IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 64405-0-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	UNPUBLISHED OPINION
JIN WOO KIM,	)	
	)	
Appellant.	)	FILED: August 22, 2011
	)	

Leach, A.C.J. — Jin Woo Kim appeals his conviction and sentence for first degree robbery, second degree assault, and first degree kidnapping. He claims that under the merger doctrine his conviction for assault violates his right against double jeopardy. Kim also challenges the sufficiency of the evidence supporting his kidnapping conviction, claiming the kidnapping was "incidental" to the robbery. In the alternative, Kim challenges his offender score, arguing his convictions constitute the same criminal conduct. We disagree. Because the assault and robbery were committed with independent purposes and effects, the assault did not merge into the robbery. Because the kidnapping was not incidental to the robbery, sufficient evidence supports that conviction. Finally, Kim waived his right to challenge his offender score by agreeing to it at the sentencing hearing. We therefore affirm.

FACTS

On May 30, 2008, Sung Na met Kim at Cellular Town to pay off a gambling debt and to buy $20 worth of marijuana. Kim took Na into a back room where Na repaid Kim, purchased the marijuana, and left the store.

While Na was driving home, Kim called and asked him to return to the store to talk about another matter. Na agreed, and when he returned to Cellular Town, Kim again took Na into the back room. Eric Park, a friend of Kim's, was there when Na arrived. Kim asked Park to wait outside.

Kim then angrily accused Na "of taking something from his book bag or stealing money from him or drugs or something." When Na denied Kim's accusations, Kim grew more agitated. Kim pulled a handgun out from behind his back, loaded a round in the chamber, pointed the gun at Na's face, and started yelling, "Do you want to die?" Kim tapped the gun against Na's forehead and told Na, "You got a choice to make. Give me your car. You got to repay me somehow. Give me your car. Empty your bank account. If you don't, I will kill you."

Kim held the gun to Na's face until Na said, "Okay, just take the car, empty out my bank account, whatever you want." Kim stated that they would go to the Bank of America to use the automatic teller machine (ATM). Kim warned Na, "I have the gun. I will sit right behind you, so if you try to do anything, I will shoot you."

Kim then directed Na outside, concealed his gun, and ordered both Na

and Park into Na's car. Na drove while Park sat in the front passenger seat and Kim sat in the back seat. Kim instructed Na to drive to an ATM machine three blocks away. At the bank, Kim demanded that Na withdraw money from his account. Na tried, but because he had withdrawn the maximum daily amount earlier that day, he was unable to access any money. Na returned, explained the situation, and showed Kim the receipt. Kim responded that he would get the money the next day.

Kim then ordered Na to drive to Na's apartment. At the apartment, Kim and Na went inside while Park waited outside. Once inside, Kim began rifling through Na's personal effects and collecting personal documents, including Na's car title. Although Kim still carried the gun in his hand, he did not point it at Na while in the apartment. Kim demanded that Na hand over the keys to the car and warned him, "If you try to call the police, I will come after you. I know where your parents live and where you live. I know your bank account number." Kim then left in Na's car. The entire incident lasted more than three hours.

Na called the police the following day. Na gave them a description of his car and described the location of where he thought Kim lived. After the police retrieved Na's car, Kim began sending threatening text messages to Na. Alarmed, Na called the police a second time.

On July 30, a special weapons and tactics team along with robbery detectives executed a warrant for Kim's arrest, took him into custody, and searched his store and apartment. A safe in Kim's apartment contained two

loaded assault rifles, two handguns, including a Ruger semiautomatic handgun, and magazines loaded with hollow-point bullets.

The State charged and a jury convicted Kim of second degree assault, first degree kidnapping, and first degree robbery. His sentence included a firearm sentencing enhancement for each offense. Kim received a low-end standard-range sentence for a total of 228 months of imprisonment.

Kim appeals.

