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STATE OF WASHINGTON

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

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STATE OF WASHINGTON,

Respondent,

v.

ZACHARY LYNN FRAZIER,

Appellant.

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

The Honorable Frank E. Cuthbertson, Judge

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OPENING BRIEF OF APPELLANT

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PM 10/26/06

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in denying Mr. Frazier's motion to suppress the show-up identification.

2. The trial court erred in entering the following findings of fact in its Findings of Fact and Conclusions of Law Re: Identification Suppression Motion: 2, 4, 5, 11, 12, 14. CP 97-101

3. The trial court erred in entering the following conclusions of law its Findings of Fact and Conclusions of Law Re: Identification Suppression Motion: 19, 20, 21. CP 97-101.

4. The trial court erred in denying Mr. Frazier's motions to sever or for a mistrial based on the inappropriate conduct of his co-defendant.

5. The trial court erred in giving instruction no. 7. CP 44.

6. The trial court erred in entering separate judgments and sentences for first degree robbery, as charged in Count I of the amended information, and second degree assault, as charged in Counts II and III of the amended information.

7. The trial court erred in counting Mr. Frazier's second degree assaults as offender score

in calculating the standard range for his robbery conviction.

8. The trial court erred in including prior washed out convictions in Mr. Frazier's offender score.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court's denial of the defense motion to suppress the show-up identification deny Mr. Frazier his state and federal constitutional right to due process of law, under the Fifth and Fourteenth Amendments, where Mr. Frazier was shown in front of the truck associated with the crime and with his co-defendants, including Ms. Banks who could not have been one of the two intruders and who was known to the victims, and where the one witness who identified him told the police virtually while she was observing the intruders that another person committed the crime?

2. Did the trial court's denial of severance or a mistrial deny Mr. Frazier his state and federal constitutional rights to due process of law under the Fifth and Fourteenth Amendments where Mr. Calhoun's outbursts during trial necessarily prejudiced Mr. Frazier because the court's

instructions to the jury tied Mr. Frazier's guilt to Mr. Calhoun's?

3. Did the trial court's giving of instruction 7, proposed by the state, deny Mr. Frazier his due process right under the Fifth and Fourteenth Amendments to the federal constitution as well as his state due process rights where the instruction allowed the jury to convict on any of the charged crimes based on its belief that someone committed the crime and that Mr. Frazier participated in at least one of the charged crimes?

4. Did the trial court err in entering judgment and sentence for the two second degree assault charges where there was no effect or purpose of the assaults independent of the first degree robbery conviction?

5. Did the trial court err in counting the second degree assault convictions separately in calculating the offender score for the robbery conviction where each assault was the same criminal conduct.

6. Did the trial court err in considering Mr. Frazier's prior washed out convictions from

California in calculating Mr. Frazier's offender score.

**C. STATEMENT OF THE CASE**

**1. Procedural facts**

The Pierce County Prosecutor's office charged Zachary Frazier, along with co-defendants Abdul Calhoun and Verndeleao (Joy) Banks, with one count of first degree robbery, two counts of second degree assault, one count of first degree burglary, one count of third degree assault and one count of unlawful use of drug paraphernalia. CP 6-9. Ms. Banks entered a plea of guilty shortly after trial began.<sup>1</sup> RP 79-89. Mr. Frazier and Mr. Calhoun were tried together to a jury before the Honorable Frank E. Cuthbertson.

The jury acquitted Mr. Frazier of the use of drug paraphernalia charge and convicted him of the remaining counts. CP 29-34. On June 2, 2006, Judge Cuthbertson entered judgment and sentence, sentencing Mr. Frazier to terms within the standard

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<sup>1</sup> The consecutively-numbered volumes of the verbatim report of proceedings transcribed by court reporter Kyle Steadman are designated RP; the remaining short volumes are designated by date. The verbatim report of proceeding for May 3, 2006, was replaced by an amended volume.

range.<sup>2</sup> CP 79-91. Mr. Frazier filed a timely notice of appeal from the judgment and sentence. CP 92.

## 2. Trial evidence

The charges in this case arose from a July 11, 2005, robbery at the apartment of Isha Isaac in Lakewood, Washington. RP 98, 136, 334. A small safe with Ms. Isaac's personal papers and \$400 was taken. RP(5/3) 33-42; RP 209-210, 221, 239, 250.

