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SUPREME COURT
STATE OF WASHINGTON
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No. 80441-9

BY RONALD R. CARPENTER
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THE SUPREME COURT OF WASHINGTON
(Court of Appeals No. 57738-7-I)

STATE OF WASHINGTON,

Respondent,

v.

BAYANI JOHN MANDANAS,

Appellant/Petitioner.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 JUN 30 AM 11:42

Petitioner's
APPELLANT'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

On April 29 2008, this Court granted Appellant John Mandanas' petition for discretionary review as to the sentencing issues in this case. Pursuant to RAP 13.7(d), Appellant now submits this supplemental brief.

II. DISCUSSION

At trial, Mr. Mandanas was convicted of one count of Assault in the Second Degree and one count of Felony Harassment. The jury also concluded that he was armed with a deadly weapon at the time of each offense. The trial judge sentenced Mr. Mandanas to three months on each count, to run concurrently, and an enhancement of 36 months on Count I and 18 months on Count II, to run consecutively to each other and to the standard range sentence of three months, for a total sentence of 57 months in custody.

On appeal, Division I properly concluded that the two underlying offenses clearly constituted the "same criminal conduct" under RCW

9.94A.589(1)(a). See Petition for Discretionary Review, Appendix A at 20. Nevertheless, the Court concluded that all enhancements require consecutive sentences, "even with a finding of same criminal conduct." *Id.*

This Court should reverse and remand the case for resentencing.

A. Same Criminal Conduct

Where a defendant is convicted of two or more current offenses, the trial court must calculate the offender score, and resulting sentence ranges, by counting all other current and prior convictions as prior convictions. See generally *State v. Dolen*, 83 Wn.App. 361, 364, 921 P.2d 590 (1996), review denied, 131 Wn.2d 1006, 952 P.2d 144 (1997) (discussing RCW 9.94A.589(1)(a)).¹ If, however, any of the

¹ The statute provides in relevant part:

Whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender

current offenses encompass "the same criminal conduct," the court must count these offenses as one crime. See, e.g., *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999), *aff'd*, 148 Wn.2d 350, 60 P.3d 1192 (2003).

"Same criminal conduct" means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). The test is established where all three elements are present. See, e.g., *Tili*, 139 Wn.2d at 123; *State v. Israel*, 113 Wn.App. 243, 295, 54 P.3d 1218 (2002). In determining whether the crimes are the same criminal conduct for purposes of

score: PROVIDED, that 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. Sentences imposed under this subsection shall be served concurrently "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

RCW 9.94A.589(1)(a).

sentencing the trial court makes factual determinations and utilizes its discretion. See *State v. Nitsch*, 100 Wn.App. 512, 523, 997 P.2d 1000 (2000).

In *Tili*, the Court addressed two questions - the first being whether three counts of rape, where each act of penetration occurred within moments of each other, constituted the same criminal conduct; and second, whether the counts of assault and burglary would also fall under the rule of same criminal conduct. See 139 Wn.2d at 128. The *Tili* Court concluded that the three rape counts were the same criminal conduct and that the assault was part of the rape; but it also found that the assault did not merge with the burglary. See *id.* at 123. The Court pointed to the rule that the relevant inquiry for the intent prong is to what extent the criminal intent, when viewed objectively, changed from one crime to the next. See *id.* at 123.

At the time of Mr. Mandanas' sentencing

hearing, the trial court concluded that the two crimes did not constitute the same criminal conduct within the meaning of this rule. In the court's view, the crimes involved "different levels of intent." Petition for Discretionary Review, App. A at 18. The Court of Appeals reversed this aspect of the trial court's decision. As the Court correctly held:

Here, there is no question that Mandanas committed assault and harassment at the same time and place, and against the same victim. The question is whether his intent, when viewed objectively, changed between the crimes, and whether the commission of one crime furthers the other. Second degree assault requires the intent either to cause bodily harm or to create apprehension of bodily harm. *State v. Byrd*, 125 Wn.2d 707, 711, 887 P.2d 396 (1995). Felony harassment requires a person to knowingly threaten to cause bodily injury immediately or in the future to the person threatened. RCW 9A.46.020(1)(a)(i). Crimes that Mandanas objectively intended to commit include causing bodily harm and threatening to commit bodily injury, which created an apprehension of bodily harm. There was no discernible change in intent between the crimes. Moreover, inflicting bodily harm and threatening to kill Padilla furthered the crime of creating apprehension of more bodily

harm. Because one crime furthered another, and because Mandanas's criminal intent did not change from one crime to another, his actions encompass same criminal conduct. We conclude that the trial court abused its discretion in finding otherwise, vacate the sentence and remand for resentencing based on same criminal conduct.

Id. at 19.

Not surprisingly, the State did not seek review of this aspect of the appellate court's decision. When viewed objectively, it is clear that the facts do establish that Mr. Mandanas had the same criminal intent - he intended to frighten Mr. Padilla - at that time that he committed the two charged offenses.

B. The Two Weapon Enhancements Should Not Run Consecutively

RCW 9.94A.533(3) provides in pertinent part:

[A]dditional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being

sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement.

* * *

(e) Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter.

Id. In *State v. DeSantiago*, 149 Wn.2d 402, 68 P.3d 1065 (2003), this Court concluded that the previously codified version of this same statute allows the same offense to be enhanced more than once for each weapon used in that offense.

This case, however, presents a very different question: Whether the court can impose two separate weapon enhancements, and run those enhancements consecutively, even though the defendant's underlying offenses (assault and felony harassment) must be considered the "same criminal conduct" under the SRA. For several

reasons, the answer must be "no."

"Where statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself." *In re Swanson*, 115 Wn.2d 21, 27, 804 P.2d 1 (1990) (quoting *Human Rights Comm'n v. Cheney Sch. Dist. No. 30*, 97 Wn.2d 118, 121, 641 P.2d 163 (1982)). A statute must be construed as a whole so as to give effect to all language and to harmonize all provisions. See *City of Seattle v. Fontanilla*, 128 Wn.2d 492, 498, 909 P.2d 1294 (1996). Under rules of statutory construction each provision of a statute should be read together (*in para materia*) with other provisions in order to determine the legislative intent underlying the entire statutory scheme. See, e.g., *In re Estate of Kerr*, 134 Wn.2d 328, 336, 949 P.2d 810 (1988). The purpose of interpreting statutory provisions together with related provisions is to achieve a harmonious and unified statutory scheme that maintains the integrity of the respective

statutes. See *id.* (citing *State v. Williams*, 94 Wn.2d 531, 547, 617 P.2d 1012 (1980); *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 452 (1974)). Statutes relating to the same subject must be read as complementary, instead of in conflict with each other. See, e.g., *Waste Management of Seattle, Inc. v. Utilities Transp. Comm'n*, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994).

1. Statutory Construction

RCW 9.94A.533(3)(e) provides that a firearm enhancement may only apply if the defendant or an accomplice is armed with a firearm and he is "**being sentenced**" for one of the listed offenses. See *id.* (emphasis added). Thus, by its own terms, a firearm enhancement should not apply to any offense upon which the defendant is **NOT** being sentenced. Where a sentencing court finds that two convictions encompass "same criminal conduct," however, these offenses must be "counted as one crime" and the defendant is only sentenced for a single offense. See RCW

9.94A.589(1)(a).

Similarly, RCW 9.94A.533(3)(e) states that firearm enhancements are mandatory and consecutive in general, but it includes a proviso that such enhancements apply only to "all offenses **sentenced** under this chapter." *Id* (emphasis added). In light of the clear terms of RCW 9.94A.589(1)(a), the legislature did not authorize multiple enhancements where the defendant is being sentenced upon only a single, unified offense. Put another way, this Court should hold that the firearm enhancement for the lesser offense - harassment - is not covered by RCW 9.94A.533(3)(e) since Mr. Mandanas must not be "sentenced" for that particular offense.

The parties have identified one reported case where Division III seemed to conclude that convictions for two related assaults may be subject to consecutive weapon enhancements even if the assaults could be considered "same criminal conduct." See *State v. Callihan*, 120

Wn.App. 620, 623, 85 P.3d 979 (2004). The *Callihan* Court offered little analysis to support its conclusion. Instead, it simply stated that RCW 9.94A.310 (a previous version of this same statute) unambiguously requires consecutive sentences for each enhancement.

Callihan did not present the same issues as in this case. The two assaults in *Callihan* were clearly distinct acts. It is hard to understand how any court could have found that they constituted same criminal conduct under RCW 9.94A.589(1)(a). Nevertheless, relying upon this single precedent, the court below in the instant case concluded that the two enhancements must run consecutively to the charged offenses and to each other.

The State is usually permitted to charge a defendant with multiple offenses - and multiple alternative offenses - based upon the same transaction and occurrence. See *State v. Korum*, 157 Wn.2d 614, 141 P.3d 13 (2006) (discussing CrR

4.3). But this does not mean that the Court must impose an increased sentence based upon the multiplicity of charges, particularly where such a scheme would necessarily lead to absurd results. See, e.g., *State v. Watson*, 146 Wn.2d 947, 955, 51 P.3d 66 (2002) (court must avoid a literal reading of a statute if it would result in unlikely, absurd, or strained consequences).

For example, when faced with a situation where the defendant fires a single gunshot and seriously injures another person during the course of an argument, the State would be free to charge that defendant with numerous offenses: assault in the first degree (assault with intent to kill), assault in the second degree (assault with a firearm), assault in the third degree (reckless assault), felony harassment, and perhaps numerous other offenses. In addition, the State would be free to allege that the defendant was armed with a firearm during the course of each of these offenses. If we assume

that neither the State nor the defense requested a lesser included crime or lesser degree instruction (as in WPIC 4.11), the jury would be free to return verdicts on each of these alternative charges. - including multiplicitous enhancements. Clearly, the legislature could not have intended for the court to impose consecutive terms for each and every firearm enhancement that could conceivably be charged on account of a single incident involving one firearm and one victim.

Another example helps to make this same point. Let's assume that a defendant strikes an individual with multiple blows while holding a firearm. Conceivably, the State could charge the defendant with assault for each blow and attempted blow, and seek a firearm enhancement on each charge. Although there would be no question that the court would impose just one sentence for the multiple blows, the State would argue that the Court must impose consecutive multiple

enhancements for each of the charged offenses. Such a result defies logic and common sense.

This Court should reject the appellate court's simplistic reading of RCW 9.94A.589(1)(a) and 9.94A.533(3)(e). Rather, Mr. Mandanas' construction would harmonize these two related provisions - and at the same time it would guard against the absurd results that would necessarily flow from the State's proposed interpretation.

Minimally, this Court should conclude that the firearm enhancement provisions are ambiguous in these circumstances. See, e.g., *United States v. Santos*, 128 S.Ct. 2020 (2008) (applying rule of lenity to interpret ambiguous terms in federal money laundering statute). The rule of lenity applies to resolve statutory ambiguities in criminal cases in favor of the defendant, absent legislative intent to the contrary. See *State v. Lewis (In re Charles)*, 135 Wn.2d 239, 249-50, 955 P.2d 798 (1998). Accord *State v. Roberts*, 117 Wn.2d 576, 585-86, 817 P.2d 855 (1991). The rule

applies in the event of ambiguous provisions of the Sentencing Reform Act, as in this case. See *id.*

2. Double Jeopardy

The United States and Washington Constitutions' double jeopardy clauses are "identical in thought, substance, and purpose." *State v. Schoel*, 54 Wn.2d 388, 391, 341 P.2d 481 (1959). They both "protect against multiple punishments for the same offense, as well as against a subsequent prosecution for the same offense after acquittal or conviction." *State v. Graham*, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005) (citing *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)). Courts may not enter multiple convictions for the same offense without offending double jeopardy. See *State v. Vladovic*, 99 Wn.2d 413, 422, 662 P.2d 853 (1983). See also *State v. Womac*, 160 Wn.2d 643, 657, 160 P.3d 40 (2007) ("double jeopardy may be violated when a defendant receives

multiple convictions for a single offense (regardless of whether concurrent sentences are imposed)").

The legal foundation for the "unit of prosecution" analysis rests on double jeopardy protections. While the issue is one of constitutional magnitude on double jeopardy grounds, the analytical framework centers around a question of statutory interpretation and legislative intent. See *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). When the legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects against multiple convictions for committing just one unit of the crime. See *Adel*, 136 Wn.2d at 634.

If the legislature has failed to denote the unit of prosecution in a criminal statute, the United States Supreme Court has declared that the ambiguity should be construed in favor of lenity. See *Bell v. United States*, 349 U.S. 81, 83, 75

S.Ct. 620, 99 L.Ed.2d 905 (1955); *State v. Tvedt*, 153 Wn.2d 705, 710-11, 107 P.3d 728 (2005).

In *Adel*, for example, this Court concluded that a defendant could not be punished multiple times for simple possession of marijuana simply because the drug was found in multiple places. In so ruling, the Court rejected the claim that the defendant violated the possession statute multiple times simply because he constructively possessed the drug in two different places and emphasized that the State's argument rested "on a slippery slope of prosecutorial discretion to multiply charges." 136 Wn.2d at 636.

Similarly, in *State v. Varnell*, 162 Wn.2d 165, 107 P.3d 24 (2008), the Court analyzed the appropriate prosecution unit for Washington's solicitation statute and concluded that the statute criminalizes the singular act of engaging another to commit a crime. Thus, the *Varnell* Court found one singular unit, even though the defendant had been convicted for soliciting the

murder of four individuals. As the Court explained:

Varnell's solicitation to the undercover detective to commit the four murders was made only to the detective, at the same time, in the same place, and for the same motive. This scenario constitutes a single unit of prosecution.

Id. at 171.

In *DeSantiago*, this Court concluded that, under the enhancement statute, use of the term "a firearm" means that a defendant may be punished separately for each firearm involved. See 149 Wn.2d at 419. Here, however, there is no dispute that the defendant possessed only a single firearm.

As this Court has explained, the unit of prosecution need not be determined by any single characteristic or factor. See, e.g., *Tvedt*, 153 Wn.2d at 711. In a case of this sort, in light of the terms of the enhancements statute, the prosecution unit is each "sentenced offense." Thus, where the defendant is sentenced for a

single offense including a single firearm, only one prosecution unit - or one enhancement - can be applied.²

III. CONCLUSION

The legislature is empowered to enact crimes, but it is not permitted to create a sentencing system that allows for cumulative punishments for the same offense. See, e.g., *Whalen v. United States*, 445 U.S. 684, 689 n.3, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). Here, the Court of Appeals wrongly concluded that Mr. Mandanas could be punished twice for pointing a gun at Mr. Padilla - once because Mr. Mandanas intended to create apprehension of bodily harm (assault) and once again because Mr. Mandanas communicated a threat of intent to cause bodily injury (harassment) by that very same conduct. In light of the relevant statutes and double jeopardy principles, this Court should not permit

² This case does not present the issue regarding the appropriate prosecution unit for an assault that

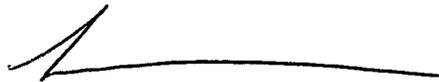
multiple enhancements for this conduct.

For all the foregoing reasons, and in the interests of justice, this Court should reverse Mr. Mandanas' sentence and remand for resentencing with directions that only a single sentencing enhancement may be imposed.

DATED this 30th day of June, 2008.

Respectfully submitted,

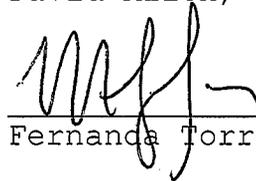
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involved multiple victims or a series of assaults that would not be considered same criminal conduct.

PROOF OF SERVICE

Todd Maybrow swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 30th day of June, 2008, I deposited for mailing, postage prepaid, first class, one true copy of Appellant's Supplemental Brief directed to attorney for Respondent:

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DATED at Seattle, Washington this 30th day of June, 2008.



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