No. 42413-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MIGUEL ANGEL VILLANUEVA-GONZALEZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Miguel Villanueva-Gonzalez (Villanueva) was convicted of one count of second degree assault and one count of fourth degree assault based on a single incident in which he allegedly hit Maria Gobea in the nose and then grabbed her by the neck. Because fourth degree assault is a lesser offense of second degree assault, the two offenses are the same in law for double jeopardy purposes. In addition, because the two actions of hitting Ms. Gobea in the nose and grabbing her by the neck occurred in the same place during a single uninterrupted episode, they are the same in fact. Therefore, Mr. Villanueva was convicted twice for the same offense, in violation of his constitutional right to be free from double jeopardy.

B. ASSIGNMENT OF ERROR

Mr. Villanueva was punished twice for the same offense, in violation of the Double Jeopardy Clause.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The Double Jeopardy Clause prohibits multiple convictions for offenses that are the same in law and fact. Where one offense is a lesser offense of another, the two are the same in law. Two assaults are the same in fact if they are committed against the same person during a single uninterrupted episode. Was Mr. Villanueva convicted twice for the same offense in violation of the Double Jeopardy Clause, where his convictions

for second degree assault and fourth degree assault were based on acts committed against the same person during a single uninterrupted episode?

D. STATEMENT OF THE CASE

Ms. Gobea and Mr. Villanueva have been in a romantic relationship for about seven years and have three children together, with one on the way. RP 173-74. On the night of March 26, 2011, Ms. Gobea went out dancing at a nightclub without Mr. Villanueva. RP 176. When she came home, she went into the children's room to watch television with them and the babysitter. RP 176-77. Mr. Villanueva was not at home. RP 177.

When Mr. Villanueva arrived home later, he was angry Ms. Gobea had gone out dancing without him. RP 178. He pulled her out of the room, causing her to hit herself on a piece of furniture. RP 179. Then he hit her in the nose once with his forehead. RP 179. Next he grabbed her by the throat and held her against the furniture, saying he did not want her in the house. RP 193-94. She also sustained a bump on her forehead but did not know what caused it. RP 181.

Ms. Gobea went to the hospital that night. RP 240. A "CAT" scan revealed a nasal fracture. RP 242. Ms. Gobea did not tell the treating physician she had been held by the neck and he did not notice any marks on her neck or other signs of strangulation. RP 246-47.

The State charged Mr. Villanueva with one count of second degree assault by strangulation, RCW 9A.36.021(1)(g) (count I), and one count of second degree assault by intentionally assaulting another person and thereby recklessly inflicting substantial bodily harm, RCW 9A.36.021(1)(a) (count II).[1] CP 22-23. The State alleged both offenses were committed against the same person on the same date.[2] Id.

At the jury trial, in closing argument, the deputy prosecutor told the jury that count I referred to the alleged strangulation of Ms. Gobea. RP 354-57; see also CP 40 (to-convict instruction for count I). The prosecutor also told the jury that count II referred to the alleged hitting of Ms. Gobea in the nose and the resulting nasal fracture. RP 348-49; see also CP 44 (to-convict instruction for count II).

The defense requested, and the court provided, instructions on the lesser crime of fourth degree assault for both counts I and II. CP 24-28, 47-49.

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[1] The State also charged Mr. Villanueva with one count of first degree criminal impersonation for allegedly giving police a false name, RCW 9A.60.040(1) (count III). CP 23. Mr. Villanueva was convicted of that count, which is not at issue in this appeal. CP 64. The State also stated it was seeking an exceptional sentence based on the allegation the two assaults involved domestic violence and occurred within sight or sound of the victim's or the offender's minor children, RCW 9.94A.535(3)(h)(ii). CP 22-23. The jury later found the existence of the aggravator and an exceptional sentence of six months above the standard range was imposed for count II. RP 408; CP 63, 68.

[2] The information alleged the assaults were committed against "Maria D. Govea Aariaga" but at trial the complainant stated her name was "Maria Gobea." 7/13/11RP 173. She is referred to by the latter name in this brief.

