

65848-4

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NO. 65848-4

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

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STATE OF WASHINGTON,

Respondent,

v.

IMRAN VAHORA,

Appellant.

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DIVISION ONE  
SEATTLE, WA

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

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BRIEF OF APPELLANT

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**A. ASSIGNMENT OF ERROR**

The convictions on counts six and seven violate the constitutional prohibition on double jeopardy.

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

Although the State may bring, and the factfinder may consider, multiple charges arising from the same conduct, courts may not enter multiple convictions for the same offense without violating double jeopardy. Here, the State charged Imran Vahora with two counts of assault based on one assault against one victim. After Mr. Vahora was convicted on both counts, the State properly moved to dismiss one conviction and the court properly granted the motion. However, the court forgot to delete the redundant conviction from the judgment and sentence. Must the conviction be vacated and stricken from the judgment and sentence?

**C. STATEMENT OF THE CASE**

Appellant Imran Vahora was charged with several crimes (eight counts total) based on a series of events that occurred in the fall of 2008. Mr. Vahora waived his right to a jury trial and a bench trial was held in June of 2010. For purposes of this appeal, Mr. Vahora will set forth the facts regarding counts six and seven.

In November of 2008, Mr. Vahora picked up B.R.C., who was working as a prostitute. 6/17/10 RP 43-47. B.R.C. tried to direct Mr. Vahora to a certain location, but Mr. Vahora disregarded her instructions and parked in a different neighborhood. Because Mr. Vahora refused to follow her directions, B.R.C. became scared and told him to let her out of the car. 6/17/10 RP 50. Instead, Mr. Vahora attacked her, choked her, and tried to put his hand down her throat. 6/17/10 RP 51. B.R.C. had difficulty breathing. 6/17/10 RP 51-52.

B.R.C. said, "if you want to have sex with me, just take it." 6/17/10 RP 53. But Mr. Vahora did not rape B.R.C., and instead continued to attack her. 6/17/10 RP 54. After they fought for about five minutes, B.R.C. managed to open the door and escape. 6/17/10 RP 55-56.

For this incident, the State charged Mr. Vahora with one count of second-degree assault based on intent to rape (count six), and one count of second-degree assault based on strangulation (count seven). CP 26-27. After the State's closing argument, the court asked the State what its theory was on counts six and seven. 6/24/10 RP 15. The prosecutor explained, "On the two Assault 2 SM's instead of charging in the alternative, I went ahead and

charged both. Of course, I am sure they will merge.” 6/24/10 RP 15.

The court found Mr. Vahora guilty of both counts six and seven. CP 45-54. At sentencing, the State moved to dismiss count six. 7/29/10 RP 2. The prosecutor stated, “As the Court knows, I went forward on basically two theories of Assault in the Second Degree. As we discussed during trial, I believe that they merged as the same course of conduct and so at this time I’m willing to dismiss count six.” 7/29/10 RP 2-3. The court granted the motion. 7/29/10 RP 3. It did not include count six in its offender score calculation, and did not separately sentence Mr. Vahora for count six. However, count six is listed as one of Mr. Vahora’s convictions on the judgment and sentence. CP 64.

D. ARGUMENT

THE CONVICTION FOR COUNT SIX MUST BE  
VACATED AND STRICKEN FROM THE JUDGMENT  
BECAUSE THE TRIAL COURT PROPERLY GRANTED  
THE STATE’S MOTION TO DISMISS THE  
CONVICTION ON DOUBLE-JEOPARDY GROUNDS.

The trial court and the parties recognized that the two convictions for the alternative means of committing assault against B.R.C. violated the prohibition on double jeopardy and that dismissal of one of the convictions was appropriate. The inclusion

of the conviction on count six in the judgment and sentence appears to be a mere clerical error. This Court should remand for correction of the error.

a. A defendant's right to be free from double jeopardy is violated if he is convicted of two offenses that are identical in fact and law. The Fifth Amendment to the United States Constitution provides, "No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb...." U.S. Const. amend. V. Similarly, article I, section 9 of our state constitution provides, "No person shall be ... twice put in jeopardy for the same offense." Const. art. I, § 9. These clauses protect defendants against "prosecution oppression." State v. Womac, 160 Wn.2d 643, 650, 160 P.3d 40 (2007) (quoting 5 Wayne R. LaFare, Jerold H. Israel & Nancy J. King, Criminal Procedure § 25.1(b), at 630 (2d ed. 1999)).

To determine whether multiple convictions violate double jeopardy, Washington courts apply the "same evidence" test. State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995) (citing Blockburger v. United States, 284 U.S. 299, 304, 76 L.Ed. 306, 52 S.Ct. 180 (1932)). Under that test, absent clear legislative intent to the contrary, a defendant's double jeopardy rights are violated if he is convicted of offenses that are identical both in fact and in law.

Id.; State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005).

In other words, two convictions violate double jeopardy when the evidence required to support a conviction on one charge would have been sufficient to warrant a conviction upon the other.

Freeman, 153 Wn.2d at 772 (citing State v. Reiff, 14 Wash. 664, 667, 45 P. 318 (1896)). Courts evaluate the elements “as charged and proved, not merely as the level of an abstract articulation of the elements.” Freeman, 153 Wn.2d at 777.

Although the State may bring, and the factfinder may consider, multiple charges arising from the same conduct, courts may not enter multiple convictions for the same offense without violating double jeopardy. Id. at 770.. The double jeopardy clause bars multiple convictions arising out of the same act even if concurrent sentences have been imposed. Rutledge, 517 U.S. at 302; Calle, 125 Wn.2d at 775. Where two convictions violate double jeopardy, the court must vacate the conviction on the lesser offense. Womac, 160 Wn.2d at 656; State v. Weber, 159 Wn.2d 252, 266, 149 P.3d 646 (2006). “To assure that double jeopardy proscriptions are carefully observed, a judgment and sentence must not include any reference to the vacated conviction.” State v. Turner, 169 Wn.2d 448, 464, 238 P.3d 461 (2010).

b. As the court and the parties recognized, the assault convictions entered in this case are identical in fact and law, and a conviction should have been entered for one count only. The State charged Mr. Vahora with two alternative means of assaulting B.R.C., based on the same event. Alternative means of committing one offense are the same offense for double-jeopardy purposes. State v. Johnson, 113 Wn. App. 482, 487, 54 P.3d 155 (2002).

As the prosecutor explained, he could have charged it as one count of assault with the two alternative means embedded in the same count, but it was equally proper to charge two counts so long as only one conviction was entered. 6/24/10 RP 15; see Womac, 160 Wn.2d at 657-58. After the court found Mr. Vahora guilty on both counts, the prosecutor properly moved to dismiss count six, and the court properly granted the motion. 7/29/10 RP 2-3. It appears the court simply forgot to delete count six from the judgment and sentence. CP 65.

Count six must be vacated and stricken from the judgment and sentence. Womac, 160 Wn.2d at 656. Although the trial court excluded count six from the offender score computation, and declined to sentence Mr. Vahora on count six, the inclusion of the conviction on the judgment and sentence violates double jeopardy.

Id. at 658. This is because the conviction itself, apart from the sentence, has potential adverse collateral consequences. Id. at 657 (citing Ball v. United States, 470 U.S. 856, 865, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985)). Accordingly, Mr. Vahora asks this Court to remand with instructions to vacate the conviction on count six by striking it from the judgment and sentence.

E. CONCLUSION

For the reasons above this Court should reverse Mr. Vahora's conviction on count six, and remand with instructions to strike the conviction from the judgment and sentence.

DATED this 7<sup>th</sup> day of February, 2011.

Respectfully submitted,

  
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