

NO 37827-2

COURT OF APPEALS
DIVISION II

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

DAVID S. RAMOS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson, Judge

No. 05-1-03836-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did defendant waive any argument that his convictions violate double jeopardy when he pled guilty pursuant to a negotiated plea agreement? Alternatively, did defendant fail to show that his convictions for first degree murder and first degree rendering criminal assistance violate double jeopardy when the two offenses are not the same in law or fact?

B. STATEMENT OF THE CASE.

1. Procedure

On August 5, 2005, the State charged David Steven Sanchez Ramos along with his co-defendants, Josua Ryan Owen and Terrance Lee Scott, with aggravated first degree murder (Count I), first degree murder (Count II), and three counts of first degree robbery (Counts III, IV, V). CP 1-6. On December 8, 2006, the State filed an amended information adding Casey Lee Spence and Durrion Wesley Turner as co-defendants to the existing counts, and charging all five co-defendants with one more count of first degree robbery (Count VI), three counts of second degree assault (Count VII, VIII, IX,), and one count of first degree unlawful possession of a firearm. CP 7-12.

On February 1, 2008, the parties appeared before the Honorable Brian Tollefson for the plea hearing. 2/1/2008 RP 1. The State provided to the court a second amended information and prosecutor's statement pursuant to the plea agreement. CP 15-17, 56-57. The second amended information charged defendant with first degree murder with a firearm enhancement (Count I), first degree robbery with a firearm enhancement (Count III), and first degree rendering criminal assistance (Count XI). CP 15-17. Defendant advised the court that he was prepared to enter pleas of guilty to each of the three counts charged in the second amended information when the court accepts the filing of that information. 2/1/2008 RP 1. The court then accepted the filing of the second amended information "contingent upon Mr. Sanchez Ramos pleading guilty to it today." 2/1/2008 RP 1. Defendant pled guilty to all three counts and sentencing was set over until March 28, 2008. CP 18-27, 55.

On April 25, 2008, the parties appeared before the Honorable Brian Tollefson for sentencing. CP 37-49. The court sentenced defendant to a high end, standard range sentence on each of the three counts to run concurrent with each other, plus sixty month firearm enhancements on Counts I and III to run consecutive with each other, and all other sentences, for a total of 481 months. CP 37-49. The court also imposed standard costs and fines. CP 37-49.

2. Facts

Defendant and his co-defendants were members of a gang that called itself the “Spanaway Crips.” CP 5-6, 13-14. On July 20, 2005, at approximately 1:00 am, defendant and his co-defendants had gathered at the Spire Rock area near Sprinker Recreation Center in Spanaway. CP 5-6, 13-14. There, Cliff Nelson, Kenneth Palmer, Robert Swesey, and Derrick Johnson, arrived at the park looking for an unrelated party. *Id.* Defendant and his fellow gang members confronted Nelson and his friends. *Id.* An argument ensued during which several members of defendant’s group produced guns and pointed them at the four young men. *Id.* Defendant produced a BB gun. CP 5. Members of defendant’s group ordered the four young men to empty their pockets, take off their clothes, and lie on the ground. CP 5-6, 13-14.

Each of the four young men was beaten by members of defendant’s group. CP 5-6, 13-14. Palmer suffered extensive injuries to his face and head. *Id.* Nelson was pistol whipped repeatedly and suffered extensive lacerations to the back of his head – these lacerations resulted in significant blood loss. *Id.* A member of defendants’ group pressed the barrel of a handgun against Swesey’s anus and joked about shooting Swesey. CP 13-14.

After pistol whipping Nelson, co-defendant Owen handed his gun to defendant and told defendant to shoot anyone who tried to run away. CP 5-6, 13-14. Owen then began rummaging through the victims' belongings. CP 13-14. Nelson stood up and tried to run away. CP 5-6, 13-14. Sanchez Ramos fired a shot at Nelson, then chased after him on foot firing several more shots at him. CP 5-6, 13-14. Several of the co-defendant's also chased Nelson. *Id.* Nelson collapsed into some nearby bushes where he died from three gunshot wounds to his body. CP 5-6, 13-14. Officers found both .40 caliber and 9mm shell casings at the scene. *Id.* The Medical Examiner concluded that the major bleeding from Nelson's head wounds also contributed to his death. *Id.*

Defendant disposed of one his co-defendant's firearms that was used in the murder. CP 18-27.

C. ARGUMENT.

1. DEFENDANT WAIVED ANY ARGUMENT THAT HIS CONVICTIONS VIOLATE DOUBLE JEOPARDY WHEN HE PLED GUILTY TO AMENDED CHARGES IN A NEGOTIATED PLEA AGREEMENT; ALTERNATIVELY, DEFENDANT HAS FAILED TO SHOW THAT HIS CONVICTIONS FOR FIRST DEGREE MURDER AND FIRST DEGREE RENDERING CRIMINAL ASSISTANCE VIOLATE DOUBLE JEOPARDY BECAUSE THE TWO CRIMES ARE NOT THE SAME IN FACT OR IN LAW.

