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NO. 59281-5-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

HERBERT JOHN KIER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CAROL SCHAPIRA

BRIEF OF RESPONDENT

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STATE OF WASHINGTON
COURT OF APPEALS
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A. ISSUES PRESENTED

The defendant was convicted in a carjacking incident of first-degree robbery for stealing a car, and an additional count of second-degree assault for ordering the passenger out of the vehicle at gunpoint. Should this Court reject the defendant's claims that his two convictions violate double jeopardy because his second-degree assault conviction against the passenger merges into the first-degree robbery conviction?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

In 1999, by amended information, the defendant was charged with first-degree robbery and second-degree assault. CP 5-6. A jury found the defendant guilty as charged.¹ CP 119-20. The defendant was sentenced on September 17, 1999. CP 8-14. On July 26, 2002, following an appeal² involving issues not relevant to this appeal, the defendant was resentenced. CP 44-53.

¹ The verbatim report of proceedings is cited as follows: 1RP--7/12/99; 2RP--7/13/99; 3RP--7/14/99; 4RP--7/15/99; 5RP--8/19/99; 6RP--9/17/99 and 7RP--5/1/02, 6/28/02 and 7/26/02.

² State v. Kier, 109 Wn. App. 1020, 2001 WL 1463810, Nov. 19, 2001 (45292-4-I) (unpublished).

With an offender score of seven, the defendant received a standard range sentence of 90 months on count I, the first-degree robbery conviction, to be served concurrently with a standard range sentence of 44 months on count II, the second-degree assault conviction. CP 44-53. The defendant also received firearm enhancements of 60 months and 36 months, respectively, to be served concurrently.³ CP 44-53.

The defendant filed another appeal,⁴ also involving issues not relevant to this appeal. As a result of this later appeal, the defendant's term of community placement was modified, but in all other respects, his sentence remained the same. CP 75.

On October 23, 2006, the defendant filed with the trial court a Motion to Vacate Judgment & Sentence in which he argued his two convictions amounted to a double jeopardy violation. CP 81-94. On October 26, 2006, without a hearing or input from the

³ The defendant received the benefit of an illegal sentence. The defendant committed his crime post In re Charles, 135 Wn.2d 239, 955 P.2d 798 (1998) and the 1998 amendments to the hard times for armed crimes statutes. See 1998 Laws of Washington, ch. 235 § 1; former RCW 9.94A.310; State v. Thomas, 113 Wn. App. 755, 54 P.3d 719 (2002). The amendments to the statute overruled the holding of In re Charles and made it mandatory that firearm enhancements be served consecutively. Id.

⁴ State v. Kier, 119 Wn. App. 1028, 2003 WL 22766038, Nov. 24, 2003 (50852-1-I) (unpublished), rev. denied, 152 Wn.2d 1005 (2004).

State, the trial court signed an order denying the defendant's motion. CP 95-96. The defendant then filed a late notice of appeal but this Court agreed to accept. CP 98-101.

2. SUBSTANTIVE FACTS

On April 27, 1999, 20-year-old Qualagine Hudson and his 16-year-old cousin, Carlos Ellison, were driving home from a car shop in Hudson's car. 3RP 43-45, 64-66. Ellison, who did not yet have his driver's license, was seated in the passenger seat. 3RP 44, 50-51. Hudson was trying to sell his car and had a For Sale sign posted in the window. 3RP 46.

As Hudson drove down the street, three men in another car started honking their horn at him. 3RP 46, 68-69. Thinking the men were interested in buying his car, Hudson pulled over, got out of the car and started talking to the driver of the other car, co-defendant Cedric Alderman. 3RP 68-69; 4RP 16. The defendant, a passenger in the other car, then got out and pointed a gun at Hudson. 3RP 48, 72-73. Alderman then grabbed Hudson but Hudson was able to free himself and run to call the police. 3RP 74.

The defendant then approached Hudson's car and pointed a gun at Ellison, who was still seated in the passenger seat. 3RP 50-52, 84. The defendant told Ellison to "get the fuck out of the car." 3RP 51-52. Ellison complied and the defendant and Alderman then drove away with both cars. 3RP 51-52.