Ms. Isaac, Ms. Isaac's sister Celia, and three of their children were asleep in the living room of the apartment; Ms. Isaac's fiance Rolan Kimbrough and their child were sleeping in the bedroom when two men entered through a living-room window. RP(5/3) 27--31; RP 136, 139-141, 215-220. The two men wore bandanas covering parts of their faces, and one or both of the men demanded to know where the safe was. RP(5.3) 33, 38; RP 100, 141-143, 217-218 235. One went through to the bedroom and the other went to where Celia Isaac had been sleeping on the couch and reached into her bra. RP(5/3) 34-38; RP 98-99, 142, 160, 216, 219-220. The man who went to the bedroom struck Kimbrough in the face, but did

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<sup>2</sup> An order correcting a scrivener's error in the judgment and sentence was entered on September 8, 2006. CP 95-96.

not injure him. RP 142-144. Kimbrough testified that his face hurt, like a sting. RP 170.

Celia Isaac testified at trial that she had the key in her bra and that she told the police on the night of the incident that she kept the key and other valuables in her bra. RP(5/3) 46-47; RP 98-100. In her handwritten statement to the police, however, Celia did not mention that she had the key in her bra or that she kept it there. RP 98-99. In contradiction, Officer Eric Bell, who responded to the 911 call and interviewed Isha, Celia and Kimbrough, testified that Celia never said that she had a key to the safe in her bra and that he was told that the key was in the keyhole of the safe attached by a pink keychain. RP 389.

According to Celia, no threats were made by the men and she was not injured. RP 116. Isha agreed that the men did not threaten them. RP 222.

Isha followed the two men outside once they had located the safe and left; she had already called 911 and took the phone with her. RP 151, 153, 220-222. Isha described the red truck the men got into and provided the license number of the truck. RP 223-224. Isha also told the 911 operator that she

recognized one of the intruders as someone called either "Teeth" or "Teas." RP 225.

A Lakewood police officer saw the truck a short time later, followed it into a driveway and arrested three people: Mr. Frazier, Mr. Calhoun and Ms. Joy Banks. RP 304-313, 360, 384-387. Isha and Kimbrough were taken to where the arrest took place to make an identification. RP 154. Kimbrough testified at trial that he identified Mr. Calhoun as the man who hit him; he could not identify Mr. Frazier. RP 157, 194. Although Kimbrough had not mentioned bandanas in his police statement, he identified the bandanas found near the truck at trial. RP 160, 183-184.

Isha testified that she identified Mr. Calhoun from his hairstyle as the person who hit Kimbrough and identified Mr. Frazier as the man in the living room. RP 229-232, 241. According to Isha, she had met Mr. Frazier several nights earlier as the boyfriend of her friend Joy Banks, the third person in the car. RP 259.

Celia Isaac was unable to identify Mr. Frazier as one of the intruders; on direct examination, she was unable to identify him in the courtroom as Ms.

Banks' boyfriend. RP(5/3) 33. On redirect, however, when the prosecutor specifically pointed to Mr. Frazier, Celia agreed that she was the person with Ms. Banks whom she met one or two days before the incident. RP 113-115, 126-127.

Officer Bell, who took Isha and Kimbrough to the show-up, insisted that Mr. Frazier was identified as the intruder who went to the bedroom and hit Kimbrough and Mr. Calhoun as the intruder who put his hand inside Celia's bra. RP 343, 345, 356.

The safe and two bandanas were found under and near the truck after it was stopped. RP 313-315.

The 911 tape was played to the jury without objection. RP 445, 451-452.

Mr. Calhoun testified that Ms. Banks had picked him up at a friend's house and directed him to the house where the arrest took place. RP 464-466. According to Mr. Calhoun, Mr. Frazier was at the house and entered the truck only because the arresting officers ordered him to get into the truck. RP 470-471.

