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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CYNTHIA MARIE GUZMAN, Appellant.	No. 50374-3-II UNPUBLISHED OPINION

LEE, J. — Cynthia M. Guzman appeals her convictions and sentence for six counts of first degree kidnapping, four counts of first degree robbery, four counts of second degree assault, first degree burglary, second degree unlawful possession of a firearm, intimidating a witness, and tampering with a witness, all resulting from her involvement in a residential burglary and robbery. She argues that: (1) insufficient evidence supported the firearm enhancements for two of her assault, kidnapping, and burglary convictions, (2) insufficient evidence supported one of her robbery convictions, (3) her four second degree assault convictions should have merged into her four first degree robbery convictions, (4) she was provided ineffective assistance of counsel at sentencing, and (5) the State failed to prove her prior criminal convictions by a preponderance of the evidence at sentencing.

We hold that sufficient evidence supported Guzman's firearm enhancements and robbery convictions. However, we agree that Guzman's four second degree assault convictions merge into

her four first degree robbery convictions. Accordingly, we affirm Guzman's convictions for six counts of first degree kidnapping, four counts of first degree robbery, first degree burglary, second degree unlawful possession of a firearm, intimidating a witness, tampering with a witness, and firearm enhancements for the kidnapping and burglary convictions, but we reverse Guzman's four second degree assault convictions and remand for resentencing.

FACTS

A. THE ROBBERIES

On July 9, 2016, Cynthia Guzman, Noah Robertson, and Abraham Galindo robbed several people inside of a residence. When the group first arrived, April Alvarez and her husband were standing in front of the residence. Robertson approached Alvarez, pointed what appeared to be a gun in her face, and demanded her cellphone. Guzman grabbed Alvarez's cellphone and ordered her to get down on the ground. Galindo then held Alvarez and her husband at knifepoint in front of the house as Guzman and Robertson went inside.

Guzman and Robertson entered a back bedroom in the house, where they encountered David Garcia. Robertson pointed what appeared to be a gun at Garcia, ordered him to the ground, and told Garcia to empty his pockets. Robertson then tased Garcia, and took his wallet and cellphone.

Next, Robertson and Guzman entered a bedroom where Daniel Smith and Jessica Brackens were staying. Smith heard the strangers coming and grabbed his sawed-off shotgun. The gun was operational. Smith tried to defend himself by shoving his shotgun into Robertson's chin and throat. However, Robertson "absorbed [the shotgun] pretty easily," and Smith ended up letting go of his

shotgun. 4 Verbatim Report of Proceedings (VRP) (Feb. 22, 2017) at 514. Smith then crawled outside of the house through his bedroom window.

Robertson and Guzman demanded drugs and money from Brackens. Robertson hit Brackens with an unidentified object and ordered her to take her clothes off. Meanwhile, Guzman pointed what appeared to be a real gun in Brackens's face. Out of fear, Brackens surrendered some heroin she had kept in her bra.

Galindo was still holding Alvarez and her husband at knifepoint in front of the house when he saw Smith crawl through the window. Galindo chased Smith and stabbed him several times with the knife. The knife fight left Alvarez and her husband unattended, and the couple took the opportunity to escape. As they left, Guzman came outside of the house and pointed a shotgun at them.

Guzman then went to the side of the house where Galindo and Smith were fighting. Guzman pointed what appeared to be a gun at Smith and ordered him back inside the house. Galindo dragged Smith back inside of the house and sat Smith on the kitchen floor. As Smith sat on the kitchen floor, Robertson handed Galindo a gun that Smith later testified "could have been [his]." 4 VRP (Feb. 22, 2017) at 481.

Eventually, Guzman, Robertson, and Galindo left the residence. They were apprehended approximately a mile from the residence. Law enforcement searched the trunk of their car and discovered a Taser, two pistols, a rifle, and a shotgun. Upon further inspection, law enforcement discovered that the pistols and rifle were not firearms, but were instead airsoft or pellet guns. The only real gun inside of the trunk was the shotgun that belonged to Smith.

