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No. 68679-8

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ROBIN L. DAVIS,

Petitioner.

PETITION FOR REVIEW

STATE OF WASHINGTON
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STATE OF WASHINGTON
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A. IDENTITY OF PETITIONER

Robin Davis, defendant in the trial court, is the petitioner herein.

B. CITATION TO COURT OF APPEALS DECISION

On November 4, 2013, Division I of the Court of Appeals issued its decision vacating the convictions for Assault in the Second Degree, affirming the convictions for Kidnap in the Second Degree, and remanding the case for resentencing. A true and accurate copy of the Court of Appeal's decision will be found in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the "initial aggressor" instruction given by the trial court deprived the defendant of his right to adequately argue his theory of the case thereby depriving him of a fair trial.

D. STATEMENT OF THE CASE

Robin Davis and Jeffrey Saunders were partners in an automobile repossession business. On September 10, 2010 they

were in western Washington having just delivered some vehicles, which had been repossessed. RP 385. Leobardo Rios contacted Jeff Saunders and hired his company to repossess two vehicles purchased by Teresa Valdez and believed to be in her possession in Western Washington. RP 391 – 93. Jeff Saunders, Robin Davis, and Chet Davis, Robin Davis's adult son, drove from Auburn, Washington toward Mount Vernon where they hoped to locate one the vehicles. RP 394 – 95. Unbeknownst to Mrs. Valdez the seller installed GPS devices in both vehicles prior to delivering them to her. RP 377. Mr. Rios, located in Texas, was monitoring the GPS devices and giving directions to Jeff Saunders as to the current location of the vehicles. RP 377 – 78.

Jeff Saunders directed Robin Davis, who was driving the three, to a Kentucky Fried Chicken (KFC) restaurant located in Mount Vernon, Washington, where Mr. Rios told him the Explorer currently was located. Robin Davis parked his vehicle, a gray Ford pickup, near the exit of the drive thru to the

Kentucky Fried Chicken. Jeff Saunders got out of the pickup and approached the Explorer, which was in the drive thru lane apparently waiting for the passengers to pick up an order. RP 397 – 98. Saunders knocked on the passenger side window of the Explorer and advised the occupants that the vehicle was wanted in Texas. He told the driver of the vehicle, later identified as Salvador Valdez, to pull over. Instead of pulling over Salvador Valdez floored the vehicle, causing it to almost strike Mr. Saunders. It then jumped the curb, crossed two lanes of traffic and sped away from the Kentucky Fried Chicken. RP 400 – 02.

Unsuccessful in that attempt, Saunders and Davis decided that they would try to repossess the second vehicle. RP 404. Mr. Rios, still monitoring the GPS devices, advised Saunders that the second vehicle was positioned in North Marysville. Robin Davis got onto Interstate 5 driving south, headed for Marysville. While en route, he observed the Valdez Explorer ahead of him also traveling southbound. RP 405. He

followed the Explorer exiting I-5 at 172nd Avenue NE. He watched the Explorer turn right off of 172nd Avenue and pull into the Burger King parking lot where it parked quite far from the entrance to the restaurant. Robin Davis drove his vehicle into the parking lot and parked not far from the Explorer. RP 407 – 08. Saunders got out of the pickup with the repossession paperwork in his hand and began to approach the Explorer. RP 409. At that point the driver of the Explorer started it up and began speeding toward the exit of the parking lot. By this time Chet Davis had exited the pickup and was in the path of the Explorer. RP 409 – 10. Believing that his son was about to be struck by the Explorer, Robin Davis reached behind the driver's seat of the pickup, grabbed an unloaded rifle, pointed it at the oncoming Explorer and ordered the driver to stop. The Explorer did stop. RP 547-49. Jeff Saunders approached the Explorer and ordered the occupants out of the Explorer. J. V., Salvador's 15 year old son, got out of the passenger side of the SUV

followed by his father. Apparently the driver's side door was inoperable. RP 550.

As soon as the occupants were out of the Explorer Robin Davis put the rifle back into his car. RP 549. Saunders advised Salvador Valdez that he was placing him under arrest for attempting to run him down at the KFC. RP 414. He also told him that they were repossessing the vehicle and that they were also going to repossess the second vehicle. He placed J.V. in the pickup with Robin and Chet Davis while he drove the Explorer, with Salvador in the passenger seat. Saunders began to lead the way to where he believed the second vehicle was located. RP 418-19.

While en route Salvador Valdez told Saunders that he was diabetic and needed sugar. Saunders stopped almost immediately at a convenience store. RP 420-21. Salvador Valdez went into the store to purchase juice while Robin Davis and Saunders conversed. As Salvador Valdez exited the convenience store the police arrived. With guns drawn they

ordered everyone out of the vehicle. RP 421. After some preliminary investigation, they arrested Robin Davis, Jeff Saunders, and Chet Davis. RP 424.

Almost seven months later the Snohomish County Prosecutor charged Robin Davis with one count of Kidnap in the First Degree, one count of Kidnap in the Second Degree, and two counts of Assault in the Second Degree. CP 1. By the time of trial the State had amended its information to add a firearm enhancement to each of the four counts. CP 40. Jeff Saunders also was charged with those four counts plus an additional count of Unlawful Possession of a Firearm by a Convicted Felon. Chet Davis resolved his case prior to trial by entering a guilty plea to one count of Unlawful Imprisonment.

