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JUL 13 2007

King County Prosecutor
Appellate Unit

81030-3

NO. 59281-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

HERBERT JOHN KIER,

Appellant.

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
JUL 13 2007

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

The Honorable Carol A. Schapira, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court erred when it denied Appellant's motion to vacate his assault conviction on double jeopardy grounds.

Issue Pertaining to Assignment of Error

Appellant was convicted of one count of robbery in the first degree and one count of assault in the second degree arising from a single incident of carjacking. Following the Washington State Supreme Court's decision in State v. Freeman,¹ -- where the Court held that a conviction on second degree assault will typically merge with a first degree robbery -- appellant filed a motion asking the trial court to vacate his second degree assault conviction. The court denied that motion. Did the court err when it refused to merge appellant's second degree assault conviction into his first degree robbery and denied his motion to vacate?

B. STATEMENT OF THE CASE

1. Procedural History²

Herbert John Kier was initially charged with one count of robbery in the first degree. CP 1. The information alleged a carjacking at gunpoint with two victims -- Qualigine Hudson and Carlos Ellison. CP 1-2.

¹ State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005).

² This is the fourth time this case has come before this Court. *See* Case Numbers 45292-4-I, 50852-1-I and 55373-9-I.

Negotiations failed. 1RP 4-5.³ The State filed an amended information maintaining the first count with Hudson and Ellison as victims and adding a charge of assault in the second degree as Count II, specifying Ellison as the victim.⁴ CP 5-6.

³ This brief refers to the verbatim report of proceedings (from COA No. 45292-4-I) as follows: 1RP - July 12, 1999; 2RP - July 13, 1999; 3RP - July 14, 1999; 4RP - July 15, 1999; 5RP - August 19, 1999; 6RP - September 17, 1999; 7RP - May 1, 2002, June 28, 2002, and July 26, 2002. Undersigned counsel will be filing a motion to transfer the record in that case for consideration in this appeal.

⁴ The information alleged the assault as follows:

And I . . . further do accuse Herbert John Kier, AKA John Herbert Kier of the crime of Assault in the Second Degree, based on the same conduct as another crime charged herein, which crimes were part of a common scheme or plan, committed as follows:

That the defendant . . . in King County, Washington on or about April 27, 1999, did intentionally assault Carlos Ellison with a deadly weapon, to-wit : a firearm;

Contrary to RCW 9A.36.021(1)(c), and against the peace and dignity of the State of Washington.

And I . . . further do accuse the defendant . . . at said time of being armed with a deadly weapon, to-wit: a firearm, under the authority of RCW 9.94A.125 and 9.94A.310.

CP 6.

A jury convicted Kier on both counts. Supp. CP ____ (sub no. 30A, Verdict Form B/Guilty -- filed 07/19/1999); Supp. CP ____ (sub no. 30B, Verdict Form A/Guilty -- filed 07/19/1999).

When an allegation of juror misconduct arose, Kier filed a motion for new trial, which was denied. CP 40. Kier was initially sentenced with an offender score of nine to a 200-month term. CP 10. In the decision on Kier's initial appeal, however, this Court directed the trial court to conduct additional fact finding and -- if the court were to deny the motion for new trial -- to reconsider Kier's offender score. CP 15-21. When the trial court denied Kier's motion for a new trial, he was re-sentenced with an offender score of seven to a 150-month term. CP 40-41, 45, 47. On Kier's subsequent appeal, this Court affirmed, but remanded for correction of the community placement term. CP 54-61, 75. Kier then filed a motion to modify his sentence on a number of bases. CP 62-74. That motion was certified to this Court as a personal restraint petition, which was dismissed. CP 76-80.

After the Washington Supreme Court issued its opinion in State v. Freeman, Kier filed a motion under CrR 7.8(b)(5)⁵ to vacate his second

⁵ CrR 7.8 -- Relief from Judgment or Order -- provides in pertinent part:

(continued...)

degree assault conviction as a violation of double jeopardy. CP 81-91. Kier asked to be re-sentenced with an offender score of five. CP 89. The trial court denied that motion. CP 95-96. This appeal follows. CP 98-101.

