IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. COREY JEROME IRISH, Appellant.	No. 37591-5-II UNPUBLISHED OPINION

Van Deren, C.J. — Corey Jerome Irish appeals his conviction for unlawful possession of a controlled substance, arguing that the trial court erred by failing to vacate the conviction when he obtained the controlled substances in a first degree robbery for which he was convicted. He also contends that his convictions for two counts of second degree assault should be vacated because there was insufficient evidence for the jury to find him liable as an accomplice. Finally, he contends that his sentence for unlawful possession of a firearm exceeds the standard range. In his statement of additional grounds for review (SAG),[1] Irish claims that (1) the assault and unlawful possession of a controlled substance convictions merge with robbery and constitute double jeopardy, (2) his due process rights were violated because the information did not charge him with accomplice liability, (3) the firearm enhancement violates equal protection, and (4) his prior

[1] RAP 10.10.

convictions were part of the same criminal conduct and should be calculated as a single conviction for scoring purposes. We affirm all the convictions except we vacate the conviction for unlawful possession of a controlled substance under the facts of this case. We also remand for resentencing.

FACTS

On April 23, 2007, around 3:00 am, Irish and an unidentified man entered a Walgreens store. They walked in and stood next to an employee, Walter Staten, while he was standing on a ladder. When Staten asked if he could help them, the unidentified man requested that Staten step down off the ladder. Irish stood behind the unidentified man as the unidentified man pulled out a pistol. The unidentified man asked how many people were in the store and where they were. Staten explained that Jeanelle O'Dell, the store manager, was in the stockroom and Daniel Garibay was in the pharmacy. The unidentified man then asked Staten to take him to O'Dell. Irish walked toward the pharmacy as the unidentified man escorted Staten to the stockroom. Staten and the man encountered O'Dell on the way to the stockroom, Staten moved to the side, O'Dell saw the drawn pistol, and she put her hands up. The man then took Staten and O'Dell to the stockroom where he held them for several minutes.

In the meantime, Irish went to the pharmacy counter and jumped over it. Garibay was facing away from the register when he "heard a huge, loud thump" and turned around to see Irish. Report of Proceedings (RP)[2] at 98. Irish ordered Garibay to open the cabinets for "Percocet, [O]xycodone, and Vicodin." RP at 100. Garibay unlocked and opened the narcotics cabinet. Garibay and Irish filled two white trash bags that Irish had brought with him with drugs from the

[2] The undated citations to the record are from the trial proceedings.

cabinet. While helping Irish fill the bags, Garibay pressed the silent alarm button three times. After Irish filled the two bags he had brought with him, Irish asked Garibay for a third bag, which he wanted filled with Xanax, Viagra, and Valium. After filling the bags, Irish told Garibay to come with him. The other man met them outside of the pharmacy counter and took Garibay to the stockroom while Irish left with the bags.

At approximately 3:35 am the silent alarm alerted the Tacoma police. They arrived at the Walgreens store in a "dark out," with no lights or sirens activated, and four officers approached the side of the main entrance. RP at 113. As the four officers came into view of the front door, another officer watching from a distance "indicated that someone was exiting, described him as a black male, and said that he had bags over his shoulders." RP at 114. Irish exited the store with "three plastic bags slung over his shoulders" and Officer David May "commanded him to get down on the ground; that we were the police." RP at 115. Irish proclaimed his surprise, dropped the bags, turned around, and ran back into the store. The officers pursued Irish as he ran toward the store's far left aisle. They lost sight of him briefly but intercepted him at the corner of a display aisle. After Irish surrendered, the officers retrieved latex gloves Irish was wearing and a gun on the top shelf of a display aisle, located approximately one foot from where the officers intercepted Irish. The officers arrested Irish but did not apprehend the unidentified man.

The State charged Irish with (1) first degree robbery (count I), (2) second degree assault of Staten (count II), (3) second degree assault of Garibay (count III), (4) second degree assault of O'Dell (count IV), (5) unlawful possession of a controlled substance (UPCS) with intent to deliver (count V), and (6) first degree unlawful possession of a firearm (UPF) based on a previous

conviction (count VI). The jury found Irish guilty as charged and returned firearm special verdicts on all the convictions except the UPF conviction.

