

NO. 39098-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JUDE LINAREZ,

Appellant.

STATE OF WASHINGTON
BY _____
DEPUTY
COURT CLERK
JAN 14 11 09 AM '17
COURT OF APPEALS
DIVISION TWO

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

The Honorable Frank E. Cuthberston, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

CATHERINE E. GLINSKI
Attorney at Law
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

TABLE OF CONTENTS

TABLE OF CONTENTS	I
TABLE OF AUTHORITIES	II
A. ASSIGNMENTS OF ERROR	1
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	1
B. STATEMENT OF THE CASE	2
1. PROCEDURAL HISTORY	2
2. SUBSTANTIVE FACTS.....	2
C. ARGUMENT	6
1. THE COURT’S FAILURE TO MERGE THE FIRST DEGREE ROBBERY AND SECOND DEGREE ASSAULT CONVICTIONS VIOLATED DOUBLE JEOPARDY.....	6
2. THE TRIAL COURT FAILED TO APPLY THE SAME CRIMINAL CONDUCT PROVISION IN CALCULATING LINAREZ’S OFFENDER SCORE.....	10
a. <i>If this Court finds that the first degree robbery and second degree assault do not merge, the offenses nonetheless must be counted as one offense in calculating the offender score because they encompass the same criminal conduct.</i>	11
b. <i>Under the facts of this case, the first degree assault and unlawful possession of firearm encompass the same criminal conduct.</i>	13
D. CONCLUSION	14

TABLE OF AUTHORITIES

Washington Cases

<u>In re Pers. Restraint of Orange</u> , 152 Wn.2d 795, 100 P.3d 291 (2004).....	6
<u>State v. Adame</u> , 56 Wn. App. 803, 785 P.2d 1144, <u>review denied</u> , 114 Wn.2d 1030 (1990).....	12
<u>State v. Calle</u> , 125 Wn.2d 769, 888 P.2d 155 (1995).....	6
<u>State v. Dunaway</u> , 109 Wn.2d 207, 743 P.2d 1237 (1987).....	12
<u>State v. Freeman</u> , 153 Wn.2d 765, 108 P.3d 753 (2005).....	7, 9
<u>State v. Haddock</u> , 141 Wn.2d 103, 3 P.3d 733 (2000)	10, 11, 14
<u>State v. Lewis</u> , 115 Wn.2d 294, 797 P.2d 1141 (1990).....	12
<u>State v. Prater</u> , 30 Wn. App. 512, 635 P.2d 1104 (1981), <u>review denied</u> , 97 Wn.2d 1007 (1982).....	10
<u>State v. Tili</u> , 139 Wn.2d 107, 985 P.2d 365 (1999).....	11, 14
<u>State v. Torngren</u> , 147 Wn. App. 556, 196 P.3d 742 (2008).....	13
<u>State v. Vladovic</u> , 99 Wn.2d 413, 662 P.2d 853 (1983)	7, 10
<u>State v. Wilson</u> , 136 Wn. App. 596, 150 P.3d 144 (2007)	12

Statutes

RCW 9.41.040(2)(a)(i).....	2
RCW 9.94A.510.....	8
RCW 9.94A.589(1)(a)	10
RCW 9A.36.011(1)(a)	2, 13
RCW 9A.36.021(1)(a)	2, 8, 12
RCW 9A.52.020(1)(a)	2

RCW 9A.52.050.....	5
RCW 9A.56.190.....	2, 8, 12
RCW 9A.56.200(1)(a)(ii).....	2, 8
Constitutional Provisions	
Const. art. I, § 9.....	6
U.S. Const., amend. V.....	6

A. ASSIGNMENTS OF ERROR

1. Imposition of punishment for both first degree robbery and second degree assault violates constitutional guarantees against double jeopardy.

2. The trial court miscalculated appellant's offender score by counting separately crimes that encompassed the same criminal conduct.

Issues pertaining to assignments of error

1. Appellant was charged with robbing a motel clerk at gunpoint. Where the robber struck the clerk with a gun in order to facilitate the robbery, do the charges of first degree robbery and second degree assault arising from that single incident merge? Must the sentence and firearm enhancement imposed on the second degree assault conviction be vacated consistent with double jeopardy principles?

