

No. 95263-9

NO. 47868-4

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

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STATE OF WASHINGTON,  
Respondent,

v.

ANTHONY A. MORETTI,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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THE HONORABLE F. MARK MCCAULEY, JUDGE

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SUPPLEMENTAL BRIEF OF RESPONDENT REGARDING DOUBLE JEOPARDY

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ERIN C. JANY  
Deputy Prosecuting Attorney  
for Grays Harbor County

  
WSBA #43071

OFFICE AND POST OFFICE ADDRESS

County Courthouse  
102 W. Broadway, Rm. 102  
Montesano, Washington 98563  
Telephone: (360) 249-3951

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A. APPELLANT'S SUPPLEMENTAL ASSIGNMENT OF ERROR

The Appellant argues that the Fifth Amendment and Article 1, § 9 prohibitions against double jeopardy were violated when appellant was convicted of both first degree robbery and second degree assault of the same victim, Mr. Knapp, for the same acts and the assault elevated the robbery to first degree.

B. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENT

Did the commission of the “included” crime, i.e. assault in the second degree, have an independent purpose or effect from the other crime, i.e. robbery in the first degree, which would allow for a well-established exception that may operate to permit two convictions to stand even when they formally appear to be the same crime under other tests?

C. ARGUMENT

THERE ARE FACTS THAT SUPPORT THAT THE ASSAULT AGAINST MR. KNAPP HAD AN INDEPENDENT PURPOSE OR EFFECT FROM THE ROBBERY OF MR. KNAPP AND AS SUCH DOUBLE JEOPARDY DOES NOT APPLY.

The federal and state double jeopardy clauses provide identical protections. *State v. Gocken*, 127 Wash.2d 95, 107, 896 P.2d 1267 (1995). Both protect against multiple punishments for the same offense. *State v. Calle*, 125 Wash.2d 769, 776, 888 P.2d 155 (1995). Although the protection itself is constitutional, the Legislature has the power to decide what conduct is criminal and to determine the appropriate punishment. *Id.* at 777-78. The judicial

inquiry thus is limited to determining whether the Legislature intended to authorize multiple punishments. *Id.* Several tests have emerged to determine the legislative intent.

*State v. Freeman* best addresses the tests related to legislative intent and the arguments at issue in this case. *See State v. Freeman*, 153 Wash.2d 765, 108 P.3d 753 (2005). The State may bring (and a jury may consider) multiple charges arising from the same criminal conduct in a single proceeding. *Id.* at 770 (citing *State v. Michielli*, 132 Wash.2d 229, 238–39, 937 P.2d 587 (1997)). Courts may not, however, enter multiple convictions for the same offense without offending double jeopardy. *Id.* at 771 (citing *State v. Vladovic*, 99 Wash.2d 413, 422, 662 P.2d 853 (1983) (citing *Albernaz v. United States*, 450 U.S. 333, 344, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981))). “Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense.” *Id.* (citing *In re Pers. Restraint of Orange*, 152 Wash.2d 795, 815, 100 P.3d 291 (2004)).

In the case at hand, as in *Freeman*, the dispositive question is whether, and if so, when the legislature intended to punish

separately both a robbery elevated to first degree by an assault, and the assault itself. *Freeman*, 153 Wash.2d at 771 (citing *Garrett v. United States*, 471 U.S. 773, 779, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985) (legislature has the power to criminalize every step leading to a greater crime, and the crime itself) (citing *Albrecht v. United States*, 273 U.S. 1, 11, 47 S.Ct. 250, 71 L.Ed. 505 (1927)); *Whalen v. United States*, 445 U.S. 684, 688–89, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980)). According to *Freeman*, if the legislature authorized cumulative punishments for both crimes, then double jeopardy is not offended. *Id.*

The first consideration, therefore, is any express or implicit legislative intent. *Freeman*, 153 Wash.2d at 771 -72. Sometimes the legislative intent is clear, such as when it explicitly provides that burglary shall be punished separately from any related crime. RCW 9A.52.050. *Id.* at 772. Sometimes, there is sufficient evidence of legislative intent that the court is confident concluding that the legislature intended to punish two offenses arising out of the same bad act separately without more analysis. *Id.* (citing *Calle*, 125 Wash.2d at 777–78, 888 P.2d 155 (rape and incest are separate offenses)). Thereafter, if the legislative intent is not clear, the court

may then turn to the *Blockburger* test, which is used by Federal courts. *Id.* (citing *Calle*, 125 Wash.2d at 777–78, 888 P.2d 155; *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932)).

