

69767-6

69767-6

NO. 69767-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

BINYAM YEMRU,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY,

The Honorable Leroy McCullough, Judge

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BRIEF OF APPELLANT

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AUG 22 2013

King County Prosecutor  
Appellate Unit

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A. ASSIGNMENTS OF ERROR

1. The court erred in entering judgments for both second degree assault and first degree robbery in violation of the constitutional prohibition against double jeopardy.

2. The court erred in entering judgments for both first degree robbery and theft of a motor vehicle in violation of the constitutional prohibition against double jeopardy.

Issues Pertaining to Assignments of Error

1. Appellant was convicted of first degree robbery and second degree assault. The assault was used to elevate the robbery to first degree. Generally, in the absence of clear contrary legislative intent, convictions for robbery and assault merge under these circumstances and the assault conviction is vacated. Do appellant's convictions merge?

2. Double jeopardy protects against dual convictions for the same offense. Do the dual convictions for first degree robbery and theft of a motor vehicle violate double jeopardy when the evidence required to prove the robbery necessarily also proves theft of a vehicle? Alternatively, do appellant's convictions merge?

3. Did the court err in entering judgment against appellant for both first degree robbery and second degree assault?

4. Did the court err in entering judgment against appellant for both first degree robbery and taking a motor vehicle?

B. STATEMENT OF THE CASE<sup>1</sup>

1. Procedural Facts

The King County Prosecutor charged Binyam Yemru with two counts of first degree robbery, one count of second degree assault, one count of theft of a motor vehicle and one count of felony harassment. CP 52-54. Paige Knight was the named victim in one first degree robbery charge (Count I). Id. Mathew Nordstrom was the named victim in the other first degree robbery charge, the second degree assault charge, and the theft of a motor vehicle charge (Counts II, III and IV). Id. John Mbugua was named victim in the felony harassment charge (Count V). Id. It was alleged all the charged offenses occurred on August 10, 2010. Id.

A jury found Yemru guilty as charged. CP 98-93. Yemru was sentenced to 77 months on each of the robbery charges (Counts I and III), 43 months on both the assault (Count II) and taking a motor (Count IV) charges, and 33 months on the felony harassment charge (Count V). CP 99. The sentences were ordered to run concurrent, and concurrent with

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<sup>1</sup> The citations to verbatim report of proceedings are as follows: 1RP August 9, 2013; 2RP August 13, 2012; 3RP August 14, 2012; 4RP August 15, 2012; 5RP August 16, 2012; 6RP August 20, 2012; 7RP August 21, 2012; 8RP August 22, 2012; 9Rp August 23, 2012; 10Rp August 27, 2012; 11RP August 28, 2012; 12RP August 29, 2012; 13R August 30, 2012; 14 RP December 19, 2012.

another unrelated offense that Yemru was sentenced to at the same time.  
Id; 14RP 5.

2. Substantive Facts

a. Counts I and V

Sometime in the afternoon of August 10, 2010, Paige Knight walked from her apartment on Pacific Highway South to a nearby Burger King restaurant. 7RP 7,10. While in the restaurant's parking lot Paige ran into a man who she later identified as Yemru. 7RP 10. She invited Yemru back to her apartment to smoke some marijuana. 7 RP 10-11, 70. When Paige and Yemru got to the apartment Yemru gave her a twenty dollar bill presumably in exchange for the marijuana. 7RP 72, 75. Paige put the money in her bra. 7RP 72.

According to Paige, they did not smoke the marijuana but instead talked and watched television for about 20 to 30 minutes. Paige said she then got a phone call from her friend John Mbugua who said he was coming over. 7RP 12-13. Mbugua, however, testified Paige called him and asked him to come to her apartment to help her with something. 5RP 17.

After speaking with Mbugua, Paige told Yemru to leave. As they walked to the front door Yemru pulled out a gun and demanded Paige give him money. 7RP 12-3. Paige gave Yemru the twenty dollar bill that she



had put in her bra. Yemru then rummaged through the apartment. 7RP 14-15. He took a decorative sword hanging on the wall. 7RP 16.

