

No. 95263-9

No.47868-4-II

#15-1-000056-8

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

STATE OF WASHINGTON,

Respondent,

v.

THE PERSON IDENTIFIED BY THE STATE IN THIS PERSISTENT
OFFENDER PROCEEDING AS ANTHONY A. MORETTI,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
GRAYS HARBOR COUNTY

The Honorable F. Mark McCauley, Trial Judge

*APPELLANT'S SUPPLEMENTAL BRIEF REGARDING
DOUBLE JEOPARDY*

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

Both the Fifth Amendment and Article 1, § 9 prohibitions against double jeopardy were violated when appellant was convicted of both first-degree robbery and second-degree assault of the same victim for the same acts and the assault elevated the robbery to first-degree.

B. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENT

Where a robbery is elevated to first degree based on the commission of conduct which is separately charged as a second-degree assault, should this Court follow longstanding law and dismiss the conviction for the lesser offense as the two convictions violate the state and federal prohibitions against being subjected to “double jeopardy” and there was no “independent purpose” for the assault?

C. ARGUMENT

THE CONVICTIONS FOR FIRST-DEGREE ROBBERY AND SECOND-DEGREE ASSAULT OF KNAPP VIOLATED THE STATE AND FEDERAL PROHIBITIONS AGAINST DOUBLE JEOPARDY

In general, the state may bring multiple charges based on the same criminal incident. See State v. Michielli, 132 Wn.2d 229, 238-39 937 P.2d 587 (1997); Whalen v. United States, 445 U.S. 684, 688-89, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980). However, both the Fifth Amendment and Article 1, § 9 of the state constitution prohibit a person being twice put “in jeopardy” for the “same offense.” State v. Freeman, 153 Wn.2d 765, 768, 108 P.3d 754 (2005); Garrett v. United States, 471 U.S. 773, 779, 105 S. Ct. 2407, 85 L. Ed. 2d 764 (1985). As a result, a court may not enter multiple convictions or punishments for two offenses which are legally deemed the “same offense.” See In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004); Ball v. United States, 470 U.S. 856, 864, 105 S. Ct. 1668, 84 L. Ed. 2d

740 (1985).

In this case, this Court should reverse and dismiss the conviction for second-degree assault contained in count II, because that conviction violated appellant's state and federal rights to be free from double jeopardy.

This Court applies de novo review. See State v. Vladovic, 99 Wn.2d 413, 422, 662 P.2d 853 (1983). Further, this constitutional issue may be raised for the first time on appeal. See State v. Adel, 136 Wn.2d 629, 631-32, 965 P.2d 1072 (1998). A court entering multiple convictions for the "same offense" violates the state and federal prohibitions against double jeopardy. See Freeman, 153 Wn.2d at 770-71. But because the Legislature bears the power to define crimes, the determination of whether double jeopardy has been violated depends in large part on "whether the legislature intended separate offenses" to occur. See In re Personal Restraint of Francis, 170 Wn.2d 517, 523-24, 242 P.3d 866 (2010).

In most cases, double jeopardy analysis where there are two convictions for the same conduct requires the Court to start by looking at the statutes themselves to see if there was an express or implied intent to create separate offenses to be seen. State v. Calle, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995). Without such evidence - such as an "anti-merger" clause - the Court then applies the so-called "Blockburger" test, named after Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Calle, 125 Wn.2d at 777-78. The Blockburger test requires looking at the elements of each

crime as charged and presented to determine whether they criminalize the same conduct. See id. If so, it is presumed the Legislature intended to punish both offenses through a greater sentence for the higher crime. Freeman, 153 Wn.2d at 772-73.

In addition to the plain language and Blockburger tests, the Court also looks at the non-constitutional “merger” doctrine as another “aid in determining legislative intent.” Freeman, 153 Wn.2d at 772. In that analysis, even if the two crimes have separate elements, if the degree of one offense is raised by the conduct charged as the other, it is again assumed that the Legislature intended to punish only the higher crime. Id.; see Vladovic, 99 Wn.2d at 419.

In this case, this Court need not start from scratch with looking for legislative intent in the statutes. This is because, since 1975, Washington courts have “generally held that convictions for assault and robbery stemming from a single violent act are the same for double jeopardy purposes” - and further, that the assault conviction must therefore be reversed. Freeman, 153 Wn.2d at 772; see State v. Prater, 30 Wn. App. 512, 516, 635 P.2d 1104 (1981).

As the Supreme Court has noted, “when an assault elevates a robbery to first degree, generally the two offenses are the same for double jeopardy purposes.” State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008). Indeed, there is a long line of cases in this state addressing the two statutory schemes of second-degree assault and first-degree robbery, concluding that double jeopardy prohibitions were violated

when there are convictions for both second-degree assault and first-degree robbery, “when the assault facilitates the robbery.” Freeman, 153 Wn.2d at 776; see e.g. Kier, supra; State v. Bresolin, 13 Wn. App. 386, 534 P.2d 1394 (1975).

