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NO. 36067-5-II  
Cowlitz Co. Cause NO. 06-1-01428-3

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

**STATE OF WASHINGTON,**

Respondent,

v.

**ADAM MATTHEW JACOBS,**

Appellant.

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**BRIEF OF RESPONDENT**

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**I. STATEMENT OF THE CASE**

The State agrees with the factual and procedural history as set forth by the Appellant.<sup>1</sup> Rather than restate the facts, the State refers to the affidavit of probable cause relied upon by the sentencing court. CP 1-4.

**II. ISSUES PRESENTED**

1. **Did the sentencing court abuse its discretion by finding the burglary, robbery, and assault convictions did not amount to same criminal conduct under RCW 9.94A.589(1)(a)?**
2. **Do separate convictions for assault and robbery violate double jeopardy?**

**III. SHORT ANSWERS**

1. No.
2. No.

**IV. ARGUMENT**

**I. The Sentencing Court Did Not Abuse Its Discretion by Finding the Burglary, Robbery, and Assault Convictions Were Not the Same Criminal Conduct.**

The Appellant argues that the sentencing court erred by finding that the three convictions in this case did not amount to same criminal conduct under RCW 9.94A.589(1)(a). This statute states that "same criminal conduct" means "two or more crimes that require the same

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<sup>1</sup> It should be noted however, that at the sentencing hearing the State contended the appellant, by arguing the very issues presented in this appeal, was in breach of the plea bargain. The State reserves the right to seek appropriate relief should this appeal prove successful.

criminal intent, are committed at the same time and place, and involve the same victim.” As the crimes in this case did not involve the same criminal intent or the same victim, the Appellant’s claim must fail.

**a. The Burglary Did Not Amount to the Same Criminal Conduct as the Robbery or Assault.**

When a sentencing court’s determination of “same criminal conduct” is appealed, the sentencing court’s finding shall be reversed only if this Court finds a clear abuse of discretion or misapplication of the law. State v. Price, 103 Wn.App. 845, 14 P.3d 841 (2000).

The burglary anti-merger statute, RCW 9A.52.040, states that “[E]very person who, in the commission of a burglary shall commit any other crime, may be punished therefore as well as for the burglary, and may be prosecuted for each crime separately.” In State v. Lessley, 118 Wn.2d 773, 827 P.2d 996 (1992), the Supreme Court held that the anti-merger statute allows a sentencing judge to treat burglary as a separate crime for the purposes of calculating a defendant’s offender score. The Supreme Court noted that:

Allowing a sentencing judge discretion to apply the burglary antimerger statute serves the SRA's proportionality function. A defendant who commits multiple crimes after breaking into a home should not be able to escape a more serious offender score. This approach recognizes burglaries involve a breach of privacy and security often deserving of separate consideration for punishment.

Lessley, 118 Wn.2d at 782. The anti-merger statute controls over the general language as to “same criminal conduct” in RCW 9.94.589 when the sentencing judge imposes punishment pursuant to RCW 9A.52.050. Id. at 781-782.

Given this, the sentencing court did not err when it determined that the burglary should be treated separately from the robbery and assault that occurred in Ms. Camba’s home. See also State v. Larry, 108 Wn.App. 894, 915-917, 34 P.3d 241 (2002). This Court should uphold the sentencing court’s proper exercise of its discretion under the anti-merger statute.

**b. The Assault Did Not Amount to the Same Criminal Conduct as the Robbery or Burglary, As These Crimes Involved a Different Victim.**

The plain language of RCW 9.94A.589(1)(a) indicates that “same criminal conduct” means two or more crimes that require the same criminal intent, are committed at the same time and place, and *involve the same victim*. (Emphasis added).

