

No. 37841-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL DAY,

Appellant.

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION TWO
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COURT OF APPEALS
DIVISION TWO

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

The Honorable Ronald Culpepper (motions) and the Honorable Thomas
Felnagle (trial), judges

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to prove all the essential elements of first-degree robbery.
2. The trial court erred in denying the motion to dismiss after the close of the state's case.
3. In the alternative, the assault conviction must be dismissed because the separate conviction violated Mr. Day's rights to be free from double jeopardy.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove that Mr. Day committed first-degree robbery, the prosecution was required to show that he used force to obtain or retain the property being stolen, or to prevent resistance to its taking. Mr. Day assaulted his ex-wife because he was angry about her refusing to go up to his apartment with him. After that assault, as an afterthought, before he left, he took his wife's purse.

Was the evidence insufficient to prove the necessary relationship between the force used (the assault) and the theft as required to prove first-degree robbery?

Further, did the trial court err in denying the motion to dismiss at the close of the state's case?

2. Where a second-degree assault is committed for the purposes of committing theft and that assault elevates the theft to a first-degree robbery, the assault conviction must be dismissed as it is in violation of double jeopardy. If this Court finds that the evidence was sufficient to prove that the assault was for the purposes of committing the

theft and thus the first-degree robbery conviction can stand, is dismissal of the assault conviction required because the separate conviction violates double jeopardy?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Daniel Day was charged by information with second-degree assault and first-degree robbery, both alleged as domestic violence crimes. CP 1-2; RCW 9A.36.021(1)(a); RCW 9A.56.190; RCW 9A.56.200(1)(iii); RCW 10.99.020.

The matter was continued on March 3 and 26, May 5, 12, 13, 20 and 21, 2008, by motions before the Honorable Ronald E. Culpepper, and trial was held before the Honorable Thomas Felnagle on May 28-30, 2008, after which a jury found Day guilty as charged.¹ CP 45-46.

On June 6, 2008, Judge Felnagle imposed a standard-range sentence for each offense, running them concurrently. CP 77-90; SRP 7-8. Day appealed and this pleading follows. CP 97-111.

2. Testimony at trial

At about 7 a.m. on the morning of December 30, 2007, Shelley

¹The verbatim report of proceedings consists of five volumes, which will be referred to as follows:

the volume containing the pretrial motions of March 2 and 26, May 5, 12, 13, 20 and 21, 2008, as "1RP;"
the three chronologically paginated volumes containing the trial of May 28-30, 2008, as "RP;"
the volume containing the sentencing of June 6, 2008, as "SRP."
April 16, 2008, as "3RP;"
the five chronologically paginated volumes containing the proceedings of April 21-23, 28-29, 2008, as "4RP;"
May 9, 2008, as "5RP;"
June 13, 2008, as "6RP."

Day went with her ex-husband, Daniel Day, to cash some checks for him at her bank. RP 47-55. Shelley,² who had done this for Daniel 5-10 times before, took the checks he gave her, deposited them into her account through a cash machine, and gave Daniel his cash. RP 50-53, 90. They then went to her van, because Daniel had asked for a ride to his home. RP 58-60, 90. Once they got to his apartment, he asked her if she would come up and she declined. RP 60-61, 90. According to Shelley, at that point, Daniel grabbed her hair and pulled her head towards him, saying “yes, you are going to go to my apartment.” RP 61.

Shelley was still not yet parked, so Daniel put the van in park. RP 61. Shelley grabbed her keys and, she said, Daniel then pulled her head down and started hitting her in her face and head. RP 61. Shelley started screaming and managed to honk the horn. RP 62. Daniel then stopped hitting Shelley, opened the van door and ran. RP 62.