At the conclusion of the State's case the defense moved to dismiss the charge of Kidnap in the First Degree based on the failure of the State to introduce sufficient evidence to justify giving that count to the jury. The judge granted the motion to dismiss that charge, but allowed the State to amend to Kidnap

in the Second Degree. RP 374. Following a four-day trial the jury found Robin Davis guilty of two counts of Kidnap in the Second Degree and two counts of Assault in the Second Degree. The jury also returned a special verdict for each count finding that Robin Davis had been armed with a firearm. The jury found Jeffrey Saunders guilty of two counts of Kidnap in the Second Degree while armed with a firearm and acquitted him of two counts of Assault in the Second Degree and Unlawful Possession of a Firearm. CP 48 – 57.

Judge McKeeman imposed an exceptional sentence. CP 64. He did not impose any period of confinement on any of the four counts, but did impose three years for each firearm enhancement to run consecutively thereby sentencing Robin Davis to twelve (12) years in prison. CP 68. Mr. Davis filed a timely notice of appeal and the court granted him bail pending this appeal. CP 69. The Court of Appeals vacated the convictions for the two counts of Assault in the Second Degree, affirmed the convictions for two counts of Kidnap in the

Second Degree (with firearm allegations) and remanded the matter to the trial court for resentencing.¹

E. ARGUMENT

This Court should accept review pursuant to RAP 13.4(b) (4)(the petition involves an issue of substantial public interest that should be determined by the Supreme Court.) The issue raised in this petition concerns the propriety of the “initial aggressor” instruction given at trial, based on the WPIC, with reference to the defense raised at trial. The rationale for the “initial aggressor” instruction was set out in State v. Riley, 137 Wash.2d 904, 911, 976 P.2d 624, 628 (1999) in which the Court wrote: “As a leading treatise explains, the reason one generally cannot claim self-defense when one is an aggressor is because “the aggressor's victim, defending himself against the aggressor, is using lawful, not unlawful, force; and the force defended against must be unlawful force, for self-defense.” 1

¹ The Court's instruction on the lawful use of force applied to the kidnap as well as assault allegations. See Court's Instruction 31.

Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 5.7, at 657–58 (1986) (footnotes omitted).

When the initial aggressor instruction becomes an issue on appeal our Courts routinely remark:

Notably, Washington courts have noted few situations exist necessitating an aggressor instruction. *State v. Arthur*, 42 Wash.App. 120, 125 n. 1, 708 P.2d 1230 (1985). This is because “[t]he theories of the case can be sufficiently argued and understood by the jury without such instruction.” *Id.* Moreover, “[w]hile an aggressor instruction should be given where called for by the evidence, an aggressor instruction impacts a defendant's claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt.” *Riley*, 137 Wash.2d at 910 n. 2, 976 P.2d 624.

See *State v. Stark*, 158 Wash.App. 952, 960, 244 P.3d 433, 437 (2010).

In the typical case the Appellate Courts then go on to examine the facts of the case to determine whether there is credible evidence that the defendant, through an intentional act independent of the actual assault, provoked a belligerent response. If the defendant did, he or she is not entitled to justify his use of force as lawful.

Mr. Davis relied on the “lawful use of force” defense and the Court properly advised the jury of that defense. See Court’s Instruction 31. At the State’s request the Court also read to the jury Instruction 33², the “initial aggressor” instruction which states:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense or defense of another and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense or defense of another is not available as a defense.

The instruction, as applied to the facts of this case prevented the defense in this case from effectively arguing its theory of the case, that the defendant’s use of force was not unlawful.

In State v. Brower, 43 Wash.App. 893, 901, 721 P.2d 12 (1986) the Court held that the first-aggressor instruction is

² This instruction is taken from WPIC 16.04

proper when the record shows that the defendant is involved in wrongful or unlawful conduct before the charged assault occurred. It is not proper simply because the defendant provoked a belligerent response from the alleged victim.³ Accepting that the term “unlawful act” is void for vagueness and for that reason cannot be part of the “initial aggressor” instruction creates a conundrum for the defendant who simply is doing what the law allows, but nonetheless provokes another person. Since the rationale underlying the “initial aggressor” instruction is based upon the principle that the aggressor cannot claim self-defense because the victim of the aggressive act is entitled to respond with lawful force, State v. Riley, supra., 137

³ In State v. Wingate, 155 Wash.2d 817, 821-822, 122 P.3d 908, 910 (2005) the Supreme Court criticized Brower stating: The Court of Appeals' reliance on *Brower* and *Craig* is misplaced. *Brower* dealt with an aggressor instruction that addressed an “unlawful act” that created a necessity to respond in self-defense, rather than an intentional act that is reasonably likely to provoke a belligerent response, as does the present instruction. See *Brower*, 43 Wash.App. at 901, 721 P.2d 12. The “unlawful act” language appearing in the aggressor instruction in *Brower* was previously held to be unconstitutionally vague. See *id.* (referencing *State v. Arthur*, 42 Wash.App. 120, 708 P.2d 1230 (1985), which found the “unlawful act” language improper).

Wash.2d at 912, it is appropriate that the jury be so instructed. The lack of any guidance or limitation regarding the victim's actions leaves the jury in a situation in which it looks solely at whether the defendant provoked the alleged victim. The inadequacy of the instruction is significant, as the facts of this case do not present the typical scenario.