B. CHARGES

The State initially charged Guzman with first degree robbery and second degree unlawful possession of a firearm based on her involvement in the robberies. The State amended the charges and added six counts of first degree kidnapping, three counts of first degree robbery, four counts of second degree assault, first degree burglary, intimidating a witness, and tampering with a witness. Four of the first degree robbery first degree kidnapping, and second degree assault counts involved Brackens, Smith, Alvarez, and Garcia. The State also alleged that Guzman or an accomplice was armed with a deadly weapon and with a firearm on the burglary count, and the kidnapping and second degree assault counts involving Brackens and Smith.

C. TRIAL

1. Testimony

At trial, Brackens, Smith, Alvarez, and Garcia testified to the facts discussed above. Robertson also testified and described Guzman's involvement in the robberies. Robertson testified that he saw Guzman with Smith's shotgun "[d]uring the whole ruckus" in Smith's room. 5 VRP (Feb. 23, 2017) at 696. He also saw Guzman with the shotgun while Smith and Brackens were in the bedroom, and he remembered Guzman had the shotgun close to the time that Galindo brought Smith back into the house.

Smith testified that he saw Robertson hand Galindo a gun while they were in the kitchen. When asked to describe the gun, Smith testified "[n]ow that I'm thinking about it, it could have been mine." 4 VRP (Feb. 22, 2017) at 481.

2. Jury Instructions

The jury was instructed that "[a] person commits the crime of robbery in the first degree when in the commission of a robbery or in immediate flight therefrom he or she is armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon." Clerk's Papers (CP) at 481. And the jury was instructed that in order to prove robbery in the first degree, the State must prove seven elements beyond a reasonable doubt:

> (1) That on or about July 9, 2016, the defendant or an accomplice unlawfully took personal property from the person or in the presence of another; to wit April Kathleen Alvarez [Brackens/Smith/Garcia];[1]
>
> (2) That the person from whom or in whose presence the property was taken had an ownership, representative, or possessory interest in the property taken;
>
> (3) That the defendant or an accomplice intended to commit theft of the property;
>
> (4) That the taking was against the person's will by the defendant or an accomplices' use or threatened use of immediate force, violence, or fear of injury to that person;
>
> (5) That force or fear was used by the defendant or an accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
>
> (6) (a) That in the commission of these acts or in immediate flight therefrom the defendant or an accomplice was armed with a deadly weapon or
> (b) That in the commission of these acts or in the immediate flight therefrom the defendant or an accomplice displayed what appeared to be a firearm or other deadly weapon; and
>
> (7) That any of these acts occurred in the State of Washington.

CP at 482.

[1] The jury instructions for first degree robbery were identical for each victim.

The jury instructions defined assault in part as "an act 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." CP at 469. The jury was also instructed that "[a] person commits the crime of assault in the second degree when he or she assaults another with a deadly weapon or assaults another with intent to commit a felony." CP at 494. The jury was further instructed that in order to convict Guzman of second degree assault, it needed to find beyond a reasonable doubt that Guzman or an accomplice assaulted another with either a deadly weapon, or with the intent to commit first degree robbery.

The jury was also instructed on accomplice liability. The instructions defined accomplice liability as:

> A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

CP at 459.

The jury found Guzman guilty as charged. The jury also returned special verdicts finding that Guzman or an accomplice had been armed with a firearm during the burglary, and the assaults, kidnappings, and robberies of Smith and Brackens.

Guzman appeals.

ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

Guzman challenges the sufficiency of the evidence to support the firearm enhancements to the first degree kidnapping, first degree robbery, and second degree assault convictions involving Brackens and Smith. She also challenges the sufficiency of the evidence to support her robbery conviction involving Brackens. We hold that sufficient evidence supported the firearm enhancements involving Brackens and Smith, and the robbery conviction involving Brackens.

