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SUPREME COURT  
STATE OF WASHINGTON

No. 81626-3

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BY RONALD D. CARPENTER

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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CLERK

STATE OF WASHINGTON,

Respondent,

v.

GUY DANIEL TURNER,

Petitioner.

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Court of Appeals No. 33678-2 II  
Appeal from the Superior Court of Pierce County  
The Honorable Brian M. Tollefson, Judge  
Cause No. 05-1-00021-1

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PETITIONER'S SUPPLEMENTAL BRIEF ON REVIEW

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A. IDENTITY OF PETITIONER

The Petitioner for review is Guy Daniel Turner, the defendant and appellant in this case.

B. COURT OF APPEALS DECISION

This court has accepted review of the opinion in the Court of Appeals, Division II, No. 33678-2-II which was filed on April 29, 2008.

C. ISSUES PRESENTED FOR REVIEW

1. Whether Division II of the Court of Appeals erred by refusing to permanently, finally, and unconditionally vacate petitioner's assault in the second degree conviction as violative of the Double Jeopardy clauses of the United States and Washington constitutions despite this court's ruling in State v Womac, 160 Wn. 2d 643, 160 P. 3d 40 (2007).
2. Whether Division II of the Court of Appeals erred in holding that a trial court can avoid the double jeopardy implications of this court's holding in Womac by conditionally vacating a merged conviction as violative of double jeopardy, not including the conviction in the judgment and sentence, and entering a separate written order with the judgment and sentence stating that the merged conviction is valid and can be reinstated if the remaining lead conviction is reversed on appeal or set aside by collateral attack.

D. STATEMENT OF THE CASE

Petitioner filed a Brief of Appellant with Division II of the Court of Appeals alleging that the trial court had erred regarding the above indicated issues. Petitioner also filed a Petition for Review with this Court. The brief

and petition for review both set out the facts relevant to this brief and are hereby incorporated by reference.

E. ARGUMENT

1. THIS COURT'S OPINION IN WOMAC STANDS FOR THE PRINCIPLE THAT A CONVICTION IN AND OF ITSELF CONTAINS ALL THE PUNATIVE CONSEQUENCES THAT VIOLATE PRINCIPLES DOUBLE JEOPARDY AND THAT THE ONLY ALLOWABLE REMEDY IS TO VACATE THE CONVICTION THAT VIOLATES DOUBLE JEOPARDY PERMENANTLY, FINALLY AND UNCONDITIONALLY.

a. The Court of Appeals and the trial court in this case have wrongfully concluded that a verdict of guilty by a jury is not a conviction for double jeopardy purposes as long as the conviction is not included in the judgment and sentence and the defendant is not sentenced on that conviction.

A conviction, under Washington law, remains a conviction regardless of the trial court's magical judicial "slight of hand" decision to not enter judgment on it. The Sentencing Reform Act RCW 9.94A.030 (12) defines "conviction" as:

"an adjudication of guilt pursuant to Titles 10 or 13 RCW, and includes a verdict of guilty, and acceptance of a plea of guilty."

A conviction can still be counted in a future offender score under the

above definition regardless of whether a court enters judgment on it or whether or not sentence is imposed. RCW 9.94A.525.

Similarly ER 609 (a) permits impeachment of a witness with evidence that the witness has been convicted of a crime. The time limit governing the use of such evidence is calculated from the witness's release from custody or from the date of conviction. ER 609 (a). Entry of a judgment and or sentence is not a requirement for impeachment under this rule.

The double jeopardy provision under Article 1 § 9 of the Washington Constitution and the Fifth Amendment to the United States Constitution prohibits multiple punishments for the same offense imposed in the same proceeding. State v Womac, 160 Wn. 2d 643, 650-51, 160 P. 3d 40 (2007).

The appropriate remedy for a violation of double jeopardy is a permanent, final, and unconditional vacation of the conviction that violates double jeopardy. Womac, at 656. See also State v Gohl, 109 Wn. App 817, 37 P. 3d 293 (2001), State v Valentine, 108 Wn. App. 24, 29 P. 3d 42 (2001).

