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COURT OF APPEALS

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STATE OF WASHINGTON NO. 34224-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

DERRICK KIRKWOOD,

Appellant.

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

The Honorable Linda Lee, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court miscalculated Mr. Kirkland's offender scores for his burglary, assault and possession of a firearm convictions.

2. The trial court erred in not merging the second degree assault convictions with the attempted robbery conviction.

3. The trial court erred in imposing firearm enhancements.

4. The trial court erred in not finding that the unlawful possession of a firearm conviction was the same criminal conduct as the assault convictions.

5. The trial court erred in not considering whether to apply or not apply the burglary anti-merger statute.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court miscalculate Mr. Kirkwood's offender scores by counting separately crimes which were held by this Court to be the same criminal conduct?

2. Did the trial court err in refusing to merge Mr. Kirkwood's attempted first degree robbery conviction and his second degree assault convictions

where the legislature did not intend for the assault convictions to be imposed separately?

3. Where the legislature failed to provide a procedure for submitting a firearm enhancement to a jury and where the Washington Supreme Court has consistently refused to create a procedure where the legislature has not, did the trial court err in imposing firearm enhancements on Mr. Kirkwood?

4. Where the victims of the assaults were the same as the victims of the unlawful possession of a firearm, should the firearm possession conviction have been considered the same criminal conduct?

5. Did the court err in not at least considering on the record whether to apply the burglary anti-merger statute.

C. STATEMENT OF THE CASE

1. Procedural history

Mr. Kirkwood was convicted, in 2002, of the first degree burglary of a house in Spanaway, Washington (Count 1); the attempted first degree robbery of James Ultican, Eloise Ultican, Carol Coolidge and/or Michael Hassenger who were present in the house (Count II); the second degree assaults of Eloise Ultican (Count IV), Carol Coolidge (Count

V), and Michael Hassenger (Count VI); and the unlawful possession of a firearm (Count VII). CP 1-18. The jury found that Mr. Kirkwood was armed with a firearm during the commission of these crime. CP 1-18. He was acquitted of the first degree assault of James Ultican (Count III). CP 1-18.

The incident which gave rise to these convictions involved the early-morning entry of two men into the house in Spanaway, Washington, in which James Ultican and his girlfriend Carol Coolidge were sleeping in the bedroom and James' mother Eloise Ultican and a teenage boy named Michael Hassenger were sleeping on couches in the living room. RP 142-146, 149, 219.¹ The men were wearing ski masks and apparently believed that there were drugs in the house. RP 143-144, 202, 240-241. Finding none, they left. RP 167.

The man described as African American entered the bedroom, yelled at James Ultican and hit him on

¹ The citations to the record here are citations to the verbatim report of proceedings at trial, which were filed on direct appeal, COA No. 28628-9-II. These facts are also set out in some detail in the decision by this Court in No. 28628-9-II.

The verbatim report of the motions and resentencing hearings are designated by date: RP(11/4/05) and RP(12/2/05).

the head with a gun. RP 143, 145-146. He forced Ultican and Ms. Coolidge to the living room where a second man, described as Caucasian, was stationed by the door with a gun. RP 146-147, 149, 151, 154, 172-177, 221-222, 251, 254-256.

The African American man ransacked the house asking "Where's the dope?" RP 152-154, 180, 216. Eloise Ultican offered him money, but he responded that he was seeking "dope." RP 183. The two men left a short time later, after having been in the house less than five minutes, without having found any drugs. RP 167.

Mr. Kirkwood was stopped as he was driving alone on a major highway some distance from the house. RP 429-431; 467-480. He ran from the police and was chased by a police dog. RP 277-278, 290-294; 429-431; 467-480. The dog recovered a revolver which had fingerprints on it that did not match anyone in the police computer system or Mr. Kirkwood. RP 431, 475; 500-503.

Mr. Kirkwood's defense was that he was not involved in the incident and that he fled from the police because of an outstanding warrant. RP 442.

Even though the state charged Mr. Kirkwood with being the African American assailant and argued at trial that he was this assailant, the jurors did not believe that he was and acquitted him of assaulting James Ultican. A report by a defense investigator after trial set forth that the jurors he contacted said they believed that Mr. Kirkwood might have been the white man in the living room or possibly some third person who remained outside during the incident. RP 928-929, 940-943.