2. Substantive Facts

On the afternoon of April 27, 1999, Qualigine Hudson was driving a Cadillac, which he owned but which was registered to his girlfriend. 3RP 65. Carlos Ellison, who is Hudson's cousin and who lived with Hudson at that time, was the only passenger. 3RP 44, 65.

⁵(...continued)

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.

On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

. . . .

(5) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to RCW 10.73.090, .100, .130, and .140. A motion under section (b) does not affect the finality of the judgment or suspend its operation.

On the date of incident, Hudson was trying to sell the Cadillac to pay off parking tickets, and there was a "for sale" sign in the car window. 3RP 46, 66-67. Hudson and Ellison had been at a hydraulics shop and were returning home. 3RP 45, 65-67. On the way, they encountered a burgundy Nissan Maxima containing three men who signaled Hudson to pull over. 3RP 46-47, 68. Hudson recognized the driver -- Cedrick Alderman -- and thought he might want to purchase the Cadillac. 3RP 68-70. Hudson pulled over, got out of the car, and engaged Alderman in discussion about the qualities of the Cadillac. 3RP 69-70. Ellison remained seated inside the Cadillac. 3RP 46.

During these discussions, a second person got out of the Nissan. 3RP 70. That person -- subsequently identified as Kier -- threatened Hudson with a handgun while Alderman put Hudson in a bear hug. 3RP 48-50, 73-74. The record is unclear, but Hudson either managed to get away from Alderman or Alderman threw him away from the Cadillac. 3RP 50, 74. In either case, Hudson fled the scene, leaving Ellison alone in the Cadillac. 3RP 50. The gunman then pointed the gun at Ellison and told him to "Get the fuck out of the car." 3RP 51. Ellison got out of the car, and the gunman came around to the passenger side and asked if Ellison had any money. 3RP 51-52. Ellison answered that he did not. 3RP 51-52.

Once Ellison was out of the Cadillac, Alderman drove off in the Cadillac while the gunman fled in the Nissan with the third person. 3RP 51-52.

C. ARGUMENT

1. BECAUSE THE THREAT TO USE FORCE AGAINST ELLISON WAS NECESSARY TO COMPLETE THE ROBBERY, THE COURT ERRED WHEN IT REFUSED TO MERGE KIER'S CONVICTIONS.

Both the Fifth Amendment of the United States Constitution⁶ and Article 1, § 9 of the Washington Constitution⁷ prohibit double jeopardy. The federal and state provisions offer identical protections. State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005); State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). This Court's review is *de novo*. Freeman, 153 Wn.2d at 770.

Double jeopardy protections are intended to ensure that no person shall be subject to subsequent prosecutions for the same offense after an acquittal, subsequent prosecutions for the same offense after a conviction, and multiple punishments for the same criminal act. Brown v. Ohio, 432

⁶ The double jeopardy clause of the Fifth Amendment of the United States Constitution states, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb[.]"

⁷ Art. 1, § 9 of the Washington Constitution -- Rights of Accused Persons -- provides, "No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense."

U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977); State v. Jones, 97 Wn.2d 159, 162, 641 P.2d 708 (1982); State v. McFarland, 73 Wn. App. 57, 67, 867 P.2d 660 (1994), *affirmed*, 127 Wn.2d 322, 899 P.2d 1251 (1995), *habeas corpus denied*, McFarland v. Ducharme, 161 F.3d 13 (9th Cir. 1998).

A person may suffer multiple punishments for the same criminal act where the legislature has elevated the degree of an offense -- and the severity of its punishment -- and the elevating circumstances are also defined as a separate criminal offense. Freeman, 153 Wn.2d at 772-73; State v. Parmelee, 108 Wn. App. 702, 710, 32 P.3d 1029 (2001), *rev. denied*, 146 Wn.2d 1009 (2002) (double jeopardy protections are the basis behind merger doctrine). When a crime is elevated to a higher degree by proof of another crime proscribed elsewhere in the criminal code, merger is applicable to avoid multiple punishments. Parmelee, 108 Wn. App. at 710.

