

NO. 38662-3-II

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

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STATE OF WASHINGTON,

Respondent,

v.

DAVID ARLIN TAYES,

Appellant.

03 OCT 27 11:12:53  
STATE OF WASHINGTON  
BY [Signature]  
DEPT. OF JUSTICE

COURT OF APPEALS  
DIVISION TWO  
CLERK OF COURT

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

The Honorable Thomas J. Felnagle

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BRIEF OF APPELLANT

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VALERIE MARUSHIGE  
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P.M. 10-26-2009

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in counting appellant's conviction for rape in the third degree as a prior most serious offense and sentencing him to life without the possibility of parole as a persistent offender under the Persistent Offender Accountability Act.

2. The trial court erred in entering findings of fact and conclusions of law for appellant's assault in the first degree conviction.

Issues Pertaining to Assignments of Error

1. Did the trial court err in counting appellant's 1979 conviction for rape in the third degree as a prior most serious offense when the conviction did not constitute a sex offense as defined in the Sentencing Reform Act and consequently washed out?

2. Did the trial court err in entering findings of fact and conclusions of law for the assault in the first degree conviction which merged with the manslaughter in the first degree conviction because a trial court may not enter multiple convictions for the same offense without offending double jeopardy?

B. STATEMENT OF THE CASE<sup>1</sup>

1. Procedural Facts

On May 31, 1996, the State charged, appellant, David Arlin Tayes, with murder in the second degree by alternative means, intentional murder, and felony murder predicated on assault in the second degree. Supp CP \_\_\_\_ (Information, 05/31/96). A jury found Tayes guilty as charged but the verdict form did not specify a particular alternative. Supp CP \_\_\_\_ (Verdict Form, 03/17/97). On May 22, 1997, the court sentenced Tayes to life without the possibility of parole as a persistent offender. CP 3-13.

On July 20, 2007, the court vacated Tayes' conviction and sentence pursuant to In re Andress and In re Hinton, where the Washington Supreme Court invalidated the felony murder statute when the underlying felony was assault. 2RP 2-3; CP 14-17. The State filed an amended information on October 19, 2007, charging Tayes with murder in the second degree and assault in the first degree. CP 18-19. Following a bench trial before the Honorable Thomas J. Felnagle, on October 23, 2008, the court found Tayes guilty of the lesser included offense of manslaughter in the first degree and assault in the first degree. 14RP 787-

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<sup>1</sup> There are 16 volumes of verbatim report of proceedings. In accordance with RAP 10.3(a)(4), the Statement of the Case contains facts and procedure relevant to the issues presented for review: 1RP - 06/26/07; 2RP - 07/20/07; 3RP - 10/19/07; 4RP - 02/06/08; 5RP - 04/04/08; 6RP - 10/01/08; 7RP - 10/09/08; 8RP - 10/13/08; 9RP - 10/14/08; 10RP - 10/15/08; 11RP - 10/20/08; 12RP - 10/21/08; 13RP - 10/22/08; 14RP - 10/23/08; 15RP - 12/05/08; 16RP - 06/05/09.

89; Supp CP \_\_\_\_ (Findings of Fact and Conclusions of Law, 06/04/09; Findings of Fact and Conclusions of Law, 06/08/09). On December 5, 2008, the court sentenced Tayes to life without parole as a persistent offender. 15RP 819-20; CP 47.

2. Substantive Facts

a. Trial<sup>2</sup>

In the early morning of May 30, 1996, Detective Tim Kobel responded to a 911 call of a death at Seeley Lake Apartments in Lakewood. 7RP 53-57. Kobel entered into a blood spattered apartment where officers on the scene found the brutalized body of Alice Saul in a bathtub. 7RP 56, 67-71, 98-99. Kobel learned that Tayes had made the 911 call and saw him seated in the back seat of a patrol car. Tayes was not a suspect but was being transported to the precinct for an interview. 7RP 75-77.

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<sup>2</sup> Tayes asserted the affirmative defense of insanity which is subject to the M’Naghten test (Queen v. M’Naghten, 8 Eng. Rep. 718 (1843), as codified under RCW 9A.12.010(1):

To establish the defense of insanity, it must be shown that:

(1) At the time of the commission of the offense, as a result of mental disease or defect, the mind of the actor was affected to such an extent that:

(a) He was unable to perceive the nature and quality of the act with which he is charged; or

(b) He was unable to tell right from wrong with reference to the particular act charged.

