

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 REPLY BRIEF

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A. ARGUMENT IN REPLY

MR. VILLANUEVA WAS PUNISHED TWICE FOR
THE SAME OFFENSE, IN VIOLATION OF THE
DOUBLE JEOPARDY CLAUSE

The State contends Mr. Villanueva was not punished twice for the same offense because his two actions of putting his hands on Ms. Gobeas's throat and hitting her in the nose were two separate "units of prosecution." SRB at 2. The State acknowledges that Mr. Villanueva was convicted under two separate statutory provisions—for fourth degree assault and second degree assault. But the State contends what matters is that he was *charged* with two counts of second degree assault. SRB at 6-8.

The State applies the wrong analysis. The question in a double jeopardy case is not whether the defendant was *charged* twice for the same offense, but whether he was *punished* twice for the same offense. Because Mr. Villanueva was *convicted* twice for the same offense, a double jeopardy violation occurred. In addition, the "unit of prosecution" analysis does not apply because Mr. Villanueva was convicted under two separate statutes. Instead, the "Blockburger" test applies. Under that test, the two offenses were the same in fact and law.

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) (emphasis added), overruled on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989); State v. Gocken, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995). It is well-established that a conviction constitutes “punishment” for purposes of the Double Jeopardy Clause. State v. Turner, 169 Wn.2d 448, 454-55, 238 P.3d 461 (2010); Ball v. United States, 470 U.S. 856, 865, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985). Therefore, if Mr. Villanueva received two *convictions* for the same offense, a double jeopardy violation occurred, regardless of the original charges.

To determine whether Mr. Villanueva was convicted twice for the same offense, the first question is whether he was convicted for violating the same statute or two different statutes. The “unit of prosecution” analysis applies only if he was convicted twice for violating the same statute. “[W]hen a defendant is convicted of multiple violations of *the same statute*, the double jeopardy question focuses on what ‘unit of prosecution’ the Legislature intends as the punishable act under the statute.” State v. Westling, 145 Wn.2d 607,

610, 40 P.3d 669 (2002) (emphasis added). The usual “Blockburger” test does not apply under that circumstance because “[w]hen a defendant is convicted for violating one statute multiple times, the same evidence test will *never* be satisfied.” State v. Adel, 136 Wn.2d 629, 633, 965 P.2d 1072 (1998). That is because “[t]wo convictions for violating the same statute will always be the same in law, but they will never be the same in fact. In charging two violations of the same statute, the prosecutor will always attempt to distinguish the two charges by dividing the evidence supporting each charge into distinct segments.” Id. at 633-34. Thus, the proper test for determining whether a person can be convicted multiple times for violating the same statute is “what ‘unit of prosecution’ has the Legislature intended as the punishable act under the specific criminal statute.” Id. at 634 (citing Bell v. United States, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955)).

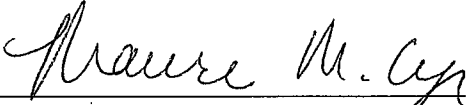
Here, Mr. Villanueva was convicted of violating two *separate* statutes: RCW 9A.36.021(1)(a) (second degree assault) and RCW 9A.36.041(1) (fourth degree assault). CP 66, 81. Therefore, the “unit of prosecution” test does not apply. Instead, the usual “Blockburger” or “same evidence” test applies.

As argued in the opening brief, under the “Blockburger” test, the two convictions for second degree assault and fourth degree assault violate the Double Jeopardy Clause because they are the same in law and in fact. Therefore, the conviction for the lesser offense must be vacated.

B. CONCLUSION

For the reasons given above and in the opening brief, 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 13th day of June 2012.


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