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NO. 67924-4-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

DAVID V. CHESNOKOV,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Dave Needy, Judge

RESPONDENT'S BRIEF

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ORIGINAL

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I. SUMMARY OF ARGUMENT

The appellant, David V. Chesnokov, was convicted of three counts of Assault in the Second Degree, one count of Robbery in the First Degree, and one count of Tampering with a Witness. Chesnokov claims that two of the assault convictions merge with the robbery conviction.

The State responds that the assault convictions do not merge because the charged assault is not what elevated the robbery to the first degree.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The second degree assault convictions were based on the assaults being with a deadly weapon. The factor that elevated the robbery to the first degree was that the defendant displayed what appeared to be a firearm. Did the assault with a deadly weapon elevate the robbery to the first degree?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On August 30, 2011, the State filed the Third Amended Information charging the appellant, David V. Chesnokov, with Robbery in the First Degree, Assault in the Second Degree (three counts), Trafficking in Stolen Property in the First Degree, and Tampering with a Witness. The robbery and each of the assaults alleged a deadly weapon enhancement. The State also alleged an aggravating factor of recent recidivism. CP 15-18.

On September 26, 2011, the State orally moved to amend the Information to remove the deadly weapon enhancements and the trafficking charge. Supp. CP ____ (sub 41, page 3). The trial commenced that day. Supp. CP ____ (sub 41).

On September 28, 2011, the jury rendered verdicts of guilty as to all counts and answered “yes” as to the special verdict form, finding that the aggravating factor was present. CP 43-48.

On October 27, 2011, the Fourth Amended Information was filed to conform with the oral amendments of September 26, 2011. CP 93-95.

Chesnokov was sentenced on November 3, 2011, to the mid-point of the standard range, one hundred forty-four months in prison. CP 100.

Notice of Appeal was timely filed on November 3, 2011. CP 108-109.

2. Statement of Facts

On February 20, 2011, Chesnokov, Caroline Bondarchuk, Christina Bondarchuk (Bondarchuk herein), Mark Shtefanio (Shtefanio herein), and Ruvim Shtefanio drove to Mount Vernon from Vancouver, Washington, in Chesnokov’s car, a 1997 red Dodge Neon. RP¹ 178-180, 246. Bondarchuk was Shtefanio’s girlfriend. RP 130, 179. They met up with their friends, Vlad and Eddie, in Mount Vernon. RP 182. At one point in the evening,

¹ RP refers to the Verbatim Report of Proceedings.

Shtefanio and Chesnokov separated from the other five people in the group. RP 183. During that time, Shtefanio and Chesnokov went to the AT&T store located at 1718 Riverside Drive where they were observed by Catalina Ochoa who was working at the time. RP 86, 126. Shtefanio and Chesnokov entered the store at about 5:06 p.m. After wandering around the store looking at various iphone and tablet displays, they left the store at about 5:19 p.m. RP 90. At this time, Chesnokov was wearing a hooded tan/beige jacket with an eagle emblem later identified as belonging to Shtefanio. RP 85, 88, 126, 127, 201. At some point they met up with their friends again and they all went to the Best Western motel. RP 130, 131, 183. There, at about 8:15 p.m., Shtefanio checked in and Bondarchuk was standing with him. RP 130, 131. Bondarchuk was wearing Shtefanio's hooded tan/beige jacket with an eagle emblem. RP 15, 201, 203. They all spent the night at the motel.

The next morning, on February 21, 2011, Melissa Suarez, Morgan Venneti, and Lupe Dickey were working at the AT&T store located at 1718 Riverside Drive, Mount Vernon Washington. RP 9, 44. The AT&T store has, displayed on the walls, iphones and a Galaxy tablet. RP 47. The store is about four blocks away from the Best Western motel.

At about 9:25 a.m., Venneti and Dickey were working at the front counter when two men, later identified as Chesnokov and Shtefanio, entered the store. RP 44. Chesnokov was wearing a red/ burgundy sweatshirt with a

hood, a jean jacket, black jeans, black gloves, and a belt hanging down. RP 16, 48, 115, 116. Shtefanio was wearing his tan/beige hooded zip-up jacket with an eagle on the front that Bondarchuk had been wearing at the motel the previous night. RP 15, 127, 130. Chesnokov and Shtefanio were wearing bandanas that covered the lower part of their faces. RP 15, 19, 50.

