

70858-9

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No. 70858-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

EDMOND MAYNOR,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. The convictions for robbery of Tu Huynh in the jewelry store and assault of Tu Huynh in the jewelry store violate the Fifth Amendment prohibition on double jeopardy, requiring vacation of the assault conviction.

As explained in the opening brief, the conviction on count two should be reversed and the charge dismissed with prejudice, because entering convictions for both counts one and two violated Mr. Maynor's constitutional right to be free from double jeopardy. The assault at issue in count two was part and parcel of the robbery at issue in count one, not a separate crime. *See* Br. of Appellant at 5-9; *In re the Personal Restraint of Francis*, 170 Wn.2d 517, 242 P.3d 866 (2010); *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005).

The State claims the two convictions are proper by characterizing the robbery as the first step in the transaction, when Mr. Maynor pulled out the gun and threatened to shoot if not given the tray of rings, and the assault as the second step in the transaction, when a couple of seconds later Mr. Maynor fired a shot in order to retain the tray of rings. Br. of Respondent at 12-13. The State insists that given the prosecutor's "clear election of the shooting" as the act constituting the assault, the two crimes are separate even though the prosecutor also relied in part on that shooting to support the robbery conviction. Br. of Respondent at 13, n.3, 14. The

State's arguments are foreclosed not only by *Francis* and *Freeman*, but also by *State v. Kier*, 164 Wn.2d 798, 194 P.3d 212 (2008); *State v. Jackman*, 156 Wn.2d 736, 132 P.3d 136 (2007); and *State v. Truong*, 168 Wn. App. 529, 277 P.3d 74 (2012).

Kier was a car-jacking case in which the State charged the defendant with second-degree assault of a victim named Ellison and first-degree robbery of both Ellison and his companion, Hudson. *Kier*, 164 Wn.2d at 803. The State argued that the two convictions did not violate double jeopardy because during closing argument it elected Hudson as the victim of the robbery and Ellison as the victim of the assault. *Id.* at 805. The Supreme Court disagreed, because even though the State elected different victims for the two counts in closing argument, the evidence and instructions in the case allowed the jury to convict if it found that Ellison was the victim of both counts. *Id.* at 811. "This creates an ambiguity in the jury's verdict, which, under the rule of lenity, must be resolved in the defendant's favor." *Id.*; accord *State v. DeRyke*, 110 Wn. App. 815, 823-34, 41 P.3d 1225 (2002), *aff'd on other grounds*, 149 Wn.2d 906 (2003) (holding first-degree kidnapping conviction merged into attempted rape conviction even though jury might have based latter on deadly weapon element because neither jury instructions nor verdict form required jury to specify alternative on which it was relying).

Here, the verdict is even more ambiguous because unlike in *Kier*, the State did not elect a particular act or alternative for the robbery charge during closing argument. Instead, the prosecutor referred both to Mr. Maynor's threat to use the weapon and the firing of the shot to support the robbery charge. RP (6/18/13) 279, 287. But even if the State *had* elected the act supporting the robbery, its argument would be foreclosed by *Kier*. 164 Wn.2d at 811.

The argument is also foreclosed by *Jackman* and *Truong*. In *Jackman*, the Supreme Court emphasized that the State "may not divide a defendant's conduct into segments in order to obtain multiple convictions." *Jackman*, 156 Wn.2d at 749. And in *Truong*, this Court explained:

We have adopted a "transactional" analysis of robbery, whereby the force or threat of force need not precisely coincide with the taking. The taking is ongoing until the assailant has effected an escape. The definition of robbery thus includes violence during flight immediately following the taking.

State v. Truong, 168 Wn. App. at 535-36 (internal citations omitted).

The evidence the State presented at trial showed an ongoing course of conduct in which Mr. Maynard used a gun against the jeweler in order to obtain and retain a tray of rings. The assault was not a separate and distinct act from the robbery. Under the cases discussed above and in

the opening brief, the assault conviction and its associated enhancement must be vacated, and the case remanded for resentencing. *Francis*, 170 Wn.2d at 531.

2. The convictions for counts three and four should be reversed and the case remanded for a new trial because the prosecutor committed prejudicial misconduct by falsely accusing Mr. Maynor of planning similar crimes in the past.

As explained in the opening brief, a new trial should be granted on counts three and four because during cross-examination the prosecutor violated an order in limine and falsely accused Mr. Maynor of having planned similar crimes in the past. Although the court told the jury to disregard the prosecutor's statement, it should have granted Mr. Maynor's motion for a mistrial because the prosecutor's false allegation was incurably prejudicial. Br. of Appellant at 9-14.

The State urges this Court to affirm because "the prosecutor had a good-faith basis for the inquiry and [Mr.] Maynor cannot establish prejudice in any event." Br. of Respondent at 19. The former is irrelevant and the latter is wrong.

