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**Mar 08, 2017**  
Court of Appeals  
Division III  
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 34458-4-III

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STATE OF WASHINGTON, Respondent,

v.

ALEX S. NOVIKOFF, Appellant.

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APPELLANT'S BRIEF

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**TABLE OF CONTENTS**

**AUTHORITIES CITED**.....ii

**I. INTRODUCTION**.....1

**II. ASSIGNMENTS OF ERROR**.....1

**III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR** .....1

**IV. STATEMENT OF THE CASE**.....2

**V. ARGUMENT**.....4

**VI. CONCLUSION**.....8

**CERTIFICATE OF SERVICE** .....9

**AUTHORITIES CITED**

**Federal Cases**

*Albernaz v. U.S.*, 450 U.S. 333, 101 S. Ct. 1137, 67 L.Ed.2d 275 (1981).....6

*Blockburger v. U.S.*, 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed. 306 (1932).....4

*Harris v. Oklahoma*, 433 U.S. 682, 97 S. Ct. 2912, 53 L.Ed.2d 1054 (1977).....5

*Wahlen v. U.S.*, 445 U.S. 684, 100 S. Ct. 1432, 63 L.Ed.2d 715 (1980).....4

**State Cases**

*State v. Balderas-Ramos*, 133 Wn. App. 1030 (2006).....7

*State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997).....7

*State v. Calle*, 125 Wn.2d 769, 888 P.2d 155 (1995).....4, 5, 6

*State v. Gocken*, 127 Wn.2d 95, 896 P.2d 1267 (1995).....4

*State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997).....5

*State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016).....7

*State v. Villanueva-Gonzalez*, 175 Wn. App. 1, 304 P.3d 906 (2013).....5, 7

*State v. Vladovic*, 99 Wn.2d 413, 662 P.2d 853 (1983).....5, 6

**Statutes**

RCW 9A.36.041.....6

RCW 26.50.110(4).....6

**Court Rules**

GR 14.1(a).....7

## **I. INTRODUCTION**

A jury convicted Alex Novikoff of committing an assault in violation of a domestic violence protection order, unlawful imprisonment, assault in the fourth degree, and theft in the third degree. On appeal, Novikoff contends that separate convictions for assault in violation of a protection order and assault in the fourth degree violate double jeopardy, and requests that the court dismiss the assault in the fourth degree conviction.

## **II. ASSIGNMENTS OF ERROR**

**ASSIGNMENT OF ERROR 1:** The convictions for assault in violation of a protective order and assault in the fourth degree violate double jeopardy where the same conduct establishes the basis for both convictions.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**ISSUE 1:** When acts comprising an assault in the fourth degree serve as the predicate for a felony conviction for assault in violation of a protection order, is double jeopardy violated by permitting two separate criminal convictions that require the same proof? YES.

**ISSUE 2:** Is fourth degree assault a lesser-included offense to felony violation of a protective order by assault? YES.

#### **IV. STATEMENT OF THE CASE**

Alex Novikoff had been in and on-and-off romantic relationship with Kara Ahlson for a year or two before Ahlson obtained a protective order against him in September 2015. I RP 153, 156-58. The State charged Novikoff with four crimes, including felony assault in violation of a protective order and assault in the fourth degree, arising from an interaction on February 24, 2016. CP 71-73.

The parties disputed what exactly transpired that day, although they agreed that a protection order was in place prohibiting Novikoff from having contact with Ahlson. I RP 158, II RP 331. Ahlson testified that she was talking with Novikoff through messaging on the evening of February 21 and agreed to meet him to talk. I RP 161-62. After talking for a while, Novikoff teased her that he was not going to take her home and drove her back to his house. I RP 164-65. Ahlson claimed that they began to argue almost immediately, but she continued to stay at Novikoff's house for the next couple of days because he would not take her back home. I RP 165, 178, 180. On the morning of February 24, Ahlson had an appointment for a urinalysis arising from a CPS case and Novikoff had agreed to take her to it. I RP 184-85. But they began to argue again, and Ahlson said that he struck her in the face, causing her to bleed. I RP 185-86. Eventually, Novikoff told her to take her things and

go, and she flagged down a passing car and got a ride back to town. I RP 192-93. The driver who took her to town corroborated finding her on the road with blood on her face. I RP 35-37.

Novikoff denied that Ahlson had been at his house for several days and testified that she arrived at his house on the morning of the 24<sup>th</sup>. II RP 329-30. He said that he had agreed to get her clean urine to use in the urinalysis, and she was there to get it. II RP 332. He denied ever physically injuring Ahlson or having any contact with her since the protective order was put in place. II RP 346, 349.

