

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

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STATE OF WASHINGTON,

Respondent,

v.

CYNTHIA MARIE GUZMAN,

Appellant.

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

The Honorable Jeffrey P. Bassett

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REPLY BRIEF OF APPELLANT

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VALERIE MARUSHIGE  
Attorney for Appellant

23619 55<sup>th</sup> Place South  
Kent, Washington 98032  
(253) 520-2637

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A. ARGUMENT IN REPLY

1. REVERSAL AND DISMISSAL IS REQUIRED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO OVERCOME PROOF BEYOND A REASONABLE DOUBT.

The State argues there was sufficient evidence that Cynthia Guzman robbed Jessica Brackens and she was armed with a firearm while kidnapping, robbing, and assaulting Brackens and Daniel Smith. Brief of Respondent at 17-18. The record belies the State's argument.

The State contends that “[f]our purses and one bundle of drugs were stolen from Ms. Brackens by force of violence,” citing statements by Brackens and Smith. Brackens explained, “I had heroin in my bra. When I was taking off my clothes, I threw it with my clothes so they wouldn't find it right away. After they were threatening me, I just grabbed it and gave it to them, because I was scared.” RP 237. Smith claimed four or five Coach purses that were hanging on the wall belonged to Brackens although “she never used them, but they were there for her. They were taken. They were hers.” RP 504-05.

Such testimony fails to establish that Guzman or an accomplice took personal property from Brackens or in her presence against her will by the use or threatened use of immediate force. RCW 9A.56.190. Moreover, Brackens repeatedly testified that she did not know of anything that was taken that belonged to her. RP 239-40, 254. As the prosecutor admitted

during closing argument, Brackens could not remember anything being taken from her. RP 1034. Where the alleged victim of the robbery does not identify any personal property that was taken from her, no rational trier of fact could find that the State proved all the elements of the crime of robbery beyond a reasonable doubt.

The State's also argues there was sufficient evidence that Guzman was armed with a firearm while kidnapping, robbing, and assaulting Brackens and Smith where Noah Robertson "placed the gun in Guzman's hands" and "as Mr. Matson and Ms. Brackens fled the robbery in their truck, Mr. Matson saw the female robber, Guzman, level a gun with two barrels at them." The State's argument fails because as the jury instruction requires, the State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant or an accomplice and that there was a connection between the firearm and the crime. CP 514. When the prosecutor asked Robertson if Guzman had "any kind of interaction" with Brackens and Smith while she had the gun, Robertson replied, "Not really. Because I told her to just get rid of it, put that in the car, told Abraham to put that in the truck, and let's get out of here." RP 697. Robertson's testimony substantiates that because the gun was not used to carry out the crimes, there was no connection between the firearm, Guzman, and the crimes.

Furthermore, contrary to the State's assertion, it was April Alvarez not Brackens who fled in the truck with Matson and he did not see anyone pointing a gun at them as they drove off. RP 562. However, Alvarez testified that she saw Guzman aiming a gun at them but she "didn't spend a whole lot of time" looking at the gun. RP 313. In any event, Alvarez's claim that Guzman aimed a gun at her and Matson while they drove away fails to establish proof beyond a reasonable doubt that Guzman was armed with a firearm while kidnapping, robbing, and assaulting Brackens and Smith.

The firearm enhancements and the robbery conviction involving Brackens must be reversed and dismissed. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

