NO. 35579-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN KAZMIERCZAK,

Appellant.

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

The Honorable Frederick W. Fleming, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied appellant's motion for mistrial following a serious trial irregularity, improper introduction of appellant's custodial statement.

2. The State's introduction of appellant's statement, in violation of the court's order and absent a CrR 3.5 hearing, was prosecutorial misconduct denying appellant a fair trial.

3. The introduction of appellant's statement violated CrR 3.5 and appellant's Fifth Amendment privilege against self-incrimination.

4. The trial court erred when it failed to dismiss appellant's third degree assault conviction even though it merged his first degree robbery conviction.

Issues Pertaining to Assignments of Error

1. The trial court's omnibus order provided appellant's custodial statements could be offered "in the State's case in rebuttal only." No CrR 3.5 hearing was held. On cross-examination of appellant, the prosecutor introduced, in violation of the court's order, a custodial statement that undermined appellant's voluntary intoxication defense. Because introduction of the statement was a serious trial irregularity, did the trial court err in denying appellant's motion for a mistrial?

2. Appellant's assault charge elevated the robbery charge to a first-degree offense. Does merger require vacation of appellant's third degree assault charge?

B. STATEMENT OF THE CASE

1. Procedural Facts

By amended information, the Pierce County prosecutor charged John Kazmierczak with first degree robbery (count 1) and second degree assault (count 2), based on events occurring on February 16, 2006 in Puyallup. CP 3-4. A pretrial omnibus order provided:

> 1. Regarding CUSTODIAL STATEMENTS by defendant:
>
> [ ] No custodial statements will be offered in the State's case in chief, or in rebuttal.
> [X] The statements of defendant will be offered in the State's case in rebuttal only."
> [ ] The statements referred to in the State's discovery will be offered and:
>
> > [ ] May be admitted into evidence without a pre-trial hearing, by stipulation of the parties,
> > [ ] A pretrial hearing shall be held . . . .

Appendix.[1] No CrR 3.5 hearing was held.

A jury found Kazmierczak guilty of first degree burglary. As to count 2, it found him guilty of third degree assault, a lesser-degree

[1] A supplemental designation of clerk's papers was filed on March 27, 2007 designating this document.

offense. 4RP[2] 300-01; CP 42-44. After Kazmierczak stipulated to his prior convictions, the court found him a persistent offender and sentenced him to life in prison without possibility of parole. 5RP 312-13; CP 45-46, 61-106; former RCW 9.94A.030(33)(a) (2005). Kazmierczak timely appealed. CP 107.

2. Testimony of State's Witnesses

The evening of February 16, 2006, Jaymie Parkhurst got off the bus in downtown Puyallup and walked toward her car. 2RP 30, 33-34. She noticed a man, Kazmierczak, following her. 2RP 40-42. Parkhurst realized she was mistaken about where she parked her car and had to double back. She passed Kazmierczak walking in the opposite direction. 2RP 43-44. When Parkhurst reached her car, which was parked in a lot near the Eagles Club, Kazmierczak approached her and demanded her car keys. 2RP 46-47. Parkhurst punched him twice in the face. The punches did not dissuade Kazmierczak, so she handed him the keys. 2RP 48.

Kazmierczak then demanded Parkhurst's cell phone. 2RP 49. When she refused, he grabbed at the phone with one hand and the back of Parkhurst's head with the other. 2RP 50. Parkhurst let go of the phone and her other belongings and managed to twist away. 2RP 51-54. In

[2] This brief refers to the verbatim report of proceedings as follows: 1RP – 11/6/06; 2RP – 11/7/06; 3RP – 11/8/06; 4RP – 11/9/06; and 5RP – 11/17/06.

extricating herself from Kazmierczak's grip, Parkhurst's hair was ripped out in four places, the largest patch three inches in diameter. 2RP 54-55.