The jury convicted Novikoff on all counts. III RP 554-55, CP 110-13. At sentencing, Novikoff's attorney argued that the convictions for violation of a protection order and assault in the fourth degree should merge. CP 127, III RP 588. The trial court declined to merge the offenses and imposed nine months' incarceration on the protection order violation along with 364 suspended days on the assault. CP 148, III RP 589. Novikoff now appeals, and has been found indigent for that purpose. CP 158, 159.

## V. ARGUMENT

On appeal, Novikoff contends that the separate convictions for fourth degree assault and felony assault in violation of a protection order violate double jeopardy when both convictions are premised on the same criminal act. Accordingly, the fourth degree assault conviction should be dismissed.

The Fifth Amendment to the United States Constitution protects individuals from multiple prosecutions for the same crime, and is applicable to the states through the Fourteenth Amendment. Article 1, Section 9 of the Washington State Constitution also protects against double jeopardy. The guarantee against double jeopardy protects persons from multiple punishments for the same offense. *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995) (citing *Wahlen v. U.S.*, 445 U.S. 684, 688, 100 S. Ct. 1432, 63 L.Ed.2d 715 (1980)).

Double jeopardy prevents cumulative punishment if offenses are legally identical and are based on the “same act or transaction.” *State v. Gocken*, 127 Wn.2d 95, 101, 896 P.2d 1267 (1995) (quoting *Blockburger v. U.S.*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L.Ed. 306 (1932)). Offenses are not legally identical if each offense contains an element not contained in the other. *Gocken*, 127 Wn.2d at 101. A person cannot be convicted of

both a greater and a lesser-included offense without necessarily violating double jeopardy. *See Harris v. Oklahoma*, 433 U.S. 682, 97 S. Ct. 2912, 53 L.Ed.2d 1054 (1977) (“When, as here, conviction of a greater crime . . . cannot be had without conviction of the lesser crime, . . . the Double Jeopardy Clause bars prosecution for the lesser crime, after conviction of the greater one.”); *see also State v. Villanueva-Gonzalez*, 175 Wn. App. 1, 6, 304 P.3d 906 (2013) (holding separate convictions for fourth degree assault and second degree assault violated double jeopardy because fourth degree assault was a lesser-included offense).

Novikoff raised double jeopardy concerns below in asking the trial court to merge the convictions for assault and felony violation of a protective order. Where offenses are not legally identical, the merger doctrine may apply. Merger is a doctrine of statutory interpretation “used to determine whether the Legislature intended to impose multiple punishments for a single act that violates several statutory provisions.” *State v. Michielli*, 132 Wn.2d 229, 238, 937 P.2d 587, 592 (1997) (*quoting State v. Vladovic*, 99 Wn.2d 413, 419 n. 2, 662 P.2d 853 (1983)). The court looks to the language and intent of the statutes proscribing the offenses to determine whether multiple offenses may be punished cumulatively. *Calle*, 125 Wn.2d at 777. When the conduct of one offense



elevates the degree of the second offense, the offenses merge to avoid double jeopardy. *Vladovic*, 99 Wn.2d at 419.

Double jeopardy inquiry must begin first with evaluating whether the legislature has authorized multiple punishments for the same offense in the statutory language. *Calle*, 125 Wn.2d at 776 (citing *Albernaz v. U.S.*, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L.Ed.2d 275 (1981)). In the present case, Novikoff was convicted under RCW 26.50.110(4) and 9A.36.041, which provide respectively:

Any assault that is a violation of an order issued under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony, and any conduct in violation of such an order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony.

And

A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.

Facially, the statutory prohibitions overlap. If a violation of the Title 26 prohibition is established, no additional element is required to prove the fourth degree assault, making fourth degree assault a lesser-included offense to felony assault in violation of a

protective order. *See State v. Berlin*, 133 Wn.2d 541, 545, 947 P.2d 700 (1997) (defining the “legal prong” of the lesser-included offense test as whether the elements of the lesser offense are necessary elements of the greater offense).<sup>1</sup> To prove the felony violation, the State had to show that Novikoff committed an assault on Ahlson. The assault was elevated to a felony by proof of the additional element that Novikoff was restrained from contacting Ahlson by a court order. Because the assault was a lesser-included offense to the felony violation of a protective order, conviction of both charges violates double jeopardy by imposing multiple punishments for the same crime. *Villanueva-Gonzalez*, 175 Wn. App. at 6-7.

