SUPREME COURT NO. 90387-5

NO. 69767-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BINYAM YEMRU,

Petitioner.

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

The Honorable Leroy McCullough, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Binyam Yemru, the appellant below, asks this Court to review the Court of Appeals decision referred to in Section B.

B. COURT OF APPEALS DECISION

Yemru requests review of the Court of Appeals unpublished decision in State v. Binyam Yemru, Court of Appeals No. 69767-6-I, filed May 19, 2014. Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Do the dual convictions for first degree robbery and theft of a motor vehicle violate double jeopardy when the legislature implicitly intended there be only one punishment for violation of both offenses?

2. Where the first degree robbery and taking a motor vehicle charges were identical in law and fact do the convictions for both offenses violate double jeopardy?

3. Where the first degree robbery charge alleged petitioner stole the victim's car by threatening him with a sword, and the taking a motor vehicle charge alleged petitioner stole the same car, under the merger doctrine do the convictions for both offenses violate double jeopardy?

D. STATEMENT OF THE CASE

Mathew Nordstrom was walking to his car parked in the Highline Community College parking lot when he saw Binyam Yemru coming towards him carrying a sword. 6RP 4-9. Nordstrom got into his car. When Yemru came up to the car Nordstrom rolled down the passenger window and Yemru asked for a ride. 6RP 12-13. 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 what appeared to be 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 plastic gun down, pulled out the sword and poked Nordstrom with it. 6RP 27. Nordstrom realized the sword was real so he got out and Yemru drove off in Nordstrom's car. 6RP 27- 29.

Yemru was charged with first degree robbery, second degree assault, and theft of a motor vehicle based on the incident with Nordstrom. CP 52-54 (Count II, III and IV). 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 (emphasis added).

A jury found Yemru guilty as charged. CP 98-93. Yemru was sentenced to 77 months on each of two 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.[1] The sentences were ordered to run concurrent. Id.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENTS

DIVISION ONE'S DECISION THAT YEMRU'S CONVICTIONS FOR BOTH FIRST DEGREE ROBBERY AND TAKING A MOTOR VEHICLE DOES NOT VIOLATE DOUBLE JEOPARDY CONFLICTS WITH A NUMBER OF THIS COURT'S DECISIONS, DIVISION TWO'S DECISION IN STATE V. RALPH, AND INVOLVES A SIGNIFICANT QUESTION OF LAW UNDER BOTH THE STATE AND FEDERAL CONSTITUTIONS.

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

[1] Counts I and V involved different victims.

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 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. An essential element of robbery is the specific intent to steal, which is the equivalent to specific intent element of theft. State v. Sublett, 176 Wn.2d 58, 88, 292 P.3d 715 (2012).

Yemru argued on appeal the convictions for the first degree robbery (Count III) and the second degree assault (Count II) violated double jeopardy. The State conceded and the Court of Appeals agreed. Slip. Op. at 3.

Yemru also argued the convictions for the first degree robbery (Count III) and taking a motor (Count IV) also violated double jeopardy. The Court of Appeals disagreed. Yemru requests this Court review that part of the Court of Appeals' decision.

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. Kier, 164 Wn.2d 798, 803, 194 P.3d 212 (2008); 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 two statutes, the court must determine whether the Legislature intended to authorize multiple punishments. Freeman, 153 Wn.2d at 771; State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995).

A court engages in a three-part test to determine whether the Legislature intended multiple punishments in a particular situation. Kier, 164 Wn.2d at 804. First, the court reviews the statutes involved for any express or implicit legislative intent. State v. Calle, 125 Wash.2d 769, 776, 888 P.2d 155 (1995). Second, if the statutes do not disclose legislative intent 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)). Third, if the offenses are not the same in fact or in law under the merger doctrine the court determines whether to prove an element or degree of a crime the State must prove conduct that constitutes at least one additional crime. Kier, 164 Wn.2d at 804; State v. Vladovic, 99 Wn.2d 413, 418–20, 662 P.2d 853 (1983).

a. The Legislature Did Not Intend Multiple Punishments For First Degree Robbery And Taking A Motor Vehicle.

The Court of Appeals correctly found that neither the first degree robbery statue nor theft of a motor vehicle statute explicitly approves the imposition of multiple punishments. It concluded, however, that because in 2007 the legislature created a separate crime of theft of a motor vehicle and made it a class B felony, the question of whether the legislature intended to authorize multiple punishments was inconclusive. Slip. Op. at 8-10. That conclusion is unsupported.