Chesnokov was holding what appeared to be a gun. RP 48-49, 58. The gun was held in his left hand. RP 115, 125. Chesnokov is left handed. RP 127, 261. Chesnokov pointed the gun at Venneti's head as he told her and Dickey to get down on the ground. RP 48-49, 58. Venneti believed that it was a real gun and was very frightened. RP 48, 50, 51. Chesnokov then walked toward Dickey. RP 49. Shtefanio was running around the store grabbing the phones off the wall. RP 50, 59.

Meanwhile, Suarez was working in the back room of the store at about 9:25 a.m. when she heard loud voices from the sales floor. RP 11, 14. After a short time, she went to the sales floor where she saw Chesnokov with what appeared to be a gun pointed at Venneti and Dickey. RP 11, 14, 48. Chesnokov was telling them to get down and he was pointing the gun over the counter at them. RP 15. He was saying "get on the floor, and let me see your hands, get on the floor." RP 16. She saw Shtefanio ripping iphones off the wall. RP 15. When Suarez came out, Chesnokov ran to her and "told me to let me see your hands", he repeated that, and said get on the floor. RP 17,

59, 60. As he was speaking, he pointed the gun at Suarez's head. RP 17, 60. Suarez was afraid and complied. RP 17-18. She believed it was a real gun. RP 18. Shtefanio continued to remove the iphones and then ripped a Galaxy tablet out of the wall. RP 20. The two men ran out of the store with two iphones and a Galaxy tablet. RP 27, 59.

After the robbery, Shtefanio and Chesnokov went back to the motel, woke up Caroline Bondarchuk, Bondarchuk, and Ruvim Shtefanio, and said it was time to check out. RP 206-207. They drove back to Vancouver in Chesnokov's car. RP 207. While they were driving back to Vancouver, Shtefanio was showing off an iphone and ipad in the car. RP 190.

On March 11, 2011, Detective Young and Sergeant Shipman executed arrest warrants on Chesnokov and Shtefanio and search warrants on their residences and Chesnokov's car in Vancouver. RP 111-112.

The Galaxy tablet that had been stolen was recovered from Shtefanio's residence. RP 26-27, 139; Supp. CP ____ (sub 44.100, page 1).

Items of clothing that matched what Chesnokov was wearing during the robbery were recovered from Chesnokov's person (he was wearing the sweatshirt with jacket at the time of his arrest) and his bedroom (black jeans, belt, bandana). RP 23-25, 117-119, 246; Supp. CP ____ (sub 44.100, page 1).

From within Chesnokov's vehicle, officers located a handgun holster, another bandana, a BB gun, black gloves, and a backpack. RP 250,

251, 252, 253. From within the backpack, officers recovered another pair of black gloves, a BB gun, a bottle of BBs, and a box of CO-2 cartridges which propel the BBs from the gun. RP 254, 256. The BB gun in the backpack looked like the one used in the robbery. RP 25-26; (Supp. CP ____ (sub 44.100, page 1).

After Chesnokov was arrested, he was held at the Skagit County Jail. He had a recorded telephone conversation with Christina. He urged her to not talk about what she knew. RP 172-177.

IV. ARGUMENT

1. The second degree assault convictions as to Venneti and Dickey do not merge with the robbery conviction and convictions for both, therefore, do not constitute double jeopardy.

Under the facts of this particular case, the assaults do not merge with the robbery because the assault charges were not necessary to elevate the robbery to first degree.

