IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FILED
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STATE OF WASHINGTON
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STATE OF WASHINGTON, Respondent,	DIVISION ONE
v.	No. 69767-6-I
BINYAM B. YEMRU, Appellant.	UNPUBLISHED OPINION
	FILED: May 19, 2014

DWYER, J. — Binyam Yemru was convicted by a jury of robbery in the first degree (count I), assault in the second degree (count II), robbery in the first degree (count III), theft of a motor vehicle (count IV), and felony harassment (count V). Paige Knight was the victim in count I. John Mbugua was the victim in count V. Michael Nordstrom was the victim in counts II, III, and IV. On appeal, Yemru does not challenge the convictions on counts I, III, or V. As to counts II and IV, Yemru contends that principles of double jeopardy require the dismissal of the assault in the second degree charge and the theft of a motor vehicle charge. We agree as to count II and disagree as to count IV. Accordingly, we order that the assault charge be dismissed on remand. We affirm the other convictions.

I

The facts relative to the issues on appeal are these. When Michael Nordstrom approached his automobile, he noticed Yemru carrying what appeared to be a samurai sword. As Nordstrom was getting into his car, he

heard Yemru call out "hey." Once in the car, Nordstrom rolled down the passenger window to hear what Yemru had to say. Yemru asked if he could have a ride. Nordstrom refused Yemru's request. Yemru then pushed a pistol through the passenger window and pointed it at Nordstrom. Nordstrom attempted to raise the passenger window, but a safety feature caused the window to descend each time it hit the gun. Nordstrom realized that the gun was fake because it sounded like plastic each time it came into contact with the passenger window.

Unfortunately for Nordstrom, the passenger door was unlocked, allowing Yemru to enter the car. At the same time, Nordstrom opened his driver's door to give himself an escape route. Yemru pointed the gun at Nordstrom and told him to drive. Nordstrom refused, telling Yemru that he knew the gun was fake. Yemru then pulled out the sword, asked if it was fake, and poked it toward Nordstrom. When Nordstrom tried to deflect the sword, he realized that it was real and quickly got out of the car, grabbing his backpack as he did so, but leaving his keys in the ignition. Yemru drove away in the car.

Yemru was arrested and charged with five felony counts: two counts of robbery in the first degree, one count of assault in the second degree, one count theft of a motor vehicle and one count of felony harassment. A jury found Yemru guilty on all five counts. Yemru appeals only the convictions for second degree assault and theft of a motor vehicle. He contends that coupling these convictions with the conviction for robbing Nordstrom violates the prohibition against double jeopardy.

II

Yemru first assigns error to the trial court's decision to enter judgment on the jury's verdict finding him guilty on count II, assault in the second degree, and imposing sentence thereon. The court erred in so doing, Yemru asserts, because the double jeopardy merger doctrine required the court to rule that the assault count merged into the robbery in the first degree count. Citing State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008), the State concedes error. We accept the concession and reverse the assault conviction with instructions to the trial court to dismiss count II upon remand.

III

Yemru next contends that double jeopardy or merger principles required the trial court to dismiss the theft of a motor vehicle charge in favor of entering judgment on the robbery in the first degree charge. The State contests this allegation.

"The double jeopardy clause in Const. art. I, § 9 is given the same interpretation the Supreme Court gives to the double jeopardy clause in the Fifth Amendment." State v. Gocken, 127 Wn.2d 95, 109, 896 P.2d 1267 (1995). "The double jeopardy clauses of the Fifth Amendment and Const. art. I, § 9 protect a defendant against multiple punishments for the same offense." State v. Calle, 125 Wn.2d 769, 772, 888 P.2d 155 (1995).

> [T]he question whether punishments imposed by a court, following conviction upon criminal charges, are unconstitutionally multiple cannot be resolved without determining what punishments the legislative branch has authorized. Whalen[v. United States, 445 U.S. 684,] 688, [100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980)]. Our

> review here is limited to assuring that the court did not exceed its legislative authority by imposing multiple punishments for the same offense.

Calle, 125 Wn.2d at 776.

