

65208-7

65208-7

NO. 65208-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BAYANI JOHN MANDANAS,

Appellant.

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COURT OF APPEALS
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE GREGORY CANOVA

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	4
1. MANDANAS IS BARRED FROM RAISING THIS ISSUE IN HIS SECOND APPEAL	4
2. MANDANAS' TWO CONVICTIONS DO NOT VIOLATE DOUBLE JEOPARDY.....	5
D. <u>CONCLUSION</u>	12

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Blockburger v. United States, 284 U.S. 299,
52 S. Ct. 180, 76 L. Ed. 306 (1932)..... 6, 7

United States v. Dixon, 509 U.S. 688,
113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993)..... 11

Washington State:

In re Orange, 152 Wn.2d 795,
100 P.3d 291 (2004)..... 12

State v. Barberio, 121 Wn.2d 48,
846 P.2d 519 (1993)..... 4

State v. Bauers, 25 Wn.2d 825,
172 P.2d 279 (1946)..... 4

State v. Calle, 125 Wn.2d 769,
888 P.2d 155 (1995)..... 5, 6, 7, 8, 9, 10, 11

State v. Eaton, 82 Wn. App. 723,
919 P.2d 116 (1996)..... 9

State v. Freeman, 153 Wn.2d 765,
108 P.3d 753 (2005)..... 10

State v. Frohs, 83 Wn. App. 803,
924 P.2d 384 (1996)..... 9

State v. Gocken, 127 Wn.2d 95,
896 P.2d 1267 (1995)..... 11

State v. Goodwin, 146 Wn.2d 861,
50 P.3d 618 (2002)..... 5

<u>State v. Jacobsen</u> , 78 Wn.2d 491, 477 P.2d 1 (1970).....	4
<u>State v. Johnson</u> , 92 Wn.2d 671, 600 P.2d 1249 (1979).....	9
<u>State v. Kilgore</u> , 167 Wn.2d 28, 216 P.3d 393 (2009).....	5
<u>State v. Mandanas</u> , 139 Wn. App. 1017, 2007 WL 1739702 (2007).....	2
<u>State v. Mandanas</u> , 168 Wn.2d 84, 228 P.3d 13 (2010).....	2
<u>State v. Sauve</u> , 100 Wn.2d 84, 666 P.2d 894 (1983).....	5
<u>State v. Vaughn</u> , 83 Wn. App. 669, 924 P.2d 27 (1996), <u>rev. denied</u> , 131 Wn.2d 1018 (1997).....	12
<u>State v. Vladovic</u> , 99 Wn.2d 413, 662 P.2d 853 (1983).....	9

Statutes

Washington State:

RCW 9.94A.589	2
RCW 9A.36.021	6, 7
RCW 9A.44.040	9
RCW 9A.44.050	9
RCW 9A.46.020	6, 8

A. ISSUE PRESENTED

Do convictions for second-degree assault and felony harassment violate double jeopardy?

B. STATEMENT OF THE CASE

On November 16, 2005, by Amended Information, the defendant, Bayani Mandanas, was charged in count I with second-degree assault and in count II with felony harassment. CP 68-69. A sentence enhancement firearm allegation was charged with each count. Id. Mandanas was tried by jury and convicted as charged.¹ CP 94-97.

The convictions stem from an assault on Carlos Padilla. Padilla had been involved in a romantic relationship with Mandanas' wife, Eleanor. This relationship took place while Mandanas and his wife were going through divorce proceedings. 3RP 94-96.

On December 20, 2004, Mandanas confronted Padilla as Padilla exited a medical clinic. 3RP 99-100. Mandanas punched Padilla in the face, hit him in the head with a gun, then pointed the gun at Padilla's head and threatened to kill him. 3RP 99-102. After

¹ The verbatim report of proceedings is cited as follows: 1RP--11/16/05; 2RP--11/17/05; 3RP--11/21/05; 4RP--11/22/05; 5RP--11/23/05; 6RP 2/10/06; and 7RP--3/26/10.

initially trying to defend himself, Padilla began begging for his life as he backed up towards the clinic. 3RP 103-05. Padilla then went inside and sat down in a chair. 3RP 116. Mandanas followed Padilla into the clinic, again hit Padilla in the head with the gun and then fled when he heard that the police were being called. 3RP 33, 86, 116.

