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Court of Appeals  
Division III  
State of Washington  
10/22/2019 3:33 PM

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36601-4-III

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STATE OF WASHINGTON, Respondent,

v.

GERALD ANTHONY BROWN, Appellant.

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**APPELLANT'S BRIEF  
(AMENDED)**

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## **I. INTRODUCTION**

A trial court convicted Gerald Brown of burglary, robbery, second degree assault, theft of a firearm, and third degree theft arising from a single home invasion incident. Because the assault and the thefts merge into the robbery conviction, they violate double jeopardy and must be vacated. Resentencing is required. Additionally, the trial court erred in entering an order of restitution when Brown was not present and did not waive his right to be present at the hearing.

## **II. ASSIGNMENTS OF ERROR**

**ASSIGNMENT OF ERROR NO. 1:** Brown's convictions for second degree assault, theft of a firearm, and third degree theft violate double jeopardy when they consisted of the same conduct supporting the first degree robbery conviction.

**ASSIGNMENT OF ERROR NO. 2:** The trial court exceeded its authority in entering an order of restitution when Brown was not present and had not waived his right to appear at the hearing.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**ISSUE NO. 1:** Whether the theft of a firearm and third degree thefts constituted the taking of property that supported the robbery conviction.

ISSUE NO. 2: Whether the second degree assault constituted the use of force that supported the robbery conviction.

ISSUE NO. 3: Whether Brown had a right to be present at a post-sentencing hearing on restitution.

#### **IV. STATEMENT OF THE CASE**

The State tried Gerald Brown to the bench on charges of first degree burglary, first degree robbery, theft of a firearm, two counts of second degree assault, and third degree theft. CP 8, 13. Trial testimony showed that on October 23, 2018, Bruin<sup>1</sup> Duke and Patrick West lived together at an apartment in Ellensburg. RP 13-14, 100-01. It was West's birthday and they had ordered pizza and invited guests over for a party. RP 16-18, 102. West had received a notification on his phone that the pizza was on its way when someone knocked on the door. RP 19, 104.

West answered the door and was immediately struck in the head, causing him to fall onto the couch. RP 20-22, 104-05. Duke saw two individuals he described as a tall black guy and a short white kid enter. RP 20. He did not know them but assumed they were friends of West and

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<sup>1</sup> Mr. Duke's first name is spelled variously as "Bruin," "Bruen," and "Berwyn" throughout the verbatim reports of proceeding and the clerk's papers. For purposes of this brief, the spelling of "Bruin," which is set forth in the State's exhibit list, shall be adopted. CP 7. In the event this spelling is incorrect, no disrespect is intended to Mr. Duke.

paid little attention until he heard a loud smack and saw West fall onto the couch holding his head. RP 20-22. Duke then saw the black man swing a bat toward him and he put his arm up to block it. RP 22-23. Somebody also punched him in the face. RP 24. The black man threatened them with a knife, telling them to be cool. RP 27, 106.

After attacking Duke and West, the two men began going through the apartment, taking things and putting them into bags. RP 24-27, 109-10. West recognized the white man as someone he had met once a year before and knew as "Christian." RP 106, 107. The black man told Duke that they were selling marijuana in Sureño turf and had to pay tax. RP 28-29. He told them they should sell cocaine instead and gave West his Snapchat account. RP 30, 114. At some point, the man identified himself as G.A. RP 35, 144. He told West and Duke not to tell anybody about the incident, saying he would kill them if they went to the police. RP 32, 113. When the pizza delivery arrived, the black man answered the door and took the pizza. RP 33, 112. After about 10 minutes, they left, saying they would be back again. RP 34, 46, 115, 117.

Shortly afterward, West's neighbor Daniel Olsen texted him to say he had seen people with bats leaving and he came over to check on them. RP 116-17. At Olsen's urging, West went to the hospital and was

transferred to Harborview with a concussion, an epidural hematoma, and a hairline skull fracture. RP 117-19, 133, 152. West and Duke began messaging their friends to try to identify the robbers and were given the name "Gerald Brown." RP 37-38, 121. Both of them looked Brown up on Facebook and recognized him as the robber, conversing with each other to confirm their identification. RP 38, 121-23.

Neither West nor Duke contacted police immediately. West recuperated in Mount Vernon after his release from the hospital and was eventually persuaded by his family to report the incident. RP 119-20. Duke, who remained in the apartment by himself, became concerned and called the police after he received a Snapchat message from an account named Rice Pirate, which he identified as belonging to the white man involved. RP 47, 54-55. Both Duke and West identified Gerald Brown to police in a photo line-up as the black man involved in the attack. RP 67, 69, 127, 129.