Despite the plain meaning of the statute, the Appellant argues that the assault committed against Mr. Leong constitutes the same criminal conduct as the burglary and robbery committed against Ms. Camba. As support for this dubious proposition, the Appellant cites to State v. Edwards, 45 Wn.App. 378, 725 P.2d 442 (1982). Unfortunately for the

Appellant, the Supreme Court expressly overruled Edwards in State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). In Dunaway, the Supreme Court held that:

Despite our general endorsement of the *Edwards* approach, we specifically overrule one portion of its holding. The *Edwards* court held that crimes involving two victims could constitute “the same criminal conduct”. We disagree. Convictions of crimes involving multiple victims must be treated separately. To hold otherwise would ignore two of the purposes expressed in the SRA: ensuring that punishment is proportionate to the seriousness of the offense, and protecting the public. RCW 9.94A.010(1),(4). As one commentator has noted, “to victimize more than one person clearly constitutes more serious conduct” and, therefore, such crimes should be treated separately. D. Boerner, *Sentencing in Washington* § 5.8(a) at 5-18 (1985). Additionally, treating such crimes separately, thereby lengthening the term of incarceration, will better protect the public by increasing the deterrence of the commission of these crimes. For these reasons, we conclude that crimes involving multiple victims must be treated separately.

109 Wn.2d at 215.<sup>2</sup>

In State v. Davison, 56 Wn.App. 554, 784 P.2d 1268 (1990), the court applied the Dunaway test and found that burglary in the first degree based on an assault of one victim was not the same criminal conduct as assault in the second degree based on an attack on a second victim. There, the defendant burst into the apartment of the first victim and assaulted her,

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<sup>2</sup> The appellant’s reliance upon the Edwards decision becomes even more inexplicable when one learns that the current language in RCW 9.94A.589 that same criminal conduct must involve the same victim was not enacted until 1987. Thus, the appellant has cited to a case that interpreted a wholly different, and since amended, statute. The Reinks case cited by appellant was interpreting similarly dated language.

after this first victim fled the defendant then assaulted another victim in an attempt to steal money from him. Davison, 56 Wn.App. 555-556. As there were multiple victims, the crimes did not constitute the same criminal conduct and were treated separately.

Here, the Appellant was convicted of robbery and burglary against one victim, Ms. Camba, and assault against a second victim, Mr. Leong. Under the plain language of RCW 9.94A.589(1)(a) and the Dunaway decision, these crimes constitute separate and distinct offenses and were properly counted separately in the appellant's offender score. Considering the state of the law, it strains credulity to argue that the sentencing court abused its discretion by following the plain language of the relevant statute. This Court should reject the Appellant's claim that these offenses were the same criminal conduct.

**II. The Convictions for Robbery in the First Degree and Assault in the Second Degree Did Not Violate Double Jeopardy and Do Not Merge.**

The Appellant contends that his convictions for robbery in the first degree and assault in the second degree are in fact the same crime, and should therefore merge under State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005). However, the Appellant's reliance on Freeman is misplaced, as this decision dealt with a robbery conviction that was elevated to the first degree because of an assault committed against the robbery victim.

153 Wn.2d at 771. In the instant case, the appellant's robbery conviction was not elevated to the first degree because of an assault, but because he was armed with a deadly weapon at the time he committed the robbery. See CP 9.

To determine whether two crimes are the same for the purposes of double jeopardy, the courts look to the test set forth in Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); Freeman, 153 Wn.2d at 773. This test states that if proof of the elements of one crime necessarily proves the elements of the other crime, then the offenses merge to avoid a violation of double jeopardy. However, if each crime contains an element that the other does not, it is presumed that the crimes are not the same offense for double jeopardy purposes. State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155; Blockburger, 284 U.S. at 304, 52 S.Ct. 180 (establishing "same evidence" or "same elements" test); see also State v. Reiff, 14 Wn. 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)).

Here, the Appellant was convicted of robbery in the first degree, as charged in the amended information, the elements of this crime were that he:

1. Unlawfully took personal property in the presence of Lanita Camba, against her will by the use or threatened use of immediate force, violence, or fear of injury to that person or her property or the person or property of anyone; and
2. That in commission of this robbery he was armed with a deadly weapon.

RCW 9A.56.190; RCW 9A.56.200, CP 9.

The Appellant was also convicted of assault in the second degree, and as charged in the amended information the elements of this crime were that he:

1. Under circumstances not amounting to assault in the first degree, did assault Julian Leong with a deadly weapon.

RCW 9A.36.021; CP 10.