Both the United States Constitution and the Washington State Constitution protect a person from twice being placed in jeopardy for the

same offense. U.S. Const. amend. V (no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.”); Wash. Const. art. I, § 9 (no person shall “be twice put in jeopardy for the same offense). “The federal and state [double jeopardy] provisions afford the same protections and are ‘identical in thought, substance, and purpose.’” *In re Pers. Restraint of Davis*, 142 Wn.2d 165, 171, 12 P.3d 603 (2000) (quoting *State v. Schoel*, 54 Wn.2d 388, 391, 341 P.2d 481 (1959)).

To determine if the defendant has been punished twice for a single act under separate criminal statutes, the courts apply the test laid out in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L.Ed. 306 (1932). Under the *Blockburger* test, double jeopardy arises if the offenses are identical both in law and in fact. *Blockburger*, 284 U.S. 299, 304. “[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” *Blockburger*, at 304 citing *Gavieres v. United States*, 220 U.S. 338, 342, 31 S. Ct. 421, 55 L.Ed. 489 (1911). When convictions on two crimes for the same act would constitute double jeopardy, the remedy is to vacate the conviction for the “lesser” crime. *In re Pers. Restraint of Burchfield*, 111 Wn. App 892, 899, 46 P.3d 840 (2002).

- a. Defendant waived any issue of double jeopardy when he pled guilty to an amended information in a negotiated plea agreement.

In *State v. Amos*, 147 Wn. App. 217, 223, 195 P.3d 564 (2008), Forrest Amos and three accomplices committed a home invasion robbery of Joe Hull's home. After lengthy plea negotiations, Amos pleaded guilty to first degree burglary, first degree robbery, second degree assault, possession of a stolen firearm, theft of a firearm, and first degree unlawful possession of a firearm. *Amos*, 147 Wn. App. 217, 223. After sentencing, Amos successfully challenged his offender score calculation by challenging the inclusion of two juvenile offenses that had washed out. *Amos*, at 224. The court sentenced Amos on the recalculated offender score; Amos again appealed, this time alleging that his convictions for first degree robbery and second degree assault violated double jeopardy. *Id.* at 225.

This court rejected Amos' argument because Amos waived his right to appeal the second degree assault conviction when he requested the court to amend the original information to replace the first degree assault charge with second degree assault. *Id.* at 225. To do otherwise, would allow a defendant to manipulate and mislead courts by negotiating for reduced charges and then challenging the court's ability to hold him to the very bargain he negotiated. In rejecting Amos' double jeopardy argument,

this court distinguished *State v. Knight*, 162 Wn.2d 806, 174 P.3d 1167 (2008), which allowed a post plea challenge based upon the double jeopardy “unit of prosecution” doctrine. *But see State v. Martin*, ___ Wn. App. ___ (Division I, No. 60642-5) (2009)(holding that a guilty plea does not waive a double jeopardy challenge). The *Amos* court held that under *Knight* a double jeopardy challenge based upon the “unit of prosecution” doctrine was not waived by defendant’s plea because it went to the very power of the State to bring a defendant into court.

Like *Amos*, here defendant plead guilty to much reduced charges in a bargained for plea agreement. Defendant was originally charged with both aggravated first degree murder and first degree murder for the death of Clifford Nelson, four (4) counts of first degree robbery, and three counts of second degree assault, but ultimately plead guilty to a three counts, two of which he now allege violate his rights against double jeopardy. CP 7-12, 15-17, 18-27. Like *Amos*, this court should not allow defendant to manipulate and mislead the court by entering into a plea for much reduced charges, and then challenge the convictions without withdrawing his plea. This court should find that defendant, like *Amos*, waived his right to challenge his convictions on double jeopardy grounds when defendant advised the court he was prepared to enter pleas of guilt to the three charges once the court accepted the filing of the amended information and the court, in turn, accepted the filing of the second

amended information "...contingent upon Mr. Sanchez Ramos pleading guilty to it..." 2/1/08 RP 1.

b. First Degree Murder and First Degree Rendering Criminal Assistance are not the same in law

Should this court find that defendant has not waived his double jeopardy challenge, defendant's argument that his convictions violate double jeopardy fails because defendant's convictions for first degree murder and first degree rendering criminal assistance are not the same in law or fact.

"Offenses are legally identical unless each offense contains an element not contained in the other." *State v. Gocken*, 127 Wn.2d 95, 101, 896 P.2d 1267 (1995). Here, first degree rendering criminal assistance and first degree murder each contain an element not contained in the other. A person commits the crime of first degree rendering criminal assistance if he renders criminal assistance to a person who has committed or is being sought for murder in the first degree. *See* RCW 9A.76.070(1). A person renders criminal assistance "if, with intent to prevent, hinder, or delay the apprehension or prosecution of another person who he knows has committed a crime...or is being sought by law enforcement officials for the commission of a crime...he...conceals, alters, or destroys any physical evidence that might aid in the discovery or apprehension of such person..." *See* RCW 9A.76.050(5). Whereas, a person commits the crime

of first degree murder if he, with a premeditated intent to cause the death of another person, causes the death of such person. RCW 9A.32.030(1)(a).