After Daniel got out of the van, Shelly was “kind of a little stunned,” but she noticed that her purse was no longer on the floor between the two front seats. RP 62-64. She never saw Daniel with the purse in his hands, however, nor did she ever fight with him over it. RP 64, 92. When she saw her purse was gone. Shelley pulled her van into a parking spot and called the police emergency telephone number, 9-1-1. RP 64-65, 110.

Shelley admitted that Daniel never said anything about wanting money or anything else at any point during the incident. RP 91. Instead,

²Because Ms. Day and the defendant share the same last name, they will be referred to by first name herein, for purposes of clarity. No disrespect is intended.

he just seemed angry that she would not go up to his apartment with him. RP 91. Shelley did not remember if Daniel was yelling something like “[y]ou will come inside” while he was hitting her. RP 91.

Shelley testified that Daniel called her “numerous times” after the incident and that he told her he had his purse and wanted to meet her to give it back. RP 87. He never used any of the credit cards or other cards in her purse, nor did Shelley have any information that he ever even tried to do so. RP 94-95.

Police arrived and took photographs of her face. RP 68. A search for Daniel was initially unsuccessful but he was contacted about 10 days later at his workplace. RP 67-68, 106-108, 116.

An officer testified that, when she was telling him about the incident, Shelley said that, after Daniel asked her to go up to his apartment and she refused, Daniel put the van into park and grabbed the keys and it was when she tried to grab the keys back that he started hitting her. 4RP 106.

Shelley had redness on her eyes for at least a month and had purple markings below the right and left eyes, which she said took about a month and a half to clear up. RP 83-84. Although she initially refused medical treatment and said she did not need it, she went to the doctor on January 2 and was given pain medicine. RP 85, 89, 105.

D. ARGUMENT

1. REVERSAL OF THE ROBBERY CONVICTION IS REQUIRED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE AN ESSENTIAL ELEMENT OF THAT CRIME

Under the state and federal due process clauses, the prosecution must prove every essential element of a charged crime, beyond a reasonable doubt. See State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980); Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); Sixth Amend.; Fourteenth Amend.; Article I, § 22. Failure to meet that burden compels not only reversal but reversal and dismissal with prejudice. State v. Smith, 155 Wn.2d 496, 504-505, 120 P.3d 559 (2005).

In this case, this Court should reverse and dismiss the conviction for first-degree robbery, because the prosecution failed to present sufficient evidence to prove an essential element of that offense. Further, the Court should hold that the trial court erred in failing to grant the motion to dismiss at the close of the state's evidence for failure to state a prima facie case. See RP 119-22.

First, the Court should reverse, because there was insufficient evidence to prove all the essential elements of the offense. Evidence is sufficient to support an element if, viewed in the light most favorable to the state, any rational trier of fact could have found the element was established, beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201-202, 829 P.2d 1068 (1992).

Here, no rational trier of fact could have found all the essential

elements of the robbery. Day was charged with first-degree robbery. CP

1-2. That offense is defined in both RCW 9A.56.190 and RCW

9.94A.200. RCW 9A.56.190 defines robbery as follows:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

Under RCW 9A.56.200(1)(a)(iii), robbery is a first-degree offense when, “[i]n the commission of a robbery or. . .immediate flight therefrom,” the perpetrator “[i]nflicts bodily injury.”

In State v. Handburgh, 119 Wn.2d 284, 293, 830 P.2d 641 (1992), the Supreme Court rejected the common law view of robbery and held that it is not necessary for the force used during a robbery to be contemporaneous with the taking in order for a robbery conviction to be proper. Instead, as the Court again reiterated only a few years ago, the Handburgh Court adopted a “modern transactional view” of the crime of robbery, which requires that the force must be used “to either obtain or retain property or to overcome resistance to the taking” for a crime to amount to robbery. State v. Johnson, 155 Wn.2d 609, 611, 121 P.3d 91 (2005).

As a result, to prove robbery, it is not enough to simply prove that force was used at some point, because “[m]erely demonstrating that the use of force preceded the theft does not amount to robbery.” State v.

