

No. 35719-4-II

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

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STATE OF WASHINGTON,

Respondent,

v.

PAUL V. JOHNS, JR.  
JAMES C. FAIRCLOTH

Appellants.

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

The Honorable Richard Strophy, Judge  
Cause Nos. 06-1-00971-5  
06-1-00947-2

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BRIEF OF RESPONDENT

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## A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Johns and Faircloth received ineffective assistance of counsel because their trial attorneys failed to request special interrogatories after the jury convicted the defendants of first degree murder charged in the alternative means of intentional, premeditated murder and felony murder predicated on either first degree robbery or first degree kidnapping, and where the defendants were also convicted of first degree robbery and first degree kidnapping, and because they failed to argue double jeopardy as a result of those convictions.

2. Whether Johns and Faircloth received ineffective assistance of counsel because their trial attorneys failed to argue double jeopardy when the defendants were convicted of both first degree robbery and first degree kidnapping.

3, Whether Faircloth was improperly convicted of an uncharged offense when he was charged with illegally possessing a firearm under the alternative that he had a previous felony conviction, but was convicted under the alternative of having a previous misdemeanor domestic violence conviction.

4. Whether the court exceeded its authority by imposing a lifetime no-contact order on Faircloth on all of the convictions, which included one Class B felony, second degree assault, and one Class C felony, second degree unlawful possession of a firearm, as well as three Class A felonies.

## B. STATEMENT OF THE CASE.

The State accepts the statement of facts and procedure as set forth in the briefs of both Johns and Faircloth.

## C. ARGUMENT.

1. The convictions for first degree kidnapping merge into the convictions for first degree murder, where murder was charged in the alternatives of premeditated intentional murder and felony

murder based upon either first degree robbery or first degree kidnapping, and no special interrogatories were submitted to the jury to determine on which alternative it convicted. However, the convictions for first degree robbery should not merge into the first degree murder convictions.

The double jeopardy clause of the Fifth Amendment of the United States Constitution and the double jeopardy clause in Article 1, Section 9 of the Washington State Constitution provide identical protections. State v. Glocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). These provisions protect against a second prosecution for the same offense after acquittal, against a second conviction for the same offense after conviction, and against multiple punishments for the same offense. Id., at 100.

Imposition of more than one punishment for a criminal act that violates more than one criminal statute is not necessarily multiple punishment of a single offense, and therefore double jeopardy. The fundamental question is whether the legislature intended that multiple punishments result. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995).

Three steps are used in determining whether the Legislature authorized multiple punishments. We first look at the statutory language to determine whether separate punishments are specifically authorized. If the language is silent, we apply the "same evidence" test to determine whether each offense has an

element not contained in the other. If each offense contains a separate element, we then determine whether there is evidence of a legislative intent to treat the crimes as one offense for double jeopardy purposes.

State v. Burchfield, 111 Wn. App. 892, 895-96, 46 P.3d 840 (2002).

The merger doctrine is one of the means used to determine whether the legislature authorized multiple punishments in a particular case. This doctrine applies when the legislature has clearly indicated that in order to prove a particular degree of a crime, the State must prove not only that the defendant committed that crime, but also committed an additional act which is itself defined as a crime elsewhere in the criminal code. In that instance, the two crimes may merge. State v. Freeman, 153 Wn.2d 765, 777-78, 108 P.3d 753 (2005). See also State v. Vladovic, 99 Wn.2d 413, 662 P.2d 853 (1983). Here, of course, the State had to prove both first degree kidnapping and first degree robbery to meet the felony murder alternative of the first degree murder charge.

Merger is not, however, mandatory when one crime provides the basis for proving the other. This division held in 1981 that when the underlying felony used to support the felony murder charge is an act separate and distinct, independent of the killing, the lesser crime does not merge into the felony murder conviction. State v.

Peyton, 29 Wn. App. 701,720, 630 P.2d 1362 (1981). In Peyton, multiple defendants had robbed a bank in Tacoma, and one of them shot a deputy sheriff who was pursuing them as they fled the bank. The court found the robbery sufficiently separate and distinct from the killing that the two did not merge, although the felony murder conviction was based upon the bank robbery.