1. Legal Principles

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). An insufficiency claim admits the truth of the State's evidence and all reasonable inferences that can be drawn from that evidence. *Id.* All such inferences "must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* Direct and circumstantial evidence are equally reliable. *State v. Farnsworth*, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016). And we defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of evidence. *State v. Ague-Masters*, 138 Wn. App. 86, 102, 156 P.3d 265 (2007).

2. Firearm Enhancements

Guzman argues that the State failed to present sufficient evidence for the jury to find that Guzman was armed with a firearm at the time she kidnapped, assaulted, and robbed both Brackens and Smith. We disagree.

A firearm enhancement increases the sentence for an underlying felony "if the offender or an accomplice was armed with a firearm" during the course of the crime. RCW 9.94A.533(3). " 'A defendant is armed when he or she is within proximity of an easily and readily available deadly weapon for offensive or defensive purposes and when a nexus is established between the defendant, the weapon, and the crime.' " *State v. O'Neal*, 159 Wn.2d 500, 503-04, 150 P.3d 1121 (2007) (internal quotation marks omitted) (quoting *State v. Schelin*, 147 Wn.2d 562, 575-76, 55 P.3d 632 (2002) (plurality opinion). A nexus exists if the defendant and the weapon were " 'in close proximity' at the relevant time." *State v. Houston-Sconiers*, 188 Wn.2d 1, 17, 391 P.3d 409 (2017) (quoting *State v. Gurske*, 155 Wn.2d 134, 141-42, 118 P.3d 333 (2005)). Sufficient evidence of a nexus is present "[s]o long as the facts and circumstances support an inference of a connection between the weapon, the crime, and the defendant." *State v. Easterlin*, 159 Wn.2d 203, 210, 149 P.3d 366 (2006)).

The State presented sufficient evidence of such a nexus here. Smith testified that he had an operable shotgun in his bedroom, and that he shoved the shotgun into Robertson's throat in order to defend himself. When this did not deter Robertson from entering his bedroom, Smith dropped the shotgun and climbed out of the house through his bedroom window. Robertson testified that he saw Guzman with a shotgun "[d]uring the whole ruckus" in Smith's room. 5 VRP (Feb. 23, 2017) at 696. Viewing this testimony in a light most favorable to the State, Robertson

saw Guzman with the shotgun while Smith and Brackens were still in the bedroom. And Robertson testified that Guzman had the shotgun close to the time when Galindo brought Smith back into the house.

Smith testified that after Guzman ordered Smith back inside of the house, Robertson handed Galindo a gun as Smith sat on the kitchen floor. When asked to describe this gun, Smith testified "[n]ow that I'm thinking about it, it could have been mine." 4 VRP (Feb. 22, 2017) at 481. Finally, Alvarez testified that as she and her husband drove away from the front of the house, Guzman stood on the front porch and pointed a shotgun at them. This circumstantial evidence supported an inference that Smith's operable shotgun was within proximity of Guzman or an accomplice and readily available for offensive or defensive purposes during the robbery of Brackens and Smith. And the combined testimony of Robertson, Smith, and Alvarez supported an inference of a connection between Guzman or an accomplice, the operable shotgun, and the robbery, assault, and kidnapping of both Brackens and Smith. Viewing this evidence in the light most favorable to the State, a rational trier of fact could have found beyond a reasonable doubt that Guzman or an accomplice was armed with a firearm during the robbery, assault, and kidnapping of Brackens and Smith.

3. Robbery of Brackens

Guzman argues that her conviction for first degree robbery involving Brackens rests on insufficient evidence because the State failed to present any evidence that Guzman took personal property from Brackens. We disagree.

