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NO. 61481-9-I

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

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STATE OF WASHINGTON,  
Respondent,

v.

JOHN CHARLES FRANKLIN,  
Appellant.

---

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

The Honorable Catherine Shaffer

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. THE CONVICTIONS IN COUNTS I AND V  
VIOLATED THE PROHIBITION AGAINST  
DOUBLE JEOPARDY.

Double jeopardy protects a criminal defendant from multiple convictions and punishments for the same offense. United States Constitution, Fifth Amendment; Washington Constitution, Article 1, section 9. The State argues that the crimes of second degree assault and third degree assault are not the “same offense” for purposes of double jeopardy. Brief of Respondent at 12-15. The State is incorrect. The crime of assault in the first degree necessarily includes the lesser crimes of assault in the second degree, assault in the third degree and assault in the fourth degree. State v. Marquez, 131 Wn. App. 566, 571, 127 P.3d 786 (2006). Convictions for assault in the second degree and assault in the third degree constitute the same offense for double jeopardy purposes. State v. Brett, 126 Wn.2d 136, 181, 892 P.2d 29 (1995).

Here, the unit of prosecution for the assault should be each person assaulted. The State argues that the “cases relied on by Franklin merely hold that if one act of assault or reckless endangerment has multiple victims, the defendant can be charged with multiple acts of those statutes.” Brief of Respondent at 14.

This is precisely because the unit of prosecution for assault is each victim rather than each act. See State v. Graham, 153 Wn.2d 400, 406-08, 103 P.3d 1328 (2005); State v. Smith, 124 Wn. App. 417, 432, 102 P.3d 158 (2004), aff'd on other grounds, 159 Wn.2d 778 (2005).

Since Ms. Shorr was the victim in both counts I and V, and since the two counts constituted one continuous act, there was only a single violation of the law. State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984). The State argues that "Petrich merely holds that if two assaults constitute a continuing course of conduct, the State does not need to provide a unanimity instruction." Brief of Respondent at 15. The State ignores the reasoning behind Petrich. Where multiple acts constitute but one "continuous act," a unanimity instruction is not needed because only one crime has been committed. Petrich, 101 Wn.2d 571.

Here, the charges in counts I and V constitute only one crime. In closing argument, the prosecuting attorney described counts I and V together as one incident of assault. 10/23/07RP 92-93. This is an accurate depiction, since Ms. Shorr testified that both acts occurred in front of the residence within minutes of each

other. 10/15/07RP 88. Mr. Franklin's conviction for assault in the third degree must be vacated.

2. THE SEARCH OF MR. FRANKLIN'S PERSON  
WAS CONDUCTED WITHOUT AUTHORITY OF  
LAW IN VIOLATION OF THE WASHINGTON  
CONSTITUTION.

Article 1, section 7 of the Washington Constitution prohibits searches conducted "without authority of law." In the context of a search incident to arrest, it is the fact of the lawful arrest that provides the requisite authority of law for the resulting search. State v. Grande, 164 Wn.2d 135, 139-40, 187 P.3d 248 (2008); State v. O'Neill, 148 Wn.2d 564, 585, 62 P.3d 489 (2003); State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). In the absence of an actual, lawful arrest, even where there is probable cause for the arrest, a search is without authority of law. O'Neill, 148 Wn.2d at 585-86.

The State argues that O'Neill merely stands for the proposition that an actual arrest must precede the search, and that, in this case, Mr. Franklin was not searched until after he was arrested. Brief of Respondent at 20. However, the State must also prove that there was a lawful arrest. Under Washington law, a

lawful search incident to an arrest must be based on a lawful arrest. Grande, 164 Wn.2d at 139-40.

The State argues the trial court found that Mr. Franklin was arrested based on probable cause to believe he possessed drugs. Brief of Respondent at 15-18. In fact, the trial court made no such finding. CP 104 (Conclusions of Law 10 and 11). While the court found that probable cause to arrested existed, the court did not make a finding that Mr. Franklin was actually arrested based on the probable cause (as opposed to the supposed warrant which was not proven to exist). "In the absence of a finding on a factual issue", the party with the burden of proof is presumed to have "failed to sustain their burden on this issue." State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). It is presumed, then, that the State failed to prove that Mr. Franklin was actually arrested based on probable cause to believe he had committed a crime.

