

71803-7

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NO. 71803-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMAR MENESE,

Appellant.

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

The Honorable Andrea Davis, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court erred in concluding it lacked discretion to merge appellant's assault conviction with his burglary conviction.

Issue Pertaining to Assignment of Error

Is remand for resentencing required because the court refused to consider merging the assault into the burglary based on an erroneous view that the so-called 'burglary antimerger statute,' (RCW 9A.52.050), eliminated any sentencing discretion in this regard?

B. STATEMENT OF THE CASE

In May 2013, the King County Prosecutor charged appellant Jamar Meneese with second degree assault domestic violence and misdemeanor violation of a court order. CP 1-2. The State alleged that on April 20, 2013, Meneese assaulted Destyni Winston, his ex-girlfriend, while she stood in the door of an apartment where she was staying, and that in doing so Meneese also violated a no-contact order. CP 4.

An amended information was filed December 6, 2013, adding one count of first degree burglary. CP 7-8. A second amended information was filed January 13, 2014, the first day of trial, alleging the sentencing aggravator that the assault and burglary were part of an ongoing pattern of abuse. CP 13-14. According to Meneese's trial counsel at sentencing, the burglary charge was added because Meneese exercised his right to trial.

1RP¹ 359. The sentencing prosecutor (who was not the trial prosecutor) did not dispute this claim. See 1RP 341 (sentencing prosecutor states she is "standing in" for the trial prosecutor).

A jury trial was held before the Honorable Andrea Darvis, January 13-17, 2014. 1RP. The evidence presented consisted of several exhibits and two prosecution witnesses; Esther Jordan, the 67-year old "adopted" grandmother of the complaining witness, Destyni Winston, and City of Kent Police Officer Daniel Yagi. 1RP 111-12, 172.

According to Jordan, Winston lived with her for a couple of months in the first half of 2013. 1RP 113. During that time, Meneese would visit and occasionally stay the night. 1RP 114, 155.

Some time in early April 2013, Jordan informed Winston that Meneese was not longer welcome in her home. 1RP 122. Jordan did not see Meneese again until April 20, 2013, when there was knock on the front door at about 8:30 or 9 p.m. 1RP 123.

When Jordan opened the door there was a woman outside asking if Winston was there, to which Jordan replied, "yes." 1RP 123-24. Winston, who was standing behind Jordan, said "that's my friend, let her in." 1RP

¹ There are seven volumes of verbatim report of proceedings referenced as follows: 1RP - six-volume, consecutively paginated set for the dates of January 13-17, 2014 (trial) and March 21, 2014 (sentencing); and 2RP - February 7, 2014 (defense motion for a new trial).

124. The woman outside moved away from the door, however, and instead urged Winston to come outside. 1RP 125. After Winston refused, Meneese appeared in the doorway, entered about two feet into the home, reached over Jordan's shoulder and punched Winston on the left side of her face and knocked a tooth out.² 1RP 126-27, 132. Jordan recalled that as Meneese walked away he said, "next time bitch you won't get up." 1RP 157. Over Winston's objections, Jordan called 911 to report the incident. 1RP 161.

Officer Yagi responded to Jordan's 911 call. 1RP 161, 173. Yagi recalled obtaining a statement and taking photographs at the scene, including ones of Winston's mouth and one of a tooth on the floor. 1RP 177. Yagi was also used by the prosecution to admit a copy of a no-contact order issued by the Federal Way Municipal Court on December 2, 2011, prohibiting Meneese from having any contact with Winston until December 2, 2016. 1RP 204; Ex. 13.

The jury found Meneese guilty of the charged offenses. CP 56-58; 1RP 326. The jury never considered the charged sentencing aggravator, however, as it was withdrawn by the prosecution after the guilty verdicts were read. 1RP 335.

² Jordan claimed she was also injured by Meneese's punch, albeit inadvertently when his arm hit her in the lip as he struck Winston. 1RP 124, 132.

Sentencing occurred March 21, 2014. 1RP 341-81. Meneese's counsel urged the court to merge the assault with the burglary and to calculate Meneese's offender score without counting the assault because, counsel argued, it constituted the same criminal conduct as the burglary. 1RP 342-45. In response to the court's inquiry about whether the burglary antimerger statute cited by the prosecution precluded merging the offenses, counsel asserted the statute gave the court discretion whether to merge them or not. 1RP 342-43, 351, 353-54.

The sentencing prosecutor expressed some doubt about whether the burglary antimerger statute was mandatory or discretionary, noting the language of the statute could be interpreted to allow for some discretion by sentencing courts. 1RP 346. The prosecutor noted, however, that the assault and burglary did not constitute "same criminal conduct" for purposes of calculating Meneese's offender score because the victim of the assault was Winston, while the burglary victims included both Winston and Jordan. 1RP 347.

The court rejected Meneese's request to treat the burglary and assault as same criminal conduct, agreeing with the prosecution that the offenses had different victims. 1RP 355-56. The court also declined to merge the assault into the burglary:

With respect to the merger issue, the courts are pretty clear that when there's a clear statement of legislative intent that crimes committed during a burglary should not merge when the defendant is convicted of a crime then the courts -- or an other crime, then the courts don't apply the merger doctrine. It seems fairly clear to me the legislative intent here was to, in a situation where a person enters a dwelling in which he or she has no lawful right to be, and then commits a crime there, the clear intent of the legislature is that the crime be treated separately from the act of burglary itself. I don't read the statute as giving the Court any discretion. And Frankly, I'm a little concerned about the implications of the Court having discretion in this regard. I actually think that it could very well -- the risk is significant that it would result in people committing the same actions being treated differently. Now I will observe that the discretion is there, it just doesn't lie with the Court. It lies with the prosecuting agency, which is [sic] the folks who make the decision [as] to what to charge, and those decisions are frequently made in the context of plea negotiations, and I understand that. . . . I realize this was a somewhat limited burglary, but, I think, it's fairly clear that both the case law and statute indicate that the burglary charge does not merge with the assault charge.