C. ARGUMENT

1. THE DEFENDANT'S CONVICTIONS FOR FIRST-DEGREE ROBBERY AND SECOND-DEGREE ASSAULT DO NOT VIOLATE THE PROHIBITION AGAINST DOUBLE JEOPARDY.

The defendant combines the concepts of unit of prosecution, a multiple acts case, his definition of what constitutes a robbery and the rule of lenity to apply a double jeopardy/merger analysis in arguing that his second-degree assault conviction should be vacated. This claim should be rejected. Consistent with the Supreme Court's double jeopardy analysis in State v. Tvedt,⁵ the defendant was properly convicted of first-degree robbery and the separate crime of second-degree assault.

⁵ 153 Wn.2d 705, 107 P.3d 728 (2005).

2. SUMMARY OF ARGUMENT.

The defendant's argument depends upon the application of State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005), a double jeopardy/merger case wherein the Washington Supreme Court held that, as charged and convicted, second-degree assault can merge into first-degree robbery under certain circumstances. As will be discussed below, the State contends that the Freeman case was decided incorrectly. A careful analysis of the robbery and assault statutes shows that second-degree assault does not elevate a robbery to first-degree robbery as the Court assumed and that the Legislature did not intend for second-degree assault to merge into first-degree robbery.

In any event, the premises required in order for the defendant to argue that Freeman is applicable to his case are flawed. The application of Freeman is dependent upon the underlying second-degree assault charge being based upon the inflicts bodily harm prong of the assault statute, not the assault with a firearm prong, as charged and proven here. This is because the Court in Freeman found that in proving the bodily harm prong of the robbery statute, as was charged there, the State was "required" to prove a second-degree assault charge based upon an intentional

assault and infliction of substantial bodily harm. Here, like this Court held in State v. Esparza, 135 Wn. App. 54, 143 P.3d 612 (2006), where first-degree robbery is based upon being armed with a firearm or displaying what appears to be a firearm, and not the bodily harm prong of the statute, the State is not required to prove an assault in order to prove the robbery and the merger doctrine discussed in Freeman does not apply.

Additionally, the defendant wants this Court to assume, via robbery's unit of prosecution, a multiple acts case, his definition of what constitutes a robbery and the rule of lenity that the jury found him guilty of first-degree robbery, not for robbing the owner and driver of the vehicle, Qualagine Hudson, but for the forcing of Carlos Ellison out of the vehicle at gunpoint. This argument, however, ignores the prosecutor's election of the act constituting robbery--the taking of the vehicle from Hudson--and to accept the defendant's argument would lead to the absurd result that one could never commit a robbery of a vehicle until each and every passenger was removed from the vehicle.

Finally, the Supreme Court has stated that even where merger may apply, there is a "well established exception" when there is a separate injury to the person or property of the victim or

others, which is separate and distinct from and not merely incidental to the crime of which it forms an element. Freeman, 153 Wn.2d at 778-79. As noted in Tvedt, 153 Wn.2d at 717 n. 5, where there are multiple persons subjected to a robbery, "[n]othing in our decision forecloses the State from charging other appropriate crimes, such as assault," to deal with the harm to multiple victims of a robbery.

3. THE STATUTES AND CHARGES.

The defendant was charged and convicted of second-degree assault under subsection (1)(c) of the assault statute. CP 5-6, 113.

The statute provides in pertinent part:

(1) A person is guilty of assault in the second degree if he or she . . .

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) **Assaults another with a deadly weapon**; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture.

RCW 9A.36.021 (since amended) (emphasis added).

The first-degree robbery statute provides in pertinent part that:

(1) A person is guilty of robbery in the first degree if in the commission of a robbery or of immediate flight therefrom, he:

(a) Is armed with a deadly weapon; or

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

(c) Inflicts bodily injury.

RCW 9A.56.200 (since amended).

The general robbery statute 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.