(2) The defense of insanity must be established by a preponderance of the evidence.

Deputy Christopher Rather reported to the apartment to investigate the 911 call and spoke with Tayes who was Saul's brother. 8RP 206-08. Rather located Saul in the bathtub and called medics who arrived and confirmed that she was dead. 8RP 207-08. Tayes said he and Saul had an argument earlier so he left and when he returned he found Saul and called 911. 8RP 209. Tayes told Rather that Saul was dead and asked him how she died. He was very calm and did not show any signs of being under the influence of drugs or alcohol. 8RP 209-210. There was no evidence of a forced entry. 8RP 209.

Detective Anthony Berger spoke with Tayes while he was in the patrol car after advising him of his rights. 8RP 215-18. Berger introduced himself and tried to shake Tayes' hand when he noticed that his hand was puffy and swollen, "I said, Whoa, what happened to your hand?" 8RP 218-19. Tayes said he had gotten into a fight with some kids. 8RP 219. Tayes did not seem out of touch with reality or under the influence of drugs or alcohol. 8RP 220, 224.

Major James Jenkins interviewed Tayes with Detective Kobel at the precinct. 9RP 254-55. When they eventually confronted him about killing his sister and explained the difference between murder and manslaughter, Tayes said, "I didn't murder her." 9RP 264. When they suggested that perhaps the situation just got out of hand, Tayes replied,

“I’d like to tell you it was an accident. I don’t want to go to prison for the rest of my life.” 9RP 310-11. Tayes told them he thought someone was trying to frame him and that Sauls’ ex-husband may have killed her. 9RP 301, 305. Tayes did not appear confused or out of touch with reality or affected by drugs or alcohol. 9RP 266-67.

Sharon Elizabeth, Tayes’ older sister, knew that Tayes was temporarily staying at Saul’s apartment. 8RP 150-51. Around 5 p.m. on May 29, 1996, Tayes called her and said Saul wanted him to move out of the apartment. 8RP 154. Tayes sounded “antsy and nervous about having to leave” and he asked her “something about whether [Saul] was going to have a gun” when she came home. 8RP 153-55. Elizabeth asked him why would she need a gun and Tayes said he did not know but “I’ll be ready when she gets here.” 8RP 153.

Elizabeth explained that Tayes suffers from a mental illness but when he was on medication “generally, he was normal.” 8RP 169. When Tayes did not take his medication, he was easily agitated and argumentative, “uncontrollable or out of control.” 8RP 172. Elizabeth did not believe Tayes was taking his medication during the time of Saul’s death. 8RP 181-82.

On May 29, 1996, Julia Harris received a phone call from her son, Tayes, early in the day. 9RP 237. Tayes was upset about having to leave

Saul's apartment. 9RP 238-39. Harris called Tayes back later in the afternoon and asked him if Saul had returned and he said she was not there. He sounded calm and quiet. 9RP 243-44. About 3:00 or 4:00 the next morning, Tayes called her and said, "Mother, Alice is in the bathtub, and she won't move." 9RP 245. Harris told him to call 911 and she and her other daughters went over to the apartment. 9RP 245.

Dr. Mark Whitehill evaluated Tayes in December 1996 during an interview which took several hours. 11RP 409. Whitehill administered a battery of psychological tests commonly used in cases of forensic assessment and reviewed Tayes' psychiatric records and the discovery in his case. 11RP 410. Whitehill applied the MMPI-2, a "common psychometric measure which assesses a wide range of psychopathology" and MCMI-II, "the Millon Clinical Multiaxial Inventory, Second Edition." 11RP 440-41. Whitehill found that Tayes exhibited symptoms of severe mental illnesses, "[T]he principal diagnosis is schizoaffective disorder, bipolar type. Also coded Axis I, which are the conditions for which people seek treatment typically, are alcohol abuse and cocaine abuse. On Axis II, I diagnosed Mr. Tayes with a antisocial personality disorder." 11RP 442.

Tayes admitted that he got upset and all of a sudden he began beating Saul with his hands. Tayes said "some type of evil spirit was quickly moving in." 11RP 459. He told Whitehill, "I had no control over

myself. I did not know whether I was fighting Alice or fighting all the confusion and all the anger I felt inside.” 11RP 459. Tayes did not recognize who he was beating, “It had completely left my mind that it was my sister.” 11RP 459.