2.a. In the alternative, where the first degree robbery and second degree assault were intimately related as part of a single incident and the assault furthered the robbery, do they encompass the same criminal conduct for the purpose of calculating appellant's offender score?

2.b. Where an unlawfully possessed firearm is used to commit a first degree assault, do the first degree assault and the unlawful possession of a firearm involve the same victim and thus encompass the same criminal conduct?

B. STATEMENT OF THE CASE

1. Procedural History

Appellant Jude Linarez was charged by amended information in Pierce County Superior Court with first degree assault, second degree assault, first degree robbery, first degree burglary, and second degree unlawful possession of a firearm. CP 16-18; RCW 9A.36.011(1)(a); RCW 9A.36.021(1)(a); RCW 9A.56.190; RCW 9A.56.200(1)(a)(ii); RCW 9A.52.020(1)(a); RCW 9A.41.040(2)(a)(i). The case proceeded to jury trial before the Honorable Frank E. Cuthberston, and the jury returned guilty verdicts. CP 110-114. The jury also returned special verdicts finding Linarez was armed with a firearm during the commission of the assaults, robbery, and burglary. CP 115-118. The court imposed standard range sentences based on the State's offender score calculation, for a total sentence of 394 months confinement. CP 122, 125. Linarez filed this timely appeal. CP 133.

2. Substantive Facts

On January 12, 2008, Rebecca Hayden was working her first shift as front desk clerk at the Econo Lodge in Fife. 3RP¹ 95. She was being trained by Christina Smith, who normally worked the graveyard shift

¹ The Verbatim Report of Proceedings is contained in eight volumes, designated as follows: 1RP—2/2/09; 2RP—3/12/09; 3RP—3/16/09; 4RP—3/17/09; 5RP—3/18/09; 6RP—3/23/09; 7RP—3/24/09; 8RP—4/3/09.

alone. 5RP 292-93, 319. Around 3:00 a.m., a man came through the back door, pointed a gun at Hayden and Smith, and said he wanted the money from the safe. 3RP 97, 100, 141; 5RP 304. He walked behind the desk and ordered Smith and Hayden into the storage room, telling them to get down on the floor. 3RP 98. The man fired a shot in the ceiling, then pulled Smith out of the room and told her to open the door to the office. 3RP 101-02.

There is a safe in the office at the Econo Lodge, but the door to the office remains locked during the night shift, and only the manager has a key. 3RP 50-51. The man kept saying he wanted the safe out of the office, but Smith told the man she did not have a key. 5RP 305-06. She then started banging and kicking the door, trying to open it, and suggested the man shoot the window open. 3RP 102-03. When he could not get to the safe in the office, the man became more physical. 4RP 200. He hit Smith in the head with the gun, he kicked Hayden in the jaw, and he pistol whipped her in the back of the head. 3RP 104; 5RP 307. The man then grabbed Hayden by the collar and pulled her out of the storage room, saying he would shoot her unless Smith opened the office. As he did so, Smith ran out the front door, and the man fired two shots after her. 3RP 103-04, 105.

The man ordered Hayden to open the safe under the front desk counter, but she told him she did not have a key. 3RP 106-07. She then opened the cash drawer and told him to take that. The man took the cash tray from the drawer, opened an adjacent drawer, and told Hayden to give him the identification cards from that drawer. 3RP 108. She complied, and the man walked out of the building. 3RP 108.

When Smith was interviewed by police she said she knew the suspect as HB. 3RP 147; 5RP 373. She later picked Jude Linarez's photograph out of a montage, and Linarez was arrested and charged based on Smith's identification. 3RP 171; 4RP 223. Hayden was unable to make an identification from the montage, but she nonetheless purported to identify Linarez at trial, saying his lips looked familiar. 3RP 119, 121. She admitted upon further questioning, however, that she did not remember what the robber looked like. 3RP 140.

Although the Econo Lodge's surveillance cameras recorded the incident, the video could not be copied for use in court. 3RP 55. Instead, still photographs created from the video were admitted as exhibits. 3RP 57. None of these photographs contained a clear image of the suspect, however, and no one identified Linarez as the person in the photographs. 3RP 78, 86. Moreover, an identifiable fingerprint lifted from the drawer

the robber opened did not match Linarez's fingerprints. 4RP 197; 5RP 363-64.

