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No. 65208-7-I

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

King County No. 05-1-03922-8 SEA

STATE OF WASHINGTON,

Respondent,

v.

BAYANI JOHN MANDANAS,

Appellant.

APPELLANT'S OPENING BRIEF (AMENDED)

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I. ASSIGNMENTS OF ERROR

1. Double jeopardy is violated where Appellant was convicted and then sentenced for two separate offenses (assault and felony harassment), even though the jury may well have concluded that these two offenses were based upon the very same acts and the very same offense conduct.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was double jeopardy violated where Appellant was convicted and then sentenced based upon two separate offenses although these convictions were based upon the very same acts and the very same offense conduct? (Assignment of Error 1)

III. STATEMENT OF THE CASE¹

A. Procedural Background

Defendant Bayani John Mandanas was charged by information, filed February 7, 2005, with one count of Assault in the Second Degree, with a

¹ This is the second appeal relating to Mr. Mandanas' conviction and sentence. The initial appeal was decided by this Court on June 18, 2007. *See State v. Mandanas*, Court of Appeals No. 57738-7-I (slip op.). At the request of this Court, Mr. Mandanas will not cite to the clerks papers from the appeal in Court of Appeals No. 57738-7-I. Rather, the term "CP" refers to the clerks papers pertaining to the resentencing hearing and the current appeal. The court reporter produced transcripts for the November 16, 2005 and November 17, 2005 pretrial/trial proceedings, as well as the November 21, 2005 and November 22, 2005 trial proceedings. The resentencing hearing was held on March 26, 2010 and is identified as "3/26/10 RP" followed by the appropriate page number.

deadly weapon enhancement, and one count of Felony Harassment. The Information was amended before trial to add a deadly weapon enhancement to the Felony Harassment count. *See* CP 3-6.

On November 17, 2005, a jury trial commenced before the Honorable Gregory Canova. The jury subsequently returned a verdict of guilty to both counts on November 22, 2005. The jury also returned a special verdict on each count, finding that the defendant was armed with a firearm during the commission of the crimes. *See* CP 5-6.

On February 10, 2006, Judge Canova sentenced Mr. Mandanas to three months on each count, to run concurrently, and an enhancement of 36 months on Count I and 18 months on Count II, to run consecutively to each other and to the standard range sentence of three months, for a total sentence of 57 months in custody. *See* CP 6.

Mr. Mandanas timely filed a notice of appeal on February 10, 2006. This Court issued an unpublished decision on June 18, 2007. *See State v. Mandanas*, Court of Appeals No. 57738-7-I (slip op.). *See* CP 14-34. The Court affirmed Mr. Mandanas' convictions. In so ruling, the Court concluded that there was no plain error (a) in failing to use a unanimity instruction on the two alternative means the State used to support the

second degree assault charge and (b) inherent in the court's self-defense instructions. *See* CP 17-31.²

The Court then addressed Mr. Mandanas' sentencing issues and concluded that the two underlying offenses clearly constituted the "same criminal conduct" under RCW 9.94A.589(1)(a). *See* CP 31-34. Nevertheless, the Court concluded that all enhancements require consecutive sentences, "even with a finding of same criminal conduct." *See id.* The Court then remanded for resentencing consistent with its ruling on the same criminal conduct issue.

The Washington Supreme Court granted Petitioner's Motion for Review, but chose to consider "only the sentencing issue." *See State v. Mandanas*, 163 Wn.2d 1021, 185 P.3d 1194 (2008); Washington Supreme Court Order (April 30, 2008). The Court issued its ruling on January 28, 2010. *See State v. Mandanas*, 168 Wn.2d 84, 228 P.3d 13 (2010). In essence, the Court concluded that, based upon principles of statutory construction, the Legislature did intend to impose multiple enhancements where a defendant is convicted of multiple enhancement-eligible offenses that constitute same criminal conduct under the sentencing statute. The

² Mr. Mandanas' trial counsel proposed no jury instructions, so this Court was left to craft instructions which captured the defense. Since trial counsel stated no objections to these instructions, this Court applied a "manifest error" or "plain error" standard when considering these matters. *See* CP 24.