“No person shall be . . . twice put in jeopardy for the same offense.” State v. Freeman, 153 Wn.2d 765, 768, 108 P.3d 753 (2005); Const. art. I, § 9; accord U.S. Const. amend. V. Whether two or more crimes arising out of the same course of conduct violates double jeopardy “largely turns on whether the legislature intended to punish the conduct as separate crimes or to punish the conduct as a single, “higher” felony.” Id. Our Supreme Court

has adopted a three-part test for determining whether the legislature intended multiple punishments in a particular situation. Freeman, 153 Wn.2d at 771-772. First, the court considers any express or implicit legislative intent. Freeman, 153 Wn.2d at 771-772. If the intent is unclear, then the court engages in the Blockburger² “same evidence” analysis. Freeman, 153 Wn.2d at 772. Where the degree of one offense is elevated by conduct constituting a separate offense, a third test, the merger doctrine, may be an aid in determining legislative intent. Freeman, 153 Wn.2d at 772-773; State v. Kier, 164 Wn.2d 798, 803-804, 194 P.3d 212 (2008).

The State Supreme Court in both Freeman and Kier engaged in a double jeopardy analysis with respect to a robbery charge that had been elevated to the first degree with the charged assault in the second degree conviction. The Court, in both cases, held that there was no *per se* rule and that a “case by case approach is required to determine whether first degree robbery and second degree assault are the same for double jeopardy purposes.” Freeman, 153 Wn.2d at 780.

In Freeman, supra, the Court found no explicit or implied legislative intent one way or the other, other than to find that courts are to consider the issue on a case by case basis. Freeman, 153 Wn.2d at 775-776. There was

² Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

no evidence that “the legislature intended to punish second degree assault separately from first degree robbery when the assault facilitates the robbery.” Freeman, 153 Wn.2d at 776 (emphasis added).

Under Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), it is presumed that the legislature did not intend to punish criminal conduct twice when the evidence required to support a conviction on one would have been sufficient to warrant a conviction on the other. Freeman 153 Wn.2d at 776-777 (citations omitted). “Accordingly, if the crimes, as charged and proved, are the same in law and in fact, they may not be punished separately absent clear legislative intent to the contrary.” Freeman, 153 Wn.2d at 777, citing Blockburger, 284 U.S. at 304. “The mere fact that the same *conduct* is used to prove each crime is not dispositive.” Freeman, 153 Wn.2d at 777 (emphasis in original). The parties in Freeman were in agreement that the assault and the robbery were not the same in fact or in law.

The third test in ascertaining whether a conviction on two offenses constitutes a double jeopardy violation is the merger doctrine.

The merger doctrine is a rule of statutory construction which 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 which is defined as a crime elsewhere in the criminal statutes (*e.g.*, assault or kidnapping).

Freeman, 153 Wn.2d at 777-778, citing State v. Vladovic, 99 Wn.2d 413, 420-421, 662 P.2d 835 (1983).

In Freeman, supra, the defendant pulled a gun on the victim and ordered him to hand over the valuables. When the victim did not immediately comply, the defendant shot him. In the consolidated case of State v. Zumwalt, the defendant punched the victim in the face and then robbed her of cash and casino chips.

The defendants in both cases were charged with Robbery in the First Degree and Assault in the Second Degree. In both cases, it was the assault, in charging, and in fact, that elevated the robbery to first degree. “As charged and proved, without the conduct amounting to assault, each would be guilty of only second degree robbery.” Freeman, 153 Wn. 2d at 778. The question was whether the assault merged with the robbery when the robbery was elevated to the first degree by the charged assault. Freeman, 153 Wn.2d at 771. Freeman did not address the circumstance where, as here, the assault was not the element that enhanced the robbery to first degree.

Under the circumstances of the Freeman case, the Court conducted a legislative intent analysis first finding no explicit legislative intent to punish the crimes separately, then finding that Blockburger did not support the

double jeopardy argument. In the merger analysis, the Court found that the crimes, as charged and proved in this case, merged. In order to prove the first degree robbery, the State had to prove the defendants committed the second assault in order to prove the first degree robbery.

The Court in Kier reiterated that whether Assault in the Second Degree merges with Robbery in the First Degree is highly fact specific. In Kier, Hudson was the driver of a vehicle and Ellison was the passenger. A confrontation ensued between Hudson and Kier where Kier pointed a gun at Hudson. Hudson broke free and fled. Kier then approached Ellison, pointed the gun at him and told him to get out of the car. After he did, Kier and his companions drove away with the car.