If there is no explicit legislative intent to authorize multiple punishments for violations of two statutes, evidence of legislative intent may be discerned by legislative history, the structure of the statutes, whether the statutes are directed at eliminating different evils or other sources of legislative intent. Freeman, 153 Wn.2d at 773; Calle, 125 Wn.2d at 777-778. In making theft of a motor vehicle a class B felony the legislature's goal was to remedy the perceived under-punishment of theft when the property was a motor vehicle. Slip. Op. at 7-9 (citing RCW 9A.56.065).

This perceived under-punishment of auto theft offenses, however, does not exist when a person is convicted of first degree robbery for taking a motor vehicle. First degree robbery, regardless of the property taken, is

a class A felony. RCW 9A.56.200. First degree robbery is also classified as a most serious offense, with a seriousness level of nine. RCW 9.94A.030(32)(a); RCW 9.94A.515. The standard range with an offender score of 0 is 31 to 41 months. RCW 9.94A.510; RCW 9.94A.515. Taking a motor vehicle is classified with a seriousness level of two, and with an offender score of 0 the standard range is 0 to 90 days. Id. The problem the Legislature intended to remedy by creating a separate offense of taking a motor vehicle does not exist when the offender is also convicted of robbery for stealing the same vehicle.

The legislature's placement of an offense within the criminal code is also evidence of legislative intent. See In re Pers. Restraint of Percer, 150 Wn.2d 41, 51–52, 75 P.3d 488 (2003) (when determining legislative intent as to whether two offenses were the same for double jeopardy purposes, this Court looked to the location of the offenses in the criminal code); Calle, 125 Wn.2d at 780 (same). Theft of a motor vehicle and robbery are found in the same chapter of the code. RCW 9A.56.190 (first degree robbery); RCW 9A.56.065 (theft of a motor vehicle). Both offenses are directed towards the evils of theft whether a car or other property is stolen.

The Legislature's intent was to ensure that anyone stealing a motor vehicle be guilty of a class B felony. It was not to make that person guilty

of a class B and class A felony when the vehicle is taken in a robbery. The structure of the statues, punishment for violation of the statutes, their placement in the code and the evil both attempt to thwart, imply the legislature did not intend separate punishments for robbery and taking a motor vehicle where there is a single taking of a car.

b. The Court Of Appeals Decision Conflicts With This Court's Decisions Applying The Blockburger Test.

The Court of Appeals found because to prove theft of a motor vehicle the State was required to prove a motor vehicle was taken, whereas robbery does not require a motor vehicle be taken to satisfy the theft element of that offense, the "offenses fail the Blockburger test." Slip. Op. at 10-11. The Court of Appeals' analysis misconstrues the Blockburger test. Even if the legislative intent is inconclusive, the convictions for both offenses here violate double jeopardy under the Blockburger test.

Under Blockburger, the presumption is that the legislature did not intend to punish criminal conduct twice when the evidence required to support a conviction of one of the charged crimes would have been sufficient to warrant a conviction of the other. Freeman, 153 Wn.2d at 776 (citations omitted). Whether the offenses are the same in fact and law is a case by case analysis that compares the elements in a commonsense

manner as charged and proven. Calle, 125 Wn.2d at 777-778; Freeman, 153 Wn.2d at 773; In re Pers. Restraint of Orange, 152 Wn.2d 795, 817-818, 100 P.3d 291 (2004) (merely comparing elements at abstract level misapplies the Blockburger test). If the facts the State must prove to convict the defendant under the two statutes are the same, the convictions violate double jeopardy, even if the elements facially differ. State v. Hughes, 166 Wn.2d 675, 684, 212 P.3d 558 (2009).

In Hughes, for example, this Court held convictions for both second degree child rape and second degree rape violated double jeopardy. Hughes sexually assaulted a 12–year–old child with cerebral palsy. He was convicted of second degree rape based on the theory the victim was unable to consent due to physical helplessness or mental incapacity, and second degree child rape based solely on the victim's age. Hughes, 166 Wn.2d at 679. The Hughes Court reasoned that although the elements of the two crimes facially differ, both require proof of nonconsent because of the victim's status. Id. at 684. This Court concluded "the two offenses are the same in fact and law" and double jeopardy barred a conviction on separate offense. Id.