Before sentencing, Irish moved to (1) dismiss the Staten and O'Dell assault convictions, arguing that the information did not refer to accomplice liability; (2) arrest judgment on the Garibay assault conviction for insufficient proof; and (3) dismiss the UPCS with intent to deliver conviction for insufficient evidence. Irish argued that the Staten and O'Dell assaults were part of the robbery. The trial court denied Irish's motion because these assault victims differed from Garibay, the robbery victim. The State conceded that the Garibay assault merged with the robbery and the trial court dismissed the assault conviction involving Garibay. The trial court denied the motion to arrest judgment on the UPCS conviction but reduced the conviction from possession with intent to deliver to simple unlawful possession of a controlled substance. The trial court denied Irish's motion to dismiss the UPCS conviction, ruling that it did not merge with the robbery.

At sentencing, Irish argued that his prior convictions for two counts of second degree assault and two counts of first degree robbery, which created an offender score of eight, were the same course of conduct. The State argued that the crimes were not same criminal conduct because there were different victims. The trial court did not explicitly rule on whether these prior convictions were same criminal conduct but appeared to have been convinced by the State's argument because it calculated the offender score as if the prior convictions were separate crimes. There was initial confusion about the offender score based on the prior convictions totaling six points, but the parties conceded and the trial court concluded that eight was the correct score:

two points for each of the four convictions.

Based on the prior convictions, Irish's offender score was eight on the UPCS and UPF convictions. For the robbery and assault convictions, Irish's offender score was 14.[3] The trial court imposed the high end of the standard ranges for each conviction, to run concurrently, with the firearm enhancements to run consecutively to each other and to the underlying sentences. The judgment and sentence shows the UPCS conviction with a seriousness level of II and a sentencing range of 45 to 90 months and an 18-month firearm enhancement. The total sentence was 321 months: 171 months plus 150 months for the enhancements.[4]

Irish appeals.

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[3] Apparently the eight points for the prior convictions were added to two points each for the other two violent offense convictions and one point each for the first degree unlawful possession of a firearm and unlawful possession of a controlled substance convictions, "it's actually 14 . . . 2, 4, 6, 8, 10, 12, 13, 14." RP (Apr. 4, 2008) at 21.

[4] This chart clarifies how the trial court evaluated the convictions for sentencing purposes.

	Robbery	Staten Assault	Garibay Assault	O'Dell Assault	UPCS	UPF
Count	I	II	III	IV	V	VI
Disposition			merged w/ robbery		reduced from intent to deliver to possession	
Seriousness Level	IX	IV		IV	II	VII
Offender Score	14	14		14	8	8
Sentence range	129-171	63-84		63-84	45-90	87-116
Sentence (concurrent)	171	84		84	90	116
Firearm Enhancement (consecutive)	60	36	n/a	36	18	n/a

ANALYSIS

I. Robbery and Possession of a Controlled Substance

Irish contends that the trial court erred by sentencing him both for robbery and for possession of a controlled substance stolen during the robbery. He argues that when a person is convicted of robbery based on taking a controlled substance, that person may not also be convicted of unlawful possession of that same controlled substance. The State argues that possession of controlled substances is unlawful, regardless of whether the substance is obtained through the crime of robbery. On the facts of this case, we agree with Irish.

A. Standard of Review

The commonsense doctrine that a thief may not be convicted of stealing and possessing or receiving the same stolen goods fundamentally raises questions of statutory construction that we review de novo. *See State v. Allen*, 150 Wn. App. 300, 307, 207 P.3d 483 (2009); *United States v. Tyler*, 466 F.2d 920, 922 (9th Cir. 1972).

B. Acts of Theft and Their Fruits

Beyond merger and the constitutional protections against double jeopardy, where a party is a principal thief, he or she may not also be convicted of receiving or possessing stolen goods. *State v. Melick*, 131 Wn. App. 835, 840-41, 129 P.3d 816 (2006); *State v. Hancock*, 44 Wn. App. 297, 300-01, 721 P.2d 1006 (1986). The underlying reasoning is that a person may not take from another and give possession to himself. *Melick*, 131 Wn. App. at 843. In instances where the acts of both stealing and possessing or receiving the stolen item are charged and a conviction results, the trial court should vacate one of the convictions before sentencing. *See Melick*, 131

Wn. App. at 843-44; *Hancock*, 44 Wn. App. at 301-02.

