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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

EDDIE EUGENE CRUMBLE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 06-1-00814-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should defendant's two convictions for first degree assault be vacated because these convictions were based upon the same acts as his two convictions for attempted first degree murder?

2. Did the sentencing court properly sentence defendant as a persistent offender on the two attempted first degree murder counts and the first degree burglary count when defendant, on separate occasions, had previously been convicted of two most serious offenses?

B. STATEMENT OF THE CASE.

1. Procedure

On February 17, 2006, the State charged Eddie Eugene Crumble, hereinafter "defendant," with two counts of attempted first degree murder, each with a firearm enhancement, and one count of first degree unlawful possession of a firearm. CP 1-5. The State filed a persistent offender notice on February 17, 2006. CP 43. The State filed an amended information on April 6, 2006. CP 6-9. In the amended information, the State added two counts of first degree assault and one count of first degree burglary, all with firearm enhancements, to the counts in the original information. CP 6-9. On October 12, 2006, the parties appeared before

the Honorable Judge Ronald Culpepper and filed document entitled 1) stipulations for presentation as evidence in bench trial and 2) waiver of jury trial. CP 10-14, 44. RP 4-5, 6-13.

On October 23, 2006, the Court found defendant guilty as charged. CP27-29; RP 15-16. The Court orally sentenced defendant as a persistent offender to life in prison without the possibility of release on the two attempted first degree murder counts, the two first degree assault counts, and the first degree burglary count; 116 months on the first degree unlawful possession of a firearm count; and 60 months on each of the firearm enhancements. RP 29-30. The Court ordered all counts to run concurrent with each other, but consecutive to the firearm enhancements. RP 29-30.

The judgment and sentence filed on October 23, 2006, sentenced defendant as a persistent offender to life in prison without the possibility of release on the two attempted first degree murder convictions, the two first degree assault convictions and the first degree burglary conviction. CP 27-39. On the first degree unlawful possession of a firearm conviction, defendant was sentenced to 116 months. CP 27-39. All counts were run concurrent except the two attempted murder convictions, which were run consecutive to each other. CP 27-29. The firearm enhancements for the two attempted murder counts and the first degree

burglary count were run consecutive to each other and all other sentences. CP 27-39. The firearm enhancements for the two first degree assault convictions were run concurrent. CP 27-39. The total confinement ordered on defendant's judgment and sentence was life plus 180 months. CP 27-39.

This timely appeal followed.

2. Facts

On January 21, 2006, defendant took a .380 caliber handgun and jewelry from Trumaine House. CP 11. The gun and jewelry belonged to House. CP 11. Defendant fled the scene in a vehicle driven by Lakeisha Crawford. CP 11. Shadaya Denegal was a passenger in that vehicle. CP 11. When House reported the theft to the police, House identified defendant by his street name "Stack." CP 12. On February 4, 2006, police arrested Crawford and she identified defendant as "Stack." CP 12. After her arrest, Crawford called defendant from jail and told him that Shadaya Denegal had identified defendant to police. CP 12. On February 6, 2006, defendant was charged with first degree robbery and first degree unlawful possession of a firearm for the House incident. CP 12. Because of defendant's criminal history, the first degree robbery charge would be his third "strike" offense. CP 12.

On February 15, 2006, defendant and Andrew Pollard went to the residence of Shadaya Denegal and her mother, Shonda Denegal. CP 12. Defendant was aware that he had been charged with his third “strike” offense, and that he would be sentenced to life in prison if convicted. CP12-13. Defendant went to the Denegals’ residence with a loaded handgun to prevent Shadaya Denegal from testifying against him. CP 13.

When they arrived at the Denegals’ residence, defendant had Pollard knock on the door while defendant stood to the side. CP 13. Shadaya Denegal opened the door and defendant forced his way into the residence without permission. CP 13. Defendant asked Shadaya Denegal who else was home and she told him her mother was in the residence. CP 13. Defendant then shot Shadaya Denegal in the head with his handgun. CP 13. Shadaya Denegal suffered a gunshot wound to her face and was bleeding from her face and ear. CP 13.

After shooting Shadaya Denegal, he walked into her mother’s bedroom and fired one bullet into Shonda Denegal’s head, one bullet into her torso, and one bullet into her thigh. CP 13. Defendant then fled the residence. CP 13.