Like the crimes in Hughes, in the abstract robbery and theft of a motor vehicle facially differ because stealing a vehicle is not necessary to prove the theft element of robbery. Here, however, in support of the theft

element of the robbery charge the State specifically alleged Yemru stole Nordstrom's car. Theft of the same car taken from Nordstrom was alleged in the theft of motor vehicle charge. "A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other." Orange, 152 Wn.2d at 816 (emphasis original) (quoting State v. Reiff, 14 Wash. 664, 667, 45 P. 318 (1896) quoting Morey v. Commonwealth, 108 Mass. 433, 434 (1871). The two crimes were based on the theft of the same car from the same victim, and the evidence required to prove the robbery as charged and proven was sufficient to warrant a conviction of the theft of a motor vehicle charge. The legislature did not intend dual convictions for both first degree robbery and theft of a motor vehicle where as charged and proven both require proof the same vehicle was stolen from the same person in the same transaction. The Court of Appeals' decision that the convictions for the two offenses as charged and proven did not violate double jeopardy conflicts with this Court's decisions in Freeman, Calle, Orange, and Hughes.

c. The Court Of Appeals Decision Conflicts With Division Two's Decision In State v. Ralph.

Assuming for the sake of argument the Court of Appeals was correct in concluding the first degree robbery and theft of a motor vehicle convictions fail the Blockburger test, under the merger doctrine analysis multiple convictions were not intended. In a strikingly similar case Division Two recently held the offenses of second degree robbery and taking a motor vehicle without permission violated double jeopardy. State v. Ralph, 175 Wn. App. 814, 308 P. 3d 749, rev. denied, 179 Wn.2d 1017 (2014).

In Ralph the defendant hit the victim in the face, knocked him to the ground and then drove off in the victim's truck. 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.
>
> As our Supreme Court has long acknowledged, the constitutional prohibition against double jeopardy is violated when " 'the evidence required to support a conviction [of one crime] would have been sufficient to warrant a conviction upon the other.' " Freeman, 153 Wash.2d at 772, 108 P.3d 753 (citing State v. Reiff, 14 Wash. 664, 667, 45 P. 318 (1896) (quoting Morey v. Commonwealth, 108 Mass. 433, 434 (1871))). Accordingly, we hold that, under the facts here, Ralph's

> convictions for second degree robbery and second degree taking of a motor vehicle without permission constitute double jeopardy.

Ralph, 175 Wn. App. at 826-827.

Yemru assaulted Nordstrom with a sword, instead of a fist, but like in Ralph, an assault was committed for the sole purpose of taking a vehicle from the person assaulted. On appeal Yemru cited Ralph in support of his argument that his robbery and car theft convictions violated double jeopardy for the same reasons Ralph's convictions for second degree robbery and taking a motor vehicle without permission violated double jeopardy. Brief of Appellant at 10-11. In its decision the Court of Appeals fails to even mention Ralph, much less distinguish it, despite its obvious similarities and Yemru's reliance on its holding and reasoning. Instead, the court concluded the merger doctrine inapplicable because the degree of robbery was not elevated by the theft of a motor vehicle charge. Slip. Op. 12.

The Court of Appeals' analysis is flawed for two reasons. First, it fails to view the offenses as charged and proven. In re Pers. Restraint of Francis, 170 Wn.2d 517, 523–24, 242 P.3d 866 (2010). In the robbery charge the State specifically alleged and proved Yemru stole the same

vehicle to support of the theft element of robbery that it alleged and proved he stole to support the theft element of taking a motor vehicle.

Second, the Court of Appeals erroneously concludes the merger doctrine is only applicable when one offense elevates the other offense to higher degree. Merger also applies when the State must prove conduct to prove an element or degree of one offense and the same conduct also proves the other offense. Francis, 170 Wn .2d at 534 (C.J. Madsen, concurring) (citing Kier, 164 Wn.2d at 804; State v. Vladovic, 99 Wash.2d 413, 418–20, 662 P.2d 853 (1983); State v. Johnson, 92 Wash.2d 671, 681, 600 P.2d 1249 (1979)); See, Freeman, 153 Wn.2d 765, 771 n. 1 (citing Akhil Reed Amar & Jonathan L. Marcus, Double Jeopardy Law After Rodney King, 95 Colum. L. Rev. 1, 28–29 (1995)) (where a lesser included offense can be presumed to be punished by the greater offense, conviction under both offenses would offend double jeopardy); see also, State v. Jackman, 156 Wn.2d 736, 749, 132 P.3d 136 (2006) ("if a statute constitutes a lesser included offense of another statute, convictions for both offenses would violate double jeopardy.").