This doctrine grew out of *State v. Flint*, 4 Wn. App. 545, 483 P.2d 170 (1971), wherein Division One of this court noted Justice Frankfurter's dissent from *Milanovich*, which states:

> "It is hornbook law that a thief cannot be charged with committing two offenses—that is, stealing and receiving the goods he has stolen. And this is so for the commonsensical, if not obvious, reason that a man who takes property does not at the same time give himself the property he has taken. In short, taking and receiving, as a contemporaneous—indeed a coincidental—phenomenon, constitute one transaction in life and, therefore, not two transactions in law."

Flint, 4 Wn. App. at 547 (citations omitted) (quoting *Milanovich v. United States*, 365 U.S. 551, 558, 81 S. Ct. 728, 5 L. Ed.2d 773 (1961)). Flint was "found guilty of 'grand larceny by possession' of two stolen Winchester rifles." *Flint*, 4 Wn. App. at 546. He argued that one who "'wrongfully appropriates' property cannot be guilty of 'receiving' the same property." *Flint*, 4 Wn. App. at 547. The court noted that "as Mr. Justice Frankfurter further points out, the severable ingredients of one compound transaction may be outlawed and made punishable as separate offenses." *Flint*, 4 Wn. App. at 547. But the court did not reach Flint's argument because "Flint was charged only with the secondary receiving. He did not admit that he committed the burglary." *Flint*, 4 Wn. App. at 548. The *Flint* court opined that "[p]erhaps one charged solely with 'receiving' stolen property under RCW 9.54.010(5) could avoid prosecution on that charge by admitting the primary theft of the property. Flint did not choose . . . to leap from the frying pan into the fire." 4 Wn. App. at 548.

In *Hancock*, the defendant stole 139 cases of cheese from a government agency and was convicted of first degree theft and first degree possession of stolen property. 44 Wn. App. at 298-99. Division One of this court reversed the possession of stolen property conviction. *Hancock*,

44 Wn. App. at 304. In *Melick*, the defendant was charged and convicted of taking a motor vehicle without permission and first degree possession of stolen property when found in possession of the truck. 131 Wn. App. at 837-38. The court reversed Melick's conviction for possession of stolen property based on a review of *Hancock* and a similar line of federal cases, holding that "the fact finder should be instructed that if it finds the defendant guilty of the taking, it should not consider the possession charges." *Melick*, 131 Wn. App. at 844, 840-42. The court explained that possession is the proper charge where "the prosecutor has clear evidence that the proceeds of the robbery were found in the person's possession and less clear evidence that that person was a participant in the robbery." *Melick*, 131 Wn. App. at 844.

We are faced with unique facts in this case and must decide how this doctrine applies to a conviction for possession of a controlled substance obtained in a robbery that solely involved taking controlled substances. The *Hancock* decision was based on a statutory scheme providing different levels of punishment within the same category of crime. 44 Wn. App. at 300-01. The court focused on the theft statute's scheme that included theft and possession of stolen property and the antecedent larceny statute with five classes of larceny. *Hancock*, 44 Wn. App. at 300-01; *see also* RCW 9A.56.020(1)(a), .140(1); former RCW 9.54.010(1), (5) (1974). The *Melick* court appears to have taken the statutory analysis largely for granted. *See* 131 Wn. App. at 839. The court noted in passing that Melick was charged with second degree taking a motor vehicle without permission and first degree possession of stolen property—both crimes described in chapter 9A.56 RCW. *Melick*, 131 Wn. App. at 839; former RCW 9A.56.070, .150 (2002). Furthermore, the State apparently had "less clear" evidence to show that Melick stole the truck,

requiring that "the fact finder should be instructed that if it finds the defendant guilty of the taking, it should not consider the possession charges." *Melick*, 131 Wn. App. at 844.

Here, Irish was charged with two crimes found in different chapters proscribing different criminal conduct.[5] "Robbery" is defined in chapter 9A.56 RCW:

> 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.