ANALYSIS

Kim argues that double jeopardy principles preclude his conviction for second degree assault. Specifically, Kim claims that because the second degree assault elevated the robbery to first degree, the doctrine of merger requires vacation of the assault conviction. We review double jeopardy challenges, which may be raised for the first time on appeal, de novo.[1]

The state and federal constitutions protect against multiple punishments for the same offense. The Fifth Amendment to the United States Constitution provides that no "person [shall] be subject for the same offense to be twice put in jeopardy of life or limb." Similarly, article I, section 9 of the Washington Constitution ensures that "[n]o person shall be . . . twice put in jeopardy for the same offense." Beyond those constraints, the legislature may prescribe multiple punishments for a single course of conduct under separate criminal statutes.[2] If

[1] RAP 2.5(a)(3); State v. Kier, 164 Wn.2d 798, 803-04, 194 P.3d 212 (2008); State v. Zumwalt, 119 Wn. App. 126, 129, 82 P.3d 672 (2003), aff'd, State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005).

the legislature authorized multiple punishments for multiple crimes, double jeopardy is not offended.[3] "'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.'"[4]

Our Supreme Court has adopted a three-part test for determining whether the legislature intended multiple punishments in a particular situation.[5] First, we consider any express or implicit legislative intent based upon the criminal statutes involved.[6] If this intent is unclear, we use the "same evidence" test to assess whether the two offenses are the same in law and fact.[7] Where the degree of one offense is elevated by conduct constituting a separate offense, a third test, the merger doctrine, may help determine legislative intent.[8] Under the merger doctrine, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime.[9] But, even if two convictions appear to merge on an abstract level under this test, they may be punished separately if an independent purpose or effect to each exists.[10] Because both

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[2] State v. Esparza, 135 Wn. App. 54, 59, 143 P.3d 612 (2006) (citing State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995)).
[3] Freeman, 153 Wn.2d at 771.
[4] Kier, 164 Wn.2d at 803-04 (quoting Freeman, 153 Wn.2d at 771).
[5] See Freeman, 153 Wn.2d at 771-73.
[6] Freeman, 153 Wn.2d at 771-72.
[7] Freeman, 153 Wn.2d at 772.
[8] Kier, 164 Wn.2d at 805.
[9] Freeman, 153 Wn.2d at 772-73.
[10] Kier, 164 Wn.2d at 804.

parties base their respective arguments on merger, we do not address the other parts of the test.

In State v. Zumwalt, a consolidated case decided under State v. Freeman,[11] our Supreme Court stated that generally first degree robbery and second degree assault will merge, unless the two offenses have an independent purpose or effect. But the court declined to adopt a per se rule and held that the question of whether a second degree assault merges with a first degree robbery must be decided case by case,[12] focusing on whether the facts of an individual case demonstrate an independent purpose or effect for the assault.[13]

Relying on Zumwalt, Kim asserts his assault and robbery convictions merge because the State based both the second degree assault with a deadly weapon and the first degree robbery charges on the same factual scenario. Kim also argues the State failed to prove an independent purpose or effect for each offense because the jury instructions did not require it to find the specific act by which Kim assaulted Nah. Because Zumwalt is factually distinguishable, we disagree with Kim.

In Zumwalt, the State charged the defendant with first degree robbery and second degree assault after he punched the victim in the face and robbed her.[14] The State charged the first degree robbery under the infliction of bodily injury

[11] 153 Wn.2d 765, 780, 108 P.3d 753 (2005).
[12] Freeman, 153 Wn.2d at 774.
[13] Freeman, 153 Wn.2d at 779.
[14] Freeman, 153 Wn.2d at 770.

prong, RCW 9A.56.200(1)(a)(iii).[15] This charge required proof of the elements of robbery plus the infliction of bodily injury constituting an assault.[16] The State charged the second degree assault under the reckless infliction of bodily harm prong, RCW 9A.36.021(1)(a).[17] The only facts that elevated the robbery to first degree also established the separate assault charge.[18] Because commission of the assault had no separate purpose or effect, our Supreme Court concluded that the two convictions merged for double jeopardy purposes.[19]

Unlike Zumwalt, here the conduct underlying the assault was separate and distinct from the conduct that elevated the robbery to first degree robbery. The amended information charged Kim with first degree robbery under RCW 9A.56.200(1)(a)(i) and 9A.56.190 for allegedly taking Na's vehicle without Na's permission while armed with a deadly weapon and displaying what appeared to be a firearm.[20] The "to convict" instruction for first degree robbery required proof beyond a reasonable doubt that Kim unlawfully and intentionally took Na's personal property against Na's will by the use or threatened use of immediate

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[15] Zumwalt, 119 Wn. App. at 131. RCW 9A.56.200(1)(a)(iii) states, "A person is guilty of robbery in the first degree if . . . [i]n the commission of a robbery . . . he or she . . . [i]nflicts bodily injury."

[16] Zumwalt, 119 Wn. App. at 131.

[17] Zumwalt, 119 Wn. App. at 131. RCW 9A.36.021(1)(a) provides, "A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree . . . [i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm."