In Jackman, this Court made clear prosecutors may not "divide a defendant's conduct into segments in order to obtain multiple convictions." Jackman, 156 Wn.2d at 749. If the prosecution has to prove one crime in order to prove the other, entering convictions for both

violates double jeopardy. Id. Entering convictions for two crimes violates double jeopardy if "it is impossible to commit one without also committing the other." Id. In other words, if under the facts of a case one crime is essentially a lesser included offense of the other, double jeopardy bars convictions for both. Id. at 749-750.

The Jackman Court explained how the above legal principles are properly applied in context. It observed that communication with a minor for an immoral purpose was not a lesser included offense of sexual exploitation of a minor because communication is not part of both offenses. However, it could be the equivalent of a lesser included offense under a double jeopardy analysis "[I]f a person merely invited a minor to engage in sexually explicit conduct while being filmed, that conduct might also satisfy the communication statute, even though the sexual exploitation statute clearly encompasses actions that exceed mere invitation to engage in the prohibited conduct." Jackman, 156 Wn.2d at 749-750.

The Ralph court followed the Jackman Court's reasoning:

> Although the statutory elements of the two crimes differ, as charged and proved here, second degree TMVWP is the functional equivalent of a lesser included of the second degree robbery. As applied here, both crimes required "taking" another person's property, Hampton's truck, without his permission; proving these two main facts proved second degree TMVWP. The following additional facts, however, elevated Ralph's TMVWP from non-forceful "joyriding" to second degree robbery: Ralph

> punched Hampton in the face and knocked him to the ground to gain possession of Hampton's truck and drive it away. 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.

Ralph, 175 Wn. App. at 825-826.

That reasoning applies to Yemru's case as well. Like in Ralph the taking a motor vehicle offense was the equivalent of a lesser included offense to the first degree robbery as charged and proven.

Theft is an essential element of robbery. To support that element Yemru was charged in the robbery count with stealing Nordstrom's car. The same element was required to find the theft of the same car under the taking a motor vehicle charge. The evidence to support the theft element of the robbery was the same evidence to support the theft element of the taking a motor vehicle. *Without proof of the theft of the car there would not have been a robbery at all*, just as without proof of the assault with a deadly weapon, there would have been no first degree robbery, which the State conceded and the Court of Appeals correctly found in concluding convictions for both the assault and first degree robbery violated double jeopardy. Freeman, 153 Wn.2d at 774.

Simply put, if the State had failed to prove the theft of a motor vehicle as charged it would have necessarily failed to prove robbery as charged. See, Francis, 170 Wn.2d at 525 (convictions for both second degree assault and attempted first degree robbery violated double jeopardy where the evidence proving the assault was also the evidence proving the force element of the attempted robbery). If, as here, the facts the State must prove to convict a defendant under the two statutes are the same, the convictions violate double jeopardy. Jackman, 156 Wn.2d at 760.

The Court of Appeals analysis is flawed. Its decision directly conflicts with the reasoning and holding in Division Two's decision in Ralph.

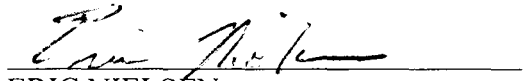
F. CONCLUSION

For the above reasons, this Court should accept review. RAP 13.4(b)(1)(2) and (3). This Court should reverse the Court of Appeals decision.

DATED this 6 day of June 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BINYAM B. YEMRU, Appellant.	)	DIVISION ONE No. 69767-6-I UNPUBLISHED OPINION FILED: May 19, 2014

DWYER, J. — Binyam Yemru was convicted by a jury of robbery in the first degree (count I), assault in the second degree (count II), robbery in the first degree (count III), theft of a motor vehicle (count IV), and felony harassment (count V). Paige Knight was the victim in count I. John Mbugua was the victim in count V. Michael Nordstrom was the victim in counts II, III, and IV. On appeal, Yemru does not challenge the convictions on counts I, III, or V. As to counts II and IV, Yemru contends that principles of double jeopardy require the dismissal of the assault in the second degree charge and the theft of a motor vehicle charge. We agree as to count II and disagree as to count IV. Accordingly, we order that the assault charge be dismissed on remand. We affirm the other convictions.