4. THE TEST FOR DOUBLE JEOPARDY AND MERGER.

In beginning an analysis of an alleged double jeopardy/merger violation,⁶ the first step is to look at what the double jeopardy clause is intended to protect against, i.e., the purpose of the rule. Without question, subject to constitutional constraints, the legislature has the absolute power to define criminal conduct and assign punishment. Calle, 125 Wn.2d at 776. In many cases, a defendant's conduct, a single act, may violate more than one criminal statute. Without question, a defendant can permissibly receive multiple punishments for a single criminal act that violates

⁶ The term "merger" is used in several different contexts. As used herein, it is part of the doctrine of statutory interpretation used to determine whether the legislature intended to impose multiple punishments for a single act that violates several statutory provisions. State v. Vladovic, 99 Wn.2d 413, 419 n. 2, 662 P.2d 853 (1983); State v. Sweet, 138 Wn.2d 466, 478, 980 P.2d 1223 (1999). Courts have recognized that the "merger doctrine belongs squarely within the third prong of the Calle double jeopardy analysis." State v. Frohs, 83 Wn. App. 803, 811, 924 P.2d 384 (1996) (referring to State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995)).

more than one criminal statute. Calle, at 858-60 (finding no double jeopardy violation where a single act of intercourse violated the rape and incest statutes). Double jeopardy is only implicated when the court exceeds the authority granted by the legislature and imposes multiple punishments where multiple punishments are not authorized. Calle, at 776. Therefore, a reviewing court's role "is limited to determining what punishments the legislative branch has authorized," and determining whether the sentencing court has properly complied with this authorization. Calle, at 776.

In Calle, the Supreme Court set forth a three-part test for determining whether multiple punishments were intended by the legislature.⁷ The first step is to review the language of the statutes to determine whether the legislation expressly permits or disallows multiple punishments. Calle, at 776. Should this step not result in

⁷ Calle represented an affirmation of the rejection of the factual type analysis that was being conducted by some courts prior to the early 90's. In 1993, the United States Supreme Court rejected the "same conduct" fact based test for determining double jeopardy. United States v. Dixon, 509 U.S. 688, 704, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). Two years later, the Washington Supreme Court did the same, recognizing that a fact analysis based test had been rejected by the United States Supreme Court and that the State double jeopardy clause did not provide broader protection than its federal counterpart. State v. Gocken, 127 Wn.2d 95, 896 P.2d 1267 (1995). This rejection of a fact-based double jeopardy/merger analysis makes sense when considering the question is one of legislative intent of which the facts of a particular case tell us nothing. See State v. Vaughn, 83 Wn. App. 669, 924 P.2d 27 (1996), rev. denied, 131 Wn.2d 1018 (1997) (recognizing rejection of the "same conduct" rule in finding no double jeopardy for kidnap and rape).

a definitive answer, the court turns to step two to determine legislative intent, the two-part "same evidence" or "Blockburger"⁸ test. This test asks whether the offenses are the same "in law" and "in fact." Calle, at 777. Offenses are the same "in fact" when they arise from the same act. Offenses are the same "in law" when proof of one offense would always prove the other offense. Calle, at 777. If each offense includes elements not included in the other, the offenses are considered different and multiple convictions can stand. Calle, at 777. Failure under either prong creates a strong presumption in favor of multiple punishments, a presumption that can only be overcome where there is "clear evidence" that the legislature did not intend for the crimes to be punished separately. Calle, at 778-80. This search for "clear evidence" of contrary legislative intent is the third step of the analysis.

Under this third part of the Calle test falls the merger doctrine. Merger is another tool used to determine legislative intent, but the doctrine only applies to certain statutory situations.

The merger doctrine:

only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime (e.g.,

⁸ Referring to United States v. Blockburger, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

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 [that] is defined as a crime elsewhere in the criminal statutes (e.g., assault or kidnapping).

State v. Eaton, 82 Wn. App. 723, 730, 919 P.2d 116 (1996) (citing Vladovic, 99 Wn.2d at 413) (emphasis added).

If two crimes fall within the merger doctrine, this is an indication that the legislature may have intended only one punishment. However, even where the merger doctrine applies, it is not a violation of double jeopardy just because one crime may be elevated to a higher degree by proof of another crime. Both convictions will be allowed to stand where the legislative purpose for criminalizing the conduct or the harm associated with each crime is unique; that is, where the statutes in question address two separate evils or the crime involves "some injury to the person or property of the victim which is separate and distinct from and not merely incidental to the crime of which it forms an element." State v. Vermillion, 112 Wn. App. 844, 859-60, 51 P.3d 188 (2002), rev. denied, 148 Wn.2d 1022 (2003); Calle, at 780; Freeman, 153 Wn.2d at 778-79.