Court chose not to reach any of Mr. Mandanas' claims under the Double Jeopardy Clause. *See id.*

Two of the justices concurred in the decision; however, these justices also explained that the statute had led to unfortunate, and unjust, results. "This case also illustrates the unhealthy tension that sometimes exists between justice and law. In a court of law, justice may ultimately be the loser. It surely lost here." *Id.* (Madsen and Sanders, JJ. concurring).

The case was then returned to the King County Superior Court for hearing on March 26, 2010. *See* CP 1. Mr. Mandanas then argued that his underlying convictions – the assault and felony harassment – violated the Double Jeopardy Clause. *See* 3/16/10 RP; CP 8-12. Although the defendant had previously attempted to raise this same argument, Mr. Mandanas maintained that no court had previously ruled upon the issue. The prosecutor presented no briefing or argument in response. *See* 3/25/10 RP 1-2.³

Judge Canova did not permit defense counsel to present any argument at the resentencing hearing. Rather, based upon his own reading

³ In fact, without providing any reason or explanation, the prosecutor asked the Court to impose a sentence longer than the sentence imposed at the original sentencing hearing. Such a sentence would have violated due process. *See, e.g., North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974)

of the appellate decisions, the judge found that this Court had previously ruled on this same issue. *See* 3/26/10 RP 3-4. Defense counsel again objected to this conclusion and noted that the reviewing courts had never ruled upon this issue. *See* 3/26/10 RP 5.⁴ The judge disagreed, and once again sentenced Mr. Mandanas to three months on each count, to run concurrently, and an enhancement of 36 months on Count I and 18 months on Count II, to run consecutively to each other and to the standard range sentence of three months, for a total sentence of 57 months in custody. *See* 3/26/10 RP 9-10; CP 48-55.

Mr. Mandanas timely filed a notice of appeal on April 13, 2010. *See* CP 56-65.

B. Facts of the Underlying Case

The facts surrounding this case are set forth in *State v. Mandanas*, Court of Appeals No. 57738-7-I. There, this Court explained:

Carlos Padilla had been involved in a romantic relationship with Bayani John Mandanas' wife, Eleanor. This relationship took place while Mandanas and his wife were in divorce proceedings, but still living together. Mandanas learned about the relationship from his friends. In July or August of 2004, Mandanas met with Padilla and Eleanor and asked them to avoid publicizing their relationship until the divorce was final. Padilla told Mandanas that he would stop seeing Eleanor, but their

⁴ Counsel specifically noted that the State's prosecutor had essentially conceded this point in his argument before the Washington Supreme Court. 3/26/10 RP 5-6.

relationship continued until they mutually ended it around December 8, 2004.

On December 20, 2004, Mandanas and Padilla encountered each other outside the Southgate Medical Clinic, and a confrontation ensued. The parties gave conflicting testimony describing the assault. Although three witnesses could not testify as to who struck first, the rest of their testimonies corroborated Padilla's version of the events. Padilla testified that when he stepped outside the clinic, Mandanas confronted him and punched him in the mouth and threatened to kill him. Padilla punched back, hitting Mandanas in the face, and blocked another punch. He felt a metal object hit his head, and then saw that Mandanas was pointing a gun at him. Padilla testified that Mandanas again threatened to kill him. Padilla said that he begged for his life and tried to explain that he and Eleanor had broken up. And Mandanas replied that he was "going to bring me down" while continuing to point the gun at him. Padilla backed into the clinic and sat in a chair. Mandanas followed him and again struck him with the gun, above Padilla's ear. Padilla continued to tell Mandanas that his relationship with Eleanor was over. He then asked people in the clinic to call 9-1-1. Mandanas left when he heard that police were being called.