I

The facts relative to the issues on appeal are these. When Michael Nordstrom approached his automobile, he noticed Yemru carrying what appeared to be a samurai sword. As Nordstrom was getting into his car, he

heard Yemru call out "hey." Once in the car, Nordstrom rolled down the passenger window to hear what Yemru had to say. Yemru asked if he could have a ride. Nordstrom refused Yemru's request. Yemru then pushed a pistol through the passenger window and pointed it at Nordstrom. Nordstrom attempted to raise the passenger window, but a safety feature caused the window to descend each time it hit the gun. Nordstrom realized that the gun was fake because it sounded like plastic each time it came into contact with the passenger window.

Unfortunately for Nordstrom, the passenger door was unlocked, allowing Yemru to enter the car. At the same time, Nordstrom opened his driver's door to give himself an escape route. Yemru pointed the gun at Nordstrom and told him to drive. Nordstrom refused, telling Yemru that he knew the gun was fake. Yemru then pulled out the sword, asked if it was fake, and poked it toward Nordstrom. When Nordstrom tried to deflect the sword, he realized that it was real and quickly got out of the car, grabbing his backpack as he did so, but leaving his keys in the ignition. Yemru drove away in the car.

Yemru was arrested and charged with five felony counts: two counts of robbery in the first degree, one count of assault in the second degree, one count theft of a motor vehicle and one count of felony harassment. A jury found Yemru guilty on all five counts. Yemru appeals only the convictions for second degree assault and theft of a motor vehicle. He contends that coupling these convictions with the conviction for robbing Nordstrom violates the prohibition against double jeopardy.

II

Yemru first assigns error to the trial court's decision to enter judgment on the jury's verdict finding him guilty on count II, assault in the second degree, and imposing sentence thereon. The court erred in so doing, Yemru asserts, because the double jeopardy merger doctrine required the court to rule that the assault count merged into the robbery in the first degree count. Citing State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008), the State concedes error. We accept the concession and reverse the assault conviction with instructions to the trial court to dismiss count II upon remand.

III

Yemru next contends that double jeopardy or merger principles required the trial court to dismiss the theft of a motor vehicle charge in favor of entering judgment on the robbery in the first degree charge. The State contests this allegation.

"The double jeopardy clause in Const. art. I, § 9 is given the same interpretation the Supreme Court gives to the double jeopardy clause in the Fifth Amendment." State v. Gocken, 127 Wn.2d 95, 109, 896 P.2d 1267 (1995). "The double jeopardy clauses of the Fifth Amendment and Const. art. I, § 9 protect a defendant against multiple punishments for the same offense." State v. Calle, 125 Wn.2d 769, 772, 888 P.2d 155 (1995).

> [T]he question whether punishments imposed by a court, following conviction upon criminal charges, are unconstitutionally multiple cannot be resolved without determining what punishments the legislative branch has authorized. Whalen[v. United States, 445 U.S. 684,] 688, [100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980)]. Our

> review here is limited to assuring that the court did not exceed its legislative authority by imposing multiple punishments for the same offense.

Calle, 125 Wn.2d at 776.

Here, Yemru contends that he is exposed to multiple punishments as a result of having the convictions for robbery in the first degree (of Nordstrom) and theft of a motor vehicle (Nordstrom's automobile) reduced to judgment with sentences for each imposed upon Yemru.

Although the State may bring multiple charges arising from the same criminal conduct, "'[w]here 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.'" State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005) (quoting In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)). "If the legislature authorized cumulative punishments for both crimes, then double jeopardy is not offended." Freeman, 153 Wn.2d at 771.

Recently, in State v. Esparza, 135 Wn. App. 54, 143 P.3d 612 (2006), we reiterated our approach to resolving double jeopardy issues, as elucidated by our Supreme Court in Freeman.

