

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint)	No. 82619-6
Petition of)	
)	En Banc
SHAWN DOMINIQUE FRANCIS,)	
)	Filed November 18, 2010
Petitioner.)	
_____)	

SANDERS, J.—We are asked to decide whether double jeopardy protection is violated where Shawn Francis pleaded guilty to felony murder of Jason Lucas, first degree attempted robbery of D’Ann Jacobsen, and the second degree assault of D’Ann Jacobsen, all arising from the same string of conduct. Because the State expressly relied on the second degree assault conduct to elevate the attempted robbery to the first degree when it charged the crimes, convictions on both charges violate double jeopardy protections. We vacate the lesser second degree assault charge and remand for resentencing consistent with our holding here.

FACTS

Shawn Francis, accompanied by Quinn Spaulding, attacked Jason Lucas

and D'Ann Jacobsen with a baseball bat in order to steal \$2,000 Lucas and Jacobsen had received from Jacobsen's parents. Francis failed to take any money because he fled when another person approached. Lucas died of his injuries.

Francis pleaded guilty to first degree felony murder of Lucas, second degree assault of Jacobson, and attempted first degree robbery of Jacobsen. The trial court sentenced him to 347 months' imprisonment on the felony murder charge, 14 months on the assault, and 40.5 months on the robbery, all sentences to run concurrently.

Francis filed a personal restraint petition in the Court of Appeals. The Court of Appeals dismissed, asserting double jeopardy violations are waived upon a guilty plea. We granted discretionary review. *In re Pers. Restraint of Francis*, 166 Wn.2d 1015, 213 P.3d 930 (2009).

ANALYSIS

- I. Did Francis waive a double jeopardy challenge when he pleaded guilty?

The State argues Francis waived any double jeopardy challenge when he pleaded guilty to all three offenses. However, the mere act of pleading guilty does not waive a double jeopardy challenge.¹ A guilty plea, by its nature, admits factual guilt—and thus waives any challenge on that ground. *State v. Knight*, 162

¹ The double jeopardy protections under the United States Constitution and the Washington State Constitution provide the same protections. *In re Pers. Restraint of Davis*, 142 Wn.2d 165, 171, 12 P.3d 603 (2000).

Wn.2d 806, 811, 174 P.3d 1167 (2008). However, a guilty plea does not waive a challenge to “the very power of the State to bring the defendant into court to answer the charge brought against him,” *id.* (quoting *Blackledge v. Perry*, 417 U.S. 21, 30, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974)), nor does it waive a challenge when the court enters multiple convictions or sentences for the same offense, *State v. Hughes*, 166 Wn.2d 675, 681 n.5, 212 P.3d 558 (2009). Here, Francis challenges the latter—the court’s ability to enter convictions and sentence him for duplicative charges.² He did not waive that challenge by pleading guilty.

II. Did Francis’ convictions violate double jeopardy?

“The proper interpretation and application of the double jeopardy clause is a question of law which we review de novo.” *Knight*, 162 Wn.2d at 810 (citing *State v. Womac*, 160 Wn.2d 643, 649, 160 P.3d 40 (2007)).

² A conflict in the Court of Appeals arose on this waiver issue because Division Two in *State v. Amos*, 147 Wn. App. 217, 226-27, 195 P.3d 564 (2008), misread our decision in *Knight* (determining a guilty plea did not automatically waive a double jeopardy challenge) to concern only “unit of prosecution” violations (where the State charges a defendant twice for the same offense—e.g., two counts of robbery for the same single robbery) and not “same offense” violations (where the State is not precluded from *charging* both offenses—e.g., a felony murder *and* the underlying robbery—even though double jeopardy would require merger of the claims upon conviction). We have since clarified that a guilty plea does not automatically waive a double jeopardy challenge for a “unit of prosecution” violation or a “same offense” violation. *Hughes*, 166 Wn.2d at 681 n.5. Division Two has already abandoned the *Amos* holding, *see State v. Ramos*, noted at 154 Wn. App. 1048, 2010 WL 705258, at *2, and Division One refused to follow it, *State v. Martin*, 149 Wn. App. 689, 691 n.1, 205 P.3d 931 (2009).

- a. Did the court violate double jeopardy here when it entered convictions for both attempted first degree robbery and second degree assault?

A court entering multiple convictions for the same offense violates double jeopardy. *State v. Freeman*, 153 Wn.2d 765, 770-71, 108 P.3d 753 (2005).

Because the legislature has the power to define offenses, whether two offenses are separate offenses hinges upon whether the legislature intended them to be separate. *See id.* at 771-72.

