

COURT OF APPEALS
DIVISION II

09 MAR -3 AM 11:36

No. 37827-2-II

STATE OF WASHINGTON
BY 

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID RAMOS

Appellant.

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

The Honorable Brian Tollefson, Judge

OPENING BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

FILED
COURT OF APPEALS DIVISION II
STATE OF WASHINGTON
2009 FEB 27 PM 4:30

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural Facts</u>	1
2. <u>Substantive Facts</u>	1
C. <u>ARGUMENT</u>	4
SANCHEZ RAMOS’ CONVICTIONS FOR FIRST DEGREE MURDER AND RENDERING CRIMINAL ASSISTANCE VIOLATE DOUBLE JEOPARDY.....	4
a. <u>Sanchez Ramos’s Convictions for Murder and Rendering Criminal Assistance Violate Double Jeopardy Because They Are the Same Offense.</u>	5
b. <u>Sanchez Ramos’s Guilty Plea Does Not Waive Double Jeopardy Protection</u>	9
D. <u>CONCLUSION</u>	12

TABLE OF AUTHORITES

Page

WASHINGTON CASES

<u>In re Pers. Restraint of Burchfield</u> 111 Wn. App. 892, 46 P.3d 840 (2002).....	5
<u>In re Pers. Restraint of Fletcher</u> 113 Wn.2d 42, 776 P.2d 114 (1989).....	11
<u>In re Pers. Restraint of Orange</u> 152 Wn.2d 795, 100 P.3d 291 (2004).....	5
<u>State v. Anderson</u> 63 Wn. App. 257, 818 P.2d 40 (1991).....	6, 8
<u>State v. Bobic,</u> 140 Wn.2d 250, 996 P.3d 610 (2000).....	4
<u>State v. Burnett</u> 37 Wn.2d 619, 225 P.2d 416 (1950).....	8
<u>State v. Calle</u> 125 Wn.2d 769, 888 P.2d 155 (1995).....	6
<u>State v. Freeman</u> 153 Wn.2d 765, 108 P.3d 753 (2005).....	4, 8
<u>State v. French</u> 157 Wn.2d 593, 141 P.3d 54 (2006).....	10, 11
<u>State v. Gocken</u> 127 Wn.2d 95, 896 P.2d 1267 (1995).....	4
<u>State v. Handley</u> 115 Wn.2d 275, 796 P.2d 1266 (1990).....	8
<u>State v. Jackman</u> 156 Wn.2d 736, 132 P.3d 136 (2006).....	4

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES

State v. Johnson
92 Wn.2d 671, 600 P.2d 1249 (1979)..... 2, 5

State v. Jones
3 Wash. 175, 28 P. 254 (1891) 8

State v. Knight
162 Wn.2d 806, 174 P.3d 1167 (2008)..... 9, 10

State v. Louis
155 Wn.2d 563, 120 P.3d 936 (2005)..... 10

State v. Potter
31 Wn. App. 883, 645 P.2d 60 (1982)..... 5

State v. Tornngren
147 Wn. App. 556, 196 P.3d 742 (2008)..... 10, 11

State v. Vladovic
99 Wn.2d 413, 662 P.2d 853 (1983)..... 10

State v. Weber
159 Wn.2d. 252, 149 P.3d 646 (2006)..... 12

State v. Womac
160 Wn.2d 643, 160 P.3d 40 (2007) 4, 5, 9, 11

FEDERAL CASES

Albernaz v. United States
450 U.S. 333, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981)..... 8

Blockburger v. United States
284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)..... 5

TABLE OF AUTHORITIES (CONT'D)

	Page
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
 <u>Butler v. State</u>	
335 Md. 238, 643 A.2d 389 (1994)	7
 <u>Staten v. State</u>	
519 So.2d 622 (Fla. 1988).....	7
Const. art. I, § 9.....	4
U.S. Const. amend. V	4
Rem. Rev. Stat., §2261	7, 8
FORMER RCW 9.94A.510 (2005).	12
FORMER RCW 9.94A.525 (2005)	12
RAP 2.5(a).....	4
RCW 9A.76.080	6
RCW 9A.76.090	6
RCW 9.94A.510	12
RCW 9.94A.525(5).....	11
RCW 9.94A.525(8)(9)	12
RCW 9A.76.050	6, 7, 8
RCW 9A.76.060	7
RCW 9A.76.070	7

A. ASSIGNMENT OF ERROR

Appellant's conviction for rendering criminal assistance violates double jeopardy.