> "Because the question largely turns on what the legislature intended, we first consider any express or implicit legislative intent. Sometimes the legislative intent is clear, as when it explicitly provides that burglary shall be punished separately from any related crime. RCW 9A.52.050. Sometimes, there is sufficient evidence of legislative intent that we are confident concluding that the legislature intended to punish two offenses arising out of the

same bad act separately without more analysis. E.g., [State v.] Calle, 125 Wn.2d [769,] 777-78[, 888 P.2d 155 (1995)] (rape and incest are separate offenses).

Second, if the legislative intent is not clear, we may turn to the Blockburger test. See Calle, 125 Wn.2d at 777-78; Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). If each crime contains an element that the other does not, we presume that the crimes are not the same offense for double jeopardy purposes. Calle, 125 Wn.2d at 777; Blockburger, 284 U.S. at 304 (establishing "same evidence" or "same elements" test); State v. Reiff, 14 Wash. 664, 667, 45 P. 318 (1896) (double jeopardy violated when "'the evidence required to support a conviction [of one crime] would have been sufficient to warrant a conviction upon the other'") (quoting Morey v. Commonwealth, 108 Mass. 433, 434 (1871)).

When applying the Blockburger test, we do not consider the elements of the crime on an abstract level. "'[W]here *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.'" [In re Personal Restraint of] Orange, 152 Wn.2d [795,] 817[, 100 P.3d 291 (2004)] (quoting Blockburger, 284 U.S. at 304 (citing Gavieres v. United States, 220 U.S. 338, 342, 31 S. Ct. 421, 55 L. Ed. 489 (1911))). However, the Blockburger presumption may be rebutted by other evidence of legislative intent. Calle, 125 Wn.2d at 778.

Third, if applicable, the merger doctrine is another aid in determining legislative intent, even when two crimes have formally different elements. Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime. [State v.] Vladovic, 99 Wn.2d [413,] 419[, 662 P.2d 853 (1983)].

Finally, even if on an abstract level two convictions appear to be for the same offense or for charges that would merge, if there is an independent purpose or effect to each, they may be punished as separate offenses. State v. Frohs, 83 Wn. App. 803, 807, 924 P.2d 384 (1996) (citing State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979))."

Esparza, 135 Wn. App. at 59-61 (alterations in original) (quoting Freeman, 153 Wn.2d at 771-73).

To properly analyze a double jeopardy claim, we must also keep aware of that which is *not* a proper analysis. In 1990, the United States Supreme Court ruled that a double jeopardy analysis must consist of two parts: the Blockburger test and a "same conduct" test. Gocken, 127 Wn.2d at 101. In Grady v. Corbin, 495 U.S. 508, 521, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), the Supreme Court held:

> [T]he Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.

"The 'same conduct' test announced in Grady was overruled three years later in [United States v.] Dixon[, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993)]." Gocken, 127 Wn.2d at 101. Thus, the "same conduct" test applies to neither a Fifth Amendment nor an article I, § 9 double jeopardy analysis. Gocken, 127 Wn.2d at 107.

The legislature created the crime of theft of a motor vehicle,[1] codified as RCW 9A.56.065, in 2007. There is an extensive statement of legislative intent.

> (1) The legislature finds that:
> (a) Automobiles are an essential part of our everyday lives. The west coast is the only region of the United States with an increase of over three percent in motor vehicle thefts over the last several years. The family car is a priority of most individuals and families. The family car is typically the second largest investment a person has next to the home, so when a car is stolen, it causes a significant loss and inconvenience to people, imposes financial hardship, and negatively impacts their work, school, and personal

[1] "(1) A person is guilty of theft of a motor vehicle if he or she commits theft of a motor vehicle.
(2) Theft of a motor vehicle is a class B felony."

activities. Appropriate and meaningful penalties that are proportionate to the crime committed must be imposed on those who steal motor vehicles;

(b) In Washington, more than one car is stolen every eleven minutes, one hundred thirty-eight cars are stolen every day, someone's car has a one in one hundred seventy-nine chance of being stolen, and more vehicles were stolen in 2005 than in any other previous year. Since 1994, auto theft has increased over fifty-five percent, while other property crimes like burglary are on the decline or holding steady. The national crime insurance bureau reports that Seattle and Tacoma ranked in the top ten places for the most auto thefts, ninth and tenth respectively, in 2004. In 2005, over fifty thousand auto thefts were reported costing Washington citizens more than three hundred twenty-five million dollars in higher insurance rates and lost vehicles. Nearly eighty percent of these crimes occurred in the central Puget Sound region consisting of the heavily populated areas of King, Pierce, and Snohomish counties;