In support of its claim that a showing of "bad faith" is required to prevail on a claim of prosecutorial misconduct, the State cites a case from 1985. Br. of Respondent at 24 (citing *State v. Manthie*, 39 Wn. App. 815,

820, 696 P.2d 33 (1985)). This is not the law. Although the word “misconduct” implies ill intent, it is well-settled that “prosecutorial misconduct” is a term of art that applies to various types of misstatements regardless of the speaker’s motives. Prosecutorial misconduct occurs when prosecutors violate pretrial rulings, discuss facts not in evidence, misstate the law, shift the burden of proof, comment on the exercise of a constitutional right, mischaracterize the role of the jury, present personal opinions, impugn defense counsel, or otherwise inflame the passions of the jury – regardless of whether the prosecutor genuinely believes he or she is following the law.¹ Thus, for example, it is prosecutorial misconduct to tell the jury it has to be able to “explain a reason” if it finds the defendant not guilty, even though prosecutors made this argument in good faith based on a jury instruction describing reasonable doubt as “a doubt for which a reason exists.” *State v. Emery*, 174 Wn.2d 741, 759-60, 278 P.3d 653 (2012); *State v. Johnson*, 158 Wn. App. 677, 684, 243 P.3d 936 (2010).

¹ For various types of misconduct *see, e.g., State v. Lindsay*, 180 Wn.2d 423, 326 P.3d 125 (2014); *In re the Personal Restraint of Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012); *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996); *State v. Gauthier*, 174 Wn. App. 257, 267, 298 P.3d 126 (2013); *State v. Pierce*, 169 Wn. App. 533, 537, 280 P.3d 1158 (2012); *State v. McCreven*, 170 Wn. App. 444, 284 P.3d 793 (2012).

Accordingly, regardless of whether the prosecutor acted in good faith when saying, “This is not the first time you had contemplated hurting others in an effort to be shot by police,” the question is whether this extraordinarily prejudicial misstatement could not have been cured by an instruction and therefore requires a new trial. The answer is yes as to counts three and four. *See* Br. of Appellant at 9-14.²

In evaluating prejudice, the State points out that Mr. Maynor fired two shots toward Huynh, but ignores the evidence that Mr. Maynor’s intent in firing those shots was not to cause great bodily harm but to scare Mr. Huynh so he would stop chasing him. Absent the prosecutor’s false accusation that this was not the first time Mr. Maynor had planned this type of crime, the jury may well have convicted him of the lesser offense. Intent was similarly at issue in count three, for which Mr. Maynor testified that the gun went off when he and Mr. Sandoval were wrestling on the ground, and that he did not intentionally pull the trigger.

The State claims Mr. Maynor cannot show prejudice because the defense objection was sustained and the jury was instructed to disregard the question and its inferences. Br. of Respondent at 27. But it is well-

² The State’s claim that the prosecutor was referring only to the *current* crime is belied by the prosecutor’s actual statement. *Compare* Br. of Respondent at 25-26, 29-30 to RP (6/17/13) 183 (“This is not the first time that you had contemplated hurting others in an effort to be shot by police, was it?”).

settled that some errors are too prejudicial to be cured by an instruction. For example, the Supreme Court granted a new trial in *Glasmann* even though the defendant did not object in the trial court, because the prejudice “could not have been cured by an instruction.” *Glasmann*, 175 Wn.2d at 707. The same is true here as to counts three and four, and this Court should remand for a new trial on those counts. Br. of Appellant at 9-14.

3. Mr. Maynor was deprived of his constitutional right to the effective assistance of counsel at sentencing because his attorney failed to argue that the three counts involving Tu Huynh encompassed the same criminal conduct.

As explained in the opening brief, Mr. Maynor was deprived of his constitutional right to the effective assistance of counsel when his attorney failed to argue that counts one, two, and four constituted the same criminal conduct for sentencing purposes. There is a reasonable probability that had the argument been made, the trial court would have found the three counts occurred at the same time and place, against the same victim, with the same objective intent. Thus, Mr. Maynor’s sentence should be reversed and the case remanded for a new sentencing hearing. Br. of Appellant at 15-21 (citing, inter alia, *State v. Phuong*, 174 Wn. App. 494, 299 P.3d 37 (2013); *State v. Davis*, 174 Wn. App. 623, 300 P.3d 465 (2013)).