Three witnesses in and around the clinic testified about these events. Each witness testified that they saw Mandanas pull a gun from his pants and point it at Padilla. The witnesses that understood Tagalog, the language the two men were speaking, testified that Mandanas said "I will kill you." All three witnesses testified that they saw Mandanas hit Padilla in the head; one witness saw Mandanas use his gun to deliver the blow. All accounts indicate that Padilla took no defensive action toward Mandanas once they were inside the clinic. One witness believed that the entire incident took place over the course of about two minutes.

Mandanas presented a very different scenario during his testimony. He said that on December 20, 2004, he was returning from making a bank deposit. When he made deposits he usually carried a gun, for which he had a permit.

He claimed that he stopped near the clinic to make a telephone call and was on the phone when Padilla approached him and punched him. He said that this punch knocked the gun out of his belt. Concerned that Padilla might try to grab the gun, Mandanas struggled with Padilla and admitted that he hit Padilla with the gun after he picked it up. Mandanas testified that he thought that Padilla was heading towards the clinic to get a weapon, so he followed him inside and pushed him down because he did not want him to leave the clinic. Once they were both in the clinic, they struggled again. Mandanas said that he could not recall if he hit Padilla with the gun a second time, or even if he was still holding the gun at the time—he thinks it may have been in his pocket when he exited the clinic.

The day after the assault, Mandanas, accompanied by his lawyer, turned himself in to the police. He turned over a .38 caliber revolver and five bullets. The gun was later found to be in working condition.

CP 15-18.

IV. ARGUMENT

A. Double Jeopardy Bars Imposition of Separate Sentences for Two Offenses, and Increased Punishment, Where the Convictions are Based upon the Very Same Acts and the Very Same Offense Conduct

1. Legal Background

Where a defendant is convicted of two or more current offenses, the trial court must calculate the offender score, and resulting sentence ranges, by counting all other current and prior convictions as prior convictions. *See generally State v. Dolen*, 83 Wn.App. 361, 364, 921 P.2d 590 (1996), *review denied*, 131 Wn.2d 1006, 932 P.2d 644 (1997)

(discussing RCW 9.94A.589(1)(a)).⁵ If, however, any of the current offenses encompass “the same criminal conduct,” the court counts these offenses as one crime. *See, e.g., State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999), *aff’d*, 148 Wn.2d 350, 60 P.3d 1192 (2003).

Moreover, the double jeopardy clauses of the Fifth Amendment and article 1, section 9 of the Washington Constitution prohibit multiple punishments for the same offense. *See, e.g., State v. Calle*, 125 Wn.2d 769, 888 P.2d 155 (1995) (double jeopardy may be implicated when multiple convictions arise out of the same act even if concurrent sentences imposed); *State v. Maxfield*, 125 Wn.2d 378, 886 P.2d 123 (1994).

**B. The Two Substantive Offenses – Assault And Harassment –
Constitute The Same Criminal Conduct**

When a defendant is convicted of two or more crimes, current offenses are treated as prior offenses for determining the offender score

⁵ The statute provides in relevant part:

Whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently “Same criminal conduct,” as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

unless the current offenses encompass the same criminal conduct, in which case the current offenses count as one crime. *See* RCW 9.94A.589(1)(a). “Same criminal conduct” means “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). The test is established where all three elements are present. *See, e.g., State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999), *aff’d*, 148 Wn.2d 350 (2003); *State v. Israel*, 113 Wn.App. 243, 295, 54 P.3d 1218 (2002). In determining whether the crimes are the same criminal conduct for purposes of sentencing, the trial court makes factual determinations and utilizes its discretion. *See State v. Nitsch*, 100 Wn.App. 512, 523, 997 P.2d 1000 (2000).

At sentencing, the trial court concluded that these two offenses did not constitute “same criminal conduct” within the meaning of the statute.

This Court disagreed and explained:

Here, there is no question that Mandanas committed assault and harassment at the same time and place, and against the same victim. The question is whether his intent, when viewed objectively, changed between the crimes, and whether the commission of one crime furthers the other. Second degree assault requires the intent either to cause bodily harm or to create apprehension of bodily harm. *State v. Byrd*, 125 Wn.2d 707, 711, 887 P.2d 396 (1995).

