

COA NO. 66658-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

HECTOR VETETA-CONTRERAS,

Appellant.

REC'D
MAY 29 2012
King County Prosecutor
Appellate Unit

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 MAY 29 PM 4:38
M

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

The Honorable Ronald Kessler, Judge

REPLY BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
THE CONVICTION FOR SECOND DEGREE ASSAULT MUST BE VACATED ON DOUBLE JEOPARDY GROUNDS AND ITS ACCOMPANYING DEADLY WEAPON ENHANCEMENT MUST BE VACATED AS WELL.....	1
B. <u>CONCLUSION</u>	5

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1,</u> 124 Wn.2d 816, 881 P.2d 986 (1994).....	4
<u>In re Electric Lightwave, Inc.,</u> 123 Wn.2d 530, 869 P.2d 1045 (1994).....	4
<u>Kucera v. State,</u> 140 Wn.2d 200, 995 P.2d 63 (2000).....	4
<u>State v. DeRyke,</u> 110 Wn. App. 815, 41 P.3d 1225 (2002), <u>aff'd on other grounds,</u> 149 Wn.2d 906, 73 P.3d 1000 (2003).....	1-3, 5
<u>State v. Esparza,</u> 135 Wn. App. 54, 143 P.3d 612 (2006), <u>review denied,</u> 161 Wn.2d 1004, 166 P.3d 719 (2007)	1, 4, 5
<u>State v. Kier,</u> 164 Wn.2d 798, 194 P.3d 212 (2008).....	1-3, 5

A. ARGUMENT IN REPLY

THE CONVICTION FOR SECOND DEGREE ASSAULT MUST BE VACATED ON DOUBLE JEOPARDY GROUNDS AND ITS ACCOMPANYING DEADLY WEAPON ENHANCEMENT MUST BE VACATED AS WELL.

The State contends the double jeopardy claim is controlled by State v. Esparza, 135 Wn. App. 54, 143 P.3d 612 (2006), review denied, 161 Wn.2d 1004, 166 P.3d 719 (2007). Brief of Respondent at 120-25. The State is wrong. Esparza does not defeat Veteta-Contreras's double jeopardy claim.

The court in Esparza found convictions for attempted first degree robbery and second degree assault did not violate double jeopardy because the assault was not necessarily the act that elevated the attempted robbery conviction. Esparza, 135 Wn. App. at 57, 63-64, 66. But in double jeopardy merger cases, the rule of lenity applies where it is unclear what evidence the jury relied upon to convict for the greater offense. State v. Kier, 164 Wn.2d 798, 811-13, 194 P.3d 212 (2008); State v. DeRyke, 110 Wn. App. 815, 823-24, 41 P.3d 1225 (2002), aff'd on other grounds, 149 Wn.2d 906, 73 P.3d 1000 (2003)). The rule of lenity must be applied in Veteta-Contreras's favor, resulting in the conclusion that a double jeopardy violation occurred here.

In DeRyke, this Court found the trial court's "to convict" instruction on attempted first degree rape permitted the jury to find that kidnapping the victim elevated the attempted rape to the first degree. DeRyke, 110 Wn. App. at 823–24. Because there was no way to determine in fact that the jury had not considered the kidnapping as the elevating element, the rule of lenity applied to merge the kidnapping conviction into the attempted first degree rape. Id. at 824. This Court noted the ambiguity could have been eliminated had the State proposed an instruction that precluded the jury from considering the kidnapping as an elevating element for attempted first degree rape. Id.

In Kier, the Supreme Court applied the rule of lenity to defeat the State's argument that double jeopardy did not bar convictions for both first degree robbery and second degree assault under a merger analysis because the crimes involved different victims. Kier, 164 Wn.2d at 808, 811-13. Analogizing to DeRyke, the Supreme Court concluded the verdict was ambiguous. Id. at 812. The jury heard evidence describing both Hudson and Ellison as victims of the robbery and the instruction did not specify a victim. Id. "[G]iven the possibility that the jury could have found Ellison a victim of the robbery and the certainty based on the instructions that it found him the victim of the assault, it is unclear from the jury's verdict whether the assault was used to elevate the robbery to first degree." Id. at

812-13. Notwithstanding the prosecutor's attempted election in closing argument, the Supreme Court concluded the rule of lenity required the merger of Kier's second degree assault conviction into his first degree robbery conviction. Id. at 812-14.

As in DeRyke and Keir, it is unclear what evidence the jury relied on to convict Veteta-Contreras for the greater offense. The verdict is ambiguous as to whether the jury relied on the second degree assault as the substantial step elevating the attempted robbery.

The instructions allowed the jury to convict for attempted first degree robbery based on the same act that constituted the second degree assault. The "to convict" instruction for attempted first degree robbery required the State to prove "the defendant did an act that was a substantial step toward the commission of Robbery in the First Degree against Eliezer Duran" and "That the act was done with the intent to commit Robbery in the First Degree." CP 130 (Instruction 18). The jury was further instructed "A person commits the crime of robbery in the first degree when in the commission of a robbery he or she is armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon." CP 125 (Instruction 13). Instruction on second degree assault required the State to prove Veteta-Contreras assaulted Duran with a deadly weapon. CP 133-34 (Instructions 21 and 22).

The jury heard evidence that Veteta-Contreras assaulted Duran with a deadly weapon during the course of the attempted robbery. 2RP 698-99, 735-37, 763, 766. The prosecutor expressly invited the jury to consider that assault as a substantial step for attempted first degree robbery. 3RP 36.

The jury could have concluded the action constituting second degree assault constituted the substantial step for attempted first degree robbery. The verdict is ambiguous regarding whether the jury did so. The rule of lenity operates in Veteta-Contreras's favor, compelling the conclusion that his convictions for both attempted first degree robbery and second degree assault violate double jeopardy.

Esparza did not address the rule of lenity. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Furthermore, cases that fail to specifically raise or decide an issue are not controlling authority and have no precedential value in relation to that issue. Kucera v. State, 140 Wn.2d 200, 220, 995 P.2d 63 (2000); In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994).

Esparza treated the lack of certainty regarding whether the lesser offense constituted the substantial step for the attempted first degree

robbery as dispositive. Esparza, 135 Wn. App. at 57, 63-64, 66. But applying the rule of lenity leads to the opposite result. Had Esparza applied the rule of lenity, a double jeopardy violation would have been found. The double jeopardy analysis in Esparza is incomplete. Under Kier and DeRyke, the rule of lenity must be applied to resolve double jeopardy claims such as the one presented here. The merger argument presented in the opening brief holds. The conviction for second degree assault under count III must be vacated on double jeopardy grounds.

B. CONCLUSION

For the reasons stated above and in the opening brief, Veteta-Contreras respectfully requests that this Court reverse the convictions and associated sentencing enhancements. In the event this Court declines to reverse all convictions, the conviction and sentencing enhancement under count III case should be vacated and the case remanded for resentencing on remaining counts.

DATED this 29th day of May 2012.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON)

Respondent,)

v.)

HECTOR VETETA-CONTRERAS,)

Appellant.)

COA NO. 66658-4-1

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF MAY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JAMES LOBSENZ
CARNEY BRADLEY SPELLMAN
701 5TH AVENUE, SUITE 3600
SEATTLE, WA 98104

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF MAY 2012.

x Patrick Mayovsky

2012 MAY 29 PM 4:38
COURT OF APPEALS DIV 1
STATE OF WASHINGTON