Finally, the State relies on State v. Huff, 64 Wn. App. 641, 645, 826 P.2d 698, rev. denied, 119 Wn.2d 1007 (1992), for its assertion that "[a]s long as probable cause to arrest exists, the subjective basis of the arrest is irrelevant." Brief of Respondent at 19. Huff was decided by the Court of Appeals years before the State Supreme Court's decision in O'Neill. In addition, the issue in

Huff was merely whether probable cause for arrest existed. Huff, 64 Wn. App. at 648. The court did not analyze the case separately under the Washington Constitution. Id. at 646. Federal law may allow a search incident to arrest so long as probable cause for the arrest existed. However, under Washington law, even if probable cause existed, the resulting search was without authority of law, since Mr. Franklin was not actually arrested on the drug charge. O'Neill, 148 Wn.2d at 585-86.

3. THE STATE FAILED TO PROVE MR. FRANKLIN ENTERED A VALID WAIVER OF HIS MIRANDA RIGHTS.

The prosecution may not use statements obtained from custodial interrogation unless procedural safeguards guarantee that the accused has been informed of and freely waived the constitutional privileges of the Fifth and Sixth Amendments to the United States Constitution. Miranda v. Arizona, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The State bears the “heavy burden” of proving by a preponderance of the evidence that he knowingly, voluntarily, and intelligently waived his Miranda rights. Id. at 475; State v. Robtoy, 98 Wn.2d 30, 35-36, 653 P.2d 284 (1982); State v. Coles, 28 Wn. App. 563, 567, 625 P.2d 713, rev. denied, 95 Wn.2d 1024 (1981).

The State concedes that “[n]one of the State witnesses, however, testified that Franklin specifically stated that he agreed to waive his rights.” Brief of Respondent at 22. Nevertheless, the State argues Mr. Franklin impliedly waived his Miranda rights. Brief of Respondent at 24. While a Miranda waiver need not be explicit, neither can it be implied merely because an individual makes a statement after receiving Miranda warnings. Miranda, 384 U.S. at 475 (“a valid waiver will not be presumed simply from silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained”); accord State v. Adams, 76 Wn.2d 650, 671, 458 P.2d 558 (1969), rev’d on other grounds, 403 U.S. 947, 91 S.Ct. 2273, 29 L.Ed.2d 855 (1971).

In this case, the trial court did precisely what the Miranda court clearly stated it could not do: presume a valid waiver of Miranda based solely upon Mr. Franklin’s confession following Miranda warnings. This court should suppress the statements to police as a violation of Miranda. Miranda, 384 U.S. at 475.

Finally, the State argues that even if Mr. Franklin did not waive his Miranda rights, the error in admitting his statements was harmless. Brief of Respondent at 25-27. To find an error affecting a constitutional right harmless, the reviewing court must find it

harmless beyond a reasonable doubt. Arizona v. Fulminante, 499 U.S. 279, 295-96, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); State v. Rueben, 62 Wn.App. 620, 626, 814 P.2d 1177, rev. denied, 118 Wn.2d 1006 (1991). The State argues that the statements Mr. Franklin made concerning the guns were exculpatory. Brief of Respondent at 26. If so, this does not explain why the State, not the defense, offered these statements into evidence. In fact, the statements were offered to show Mr. Franklin's knowledge and possession of firearms in the house, as well as his involvement in selling drugs. The error in finding the State had proven a valid waiver of Miranda cannot be deemed harmless. Reversal of the convictions in counts II and III is required.

4. MR. FRANKLIN WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

a. Defense counsel's failure to raise the issue of same criminal conduct constitutes ineffective assistance of counsel. "Same criminal conduct" is defined as "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 offenses in counts IV and VI constitute the same criminal conduct, as do the offenses in counts I and V.

Defense counsel's performance was deficient in failing to raise this issue at sentencing.

Count IV (felony harassment) and count VI (assault in the second degree) both occurred in the basement, at the same time, and Ms. Shorr was the victim of both offenses. The State, in fact, discusses these charges as one incident. Brief of Respondent at 29. The State, however, maintains that the two charges do not share the same intent. Brief of Respondent at 31. The State cites to two cases in support of its argument. In State v. Wilson, 136 Wn. App. 596, 150 P.3d 144 (2007), the defendant entered a home with the intent to commit an assault, committed the assault, left, and then returned to the home to threaten the victim. Id. at 614-15. The court held that under the specific facts of that case, the two crimes were not the same criminal conduct - the defendant had different intents in committing the two offenses, and they were separated in time. Id. at 615. The State also cites to State v. Worl, 129 Wn.2d 416, 918 P.2d 905 (1996), for the proposition that malicious harassment and attempted second degree murder evidenced distinct intents. Brief of Respondent at 31. However, the Washington Supreme Court held that the two offenses did comprise the same criminal conduct. Id. at 429.