Paige said Mbugua called her again while Yemru was still in the apartment. Yemru told Paige to tell Mbugua to come to the apartment. 7RP 26. Mbugua did not recall another phone conversation with Paige. Mbugua did arrive at Paige's apartment, however, knocked on the door, and when nobody answered he opened it. 5RP 24-25. A man, who Mbugua later identified as Yemru, came out of the bedroom, pointed a gun at Mbugua, threatened him, and told him to get inside. 5RP 25. Mbugua ran away. 5RP 27.

Paige testified Yemru ran after Mbugua. Paige ran out of the apartment as well and called 911. 7RP 27-29. A few seconds later she saw Yemru run towards Highline Community College, which is next to Paige's apartment complex behind some bushes. 7RP 21, 29.

Police arrived about a minute later. During her interview with police, Paige told the officer that while she and Yemru were walking to her apartment Yemru mentioned he was hanging out at the Kings Arms Motel. 7RP 31. The motel is about a three minute walk from Paige's apartment.

Id. She also told police she thought the gun Yemru had was not real. 7RP 33.<sup>2</sup>

b. Counts II, III, and IV

That same afternoon Mathew Nordstrom was walking to his car parked in the Highline Community College parking lot when he saw a man, who he later identified as Yemru, coming towards him carrying a sword. 6RP 4-9. Nordstrom got into his car and Yemru came up to the car and said “hey.” 6RP 12. Nordstrom rolled down the passenger window and Yemru asked for a ride. 6RP 13. Nordstrom told Yemru he could not give him a ride and he started to roll up the car’s window. At the same time Yemru stuck a gun through the partially opened window. 6RP 16-19. Nordstrom kept rolling the window up. The window hit the gun and it sounded to Nordstrom like the gun was plastic. 6RP 19.

Yemru then got into the passenger seat of the car and Nordstrom told him that he (Nordstrom) knew the gun was not real. 6RP 26-27. Yemru put the gun down, pulled out the sword and poked Nordstrom with it. 6RP 27. When Nordstrom pushed the sword away he realized the sword was real so he got out of the car and Yemru drove off in the car. 6RP 27-29. Nordstrom went to the Highline security office and called police. 6RP 30.

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<sup>2</sup> Paige gave police a description of the man who she later identified as Yemru. 10RP 64. She did not tell police she invited Yemru back to her apartment to smoke marijuana, that she rolled a “blunt” or that Yemru gave her twenty dollars in exchange for marijuana. 10 RP 73-75.

Based on information from Paige and Nordstrom police believed the same man was involved in both incidents and he might have gone to the Kings Arms Motel. 6RP 85-87. Police went to the motel and saw Nordstrom's car in the parking lot. 6RP 88, 10RP 38-39.

Sergeant Darin Majack, with the City of Kent Police Department, was one of the first officers to arrive at the motel. A few minutes after he got to the motel Majack saw Yemru on the motel's stairwell. 6RP 96-97. Majack confronted Yemru who told Majack he was staying in room 247, and he had just woken up and was going to get a pop. 6RP 98-99. After speaking with Yemru, Majack let him go because Yemru did not fit the description of the suspect given by Paige and Nordstrom. 6RP 99.

There were security cameras around the motel. 5RP 114. Police viewed the video and it appeared the man who got out of Nordstrom's car had gone into room 247. 6RP 103-104, 11RP 25. The motel registration showed that room was rented to Yemru. 7RP 86.

The police contained the area and a SWAT team arrived at the motel. Police again stopped Yemru and another man as they were leaving the motel. 10 RP 67, 72. Yemru was again released.

