

DM 3-24-07

NO. 34941-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

ZACHARY LYNN FRAZIER,

Appellant.

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

The Honorable Frank E. Cuthbertson, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. RESTATEMENT OF FACTS.	1
B. ARGUMENT IN REPLY	2
1. THIS COURT SHOULD ACCEPT THE STATE'S CONCESSION THAT SEPARATE CONVICTIONS FOR ROBBERY AND THE ASSAULT OF CELIA VIOLATES DOUBLE JEOPARDY, AND FURTHER HOLD THAT THE CONVICTIONS FOR ROBBERY AND THE ASSAULT OF ROLAN KIMBROUGH ALSO VIOLATES DOUBLE JEOPARDY.	2
2. THE ASSAULT CONVICTIONS SHOULD ALSO BE CONSIDERED THE SAME CRIMINAL CONDUCT AS THE ROBBERY CONVICTION .	3
3. MR. FRAZIER'S CALIFORNIA CONVICTIONS SHOULD NOT HAVE BEEN INCLUDED IN HIS OFFENDER SCORE	4
4. THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION TO SUPPRESS THE SHOW- UP IDENTIFICATION	4
5. THE TRIAL COURT ERRED IN DENYING EITHER SEVERANCE OR A MISTRIAL BASED ON THE MISCONDUCT OF MR. CALHOUN. .	6
6. THE TRIAL COURT ERRED IN GIVING INSTRUCTION NUMBER 7.	7
C. CONCLUSION	10

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Goodwin,
146 Wn.2d 861, 50 P.3d 618 (2002) 4

State v. Freeman,
153 Wn.2d 765, 108 P.3d 753 (1995) 2

RULES, STATUTES AND OTHERS

RCW 9.94A.589(1)(a) 3

A. RESTATEMENT OF FACTS

Isha Isaac called 911 before the intruders who took the safe had left her apartment; she followed the intruders to their truck and continued talking to the 911 operator as she followed them. RP 151, 153, 220-224. She told the 911 operator at that time that she recognized one of the intruders as someone called either "Teeth" or "Teas." RP 225. "Teeth" or "Teas" wore his hair in braids and had a baby face, terms not descriptive of Mr. Frazier. RP 247, 260.

Neither Celia Isaac nor Rolan Kimbrough were able to identify Mr. Frazier. RP 157, 194; RP(5/3) 33. Isha identified Mr. Frazier as one of the intruders only after Ms. Banks was removed from the car and Isha associated him with Ms. Banks. RP 54. She testified that Mr. Calhoun was the person who hit Kimbrough and Mr. Frazier as the person who remained in the living room. RP 229-232, 241. Officer Bell, who took Isha and Kimbrough to the show-up, was adamant that Mr. Frazier was identified as the intruder who hit Kimbrough and Mr. Calhoun was the intruder who put his hand inside Celia's bra. RP 343, 345, 356.

The police followed the red truck identified by Isha into a driveway. RP 304-313, 360, 384-387. Mr. Calhoun testified at trial that Mr. Frazier was at the house where the truck was stopped and got into the truck only because the arresting officers ordered him to get into the truck. RP 470-471.

B. ARGUMENT IN REPLY

- 1. THIS COURT SHOULD ACCEPT THE STATE'S CONCESSION THAT SEPARATE CONVICTIONS FOR ROBBERY AND THE ASSAULT OF CELIA VIOLATES DOUBLE JEOPARDY, AND FURTHER HOLD THAT THE CONVICTIONS FOR ROBBERY AND THE ASSAULT OF ROLAN KIMBROUGH ALSO VIOLATES DOUBLE JEOPARDY.**

The state properly concedes that under State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (1995), the assault conviction involving Celia Isaac merged with the robbery conviction. Brief of Respondent (BOR) at 17. Contrary to the argument of the state, however, the assault conviction involving Rolan Kimbrough should also merge with the robbery. The assault of Kimbrough had no purpose other than completing the robbery.

Although the state argues that the purpose of the assault of Kimbrough was to make sure that he did not escape, that he could not retrieve a weapon or that he could not call for help (BOR) 34-35),

these purposes are not independent of the goal of obtaining and retaining the safe. Most importantly, under the court's instructions to the jury, the jurors necessarily had to have found that "[t]he assault of Kimbrough was committed with the intent to commit Robbery or Theft in the second degree," and not an independent purpose. CP 59.

The jury convicted Mr. Frazier of the assault of Kimbrough based on a finding beyond a reasonable doubt that the assault was committed with a goal of obtaining the safe. The convictions of the robbery and the assault of Kimbrough should merge.

2. THE ASSAULT CONVICTIONS SHOULD ALSO BE CONSIDERED THE SAME CRIMINAL CONDUCT AS THE ROBBERY CONVICTION.

Because the assaults should merge with the robbery, this Court need not reach the issue of whether the assaults should be the same criminal conduct as the robbery. These convictions, however, meet the test of RCW 9.94A.589(1)(a). See Opening Brief of Appellant (AOB) 30-34.

Although the state argues that the assault against Kimbrough has a different victim than the robbery (BOR 39), as the jury was instructed, there were no named victims for the robbery and any person

present at the house was a potential victim of the robbery. CP 49.

3. MR. FRAZIER'S CALIFORNIA CONVICTIONS SHOULD NOT HAVE BEEN INCLUDED IN HIS OFFENDER SCORE.

Contrary to the argument of the state (BOR 40), a *legal* error leading to an excessive sentence cannot be waived by stipulation. BOR 40; In re Goodwin, 146 Wn.2d 861, 874-876, 50 P.3d 618 (2002).