Both Shadaya and Shonda Denegal survived, but were severely injured. CP 13. As a result of the shootings, Shonda Denegal lost one eye, one kidney, and part of her liver. CP 13.

C. ARGUMENT.

1. DEFENDANT'S TWO CONVICTIONS FOR FIRST DEGREE ASSAULT SHOULD BE VACATED BECAUSE THESE CONVICTIONS WERE BASED UPON THE SAME ACTS AS THE TWO ATTEMPTED FIRST DEGREE MURDER COUNTS.

Both the United States Constitution and the Washington State Constitution protect a person from twice being placed in jeopardy for the same offense. U.S. Const. amend. V (no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."); Wash. Const. art. I, § 9 (no person shall "be twice put in jeopardy for the same offense). "The federal and state [double jeopardy] provisions afford the same protections and are 'identical in thought, substance, and purpose.'" In re Pers. Restraint of Davis, 142 Wn.2d 165, 171, 12 P.3d 603 (2000) (quoting State v. Schoel, 54 Wn.2d 388, 391, 341 P.2d 481 (1959)). To determine if the defendant has been punished twice for a single act under separate criminal statutes, the courts apply the test laid out in Blockburger V. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Under the Blockburger test, double jeopardy arises if the offenses are identical both in law and in fact. Blockburger, 284 U.S. 299, 304. "[W]here 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." Blockburger, at 304 citing Gavieres v.

United States, 220 U.S. 338, 342, 31 S. Ct. 421, 55 L. Ed. 489 (1911).

When convictions on two crimes for the same act would constitute double jeopardy, the remedy is to vacate the conviction for the “lesser” crime. In re Pers. Restraint of Burchfield, 111 Wn. App 892, 899, 46 P.3d 840 (2002).

In the present case, defendant went to the Denegals’ residence with the intent to prevent Shadaya Denegal from testifying against him. CP 13. Defendant shot Shadaya Denegal in the head and then went into her mother’s room and shot her in her head, torso, and leg. CP13. For these acts, the defendant was convicted of two counts of first degree assault, two counts first degree attempted murder, one count of first degree unlawful possession of a firearm, and one count of first degree burglary. RP 29-30. Defendant challenges his first degree assault convictions because the same acts, shooting Shadaya and Shonda Denegal, were the basis for both the assault and the attempted murder convictions.

Applying the Blockburger test to the present case, neither crime requires proof that the other does not. When the defendant shot Shadaya Denegal, he committed both first degree assault and attempted first degree murder. When defendant shot Shonda Denegal, he committed both first degree assault and attempted first degree murder. Therefore, under the Blockburger test, convictions for both the assaults and the attempted murders constitute double jeopardy. The first degree assault convictions should be vacated and the case remanded for resentencing on the

remaining two counts of attempted first degree murder, one count of first degree unlawful possession of a firearm, and one count of first degree burglary and their respective firearm enhancements.

The practical effect of vacating defendant's two assault convictions is minimal. On remand, defendant will again be sentenced to life in prison as a persistent offender on each of the two attempted first degree murder convictions and the one first degree burglary conviction. Each of these counts will still be firearm enhanced. Additionally, for the first degree unlawful possession of a firearm, defendant's offender score will remain unchanged as "nine plus."

2. THE DEFENDANT WAS PROPERLY SENTENCED TO LIFE IN PRISON ON HIS TWO COUNTS OF ATTEMPTED FIRST DEGREE MURDER AND ONE COUNT OF FIRST DEGREE BURGLARY PURSUANT TO THE PERSISTENT OFFENDER STATUTE.

Defendant asserts that he was improperly sentenced under RCW 9.94A.589(1)(b). This statute states in the relevant part:

Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level...shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offer score and the standard sentence for other serious violent offenses shall be determined by using an offender score of zero...

However, RCW 9.94A.589(1)(b) is not applicable when a defendant is sentenced as a persistent offender. RCW 9.94A.570 is the exclusive statutory authority for sentencing a persistent offender. See, State v. Thorne, 129 Wn.2d 736, 761, 921 P.2d 514 (1996). Under RCW 9.94A.030(33)¹, a defendant who has been convicted of a most serious offense and has previously been convicted on at least two separate occasions of most serious offenses is considered a “persistent offender.”

