

67924-4

67924-4

NO. 67924-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID CHESNOKOV,

Appellant.

FILED  
COURT OF APPEALS DIVISION ONE  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SKAGIT COUNTY

The Honorable David R. Needy, Judge

BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENT OF ERROR</u> .....	1
<u>Issue Pertaining to Assignment of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. <u>Trial Testimony</u> .....	1
2. <u>Double Jeopardy</u> .....	5
C. <u>ARGUMENT</u> .....	8
THE SECOND DEGREE ASSAULT CONVICTIONS AGAINST VENNETI AND DICKEY MUST BE VACATED BECAUSE THE ASSAULT MERGED WITH THE ROBBERY.	8
1. <u>Double Jeopardy Prohibits Multiple Punishments For the     Same Offense</u> .....	8
2. <u>The Second Degree Assaults Elevated Robbery to the First     Degree</u> .....	9
3. <u>The Offenses Had No Independent Purpose or Effect</u> .....	15
4. <u>The Rule of Lenity Also Requires Merger</u> .....	17
5. <u>Vacation and Remand is the Appropriate Remedy</u> .....	20
D. <u>CONCLUSION</u> .....	22

**TABLE OF AUTHORITIES**

Page

**WASHINGTON CASES**

**In re Francis**

170 Wn.2d 517, 242 P.3d 866 (2010)..... 15, 16, 17, 21

**In re Pers. Restraint of Percer**

150 Wn.2d 41, 75 P.3d 488 (2003)..... 14

**State v. DeRyke**

110 Wn. App. 815, 41 P.3d 1225 (2002)  
aff'd. on other grounds, 149 Wn.2d 906, 73 P.3d 1000 (2003)..... 17

**State v. Freeman**

53 Wn.2d 765, 108 P.3d 753 (2005)..... 5, 6, 8, 9, 12, 14, 15, 16, 17, 20, 21

**State v. Kier**

164 Wn.2d 798, 194 P.3d 212 (2008)..... 5, 6, 8, 9, 11-13, 15, 17, 18, 19, 21

**State v. Prater**

30 Wn. App. 512, 635 P.2d 1104 (1981)  
rev. denied, 97 Wn.2d 1007 (1982) ..... 16

**State v. Tvedt**

153 Wn.2d 705, 107 P.3d 728 (2005)..... 8

**State v. Vladovic**

99 Wn.2d 413, 662 P.2d 853 (1983)..... 9

**FEDERAL CASES**

**Blockburger v. United States**

284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)..... 14

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
RCW 9A.36.021 .....	10, 12
RCW 9A.56.200 .....	10, 12
U.S. Const. amend. V .....	8
Wash. Const. art. I, § 9 .....	8

A. ASSIGNMENT OF ERROR

The trial court violated the prohibition against double jeopardy when it denied appellant's motion to merge his second degree assault and first degree robbery convictions.

Issue Pertaining to Assignment of Error

Appellant was convicted of one count of first degree robbery and three counts of second degree assault arising from a single incident of armed robbery. The robbery charge alleged appellant displayed what appeared to be a firearm and "threatened use of immediate force, violence, or fear of injury to said person or the property of said person or the person or property of another[.]" CP 93. Each assault alleged appellant assaulted a complainant with a deadly weapon. CP 94. Two of the alleged assault complainants were also named as complainants in the robbery charge. Where the assaults with a deadly weapon elevated the robbery to the first degree, and the assaults had no independent purpose or effect, did the trial court violate appellant's right against double jeopardy by refusing to merge the offenses?

B. STATEMENT OF THE CASE

1. Trial Testimony

Appellant David Chesnokov and Mark Shtefanio drove from Vancouver to Mount Vernon to visit mutual friends. Also riding in

Chesnokov's car were Shtefanio's brother, Ruvim, girlfriend, Christina Bondarchuk, and Bonadarchuk's cousin, Caroline. RP<sup>1</sup> 179-81, 197-98, 201. Chesnokov and Shtefanio separated from the others after arriving in Mount Vernon. RP 182-84. Christina testified Chesnokov and Shtefanio went to eat while everyone else went to a mountain lookout. RP 198-99.