In this case Mr. Davis contended that the first contact with the Valdez family occurred in Mt. Vernon at the KFC drive through when, pursuant to the creditor's authorization, they attempted to repossess the car – a lawful act. The second contact occurred in Marysville in the Burger King parking lot when the defendant again attempted to repossess the car and to arrest the driver of the Explorer for attempting to run over Mr. Saunders as the Mr. Valdez fled from the KFC, also a lawful act. The Court instructed the jury on the lawful use of force. It found that the defense presented sufficient facts to the jury to justify the giving of these instructions. The State did not assign error to the Court's instructions.

Although repossession and/or a citizen's arrest are lawful acts, they also are intentional acts that are likely to provoke a belligerent response. Most people do not want their possessions repossessed, nor do they want to be arrested. A belligerent response by that person would come as no surprise. Yet the "initial aggressor" instruction advised the jury that if the defendant's intentional act was reasonably likely to provoke a belligerent response, the lawful use of force defense was not available to the defendant.

The cases relied upon by the Court of Appeals do not address the issue presented in this case. More often than not the cases concern who threw the first punch, displayed a weapon, whether the defendant's provocation was independent of the assault, or whether more than words served as the provocation. This case is different as it presents the question of the propriety of the WPIC initial aggressor instruction that does not distinguish between intentional lawful acts and unlawful acts.

The defense, in this case, could not effectively argue its theory of the case. This “initial aggressor” instruction allowed the jury to reject the defendant’s lawful use of force arguments, not based on a finding that the defendant provoked a situation in which Mr. Valdez was entitled to respond belligerently, but simply by finding that the defendant’s intentional actions provoked a belligerent response. Making such a finding would render the “use of force” instruction inapplicable. However, the “initial aggressor” instruction should not preclude the defendant’s use of force if the provoking action was not unlawful. In other words, assuming a proper repossession or citizen’s arrest, Mr. Valdez was not entitled to use force to resist; his belligerent response was not justified. If Mr. Valdez belligerent response was not justified, Davis was not the “initial aggressor.”

This contention is supported by State v. Stark, 158 Wash.App. 952, 244 P.3d 433 (2010). In Stark the defendant shot her husband who had come to her home after learning that

she had obtained a restraining order against him. The Court gave an initial aggressor instruction, which the State, on appeal, sought to justify on the basis that the restraining order provoked Mr. Stark. The Court disagreed. It held that Ms. Stark was justified in obtaining the restraining order and that “(B)ecause Ms. Stark did not provoke the fight (she was hiding in the kitchen), because no conflicting evidence is presented regarding Ms. Stark’s conduct, and because the evidence does not show Ms. Stark made the first move (Mr. Stark charged, threatened to kill Ms. Stark, and reached for a knife), sufficient evidence does not exist to justify an aggressor instruction. “ Id at 960. Since the initial aggressor instructor prevented Ms. Stark from arguing her theory of the case (lawful use of force), the Court vacated her conviction.

In the case at bar the Court found that there was sufficient evidence to instruct the jury that the lawful use of force also included force used in making a citizen’s arrest. See Instruction 31. The State did not assign error to that instruction.

Based on the testimony offered by the defense, Davis and Saunders had probable cause to believe the driver of the Explorer committed a felony, either assault in the second degree or attempted vehicular assault. See instruction 35. Similar to that of a police officer, they were entitled to use force to make the arrest. No one would dispute that ordering someone out of a car is an intention and provocative act. However, if the Davis party had probable cause on which to make a citizen's arrest, they were justified to use force to effectuate it. Their actions were lawful.

A citizen who uses force while attempting to make a citizen's arrest stands in the shoes of a police officer. See State v. Clarke, 61 Wash.2d 138, 144, 377 P.2d 449, 453 (1962)(We conclude, after careful consideration of the conflicting arguments, that the best rule, and the rule which we adopt in this case, is that it is lawful for a private citizen to use deadly force in attempting to apprehend a fleeing felon in any situation where it would be lawful for a peace officer to do so.). The act

of using reasonable force to make a valid citizen's arrest should never justify the giving of an initial aggressor instruction.

The defense contends that there was not sufficient evidence to justify the "initial aggressor" instruction. However, even if there was a basis for giving an "initial aggressor" instruction, the WPIC version given by the Court misstated the law. It allowed the jury to reject the defendant's defense based on intentional, but lawful acts by the defendant. The failure to require the jury to first determine whether Mr. Valdez's belligerent response was justified so that Mr. Davis would be considered the initial aggressor was error.

The trial courts rely upon the WPIC in determining what instructions to read to the jury. This Court has supervisory powers over the State's courts. State v. Fields, 85 Wash.2d 126, 129, 530 P.2d 284 (1975) (citing State ex rel. Foster-Wyman Lumber Co. v. Superior Court, 148 Wash. 1, 267 P. 770 (1928)). State v. Bennett, 161 Wash.2d 303, 317, 165 P.3d 1241, 1249 (2007). It is this Court, which should correct the

WPIC so that defendants in a situation similar to Mr. Davis, who assert that their actions were lawful, albeit provocative, can adequately argue their theory of the case and have the jury properly decide whether their use of force was lawful.

F. CONCLUSION

Determining the propriety of jury instructions is the function of the Supreme Court. It is important that the jury instructions be consistent from trial court to trial court. While there may be circumstances that justify the giving of the “initial aggressor” instruction, Mr. Davis contends that this was not such a case. Even if there was credible evidence that Mr. Davis provoked a belligerent response, the jury should have been instructed that before rejecting his claim of lawful use of force, it had to find that his intentional act created a situation that justified the “victim” to respond with the lawful use of force.

