NO. 42413-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

MIGUEL ANGEL VILLANUEVA-GONZALEZ, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-00544-5

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE

Maria Gobea and the defendant, Miguel Villanueva-Gonzales, were in a romantic relationship and have three children together. RP 151-52. On March 27, 2011, Maria went to a dance. RP 174, 176. The defendant didn't accompany Maria to the dance. RP 176. When she returned home she went into her children's bedroom to watch television with them and the babysitter, Itsel. RP 176-77. Only her five year-old child was awake. RP 177. At some point later the defendant came into the bedroom and angrily confronted her. RP 177-78. He told her "get out of there," upset because she had attended the dance without him. RP 178. He pulled her out of the room, causing her to hit her leg against some furniture. RP 179. He then head-butted her in the nose, causing it to fracture in two places. RP 179, 242. After head-butting her he grabbed her throat and strangled her. RP 193-94. She had trouble breathing, caused not only by the strangulation but the blood running down through her nose RP 194.

The State charged Villanueva-Gonzales with two counts of assault in the second degree. CP 22-23. Count I alleged the defendant committed

assault in the second degree by strangling Ms. Gobea, contrary to RCW 9A.36.021(g), and count II alleged the defendant committed assault in the second degree by assaulting Ms. Gobea and thereby recklessly inflicting substantial bodily harm. CP 22-23. The jury returned a verdict of guilty to the lesser included offense of assault in the fourth degree as to count I, and convicted the defendant as charged as to count II. CP 59, 61. This timely appeal followed. CP 90.

C. ARGUMENT

I. VILLANUEVA-GONZALES' RIGHT TO BE FREE OF DOUBLE JEOPARDY WAS NOT VIOLATED.

The defendant claims that his actions in assaulting Ms. Gobea by grabbing her throat and causing her difficulty in breathing was the same act or transaction as the head-butt he administered to her nose, causing it to fracture. The defendant is incorrect. These acts are separate. They are two units of prosecution, not one. That they occurred close in time to one another is irrelevant. The defendant's right to be free of double jeopardy was not violated.

1 Double jeopardy

The Fifth Amendment to the United States Constitution provides "no person shall...be subject for the same offense to be twice put in

jeopardy of life or limb..." Article 1, section 9 of the Washington State Constitution mirrors the federal constitution stating "[n]o person shall be...twice put in jeopardy for the same offense." "Washington's double jeopardy clause offers the same scope of protection as the federal double jeopardy clause."

State v. Womac, 160 Wn.2d 643, 650, 160 P.3d 40 (2007); citing *In re Pers. Restraint of Percer*, 150 Wn.2d 41, 49, 75 P.3d 488 (2003), citing *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). "Both prohibit...multiple punishments for the same offense imposed in the same proceeding." *Womac* at 651, citing *Percer* at 48-49, citing *State v. Bobic*, 140 Wn.2d 250, 260, 996 P.2d 610 (2000). Justice Sanders, writing the majority opinion in *Womac*, surmised "To permit such a practice allows the State multiple bites at the apple by labeling one crime by three different names and upholding any and all resulting convictions." *Womac* at 651. Double jeopardy questions are reviewed de novo. *State v. S.S.Y.* 150 Wn.App. 325, 329, 207 P.3d 1273 (2009), *affirmed* 170 Wn.2d 322, 241 P.3d 781 (2010); *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

Washington follows the same evidence rule adopted by the Supreme Court in 1896. *Womac* at 652, *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). This rule provides that a defendant is subjected

to double jeopardy if he is convicted of offenses that are identical both in fact and in law. *Calle* at 777. "'Washington's 'same evidence' test is very similar to the rule set forth in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180 (1932).'" *Womac* at 652, *Calle* at 777. Unless the legislature has expressed a clear intent that multiple punishments not be imposed, the same evidence rule applies. *State v. Gohl*, 109 Wn.App. 817, 821, 37 P.3d 293 (2001).

> [O]ffenses are not constitutionally the same if there is any element in one offense not included in the other and proof of one offense would not necessarily prove the other." *State v. Trujillo*, 112 Wn.App. 390, 410, 49 P.3d 935 (2002) (citing *Calle* at 777-78). Washington courts, however, have occasionally found a violation of double jeopardy *despite* a determination that the offenses involved clearly contained different legal elements. *State v. Schwab*, 98 Wn.App. 179, 184-85, 988 P.2d 1045 (1999).