The defendant was sentenced on February 10, 2006. At sentencing, Mandanas argued that his convictions constituted the "same criminal conduct" under RCW 9.94A.589(1)(a), and therefore his convictions should not score against each other. The trial court rejected this claim. 6RP 4-5. Mandanas also argued that his two firearm enhancements should run concurrent to each other. The trial court rejected this claim as well. 6RP 5-6.

The court then imposed a term of three months each on count one and count two, to be served concurrently with each other, and consecutively to 36 and 18 month consecutive firearm enhancements, for a total term of confinement of 57 months. CP 98-105. Mandanas appealed. See State v. Mandanas, 139 Wn. App. 1017, 2007 WL 1739702 (2007) (not published), and State v. Mandanas, 168 Wn.2d 84, 228 P.3d 13 (2010).

As relevant here, Mandanas argued on appeal that the trial court erred in finding that his convictions did not constitute the "same criminal conduct" for scoring purposes. This Court agreed and ordered that Mandanas be resentenced consistent with the finding that his two offenses constitute the same criminal conduct for scoring purposes and therefore they should not have scored against each other.² A mandate terminating review was issued on February 17, 2010. CP 106-16.

On March 26, 2010, Mandanas was resentenced with his two convictions not scoring against each other. CP 48-55. Because of the unnoticed error in Mandanas' favor in his first sentence, upon resentencing, Mandanas received the exact same sentence, a bottom of the range sentence of 57 months--three months for his assault conviction with the two firearm enhancements. Id.

² Ironically, apparently unnoticed by the parties, Mandanas actually received the sentence he sought on appeal. The standard range for second-degree assault (the greater offense) with an offender score of one is 6 to 12 months; i.e., if the felony harassment count had scored against the second-degree assault. The standard range for second-degree assault with an offender score of zero is 3 to 9 months; i.e., if the felony harassment count had not scored against the assault. Mandanas received a three-month sentence. Although the offender score was listed as "1," the standard range listed was 3 to 9, consistent with an offender score of "0."

At his resentencing, Mandanas attempted to persuade the court to determine a new issue outside the scope of the remand order. Specifically, Mandanas asked the court to find that his two underlying convictions violate double jeopardy. 7RP 4-5. The court declined to address the issue. 7RP 5-6.

C. ARGUMENT

1. MANDANAS IS BARRED FROM RAISING THIS ISSUE IN HIS SECOND APPEAL.

Washington law holds that a defendant may not raise an issue in a second appeal that he could have raised in a first appeal, unless the issue was reconsidered by the trial court in the proceedings upon remand. State v. Barberio, 121 Wn.2d 48, 846 P.2d 519 (1993); State v. Jacobsen, 78 Wn.2d 491, 493, 477 P.2d 1 (1970) ("We adhere to our policy which prohibits issues from being presented on a second appeal that were or could have been raised on the first appeal") (citing State v. Bauers, 25 Wn.2d 825, 172 P.2d 279 (1946)).

Even though an appeal raises issues of constitutional import, at some point the appellate process must stop. Where...the issues could have been raised on the first appeal, we hold they may not be raised in a second appeal.

State v. Sauve, 100 Wn.2d 84, 87, 666 P.2d 894 (1983) (declining to address Sauve's constitutional search issues in his second appeal).³

Mandanas could have raised his double jeopardy claim at his first sentencing and his first appeal, but he did not. He attempted to persuade the sentencing court to address the issue at his resentencing, but the court declined to do so. Thus, the defendant is barred from raising this issue in his second appeal.

2. MANDANAS' TWO CONVICTIONS DO NOT VIOLATE DOUBLE JEOPARDY.

Mandanas contends that his convictions for second-degree assault and felony harassment violate double jeopardy. He is incorrect. Applying the test for determining whether a double jeopardy violation has occurred, as outlined in State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995), it is clear convictions for both offenses may stand.