[18] Zumwalt, 119 Wn. App. at 132.

[19] Freeman, 153 Wn.2d at 778.

[20] A person is guilty of robbery in the first degree under RCW 9A.56.200(1)(a)(i) when "[i]n the commission of a robbery . . . he or she . . . [i]s armed with a deadly weapon."

force, violence, or fear of injury to Na while armed with a deadly weapon or by displaying what appeared to be a firearm or other deadly weapon.

The amended information charged Kim with second degree assault under RCW 9A.36.021(1)(c) for allegedly assaulting Na with a Ruger semiautomatic handgun.[21] The "to convict" instruction for second degree assault required proof beyond a reasonable doubt that Kim assaulted Na with a deadly weapon. A separate instruction provided the jury with the three common law definitions of assault. The one relevant here defined assault as putting another in apprehension or fear of bodily harm, regardless of whether the actor intends to inflict or is incapable of inflicting such harm.[22] Assault in the second degree also requires specific intent to create a reasonable apprehension that bodily harm is imminent.[23] Evidence of intent must include some physical action that goes beyond mere threats.[24] A jury may infer specific intent from the defendant pointing a gun at the victim but not from merely displaying a firearm.[25]

At trial, Na testified that when he was with Kim at Cellular Town, Kim

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[21] A person is guilty of assault in the second degree under RCW 9A.36.021(1)(c) "if . . . under circumstances not amounting to assault in the first degree . . . [he] [a]ssaults another with a deadly weapon."

[22] State v. Walden, 67 Wn. App. 891, 893-94, 841 P.2d 81 (1992).

[23] State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995).

[24] State v. Murphy, 7 Wn. App. 505, 511-12, 500 P.2d 1276 (1972).

[25] State v. Eastmond, 129 Wn.2d 497, 500, 919 P.2d 577 (1996) ("A jury may infer specific intent to create fear from the defendant's pointing a gun at the victim, unless the victim knew the weapon was unloaded, but not from mere display." (citing State v. Miller, 71 Wn.2d 143, 146, 426 P.2d 986 (1967))), overruled on other grounds by State v. Brown, 147 Wn.2d 330, 340, 58 P.3d 889 (2002).

demanded that Na return stolen items to him. After Na denied the accusations, Kim brandished a loaded weapon, pointed it at Na's face, and began threatening him. The purpose of this assault was to scare Na into handing over some of Kim's property that Kim believed Na had in his possession. Only after it became apparent that Na could not return Kim's property did Kim decide to rob Na. Kim then directed Na to his car and ordered him to drive to an ATM, and after an attempted robbery at the ATM failed, to Na's apartment where Kim completed a robbery. According to Na's testimony, however, Kim never pointed the gun at Na while they were in Na's apartment. Thus, as proved, the only robbery that occurred in this case took place at Na's apartment. And because merely displaying a weapon is legally insufficient to prove second degree assault, the only assault occurred at a separate time, in a separate place, and with a different purpose than the robbery.

These facts differ significantly from those in Zumwalt, where the assault and robbery resulted from a single course of conduct. Consequently, we have serious doubts about whether Kim's convictions for robbery and assault merge at an abstract level under the first part of the Zumwalt analysis. But even if the two convictions merge on an abstract level, we conclude that, unlike Zumwalt, the evidence presented at trial establishes an independent purpose or effect for each offense. Because merger does not occur under this circumstance, we hold that Kim's assault and robbery convictions do not offend double jeopardy.

Kim disagrees for two reasons. First, he contends that this case is similar

to State v. Kier[26] and State v. DeRyke.[27] In those cases, the court applied the rule of lenity in the context of merger because the "to convict" instructions permitted the jury to convict the defendant of both the charged offense that elevated another crime to a higher degree and the elevated offense based upon the same conduct.[28] In other words, the jury was not instructed that it must rely upon a separate act for each offense. According to Kim, the jury instructions in this case suffer from the same deficiency because they did not require the jury to specify the factual basis for a guilty verdict on each count. This argument fails. Because DeRyke is silent about the merger exception, it provides no guidance on this issue. And in Kier, decided after DeRyke, the court followed the same two-part analysis described in Freeman: it determined whether the two convictions merged before assessing whether the exception to merger permitted both convictions to stand.[29] Moreover, the court in Kier expressly refused to "rule out the possibility that, in the course of a robbery, a separate assault on a victim may occur."[30] Given our conclusion that Kim committed an assault independent of the robbery, Kier and DeRyke do not support Kim's position.