5. THE SUPREME COURT'S ANALYSIS OF THE MERGER DOCTRINE IN FREEMAN IS FLAWED.

In State v. Freeman, 153 Wn.2d 765, the Supreme Court held that the Legislature intended a person committing first-degree assault and first-degree robbery, convicted as Freeman was, be punished separately.⁹ In a consolidated case, State v. Zumwalt, the Court held that the Legislature intended a person committing second-degree assault and first-degree robbery, convicted as Zumwalt was, be punished for just first-degree robbery, the assault conviction being vacated.¹⁰ To the extent the Freeman case is applicable here, the State contends that the merger analysis conducted as part of the result in Zumwalt was done incorrectly.

In conducting its double jeopardy/merger analysis, the Court in Freeman correctly noted that neither the robbery nor the assault statutes expressly allow or disallow multiple punishments for a single act that violates both statutes. Freeman, at 775. The Court also appropriately accepted the parties' acknowledgment that the two crimes as charged and proved are not the same "in law." In

⁹ In the course of committing robbery, Freeman shot his victim.

¹⁰ In the course of committing robbery, Zumwalt punched his victim in the face causing substantial bodily harm.

other words, they failed the "same evidence" or "Blockburger" test.¹¹ Freeman, at 776-77.

What the Court did find was that first-degree robbery, based upon the infliction of bodily injury, and assault requiring intent to assault and infliction of bodily harm technically merge--that the first-degree robbery statute "requires" proof of an assault to elevate second-degree robbery to first-degree robbery.¹² Freeman, at 778. The State takes issue with this finding.

The Court correctly stated that the merger doctrine 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)." Freeman, at 777-78 (citing Vladovic, 99 Wn.2d at

¹¹ As convicted here, robbery requires proof of intent to commit theft by the use or threatened use of force. RCW 9A.56.190. Robbery does not require an intent to assault nor does it require an actual assault. Second-degree assault requires both intent to assault and an actual assault with a firearm. RCW 9A.36.011. With each crime having an element not contained in the other, the two offenses fail the same "in law" prong of the "same evidence" test.

¹² The Court still found first-degree assault and first-degree robbery did not merge because first-degree assault carries a greater punishment and therefore, the Court held, the Legislature must have intended that both crimes be punished separately. This will be discussed in further detail.

420-21). The Court then made the statement that in order to prove first-degree robbery the State had to prove an assault. Freeman, at 778. This statement is incorrect.

While as charged, first-degree robbery requires proof of bodily harm, the statute does not require that the State prove that a defendant had an intent to assault another or that substantial bodily harm occurred. In other words, there is no requirement that in proving first-degree robbery the State must prove not only that a defendant committed that crime (robbery) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (assault). For example, a defendant may grab at a victim's purse in an attempt to steal it; if in the process, the strap injures the victim's arm, the defendant is guilty of first-degree robbery but is not guilty of an assault because there is no intent to assault. Because the Legislature has not required that in order to prove first-degree robbery the State must also prove an assault, the merger doctrine simply does not apply. The simple fact that both crimes may have occurred is not the test for merger.

The Court in Freeman also erred in reasoning that the Legislature must have intended second-degree assault to merge with first-degree robbery because the punishment for second-

degree assault is less than the punishment for first-degree robbery (contrasting the fact that the punishment for first-degree assault is greater than the punishment for first-degree robbery). This reasoning ignores the fact that there are four degrees of assault with increasingly severe punishments, not just the two degrees of assault that were before the Court.

In enacting four degrees of assault with four commensurate levels of punishment, the Legislature clearly intended each level of assault to be punished at a different level of severity.¹³ In other words, a minor or fourth-degree assault should be punished less severely than a second-degree assault that can result in substantial bodily harm.¹⁴ The Supreme Court's analysis does not take all the degrees of assault into account. Under the Court's rationale, a defendant who commits a minor assault in conjunction with a robbery would be punished to the exact same extent as a person

¹³ Fourth degree assault is a gross misdemeanor. Third-degree assault is a Class C felony with an initial standard range of one to three months. Second-degree assault is a Class B felony with an initial standard range of three to nine months. First-degree assault is a Class A felony with an initial standard range of 93 to 123 months. RCW 9A.36.001; RCW 9A.36.021; RCW 9A.36.031; RCW 9A.36.041; RCW 9.94A.510; RCW 9.94A.515.