The jury found Mr. Villanueva guilty as charged of second degree assault for count II. CP 61. The jury did not make a finding of second degree assault for count I, and instead found Mr. Villanueva guilty of the lesser crime of fourth degree assault. CP 58-59, 66, 81.

E. ARGUMENT

MR. VILLANUEVA'S CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY WAS VIOLATED BECAUSE HE WAS CONVICTED TWICE FOR THE SAME OFFENSE

Mr. Villanueva was convicted of both second degree assault and fourth degree assault for allegedly hitting Ms. Gobea in the nose and then grabbing her by the neck during a single uninterrupted incident. But the Legislature did not intend to impose separate punishments for each blow landed against the same person during a single fight. Mr. Villanueva's two assaultive actions arose from a single impulse, with no time between them for him to form a separate intent. Therefore, the two offenses were the same in law and fact for purposes of the Double Jeopardy Clause and one of the convictions must be vacated.

1. The Double Jeopardy Clause prohibits multiple convictions for offenses that are the same in law and fact.

The Double Jeopardy Clause of the federal constitution provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense, and the Washington Constitution provides that no individual

shall "be twice put in jeopardy for the same offense." U.S. Const. amend. V; Const. art. I, § 9.[3] The Double Jeopardy Clause protects against multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 726, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989); Gocken, 127 Wn.2d at 100.

To analyze a double jeopardy claim, the Court first examines the statutory language to see if the applicable statutes expressly permit multiple punishment for the same act or transaction. State v. Hughes, 166 Wn.2d 675, 681, 212 P.3d 558 (2009). If the statutes do not speak to multiple punishments for the same act, the Court then applies the "same evidence" analysis, which is also known as the "Blockburger test." Id. at 681-82, 682 n.6 (citing Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). Under that test, two offenses are the same for double jeopardy purposes if they are identical in law and fact. Hughes, 166 Wn.2d at 682.

Here, Mr. Villanueva was convicted of second degree assault under RCW 9A.35.021(1)(a) and fourth degree assault under RCW 9A.36.041. The statutes do not expressly authorize multiple punishment

[3] The Fifth Amendment's double jeopardy protection applies to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 787, 89 S. Ct. 2056, 23 L. Ed. 2d 707, (1969). Washington gives its constitutional provision against

for the same act or transaction. Therefore, the "same evidence" test applies. Hughes, 166 Wn.2d at 681-82.

2. Second degree assault and fourth degree assault are the same in law because one is a lesser offense of the other.

To determine whether two offenses are the same in law under the Blockburger test, the question is whether each statutory provision contains an element not included in the other, and each requires proof of a fact the other does not. Hughes, 166 Wn.2d at 682; Blockburger, 284 U.S. at 304. "Where lesser and greater offenses are concerned, they are the same offense for purposes of double jeopardy, as the lesser offense requires no proof beyond that required to prove the greater." Brown v. Ohio, 432 U.S. 161, 168, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977).

Fourth degree assault is a lesser offense of second degree assault as charged in this case. To prove second degree assault under RCW 9A.36.021(1)(a), the State was required to prove Mr. Villanueva "[i]ntentionally assault[ed] another and thereby recklessly inflict[ed] substantial bodily harm." See also CP 44 (jury instruction). To prove fourth degree assault, the State was required to prove Mr. Villanueva "assault[ed] another." RCW 9A.36.041(1); see also CP 49. Because proof of fourth degree assault required no proof beyond what was required to

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double jeopardy the same interpretation that the United States Supreme Court gives to the Fifth Amendment. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

prove second degree assault, they are the same in law for double jeopardy purposes. Brown, 432 U.S. at 168; Hughes, 166 Wn.2d at 682.

3. The two offenses are the same in fact because they occurred during a single uninterrupted episode.

In determining whether two offenses that are the same in law for double jeopardy purposes are also the same in fact, the question is whether the legislature intended to prohibit each individual act "'or the course of action which they constitute. If the former, then each act is punishable separately. . . . If the latter, there can be but one penalty.'" Blockburger, 284 U.S. at 302 (quoting Wharton's Criminal Law § 34 (11th ed.)).

As stated, both the second degree assault statute and the fourth degree assault statute required proof that Mr. Villanueva "assault[ed] another." RCW 9A.36.021(1)(a), .041(1). "Assault" is further defined by the common law as: (1) an intentional touching, striking, cutting, or shooting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person; (2) an act, with unlawful force, done with intent to inflict bodily injury upon another, tending, but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented; or (3) an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury

even though the actor did not actually intend to inflict bodily injury. State v. Smith, 159 Wn.2d 778, 781-82, 154 P.3d 873 (2007). The common law definitions of assault are not essential elements of the crime but are merely descriptive of the term "assault." Id. at 788.

In State. Tili, the Washington Supreme Court noted that, unlike the rape statute, which proscribes each act of "sexual intercourse," the assault statute does not proscribe each physical act against a victim. 139 Wn.2d 107, 116-17, 985 P.2d 365 (1999). Instead, "the Legislature only defined 'assault' as that occurring when an individual 'assaults' another." Id. (citing RCW 9A.36.041). As noted, the term "assault" is further defined by the common law, "which sets out many different acts as constituting 'assault,' some of which do not even require touching." Id. at 117. "Consequently, the Legislature clearly has not defined 'assault' as occurring upon *any* physical act." Id. Thus, a person cannot be charged and convicted "for every punch thrown in a fistfight without violating double jeopardy." Id. at 116.

When a crime is defined as a course of action rather than by each individual act, a single crime occurs "'when the impulse is single, . . . no matter how long the action may continue,'" but "'[i]f successive impulses are separately given, even though all unite in swelling a common stream

of action, separate indictments lie.'" Blockburger, 284 U.S. at 302 (quoting Wharton's Criminal Law § 34 (11th ed.)).

When a crime—such as assault—is defined as a course of action, to determine whether one or more crimes occurred, courts look to whether there are multiple victims, whether the acts occurred in multiple locations, whether there was a temporal break or an intervening act between them, and/or whether a new criminal intent was formed. See, e.g., Lucero v. Kirby, 133 F.3d 1299, 1317 (10th Cir. 1998) (holding convictions for aggravated burglary and attempted sexual penetration violated double jeopardy where acts occurred in same place, against same victim, and during short period of time with no intervening acts); United States v. Chipps, 410 F.3d 438, 447-49 (8th Cir. 2005) (applying Blockburger "impulse test" and holding two convictions for assault violated double jeopardy where first conviction related to conduct occurring inside offender's house and second related to conduct occurring after victim stumbled out front door of house, with no more than a few seconds elapsing between the two instances of assaultive conduct); Partch v. State, 43 So.3d 758, 760-62 (Fla. Dist. Ct. App. 2010) (holding convictions for sexual battery and attempted sexual battery violated double jeopardy where conduct giving rise to charges

occurred against same victim, within span of minutes, with no discernable temporal break).

Washington courts have had little occasion to address the circumstances under which the State may convict a person of multiple assaults for a series of acts committed against the same victim.[4] In State v. Byrd, 25 Wn. App. 282, 607 P.2d 321 (1980), the Court's decision to uphold separate convictions for assault is consistent with the analysis applied in the cases cited above. In Byrd, the defendant was convicted of first degree burglary based on assault and second degree assault of the same victim. Id. at 283-84. The facts showed Byrd knocked on the victim's door one night, and when she answered, he forced his way in, grabbed her around the waist, and attempted to pull her back into the apartment. Id. at 284. She retreated into the apartment and locked the door against him. Id. Minutes later Byrd tried to force his way in again, the victim ran out the back door, and Byrd caught her just as she reached her manager's apartment and grabbed her breasts and between her legs. Id. at 284-85. The Court held no double jeopardy violation occurred because the assault elevating the crime to first degree burglary was the

[4] It is well-settled that a person may be convicted multiple times for committing the same assaultive act against multiple victims. E.g., State v. Smith, 124 Wn. App. 417, 432, 102 P.3d 158 (2004), aff'd on other grounds, 159 Wn.2d 778, 154 P.3d 873 (2007) (citing State v. Wilson, 125 Wn.2d 212, 220, 883 P.2d 320 (1994)).

struggle in the doorway, and the second degree assault was based on the second attack outside the manager's door. Id. at 290.

In Byrd, the two assaults occurred in separate locations, with both a temporal break and intervening acts occurring between them. Id. at 284-85. After the first assault, the victim locked the door but Byrd forced his way in again and chased her out the back door to the manager's apartment before the second assault occurred. Id. As discussed, for crimes defined as a course of action, multiple crimes occur if the acts are committed in multiple locations, with a temporal break or an intervening act between them. Lucero, 133 F.3d at 1317; Chipps, 410 F.3d at 447-49; Partch, 43 So.3d at 760-62. Thus, the facts in Byrd supported separate convictions for assault.

In contrast, when a person commits a series of assaultive acts against the same victim in a single uninterrupted episode, only one crime occurs. In United States v. Chipps, for instance, the Eighth Circuit held only one assault occurred when the victim was attacked inside the house and then again after he stumbled out the front door, where no more than a few seconds elapsed between the two instances. 410 F.3d at 447-49. In United States v. McLaughlin, the D.C. Circuit held only one assault occurred when the victim received multiple gunshot wounds while being chased down a street. 164 F.3d 1, 16-17 (D.C. Cir. 1998).

In this case, Mr. Villanueva was convicted of both second degree assault and the lesser crime of fourth degree assault for acts occurring during a single, uninterrupted episode against the same victim. Ms. Gobea testified Mr. Villanueva pulled her out of the children's room, causing her to hit herself on a piece of furniture, then hit her in the nose with his forehead, and then grabbed her by the throat. RP 179, 193-94. The acts occurred in the same place, within a short time frame, with no intervening acts between them. The acts arose from a single "impulse" and Mr. Villanueva had no occasion to form a separate intent between them. Blockburger, 284 U.S. at 302. Therefore, the facts support only one conviction for assault. Byrd, 25 Wn. App. at 290; Chipps, 410 F.3d at 447-49; McLaughlin, 164 F.3d at 16-17.

The prosecutor told the jury during closing argument that each assault count was based on a different act—that count I referred to Mr. Villanueva's act of grabbing Ms. Gobea by the throat, and that count II referred to his act of hitting her in the nose. RP 348-49. But when a crime is defined as a course of action, the State may not avoid the requirements of the Double Jeopardy Clause by attempting to divide the crime into a series of separate acts. See Brown, 432 U.S. at 169 ("The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a

series of temporal or spatial units."). The legislature did not define the crime of assault as occurring upon every act committed during an assaultive episode. Tili, 139 Wn.2d at 116-17. Therefore, the separate acts of hitting Ms. Gobea in the nose and grabbing her by the throat do not amount to separate crimes of assault.

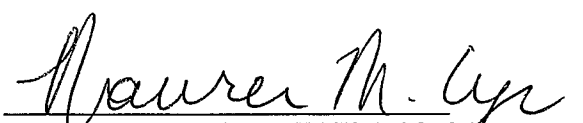
4. The fourth degree assault conviction must be vacated.

When two convictions violate the Double Jeopardy Clause, the remedy is to vacate the conviction for the lesser offense. In re Pers. Restraint of Strandy, 171 Wn.2d 817, 820, 256 P.3d 1159 (2011). Therefore, the conviction for fourth degree assault must be vacated.

F. CONCLUSION

Mr. Villanueva's convictions for second degree assault and fourth degree assault violated his constitutional right to be free from double jeopardy because they were based on acts occurring during a single assault. Therefore, the conviction for fourth degree assault must be vacated.

Respectfully submitted this 30th day of January 2012.



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

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	)	
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	)	NO. 42413-4-II
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	)	
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	)	
Appellant.	)	

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