Parkhurst ran from the lot toward the Eagles club. 2RP 52. When she reached Third Avenue Northwest, she fell into the street, skinning her leg, ankle, and elbow. 2RP 45, 52, 56. She did not know where Kazmierczak was at that point. 2RP 53, 62. Parkhurst summoned a passing car and told the occupants, Jaesung Ji, Jason Choi, and Nathan Merz, she had been attacked. Parkhurst pointed out Kazmierczak, who was running away, then went into the Eagles club and called the police. 2RP 53-54, 57, 81.

Ji let Choi out of the car to look after Parkhurst and drove after Kazmierczak, yelling at him to stop. Kazmierczak did not. 2RP 87, 112. Merz recalled Kazmierczak mumbling as he jogged down the side of the road, but Merz could not understand him. 2RP 137, 147-48. Ji eventually stopped the car and followed Kazmierczak on foot. 2RP 85-86. Kazmierczak told Ji to stop following and threatened Ji that he could "take" him, so Ji kept his distance and waited for the police. 2RP 88. After Ji stopped the car, Merz went to get the police because he had seen them heading in the wrong direction. 2RP 149. Police eventually arrested Kazmierczak near the Bank of America on West Meeker. 2RP 89; 3RP

169. Parkhurst's keys were later found inside the fenced lot of a business located along the route traveled by Kazmierczak. 2RP 102-06.

3. Testimony of Defense Witnesses

Kazmierczak worked in Auburn and February 16 was payday. 3RP 195-96. That morning, he withdrew $100 from his account. 3RP 197. After getting off work that afternoon around 3:30, he went to the Home Plate Pub with a workmate. 3RP 200-01. While there, Kazmierczak ordered four rounds of drinks for himself. Each round consisted of a mini-pitcher of beer (approximately three glasses of beer) and a "Jaeger bomb," a shot of hard liquor. 3RP 201-03, 209. Kazmierczak left the bar to get the 6:00 train to Tacoma, where he resided. 3RP 204-05. While riding on the train, he began feeling drunk and nodded off. 3RP 206. He vaguely remembered getting off when the train stopped, but he did not recall which stop. The next thing he remembered, someone was chasing him. 3RP 207-08, 216, 223. Kazmierczak admitted he was a longtime heavy beer drinker and often got drunk after work. 3RP 212, 219.

Officer Scott Lien, who arrested Kazmierczak, testified Kazmierczak appeared intoxicated when he arrested him. 3RP 169-70.

The jury was instructed on voluntary intoxication:

> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent, knowledge, recklessness, or negligence.

CP 25 (Instruction 18).

4. Introduction of Statement, Motion for Mistrial, and Closing Argument

After the State rested and before the defense called Lien as its first witness, the State informed the court Kazmierczak "made some statements to Officer Lien. The State would move to preclude defense counsel from asking that officer anything about those statements that were made to the officer in terms of the content." 3RP 157. Defense counsel informed the court he would not introduce any statements. 3RP 157-58.

As agreed, during direct examination of Lien, defense counsel did not elicit any statements by Kazmierczak. 3RP 167-71. Likewise, no statements were elicited on direct examination of Kazmierczak. 3RP 194-208. However, on cross-examination of Kazmierczak the prosecutor inquired:

> [The State:] Did the police officers catch you with any stolen property on you?
> [Kazmierczak:] I have no idea.
> [The State:] Okay. Do you remember speaking to the police officer?
> [Kazmierczak:] Yes.
> [The State:] In fact, Officer Lien, who was in here testifying?

> [Kazmierczak:] I couldn't . . . tell you.
>
> [The State:] Okay. Do you recall the officer telling you you were under arrest?
>
> [Kazmierczak:] Yes.
>
> . . . .
>
> [The State:] Do you recall the officer telling you what you were arrested for?
>
> [Kazmierczak:] No.
>
> [The State:] Isn't it true he told you that you were arrested for robbery?
>
> [Kazmierczak:] Not to my knowledge.
>
> [The State:] And isn't it true . . . you told him, quote, I'm not in possession of anything so how could this be?
>
> [Kazmierczak:] I don't remember making that statement.
>
> [The State:] And in fact, you did not have the victim's keys, is that correct, when the police contacted you?
>
> [Kazmierczak:] I have no knowledge of that.