¹⁴ "Substantial bodily harm" means "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b).

committing a very severe assault in conjunction with a robbery. For example, a defendant involved in a purse snatching incident like that described above would be punished exactly the same as a purse snatcher who punches his victim in the face and shatters the victim's cheek. The statutory scheme of varying degrees of assault demonstrates that the Legislature wanted these persons to be treated differently, not the same as Freeman Court suggests. In short, if an assault merges with robbery at all, it would be fourth degree assault only.

6. FREEMAN DOESN'T APPLY. THIS COURT HAS RULED THAT THE LEGISLATURE INTENDED A PERSON CONVICTED OF ATTEMPTED FIRST-DEGREE ROBBERY AND SECOND-DEGREE ASSAULT BE PUNISHED FOR BOTH OFFENSES.

In State v. Esparza, 135 Wn. App. 54, this Court, distinguishing Freeman and held that a person convicted of attempted first-degree robbery and second-degree assault arising out of the same incident can permissibly be punished for having committed both offenses. The application of Freeman depends upon the prong of the assault statute under which a defendant is convicted.

In Zumwalt, the consolidated case with Freeman, wherein the Supreme Court found that under certain circumstances second-degree assault and first-degree robbery merge, the defendant, Zumwalt, was convicted of second-degree assault under the intentionally assaults and inflicts substantial bodily harm prong of the assault statute. RCW 9A.36.021(1)(b). His conviction for first-degree robbery was based upon him inflicting bodily injury. RCW 9A.56.200(1)(c). Specifically, Zumwalt assaulted his victim by punching her in the eye, causing a fracture, and then robbed her of \$300. Freeman, 153 Wn.2d at 770. Under the facts of the case, the Supreme Court found that "the State had to prove the defendants committed an assault in furtherance of the robbery." Freeman, at 778. Without the assault, Zumwalt would have been guilty only of second-degree robbery. Id. That is not the case here, nor was it the case in Esparza.

In Esparza, the defendant, Jamar Beaver,¹⁵ entered a jewelry store, pointed his gun at a number of customers, and told them that this was a robbery. Beaver then spotted the store

¹⁵ Miguel Esparza and Jamar Beaver committed the charged crimes together. The appeal involved only Jamar Beaver. It is unknown why the case caption includes Esparza. All the actions referred to here involve defendant Beaver.

manager and pointed his gun at him. The manager, who was armed, fired and hit Beaver. Beaver fled and was apprehended a short distance away. Beaver was convicted of attempted first-degree robbery under the "armed with a deadly weapon" and "displays what appears to be a firearm" prongs of the robbery statute. Esparza, 135 Wn. App. at 66; RCW 9A.56.200(1)(a)-(b). His second-degree assault conviction was based on the "assaults another with a deadly weapon" prong of the assault statute. Esparza, at 66; RCW 9A.36.021(1)(c).

In rejecting Beaver's merger argument, this Court stated that to prove attempted first-degree robbery as charged, the State needed only to prove that Beaver was armed with a firearm to elevate the robbery to first-degree robbery. Esparza, at 66. The State did not need to prove Beaver actually assaulted or intended to assault the victim, and thus the merger doctrine did not apply. Id.

[W]e find that double jeopardy was not violated because under the facts of this case it was not *required* for the State to prove facts sufficient to convict Beaver of second degree assault in order for it to prove Beaver committed the offense of first degree attempted robbery.

Esparza, at 64. Like here, where first-degree robbery is predicated on the defendant being armed or displaying a weapon, it is not necessary to actually prove an assault with the firearm or bodily harm. In other words, even if the State had never proven that the defendant here assaulted Carlos Ellison, he would still have been guilty of first-degree robbery because he was armed with a deadly weapon and displayed it. Thus, the application of the merger doctrine as discussed in Freeman does not apply.