Issue Pertaining to Assignments of Error

During a robbery, appellant's accomplice handed him a gun and told him to shoot any of the victims who tried to run. Appellant pled guilty to first-degree murder, first-degree robbery, and first-degree rendering criminal assistance because he disposed of the firearm. Does his conviction for rendering criminal assistance to another participant in the same crime violate double jeopardy?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Pierce County Prosecutor charged appellant David Sanchez Ramos with first-degree murder with a firearm sentencing enhancement, first-degree robbery with a firearm sentencing enhancement, and first-degree rendering criminal assistance. CP 15-17. Sanchez Ramos pled guilty to all three charges and the court imposed a standard range sentence. CP 18-27, 39, 43. This appeal timely follows. CP 52.

2. Substantive Facts

The night of July 19-20, 2005, Sanchez Ramos was hanging out with several fellow members of the Spanaway Crips in a local park. CP 5. At

approximately one a.m., four other young men arrived at the park looking for a party they had been told was in the area. CP 5. After the encounter became hostile, the gang members drew handguns, except for Sanchez Ramos, who was armed only with a BB gun. CP 5.

Joshua Owen, the purported leader, gave his gun to Sanchez Ramos and told him to shoot anyone who tried to escape. CP 5. The four new arrivals were assaulted and robbed. CP 5. When Cliff Nelson got up and tried to run away, Sanchez Ramos did as instructed. CP 5. Nelson's death was caused by gunshot wounds and lacerations to the head. CP 6.

The State charged Sanchez Ramos with aggravated first-degree murder, four counts of first-degree robbery, and three counts of first degree assault. CP 7-12. When the State filed a second amended information reducing the charges to one count each of first degree murder, first degree robbery, and first degree rendering criminal assistance, Sanchez Ramos pled guilty. CP 15-17. In his Statement on Plea of Guilt, Sanchez Ramos admitted the following:

On July 20, 2005, I unlawfully and with premeditated intent did shoot and kill Clifton Nelson with a firearm in Pierce Co. WA. On that date I was an accomplice in the theft of personal property belonging to Kenneth Palmer, Robert Swesey, and Derick Johnson with the use of force and being armed with a firearm in Pierce Co. WA. On that same date, I rendered criminal assistance to another who committed the crime of murder in the first degree by

disposing of a firearm, which would have aided in the apprehension of that person, in Pierce Co. WA.

In consideration for the reduction in charges, Sanchez Ramos also stipulated his offenses were not the same criminal conduct and did not merge for sentencing purposes. CP 28. He waived his right to appeal a standard range sentence based on the stipulated criminal history and offender score. CP 30.

At the plea hearing, the court engaged Sanchez Ramos in a colloquy regarding his waiver of rights and the consequences of his plea. 2RP¹ 2-7. The court found the pleas were knowing, intelligent, and voluntary and there was a factual basis for the charges. 2RP 8.

A sentencing hearing was held on April 25, 2008. 3RP 1. The court imposed the State's recommended sentence at the high end of the standard range, for a total of 361 months confinement on the first degree murder charge with a 60 month firearm enhancement, 61 months on the first degree robbery charge with a 60 month consecutive firearm enhancement, and 17 months on the rendering criminal assistance charge for a total of 481 months confinement, plus restitution and costs. 3RP 3; CP 19, 43.

¹ There are three volumes of Verbatim Report of Proceedings referenced as follows: 1RP – 1/28/2008; 2RP – 2/1/2008; 3RP - 4/25/2008.

C. ARGUMENT

SANCHEZ RAMOS' CONVICTIONS FOR FIRST DEGREE
MURDER AND RENDERING CRIMINAL ASSISTANCE
VIOLATE DOUBLE JEOPARDY.