Similarly, in State v. Saunders, 120 Wn. App. 800, 86 P.3d 232 (2004), the court declined to merge first degree robbery, first degree kidnapping, and first degree rape with felony murder. In this case, Saunders and/or an accomplice, Williams, had raped, restrained, and robbed the victim. He was convicted of felony murder based upon first degree rape, first degree robbery, and first degree kidnapping. He was also convicted of those three offenses separately. The facts in Saunders were that the victim had given Williams a ride to the home she shared with Saunders after her car had broken down. The victim accepted an invitation to enter the residence and consume alcohol. When asked to participate in a sexual threesome, the victim refused, and Williams began to beat her while Saunders obtained handcuffs and leg shackles, which they used to restrain the victim. Williams raped her anally with a television antenna, and Saunders stabbed her with a knife. She

was also strangled, and duct tape was placed over her mouth. Her watch was taken from her and her body was left on the floor for five days before it was discovered by a visitor looking for Saunders.

The court in Saunders declined to merge the underlying felonies into the felony murder conviction, referring to State v. Johnson, 92 Wn.2d 671, 600 P.2d 1249 (1979). Johnson found that kidnapping and rape merged because the kidnapping was incidental to the rape, and based the holding on three factors:

- (1) the rape and kidnapping “occurred almost contemporaneously in time and place”;
- (2) the “sole purpose of the kidnaping [sic] and assault was to compel the victims’ submission to acts of sexual intercourse”; and
- (3) there was “no injury independent of or greater than the injury of rape.

Saunders, *supra*, at 822. The Saunders court, applying these three factors, found that although the robbery and murder occurred close in time and place, the defendants committed the robbery after the murder and not to facilitate the murder. The kidnapping did not merge with felony murder because it had a purpose and injury separate from the murder. The defendants restrained her in order to humiliate her and retaliate for her refusal to participate in sexual acts. The rape was also not “merely incidental” to the murder, for

although it occurred close in place and time, “the harm exceeded that necessary to commit the murder”. Saunders, *supra*, at 822-23.

The harm that is addressed by the different statutes was also a consideration in State v. Cole, 117 Wn. App. 870, 73 P.3d 411 (2003). In this case involving convictions for first degree robbery and second degree assault arising from the same incident, the court said:

The assault and robbery statutes do not address identical evils. The assault statutes are directed at assaultive conduct. . . . “The robbery statute is designed to discourage the taking of property from the person of another by use or threatened use of force and serves to protect individuals from loss of property and threat of violence to their persons.” . . . .

Cole, *supra*, at 877, cites omitted.

In this case, the State concedes that the first degree kidnapping was an integral part of the crime of first degree murder. While the kidnapping was not necessary to the killing (Johns could have shot her at Faircloth’s apartment), in fact he did tie the victim’s hands, put a hood over her head, and force her into a car. After driving some distance, he then forced her to walk up a logging road and sit in a particular position before shooting her in the head. The robbery, however, as argued again below, was a separate and distinct crime, similar to the robbery in the Peyton, case. The

taking of the victim's jewelry was totally unnecessary to accomplish the murder, and could have been done only out of greed (because Johns wanted the jewelry) or to humiliate and terrorize her further. It is sufficiently distinct that it should not merge into the first degree murder conviction.

Faircloth cites to State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007), arguing that the Supreme Court has held that a defendant cannot be convicted both of felony murder and the underlying felony. Womac, however, is not only distinguishable from the present case, but it did not hold that the underlying felony always merges into felony murder. Womac's four-month-old son died from head injuries; Womac was subsequently charged and convicted of homicide by abuse, second degree felony murder, and first degree assault, all as separate crimes rather than in the alternative. The Supreme Court held that there had been a single crime against a single victim, but it resulted in three convictions. Under the facts of that case, that is true; the assault was the cause of death, for which Womac was convicted of two different homicide crimes. However, in the case of Johns and Faircloth, there was more than one crime against the victim. The robbery was distinct from the kidnapping and murder, and the fact that they happened in

unbroken sequence does not inevitably make it the same criminal conduct for purposes of double jeopardy. The State agrees that where the kidnapping merges into the felony murder, the conviction cannot stand, even if no separate punishment is imposed.

Faircloth seems to argue that if the first degree robbery and first degree kidnapping are found to merge with the first degree murder, all three convictions should be reversed. None of the cases cited support that result. The murder conviction should stand regardless of any merger of the lesser charges. In Womac, for example, the homicide by abuse conviction stood, while the felony murder and first degree assault convictions were dismissed.

2. The defendants' convictions for first degree robbery and first degree kidnapping do not merge, and thus counsel was not ineffective for failing to make that argument.

