car. RP (8/16/12) 87-88; RP (8/20/12) 33, 101.

As demonstrated by the evidence, all of the events in this case took place continuously, sequentially, in the same place, with the same victim, and over the course of a brief period of time. Accordingly, this case involves a continuing course of conduct rather than a series of distinct acts. Stated in the converse, it would defy common sense to view the facts of this case as a series of discrete acts that could support multiple counts of attempted

robbery. Therefore, no unanimity instruction was required, and Nguyen's claim to the contrary is without merit.

D. CONCLUSION

Nguyen's conviction for assault in the second degree merges with his conviction for attempted robbery in the first degree; therefore, the assault conviction should be vacated. A jury unanimity instruction was not required because Nguyen's actions constituted a continuing course of conduct rather than multiple discrete acts.

For the reasons set forth above, this Court should remand to the trial court to vacate the assault conviction and to resentence Nguyen. In all other respects, this Court should affirm.

DATED this 13th day of November, 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 Sarah Hrobsky, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ZACHARY NGUYEN, Cause No. 69543-6-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.

LBrame
Name

11/13/13
Date

Done in Seattle, Washington