(c) Law enforcement has determined that auto theft, along with all the grief it causes the immediate victims, is linked more and more to offenders engaged in other crimes. Many stolen vehicles are used by criminals involved in such crimes as robbery, burglary, and assault. In addition, many people who are stopped in stolen vehicles are found to possess the personal identification of other persons, or to possess methamphetamine, precursors to methamphetamine, or equipment used to cook methamphetamine;

(d) Juveniles account for over half of the reported auto thefts with many of these thefts being their first criminal offense. It is critical that they, along with first time adult offenders, are appropriately punished for their crimes. However, it is also important that first time offenders who qualify receive appropriate counseling treatment for associated problems that may have contributed to the commission of the crime, such as drugs, alcohol, and anger management; and

(e) A coordinated and concentrated enforcement mechanism is critical to an effective statewide offensive against motor vehicle theft. Such a system provides for better communications between and among law enforcement agencies, more efficient implementation of efforts to discover, track, and arrest auto thieves, quicker recovery, and the return of stolen vehicles, saving millions of dollars in potential loss to victims and their insurers.

(2) It is the intent of this act to deter motor vehicle theft through a statewide cooperative effort by combating motor vehicle theft through tough laws, supporting law enforcement activities, improving enforcement and administration, effective prosecution,

> public awareness, and meaningful treatment for first time offenders where appropriate. It is also the intent of the legislature to ensure that adequate funding is provided to implement this act in order for real, observable reductions in the number of auto thefts in Washington state.

Laws of 2007, ch. 199, § 1.

We turn now to the first step of the Freeman analysis: the search for explicit legislative intent. "Again, if the statutes explicitly authorize separate punishments, then separate convictions do not offend double jeopardy." Freeman, 153 Wn.2d at 773. "Evidence of legislative intent may be clear on the face of the statute, found in the legislative history, the structure of the statutes, the fact the two statutes are directed at eliminating different evils, or any other source of legislative intent." Freeman, 153 Wn.2d at 773 (citing Ball v. United States, 470 U.S. 856, 864, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985); Calle, 125 Wn.2d at 777-78).

The robbery in the first degree statutes[2] and the theft of a motor vehicle

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[2] A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190.

(1) A person is guilty of robbery in the first degree if:

(a) In the commission of a robbery or of immediate flight therefrom, he or she:

(i) Is armed with a deadly weapon; or

(ii) Displays what appears to be a firearm or other deadly weapon; or

(iii) Inflicts bodily injury; or

(b) He or she commits a robbery within and against a financial institution as defined in RCW 7.88.010 or 35.38.060.

(2) Robbery in the first degree is a class A felony.

statute do not explicitly approve the imposition of multiple punishments. However, the legislature's decision to create a separate crime of theft of a motor vehicle, its decision to assign the crime the level of a class B felony, and its statement of purpose in doing so, all support a conclusion that the legislature desired that theft of a motor vehicle be treated differently, and more severely, than thefts involving other chattel of equal value. Thefts of property are otherwise generally categorized pursuant to the value of the chattel taken.[3] Theft

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RCW 9A.56.200.

(1) "Theft" means:

(a) 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; or

(b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

(2) In any prosecution for theft, it shall be a sufficient defense that:

(a) The property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable; or

(b) The property was merchandise pallets that were received by a pallet recycler or repairer in the ordinary course of its business.

RCW 9A.56.020.

[3] (1) A person is guilty of theft in the first degree if he or she commits theft of:

(a) Property or services which exceed(s) five thousand dollars in value other than a firearm as defined in RCW 9.41.010;

(b) Property of any value, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, taken from the person of another;

(c) A search and rescue dog, as defined in RCW 9.91.175, while the search and rescue dog is on duty; or

(d) Commercial metal property, nonferrous metal property, or private metal property, as those terms are defined in RCW 19.290.010, and the costs of the damage to the owner's property exceed five thousand dollars in value.

(2) Theft in the first degree is a class B felony.

RCW 9A.56.030.