On appeal, this Court affirmed Mr. Kirkwood's convictions and rejected his claims that convicting him of both assault and robbery violated the prohibition against double jeopardy and that the assaults and attempted robbery should have been considered the same criminal conduct. This Court held, however, that the trial court improperly included Mr. Kirkwood's juvenile conviction in his offender score and remanded for resentencing. On reconsideration, this Court held that the robbery and the assaults were the same criminal conduct.

On remand, the court imposed the same sentence as initially imposed. CP 154-166. Mr. Kirkwood timely appealed. CP 19-42.

2. Remand

On remand, the trial court agreed that, under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), Mr. Kirkwood's offender score should not include a point for being on community placement at the time of the offense. RP(11/4/05) 9-10.

The court, however, rejected Mr. Kirkwood's argument that under State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005), Mr. Kirkwood's attempted robbery conviction and his three second degree assault convictions should merge. RP(12/2/05) 3-4. The court denied Mr. Kirkwood's further argument that his firearm enhancements should be vacated under State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005), because the legislature did not provide a procedure for imposing a firearm enhancement as it did for deadly weapon enhancements. RP(12/2/05) 5-9.

Defense counsel argued that Washington Supreme Court in Freeman explained previous decisions and

set out the merger analysis for first degree robbery and second degree assault convictions where the robbery and assault did not have independent purposes or effects. RP(11/4/05) 17-25. Counsel explained that the court could revisit the issue under the law of the case doctrine and should consider that the legislature would not have intended for a completed first degree robbery to merge with a second degree assault, but not the lesser crime of attempted second degree assault. RP(11/4/05) 22-25.

Counsel also urged the court to dismiss the firearm enhancements under the authority of Recuenco.

B. ARGUMENT

1. THE TRIAL COURT MISCALCULATED THE OFFENDER SCORES FOR MR. KIRKWOOD'S CONVICTIONS.

The trial court accepted the state's calculation of Mr. Kirkwood's offender scores for his burglary, assault and possession of a firearm convictions. This was in error.

In the initial direct appeal in this case, this Court held, on reconsideration, that:

The general verdict form for count II, however, does not delineate the robbery victims. Instead, the form refers to the

charging instrument, which lists Kirkwood's victims in the conjunctive and disjunctive as "James Ultican, Eloise Ultican, Carol Coolidge and/or Michael Hassenger, Jr." CP at 9. It is unknown, then, whether the jury convicted Kirkwood of attempted robbery on a single victim or multiple victims. Accordingly, we assume that the assaults and attempted robbery involved the same victim.

Order on Reconsideration 1. For that reason, this Court concluded that the trial court erred in its ruling the crimes were not the same criminal conduct.

To arrive at the respective offender scores of 13, 11 and 9, the state assumed that there were 4 other current violent offenses for the burglary conviction, 3 other current violent offenses for the assault convictions and 5 other current convictions for the possession of a firearm. Since, however, the attempted robbery and the assaults were the same criminal conduct, they should have counted as only one crime. In the case of the burglary conviction, the correct offender score should have been 7 points, one point for the offenses deemed to be the same criminal conduct, doubled, plus one point for the possession of a firearm conviction and 4 points for prior convictions. The offender score for the

assault convictions and the possession of a firearm should be similarly reduced.

RCW 9.94A.589 (formerly RCW 9.94A.400) provides that:

whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, *That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.*

(emphasis added). This language is unambiguous. See, State v. Porter, 133 Wn.2d 177, 180-181, 942 P.2d 974 (1997). Since the attempted robbery merged with the assaults, they should have been counted as only one conviction for purposes of calculating the offender scores. Accordingly, Mr. Kirkwood's case should be remanded for resentencing with a correct offender score.

2. THE TRIAL COURT ERRED IN NOT MERGING MR. KIRKWOOD'S ASSAULT AND ROBBERY CONVICTIONS WHERE THE LEGISLATURE DID NOT INTEND FOR THEM TO BE IMPOSED SEPARATELY.

The trial court erred in ruling that the second degree assault convictions did not merge with the attempted first degree robbery conviction. Under the analysis of the Washington Supreme Court in

State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005), these convictions should have merged.

In Freeman, the Supreme Court held that second degree assault and first degree robbery merge unless each has an independent purpose or effect. In reaching this holding, the Freeman court went through an extended analysis and reinterpreted a number of its prior decisions.

First, the court made clear that the central underlying inquiry was "whether, in light of legislative intent, the charged crimes constitute the same offense." Freeman, 153 Wn.2d at 771 (citing In re Pers. Retraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)). This is because the legislature has the power to define crimes and set punishment for them. Freeman, at 771 (citing State v. Calle, 125 Wn.2d 769, 777-778, 888 P.2d 155 (1995)).

