

81626-3

NO. 33678-2

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

STATE OF WASHINGTON, RESPONDENT

v.

GUY DANIEL TURNER, APPELLANT

FILED
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DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
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Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 05-1-00021-1

SUPPLEMENTAL BRIEF OF RESPONDENT

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

1. Were defendant's double jeopardy rights violated where the sentencing court properly merged defendant's first degree robbery and second degree assault convictions; imposed judgment only on the first degree robbery conviction; and vacated defendant's second degree assault conviction for purposes of sentencing?

B. STATEMENT OF THE CASE.

For the purposes of this brief, the State incorporates by reference the procedural and substantive facts set forth in the State's original response brief.

C. ARGUMENT.

1. DEFENDANT'S DOUBLE JEOPARDY RIGHTS WERE NOT VIOLATED WHERE THE SENTENCING COURT PROPERLY MERGED DEFENDANT'S FIRST DEGREE ROBBERY AND SECOND DEGREE ASSAULT CONVICTIONS; IMPOSED JUDGMENT ONLY ON THE FIRST DEGREE ROBBERY CONVICTION; AND VACATED DEFENDANT'S SECOND DEGREE ASSAULT CONVICTION FOR PURPOSES OF SENTENCING.

The double jeopardy doctrine protects an individual from multiple punishments for the same crime. See State v. Womac 160 Wn.2d 643, 650, 160 P.3d 40 (2007). [N]o person shall...be subject for the same

offense to be twice put in jeopardy of life or limb....” U.S. CONST. amend. V. No person shall...be twice put in jeopardy for the same offense. WA CONST article 1, section 9. The scope and protections of Washington’s double jeopardy clause are the same as those provided in the federal double jeopardy clause. Womac at 650 citing, State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Courts may not enter multiple convictions for the same offense without violating double jeopardy. Womac at 658 citing, State v. Freeman, 153 Wn.2d 765, 770, 771, 108 P.3d 753 (2005). In this context, [*j*]eopardy means “exposure to danger.” Id. at 651, citing Linda S. Portnoy, Washington Criminal Practice in Courts of Limited Jurisdiction, section 15.05(C), at 15-7 (3d ed. 2005) (emphasis in original).

In Womac, the defendant was convicted of homicide by abuse, second degree murder, and first degree assault for the death of his son. Id. at 648. At sentencing, the court found that all three counts constituted the same criminal conduct. Id. at 654. The sentencing court imposed judgment on all three counts and an exceptional sentence on Count I, but did not impose a sentence on the other two counts to avoid violating constitutional double jeopardy provisions. Id. The court stated that sentencing Womac on all three counts would result in multiple

punishments for the same criminal conduct and would violate double jeopardy¹. Id.

On appeal, this court held double jeopardy required the lesser counts to be immediately and conditionally dismissed, which allowed for their reinstatement if the greater verdict and sentence are later set aside. State v. Womac, 130 Wn. App. 450, 459-60, 123 P.3d 528 (2005). This court remanded for the sentencing court to conditionally dismiss counts two and three. Womac, 130 Wn. App. 450, 459-60.

The Supreme Court disagreed. The Supreme Court focused on the fact that Womac's convictions had been reduced to a judgment and therefore remained on his record. "[T]he trial court *did* enter judgment on Counts II and III declaring both convictions "valid" while clarifying that imposing separate punishments would violate double jeopardy provisions." Womac, 160 Wn.2d 643, 658 (emphasis in original). Because the convictions were reduced to judgment, the court directed that Womac's convictions on counts II and III be vacated. Womac, 160 Wn.2d at 660. The court reasoned that the convictions, even without a sentence, placed Womac in danger and, therefore, jeopardy.

In the present case, a jury convicted defendant of both first degree robbery and second degree assault. CP 10, 12. At sentencing, the court

¹ The court noted in an appendix to the judgment and sentence that imposing separate punishments for counts I, II, and III would violate double jeopardy provisions. Womac at 654.

determined the second degree assault conviction merged into the first degree robbery conviction. CP 16-17. The second degree assault conviction was vacated for purposes of sentencing. CP 16-17. Only the robbery conviction was reduced to judgment. CP 18-30. The court noted that the second degree assault conviction was “a valid conviction, and the defendant could be sentenced on it if, on appeal, the conviction for first degree robbery is vacated or otherwise set aside. CP16-17.

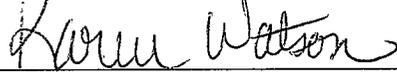
The present case is distinguishable from Womac because defendant’s second degree assault conviction was vacated for purposes of sentencing and not reduced to judgment. As a result, defendant only received one punishment for his crime. Unlike Womac, whose three convictions were reduced to judgment, defendant does not have convictions for multiple offenses for a single act. Defendant’s double jeopardy rights were not violated because the trial court properly vacated defendant’s second degree assault conviction for purposes of sentencing and only reduced his first degree robbery conviction to judgment.

D. CONCLUSION.

The State respectfully requests this court to affirm the defendant's conviction.

DATED: FEBRUARY 1, 2008

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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.

2/1/08 G. Horne
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