

FILED
Court of Appeals
Division II
State of Washington
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NO. 50934-2-II

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

STATE OF WASHINGTON, Respondent

v.

RONALD WITTHAUER Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-02355-1

REPLY BRIEF OF CROSS-APPELLANT

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ISSUE PRESENTED

I. Whether the offenses of Rape in the Second Degree and Indecent Liberties “merge.”

STATEMENT OF THE CASE

The State relies on its prior statement of the case and agrees with cross-respondent’s statement of the case in its response.

ARGUMENT

The State agrees with Witthauer in every aspect of the State’s cross-appeal. As argued in our brief of cross-appellant, and as agreed to by Witthauer, the offenses of Rape in the Second Degree and Indecent Liberties do not “merge.” Thus, the trial court erred in entering a finding that count two, Indecent Liberties, “merged,” with Count 1. The State agrees that the trial court found, and the State agreed at sentencing, that the two offenses constituted the same criminal conduct. The State did not appeal this finding and did not intend to. The State’s appeal only concerns the trial court’s ruling that the two offenses “merged.” As discussed in its brief of cross-appellant and Witthauer’s response of cross-respondent, the offenses do not merge and the trial court erred in so ruling.

However, as the trial court found the offenses were same criminal conduct, and that issue is not before this Court, the offender score and sentence length is not affected. Resentencing is unnecessary in this

instance. The State is seeking relief in the form of reinstatement of count 2 as by finding it “merged,” the trial court necessarily vacated that conviction. Convictions for both counts should stand as they do not merge and there is no double jeopardy issue implicated in Witthauer’s convictions for both counts.

Accordingly, the State asks this Court to find counts 1 and 2 do not merge and that both counts should remain as convictions in the judgment and sentence in this case, and any order of the trial court that count 2 “merged” with count 1 should be vacated. The sentence should remain the same.

CONCLUSION

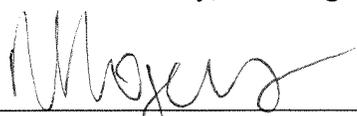
The State agrees with Witthauer’s assessment in his response of cross-respondent. This Court should vacate the trial court’s order finding that count 2 “merged” with count 1.

DATED this 31st day of December, 2018.

Respectfully submitted:

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Comments:

REPLY BRIEF OF CROSS-APPELLANT. This is a follow up to the Court of Appeals e-mail filing on 12/31/18.

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