Following the steps of the analysis as described above, the first inquiry is whether the language of the statute specifically authorizes multiple punishments. The elements of first degree robbery are set forth in RCW 9A.56.200:

- (1) A person is guilty of robbery in the first degree if:
  - (a) In the commission of a robbery or of immediate flight therefrom, he or she:
    - (i) is armed with a deadly weapon; or
    - (ii) displays what appears to be a firearm or other deadly weapon; or
    - (iii) inflicts bodily injury; or

(b) He or she commits a robbery within and against a financial institution as defined in RCW 7.88.010 or 35.38.060.

(2) Robbery in the first degree is a class A felony.

Robbery is defined in RCW 9A.56.190:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain and retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

Kidnapping in the first degree is codified in RCW 9A.40.020:

(1) A person is guilty of kidnapping in the first degree if he intentionally abducts another person with intent:

(a) to hold him for ransom or reward, or as a shield or hostage; or

(b) to facilitate commission of any felony or flight thereafter; or

(c) to inflict bodily injury on him; or

(d) to inflict extreme mental distress on him or a third person; or

(e) to interfere with the performance of any governmental function.

(2) Kidnapping in the first degree is a class A felony.

It is apparent that the language of the statutes is silent regarding multiple punishments. The next step, then, is to apply

the “same evidence” test—does each offense have an element not contained in the other? Here, the answer is clearly yes; kidnapping requires an abduction, whereas robbery requires an unlawful taking of personal property from the person or in the presence of another. Even if the two crimes occur simultaneously, proving one does not prove the other. If the offenses are not the same in law, “there is a strong presumption that the legislature intended separate punishment for each offense, even if they are committed by a single act.” State v. Cole, *supra*, at 875, (citing to Calle, *supra* at 780). “This presumption ‘should be overcome only by clear evidence of contrary intent.’” *Id.* One of the factors to consider in determining legislative intent is whether or not the statutes are located in different chapters of the criminal code. *Id.* Here they are obviously in different chapters.

Even if the two crimes pass the above tests, convictions for both may still violate double jeopardy if they merge. Merger has been explained in Vladovic, *supra*, 420-21, as follows:

[T]he 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). Pursuant to this rule, kidnapping does not merge with first degree robbery.

Conversely, does robbery merge into kidnapping in the first degree under the above principles? The first degree kidnapping statute applicable in this case specifically requires proof of another felony in order to elevate the crime to first degree kidnapping. (Cite omitted.) Accordingly, the merger doctrine could apply to preclude a conviction for such additional crime if the crime was merely incidental to the kidnapping.

In Vladovic, the court went on to discuss an exception to the merger doctrine, as applied in Johnson, supra, and State v. Allen, 94 Wn.2d 860, 621 P.2d 143 (1980). This exception is that “if the offenses committed in a particular case have independent purposes or effects, they may be punished separately.” Vladovic, supra, at 421. There must be “some injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element.” (Cite omitted.) Id.

In the present case, Johns took the victim, her hands tied and having been hit in the head with a gun shortly before, to the place where she was to be executed. Before shooting her, he took her jewelry from her. This was completely unnecessary to accomplish either the kidnapping or the murder; it was purely a

theft. The kidnapping and robbery statutes address very different kinds of harm, as discussed in Cole, *supra*, at 877. Kidnapping does not merge into robbery, and under this exception, the robbery should not merge into the kidnapping.

The to-convict instruction for kidnapping contains this language:

To convict the defendant . . . . of the crime of Kidnapping in the First Degree, as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about April 13, 2006, the defendant or an accomplice intentionally abducted LYNN SOEBY;

(2) That the defendant abducted that person with intent

(a) to facilitate the commission of robbery or murder; or

(b) to inflict bodily injury on the person; or

(c) to inflict extreme mental distress on that person;

(3) That any of these acts occurred in the State of Washington.

[Faircloth CP 53]. The evidence presented at trial showed overwhelmingly that the purpose of kidnapping Ms. Soeby was to kill her. There had been some items taken from her at the apartment, and there was no need to take her out onto a remote and deserted logging road to relieve her of the remainder of her jewelry. The robbery was over and beyond the kidnapping and

murder, and should be considered separate criminal conduct. Under the rationale of the cases holding that the underlying felony does not always merge with felony murder, one of the bases for first degree kidnapping would not always merge into the kidnapping. Johnson does not preclude this result.

We hold that, as to any such offense which is proven, an additional conviction cannot be allowed to stand *unless it involves some injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element.*

Johnson, *supra*, at 680, emphasis added.