To determine whether the legislature intended two separate offenses, we first consider any express or implicit representations of legislative intent. *Id.* But here that is a dead end; the relevant statutes provide no express or implicit representations. *See* RCW 9A.28.020; RCW 9A.36.021; RCW 9A.56.190, .200.

So we move to the remaining considerations: (a) the *Blockburger*³ test, (b) the merger doctrine, and (c) whether there was an independent purpose or effect for each offense. *Freeman*, 153 Wn.2d at 772-73. These considerations inform but do not compel our outcome; the underlying inquiry is still whether the legislature intended the offenses to be the same. *Id.* at 771-72. We make this determination on a case by case basis. *Id.* at 780.

But first we must consider the nature of the charged offenses. We view the offenses *as they were charged*. *Id.* at 772; accord *In re Pers. Restraint of*

³ *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

Orange, 152 Wn.2d 795, 817, 100 P.3d 291 (2004). We do not consider the elements of the offenses in the abstract; that is, we do not consider all the ways in which the State could have charged an element of an offense, but rather we consider how the State actually charged the offense.

Here, Francis' second degree assault conduct was also charged as an element of the first degree robbery charge. The first degree attempted robbery was charged as: "perform[ing] an act which was a substantial step toward the taking of personal property with intent to steal from the person or in the presence of D'Ann Jacobsen, against such person's will by use or threatened use of immediate force, violence, or fear of injury to D'Ann Jacobsen, and in the commission thereof, or in immediate flight therefrom *Shawn Dominique Francis inflicted bodily injury upon D'Ann Jacobsen . . .*" *In re Pers. Restraint of Shawn Francis* (Pers. Restraint Pet. (PRP), Ex. D at 2-3 (Wash. Ct. App., No. 37489-7)) (emphasis added). The State charged the second degree assault as "unlawfully and feloniously assault[ing] D'Ann Jacobsen with a deadly weapon, to-wit: a baseball bat . . ." PRP, Ex. D at 2. The State expressly used the second degree assault conduct to elevate Francis' attempted robbery charge to the first degree.

Based upon these facts, the merger doctrine is the most compelling consideration to determine legislative intent.⁴ Francis caused Jacobsen bodily

injury. The State charged that conduct as the second degree assault. The State also used that conduct to elevate Francis' attempted robbery to the first degree.

“Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime.” *Freeman*, 153 Wn.2d at 772-73. We thus presume here that the legislature intended to punish Francis' second degree assault through a greater sentence for the attempted first degree robbery.

This conclusion is further supported by the final *Freeman* consideration, whether the offenses Francis committed had an independent purpose or effect. *Id.* “[O]ffenses may in fact be separate when there is a separate injury to the ‘the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element.’” *Id.* at 778-79 (quoting *State v. Frohs*, 83 Wn. App. 803, 807, 924 P.2d 384 (1996)). Here,

⁴ The *Blockburger* test weighs in favor of the attempted first degree robbery and the second degree assault constituting two separate offenses. Under the *Blockburger* test, offenses are not the same if *each* offense requires proof of a fact the other does not. *Freeman*, 153 Wn.2d at 772 (citing *Blockburger*, 284 U.S. at 304); *In re Orange*, 152 Wn.2d at 817. Here, the offenses *as charged* are not the same because each has an element the other does not: the attempted first degree robbery requires an intent to take property while the second degree assault here requires use of a deadly weapon. However, this outcome creates a rebuttable presumption that the offenses are not the same. We recognized in *Freeman* the merger doctrine can rebut this presumption, 153 Wn.2d at 772, and it does here.

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the sole purpose of the second degree assault was to facilitate the attempted robbery. The assault was not “separate and distinct” from the attempted robbery; it was incidental to it. *Id.*

Because, *as charged*, Francis’ conviction for second degree assault merges into his conviction for attempted first degree robbery, the trial court violated double jeopardy when it entered convictions on both offenses. We thus vacate the conviction on the lesser offense – the second degree assault.

The State makes several arguments to circumvent this conclusion by encouraging the court to look to how the State *could* have charged Francis. However, our inquiry under double jeopardy limits us to how the State *actually* charged him.

The State argues, because Francis is charged with *attempted* first degree robbery, it need not prove that he *actually* caused bodily injury – i.e., the assault conduct, but only that he *intended* and *took a substantial step* to cause bodily injury. The State asserts attempted first degree robbery was completed prior to the second degree assault conduct when Francis lay in wait for the victims.