In determining legislative intent, the first inquiry is whether there is explicit evidence of intent. Freeman, at 771-772. In the absence of explicit indication of intent, the next step is to apply the test of Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

The Blockburger test is "whether each provision requires proof of a fact which the other does not." Freeman, at 772 (quoting Blockburger, 284 U.S. at 304)).

Most importantly, however, the Blockburger test yields only a presumption which "may be rebutted by other evidence of legislative intent." Freeman, at 772 (citing Calle, 125 Wn.2d at 778)). The Blockburger test "is not dispositive on the question whether two offenses are the same." Freeman, at 777.

Another aid to determining legislative intent is the merger doctrine, which provides that "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 at 772-773 (citing State v. Vladovic, 99 Wn.2d 413, 419, 662 P.2d 853 (1983)).

Finally, the Freeman court concluded that the final inquiry must be whether there is an independent purpose or effect to each crime as charged. Freeman, at 773.

In performing the analysis for first degree robbery and first degree assault and first degree robbery and second degree assault, the court first determined that "since 1975, courts have generally held that convictions for assault and robbery stemming from a single violent act are the same for double jeopardy purposes and that the conviction for assault must be vacated at sentencing." Freeman at 774. The court, however, failed to conclude that a per se rule had emerged and that it remains necessary to look at each case. Freeman at 774.

Even where an assault elevates the degree of the robbery, the courts have analyzed the cases individually. Freeman, at 774.

The court, in Freeman, then concluded that the legislature did not intend a first degree assault to merge with a first degree robbery because the penalty for the assault, which elevates the degree of the robbery, has a higher standard range of sentence than the robbery. This, the court held, shows that the punishment for the robbery was not intended to include the punishment for the assault as well. Freeman, at 775-776.

The Freeman court held, however, that with second degree assault, the standard range was much lower than the robbery standard range and that, therefore, "we find no evidence that the legislature intended to punish second degree assault separately from first degree robbery when the assault facilitates the robbery." Freeman, at 776.

In using this analytical framework on the specific cases at issue, the Freeman court noted that the parties agreed "that these crimes are not the same at law" and that the Blockburger analysis would not be undertaken. Freeman, at 77.

The court then considered whether there was an injury that was separate and distinct from and not merely incidental to the greater crime as established by the facts of the individual case. Freeman, at 779. The court noted, however, that "this exception [to merger] does not apply merely because the defendant used more violence than necessary to accomplish the crime. The test is whether the unnecessary force had a purpose or effect independent of the crime." Freeman, at 779.

Here, it is clear that the second degree assaults consisted entirely of using the gun during

the course of trying to obtain drugs during the robbery. There was no possible independent effect, purpose or injury. And the only reason why the robbery was not a completed robbery was simply because the robbers were in error in believing that they would find drugs at the house.

The only reason that this Court, on direct appeal, and the trial court on remand, citing State v. Beals, 100 Wn. App. 189, 193-194, 997 P.2d 941, review denied, 141 Wn.2d 1006 (2000), found that the first degree robbery and second degree assault could not merge was because the charge was *attempted* robbery and the second degree assault was not necessary to establish an attempt to commit a robbery. Slip op. at 15-16. But examining Beals, in light of Freeman shows that the Beals court did not hold that an attempted robbery could never merge with a second degree assault.

In Beals, the defendant had hit the victim with a hammer and demanded \$500. In holding that the attempted robbery did not merge with the assault, the court noted that it was unlikely the legislature intended merger "to apply here," because the assault had an independent purpose and effect from the

robbery. Beals at 194. The Beals court expressly noted that the "attempt could have been accomplished merely by displaying a deadly weapon." Beals, at 194.

Thus, the facts of this case represent the precise case the court, in Beals, used to represent what would have been a means of committing the attempted robbery without having the assault have an independent purpose or injury. This is a case where the legislature did intend the two convictions to merge. There was no independent purpose or effect of the assault; the purpose of displaying the gun was to accomplish the robbery. The robbery attempt was accomplished by displaying the weapon.

If, in fact, the legislature had intended the first degree robbery and the second degree assault to merge if drugs had been found and taken, it follows that the legislature similarly intended to have the crimes merge when the less serious attempt was charged.

In other words, the legislature surely did not intend to reduce the standard range for a completed robbery by 5 to 7 months and not reduce the standard

range by 4.75 to 5.25 months for an attempted robbery, a crime of lesser culpability.