Comparing the elements of the two convictions in this case, it is clear that proof of one will not necessarily prove the other. The robbery conviction does not require proof of an assault, but merely that the Appellant was armed with a deadly weapon. As the elements of these two crimes, as charged, are not the same, the Blockburger test dictates that these two crimes are not the same and separate convictions do not violate double jeopardy. See Calle, 125 Wn.2d at 777 (rape and incest are not the

same, as one requires proof of relationship and the other proof of force); Blockburger, 284 U.S. at 304, 52 S.Ct. 180.

Furthermore, the Appellant's assault of Julian Leong had an independent purpose than the robbery. As stated in the affidavit of probable cause, CP 1-4, the struggle between the Appellant and Lanita Camba awakened Julian Leong. Mr. Leong then entered Ms. Camba's room, where he observed the Appellant holding her down on the bed. Mr. Leong then grabbed a pair of scissors and attempted to come to Ms. Camba's rescue, but this was prevented when the Appellant's accomplice approached Mr. Leong from behind and held a knife to his throat. CP 2.

This assault was therefore not intended to force Ms. Camba to hand over her money, in furtherance of the robbery, but was instead intended to prevent Mr. Leong from attacking the Appellant. Indeed, the Appellant's accomplice had already stolen Ms. Camba's wallet prior to assaulting Mr. Leong from behind. CP 1. Contrary to Appellant's claims, the robbery was completed before Mr. Leong was assaulted.

Indeed, if the Appellant had assaulted Mr. Leong with the knife in order to force Ms. Camba to hand over her wallet, the Appellant's claims may have some weight. However, the facts do not indicate that the Appellant subdued Ms. Camba and Mr. Leong and then stated that he would stab Mr. Leong unless then the wallet was produced. Instead, the

facts are very clear that the robbery had already occurred prior to Mr. Leong being assaulted. CP 1-4. As such, this assault had a purpose independent of the robbery. See State v. Wade, 133 Wn.App. 855, 872 138 P.3d 168 (2006); State v. Prater, 30 Wn.App. 512, 516, 635 P.2d 1104 (1981) (assault was separate from robbery where the defendant forced one victim to search for money and then shot another victim while he was lying on the floor).

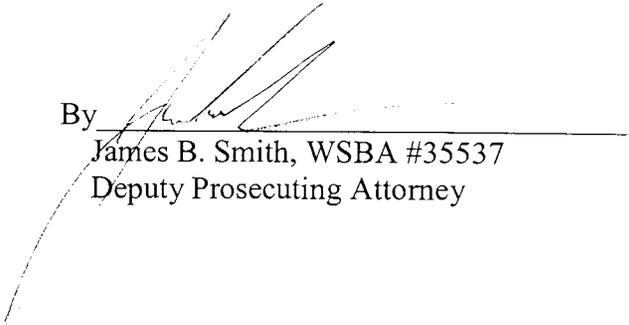
Given all these considerations, the assault against Mr. Leong cannot be considered to be the same crime as the robbery of Ms. Camba. Separate convictions for these acts do not violate double jeopardy, and these convictions do not merge. This Court should reject the Appellant's claim otherwise.

## **V. CONCLUSION**

Based on the preceding argument, the State respectfully requests the Court to deny the Appellant's appeal. The sentencing court did not abuse its discretion by finding the instant conviction were not the same criminal conduct and did not violate double jeopardy. The State asks this Court to uphold the sentence imposed by the trial court.

Respectfully submitted this 14<sup>th</sup> day of November, 2007.

Susan I. Baur  
Prosecuting Attorney

By 

James B. Smith, WSBA #35537  
Deputy Prosecuting Attorney

COURT OF APPEALS, STATE OF WASHINGTON  
DIVISION II

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Cowlitz County No.  
06-1-01428-3

CERTIFICATE OF  
MAILING

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BY: [Signature]

I, Audrey J. Gilliam, certify and declare:

That on the 14 day of November, 2007, I deposited in the mails

of the United States Postal Service, first class mail, a properly stamped  
and address envelope, containing Brief of Respondent addressed to the  
following parties:

Court of Appeals  
950 Broadway, Suite 300  
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I certify under penalty of perjury pursuant to the laws of the State  
of Washington that the foregoing is true and correct.

Dated this 14 day of November, 2007

Audrey J. Gilliam  
Audrey J. Gilliam