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[26] 164 Wn.2d 798, 194 P.3d 212 (2008).

[27] 110 Wn. App. 815, 41 P.3d 1225 (2002), aff'd 149 Wn.2d 906, 73 P.3d 1000 (2003).

[28] Kier, 164 Wn.2d at 812-14 (applying merger under rule of lenity where jury instructions permitted jury to conclude that a second degree assault elevated robbery to first degree); DeRyke, 110 Wn. App. at 824 (applying merger under rule of lenity where jury instructions permitted jury to conclude that a kidnapping elevated attempted rape to first degree).

[29] Kier, 164 Wn.2d at 812-14.

[30] Kier, 164 Wn.2d at 814.

Second, Kim argues that the charging documents indicate that the State based both convictions on the same factual scenario because the information alleged that the robbery and assault were "part of a common scheme or plan" and were "so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other." But the State is not required to prove nonessential facts contained in an information unless they are also included in the jury instructions.[31] Because the jury instructions do not include language referring to a common scheme or plan or otherwise contain allegations that the crimes are so closely linked that it is difficult to separate proof of one from another, Kim's argument fails.

For the first time in his reply brief, Kim relies on Freeman to argue that applying the independent purpose or effects exception to merger wrongly equates the "as charged and proved" standard into a sufficiency of the evidence standard. According to Kim, the question is not whether the State presented sufficient evidence to prove each crime but whether the State actually proved that a separate crime occurred. Kim also argues for the first time in his reply brief that second degree assault merges with first degree kidnapping. Because we do not ordinarily consider arguments raised for the first time in a reply brief, we do not consider them here.[32]

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[31] Kier, 164 Wn.2d at 808.

[32] See State v. White, 123 Wn. App. 106, 114 n.1, 97 P.3d 34 (2004) (citing Cowiche Canyon Conservancy v. Bosely, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)). Kim cites State v. McNeal, 142 Wn. App. 777, 789 n.19, 175 P.3d 1139 (2008), where the court considered an argument raised for the first time in

Next, Kim claims the court erred when it convicted Kim for first degree kidnapping because any kidnapping was merely incidental to the robbery. He maintains that because the kidnapping was done solely to facilitate the robbery, it was not an independent crime and insufficient evidence exists to sustain the kidnapping conviction.

Preliminarily, it is unclear whether Kim is making a merger argument or whether he is challenging the sufficiency of the State's evidence. Nevertheless, he primarily relies on State v. Korum[33] for support. In that case, Division Two reversed kidnapping convictions in connection with a series of home invasion robberies where the defendants restrained the victims with duct tape and searched their homes for drugs, money, and other valuables.[34] The court held "as a matter of law that the kidnappings . . . were incidental to the robberies" in part because the forcible restraint of the victims was inherent to the armed robberies, the restraint was contemporaneous with the robberies, and the victims were not transported during or after the invasion to a spot where they were not likely to be found.[35]

But in State v. Louis,[36] our Supreme Court held that convictions for first

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a reply because the defendant's opening brief was filed before the legislature adopted certain amendments affecting the outcome of that case. Because Kim cites to no intervening legislative action impacting this case, McNeal is inapposite.

[33] 120 Wn App. 686, 86 P.3d 166 (2004), aff'd in part, rev'd in part, 157 Wn.2d 614, 141 P.3d 13 (2006).

[34] Korum, 120 Wn. App. at 689-92.

[35] Korum, 120 Wn. App. at 707.

[36] 155 Wn.2d 563, 570-71, 120 P.3d 936 (2005).

degree robbery and first degree kidnapping do not merge or otherwise violate double jeopardy, even if the kidnapping is incidental to the robbery. In Louis, the defendant, while robbing a jewelry store at gunpoint, forced the owners into the bathroom and covered their eyes and mouths and bound their hands and feet with duct tape.[37] The jury convicted the defendant of one count of first degree robbery and one count of first degree kidnapping for each victim.[38]

On appeal, the defendant argued that his convictions merged because the kidnappings were simultaneous and incidental to the robbery.[39] The court rejected that argument, reasoning proof of kidnapping is not necessary to prove robbery, and first degree kidnapping requires only the intent to commit a robbery, not the completion of one.[40] Because Louis controls, Kim's challenge fails so long as the State produced sufficient evidence to support the kidnapping conviction.

