

FILED  
Court of Appeals  
Division III  
State of Washington  
1/30/2020 4:27 PM

No. 36758-4-III

IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON

DIVISION THREE

---

STATE OF WASHINGTON,

Respondent,

v.

JASON DAVIS,

Appellant.

---

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

---

BRIEF OF APPELLANT

---

TIFFINIE B. MA  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 610  
Seattle, Washington 98101  
(206) 587-2711  
tiffinie@washapp.org

TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR..... 1

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR ..... 1

C. STATEMENT OF THE CASE..... 1

D. ARGUMENT ..... 3

Mr. Davis’s two assault convictions arising out of a single,  
continuous assault violated the Double Jeopardy  
Clause. .... 3

*1. The unit of prosecution for the crime of assault is  
a course of conduct. .... 3*

*2. Mr. Davis’s assaultive acts amounted to only a  
single course of conduct. .... 6*

*3. The conviction for fourth degree assault must be  
vacated..... 9*

E. CONCLUSION..... 10

TABLE OF AUTHORITIES

**UNITED STATES SUPREME COURT CASES**

*Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989) ..... 4

*Bell v. United States*, 349 U.S. 81, 75 S. Ct. 620, 99 L. Ed. 905 (1955)..... 4

*Brown v. Ohio*, 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977)..... 3, 5

*North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969)..... 3

*Sanabria v. United States*, 437 U.S. 54, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978) ..... 4

**WASHINGTON SUPREME COURT CASES**

*In re Pers. Restraint of Strandy*, 171 Wn.2d 817, 256 P.3d 1159 (2011)..... 9

*State v. Adel*, 136 Wn.2d 629, 965 P.2d 1072 (1998) ..... 4

*State v. Fuller*, 185 Wn.2d 30, 367 P.3d 1057 (2016) ..... 6

*State v. Gocken*, 127 Wn.2d 95, 896 P.2d 1267 (1995) ..... 4

*State v. Hughes*, 166 Wn.2d 675, 212 P.3d 558 (2009)..... 9

*State v. Varnell*, 162 Wn.2d 165, 170 P.3d 24, 26 (2007) ..... 5

*State v. Villanueva-Rosales*, 180 Wn.2d 975, 329 P.3d 78 (2014)..... 5, 7, 8

**WASHINGTON COURT OF APPEALS CASES**

*In re Personal Restraint of White*, 1 Wn. App.2d 788, 407 P.3d 1173 (2017)..... 7, 8

*State v. McReynolds*, 117 Wn. App. 309, 71 P.3d 663 (2003) ...5

**DECISIONS OF OTHER JURISDICTIONS**

*Harrell v. Israel*, 478 F. Supp. 752 (E.D. Wis. 1979).....5

**CONSTITUTIONAL PROVISIONS**

Const. art. I, § 9 .....4

U.S. Const. amend. V.....3, 4

**A. ASSIGNMENT OF ERROR**

Mr. Davis was convicted twice for the same offense in violation of the double jeopardy clause. The trial court erred by failing to vacate the conviction for the lesser offense.

**B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

Entering multiple convictions for acts which occurred during one continuous assault violates the Double Jeopardy Clause. Here, the evidence showed Mr. Davis assaulted his girlfriend in a single, continuous incident in the same place, at the same time, and with the same motivation. Do his two assault convictions violate the Double Jeopardy Clause?

**C. STATEMENT OF THE CASE**

Jason Davis and Roberta Stone were in a dating relationship. RP 276. At times, Mr. Davis stayed with Ms. Stone in her apartment. RP 281. On the night of the incident, Ms. Stone reported to police that she and Mr. Davis were sitting on the couch when he tried to kiss her. RP 291. When she refused, he began choking her, bit her lip, and bit her thumb. RP 317-18. Ms. Stone urinated herself during the incident. RP 318. Mr. Davis then left, and Ms. Stone called

911. RP 281. Responding officers described Ms. Stone as “hysterical,” and noted an injury to her thumb, marks on her neck, and a small injury to her lip. RP 268-69. She reported the incident “happened so fast.” RP 319.

The next day, Ms. Stone gave another statement to police consistent with her initial report. RP 372-73. However, Ms. Stone later amended her statement, revealing to the prosecutor she had initiated the fight between Mr. Davis and herself. RP 300-03. Ms. Stone told the prosecutor the couple had gotten into an argument about Ms. Stone’s drinking and her refusal to kiss Mr. Davis. RP 277, 303. Ms. Stone, who had not been taking her anxiety medication, became hostile towards Mr. Davis and “slugged him a couple of times” and “elbowed him.” RP 278. Mr. Davis then pushed her down on the couch and bit her thumb. RP 281, 286. She could not recall how she injured her lip. RP 301. At trial, she testified consistently with this later statement, adding that in hindsight she did not believe Mr. Davis had been choking her. RP 277-87.

The State charged Mr. Davis with one count of assault in the second degree by strangulation, and two counts of assault in the fourth degree for the thumb injury and the lip injury. CP 38-40. The jury found him guilty of assault in the second degree and assault in the fourth degree for the thumb injury. CP 46-51. The court entered separate convictions for second degree assault and fourth degree assault. CP 1-13.

#### **D. ARGUMENT**

**Mr. Davis’s two assault convictions arising out of a single, continuous assault violated the Double Jeopardy Clause.**

1. *The unit of prosecution for the crime of assault is a course of conduct.*

The Double Jeopardy Clause provides that no person shall be “subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. Relevant here, the clause “protects against multiple punishments for the same offense.” *Brown v. Ohio*, 432 U.S. 161, 165, 97 S. Ct. 2221, 2225, 53 L. Ed. 2d 187 (1977) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds by Alabama v. Smith*, 490

U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989)); *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995); U.S. Const. amend. V; Const. art. I, § 9.

The Legislature, not the prosecutor, establishes what constitutes an “offense” for purposes of the Double Jeopardy Clause. *Sanabria v. United States*, 437 U.S. 54, 69-70, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978). Where the State alleges a series of simultaneous acts constitutes more than one offense, the proper question is what “unit of prosecution” has the Legislature intended as the punishable act. *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998).

Once the Legislature defines the scope of a criminal act – that is, the unit of prosecution – double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime. *Id.* at 634 (citing *Bell v. United States*, 349 U.S. 81, 83-84, 75 S. Ct. 620, 99 L. Ed. 905 (1955)). “The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by

the simple expedient of dividing a single crime into a series of temporal or spatial units.” *Brown* , 432 U.S. at 169.

The unit of prosecution may be a single, discrete act, such as one conversation soliciting another to commit a crime. *See State v. Varnell*, 162 Wn.2d 165, 170, 170 P.3d 24, 26 (2007). Alternatively, it may be a course of conduct, such a series of assaultive acts committed in succession. *See State v. Villanueva-Rosales*, 180 Wn.2d 975, 978, 329 P.3d 78 (2014).

When a statute defines a crime as a course of conduct over a period of time, “then it is a continuous offense and any conviction or acquittal based on a portion of that course of action will bar prosecution on the remainder.” *State v. McReynolds*, 117 Wn. App. 309, 339, 71 P.3d 663 (2003) (quoting *Harrell v. Israel*, 478 F. Supp. 752, 755 (E.D. Wis. 1979)).

Our Supreme Court has determined the unit of prosecution for assault is a course of assaultive conduct. *Villanueva-Gonzalez*, 180 Wn.2d at 984-85. Thus, multiple

assaultive acts coalesce into a single assault if they occur during one continuous incident. *Id.*

Whether multiple convictions violate the Double Jeopardy Clause is a question of law reviewed *de novo*. *State v. Fuller*, 185 Wn.2d 30, 34, 367 P.3d 1057 (2016).

2. *Mr. Davis's assaultive acts amounted to only a single course of conduct.*

The Double Jeopardy Clause barred multiple assault convictions because Mr. Davis's conduct constituted only a single course of assaultive conduct.

To determine whether multiple assaultive acts constitute separate acts or a single course of conduct, the Court considers the totality of the circumstances in light of various factors including: (1) the length of time over which the assaultive acts took place; (2) whether the assaultive acts took place in the same location; (3) the defendant's intent or motivation for the different assaultive acts; (4) whether the acts were uninterrupted or there were any intervening acts or events; and (5) whether there was an opportunity for the

defendant to reconsider his or her actions. *Villanueva-Gonzalez*, 180 Wn.2d at 985.

In *Villanueva-Gonzalez*, the defendant pulled his girlfriend out of a room, broke her nose by hitting her with his forehead, and held her by her neck against furniture so she could not get up. *Id.* at 978. A jury found him guilty of both second degree assault, for recklessly inflicting substantial bodily harm, and fourth degree assault, as a lesser-included offense of second degree assault by strangulation. *Id.* at 981. Villanueva-Gonzalez's actions took place in the same location over a short period of time. *Id.* at 986. The incident took place without interruptions or intervening events. *Id.* No evidence suggested he had different intentions or motivations for any of the acts or an opportunity to reconsider them. *Id.* Thus, the Court concluded his assaultive acts "constituted a single course of conduct" and he could not be convicted of two separate counts of assault. *Id.*

Similarly, in *In re Personal Restraint of White*, 1 Wn. App.2d 788, 790, 407 P.3d 1173 (2017), White pointed a gun

at his girlfriend, threatened to kill her, threw her to the floor, and began hitting her. *Id.* He hit her repeatedly on the back of the head while telling her she was going to die, and then placed his hands around her neck. *Id.* These acts took place over a short period of time in the same place; White's intent and motivation did not change; and the assault was continuous with "no interruption or moment of calm that provided an opportunity to reconsider." *Id.* at 795-98.

Therefore, White's two convictions for second degree assault violated the prohibition against double jeopardy. *Id.* at 798.

Here, as in *Villanueva-Gonzalez* and *White*, Mr. Davis's multiple assaultive acts constituted a single course of conduct. After Ms. Stone pushed him away, he immediately got on top of her, began choking her, and bit her thumb. RP 317-18. These acts occurred in the same location at the same time. RP 281-86. No evidence suggested Mr. Davis had different intentions or motivations for either act, or an opportunity to reconsider them. *See Villanueva-Gonzalez*, 180 Wn.2d at 981. Indeed, Ms. Stone's statements indicate Mr.

Davis reacted quickly to her rejection and everything “happened so fast.” RP 317-19. Therefore, his assaultive acts “constituted a single course of conduct” and his multiple convictions for assault violated the prohibition against double jeopardy. *Villanueva-Gonzalez*, 180 Wn.2d at 981.

3. *The conviction for fourth degree assault must be vacated.*

The remedy for a double jeopardy violation is to vacate the offending conviction. *State v. Hughes*, 166 Wn.2d 675, 686, 212 P.3d 558 (2009). “When a conviction violates double jeopardy principles, it must be *wholly vacated*.” *In re Pers. Restraint of Strandy*, 171 Wn.2d 817, 819-20, 256 P.3d 1159 (2011) (emphasis added). When two convictions violate the Double Jeopardy Clause, the remedy is to vacate the conviction for the lesser offense. *Id.* at 820. This case must be remanded with instructions to vacate the conviction for fourth degree assault.

**E. CONCLUSION**

For the reasons stated above, Mr. Davis asks this Court to remand with instructions to vacate his conviction for fourth degree assault.

DATED this 30<sup>th</sup> of January 2020.

Respectfully submitted,

/s Tiffinie B. Ma  
Tiffinie B. Ma – WSBA #51420  
Attorney for Appellant  
Washington Appellate Project  
(91052)  
1511 Third Ave, Ste 610  
Seattle, WA 98101  
Telephone: (206) 587-2711  
Fax: (206) 587-2711

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

---

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 36758-4-III
	)	
JASON DAVIS,	)	
	)	
APPELLANT.	)	

---

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30<sup>TH</sup> DAY OF JANUARY, 2020, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> DENIS TRACY, PROSECUTOR	( )	U.S. MAIL
[denist@co.whitman.wa.us]	( )	HAND DELIVERY
WHITMAN COUNTY PROSECUTOR'S OFFICE	<input checked="" type="checkbox"/> (X)	E-SERVICE VIA PORTAL
PO BOX 30		
COLFAX WA 99111-0030		
<input checked="" type="checkbox"/> JASON DAVIS	<input checked="" type="checkbox"/> (X)	U.S. MAIL
(ADDRESS OF RECORD)	( )	HAND DELIVERY
ON FILE WITH OUR OFFICE)	( )	_____

SIGNED IN SEATTLE, WASHINGTON THIS 30<sup>TH</sup> DAY OF JANUARY, 2020.

X \_\_\_\_\_ 

# WASHINGTON APPELLATE PROJECT

January 30, 2020 - 4:27 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36758-4  
**Appellate Court Case Title:** State of Washington v. Jason Anthony Davis  
**Superior Court Case Number:** 19-1-00024-9

### The following documents have been uploaded:

- 367584\_Briefs\_20200130162653D3607840\_2029.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was washapp.013020-03.pdf*

### A copy of the uploaded files will be sent to:

- amandap@co.whitman.wa.us
- denist@co.whitman.wa.us
- greg@washapp.org

### Comments:

---

Sender Name: MARIA RILEY - Email: maria@washapp.org

**Filing on Behalf of:** Tiffinie Bie Ha Ma - Email: tiffinie@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:  
1511 3RD AVE STE 610  
SEATTLE, WA, 98101  
Phone: (206) 587-2711

**Note: The Filing Id is 20200130162653D3607840**