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NO. 59281-5-1

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

REC'D

OCT 25 2007

King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

HERBERT JOHN KIER,

Appellant.

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

The Honorable Carol A. Schapira, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE MERGER ANALYSIS IN STATE v. FREEMAN IS STILL GOOD LAW AND IS APPLICABLE TO THIS CASE.

Discussing perceived flaws in the Supreme Court's analysis of merger doctrine in State v. Freeman, 153 Wn.2d 705, 107 P.3d 728 (2005), the State argues that the Court misinterpreted the Legislature's intent regarding whether an assault should be punished separately from the robbery. Br. of Respondent at 15-17. The Court's decision in Freeman, however, was filed on March 17, 2005 -- more than two years ago -- and the Legislature has not seen any need to clarify its intent in light of that decision. *Cf.* Laws of 2003, ch. 3, § 1 (amending second degree felony murder statute to clarify disagreement with Supreme Court's construction in In re Address, 147 Wn.2d 602, 56 P.3d 981 (2002)); *see also* State v. Thompson, 88 Wn.2d 13, 17-18, 558 P.2d 202 (1977) (noting significance of legislature's inaction following court's decision construing legislative intent).

Indeed, the Legislature amended the second degree assault statute addressed by the Freeman Court -- and at issue in this case -- during the 2007 session without taking any action in response to Freeman. *See* Laws of 2007, ch. 79, § 2 (adding strangulation as a means of committing second degree assault); *see also* State v. Wanrow, 91 Wn.2d 301, 313, 588

P.2d 1320 (1978) (Hicks, J., concurring) (when court construes statute, reenactment without change indicates legislative approval of construction).¹ In light of the Legislature's silence, this Court can comfortably assume that Freeman's merger analysis reflects the Washington State Legislature's intent.

The State argues that assault should not merge with first degree robbery because the State is not required to prove an assault to elevate the degree of the robbery. Br. of Respondent at 14-15. The State then argues that because the robbery statutes do not require the State to prove an intent to commit assault, elevation of a robbery charge to first degree does not require proof of an assault. Br. of Respondent at 15. On this basis, the State contends that the Supreme Court erred in its analysis in Freeman. Br. of Respondent at 15.

The State is wrong because the robbery statute generally requires proof of a common law assault to sustain a conviction. The State ignores the fact that there is no definition of "assault" in the criminal code and that

¹ SB 6801 is the only bill addressing the first degree robbery statute introduced since Freeman was decided. That bill, which clarifies evidentiary issues regarding proof that an establishment is a "financial institution" under RCW 9A.56.200(1)(b), received its first reading on January 24, 2006. It appears not to have moved beyond first reading, however, and an identical bill -- SB 5705 -- received first reading on January 29, 2007. Neither bill addresses the merger issue in Freeman.

Washington courts thus apply the common law definitions of assault. State v. Walden, 67 Wn. App. 891, 893, 841 P.2d 81 (1992). Washington courts use three common law definitions of assault: (1) an attempt, with unlawful force, to inflict bodily injury upon another (attempted battery); (2) an unlawful touching with criminal intent (actual battery); and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting that harm (common law assault). State v. Wilson, 125 Wn.2d 212, 218, 883 P.2d 320 (1994); Walden, 67 Wn. App. at 893-94.

It is this third definition -- putting another in apprehension of harm -- that is implicated in this case. Here, the jury was instructed only on this third definition of "assault":

An "assault" is 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 a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 112 (emphasis added).

If this definition is compared with the definition of robbery provided by the Legislature, it becomes readily apparent that an assault is a necessary element of most robberies, and that an assault involving a

firearm is a necessary elevating factor for first degree robbery as charged here. The definition of robbery provides:

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. 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 (emphasis added).