Moreover, there is no reason why an attempt should be considered under any other analytical framework than a completed robbery. In neither case is the Blockburger test dispositive and Freeman set out a general framework for analyzing all crime.

Most importantly, in any case involving multiple weapons sentencing enhancements, the legislature cannot have intended to punish an attempt with multiple consecutive sentence enhancements while not punishing a completed armed robbery with multiple consecutive sentence enhancements. This is the precise effect of the decision of the trial court in ruling that the convictions do not merge. When crimes merge, the conviction for the lesser crime is not entered and cannot support a sentence enhancement. Freeman, at 770-771 (citing Vladovic, 99 Wn.2d at 422, and Albernaz v. United States, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981)); RCW 9.94A.533(3)(e).

This should be true particularly where, as in this case, the number of assaults is related to the

number of persons in the home and there was no evidence that the assailants expected all of them to be present. In Ladner v. United States, 358 U.S. 169, 79 S. Ct. 209, 3 L. Ed. 2d 199 (1958), the United States Supreme Court held that only one of two convictions for assault could stand where the defendant fired one shot and wounded two federal officers. In so holding, the Court rejected the argument that there should be as many assaults as there were officers affected:

Punishments totally disproportionate to the act of assault could be imposed because it will often be the case that the number of officers affected will have little bearing on the seriousness of the criminal act. For an assault is ordinarily held to be committed merely by putting another in apprehension of harm whether or not the actor actually intends to inflict or is capable of inflicting the harm. Thus, under the meaning for which the Government contends, one who shoots and seriously wounds an officer would commit one offense punishable by 20 years' imprisonment, but if he points a gun at five officers, putting all of them in apprehension of harm, he would commit five offenses punishable by 50 years' imprisonment, even though he does not fire the gun and no officer actually suffers injury.

Ladner, 358 U.S. at 177.

Freeman set out an analysis relevant to this case. It was decided after this case, and to the

degree that Freeman clarified that Beals did not categorically exclude attempts from merger, it should have required a different result on remand and a different result here. RAP 2.5(c); Roberson v. Perez, 119 Wn. App. 928, 83 P.3d 1026 (2004) (law of the case doctrine should not bar revisiting an issue where to do so would promote the ends of justice). Accordingly, Mr. Kirkwood's case should be reversed and remanded for resentencing with his second degree assault convictions merged with the first degree attempted robbery conviction.

3. THE TRIAL COURT ERRED IN IMPOSING FIREARM SENTENCING ENHANCEMENTS.

The trial court erred in imposing firearm enhancements because the Legislature failed to enact a procedure authorizing the jury to make such a finding. In RCW 9.94A.602, the Legislature set out a procedure for alleging and submitting to a jury the issue of whether the defendant was armed with a deadly weapon. In contrast, no procedure has ever been enacted for alleging and submitting to the jury the question of whether the defendant was armed with a firearm. Absent such enacted authority, neither the trial court nor the appellate court has the power to create a procedure. State v. Martin, 94

Wn.2d 1, 614 P.2d 164 (1980); State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1981).

The Supreme Court in State v. Recuenco, 154 Wn.2d 156, 164, 110 P.3d 188 (2005), and in State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), relied on Martin and Frampton in holding that on remand, after reversal of the exceptional sentences in Hughes and a firearm enhancement in Recuenco, the court could not create a procedure where the legislature had not provided one.

In Hughes, the Court found it unnecessary to decide the issue of whether juries could be given special verdict forms or interrogatories to determine aggravating factors, but expressly held that "[w]here the legislature has not created a procedure for juries to find aggravating factors and has, instead, explicitly provided for judges to do so, we refuse to imply such a procedure on remand." Hughes, at 149-150. Thus, although the court reserved on the issue of submitting special verdict forms unauthorized by statute, the court's emphasis was not on the lack of authority for empanelling a jury on remand, but on the lack of authority for

creating a procedure for finding aggravating factors where the legislature had not done so.²

Similarly, in Recuenco, the court refused to create a procedure for imposing a firearm enhancement on remand.

The decisions in Recuenco and in Hughes are in keeping with the rule that a trial court's discretion to impose sentence is limited to that which it is granted by the legislature. State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986). In Ammons, the court upheld the Sentencing Reform Act (SRA) against the challenge that it violated the separation of powers and infringed upon judicial discretion in sentencing. In upholding the SRA, the Ammons court relied on the long-standing authority that clearly recognizes (1) that the legislature has the sole authority to set the terms under which the trial court can impose punishment for crimes and (2) that the trial court has no independent inherent authority to punish for crimes.