> A person is guilty of robbery in the first degree if:
> (a) In the commission of a robbery or of immediate flight therefrom, he or she:
> (i) Is armed with a deadly weapon; or
> (ii) Displays what appears to be a firearm or other deadly weapon; or
> (iii) Inflicts bodily injury; or
> (b) He or she commits a robbery within and against a financial institution as defined in RCW 7.88.010 or 35.38.060.

RCW 9A.56.200(1).

Chapter 69.50 RCW criminalizes unlawful possession of a controlled substance: "It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter."

[5] Under *State v. Freeman*, 153 Wn.2d 765, 772, 108 P.3d 753 (2005) and *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932) unlawful possession of a controlled substance is not an element of robbery so, if Irish's claim is one of merger, it fails.

RCW 69.50.4013(1). It is immaterial whether the substance was stolen, purchased illicitly, or gratuitously provided by a friend: possession without a valid prescription or order is illegal.

In this vacuum of Washington authority, the State points to a Kentucky case where a defendant's convictions for both first degree robbery and unlawful possession of a controlled substance were upheld because "[i]t cannot sensibly be regarded as a legal possession because the possessor accomplished it through theft. It is an entirely separate crime from theft." *Hayes v. Kentucky*, 625 S.W.2d 575, 576 (Ky. 1981). Yet, the State's citation is unhelpful, as the Kentucky Supreme Court in *Hayes* relied on another case where that court answered affirmatively the question "whether one who steals property can be convicted of knowingly retaining the stolen goods," holding that the statute "covers the thief who retains or disposes of property he has stolen." *Sutton v. Kentucky*, 623 S.W.2d 879, 880 (Ky. 1981). Kentucky's statutory scheme, unlike Washington's, appears to allow "that one who steals property and is later found to be in possession of it may be convicted both of the theft itself . . . and the retention." *Sutton*, 623 S.W.2d at 880.

Unlawful possession of a firearm is one of the few analogous situations where status-based possession is separately criminalized. *See* RCW 9.41.040. But, the legislature, in amending the unlawful possession of a firearm statute, explicitly provided:

> Nothing in chapter 129, Laws of 1995 shall ever be construed or interpreted as preventing an offender from being charged and subsequently convicted for the separate felony crimes of theft of a firearm or possession of a stolen firearm, or both, in addition to being charged and subsequently convicted under this section for unlawful possession of a firearm in the first or second degree.

RCW 9.41.040(6). Had the legislature added such a provision to the possession of a controlled

substance statute, dual convictions for robbery involving a controlled substance and unlawful possession of a controlled substance obtained in the robbery clearly would be permissible.

Hancock and *Melick* are distinguishable because they addressed crimes described in the same code chapter proscribing the crimes the defendants committed. In *Melick*, there was less clear evidence of how Melick obtained possession of the stolen truck. Because the crimes involved in this case are described in different chapters of the RCW and because possession of the controlled substances is clearly unlawful under RCW 69.50.4013(1), regardless of how they are obtained, conviction for unlawful possession of controlled substances obtained in a robbery may not, in certain circumstances, violate the longstanding doctrine precluding conviction for theft or robbery and possession of the property obtained via theft or robbery when all of the proscribed behavior is described within the same RCW chapter. But here, the trial court dismissed the intent to deliver portion of the conviction at sentencing, leaving only the possession conviction and Irish's possession of the stolen drugs was fleeting—he only made it outside on the apron entrance to the Walgreens before he was arrested. The court in *Melick* stated that "when the evidence does not support a possession separate in time . . . from the original theft, only the theft conviction may stand."[6] 131 Wn. App. at 843.

Thus, under these circumstances, we vacate the possession conviction and remand for resentencing.

[6] But continuous possession may not necessarily change the outcome. In *Hancock*, 44 Wn. App. at 301-02, continuous possession of stolen goods for 24 days still resulted in dismissal of the possession charge. *Melick*, 131 Wn. App. 843 n.4.