3RP 225-26. Kazmierczak did not object.

On rebuttal, the State re-called Lien, who testified he told Kazmierczak he was under arrest for robbery. According to Lien, Kazmierczak replied, "How could [I] be arrested for that, I'm not in possession of anything." 3RP 227.

After the State rested, Kazmierczak's counsel moved for a mistrial, arguing before trial, the parties agreed before any statements by Kazmierczak were admitted, a CrR 3.5 hearing would be held and, moreover, defense counsel had not introduced any of Kazmierczak's

statements. The State argued the statements had been used in rebuttal. 3RP 231.

The court agreed with the State:

> I'm going to deny the motion for mistrial. I don't believe that under he circumstances it rises to the level of a mistrial. And the totality of the circumstances . . . don't rise to that level. So I'm going to deny the motion [.] And it was in rebuttal. So, that will be the judgment of the court.

3RP 232.

In closing argument, the State argued Kazmierczak's statement to the police showed he possessed the requisite mental state to commit the charged crimes:

> [Kazmierczak] intended to take those keys from [Parkhurst]. . . .
>
> [R]emember what he said to the police office afterwards when the police officer told him he was under arrest for robbery. He said, "How can you charge me with that when you didn't find any property on me? Kind of suggesting, "Na-na na-na-na, you can't catch me. You don't have me. I got rid of the property." He didn't say that, but that's clearly what his belief was.

3RP 253. The State made a similar argument in rebuttal:

> As I mentioned to you earlier, the fact that when the officer contacted [Kazmierczak], . . . [he] says, "How can that be if you didn't find evidence on me[?]". . . <u>that shows he's thinking</u>. Maybe not thinking well, maybe he is not making the best decisions. Maybe he is wrong about what the law is. Maybe he thinks we can't pin it on him if he doesn't have the goods on him and he's not caught red-handed. Well, he's wrong about that, because we can pin it on him."

3RP 280 (emphasis added).

C. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT DENIED KAZMIERCZAK'S MOTION FOR A MISTRIAL FOLLOWING INTRODUCTION OF HIS CUSTODIAL STATEMENT.

The trial court erred when it denied Kazmierczak's motion for a mistrial following a serious trial irregularity, the State's introduction of his custodial statement.

In deciding whether an irregularity warrants a new trial, this Court considers (1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether their regularity could have been cured by an instruction. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). A mistrial should be granted when "nothing the trial court could have said or done would have remedied the harm done to the defendant." State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979). If raised in time for the trial court to take corrective action, a defendant's motion for a mistrial preserves the issue for appeal. State v. Koch, 126 Wn. App. 589, 597-98, 103 P.3d 1280, review denied, 154 Wn.2d 1028 (2005).

State v. Wilburn, while not identical, is instructive. In a prosecution for rape, a superior court employee testified she was

"surpri[s]ed" to see the Wilburn "back" and while interviewing him, he said, "Yes, I did it again, and I need treatment." 51 Wn. App. 827, 832, 755 P.2d 842 (1988). Although the trial court had earlier ordered no evidence of Wilburn's prior convictions would be allowed, it denied a motion for mistrial. Id. On appeal, this Court reversed, holding because the outcome depended largely on the credibility of Wilburn and the complaining witness, a curative instruction could not have remedied the error. Id. at 832-33.

Here, the trial irregularity was serious. Admission of the statement violated the court's own pretrial order. Moreover, admission of the statement without a CrR 3.5 hearing violated Kazmierczak's privilege against self-incrimination. Finally, in introducing the statement contrary to the court's order, the prosecutor committed prejudicial misconduct denying Kazmierczak a fair trial.