"A person commits robbery when he or she unlawfully takes personal property from the person of another . . . against his or her will by the use or threatened use of immediate force,

violence, or fear of injury to that person or his or her property." RCW 9A.56.190. A robbery may occur even when the victim lacks a legally cognizable claim to the item in his or her possession, such as when the item is illegal to possess. *State v. Nelson*, 191 Wn.2d 61, 77, 419 P.3d 410 (2018).

Here, Brackens testified that Guzman and a man broke into the bedroom she was in and demanded drugs and money from her. Guzman pointed a gun at Brackens's face and the man told Brackens to take all of her clothes off. Out of fear, Brackens surrendered some heroin that she had kept in her bra. Viewing this evidence in the light most favorable to the State, the jury could have found beyond a reasonable doubt that Guzman took personal property from Brackens against her will by use or threatened use of immediate force, violence or fear of injury. Thus, Guzman's challenge to the sufficiency of the evidence fails.

B. DOUBLE JEOPARDY AND MERGER

Guzman argues that her four second degree assault convictions involving Brackens, Smith, Alvarez, and Garcia and her four first degree robbery convictions involving those same victims violated double jeopardy. She argues that the trial court violated the prohibition against double jeopardy because the court should have merged the second degree assault convictions involving each victim into the first degree robbery convictions involving that same victim. We agree.

The State may bring multiple charges resulting from the same criminal conduct in a single proceeding. *State v. Kier*, 164 Wn.2d 798, 803, 194 P.3d 212 (2008). However, courts may not impose multiple punishments for the same offense without offending double jeopardy. *Id.* "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." *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). We review de novo whether multiple convictions arising out of the same offense violate double jeopardy. *Id.* at 770.

In *State v. Freeman*, the defendant was convicted of first degree robbery and second degree assault arising from an incident in which he punched a woman's face and then took her money. 153 Wn.2d 765, 771, 108 P.3d 753 (2005). After analyzing the applicable robbery and assault statutes, the *Freeman* court concluded that the second degree assault conviction merged with the first degree robbery conviction and, therefore, the multiple convictions violated double jeopardy. *Id.* at 773-78.

The *Freeman* court applied a three-part test to determine whether the multiple convictions offended double jeopardy: (1) whether the legislature intended to punish the crimes separately, (2) if the legislative intent is unclear, the "same evidence" *Blockburger*[2] test, and (3) if applicable, the merger doctrine. *Id.* at 771-73. The merger doctrine may aid in determining legislative intent when the degree of one offense is elevated by conduct establishing a separate offense. *Id.* at 772-73; *Kier*, 164 Wn.2d at 804. "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." *Freeman*, 153 Wn.2d at 772-73.

However, the *Freeman* court held that even if on an abstract level two convictions appear to be the same offense, they may be punished as separate offenses if there is an independent

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

purpose or effect to each. *Id.* at 773. The independent purpose or effect inquiry is "[a]n exception to the merger doctrine" that applies "if the offenses committed in a particular case have independent purposes or effects." *State v. Vladovic*, 99 Wn.2d 413, 421, 662 P.2d 853 (1983). Under this exception, such offense may be punished separately, "even when they formally appear to be the same crime under other tests." *Freeman*, 153 Wn.2d at 778. The independent purpose exception "is less focused on abstract legislative intent and more focused on the facts of the individual case." *Id.* at 779.

After finding no evidence that the legislature intended to punish second degree assault separately from first degree robbery, and determining that the *Blockburger* test was not dispositive, the *Freeman* court applied the merger doctrine. *Id.* at 773-78. The *Freeman* court held that the defendant's first degree robbery and second degree assault convictions merged because "the State had to prove the defendant[] committed an assault in furtherance of the robbery." *Id.* at 778. And because "[t]here [was] no evidence in the record to support a conclusion that the violence used by Freeman to complete the robbery was 'gratuitous' or done to impress Freeman's friends, or had some other and independent purpose or effect," the independent purpose exception did not apply. *Id.* at 779.