Comparing the two provisions, the definition of assault requires “a reasonable apprehension and imminent fear of bodily injury” while the definition of robbery requires “the use or threatened use of immediate force, violence, or fear of injury.” CP 112; RCW 9A.56.190. The two provisions both require the actor create a reasonable apprehension in the victim that some degree of bodily injury is imminent, or immediate. In cases like this, where the defendant is charged with being armed with a deadly weapon or displaying a deadly weapon as the means of creating that threatened use of immediate force, violence, or fear of injury, the reasonable apprehension and imminent fear of bodily injury required by the definition of assault is a necessary consequence. This is especially the

case if the threatened use of immediate force is sufficient “to obtain or retain possession of the property, or to prevent or overcome resistance to the taking” as required for a completed robbery.

Thus, the State’s example of the purse snatcher who slightly injures the person holding the purse without intending to commit assault fails. Br. of Respondent at 15. An intentional “use . . . of immediate force” for the purposes of “unlawfully taking property from another” that results in a slight injury is an “unlawful touching with criminal intent,” and thus an assault. The degree of assault would depend on application of the legislatively defined means of committing assault and the severity of the injury. *See State v. Smith*, 159 Wn.2d 778, 784-90, 154 P.3d 873 (2007) (the common law defines assault, while the legislative provisions establish the alternative means for committing the various degrees of assault). Under *Freeman*, any degree of assault committed by the purse snatcher would merge into the robbery so long as the injury does not amount to a first degree assault.

The State also claims the *Freeman* Court erred by failing to address all the degrees of assault -- and their varying degrees of punishment -- in its merger analysis. This argument fails in light of the distinction the *Freeman* Court drew between first degree assault, which does not merge with first degree robbery precisely because of the more severe punishment

provided for that degree of assault, and second degree assault, which is punished less severely than the robbery. Because the offense levels -- and hence the standard range -- descends for each lesser degree of assault, the State has not made -- and cannot make -- any argument that this analysis would change if the Supreme Court had included third and fourth degree assaults into its analysis. Thus, contrary to the State's assertion here, the Freeman Court examined the disparate punishments provided by the Legislature and determined that merger applies for those degrees of assault that are punished less severely than the first degree robbery.

In this case, Kier's standard range for first degree robbery is 87-126 months, while his standard range for second degree assault is 43-57 months. CP 45. Clearly, the more severe sentence provided for the first degree robbery places this case squarely under the merger analysis of Freeman. The State's argument that the Supreme Court failed to take the varying degrees of assault into consideration simply fails.

This Court should vacate Kier's conviction for second degree assault and remand for entry of sentence on first degree robbery only.

2. THE ATTEMPTED ROBBERY CASE RELIED UPON BY THE STATE IS INAPPLICABLE.

The State relies on State v. Esparza, 135 Wn. App. 54, 143 P.3d 612 (2006), to argue that Freeman's merger analysis does not apply when the second degree assault is charged under the "armed with a deadly weapon" or "displays a deadly weapon" prong of the second degree assault statute. Br. of Respondent at 17-20. This argument, however, fails to consider the fact that Esparza involved a charge of attempted first degree robbery. Esparza, 135 Wn. App. at 57.

The elements required to prove an attempted robbery are: (1) an intent to commit a robbery; and (2) a substantial step towards carrying out that intent. RCW 9A.28.020(1).² "A 'substantial step' for purposes of the criminal attempt statute is defined as conduct that is strongly corroborative of the actor's criminal purpose." Esparza, 135 Wn. App. at 63 (citations omitted). Given the facts, this Court determined that a number of actions that would have constituted a substantial step had been proven at trial, including walking into the store, wielding guns and announcing the

² In pertinent part, RCW 9A.28.020 -- Criminal Attempt -- provides:

(1) A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

robbery. *Id.* at 63-64. The Court then observed that the State was not required to prove a second degree assault in order to elevate an attempted robbery to an attempted first degree robbery committed under the “armed with a deadly weapon” or “displayed what appeared to be a deadly weapon” prongs. Esparza, 135 Wn. App. at 66.