³ See also State v. Goodwin, 146 Wn.2d 861, 877, 50 P.3d 618 (2002) ("Correcting an erroneous sentence in excess of statutory authority does not affect the finality of that portion of the judgment and sentence that was correct and valid when imposed"); State v. Kilgore, 167 Wn.2d 28, 37, 216 P.3d 393 (2009) (judgment is final when no appealable issue remains, implying that after a remand and resentencing, a defendant would be able to appeal only on the limited issue that that trial court exercised independent judgment when imposing a new sentence).

In Calle, the Supreme Court set forth a three-part test for determining whether multiple punishments were intended by the legislature. The first step is to review the language of the statutes to determine whether the legislation expressly permits or disallows multiple punishments. Calle, 125 Wn.2d at 776. Should this step not result in a definitive answer, the court turns to another rule of statutory construction, the two-part "same evidence" or "Blockburger" test. This test asks whether the offenses are the same "in law" and "in fact." Calle, at 777. Failure under either prong creates a strong presumption in favor of multiple punishments, a presumption that can only be overcome where there is "clear evidence" that the legislature did not intend for the crimes to be punished separately. Calle, at 778-80.

Neither the assault statute (RCW 9A.36.021), nor the felony harassment statute (RCW 9A.46.020) expressly allows or disallows multiple punishments for a single act. Because the statutes do not supply this Court with an answer, the Court must turn to the "same evidence" test.

The "same evidence" or "Blockburger"⁴ test asks whether the offenses are the same "in law" and "in fact." Calle, at 777. Offenses are the same "in fact" when they arise from the same act. Offenses are the same "in law" when proof of one offense would always prove the other offense. Calle, at 777. If each offense includes elements not included in the other, the offenses are considered different and multiple convictions can stand. Calle, at 777.

Here, the defendant's convictions are not the same "in law."

As charged here, to convict Mandanas of second-degree assault, the State was required to prove that the defendant assaulted Carlos Padilla with a deadly weapon. CP 78; CP 68-69; RCW 9A.36.021(1)(c). Felony harassment does not require that a defendant use a deadly weapon or that he assault his victim.

As charged here, to convict Mandanas of felony harassment, the State was required to prove that the defendant, acting without lawful authority, knowingly threatened to kill Carlos Padilla and that the words or conduct of the defendant placed Carlos Padilla in reasonable fear that the threat to kill would be carried out. CP 87;

⁴ Referring to Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

CP 68-69; RCW 9A.46.020(1), (2). Second-degree assault does not require a defendant knowingly threaten his victim, that the threat be a threat to kill or that the victim be placed in reasonable fear of death.

With each charged crime having an element not contained in the other (in this case multiple elements), the two offenses fail the same "in law" prong of the "same evidence" test. It makes no difference that the convictions may be the same "in fact." Because the offenses are not the same "in law," this Court must find that the defendant's convictions were appropriately punished separately unless "there is a clear indication of contrary legislative intent." Calle, at 780.

The "strong presumption" created by the "same evidence" test, that two offenses can be punished separately, can be overcome only by clear evidence of contrary legislative intent. Calle, at 780. Here, there is no such evidence and Mandanas does not argue otherwise. There is nothing in the statutes or legislative history that suggests otherwise.

In arguing that double jeopardy has been violated here, Mandanas makes two different arguments that do not apply. First,

citing to State v. Johnson⁵ and State v. Vladovic,⁶ Mandanas argues that his convictions merge.⁷ However, the merger doctrine does not apply to his case. The merger doctrine:

only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime (e.g., first degree rape) the State must prove not only that a defendant committed that crime (e.g. rape) but that the crime was accompanied by an act [that] is defined as a crime elsewhere in the criminal statutes (e.g., assault or kidnapping).⁸

State v. Eaton, 82 Wn. App. 723, 730, 919 P.2d 116 (1996) (citing Vladovic, 99 Wn.2d 413 (emphasis added)). In other words, merger applies only when it is required that one crime is elevated by proof of another crime. The premise is that this shows the legislature intended the punishment for the elevated crime to constitute the

⁵ 92 Wn.2d 671, 600 P.2d 1249 (1979).

⁶ 99 Wn.2d 413, 662 P.2d 853 (1983).