In the meantime, police drove Nordstrom to a location near the motel for the purpose of identifying any suspects. 10RP 23, 31. While sitting in a police car with detective Jeffrey Shirey, Nordstrom saw two men at an

intersection walking towards the motel. 6RP 38-40. Nordstrom told Shirey he thought he recognized one as the person who took his car. 6RP 41, 9RP 43. Shirey asked Nordstrom if he was sure he recognized the man but Nordstrom was not positive so Shirey and Nordstrom continued to watch the men. 6RP 41, 9RP 45. As the men got closer Nordstrom indicated to Shirey that he was positive the shorter man was the man who took his car. 6RP 41, 9RP 46-48. Shirey arrested the men. 9RP 51. One of the men was Leykun Getahun and the other was Yemru. 5RP 84, 9RP 50. Yemru was searched and police found a key to room 247. 5RP 90.

c. Other Evidence

Police eventually searched room 247. 5RP 97. Inside they found a sword, its sheath, and an Airsoft BB gun with a magazine. 5RP 100-107. Paige identified the sword as the one taken from her apartment, and she said the gun looked like the gun Yemru had pointed at her. 7RP 16-17.

A DNA analysis of the gun, sword and sheath showed a majority of the DNA profile on the gun was from a female, with a trace profile of a man. 8RP 44-45. The DNA on the sheath could have contributed by one in seven persons, and the DNA on the sword by one in two persons. 8RP 52-53. Yemru could not be excluded as a source. 8RP 53. Yemru's fingerprints were found on the passenger side door handle of Nordstrom's car and on the sword. 9RP 24-26.

d. Defense Case

Yemru testified he checked into the Kings Arms Motel on August 5, 2010. His friends often came and visited him at the motel while he was staying there.

On the evening of August 9, 2010, Yemru and some friends went to a hookah lounge in Seattle to smoke tobacco and listen to music. He did not get home until about 3:00 a.m. the next morning. 11RP 45-51. Later that day the motel's cleaning lady woke Yemru. 11RP 52. He declined her offer to clean the room and went back to sleep. 11RP 52. He was woken again when he received a text message on his phone. While reading the message his phone rang and it was Getahun at his door. Yemru opened the door for Getahun then took a shower. 11RP 52-53.

After his shower, Yemru went to get a pop and was stopped by a police officer. After talking to the officer he went back to his room and got dressed. 11RP 53-54. He and Getahun then left to go get a friend who lived in Tukwilla. When they walked down the stairs of the motel they were again stopped by police and handcuffed. Eventually they were released. 11RP 54-55.

Yemru and Getahun left the motel, took a bus to Tukwilla, picked up their friend and returned to the nearby Burger King restaurant. 11RP 55-56. Yemru wanted his laptop so he and Getahun walked back to the motel

while their friend stayed at the restaurant. 11RP 57. When they got close to the motel they were arrested. 11RP 58. Yemru said he did not know there was a sword or air gun in the motel room. 11RP 65-67.

C. ARGUMENT

YEMRU'S CONVICTIONS FOR ASSAULT (COUNT II), ROBBERY (COUNT III), AND THEFT OF A MOTOR VEHICLE (COUNT IV) VIOLATE DOUBLE JEOPARDY.

Under the double jeopardy provisions of the United States and Washington constitutions, a person may not be convicted or punished more than once for the same offense. U.S. Const. amend. V; Const. art. I, § 9; Brown v. Ohio, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977); State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005); State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). If an act supports charges under multiple statutes, the court must determine whether the Legislature intended to authorize multiple punishments. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). If the statutes do not expressly disclose legislative intent regarding multiple punishments, the court considers whether the offenses are identical in fact and in law. Id. at 777; State v. Louis, 155 Wn.2d 563, 569, 120 P.3d 936 (2005) (citing Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)).

Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, this Court presumes the legislature intended to punish both offenses through a greater sentence for the greater crime. Freeman, 153 Wn.2d at 773-74. Merger is based on the protection against double jeopardy. State v. Parmelee, 108 Wn. App. 702, 710, 32 P.3d 1029 (2001). The merger doctrine avoids double jeopardy by merging a lesser offense "into the greater offense when one offense raises the degree of another offense." State v. Collicott, 118 Wn.2d 649, 668, 827 P.2d 263 (1992).