Whitehill concluded that Tayes was “legally insane and, in particular, was unable to appreciate the nature and quality of his behavior. There was also evidence that he might not have known the difference between right and wrong, but I think that evidence was not as clear as his inability to appreciate the nature and quality of his behavior.” 11RP 462-63. He believed Tayes was “very dangerous such that, if he were to be released into society, there’s a high likelihood that he would engage in acts jeopardizing public safety.” Whitehill recommended that Tayes be sent to Western State Hospital for treatment of his mental condition. 11RP 464-65.

Dr. Ronald Hart evaluated Tayes at Western State Hospital on June 4, 1996, to determine whether he was competent to stand trial. 12RP 556. Tayes was “quite affective and very symptomatic. He escalated after being on the ward for a short period of time, refused redirection, was threatening, was placed in seclusion, and finally in restraints.” 12RP 561. Hart put Tayes on medication which Tayes discontinued and refused to take. 12RP 563. Hart observed Tayes for a period of 30 days and

concluded that he “had the capacity to proceed with his case.” 12RP 563-64.

In January 1997, Hart evaluated Tayes for purposes of determining his mental state at the time of the crime. 12RP 594-95. Hart diagnosed Tayes with “[p]olysubstance dependency, rule-out schizoaffective disorder, antisocial personality disorder.” 12RP 595. Hart determined that Tayes “had the capacity to form intent or goal-directed behavior” and “[h]e executed goal-directed behavior before, during, and after the death of his sister.” 12RP 601-02. He opined that Tayes “abused street drugs, primarily cocaine and alcohol, for a significant period of time leading up to the death” and “he was affected at the time as a result of those drugs.” 12RP 607. Hart concluded that Tayes was not legally insane when he killed Saul. 12RP 609.

b. Sentencing

The trial court found Tayes guilty of the lesser included offense of manslaughter in the first degree and assault in the first degree which merged with the conviction for manslaughter in the first degree. 14RP 787-89, 15RP 822.

At sentencing, defense counsel argued that Tayes’ conviction for third degree rape in 1979 should not be counted as a strike because it was not a sex offense as defined under the Sentencing Reform Act and

consequently it washed out. 15RP 797-800. The State argued that the third degree rape counted as a strike and the trial court agreed. 15RP 800-02, 808. The court determined that Tayes' convictions for rape in the third degree, assault in the second degree, and manslaughter in the first degree constitute three most serious offenses and sentenced Tayes to life in prison without the possibility of parole as a persistent offender. 15RP 820; CP 47.

Over defense counsel's objection, the court entered findings of fact and conclusions of law for the assault in the first degree conviction rather than vacating the conviction. 16RP 2-14; Supp CP \_\_\_\_ (Findings of Fact and Conclusions of Law, 06/08/09).

C. ARGUMENT

1. THE TRIAL COURT ERRED IN COUNTING TAYES' CONVICTION FOR THIRD DEGREE RAPE AS A MOST SERIOUS OFFENSE AND SENTENCING HIM TO LIFE WITHOUT PAROLE AS A PERSISTENT OFFENDER.

The trial court erred in counting Tayes' 1979 conviction for third degree assault as a most serious offense because the conviction was not a sex offense as defined under the Sentencing Reform Act and consequently the conviction washed out. The court's error requires reversal of Tayes' sentence and remand for resentencing.

Statutory interpretation is a question of law that appellate courts review *de novo*. State v. Watson, 146 Wn.2d 947, 954, 51 P.3d 66 (2002).

In interpreting a statute, the courts look first to the statute's plain language. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). "Courts should assume the Legislature means exactly what it says. Plain words do not require construction. The courts do not engage in statutory interpretation of a statute that is not ambiguous." State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). If the statute is clear on its face, its meaning is to be derived from the plain language of the statute alone. Legislative definitions included in the statute are controlling. Watson, 146 Wn.2d at 954.

In 1990, the legislature amended RCW 9.94A.360(2), eliminating sex offenses from the washout provision:

Except as provided in subsection (4) of this section, class A and sex prior felony convictions shall always be included in the offender score. Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without being convicted of any felonies. Class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without being convicted of any felonies.

Law of 1990, ch. 3, section 706 (in relevant part).

RCW 9.94A.030(33)(a) in relevant part defined “sex offense” as a “felony that is a violation of chapter 9A.44 RCW or RCW 9A.64.020 or 9.68A.090 or a felony that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes.”