The State’s argument is inspired by *State v. Beals*, 100 Wn. App. 189, 194, 997 P.2d 941 (2000) (“The attempted robbery was complete as soon as Beals formed the requisite intent [for attempted first degree robbery] and took the

hammer in hand, and is distinguishable from Beals' act of hitting Perry on the head to complete the assault."'), but *Beals* is inapposite. The issue in *Beals* was whether there was a *substantial step* to support the attempted first degree robbery other than the assault conduct. *Id.* at 193-95. Here, regardless of the substantial step, the assault conduct is necessary to raise the attempted robbery to the first degree. The State charged Francis with attempted *first degree* robbery pursuant to RCW 9A.56.200(1)(a)(iii) because he *actually* inflicted bodily injury on Jacobsen. The assault conduct is the sole basis charged for raising the attempted robbery to the first degree; the apparent legislative intent is to punish both crimes with a greater sentence for the greater offense. *Freeman*, 153 Wn.2d at 772-73.⁵

Permitting the State to rewrite on appeal how it charged the offenses would result in Francis' being convicted for a crime to which he did not plead guilty. An attempted robbery where a defendant actually resorted to violence as

⁵ The State cites another Court of Appeals case dealing with the substantial step of attempted first degree robbery, *State v. Esparza*, 135 Wn. App. 54, 61-64, 143 P.3d 612 (2007). *Esparza* held that when the State charges a defendant with an attempt crime *but does not specify what the substantial step is*, for double jeopardy analysis, the court need not assume the assault conduct is the substantial step when other conduct would also satisfy that requirement. *Id.* at 61-64. But here the State charged Francis with *specific* conduct – inflicting bodily injury on Jacobsen – to satisfy the statutory element to raise the attempted robbery to the first degree. *See* RCW 9A.56.200(1)(a)(iii). The second degree assault conduct is inseparable from the attempted first degree robbery *as it was charged*. The convictions are thus the same for the purposes of double jeopardy and must merge. *See Freeman*, 153 Wn.2d at 772-73.

the robbery progressed is a different set of facts than an attempted robbery where the defendant, upon taking a substantial step such as lying in wait, already intended to cause bodily harm. Francis was given notice of and pleaded guilty to attempted robbery under the first set of facts. The second set, which the State encourages the court to view as interchangeable, was never charged nor does it appear Francis was guilty of those facts based upon his explanation of the crime.

The State also argues the second degree assault conduct need not be part of the attempted first degree robbery charge because Francis was armed with and/or displayed a deadly weapon (a baseball bat) in his attempt, and thus his attempted robbery is alternatively elevated to the first degree pursuant to RCW 9A.56.200(1)(a)(i) and (ii). But again, the State didn't *charge* Francis with attempted first degree robbery based upon those alternative grounds, but rather based upon the infliction of bodily injury, RCW 9A.56.200(1)(a)(iii). The State has great latitude and discretion when it chooses what it will charge a defendant. But once the State has charged the defendant, short of a timely amendment, the State is stuck with what it chose. The charging document provides the defendant notice of the accusations as charged, and the State is obliged to prove them as charged. This court is not privy to what strategic or evidentiary advantages the State may have considered when it chose to charge Francis with attempted first degree robbery based upon inflicting bodily injury on Jacobsen. Nor would that

be relevant to the court's inquiry. All that matters on appeal is whether the attempted first degree robbery and second degree assault charges merge *as they were charged*. Because the attempted robbery charge is elevated to first degree by the assault conduct, the two convictions merge.

- b. Did the court violate double jeopardy when it entered convictions for both the attempted robbery of Jacobsen and the felony murder of Lucas?

If Francis had pleaded to the attempted robbery *of Lucas* and felony murder *of Lucas*, double jeopardy would preclude conviction on the attempted robbery count. The killing “had no purpose or intent outside of accomplishing the robbery” and therefore the attempted robbery would merge into the felony murder. *State v. Williams*, 131 Wn. App. 488, 499, 128 P.3d 98 (2006) (addressing the merger of attempted robbery and felony murder of the same victim); *see also State v. Vladovic*, 99 Wn.2d 413, 421, 662 P.2d 853 (1983) (mirroring the above analysis in the context of kidnapping and robbery).

Here, however, Francis pleaded guilty to the felony murder *of Lucas* and attempted robbery *of Jacobsen* – two different victims. The State argues Francis intended to rob both Lucas and Jacobsen by taking property from each of their persons, so two separate crimes existed and there is no double jeopardy violation. Francis argues he intended only to steal one item of property jointly held by Lucas and Jacobsen – \$2,000 Jacobsen had received from her parents – and

under our holding in *State v. Tvedt*, 153 Wn.2d 705, 107 P.3d 728 (2005), only one count of robbery can be charged for any one piece of property.