Entering multiple convictions for the same offense in violation of double jeopardy is manifest constitutional error, which may be reviewed for the first time on appeal. RAP 2.5 (a); State v. Mutch, 171 Wn.2d 646, 661, 254 P.3d 803 (2011); State v. Adel, 136 Wn.2d 629, 631-32, 965 P.2d 1072 (1998). When two convictions violate double jeopardy, the crime that carries the lesser penalty must be unconditionally vacated. State v. Turner, 169 Wn.2d 448, 465-66, 238 P.3d 461 (2010). Double jeopardy is violated even when the person is not sentenced for the second conviction State v. Womac, 160 Wn.2d 643, 656-59, 160 P.3d 40 (2007).

1. The second degree assault conviction (Count II) and the first degree robbery conviction (Count III) violate double jeopardy.

Where the State uses second degree assault conduct to elevate the robbery charge to first degree, the offenses generally merge and are the same for double jeopardy purposes unless they have an independent purpose or effect. In re Francis, 170 Wn.2d 517, 525, 532, 242 P.3d 866 (2010); Freeman, 153 Wn.2d at 780. Here the second degree assault against Nordstrom was used to elevate the robbery charge against Nordstrom to first degree.

The State charged Yemru with first degree robbery in Count III as follows:

[O]n or about August 10, 2010 [Yemru] did unlawfully and with intent to commit theft take personal property of another, to wit: a motor vehicle from the person or in the presence of Mathew Nordstrom, against his will, by used or threatened use of immediate force, violence and fear of injury to [Nordstrom] or his property and the person or property of another, and in the commission of said crime and in immediate flight therefrom, [Yemru] displayed what appeared to be a firearm or other deadly weapon, to wit: a sword.

CP 53.

The court instructed the jury that robbery requires the taking of property from the person against the person's will by the use or threatened use of immediate force, violence, or fear of injury to that person or that person's property or the person or property of anyone. CP 126 (Instruction No. 11. To elevate the charge to first degree robbery, the State had to prove Yemru was armed with a deadly weapon,



displayed what appears to be a firearm or other deadly weapon. CP 127 (Instruction No. 12).

The State charged Yemru with second degree assault in Count II as follows: [O]n or about August 10, 2010, [Yemru] did intentionally assault Mathew Nordstrom with a deadly weapon, to wit: a sword. CP 52-53.

The court instructed the jury, in part, that assault constituted an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury. CP 132 (Instruction No. 16). It instructed the jury that to convict Yemru the State had to prove he assaulted Nordstrom with a deadly weapon. CP 135 (Instruction No. 19).

The State used the second degree assault with a sword conduct to elevate the robbery to first degree status. The basis for first degree robbery was the use or threat to use immediate force, violence or fear of injury by the display of the sword, the same conduct forming the basis for the second degree assault charge.

This case is similar to State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008). Kier approached the passenger of a car after the driver of the car left, pointed a gun at the passenger and told him to get out of the car. The

passenger complied and Kier drove away with the car. Kier, 164 Wn.2d at 801-03.

Kier was convicted of first degree robbery and second degree assault. Relying on Freeman, the Supreme Court found the offenses merged because the completed assault was necessary to elevate the completed robbery to first degree. The Court noted that, *as charged*, both offenses required the State to prove Kier's conduct created a reasonable apprehension or fear of harm. The Court found Kier's display of a gun was the means of creating that apprehension or fear under both offenses. Kier, 164 Wn.2d at 806-07.

As in Kier, the display of the sword created the apprehension of fear for both the second degree assault and first degree robbery. Moreover, threatening Nordstrom with the sword, which formed the basis of the assault, was done to facilitate the robbery. The assault with the sword had no purpose or effect other than to force Nordstrom to relinquish his car, which was the State's theory of the case as argued to the jury. "Count II, the Assault on Mathew Nordstrom with the samurai sword, as the defendant forced Mr. Nordstrom out of his black Scion in order to take it, which is the ...Robbery in the First Degree charge charged in Count III." 12RP 47. Thus, the offenses merge.

2. The convictions for theft of a motor vehicle conviction (Count IV) and first degree robbery (Count III) violate double jeopardy.