Because the protections afforded by double jeopardy are constrained by the legislature's power to define crimes and allocate punishments, courts addressing multiple punishment cases look to the intent of the legislature to discern whether the legislature intended to separately punish both the underlying and the elevating criminal offenses. Freeman, 153 Wn.2d at

771. If the legislature has authorized punishments for both of the crimes, the prohibition against double jeopardy is not violated. Freeman, 153 Wn.2d at 771. Where there is doubt as to the legislature's intent, however, the rule of lenity requires merger and the conviction for the lesser offense is vacated. See Tvedt, 153 Wn.2d at 711 (any ambiguity in the unit of prosecution must be resolved against turning a single transaction into multiple offenses); State v. Birgen, 33 Wn. App. 1, 6, 651 P.2d 240 (1982), *rev. denied*, 98 Wn.2d 1013 (1983) (doubts as to whether legislature intended multiple convictions from a single act to be resolved against multiple convictions).

One tool useful for analyzing the issue in this case is unit of prosecution. Tvedt, 153 Wn.2d at 710. While unit of prosecution analysis is strictly applicable to cases where the defendant has been charged with multiple counts of the same criminal offense, Adel, 136 Wn.2d at 633-65, the analysis provides an instructive starting point to the merger analysis in this case because it defines boundaries of the elevated criminal offense -- first degree robbery.

In Washington, the crime of robbery is defined as a hybrid offense against both property and persons. Tvedt, 153 Wn.2d at 711-12. Thus, the unit of prosecution for a violation of robbery is "each separate forcible

taking of property from or from the presence of a person having an ownership, representative, or possessory interest in the property, against that person's will." Tvedt, 153 Wn.2d at 714-15. In this regard, some degree of assaultive conduct -- in the form of apprehension or fear sufficient to overcome the possessor's will -- is a necessary element for first degree robberies. See Freeman, 153 Wn.2d at 778 (to prove first degree robbery as charged, State had to prove an assault in furtherance of the robbery).

In State v. Freeman, the Supreme Court addressed the question of whether an assault necessarily merges with robbery in two circumstances. First, looking at a case where the defendant was convicted of first degree robbery and first degree assault arising from the same conduct, the Freeman Court found that because the punishment for first degree assault was significantly more severe than that provided for first degree robbery, the legislature intended to punish them as separate offenses; thus first degree assault does not merge into first degree robbery. Freeman, 153 Wn.2d at 775-76.

Second, where the defendant had been convicted of both first degree robbery and second degree assault, the Freeman Court noted that the punishment for the second degree assault was less than that for the first degree robbery. Freeman, 153 Wn.2d at 776. Thus, the Court found that

the legislature had not clearly intended to punish each offense separately. Freeman, 153 Wn.2d at 776. Rather, the Freeman Court determined that in most cases second degree assault will merge into the first degree robbery, thus precluding punishment for both crimes. Freeman, 153 Wn.2d at 780 (generally first degree robbery and second degree assault will merge unless they have an independent purpose or effect). The Court, however, directed that merger should be applied based on a close reading of the facts of each case. Freeman, 153 Wn.2d at 780. Merger does not apply in cases where the assaultive conduct manifests a criminal intent independent of the robbery. Freeman, 153 Wn.2d at 778-79.

Under the facts of this case, merger applies, and the trial court subjected Kier to double jeopardy when it denied his motion to vacate his second degree assault conviction. In this case, Kier was charged in Count I with robbery in the first degree with both Hudson and Ellison specified as victims. CP 5. The court below refused to merge Kier's robbery and assault convictions, finding it significant that there were two robbery victims. CP 95-96. Denying Kier's motion to vacate his second degree assault conviction, the court below said:

In this case, threatening victim Hudson with a gun in order to deprive him of his property was sufficient to elevate the robbery charge to robbery in the first degree. The act of threatening victim Ellison with a gun, even if

done to effectuate the robbery of Hudson, was a separate act of second degree assault perpetrated against a second victim.