Womac at 652. "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." *State v. Freeman*, supra, at 772; citing *Calle* at 777. The *Freeman* Court went on to say "[w]hen 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.'" *Freeman* at 772, quoting *In re Personal Restraint of Orange*, 152 Wn.2d 795, 817, 100 P.3d 291 (2004) (italics in original), quoting *Blockburger*, supra, at 304.[1]

2. *Application to Villanueva-Gonzales' case*

Villanueva-Gonzales' claim is that his act of head-butting Ms. Gobea, thereby breaking her nose, was the same act or transaction as his act of grabbing Ms. Gobea's throat and holding her against the wall. In other words, that the acts constituted one unit of prosecution. The double jeopardy clauses of the Washington State Constitution and United States Constitution provide identical protection against multiple punishments for the same offense. *State v. Graham*, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005). If a defendant is convicted of violating a single statute multiple times, the proper inquiry in a single statute case is "what 'unit of prosecution' has the Legislature intended as the punishable act under the specific criminal statute." *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998) (citing *Bell v. United States*, 349 U.S. 81, 83, 75 S. Ct. 620,

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[1] The *Blockburger* doctrine for whether two crimes are the "same offense" is a distinct doctrine from merger (or merger-by-elevation). "Several distinct doctrines stem from the prohibition on double jeopardy and the *Blockburger* test is merely one of them." *State v. S.S.J.*, 150 Wn.App. 325, 207 P.3d 1273 (2009), *affirmed* 170 Wn.2d 322, 241 P.3d 781 (2010). Crimes merge when proof of one is *necessary* to prove an element or degree of another crime. *S.S.J.* at 330. A conviction for an offense which elevates another can stand, however, where that conviction is based on "some injury to 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." *S.S.J.* at 330, quoting *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979).

99 L. Ed. 905 (1955); *State v. Mason*, 31 Wn. App. 680, 685-87, 644 P.2d 710 (1982), *superseded on other grounds as stated in State v. Elliott*, 114 Wn.2d 6, 16, 785 P.2d 440 (1990)). "When the Legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime." *Adel*, 136 Wn.2d at 634. And, if the statute is ambiguous because the Legislature has failed to denote the unit of prosecution, "the ambiguity should be construed in favor of lenity." *Adel*, 136 Wn.2d at 634-35 (citing *Bell*, 349 U.S. at 84). The issue presents a question of statutory interpretation and legislative intent. *State v. Ose*, 156 Wn.2d 140, 144, 124 P.3d 635 (2005). Appellate review is de novo. *State v. Sutherby*, 165 Wn.2d 870, 878, 204 P.3d 916 (2009).

The State charged Villanueva-Gonzalez with two assaults under two different provisions of RCW 9A.36.021. The Statute provides:

> (1) A person is guilty of **assault** in the **second degree** if he or she, under circumstances not amounting to **assault** in the first degree:
> (a) Intentionally **assaults** another and thereby recklessly inflicts substantial bodily harm: or
>
> (b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child: or
>
> (c) **Assaults** another with a deadly weapon: or

> (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
>
> (e) With intent to commit a felony, **assaults** another; or
>
> (f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or
>
> (g) **Assaults** another by strangulation.

Under the statute, there are seven distinct ways of committing **second degree assault**. Any one of the ways constitutes a single **unit of prosecution.** *State v. Smith*, 124 Wn. App. 417, 432, 102 P.3d 158 (2004), *reviewed and affirmed on other grounds, State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007) (assaulting another with a deadly weapon comprises the criminal activity measured by the **unit of prosecution** under **second degree assault** statute). The legislature, by setting out seven specific alternative ways of committing the offense, defined the **unit of prosecution.** Here, the grabbing of the throat and the head butt which broke Ms. Gobea's nose each constituted a unit of prosecution.

That the jury returned a verdict on count I to the lesser included offense of assault in the fourth degree is of no moment. As the Supreme Court observed,

> The legislature has codified four degrees of criminal assault. Between the crimes of first, second, and third degree assault, the legislature has delineated a total of 17

> alternative means of commission. *See* RCW 9A.36.011-.031. As promulgated by the legislature, the second degree criminal assault statute articulates a single criminal offense and then provides six separate subsections by which the offense may be committed. RCW 9A.36.021(1)(a)-(f). Each of these six subsections represents an alternative means of committing the crime of second degree assault. *Accord State v. Whitney*, 108 Wn.2d 506, 510-11, 739 P.2d 1150 (1987).

State v. Smith, 159 Wn.2d at 784 (some internal citations omitted).

The defendant makes much in his brief about the closeness in time between the two assaults, as though that were dispositive of the unit of prosecution question. But the fact that the assaults occurred very close in time does not render them one unit of prosecution rather than two. See e.g. *State v. Tili*, 139 Wn.2d 107, 985 P.2d 365 (1999) (three separate penetrations of the victim's anus and vagina during a sexual assault constituted three separate acts of rape, despite their nearly simultaneous occurrence.)

The defendant's assaultive acts were not a single act or transaction. They were separate acts constituting two units of prosecution. The defendant's right to be free of double jeopardy was not violated.

D. CONCLUSION

The defendant's right to be free of double jeopardy was not violated and his convictions should be affirmed. Should this Court disagree, the State agrees with the defendant that the proper remedy is to vacate the conviction for assault in the fourth degree and leave the assault in the second degree conviction undisturbed.

DATED this 2nd day of August, 2012.

Respectfully submitted:

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