Here, Yemru contends that he is exposed to multiple punishments as a result of having the convictions for robbery in the first degree (of Nordstrom) and theft of a motor vehicle (Nordstrom's automobile) reduced to judgment with sentences for each imposed upon Yemru.

Although the State may bring multiple charges arising from the same criminal conduct, "'[w]here 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.'" State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005) (quoting In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)). "If the legislature authorized cumulative punishments for both crimes, then double jeopardy is not offended." Freeman, 153 Wn.2d at 771.

Recently, in State v. Esparza, 135 Wn. App. 54, 143 P.3d 612 (2006), we reiterated our approach to resolving double jeopardy issues, as elucidated by our Supreme Court in Freeman.

> "Because the question largely turns on what the legislature intended, we first consider any express or implicit legislative intent. Sometimes the legislative intent is clear, as when it explicitly provides that burglary shall be punished separately from any related crime. RCW 9A.52.050. Sometimes, there is sufficient evidence of legislative intent that we are confident concluding that the legislature intended to punish two offenses arising out of the

> same bad act separately without more analysis. E.g., [State v.] Calle, 125 Wn.2d [769,] 777-78[, 888 P.2d 155 (1995)] (rape and incest are separate offenses).
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> Second, if the legislative intent is not clear, we may turn to the Blockburger test. See Calle, 125 Wn.2d at 777-78; Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). 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. Calle, 125 Wn.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)).
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> When applying the Blockburger test, we do 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 offenses or only one, is whether each provision *requires proof of a fact* which the other does not.'" [In re Personal Restraint of] Orange, 152 Wn.2d [795,] 817[, 100 P.3d 291 (2004)] (quoting Blockburger, 284 U.S. at 304 (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. Calle, 125 Wn.2d at 778.
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> Third, if applicable, the merger doctrine is another aid in determining legislative intent, even when two crimes have formally different elements. 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. [State v.] Vladovic, 99 Wn.2d [413,] 419[, 662 P.2d 853 (1983)].
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> 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. State v. Frohs, 83 Wn. App. 803, 807, 924 P.2d 384 (1996) (citing State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979))."

Esparza, 135 Wn. App. at 59-61 (alterations in original) (quoting Freeman, 153 Wn.2d at 771-73).

To properly analyze a double jeopardy claim, we must also keep aware of that which is *not* a proper analysis. In 1990, the United States Supreme Court ruled that a double jeopardy analysis must consist of two parts: the Blockburger test and a "same conduct" test. Gocken, 127 Wn.2d at 101. In Grady v. Corbin, 495 U.S. 508, 521, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), the Supreme Court held:

> [T]he Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.

"The 'same conduct' test announced in Grady was overruled three years later in [United States v.] Dixon[, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993)]." Gocken, 127 Wn.2d at 101. Thus, the "same conduct" test applies to neither a Fifth Amendment nor an article I, § 9 double jeopardy analysis. Gocken, 127 Wn.2d at 107.

The legislature created the crime of theft of a motor vehicle,[1] codified as RCW 9A.56.065, in 2007. There is an extensive statement of legislative intent.

> (1) The legislature finds that:
> (a) Automobiles are an essential part of our everyday lives. The west coast is the only region of the United States with an increase of over three percent in motor vehicle thefts over the last several years. The family car is a priority of most individuals and families. The family car is typically the second largest investment a person has next to the home, so when a car is stolen, it causes a significant loss and inconvenience to people, imposes financial hardship, and negatively impacts their work, school, and personal

[1] "(1) A person is guilty of theft of a motor vehicle if he or she commits theft of a motor vehicle.
(2) Theft of a motor vehicle is a class B felony."

activities. Appropriate and meaningful penalties that are proportionate to the crime committed must be imposed on those who steal motor vehicles;

(b) In Washington, more than one car is stolen every eleven minutes, one hundred thirty-eight cars are stolen every day, someone's car has a one in one hundred seventy-nine chance of being stolen, and more vehicles were stolen in 2005 than in any other previous year. Since 1994, auto theft has increased over fifty-five percent, while other property crimes like burglary are on the decline or holding steady. The national crime insurance bureau reports that Seattle and Tacoma ranked in the top ten places for the most auto thefts, ninth and tenth respectively, in 2004. In 2005, over fifty thousand auto thefts were reported costing Washington citizens more than three hundred twenty-five million dollars in higher insurance rates and lost vehicles. Nearly eighty percent of these crimes occurred in the central Puget Sound region consisting of the heavily populated areas of King, Pierce, and Snohomish counties;