7. THE JURY INSTRUCTIONS AND PROSECUTOR'S ELECTION DEMONSTRATE THAT THE DEFENDANT WAS CONVICTED OF ROBBING QUALAGINE HUDSON AND ASSAULTING CARLOS ELLISON.

The defendant's claimed double jeopardy argument is also predicated upon robbery's unit of prosecution, multiple acts case jurisprudence, the defendant's definition of robbery and the rule of lenity. Specifically, the defendant discusses the fact that the unit of prosecution for robbery is not based solely on the number of persons who have possession of the property, that a robbery is not complete until a robber has "sole" possession of the property, that the charging document here listed both Qualagine Hudson and Carlos Ellison as victims, that the jury instructions did not indicate

which person was the victim of the robbery, that the rule of lenity requires the court assume that the robbery conviction was based upon the jury finding Ellison was the victim of the robbery and therefore Freeman's merger doctrine analysis applies. It is only upon a finding that the jury's verdict was based on Ellison being the victim of both the robbery and assault convictions that the defendant can argue Freeman applies. These assertions made by the defendant are without merit.

When a defendant is convicted of violating one statute multiple times, the proper double jeopardy inquiry is what "unit of prosecution" has the legislature intended as the punishable act under the specific criminal statute. State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998); Bell v. United States, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955). When the legislature defines the scope of a criminal act, double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime, or "unit of prosecution." Adel, 136 Wn.2d at 634.

Robbery is both a property crime and a crime against the person. Tvedt, 153 Wn.2d 705, 711. The unit of prosecution for 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 short, if one piece of property is stolen from two persons having some custody of the property, only one count of robbery can stand. In contrast, if there is a taking from both persons of separate property from each, then two counts can stand. Id.; see also State v. Latham, 35 Wn. App. 862, 670 P.2d 689 (1983), rev. denied, 100 Wn.2d 1035 (1984) (car stolen from owner/driver and passenger supports only one count because robbery occurred after passenger got out and passenger had no interest in vehicle); State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984) (money taken from two bank tellers sufficient for two counts of robbery).

The State and the defendant are in agreement as to the unit of prosecution for robbery. But as applied here, the defendant asserts that both Qualagine Hudson and Carlos Ellison could legally have been victims of the robbery because both had an interest in the car greater than that of himself.¹⁶ The defendant

¹⁶ A person having a right to possession superior to that of the robber is deemed to be the owner as against that person. Latham, 35 Wn. App. at 866.

further asserts that the robbery was not complete until Ellison was out of the vehicle and he had driven away.¹⁷

In conjunction therewith, the defendant asserts that because the charging document here listed both Hudson and Ellison in the robbery count, and because the jury instructions did not specifically state that Hudson was the victim of the robbery, the rule of lenity requires that the court assume the jury based its verdict on Ellison being the victim of the robbery. It is in this manner, that the defendant can then attempt to argue that the assault charge in which Ellison was the victim is what elevated the robbery to first-degree robbery. But this argument fails.

In pertinent part, the Amended Information reads:

That the defendants. . .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 and in the presence of Qualagine Hudson and Carlos Ellison, against their will. . .

¹⁷ While it is true that a robbery is not complete until the robber has taken control of the property (see State v. Robinson, 73 Wn. App. 851, 857, 872 P.2d 43 (1994)), 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. To hold as such would mean that a person who robs the driver of a bus, RV or large vehicle, and drives away with the vehicle with passengers still inside the vehicle, has not yet committed a robbery unless and until each and every passenger has been removed from the vehicle.

CP 5. However, the jury was never read the factual portion of the Amended Information listing either Hudson or Ellison. 2RP 60. The court merely informed the jury of the charges, first-degree robbery and second-degree assault, the legal elements, but did not inform the jury of the surplus factual portion of the Amended Information.¹⁸ 2RP 60.

In regards to the "to convict" robbery instruction, the instruction was written in the singular, a single victim. In pertinent part it read:

To convict the defendant of the crime of Robbery in the First Degree, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

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

.

¹⁸ Unless included in the instructions, the State is not required to prove surplus facts included in the information. Tvedt, 153 Wn.2d at 719.