The privilege against self-incrimination is guaranteed by the federal and the state constitutions. U.S. Const. amend. 5; Const. Art. 1 § 9; State v. Earls, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991) (federal and state protections are coextensive). To protect this right, the police must inform a suspect of his right to remain silent prior to interrogation. Miranda v. Arizona, 384 U.S. 436, 474, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Whether a statement is voluntary is based on a two-part test. To

satisfy due process, the statement must not be the product of police coercion. To satisfy Miranda, a defendant must be first informed of his rights and make the statement only after knowingly and intelligently waiving those rights. State v. Reuben, 62 Wn. App. 620, 624, 814 P.2d 1177, review denied, 118 Wn.2d 1006 (1991). The State has a heavy burden to prove the defendant was fully advised of and understood his rights before waiving them. Miranda, 384 U.S. at 475; Reuben, 62 Wn. App. at 625. Statements taken in violation of the Miranda rules may be admissible to impeach conflicting testimony by the defendant, but they may not be used in the prosecution's case in chief. Michigan v. Harvey, 494 U.S. 344, 350-51, 110 S. Ct. 1176, 108 L. Ed. 2d 293 (1990); Harris v. New York, 401 U.S. 222, 224-25, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971).

Under CrR 3.5(a), "[w]hen a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible." CrR 3.5 was enacted to meet the constitutional requirement of Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. d 908 (1964). See State v. Rice, 24 Wn. App. 562, 564-65, 603 P.2d 835 (1979). The purpose of the rule is to provide a mechanism for the defendant to have the voluntariness of an incriminating statement determined in a preliminary hearing, outside the presence of the

jury. State v. Williams, 137 Wn.2d 746, 751, 975 P.2d 963 (1999). A CrR 3.5 hearing must be held, whether or not the defendant requests it, to allow the court to rule on the admissibility of the statement. See State v. Tim S., 41 Wn. App. 60, 63, 701 P.2d 1120 (1985). A CrR 3.5 hearing may only be waived knowingly and intentionally. State v. Fanger, 34 Wn. App. 635, 637, 663 P.2d 120 (1983).

Here, the court ruled Kazmierczak's custodial statements could only be admitted during the State's rebuttal case. 3RP 231; Appendix. Instead, the statement was introduced during the State's cross-examination of Kazmierczak. This was a clear violation of the court's order. Moreover, Kazmierczak had not testified about his statements, so the statement was not even proper impeachment evidence.[3]

Although a violation of CrR 3.5 does not necessarily require reversal,[4] the record before this Court raises the question of whether Kazmierczak's custodial statement was admissible. For example, there was no indication Kazmierczak was given Miranda warnings. Kazmierczak did not remember making the statement. According to Lien,

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[3] Assuming arguendo the statement was the result of custodial interrogation but not police "coercion," introduction of the statement also violated the rule in Miranda. See, e.g., Harvey, 494 U.S. at 350-51 (statements taken in violation of only Miranda rules may not be used in the prosecution's case-in-chief, but may be admissible to impeach conflicting testimony by the defendant).

[4] State v. Summers, 52 Wn. App. 767, 774, 764 P.2d 250 (1988), review denied, 112 Wn.2d 1006 (1989).

Kazmierczak was visibly intoxicated and made the statement after Lien told him he was under arrest for robbery. Based on the skeletal record, there is some indication the trial court would have excluded the statement. See, e.g., Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980) (interrogation occurs upon any words or actions on the part of police that the police should know are reasonably likely to elicit an incriminating response from the suspect); Reuben, 62 Wn. App. at 625-26 (intoxication does not automatically prevent a waiver of Miranda rights, but evidence of intoxication is a factor to be considered in determining the validity of the waiver). However, the record is incomplete because no CrR 3.5 hearing was held.

This Court should not permit the State to take advantage of the "catch-22" it created when it presented Kazmierczak's statement without a hearing to flesh out the record. The prosecutor has an obligation to exercise scrupulous care to not violate a defendant's rights. State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968) ("[The prosecutor's] trial behavior must be worthy of the office, for [the prosecutor's] misconduct may deprive the defendant of a fair trial."). Prosecutorial misconduct violates a defendant's due process right to a fair trial when there is a substantial likelihood the prosecutor's misconduct affected the jury's verdict. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); State

v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). Moreover, where a prosecutor's misconduct undermines the constitutional rights of the accused, reversal is required unless the error was harmless beyond a reasonable doubt. State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546 (1990) (citing State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985)).[5]

