NO. 30641-1-III
(Consolidated under 30640-2-III)

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

STATE OF WASHINGTON,

Respondent,

v.

GARY ENGLESTAD, JR.,

Appellant.

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

The Honorable Scott R. Sparks, Judge

BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The court violated the prohibition against double jeopardy by failing to vacate appellant's second degree assault convictions under Counts II & IV and their accompanying deadly weapon enhancements.

2. Pursuant to RAP 10.1(g)(2), Appellant adopts by reference the assignments of error set forth in the co-appellant's opening brief.[1]

Issues Pertaining to Assignment of Error

1. Did two of appellant's three second degree assault convictions merge with the associated robbery convictions because proof of the assaults was required to elevate the robberies to first degree status?

2. Where the second degree assault convictions merge with the associated first degree robbery convictions, does the protection against double jeopardy require vacating the second degree assault convictions and their accompanying deadly weapon enhancement?

3. Pursuant to RAP 10.1(g)(2), Appellant adopts by reference the issue statements set forth in the co-appellant's opening brief.

B. STATEMENT OF THE CASE

1. Procedural History

The State charged appellant Gary Engelstad, Jr. and co-appellant Joseph Shouse with the following offenses:

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[1] This appeal is consolidated with State v. Shouse, No. 30640-2-III.

Count I: first degree robbery against Gerald Moccardine;

Count II: second degree assault against Gerald Moccardine;

Count III: first degree robbery against Dawn Flood;

Count IV: second degree assault against Dawn Flood;

Count V: second degree assault against Julie Curry;

Count VI: first degree burglary against Gerald Moccardine;

Count VII: first degree unlawful possession of a firearm;

Count VIII: second degree theft against Gerald Moccardine; and

Count IX: second degree theft against Dawn Flood.

CP 256-60.

Counts I-VI were alleged to have been committed with the use of a firearm. Id. The State alleged all the offenses were committed on or about October 20, 2010, during an incident at Moccardine's property. Id.

A jury found Engelstad guilty on all counts and found Counts I-VI were committed while armed with a firearm. CP 219-22. The court imposed 459 months of confinement, which includes 288 months in firearm sentence enhancements. CP 227-39. The court did not impose terms of confinement for the theft convictions under counts VIII and IX, concluding they merged with the robbery convictions and therefore should be dismissed with prejudice. CP 278; RP 718. Engelstad appeals. CP 241-55.

2. Trial

Sixty-year old Gerald Moccardine makes his living "in the scrap business." RP 280, 283. This involves clearing and collecting "junk" from the property of others. RP 283. Moccardine claimed that sometime in early to mid-October 2010, Shouse gave him permission to remove various items from Shouse's property. RP 280-86. When Shouse subsequently discovered Moccardine late one night loading items from Shouse's property into a van he became upset, so Moccardine returned the items, or at least he said he did. RP 287-89, 505-06.

Several days later, on the morning October 17, 2010, Shouse and Engelstad showed up at Moccardine's scrap yard. RP 291. According to Moccardine, Engelstad spent time with Moccardine's 31-year old girlfriend, Dawn Flood, while he showed Shouse around the property and pointed out the various projects he was working on. RP 175, 177-78, 292-93, 340. It was Moccardine's impression that Shouse was looking for something, but never asked to see anything specific. RP 293.

Flood testified it was clear Shouse and Engelstad were upset with Moccardine when they showed up that day. Flood said they were there to find items Moccardine had taken from Shouse's property. RP 178, 181.

Moccardine and Flood next encountered Shouse and Engelstad sometime between 11 pm on October 19, 2010, and 1 am on October 20,

2010. RP 186-87, 222-23. According to Flood, she, Moccardine and a woman named Julie Curry were in a trailer at the scrap yard when they heard a knock on the door. RP 187-88. When the door opened, Flood saw Shouse and Engelstad standing outside. RP 188. Shouse accused them of calling the police on him a couple of days before. RP 192. Engelstad then told Moccardine they were there to take his alternators. RP 192-93.

Flood claimed Moccardine handed his wallet to Engelstad, who removed money from it and then hit Moccardine in the head. RP 194-96. When Moccardine reached for a pocket, Engelstad pulled out a gun and pointed it at Moccardine. RP 196-97. When Flood asked Engelstad if the gun was necessary, he told her he drew it because he thought Moccardine was reaching for something, presumably a weapon. RP 198-99.

Flood recalled that after Engelstad pulled the gun another person entered the trailer, took the gun from Engelstad, and conducted a "room check." RP 198-99. Engelstad then left and the other man stayed, took their cell phones from them, and held them in the trailer for approximately 30 to 40 minutes. RP 201-02, 205. While they sat in the trailer Flood could hear shouting, laughing and commotion outside, and eventually she heard two cars start up and leave the property. RP 204-05. When Flood subsequently went outside, she discovered her possession had been gone

through and everything except her clothes taken, including two "PSPs", a Playstation game consol, two bags of jewelry and binoculars. RP 207-12.

Both Moccardine and Curry gave renditions of events that night similar to Flood's, although Curry did not claim any of her property was missing. RP 296-318, 407-26. Neither Flood nor Curry claimed they were ever physically assaulted by anyone during the incident, and Flood denied ever being threatened by Engelstad. RP 222, 238. Curry testified Engelstad told her they had "no beef" with her. RP 424.

c. Sentencing

Prior to sentencing, Engelstad's counsel filed brief arguing the theft and assault convictions associated with Moccardine and Flood should be vacated because they merge with the first degree robbery convictions. CP 223-26. The State conceded the thefts merge, but argued the assaults should not. CP 261-77. At sentencing the trial court adopted the State's legal position, summarily concluding it was "exactly correct". RP 723.

C. ARGUMENTS

1. ENGELSTAD'S CONVICTIONS UNDER COUNT II & IV AND ASSOCIATED FIREARM ENHANCEMENTS MUST BE VACATED.

Engelstad's convictions for the second degree assault under counts II & IV violate the constitutional prohibition against double jeopardy. As correctly argued by Engelstad's counsel, like the theft convictions, they

merged with the robberies because it was the assaults that promoted the robberies to first degree status. The mandatory remedy for convictions that violates double jeopardy is vacature. The court erred in failing to vacate the assault convictions involving Moccardine and Flood, and consequently erred in considering them for sentencing purposes.

Both the Fifth Amendment of the United States Constitution and Article 1, section 9 of the Washington Constitution prohibit double jeopardy. State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005). One of the purposes of the double jeopardy clause is to prevent multiple punishments for the same offense. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). Merger is based on the protection against double jeopardy. State v. Parmelee, 108 Wn. App. 702, 710, 32 P.3d 1029 (2001). The merger doctrine avoids double punishment by merging a lesser offense "into the greater offense when one offense raises the degree of another offense." State v. Collicott, 118 Wn.2d 649, 668, 827 P.2d 263 (1992).

Where the State uses second degree assault conduct to elevate a robbery charge to the first degree, the offenses generally merge and are the same for double jeopardy purposes unless they have an independent purpose or effect. Francis, 170 Wn.2d at 525, 532; Freeman, 153 Wn.2d at 780. The assaults of Moccardine and Flood in the course of robbing them are textbook example of this principle.

In making the merger determination, courts view the offenses as charged. In re Francis, 170 Wn.2d 517, 523-24, 242 P.3d 866 (2010). The first degree robberies here were charged as follows:

> They, the said, GARY E. ENGELSTAD JR. and JOSEPH L. SHOUSE, in the State of Washington, as principal or accomplice on or about October 20, 2010, with intent to commit theft, did unlawfully take personal property that the Defendant did not own from the person or in the presence of [Geraldine Moccardine/Dawn Flood], against such person's will, by use or threatened use of immediate force, violence, or fear of injury to said person or the property of said person or the person or property of another, and in commission of said crime and in immediate flight therefrom, Defendant was armed with a deadly weapon and or displayed what appeared to be a firearm or other deadly weapon and/or inflicted bodily injury upon [Gerald Moccardine/Dawn Flood]; thereby committing the felony crime of ROBBERY IN THE FIRST DEGREE; contrary to Revised Code of Washington 9A.56.200(1)(a)(i), 9A.56.200(1)(a)(ii) and 9A.08.020.

CP 257.

> The three second degree assaults were charged as follows;
>
> They, the said GARY D. ENGELSTAD JR. and JOSEPH L. SHOUSE, in the State of Washington, as principal or accomplice on or about October 20, 2010, did intentionally assault another person, to wit: [Gerald Moccardine/Dawn Flood/Julie Curry], with a deadly weapon, to wit: handgun; thereby committing the felony crime of ASSAULT IN THE SECOND DEGREE; contrary to the Revised Code of Washington 9A.36.021(1)(c) and 9A.08.020.

CP 257.

The State used the second degree assault with a handgun conduct for Counts II & IV to elevate the robbery in Counts I & III to first degree status. The basis for first degree robberies was the use or threat to use immediate force, violence or fear of injury by means of the handgun brandished by Engelstad — the same conduct forming the basis for the second degree assaults charges.

"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 must presume the legislature intended to punish Engelstad's second degree assault of Moccardine and Flood through greater sentences for the associated first degree robberies.

This conclusion is supported by the fact that these offenses had no independent purpose or effect. Here, as in Francis, "the sole purpose of the second degree assault was to facilitate the . . . robbery. The assault was not 'separate and distinct' from the . . . robbery; it was incidental to it." Francis, 170 Wn.2d at 525. The assaults here had no purpose and effect other than to force Moccardine and Flood to submit to the robberies.

It is well established that the remedy for convictions on two counts that together violate the protection against double jeopardy is to vacate the

conviction on the lesser offense. See, e.g., State v. League, 167 Wn.2d 671, 672, 223 P.3d 493 (2009); State v. Knight, 162 Wn.2d 806, 810, 174 P.3d 1167 (2008). In Francis, for example, the Supreme Court did what the trial court should have done here: it vacated the second degree assault that merged with the attempted first degree robbery under double jeopardy. Francis, 170 Wn.2d at 531, 532.

There is a simple reason why vacature is necessary. "The term 'punishment' encompasses more than just a defendant's sentence for purposes of double jeopardy." State v. Turner, 169 Wn.2d 448, 454, 238 P.3d 461 (2010). "[E]ven a conviction alone, without an accompanying sentence, can constitute 'punishment' sufficient to trigger double jeopardy protections." Turner, 169 Wn.2d at 454-55. The lesser conviction in and of itself violates double jeopardy because it may result in future adverse consequences and, at the very least, carries a societal stigma. Id.; State v. Womac, 160 Wn.2d 643, 656-58, 160 P.3d 40 (2007). Double jeopardy is thus violated even where a person is not sentenced for the offending conviction. State v. Gohl, 109 Wn. App. 817, 822, 37 P.3d 293 (2001) (rejecting State's argument that there was no double jeopardy violation because the trial court imposed no sentence for the assaults, finding them to encompass the same conduct), review denied, 146 Wn.2d 1012 (2002).

A conviction that offends double jeopardy retains no validity whatsoever. Turner, 169 Wn.2d at 464. And a conviction subject to vacature has no legal force or effect. To "vacate" means "[t]o nullify or cancel; make void; invalidate." Black's Law Dictionary 1584 (8th Ed. 2004). For all legal purposes, vacated convictions do not exist. This case should be remanded for entry of an order vacating the second degree assault convictions and deadly weapon enhancements under Count II and IV, and for resentencing.

2. ADOPTION OF CO-APPELLANT ARGUMENTS.

To the extent applicable, Engelstad adopts by reference the arguments set forth the co-appellant's opening brief. RAP 10.1(g)(2).

D. CONCLUSION

For the reasons stated, this Court should grant the requested relief.

DATED this 16th day of January 2013.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

CHRISTOPHER H. GIBSON
WSBA No. 25097
Office ID No. 91051

Attorneys for Appellant

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.
1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488
WWW.NWATTORNEY.NET

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. LIND
JENNIFER M. WINKLER
ANDREW P. ZINNER
CASEY GRANNIS
JENNIFER J. SWEIGERT

OF COUNSEL
K. CAROLYN RAMAMURTI
JARED B. STEED

State v. Gary Engelstad, Jr.

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Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 16th day of January, 2013, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

Gregory Zempel
Kittitas County Prosecuting Attorney
prosecutor@co.Kittitas.wa.us

Dennis Morgan
Attorney at Law
nodblspk@rcabletv.com

Gary Englestad, Jr.
DOC No. 788871
Washington Corrections Center
1313 N. 13th Avenue
Walla Walla, WA 99362

Signed in Seattle, Washington this 16th day of January, 2013.

X Patrick Mayovsky