

No. 39103-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JAMES LEROY LINDSAY, SR.,

Appellant.

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

The Honorable Brian Tollefson

REPLY BRIEF OF APPELLANT JAMES LINDSAY, SR.

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT 1

 1. THE COURTROOM WAS CLOSED WHEN THE VERDICT WAS TAKEN VIOLATING MR. LINDSAY’S RIGHT TO A PUBLIC TRIAL AND THE PUBLIC’S RIGHT TO AN OPEN COURTROOM..... 1

 2. THE DESTRUCTION OF MR. LINDSAY’S LEGAL MATERIALS BY JAIL STAFF VIOLATED HIS RIGHT TO COUNSEL..... 3

 3. IMPOSITION OF CONVICTIONS FOR ROBBERY, KIDNAPPING AND ASSAULT VIOLATED DOUBLE JEOPARDY WHERE THE ASSAULT AND KIDNAPPING SHOULD HAVE BEEN STRICKEN 5

 a. Imposition of convictions for robbery and kidnapping where the kidnapping was incidental to the robbery violated double jeopardy. 6

 b. Imposition of convictions for first degree robbery and second degree assault where the assault was the force for the robbery violated double jeopardy. 8

 c. Imposition of convictions for kidnapping and assault where the assault was the force necessary for the abduction violated double jeopardy..... 9

B. CONCLUSION 10

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I 1

U.S. Const. amend. V.....3, 5

U.S. Const. amend. VI..... 1, 3

WASHINGTON CONSTITUTIONAL PROVISIONS

Article I, section 10 1

Article I, section 22 1

Article I, section 95

FEDERAL CASES

Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)6

Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982) 1

North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)6

United States v. Cronin, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)4

WASHINGTON CASES

In re Personal Restraint of Orange, 152 Wash.2d 795, 100 P.3d 291 (2004)6

In re the Personal Restraint Petition of Bybee, 142 Wn.App. 260, 175 P.3d 589 (2007)6

Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982) 1

State v. Cory, 62 Wn.2d 371, 382 P.2d 1019 (1963).....3

<i>State v. Easterling</i> , 157 Wn.2d 167, 137 P.3d 825 (2006)	3
<i>State v. Freeman</i> , 153 Wn.2d 765, 108 P.3d 753 (2005)	5, 9, 10
<i>State v. Garza</i> , 99 Wn.App. 291, 994 P.2d 868, <i>review denied</i> , 141 Wn.2d 1014 (2000)	4, 5
<i>State v. Korum</i> , 120 Wn.App. 686, 86 P.3d 166 (2004), <i>reversed on other grounds</i> , 157 Wn.2d 614 141 P.3d 13 (2006)	6
<i>State v. Paumier</i> , 155 Wn.App. 673, 230 P.3d 212, <i>review granted</i> , 169 Wn.2d 1017 (2010)	1
<i>State v. Rice</i> , 110 Wn.2d 577, 757 P.2d 889 (1988)	2
<i>State v. Wise</i> , 148 Wn.App. 425, 200 P.3d 266 (2009), <i>review granted</i> , 170 Wn.2d 1009 (2010)	1
STATUTES	
RCW 9A.40.030	9

A. ARGUMENT

1. THE COURTROOM WAS CLOSED WHEN THE VERDICT WAS TAKEN VIOLATING MR. LINDSAY'S RIGHT TO A PUBLIC TRIAL AND THE PUBLIC'S RIGHT TO AN OPEN COURTROOM

Both the federal and state constitutions guarantee the accused the right to a public trial. The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." Article I, section 22 of the Washington Constitution also guarantees "[i]n criminal prosecutions, the accused shall have the right to . . . a speedy public trial."

The United States Constitution guarantees the public the right to access to court proceedings. U.S. Const. amends. I, VI; *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603-05, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982). The clear constitutional mandate in article I, section 10 of the Washington Constitution entitles the public and the press to openly administered justice. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).¹

¹ This Court's decisions in *State v. Paumier*, 155 Wn.App. 673, 230 P.3d 212, review granted, 169 Wn.2d 1017 (2010), and *State v. Wise*, 148 Wn.App. 425, 200 P.3d 266 (2009), review granted, 170 Wn.2d 1009 (2010), dealing with this issue were argued before the Washington Supreme Court on May 3, 2011. Decisions are pending.

The court's act of taking the verdict is a critical stage of the proceedings at which the defendant and the public have a right to be present. *State v. Rice*, 110 Wn.2d 577, 617, 757 P.2d 889 (1988).

In its response brief, the State contends that the courtroom and courthouse were not closed, thus the public's and Mr. Lindsay's rights to an open courtroom were not violated. Brief of Respondent at 11-14. The brief baldly states: "it is undisputed that both the courtroom and the courthouse were not closed." Brief of Respondent at 11. Quite the contrary, Mr. Lindsay vehemently disputes this statement. In fact, the court accepted the verdicts well after 8 p.m. and the hours posted for the courthouse are 8:30 to 4:30, thus the courthouse was plainly closed as far as the public was aware. RP 8941-42. While the trial court was correct that its *courtroom* was open, the court overlooked the fact the *courthouse* was closed, rendering irrelevant whether the courtroom was open since the public was excluded. There is no requirement that a member of the public assert the public's right to preserve the issue for appeal, thus there was no requirement that a specific member of the public was barred in order to show a violation of the public's

right. *State v. Easterling*, 157 Wn.2d 167, 176 n.8, 137 P.3d 825 (2006).