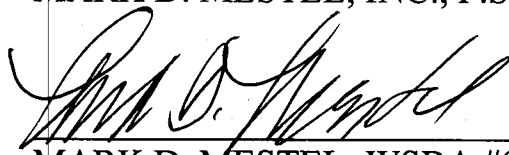
The failure to properly advise the jury deprived Mr. Davis of his right to adequately present his defense. This Court

should accept review, vacate the remaining convictions, and
remand to the trial court for a new trial.

DATED 27 day of November, 2013.

Respectfully submitted,

MARK D. MESTEL, INC., P.S.

A handwritten signature in black ink, appearing to read "Mark D. Mestel", written over a horizontal line.

MARK D. MESTEL, WSBA #8350
Attorney for Petitioner

G. CERTIFICATE OF SERVICE

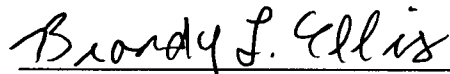
I hereby certify that a copy of the foregoing Petition for Review was served upon the following by Certified Mail via United States Postal Service, addressed to:

- 1) Court of Appeals **(2 Copies)**
Division One
600 University Street
One Union Square
Seattle, WA 98101

I hereby certify that a copy of the foregoing Petition for Review was served upon the following by United States Postal Service, addressed to:

- 2) Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S 504
Everett, WA 98201
- 3) Robin Davis
26208 West SR 904
Cheney, WA 99004

DATED this 27 day of November, 2013.



Brandy L. Ellis, Secretary

APPENDIX

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 68679-8-1
Respondent,)	
)	DIVISION ONE
v.)	
)	
ROBIN LEE DAVIS,)	PUBLISHED IN PART
)	
Appellant.)	FILED: November 4, 2013

SPEARMAN, A.C.J. — Repossession agent Robin Davis and two co-defendants, while repossessing two cars owned by the same family, forced the driver and a passenger of one of the cars to get out at gunpoint and take them to the second car. Davis was convicted of two counts of kidnapping in the second degree and two counts of assault in the second degree. On appeal, he claims (1) the assault merged with the kidnapping for each victim; (2) the trial court erroneously gave an initial aggressor instruction; (3) the court erroneously permitted rebuttal testimony about repossession industry standards; and (4) the to-convict instruction for kidnapping omitted an essential element. We agree regarding merger and reject his remaining claims. We remand for vacation of the assault convictions and for resentencing, and otherwise affirm.

FACTS

Robin Davis and Jeffrey Saunders were partners in Allstate Recovery, an automobile repossession business. On September 10, 2010, Davis drove his truck from Auburn, Washington to Mount Vernon to repossess a Ford Explorer on behalf of a client who had sold two cars to Rachel Valdez. Saunders and Davis's adult son, Chet Davis (Chet)¹, were Davis's passengers. The client was monitoring the location of Rachel Valdez's cars by GPS and informing Saunders of their location.

Saunders directed Davis to a KFC restaurant in Mount Vernon, where they spotted the Explorer in the drive-through lane. It was evening and starting to get dark. Davis parked near the exit of the drive-through and Saunders got out of the truck to approach the Explorer. Rachel Valdez's husband, Salvador Valdez (Valdez), was driving the Explorer. Valdez's passengers were his sister, niece, and 15-year-old son, J.V. Saunders yelled, knocked and pressed on the passenger-side window, and ordered Valdez to pull forward. As Valdez drove forward he saw Davis's truck parked in a way that blocked him from passing. Valdez floored the Explorer, jumped the curb, and drove away, almost striking Saunders. Valdez dropped off his sister and niece at their home.

Saunders and Davis then drove to Marysville to attempt a repossession of the second vehicle. En route, they observed Valdez's Explorer ahead of them. Davis followed the car into the parking lot of a Burger King. Valdez and J.V. noticed the truck following them and believed it was the same one from KFC. In the parking lot, Saunders, Davis, and Chet got out of the truck and went to the

¹ For ease of reference, Chet Davis will be referred to by his first name.

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Explorer. Davis aimed a shotgun at the Explorer while yelling at the occupants to get out. According to J.V. and Valdez, one of the other men had a pistol and aimed it at them while standing in front of the Explorer. J.V. and Valdez got out of the Explorer. Saunders patted down Valdez, pulled his wallet out of his pocket, and gave the wallet to Davis, saying, "Hold this in case he runs." Verbatim Report of Proceedings (VRP) at 99-100, 157. J.V. testified that a pistol was pointed at him and that he felt a gun at his back. Saunders told Valdez he was going to jail for trying to run him over and that they were going to repossess the Explorer. Saunders ordered Valdez to take them to the second car. He made J.V. get into the truck with Davis and Chet and made Valdez get into the Explorer, with Saunders driving. Two witnesses observed the incident at Burger King and called 911.

After Saunders began driving to the location of the second car, with Davis's truck following, Valdez told Saunders he was diabetic and needed sugar. Both cars stopped at a convenience store and Valdez went inside. By the time he exited, the police had located the party at the convenience store. The police ordered everyone out of the vehicles and arrested Davis, Saunders, and Chet. A search of Davis revealed three rounds of ammunition. A pistol and a shotgun was found on the back seat of the truck.²

The State charged Davis with one count of kidnapping in the first degree, one count of kidnapping in the second degree, and two counts of assault in the second degree. The State alleged that he was armed with a firearm for each count. Saunders was charged with the same four counts, also with firearm

² Both firearms were tested and determined to be operable.