Under the *Blockburger* test, if each crime contains an element that the other does not, the court presumes that the crimes are not the same offense for double jeopardy purposes. *Freeman*, 153 Wash.2d at 772 (citing *Calle*, 125 Wash.2d at 777; *Blockburger*, 284 U.S. at 304 (establishing “same evidence” or “same elements” test); *State v. Reiff*, 14 Wash. 664, 667, 45 P. 318 (1896) (double jeopardy violated when “ ‘the evidence required to support a conviction [of one crime] would have been sufficient to warrant a conviction upon the other’ ”) (quoting *Morey v. Commonwealth*, 108 Mass. 433, 434 (1871)). When applying the *Blockburger* test, the court does not consider the elements of the crime on an abstract level. “ ‘[W]here *the same act or transaction* constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offense or only one, is whether each provision *requires proof of a fact* which the other does not.’ ” *Id.* (citing *Orange*, 152 Wash.2d at 817 (quoting *Blockburger*, 284

U.S. at 304, 52 S.Ct. 180 (citing *Gavieres v. United States*, 220 U.S. 338, 342, 31 S.Ct. 421, 55 L.Ed. 489 (1911))). However, the *Blockburger* presumption may be rebutted by other evidence of legislative intent. *Id.* (citing *Calle*, 125 Wash.2d at 778).

The merger doctrine is a third consideration to aid the court in determining legislative intent, even when two crimes have formally different elements. *Freeman*, 153 Wash.2d at 772. Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime. *Id.* (citing *Vladovic*, 99 Wash.2d at 419. Finally, even if on an abstract level, two convictions appear to be for the same offense or for charges that would merge, if there is an independent purpose or effect to each, they may be punished as separate offenses. *Id.* (citing *State v. Frohs*, 83 Wash.App. 803, 807, 924 P.2d 384 (1996) (citing *State v. Johnson*, 92 Wash.2d 671, 680, 600 P.2d 1249 (1979))).

As pointed out by the appellant, courts have generally held since 1975 that convictions for assault and robbery stemming from a single violent act are the same for double jeopardy purposes and

that the conviction for assault must be vacated at sentencing. *Freeman*, 153 Wash.2d at 773 (citing *State v. Prater*, 30 Wash.App. 512, 516, 635 P.2d 1104 (1981); *State v. Springfield*, 28 Wash.App. 446, 453, 624 P.2d 208 (1981) (“Springfield's one punch ... can support a conviction for either the robbery or the assault, but not both.”), *substantially overruled by Calle*, 125 Wash.2d at 777, 888 P.2d 155; *State v. Bresolin*, 13 Wash.App. 386, 394, 534 P.2d 1394 (1975) (merging assault and robbery); *see generally* 12 Royce A. Ferguson, Jr., Washington Practice: Criminal Practice and Procedure § 2107, at 455–465 (3d ed.2004); 13 Royce A. Ferguson, Jr., *supra* § 4706, at 340–44). However, the court held in *Freeman* that no per se rule has emerged; instead, courts have continued to give a hard look at each case individually and have not held as a matter of law that the two crimes of assault and robbery are the same. *Id.* at 774 (citing generally *Vladovic*, 99 Wash.2d 413, 662 P.2d 853). Furthermore, although there is evidence that the legislature did intent to punish first degree assault and robbery separately, there is no legislative intent to punish second degree assault separately from first degree robbery when the assault facilitates the robbery. *Id.* at 776.