### **3. The show-up**

Prior to trial, the defendants challenged the show-up identification as impermissibly suggestive. RP 52. Counsel argued that the defenants were identified because they were viewed in front of the truck in which they knew the robbers left the apartment. RP 52-53, 54-55. Defense counsel for Mr. Frazier argued in particular that Isha Isaac did not identify him until Ms. Banks was removed from the car and Isha associated him with Ms. Banks. RP 54. The trial court denied the motion to suppress the identification on the grounds that Ishi and Kimbrough had an opportunity to observe the defendants during the incident; Isha had been accurate about the truck, bandanas and clothing; Isha and Kimbrough were certain and the show-up took place a short time after the incident. RP 66-69.

The trial court subsequently entered written findings of fact and conclusions of law in support of its denial of the defense motions to suppress their pre-trial identifications. CP 97-101.

### **4. Denial of severance or mistrial**

Prior to trial, counsel for Abdul Calhoun asked the trial court for a mental health evaluation for

his client. RP 32. Counsel noted that Mr. Calhoun had already had three different attorneys and had the defense investigator quit. RP 34. When the trial court denied the request, counsel for Ms. Banks moved for severance. RP 44, 50. Defense counsel renewed this motion for severance during the course of trial and on two occasions moved for a mistrial because of Calhoun's outbursts in front of the jury. Counsel argued that Calhoun's disruptive behavior denied his co-defendant a fair trial. RP(5/1) 4-5.

Calhoun personally petitioned the court for interrogatories and dismissal, tried repeatedly to fire his attorney, filed affidavits of prejudice, took Mr. Frazier's copies of proposed jury instructions, and accused the court of treason. RP(5/1) 10-11; RP(5/2) 3, 10; RP 91, 275-276, 413, 416-417, 423-426, 454.

In front of the jury, Calhoun addressed the jurors and told them that he would like them to know that he had fired his attorney and his attorney had denied him his rights. RP 277. The trial court had to excuse the jury and warn Calhoun that he would be held in contempt. RP 279. Defense counsel

specifically asked for severance and expressed concern that Mr. Frazier could not receive a fair trial because Calhoun's highly disruptive conduct was inflammatory and prejudicial. RP 279. Counsel asked for a mistrial. RP 279-281. The court denied the motion but instructed the jury to disregard the interruption. RP 279-281.

Calhoun addressed the jury at the time he was being sworn in as a witness and referred to his reliance on the Holy Bible and cited Biblical authority. RP 459. The court had to excuse the jury. RP 459.

Calhoun stated several times in front of the jury that the judge did not want the jurors to hear the whole story and that his attorney lied. RP 472-475. He accused the judge of treason. In response, the court excused the jurors and told counsel that it would not be possible to continue taking testimony from Calhoun.<sup>3</sup> RP 475. This, however, did not end Calhoun's outbursts. He again addressed

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<sup>3</sup> At the urging of the prosecutor, the court allowed Mr. Chambers to conduct a limited cross examination of Mr. Calhoun. RP 475-480. While the jurors were excused, the court told Calhoun that the stun gun would be used if there were further outbursts. RP 475-476.

the jury and told that that the judge had threatened to shock him. RP 499-500. The court had Calhoun removed from the courtroom and instructed the jurors to disregard the outburst. RP 500.

Calhoun indicated that he would file a complaint with the judicial conduct commission. RP 512. Defense counsel again moved for severance or a mistrial because the jury heard Calhoun say that the judge had threatened to put a shock collar on him and that he had been taken from the courtroom by officers. RP 513-514. The court denied the motions on the grounds that the jurors could differentiate between Mr. Frazier's conduct and Mr. Calhoun's. RP 514.

#### **D. ARGUMENT**

##### **1. THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION TO SUPPRESS THE SHOW-UP IDENTIFICATION.**

The trial court erred in denying the defense motion to suppress the show-up identification. The issue should not have been whether there was strong evidence linking the defendants to the robbery, but whether the circumstances of the show-up were impermissibly suggestive. The defendants were shown in front of the truck which was linked to the

robbery, creating a likelihood that Isha Isaac and Rolan Kimbrough would have identified any two men who looked similar to the robbers. Similarly, the presence of Ms. Bank, who could not have been identified as one of the robbers, created a likelihood of misidentification; Isha associated Mr. Frazier with Ms. Banks and likely identified him as one of the intruders for that reason. Similarly, showing Mr. Frazier at the same time as Mr. Calhoun was prejudicial; it was Calhoun's hairstyle that was the basis of Kimbrough's identification of him. RP 157, 367.