It is incredible to believe that a member of the public would appear to observe trial proceedings at 8 o'clock at night in a courthouse whose posted hours show the courthouse closed at 4:30. Whether or not there were people at the doors willing to let the public in misses the point. The courthouse was closed. The trial court violated Mr. Lindsay's right to an open courtroom and the public's right to open access. Mr. Lindsay is entitled to reversal of his convictions and remand for a new trial.

2. THE DESTRUCTION OF MR. LINDSAY'S
LEGAL MATERIALS BY JAIL STAFF
VIOLATED HIS RIGHT TO COUNSEL

The right to counsel is protected by article I, section 22 of the Washington State Constitution and by the Fifth and Sixth Amendments of the United States Constitution. *United States v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *State v. Cory*, 62 Wn.2d 371, 373, 382 P.2d 1019 (1963). Intrusion into the attorney-client private communications violates the right to counsel. *Cory*, 62 Wn.2d at 376-77.

The State concedes, as it must, that jail officials most likely destroyed Mr. Lindsay's notebook containing his legal materials,

but contends it was not purposeful and was part of “a routine search” of Mr. Lindsay’s cell. Brief of Respondent at 25-28. While it is true that there was no evidence the jail guards acted purposefully, the guards in *State v. Garza* were also acting pursuant to legitimate concern over a possible escape attempt and were deemed to be acting purposefully. 99 Wn.App. 291, 296-97, 994 P.2d 868, *review denied*, 141 Wn.2d 1014 (2000).

The State takes great pains to distinguish this case from *Garza*, pointing out there was no evidence the guards read Mr. Lindsay’s notes and did not learn anything. Brief of Respondent at 26. Although the jail guards arguably did not learn anything about Mr. Lindsay’s case and arguably nothing was passed along to the prosecutor’s office, this is of no moment under *Garza*. In *Garza*, the Court found an improper intrusion into the attorney-client relationship *despite* the fact there was no evidence the guards had read the materials, only an allegation they *may* have. There also was no evidence that any of the information was passed on to the prosecutor. *Garza*, 99 Wn.App. at 293-94.

Here, the materials seized from Mr. Lindsay contained his thoughts, legal theories, and ideas which he planned to submit to his attorney. The correspondence also contained items on which

defense counsel had written notes to Mr. Lindsay containing legal theories. Clearly these were the types of items the cases such as *Cory* and *Garza* were so concerned and constituted attorney-client communications.

Further, the jail guard's actions were identical to those of the staff in *Garza*, thus constituting purposeful action. The guards were specifically searching Mr. Lindsay's cell and came upon the items as part of that search. The destruction of Mr. Lindsay's legal materials violated his right to counsel. The trial court erred when it denied his motion for a mistrial.

3. IMPOSITION OF CONVICTIONS FOR ROBBERY, KIDNAPPING AND ASSAULT VIOLATED DOUBLE JEOPARDY WHERE THE ASSAULT AND KIDNAPPING SHOULD HAVE BEEN STRICKEN

Double jeopardy bars multiple punishments for the same offense. U.S. Const. amend. V; Const. article I, section 9; *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). Double jeopardy challenges are reviewed *de novo*. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

Initially, the State contends that the multiple convictions do not violate double jeopardy because they do not have the same elements. Brief of Respondent at 18-19. In assessing whether two

offenses violate double jeopardy, this Court does not consider the elements of the offenses on an abstract level. “[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 offense or only one, is whether each provision *requires proof of a fact* which the other does not.” *In re Personal Restraint of Orange*, 152 Wash.2d 795, 817, 100 P.3d 291 (2004), quoting *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

Clearly here the offenses do not have the same elements. But that is not the question. The question is whether additional proof is required to prove them. Mr. Lindsay contends the same proof was used to support multiple offenses, thereby violating double jeopardy.

a. Imposition of convictions for robbery and kidnapping where the kidnapping was incidental to the robbery violated double jeopardy. The State attempts to distinguish the decision in *State v. Korum*, 120 Wn.App. 686, 86 P.3d 166 (2004), *reversed on other grounds*, 157 Wn.2d 614 141 P.3d 13 (2006), by relying on this Court’s decision in *In re the Personal Restraint Petition of Bybee*, 142 Wn.App. 260, 175 P.3d 589 (2007). The

State claims that *Bybee* determined the Supreme Court's reversal of Mr. Korum's kidnapping convictions "was because there was insufficient evidence of independent kidnappings distinct from the robberies." Brief of Respondent at 21.

The State misunderstands the Court's ruling in *Bybee*. The kidnapping convictions violated double jeopardy because there was insufficient evidence that these convictions were distinct from the robberies. It was not a question of the sufficiency of the evidence, as the State claims, but a question of whether there was sufficient evidence presented to show they were *distinct* from the robberies. If there had been evidence to distinguish the offenses, there would have been no double jeopardy violation.

Nevertheless, in its attempt to show the robbery and assault convictions were not based on the same evidence, the State conveniently ignored the trial prosecutor's argument in closing that the assault conviction was the force for both the robbery and for the abduction for the kidnapping, further evidencing the kidnap was merely incidental to the robbery. RP 8696-98.

Because the robbery was not complete until Mr. Lindsay and Ms. Holmes departed with the property, Mr. Wilkey was not bound for longer than necessary to accomplish the robbery. Thus as a

matter of law, Mr. Wilkey's restraint was incidental to the robbery and the imposition of a conviction for kidnapping violated double jeopardy. *Korum*, 120 Wn.App. at 707.

This Court should find the kidnapping incidental to the robbery and strike the kidnapping conviction.

b. Imposition of convictions for first degree robbery and second degree assault where the assault was the force for the robbery violated double jeopardy. Interestingly, the State relies on the decision in *Freeman* to claim the first degree robbery and second degree assault convictions do not merge. Brief of Respondent at 22-23. In so doing, the State apparently wants to argue second degree assault under the prongs of deadly weapon and recklessly inflicting substantial bodily harm, which the jury flatly rejected. CP 394.

Again, the trial prosecutor's closing argument, ignored by the State here, speaks volumes and supports Mr. Lindsay's argument. The prosecutor argued the force used to commit the robbery and elevate it to first degree robbery was the placing of the zip ties on Mr. Wilkey to restrain him and keep him from preventing Mr. Lindsay and Ms. Holmes from taking the items from Mr. Wilkey's residence. RP 8969. Thus, this force was used to elevate the

robbery from second degree to first degree and was the evidence of the assault. Under *Freeman*, the assault should have merged into the robbery count. 153 Wn.2d at 778. The court erred in failing to merge the two offenses.

c. Imposition of convictions for kidnapping and assault where the assault was the force necessary for the abduction violated double jeopardy. Again the State makes its argument based upon facts rejected by the jury. The State contends Mr. Wilke was assaulted after he was restrained, thus the force was not necessary for the abduction. Brief of Respondent at 23. Once again, the trial prosecutor's argument to the jury, ignored by the State in its brief, undercuts its argument here.

At trial, the prosecutor argued several theories of kidnapping to support the first degree kidnapping charge, which were subsequently rejected by the jury when it found Mr. Lindsay not guilty of first degree kidnapping: that Mr. Lindsay used of a firearm or that he inflicted emotional distress on Mr. Wilkey. RP 8698-99. Instead, the jury found Mr. Lindsay guilty of second degree kidnapping, which merely required an abduction. RCW 9A.40.030 (1); CP 339.

In his closing argument, the prosecutor also argued Mr. Lindsay used zip ties to keep Mr. Wilkey restrained in a chair, an action which constituted an assault but also proof of the abduction. RP 8900. Thus, Mr. Lindsay's assault of Mr. Wilkey with the zip ties provided the force for the abduction, an element of second degree kidnapping. The assault had no purpose or effect independent of the kidnapping. *Freeman*, 153 Wn.2d at 778-79.

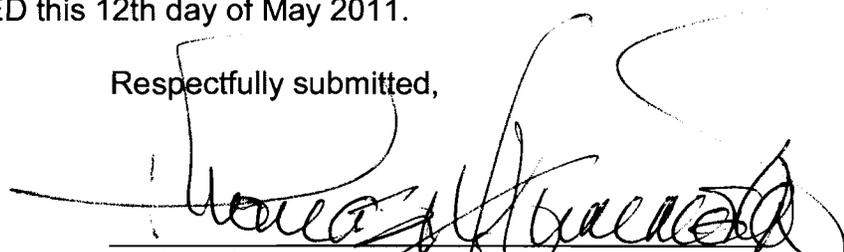
As in the case of the robbery and assault counts, the assault should have merged into the kidnapping count. This Court should order the assault stricken from the judgment and sentence.

B. CONCLUSION

For the reasons stated, Mr. Lindsay submits this Court must either reverse his convictions and remand for a new trial, or remand for resentencing.

DATED this 12th day of May 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over a horizontal line. The signature is stylized and cursive.

THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 39103-1-II
)	<i>consolidated w/ No. 39113-9-II</i>
JAMES LINDSAY, SR.,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF MAY, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
|---|-------------------|-------------------------------------|
| [X] KIMBERLEY DEMARCO
PIERCE COUNTY PROSECUTING ATTORNEY
930 TACOMA AVENUE S, ROOM 946
TACOMA, WA 98402-2171 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| [X] BARBARA COREY
ATTORNEY AT LAW
902 S 10 TH ST
TACOMA, WA 98405 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| [X] JAMES LINDSAY, SR.
329498
COYOTE RIDGE CORRECTIONS CENTER
PO BOX 769
CONNELL, WA 99326 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF MAY, 2011.

X _____
[Signature]

MAY 19 2011
11:19 AM
CLERK OF COURT
COURT OF APPEALS
DIVISION TWO
SEATTLE, WA

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎(206) 587-2711