Therefore, without a finding of legislative intent, the next step is to apply the *Blockburger* “same evidence” test. *Freeman*, 153 Wash.2d at 776. Under *Blockburger*, if the crimes, as charged and proved, are the same in law and in fact, they may not be punished separately absent clear legislative intent to the contrary. *Id.* (citing *Blockburger*, 284 U.S. at 304, 52 S.Ct. 180). However, the mere fact that the same *conduct* is used to prove each crime is not dispositive. *Id.* (referencing *United States v. Dixon*, 509 U.S. 688, 704, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993) (explicitly rejecting “same conduct” test.)). Here, the crimes are not the same at law or fact, therefore *Blockburger* does not apply and the next step is to analyze the issue under the merger doctrine. Under the merger rule, assault committed in furtherance of a robbery merges with robbery and without contrary legislative intent or application of an exception, these crimes would merge. *Id.* at 778 (citing *see generally* 13 Royce A. Ferguson, Jr., *supra* § 4706, at 340–44). The next step then is to look at the application of an exception.

According to *Freeman*, a well-established exception exists, which allows two convictions to stand even when they formally appear to be the same crime under other tests. *Freeman*, 153

Wash.2d at 778. These offenses may in fact be separate when there is a separate injury to the “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.* at 779 (citing *Frohs*, 83 Wash.App. at 807 (citing *Johnson*, 92 Wash.2d at 680). This exception is less focused on abstract legislative intent and more focused on the facts of the individual case. The test is whether the unnecessary force had a purpose or effect independent of the crime, which has been addressed in several cases.

For example, in *Prater*, when the defendant shot one victim after demanding money, the court found that the action was not done for the purpose of obtaining money during the robbery because, by disabling the victim, the defendant effectively hindered rather than aided the commission of the crime. *State v. Prater*, 30 Wash.App. 512, 516, 635 P.2d 1104 (1981). Further, the court found that when the defendant struck one victim *after* completing a robbery, there was a separate injury and intent, justifying a separate assault conviction because the assault did not forward the robbery. *Id.* Similarly, in *Mahoney*, at the time of the

assault, which took place in the garage, there was no attempt at robbery and, at the time the money was taken, when the victim of the assault was then in the house, there was no injury inflicted and no weapon was present. *State v. Mahoney*, 40 Wash.App. 514, 517, 699 P.2d 254 (1985). The court found it significant that the infliction of injury had ceased before the robbery attempt was made and that, as a result, the acts constituting the assault were separate and distinct from the acts alleged in the first degree robbery count. *Id.* Therefore, the court found that there was no merger and no risk of double jeopardy. *Id.*

In the case at hand, the appellant attacked both Mr. Knapp and Mr. Ball, striking Mr. Ball first by hitting his arms with a bat. RP 118, 119, 121. Mr. Ball was then chased off by Sam Hill, who was armed with a baton. RP 120, 122. The appellant, along with Sam Hill, thereafter focused their attack on Mr. Knapp, striking him repeatedly and causing significant injuries to his forehead, the back of his head, and his ear, which was split open, as well as injuries to his arms from trying to block the attack. RP 164, 168, 171. During the attack, the appellant and Sam Hill were telling Mr. Knapp to give them the money and they took his money from

him. RP 123, 125, 167. Mr. Knapp testified at trial that after Mr. Ball ran off, “they both jumped me and then took my money and kept beating me.” RP 163.

As in the cases cited above, it is significant that the appellant kept beating Mr. Knapp after he and Sam Hill attacked and physically assaulted Mr. Knapp and robbed him of his money. By continuing to beat the victim after the money was taken, it is clear that physically assaulting Mr. Knapp in order to take his money was not the only motivation the appellant had for using violence against Mr. Knapp. The appellant’s assault of Mr. Knapp had an independent purpose and/or effect from the appellant’s robbery of Mr. Knapp and as such, the exception applies to this case. Even though the convictions formally appear to be the same crime under other tests, the two convictions do not merge and do not violate double jeopardy.

### **CONCLUSION**

For the aforementioned reasons, the State humbly requests that this Court affirm all of the convictions in this case.

DATED this 29<sup>th</sup> day of June, 2017.

Respectfully Submitted,

BY:   
ERIN C. JANY  
Deputy Prosecuting Attorney  
WSBA # 43071

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