RCW 9.94A.589(1)(a).

Felony harassment requires a person to knowingly threaten to cause bodily injury immediately or in the future to the person threatened. RCW 9A.46.020(1)(a)(i). Crimes that Mandanas *objectively* intended to commit include causing bodily harm and threatening to commit bodily injury, which created an apprehension of bodily harm. There was no discernible change in intent between the crimes. Moreover, inflicting bodily harm and threatening to kill Padilla furthered the crime of creating apprehension of more bodily harm. Because one crime furthered another, and because Mandanas's criminal intent did not change from one crime to another, his actions encompass same criminal conduct. We conclude that the trial court abused its discretion in finding otherwise, vacate the sentence and remand for resentencing based on same criminal conduct.

See CP 30-31.

C. Imposing Separate Sentences for these Two Offenses Violates Double Jeopardy

The United States and Washington Constitutions' double jeopardy clauses are "identical in thought, substance, and purpose." *State v. Schoel*, 54 Wn.2d 388, 391, 341 P.2d 481 (1959). They both "protect against multiple punishments for the same offense, as well as against a subsequent prosecution for the same offense after acquittal or conviction." *State v. Graham*, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005) (citing *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)). See also *Calle*, 125 Wn.2d at 776.

Here, the State has asked the courts to punish Mr. Mandanas twice for pointing a gun at Mr. Padilla – once because Mr. Mandanas intended

to create apprehension of bodily harm (assault) and once because Mr. Mandanas communicated a threat of intent to cause bodily injury (harassment). This Court should not permit multiple punishments for this conduct.

As noted above, double jeopardy offers three constitutional protections. One aspect of double jeopardy protects a defendant from being punished multiple times for the same offense. As the Washington Supreme Court has explained: “It is unjust and oppressive to multiply punishments for a single offense.” *State v. Johnson*, 92 Wn.2d 671, 600 P.2d 1249 (1979).

In *Johnson*, the defendant was convicted of two counts of first degree rape, first degree kidnapping, and first degree assault. On review, the court concluded that convictions for the kidnapping and assault merged into a conviction for the rape. As the court subsequently explained:

The basis for these convictions was a single incident during which the defendant threatened and restrained two girls in order to rape them. The applicable first degree rape statute required the State to prove conduct constituting at least one additional crime other than rape in order to prove first degree rape. Kidnapping and assault were both listed as such additional crimes, although no particular degree was required. This court held that the assaults and kidnappings were merely incidental to and not separate and distinct from the rapes. Because proof of the assaults and kidnappings were necessary elements to prove first degree

rape, they merged into the rape and were not separately punishable.

State v. Vladovic, 99 Wn.2d 413, 419, 662 P.2d 853 (1983).

In more recent cases, the Washington Supreme Court has explained that the merger doctrine is of constitutional magnitude. *See, e.g., State v. Hughes*, 166 Wn.2d 675, 212 P.3d 558 (2009); *State v. Frohs*, 83 Wn.App. 803, 924 P.2d 384 (1996). In *Calle, supra*, for example, the Court held that the offense of rape and incest are the same “in fact” because they arose out of the same act wherein the defendant had sexual intercourse with the victim. *See Calle*, 125 Wn.2d at 777.

The Court reached a similar conclusion in *State v. Kier*, 164 Wn.2d 798, 194 P.3d 212 (2008). There, the Court held that the Legislature did not intend separate punishments for convictions of first degree robbery and second degree assault. In finding a double jeopardy violation, the Court explained:

When the definitions of first degree robbery and second degree assault are set side by side, it is clear that both charges required the State to prove that Kier’s conduct created a reasonable apprehension or fear of harm. Because Kier was also charged with being armed with or displaying a deadly weapon, this was the means of creating that apprehension or fear.

Id. at 806.

This Court should also consider the Washington Supreme Court's decision in *In re Orange, supra*. There, the defendant was charged with attempted murder and assault. The Court found a double jeopardy violation and held: "The two crimes were based on the same shot directed at the same victim, and the evidence required to support the conviction for first degree attempted murder was sufficient to convict Orange of first degree assault." 152 Wn.2d at 818.