Second, the identifications were not shown to be reliable. Isha identified, by name, someone else--"Teeth" or "Teas"--to the 911 operator; "Teas" wore his hair in braids and had a baby face. RP 247, 260. Isha made that identification virtually contemporaneously with the incident. RP 220-225. It was relatively dark during the incident, and the intruders had their faces covered. RP 104, 143, 235, 247. Kimbrough was not able to identify Mr. Frazier, nor was Celia Isaac, the person who had the best opportunity to see him. RP 128, 194. Isha identified

Mr. Frazier because she had seen him with Ms. Banks, not because she recognized him from the scene.

Although Isha and Kimbrough provided general descriptions of clothing and relative heights, neither provided a detailed description. RP 340-342. The show-up identifications should have been suppressed.

Impermissibly suggestive line-up procedures violates due process, when the procedure creates an "irreparable probability of misidentification." State v. Brown, 128 Wn. App. 307, 312, 116 P.3d 400 (2005) (citing State v. Ramirez, 109 Wn. App. 749, 761, 37 P.3d 343 (2002) and State v. Vickers, 107 Wn. App. 960, 967, 29 P.3d 752 (2001), aff'd, 148 Wn.2d 91 (2002)). In Brown, unlike this case, the court upheld a show-up of one person who was not shown with other possible suspects or other items associated with the crime. Brown, 128 Wn. App. 311.

The suggestive show-up was not overcome by a showing of reliability, considering (1) the opportunity of the witnesses to view the suspect at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description; (4) the level of certainty at the

confrontation; and (5) the time between the crime and the confrontation. Ramirez, 109 Wn. App. at 762; State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999).

Here, contrary to the findings and conclusions of the trial court, the entire incident took place within minutes and the apartment was relatively dark. While Isha and Kimbrough were certain at the time of the show-up and the show-up was close in time to the incident, their prior identifications had been very general and Isha made a misidentification virtually contemporaneously with robbery to the 911 operator. Although she had met Mr. Frazier on a prior occasion, she did not identify him until after she saw Ms. Banks.

Insofar as the court's findings of fact reflect that all of the adults in the apartment "had face contact with the robbers for several minutes during the robbery (finding 2), that the victims could distinguish features (finding 4), that the robbers "were shouting commands at the victims and making demands of them throughout the time they were in the apartment" (finding 5), that two of the three victims identified Mr. Frazier (finding 12); and

that the defendants were displayed one at a time and that Ms. Isaac and Mr. Kimbrough both positively identified Mr. Frazier (finding 14), the findings were not supported by substantial evidence in the record. Only one person identified Mr. Frazier as one of the intruders, Isha Isaac. RP 128, 194. Mr. Kimbrough was in the bedroom for most of the incident and there was no testimony that he observed Mr. Frazier for any length of time. RP 140-144. Celia reported that Mr. Frazier said nothing during the incident. RP 113-114. Isha and Kimbrough reported that one or both of the intruders kept asking where the safe was, but Isha was clear that there were no threats. RP 222. Findings which are not supported by substantial evidence need not be considered verities on appeal. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (findings are not supported by substantial evidence unless there is sufficient evidence in the record to convince a fair-minded, reasonable person of the truth of the fact).

Under these circumstances the trial court erred in ruling that the identification procedures were not impermissibly suggestive and that they were

reliable enough to be admitted. Tellingly, Celia Isaac, who had perhaps the best opportunity of all to identify Mr. Frazier, if he were the person who assaulted her, could not identify him as the person who entered the apartment. Celia was not at the show-up and was not tainted by the procedure. The show-up identifications should have been suppressed. The error in not suppressing the evidence was constitutional and not harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Mr. Frazier's convictions should be reversed with instructions to suppress the identification of Mr. Frazier on remand.

