

FILED: September 21, 2011

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

BENJAMIN RAY BRYANT,
Defendant-Appellant.

Umatilla County Circuit Court
CF090165

A143569

Christopher R. Brauer, Judge.

Submitted on August 02, 2011.

Peter Gartlan, Chief Defender, and Zachary L. Mazer, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

John R. Kroger, Attorney General, Mary H. Williams, Solicitor General, and David B. Thompson, Senior Assistant Attorney General, filed the brief for respondent.

Before Brewer, Chief Judge, and Edmonds, Senior Judge.

BREWER, C. J.

Reversed and remanded for resentencing; otherwise affirmed.

1 BREWER, C. J.

2 Defendant appeals from his convictions for second-degree assault and
3 assaulting a public safety officer, arguing, *inter alia*, that the trial court erred by assigning
4 an increased criminal history score to his conviction on Count 3 (assault of a public
5 safety officer) based on his convictions on Counts 1 and 2 (assault in the second-degree
6 and assault of a public safety officer, respectively), because all three counts arose out of
7 the same criminal episode.¹ The state concedes that the trial court erred in so doing. As
8 explained below, we agree. Accordingly, we reverse and remand for resentencing.

9 The pertinent facts are undisputed. On the day he committed the crimes at
10 issue here, defendant was incarcerated at the Eastern Oregon Correctional Facility and
11 had been let out of his cell along with another inmate, Neal, by Officer Lake, a
12 corrections officer at the facility. Lake had let Neal and defendant out of their cell after
13 they asked to get water from a day room. As Neal and defendant were looking at a
14 bulletin board in the day room, Neal called out to Lake. As Lake approached Neal, Neal
15 asked Lake about a canteen call schedule posted on the bulletin board. When Lake began
16 to answer Neal's question, defendant attacked, striking him nine times in the head with
17 his fists. Neal began striking Lake as well, and, when he fell to the floor, both inmates
18 kicked and punched him. Within moments, a second officer, Frye, attempted to
19 intervene. He placed himself between the inmates and Lake; both Neal and defendant

¹ Because of our disposition of that assignment of error, we need not reach his remaining contentions.

1 then began striking Frye. Frye was able to convince both inmates to "back off," but, as
2 Lake began to stand up, both inmates again began striking Frye. Lake, by this time on his
3 feet, sprayed both Neal and defendant with chemical spray. Defendant began to flee, but
4 fell. Neal struck Lake again, knocking him backwards. As Lake attempted to regain his
5 footing and to spray Neal, defendant struck him in the eye, knocking him to the ground.
6 Defendant continued trying to hit Lake, and, when defendant "backed off a bit," Lake was
7 able to "front kick him." Defendant and Neal stopped their assault, came together, looked
8 at Lake, and "high-fived" one another. The assault lasted roughly one minute.

9 For that conduct, defendant was convicted of one count of second-degree
10 assault and two counts of assaulting a public safety officer. At sentencing, the trial court
11 assigned defendant a criminal history score of 6C on Count 3, based on his convictions
12 on Counts 1 and 2. However, defendant argued that the proper criminal history score was
13 6E, because all three counts had arisen out of the same "criminal episode," and, thus,
14 Counts 1 and 2 could not be used to enhance his criminal history score for purposes of
15 sentencing on Count 3. The trial court rejected defendant's argument and imposed a
16 sentence of 18 months' incarceration on Count 3, consecutive to the sentences imposed
17 on Counts 1 and 2. This appeal followed.

18 Defendant renews his argument on appeal, and, as noted, the state concedes
19 that the trial court erred. We find the state's concession to be well founded. As we have
20 explained,

21 "[a] defendant's criminal history score is used to calculate the sentence the
22 court is to impose. OAR 213-004-0006. The score is determined by

1 several factors, including the number and character of the offender's prior
2 convictions. *Id.* When multiple convictions occur in the same proceeding,
3 ones occurring in an earlier criminal episode may be used to recalculate the
4 defendant's criminal history score with respect to convictions stemming
5 from a later criminal episode. *State v. Bucholz*, 317 Or 309, 317, 855 P2d
6 1100 (1993); *State v. Allen*, 151 Or App 281, 290-91, 948 P2d 745 (1997).
7 In contrast, when a defendant's multiple convictions *stem from the same*
8 *criminal episode*, his criminal history score remains the same with respect
9 to all of those convictions."

10
11 [*State v. Norman*](#), 216 Or App 475, 485-86, 174 P3d 598 (2007), [*vac'd on other grounds*](#),
12 345 Or 319 (2008) (emphasis added). As we recently observed, the term "criminal
13 episode" appears in many different contexts, and its meaning can vary with the context in
14 which it is used. [*State v. Potter*](#), 245 Or App 1, 4, ___ P3d ___ (2011). For purposes of
15 calculating a defendant's criminal history score under OAR 213-004-0006, we have held
16 that crimes arise out of the same "criminal episode" where the "circumstances are so
17 interrelated that a complete account of one offense cannot be related without relating
18 details of the other(s)." *Norman*, 216 Or App at 489.

19 Here, Count 3 of the indictment charged defendant with assaulting a public
20 safety officer, Frye. It is apparent from our recitation of the facts in this case that
21 defendant's assault of Frye was so interrelated with his assault of Lake that a complete
22 account of defendant's conduct against Frye cannot be related without also relating details
23 of defendant's conduct directed at Lake. Accordingly, defendant's crimes arose out of the
24 same "criminal episode," and the trial court erred in using defendant's convictions on
25 Counts 1 and 2 as part of its calculation of his criminal history score for purposes of
26 sentencing on Count 3.

27 Reversed and remanded for resentencing; otherwise affirmed.