The jury returned guilty verdicts, and the case proceeded to sentencing. The prosecutor initially calculated Linarez's offender score as 8 on the assault, robbery and burglary charges and 5 on the firearm charge. 8RP 2-3. Defense counsel objected to the offender score calculation, reserving the issue for appeal. 8RP 4. She indicated that she calculated Linarez's offender score as 4 or 5, rather than 8. 8RP 4. Counsel argued that Linarez's prior offense was committed as a juvenile and should be scored as only ½ point, and the State incorrectly included each of the current offenses in the offender score. 8RP 5. Counsel asked the court to impose low-end sentences, reiterating that calculation of the offender score would be an issue on appeal. 8RP 6.

The prosecutor then conceded that the prior juvenile conviction was improperly scored and recalculated the offender score as 7 and 4. 8RP 8-9. She also argued that the first degree robbery and second degree assault charges did not merge because the assault was based on inflicting substantial bodily harm, not merely causing a reasonable apprehension or fear. 8RP 10. Further, the robbery and burglary charges did not merge due to the burglary anti-merger statute, RCW 9A.52.050. 8RP 11. The

court accepted the State's offender score calculation, and defense counsel again made a record that she was objecting to that calculation. 8RP 12-13.

C. ARGUMENT

1. THE COURT'S FAILURE TO MERGE THE FIRST DEGREE ROBBERY AND SECOND DEGREE ASSAULT CONVICTIONS VIOLATED DOUBLE JEOPARDY.

The United States Constitution provides that a person may not be "subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const., amend. V. Similarly, the Washington State Constitution provides that a person may not be "twice put in jeopardy for the same offense." Const. art. I, § 9. The constitutional guarantee against double jeopardy protects against multiple punishments for the same offense. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995); U.S. Const., amend. V; Const., art. I, § 9. "Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense." In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004).

Merger is a "doctrine of statutory interpretation used to determine whether the Legislature intended to impose multiple punishments for a single act which violates several statutory provisions." State v. Vladovic,

99 Wn.2d 413, 419 n.2, 662 P.2d 853 (1983). Under the merger doctrine, when the degree of one offense is raised by conduct that constitutes a separate crime, the two offenses merge. State v. Freeman, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005).

The question in Freeman was whether the legislature intended separate punishment for both an assault committed in furtherance of first degree robbery and the robbery. Freeman, 153 Wn.2d at 771. Two cases were consolidated in Freeman, one involving first degree assault and first degree robbery, and one involving second degree assault and first degree robbery. As to second degree assault, the Court held, “we find no evidence that the legislature intended to punish second degree assault separately from first degree robbery when the assault facilitates the robbery.” Freeman, 153 Wn.2d at 776.

In Freeman, the court noted that in both cases, to prove first degree robbery as charged and proved by the State, the State had to prove the defendants committed assault in furtherance of the robbery. Thus, without the conduct amounting to assault, each defendant would be guilty of only second degree robbery. Freeman, 153 Wn.2d at 778. Under the merger rule, in the absence of contrary legislative intent, an assault committed in furtherance of a robbery merges with the robbery. Freeman, 153 Wn.2d at 778. The court found evidence that the legislature did not intend first

degree assault to merge with first degree robbery. Freeman, 153 Wn.2d at 778. It held, however, that second degree assault and first degree robbery will generally merge unless the two crimes had an independent purpose and effect. Freeman, 153 Wn.2d at 780.

Here, the State charged Linarez with first degree robbery, alleging he took personal property belonging to another from Hayden's person or in her presence, against her will by use or threatened use of immediate force, violence, or fear of injury to Hayden and/or Smith, and in the commission of the offense he displayed a firearm. CP 17; RCW 9A.56.190; RCW 9A.56.200(1)(a)(ii). The State charged Linarez with second degree assault, alleging he intentionally assaulted Hayden and thereby recklessly inflicted substantial bodily harm, while armed with a firearm. CP 16-17; RCW 9A.36.021(1)(a); RCW 9.94A.510.

