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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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

STATE OF WASHINGTON, RESPONDENT

v.

JUDE LINAREZ, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Frank E. Cuthbertson

No. 08-1-00279-1

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**Brief of Respondent**

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

1. Whether the defendant's convictions for First Degree Robbery and Second Degree Assault violate double jeopardy or should merge under the merger doctrine?
2. Whether the defendant properly preserved any "same criminal conduct" claims for review on appeal?
3. Whether any of the defendant's charges were the same course of conduct?

B. STATEMENT OF THE CASE.

1. Procedure

On January 15, 2008, the State charged JUDE MARTIN LINAREZ, hereinafter "the defendant," with three counts: Count I and II, Assault in the First Degree, and Count III, Robbery in the First Degree. CP 1-2. In an amended information, filed September 23, 2008, the State charged the defendant with five counts: Count I, Assault in the First Degree; Count II, Assault in the Second Degree; Count III, Robbery in the First Degree; Count IV, Burglary in the First Degree; and Count V, Unlawful Possession of a Firearm in the Second Degree. CP 16-18. The case was assigned to the Honorable Frank E. Cuthbertson for trial. Upon hearing and deliberating on the evidence, the jury found the defendant

guilty as charged. CP 110-114. By special verdict, the jury found the defendant was armed with a firearm during the commission of Counts I, II, III, and IV. CP 115-118.

Based on the defendant's criminal history and current convictions, the court calculated an offender score of 7 for Counts I, II, III, and IV, and an offender score of 4 for Count V. CP 119-132. The defendant objected to the offender score calculation at sentencing but did not state a basis for the objection. 8RP 4, 13<sup>1</sup>. On April 3, 2009, the court sentenced the defendant to the low-end standard range on the First Degree Assault, imposing 178 months. CP 119-132. The defendant received an additional 60 months for the firearm enhancement, to run consecutively with the First Degree Assault sentence. *Id.* The court sentenced the defendant 57 months on the Second Degree Assault, 116 months on the First Degree Robbery, 89 months on the First Degree Burglary, and 16 months on the Unlawful Possession of a Firearm, each to run concurrently with the First Degree Assault sentence. *Id.* The defendant received an additional 36 months for the Second Degree Assault firearm enhancement, 60 months for the First Degree Robbery firearm enhancement, and 60 months for the First Degree Burglary firearm enhancement, each to run consecutively

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<sup>1</sup> For consistency, the State will adopt the defendant's method for referring to the Verbatim Report of Proceedings, designated as follows: 1RP – 2/2/09; 2RP – 3/12/09; 3RP – 3/16/09; 4RP 3/17/09; 5RP – 3/18/09; 6RP – 3/23/09; 7RP – 3/24/09; 8RP – 4/3/09.

with the First Degree Assault firearm enhancement sentence and with each other. *Id.* This resulted in a total confinement period of 394 months. *Id.* From entry of this judgment, the defendant filed a timely notice of appeal. CP 133.

## 2. Facts

During the graveyard shift on January 12, 2008, Christina Smith began training new employee, Rebecca Hayden, as a desk clerk at the Econo Lodge in Fife, Washington. 3RP 94-96. At trial, Smith and Hayden testified that at approximately 3:00 a.m., a man, later identified as the defendant, entered the Econo Lodge lobby through the back door. 3RP 100, 5RP 303. The defendant displayed a gun and told Hayden and Smith to go into an open office behind the desk and lie facedown on the floor. 3RP 98. The women followed the defendant's orders. *Id.* The defendant called Smith back to the lobby and told her to unlock the main Econo Lodge office. 3RP 102, 5RP 306. Smith told the defendant she did not have a key to the office. 3RP 102, 5RP 305. The defendant told Smith to open the door or he would shoot Hayden. 3RP 103. Smith began banging and kicking on the office door but could not open it. 5RP 306. The defendant entered the back office, struck Hayden in the head with his gun, and kicked her in the jaw and arm. 3RP 104.

While the defendant focused his attention on Hayden, Smith fled the scene. 5RP 310. The defendant noticed Smith leaving and fired at least two shots in Smith's direction. 3RP 105; 5RP 310. The defendant

then picked Hayden up by the collar of her shirt and pulled her to a safe located under the front desk. 3RP 103, 106. The defendant told Hayden to open the safe. Hayden said she was a new employee and did not have the key. 3RP 105-106, 125. The defendant replied, “Don’t give me that shit about being new. Open the safe.” 3RP 107. When Hayden couldn’t open the safe, she instead gave the defendant the cash drawer from the cash register. 3RP 125. The defendant then opened the drawer next to the registers. *Id.* The drawer contained several identification cards. 3RP 126. The defendant pointed at the drawer’s contents with the gun and Hayden gave the identification cards to the defendant. 3RP 126. The defendant then walked out the back door and left the premises. 3RP 126.