In *Tvedt* we explained double jeopardy protects an individual from being convicted of more than one count of a crime for the same “unit of prosecution.” *Id.* at 710 (quoting *State v. Westling*, 145 Wn.2d 607, 610, 40 P.3d 669 (2002)).

The unit of prosecution is the essential conduct that makes up the core of the offense. The unit of prosecution for robbery has two components: a crime against property and a crime against a person. *Id.* at 711. One unit of prosecution for robbery exists for “each separate forcible taking of property from or from the presence of a person having an ownership, representative, or possessory interest in the property, against the person’s will.” *Id.* at 714-15. Thus, a single count of robbery results from taking one or more items from one person or taking one item in the presence of multiple people, even if each has an interest in that item. *Id.* at 720.

Francis argues the \$2,000 is one item of property and thus can constitute only one count of attempted robbery here. But a sum of money, even if that sum is owned by the same individual or entity, *can* constitute divisible property for the purpose of multiple robbery counts. In *State v. Rupe*, 101 Wn.2d 664, 693, 683 P.2d 571 (1984), a defendant took money from the tills of two individual cashiers. The defendant argued that the sum of money he took was collectively

the bank's money and thus constituted one item of property. *Id.* This court rejected that argument because each individual teller had money in her till that was in her possession and control and that the defendant took by force. *Id.* The money was divisible property taken by the defendant from separate individuals, resulting in multiple robberies. *Id.* Similarly, had Francis taken money *from the person* of both Lucas and Jacobsen, he would be guilty of two counts of robbery. *See Rupe*, 101 Wn.2d at 693. If he *intended* to do so, he is guilty of two counts of attempted robbery. Francis' argument that *Tvedt* precludes two robbery charges here fails.

Furthermore, two *attempted* robbery charges are permitted here *regardless* of whether the \$2,000 is considered one piece of property. Even if Lucas or Jacobsen held the entire, undivided \$2,000 and Francis was aware the entire sum was only on the person of one of them, he would still be guilty of two counts of *attempted* robbery. Attempted robbery requires that Francis intended to take property from an individual with the use or threatened use of force. *See RCW 9A.28.020(1); RCW 9A.56.190.* If Francis intended to take the \$2,000 and intended to take it from the person of Lucas or Jacobsen – whomever he discovered was carrying it – he would be guilty of two counts of attempted robbery, even though it would be factually impossible that *both* individuals had the \$2,000 on their person. Factual impossibility is no defense to an attempt

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crime, RCW 9A.28.020(2), and if Francis intended to take the \$2,000 by force from whomever had it, he satisfied the requirements for attempted robbery as to both Lucas and Jacobsen.

That scenario best fits the facts and charges provided in the plea statement and second amended information here. The purpose of the crime was to steal the \$2,000 Lucas and Jacobsen received from her parents – regardless of who carried it. PRP, Ex. A, ¶ 13; *see also* PRP at 27-28 (Francis characterizing the crime as “the attempted taking of money jointly controlled by Lucas and Jacobsen.”). Francis acknowledged he took “a substantial step toward robbing [Jacobsen] and [Lucas].” PRP, Ex. A, ¶ 13. Furthermore, Francis concedes he intended to rob Lucas and he pleaded guilty to the attempted robbery charge against Jacobsen: “[I] perform[ed] a substantial step toward the taking of personal property with intent to steal from the person of or in the presence of D’Ann Jacobsen, against D’Ann Jacobsens [sic] will by use of force, violence or fear and in the commission of the offense did inflict bodily injury on D’Ann Jacobsen.” PRP, Ex. A, ¶ 6. Also, Francis’ conduct was envisioned as two attempted robberies from the beginning; the prosecutor dropped the attempted robbery count *against Lucas* from the second amended complaint because it would have merged into the felony murder upon conviction. PRP, Ex. D, Prosecutor’s Statement re: Second Am. Information.

Francis' attempt on appeal to reframe his offenses as only an attempt to rob Lucas contradicts the most natural reading of the plea statement⁶ and impermissibly expands the record on appeal. A double jeopardy challenge does not permit a defendant to supplement the record. *See Knight*, 162 Wn.2d at 811 (citing *United States v. Broce*, 488 U.S. 563, 575-76, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989) (defendants were precluded from expanding the record to demonstrate their two convictions for conspiracy stemmed from a single conspiracy)). Francis' personal declaration, recharacterizing the crimes, has no bearing here. *See Pet'r's Reply Br.*, Ex. A.