The evidence in this case showed the robber hit Hayden with a gun, constituting the assault, in order to facilitate the robbery. He walked behind the front desk, pulled a gun, and demanded access to the safes; when Smith failed to open the office, the robber hit Hayden in an attempt to force compliance with his demands. 3RP 97, 100, 104; 4RP 200; 5RP 304; 6RP 444. Robbery requires the use or threatened use of force, violence, or fear. It was the assault, together with the taking, which constituted the robbery, and the presence of the gun used in the assault

which elevated the robbery to first degree. Without the assault as charged and proved in this case, Linarez could not have been convicted of first degree robbery. Because the assault was committed in furtherance of the robbery, the offenses merge. See Freeman, 153 Wn.2d at 778.

Moreover, the second degree assault did not have any purpose independent of the first degree robbery. Two offenses may be separate in fact if there is a separate injury to the victim that is distinct from and not simply incidental to the greater crime of which it forms an element. Freeman, 153 Wn.2d at 778. Contrary to the State's argument at sentencing, this exception does not apply simply because Linarez used more force in the assault than necessary to establish robbery. See Freeman, 153 Wn.2d at 779. The test is whether the unnecessary force had a purpose or effect independent of the crime. Freeman, 153 Wn.2d at 779.

Here, the demand for the money, striking of Hayden, and taking of the cash drawer all occurred very quickly. Although the robber actually struck Hayden and did not merely cause reasonable apprehension or fear, the sole purpose of striking Hayden with the gun was to persuade her to turn over the motel's money. As the Court recognized in Freeman, "[u]sing force to intimidate a victim into yielding property is often incidental to the robbery." Freeman, 153 Wn.2d at 779 (citing State v.

Prater, 30 Wn. App. 512, 516, 635 P.2d 1104 (1981), review denied, 97 Wn.2d 1007 (1982)). There was no independent purpose for the assault in this case, and the offenses therefore merge.

Because the second degree assault merges with the robbery, no separate punishment may be imposed on the second degree assault charge. See Vladovic, 99 Wn.2d at 419. Both the sentence and the firearm enhancement imposed on the second degree assault must be vacated.

2. THE TRIAL COURT FAILED TO APPLY THE SAME CRIMINAL CONDUCT PROVISION IN CALCULATING LINAREZ'S OFFENDER SCORE.

Under the Sentencing Reform Act, multiple current offenses are generally counted separately in determining the offender score. If the sentencing court finds that two or more offenses encompass the same criminal conduct, however, those offenses are counted as a single crime. RCW 9.94A.589(1)(a). Crimes encompass the same criminal conduct if they “require the same criminal intent, are committed at the same time and place, and involve the same victim.” Id. While the sentencing court has discretion to determine whether offenses encompass the same criminal conduct, an appellate court must reverse a decision that constitutes an abuse of discretion or misapplication of the law. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

Defense counsel argued at sentencing that it was error to count each of Linarez's current offenses in calculating his offender score. She calculated Linarez's score as 4 or 5, rather than 7, and stated the correct calculation would be an issue on appeal. 8RP 4-6, 12-13. The record sheds little light on the trial court's reasoning for adopting the State's offender score calculation, rather than the defense's. If the court acted arbitrarily, it abused its discretion. If it determined that none of the offenses encompassed the same criminal conduct, it misapplied the law. "Either error requires reversal and remand for resentencing." Haddock, 141 Wn.2d at 110.

- a. If this Court finds that the first degree robbery and second degree assault do not merge, the offenses nonetheless must be counted as one offense in calculating the offender score because they encompass the same criminal conduct.**

There is no question that the second degree assault and first degree robbery occurred at the same time and place and involved the same victim, Rebecca Hayden. These two offenses also involved the same objective criminal intent.

The relevant inquiry for the intent prong is the extent to which the criminal intent, when viewed objectively, changed from one crime to the next. State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). The court must examine the statutes underlying the charged offenses to determine

whether the required intents are the same or different. State v. Wilson, 136 Wn. App. 596, 613, 150 P.3d 144 (2007). “Objective intent may be determined by examining whether one crime furthered the other or whether both crimes were a part of a recognizable scheme or plan.” Wilson, 136 Wn. App. at 613 (citing State v. Lewis, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990)).