Because these two offenses would not merge, counsel did not provide ineffective assistance by failing to argue merger.

3. Faircloth was not improperly convicted of an uncharged alternative of second degree unlawful possession of a firearm.

Faircloth was charged, in Count VI of the fourth amended information, of Unlawful Possession of a Firearm in the Second Degree, RCW 9.41.040(2)(a)(i); Class C Felony:

In that the defendant, JAMES CLINTON FAIRCLOTH, JR, in the State of Washington, on or about April 13, 2006, did knowingly have in his possession or in his control a firearm, after having previously been convicted of a felony.

[CP 15]

RCW 9.41.040(2)(a)(i) reads as follows:

(2)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if the person does not qualify under subsection (1) of this section for the crime of unlawful possession of a firearm in the first degree and the person owns, has in his or her possession, or has in his or her control any firearm;

(i) after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any felony not specifically listed as prohibiting firearm possession under subsection (1) of this section, or any of the following crimes when committed by one family or household member against another, committed on or after July 1, 1993: *Assault in the fourth degree*, coercion, stalking, reckless endangerment, criminal trespass in the first degree, or violation of the provisions of a protection order or no-contact order restraining the person or excluding the person from a residence (RCW 26.50.060, 26.50.070, 26.50.130, or 10.99.040);

(Emphasis added.) Subsection (b) of this statute makes second degree unlawful possession of a firearm a class C felony.

Here it appears that there is more of a scrivener's error than an uncharged alternative. The original and first amended information both referred to fourth degree assault as being the underlying conviction. [CP 2, 3]. The citation to the statute on the fourth amended information was correct. The jury was correctly instructed that they must find Faircloth had a prior conviction for fourth degree assault. [CP 78, Instruction 50] The proof presented at trial was of a conviction for fourth degree assault. The offense is

a Class C felony in either event. Any error was harmless beyond a reasonable doubt. Further, the only challenge to the charging document has been made on appeal.

"[W]hen a defendant challenges the sufficiency of a charging document, the standard of review depends on the timing of the objection." State v. Grant, 104 Wn. App. 715, 720, 17 P.3d 674 (2001). If the defendant challenges the sufficiency of the charging document while the State still has the opportunity to amend the information, strict construction applies. Phillips, 98 Wn. App. at 940-43; see also Vangerpen, 125 Wn.2d at 789 (noting State may not amend information after it has rested "unless the amendment is to a lesser degree of the same crime or a lesser included offense"). But if the defendant does not challenge the information until after the State's opportunity to amend the information has been lost, liberal construction applies. Id. at 788. This difference in standards discourages "sandbagging," the potential defense practice of remaining silent in the face of a constitutionally defective charging document because a timely challenge will merely result in the State amending the information to cure the defect. Kjorsvik, 117 Wn.2d at 103; Phillips, 98 Wn. App. at 940; see also 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 19.2, at 442 n.36 (1984).

State v. Mendoza-Solario, 108 Wn. App. 823, 830, 33 P.3d 411 (2001). Fairchild has failed to specify any prejudice, and to reverse this conviction would be purely form over substance.

4. The lifetime no-contact order imposed on Faircloth as part of his judgment and sentence must be limited to the Class A felony convictions.

The State agrees that the trial court lacked authority to order a no-contact order for more than ten years on the second degree assault conviction and five years on the unlawful possession of a firearm charge. State v. Armendariz, 160 Wn.2d 106, 119-20, 156 P.3d 201 (2007). Fairchild's judgment and sentence should be amended to reflect that limit, while still imposing a lifetime no-contact order pursuant to the convictions for first degree murder and first degree robbery.

#### D. CONCLUSION.

While the State concedes that the defendants' convictions for first degree kidnapping must merge into the first degree murder conviction, the first degree robbery convictions should not. The convictions for first degree robbery and first degree kidnapping do not merge into each other. Faircloth was not convicted of an uncharged alternative to the crime of second degree unlawful possession of a firearm. Faircloth's judgment and sentence should be amended to clarify that the lifetime no-contact order applies only to the class A felony convictions, while the second degree assault should carry a ten-year limit to the no-contact order and the second degree unlawful possession of a firearm conviction should have a five-year limit.

Respectfully submitted this 2d of January, 2007<sup>8</sup>.

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A copy of this document was properly addressed and mailed, postage prepaid, to the following individual(s) on January 2, 2008.

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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: 1/2/08  
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