State v. Stith, 71 Wn. App. 14, 856 P.2d 415 (1993) illustrates the necessity of reversal where the State's violation of a pretrial ruling prejudices a defendant. There, the trial court excluded evidence of the Stith's prior conviction. Id. at 22. In closing, the prosecutor argued Stith had recently been released from jail for a previous drug dealing conviction and "was just coming back and he was dealing again." Id. at 21-22. This Court reversed Stith's conviction based in part on that comment, stating:

> As in State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988), aff'd, 119 Wn.2d 711 (1992), wherein the Supreme Court overturned a conviction for prosecutorial misconduct, the "remarks were flagrant, highly prejudicial and introduced 'facts' not in evidence." Instructions to the jury to disregard the comments cannot cure such prejudice. The mandatory remedy is a mistrial.

Stith, 71 Wn. App. at 23.

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[5] Guloy adopted the "overwhelming untainted evidence" standard: this Court looks at the untainted evidence to determine if it is so overwhelming it necessarily leads to a finding of guilt. 104 Wn.2d at 425-26.

Presenting Kazmierczak's statement in violation of the pretrial order and without a CrR 3.5 ruling was flagrant, prejudicial misconduct. By violating the court's omnibus order, the State ensured admission of damaging evidence without a fair hearing on its admissibility. The prosecutor's closing argument emphasizing Kazmierczak's statement and treating it as substantive evidence of the required mental state compounded the resulting prejudice. 3RP 280 (the statement to Lien "show's he's thinking").

In summary, the State's improper introduction of Kazmierczak's statement was serious trial irregularity. Escalona, 49 Wn. App. at 254. As for the other factors to be considered under Escalona, the improperly admitted statement was not cumulative of other evidence. There was no other evidence that so seriously undermined Kazmierczak's asserted voluntary intoxication defense. And although the jury was never instructed to disregard the evidence or given a limiting instruction, it would have been futile for Kazmierczak to request such an instruction. The court seemed unaware the State had violated its order. In its ruling denying a mistrial, the court observed Kazmierczak's statement was introduced in the State's rebuttal, which it was not. 3RP 232.

Under the circumstances, nothing less than a mistrial could have remedied the harm done by the State's introduction of Kazmierczak's

statement. Accordingly, the court erred in denying his motion for mistrial, and the convictions should be reversed.

2. KAZMIERCZAK'S THIRD DEGREE ASSAULT MERGES WITH HIS FIRST DEGREE ROBBERY CHARGE AND SHOULD BE VACATED.

Because proof of assault is necessary to prove an element of first degree robbery, Kazmierczak's third degree assault charge merges with his first degree robbery charge and should be dismissed. Because the merger doctrine arises from the constitutional prohibition against double jeopardy, it is a claim Kazmierczak may raise for the first time on appeal. RAP 2.5(a)(3); State v. Frohs, 83 Wn. App. 803, 811 n. 2, 924 P.2d 384 (1996).

The double jeopardy clauses of the State and Federal constitutions prevent the imposition of multiple punishments for the same offense. U.S. Const. amend. 5; Const. art. 1, § 9; State v. Calle, 125 Wn.2d 769, 772, 776, 888 P.2d 155 (1995). The protection is constitutional, but because the legislature is free to define crimes and fix punishments as it will, "the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." Brown v. Ohio, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977). A concurrent sentence does not cure a double jeopardy violation. State v. Adel, 136 Wn.2d 629, 632, 965 P. 2d

1072 (1998); Calle, 125 Wn.2d at 774-75; State v. Read, 100 Wn. App. 776, 793, 998 P.2d 897 (2000).

Merger is a "doctrine of statutory interpretation used to determine whether the Legislature intended to impose multiple punishments for a single act which violates several statutory provisions." State v. Vladovic, 99 Wn.2d 413, 419 n.2, 662 P.2d 853 (1983). Crimes merge when proof of one is necessary to prove an element or the degree of another crime. Id. at 419-21; State v. Parmelee, 108 Wn. App. 702, 710, 32 P.3d 1029 (2001), review denied, 146 Wn.2d 1009 (2002). The merger doctrine thus applies where a crime can be elevated to a higher degree by proof of an act defined as a crime elsewhere in the criminal code. State v. DeRyke, 110 Wn. App. 815, 822-23, 41 P.3d 1225 (2002); State v. Taylor, 90 Wn. App. 312, 320, 950 P.2d 526 (1998) (quoting Frohs, 83 Wn. App. at 806).