⁷ The term "merger" is used (and misused) in several different contexts. As used herein, it 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. Vladovic, 99 Wn.2d at 419 n.2. Merger is simply a part of the test for double jeopardy limited to specific situations wherein one crime is elevated by required proof of another. State v. Frohs, 83 Wn. App. 803, 811, 924 P.2d 384 (1996) (citing Calle, 125 Wn.2d 769).

⁸ By statute, first-degree rape requires that the perpetrator engage in sexual intercourse with another person by forcible compulsion where the perpetrator either (1) kidnaps the victim or (2) inflicts serious physical injury upon the victim. RCW 9A.44.040. Without the required proof of a kidnapping or serious physical injury, intercourse by forcible compulsion constitutes the lesser offense of second-degree rape. RCW 9A.44.050.

sole punishment for the commission of the act that violated both statutes. State v. Freeman, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005).

Here, there is no elevated crime. Second-degree assault is not a lesser assault elevated by proof of a threat to kill. Conversely, felony harassment is not elevated by proof of an assault with a deadly weapon. Further, neither crime *requires* proof of the other for a conviction. Thus, for both these reasons, the merger doctrine does not apply.

Second, Mandanas argues that because his same conduct may have been used to prove both charges, there is a violation of double jeopardy. This fact-based type analysis for determining double jeopardy has been rejected by both the United States Supreme Court and the Washington State Supreme Court.

Subject to constitutional constraints, the legislature has the absolute power to define criminal conduct and assign punishment. Calle, at 776. In many cases, a defendant's conduct may violate more than one criminal statute. Without question, a defendant can permissibly receive multiple punishments for a single act that violates more than one criminal statute. Calle, at 858-60 (finding no double jeopardy violation where a single act of intercourse violated

the rape statute and the incest statute). Double jeopardy is only implicated when the court exceeds its legislative authority by imposing multiple punishments where multiple punishments have not been authorized. Calle, at 776. Thus, a test that only looks at the conduct of the defendant is insufficient to determine whether there is a double jeopardy violation. Id. In fact, Calle, in explicitly delineating the test for determining legislative intent and whether a double jeopardy violation has occurred, affirmed the rejection of the factual type analysis that was being conducted by some courts prior to the early 90's--the analysis that the defendant seeks to apply here.

In 1993, the United States Supreme Court specifically overruled the "same conduct" fact-based test for determining double jeopardy. United States v. Dixon, 509 U.S. 688, 704, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). Two years later, the Washington State Supreme Court did the same, recognizing that a factual analysis based test had been rejected by the United States Supreme Court and that the State double jeopardy clause did not provide broader protection than its federal counterpart. State v. Gocken, 127 Wn.2d 95, 896 P.2d 1267 (1995). This rejection of a fact-based double jeopardy/merger analysis makes sense when

considering the question is one of legislative intent of which the facts of a particular case tell us nothing. See also State v. Vaughn, 83 Wn. App. 669, 924 P.2d 27 (1996), rev. denied, 131 Wn.2d 1018 (1997) (recognizing rejection of the "same conduct" rule in finding no double jeopardy for kidnap and rape). In short, Mandanas' conduct based argument must be rejected.⁹

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's convictions.

DATED this 16 day of ~~August~~^{September}, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

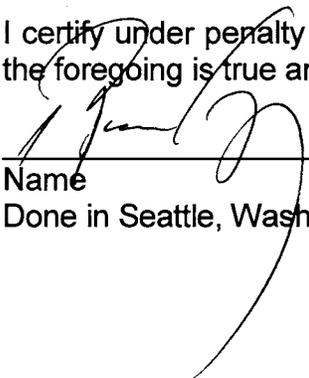
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⁹ Mandanas also cites to In re Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), and implies that the Court applied a same conduct type analysis. This is incorrect. The Court in Orange specifically stated that the test is "whether each provision requires proof of a fact which the other does not." Orange, 152 Wn.2d at 817-18. The Court did not change the test for determining whether a double jeopardy violation has occurred.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Allen, the attorney for the appellant, at Allen, Hansen & Maybrown, 600 University Street, Suite 3020, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. MANDANAS, Cause No. 65208-7-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

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