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enhancements, plus one count of unlawful possession of a firearm by a convicted felon. Chet pleaded guilty to unlawful imprisonment.

Davis and Saunders were tried together. Saunders testified that he had been in the vehicle repossession business since 1997 and had learned how to conduct repossessions on the job. He testified that there were no laws specifically governing repossessions in Washington. Several times during his testimony, he referenced repossession industry standards. At the conclusion of the defense's case, the State sought to introduce testimony from Harlow Cody, an experienced repossession agent. Davis objected, arguing it was not relevant to the defense's case and related to collateral matters. The court permitted Cody to testify that there were laws governing vehicle repossessions in Washington and to testify in response to Saunders' testimony about industry standards.

At the conclusion of the State's case, the trial court granted the defense's motion to dismiss the charge of kidnapping in the first degree based on insufficient evidence. The court allowed the State to amend that charge to kidnapping in the second degree.

The trial court gave the jury the defense's requested lawful use of force instruction, including a self-defense instruction. The self-defense instruction was based on Saunders' testimony that Valdez drove the Explorer toward Chet in the Burger King parking lot and that Saunders aimed the shotgun at the Explorer to make Valdez stop. Over the defense's objection, the trial court also gave the State's requested initial aggressor instruction.

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The jury found Davis guilty of two counts of kidnapping in the second degree and two counts of assault in the second degree and also found he had been armed with a firearm for each count.³ At sentencing, the court determined that the assault and kidnapping convictions for each victim were the same criminal conduct and adjusted Davis's offender score to a "2."⁴ Clerk's Papers at 22; 68; 111. The sentencing range for each count was 13 to 17 months. Davis argued for an exceptional sentence of no time on the standard range sentence due to the mandatory time for the firearm enhancements. The court found two mitigating factors justified an exceptional sentence and imposed no time on the charges, followed by four consecutive 36-month sentences for the firearm enhancements. Davis appeals.

DISCUSSION

Davis claims that (1) the kidnapping and assault of each victim merged; (2) the trial court erred in giving the initial aggressor instruction; (3) the court erred in permitting rebuttal testimony about repossession industry standards; and (4) the to-convict instruction for kidnapping omitted an essential element of the crime.

Merger

Merger issues involve questions of law reviewed de novo.⁵ State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005) (citing State v. Johnston, 100

³ The jury found Saunders guilty of two counts of kidnapping in the second degree while armed with a firearm and acquitted him of two counts of assault in the second degree and unlawful possession of a firearm. Saunders appealed separately. See State v. Saunders, 2013 WL 5729805, at *2-7 (Oct. 21, 2013).

⁴ Because each crime was violent, it counted as "2" in computing the offender score.

⁵ A double jeopardy challenge is a constitutional claim that may be raised for the first time on appeal. Freeman, 153 Wn.2d at 770. Davis did not waive this claim by failing to raise it below.

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Wn. App. 126, 137, 996 P.2d 629 (2000)). The State may bring multiple charges arising from the same criminal conduct in a single proceeding. State v. Kier, 164 Wn.2d 798, 803, 194 P.3d 212 (2008) (citing State v. Michielli, 132 Wn.2d 229, 238-39, 937 P.2d 581 (1997)). However, state and federal constitutional protections against double jeopardy prohibit multiple punishments for the same offense. "Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense." Freeman, 153 Wn.2d at 771 (internal quotation marks and citation omitted). Because the legislature has the power to define offenses and set punishments, the determination of a double jeopardy violation turns on legislative intent. Id. at 771-72.

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.⁶ In re Pers. Restraint of Fletcher, 113 Wn.2d 42, 50-51, 776 P.2d 114 (1989). The doctrine 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).

Id. at 51 (quoting State v. Vladovic, 99 Wn.2d 413, 421, 662 P.2d 853 (1983)).

If the doctrine applies, we presume the legislature intended to punish both offenses through a greater sentence for the greater offense. Freeman, 153 Wn.2d at 772-

⁶ Although there are several steps to determine the existence of a double jeopardy violation, Davis only argues that merger applies. Therefore, we will focus on the merger doctrine.

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73. Even if charges appear to merge, however, they may be punished separately if there is an independent purpose or effect to each. Id. at 773.

Although unlawful imprisonment is not specifically designated by statute as a lesser degree of kidnapping, for several reasons, we conclude that for purposes of the merger analysis, it should be considered as such.⁷ The statutes defining kidnapping (RCW 9A.40.020 for kidnapping in the first degree, RCW 9A.40.030 for kidnapping in the second degree) and unlawful imprisonment (RCW 9A.40.040) are found consecutively in chapter 9A.40 RCW. Unlawful imprisonment is also a lesser included offense of kidnapping. State v. Russell, 104 Wn. App. 422, 449 n.61, 16 P.3d 664 (2001) (citing State v. Hansen, 46 Wn. App. 292, 296, 730 P.2d 706 (1986)). Furthermore, the purpose of the merger doctrine is to determine whether the legislature intended multiple punishments for a single act that violates several statutory provisions. Fletcher, 113 Wn.2d at 50-51. Here, the lesser crime of unlawful imprisonment can be raised to the greater crime of kidnapping in the second degree by conduct criminalized separately under the second degree assault statute. A person commits unlawful imprisonment if the person knowingly restrains another person. RCW 9A.40.040(1). A person commits second degree kidnapping if the person intentionally abducts another person under circumstances not amounting to first-degree kidnapping. RCW 9A.40.030(1). "Abduct" means to restrain a person by either (a) secreting or holding him or her in a place where he or she is not likely to be found, or (b) using or threatening to use deadly force." RCW 9A.40.010(1). "Restrain" is defined, in relevant part, as,

⁷ There is no lesser degree of kidnapping than kidnapping in the second degree.