A conviction in and of itself is punishment for purposes of double jeopardy. In Gohl, the State argued that convictions for attempted murder and first degree assault did not violate double jeopardy because the sentencing court, finding that the crimes encompassed the same criminal

conduct, imposed no sentence for the assault. The Gohl court disagreed,

Gohl at 822:

“This argument contradicts the rule that conviction, and not merely imposition of a sentence, constitutes punishment. The fact of multiple convictions, with the concomitant societal stigma and potential to increase sentence under recidivist statutes for any future offense violated double jeopardy even where, as here, the trial court imposed only one sentence for the two offenses”.

Gohl at 822 (citing Ball v United States, 470 U.S. 856, 861, 105 S. Ct

1668, 84 L. Ed 2d 740 (1985).

This court in Womac held similarly. Womac at 656-58. Division II by wrongfully concluding that a conviction that is not put to judgment is not a conviction for double jeopardy purposes ignored the definition of conviction in the Sentencing Reform Act. Once Division II made this error it became easy for them to avoid the holdings in Womac and Gohl that a conviction in and of itself is punishment for double jeopardy purposes. This court should not make this same error and should reaffirm its holding in Womac.

- b. This court, in Womac, held that double jeopardy prevents the State from holding convictions in a safe for a rainy day, as “back up”, in the event the greater conviction is set aside, then revive those lesser convictions and sentence the defendant on them.

In Womac this court expressly disapproved of conditionally vacating

convictions that violate double jeopardy only to allow them to be revived and reinstated once the remaining conviction is set aside. Womac at 658.

“The Court of Appeals conditional dismissal of Womac’s lesser charges and verdicts, allowing for reinstatement if the greater verdict and sentence are later set aside, is entirely without support.”

Simply put, under Womac, a court has no authority to hold a conviction that violates double jeopardy in abeyance only to resurrect and reinstate it once the double jeopardy violation is supposedly cured when the main conviction is reversed on appeal or dismissed by collateral attack.

This court agreed with Womac’s trial counsel that it was “unjust to find a double jeopardy violation and hold these convictions in a safe for a rainy day, in the event that the homicide by abuse gets reversed...then they can sort of rise from the dead like Jesus on the third day and bite my client, and he can be sentenced on convictions that the court already ruled violated double jeopardy”. Womac at 651 Subsequent to Womac, this court entered an opinion in State v Schwab, 163 Wn. 2d 664, 185 P. 3d 1151 (2008).

In Schwab, this court did allow the reinstatement of the defendant’s manslaughter conviction that was vacated on double jeopardy grounds when his second degree murder conviction was vacated on the grounds that under

In Re Personal Restraint of Andress, 147 Wn. 2d 602, 56 P. 3d 981 (2002)  
second degree felony murder could not be predicated by assault.

This court, in Schwab, reaffirmed its holding in Womac but held that because of the major unforeseeable change in the law under Andress, RAP 2.5 (c) (2) allowed an appellate court in the unique situation brought on by Andress, where the interest of justice would best be served, to review the propriety of its earlier decision in the same case in light of the new unforeseen change in the law. Schwab is limited to its very unique situation and did not change or effect Womac. This court, in Schwab, specifically held that the Womac court did not foresee or consider the impact of RAP 2.5. (c) in the unique situation created by that case. Schwab at 669:

It is important to note that the Court of Appeals in Schwab I did exactly what we determined was required in Womac: it vacated the lesser conviction where convictions for both first degree manslaughter and second degree felony murder violated double jeopardy. Schwab I, 98 Wn. App. at 190. The Womac court denounced the idea of a lurking conviction that can be magically revived after reversal of the remaining conviction. Womac, 160 Wn. 2d at 651. Yet in Womac, we did not consider a case in the procedural posture presented here, nor did the Womac court specifically consider the impact of RAP 2.5 (c) (2) in this procedural setting.

This court also reaffirmed its holding in Womac that a defendant faces punitive consequences from a conviction even if not sentenced on it.

Schwab at 668.

The present case does not create the unique procedural setting as Schwab. Schwab should be limited to its unique facts. However this court's holding in Schwab could create confusion in the lower courts about whether this court truly meant what it said in Womac that convictions that violate double jeopardy must be unconditionally and finally vacated with no possibility that they can be revived.

- c. A trial court cannot be allowed, under Womac, to do in a separate order what this court in Womac forbids it to do in the judgment and sentence.

In Womac, the jury convicted the defendant of homicide by abuse, second degree felony murder, and first degree assault arising from the death of his infant son. The trial court included all three convictions in the judgment and sentence but only sentenced Womac on the homicide by abuse charge. Division II, on appeal, directed the trial court to conditionally dismiss the felony murder and assault convictions allowing them to be revived and reinstated should the homicide by abuse charge be reversed on appeal or otherwise be set aside by the collateral attack. This court, finding a double jeopardy violation, ordered the trial court to unconditionally vacate the remaining convictions.

In the present case, the trial court did not include Mr. Turner's second degree assault conviction in the judgment and sentence after finding that it merged with his robbery conviction for double jeopardy purposes. However, the court did sign a separate order which in essence acted as an addendum to the judgment and sentence. (See Appendix A). The order stated that the assault conviction, despite merging with the robbery, was a valid conviction and could be reinstated should Mr. Turner's first degree robbery conviction be reversed on appeal or otherwise be set aside. Division II affirmed this procedure relying on State v Ward, 125 Wn. App. 138, 104 P. 3d 61 (1991) and State v Trujillo, 112 Wn. App. 390, 49 P. 3d 395 (2005). In Ward, the defendant was charged in the alternative with second degree felony murder and second degree intentional murder. The jury convicted Ward alternatively of second degree felony murder and first degree manslaughter. The trial court entered a judgment and sentence solely on the second degree felony murder conviction. On appeal, Ward's second degree felony murder conviction was reversed under this court's Andress decision. The Court of Appeals held that convicting and sentencing Ward for both convictions would violate double jeopardy. However, because the manslaughter conviction was not included in the judgment and sentence there was no double jeopardy violation and the

court reasoned it didn't have to vacate the manslaughter conviction. Ward raised the same unique situation as Schwab and is distinguishable in this case.

In Trujillo, the jury convicted four defendants of first degree assault and in the alternative first degree attempted murder. The Court of Appeals Division II held that when a jury returns a guilty verdict on each alternative charge, the court should only enter a judgment on the greater offense and only sentence the defendant on that charge without reference to the conviction of the lesser charge. The court held that because the lesser charge was not reduced to judgment there was no double jeopardy violation. Trujillo at 411.

In Womac, this court distinguished Ward and Trujillo by stating that Womac was charged separately, not in the alternative. This court, in Womac, after distinguishing Ward and Trujillo held at 659:

Womac correctly argues, a court has no authority to "take a verdict on another charge ..., find that it violates double jeopardy ... , not sentence the defendant ... on it, and just ... hold it in abeyance for a later time." 7 VRP at 1074.

This court correctly concluded that a conviction for double jeopardy purposes includes a conviction in and of itself regardless of whether a court entered judgment on it.

Here, Turner was charged in the alternative with robbery in the first degree and assault in the first degree and was alternatively convicted of

robbery in the first degree and assault in the second degree. This court did not have to address Ward and Trujillo in Womac because they were distinguishable. However, Ward and Trujillo violate all of the double jeopardy concerns argued in this brief and found by this court in Womac. Ward and Trujillo wrongfully assume that a jury verdict of guilty is not a conviction if the defendant is not sentenced and no judgment is entered. RCW 9.94A: 030 (12) as previously argued, states otherwise. Secondly, Ward and Trujillo are inconsistent with this court's opinion in Womac in which this court held that a conviction in and of itself, regardless of whether the defendant is sentenced or judgment is entered on it, is punishment for double jeopardy purposes.

This court cannot allow a trial court to avoid the holding in Womac by a judicially magic "slight of hand" decision to accomplish by a separate written order what this court forbids it to do in Womac in the judgment and sentence itself. A vacated conviction means that it ceases to exist. J.F. vs D.B., 941 A. 2d 718, 721, (2008-P.A. Super.)

"... where a judgment is vacated or set aside (or stricken from the record) by valid order or judgment, it is entirely destroyed..."

See also People v Baker, 85 Ill. App. 3d 661, 663, 406 N.E. 2d 1152 (1980) (

a vacated judgment is entirely destroyed). Mr. Turner's assault in the second degree becomes no less of a conviction here, for double jeopardy purposes, by placing it in a separate order apart from the judgment and sentence.