The Court's analysis applies with great force in this case. Here, the assault and harassment occurred during the same segment of time and, as noted above, these offenses were inextricably intertwined. There should be no dispute that the evidence required to support a conviction of the assault offense would most certainly have been sufficient to support a conviction for felony harassment. In fact, this Court has already concluded that these offenses involved the same victim, same evidence, same intent, and same harm. These offenses are essentially indistinguishable.

The defense recognizes that the Washington courts have sometimes noted that the double jeopardy clause is not violated if the Legislature specifically authorizes multiple punishments. *See In the Matter of the Personal Restraint Petition of Burchfield*, 111 Wn.App. 892, 895, 766 P.2d 454 (2002). There is some question whether such a

legislative edict would override a fundamental constitutional right. In any event, the defense maintains that the Legislature did not clearly authorize multiple consecutive punishments in a case of this sort.

D. This Court Did Not Resolve the Constitutional Issue during Mr. Mandanas' Prior Appeal

On remand, the trial court refused to reach the merits of Mr. Mandanas' double jeopardy argument – ostensibly based upon the judge's belief that this Court had already ruled on these matters. *See* 3/26/10 RP 3-5. In reality, neither this Court nor the Washington Supreme Court has ruled on this particular question.

During Mr. Mandanas' first appeal, this Court simply held that multiple weapons enhancements could be applied without violating the Double Jeopardy Clause. The Court said nothing at all about the underlying crimes – except to rule that they amounted to same criminal conduct under the statute. The Court's decision tells us nothing about the double jeopardy issue vis-à-vis the underlying offense conduct.

There is no doubt that the Washington Supreme Court never made any ruling on this issue. In fact, the Court refused to rule upon any constitutional questions at all. *See Mandanas*, 168 Wn.2d 84.

The trial court's refusal to reach the issue is particularly unfair given this procedural history. Neither the trial court nor the appellate

court has ever ruled upon this important legal issue. In fact, during oral argument in the Washington Supreme Court, a member of the King County Prosecutor's Office made the following argument to the Court:

Double jeopardy is not – absolutely not – before this Court. It has never been raised for the underlying offenses. I am somewhat shocked to hear defense counsel claim that the assault and the felony harassment violate double jeopardy.

Argument of King County Special Deputy Prosecutor Dennis McCurdy before Washington Supreme Court in *State v. Mandanas* (at 19:40-20:00). Along the way, the prosecutor conceded that this particular issue had not been decided by the Court of Appeals.

The Washington Supreme Court did not rule upon this issue. Clearly, the prosecutor rightly contemplated that the trial court would be in a better position to rule upon this issue upon remand. That is why defense counsel informed the trial judge:

I want to be clear on the record that I don't believe in all of the proceedings that I've been involved in, although we requested a ruling, that we ever got a ruling. And specifically, I assume the Supreme Court would have expected that would be decided by this Court. And I don't believe there is anything in the Court of Appeals' decision which even discusses the cases or the issue about whether the assault and the harassment violate double jeopardy.

3/26/10 RP 6. Under these facts, there is no limitation that would preclude the trial court, or this Court, from ruling on this important constitutional question.

V. CONCLUSION

For all of these reasons, and in the interests of justice, this Court should conclude that the substantive offenses – assault and felony harassment – are “same criminal conduct” and that double jeopardy precludes sentencing on these two offenses. Thus, Mr. Mandanas should be sentenced only on the greater offense. This Court should reverse Mr. Mandanas’ sentence and remand for resentencing on Count 1 only.

DATED this 3rd day of August, 2010.

Respectfully submitted,

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By:



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PROOF OF SERVICE

Todd Maybrowns swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 3rd day of July, 2010, I deposited for mailing, postage prepaid, first class, one true copy of Appellant's Opening Brief directed to attorney for Respondent:

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And to Appellant:

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DATED at Seattle, Washington this 3rd day of August, 2010.



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