Chesnokov and Shtefanio rejoined the others at a hotel where everyone spent the night in one room. RP 184-87, 193, 200-01. Chesnokov and Shtefanio woke the others up around 10a.m. the next morning to drive back to Vancouver. RP 187-89, 206-07. Christina and Caroline denied Chesnokov and Shtefanio were in a hurry to leave the hotel. RP 188, 207. During the drive home, Shtefanio showed others an iPhone and computer tablet. RP 190, 195, 208. Shtefanio and Chesnokov "joked" about an AT&T store and making money. RP 208-09. They did not say the items were stolen. RP 194-95, 208.

Earlier that same morning two iPhones and a computer tablet were taken from an AT&T store. RP 27, 84, 106-07. Store employees Morgan Venneti and Lupe Dickey were behind a counter when two men entered the store around 9:30 a.m. RP 43, 47-48, 56-57. No customers were in the store at the time. RP 53, 57.

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: RP – September 26, 2011, September 27, 2011, September 28, 2011, October 27, 2011, and November 3, 2011.

Both men had their faces covered with bandannas. RP 15, 50, 54, 58, 61. One man wore a red sweatshirt and had a gun in his hand. RP 16, 47-48. The other man had on a white sweatshirt and backpack. RP 50. Venneti believed the gun was “real.” RP 51. The man with the gun pointed it at Venneti’s head and told her and Dickey to get on the ground. RP 49, 58-59. Dickey tried to hit a “panic button” as she and Venneti went to the ground, but was unsuccessful. RP 52, 61. Dickey saw the man in the white sweatshirt grab two iPhones and a Samsung computer tablet. RP 59.

Store employee Melissa Suarez was in a back office when she heard loud voices coming from the sales floor. RP 9, 11. When Suarez entered the sales floor, she saw a man in a burgundy sweatshirt pointing a gun at Venneti and Dickey and a man in a beige sweatshirt ripping iPhones off a wall. RP 14-16, 31. Suarez laid on the floor when the man pointed the gun at her head and told her to get down. RP 17-18, 31, 34, 59-60. The men left the store less than one minute after entering. RP 19, 31. None of the store employees could identify the men. RP 30, 54-55, 62.

Police confiscated surveillance camera recordings from the store and hotel. RP 5-6, 91, 113. Assistant store manager Catalina Ochoa told police the men in the video looked familiar as customers from the previous

night. RP 81, 85. Ochoa testified the men's build and height were similar and she recognized an eagle pictured on one of the men's sweatshirts. RP 85-90. The surveillance video showed the customers spent about 20 minutes in the store looking at a Samsung computer tablet. RP 86, 90-91. The hotel surveillance video showed Christina wearing the eagle-pictured sweatshirt. RP 127.

Based on this information, Detectives Mark Shipman and Brandon Young obtained and executed search and arrest warrants on Chesnokov and Shtefanio. RP 112, 117, 139, 245. In Chesnokov's car police found a bandana, backpack, two pairs of gloves, a BB gun and CO2 pack, gun holster, and shoes similar in appearance to those depicted in the store surveillance video. RP 115-19, 124, 246-56, 58. A Samsung computer tablet was found in Shtefanio's house. RP 139, 141, 263-64. The tablet serial number matched the one taken from AT&T. RP 141. No iPhones were found. RP 139.

Chesnokov and Shtefanio were arrested following the search. RP 117, 245. In a telephone call from the jail, Chesnokov told Christina not to say anything and "tell them we didn't show you nothing." RP 174-78, 209-10, 213. Christina denied that Chesnokov asked her to testify falsely or withhold testimony. RP 217-18.

Based on this evidence, the state charged Chesnokov with one count of first degree robbery, three counts of second degree assault, and one count of tampering with a witness. CP 93-95. Young contradicted the testimony of Caroline and Christina. He testified both women stated Chesnokov and Shtefanio were in a hurry to leave the hotel the day of the incident. RP 226-27, 230. Caroline told Young that Chesnokov and Shtefanio had stolen the items and intended to sell them. RP 227. Young testified Christina reported Chesnokov and Shtefanio “implied” they had stolen the items. RP 229-30.