**2. THE TRIAL COURT ERRED IN DENYING MR. FRAZIER EITHER SEVERANCE OR A MISTRIAL BASED ON THE MISCONDUCT AND OUTBURSTS OF HIS CO-DEFENDANT.**

The trial court erred in denying Mr. Frazier's motions for severance of his trial from Mr. Calhoun's and in denying his motion for a mistrial after Mr. Calhoun tainted the jury with his outbursts. As the jury was instructed, the jury's consideration of Mr. Frazier's guilt was inextricably intertwined with the jury's consideration of Mr. Calhoun's guilt. There was

simply no way that the prejudice to Mr. Calhoun of his own disruptive and inappropriate behavior could be isolated from the prejudice to Mr. Frazier.

An irregularity in the trial proceedings requires a mistrial where the effect of the irregularity deprives the defendant of a fair trial. State v. Post, 59 Wn. App. 389, 797 P.2d 1160 (1990). The relevant factors are (1) the seriousness of the irregularity; (2) whether the improper statement was cumulative; (3) whether the jurors were properly instructed to disregard the statement; and (4) whether the irregularity was so grievous that nothing short of a new trial could remedy it. State v. Essex, 57 Wn. App. 411, 415-416, 788 P.2d 589 (1990).

In this case, those criteria were met. Mr. Calhoun's outbursts during which he personally addressed the jurors and told them they were not hearing the whole story, the judge had committed treason and his lawyer and other witnesses were lying surely diminished Mr. Calhoun in the eyes of the jurors were serious and repeated irregularities in the trial proceedings. RP 472-475, 499-500. Having Mr. Calhoun removed by officers from the

courtroom was a serious irregularity. RP 500. Mr. Calhoun's statements were not proper evidence and not cumulative of evidence. Although the jurors were instructed to disregard the outbursts, nothing short of a new trial court could remedy the prejudice. The court erred in denying severance or a mistrial. The court's basis for denying a mistrial was that the jurors would see that Mr. Frazier behaved appropriately in contrast with Mr. Calhoun. RP 514. The court's reason, however, did not address the real prejudice: if Mr. Calhoun's behavior discredited him in the eyes of the jury and made it more likely they would find him guilty, it also necessarily made it more likely that the jury would convict Mr. Frazier. The jury was instructed in a manner that made Mr. Frazier's guilt virtually the same as Mr. Calhoun's guilt.

In Remmer v. United States, 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 2d 654 (1954), the Supreme Court held that prejudice is presumed where there is a private contact or tampering occurs about a matter pending before the court. Mr. Calhoun's contact, "Ladies and Gentlemen . . ." directly to the jury about the pending charges, while it took place in

open court was effectively a private contact and a blatant attempt to tamper with the jury that should have been presumed prejudicial.

In North Carolina v. McGuire, Puff and Wellman, 254 S.E.2d 165 (N. Carolina 1979), the Supreme Court of North Dakota upheld the convictions of two co-defendants who were tried jointly with a third misbehaving co-defendant. In upholding the convictions, the North Carolina court cited several 1972 federal cases in which convictions were upheld under egregious circumstances. McGuire, 254 S.E.2d at 169-170. The McGuire court, however, quoted the court in United States v. Bamberger, 456 F.2d 1119 (3rd Cir. 1972), cert. denied sub nom Crapps v. United States, 406 U.S. 969 (1972), that the "issue presents a delicate balancing of the right of a passive co-defendant to have his cause determined in an atmosphere free of inflammatory speech and gesture, society's interest in speedy trials for those accused of a crime, the realities of sound judicial administration, and a consideration of convenience to witnesses." McGuire, at 170; Bamberger, 456 F.2d at 1128.

Here, Mr. Frazier's right to a trial determined in an atmosphere free of inflammatory speech and gesture was not sufficiently protected. The attempts to communicate directly with the jurors, to tell them that the trial judge had committed treason and his lawyer lied, could not help but prejudice Mr. Frazier. Had the issue of Mr. Calhoun's guilt not been tied so strongly to a determination of Mr. Calhoun's guilt this might not have been the case. Unfortunately, it was strongly tied to a determination of Mr. Calhoun's guilt.

The conduct in this case resulted in a denial of a fair trial to Mr. Frazier and should result in reversal of Mr. Frazier's convictions and retrial without the presence of Mr. Calhoun. While there may be many circumstances in which outbursts by a co-defendant do not reflect on a defendant's guilt or innocence, but this is not one of those cases.