When reviewing a sufficiency challenge, we view the evidence in the light most favorable to the prosecution and ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[41] Here, the State presented ample evidence for a rational fact finder to find the elements of kidnapping.

As charged and proved, the jury had to find that Kim intentionally

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[37] Louis, 155 Wn.2d at 566-67.
[38] Louis, 155 Wn.2d at 567.
[39] Louis, 155 Wn.2d at 570.
[40] Louis, 155 Wn.2d at 571.
[41] State v. Lord, 117 Wn.2d 829, 881, 822 P.2d 177 (1991).

abducted Na with the intent to facilitate the commission of a robbery. RCW 9A.40.010(2) defines the word "abduct" as restraining another person by (a) secreting or holding that person in a place where he is not likely to be found or (b) using or threatening to use deadly force. RCW 9A.40.010(1) defines "restraint" as restricting another's movement without his consent and legal authority in a manner that interferes substantially with his liberty.

Here, Kim brandished a firearm and, over the course of three hours, forced Na, under the threat of death, to drive to two separate locations, the bank and then Na's apartment. At the bank, Kim ordered Na to withdraw money from his account. When that failed, Kim ordered Na to drive to the apartment, where he eventually completed a robbery. Clearly, under these facts, Kim restrained Na under the threat of deadly force even before he directed Na to the apartment.

As an alternative basis for relief, Kim argues he is entitled to resentencing because the trial court incorrectly calculated his offender score by failing to treat his robbery, kidnapping, and assault charges as the same criminal conduct under RCW 9.94A.525(5)(A). Again, we disagree. Kim is barred from raising a same criminal conduct claim for the first time on appeal because he failed to raise it at the trial level and he affirmatively assented to his offender score.[42]

[42] See In re Pers. Restraint of Shale, 160 Wn.2d 489, 495-96, 158 P.3d 588 (2007) (defendant waived challenge by agreeing to the offender score as part of his plea bargain without challenging the score computation); State v. Nitsch, 100 Wn. App. 512, 520-22, 997 P.2d 1000 (2000) (determining that where the defendant failed to identify a factual dispute for the court's resolution and failed to request an exercise of the courts discretion, he waived the challenge to the offender score).

In response, Kim asserts that he did not waive the right to raise this issue on appeal because his counsel was ineffective for failing to object below. But Kim cites only unpublished opinions in support of his argument. He also fails to explain how the alleged missteps resulted in ineffective assistance of counsel. Not only is it improper to rely on unpublished opinions,[43] but this court generally does not consider arguments unsupported by authority or ones that are insufficiently argued by the parties.[44] Therefore, we need not address Kim's ineffective assistance claim.[45]

Finally, Kim asserts the trial court erred by denying his motion for a new trial. Kim argues a new trial is warranted because the prosecutor questioned a detective about statements Kim made that had been suppressed at a pretrial hearing. In support of this argument, Kim claims defense counsel immediately objected to the prosecutor's line of questioning, noting the impropriety of

[43] GR 14.1(a); Skamania County v. Woodall, 104 Wn. App. 525, 536 n.11, 16 P.3d 701 (2001).

[44] Cowiche Canyon Conservancy, 118 Wn.2d at 809 (appellate court will not consider arguments not supported by authority or citations to the record); State v. Elliott, 114 Wn.2d 6, 15, 785 P.2d 440 (1990) (appellate court need not consider claims that are insufficiently argued).

[45] Even if we reached the merits of Kim's sentencing challenge, it would fail because he cannot show that his counsel's performance fell below an objective standard of reasonableness. Crimes constitute the "same criminal conduct" when they share the same objective criminal intent, are committed at the same time and in the same place, and involve the same victim. State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). If any one element is missing, multiple offenses do not constitute the same criminal conduct and each conviction must be counted separately in calculating an offender score. Lessley, 118 Wn.2d at 778. The only element satisfied in this case is the same victim requirement. Therefore, no error occurred, and absent error, Kim cannot establish ineffective assistance of counsel. See State v. Stenson, 132 Wn.2d 668, 705-706, 940 P.2d 1239 (1997).

referencing suppressed evidence. However, Kim fails to cite to the record in this section of his brief. Because we need not consider argument unsupported by citations to the record,[46] Kim's argument fails.

For the foregoing reasons, we affirm Kim's conviction and sentence.

Leach, A.C.J.

WE CONCUR:

Spearman, J.

Grau, J.

[46] Cowiche Canyon Conservancy, 118 Wn.2d at 809.