After hearing this evidence, a Skagit County jury found Chesnokov guilty as charged. CP 43-47; RP 337-40. The jury also returned a special verdict finding Chesnokov committed the offenses shortly after being released from prison. CP 48; RP 356, 364-67.

## 2. Double Jeopardy

Before sentencing, Chesnokov’s trial attorney argued each of the second degree assault convictions merged with the first degree robbery conviction. CP 83-92. Relying on State v. Freeman<sup>2</sup> and State v. Kier,<sup>3</sup> defense counsel argued the offenses merged for the following reasons: (1) the robbery was accomplished by the conduct supporting the assault

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<sup>2</sup> 53 Wn.2d 765, 770, 108 P.3d 753 (2005).

<sup>3</sup> 164 Wn.2d 798, 814, 194 P.3d 212 (2008).

charges; (2) the assaults had no independent purpose or effect separate from the robbery; and (3) the assaults caused no “unique or additional harm” separate from the robbery. CP 87-88; RP 376-78. Trial counsel asserted that because the offenses merged, Chesnokov had an offender score of three and a standard range of 46 to 61 months on the first degree robbery. CP 88; RP 381.

The State argued the assault against Suarez did not merge into the robbery because she was not named as a victim of the robbery. CP 118. The State suggested the remaining assaults did not merge with the robbery because “the assault charges were not necessary to elevate the robbery to first degree.” CP 113. The State maintained the robbery required evidence that Chesnokov displayed what appeared to be a firearm, whereas the assaults required evidence he actually used a deadly weapon. CP 118-19. The State’s memorandum concluded:

In order to find the robbery charged herein, the jury was not required to find that the assault charged herein as to Dickey or as to Vanetti [*sic*] was committed. This defeats the merger argument. To state this a different way, in order to prove that the robbery was elevated to first degree, the State did not need to prove that the robbery “was accompanied by an act which is defined as a crime elsewhere,” i.e. that the defendant created apprehension and fear by use of an actual deadly weapon. (emphasis in original). These are the distinguishing factors between Kier/Freeman and the case at bar. In Kier/Freeman, the assault was pled, proven and instructed on an element that

was also necessary to elevate the robbery to the first degree. That is not the situation in the case at bar.

CP 119.

At sentencing, the trial court concluded none of the assault offenses merged into the robbery conviction. RP 383-84. The court stated, "my gut reaction was of course they merge, it's all part of what facilitated the robbing that store." RP 383. But the trial court further concluded:

[I]t's an interesting concept, because without the gun, and without pointing it at people, you really aren't able to rob them, but the technical interpretation is could you have been charged with Robbery in the First Degree without committing the elements of Assault in the Second Degree. And the answer is yes, because pointing a deadly weapon at someone is different from committing a robbery, and in the course of that, displaying what appears to be a firearm. And so they are two separate concepts, and the State is entitled to what I believe is the correct interpretation of the law, even though personally I have some difficulty with that idea.

RP 383-84.

Based on an offender score of nine, the trial court imposed a standard range sentence of 144 months for the first degree robbery. CP 97-107. Chesnokov timely appeals. CP 108-09.

C. ARGUMENT

THE SECOND DEGREE ASSAULT CONVICTIONS AGAINST VENNETI AND DICKEY MUST BE VACATED BECAUSE THE ASSAULT MERGED WITH THE ROBBERY.

1. Double Jeopardy Prohibits Multiple Punishments For the Same Offense.

Both the Fifth Amendment of the United States Constitution and Article 1, § 9 of the Washington Constitution prohibit double jeopardy. State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005). One of the purposes of the double jeopardy clauses is to prevent multiple punishments for the same offense. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

Courts look to legislative intent to discern whether the underlying and the elevated criminal offenses were intended to be punished separately. Freeman, 153 Wn.2d at 771. If the legislature has authorized punishments for both of the crimes, the prohibition against double jeopardy is not violated. Freeman, 153 Wn.2d at 771. Where there is doubt as to the legislature's intent, however, the rule of lenity requires merger and the conviction for the lesser offense is vacated. State v. Kier, 164 Wn.2d 798, 814, 194 P.3d 212 (2008) (rule of lenity requires merger where verdict is ambiguous); Tvedt, 153 Wn.2d at 711 (any ambiguity in

the unit of prosecution must be resolved against turning a single transaction into multiple offenses).

One tool for determining legislative intent in the double jeopardy context is the merger doctrine. Freeman, 153 Wn.2d at 777. Two offenses merge if, to elevate a crime to a higher degree, the State must prove the crime “was accompanied by an act which is defined as a crime elsewhere in the criminal statutes[.]” Freeman, 153 Wn.2d at 778 (citing State v. Vladovic, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983)). When determining merger, courts view the offenses *as charged*, not how they could have been charged. Freeman, 153 Wn.2d at 777. The question whether the merger doctrine bars double punishment is reviewed de novo. Freeman, 153 Wn.2d at 770

2. The Second Degree Assaults Elevated Robbery to the First Degree.

“The merger doctrine is triggered when second degree assault with a deadly weapon elevates robbery to the first degree because being armed with or displaying a firearm or deadly weapon to take property through force or fear is essential to the elevation.” Kier, 164 Wn.2d at 806. The question here is whether Chesnokov could have been charged with first degree robbery without the conduct constituting the assault. Freeman, 153 Wn.2d at 778.

The first degree robbery was charged by amended information as follows:

[D]id unlawfully take personal property that the Defendant did not own from the person or in the presence of Morgan Venetti [*sic*] and/or Lupe Dickey, against such person's will, by use or threatened use of immediate force, violence, or fear of injury to said person or the property of said person or the person or property of another, and in the commission of said crime and in immediate flight therefrom, the Defendant displayed what appeared to be a firearm; contrary to Revised Code of Washington 9A.56.200(1)(a).<sup>4</sup> CP 93.

The second degree assaults against Venetti and Dickey were charged as "did intentionally assault another person. . . with a deadly weapon, to wit: a B-B Gun; contrary to Revised Code of Washington 9A.36.021(1)(c)."<sup>5</sup> CP 94.

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<sup>4</sup> RCW 9A.56.200(1) provides that a person is guilty of robbery in the first degree if:

(a) In the commission of a robbery or of immediate therefrom, he or she:

- (i) Is armed with a deadly weapon; or
- (ii) Displays what appears to be a firearm or other deadly weapon; or
- (iii) Inflicts bodily injury[.]

<sup>5</sup> RCW 9A.36.021(1)(c) provides that "a person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree. . . (c) assaults another with a deadly weapon[.]"

The jury was instructed that robbery requires the taking of property by “the use or threatened use of immediate force, violence, or fear of injury to a person or his property, or the person or property of anyone.” CP 60 (instruction 9). Second degree assault was defined as “an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another reasonable apprehension and imminent fear of bodily injury[.]” CP 66 (instruction 15).

The information and instructions show the State relied on the conduct underlying the second degree assaults to elevate the robbery charge to the first degree. As charged, the State was required to prove Chesnokov’s conduct created a reasonable apprehension or fear of harm which overcame Venneti’s and/or Dickey’s will to retain the property. The basis for the assault – Chesnokov’s pointing the BB gun – was the means of creating that apprehension or fear. Put another way, Chesnokov’s display of a BB gun was the means of assaulting (creating the apprehension or fear) Venneti and Dickey in order to further the robbery, i.e., to forcibly take property from the store employees against their will.

Kier is instructive in this regard. Kier was a passenger in a car that honked at another car containing owner and driver Hudson and his passenger Ellison. Hudson stopped and got out of his car believing the

honking suggested an interest in buying his car. Ellison stayed inside the car while Hudson spoke with the driver of Kier's car. During this conversation, Kier got out of the other car and pointed a gun at Hudson. Hudson ran away to call police. Kier approached Ellison, pointed the gun at him, and told him to get out of the car. Ellison complied and Kier drove away with the car. Kier, 164 Wn.2d at 801-03.

Kier was convicted of first degree robbery and second degree assault for the carjacking. Kier was convicted under RCW 9A.56.200(1)(a), which provides that a person is guilty of first degree robbery if he is "armed with a deadly weapon or displays what appears to be a firearm or deadly weapon, during the commission of a robbery." Like Chesnokov, Kier was also convicted of second degree assault under RCW 9A.36.021(1)(c), which requires assault with a deadly weapon. Kier, 164 Wn.2d at 805-06.

Relying on Freeman, the Supreme Court found the offenses merged because "the completed assault was necessary to elevate the completed robbery to first degree." The Court noted that as charged, both offenses required the State to prove Kier's conduct created a reasonable apprehension or fear of harm. The Court found Kier's display of a gun was the means of creating that apprehension or fear. Kier, 164 Wn.2d at 806-07.

Like Kier, Chesnokov's second degree assault with a deadly weapon elevated the robbery to the first degree because displaying the gun was essential to take property through apprehension or fear. The prosecutor acknowledged as much during closing argument: "In other words, the threatened use of the gun was used in order to steal the property, and was used to prevent anyone from stopping them from taking the property. Clearly that's the case here." RP 286.

Despite the holding in Kier, the State may argue, as it did at sentencing, that the offenses do not merge because the robbery was charged as displaying an apparent firearm whereas the assaults were committed by use of a deadly weapon. Deadly weapon was defined in the jury instructions as "any weapon, device, instrument, substance, or article which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." CP 68 (instruction 17). The term "firearm" was not defined.

Here, the BB gun was the alleged deadly weapon. The BB gun was the only instrument that could have constituted the apparent firearm. Suarez, Venneti, and Dickey testified to seeing only one gun, which "looked the same" as Officer Tobin Ruxton's sidearm. RP 101. The only BB gun recovered was the same length as Ruxton's sidearm. RP 109, 255.

Each witness testified it was the pointing of a gun which enticed them to get on the ground. RP 17-18, 31, 34, 47-49, 58-60. In other words, although the robbery used the language “appeared to be a firearm,” whereas the assaults stated “use of a deadly weapon,” the evidence demonstrates they were one and the same.

Even assuming the differing charging language fails the Blockburger<sup>6</sup> “same evidence” test, this does not defeat the merger analysis. The same evidence test is simply a rule of statutory construction used to determine legislative intent; it is not dispositive of the issue whether two offenses are the same. In re Pers. Restraint of Percer, 150 Wn.2d 41, 50, 75 P.3d 488 (2003). In any event, like the petitioners in Freeman, Chesnokov does not rely on Blockburger as a basis for finding a double jeopardy violation. Freeman, 153 Wn.2d 777.

That the assaults involved a “deadly weapon,” rather than an “apparent firearm” does not defeat application of the merger doctrine. The fact remains that the completed assaults against Venneti and Dickey were necessary to elevate the completed robbery to the first degree because

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<sup>6</sup> Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932) (“The applicable rule is that, 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.”)

displaying the BB gun was essential to taking property through apprehension or fear. The second degree assaults, therefore, merged with the robbery, and Chesnokov's assault convictions should be reversed and the case remanded for resentencing.

3. The Offenses Had No Independent Purpose or Effect.

Where the State uses second degree assault to elevate the robbery charge to the first degree, the offenses generally merge and are the same for double jeopardy purposes unless they have an independent purpose or effect. In re Francis, 170 Wn.2d 517, 525, 532, 242 P.3d 866 (2010); Kier, 164 Wn.2d at 806; Freeman, 153 Wn.2d at 780.

Offenses may be separate in fact, however, if there is a separate injury to the complainant that is distinct from and not simply incidental to the greater crime of which it forms an element. Freeman, 153 Wn.2d 778-79. "The test is not whether the defendant used the least amount of force to accomplish the crime. The test is whether the unnecessary force had a purpose or effect independent of the crime." Freeman, 153 Wn.2d at 778.

Chesnokov's offenses merge when applying this test as well. Here, the purpose of pointing the gun at Venneti and Dickey and ordering them to the ground was to facilitate the robbery. The entire incident lasted less than a minute and Chesnokov used the least amount of force

necessary to effectuate the robbery. The assaults had no purpose and effect other than to force Venneti and Dickey to relinquish the property.

“Using force to intimidate a victim into yielding property is often incidental to the robbery.” Freeman, 153 Wn.2d at 779. This point is illustrated by Freeman and Francis. Petitioner Freeman drew a gun, ordered the complainant to relinquish any valuables, and when the complainant did not immediately comply, Freeman shot the complainant and then robbed him. Freeman, 153 Wn.2d at 769. Petitioner Zumwalt, without demanding the complainant’s property, punched him in the face, causing serious injuries. Zumwalt then robbed the complainant. Freeman, 153 Wn.2d at 769. The court concluded Freeman and Zumwalt assaulted the complainants to facilitate the robberies. Freeman, 153 Wn.2d at 779. Cf., State v. Prater, 30 Wn. App. 512, 516, 635 P.2d 1104 (1981) (injury sustained by victim when defendant shot him in face not part of robbery because, by disabling victim, defendant hindered rather than aided commission of robbery), rev. denied, 97 Wn.2d 1007 (1982)).

The Francis Court similarly concluded a second degree assault was incidental to an attempted first degree robbery. Francis attacked two complainants with a baseball bat in order to steal \$2,000. Francis failed to take any money because he fled when another person approached. One complainant died of his injuries. Francis pleaded guilty to the first degree

murder of one complainant and second degree assault and attempted first degree robbery of the second complainant. Francis, 170 Wn.2d at 521. The Court concluded the assault was not separate and distinct from the attempted robbery because the “sole purpose” of the assault was to facilitate the attempted robbery. Francis, 170 Wn.2d at 525.

Like Freeman and Francis, here the assaults were not ‘separate and distinct’ from the attempted robbery; it was incidental to it. Under Freeman and Francis, it could not be punished independently from the robbery.

4. The Rule of Lenity Also Requires Merger.

Even assuming the legislature could have authorized punishment in Chesnokov’s case for both the robbery and the assault, the evidence presented at trial and the absence of precise jury instructions compel merger.

Under the rule of lenity, ambiguity in a jury’s verdict must be resolved in favor of the defendant. Kier, 164 Wn.2d at 811 (citing State v. DeRyke, 110 Wn. App. 815, 824, 41 P.3d 1225 (2002), aff’d. on other grounds, 149 Wn.2d 906, 73 P.3d 1000 (2003)). Again, the facts of Kier are instructive.

The information charging Kier identified both Hudson and Ellison as victims of the robbery, and Ellison as the victim of the assault. Kier,

164 Wn.2d at 808. The “to convict” jury instruction identified Ellison as the assault victim. The robbery “to convict” instruction did not specify a robbery victim. Kier, 164 Wn.2d at 808-09. The prosecutor’s closing argument identified Hudson as the robbery victim and Ellison as the assault victim. Kier, 164 Wn.2d at 811.

On appeal, Kier argued the rule of lenity applied because it was unclear from the evidence and instructions whether the jury found that Ellison was a victim of the robbery as well as the assault. Kier, 164 Wn.2d at 811. The Supreme Court agreed, finding the robbery verdict was ambiguous as to the victim and the rule of lenity required merging the offenses since the assault was used to elevate the robbery to the first degree. Kier, 164 Wn.2d at 814. The Court concluded:

While the “to convict” instruction on the first degree robbery count was stated in terms of a single victim, nothing in the instructions identified Hudson as the sole victim of the robbery. In contrast, the second degree assault “to convict” instruction specified Ellison as the victim, leaving a reasonable jury to conclude that the robbery instruction applied equally to Hudson or Ellison, or both.

Kier, 164 Wn.2d at 812.

The Court rejected the notion that the prosecutor’s election of victims in closing argument corrected the ambiguity: “While the prosecutor at the close of the trial attempted to require this finding,

[Hudson as the robbery victim and Ellison as the assault victim] the jury was properly instructed to base its verdict on the evidence and instructions and not on the arguments of counsel. Accordingly, this is not a situation in which a clear election was made.” Kier, 164 Wn.2d at 813.

This case presents a similar ambiguity because the jury could have found Chesnokov guilty of robbing assault victim Venneti in addition to – or instead of – assault victim Dickey. This ambiguity arises from the information, the evidence at trial, and the lack of specificity in the instructions and verdict forms regarding whom the jury considered the robbery victim or victims.

The amended information identified Venneti “and/or” Dickey as victims of the robbery. CP 93. The court’s instructions likewise permitted jurors to consider Venneti, or Dickey, or both, as victims of the robbery. The “to convict” instruction told the jury to address six elements, the first of which stated: “That on or about February 21, 2011, the defendant or an accomplice unlawfully took personal property from the person or in the presence of Morgan Venneti and/or Lupe Dickey[.]” CP 64 (instruction 13). As in Kier, here the information and jury instructions permitted a reasonable juror to conclude the robbery charge applied equally to Venneti or Dickey, or both.

Neither the evidence nor the prosecutor's closing argument corrected this ambiguity. Venneti, Dickey, and Suarez testified they were ordered to the floor at gunpoint while the robbery simultaneously occurred. The prosecutor's closing argument likewise emphasized that "all of the evidence goes to all of the counts," and that property was taken in the presence and against the will of "Morgan and Lupe." RP 271, 285-86.

Finally, the verdict for Count I did not specify a robbery victim. Rather the form simply said, "We, the jury find the defendant, *GUILTY* of the crime of robbery first degree as charged in Count I." CP 43.

The evidence and instructions allowed the jury to consider Venneti, or Dickey, or both, victims of the robbery as well as the assaults. Because this Court cannot be sure the jury did not convict Chesnokov of robbing both Venneti and Dickey, the rule of lenity requires that the assaults merge into the robbery.

5. Vacation and Remand is the Appropriate Remedy.

When the degree of one offense is raised by conduct separately criminalized by the legislature, courts presume the legislature intended to punish both offenses through a greater sentence for the greater crime. Freeman, 153 Wn.2d at 772-73.

In Freeman, the Court found that although petitioner Freeman's first degree robbery and first degree assault convictions merged, "the fact that the sentence for the putatively lesser crime of assault is significantly greater than the sentence for the putatively greater crime of robbery" demonstrated the legislature intended to punish first degree assault and first degree robbery separately. Freeman, 153 Wn.2d at 778. In contrast, the merger rule did apply to petitioner Zumwalt's first degree robbery and second degree assault convictions, because the latter offense carried a lesser sentence. Freeman, 153 Wn.2d at 778.

Like petitioner Zumwalt, Chesnokov's first degree robbery conviction carried a higher standard range punishment than his assault convictions (here 129 to 171 months for robbery versus 63 to 84 months for assault). Thus, the merger doctrine applies to Chesnokov's robbery and assault convictions. The lesser assault convictions against Venneti and Dickey should, therefore, be vacated. Francis, 170 Wn.2d at 531; Kier, 164 Wn.2d at 814.

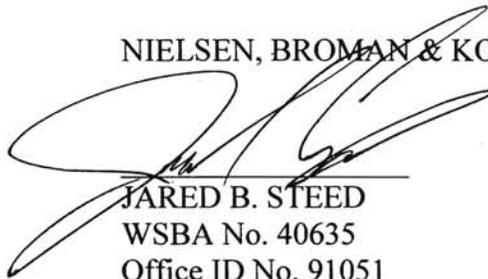
D. CONCLUSION

For the reasons discussed above, this Court should vacate two of Chesnokov's assault convictions and remand the case for resentencing.

DATED this 29<sup>th</sup> day of May, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A large, stylized handwritten signature in black ink, appearing to read 'J.B. Steed', is written over a horizontal line.

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 67924-4-1
	)	
DAVID CHESNOKOV,	)	
	)	
Appellant.	)	

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

- [X] SKAGIT COUNTY PROSECUTOR'S OFFICE  
COURTHOUSE ANNEX  
605 S. THIRD  
MOUNT VERNON, WA 98273
  
- [X] DAVID CHESNOKOV  
DOC NO. 353714  
STAFFORD CREEK CORRECTIONS CENTER  
191 CONSTANTINE WAY  
ABERDEEN, WA 98520

2012 MAY 29 PM 4:38  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION ONE

**SIGNED** IN SEATTLE WASHINGTON, THIS 29<sup>TH</sup> DAY OF MAY 2012.

x Patrick Mayovsky