The merger doctrine arises after the defendant has been found guilty of multiple charges. See State v. Michielli, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997). Even if the separate conviction is to be served concurrently, it has potential adverse collateral consequences that may not be ignored. Moreover, it "carries the societal stigma accompanying any criminal conviction." Calle, 125 Wn.2d at 773. Thus, when first degree robbery and second degree assault convictions merge, for example, the

remedy is to vacate the assault charge. State v. Freeman, 153 Wn.2d 765, 775, 108 P.3d 753 (2005).

In Freeman, the Supreme Court applied the merger doctrine to determine whether the legislature intended to "punish separately both a robbery elevated to first degree by an assault, and the assault itself." 153 Wn.2d at 771. The Freeman court considered two factual scenarios. In the first, the defendant demanded the victim's valuables at gunpoint. When the victim did not immediately comply, the defendant shot him once. The defendant and his accomplices then robbed the victim. Id. at 769. In the second case, the defendant met the victim in a casino parking lot in order to conduct a drug transaction. Once there, the defendant changed his mind about selling the victim drugs, and punched her in the face. He then robbed her. Id. at 770. The Court found the separate purpose and effect exception "does not apply merely because the defendant used more violence than necessary to accomplish the crime. . . . The test is whether the unnecessary force had a purpose or effect independent of the crime." Id. at 779. While cautioning that such crimes must be analyzed on a case-by-case basis, the Court stated that, generally, unless they have a separate purpose and effect, the two crimes merge. Id. at 780. The Court nonetheless held the crimes in the first factual scenario did not merge because the legislature intended to punish first degree assault separately.

However, in the second case, the first degree robbery and second degree assault merged. Id. at 778.

Kazmierczak grabbed Parkhurst's hair when he tried to grab her phone.[6] Parkhurst hurt her leg when she stumbled and fell. 2RP 51-56. But even in the light most favorable to the State — assuming the fall occurred as she was breaking free from Kazmierczak — there was still only one assault. The Freeman exception for first degree assault does not apply, and the crimes merge. Thus, in the event this Court disagrees reversal of both convictions is required, Kazmierczak's third degree assault conviction should be vacated and dismissed.

[6] Parkhurst gave Kazmierczak her keys after her punches did not deter him. Kazmierczak, however, did not assault Kazmierczak before obtaining the keys. 2RP 48.

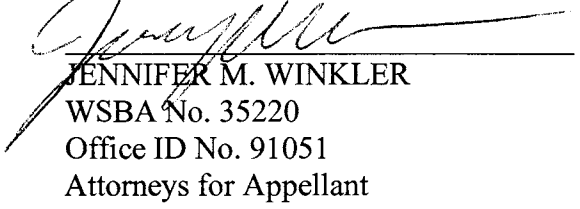
D. CONCLUSION

The State presented Kazmierczak's statement in violation of the court's pretrial order and absent a CrR 3.5 hearing, creating a serious trial irregularity. Accordingly, the trial court abused its discretion in denying Kazmierczak's motion for mistrial, and reversal of his convictions is required. Alternatively, this Court should vacate Kazmierczak's third degree assault conviction because it merges with the first degree robbery conviction.

DATED this 29TH day of March, 2007.

