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Division III
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III
No. 36601-4-III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

GERALD ANTHONY BROWN,

Defendant/Appellant

Respondent's Brief

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Appellant's conviction for Assault in the Second Degree which elevated his crime of Robbery to Robbery in the First Degree is encompassed within that conviction, and must be vacated on double jeopardy grounds. However, no such circumstances exist in relation to Appellant's convictions for Theft of a Firearm and Theft in the Third Degree as neither elevated his crime of robbery; the robbery and thefts each contain unique elements, and Legislative history belies Appellant's argument.

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I. IDENTITY OF RESPONDENT:

The State of Washington appears through the Kittitas County Prosecuting Attorney's Office.

II. STATEMENT OF RELIEF SOUGHT:

The State respectfully requests that this Court deny Appellant's request to find that his convictions for Theft of a Firearm and Theft Third are encompassed within his conviction for Robbery in the First Degree and should be vacated. The State concedes that Appellant's conviction for Assault Second is encompassed within his Robbery First conviction which will change Appellant's offender score and require resentencing; and that Appellant did not waive his right to be present for purposes of restitution, making an agreed order entered off docket void.

III. RESPONSE TO ISSUES PRESENTED FOR REVIEW:

While the Appellant's conviction for Assault Second elevated the degree of Robbery for which he was convicted, the same cannot be said of Appellant's convictions for Theft of a Firearm or Theft Third, and both case law and legislative history show a presumptive intention to hold an offender accountable for each separate offense.

IV. STATEMENT OF THE CASE:

On October 23, 2018, Patrick West and Bruin Duke[1] were residing at 412 West 12th Avenue, Apartment #3 in Ellensburg, Washington. RP 14, 100-101. Because it was Mr. West's birthday, Mr. Duke had placed an order for pizza with Domino's sometime around 4 P.M., pre-paying with his debit card. RP 17. Not long after they were notified that their pizza was on its way, the two men heard a knock on the door. RP 18-19, 104. Mr. West opened the door and just got hit "right away." RP 104. According to Mr. West, he didn't see or hear anything, but was hit with a baseball bat to the right temple area of his head.[2] RP 105. Mr. Duke, who had been sitting on a couch, had initially looked up to see people at the door, but believing they were friends of Mr. West, turned his attention back to what he was doing. RP 20. Both Mr. West and Mr. Duke described the persons as two males, one a tall black male in his mid-twenties to mid-thirties, and the other, a "chunky white kid." RP 20,

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[1] As stated in Appellant's brief, Mr. Duke's first name is spelled variously as "Bruin," "Bruen," and "Berwyn" throughout the verbatim reports of proceedings and the clerk's papers. For purposes of this brief and consistency between the parties, the spelling of "Bruin," which is adopted by Appellant, shall also be the option chosen by Respondent. BA 2. In the event that this spelling is incorrect, no disrespect is intended to Mr. Duke.

[2] The testimony at trial was that it was the other individual, not Mr. Brown, who struck Mr. West in the head as he opened the apartment door. RP 108.

106. Mr. Duke, hearing a "loud smack," looked up to see Mr. West falling onto the other couch, holding his head. RP 22. Mr. Duke then saw the tall black male, later identified as the Appellant, Gerald Brown, swinging a baseball bat towards him, and put his arm up to block the hit. RP 22. Mr. Duke took a hard hit to his arm which he stated hurt, and which, while not breaking his arm, continued to cause him pain up and until the day of trial. RP 23, 42, 45. According to Mr. Duke, the hit caused his arm to be really sore, and he was unable to readily move it for some period of time afterwards. RP 41. After striking him with the bat, Mr. Brown punched Mr. Duke in the face, breaking his glasses, and bruising his eye. RP 28, 81. Mr. Duke had been using a knife when he was struck and dropped it onto the coffee table, from where Mr. Brown picked it up. RP 25. Pointing and jabbing the blade towards Mr. Duke, Mr. Brown made the statement "you'd better be cool," and according to Mr. Duke, telling him that he would "cut me open if I do anything." RP 27, 90, 92. Mr. West saw Mr. Brown hit Mr. Duke and "pull a knife on him," but he did not see Mr. Brown strike Mr. Duke with the bat. RP 109-110.