It is “unjust and oppressive to apply multiple punishments for a single offense.” State v. Womac, 160 Wn.2d 643, 650, 160 P.3d 40 (2007). Thus, both our state and federal constitutions provide that no person may twice be put in jeopardy for the same offense. U.S. Const. amend. V; Const. art. I, § 9. The Washington Constitution and the Fifth Amendment provide the same protection against double jeopardy. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). The double jeopardy clauses provide three different protections for defendants, “one of which protects against multiple punishments for the same offense.” State v. Bobic, 140 Wn.2d 250, 260, 996 P.3d 610 (2000). Courts may not enter multiple convictions for the same offense without offending double jeopardy. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

Review of a double jeopardy issue is de novo. Freeman, 153 Wn.2d at 770. The issue of multiple convictions for the same offense in violation of double jeopardy is manifest constitutional error, which may be reviewed for the first time on appeal. See RAP 2.5(a); State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006). The appropriate remedy for convictions that

violate double jeopardy is to vacate one of the convictions. See Womac, 160 Wn.2d at 658-60.

- a. Sanchez Ramos’s Convictions for Murder and Rendering Criminal Assistance Violate Double Jeopardy Because They Are the Same Offense.

To determine whether two convictions are the same offense for double jeopardy purposes, courts first analyze whether the plain language of the statutes explicitly authorizes multiple punishment for the same conduct. In re Pers. Restraint of Orange, 152 Wn.2d 795, 816, 100 P.3d 291 (2004). When it does not, the inquiry follows the “same evidence” or Blockburger² test. Orange, 152 Wn.2d at 816. Generally, if each crime requires proof of a fact that the other does not, the two are not the same offense. Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932); Womac, 160 Wn.2d at 652.

However, the Blockburger test is not dispositive of the legislature’s intent.³ Womac, 160 Wn.2d at 655 (citing State v. Calle, 125 Wn.2d 769,

² Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

³ Indeed, Washington courts have in the past found double jeopardy violations even where the offenses contained different legal elements. See State v. Johnson, 92 Wn.2d 671, 679-80, 600 P.2d 1249 (1979) (despite different legal elements, kidnapping and assault convictions stricken because the kidnapping and assault were incidental to, and elements of, the first degree rape); State v. Potter, 31 Wn. App. 883, 887-88, 645 P.2d 60 (1982) (reckless endangerment and reckless driving convictions violated double jeopardy despite differing legal elements where the reckless endangerment conviction arose out of an act of reckless driving); In re Pers. Restraint of Burchfield, 111 Wn. App. 892, 899, 46 P.3d 840 (2002) (“Although the offenses do not contain identical legal elements, we conclude that the

778, 780, 888 P.2d 155 (1995). Rather, it establishes a presumption that may be overcome by clear evidence of contrary legislative intent. Womac, 160 Wn.2d at 655. Washington's rendering criminal assistance law does not explicitly authorize dual convictions for committing a crime and rendering assistance to a participant in that same crime. RCW 9A.76.050.⁴ Nor did the Legislature intend to impose dual penalties in this way.

First, the rendering criminal assistance statute prohibits lending assistance *to another*. RCW 9A.76.050 (emphasis added). It seeks to punish one who knowingly aids in the criminal enterprise of another. State v. Anderson, 63 Wn. App. 257, 261, 818 P.2d 40 (1991). This wording indicates the Legislature did not intend to impose dual punishment on one who merely attempts to conceal his or her own criminal conduct. Accord

Legislature did not intend to punish shooting a victim both as an assault and as a homicide.”)).

⁴ RCW 9A.76.050 provides in full:

As used in RCW 9A.76.070, 9A.76.080, and 9A.76.090, a person "renders criminal assistance" if, with intent to prevent, hinder, or delay the apprehension or prosecution of another person who he knows has committed a crime or juvenile offense or is being sought by law enforcement officials for the commission of a crime or juvenile offense or has escaped from a detention facility, he:

- (1) Harbors or conceals such person; or
- (2) Warns such person of impending discovery or apprehension; or
- (3) Provides such person with money, transportation, disguise, or other means of avoiding discovery or apprehension; or
- (4) Prevents or obstructs, by use of force, deception, or threat, anyone from performing an act that might aid in the discovery or apprehension of such person; or
- (5) Conceals, alters, or destroys any physical evidence that might aid in the discovery or apprehension of such person; or
- (6) Provides such person with a weapon.

Staten v. State, 519 So.2d 622, 626 (Fla. 1988) (concluding legislature intended “to punish as an accessory after the fact⁵ only those persons who have had no part in causing the felony itself but have merely hindered the due course of justice”); Butler v. State, 335 Md. 238, 255, 643 A.2d 389 (1994) (citing common law rule that accessories after the fact cannot also be principals). Sanchez Ramos was convicted of first-degree rendering criminal assistance, which is defined as assistance to one who has committed or is being sought for first-degree murder. CP 39; RCW 9A.76.070.⁶ He was also convicted of the underlying first-degree murder. CP 39. The Legislature did not intend to impose dual liability for committing and assisting the same crime.