II. Sufficiency of Evidence

Irish also contends that the evidence is insufficient to support a conviction as an accomplice for second degree assault because there were no facts in the record proving that Irish knew the other participant in the robbery would do anything other than distract or detain the employees. Irish contended at trial that the surveillance videotape showed Irish and the coparticipant "walking into the store, and Mr. Irish goes directly back into the area of the pharmacy. He's not next to Mr. Staten, who is standing on the ladder." RP at 172-73. Irish contends that he and his coparticipant "immediately separated" and the evidence does not support the contention he knew that his coparticipant was armed or intended to commit an assault.[7] We disagree.

A. Standard of Review

When reviewing sufficiency issues, we view the evidence in the light most favorable to the State to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). And we defer to the trier of fact on any issue that involves "conflicting testimony, credibility of

[7] Specifically, Irish contends that "[t]here is no evidence to prove that Irish knew that the second man intended to commit an assault or that the second man was armed. There are no facts in the record to prove that Irish knew that the second man would do anything more than distract or detain the Walgreens employees." Br. of Appellant at 10.

witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), *abrogated in part on other grounds*, *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

B. Accomplice Liability

Under the accomplice liability statute:

> A person is an accomplice of another person in the commission of a crime if:
> (a) With knowledge that it will promote or facilitate the commission of the crime, he
> (i) solicits, commands, encourages, or requests such other person to commit it; or
> (ii) aids or agrees to aid such other person in planning or committing it; or
> (b) His conduct is expressly declared by law to establish his complicity.

RCW 9A.08.020(3). Although accomplice liability is not strict liability, "[a]n accomplice need not have the same state of mind as a principal, but he or she must know that his or her actions will encourage or promote the principal's commission of the crime." *State v. Larue*, 74 Wn. App. 757, 762, 875 P.2d 701 (1994); *see State v. Roberts*, 142 Wn.2d 471, 511, 14 P.3d 717 (2000). "Specific knowledge of the elements of the coparticipant's crime need not be proved to convict one as an accomplice." *State v. Rice*, 102 Wn.2d 120, 125, 683 P.2d 199 (1984). In a case involving felony murder while coparticipants were intoxicated such that they might not have formed the requisite intent had they been principals, our Supreme Court noted that accomplice liability for felony murder would only require "their knowledge of their coparticipant's criminal assault on the victim. It would have been unnecessary for the State to prove the defendants' actual knowledge of their coparticipant's possession of a deadly weapon or his mental intent." *Rice*, 102 Wn.2d at 125-26, 122-23; *see State v. Davis*, 101 Wn.2d 654, 657-59, 682 P.2d 883

(1984).

Here, the State only needed to show that Irish knew that his presence would promote or facilitate his coparticipant's second degree assault against the Walgreens employees: knowledge that his coparticipant would "[a]ssault[] another with a deadly weapon." RCW 9A.36.021(c). Based on the record before us, the jury was presented with sufficient evidence for a rational trier of fact to find that Irish entered the store with another as part of a plan[8] to take controlled substances from Walgreens while restraining employees who were not in the pharmacy by assaulting them, if necessary with a deadly weapon, and that Irish knew his coparticipant was armed with a firearm to effectuate the restraint of those employees.[9]

Here, the front door surveillance video evidence is not determinative of whether Irish knew his coparticipant had a firearm or saw his coparticipant assault Staten in the process of first detaining Staten and then O'Dell. Staten testified that the two men were together when they approached him and the drug aisle camera shows Irish looking back in the direction of Staten

[8] Based on Walgreen's digital video recording (video) of the "Front Door," Irish and the coparticipant entered the store at 4:29:38 on the video time clock and Irish exited the store with garbage bags in his hands at 4:39:43. Ex. 1. Based on the speed and actions of Irish and the coparticipant, there is sufficient evidence that a rational trier of fact could infer that they had a prearranged plan to rob the pharmacy.

