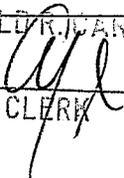


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SUPREME COURT
STATE OF WASHINGTON

NO. 81626-3

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**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

GUY TURNER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 05-1-00021-1

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. When defendant was found guilty of both second degree assault and first degree robbery, does the trial court violate defendant's double jeopardy rights when the court merges the second degree assault into the first degree robbery, vacates the second degree assault conviction for purposes of sentencing, and only reduces defendant's first degree robbery conviction to judgment?

B. STATEMENT OF THE CASE.

On January 3, 2005, the Pierce County Prosecutor's Office charged Guy Turner, hereinafter referred to as "defendant," with first degree assault (count I) and first degree robbery (count II). The information included a deadly weapon enhancement for each count. CP 1-3. The parties appeared for trial before the Honorable Brian Tollefson on May 24, 2005. RP1. On June 6, 2005, the jury returned verdicts of guilty on first degree robbery and second degree assault. CP 10, 12, RP 4 (06/06/05). By special verdict the jury found defendant had committed each offense while armed with a deadly weapon. CP 11, 13, RP 5 (06/06/05).

On July 29, 2005, the court sentenced defendant to 85 months on the robbery conviction, which included 24 months for the deadly weapon sentencing enhancement. CP 18-30, RP 8 (07/29/05). At sentencing, the

State conceded that defendant's conviction for second degree assault merged with defendant's first degree robbery conviction. RP 4 (07/29/05). The court ordered the second degree assault conviction be vacated for purposes of sentencing, but found the conviction a "valid conviction." CP 16-17. Only defendant's first degree robbery conviction was reduced to judgment. CP 18-30.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT VIOLATE DEFENDANT'S DOUBLE JEOPARDY RIGHTS WHEN IT PROPERLY MERGED DEFENDANT'S SECOND DEGREE ASSAULT CONVICTION INTO HIS FIRST DEGREE ROBBERY CONVICTION, VACATED DEFENDANT'S SECOND DEGREE ASSAULT CONVICTION FOR PURPOSES OF SENTENCING, AND REDUCED ONLY DEFENDANT'S FIRST DEGREE ROBBERY CONVICTION TO JUDGMENT.

The double jeopardy clause guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The double jeopardy clause applies to the states through the due process clause of the Fourteenth Amendment, and is coextensive with article I, § 9 of the Washington State Constitution. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)(citing *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)). Washington's double jeopardy clause offers the same scope of protection as the federal double jeopardy clause. *State v. Adel*, 136 Wn.2d 629, 632,

965 P.2d 1072 (1998)(citing *State v. Gocken*, 127 Wn.2d at 107). The double jeopardy clause encompasses three separate constitutional protections:

It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same crime.

Gocken, 127 Wn.2d at 100.

Merger is a 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 n2, 662 P.2d 853 (1983). “The [merger] doctrine arises only when a defendant has been found guilty of multiple charges, and the court then asks if the Legislature intended only one punishment for the multiple convictions.” *State v. Michielli*, 132 Wn.2d 229, 238-239, 937 P.2d 587 (1997). The question of merger arises only after the State has successfully obtained guilty verdicts on the charges that allegedly merge – if the jury acquits on one of the charges, the merger issue never arises. The court cannot use the merger doctrine to dismiss a charge prior to trial because the court cannot predict which charges on which the defendant will be convicted. *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997). With respect to cumulative sentences imposed in a single trial, the double jeopardy clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.

Missouri v. Hunter, 459 U. S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1982).

The standard of review on questions of law is *de novo*. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

There is no double jeopardy violation when a jury convicts a defendant of multiple charges for a single act if only one conviction is reduced to judgment. See *State v. Ward*, 125 Wn. App. 138, 104 P.3d 61 (2005), *State v. Trujillo*, 112 Wn. App. 390, 49 P.3d 935 (2002), and *State v. Faagata*, 147 Wn. App. 236, 238-39, 193 P.3d 1132 (2008).

In *State v. Ward*, Russell Ward was convicted of second degree felony murder and, in the alternative, first degree manslaughter. 125 Wn. App. 138, 141. At sentencing, Ward moved to vacate the first degree manslaughter conviction. *Id.* at 142. The trial court denied Ward's motion, but sentenced Ward only on second degree felony murder. *Id.* at 142. The judgment and sentence entered by the court did not mention the jury's finding that Ward was guilty of first degree manslaughter. *Id.* at 142.

On appeal, Ward successfully challenged his felony murder conviction because it was based upon the predicate felony of second degree assault. *Id.* at 141. Ward also argued that the trial court erred when it refused to vacate the first degree manslaughter conviction even though that conviction was not reduced to judgment. *Id.* at 144. Division One of the Court of Appeals rejected Ward's argument because he was not

convicted and sentenced on both crimes. *Id.* at 144. In affirming the trial court, the court held:

But Ward was not convicted and sentenced to both second degree felony murder and first degree manslaughter. Instead, the judge entered judgment and sentenced Ward only on the second degree felony murder charge; therefore there was no violation of double jeopardy. Because there was no violation of double jeopardy, the court was not required to vacate the manslaughter charge.

Id. at 144.