In 1979, Teyes pled guilty to rape in the third degree in violation of RCW 9.79.190(1)(a). Supp CP \_\_\_\_ (State’s Sentencing Memorandum, 12/01/08)(judgment and sentence is attached as an appendix). In applying the cardinal principles of statutory interpretation and looking to the plain language of the controlling statute, Teyes’ conviction was not a sex offense as defined under RCW 9.94A.030(33)(a) because it was not a felony in “violation of chapter 9A.44 RCW.” Courts must assume the legislature meant exactly what it said. Keller, 143 Wn.2d at 276-77. The statute is clear on its face but even under any other imaginable interpretation, the statute must be construed in favor of the accused pursuant to the rule of lenity. See State v. Carpenter, 117 Wn. App. 673, 681, 72 P.3d 784 (2003). Furthermore, rape in the third degree is a class C felony and Teyes was not convicted of any felonies between his 1986 conviction for assault in the second degree and the 1996 conviction for felony murder. CP 44. Teyes’ 1979 conviction for rape in the third

degree therefore washed out and does not constitute a prior most serious offense.

With Tayes' conviction for rape in the third degree washing out, Tayes has only one prior most serious offense and does not meet the requirements of a persistent offender as defined in 1996 under RCW 9.94A.030(27).<sup>3</sup> Consequently, the trial court erred in sentencing Tayes to life in prison without parole as a persistent offender and the court's error requires reversal of Tayes' sentence and remand for resentencing.

2. THE TRIAL COURT ERRED IN ENTERING FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR THE ASSAULT IN THE FIRST DEGREE CONVICTION RATHER THAN VACATING THE CONVICTION IN VIOLATION OF TAYES' RIGHT AGAINST DOUBLE JEOPARDY.

Remand for resentencing is required because the trial court erred in entering findings of fact and conclusions of law for the assault in the first

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<sup>3</sup> "Persistent offender" is an offender who:  
(a) Has been convicted in this state of any felony considered a most serious offense; and  
(b) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.360; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted.

degree conviction rather than vacating the conviction in violation of Taves' constitutional right against double jeopardy.

The fifth amendment to the United States Constitution provides “[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb. . . .” Similarly, article I, section 9 of the Washington Constitution provides “[n]o person shall be . . . twice put in jeopardy for the same offense.” Washington’s double jeopardy clause offers the same scope of protection as the federal double jeopardy clause. In re Personal Restraint of Percer, 150 Wn.2d 41, 49, 75 P.3d 488 (2003)(citing State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)). Both prohibit “(1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense imposed in the same proceeding.” Percer, 150 Wn.2d at 48-49 (citing State v. Bobic, 140 Wn.2d 250, 260, 996 P.2d 610 (2000)).

In State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2006), the State charged Womac with homicide by abuse, felony murder in the second degree, and assault of a child in the first degree for the death of his infant son. A jury found Womac guilty as charged and the trial court entered judgment on all three counts. Id. at 647-48. Womac moved to dismiss counts II and III, claiming dismissal was necessary to avoid a double

jeopardy violation. The State asked that the charges and verdicts on counts II and III remain in place until Count I had survived postsentence challenges. The trial court determined double jeopardy did not require dismissal of counts II and III and left both convictions on Womac's record. Id. at 648.

On appeal, this Court directed the trial court to "conditionally dismiss Counts II and III," allowing reinstatement should Count I later be reversed, vacated, or otherwise be set aside. The Washington Supreme Court reversed this Court's order to conditionally dismiss counts I and II and directed the trial court to vacate Womac's convictions for felony murder and assault in the first degree. Id. at 649. The Court concluded that the trial court cannot enter multiple convictions for the same offense without offending double jeopardy. Id. at 658.

Here, the trial court found Teyes guilty of manslaughter in the first degree and assault in the first degree and entered a judgment and sentence on the manslaughter conviction. The State argued that the court should proceed to enter findings and conclusions on the assault conviction because "if you're not on the bench anymore for any reason at all when it becomes necessary to enter them, you're not here to do that and some other court can't enter your findings from a bench trial and they never can get entered and therefore that conviction can't be reduced to judgment

because there are no findings and conclusions.” 16 RP 10. Over defense counsel’s objections, the court entered findings of fact and conclusions of law which found Tayes “guilty of Assault in the First Degree.” Supp CP \_\_\_\_ (Findings and Conclusions, 06/08/09).