Mr. Brown told the two men that they were there because they (Mr. West and Mr. Duke) had been selling marijuana in "their

territory," and that it was Sureno turf. RP 28-29. Mr. West testified that the two men asked them what they had "for value," which Mr. West interpreted as a demand for money with which he complied. RP 106-108. Both Mr. West and Mr. Duke testified that it was Mr. Brown who was doing most of the talking during the entire time of the burglary and robbery. RP 29, 116.

According to Mr. Duke, Mr. Brown began taking items from the coffee table almost immediately, while his co-defendant, "Christian"[3] began taking items from the kitchen counter. RP 24-26. Mr. Brown also told "Christian" to go through the house and find whatever he could to take. RP 108-109. Both men took turns going into Mr. West's room[4] and taking items while the other man stood guard over Mr. West and Mr. Duke. RP 26. In the course of this activity, one of the two men obtained Mr. West's .22 single shot rifle from behind the door in Mr. West's room. RP 26-27, 111.

While Mr. Brown and "Christian" were still at the apartment, the delivery person from Domino's arrived. RP 73, 111-112. According to Mr. Duke, when the pizza arrived, Mr. Brown threw

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[3] Mr. West had met the individual who accompanied Mr. Brown about a year previously, and knew him as "Christian." RP 107.

[4] Mr. Duke had been a temporary guest of Mr. West's for a period of one to two months prior to this incident. RP 15, 100-101. He slept in the living room on a couch. RP 19, 101.

the knife down, and answered the door. RP 90. Alex Lacy, the delivery driver, testified that before the door was opened, he heard someone say "relax, it's just the pizza guy," and then a tall black male opened the door, "standing in the doorway with the – kind of the door to one shoulder and the door jamb to the other – and filling that space – sort of forming a wall --." RP 230. Mr. Lacy was struck by the forceful and intense eye contact of the individual who answered the door, signed the slip, and took the pizza. RP 231. Mr. West believed that it was after Mr. Brown answered the door and received the pizza, that he and "Christian" began going through the house, taking items out to their vehicle. RP 31,112. Mr. Duke testified that Mr. Brown and "Christian" arrived at approximately 4:20, the pizza arrived at approximately 4:23, and Mr. Brown and "Christian" left at 4:30. RP 73. Justin Tucker, the manager at Domino's testified that the pizza left the store at approximately 4:21. RP 210-211, 215.

Before they left, Mr. Brown and "Christian" told the two men that they would kill them if they went to the cops. RP 37, 113. They also told Mr. West and Mr. Duke that they would return in a month to collect the tax. RP 46, 116. During their approximately ten minute interaction with the two men, Mr. Brown told them that they

should get into selling cocaine, which led to an exchange of snapchat information, assisting in the eventual identification of Mr. Brown and "Christian" as the two robbers. RP 29-31, 47, 50, 54, 62-63, 114-115.

During the same ten minute period of time that the burglary and robbery were occurring, Mr. West's next door neighbor, Daniel Olsen, let his dog outside. RP 244, 247. Mr. Olsen saw his dog jump up on a white guy holding a baseball bat. RP 247. Mr. Olsen grabbed his dog and went inside, but watched from his window. *Id.* Mr. Olsen observed a tall black male with Mr. West's .22 single shot rifle under his coat. RP 249. Mr. Olsen testified that he observed the stock and barrel of a rifle that Mr. West had shown him some time previously. *Id.* According to Mr. Olsen, he observed both men with a bunch of stuff in their pockets, and saw them jump in a car and drive off. RP 249-250. In addition to the rifle, and miscellaneous other items, the two men took the pizza as well. RP 110, 112.

Mr. Brown proceeded to a bench trial on charges of Burglary in the First Degree, Robbery in the First Degree, two counts of Assault in the Second Degree, Theft of a Firearm, and Theft in the Third Degree for the pizza. RP 8. He was found guilty of all counts,

but for the Assault Second involving Mr. West committed by "Christian." RP 318. Mr. Brown argues that the remaining count of assault second, as well as both theft convictions are encompassed within Mr. Brown's robbery first degree conviction, and should thus be vacated. The State concurs in part with Appellant's argument as to the assault second being encompassed within the robbery first conviction, but respectfully disagrees that the theft convictions, most notably, Mr. Brown's theft of a firearm, would also be encompassed.