Allen, 159 Wn.2d 1, 10 n. 4, 147 P.3d 581 (2006) (majority of five justices, agreeing “largely” with the four-justice dissent, which set forth this principle). Instead, “the force must relate to the taking or retention of property, either as force used directly in the taking or retention or as force used to prevent resistance to the taking.” Johnson, 155 Wn.2d at 611. Put another way, “the mere taking [of] goods from an unconscious person, without force, or the intent to use force, is not robbery, *unless such unconsciousness was produced especially for the purpose of taking the property.*” State v. Larson, 60 Wn. 2d 833, 376 P.2d 537 (1962), quoting, 2 Francis Wharton’s Criminal Law § 1092, at 1390 (12th ed. 1932) (emphasis added).

Here, there was no evidence that Mr. Day committed the assault for the purposes of taking his ex-wife’s purse. Instead, the only evidence was that he committed the assault because he wanted to get her to go upstairs with him and was angry that she refused. The assault was not during the theft, nor was it “in immediate flight therefrom.” Instead, it was a separate act, committed for a completely separate purpose, completely unrelated to the goal of a theft.

Thus, there was insufficient evidence to prove that the force used - in this case, the assault - related to the taking or retention of the property or to prevent resistance to that taking.

Indeed, the prosecutor admitted that, in fact, the only basis for the conviction was that the “opportunity” to take the purse occurred *after* the force was used - not that the purpose of the force was to create that opportunity. See RP 160. While the prosecutor thought this meant that

Mr. Day could be found guilty of robbery, Johnson, Allen, Larson and their progeny make it clear that a robbery conviction cannot be based upon the fact that force was used *at some point* during an incident involving theft. Without proof that the force was used specifically for the purpose of taking or retaining the purse or for preventing resistance to the taking, there was simply not sufficient evidence to prove that Mr. Day committed robbery. As a result, the prosecution failed to prove an essential element of the crime, and reversal and dismissal is required.

Because the state failed to present sufficient evidence to prove its case, the trial court's refusal to grant the motion to dismiss at the end of the state's case was also error. The inquiry for examining this error is the same as that which is used in examining the sufficiency of the evidence. See State v. King, 113 Wn. App. 243, 269 n. 6, 54 P.3d 1218 (2002), review denied 149 Wn.2d 1015 (2003). Because there was insufficient evidence to prove the force was used in any way to further the theft, the trial court should have granted the motion to dismiss. It erred in failing to do so, and this Court should so hold.

Reversal is required. Where, as here, the prosecution fails to present sufficient evidence to prove its case, the double jeopardy clauses of the state and federal constitutions prohibit retrial. See State v. Devries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003); State v. Anderson, 96 Wn.2d 739, 742, 638 P.2d 1205, cert. denied 459 U.S. 842 (1982). Because the state failed to present sufficient evidence to prove the essential elements of the crime, reversal and dismissal of the first-degree robbery conviction is required.

2. IN THE ALTERNATIVE, THE SECOND-DEGREE ASSAULT CONVICTION MUST BE DISMISSED AS IT VIOLATES THE STATE AND FEDERAL PROHIBITIONS AGAINST DOUBLE JEOPARDY

In the alternative, in the unlikely event that this Court finds that there was sufficient evidence that the commission of the assault related to either the taking or retention of the purse as required to prove first-degree robbery, dismissal of the assault conviction is required, because that conviction would then violate double jeopardy.

Both the state and federal constitutions protect citizens from being subjected to double jeopardy. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995); Fifth Amend.; Art. I, § 9.³ Both clauses provide the same protection, prohibiting 1) a second prosecution for the same offense after acquittal, 2) a second prosecution for the same offense after conviction, and 3) multiple punishments for the same offense. State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007).

As a result, while the state is free to charge and try to prove multiple charges arising from the same conduct, multiple convictions will offend double jeopardy unless it is clear the legislature has decided to provide for separate crimes and punishments. State v. Freeman, 153 Wn.2d 765, 770-71, 108 P.3d 753 (2005).