Francis' attempt to recharacterize the facts also ignores a guilty plea admits not only the acts described in the information, but the plea's legal consequence. *See Broce*, 488 U.S. at 569. In *Broce* the indictments did not need to expressly state the two charged conspiracies were separate. *Id.* at 569-70. The separation was inferred when the defendants pleaded guilty to both charges. Doing so waived their right to later challenge that the conspiracies charged were factually one conspiracy. *Id.* Similarly, by pleading guilty both to the felony

⁶ The language of the charge and plea statement could be clearer. Francis, however, does not base his double jeopardy claim on misunderstanding the charge, but rather on whether the facts available can constitute more than one attempted robbery charge under *Tvedt*. The former argument was not made and is waived. *See Ward v. Painters' Local Union No. 300*, 45 Wn.2d 533, 541, 276 P.2d 576 (1954) (an argument not raised is waived). Even if it had been raised, misunderstanding the charges does not create a double jeopardy violation but would be a basis to withdraw one's guilty plea (discussed in section III *infra*).

murder of Lucas and the attempted robbery of Jacobsen, Francis pleaded guilty to the facts and legal consequence of the charges – that the attempted robbery of Jacobsen was a distinct offense. He waived his right to argue the robberies of Lucas and Jacobsen are *factually* the same by now recharacterizing the underlying facts. *See id.*

In sum, the charged attempted robbery against Jacobsen is legally independent from the felony murder of Lucas and does not violate double jeopardy. Both convictions stand.

III. Remedy

Because Francis' second degree assault conviction violates double jeopardy, we vacate it here and remand to the trial court for resentencing consistent with this holding.

Francis further moves to withdraw his guilty pleas to all three offenses, arguing he did not understand the nature of the offenses. *See* Pet'r's Reply Br., Ex. A (Decl. of Shawn Francis). A defendant has one year to file such a collateral attack. RCW 10.73.090(1). Judgment was entered on May 30, 1996, and Francis filed his personal restraint petition on February 27, 2008. Francis' motion to withdraw his guilty pleas is untimely and thus denied.

The State argues vacating Francis' second degree assault conviction is impermissible because he cannot challenge individual convictions of his

indivisible, multiconviction plea agreement, citing *In re the Personal Restraint Petition of Shale*, 160 Wn.2d 489, 492-94, 158 P.3d 588 (2007). But our

subsequent decision in *Knight*, 162 Wn.2d 806, sets forth the law for this issue.⁷

There we unanimously held a defendant could challenge one conviction of an indivisible, multiconviction plea agreement on double jeopardy grounds. *Id.* We reasoned the double jeopardy violation was the *entry* of multiple convictions for the same offense, not the guilty pleas themselves, and a defendant could challenge the court's entry of any convictions that violate double jeopardy. *See id.* The appropriate remedy for a double jeopardy violation is vacating the offending conviction. *Id.*

CONCLUSION

Because the State expressly used the second degree assault conduct to

⁷ The State's reliance on *Shale* is also misguided because there was no majority opinion in *Shale*; the portion of the lead opinion upon which the State relies has no precedential value. The four-justice lead opinion and four-justice concurrence agreed only in the result. The lead opinion in *Shale* rejected the double jeopardy challenge, holding the defendant could not make a piecemeal challenge of one count of an *indivisible*, multiconviction plea agreement. 160 Wn.2d at 492-94. The lead opinion did not consider whether the court's *entry* of the convictions violated double jeopardy, as we held in *Knight*, 162 Wn.2d at 812-13. The concurrence rejected the double jeopardy challenge because the defendant waived any double jeopardy violations when he "actively participated in the amendment of charges and in crafting the plea bargain" *Shale*, 160 Wn.2d at 502 (Madsen, J., concurring). When there is no majority opinion, the holding is the narrowest ground upon which a majority agreed. *See State v. Patton*, 167 Wn.2d 379, 391, 219 P.3d 651 (2009) (citing *Davidson v. Hensen*, 135 Wn.2d 112, 128, 954 P.2d 1327 (1998)). In *Shale*, the lead opinion and concurrence agreed only in the result: double jeopardy was not violated in *Shale*'s case.

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elevate the attempted robbery charge to first degree, conviction of both offenses violates double jeopardy. We vacate the conviction on the lesser offense – the second degree assault. Francis’ other double jeopardy challenge based upon his convictions for the felony murder of Lucas and attempted first degree robbery of Jacobsen fails and both convictions stand. We remand to the trial court for resentencing consistent with this holding.

AUTHOR:

Justice Richard B. Sanders

WE CONCUR:

Justice Susan Owens

Justice Charles W. Johnson

Justice Gerry L. Alexander

Justice James M. Johnson

Justice Tom Chambers