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to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty.

RCW 9A.40.010(6). One means of abducting a person, i.e., committing the crime of second degree kidnapping, is to restrain the person by "using or threatening to use deadly force." RCW 9A.40.010(1). But when the restraint is accomplished without the use of such force, the result is the lesser offense of unlawful imprisonment. Assault in the second degree is committed, among other ways, by assault with a deadly weapon. RCW 9A.36.021(1)(c). Thus, in certain cases an assault with a deadly weapon can constitute the use or threatened use of deadly force that raises unlawful imprisonment to kidnapping in the second degree. We conclude that the merger doctrine is not precluded here simply because unlawful imprisonment is not a lesser degree of kidnapping in the second degree.

The State asserts the merger doctrine does not apply because, to prove kidnapping in the second degree, it was not required to prove assault in the second degree.⁸ We disagree. As charged and proved in this case, in the absence of the State proving that Davis committed the crime of second degree assault by means of a deadly weapon, Davis could have been convicted only of the lesser crime of unlawful imprisonment.

The State's reliance on State v. Taylor, 90 Wn. App. 312, 950 P.2d 526 (1998), a case decided in Division II of our court, is misplaced. In Taylor, the court

⁸ The State also argues that the court need not employ the merger doctrine because the legislature indicated in RCW 9.94A.533 that it intended multiple punishments for each firearm enhancement found by the jury. This argument presupposes that the assaults did not merge with the kidnappings. The State is correct to the extent that if the counts did not merge, the trial court properly imposed four consecutive terms for the firearm enhancements under RCW 9.94A.533. But this does not answer the question as to whether the assaults and kidnappings merged.

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rejected the defendant's argument that his convictions for kidnapping in the second degree and assault in the second degree merged. The court concluded that because "the threat or use of deadly force is not synonymous with the commission of second degree assault with a deadly weapon," the legislature did not clearly intend one crime to be an element of the other. Taylor, 90 Wn. App. at 320. Furthermore, the court observed, second degree kidnapping and second degree assault arose in different chapters of the penal code, and the statutes criminalizing the offenses had different purposes. Id. Thus, the court held, the crimes did not merge.

Taylor is inapposite for two reasons. First, the court did not address the issue presented here, whether the State had to prove the act that constituted the assault in order to elevate a lesser crime to kidnapping in the second degree. Thus, in determining legislative intent, the court did not consider whether the presumption that the legislature intended to punish both offenses through a greater sentence for the greater offense applied. See Freeman, 153 Wn.2d at 772-73. Second, in cases after Taylor, courts discussing merger have focused on the manner in which the offenses were charged and proved in a particular case and asked whether the State was required to prove the act constituting the merging crime to elevate the other crime. That is, courts have not simply looked at the crimes in the abstract, as the court did in Taylor.

In Freeman, the Washington Supreme Court considered whether, in the consolidated case of State v. Zumwalt, convictions for robbery in the first degree and assault in the second degree merged. Freeman, 153 Wn.2d at 770. Zumwalt

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had punched the victim in the face and robbed her. Id. The robbery was based on the infliction of bodily injury alternative means, and the assault was based on the reckless infliction of bodily harm alternative means. State v. Zumwalt, 119 Wn. App. 126, 129-32, 82 P.3d 672 (2003). The Court stated that, to prove robbery in the first degree as charged and proved, the State had to prove Zumwalt committed an assault in furtherance of the robbery. Freeman, 153 Wn.2d at 778. The convictions merged for double jeopardy purposes because “[a]s charged and proved, without the conduct amounting to assault,” Zumwalt “would be guilty of only second degree robbery.” Id. at 778.

Similarly, in State v. Esparza, 135 Wn. App. 54, 143 P.3d 612 (2006), this court looked at how the offenses at issue—assault in the second degree and attempted robbery in the first degree—were charged and proved. We noted that the State had to prove only that the defendant was armed with a deadly weapon to elevate attempted robbery to attempted robbery in the first degree, and that it was charged and proved that the defendant was so armed. Id. at 66. We explained, “Since it was unnecessary under the facts of this case for the State to prove that Beaver engaged in conduct amounting to second degree assault in order to elevate his robbery conviction, and because the State did prove conduct not amounting to second degree assault that elevated Beaver’s attempted robbery conviction, the merger doctrine does not prohibit Beaver’s conviction for both attempted first degree robbery and second degree assault.” Id.