Under the Sentencing Reform Act, RCW 9.94A.030(9) defines “conviction” as “an adjudication of guilt pursuant to Titles 10 or 13 RCW, and includes a verdict of guilty, a finding of guilt, and acceptance of a plea of guilty.” For all intents and purposes, entering findings and conclusions to hold the assault conviction in abeyance for a later time is the equivalent of conditionally dismissing the conviction, which the Washington Supreme Court deemed a violation of double jeopardy. Womac, 160 Wn.2d at 658. As the Supreme Court pointed out, “[j]eopardy means exposure to danger.” Id. at 651. Tayes remains exposed to danger because his assault conviction has not been vacated.

Resentencing is required for the trial court to strike the findings of fact and conclusions and conclusions of law and vacate the assault conviction in accordance with the Supreme Court’s holding in Womac.

D. CONCLUSION

For the reasons stated, this Court should reverse Mr. Teyes' sentence of life without the possibility of parole and remand for resentencing.

DATED this 26<sup>th</sup> day of October, 2009.

Respectfully submitted,



VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, David Arlin Teyes

# **APPENDIX**

In the Superior Court of the State of Washington  
For the County of King

THE STATE OF WASHINGTON

Plaintiff,

No. 88474

vs.

DAVID ARLIN TAYES

Judgment and Sentence

SUPERIOR COURT CLERK  
Defendant

12-18  
363919

The Prosecuting Attorney, the above-named defendant and counsel

Byron H. Ward came into Court, the defendant having been  
charged by \_\_\_\_\_ information with the crime(s) of RAPE IN THE  
SECOND DEGREE

To this \_\_\_\_\_ information the defendant entered a plea of "Guilty" on the  
26<sup>th</sup> day of JANUARY, 1979, to the lesser  
included offense: "Rape in the Third Degree"

The Court having determined that no legal cause exists to show why judgment  
should not be pronounced, it is therefore ORDERED, ADJUDGED and DECREED that  
the said Defendant is guilty of the crime(s) of \_\_\_\_\_

Rape in the Third Degree, RCW 9A.04.010(a)

and that the defendant be sentenced to imprisonment in such penal institution or  
correction facility, under the jurisdiction and supervision of the Department  
of Social and Health Services, Division of Institutions, as the Secretary of the  
Department of Social and Health Services shall deem appropriate pursuant to the  
provisions of RCW 72.13.120, for a maximum term of not more than \_\_\_\_\_

FIVE (5)

years, and a minimum term to be fixed by the Board of Prison Terms and Paroles.

~~This sentence is hereby SUSPENDED pursuant to the provisions of RCW 9A.04.060  
upon the following terms and conditions:~~

(1) The Defendant shall be under the charge of a Probation and Parole Officer  
employed by the Department of Social and Health Services, Adult Corrections Division  
and follow implicitly the instructions of said Department, and the rules and  
regulations promulgated by said Department for the conduct of the Defendant during  
the term of his probation hereunder.

(2) The termination date of probation shall be set at \_\_\_\_\_ years from date of  
this order.

(3) The Defendant shall not commit any law violations.

(4) The Defendant shall pay all costs, within \_\_\_\_\_ from date of this order.

(5) The Defendant shall serve a term of \_\_\_\_\_ in King County Jail.

(with)(without) credit to be given for time already served, to commence \_\_\_\_\_

DONE IN OPEN COURT this 17<sup>th</sup> day of December, 1979

George R. Kelle  
Judge

Presented by:

Harry F. Loda  
Deputy Prosecuting Attorney

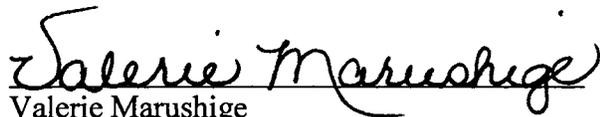
Byron H. Ward  
Attorney

**DECLARATION OF SERVICE**

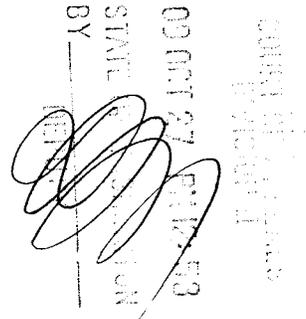
On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and David Arlin Tayes, DOC # 297669, MCC-SOU, P.O. Box 514, Monroe, Washington 98272.

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

DATED this 26<sup>th</sup> day of October, 2009 in Kent, Washington.



Valerie Marushige  
Attorney at Law  
WSBA No. 25851



09 OCT 27 PM 12:53  
KENT WA 98501  
BY [Signature]