These cases have already conducted the statutory analysis and found no intent, and have concluded that, under the relevant statutes, in most situations where there is a robbery and a second-degree assault, the robbery is elevated to “first degree” based on the conduct amounting to the assault. The general definition of robbery requires proof of the taking of personal property from someone or in their presence and against their will with either the use or threatened use of “force or violence.” RCW 9A.56.190. Robbery is elevated to “first degree” if, *inter alia*, the state also proves 1) the defendant or another is armed with a deadly weapon in committing the robbery “or in immediate flight therefrom,” or 2) one of them displays what appears to be a firearm during that same time or, 3) during that time, one of them “inflicts bodily injury.” Freeman, 153 Wn.2d at 771.

Assault, in contrast, is not defined in the criminal code, so Washington courts use the common law definitions, which are 1) an unlawful touching (actual “battery”); 2) an attempt with unlawful force to inflict bodily injury upon another (attempted battery) and 3) putting another in reasonable apprehension of harm. State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). Second-degree assault occurs when a person, “[a]ssaults another with a deadly weapon” or places someone “in fear of bodily injury by the use of a weapon that

has the apparent power to do harm.” See Kier, 164 Wn.2d at 806; see also, State v. Carlson, 65 Wn. App. 153, 828 P.2d 30, review denied, 119 Wn.2d 1022 (1992). The second-degree assault elevates the robbery to first-degree in both situations. Kier, 164 Wn.2d at 806; Freeman, 153 Wn.2d at 779.

That is exactly what happened here. Count I, the first-degree robbery, was alleged to have occurred with Knapp and the underlying conduct as either the theft being against Knapp’s will by the use or threat of force or violence or having occurred “while armed with a deadly weapon.” CP 10-11. Count II alleged the second-degree assault as that Moretti “did assault Michael L. Knapp with a deadly weapon, to wit: a baseball bat or an ASP baton[.]” CP 10-11. The robbery charge was thus elevated to first-degree based on the conduct amounting to the second-degree assault.

Any argument to the contrary should be soundly dismissed. The Supreme Court has recognized a theoretical possibility of a case in which the assault and robbery are sufficiently separate to support conviction of two crimes. Freeman, 153 Wn.2d at 778-79. But this possibility is slight. See State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979), cert. dismissed, 446 U.S. 948 (1980), disapproved in part and on other grounds by, State v. Sweet, 138 Wn.2d 466, 980 P.2d 1223 (1999). Separate convictions are proper only if the “included” crime as committed had an “independent purpose or effect from the other crime.” Freeman, 153 Wn.2d at 778-79.

There is not such “independent purpose,” however, unless

“there is a separate injury to ‘the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element.’” Freeman, 153 Wn.2d at 779, quoting State v. Frohs, 83 Wn. App. 803, 807, 924 P.2d 384 (1996) (citations omitted). The standard is not met simply because the defendant uses more force than “necessary” to commit the higher crime. Freeman, 153 Wn.2d at 779. Instead, there must be proof that the assault did not “forward” the robbery and there was “a separate injury or intent.” Freeman, 153 Wn.2d at 779.

The proper question is thus not whether more force was “necessary” to commit the crime as a minimum but rather “whether the unnecessary force had a purpose or effect independent” of the higher crime. Id.

Such independent purpose or effect is not present where, as here, the assault was a crucial part of the robbery. Thus, in Freeman, in one of the consolidated cases on appeal, there was not proof of such independent purpose or effect in a robbery case where the defendant was accused of picking up someone at his home, taking him to a dead-end street, pulling out a gun and ordering him to hand over valuables. 153 Wn.2d at 769. When the victim did not act right away, the defendant said, “[w]hat, you think I won’t shoot you?” - then fired a shot. Id. The victim was robbed where he collapsed. Id. Because there was no evidence that the shooting was for any reason other than to facilitate the robbery, the Court held, there was no proof of “independent purpose” sufficient to uphold both the

convictions for robbery and that for assault.

Indeed, the Court noted the ubiquity of force being used in robbery cases “to intimidate a victim into yielding property.” 153 Wn.2d at 779.

There was also insufficient proof under the “independent purpose” test for the second consolidated case in Freeman. 153 Wn.2d at 770. In that case, the defendant offered to meet the victim in a parking lot to sell her drugs and, when there, had second thoughts. 153 Wn.2d at 770. Instead of walking away, however, he punched her, then robbed her.

This was not evidence of an “independent purpose” sufficient to support both convictions against a double jeopardy claim. 152 Wn.2d at 779-80. While the Court was “not without sympathy” for the level of harm inflicted, and even though the Court thought the injuries “excessive . . . in relation to the crime charged,” again, the question was not what conduct *at a minimum* would be required to establish the higher crime but rather whether the two crimes had “an independent purpose or effect.” Freeman, 152 Wn.2d at 780.