**3. THE TRIAL COURT ERRED IN GIVING INSTRUCTION NUMBER 7.**

The court's Instruction number 7 relieved the state of its burden of proving every element of the crimes charged beyond a reasonable doubt, and thus deprived Mr. Frazier of due process of law under the state and federal constitutions. In re Winship,

397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-221, 616 P.2d 628 (1980).

In effect, the court's instruction told the jurors that if they found Mr. Frazier participated in "a" crime charged against him, it need not determine whether he was guilty as an accomplice or principal in determining his guilt or innocence on any of the crimes. Further, the court's instruction required the jury to determine only whether the fact that a crime had been committed had been proven beyond a reasonable doubt, not that Mr. Frazier or Mr. Calhoun had committed the crime beyond a reasonable doubt. In this way, all the jury had to find was that they were convinced beyond a reasonable doubt that one of the charged crimes had actually taken place or been committed by someone, and that Mr. Frazier participated in at least one of the crimes. This is far short of proof beyond a reasonable doubt of every fact necessary to establish every element of the crime beyond a reasonable doubt. Winship, supra.

The trial court instructed the jury:

If you are convinced that both defendants participated in a crime or crimes charged in this case and that the crime or crimes have been proven beyond a reasonable doubt, you need not determine which defendant was an accomplice and which was principal.

CP 44. Then in each "to-convict" instruction for the robbery, second degree assault and burglary counts, each element provided that either the defendant or an accomplice committed that element. CP 49, 59, 24, 30.

Here, identification was a central issue at trial. Isha had identified someone else as committing the crime to the 911 operator. RP 245, 253, 263. The officer who was present during the show-up identification procedure testified that Mr. Frazier was the person who entered the bedroom and hit Kimbrough. RP 345. This directly contradicted the testimony of Kimbrough and Isha Isaac at trial. RP 217-218, 144-145, 157. The state sought and were given an instruction, Instruction 7, which solved its evidentiary problems and relieved it of its constitutional obligation to prove every element of every crime charged beyond a reasonable doubt.

While the state does not have to prove whether the defendant was an accomplice or the principal in

a crime, the state must prove every element of each crime charged and must prove that the principal and accomplice -- rather than just someone -- actually committed the crime. Instruction 7 did not require proof of each crime or that each crime was committed by Mr. Frazier and Mr. Calhoun. Instruction 7 denied them due process of law and should require reversal of Mr. Frazier's conviction.

**4. MR. FRAZIER SHOULD NOT HAVE BEEN PUNISHED SEPARATELY FOR HIS ASSAULT CONVICTIONS.**

The trial court erred in entering separate convictions for the second degree assault charges against Mr. Frazier. The assaults had no separate or independent purpose other than to accomplish the robbery or the theft, which was an essential element of the robbery; and the robbery became a first degree robbery only on the jury's finding of the commission of an assault. As the jury was instructed, it could not have convicted Mr. Frazier of robbery in the first degree or assault in the second degree without finding beyond a reasonable doubt that each crime had the same purpose and intent. Given that the assaults had no independent purpose or effect, under State v. Freeman, 153 Wn.2d

765, 108 P.3d 753 (2005), they merged into the robbery conviction.

The trial court instructed the jury that to convict Mr. Frazier of robbery in the first degree, as charged in Count I, it must find beyond a reasonable doubt:

(1) That on or about the 11th day of July, 2005, Zachary Lynn Frazier or an accomplice unlawfully took personal property belonging to another from the person or in the presence of another;

(2) *That Zachary Lynn Frazier or an accomplice intended to commit theft of property;*

(3) That the taking was against the person's will by Zachary Lynn Frazier's or an accomplice's use or threatened use of immediate force, violence or fear of injury to that person or to the person or property of anyone;

(4) That the force or fear was used by Zachary Lynn Frazier or an accomplice to obtain or retain possession of the property or overcome resistance to the taking;

(5) *That in the commission of these acts or in immediate flight therefrom Zachary Lynn Frazier or an accomplice inflicted bodily injury; and*

(6) That the acts occurred in the State of Washington.

CP 49 (emphasis added).