The State argues that merger should be limited to those cases where the robbery is elevated by an actual battery assault. Br. of Respondent at 17-20. The State is wrong because an assault does not merge into an attempted first degree robbery regardless of how that attempt is made. In State v. Beals, 100 Wn. App. 189, 997 P.2d 941, *rev. denied*, 141 Wn.2d 1006 (2000), this Court considered a case where the defendant hit the victim in the head with a hammer while demanding money, and threatened to kill him if he did not comply. Beals, 100 Wn. App. at 191-92. Beals was charged with attempted first degree robbery under the “displays what appears to be a deadly weapon” and the “inflicts bodily injury” prongs and with second degree assault under the “deadly weapon” prong. *Id.* at 192 nn.1-3; *cf.* CP 5-6 (amended information charging Kier with first degree robbery under the “displays what appears to be a deadly weapon” prong and with second degree assault under the “deadly weapon” prong).

Rejecting Beals’ merger argument, this Court said:

A completed second degree assault is not necessary to prove attempt to commit first degree robbery, and it is unlikely the legislature intended to [sic] the merger doctrine to so apply here. The attempted robbery was complete as soon as Beals formed the requisite intent and took the hammer in hand, and is distinguishable from Beals' act of hitting Perry on the head to complete the assault.

Beals, 100 Wn. App. at 193-94 (emphasis in the original).

Contrary to the State's position here that merger is reserved only for cases where there is an actual battery assault -- Br. of Respondent at 18-20 -- this Court rejected Beals' argument that the convictions should merge because he actually inflicted bodily injury, an element of first degree robbery. Beals, 100 Wn. App. at 194-95. "The attempt to commit first degree robbery required only a single substantial step, and could have been satisfied by proof of something far less than second degree assault (e.g., merely "displaying" what appears to be a deadly weapon)." *Id.* at 194. The Beals Court relied upon In re Fletcher, 113 Wn.2d 42, 776 P.2d 114 (1989), where the Court rejected an argument that a first degree robbery should merge into a first kidnapping because the kidnapping statute required proof of another felony to elevate the crime to first degree kidnapping. Based on Fletcher, the Beals Court reasoned:

The Supreme Court rejected the argument, noting that the kidnapping statute only requires proof of intent to commit various acts, not that the acts actually be committed. Fletcher, 113 Wn.2d at 52-53. Similarly here, all that was required to satisfy the elements of attempted first degree

robbery was a substantial step which may or may not have included actual injury to the victim. The merger doctrine is thus inapplicable.

Beals, 100 Wn. App. at 194-95 (emphasis in Beals).

The State here attempts to graft doctrines applicable to an attempted crime into a case where the crime was actually committed. The analysis, however, must change when looking at conduct necessary to actually separate the property from those rightfully in possession of it, especially when the perpetrator displays a deadly weapon. In cases of completed robberies such as this, Freeman's analysis applies and the second degree assault merges with the first degree robbery. *See Freeman*, 153 Wn.2d at 780 (in most cases, second degree assault will merge into first degree robbery precluding punishment for both crimes).

In this case, the jury had to find that Kier "took personal property from the person or in the presence of another . . . against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person . . . [and that] . . . the defendant was armed with a deadly weapon or displayed what appeared to be a deadly weapon[.] CP 111 (in pertinent part)). This finding necessarily includes a common law assault committed by putting another in apprehension of harm. Wilson, 125 Wn.2d at 218. And as discussed above and in the Opening Brief -- Br. of Appellant at 10-13 -- this conduct, necessary to

prove first degree robbery, constitutes the second degree assault against Ellison.

This Court should vacate Kier's second degree assault conviction and remand for resentencing on the first degree robbery.

3. WHERE THE ONLY INJURIES ARE THOSE INTEGRAL TO THE ROBBERY, THE EXCEPTION TO THE MERGER RULE DOES NOT APPLY.

The State argues that this case falls within the exception to the merger rule applicable where there is a separate injury to a person or property that is not merely incidental to the crime of which it forms an element. Br. of Respondent at 27-28 (citing Freeman, 153 Wn.2d at 778-79). The State correctly observes that the Freeman Court instructed that application of this exception focuses on the facts of the particular case. *Id.* The State then provides an extremely cursory one sentence analysis of the facts in this case, "Here, the defendant pointed a gun at two separate individuals." Br. of Respondent at 28.

