

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-06-00039-CR

Marcus Williams, Appellant

v.

The State of Texas, Appellee

**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 403RD JUDICIAL DISTRICT
NO. D-1-DC-05-904127, HONORABLE BRENDA KENNEDY, JUDGE PRESIDING**

CONCURRING AND DISSENTING OPINION

The majority is correct that the double jeopardy issue raised by these facts is unaddressed in *Cavazos*. This determination is guided instead by *Landers*, which specifically concerned double jeopardy in the context of a lesser-included offense. Because under the authority of *Landers*, I would affirm the conviction for aggravated robbery, which is a first-degree felony, and vacate the conviction for robbery, which is a second-degree felony and a lesser-included offense, I respectfully dissent.

Although I would hold that we vacate the robbery conviction and affirm the aggravated robbery conviction, in the alternative, I would remand for further proceedings. Because (i) this issue was not raised by appellant on appeal and was raised instead by the State when it filed a supplemental brief recognizing its responsibility to raise the issue and requesting that we “abandon the lesser charge” of robbery, and (ii) appellant did not respond, rather than fall back on the

randomness of the offense specified in the first verdict form as the majority does here—a result which may be appropriate in certain circumstances—I would invite the considered views of the parties and the trial court who can better ventilate and evaluate the factors to be taken into account.

Jan P. Patterson, Justice

Before Chief Justice Law, Justices Patterson and Pemberton

Filed: June 1, 2007

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