Second, complicity in a crime and committing that crime are the same offense for double jeopardy purposes because there is no separate offense of being an accomplice; accomplice liability is principal liability.

⁵ Common law principles of liability based on being an accessory after the fact were codified as rendering criminal assistance in 1975. RCW 9A.76.050; State v. Burnett, 37 Wn.2d 619, 622, 225 P.2d 416 (1950) (citing Rem. Rev. Stat., §2261); State v. Jones, 3 Wash. 175, 178, 28 P. 254 (1891).

⁶ RCW 9A.76.070 provides in full:

- (1) A person is guilty of rendering criminal assistance in the first degree if he or she renders criminal assistance to a person who has committed or is being sought for murder in the first degree or any class A felony or equivalent juvenile offense.
- (2)(a) Except as provided in (b) of this subsection, rendering criminal assistance in the first degree is a class C felony.
- (b) Rendering criminal assistance in the first degree is a gross misdemeanor if it is established by a preponderance of the evidence that the actor is a relative as defined in RCW 9A.76.060.

State v. Handley, 115 Wn.2d 275, 293, 796 P.2d 1266 (1990). Likewise, rendering criminal assistance should not be considered a separate offense from the underlying crime because it also seeks to punish knowingly aiding in the criminal enterprise of another. Anderson, 63 Wn. App. at 261.

Although they are found in separate chapters, the legislative intent behind accomplice liability law and rendering criminal assistance is the same: “the goal in both cases is to punish for knowingly aiding the criminal enterprise of another.” Anderson, 63 Wn. App. at 261. Thus, the two statutes are not directed at “separate evils.” See Albernaz v. United States, 450 U.S. 333, 343, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981). See also Freeman, 153 Wn.2d at 773 (evidence of legislative intent may be found when statutes are directed at eliminating different evils). Historically, rendering criminal assistance was not seen as a separate offense, but instead was a variant of accessory liability. Before the recodification of Washington’s criminal law in 1975, anyone who aided in a crime was an accessory, with principal liability imposed on one who aided during or before the crime, and lesser liability imposed on an accessory after the fact. RCW 9A.76.050; State v. Burnett, 37 Wn.2d 619, 622, 225 P.2d 416 (1950) (citing Rem. Rev. Stat., §2261); State v. Jones, 3 Wash. 175, 178, 28 P. 254 (1891).

Just as complicity in a crime is not a separate offense from the crime itself, rendering criminal assistance after the fact is not a separate crime from the underlying offense. Therefore, Sanchez Ramos's dual convictions for the underlying murder and for first-degree rendering criminal assistance violate double jeopardy, and one of them should be vacated. See Womac, 160 Wn.2d at 658-60.

b. Sanchez Ramos's Guilty Plea Does Not Waive Double Jeopardy Protection.

Sanchez Ramos' guilty plea does not waive double jeopardy protection because double jeopardy goes to the State's very power to bring the defendant into court. See State v. Knight, 162 Wn.2d 806, 811, 174 P.3d 1167 (2008). When a double jeopardy violation is clear from the record, the conviction violates double jeopardy even if entered pursuant to a guilty plea. Id. In Knight, the Supreme Court held that a conviction that violated double jeopardy must be vacated, even if the plea was indivisible. Id. at 812-13. Like Knight, Sanchez Ramos does not challenge his plea, and a double jeopardy challenge to his convictions does not require withdrawal of the plea. See id. at 813. The indivisibility of his plea agreement is therefore irrelevant under Knight. Id. Because, as in Knight, the terms of the agreement did not require Sanchez Ramos to waive double jeopardy

protection, this Court should vacate his conviction for rendering criminal assistance. See id.

Sanchez Ramos did not waive his constitutional double jeopardy protection by agreeing his offenses did not merge or were not the same criminal conduct for sentencing purposes. CP 28, 30. Although violations of the merger doctrine or punishments for the “same criminal conduct” under the Sentencing Reform Act (SRA) often also violate double jeopardy, these doctrines are not coextensive. See, e.g., State v. French, 157 Wn.2d 593, 611-12, 141 P.3d 54 (2006); State v. Torngren, 147 Wn. App. 556, 563, 196 P.3d 742 (2008). The double jeopardy clause is a constitutional provision impacting the court’s power to impose judgment, rather than mere sentencing concerns. Knight, 162 Wn.2d at 811.