Respectfully submitted,

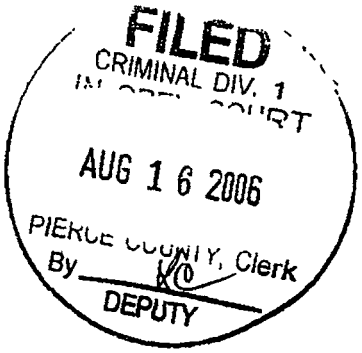
NIELSEN, BROMAN & KOCH, PLLC



JENNIFER M. WINKLER
WSBA No. 35220
Office ID No. 91051
Attorneys for Appellant

APPENDIX

06-1-00822-9 25984024 OOR 08-16-06



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. KAZMIERCZAK, JOHN Defendant.	NO. 06-1-00822-9 ORDER ON OMNIBUS HEARING CHARGE: ROB 1 TRIAL DATE: 9/13/06

THIS MATTER having come before the court for an omnibus hearing, the State represented by: DPA T. LANE. The defendant is present and represented by: E. Silva 24673

IT IS ORDERED:

1. Regarding CUSTODIAL STATEMENTS by defendant:
   - [ ] No custodial statements will be offered in the State's case in chief, or in rebuttal.
   - [✓] The statements of defendant will be offered in the State's case in rebuttal only.
   - [ ] The statements referred to in the State's discovery will be offered and:
     - [ ] May be admitted into evidence without a pre-trial hearing, by stipulation of the parties.
     - [ ] A pre-trial hearing shall be held and is estimated to require _____ (min/hr) and is set for _____.
2. Regarding SUPPRESSION OF PHYSICAL EVIDENCE OR IDENTIFICATION:
   - [ ] No motion to suppress physical evidence or identification will be filed.
   - [ ] Defendant's written motion to suppress will be filed by _____. The State's response will be filed by _____. The State will note a hearing to determine whether an evidentiary hearing will be required on defendant's motion to suppress.
3. [✓] If the defendant testifies at trial, the prior record of convictions contained in the State's discovery [ ] will [✓] will not be acknowledged by this with the following exceptions, if any Rob 2°, Burg 1°

[ ] (No) prior convictions are known at this time; State will advise defendant promptly if it learns of prior convictions.

4. Respective counsel are ordered to exchange:
NAMES, ADDRESSES, AND CONTACT INFORMATION;
KNOWN CONVICTIONS AND CRIMINAL HISTORY INFORMATION OF WITNESSES;
WRITTEN OR RECORDED STATEMENTS AND THE SUBSTANCE OF ANY ORAL STATEMENTS OF SUCH WITNESSES, including EXPERT REPORTS and TEST RESULTS, if any; and MAKE AVAILABLE FOR INSPECTIONS ALL PHYSICAL AND DEMONSTRATIVE EVIDENCE by
_____.

5. Defendant is ordered to state general nature of defense:

[ ] General Denial [ ] Consent
[ ] Alibi [✓] Diminished Capacity or Insanity; specify which
[ ] Self-defense [✓] Other; specify Voluntary Intoxication

6 No additional motions are anticipated, except: _____

Affidavits and briefs of the moving party must be served and filed (with copy to criminal motion department) by _____; Responsive brief by _____. The hearing will last about _____ (min/hr).

7. The trial will be [✓] jury [ ] non-jury, and will last about 2 days.

8. Other matters: _____

DONE IN OPEN COURT this _____ day of _____, _____.

FILED
CRIMINAL DIV. 1
SUPERIOR COURT
AUG 16 2006
PIERCE COUNTY, Clerk
By KO
DEPUTY

APPROVED:

Deputy Prosecuting Attorney 16708

Defense Attorney 26673

JUDGE

KATHRYN J. NELSON

I approve my attorney's actions as indicated by this Order and I specifically agree with the computation of time under Criminal Rule 3.3 (the 60-90 day trial rule).

Defendant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 35579-5-II
	)	
JOHN KAZMIERCZAK,	)	
	)	
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 29TH DAY OF MARCH 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KATHLEEN PROCTOR
PIERCE COUNTY PROSECUTING ATTORNEY
930 TACOMA AVENUE SOUTH
ROOM 946
TACOMA, WA 98402

[X] JOHN KAZMIERCZAK
DOC NO. 953322
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

FILED
COURT OF APPEALS
DIVISION II
07 MAR 30 AM 11:54
STATE OF WASHINGTON
BY
DEPUTY

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF MARCH 2007.

x Patrick Mayovsky