Division II recently refused to permanently and unconditionally vacate a conviction on double jeopardy grounds for the same reasons it refused to do so in this case. State v Faagata, 147 Wn. App. 236, 193 P. 3d 1132 (2008). In Faagata, the defendant was charged with and convicted separately of first degree murder and second degree felony murder for the same single death. The trial court, at sentencing, refused to unconditionally and permanently vacate Faagata's felony murder conviction, relying on the Court of Appeals decision in Womac, prior to it being reversed by this court. The trial court orally conditionally vacated the second degree felony murder conviction and did not include it in the judgment and sentence with the first degree murder conviction. Faagata at 241-42.

On May 4, 2007, the trial court entered judgment and sentence for the first degree murder conviction. The trial court then orally conditionally dismissed the second degree felony murder conviction, stating:

Well, I'm going to dismiss Count II, but I'm going to do it conditionally. I'm going to follow the Court of Appeals' decision in State v Womac, 130 Wn. App. 450, 123 P. 3d 528 (2005), rev. in part, 160 Wn. 2d 643, 160 P. 3d 40 (2007)...That's kind of new law, but it does make a certain amount of sense to me procedurally to do that. We have a

jury that entered a conviction, and I don't think that the jury's finding should be a nullity. I think it's entitled to some weight. So I'm going to dismiss it conditionally with the understanding that should Count I be reversed or something happened with that, collateral attack, it can be reinstated, and, of course, if that were ever to happen, then there would be entirely a new set of appeal rights starting at that time.

The trial court in Faagata did orally what the trial court in the present case did by separate written order but is equally as wrong as the trial court in this case.

The present case involved the merger doctrine as opposed to the same evidence test that was applied in Womac. As this court held in State v Freeman 153 Wn. 2d 765, 777-78, 108 P. 3d 753 (2005).

Another tool for determining legislative intent in the context of double jeopardy is the merger doctrine. As we have noted elsewhere:

The merger doctrine is a rule of statutory construction which only applies where the Legislature has 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).

Here, under Freeman, Turner's assault second degree merged with his first degree robbery conviction. The remedy for a violation of double jeopardy under Womac does not seem to be dependant on which tool is used to determine legislative intent in the context of double jeopardy.

Mr. Turner's conviction for assault in the second degree should be vacated under Womac, finally, permanently, and unconditionally, to allow otherwise would give the state the multiple bites at the apple that this court found inappropriate in Womac. Womac at 651.

To permit such a practice allows the State multiple bites at the apple by labeling one crime by three different names and upholding any and all resulting convictions. And the State, "with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty: Green v United States, 355 U.S. 184, 187-88, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957).

F. CONCLUSION

Mr. Turner's conviction for assault in the second degree is violative of double jeopardy and should be vacated permanently, finally, and unconditionally.

Respectfully submitted this 31<sup>st</sup> day of December, 2008



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## Appendix A



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON ~~JUL 29 2005~~  
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,  
  
Plaintiff,  
  
vs.  
  
GUY DANIEL TURNER,  
  
Defendant

Cause No. 05-1-00021-1  
  
ORDER REGARDING  
CONVICTION IN COUNT I

THIS MATTER having come on regularly for sentencing, the defendant having been present in person and represented by counsel, Dino G. Sepe, and the State having been represented by Deputy Prosecuting Attorney S.M. Penner, and the Court being in all thing duly advised, NOW THEREFORE

THE COURT FINDS as follows:

That the defendant was found guilty, by jury, in Count I of the crime of Assault in the Second Degree, and in Count II of the crime of Robbery in the First Degree;

That the conviction for Assault in the Second Degree in Count I merges into the conviction for Robbery in the First Degree in Count II, and should be vacated for the purposes of sentencing; and

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3 That the conviction for Assault in the Second Degree was nevertheless a valid conviction,  
4 and the defendant could be sentenced on it, if, on appeal, the conviction for Robbery in the First  
5 Degree is vacated or otherwise set aside.

6 SO ORDERED this 29<sup>th</sup> day of JULY, 2005.

7  
8 

HON. BRIAN TOLLEFSON  
JUDGE



9 Presented by:

10  
11  
12  
13   
14 S.M. PENNER, WSB#25470  
15 Deputy Prosecuting Attorney

16 Approved as to Form:

17 Signed in the presence of Mr. Sepe and  
18 Mr. Turner in open court

19 DINO G. SEPE, WSB#15879  
20 Attorney for Defendant

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