Following *Freeman*, the Supreme Court later held that the merger doctrine applied to a first degree robbery and second degree assault conviction arising from a carjacking incident. *Kier*, 164 Wn.2d at 801-02. In *Kier*, the defendant pointed a gun at the driver and passenger of a vehicle, ordered them out of the car, and then drove their car away. *Id.* at 802-03. The *Kier* court determined that the first degree robbery and second degree assault convictions merged by setting their definitions "side by side." *Id.* at 806. Both definitions required the State to prove that the

defendant's conduct created a reasonable apprehension or fear of harm. *Id.* And because the State also charged the defendant with being armed with or displaying a deadly weapon, the *Kier* court concluded that "this was the means of creating that apprehension or fear." *Id.* The court held that, "[t]he 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 that elevation." *Id.*

Kier is analogous here. As in *Kier*, when the definitions of first degree robbery and second degree assault "are set side by side," both charges required the State to prove that Guzman's conduct created a reasonable apprehension of fear of injury. *Id.* The general definition of robbery includes "the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone." RCW 9A.56.190. The jury convicted Guzman under RCW 9A.56.200(1)(a)(i)-(ii), which provides that a person commits first degree robbery if she is armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon. Therefore, in order to elevate Guzman's robbery conviction to first degree, the jury needed to find that she was armed with or displayed a firearm or deadly weapon to take the property of another through force or fear. *See Kier*, 164 Wn.2d at 806. This finding was also required in order to convict Guzman of second degree assault.

As in *Kier*, the jury was instructed on the common law definition of assault, which involves putting someone in apprehension and imminent fear of bodily injury, regardless of whether the actor intended to inflict bodily injury. Guzman was convicted of assault under RCW 9A.36.021(1)(c), (e), which provides that a person commits second degree assault if she assaults

another with a deadly weapon, or with intent to commit a felony.[3] Thus the degree of robbery was elevated by conduct establishing the separate offense of second degree assault. *See Kier*, 164 Wn.2d at 806.

The State argues that *Freeman* is distinguishable because the independent purpose or effect exception to merger applies here. But the State fails to identify any facts showing that Guzman assaulted the victims with a purpose other than to facilitate the robbery of each victim. Instead, the State relies on the jury's special verdict finding that the robberies were done while armed with a deadly weapon. However, the jury's finding that Guzman robbed the victims while armed with a deadly weapon does not show that the assaults had a purpose or effect independent of the robberies. Here, as in *Freeman*, there is no evidence in the record showing that the violence Guzman used to complete the robberies was gratuitous, done to impress her accomplices, or had some independent purpose or effect other than facilitating the robberies. Thus, the independent purpose or effect exception to the merger doctrine does not apply.

We hold that Guzman's four second degree assault convictions involving Brackens, Smith, Alvarez, and Garcia merge into her four convictions for first degree robbery involving those same victims. Therefore, we reverse Guzman's second degree assault convictions and remand to the trial court for resentencing.[4]

[3] The jury was instructed that the intent to commit a felony here was intent to commit a robbery.

[4] Because we reverse Guzman's second degree assault convictions and remand to the trial court for resentencing based on merger and double jeopardy, we do not address Guzman's claims that she was provided ineffective assistance of counsel at sentencing and that the State failed to prove her prior criminal convictions by a preponderance of the evidence at sentencing.

C. APPELLATE COSTS

Guzman asks that this court decline to impose appellate costs if the State prevails on appeal. The State represents that it will not seek appellate costs. We accept the State's representation and decline awarding appellate costs to the State.

CONCLUSION

We affirm Guzman's convictions for six counts of first degree kidnapping, four counts of first degree robbery, first degree burglary, second degree unlawful possession of a firearm, intimidating a witness, tampering with a witness, and firearm enhancements for the kidnapping and burglary convictions, but we reverse Guzman's four second degree assault convictions involving Brackens, Smith, Alvarez, and Garcia and remand to the trial court for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Johanson, J.P.T.

Maxa, C.J.