If the assault is deemed by this Court to be related to the theft in order to support the robbery, the separate convictions for second-degree assault and first-degree robbery would then violate Mr. Day's rights to be

³The Fifth Amendment double jeopardy clause applies to the state through the Fourteenth Amendment. See Benton v. Maryland, 395 U.S. 784, 787, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

free from double jeopardy. At the outset, the Supreme Court has recently made it clear that conviction alone amounts to a double jeopardy “punishment” for an offense, even without a sentence. Womac, 160 Wn.2d at 656. Where, as here, not only conviction but also punishment was imposed for all the offenses, there can be no question double jeopardy rights have attached, even though the sentences are ordered to run concurrently.

In Freeman, the Supreme Court examined whether a conviction for second-degree assault can be upheld when there is also a conviction for first-degree robbery and the force used in the robbery is the same conduct which is alleged to amount to the assault. First, the Court found that there was “no evidence that the legislature intended to punish second degree assault separately from first degree robbery when the assault facilitates the robbery.” 153 Wn.2d at 776.

Next, the Court looked at the “merger” doctrine, a rule of statutory construction which is used to answer whether there is double jeopardy and which applies “where the Legislature has clearly indicated that in order to prove a particular degree of crime (e.g., first degree rape) the State must prove not only that a defendant committed that crime (e.g., rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (e.g., assault or kidnaping).” Freeman, 153 Wn.2d at 777-78, quoting, State v. Vladovic, 99 Wn.2d 413, 422, 622 P.2d 853 (1983). The Court held that, under the merger rule, “assault committed in furtherance of a robbery merges with robbery and without contrary legislative intent or application of an exception, these crimes

would merge.” Freeman, 153 Wn.2d at 778. Because the Court had found evidence that the legislature specifically did not intend that first degree assault merge into first degree robbery, the Court found that merger did not apply to those two crimes but *did* apply to merge first degree robbery and second degree assault. Id. Finally, the Court looked at an exception which applies when there was an “independent purpose or effect” to each crime, i.e., when there was a “separate injury” caused by the crime which is an element of the other crime, so distinct as to be “not merely incidental to the crime of which it forms an element.” Id., quoting, State v. Frohs, 83 Wn. App. 803, 924 P.2d 384 (1996). Focusing on the facts of the individual case, the Court found that a robbery committed by shooting a person to get their property did not satisfy the exception, because there was no purpose or effect for the shooting (the force) independent of committing the crime (the robbery). Freeman, 153 Wn.2d at 779.

Applying Freeman here, if it is deemed to have been sufficiently related to the theft to elevate the theft to a first-degree robbery, the second-degree assault conviction must be dismissed as a violation of double jeopardy. If the assault is deemed the “force” for the first-degree robbery, that assault would then be an essential part of that robbery, not distinct from the injury caused by the robbery. Put another way, either the assault was unrelated (and the robbery conviction must be dismissed) or the assault was related and an integral part of the robbery. As such, it would be a violation of double jeopardy to allow the separate assault conviction to stand. If this Court does not find that there was insufficient evidence to support the first-degree robbery conviction because the assault was

unrelated, this Court should dismiss the assault conviction as a violative of double jeopardy.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and dismiss the conviction for first-degree robbery or, in the alternative, the conviction for second-degree assault.

DATED this 04 day of March, 2009.

Respectfully submitted,



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COURT OF APPEALS
DIVISION I

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STATE OF WASHINGTON

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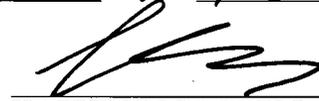
CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

to Mr. Daniel Day, DOC 879453, Cedar Creek Corr. Ctr., P.O. Box
37, Little Rock, WA. 98556.

DATED this 6th day of March, 2009.



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