² The issue of whether the juries could be given special interrogatories or special verdict forms is pending decision in the Supreme Court in the cases of State v. Butters, No. 75989-8; State v. Pillatos, No. 75984-7; State v. Base, 76081-1; State v. Metcalf, No. 76077-2.

Sentencing is a legislative power. State v. Bryan, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980). The legislature's power to fix punishment for crimes is subject only to the constitutional limitations against excessive fines and cruel punishment. State v. Mulcare, 189 Wash. 625, 628, 66 P.2d 360 (1937). It is the function of the legislature, not the judiciary, to alter the sentencing process. State v. Monday, 85 Wn.2d 906, 909-910, 540 P.2d 416 (1975). Additionally, "[i]f statutory sentencing procedures are not followed, the action of the court is void." State v. Theroff, 33 Wn. App. 741, 744, 657 P.2d 800 (1983); State v. Eilts, 94 Wn.2d 489, 495, 617 P.2d 993 (1980), overruled by statute on other grounds, State v. Barr, 99 Wn.2d 75, 78, 658 P.2d 1247 (1983).

Given that the legislature failed to provide a procedure for a jury to impose a firearm enhancement as it did for deadly weapon enhancements, given the holdings in Martin and Frampton, and the reliance on those cases in Hughes and effectively in Recuenco,

Mr. Kirkwood's firearm enhancement should be vacated.

4. **MR. KIRKWOOD'S CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM WAS THE SAME CRIMINAL CONDUCT AS HIS ASSAULT CONVICTION; THE TRIAL COURT ERRED IN NOT CONSIDERING WHETHER OR NOT TO APPLY THE BURGLARY ANTI-MERGER STATUTE.**

Mr. Kirkwood asserted at his first sentencing hearing and at resentencing (1) that the court should exercise its discretion and not apply the burglary anti-merger statute; and (2) that his firearm conviction was the same criminal conduct as his assault convictions. CP 66-101.

The trial court erred in not considering these issues and in not finding, under the facts of the case, the firearm conviction to be the same criminal conduct as his assault convictions.

a. Burglary anti-merger

Under RCW 9A.52.050, the state may separately charge a crime alleged to have been committed during the course of a burglary. The trial court, however, has discretion in sentencing not to apply the burglary antimerger statute and consider the crimes part of the same criminal conduct. State v. Lessley, 118 Wn.2d 773, 781, 827 P.2d 996 (1992).

Although defense counsel asked the court to exercise its discretion and not apply the burglary

anti-merger statute, the court never considered this request. RP(11/4/05) 26; RP(12/2/05) 3-20. Therefore, on remand, the court should make this consideration.

b. Firearm conviction

In State v. Haddock, 141 Wn.2d 103, 111, 3 P.3d 733 (1999), the Washington Supreme Court held that the general public was the victim of the defendant's unlawful possession of a firearm convictions. The court noted, however, that if Haddock had been convicted of assaulting his former girlfriend and her friends with the firearms, that the girlfriend and her friends might be considered the victims of the firearm possession convictions:

In holding that the general public is the victim of the unlawful possession of firearm counts, we are not unmindful of the dissent's position that the victims of Haddock's handguns were his former girlfriend and her friends. If Haddock had been charged with assaulting his former girlfriend and her friends with the handguns, or even with unlawfully displaying those weapons, we would be inclined to agree that those individuals were the crime victims. He was not, however, charged with those offenses.

Haddock, 141 Wn.2d at 111.

This case is precisely the case envisioned by the Supreme Court in Haddock. Eloise Ultican, Carol

Coolidge and Michael Hassenger were the specific members of the general public who were the victims of both the assaults and the unlawful possession of a firearm. Accordingly, since the act of possessing the firearm and using it to accomplish the assault was the same act at the same time and place, the possession of a firearm was the same criminal conduct with the assaults.

Mr. Kirkwood was entitled to a correct calculation of his offender score and, on remand, the court should not only consider whether to apply the burglary anti-merger statute, the court should also count the unlawful possession of a firearm and the assault as the same criminal conduct.

E. CONCLUSION

Appellant respectfully submits that his judgment and sentence should be reversed and his case remanded for the resentencing.

DATED this 19th day of April, 2006.

Respectfully submitted,


Rita J. Griffith
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Certificate of Mailing

I, Rita J. Griffith, certify that on April 19, 2006, I deposited in the United States Mail, copies of the document to which this certification is attached, as well as appendices, addressed to:

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Rita J. Griffith 4/19/06
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