Like *Ward*, in *State v. Trujillo* a jury convicted four defendants of first degree assault and, in the alternative, first degree attempted murder. 112 Wn. App. 390. In rejecting Trujillo's double jeopardy claim, the court of appeals stated "where the jury returns a verdict of guilty on each alternative charge, the court should enter a judgment on the greater offense only and sentence the defendant on that charge without reference to the verdict on the lesser offense." *Id.* at 411. The court of appeals noted that if the lesser charge is not reduced to judgment, it "does not subject the appellants to any future jeopardy." *Id.* at 411. The court's reasoning was grounded not in the fact that Trujillo and his co-defendants were charged in the alternative, but in the fact that the lesser charge was not reduced to judgment. The court further noted that if the jury's verdicts on both charges were reduced to judgment, "the trial court should enter an order vacating the [lesser] judgment." *Id.* at 412 n. 15.

In *State v. Faagata*, 147 Wn. App. 236, 238-39, Faagata was convicted of first degree murder and second degree felony murder for the death of Jason Outler. At sentencing, the court entered judgment and sentenced Faagata for the first degree murder conviction. *Id.* at 241-42. The court then conditionally dismissed the second degree felony murder conviction with the understanding that should Faagata's first degree murder conviction be set aside, the second degree felony murder conviction could be reduced to judgment and Faagata sentenced on that conviction. *Id.* at 242. The trial court noted "[w]e have a jury that entered a conviction, and I don't think that should be a nullity." *Id.* at 242. The court held that, like *State v. Ward* and *State v. Trujillo*, there was no need to vacate Faagata's second degree murder conviction because there was no double jeopardy violation. *Id.* at 248.

The Supreme Court of Indiana reached a similar result. In *State v. Green*, 856 N.E.2d 703, 704 (Ind. 2006), Michael Green was convicted of attempted robbery, conspiracy to commit robbery, burglary, and conspiracy to commit burglary for his role in a burglary and attack on Mr. and Mrs. Polgeers. The sentencing judge merged the attempted robbery and the conspiracy to commit robbery "so that only one sentence can be imposed between the two counts." *Green*, at 704. The Indiana Court of Appeals remanded the case for the trial court to vacate the conspiracy to commit robbery conviction, however, the Indiana Supreme Court reversed the court of appeals noting that "a merged offense for which a defendant is

found guilty, but on which there is neither a judgment nor a sentence, is ‘unproblematic’ as far as double jeopardy is concerned.” *Green*, at 704, citing *State v. Carter*, 750 N.E.2d 778, 780 (Ind. 2001). The court held that there was no reason to vacate the conspiracy to commit robbery conviction because the attempted robbery and conspiracy to commit robbery merged into one offense; only the attempted robbery conviction was reduced to judgment, and Green was only sentenced on the attempted robbery conviction. *Green*, at 704.

In his petition for review, defendant asserts that the present case is in direct contradiction of this court’s recent decision in *State v. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007). However, the present case is distinguishable from *Womac* on its facts because in the present case, the court merged defendant’s second degree assault conviction into his robbery conviction and only defendant’s robbery conviction was reduced to judgment.

In *State v. Womac*, 160 Wn.2d 643, 647, 160 P.3d 40 (2007), Womac was convicted of homicide by abuse, felony murder, first degree assault of a child for the death of his son, Anthony Owens. The trial court entered judgments on each of the three convictions, but only sentenced Womac on the homicide by abuse count. In an appendix to the judgment and sentence, the court found the remaining two counts valid, but chose not to sentence Womac on them in an attempt to avoid violating double jeopardy principles. *Id.* at 648. On appeal, the Court of Appeals directed

the trial court to conditionally dismiss the remaining two counts so that if the homicide by abuse conviction is set aside on appeal, then the other two counts could be reinstated. *Id.* at 649. This court reversed the Court of Appeals and remanded to the trial court to vacate Womac's convictions for felony murder and first degree assault. *Id.* at 649.

This court found that Womac was "found to have committed a single offense against a single victim yet three separate convictions remain on his record." *Id.* at 650. In finding that Womac's three convictions violate double jeopardy, this court relied on upon cases in which a defendant's multiple convictions for the same crime were reduced to judgment. *See Id.* at 656-58, citing *State v. Calle*, 125 Wn.2d. 769, 776, 888 P.2d 155 (1995)(double jeopardy may be violated when a defendant's multiple convictions for a single offense are reduced to judgment regardless of whether concurrent sentences are imposed); *State v. Gohl*, 109 Wn. App. 817, 37 P.3d 293 (2001)(defendant's double jeopardy rights were violated when the court reduced defendant's convictions for attempted murder and first degree assault to judgment even though the court found same criminal conduct and imposed no sentence for the assaults).

Unlike *Womac* and the cases on which it relies, only one of defendant's two convictions were reduced to judgment. Like *Ward*, *Trujillo*, *Faagata*, and *State of Indiana v. Green*, there is no double jeopardy violation in the present case because the court properly merged

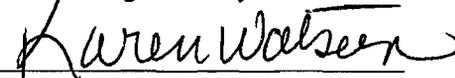
defendant's second degree assault conviction into his robbery conviction, vacated the second degree assault conviction for purposes of sentencing, and only reduced defendant's first degree robbery conviction to judgment.

D. CONCLUSION.

For the reasons stated above, this court should affirm the court of appeals.

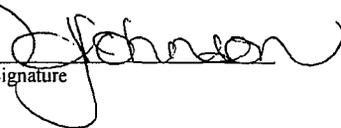
DATED: January 2, 2009.

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Attached is the State's Supplemental Brief of Respondent