Where multiple convictions violate double jeopardy, the remedy is to vacate the lesser offense and resentence the defendant. *Villanueva-Gonzalez*, 175 Wn. App. at 8. Novikoff respectfully requests that the court remand this case accordingly.<sup>2</sup>

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<sup>1</sup> In an unpublished opinion, Division One of the Court of Appeals acknowledged that fourth degree assault is a lesser-included offense of felony violation of a protective order. *State v. Balderas-Ramos*, 133 Wn. App. 1030 (2006). Pursuant to GR 14.1(a), this decision may be considered as persuasive authority on the issue.

<sup>2</sup> In the event Novikoff does not prevail on appeal, he respectfully requests that the court decline to award appellate costs to the State due to his continuing indigency pursuant to *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016) and this court’s general order dated June 10, 2016.

**VI. CONCLUSION**

For the foregoing reasons, Novikoff respectfully requests that the court VACATE the conviction for fourth degree assault and REMAND the case for resentencing.

RESPECTFULLY SUBMITTED this 8 day of March, 2017.

A handwritten signature in cursive script, appearing to read "Andrea Burkhardt", written over a horizontal line.

ANDREA BURKHART, WSBA #38519  
Attorney for Appellant

**DECLARATION OF SERVICE**

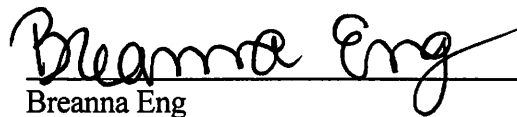
I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Kathryn Isabel Burke  
Ferry County Prosecutor's Office  
350 E. Delaware Avenue Stop 11  
Republic, WA 99166

Alex S. Novikoff  
Ferry County Corrections  
175 N. Jefferson St.  
Republic, WA 99166

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 8th day of March, 2017 in Walla Walla, Washington.

  
Breanna Eng

REPORT AS TO CONTINUED INDIGENCY

(in support of motion or request that the court exercise discretion not to award costs on appeal)

Please fill out this report to the best of your ability. While you are not required to answer all of the questions, complete information will help the court determine whether to deny costs on appeal to the State, should it prevail.

I, Alex S. Navikoff certify as follows:

1. That I own:

- a. No real property
- b. Real property valued at \$\_\_\_\_\_.
- c. Real property valued at \$\_\_\_\_\_, on which I am making monthly payments of \$\_\_\_\_\_ for the next \_\_\_\_\_ months/years (circle one).

2. That I own:

- a. No personal property other than my personal effects
- b. Personal property (automobile, money, inmate account, motors, tools, etc.) valued at \$\_\_\_\_\_.
- c. Personal property valued at \$\_\_\_\_\_, on which I am making monthly payments of \$\_\_\_\_\_ for the next \_\_\_\_\_ months/years (circle one).

3. That I have the following income:

- a. No income from any source.
- b. Income from employment: \$\_\_\_\_\_ per month.
- b. Income of \$\_\_\_\_\_ per month from the following public benefits:

- Basic Food (SNAP)  SSI  Medicaid  Pregnant Women Assistance Benefits
- Poverty-Related Veterans' Benefits  Temporary Assistance for Needy Families
- Refugee Settlement Benefits  Aged, Blind or Disabled Assistance Program
- Other: \_\_\_\_\_

4. That I have:

<input checked="" type="checkbox"/> a. The following debts outstanding:	Approximate amount owed:
Credit cards, personal loans, or other installment debt:	\$ _____
Legal financial obligations (LFOs):	\$ <u>1,265</u>
Medical care debt:	\$ _____
Child support arrears:	\$ <u>?</u>
Other debt:	\$ _____

Approximate total monthly debt payments:

\$ 25.<sup>00</sup>

( ) b. No debts.

5. That I am without other means to pay costs if the State prevails on appeal and desire that the court exercise discretion to deny costs.

6. That I can pay the following amount toward costs if awarded to the State:

\$ ?

7. That I am 28 years of age at the time of this declaration.

8. That the highest level of education I have completed is: 9<sup>th</sup>

9. That I have held the following jobs over the past 3 years:

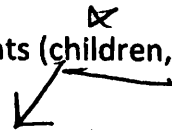
Employer/job title	Hours per week	Pay per week	Months at job
Americana	80	\$ 700. <sup>00</sup>	2
HardCore Drilling	90	\$ 900. <sup>00</sup>	4
ACT, inc.	64	\$ 800. <sup>00</sup>	3
Timberline Drilling	86	\$ 3,000	36

10. That I have received the following job training over the past three years: \_\_\_\_\_

Msha, First aid, Osha, Tech

11. That I have the following mental or physical disabilities that may interfere with my ability to secure future employment: (None)


12. That I am financially responsible for the following dependents (children, spouse, parent, etc.):



I, Alex S Novikoff, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

6-23-16

Date and Place

  
Signature of (Defendant) (Respondent) (Petitioner)