Further, defense counsel asserted at sentencing that Mr. Frazier's California offenses would wash out, but concluded that it did not matter because Mr. Frazier's offender score would be 9 even without the prior convictions. RP(sent) 3-4. This, however, was wrong and was not a waiver.

Nevertheless, as the state correctly points out, Mr. Frazier will be entitled to be resentenced, even if all of his convictions are not reversed, and he can challenge his prior convictions at resentencing. See BOR 40-41.

4. THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION TO SUPPRESS THE SHOW-UP IDENTIFICATION.

The state effectively concedes that the identification procedure was suggestive both because it was conducted beside the red truck associated

with the robbery and because only Calhoun, Frazier and Banks were present at the show-up.. RP 16-17.

But, contrary to the argument of the state (BOR 18-19), the identifications were not shown to be reliable in spite of the suggestiveness of the identifications.

First, Isha identified someone completely different by name to the 911 operator. RP 225. Kimbrough was unable to identify Mr. Frazier at the show-up, and both he and Isha identified Mr. Calhoun as the person who assaulted Kimbrough, while Officer Bell had Mr. Calhoun as being identified as the person who put his hand in Celia's bra. RP 229-232, 241, 343, 345, 356. Thus, the reports that the state asks this Court to rely on to find the identifications reliable are directly contradicted by the trial testimony. BOR at 18.

The view of Isha and Kimbrough was not unimpaired, because the faces of the intruders were covered. RP 104, 143, 235, 247. The descriptions by the victims before the show-up did not match the appearance of the defendants; Isha, in fact, identified an entirely different person before the show-up and identified Mr. Frazier only after seeing

Ms. Banks. RP 54. See BOR at 18-19. Isha identified Mr. Frazier as Ms. Banks' boyfriend rather than as the intruder. Moreover, beyond identifying clothing, neither Isha nor Kimbrough provided detailed descriptions. RP 340-343.

Most telling, Celia, who would have had the best opportunity to observe Mr. Frazier if he had been the one who reached into her bra, was unable to identify him. She was not at the show-up and not tainted by the procedure. Under all of these circumstances, the trial court erred in denying the pre-trial motion to suppress the identifications.

5. THE TRIAL COURT ERRED IN DENYING EITHER SEVERANCE OR A MISTRIAL BASED ON THE MISCONDUCT OF MR. CALHOUN.

As the jury was instructed, Mr. Frazier's guilt was inextricably intertwined with the jury's consideration of Mr. Calhoun's guilt. If Mr. Calhoun's behavior discredited him to the jury it also necessarily made it more likely that the jury would convict Mr. Frazier as well. The jury was instructed that Mr. Frazier's guilt was virtually the same as Mr. Calhoun's guilt.

Under these circumstances, Mr. Calhoun's outbursts during which he personally addressed the

jurors and told them that they were not hearing the whole story, that the judge had committed treason and that his lawyer and other witnesses were lying surely diminished Mr. Frazier in the eyes of the jurors as well as diminishing Mr. Calhoun in their eyes. RP 472-475, 499-500. Mr. Calhoun had to actually be removed from the courtroom by officers. RP 500. His statements were not proper evidence and not cumulative of any other evidence.

The denial of either severance or a mistrial denied Mr. Frazier a fair trial and should result in a reversal of his convictions,

6. THE TRIAL COURT ERRED IN GIVING INSTRUCTION NUMBER 7.

Mr. Frazier does not argue that accomplices are not equally guilty as principals. BOR 29. The problem with the Court's instruction number 7 is not that it makes an accomplice as guilty as the principal. The problem is that instruction number 7 does not require the state to prove that either Mr. Frazier or Mr. Calhoun committed all of the elements of each crime charged beyond a reasonable doubt. Instruction number 7 provided:

If you are convinced that both defendants participated in a crime or crimes charged in this case and that the crime or crimes

have been proven beyond a reasonable doubt, you need not determine which defendant was an accomplice and which was principal.

CP 44. Thus, under this instruction, the jury could convict if it found (1) that both Mr. Frazier and Mr. Calhoun "participated" in some undefined manner in one of the charged crimes ("a" crime or crimes); and (2) that the crime has been proven to have been committed by someone. Nothing in the instruction required the jury to find that either Mr. Calhoun or Mr. Frazier committed every element of the crime, rather than just participated in it in some manner. Nothing required the jury to find that Mr. Frazier or Mr. Calhoun had committed each crime charged beyond a reasonable doubt.

Under the facts of the case, it was undisputed at trial that someone committed the criminal conduct; the issue was identity. Under the court's instruction number 7, the jury could have convicted if it determined that Mr. Frazier participated in some way by meeting Ms. Banks and Mr. Calhoun at the house where the truck was stopped. The "to-convict" instructions for the robbery, second degree assault and burglary counts did not cure the problem because each element in these "to-convict" instructions

provided that either the defendant or an accomplice committed that element. CP 49, 59, 24, 30.

Instruction number 7 relieved the state of its obligation to prove every element of the crimes charged beyond a reasonable doubt. This denied Mr. Frazier due process of law and should require reversal of his convictions.

C. CONCLUSION

Appellant respectfully submits that his convictions should be reversed and remanded. In any event his case should be remanded for resentencing.

DATED this 23rd day of March, 2007.

Respectfully submitted,



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