At trial, Olsen described letting his dog outside and saw a guy standing outside the other apartment with a baseball bat. RP 244, 246. He described seeing a white man and a black man with one baseball bat that the white man was holding. RP 247. Olsen's dog jumped on the white man so Olsen went to retrieve it, bringing him face to face with the white

man. RP 247-48. Later, he saw the men run out with a bunch of stuff in their pockets and the black man was carrying a single shot .22 rifle under his coat that he recognized as belonging to West. RP 248-50. Olsen identified the black man in a subsequent police interview and photo line-up, but could not identify the white man. RP 254-55.

Brown did not present a defense at trial, arguing that the identifications were suggestive and tainted. RP 267, 286-98. The trial court acquitted Brown of assaulting West but convicted him of the other 5 counts. CP 13; RP 318. It entered findings of fact and conclusions of law supporting the conviction. CP 49-54. At sentencing, the court rejected Brown's request for a drug offender sentencing alternative and imposed a mid-range sentence of 150 months based upon a score of 9. CP 22, 23-24. RP 327. The court reserved the issue of restitution at the time, and Brown did not waive his right to be present at a future restitution hearing. CP 26. Four months later, the court entered a restitution order at a hearing at which Brown's attorney was present, but Brown was not. CP 47-48.

Brown now appeals and has been found indigent for that purpose. CP 33, 35.

## V. ARGUMENT

Because the theft of a firearm and third degree thefts constituted the taking of property supporting the first degree robbery conviction, and because the assault constitutes the use of force that elevates the taking of property into a robbery, they merge into the robbery conviction and must be vacated. Additionally, entering a restitution order outside of Brown's presence when he had not waived his right to appear violated his due process rights, and the order should be vacated.

A. The separate convictions for first degree robbery, second degree assault, theft of a firearm, and third degree theft violate double jeopardy.

Under the federal and Washington State constitutions, a person cannot receive multiple punishments for the same conviction without running afoul of the prohibition against double jeopardy. U.S. Const. amend. V; Wash. Const. art. I, § 9; *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 980, 329 P.3d 78 (2014). Alleged double jeopardy violations are reviewed *de novo*. *Id.* at 979-80. The remedy for a double jeopardy violation is to vacate one of the underlying convictions. *State v. Womac*, 160 Wn.2d 643, 660, 160 P.3d 40 (2007).

The guarantee against double jeopardy protects persons from multiple punishments for the same offense. *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). Punishments are unconstitutionally cumulative when two offenses are legally identical and are based on the “same act or transaction.” *State v. Gocken*, 127 Wn.2d 95, 101, 896 P.2d 1267 (1995) (quoting *Blockburger v. U.S.*, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306 (1932)). Offenses are not legally identical if each offense contains an element not contained in the other. *Gocken*, 127 Wn.2d at 101.

However, even where offenses are not legally identical, as in the present case, the merger doctrine may apply. The merger doctrine applies when proof of one offense will always establish another, even if the offenses involve different elements. *Calle*, 125 Wn.2d at 779. As such, merger is a doctrine of statutory interpretation “used to determine whether the Legislature intended to impose multiple punishments for a single act that violates several statutory provisions.” *State v. Michielli*, 132 Wn.2d 229, 238, 937 P.2d 587 (1997) (quoting *State v. Vladovic*, 99 Wn.2d 413, 419 n. 2, 662 P.2d 853 (1983)). The court looks to the language and intent of the statutes proscribing the offenses to determine whether multiple offenses may be punished cumulatively. *Calle*, 125 Wn.2d at 777.

In the present case, the State charged Brown with committing first degree robbery, alleging that he was armed with a deadly weapon in its commission. CP 13; RCW 9A.56.200(1)(a). A robbery is defined as unlawfully taking personal property

from the person of another or in his presence against his or her will by the use or threatened use of force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or 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.

RCW 9A.56.190.

Both the conduct comprising the second degree assault and the conduct comprising the thefts were necessary to prove the fact of a robbery. The assault charge contended that Brown assaulted Duke with a baseball bat that constituted a deadly weapon. CP 14; RCW 9A.36.021(c). Multiple Washington cases have held that when the use of force is not separate and distinct from the force required to commit the robbery, the assault merges into the robbery. *State v. Freeman*, 153 Wn.2d 765, 778, 108 P.3d 753 (2005); *State v. Prater*, 30 Wn. App. 512, 516, 635 P.2d 1104 (1981), *review denied*, 97 Wn.2d 1007 (1982); *State v. Bresolin*, 13 Wn. App. 386, 393-94, 534 P.2d 1394 (1975), *review denied*, 86 Wn.2d 1011 (1976). Because, in this case, the assault on Duke occurred at the

outset of the robbery and served to threaten and intimidate Duke and West into complying with the taking of their property, the assault merged into the robbery under these authorities. Accordingly, the second degree assault conviction should be vacated. *Womac*, 160 Wn.2d at 660.