The State concedes that all three counts involved the same victim. Br. of Respondent at 34. The State also concedes that counts one and two occurred in the same place. Br. of Respondent at 36. But it argues that count four did not occur in the same place, even though it also occurred in Westlake Mall, just outside the jewelry store. The State acknowledges, as it must, that its position is contrary to that in *State v. Davis*, 174 Wn. App. 623, 300 P.3d 465 (2013). Br. of Respondent at 34-35; *see also* Br. of Appellant at 19. In *Davis*, this Court affirmed a trial court's ruling that an assault and an attempted murder constituted the same criminal conduct, even though the assault occurred inside a cabin approximately 50 feet away from the attempted murder which occurred on the beach outside the cabin. *See id.* at 643. This Court recognized that two offenses may encompass the same criminal conduct even if they do not occur precisely in the same location if "the different physical locations are adjacent and within a short distance of each other." *Id.* at 644. That is precisely what occurred here with respect to court four.

The State correctly notes that this Court also affirmed a trial court's ruling with respect to same criminal conduct where the trial court ruled that three guns found in three different rooms in a house were not in the same "place" for purposes of RCW 9.94A.589(1)(a). Br. of Respondent at 35 (citing *State v. Stockmyer*, 136 Wn. App. 212, 148 P.3d

1077 (2006)). In *Stockmyer*, this Court said, “we cannot say as a matter of law that Stockmyer’s possession of multiple firearms in these three different locations constituted the same criminal conduct.” *Stockmyer*, 136 Wn. App. at 219. Thus, in both *Davis* and *Stockmyer*, this Court affirmed the trial court’s ruling on the “same place” analysis – in the former case in favor of the defendant and in the latter in favor of the State. *See Davis*, 174 Wn. App. at 643-44.

But here, the trial court was never given the opportunity to rule on the issue, because Mr. Maynor’s attorney did not raise the issue. *Davis* demonstrates that there is a reasonable possibility that the sentencing court would have found all three offenses occurred in the same place had the argument been made. Thus, the trial court must be given the opportunity to make this determination at a new sentencing hearing. *Phuong*, 174 Wn. App. at 547-48.

As to the “same time” component of the same criminal conduct analysis, the State concedes that counts one, two, and four “occurred in quick succession.” Br. of Respondent at 39. Yet it claims this “quick succession” does not satisfy the “same time” requirement because Mr. Maynor “had an opportunity between each crime to cease his criminal activity, but instead proceeded to commit another crime.” Br. of Respondent at 39. The State is wrong.

As already discussed in the double jeopardy section, and as was made evident by the State's case at trial, this quick sequence of events was all part of the same transaction. Moreover, the State does not explain how the sales of two different drugs 10 minutes apart in *Porter* could constitute the same criminal conduct while the events that occurred here in much more rapid succession, as part of the same general transaction, would not. *See State v. Porter*, 133 Wn.2d 177, 183, 942 P.2d 974 (1997).

Obviously, the drug seller in *Porter* "had an opportunity between each crime to cease his criminal activity, but instead proceeded to commit another crime." Br. of Respondent at 39. Yet our Supreme Court reversed the trial court's finding that the crimes did not constitute the same criminal conduct. *Porter*, 133 Wn.2d at 180. In light of *Porter*, there is a reasonable possibility that the trial court in Mr. Maynor's case would have found that the three counts at issue occurred at the same time. *Phuong*, 174 Wn. App. at 547-48.

Finally, there is a reasonable possibility the trial court would have found the three crimes were committed with the same objective intent – to obtain and retain the tray of rings. In addressing this issue, the State discusses a case in which defendants were convicted of attempted murder and robbery, where the intent of the former crime was to kill and the intent of the latter was to obtain property. Br. of Respondent at 40-41 (citing

State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237 (1987)). Here, the crimes are assault and robbery. As discussed previously, assaults which are committed to further robberies not only constitute same criminal conduct, but often constitute the same crime for purposes of double jeopardy. *See Francis*, 170 Wn.2d at 525; *Freeman*, 153 Wn.2d at 774. Mr. Maynor submits that counts one and two violate double jeopardy, as argued in the first section above. But at a minimum, they constitute the same criminal conduct, along with the third count against the same victim. Because there is a reasonable possibility that the trial court would have found counts one, two, and three constituted the same criminal conduct had counsel so argued, this Court should reverse and remand for resentencing. *See Br. of Appellant* at 15-22.

B. CONCLUSION

For the reasons stated above and in the opening brief, Mr. Maynor asks this Court to vacate the conviction on count two because the conviction violates the Fifth Amendment right to be free from double jeopardy. A new trial should be granted on counts three and four because the prejudice caused by the prosecutor's false accusation regarding Mr. Maynor's past could not be cured by an instruction. In the alternative, the case should be remanded for resentencing at which Mr. Maynor may argue that his offenses against Tu Huynh encompassed the same criminal conduct for offender score purposes.

DATED this 13th day of October, 2014.

Respectfully submitted,



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DIVISION ONE**

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)	
Respondent,)	
)	NO. 70858-9-I
v.)	
)	
EDMOND MAYNOR,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF OCTOBER, 2014, 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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