The court instructed the jury that to convict Mr. Frazier of assault in the second degree, as

charged in Count II, it must find beyond a reasonable doubt that either he or an accomplice "assaulted Rolan Kimbrough," and "[t]hat the assault was committed with intent to commit Robbery or Theft in the Second Degree." CP 59. The court instructed the jury on Count III, on the same elements, but with the intended victim being Celia Isaac. CP 61.

Under State v. Freeman, the assault convictions should have merged with the robbery conviction. In Freeman, the Supreme Court held that second degree assault and first degree robbery merge unless each has an independent purpose or effect. The assaults alleged in this case clearly had no independent purpose or effect other than to further the robbery and the underlying theft. Kimbrough was hit to further the robbery or the theft which constituted an element of the robbery and, under the state's theory, the motivation for reaching into Celia's bra was to further the robbery or theft. If the jury had not found the intent was to further the robbery or theft, it could not have convicted Mr. Frazier. Therefore the trial court erred in imposing separate

convictions and sentences for the assault convictions.

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. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)).

In determining legislative intent, the first inquiry considered by the Court was whether there was explicit evidence of intent. Freeman, at 771-772. In the absence of explicit indication of intent, the Freeman court found the next step to be 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 Court held that 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 considered by the Freeman court was 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 held 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, under the analysis and holding in Freeman, it is clear that there was no independent purpose of either reaching into Celia Isaac's bra or striking Rolan Kimbrough. Under Freeman, the assaults should merge with the robbery conviction. The assault convictions should be reversed and vacated.

**5. MR. FRAZIER'S ASSAULT CONVICTIONS ARE THE SAME CRIMINAL CONDUCT WITH HIS ROBBERY CONVICTION.**

For purposes of calculating offender score for Mr. Frazier's robbery conviction, the trial court erred in not considering the assault convictions as

the same criminal conduct. As the jury was instructed the robbery conviction was not tied to any particular victim. Therefore, with respect to each second degree assault charge, the charge was the same criminal conduct and should not have counted separately in the offender score for the robbery conviction.

Two or more current offenses are counted as one crime if they: (1) have the same objective criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. RCW 9.94A.589(1)(a).

To determine whether two or more crimes shared the same criminal intent "[t]he relevant inquiry is 'the extent to which the criminal intent, objectively viewed, changed from one crime to the next. . . This, in turn, can be measured in part by whether one crime furthered the other crime.'" State v. Williams, 135 Wn.2d 365, 368, 957 P.2d 816 (1998) (citing State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994)).

The "furtherance" test, while not the sole linchpin of the analysis, is relevant and useful in

"sequentially committed crimes." State v. Haddock, 141 Wn.2d 103, 114, 3 P.3d 733 (2001).

State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237 (1987), provides an instructive example. The defendant, in Dunaway, got into a car with two women at a shopping mall near Everett, Washington, and forced them, at gun point, to drive to Seattle. Dunaway, 109 Wn.2d at 211. The defendant took money from each woman and forced one of the women to enter a bank to withdraw money to give to him. When the woman failed to return, Dunaway left. He pled guilty to one count of kidnapping and one count of robbery for each victim. Dunaway, at 211-221. The Supreme Court held that the convictions for both crimes against each victim encompassed the same criminal conduct; the kidnapping conviction depended on his intent to commit robbery and his intent did not change between the two crimes. Dunaway, at 217.

In State v. Porter, 133 Wn.2d 177, 183-184, 942 P.2d 974 (1997), the court held that two separate sales of controlled substances, first methamphetamine and then marijuana, were the same criminal conduct because the defendant had the present intent to sell the drugs in both crimes.

As these cases show, "intent," in the context of same criminal conduct analysis, does not depend on the subjective mens rea of the crimes. The sentencing court must consider the offender's objective criminal purpose in committing the crimes. State v. Lessley, 118 Wn.2d 773, 777-778, 827 P.2d 996 (1992).