The amended information charged Kier with count 1, Robbery in the First Degree, identifying Hudson and Ellison as the victims, and count 2, Assault in the Second Degree, identifying Ellison as the victim.

The court's analysis focused on the merger doctrine. The Court noted that Kier was convicted under the robbery prong of "armed with a deadly weapon" or "displays what appears to be a firearm or deadly weapon" and he was convicted under the "assault with a deadly weapon" prong of the assault statute. The charges merged because the thing that elevated the robbery to first degree was the "deadly weapon" which was also the basis of the second degree assault charge. In other words, the assault that

was charged and proved is the same thing that elevated the robbery to first degree. Kier, 164 Wn.2d at 806.

The State argued that because there were different victims for the robbery and the assault, the offenses did not merge. Although the Information named both Hudson and Ellison as victims of the first degree robbery, the Information is not evidence. The jury instructions did not specify who the victim of the robbery was although they did name Ellison as the victim of the assault. The testimony at trial was sufficient such that a jury could find that both Hudson and Ellison were victims of the robbery. The prosecutor's closing argument clearly specified Hudson as the victim of the robbery and Ellison as the victim of the assault. The defendant argued that given the instructions and the testimony, it was unclear whether the jury found that Ellison was a victim of the robbery. Where there's ambiguity in the verdict, the rule of lenity requires that the ambiguity be resolved in the defendant's favor. The State argued that the prosecutor's argument clearly specified that Hudson was the victim of the robbery and Ellison was a victim of the assault.

The Court held that "[t]he situation here is somewhat analogous to a multiple acts case in which the State must make a clear election of the conduct forming the basis of each charge or the court must instruct the jury to agree on a specific criminal act." Kier, 164 Wn.2d at 811.

The Court cited to State v. DeRyke 110 Wn.App. 815, 41 P.3d 1225 (2002), where kidnapping merged with first degree attempted rape because, under the trial court's to-convict instructions, the jury could have found that the kidnapping of the victim elevated the attempted rape to first degree. "The court in DeRyke noted that this 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." Kier, 164 Wn.2d at 812.

"Here, given the possibility that the jury could have found Ellison a victim of the robbery and the certainly 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." Kier, 164 Wn.2d at 812-813. Therefore, the rule of lenity applied and the ambiguous verdict was interpreted in favor of the defendant. Furthermore, the prosecutor's closing argument, alone, was insufficient to elect a victim for each count.

Here, the case was charged, the evidence showed, and the jury was instructed as follows:

Robbery in the First Degree

Victims: Lupe Dickey and Morgan Vanetti

Elevating factor: display of what appears to be a firearm

Assault in the Second Degree

3 counts with a separate victim for each (Dickey, Vanetti, Melissa Suarez)

Means of assault: with a deadly weapon

As to the robbery of Dickey and Vanetti and the separate assaults of them, under the particular facts of this case, these offenses do not merge. The robbery was elevated to the first degree by the defendant's display of what appeared to be a firearm. The assault was committed by actual use of a deadly weapon. For the robbery conviction, the jury was required to find that the BB gun appeared to be a firearm. For the assault conviction, the jury was required to find that the BB gun was an actual deadly weapon. 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 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.

The jury could have found that the State did not prove that the defendant was in actual possession of the BB gun recovered, or that the BB gun was not, in fact, a deadly weapon, but nonetheless convicted on the first degree robbery.

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 first degree. That is not the situation in the case at bar.

V. CONCLUSION

Because the assault that was charged and proved was not the basis for the elevation of the robbery to first degree, the offenses do not merge and double jeopardy was not violated by convictions for both.

DATED this 21st day of August, 2012.

SKAGIT COUNTY PROSECUTING ATTORNEY

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DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:
I sent for delivery by; United States Postal Service; [] ABC Legal Messenger Service. a true and correct copy of the document to which this declaration is attached, to: Jared Steed, addressed as 1908 E MADISON ST, SEATTLE WA 98122 I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 21st day of August, 2012.

Karen R. Wallace
KAREN R. WALLACE, DECLARANT