As discussed in the Opening Brief, however, the facts of this case demonstrate that Kier's actions in regard to Ellison are integral to completing the charged first degree robbery. Br. of Appellant at 10-13. As noted there, the court below acknowledged that it based its ruling on a presumption that pointing the gun at Ellison was "done to effectuate the robbery of Hudson." Br. of Appellant at 10-11. No evidence in this case

supports an argument that pointing the gun at Ellison had any separate purpose, and the State fails to substantiate its assertion that such a purpose can be found. The only purpose supported by the evidence in this case is the unitary purpose of effectuating a theft of the Cadillac.

The State also relies on State v. Tvedt, 153 Wn.2d 705, 107 P.3d 728 (2005), for the proposition that “[n]othing in our decision forecloses the State from charging other appropriate crimes, such as assault’ to insure a defendant is sufficiently punished for harm to these other individuals.” Br. of Respondent at 28 (quoting Tvedt, 153 Wn.2d at 716 n.4 (emphasis added)). What the State ignores, however, is that the information in this case named Ellison as a victim in the first degree robbery charge. CP 5.

If Ellison is a victim of the robbery as a result of having the gun pointed at him, he cannot also be a victim of a second degree assault based on the same act of pointing a gun unless there is clear evidence that pointing the gun was done with a purpose other than effectuating the robbery. The State has failed to demonstrate such evidence exists and no such evidence appears in the record. Merger is applicable to the charges in this case.

4. THE PROSECUTOR'S ATTEMPT TO ELECT HUDSON AS THE SOLE VICTIM OF THE ROBBERY FAILED IN THE FACE OF THE COURT'S INSTRUCTIONS AND THE EVIDENCE.

The State argues that the prosecutor made an election for the jury to consider only Hudson as the victim of the robbery and only Ellison as the victim of the assault. Br. of Respondent at 23-27. Because the trial prosecutor limited his attempted election to closing argument and because both the evidence at trial and the court's instructions to the jury permitted the jury to convict Kier on a finding that Ellison was a victim of the robbery, the State's argument fails.

The State here concedes that a robbery is not complete until the robber has taken control over the property. Br. of Respondent at 23 n.17. The State then argues generally in a footnote "the cases cited by the defendant do not stand for the proposition that a robbery is not complete until a robber obtains exclusive sole control over the property." *Id.* The State asserts that Kier's position would mean that a person who seizes a large vehicle with several passengers could not be said to have completed the robbery until each of the passengers had been removed from the vehicle. *Id.*

This argument fails to address the facts of this case. All that needs to be said is that a person who commits robbery involving a vehicle with

passengers -- and whose sole intent is to steal the vehicle -- must remove those passengers before driving off in the vehicle. Otherwise, the perpetrator has manifested the intent to commit the separate crime of kidnapping in addition to robbery. *See* RCW 9A.40.010(1), (2); RCW 9A.40.030(1).³

That is precisely what would have happened if Kier had driven off without ordering Ellison out of the vehicle. Because Kier's criminal intent was solely fixed on robbery, he ordered Ellison out of the Cadillac before his accomplice drove off. Thus, pointing the gun at Ellison and ordering him out of the car demonstrates that the intent was robbery only and not to effectuate any other crime.

The State asserts that the trial deputy's statement at the start of closing argument was sufficient to elect Hudson as the sole victim of the robbery and Ellison as the sole victim of the assault. Br. of Respondent at 25-26. As discussed in the Opening Brief -- Br. of Appellant at 15-21 -- however, that argument was contrary to the evidence at trial and was not

³ RCW 9A.40.030(1) provides in pertinent part, "A person is guilty of kidnapping in the second degree if he or she intentionally abducts another person[.]" RCW 9A.40.010(2) defines "Abduct" as "to restrain a person by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force[.]" In pertinent part, RCW 9A.40.010(1) defines "Restrain" as "to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his liberty."

in line with the court's instructions -- especially the "to convict" instruction on first degree robbery. Further, while the prosecutor argued that the jury find Kier guilty of robbing Hudson and of assaulting Ellison, the prosecutor below never argued that the jury should not find Ellison to be a victim of the robbery. 4RP 66-76, 84-87. Thus, any attempted election during closing argument was ambiguous at best.