Whether two crimes share the same objective intent can be measured by determining whether one crime furthered another. State v. Lessley, 118 Wn.2d 773, 777-78, 827 P.2d 996 (1992). The State offered evidence of other assaults, both charged and uncharged, to prove that Ms. Shorr reasonably feared for her life as required to prove the felony harassment charge. Inflicting harm on Ms. Shorr furthered the crime of felony harassment by creating the apprehension of fear. In this way, the assault furthered the crime of felony harassment.

Similarly, the convictions in counts I and V for assault constitute the same criminal conduct. The State argues that the two crimes do not share the same criminal intent, and did not occur at the same time. Brief of Respondent at 31-34. The “same time” element does not require that the two crimes be committed simultaneously, but is satisfied where the two crimes are part of a “continuous, uninterrupted sequence of conduct over a very short period of time.” State v. Porter, 133 Wn.2d 177, 183, 942 P.2d 974 (1997). The repeated commission of the same crime against the same victim over a short period of time falls within the “clear category of cases where two crimes will encompass the same criminal conduct.” Id. at 181. At trial, the prosecuting attorney

discussed counts I and V together as one incident of assault.  
10/23/07RP 92-93. Both counts involved assaults against Ms.  
Shorr in front of the residence within moments of each other.  
Based on the Washington Supreme Court decision in Porter, the  
two assaults in counts I and V encompass the same criminal  
conduct. The failure to argue same criminal conduct constituted  
ineffective assistance of counsel.

b. Defense counsel's failure to move for severance of  
the charges constituted ineffective assistance of counsel. The  
State speculates that having all charges tried together was possibly  
a tactical decision by trial counsel to attack the credibility of Ms.  
Shorr. Brief of Respondent at 35-36. However, joinder is  
"inherently prejudicial," and improper joinder creates the risk that  
the jury will cumulate the evidence and find guilt, "when if the  
evidence had been considered separately, it may not have so  
found." State v. Ramirez, 46 Wn. App. 223, 226-28, 730 P.2d 98  
(1986). The Washington Supreme Court has recently reiterated  
that "[s]everance of charges is important when there is a risk that  
the jury will use the evidence of one crime to infer the defendant's  
guilt for another crime or to infer a general criminal disposition."  
State v. Sutherby, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2009 WL

943858 at \*6 (No. 80169-0, April 9, 2009). No reasonable attorney would require his or her client to defend against multiple charged and uncharged allegations unnecessarily.

The State also argues that much of the evidence was cross-admissible. Brief of Respondent at 41. But the graphic and prejudicial ER 404(b) evidence was only admissible with regard to the felony harassment charge in count IV. Court's Instruction #8 informed the jury that evidence of the uncharged assault on Ms. Nicholson could be considered in proving that Mr. Franklin possessed a firearm, as charged in count II. CP 63. The State argues that this instruction was proper, but cites to no evidence in the record that showed the gun used in the assault was one of the guns found in the house. Brief of Respondent at 39. In fact, neither Ms. Nicholson nor Ms. Shorr identified the gun used in the uncharged assault as one of the guns found in the house months later. 10/11/07RP 18-21; 10/15/07RP 122. Thus, the only proper admission of the uncharged assaults related to count IV.

If counts IV and VI were heard in a separate trial, none of the ER 404(b) evidence would have been admissible regarding the remaining six counts. A "fair determination" of Mr. Franklin's guilt or innocence demanded that severance be granted. CrR 4.4(b).

See Sutherby, 2009 WL 943858 at \*8 (“A defendant must be tried for the offenses charged, and evidence of unrelated conduct should not be admitted unless it goes to the material issues of motive, intent, absence of accident or mistake, common scheme or plan, or identity”).