V. ARGUMENT:

APPELLANT'S CONVICTION FOR ASSAULT IN THE SECOND DEGREE WHICH ELEVATED HIS CRIME OF ROBBERY TO ROBBERY IN THE FIRST DEGREE IS ENCOMPASSED WITHIN THAT CONVICTION, AND MUST BE VACATED ON DOUBLE JEOPARDY GROUNDS, HOWEVER, NO SUCH CIRCUMSTANCES EXIST IN RELATION TO APPELLANT'S CONVICTIONS FOR THEFT OF A FIREARM AND THEFT IN THE THIRD DEGREE AS NEITHER ELEVATED HIS CRIME OF ROBBERY; THE ROBBERY AND THEFTS EACH CONTAIN UNIQUE ELEMENTS, AND LEGISLATIVE HISTORY BELIES APPELLANT'S ARGUMENT.

State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005), cited by Appellant, holds that when an assault second conviction elevates the degree of robbery to robbery in the first degree, the

Court is to conduct a case by case analysis as to whether the assault is encompassed within the robbery first degree charge. In this case, Mr. Brown was charged with robbery in the first degree while being armed with a deadly weapon or displaying what appeared to be a firearm. Both Mr. West and Mr. Duke were struck by a swinging baseball bat to the head. Mr. Duke, forewarned by the "loud smack" of the bat striking Mr. West, put his arm up to protect his own head and deflect the strike, receiving an injury that continued to cause him pain up to the time of trial. A deadly weapon is defined in RCW 9A.04.110(6) as any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm. As the assault second, involving the use of the baseball bat as a deadly weapon, elevated the robbery in this case to robbery in the first degree, the State concedes that Appellant's assault second conviction merges for double jeopardy purposes and should be vacated.

However, the Appellant is also argues that because the thefts constituted the necessary taking element of the robbery, both the

theft of the firearm and the theft third also merge within the robbery, and should also be vacated on double jeopardy grounds.

Similar to *State v. Calle*, 125 Wn.2d 769, 888 P.2d 155 (1995), in which the Court found that rape and incest statutes address different elements, different crimes, and different harms, the harms associated with robbery and theft of a firearm are unique, and the statutes address different evils. 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. On the other hand, the theft of a firearm statute is designed, in part, to discourage theft of firearms, and to enhance the penalty for this type of theft.

In *Blockburger v. U.S.*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932), the Court held that the applicable rule is that where 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. Washington's "same evidence" test is similar: "'where the same act . . . 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 that the other does not.'" *Calle*, 125 Wn.2d at 777-778, (quoting *Blockburger*, 284 U.S. at 304). If one of two charged crimes requires proof of a fact not required by the other, the crimes will not constitute the same offense and cumulative punishment is presumptively allowed. *See Missouri v. Hunter*, 459 U.S. 359, 367, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983). While not dispositive, the *Blockburger* and "same evidence" tests "are significant indicators of legislative intent and raise a presumption that where the legislative authority has set forth statutory offenses for which punishments are presumptively authorized absent a clear indication of contrary legislative intent." *State v. Frohs*, 83 Wn.App. 803, 809, 924 P.2d 384 (1996), (citing *Calle*, 125 Wn.2d at 778). Furthermore where the legislature specifically authorizes cumulative punishment under two statutes, regardless of whether they proscribe the same conduct under *Blockburger*, a court's task of statutory construction is at an end, and the trial court may impose cumulative punishments under such statutes in a single trial. *Hunter, 459 U.S. at 368-69.*

The Court must begin with the language of the statutes themselves to determine whether the legislature intended to authorize multiple punishments for violations of robbery in the first

degree and theft of a firearm. If each offense, as charged, includes elements not included in the other, the offenses are different and multiple convictions can stand. Robbery in the first degree is defined 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 or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate 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. 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.