(c) Law enforcement has determined that auto theft, along with all the grief it causes the immediate victims, is linked more and more to offenders engaged in other crimes. Many stolen vehicles are used by criminals involved in such crimes as robbery, burglary, and assault. In addition, many people who are stopped in stolen vehicles are found to possess the personal identification of other persons, or to possess methamphetamine, precursors to methamphetamine, or equipment used to cook methamphetamine;

(d) Juveniles account for over half of the reported auto thefts with many of these thefts being their first criminal offense. It is critical that they, along with first time adult offenders, are appropriately punished for their crimes. However, it is also important that first time offenders who qualify receive appropriate counseling treatment for associated problems that may have contributed to the commission of the crime, such as drugs, alcohol, and anger management; and

(e) A coordinated and concentrated enforcement mechanism is critical to an effective statewide offensive against motor vehicle theft. Such a system provides for better communications between and among law enforcement agencies, more efficient implementation of efforts to discover, track, and arrest auto thieves, quicker recovery, and the return of stolen vehicles, saving millions of dollars in potential loss to victims and their insurers.

(2) It is the intent of this act to deter motor vehicle theft through a statewide cooperative effort by combating motor vehicle theft through tough laws, supporting law enforcement activities, improving enforcement and administration, effective prosecution,

> public awareness, and meaningful treatment for first time offenders where appropriate. It is also the intent of the legislature to ensure that adequate funding is provided to implement this act in order for real, observable reductions in the number of auto thefts in Washington state.

Laws of 2007, ch. 199, § 1.

We turn now to the first step of the Freeman analysis: the search for explicit legislative intent. "Again, if the statutes explicitly authorize separate punishments, then separate convictions do not offend double jeopardy." Freeman, 153 Wn.2d at 773. "Evidence of legislative intent may be clear on the face of the statute, found in the legislative history, the structure of the statutes, the fact the two statutes are directed at eliminating different evils, or any other source of legislative intent." Freeman, 153 Wn.2d at 773 (citing Ball v. United States, 470 U.S. 856, 864, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985); Calle, 125 Wn.2d at 777-78).

The robbery in the first degree statutes[2] and the theft of a motor vehicle

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[2] A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence 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 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.

(1) 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.

(2) Robbery in the first degree is a class A felony.

statute do not explicitly approve the imposition of multiple punishments. However, the legislature's decision to create a separate crime of theft of a motor vehicle, its decision to assign the crime the level of a class B felony, and its statement of purpose in doing so, all support a conclusion that the legislature desired that theft of a motor vehicle be treated differently, and more severely, than thefts involving other chattel of equal value. Thefts of property are otherwise generally categorized pursuant to the value of the chattel taken.[3] Theft

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RCW 9A.56.200.

(1) "Theft" means:

(a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

(2) In any prosecution for theft, it shall be a sufficient defense that:

(a) The property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable; or

(b) The property was merchandise pallets that were received by a pallet recycler or repairer in the ordinary course of its business.

RCW 9A.56.020.

[3] (1) A person is guilty of theft in the first degree if he or she commits theft of:

(a) Property or services which exceed(s) five thousand dollars in value other than a firearm as defined in RCW 9.41.010;

(b) Property of any value, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, taken from the person of another;

(c) A search and rescue dog, as defined in RCW 9.91.175, while the search and rescue dog is on duty; or

(d) Commercial metal property, nonferrous metal property, or private metal property, as those terms are defined in RCW 19.290.010, and the costs of the damage to the owner's property exceed five thousand dollars in value.

(2) Theft in the first degree is a class B felony.

RCW 9A.56.030.