C. ARGUMENT.

1. THE COURT PROPERLY CONVICTED AND SENTENCED THE DEFENDANT FOR THE SEPARATE CRIMES OF FIRST DEGREE ROBBERY AND SECOND DEGREE ASSAULT.

a. The defendant’s separate convictions for First Degree Robbery and Second Degree Assault do not violate double jeopardy

The Washington and United States Constitutions’ double jeopardy clauses prohibit multiple prosecutions and multiple punishments for the same criminal offense. *State v. McJimpson*, 79 Wn. App. 164, 167, 901 P.2d 354 (1995), *review denied*, 129 Wn.2d 1013, 917 P.2d 576 (1996). A defendant is subject to double jeopardy if convicted of two or more

offenses that are identical in law and in fact. *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). When faced with a claim of double jeopardy, the courts must look to what punishments the legislature has authorized before deciding whether there has been an unconstitutional imposition of multiple punishments for the same offense. *State v. Freeman*, 153 Wn.2d 765, 772, 108 P.3d 753 (2005).

*Freeman* dealt with whether the legislature intended separate punishment for both a second degree assault committed in furtherance of first degree robbery, and the robbery. *Freeman*, 153 Wn.2d at 771. The Court held, “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*, 153 Wn.2d at 776. However, the Court went on to recognize a “well established exception” to the legislative intent rule. *Id.* at 778. When there is a separate 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,” the offenses may in fact be separate and would not merge for double jeopardy purposes. *Id.*; *State v. Frohs*, 83 Wn. App. 803, 807, 924 P.2d 384 (1996) (citing *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979)). This exception shifts the focus from legislative intent to the facts of the individual case. *Freeman*, 153 Wn.2d at 779.

In this case, an examination of the facts show there was a separate and distinct injury suffered by Hayden during the Second Degree Assault independent of the First Degree Robbery.

When the defendant first arrived at the Econo Lodge he ordered Hayden and Smith to go to a back room and lie face down on the floor. 3RP 98. The defendant then ordered only Smith to return to the lobby. *Id.* The defendant ordered Smith to open the locked office. 3RP 102-103, 5RP 306. When Smith was unable to meet the defendant's demands, he threatened to shoot Hayden. 3RP 103. The defendant then proceeded to walk into the back room, strike Hayden in the head with a gun, kick her in the arm, and kick her in the jaw. 3RP 104. These facts describe the injury that constituted the basis for the Second Degree Assault charge. 6RP 444. At this point, the defendant had yet to demand any property from Hayden or in her presence.

After the defendant committed the Second Degree Assault of Hayden, he fired at least two shots at Smith as Smith fled from the hotel. 3RP 105; 5RP 310. Once Smith left the hotel lobby, the defendant decided to make a second attempt at obtaining money by robbing Hayden. The defendant grabbed Hayden by the collar of her shirt, dragged her to the front lobby counter, and waved a gun around while demanding money

and ID cards. 3RP 103-107; 125-126. These injuries constitute separate assaults committed in furtherance of the robbery. They do not amount to Second Degree Assault, and are separate from the Second Degree Assault conviction.

It is clear from the above facts that the assault of Hayden was separate from, and did not further her later robbery. The initial injurious acts were only intended to induce action from Smith and amounted to “substantial bodily harm,” the type of injury required for Second Degree Assault. *See* RCW 9A.36.021(1)(a). The later injurious acts amounted to “use or threatened use of immediate force, violence or fear of injury” required for First Degree Robbery. *See* RCW 9A.56.190; RCW 9A.56.200(1)(a)(ii). The defendant’s separate convictions for Second Degree Assault and First Degree Robbery do not violate double jeopardy.

The case at hand is similar to *State v. Wade*, 133 Wn. App. 855, 872, 138 P.3d 168 (2006). In that case, Wade and two female accomplices unlawfully entered Ben and Jennifer Dobbe’s home, demanding money allegedly owed to the two accomplices for services performed at a bachelor party. *Wade*, 133 Wn. App. at 861. Ben, Jennifer, and two friends were in the home at the time of the break-in. *Id.* Wade displayed a gun and asked for the bachelor. *Id.* Ben replied he did not know where the bachelor was located. *Id.* Wade hit Ben in the head with the gun and

demanded money for the bachelor party services. *Id.* Ben replied, “What money,” and was hit again by Wade in the head and in the shoulder with the gun. *Id.* Wade then pointed the gun at Jennifer, then Christopher, and then Ben again, demanding money and jewelry from each. *Id.* Wade and the two accomplices then fled from the home. *Id.*

A jury convicted Wade of First Degree Robbery and Second Degree Assault of Ben. *Id.* at 870. On appeal, Wade argued the convictions violated his double jeopardy rights. *Id.* This Court disagreed and held the assault conviction was based on Wade’s acts of striking Ben with the gun, prior to Wade robbing Ben. *Id.* at 872. The robbery occurred when Wade pointed the gun at Ben again, committing another assault, and demanded Ben’s money and jewelry. *Id.* This Court therefore held the Second Degree Assault had a purpose independent of the later robbery of Ben’s money and jewelry. *Id.* Similarly, the defendant’s assault on Hayden occurred when the defendant entered the back room, hit Hayden in the head with the gun, and kicked Hayden in the jaw and arm. 3RP 104. This was not the injury or force used to rob Hayden and steal the cash and identification cards. The two acts had separate purposes independent of each other and do not violate double jeopardy.

- b. The defendant's convictions for First Degree Robbery and Second Degree Assault do not merge under the merger doctrine.

The Washington Supreme Court defined the concept of Merger:

The merger doctrine is a rule of statutory construction which only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime (e.g. first degree rape) the State must prove not only that a defendant committed that crime but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (e.g. assault of kidnapping).

*State v. Vladovic*, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983). This doctrine is to be narrowly construed. *State v. Collicott*, 112 Wn.2d 399, 410-11, 771 P.2d 1137 (1989).

As the defendant points out, in *Freeman*, the court noted that when Second Degree Assault elevates robbery to first degree, the two crimes merge. *Freeman*, 153 Wn.2d 778; Appellant's Brief 7. However, the defendant's reliance on this point is misplaced as the decision in *Freeman* dealt with a robbery conviction elevated to the first degree because of an assault committed against the robbery victim. *Freeman*, 153 Wn.2d at 771. Here, the robbery was elevated to first degree because the defendant was armed with a deadly weapon when he committed the robbery. CP 16-18, 72-107, Jury Instruction No. 16, 17, 21; 6RP 444.

Under RCW 9A.56.200(1)(a), a robbery can be elevated to first degree if during the commission of a robbery or in immediate flight from a robbery the defendant was: i) armed with a deadly weapon, or ii) displayed what appeared to be a firearm or deadly weapon, or iii) inflicted bodily injury upon the victim. In the Amended Information, Count III, the State charged the defendant with First Degree Robbery by alleging “in the commission thereof, or in immediate flight therefrom, the defendant displayed what appeared to be a firearm or other deadly weapon, to wit: handgun, contrary to RCW 9A.56.190 and RCW 9A.56.200(1)(a)(ii)...” CP 16-18. This demonstrates the State’s reliance on the defendant’s possession of a handgun, not the infliction of bodily injury as the basis for First Degree Robbery. In Jury Instruction Number 21, the court instructed the jury that to convict the defendant of First Degree Robbery, the jury had to find that:

- 1) on or about the 12<sup>th</sup> day of January, 2008, the defendant unlawfully took personal property, not belonging to the defendant, from Rebecca Hayden or in the presence of Rebecca Hayden;
- 2) the defendant intended to commit theft of the property;
- 3) the taking was against the person’s will by the defendant’s use or threatened use of immediate force, violence or fear of injury to that person or to the person or property of another;
- 4) the force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

- 5) *in the commission of these acts or in immediate flight therefrom the defendant was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon; and*
- 6) any of these acts occurred in the State of Washington.

CP 72-107, Jury Instruction No. 21 (emphasis added); *See* RCW 9A.56.190.

Nowhere did the State use infliction of bodily harm as the basis for raising robbery from second degree to first degree. Had the defendant not been armed with a gun, the robbery would have remained a second degree level offense. As discussed above, the Second Degree Assault was separate from the First Degree Robbery and did not create the basis, or require proof of its commission, to raise robbery from second degree to first degree. The two convictions do not merge.

2. THE DEFENDANT WAIVED REVIEW OF ANY CLAIMED ERROR REGARDING SAME CRIMINAL CONDUCT. ALTERNATIVELY, SAME CRIMINAL CONDUCT PROVISIONS DID NOT APPLY WHEN CALCULATING THE DEFENDANT'S OFFENDER SCORE.

In *State v. Nistch*, 100 Wn. App. 512, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030 (2000), the defendant argued for the first time on appeal that two of his convictions constituted the same criminal conduct, and therefore neither could be counted as part of his offender score for sentencing the other crime. The Court of Appeals noted that application

of the same criminal conduct statute involves both factual determinations and the exercise of judicial discretion. *Nitsch*, 100 Wn. App. at 523. The court held the defendant's "failure to identify a factual dispute for the [trial] court's resolution and...failure to request an exercise of the [trial] court's discretion," waived the challenge to his offender score. *Id.* at 520. The Washington Supreme Court agreed that under circumstances such as these, the challenge to the offender score calculation has been waived. *In re Personal Restraint Petition of Goodwin*, 146 Wn.2d 861, 875, 50 P.3d 618 (2002) (adopting the waiver rule established in *Nitsch*).

A trial court cannot be expected to identify "same criminal conduct" issues *sua sponte* and conduct such a review without invitation from one of the parties. *Nitsch*, 100 Wn. App. at 525. In his assignments of error, the defendant claims for the first time on appeal that the sentencing court erred by not applying a "same criminal conduct" analysis when calculating the defendant's offender score. Appellant's Brief 1, 10. Although the defendant objected twice during sentencing, this issue was not properly raised in the trial court and the defendant has waived review of this claim on appeal.

At the April 3, 2009, sentencing hearing, the prosecutor originally miscalculated the defendant's offender score by not designating the defendant's prior conviction as a juvenile offense. 8RP 9. This

miscalculation gave the defendant an offender score of 8 for First Degree Assault, Second Degree Assault, First Degree Robbery, and First Degree Burglary, and an offender score of 4 for Unlawful Possession of a Firearm.

Defense council objected to this calculation:

Defendant's Counsel: In regards to sentencing, we're not in agreement, so we are not stipulating to the offender score calculated by the State. We will reserve that for any appeal issue.

....

The Court: Hold on a second, please. Let me inquire further. What do you believe the offender score is?

Defendant's Counsel: We figured his offender score at most would be a four or a five, not eight.

The Court: Is there a criminal history?

Defendant's Counsel: As far as I know, all he has –

The Court: I assume it's not stipulated.

Defendant's Counsel: - is his taking a motor vehicle, which is half a point, and that was as a juvenile. The State is counting all of his current offenses: the assault in the first degree as two points; the assault in the second degree is two points; the robbery in the first degree is two points; the burglary in the first degree, I believe, has two points, and the unlawful possession of a firearm is one point, and I'm not in agreement with that, so I'd just like that noted for the record.

The Court: Okay. Thank you.

8RP 4-5. Based on this dialogue, it appears the defense counsel's objection is either to the miscalculation of the prior juvenile offense or to the doubling of each violent offense. At no point did the defense counsel mention same criminal conduct or ask the trial judge to exercise his discretion on that issue. This does not amount to a proper objection sufficient to preserve a same criminal conduct issue for appeal.

Later in the sentencing hearing, the prosecutor corrected her initial offender score calculation by reclassifying the prior offense as a juvenile offense. 8RP 8-9. The prosecutor stated the defendant's prior offense was a "juvenile conviction which in the State of Washington would carry a half a point, which would not be calculated towards his offender score." 8RP 9. The prosecutor then responded to the prior offender score calculation objection by stating:

...so with respect to each count [the offender score] would be a seven rather than an eight; however, I believe that with respect to other concurrent offenses, the State has properly calculated his offender score. If the Court wants me to go into why they are correctly calculated, I will do so at this time, but it's the State's position that it is a score of seven for Counts I, II, III, and IV, and an offender score of four for Count V.

8RP 9. The defense counsel did not raise another objection at this time.

*Id.* The defense counsel did not raise any more objections until after the

trial judge sentenced the defendant. After sentencing, the defense counsel stated, "...just for the record, since I made my objection prior to the Court making its ruling, I'd just like to note we are objecting to the Court's scoring of Mr. Linarez's offender score." 8RP 13.

At no point during the sentencing hearing did the defendant state the reason for his disagreement with the offender score. *Id.* As a result, the defendant gave the court no indication that a "same criminal conduct" issue existed. By raising this issue for the first time on appeal, the defendant suggests the trial court should have identified and ruled on any potential "same criminal conduct" issues *sua sponte*. Had the defense counsel properly objected, raised a "same criminal conduct" issue, and asked the court to exercise its discretion in the matter, the court could have engaged in a "same criminal conduct" analysis and settled the dispute. The above discussions between the court and the defense counsel did not constitute an adequate objection to preserve this issue for appeal.

3. EVEN IF THIS COURT WERE TO FIND THE ISSUE  
WAS PROPERLY PRESERVED, THE CONVICTIONS  
DO NOT ENCOMPASS SAME CRIMINAL CONDUCT.

Even if this Court were to hold that this issue was properly preserved, the convictions of First Degree Robbery and Second Degree Assault do not encompass the same criminal conduct. Additionally, the

defendant's convictions of First Degree Assault and Unlawful Possession of a Firearm do not encompass the same criminal conduct.

A defendant's current offenses must be counted separately in calculating the offender score unless the trial court enters a finding that they "encompass the same criminal conduct." RCW 9.94A.589(1)(a). The trial court's determination on the issue is reviewed for abuse of discretion. *State v. Maxfield*, 125 Wn.2d 378, 402, 886 P.2d 123 (1994). The Legislature intended the phrase "same criminal conduct" to be construed narrowly. *State v. Flake*, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). For the purposes of sentencing, "same criminal conduct" involves crimes that (a) involve the same criminal intent; (b) were committed at the same time and place; and (c) involve the same victim. RCW 9.94A.589(1)(a); *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999); *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). The absence of any one of these criteria prevents a finding of same criminal conduct. *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). The analysis does not focus on the *mens rea* element of the crime, but rather on the defendant's objective criminal purpose. *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990).

The defendant first contends that his First Degree Robbery and Second Degree Assault convictions encompass the same criminal conduct.

Appellant's Brief 11. While the two crimes involved the same victim and the same time and place, they did not involve the same criminal intent. The defendant's objective criminal purpose during the Second Degree Assault was to cause bodily harm to Hayden, thereby inducing Smith to open the locked office. The defendant's objective criminal purpose during the First Degree Robbery of Hayden was to acquire property. This amounts to different objective criminal purposes. The two charges do not meet the statutory requirements for finding same criminal conduct and were properly counted separately in the defendant's offender score.

The defendant also contends the First Degree Assault and Unlawful Possession of a Firearm encompassed the same criminal conduct. Appellant's Brief 13. Once again, the defendant had different objective criminal purposes while committing these two crimes. *See State v. Thompson*, 55 Wn. App. 888, 894, 781 P.2d 501 (1989). The defendant's objective criminal purpose for unlawful possession of a firearm was to voluntarily possess a firearm despite an order prohibiting such possession. The defendant's objective criminal purpose for First Degree Assault was to assault another with a weapon likely to produce great bodily harm.

In *Thompson*, the court found these two criminal purposes to be different from each other when viewed objectively. *Id.* The defendant's decision to unlawfully possess the gun occurred at some unknown time prior to entering the Econo Lodge. Whether he took possession of the gun specifically to later commit assault, robbery, and burglary is merely speculation and cannot amount to same criminal intent and purpose.

The defendant does not address the "same criminal intent" element during his analysis of the First Degree Assault and Unlawful Possession of a Firearm charge. His focus is on the "same victim" element of the analysis. The defendant relies on *State v. Haddock*, 141 Wn.2d 103, 3 P.3d 733 (2000) to support his argument that the two crimes involve the same victim. Appellant's Brief 14. While *Haddock* does appear to support an argument that Smith was the victim of the First Degree Assault and the Unlawful Possession of a Firearm, it also supports a conclusion that these two crimes encompass different objective criminal intents. *See Haddock*, 141 Wn.2d at 111. In the same paragraph cited by the defendant, the *Haddock* court went on to say, "Any injury Haddock's former girlfriend and her friends may have suffered was a direct result of Haddock's brandishing the guns, not his unlawful possession of them." *Id.* This suggests that a defendant's objective criminal purpose in unlawfully possessing a gun is different from a defendant's objective

criminal purpose when actually using the gun. Therefore, the defendant's objective criminal intent changed once he chose to use the gun to fire at Smith, strike Hayden, and intimidate both women. Because these offenses do not involve the same objective criminal intent, they do not encompass the same criminal conduct. The trial court did not abuse its discretion in counting the defendant's convictions for First Degree Assault and Unlawful Possession of a Firearm separately for the defendant's offender score.

D. CONCLUSION.

For the foregoing reasons, the State asks this Court to affirm the Judgment and Sentence below.

DATED: February 26, 2010.

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Amanda Kunzi  
Legal Intern

FILED  
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10 MAR -1 PM 1:40

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

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.

2-26-16 Alexa Kar  
Date Signature