The Persistent Offender Accountability Act was enacted as an amendment to the SRA. Thorne, at 763. As such, the persistent offender law must be read in light of the SRA. Id. at 763. The SRA was enacted, in part, to ensure that punishment for a criminal offense is proportionate to the seriousness of the offense and the offender’s criminal history and to reduce the risk of reoffending by offenders in our community. RCW 9.94A.010(1) and (7). To effectuate these purposes, the SRA establishes sentencing guidelines and requires that those guidelines apply “equally to offenders in all parts of the state, without discrimination as to any element

¹ “Persistent Offender” is an offender who:
(a)(i) Has been convicted in this state of any felony considered a most serious offense; and
(ii) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions...of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.525...
RCW 9.94A.030(33)

that does not relate to the crime or the previous record of the defendant.”

RCW 9.94A.340. Sentences are determined based on the seriousness level of the crime committed and on the prior convictions of the defendant.

See, RCW 9.94A.520 and RCW 9.94A.525.

Consistent with the purposes of the SRA, the Persistent Offender Accountability Act is limited to persons convicted on three occasions of most serious offenses as defined in RCW 9.94A.030(29). Because of this limitation, only certain crimes and certain offenders are subject to its terms. However, where an offender fits within the definition of “persistent offender,” the sentencing terms of the law are mandatory. Thorne, at 764.

In State v. Thorne, the defendant challenged the constitutionality of the Persistent Offender Accountability Act. 129 Wn.2d 745-46. Thorne, who had two prior most serious offense convictions, was convicted of a third most serious offense and sentenced as a persistent offender under former RCW 9.94A.120(4)². Thorne, 129 Wn.2d 736, 761. In finding the statute constitutional, the court held that the Persistent Offender Accountability Act is a sentencing statute. Id. at 778.

In State v. Ball, Ball was convicted of four counts of child molestation and had previously been convicted of first degree statutory rape. 127 Wn. App 956, 113 P.3d 520 (2005). The State asked that Ball

be sentenced to life without the possibility of early release on each of the four counts of child molestation. Ball, 127 Wn. App. at 958. The sentencing court followed the State's recommendation. Id. In affirming Ball's sentence, this court stated that RCW 9.94A.570 is neither an enhancement statute nor an exceptional sentence statute, but a sentencing statute for recidivism. Id. at 959-60.

In the present case, the court orally sentenced defendant as a persistent offender under RCW 9.94A.570 for his two counts of attempted first degree murder and one count of first degree burglary. The judgment and sentence used at defendant's sentencing, however, contained a scrivener's error that omitted RCW 9.94A.570 as the sentencing authority for defendant's persistent offender convictions. It properly listed RCW 9.94A.589 as the sentencing authority for defendant's nonstrike offense.

At the time of sentencing, defendant had previously been convicted of two most serious offenses on two separate occasions. Like Thorne and Ball, once defendant fit within the definition of persistent offender it was mandatory for him to be sentenced to life in prison. The court's sentence of life in prison on defendant's two counts attempted first degree murder and one count of first degree burglary should be affirmed. This court should remand for the purpose of correcting the scrivener's error that

² Former RCW 9.94A.120(4) is now RCW 9.94A.570.

omitted RCW 9.94A.570 as the sentencing authority for defendant's persistent offender counts.

D. CONCLUSION.

For the reasons stated above, the defendant's convictions for two counts of first degree assault should be vacated. Defendant's sentence on the remaining counts should be affirmed because defendant was properly sentenced to life in prison as a persistent offender on his two counts of attempted first degree murder and one count of first degree burglary. This court should remand for purposes of correcting the scrivener's error in defendant's judgment and sentence.

DATED: JULY 27, 2007

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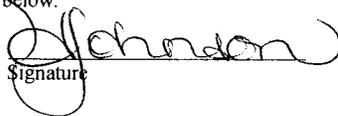


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07/27/07 10:11 AM
STATE OF WASHINGTON
BY _____
COUNTY OF PIERCE

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant ~~and~~ appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/30/07 
Date Signature