Evidence that defendant intentionally hindered or delayed the apprehension or prosecution of a person who committed the crime of first degree murder is necessary to prove rendering criminal assistance, but not necessary to prove first degree murder. Here, defendant admitted he rendered criminal assistance by disposing of a co-defendant's firearm that would have aided in the apprehension of that person who had also committed first degree murder. CP 18-27. Evidence that defendant, with premeditated intent, shot and killed Clifford Nelson, is not necessary to prove he committed the crime of rendering criminal assistance. Because both crimes contain different elements and require the proof of different facts, the double jeopardy clause does not prohibit convictions for both offenses.

In *State v. Martin*, ___ Wn. App. ___, defendant pled guilty to second degree assault and attempted third degree rape. On appeal, Martin alleged that his second degree assault and third degree rape convictions violated double jeopardy because they constituted the same offense. Based upon the unique facts of that case, an anticipatory offense and a second crime that is both charged separately and used as the basis for the attempt charge, Division One of the Court of Appeals agreed with Martin, vacated the lesser conviction, and remanded for resentencing.

Martin and D.S. each rented rooms in a boarding house. *Martin*, ___ Wn. App. ___. Martin and D.S. had an argument and D.S. went into her room to make a telephone call. *Martin*, at ___. Martin broke into her room, took the phone away from D.S., pinned her arms above her head, untied her pants and tried to pull them down. *Martin*, at ___. Martin's brother heard D.S. screaming and came into her room and pulled Martin off of her. During the incident, Martin twice threatened to kill D.S. *Martin*, at ___. The State initially charged Martin with attempted second degree rape, attempted indecent liberties, and two counts of felony harassment. *Martin*, at ___. Through plea negotiations, Martin pled guilty to amended charges of second degree assault, two counts of felony harassment, and attempted third degree rape. *Martin* at ___. After Martin pled guilty, he appealed the second degree assault and attempted third degree rape on double jeopardy grounds. *Martin*, at ___.

The court found that Martin's convictions violated double jeopardy because they were the same in fact. *Martin*, ___ Wn. App. ___. There was no independent purpose for Martin's assault of D.S. except to accomplish the attempted third degree rape. *Martin*, at ___. In Martin's case, the assault was the substantial step toward the rape. *Martin*, at ___. The court found that "[the evidence required to support Martin's conviction for attempted third degree rape was the same evidence used to

convict him of second degree assault. Under the *Blockburger* test, the two crimes were the same offense.” *Martin*, at ____.

The present case is distinguishable from *Martin* because here neither defendant’s conviction for first degree murder, nor first degree criminal assistance, is the substantial step or predicate offense for the other. Unlike *Martin*, where the assault was the substantial step for the attempted rape, here defendant’s murder of Clifford Nelson was completely separate from defendant’s rendering of criminal assistance to a co-defendant (who had also committed the crime of first degree murder) by disposing of that co-defendant’s gun. Thus, unlike *Martin*, defendant’s two convictions do not violate double jeopardy.

Finally, defendant argues that he cannot be convicted of killing a person and rendering criminal assistance for that person’s death, because double jeopardy prevents both convictions from standing. However, defendant’s argument ignores several facts surrounding the death of Clifford Nelsen.

First, defendant’s argument ignores the fact that defendant had numerous accomplices in the murder of Clifford Nelson. The original charging document listed three named co-defendants, and an amended information added two additional co-defendants, who participated in the murder of Clifford Nelson, as well as the robberies, and assaults committed against Clifford Nelson and his friends on the evening of July 20, 2005. CP 1-6, 7-12. In addition to the informations charging multiple

co-defendants in the crimes committed against Clifford Nelson and his friends that night, the declarations for probable cause describe Joshua Owens, one of defendant's co-defendants, viciously pistol whipping Clifford Nelson on the back of Nelson's head. CP 1-6, 13-14. The medical examiner listed the blood loss from the lacerations on the back of Nelson's head as a contributing factor in Nelson's death. CP 13-14. Finally, defendant states in this statement of defendant on plea of guilty that he "rendered criminal assistance to another who committed [sic] the crime of murder in the first degree by disposing of a firearm which would have aided in the apprehension of that person..." CP 18-27. Thus, the facts of this case show that defendant and his co-defendants were all responsible for the death of Clifford Nelson. Defendant's act of disposing of a co-defendant's gun that was used in this incident would have hindered or delayed law enforcement's apprehension of one of defendant's co-defendants – a person who was also sought by law enforcement for the murder of Clifford Nelson.

Thus, defendant's convictions for first degree murder and first degree rendering criminal assistance do not violate double jeopardy. Defendant's shooting of Clifford Nelson was a separate and distinct crime to his disposing of a firearm that would have lead to the apprehension of a co-defendant, who defendant knew had also committed the crime of first degree murder.

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STATE OF WASHINGTON

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D. CONCLUSION.

For the reasons argued above, the State respectfully requests this court to affirm defendant's convictions for first degree murder, first degree robbery, and first degree rendering criminal assistance.

DATED: June 22, 2009.

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Prosecuting Attorney

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6-22-09 *Alexa Ko*
Date Signature