The Court has not departed from Freeman, despite urging by the state. See Kier, 164 Wn.2d at 804-806. Kier is instructive here. In that case, the prosecution urged the Supreme Court to depart from Freeman, but the Court declined. In the underlying crimes, Kier had pointed a gun at several men inside a car, including the driver, Qualagine Hudson. Kier also walked around the car and ordered Carlos Ellison, out from the passenger side, demanding

Ellison's money. 164 Wn.2d at 802-803. Kier and others drove off, stealing the car. 164 Wn.2d at 802-803.

Kier was charged with first-degree robbery for the theft of the car, with both Hudson and Ellison listed as the victim. 164 Wn.2d at 803. The state also charged second-degree assault for pulling the gun on Ellison. On review of the two separate convictions, the Supreme Court reaffirmed Freeman, concluding it had properly interpreted the relevant statutes and properly held that separate crimes violated double jeopardy if the second-degree assault furthered the higher crime. Kier, 164 Wn.2d at 805.

In reaching that conclusion, the Court rejected the prosecutor's efforts to limit the holding of Freeman to only those cases when the second-degree assault occurred with a deadly weapon. Kier, 164 Wn.2d at 806. The state claimed that there was no double jeopardy problem for a first-degree robbery with a deadly weapon and an assault alleged to have been committed by placing the victim "in reasonable apprehension of harm." Kier, 164 Wn.2d at 806. The Supreme Court disagreed, finding that being armed with or displaying a deadly weapon was clearly an assault under the common law definition of "placing another in reasonable apprehension of harm." Kier, 164 Wn.2d at 807.

The prosecution also claimed there was no double jeopardy violation because there were different victims; i.e., Hudson was the victim of the car theft while Ellison was the victim of the assault. 164 Wn.2d at 808. The Supreme Court took a "hard look" at the way the

case was presented to the jury, asking if there was any possibility that the jury had relied on Ellison as the victim of both the theft and the assault. The Court found that it was possible, because 1) the “to convict” for the robbery did not identify the victim, 2) the second-degree assault specifically identified Ellison as being “assaulted. . .with a deadly weapon,” 3) some witnesses had referred to the robbery as a “carjacking,” 4) the prosecutor had referred to the car as belonging to Ellison a few times and 5) the 9-1-1 tape referred to the “two boys here that told me they’ve just been carjacked.” 164 Wn.2d at 811. Although the closing argument of the state seemed to refer to the robbery only in relation to Hudson, there was enough ambiguity with the evidence and instructions that the Supreme Court had to construe the verdict in favor of the defense, in light of the rule of lenity. 164 Wn.2d at 811. Because there was no way to be sure the jury had not relied on the assault of Ellison to elevate the robbery, reversal and dismissal of the assault conviction for Ellison was required.

Here, the robbery and assault were both specifically charged with Knapp as the victim. Jury instruction 11, the “to convict” for the robbery charge, required the jury to find that “in the commission of these acts, the defendant was armed with a deadly weapon[.]” CP 53-54. Instruction 14 told jurors, “[a] person commits the crime of Assault in the Second Degree when he assaults another with a deadly weapon.” CP 53-54. Instruction 15, the “to convict” for the second-degree assault charged in count II, specifically identified Knapp as

the person the jury had to find had been assaulted “with a deadly weapon.” CP 55. But the “to convict” for the robbery did not specifically name Knapp, instead of referring only to “the person” from whom the property was taken. CP 55. Looking at the case in light of Kier, however, there is significant evidence from which the jury could have relied on the assault of Knapp as enhancing the robbery to first degree. Indeed, that was the prosecution’s theory of the case. The state’s evidence established that the assault occurred when the baton or bat was used to hit Knapp while the assailants yelled, “give me the money.” RP 120-24, 254-55. The whole incident lasted about a minute or two. RP 125. The prosecutor argued Moretti and his accomplice knew that Knapp had recently won some money gambling, “wanted that money,” set up Knapp to meet them “in a secluded area” and did so in order to “roll” or rob him- which they did by assaulting him while demanding the money. RP 392-93; see RP 394-95. There was no “independent purpose” to the second degree assault. It violates double jeopardy and should be reversed.

D. CONCLUSION

This Court should dismiss the conviction for count II.

DATED this 28th day of June, 2017.

Respectfully submitted,

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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 Opening Brief to opposing counsel via first-class postage prepaid, to Grays Harbor County 102 W. Broadway, Montesano, WA. 98563, and to Mr. Anthony Moretti, DOC 860499, Clallam Bay CC, 1830 Eagle Crest Way, Clallam Bay, WA. 98326.

DATED this 28th day of June, 2016

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June 28, 2017 - 7:39 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 47868-4
Appellate Court Case Title: State of Washington, Respondent v. Anthony A. Moretti, Appellant
Superior Court Case Number: 15-1-00005-8

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