For the same reason, the third degree theft and theft of a firearm charges also merge into the robbery. The takings of the pizza and firearms necessary to support the theft charges were the same takings necessary to support the robbery and involved no separate or distinct conduct. *See Freeman*, 153 Wn.2d at 778. Proof of a completed robbery necessarily requires proof of a taking of property that would constitute a theft. *See Calle*, 125 Wn.2d at 779. Accordingly, the theft of a firearm and third degree theft convictions must also be vacated. *Womac*, 160 Wn.2d at 660.

At the time of his sentencing, Brown had four non-violent prior convictions that counted in his offender score. CP 22. With the second degree assault and theft of a firearm convictions vacated, his offender score would be three points less and would count only the robbery and burglary convictions against each other for an additional two points each. *See RCW 9.94A.525(8)* (scoring two points for prior violent convictions and one point for prior nonviolent convictions); *RCW 9.94A.589(1)(a)* (scoring other current offenses as though they were prior offenses); *RCW*

9.94A.030(56)(a)(i) (defining “violent offense” as any class A felony);  
RCW 9A.56.200(2) (classifying first degree robbery as a class A felony);  
RCW 9A.52.020(2) (classifying first degree burglary as a class A felony).

At the recalculated score of six, Brown’s standard range on the more serious robbery offense is 77-102 months. *See* RCW 9.94A.515 (establishing seriousness level of IX for first degree robbery and VII for first degree burglary); RCW 9.94A.510 (sentencing grid establishing range of 77-102 months for seriousness level IX with score of six). The sentence actually imposed of 150 months therefore exceeds the standard range for the crime.

Consequently, because the second degree assault, theft of a firearm, and third degree theft convictions violate double jeopardy, the case should be remanded to vacate those convictions and to resentence Brown on the convictions of first degree robbery and first degree burglary.

B. The trial court violated Brown’s due process rights by entering a restitution order when he was not present and had not waived his right to be present.

Under RCW 9.94A.753, the trial court has authority to impose restitution at the sentencing hearing or at a hearing within 180 days afterward. If the defendant disputes the facts supporting a claim of

restitution, they must be resolved in an evidentiary hearing. *State v. Dedonado*, 99 Wn. App. 251, 256, 991 P.2d 1216 (2000). A restitution hearing must meet minimum requirements of due process. *See State v. Raleigh*, 50 Wn. App. 248, 254, 748 P.2d 267, *review denied*, 110 Wn.2d 1017 (1988). Moreover, the setting of restitution is an integral part of sentencing. *State v. Milton*, 160 Wn. App. 656, 659, 252 P.3d 380 (2011). A defendant has both a rule-based and a constitutional right to be present for sentencing, and has a due process right to be present at any point when evidence is being presented. CrR 3.4(a); *State v. Rupe*, 108 Wn.2d 734, 743, 743 P.2d 210 (1987); *State v. McCarthy*, 178 Wn. App. 90, 98, 312 P.3d 1027 (2013).

Here, the record reflects neither that Brown was present nor that he waived his right to be present at a post-sentencing hearing to impose restitution. CP 47-48 (defendant not identified as present and did not sign the restitution order); CP 26 (box indicating “The defendant waives any right to be present at any restitution hearing [sign initials]” unchecked and uninitialed by defendant). The court is to indulge every presumption against finding a waiver of a right that is “constitutionally guaranteed to protect a fair trial” absent a clear indication of waiver in the record, and the State bears the burden to establish a valid waiver. *State v. Wicke*, 91 Wn.2d 638, 645, 591 P.2d 452 (1979). The record here is insufficient to

establish that Brown waived his right to be present at the restitution hearing. Accordingly, the restitution order should be vacated. *See Milton*, 160 Wn. App. at 659.

## **VI. CONCLUSION**

For the foregoing reasons, Brown respectfully requests that the court VACATE his convictions for second degree assault, theft of a firearm, and third degree theft as violative of double jeopardy and VACATE the order of restitution entered in violation of Brown's right to be present at the restitution hearing.

RESPECTFULLY SUBMITTED this 22 day of October, 2019.

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**CERTIFICATE OF SERVICE**

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Amended Appellant's Brief upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed and sworn this 22 day of October, 2019 in Kennewick, Washington.

  
\_\_\_\_\_  
Andrea Burkhart

**BURKHART & BURKHART, PLLC**

**October 22, 2019 - 3:33 PM**

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**Appellate Court Case Title:** State of Washington v. Gerald Anthony Brown  
**Superior Court Case Number:** 18-1-00348-1

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