The merger doctrine, by contrast, is a tool of statutory construction for determining legislative intent regarding multiple punishments for the same conduct. State v. Louis, 155 Wn.2d 563, 570, 120 P.3d 936 (2005). It applies only when the Legislature has indicated that to prove a particular degree of a crime, such as first-degree rape, the State must prove that the crime was accompanied by another act defined as a crime elsewhere in the criminal code, such as kidnapping. Louis, 155 Wn.2d at 570-71 (citing State v. Vladovic, 99 Wn.2d 413, 419 n.2, 662 P.2d 853 (1983)). The merger doctrine does not definitively establish whether two crimes are the same

offense for double jeopardy purposes. See In re Pers. Restraint of Fletcher, 113 Wn.2d 42, 47, 50-51, 776 P.2d 114 (1989) (applying separate analyses for merger and double jeopardy).

Similarly, the “same criminal conduct” analysis is a statutory analysis grounded in the SRA and affecting only punishment, not the court’s power to impose multiple convictions. See RCW 9.94A.525(5); State v. French, 157 Wn.2d 593, 611, 141 P.3d 54 (2006). Although courts occasionally use the term “merge” to refer to the same criminal conduct analysis, same criminal conduct under the SRA is a statutory consideration and not coextensive with merger doctrine or double jeopardy protection. See Torngren, 147 Wn. App. at 563-64; French, 157 Wn.2d at 611 (holding that “[a] double jeopardy violation claim is distinct from a ‘same criminal conduct’ claim and requires a separate analysis”).

Moreover, multiple convictions for the same offense violate double jeopardy even where multiple sentences are not imposed. Womac, 160 Wn.2d at 656. This holding demonstrates that double jeopardy protections are applied separately to convictions and to sentencing considerations. Waiver of statutory sentencing considerations cannot rise to the level of knowing, intelligent, and voluntary waiver of double jeopardy, one of the most important constitutional protections we possess as citizens.

Because there is no separate crime of accomplice liability, this court should hold that a person cannot simultaneously be criminally liable both as a principal and for rendering criminal assistance to another participant in one's own crime. To do so amounts to dual criminal liability for the same offense in violation of constitutional protections against double jeopardy. The remedy for a double jeopardy violation is to vacate the lesser offense. State v. Weber, 159 Wn.2d. 252, 266, 149 P.3d 646 (2006). Therefore, this Court should vacate Sanchez Ramos's conviction for rendering criminal assistance and remand for resentencing on the remaining counts.

D. CONCLUSION

For the foregoing reasons, Sanchez Ramos requests this court vacate his conviction for rendering criminal assistance and remand the other two charges for resentencing based on the resulting offender score of two.⁷

⁷ Without the conviction for rendering criminal assistance, Sanchez Ramos' offender score on the first-degree murder charge and the first-degree robbery charge should now be two, rather than three. RCW 9.94A.525(8), (9). He has no other criminal history. This makes his standard range on the first-degree murder conviction 261 to 347 months. RCW 9.94A.510. His standard range for the first-degree robbery conviction should be 41 to 54 months. RCW 9.94A.510. This outcome is the same under the current and 2005 versions of the SRA. See former RCW 9.94A.525 (2005); former RCW 9.94A.510 (2005).

DATED this 27th day of February, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, appearing to read "Jennifer J. Sweigert", written over a horizontal line.

JENNIFER J. SWEIGERT
WSBA No. 38068
Office ID No. 91051
Attorney for Appellant

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

STATE OF WASHINGTON)
Respondent,)
vs.) COA NO. 37827-2-II
DAVID SANCHEZ RAMOS,)
Appellant.)

FILED
COURT OF APPEALS DIVISION II
STATE OF WASHINGTON
2009 FEB 27 PM 4:30

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 27TH DAY OF FEBRUARY 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING 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] DAVID RAMOS
DOC NO. 317846
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

FILED
COURT OF APPEALS
DIVISION II
09 MAR -3 AM 11:36
STATE OF WASHINGTON
BY  DEPUTY

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF FEBRUARY 2009.

x Patrick Mayovsky