CP 95-96 (emphasis added); *cf.* Freeman, 153 Wn.2d at 778 (second degree assault committed in furtherance of first degree robbery merges with that robbery (emphasis added)).

The court below failed, however, to consider the unit of prosecution for robbery when it made this determination. A robbery requires a taking of property from any person who has a possessory interest in that property. Tvedt, 153 Wn.2d at 714-15. For purposes of the robbery statute, Washington courts have said that a possessor can be any person with a possessory claim superior to that of the robber's. State v. Graham, 64 Wn. App. 305, 308-09, 824 P.2d 502 (1992) (anyone in actual possession with right superior to robber is deemed owner of property against that robber).

Further, a robbery is not complete until the robber has actually taken control over the property. *Cf.* State v. Allen, 94 Wn.2d 860, 864, 621 P.2d 143 (1980), *disavowed on other grounds*, State v. Vladovic, 99 Wn.2d 413, 662 P.2d 853 (1983) (robbery complete once money had been obtained by force); State v. Robinson, 73 Wn. App. 851, 857, 872 P.2d 43 (1994) (robbery completed once the robber has achieved possession of the property).

Thus, if -- after Hudson fled the scene -- there was someone in possession of Hudson's Cadillac with a claim superior to that of the robbers, the car had not yet been reduced to the robber's control as required for a completed robbery. In this case, that person with the superior possessory claim was Ellison. As Hudson's relative and his invited passenger in the Cadillac, Ellison had a possessory interest superior to that of the robbers. There could be no completed taking of the Cadillac unless and until Ellison's will to maintain possession -- by staying inside the Cadillac -- was overcome by force or fear. When the gunman pointed the gun at Ellison and told him to "Get the fuck out of the car" and Ellison complied, the taking was then complete. Prior to that, a lawful possessor stood between the robbers and the Cadillac. Thus, Ellison is a necessary victim to the robbery.

Moreover, the assault on Ellison had no independent purpose or effect separate from the robbery of Ellison and Hudson. The only assaultive conduct directed at Ellison -- the brandishing of the gun -- was precisely the same conduct that established the elements of first-degree robbery. And the only words spoken to Ellison -- "Get the fuck out of the car" and the inquiry whether Ellison had any money -- were directed solely towards the robbery. None of the assaultive conduct manifests any intent

independent of the first-degree robbery. Under Freeman, it could not be punished independently from that robbery.

Kier's convictions for robbery in the first degree and assault in the second degree should have merged. The court below violated his right to be free from double jeopardy when it denied his motion to vacate his assault conviction and sentence him under an adjusted offender score. This Court should reverse.

2. THE EVIDENCE AND THE LAW OF THIS CASE ALSO REQUIRE MERGER.

Even assuming the legislature could have authorized punishment in this case for both the robbery and the assault, the evidence presented at trial and the absence of precise jury instructions still compel merger.

Under the rule of lenity, ambiguity in a jury's verdict must be resolved in favor of the defendant. State v. DeRyke, 110 Wn. App. 815, 824, 41 P.3d 1225 (2002), *aff'd on other grounds*, 149 Wn.2d 906, 73 P.3d 1000 (2003). DeRyke was charged with kidnapping and attempted rape in the first degree. DeRyke, 110 Wn. App. at 818. Two circumstances served to elevate the rape offense to first degree: (1) use of a deadly weapon and (2) kidnapping the victim. If the jury used the kidnapping to elevate the offense, DeRyke could not also be separately convicted of kidnapping; that offense would merge with the rape. DeRyke could only

be convicted of both kidnapping and the rape if jurors used the deadly weapon to elevate the rape to first degree. DeRyke, 110 Wn. App. at 822-823.

There could be no doubt that jurors concluded DeRyke was armed with a deadly weapon for both offenses because they returned special verdicts indicating he was so armed. But because the State had not submitted jury instructions or special verdicts requiring the jury to specify which act it chose to reach its verdict on attempted rape, this Court was unwilling to assume jurors used the fact of a deadly weapon. DeRyke, 110 Wn. App. at 824. Instead, this Court applied the general rule that ambiguous verdicts are interpreted in the defendant's favor and assumed jurors relied only on the kidnapping to elevate the attempted rape. DeRyke, 110 Wn. App. 824 (citing State v. Taylor, 90 Wn. App. 312, 317, 950 P.2d 526 (1998); United States v. Baker, 16 F.3d 854, 857-58 (8th Cir. 1994)).