Under Blockburger, 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. Blockburger, 284 U.S. at 304. Also known as the same elements or same evidence test, the Blockburger analysis finds a double jeopardy violation when the evidence required to support a conviction of one charged crime would have been sufficient to warrant a conviction upon the other. In re Pers. Restraint of Orange, 152 Wn.2d 795, 818, 820, 100 P.3d 291, 303 (2004) (quoting State v. Reiff, 14 Wash. 664, 667, 45 P. 318 (1896)).

The court engages in a commonsense, rather than mechanical, comparison of elements. See, Orange, 152 Wn.2d at 817-18 (merely comparing elements at abstract level misapplies the Blockburger test). Even if the elements facially differ, the court may nonetheless find they encompass the same offense. State v. Hughes, 166 Wn.2d 675, 684, 212 P.3d 558 (2009).

A person is guilty of theft of a motor vehicle if he commits theft of a motor vehicle. RCW 9A.56.065(1). Theft is defined as to “wrongfully obtain or exert unauthorized control over the property or services of

another or the value thereof, with intent to deprive him or her of such property or services.” RCW 9A.56.020(1)(a). A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. RCW 9A.56.190.

When a person unlawfully takes personal property from another he also wrongfully obtains that property. See, State v Crittenden, 146 Wn. App. 361, 367, 189 P.3d 849, review denied, 165 Wn.2d 1042 (2009) (theft and second degree taking of a motor vehicle both require an unauthorized taking of property). Robbery also includes the element of specific intent to steal, which is the equivalent to specific intent to deprive the victim of his or her property element of theft. State v. Sublett, 176 Wn.2d 58, 88, 292 P.3d 715 (2012); State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991)

Here, the property taken from Nordstrom in both the theft and robbery was the same motor vehicle. The evidence that proves the robbery in this case necessarily also proves the theft. Under the same evidence test, the two offenses are the same, and Yemru’s dual convictions violate double jeopardy. See, State v. Hancock, 44 Wn. App. 297, 298- 99, 721 P.2d

1006 (1986) (Legislature did not intend that a thief be convicted of theft and possession of stolen property for one act of taking the same item).

Alternatively, the two offenses merge under the merger doctrine. In State v. Ralph, \_\_ Wn. App. \_\_, \_\_ P. 3d \_\_, WL 3999878 (August 7, 2013), Division Two recently held the offenses of second degree robbery and taking a motor vehicle (TMVWP) did not meet the Blockburger test but they merged for purposes of double jeopardy.

In Ralph, the defendant punched the victim in the face and knocked him to the ground to gain possession of the victim's truck and drive it away. The Ralph court held:

Under the facts charged and proved here, the evidence supporting Ralph's robbery conviction was also sufficient to support his TMVWP conviction. Thus, the second degree robbery and the second degree TMVWP, as charged and proved here, are the same in fact: The robbery was based on the single act of Ralph's taking a motor vehicle from a single victim by force; and proof of the theft element of the robbery also proved the TMVWP charge.

State v. Ralph, 2013 WL 3999878 at 5.

Here, Yemru threatened Nordstrom with the sword to gain possession of Nordstrom's car. The robbery was based on the single act of Yemru's taking a car from Nordstrom by the threatened use of force. Under the facts charged and proved, the theft element of robbery proved the taking a motor vehicle charge. The second degree robbery and the taking a motor vehicle charge as charged and proved are the same in fact. As in Ralph,

the taking a motor vehicle conviction merges with the second degree robbery conviction.


D. CONCLUSION

Yemru's convictions for second degree assault and theft of a motor vehicle should be vacated as violating double jeopardy. State v. Turner, 169 Wn.2d at 465-66.

DATED this 21 day of August, 2013.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 69767-6-1
	)	
BINYAM YEMRU,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21<sup>ST</sup> DAY OF AUGUST 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] BINYAM YEMRU  
DOC NO. 329784  
MONORE CORRECTIONS CENTER  
P.O. BOX 777  
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 21<sup>ST</sup> DAY OF AUGUST 2013.

x Patrick Mayovsky

2013 AUG 22 PM 4:25  
STATE OF WASHINGTON  
COURT OF APPEALS