In light of these cases, to the extent Taylor can be read for the holding that kidnapping in the second degree and assault in the second degree may never

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merge, we disagree. As in Freeman, we will look at how the offenses here were charged and proved. Here, the act constituting assault in the second degree (i.e., assault with a deadly weapon) was Davis's act in pointing the gun at the victims. That same act constituted the threatened use of deadly force that was the means by which the State charged and proved that Davis committed kidnapping in the second degree: by restraining Valdez and J.V. through the threatened use of deadly force.⁹ Without the conduct amounting to assault in the second degree, Davis would have been guilty only of the lesser offense of unlawful imprisonment. The State did not allege or prove a different act constituting the threatened use of deadly force other than the pointing of the gun at the victims. Stated differently, under these facts, the State was required to prove that Davis engaged in the conduct amounting to second degree assault to elevate unlawful imprisonment to second degree kidnapping. Thus the assault as to each victim merged with the kidnapping as to that victim.

Even if crimes would otherwise merge, they can be punished separately if they had an independent purpose or effect. Freeman, 153 Wn.2d at 773. Davis argues that the firearms were used to stop Valdez's car and effectuate the kidnapping, thus there was no independent purpose or effect. The State does not argue otherwise, and we agree with Davis. We hold the assault merged with the

⁹ The jury instructions included only the "using or threatening to use deadly force" alternative means of abducting, not the "secreting" alternative means.

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kidnapping as to each victim and remand for (1) vacation of the assault convictions¹⁰ and (2) resentencing.¹¹

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions.

Initial Aggressor Instruction

Whether sufficient evidence justified an initial aggressor instruction is a question of law reviewed de novo. State v. Bea, 162 Wn. App. 570, 577, 254 P.3d 948, rev .denied, 173 Wn.2d 1003 (2011). In determining whether the evidence was sufficient, we consider the evidence in the light most favorable to the party who requested the instruction. Id. (Citing State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). An initial aggressor instruction must be supported by credible evidence that the defendant provoked the need to act in self-defense. State v. Riley, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999). Such an instruction is properly given when "(1) the jury can reasonably determine from the evidence that the defendant provoked the fight; (2) the evidence conflicts as to whether the defendant's conduct provoked the fight; or (3) the evidence shows that the defendant made the first move by drawing a weapon." State v. Anderson, 144

¹⁰ The State concedes that if an offense is vacated, the associated firearms enhancement must be vacated. We accept the concession. When a court finds convictions for two offenses violate the double jeopardy proscription against multiple punishments it must vacate one of the convictions. State v. Turner, 169 Wn.2d 448, 468-69, 238 P.3d 461 (2010). If an offense is vacated and the defendant is not sentenced for it, RCW 9.94A.533 does not provide a basis for imposing a term for the corresponding firearm enhancement. See RCW 9.94A.533(e) (making firearm enhancements mandatory "for all offenses sentenced under this chapter").

¹¹ Davis suggests that prevailing on his merger claim (i.e., having two of the four firearm enhancements vacated) requires his sentence to be reduced to six years from twelve. We disagree and remand for resentencing. The trial court imposed no time for the substantive offenses, and it is unclear how it would have sentenced Davis had it found merger.

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Wn. App. 85, 89, 180 P.3d 885 (2008) (citing Riley, 137 Wn.2d at 909-10). Words alone do not constitute sufficient provocation. Riley, 137 Wn.2d at 911.

Here, the trial court gave the jury the defense's requested lawful use of force instruction, including a self-defense instruction and a citizen's arrest instruction.¹² Davis's self-defense claim was that he aimed the shotgun at the Explorer to bluff Valdez into stopping because he believed the car was going to hit Chet. The self-defense instruction was properly given because there was testimony from the defense that Valdez tried to hit Chet.¹³ The court also gave the following initial aggressor instruction:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense or defense of another and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense or defense of another is not available as a defense.

CP at 84.

An initial aggressor instruction was proper if there was sufficient evidence that the defendants provoked Valdez into trying to hit Chet, thus prompting Davis's

¹² The self-defense instruction stated that "[t]he use of force upon or toward the person of another is lawful whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, in case the force is not more than is necessary." CP at 82.

¹³ Both the self-defense claim and the initial aggressor instruction were relevant only if the jury first believed the defense's evidence that Valdez tried to hit Chet with the Explorer. Davis testified that when Saunders and Chet got out of the truck, Valdez accelerated toward Chet, at which point Davis pulled a shotgun out of the truck and pointed it at the Explorer. But Amber Spady, who witnessed the incident at the Burger King, testified that the Explorer was in the parking lot first when the truck speeded toward it. She testified that the truck was driving more quickly than the Explorer and that when the two vehicles were close to each other the Explorer was forced to stop. After the Explorer stopped, the driver of the truck got out of the truck with a gun and pointed it at the Explorer. The other witness, Janessa Rhodes, testified that the two cars both drove quickly into the parking lot at the same time, with the truck following the Explorer. She testified that both cars drove around the parking lot, and the Explorer stopped first. The truck then stopped, and at that point two men got out of the truck with guns and began yelling at the occupants of the Explorer.

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use of force. The State argues the instruction was properly given because it was based on conflicting evidence that the Davis party's actions at the KFC and in following the Explorer into the Burger King parking lot provoked Valdez's alleged aggression. We agree. Valdez testified that Saunders came up to the Explorer from behind while it was in the drive-through lane at KFC, pressed on the car window, yelled at him to move the car forward, and did not tell him the car was being repossessed or show any repossession paperwork. He testified that Davis's truck blocked the Explorer from passing and that its lights were shining on the Explorer. The defendants demanded that the Explorer's occupants get out of the car. Valdez was "very scared" and quickly drove off. RP 139. Later, Valdez and J.V. noticed the same truck following them into the Burger King parking lot. Spady and Rhodes saw the truck following the Explorer at high speeds into the parking lot. Valdez testified that until he and J.V. were out of the Explorer and Saunders demanded to know where the second car was, he thought he was the victim of a carjacking. The evidence from the victims conflicts with Davis's contention that the defendants did nothing to provoke a belligerent response and was sufficient to justify the initial aggressor instruction.