Theft of a firearm is defined in RCW 9A.56.300:

> (1) A person is guilty of theft of a firearm if he or she commits a theft of any firearm.
> (2) This section applies regardless of the value of the firearm taken in the theft.
> (3) Each firearm taken in the theft under this section is a separate offense.
> (4) The definition of "theft" and the defense allowed against the prosecution for theft under RCW 9A.56.020 shall apply to the crime of theft of a firearm.
> (5) As used in this section, "firearm" means any firearm as defined in RCW 9.41.010.
> (6) Theft of a firearm is a class B felony.

Each offense contains an element not required in the other, robbery the taking of property from a person or in their presence by the use of force or fear; theft of a firearm, the theft of a specific instrument, to wit; a firearm.

Not only do Robbery in the First Degree and Theft of a Firearm contain different elements, but in contrast to Appellant's Assault Second conviction which elevated the degree of robbery,

Appellant's Theft of a Firearm had no such impact, and punishment for both would not constitute double jeopardy. *State v. Vladovic*, 99 Wn.2d 413, 421, 662 P.2d 853 (1983) holding that that "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 (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).

Evidence of legislative intent to hold an individual liable for multiple offenses may be clear on the face of the statute or found in the legislative history, the structure of the statutes, the fact the two statutes are directed at eliminating different evils, or any other source of legislative intent. *State v. Freeman*, 153 Wn.2d at 773, *State v. Frohs*, 83 Wn. App. 803, 924 P.2d 384 (1996).

Prior to 1994, theft of a firearm with a value of less than $1,500 was included within Theft Second and classified as a seriousness level I crime. In special session, the Legislature made its finding that increasing violence within the society "causes great concern for the immediate health and safety of our citizens and social institutions," and went on to state that the use of firearms had

dramatically increased over the past decade, reaching the conclusion that "reducing violence must include changes in criminal penalties," to include "reducing the unlawful use of and access to firearms…" Laws of 1994, Spec. Sess., ch. 7, § 101 (Violence Reduction Programs, Statement of Intent). The Legislature then removed the crime of Theft of a Firearm from the Theft Second statute, with a seriousness level of I and created the specific offense of Theft of a Firearm with a seriousness level of V. Laws of 1994, Spec. Sess., ch. 7, §432. However, it remained as a "C" felony at that time.

In 1995, the "Hard Time for Hard Crime" initiative was passed by the Legislature as written and became enforceable July 23, 1995. Theft of a Firearm was raised from a "C" felony to a "B" felony, and from a seriousness level of V to a seriousness level of VI. Laws of 1995, ch. 129, §10, (Initiative Measure No. 159). First degree theft, also a "B" felony, has only a seriousness level of II. Having distinguished the seriousness level of theft of a firearm, Appellant's argument that whether a firearm or a pizza were stolen would encompass within a robbery for double jeopardy purposes is dismissive of the Legislative history and intent of holding individuals accountable for Theft of a Firearm separate and apart from Robbery in the First Degree.

Because the Assault in the Second Degree conviction merges within the Robbery in the First Degree, Appellant would score as a seven for sentencing purposes, and must be re-sentenced within the standard range.

Because Appellant did not waive his right to be present at a restitution hearing, the agreed order signed by counsel, off docket, which bears no indicated of being adopted or accepted by Appellant must be stricken.

VI. CONCLUSION:

Appellant's conviction for Assault in the Second Degree elevated the charge of Robbery to Robbery in the First Degree and is encompassed within that charge for double jeopardy purposes. The Appellant's conviction for Assault in the Second Degree should be vacated. Appellant's conviction for Theft of a Firearm, and Theft Third had no such effect, and Legislative history would show a clear indication that Appellant's theft crimes, which do not elevate the charge of robbery, do not implicate double jeopardy. Mr. Brown's convictions for those thefts should remain. Vacating Appellant's conviction for Assault in the Second Degree decreases his offender score from a nine to a seven, and Mr. Brown should be returned to Kittitas County for resentencing. Finally, the restitution order

entered without his presence as requested and required should be stricken as void.

Respectfully submitted this 26th day of November, 2019.

_____/s/_____
Carole L. Highland
WSBA #20504
Deputy Prosecuting Attorney

PROOF OF SERVICE

I, Carole L. Highland, do hereby certify under penalty of perjury that on 26th day of November, 2019, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Respondent's Brief:

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