CP 11.¹⁹ As instructed, the jury was informed that the property was taken from one person, not multiple persons. The jury was never instructed by the court that Ellison was the victim of the robbery and that they could, or were required to so find.

Further, in closing argument, the prosecutor clearly informed the jury that Hudson was the victim of the robbery and Ellison was the victim of the assault. The prosecutor told the jury that:

. . .on April 27, 1999, Qualagine Hudson was carjacked. We know he was robbed at gunpoint, and we know that in the course of that robbery Carlos [Ellison] was assaulted with the same gun as the gunman told him to get the fuck out of the car.

4RP 67-68. The prosecutor added:

We know that Herbert Kier committed robbery in the first degree when he put that handgun into the chest of Qualagine and stole his 1990 Cadillac. . .We also know that he committed an assault in the second degree when he pointed that pistol at Carlos Ellison and told him to get out of the car.

4RP 74-75.

When the prosecution presents evidence of several acts that could form the basis of one count, either "the State must tell the jury which act to rely on in its deliberations or the court must instruct the

¹⁹ The assault "to convict" instruction specifically listed Ellison as the person who was assaulted. CP 13.

jury to agree on a specific criminal act." State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing State v. Petrich, 101 Wn.2d 566, 570, 683 P.2d 173 (1984)); see also State v. Bland, 71 Wn. App. 345, 860 P.2d 1046 (1993) (State "clearly elected" which act formed basis of each charge during closing argument). Here, the prosecutor clearly informed the jury that Hudson was the victim of the robbery and Ellison the victim of the assault. The jurors were never informed otherwise by the court and neither the prosecutor nor defense attorney argued otherwise. Further, a claim of double jeopardy is not simply based upon the instructions; rather, "the information, the instructions and argument" can make it clear the basis for each count. State v. Noltie, 116 Wn.2d 831, 847-49, 809 P.2d 190 (1991). Viewed here, it is clear Hudson was the victim of the robbery.

With the victim of the robbery charge clearly being Qualagine Hudson, the defendant's reliance upon the rule of lenity is misplaced. The rule of lenity is applied where a matter is ambiguous. State v. Cromwell, 157 Wn.2d 529, 140 P.3d 593 (2006). A matter is ambiguous if it is "arguably susceptible to more

than one reasonable interpretation." Id. The jury was informed of the factual basis for each charge and the rule of lenity does not apply. The argument that the jury did not find Hudson was robbed and instead found that Ellison was the victim of the robbery is not a "reasonable" interpretation.

Once this defense argument fails, his entire argument must be rejected. It is only by assuming that the jury found Ellison was the victim of the robbery and the victim of the assault that the defendant can argue Freeman applies. Without this assumption, the defendant cannot make a double jeopardy/merger argument because he cannot argue that proof of one crime elevated the other crime.

8. AN EXCEPTION TO MERGER.

Finally, even if this Court finds the crimes here technically merge, there is one applicable "well established exception that may allow two convictions even when they formally appear to be the same crime under other tests." Freeman, 153 Wn.2d at 778-79.

The offenses may in fact be separate when there is a separate injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element. Id. This exception is less focused on abstract legislative intent and more focused on the facts of the individual case. Id.

Here, the defendant pointed a gun at two separate individuals. Even if this Court were to find that merger applies, this Court should also find that the exception applies. As the Court in Tvedt stated in discussing situations wherein multiple persons are subjected to harm during a single robbery, "[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. Tvedt, 153 Wn.2d 705, 716 n. 4. The Legislature could not have intended that where there are multiple victims of a robbery, but only one count of robbery can be charged, that other appropriate charges cannot be filed to hold a defendant accountable for the harm to all the individual victims.

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction and sentence.

DATED this 13 day of September, 2007.

Respectfully submitted,

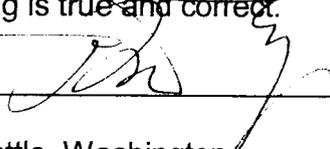
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Harlan Dorfman, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. KIER, Cause No. 59281-5-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

09-13-2007
Date

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COURT OF APPEALS
STATE OF WASHINGTON