Rebuttal Evidence

A trial court's decision to permit rebuttal evidence is reviewed for manifest abuse of discretion. State v. White, 74 Wn.2d 386, 395, 444 P.2d 661 (1968). Rebuttal evidence is admitted to allow a plaintiff to answer new matters presented by the defendant. Id. at 394-95. Rebuttal evidence is not admissible where it is

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unduly prejudicial or on collateral matters. State v. Fisher, 165 Wn.2d 727, 750, 202 P.3d 937 (2009) (internal citations omitted).

The trial court did not abuse its discretion in permitting Cody to testify. Saunders' testimony bolstered the defense's claim that the repossession attempt was conducted reasonably and in accordance with industry standards, and that it was Valdez who acted inappropriately and provoked the need for self-defense.¹⁴ Even when Saunders clarified on cross-examination that he meant some of the practices were standard for his company, his testimony did not fully retreat from his prior testimony and still permitted the inference that his company's practices were consistent with standard industry practice. Cody's testimony rebutted Saunders'

¹⁴ Saunders' testimony included the following references to repossession industry standards:

- (1) Saunders testified that it was standard in the industry when repossessing more than one car from the same owner to first attempt to repossess the car that the owners were using the most or that was on the move. When asked about this statement during cross-examination, he testified, "Well, with our company, it is [standard], yes." VRP at 451-52.
- (2) Saunders testified that when they arrived at the KFC, Davis parked to the side of the drive-through and left enough room for a car to drive by because "[i]n this industry, you know, you can't block people" VRP at 398. On cross-examination he clarified that not blocking people was standard practice for his company because it did not want to be accused of false imprisonment.
- (3) Saunders testified that when they initially pulled into the Burger King parking lot to contact the Explorer it was not his intent to arrest Valdez for attempting to run him down at the KFC. Asked why not, he replied, "It's just not standard in this industry, I guess." VRP at 407.
- (4) Saunders testified that after stopping the Explorer in the Burger King parking lot, he told J.V. he was going to ride with Davis while Saunders drove Valdez because "it's standard in the industry, whenever we repossess a vehicle, that – if there's more than two people and there's – You don't want somebody sitting behind you." VRP at 417-18. On cross-examination, when asked about this statement, he testified, "With our company, that's standard, yes." VRP at 452.
- (5) During cross-examination the prosecutor asked Saunders whether he was familiar with the term "breach of peace." Saunders testified, "To me it means that – In the industry anyways, it means that if there's a conflict, then the repossession stops." VRP at 448.
- (6) When asked on cross-examination whether it is standard in the industry for a repossession agent to back off when a person shows resistance, Saunders answered that it was, but only at that particular location. He testified he was not aware of anything prohibiting a repossession attempt later.

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testimony that certain practices were standard in the industry.¹⁵ The defense introduced evidence that made the rebuttal evidence relevant to the issues, and the trial court limited rebuttal to matters raised in the defense case.

Davis claims the evidence prejudiced him because it allowed the jury to find that, by not following repossession protocol, the defendants were the initial aggressors. "Evidence is not excluded because it is 'prejudicial' but because it is unfairly prejudicial." State v. Gentry, 125 Wn.2d 570, 637, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995) (citing State v. Lord, 117 Wn.2d 829, 891, 822 P.2d 177 (1991)). Here, though the evidence rebutted Saunders' testimony, we do not agree it was unfairly prejudicial.

Kidnapping To-Convict Instruction

Davis claims the to-convict instruction for the kidnapping counts omitted an essential element of the crime. In his opening brief, Davis assigns error to the jury instruction but does not provide argument in support, stating he is joining in his co-defendant Saunders' appellate brief.¹⁶ But in our recent decision in Saunders' appeal, we rejected the argument that the to-convict instruction relieved the State of its burden of proving all of the elements of kidnapping in the second degree because it did not state that the State had to prove that Saunders knew he did not

¹⁵ Cody testified that there were state and federal laws regulating repossession in Washington. He testified it was not industry standard practice to (1) have someone whose car was being repossessed get in the car with the agent; (2) attempt to repossess a car with people in it; (3) use a weapon, abusive language, intimidation, or coercive tactics; or (4) order someone out of a car. He testified that when a first repossession attempt failed, the industry standard was to not make a second attempt within twenty-four hours.

¹⁶ The only briefing Davis provides on this issue appears in his reply brief and pertains to why the jury instruction prejudiced him. We point out that we do not permit litigants to use incorporation by reference as a means to argue on appeal or to escape the page limits for briefs set forth in RAP 10.4(b). Kaplan v. Nw. Mut. Life Ins. Co., 115 Wn. App. 791, 801 n. 5, 65 P.3d 16 (2003).

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have legal authority to restrict the victims' movements. Saunders, 2013 WL 5729805, at *2-7 (Oct. 21, 2013). Under Saunders, we reject Davis's claim.

Remanded with instructions to vacate assault counts and for resentencing.

WE CONCUR:

