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KING COUNTY

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA MASON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Sharon Armstrong

APPELLANT'S REPLY BRIEF

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A. SUMMARY OF APPEAL

In his Appellant's Opening Brief, Mr. Mason raised two assignments of error, arguing as follows:

(1) that his double jeopardy rights were violated by the trial court's entry of judgment on a jury verdict of guilty to second degree assault, where the assault was merely the act used to satisfy the "forcible compulsion" elements of the defendant's additional jury convictions for two counts of first degree rape; and

(2) that there was insufficient evidence to support the jury verdict of guilty on the count of tampering with a witness, where the offense was charged under RCW 9A.72120(1)(c), the alternative of withholding information from a law enforcement agency, but the evidence was insufficient to prove this conduct, and at best supported an uncharged alternative under the statute – inducing a witness to testify falsely.

B. REPLY ARGUMENT

1. MR. MASON'S CONVICTION FOR SECOND DEGREE ASSAULT VIOLATED DOUBLE JEOPARDY UNDER STATE V. JOHNSON.

A trial court may not enter multiple convictions and impose punishment for conduct that amounts to a constitutional "same offense" without offending the defendant's double jeopardy

protections. State v. Vladovic, 99 Wn.2d 413, 422, 662 P.2d 853 (1983) (citing Albernaz v. United States, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981)).

Under the Respondent's cited case of State v. Johnson, 92 Wn.2d 671, 600 P.2d 1249 (1979), overruled in part on other grounds in State v. Sweet, 138 Wn.2d 466, 980 P.2d 1223 (1999), second degree assault may indeed be the "same offense" as rape.

The Respondent asserts that "where the assault had independent purpose or effect" there can be no merger and therefore no double jeopardy violation. Brief of Respondent, at p. 12 and n. 3. Contrary to the Respondent's suggestion, however, Johnson involved an assault over time and multiple instances of assaultive conduct with a knife. Johnson, 92 Wn.2d at 672-739-80.

Furthermore, here, although the assault count was charged under multiple statutory alternatives, one of these was assault committed with the intent to commit rape. CP 11, 45; RCW 9A.36.021. But the State of Washington submitted the present case to the jury seeking only a general verdict on the assault count. Absent a special verdict, the jury may well have relied on this alternative of assault for its verdict of guilty. The rule of lenity requires that ambiguous jury verdicts be construed in the

defendant's favor. State v. DeRyke, 110 Wn. App. 815, 824, 41 P.3d 1225 (2002), affirmed on other grounds, 149 Wn.2d 906, 73 P.3d 1000 (2003).

Therefore, Mr. Mason's appeal is significantly similar to State v. Martin, 149 Wn. App. 689, 205 P.3d 931 (April 13, 2009). There, convictions of defendant for second degree assault and attempted third degree rape were the same in fact and law and violated the constitutional prohibition against double jeopardy because the charges were predicated on the same conduct – Mr. Martin's assault with intent to rape the complainant, with the assault serving as an element of the rape offense (there, the substantial step). State v. Martin, 149 Wn. App. at 699-70.

There is no doubt, in fact, that this was the defendant's intent. As the prosecutor stated in closing argument, the defendant's assaultive conduct was engaged in for the purpose of commission of the rape offenses, i.e., to have "sex with her [the complainant] by force[.]" 3/4/08RP at 15.

Where a defendant's conduct can support charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the "same" offense. In re Pers. Restraint of Orange, 152

Wn.2d 795, 815, 100 P.3d 291 (2004). This focus on legislative intent is required because the legislature has the power to define offenses and set punishments. See State v. Calle, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995). In the present case, under double jeopardy principles, there was only one offense - the rape offenses -- requiring that the assault conviction be reversed and dismissed, and that the defendant's offender score and sentence on the rape crimes be accordingly reduced.

The appropriate remedy in Mr. Mason's case is remand for resentencing and vacation of the assault conviction. State v. Weber, 127 Wn. App. 879, 885, 112 P.3d 1287 (2005) ("The remedy for convictions on two counts that together violate the protection against double jeopardy is to vacate the conviction on the lesser offense"), affirmed, 159 Wn.2d 252, 149 P.3d 646 (2006).

2. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. MASON OF THE OFFENSE OF TAMPERING WITH A WITNESS AS CHARGED.

Mr. Mason relies on the argument advanced in his Appellant's Opening Brief in reliance on State v. Lubers, 81 Wn. App. 614, 915 P.2d 1157 (1996). See Appellant's Opening Brief, at pp. 11-15

C. CONCLUSION

Based on the foregoing and on his Appellant's Opening Brief, Mr. Mason respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 10 day of September, 2009.



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