Finally, the State argues that the prejudice was mitigated by the court instruction to the jury to consider each count separately. Brief of Respondent at 42. Despite the instruction, the joinder of all charges, charged and uncharged, was “inherently prejudicial.” Ramirez, 46 Wn. App. at 226. Defense counsel’s performance was deficient in failing to move for severance.

c. Defense counsel’s failure to object to inadmissible hearsay constitutes ineffective assistance of counsel. Mr. Franklin’s counsel provided ineffective assistance of counsel by not objecting to the testimony of Ms. Shorr and Ms. Nicholson regarding statements made to them by Mr. Benchero. The State argues that the defense attorney had a potential strategic reason to allow the hearsay. Brief of Respondent at 46-47. However, this evidence was crucial in proving the two witness tampering charges. There can be no legitimate strategy in failing to object to inadmissible evidence that established two felony convictions.

Under ER 801(d)(2)(iv), admissions by a party-opponent are not hearsay when the statement is made by the party's agent acting within the scope of authority to make the statement for the party. Evidence independent of the hearsay must prove the speaker's status as an agent and the nature and extent of his authority. Passovoy v. Nordstrom, Inc., 52 Wn.App. 166, 171-72, 758 P.2d 524 (1988), rev. denied, 112 Wn.2d 1001 (1989).

Here, there was no independent proof in the record to establish that the statements allegedly made by Mr. Benchero were in any way authorized by Mr. Franklin. The recorded jail telephone calls suggested that Mr. Franklin asked Mr. Benchero to contact two individuals and ask them something. Ex. 96-98. The transcripts of the calls do not establish who the two people were, or what it was that Mr. Franklin wanted Mr. Benchero to ask them. At trial, Mr. Benchero, called by the State, testified that Mr. Franklin never asked him to contact either Ms. Nicholson or Ms. Shorr, and that neither "person one" nor "person two" referred to Ms. Nicholson or Ms. Shorr. 10/18/07RP 49, 52; 10/22/07RP 12.

The State argues that Mr. Benchero was lying, and that "the State proved that person #1 referred to Nicholson." Brief of Respondent at 44. The "proof" is based on Ms. Nicholson's

testimony about what Mr. Benchero told her. Brief of Respondent at 44. The State also argues it “further showed that person #2 was Sara Shorr.” Brief of Respondent at 45. Again, the State’s “proof” consists of Ms. Shorr’s testimony regarding what Mr. Benchero said to her. Brief of Respondent at 45. The State has not proved by evidence independent of the hearsay Mr. Benchero’s status as an agent or the nature and extent of his authority.

The State argues that Mr. Benchero’s testimony establishes this independent evidence. Brief of Respondent at 48. The State is incorrect. Mr. Benchero testified that he was never asked by Mr. Franklin to contact either Ms. Nicholson or Ms. Shorr. 10/22/07RP 12. Moreover, the requisite authority can only be established from the conduct of the principal, not by the conduct of the agent. DBM Contractors, Inc. v. State, 40 Wn.App. 98, 110, 696 P.2d 1270, rev. denied, 103 Wn.2d 1039 (1985). The State did not meet this requirement.

The State also argues that Mr. Benchero’s statements were admissible as statements of a co-conspirator. Brief of Respondent at 49-50. Under ER 801(d)(2)(v) evidence independent from the hearsay evidence must prove the existence of a conspiracy, and that both the defendant and the speaker are members of the

conspiracy. State v. Pierre, 111 Wn.2d 105, 118, 759 P.2d 383 (1988).

Here, neither the recorded telephone conversations nor the testimony of Mr. Benchero established by a preponderance of the evidence that Mr. Franklin and Mr. Benchero had an agreement to perform an unlawful act. In the absence of independent evidence proving the existence of a conspiracy, Mr. Benchero's statements to Ms. Nicholson and Ms. Shorr were inadmissible under ER 801(d)(2)(v).

Finally, the State argues that Mr. Benchero's statements to the women were not hearsay at all, citing to State v. Collins, 76 Wn. App. 496, 886 P.2d 243 (1995). Brief of Respondent at 50. Questions are not statements, and therefore do not meet the definition of hearsay under ER 801. Collins, 76 Wn. App. at 498. Ms. Nicholson and Ms. Shorr did not testify that Mr. Benchero asked them questions, but rather testified that he made requests of them. This evidence was inadmissible hearsay without which counts VII and VIII could not have been proved. The failure to object constitutes ineffective assistance of counsel.

B. CONCLUSION.

Numerous error were committed in the court below, requiring reversal of Mr. Franklin's convictions.

DATED this 27th day of April, 2009.

Respectfully submitted,

  
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27<sup>TH</sup> DAY OF APRIL, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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