[9] Staten testified that while he was on a ladder stocking a shelf, Irish and his coparticipant entered the store together. The coparticipant asked Staten to "step down off the ladder, and that's when he had pulled out his pistol." RP at 81. Staten also testified that Irish "was standing behind the other person who held me up with the pistol." RP at 88. Clarifying the events, Staten elaborated that "[w]hen they came in, they came in together. I was standing on the ladder. By the time the [coparticipant] pulled the pistol out on me and started to escort me towards the stockroom, that's when [Irish] walked off towards the pharmacy." RP at 88-89.

and his coparticipant in the assault.[10]

As for Irish going "directly back into the area of the pharmacy," there is a gap of one minute and eleven seconds between the moment Irish and the coparticipant entered the store and the moment when another camera shows Irish heading to the pharmacy.[11] There is no direct evidence that Irish saw his coparticipant assault O'Dell. But a jury could reasonably infer, based on the evidence of the coparticipant's assault of Staten, that Irish knew that the coparticipant was likely to assault the other employee with a deadly weapon in the process of detaining her.

The jury heard both interpretations of the evidence in closing as well as the testimony of the witnesses. We do not review credibility determinations or the evidence but defer to the fact finder. *Thomas*, 150 Wn.2d at 874-75. We hold that any rational trier of fact could have found beyond a reasonable doubt that Irish was an accomplice in the second degree assaults by his coparticipant against Staten and O'Dell.

III. Sentencing

Irish raises on appeal, and the State concedes, that the trial court erred in its sentence for first degree UPF. Irish did not raise, but the State also concedes, that the trial court also erred in

[10] In fact, the "Drug Isle [sic]" video shows Irish stopping and looking back at 4:30:52, exiting the camera's frame six seconds later, and, at 4:31:01, the video shows the coparticipant escorting Staten with what could be a gun in his hand, which appears from and disappears back into his jacket pocket with each step. Ex. 1.

[11] At 4:29:38, the "Front Door" camera shows Irish and the coparticipant enter the store. Ex. 1. At 4:30:49, Irish enters the view of the "Drug Isle [sic]" camera. Ex. 1.

its sentence for UPCS.[12] "[I]llegal or erroneous sentences may be challenged for the first time on appeal." *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). "[P]unishment in excess of that which the Legislature has established" is legal error and thus reviewed de novo. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). Based on the State's concession on the UPF conviction sentencing and our review of the record, as well as our vacation of the UPCS conviction, we remand for resentencing and recalculation of Irish's offender score.

IV. SAG Issues

A. Merger/Double Jeopardy

Irish next argues that the three assault convictions and the unlawful possession of a controlled substance with intent to deliver conviction merge with the robbery conviction because they had no "independent purpose or effect." SAG at 1. Irish also argues that, as convictions separate from the robbery conviction, the assault, and unlawful possession of a controlled substance with intent to deliver convictions violate the United States Constitution, amendment V, and the Washington Constitution, article I, section 9 double jeopardy protections. We review a claim of double jeopardy or merger de novo.[13] *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

[12] In response to a motion by Irish, the trial court ruled that there was not sufficient evidence to convict him of attempted unlawful possession of a controlled substance with intent to deliver. But, the trial court appears to have inadvertently sentenced Irish as though he were convicted with intent to deliver, giving him a seriousness level of II on the possession of a controlled substance count.

[13] We need not address Irish's merger and double jeopardy arguments with regard to the unlawful possession of a controlled substance as we remand the possession charge for dismissal.

1. Double Jeopardy

In analyzing double jeopardy, first we look at legislative intent to determine if the legislature intended to "authorize[ ] cumulative punishments for both crimes." *Freeman*, 153 Wn.2d at 771. If the legislative intent is not clear, we turn to the *Blockburger* test: "If each crime contains an element that the other does not, we presume that the crimes are not the same offense for double jeopardy purposes." *Freeman*, 153 Wn.2d at 772; *see also Blockburger v. United States,* 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). "[W]e do not consider the elements of the crime on an abstract level," but, instead, we look to see whether "each provision requires *proof of a fact* which the other does not." *Freeman*, 153 Wn.2d at 772 (internal quotation marks omitted) (quoting *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 817, 100 P.3d 291 (2004)). Essentially, if the crimes "are the same in law and in fact, they may not be punished separately absent clear legislative intent to the contrary." *Freeman*, 153 Wn.2d at 777.