The State argues that the language in the "to convict" instruction on the first degree robbery count refers to a single victim. Br. of Respondent at 24-25. But other language in that instruction references second parties. As discussed in the Opening Brief -- Br. of Appellant at 18-19 -- the "to convict" instruction for first degree robbery told jurors they must determine whether Kier "took personal property from the person or in the presence of another[.]" CP 111 (emphasis added). By its clear language, this element permitted the jury to consider both Hudson and Ellison as victims of the robbery. In addition, that instruction directed the jury to determine whether Kier used 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[.]" *Id.* (emphasis added). Again, this instruction permitted the jury to find both Hudson and Ellison to be victims of the same robbery as victims of the threatened use of force.

In support of its assertion that the trial deputy's arguments were an adequate and effective election of Hudson as the sole victim of the robbery, the State relies on State v. Bland, 71 Wn. App. 345, 860 P.2d 1046 (1993), *overruled on other grounds*, State v. Smith, 159 Wn.2d 778, 786-87, 154 P.3d 873 (2007). That reliance is misplaced. The election in Bland included "to convict" instructions that named a specific victim for each count. Bland, 71 Wn. App. at 350 n.2. As discussed in the Opening Brief, however, the "to convict" instructions in this case specifically named Ellison as the victim of the assault, but did not name anyone as a specific victim of the robbery. Br. of Appellant at 18-19. Thus, any attempted election in this case was insufficient.

Finally, the State argues that application of the merger analysis in Freeman is dependent upon an assumption that the jury found Ellison to be a victim of the robbery. Br. of Respondent at 27. The State is confused.

The merger analysis under Freeman asks whether the Legislature intended to punish two separate offenses or whether the intent was to punish one elevated offense. *See Freeman*, 153 Wn.2d at 773-78 (analyzing whether the Legislature intended to punish separate offenses based on the standard ranges involved rather than the facts of the cases).

The merger analysis under State v. DeRyke, 110 Wn. App. 815, 41 P.3d 1225 (2002), *aff'd on other grounds*, 149 Wn.2d 906, 73 P.3d 1000

(2003), however, asks a different question: what -- given the court's instructions and the principles of lenity -- an ambiguous jury verdict requires. DeRyke, 110 Wn. App. at 822-24. In that case, this Court found that the trial court's "to convict" instruction on attempted first degree rape permitted the jury to find that kidnapping the victim elevated the attempted rape to attempted first degree rape. *Id.* at 823-24. Because there was no way to determine in fact that the jury had not considered the kidnapping as the elevating element, this Court applied lenity to merge the kidnapping conviction into the attempted first degree rape. *Id.* at 824.

Significantly, the DeRyke Court noted that this ambiguity could have been eliminated if the State had proposed a "to convict" instruction that precluded the jury from considering the kidnapping as an elevating element for attempted first degree rape. *Id.* at 824. In like manner here, the State could have proposed a "to convict" instruction on the first degree robbery that specified Hudson as a named victim. Because the State failed to propose that instruction, this case -- like DeRyke -- requires merger under the rule of lenity.

This Court can rule on merger under Freeman without regard to whether the jury's verdict was ambiguous. Or, this Court can apply DeRyke and determine that merger is required because the jury verdict is

ambiguous. Under either theory, this Court should vacate Kier's conviction for second degree assault.

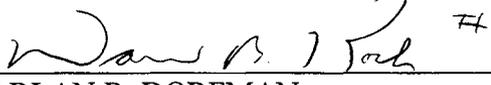
B. CONCLUSION

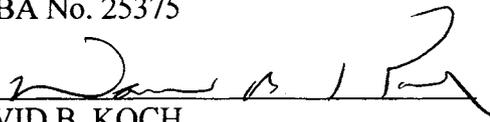
For the reasons presented in the Opening Brief and above, this Court should vacate Kier's assault conviction and remand for resentencing on first degree robbery.

DATED this 15th day of October 2007.

Respectfully submitted,

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