This case presents a similar ambiguity because the jury could have found Kier guilty of robbing Ellison (the assault victim) in addition to -- or instead of -- Hudson. This ambiguity arises from the information charging the robbery, the evidence presented at trial, and the lack of

specificity in the jury instructions and verdict forms regarding whether Ellison could be considered a robbery victim.

The amended information in this case charged the robbery as follows:

That the defendants Herbert John Kier, ADA John Herbert Kier in King County, Washington on or about April 27, 1999, did unlawfully and with intent to commit theft take personal property of another, to-wit: an automobile; from the person of and in the presence of Qualigine Hudson and Carlos Ellison, against their will, by the use or threatened use of immediate force, violence and fear of injury to such person or their property and in the commission of and in immediate flight therefrom, the defendant displayed what appeared to be a firearm, to-wit: a handgun; Contrary to RCW 9A.56.200(1)(B) and 9A.56.190, and against the peace and dignity of the State of Washington.

CP 7 (emphasis added).

The court's initial instructions to the jury at the start of voir dire did not specify the victims for either offense. 2RP 60. And the evidence from both police witnesses and Ellison either did not specify a victim for the robbery or included Ellison as a victim. Speaking of the incident, Seattle Police Patrol Officer Charlie Villagarcia testified that he responded to a "carjacking" and that the "robbery" occurred in his sector. 3RP 15-16. Inquiring about Ellison's statement to police, the prosecutor asked Villagarcia, "Did he give you a description of the car that -- his car that

had been taken?" And Villagarcia answered, "Yes." 3RP 18 (emphasis added).

In the testimony of Villagarcia's partner -- Seattle Police Patrol Officer Ronald Mazziotti -- the prosecutor established that they had responded to a 911 call regarding an alleged "carjacking." 3RP 34. The prosecutor then asked about whether they were able to get a statement from the victims.

Q. Did you get from either or both of the victims a general description of what had taken place?

A. Yes, we did.

Q. What was that?

A. The basic description, the incident was that the victims were in their vehicle. I believe they were honked at by the suspect vehicle. They pulled over. At that time they believe the suspects were interested in purchasing their car, and eventually, after some short conversation, one of the suspects pulled a gun on the victims and ended up taking the victims' vehicle.

3RP 37-38 (emphasis added). Throughout this testimony, both the prosecutor and the witnesses treat Ellison and Hudson as victims of the same robbery.

Further, Ellison's testimony also establishes that he was a victim of the robbery. The prosecutor initially asked Ellison whether he remembered the day "Qualigine's car was stolen." 3RP 44. When asked

what happened, however, Ellison answered, "We got carjacked." 3RP 45. The prosecutor then followed this answer by asking, "When is the first time you noticed the people who ended up carjacking you?" 3RP 45 (emphasis added). Ellison's answer and the prosecutor's question establish Ellison as a victim of the robbery. In addition, the first voice on the 911 tape, which was played for the jury, stated, "I have two boys here that told me they've just been carjacked." 3RP 55. And when asked to identify Kier at trial, Ellison was asked whether he was one of the people involved in the "carjacking" and whether he was the one who had the gun. 3RP 60-61.

Furthermore, when Ellison testified about having the gun pointed at him, that testimony related solely to the robbery.