The legislature has not explicitly authorized cumulative punishment for first degree robbery and second degree assault, and courts must "give a hard look at each case." *Freeman*, 153 Wn.2d at 774. But Irish does not contend that the first degree robbery and second degree assault convictions result from the same facts, so we do not apply the *Blockburger* analysis here. *See Freeman*, 153 Wn.2d at 777.

2. Merger

"The double jeopardy clauses of the United States and Washington constitutions are the foundation for the merger doctrine." *State v. Parmelee*, 108 Wn. App. 702, 710, 32 P.3d 1029

(2001). "The merger doctrine is relevant only when a crime is elevated to a higher degree by proof of another crime proscribed elsewhere in the criminal code." *Parmelee*, 108 Wn. App. at 710. In other words, "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. Merger sidesteps double punishment by merging a lesser offense "into the greater offense when one offense raises the degree of another offense." *State v. Collicott*, 118 Wn.2d 649, 668, 827 P.2d 263 (1992) (relying on *State v. Dunaway*, 109 Wn.2d 207, 743 P.2d 1237, 749 P.2d 160 (1987) and former RCW 9.94A.400 (1987 & Supp.1988), *recodified as* RCW 9.94A.589)); *see also State v. Johnson*, 113 Wn. App. 482, 488-89, 54 P.3d 155 (2002). Still, "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." *Freeman*, 153 Wn.2d at 773.

Generally, first degree robbery and second degree assault "will merge unless they have an independent purpose or effect." *Freeman*, 153 Wn.2d at 780. Still, we use "a case by case approach . . . to determine whether first degree robbery and second degree assault are the same for double jeopardy purposes." *Freeman*, 153 Wn.2d at 780.

The Supreme Court in *Freeman* consolidated two cases in which the defendants, Freeman and Zumwalt, were convicted of both first degree robbery and either first (Freeman) or second (Zumwalt) degree assault. 153 Wn.2d at 769-70. Freeman pointed a weapon at his victim, ordered the victim to turn over any valuables, shot the victim when compliance was not

forthcoming, and then robbed his victim; a jury convicted him of first degree assault and first degree robbery. *Freeman*, 153 Wn.2d at 769. Zumwalt punched his victim "hard in the face with his fist, knocking her to the ground," and he then robbed her of cash and casino chips; a trial judge convicted Zumwalt of second degree assault and first degree robbery. *Freeman*, 153 Wn.2d at 770. "In both cases, to prove first degree robbery as charged and proved by the State, the State had to prove the defendants committed an assault in furtherance of the robbery." *Freeman*, 153 Wn.2d at 778. Absent "conduct amounting to assault, [Freeman and Zumwalt] would be guilty of only second degree robbery." *Freeman*, 153 Wn.2d at 778. The court held that Zumwalt's second degree assault conviction merged with the first degree robbery conviction but that Freeman's first degree assault conviction did not merge into the robbery because there was "evidence that the legislature specifically did not intend that first degree assault merge into first degree robbery." *Freeman*, 153 Wn.2d at 778.

Here, the State charged Irish in the amended information with first degree robbery because he "was armed with a deadly weapon, to-wit: a handgun." CP at 68. It charged Irish with the second degree assaults of Garibay, O'Dell, and Staten based on the use of a firearm in each assault under RCW 9A.36.021(1)(c). The jury instructions reflected the charged elements in the amended information. In closing arguments, the State pointed to Irish's possession of a gun to support the first degree robbery conviction. The State also focused on the fact that Irish was armed with a gun and assaulted Garibay but it argued also that, in order to convict Irish of first degree robbery, the evidence need not show that Garibay actually saw the gun Irish possessed. After conviction on all charges, the trial court merged the second degree assault by Irish against

Garibay with the first degree robbery, consistent with *Freeman*. 153 Wn. 2d at 778.

By contrast, Irish's convictions for the assaults against Staten and O'Dell did not hinge on Irish's or the coparticipant's mere possession of a gun during the robbery because the coparticipant actually showed a gun to Staten and O'Dell. It was the use of the gun to restrain Staten and O'Dell that supported Irish's second degree assault convictions against them.