In State v. Anderson, 72 Wn. App. 453, 464 P.2d 1001 (1994), the defendant, who was an inmate being transported, struggled with the transporting officer and escaped. The Anderson court held that the assault furthered the escape and constituted the same criminal conduct. Anderson, 72 Wn. App. at 464. In State v. Collins, 110 Wn.2d 253, 262-263, 751 P.2d 837 (1988), the court held that two convictions were the same criminal conduct where the defendant knocked on the victim's door looking for the address of the previous residents, but when the victim allowed the defendant in to use the telephone, he assaulted and raped her. In State v. Vermillion, 66 Wn. app. 223, 832 P.2d 95 (1992), the court held that an assault furthered the commission of indecent liberties where the defendant knocked his victim to the ground and then groped her. See

also, State v. Taylor, 90 Wn. App. 312, 950 P.2d 526 (1998) (assault and kidnapping were the same criminal conduct where the assault furthered the defendant's intent to abduct the victim).

Here, the assaults furthered the robbery and had the same objective intent as the robbery. Each assault should have been considered as the same criminal conduct with the robbery, reducing Mr. Frazier's offender score by four points.

**6. MR. FRAZIER'S FIVE CALIFORNIA POSSESSION OF A CONTROLLED SUBSTANCE CONVICTIONS WASH OUT AND SHOULD NOT BE COUNTED AS OFFENDER SCORE.**

All of Mr. Frazier's five California convictions for possession of a controlled substance took place on or before October 7, 1993. His next conviction was on May, 4, 2001, over ten years later. Because possession of a controlled substance is a class C felony in Washington, Mr. Frazier's California convictions washed out before sentencing. RCW 69.50.403; RCW 9.94A.525(2). Therefore, on remand, the prior California convictions should not be counted in calculating Mr. Frazier's offender score.

At sentencing, defense counsel noted that Mr. Frazier asserted that his California offenses would

wash out, but concluded that it did not matter because Mr. Frazier's offender score would be 9 even without the prior convictions. RP(sent) 3-4. This, however, was wrong and defense counsel's error of law did not waive the issue. In re Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002). In Goodwin, the Washington Supreme Court held that a factual sentencing error can be waived by stipulation, but a legal error leading to an excessive sentence cannot. Goodwin, 146 Wn.2d at 874-876. In particular the Goodwin court held that Goodwin was entitled to resentencing without his erroneously included juvenile convictions which had washed out. As in Goodwin, Mr. Frazier did not waive his right to contest the inclusion of prior washed-out convictions in his offender score.

Whether the second degree assault convictions merge with the robbery conviction or are considered the same criminal conduct, Mr. Frazier's offender score should be reduced by four points, with only three points for other current offenses. With three points for prior offenses which did not wash out, his offender score should be not more than six rather than nine.

**7. THE TRIAL COURT ERRED IN NOT EXERCISING DISCRETION ON WHETHER TO USE THE BURGLARY ANTI-MERGER STATUTE.**

The trial court should have exercised its discretion in determining whether or not to apply the burglary anti-merger statute.

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).

Here, the trial court did not exercise its discretion in deciding whether to apply the burglary anti-merger statute and it failed to consider whether the burglary and robbery in this case were the same criminal conduct. On remand, the trial court should consider whether to apply the burglary anti-merger statute should apply.

Under the same criminal conduct test, two or more current offenses are counted as one crime if they: (1) have the same objective criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. RCW 9.94A.400(1)(a).

To be the same criminal conduct, the crimes need not be simultaneous. State v. Porter, 133 Wn.2d 177, 942 P.2d 974 (1997).

Crimes have the same objective criminal intent if the intent did not change from one crime to the next and if one crime furthered the other. State v. Taylor, 90 Wn. App. 312, 950 P.2d 526 (1998); State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994).

Here, Isha Isaac was the victim of the robbery and the burglary. The crimes took place at the same time and location and the burglary furthered the robbery. The crimes were the same criminal conduct and the trial court should have determined whether the burglary ant-imerger statute should be applied to prevent them from being counted as the same crime in calculating the offender score.

Counting the convictions as the same criminal conduct would reduce Mr. Frazier's offender score for his robbery conviction should be reduced by two more points.

**E. CONCLUSION**

Appellant respectfully submits that his convictions should be reversed and remanded. In any event his case should be remanded for resentencing.

DATED this 26<sup>th</sup> day of October, 2006.

Respectfully submitted,

  
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Certification of Service

I, Rita Griffith, attorney for Zachary Frazier, certify that on Oct. 26, 2006, I mailed to each of the following persons a copy of the document on which this certification appears:

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