Q. All right. What did Suspect No. 1 do?

A. He pointed the gun at me and told me to get out of the car.

Q. Okay. What did he say exactly?

A. Like: Get the fuck out of the car.

Q. And where were you when he pointed the gun at you?

A. In the passenger's seat.

Q. Where was he when he pointed it at you?

A. He was like halfway out of the driver's side of the car, halfway in and halfway out.

Q. Was he in the process of getting into the car?

A. No, he was like trying to get me out.

Q. Okay. And how far away did he hold the gun to you when he pointed it at you?

A. Probably like ten feet.

Q. What part of you did he point it at?

A. I don't know. It was like I was sitting here and I looked over and he was just pointing it at me.

Q. What did you do after he pointed the gun at you and said: Get the fuck out of the car?

A. I said all right, and I got out.

Q. What happened after that?

A. Then he ran around the car and asked me if I had any cash to my side, where I was a passenger, and I said no. Then I guess the short one hopped in the car and drove away. He jumped in the other car and drove away.

3RP 51-52.

The court's instructions also permitted jurors to consider Ellison as the robbery victim. The "to convict" instruction told the jury to address six elements:

1. That on or about 27th day of April, 1999 the defendant unlawfully took personal property from the person or in the presence of another;
2. That the defendant intended to commit theft of the property;

3. That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person or to that person's property or the property of another;

4. That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

5. That in the commission of these acts or in immediate flight therefrom the defendant was armed with a deadly weapon or displayed what appeared to be a deadly weapon or inflicted bodily injury; and

6. That the acts occurred in the State of Washington.

Supp. CP ____ (sub no. 27D, Court's Instructions to Jury (filed 07/15/1999)).

The element that the defendant took "personal property from the person or in the presence of another" applies equally to Hudson and/or Ellison. In contrast, the "to convict" instruction for the assault charge required the jury to determine whether "the defendant assaulted Carlos Ellison with a deadly weapon." Supp. CP ____ (sub no. 27D, Court's Instructions to Jury (filed 07/15/1999)). Thus, because there was a named victim specified in the assault instruction but none in the robbery instruction, it was entirely reasonable for the jury to believe that the robbery instruction could apply equally to Hudson and Ellison.

Finally, the verdict for Count I did not specify Hudson as the victim. Rather the form simply said, "We, the jury find the defendant, Herbert John Kier, *GUILTY* of the crime of Robbery in the First Degree as charged in Count I." Supp. CP ____ (sub no. 30B, Verdict Form A). As discussed above, however, the robbery charged in Count I named both Hudson and Ellison as victims. CP 5.

In closing, the prosecutor argued that the jury should consider Hudson to be the victim of the robbery and Ellison the victim of the assault. 4RP 67, 75-76. That argument, however, was contrary to the evidence discussed above, which clearly established that Ellison was also a victim of the carjacking and that the gun was pointed at him solely for the purposes of the robbery. In addition, the jury had been instructed to "[d]isregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court." Supp. CP ____ (sub no. 27D, Court's Instructions to Jury (filed 07/15/1999)).

The evidence heard by the jury spoke of a unitary crime -- a carjacking -- in which Ellison was a victim as well as Hudson. Ellison testified that the incident was a "carjack." Police testified that they received Ellison's statement regarding a carjacking. And while the trial deputy argued that the jury should find Hudson to be the victim of the robbery and

Ellison to be only a victim of an assault, neither the court's instructions nor the verdict form required such an election. Thus, it is entirely reasonable that the jury found Ellison to be a victim of both the robbery and the assault used to prove that robbery.

Because this Court cannot be sure that the jury did not convict Kier of robbing Ellison, the rule of lenity requires that the assault merge into the robbery. DeRyke, 110 Wn. App. 815, 824. This Court should reverse.

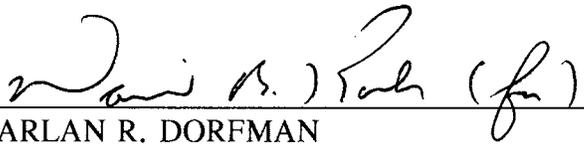
D. CONCLUSION

For the reasons stated above, Kier asks this Court to remand for vacation of the second degree assault conviction and re-sentencing.

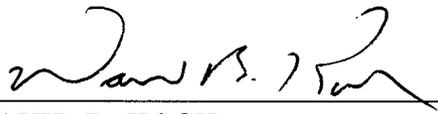
DATED this 13th day of July, 2007.

Respectfully submitted,

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