Second degree assault, as charged in this case, required proof that Linarez intentionally assaulted Hayden thereby recklessly inflicting substantial bodily harm. RCW 9A.36.021(1)(a); CP 89. Although assault is not defined by statute, the jury was instructed that, for the purposes of the second degree assault charge, an assault is “an intentional touching or striking ... that is harmful or offensive....” CP 82; 6RP 444. The robbery charge required proof of an intent to steal by the use or threatened use of force, violence, or fear of injury. RCW 9A.56.190; CP 95. The intentional touching or striking necessary to establish the assault constituted the use of force or violence necessary to establish the robbery.

Offenses are to be treated as a single crime when “one criminal event is ‘intimately related or connected to’ the other.” State v. Adame, 56 Wn. App. 803, 810, 785 P.2d 1144 (quoting State v. Dunaway, 109 Wn.2d 207, 214, 743 P.2d 1237 (1987)), review denied, 114 Wn.2d 1030 (1990). Such is the case here. The evidence showed that the robber

entered the bank demanding access to the safes and became violent in order to enforce his demands. 4RP 200; 5RP 304. The two crimes were intimately related, and the assault was incidental to, not separate from, the robbery. Compare with State v. Torngren, 147 Wn. App. 556, 565, 196 P.3d 742 (2008) (Where defendant assaulted victim for disrespecting gang member and fled, then gang member who did not flee robbed victim, objective purpose of robbery independent of purpose of assault).

Because the assault was committed in furtherance of the robbery and not for a separate and distinct purpose, the objective intent did not change from one offense to the next. The trial court's failure to count the second degree assault and first degree robbery as the same criminal conduct requires remand for resentencing.

b. Under the facts of this case, the first degree assault and unlawful possession of firearm encompass the same criminal conduct.

Linarez was charged with first degree assault of Christina Smith based on allegations that he fired two gunshots at her intending to inflict great bodily harm. RCW 9A.36.011(1)(a); 6RP 441, 485. This offense occurred simultaneously with the charged unlawful possession of a firearm, and the firearm was used in furtherance of the assault. The offenses therefore involve the same time and place and the same intent.

See Tili, 139 Wn.2d at 124 (fact that crimes committed simultaneously indicates same objective intent).

Ordinarily, the general public is the victim of a defendant's unlawful possession of a firearm. Haddock, 141 Wn.2d at 110-11. The Haddock Court recognized, however, that when the unlawfully possessed firearm is used to commit an assault, the assault victim is also the victim of the unlawful possession charge:

In holding that the general public is the victim of the unlawful possession of firearms counts, we are not unmindful of the dissent's position that the victims of Haddock's unlawful possession of the handguns were his former girlfriend and her friends. If Haddock had been charged with assaulting his former girlfriend and her friends with the handguns, or even with unlawfully displaying those weapons, we would be inclined to agree that those individuals were the crime victims.

Haddock, 141 Wn.2d at 111. Because Linarez was convicted of first degree assault for firing the gun at Smith, Smith was the victim of both the assault and the unlawful possession of the gun. Those offenses encompassed the same criminal conduct, and remand for resentencing is required.

D. CONCLUSION

Linarez's convictions for first degree robbery and second degree assault merge, and his sentence on the assault conviction must be vacated. In the alternative, the first degree robbery and second degree assault

encompass the same criminal conduct, as do the first degree assault and unlawful possession of a firearm. Remand for resentencing is required.

DATED this 13th day of November, 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Catherine E. Glinski', written over a horizontal line.

CATHERINE E. GLINSKI

WSBA No. 20260

Attorney for Appellant

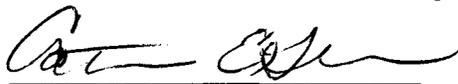
Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Jude Linarez*, Cause No. 39098-1-II, directed to:

Kathleen Proctor
Pierce County Prosecutor's Office
Room 946
930 Tacoma Avenue South
Tacoma, WA 98402-2102

Jude Linarez, DOC# 329594
D West 212
Washington State Penitentiary
1313 N 13th Ave
Walla Walla, WA 99362

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



Catherine E. Glinski
Done in Port Orchard, WA
November 13, 2009

NOV 16 11 57 AM '09
STATE OF WASHINGTON
BY _____ DEPUTY
COURT REPORTERS
SERVICES