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NO. 67924-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID CHESNOKOV,

Appellant.

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

The Honorable David R. Needy, Judge

REPLY BRIEF OF APPELLANT

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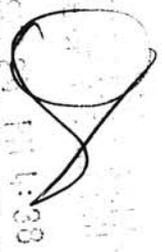


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A. ARGUMENT IN REPLY

THE SECOND DEGREE ASSAULTS MERGE WITH THE FIRST DEGREE ROBBERY BECAUSE THE THREATENED USE OF FORCE WAS NECESSARY TO COMPLETE THE ROBBERY.

“The merger doctrine is triggered when second degree assault with a deadly weapon elevates robbery to the first degree because being armed with or displaying a firearm or deadly weapon to take property through force or fear is essential to the elevation.” State v. Kier, 164 Wn.2d 798, 806, 194 P.3d 212 (2008). Where the State uses second degree assault to elevate the robbery charge to the first degree, the offenses generally merge and are the same for double jeopardy purposes unless they have an independent purpose or effect. In re Francis, 170 Wn.2d 517, 525, 532, 242 P.3d 866 (2010); Kier, 164 Wn.2d at 806; State v. Freeman, 153 Wn.2d 765, 780, 108 P.3d 753 (2005). Such is the case here. Chesnokov’s use of a BB gun was the means of assaulting (creating an apprehension of fear) Venneti and Dickey in order to further the robbery (take property against their will). Brief of Appellant (BOA) at 11-15.

The State does not dispute that Chesnokov’s conduct had a single purpose or effect. Instead, without citing authority, the State suggests the offenses do not merge because the robbery was charged as displaying an

apparent firearm whereas the assaults were charged as use of a deadly weapon. Brief of Respondent (BOR) at 12-14.

This argument fails for two reasons. First, as discussed in the opening brief, Chesnokov does not rely on Blockburger's¹ "same evidence" test as a basis for finding a double jeopardy violation. BOA at 13-14; See State v. S.S.Y., 150 Wn. App. 325, 329 n.1, 207 P.3d 1273 (2009) (declining to consider whether two crimes are the "same offense" under Blockburger where appellant did not raise that issue), aff'd, 170 Wash.2d 322, 241 P.3d 781 (2010). Moreover, whether elements are identical "in law" for purposes of the "same evidence test" is not dispositive when considering merger. BOA at 14; Freeman, 153 Wn.2d at 777; see S.S.Y., 150 Wn. App. at 329 n.1 (recognizing "the merger-by-elevation doctrine is a wholly different double jeopardy consideration than that discussed in Blockburger").

Second, both charges required the State to prove that Chesnokov's conduct created a reasonable apprehension or fear of harm. BOA at 10-11; Kier, 164 Wn.2d at 806. As proven, the means of creating that apprehension or fear was use of the same BB gun. Thus, the facts that

¹ Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

elevated the robbery to the first degree also established the separate assault charges.

Nonetheless, in an effort to defeat the merger analysis, the State speculates on what the jury *could* have found, rather than what it *did* find based on the charges and evidence at trial. The State suggests “the jury could have found that the State did not prove that the defendant was in actual possession of the BB gun recovered, or that the BB gun was not, in fact, a deadly weapon, but nonetheless convicted on the first degree robbery.” BOR at 13.

This argument is without merit. The State charged Chesnokov as both a principal and an accomplice to the robbery and assaults. CP 58, 64, 71-73. Thus, whether he or Mark Shtefanio had “actual possession” of the BB gun during the robbery is not dispositive. Moreover, had the jury concluded the BB gun was not a deadly weapon, it would necessarily have found Chesnokov not guilty of all assault charges since an essential element of that crime would not have been proven beyond a reasonable doubt. CP 71-73.

Therefore, whether the BB gun was a “deadly weapon” or not, it was still the means by which an apprehension of fear was created to facilitate the robbery. As in Kier, the fact remains that the assaults against Venneti and Dickey were necessary to elevate the robbery because use of

the BB gun was essential to taking the property through apprehension or fear.

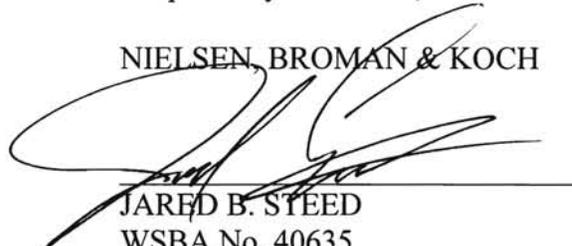
B. CONCLUSION

For the reasons discussed above and in the opening brief, this Court should vacate two of Chesnokov's assault convictions and remand the case for resentencing.

DATED this 24th day of September, 2012.

Respectfully submitted,

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v.)	COA NO. 67924-4-1
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)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 24TH DAY OF SEPTEMBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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2012 SEP 24 PM 4:33
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COURT OF APPEALS

SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF SEPTEMBER 2012.

x Patrick Mayovsky