(1) A person is guilty of theft in the second degree if he or she commits theft of:

(a) Property or services which exceed(s) seven hundred fifty dollars in value but does not exceed five thousand dollars in value, other than a firearm as defined in RCW 9.41.010 or a motor vehicle;

(b) A public record, writing, or instrument kept, filed, or deposited according to law with or in the keeping of any public office or public servant;

of a motor vehicle, to the contrary, is a class B felony even if the value of the motor vehicle is less than $5,000. Thus, the legislature plainly believes that the theft of a motor vehicle causes damage to the victim and society of a type more concerning than is true of the typical theft of a chattel.

Finding no definitive answer to the multiple punishment inquiry at step one of the Freeman analysis, we now move to step two: the Blockburger "same evidence" or "same elements" test. Freeman, 153 Wn.2d at 772. "If each crime contains an element that the other does not, we presume that the crimes are not the same offense for double jeopardy purposes." Freeman, 153 Wn.2d at 772.

To prove the crime of theft of a motor vehicle, the State was required to prove that a theft occurred and that the object of the theft was a motor vehicle. That the property taken is a motor vehicle is not an element of robbery in the first degree. To prove robbery in the first degree, the State was required to prove that the defendant displayed a deadly weapon, used force or threatened to use force in order to take the property, and that the taking was from the victim or in his presence. None of these are elements of theft of a motor vehicle. The offenses

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(c) Commercial metal property, nonferrous metal property, or private metal property, as those terms are defined in RCW 19.290.010, and the costs of the damage to the owner's property exceed seven hundred fifty dollars but does not exceed five thousand dollars in value; or

(d) An access device.

(2) Theft in the second degree is a class C felony.

RCW 9A.56.040.

(1) A person is guilty of theft in the third degree if he or she commits theft of property or services which (a) does not exceed seven hundred fifty dollars in value, or (b) includes ten or more merchandise pallets, or ten or more beverage crates, or a combination of ten or more merchandise pallets and beverage crates.

(2) Theft in the third degree is a gross misdemeanor.

RCW 9A.56.050.

fail the Blockburger test. A prohibition on multiple punishments is not indicated.

A refinement of this analytical step advises us that we are not to "consider the elements of the crime on an abstract level" but, rather, "'[w]here *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.'" Freeman, 153 Wn.2d at 772 (first alteration in original) (internal quotation marks omitted) (quoting Orange, 152 Wn.2d at 817). The parties dispute the meaning of this passage as applied to the facts of this case.

On the one hand, Yemru asserts that both offenses required proof of the same fact: that Yemru stole a motor vehicle from Nordstrom. On the other hand, the State asserts that this is really proof of two facts: that Yemru stole an item (required for robbery in the first degree) and that the item stolen was a motor vehicle (not required for robbery in the first degree).

The State's argument is consistent with the legislature's intent to view and treat theft of a motor vehicle differently than the theft of a different chattel of the same value. The legislature requires proof of a theft of an item to establish robbery or a generic theft. It does not *require* that the item be a motor vehicle. But proof of theft of a motor vehicle is *required* to establish that crime. We believe the State's analysis to be the correct one.[4] Thus, the analysis at this step does not demonstrate an intent to prohibit multiple punishments.

[4] This analysis also makes clear that we are not "readopting" the overruled Grady "same conduct" test in the guise of a Blockburger-Orange analysis.

The next step of the Freeman analysis is to determine whether the merger doctrine applies.

> [T]he merger doctrine is a rule of statutory construction which only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime (e.g., first degree rape) the State must prove not only that a defendant committed that crime (e.g., rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (e.g., assault or kidnapping).

Vladovic, 99 Wn.2d at 420-21. Here, the robbery charge was elevated to robbery in the first degree by the acts establishing the assault in the second degree charge, which we have ordered to be vacated. The degree of robbery was not elevated by the theft of a motor vehicle charge. There is no merger of the robbery in the first degree conviction with the theft of a motor vehicle conviction.

After applying the analyses mandated by Freeman, we conclude that punishments for both robbery in the first degree and theft of a motor vehicle were lawfully imposed.

Affirmed in part, reversed in part and remanded.

We concur:

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. BINYAM YEMRU, Petitioner.	)))))))))	SUPREME COURT NO. _____ COA NO. 69767-6-I

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 6TH DAY OF JUNE 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** 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 6TH DAY OF JUNE 2014.

X Patrick Mayovsky