

NO. 68914-2-I

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

REC'D
JUL 08 2013
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

SANDOR RIVERA,

Appellant.

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

The Honorable Cheryl Carey, Judge

REPLY BRIEF OF APPELLANT

ANDREW P. ZINNER
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A. ARGUMENT IN REPLY¹

THE FIRST DEGREE ROBBERY AND FIRST DEGREE ASSAULT CONVICTIONS INVOLVED THE SAME CRIMINAL CONDUCT.

Sandor Rivera contends, for reasons set forth in the Brief of Appellant (BOA), that his first degree robbery, first degree assault, and first degree burglary involved the same criminal conduct for sentencing purposes. BOA at 13-19. The State maintains none of the three crimes involved the same criminal conduct. Brief of Respondent (BOR) at 15-29. For the following reasons, Rivera asks this Court to reject the State's arguments.

The State first argues the robbery and assault were not the same criminal conduct because the continuing assaultive behavior after the initial slashes to Radio Shack Manager Gary Cook's head indicated the separate intent to inflict gratuitous violence. BOR at 18-23. The State correctly notes that crimes committed for different criminal purposes are not the same criminal conduct. BOR at 18-19. This is because the "same intent" requirement of the "same criminal conduct" test looks not to the mens rea element of the particular crime, but rather to the offender's objective criminal purpose in committing the crimes. See BOA at 15

¹ Rivera stands on the argument raised in the Brief of Appellant regarding the burglary conviction.

(citing State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144, review denied, 114 Wn.2d 1030 (1990)).

But immediately thereafter, the State contradicts itself by comparing the mental state element for the assault -- "intent to inflict great bodily harm" -- with that for robbery -- "intent to commit theft." BOR at 19. Continuing in this vein, the State declares, "The underlying *purpose* of each crime on its face is different: one is to cause severe injury and the other is to take property." BOR at 19. The State thus equates "purpose" with the statutory mens rea elements of the crimes. This is the incorrect analysis. See State v. Davis, ___ Wn. App. ___, 300 P.3d 465, 474 (2013) (citing Adame, court rejects State's assertion that for purposes of "same intent" question, "first degree assault requires the intent to inflict great bodily harm, and attempted murder requires the intent to kill.>").

Courts instead consider many factors to determine intent, including: (1) how closely related the crimes are, (2) whether the criminal objective substantially changed from one crime to the other(s); (3) whether one crime furthered another, and (4) whether the crimes were part of a recognizable scheme or plan. State v. Hernandez, 172 Wn. App. 537, 545, 290 P.3d 1052 (2012) (citing State v. Lewis, 115 Wn.2d 294, 301, 797 P.2d 1141 (1990) and State v. Burns, 114 Wn.2d 314, 319, 788 P.2d 531

(1990)). Because the State's view of "intent" is overly narrow, this Court should reject its analysis.

Furthermore, the State's reasoning does not square with the Supreme Court's decision in State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005). In discussing the merger type of double jeopardy, the court noted an exception to the merger doctrine. Offenses may be separate when there is a separate injury that is distinct from "and not merely incidental to the crime of which it forms an element." 153 Wn.2d at 778 (citing State v. Frohs, 83 Wn. App. 803, 815-16, 924 P.2d 384 (1996)). More generally, if the offenses committed *have independent purposes* or effects, they may be punished separately even where the applicable statute requires proof of another felony to elevate main crime. Frohs, 83 Wn. App. at 815-16.

This standard is analogous to the "intent" definition used in the context of "same criminal conduct." Courts determining whether the offenses were committed with the same intent consider whether the crimes at issue had different criminal purposes, objectives, or motives. See State v. Saunders, 120 Wn. App. 800, 825, 86 P.3d 232 (2004) (primary motivation for raping complainant with television antenna was to dominate and to cause pain and humiliation, which was arguably similar to the motivation for the kidnap).

The facts in Freeman are similar to those here. Freeman was among a group of men who picked up the victim to take him to a party. Instead of going to a party, however, they stopped the car on a dark, dead-end street. Freeman drew a handgun and ordered the victim to hand over any valuables. When the victim did not immediately comply, Freeman shot him. The victim collapsed bleeding in a driveway, where Freeman and the others robbed him and apparently left him for dead. Freeman, 153 Wn.2d at 769.

The Freeman Court observed that using force to intimidate a victim into relinquishing property "is often incidental to the robbery." Freeman, 153 Wn.2d at 779. The exception to the merger rule "does not apply merely because the defendant used more violence than necessary to accomplish the crime." Id. The question is instead whether the additional force had a purpose or effect independent of the crime. Id. The Court concluded Freeman shot the victim to facilitate the robbery, not to inflict gratuitous violence as the trial court found. Id.

The same is true here. Robbery requires the intent to take property by force or fear of the use of force. RCW 9A.56.190. First degree robbery as charged also required proof Rivera committed the offense while armed with a knife or sharp instrument or that he inflicted bodily injury. CP 20; RCW 9A.56.200(1)(a)(i), (iii). First degree assault as

charged required proof Rivera, with intent to commit great bodily harm, assaulted Cook with a knife or sharp object or used any force or means likely to produce great bodily harm or death, or actually inflicted great bodily harm. CP 19; RCW 9A.36.011(1)(a), (c).

The assault with a knife or sharp object, which caused great bodily harm, was the use of force while armed with a knife or sharp instrument required to prove first degree robbery as charged. The objective, which did not change, was to take as much merchandise from the store as Rivera could get away with. The ongoing assault was intimately related to the robbery, furthered its commission and was part of the recognizable overall plan. In other words, the robbery and assault involved the same criminal conduct, and the trial court abused its discretion in finding otherwise.

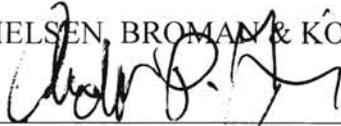
B. CONCLUSION

For the reasons cited herein and in his Brief of Appellant, this Court should reverse Rivera's sentence and remand for a resentencing with a lower offender score.

DATED this 4 day of July, 2013.

Respectfully submitted,

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Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 8TH DAY OF JULY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL

[X] SANDOR RIVERA
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SIGNED IN SEATTLE WASHINGTON, THIS 8TH DAY OF JULY 2013.

x *Patrick Mayovsky*

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