Irish's second degree assault conviction as an accomplice for the assaults against Staten and O'Dell are clearly distinguishable from Zumwalt's first degree robbery and second degree assault of his sole victim. In this case, there were multiple assault victims in different parts of the store subject to different assaults: Staten, O'Dell, and Garibay. There were also two perpetrators, Irish and his uncharged and unidentified coparticipant. Finally, in the totality of the facts of this case, Irish's first degree robbery conviction did not turn on the jury finding him guilty for the Staten and O'Dell assaults because the robbery did not occur in their presence and he did not use or threaten the use of force against them to obtain the controlled substances. His acting as an accomplice to his coparticipant's use of the firearm against Staten and O'Dell supported his second degree assault convictions.

Thus, his arguments lack merit.

B. Accomplice Liability

Irish appears to contend that his due process rights under the United States Constitution, amendment VI, and the Washington Constitution, article I, section 22, were violated because he did not have adequate notice of the charges against him. He argues that the amended information did not put him on notice of accomplice liability, charging him only as a principal for the O'Dell

and Staten assaults. We have held that "an information which charges an accused as a principal adequately apprises him or her of potential accomplice liability." *State v. Rodriguez*, 78 Wn. App. 769, 774, 898 P.2d 871 (1995). Because Irish was adequately apprised of the charges against him when he was charged as a principal for assault, we hold that this argument lacks merit.

C. Enhancements

Irish argues that the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, enhancement provisions violate United States Constitution, amendment XIV, and Washington Constitution, article I, section 12, because a similarly situated defendant who used a machine gun in an identical crime would not receive a sentencing enhancement. Irish misapprehends the SRA's enhancement provision and we need not reach the merits of his constitutional analysis. *See State v. Haney*, 125 Wn. App. 118, 125-26, 104 P.3d 36 (2005).

The SRA applies a firearm enhancement to all felonies except "[p]ossession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony." RCW 9.94A.533(3)(f).[14] Use of a machine gun is a felony that can be charged independently. *See* RCW 9.41.225. Had Irish used a machine gun, his sentence would not be any shorter as an enhancement still would have applied to the robbery, the assaults of Staten and O'Dell, and the vacated unlawful possession of a controlled substance convictions. The statute would only prevent an additional enhancement for an additional conviction for use of a machine gun in the robbery or assaults, just as it prevented an enhancement for his UPF conviction. This argument is

[14] In fact, this same statute spared Irish a firearm enhancement for the first degree unlawful possession of a firearm conviction.

unavailing.

D. Offender Score (Prior Convictions)

Irish argues that the trial court erred in computing his offender score because it did not consider whether his prior 1998 convictions for two counts of second degree assault and two counts of first degree robbery were same criminal conduct. "[A]pplication of the same criminal conduct statute involves both factual determinations and the exercise of discretion." *Goodwin*, 146 Wn.2d at 875; *see also* RCW 9.94A.589(1)(a). And "waiver can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion." *Goodwin*, 146 Wn.2d at 874. Accordingly, a "defendant's 'failure to identify a factual dispute for the court's resolution and . . . failure to request an exercise of the court's discretion' waive[s] the challenge to his offender score." *Goodwin*, 146 Wn.2d at 875 (alteration in original) (quoting *State v. Nitsch*, 100 Wn. App. 512, 520, 997 P.2d 1000 (2000)). Here, Irish only preserved for appeal the issue of whether his prior convictions constituted same criminal conduct.

"Crimes encompass the same criminal conduct for sentencing purposes if they involve the same criminal intent and were committed against the same victim at the same time and place." *State v. Young*, 97 Wn. App. 235, 240, 984 P.2d 1050 (1999). The record reflects that the 1998 convictions involved four separate victims. Based on the record before us, which includes the amended 1998 information, the 1998 handwritten plea agreement, the 1998 judgment and sentence, and the record at trial when Irish raised the issue at sentencing in this matter, we hold that the trial court did not abuse its discretion by not expressly addressing or finding that the prior convictions were same criminal conduct.

We vacate the conviction for unlawful possession of a controlled substance and affirm the remaining convictions based on sufficiency of the evidence and remand for resentencing with a newly calculated offender score.

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 pursuant to RCW 2.06.040, it is so ordered.

We concur:

Van Deren, C.J.

Houghton, J.

Bridgewater, J.