2. GUZMAN WAS DENIED HER CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The State argues that defense counsel was not ineffective for not requesting a downward exceptional sentence because he "could not avail himself of any statutory mitigating circumstance" and "under the facts of the case and nature of the convictions it would have been a useless act." Brief of Respondent at 21. The State's argument disregards the law and the facts. As argued in appellant's opening brief, under RCW 9.94A.535(1)(g), the multiple offense policy which applied in Guzman's case constitutes a

mitigating circumstance and the trial judge clearly expressed sympathy and reluctance in imposing the 1016 month sentence. The trial court stated that “my hands are pretty well tied as far as the range that I can and cannot impose,” which indicates that the court would have imposed an exceptional sentence had it known it had the discretion to do so. 05/12/17 RP 16-17. Consequently, defense counsel’s failure to argue for an exceptional sentence downward under the multiple offense policy constitutes ineffective assistance of counsel which requires a remand for resentencing. *State v. McGill*, 112 Wn. App. 95, 98-102, 47 P.3d 173 (2002)(reversed and remanded for the trial court to exercise its discretion in considering an exceptional sentence downward under the multiple offense policy).

The State also argues that defense counsel was not ineffective in failing to argue that the crimes of kidnapping, assault, and robbery constitute same criminal conduct, misapprehending the holding in *State v. Chenoweth*, 185 Wn.2d 218, 220, 370 P.3d 6 (2016). Brief of Respondent at 22-25. In *Chenoweth*, the Washington Supreme Court reaffirmed its decisions in *State v. Bobenhouse*, 166 Wn.2d 881, 896, 214 P.3d 907 (2009) and *State v. Calle*, 125 Wn.2d 769, 780, 888 P.2d 155 (1995), where the Court held that “rape of a child and incest are separate crimes because they involve distinct criminal intents.” *Chenoweth*, 185 Wn.2d at 222. The Court referred to the statutes for rape of a child and incest and concluded,

“The intent to have sex with someone related to you differs from the intent to have sex with a child. Chenoweth’s single act is comprised of separate and distinct statutory criminal intents” and therefore do not constitute same criminal conduct. *Chenoweth*, 185 Wn.2d at 223. The Court held that the two crimes are not the same criminal conduct for purposes of sentencing because a “straightforward analysis of the statutory criminal intent for rape of a child and incest identifies separate and distinct objective intent.” *Chenoweth*, 185 Wn.2d at 223.

Significantly, the *Chenoweth* majority did not expressly overrule the objective criminal purpose test established in *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987), which has been the law for over 30 years. See e.g., *State v. Graciano*, 176 Wn.2d 531, 540, 295 P.3d 219 (2013); *In re Personal Restraint of Connick*, 144 Wn.2d 442, 459-60, 28 P.3d 729 (2001), *overruled on over grounds*, *In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 50 P.3d 618 (2002); *State v. Vike*, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). As the Court determined in *Lunsford v. Saberhagen Holdings, Inc.*, when it has articulated a clear rule of law, it will not and should not, overrule the law sub silentio. 166 Wn.2d 264, 280, 208 P.3d 1092 (2009)(citing *State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999). “To do so does an injustice to parties who rely on this court to provide clear rules of law.” *Lunsford*, 166 Wn.2d at 280.

Accordingly, the circumscribed holding in *Chenoweth* does not change the clear rule of law established in *Dunaway*. Contrary to the State's argument, the objective criminal purpose test under *Dunaway* is not inconsistent with *Chenoweth*. Here, when objectively viewed, the evidence shows a continuing criminal purpose or intent to acquire property. Consequently, defense counsel provided ineffective assistance of counsel in failing to argue that the crimes of kidnapping, assault, and robbery constitute same criminal conduct. *State v. Saunders*, 120 Wn. App. 800, 825, 86 P.3d 232 (2004)(failure to argue same criminal conduct when such an argument is warranted results in ineffective assistance of counsel and requires a remand for resentencing).

3. RESENTENCING IS REQUIRED BECAUSE THE TRIAL COURT ERRED BY ENTERING SEPARATE CONVICTIONS FOR SECOND DEGREE ASSAULT AND FIRST DEGREE ROBBERY IN VIOLATION OF DOUBLE JEOPARDY.

The State argues that double jeopardy was not offended because the merger doctrine did not apply to the second degree assault and first degree robbery convictions, relying on *State v. Esparza*, 135 Wn. App. 54, 143 P.3d 612 (2006), *review denied*, 161 Wn.2d 1004 (2007). Brief of Respondent at 25-33. The State made a similar argument in *State v. Kier*, which the Washington Supreme Court rejected, holding that the second

degree assault and first degree assault convictions merged. 164 Wn.2d 798, 806-08, 194 P.3d 212 (2008),

In *Kier*, the Court distinguished *Esparza* based on the fact that the elevated charge at issue in *Esparza* was *attempted* first degree robbery, which requires only proof of intent to commit robbery and a substantial step toward carrying out that intent. *Kier*, 164 Wn.2d at 807. The Court concluded that because any number of actions Esparza took constituted a substantial step toward the attempted robbery, the assault was not necessary to elevate the charge to first degree and therefore the merger doctrine is inapplicable. *Id.*

Unlike Esparza, Kier was convicted of completed first degree robbery and consequently “the completed assault was necessary to elevate the completed robbery to first degree.” *Kier*, 164 Wn.2d at 807. The Court adhered to its analysis of the merger doctrine in *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005), holding that Kier’s second degree assault conviction merges with the first degree robbery conviction. *Kier*, 164 Wn.2d at 814.

As in *Kier*, Guzman was convicted of committing second degree assault and first degree robbery against April Alvarez, David Garcia, Daniel Smith, and Jessica Brackens. The four assault convictions must be reversed because they merge with the four first degree robbery convictions.

4. A REMAND FOR RESENTENCING IS REQUIRED BECAUSE THE STATE FAILED TO PROVE THE ALLEGED PRIOR CONVICTIONS BY A PREPONDERANCE OF THE EVIDENCE.

The State argues that resentencing is not required because defense counsel “acknowledged” Guzman’s prior convictions at sentencing. Brief of Respondent at 33-34. The record reflects that defense counsel was pointing out that Guzman “has no history of violent crimes.” 05/12/17 RP 7. He explained that “[s]he has convictions for drug offenses, possession, delivery of meth, theft, so she has lived the life of -- at least mostly of a drug user and then some ancillary crimes to that.” 05/12/17 RP 7. The State fails to cite any authority for the proposition that defense counsel’s remarks constitute an affirmative acknowledgment by the defendant of the facts and information introduced for the purposes of sentencing. Contrary to the State’s unsubstantiated argument, a remand for resentencing is required because the State failed to present any evidence to support Guzman’s alleged prior convictions and she did not affirmatively acknowledge the prior convictions asserted by the State. *State v. Mendoza*, 165 Wn.2d 913, 928-30, 205 P.3d 113 (2009), *disapproved on other grounds*, *State v. Jones*, 182 Wn.2d 1, 338 P.3d 278 (2014).

5. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD NOT AWARD COSTS.

The State has informed this Court that it will not seek costs should it substantially prevail on appeal. Brief of Respondent at 34-35. Accordingly, this Court should not award costs.

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse and dismiss the firearm enhancements, reverse and dismiss the robbery conviction against Jessica Brackens, and in any event remand for resentencing.

Should the State substantially prevail on appeal, this Court should not award costs.

DATED this 28<sup>th</sup> day of June, 2018.

Respectfully submitted,

/s/ Valerie Marushige  
VALERIE MARUSHIGE  
Attorney at Law  
23619 55<sup>th</sup> Place South  
Kent, Washington 98032  
(253) 520-2637  
[ddvburns@aol.com](mailto:ddvburns@aol.com)

**DECLARATION OF SERVICE**

On this day, the undersigned sent by email, a copy of the document to which this declaration is attached to the Kitsap County Prosecutor's Office.

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

DATED this 28<sup>th</sup> day of June, 2018.

/s/ Valerie Marushige  
VALERIE MARUSHIGE  
Attorney at Law  
WSBA No. 25851  
23619 55<sup>th</sup> Place South  
Kent, Washington 98032

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