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NO. 50934-2-III

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

STATE OF WASHINGTON,
Respondent / Cross-Appellant,

v.

RONALD WITTHAUER,
Appellant / Cross-Respondent.

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

The Honorable Robert A. Lewis, Judge

BRIEF OF CROSS-RESPONDENT

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A. RESTATEMENT OF ISSUES ON CROSS-APPEAL

1. Do the offenses merge?

2. Did the trial court nonetheless find that the offenses constituted the same criminal conduct?

B. SUPPLEMENTAL STATEMENT OF THE CASE

As indicated in Mr. Witthauer's opening brief, the State charged appellant Ronald Witthauer with second degree rape based on forcible compulsion and incapable-of-consent alternatives (count 1), as well as indecent liberties by forcible compulsion (count 2). CP 8-9; RCW 9A.44.050(1)(a), (b); RCW 9A.44.100(1)(a). The jury was instructed as to both alternatives on count 1. CP 26.

The jury convicted Witthauer of both counts. CP 43, 45.

The judgment and sentence lists both counts. CP 60. The judgment and sentence also reflects the trial court's finding that the crimes constituted the same criminal conduct.¹ CP 62. The State agreed at sentencing that the offenses constituted same criminal conduct. RP 901. However, the court also orally indicated that the offenses "merged." RP 909.

¹ See RCW 9.94A.589(1)(a) ("if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime [for purposes of offender score calculation]. Sentences imposed under this subsection shall be served concurrently.").

The Brief of Appellant (BOA) mistakenly lists this provision as RCW 9.94A.589(1)(b). BOA at 4 n. 4.

The judgment and sentence lists both crimes and imposes a 144-month exceptional sentence for count 1, the crime with the longer standard range and greater seriousness level. RCW 9.94A.510; RCW 9.94A.515. But the trial court did not enter a count 2 sentence. CP 60, 62, 64; RP 909.

C. ARGUMENT

1. THE OFFENSES DO NOT “MERGE.”

The offenses do not “merge.” The merger doctrine evaluates whether the legislature intended multiple crimes to merge into a single crime for punishment purposes. State v. Novikoff, 1 Wn. App. 2d 166, 172-73, 404 P.3d 513 (2017) (citing State v. Vladovic, 99 Wn.2d 413, 419 n.2, 662 P.2d 853 (1983)). The merger doctrine applies only when, to prove a more serious crime, the State must prove an act that a statute defines as a separate crime. Novikoff, 1 Wn. App. 2d at 173 (citing Vladovic, 99 Wn.2d at 420-21).

Neither count 1 nor count 2 elevates the other charge to a more serious crime. Under this standard, it appears the offenses do not merge.

2. THE TRIAL COURT FOUND, AND THE STATE HAS NOT CHALLENGED, THAT THE OFFENSES CONSTITUTED SAME CRIMINAL CONDUCT.

Nonetheless, the trial court found that the offenses constituted the same criminal conduct. CP 62. Consistent with the State’s acknowledgement in the court below, RP 901, the State has not appealed the court’s determination. Corrected Brief of Respondent / Cross-Appellant at 47 n. 2.

Because the two offenses do not score against each other, the standard range on the more serious offense, count 1, is not affected. RCW 9.94A.589(1)(a). As such, the State has not argued that resentencing is required as to count 1.

D. CONCLUSION

The offenses do not merge. The offenses do, however, constitute same criminal conduct. Thus, the offender score on count 1 is not affected.

DATED this 30th day of November, 2018.

Respectfully submitted,

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