1RP 354-55 (emphasis added).

Following Meneese's allocution, the court imposed a mid-standard range sentence of 27 months for the assault, 364 days for the misdemeanor violation of a court order, and, agreeing with defense counsel that the burglary was "pretty minimal as burglaries go," a low-end standard range sentence of 36 month for that offense, all concurrent to each other. 72-83; 1RP 373-74. Meneese appeals. CP 86-87.

C. ARGUMENT

THE COURT ERRED IN FAILING TO EXERCISE ITS DISCRETION TO MERGE THE ASSAULT AND BURGLARY.

Based on an erroneous understanding of the law, the trial court refused to consider merging Meneese's second degree assault conviction into his first degree burglary conviction. Because such discretion exists, this Court should reverse and remand for a resentencing.

Under the double jeopardy provisions of the United States and Washington constitutions, a person may not be convicted or punished more than once for the same offense. U.S. Const. amend. V; Const. art. I, § 9; Brown v. Ohio, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977); State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005); State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). If an act supports charges under multiple statutes, the court must determine whether the Legislature intended to authorize multiple punishments. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). If the statutes do not expressly disclose legislative intent regarding multiple punishments, the court considers whether the offenses are identical in fact and in law. Id. at 777; State v. Louis, 155 Wn.2d 563, 569, 120 P.3d 936 (2005) (citing Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)).

Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, this Court presumes the legislature intended to punish both offenses through a greater sentence for the greater crime. Freeman, 153 Wn.2d at 773-74. The merger doctrine avoids double jeopardy 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 commission of one felony to elevate the degree of another felon, the less serious offense merges into the greater offense for double jeopardy purposes, unless they have an independent purpose or effect. In re Francis, 170 Wn.2d 517, 525, 532, 242 P.3d 866 (2010); Freeman, 153 Wn.2d at 780.

In the context of burglary, however, the Legislature enacted the so-called "burglary antimerger statute,"³ which provides, "Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately." RCW 9A.52.050. Under this statute, whether to merge crimes committed in the course of a burglary into the burglary is

³ See e.g., State v. Davis, 90 Wn. App. 776, 781, 954 P.2d 325 (1998) (referring to RCW 9A.52.050 as the "burglary antimerger statute").

left to the discretion of the sentencing court based on the fact of the case.

Davis, 90 Wn. App. at 783-84.

Here, as charged, it is beyond dispute that the prosecution used the second degree assault of Winston to elevate the burglary charge to first degree:

[O]n or about April 20, 2013, [Meneese] did enter or remain unlawfully in a building located at 2714 S. 257th Pl, Kent, in said county and state, with intent to commit a crime against a person or property therein, and in entering, and while in such building and in immediate flight therefrom, the defendant did assault a person, to-wit: Destyni Monique Winston[.]

CP 14 (Second Amended Information).

Regarding the burglary, the jury was instructed:

A person commits the of burglary in the first degree when he enters or remains unlawfully in a building with intent to commit a crime against a person or property therein, and if, in entering or while in the building or in immediate flight therefrom, he assaults any person.

CP 38 (Instruction 18). Thus, to convict Meneese of first degree burglary, the State had to prove he assaulted Winston during the commission of the burglary, or in immediate flight therefrom.⁴

⁴ Although there was evidence Meneese also struck Jordan when he threw the punch at Winston, it was inadvertent and therefore was not an "assault," which was defined for the jury as "an intentional touching or striking of another person that is harmful or offensive." CP 28 (Instruction 8, emphasis added).

The scenario at issue in Davis, supra, is instructive here. Davis was convicted of first degree burglary and two assaults committed during the course of the burglary, one against the resident of the home burglarized, and one against a guest in the home. The sentencing court treated the both assaults and the burglary as same criminal conduct for offender score purposes, and also declined to apply the burglary antimerger statute, choosing instead to punish only the burglary. 90 Wn. App. at 779-80. Both Davis and the State appealed. Davis challenge the sufficiency of the evidence to convict on the burglary, and the State challenged the calculation of Davis's offender score and the trial court's refusal to punish both the burglary and the two assaults separately. Id. at 778-79.

This Court affirmed Davis's convictions, but remanded for resentencing, concluding the trial court erred in finding the assaults and the burglary involved the same criminal conduct because each assault had different victims, and both the resident and guest were victims of the burglary. 90 Wn. App. at 781-82. This Court affirmed, however, the trial court's conclusion that it had discretion whether to apply RCW 9A.52.050 based on the specific facts of the case. 90 Wn. App. at 783-84.

Davis controls and requires reversal of Meneese's judgment and sentence and remand for resentencing. Although the sentencing court

correctly denied the defense request to treat the assault and burglary as same criminal conduct because there were two victims to the burglary (Winston and Jordan), but only one for the assault (Winston), its determination that RCW 9A.52.050 eliminated any discretion to merge the assault with the burglary was clear error in light of Davis. 1RP 354-56.

D. CONCLUSION

For the reasons stated, this Court should reverse Meneese's judgment and sentence.

DATED this 30th day of December 2014.

Respectfully submitted,

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DIVISION ONE

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Appellant.)	

DECLARATION OF SERVICE

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 30TH DAY OF DECEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JAMAR MENESE
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SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF DECEMBER 2014.

x Patrick Mayovsky