(1) A person is guilty of theft in the second degree if he or she commits theft of:

(a) Property or services which exceed(s) seven hundred fifty dollars in value but does not exceed five thousand dollars in value, other than a firearm as defined in RCW 9.41.010 or a motor vehicle;

(b) A public record, writing, or instrument kept, filed, or deposited according to law with or in the keeping of any public office or public servant;

of a motor vehicle, to the contrary, is a class B felony even if the value of the motor vehicle is less than $5,000. Thus, the legislature plainly believes that the theft of a motor vehicle causes damage to the victim and society of a type more concerning than is true of the typical theft of a chattel.

Finding no definitive answer to the multiple punishment inquiry at step one of the Freeman analysis, we now move to step two: the Blockburger "same evidence" or "same elements" test. Freeman, 153 Wn.2d at 772. "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.

To prove the crime of theft of a motor vehicle, the State was required to prove that a theft occurred and that the object of the theft was a motor vehicle. That the property taken is a motor vehicle is not an element of robbery in the first degree. To prove robbery in the first degree, the State was required to prove that the defendant displayed a deadly weapon, used force or threatened to use force in order to take the property, and that the taking was from the victim or in his presence. None of these are elements of theft of a motor vehicle. The offenses

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> (c) Commercial metal property, nonferrous metal property, or private metal property, as those terms are defined in RCW 19.290.010, and the costs of the damage to the owner's property exceed seven hundred fifty dollars but does not exceed five thousand dollars in value; or
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> (d) An access device.
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> (2) Theft in the second degree is a class C felony.

RCW 9A.56.040.

> (1) A person is guilty of theft in the third degree if he or she commits theft of property or services which (a) does not exceed seven hundred fifty dollars in value, or (b) includes ten or more merchandise pallets, or ten or more beverage crates, or a combination of ten or more merchandise pallets and beverage crates.
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> (2) Theft in the third degree is a gross misdemeanor.

RCW 9A.56.050.

fail the Blockburger test. A prohibition on multiple punishments is not indicated.

A refinement of this analytical step advises us that we are not to "consider the elements of the crime on an abstract level" but, rather, "'[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 offenses or only one, is whether each provision *requires proof of a fact* which the other does not.'" Freeman, 153 Wn.2d at 772 (first alteration in original) (internal quotation marks omitted) (quoting Orange, 152 Wn.2d at 817). The parties dispute the meaning of this passage as applied to the facts of this case.

On the one hand, Yemru asserts that both offenses required proof of the same fact: that Yemru stole a motor vehicle from Nordstrom. On the other hand, the State asserts that this is really proof of two facts: that Yemru stole an item (required for robbery in the first degree) and that the item stolen was a motor vehicle (not required for robbery in the first degree).

The State's argument is consistent with the legislature's intent to view and treat theft of a motor vehicle differently than the theft of a different chattel of the same value. The legislature requires proof of a theft of an item to establish robbery or a generic theft. It does not *require* that the item be a motor vehicle. But proof of theft of a motor vehicle is *required* to establish that crime. We believe the State's analysis to be the correct one.[4] Thus, the analysis at this step does not demonstrate an intent to prohibit multiple punishments.

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[4] This analysis also makes clear that we are not "readopting" the overruled Grady "same conduct" test in the guise of a Blockburger-Orange analysis.

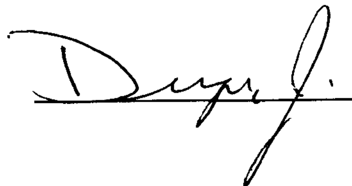
The next step of the Freeman analysis is to determine whether the merger doctrine applies.

> [T]he merger doctrine is a rule of statutory construction which only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime (e.g., first degree rape) the State must prove not only that a defendant committed that crime (e.g., rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (e.g., assault or kidnapping).

Vladovic, 99 Wn.2d at 420-21. Here, the robbery charge was elevated to robbery in the first degree by the acts establishing the assault in the second degree charge, which we have ordered to be vacated. The degree of robbery was not elevated by the theft of a motor vehicle charge. There is no merger of the robbery in the first degree conviction with the theft of a motor vehicle conviction.

After applying the analyses mandated by Freeman, we conclude that punishments for both robbery in the first degree and theft of a motor vehicle were lawfully imposed.

Affirmed in part, reversed in part and remanded.



We concur: