IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ALLAN R. SIMMONS, Appellant.	No. 40003-1-II UNPUBLISHED OPINION

Armstrong, J. — Allan Simmons appeals his convictions for first degree rape and second degree assault with sexual motivation, arguing among other issues that (1) his two convictions violate double jeopardy principles and (2) his prior Illinois robbery conviction is not comparable to a most serious offense in Washington under the Persistent Offender Accountability Act (POAA), chapter 9.94A RCW. Because the assault, as charged, had no purpose independent of the rape, we remand for the trial court to vacate the second degree assault conviction. We also agree with Simmons that his Illinois robbery conviction is not comparable to robbery in Washington; accordingly, the trial court erred in sentencing him as a persistent offender. We remand for resentencing consistent with this opinion.

FACTS

On April 11, 2009, G.S., an assistant stage manager with a theatre company, attended a cast party to celebrate the company's latest production. The cast party continued late into the night. G.S. left the party with a friend, and they walked back to their respective cars parked behind the theatre. Her friend got into his car and left, but G.S. stopped to smoke a cigarette before leaving.

As her friend drove away, Simmons, a stranger, approached G.S. and struck up a conversation. Simmons seemed friendly and the two talked for over an hour. When G.S. realized it was past 4:00 a.m., she told Simmons she had to go home. Simmons asked if she could give him a ride home and she agreed. Toward the end of the drive home, Simmons's manner began to change, giving G.S. "the creeps." Report of Proceedings (RP) at 39. He became agitated and was not giving G.S. clear directions to his house. When they finally arrived, G.S. pulled into the driveway but did not put the car in park and kept her foot on the brake.

Simmons hugged G.S. and turned as though to leave. But instead of climbing out of the car, he turned back around and punched G.S. in the face multiple times. During the attack, G.S.'s foot came off the brake pedal. The car lurched forward and traveled approximately 100 feet, crashing through a driveway gate and into a potted tree. The car then reversed back out of the gate and came to rest in a ditch on the other side of the road.

Simmons began to remove G.S.'s pants. G.S. begged him not to rape her and tried to fight back. Simmons punched her several more times and took off her boots, pants, and underwear. Realizing that she did not have the physical strength to resist, G.S. asked whether if she let him "rape" her, he would let her go. RP at 43-44. Simmons replied yes and started having sexual intercourse with G.S. G.S. begged him to leave her alone. He eventually agreed to stop, got out of the car, and with the help of someone who had arrived on the scene, tried to get her car out of the ditch. He stated he was going to get her help and ran away. G.S. called 911. The police and an ambulance responded to the scene and took G.S. to the hospital.

At the hospital, a sexual assault nurse performed a rape kit exam. The male DNA

(deoxyribonucleic acid) profile from the rape kit matched that of Simmons. A physician who examined G.S. described her as having been assaulted both physically and vaginally. In addition to her genital area being swollen and tender, G.S. sustained a lacerated nose ("sliced open" to the bone), a nasal bone fracture, two black eyes, bruising on both sides of her jaw, a swollen face and lips, damage to the eardrum, chipped teeth, and bruising on her left knee and back of hand. She was also covered with dried blood and continued to bleed during her exams.

The State charged Simmons with one count of first degree rape, or second degree rape in the alternative, and one count of second degree assault with sexual motivation. The jury found Simmons guilty of first degree rape and second degree assault with sexual motivation.

At sentencing, the State presented evidence of two prior convictions to show that Simmons qualified to be sentenced as a persistent offender: (1) an Illinois aggravated assault and (2) an Illinois robbery conviction. Simmons conceded that the aggravated assault compared to a most serious offense in Washington, but he contested the comparability of the robbery conviction. After ruling that the Illinois robbery conviction was comparable to a most serious offense in Washington, the trial court sentenced Simmons under the POAA to life without the possibility of parole.

ANALYSIS

I. Double Jeopardy

Simmons first argues that his convictions for both second degree assault and first degree rape violate the constitutional prohibition against double jeopardy because the assault was incidental to the rape. The State responds that Simmons's initial attack on G.S. illustrated an

intent to inflict lasting physical harm beyond the duration and scope of the rape.

Simmons failed to raise the double jeopardy issue at sentencing. But a defendant can raise a double jeopardy issue for the first time on appeal because the argument, if meritorious, is a manifest error affecting a constitutional right. RAP 2.5 (a); *State v. Turner*, 102 Wn. App. 202, 206, 6 P.3d 1226 (2000). Accordingly, we consider Simmons's double jeopardy argument a legal question that we review de novo. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

The double jeopardy clauses of the state and federal constitutions prohibit multiple punishments for the same offense. U.S. Const. amend. V; Wash Const. art. I, § 9; *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). Multiple convictions with concurrent sentences may also violate the rule against double jeopardy. *State v. Calle*, 125 Wn.2d 769, 773, 888 P.2d 155 (1995).

Under Washington's well-established criteria, we first consider whether the legislature intended to authorize multiple punishments where a defendant's conduct supports charges under two different criminal statutes. *State v. Williams*, 156 Wn. App. 482, 493, 234 P.3d 1174, *review denied*, 245 P.3d 773 (2010). Although sometimes explicit, legislative intent on this question is rarely clear and courts apply the "same evidence" test.[1] *Freeman*, 153 Wn.2d at 772. The test is whether the crimes, as charged, contain different elements or whether each requires proof of a fact the other does not. *Freeman*, 153 Wn.2d at 772. Where the charges differ on either the elements or the required proof, the offenses are different and multiple convictions can stand. *Calle*, 125 Wn.2d at 777. But, even when two crimes have formally different elements, where the

[1] This test is also known as the "same elements" test and the *Blockburger* test. *Orange*, 152 Wn.2d at 816.

degree of an offense is raised by conduct elsewhere defined as a crime, we apply the merger doctrine and punish both offenses through the greater sentence for the greater crime. *Freeman*, 153 Wn.2d at 772-73.

If the offenses appear to merge or pass the "same evidence" test, we must still consider whether the legislature intended to treat the conduct as a single offense for double jeopardy purposes. *Calle*, 125 Wn.2d at 778 (the "same evidence" test is a rule of statutory construction and is not controlling if it is contrary to legislative intent). Two charged offenses may indeed be separate where there is a separate and distinct injury that is not merely incidental to the crime of which it forms an element. *Freeman*, 153 Wn.2d at 778-79. Put another way, where there is an independent purpose or effect to each crime, they may be punished as separate offenses. *Freeman*, 153 Wn.2d at 779.

As here, *Williams*, 156 Wn. App. at 494, involved charges of second degree assault with sexual motivation and first degree rape. There, the court bypassed the "same elements" test because it concluded that the second degree assault merged with the first degree rape. *Williams*, 156 Wn. App. at 495. The court reasoned that the assault and the infliction of substantial bodily harm provided the necessary element of serious physical injury required for a first degree rape conviction.[2] *Williams*, 156 Wn. App. at 494-95. And because the defendant attacked and strangled the victim solely to further the rape, the assault had no purpose or effect independent of

[2] To prove the assault, the State had to prove the elements of assault and reckless infliction of substantial bodily harm. RCW 9A.36.021(1)(a). "Substantial bodily harm" is defined as a "bodily injury which involves a temporary but substantial disfigurement, or which causes . . . substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b). The specific elements of first degree rape are sexual intercourse by forcible compulsion and the infliction of serious physical injury. RCW 9A.44.040(1)(c).

the rape. *Williams*, 156 Wn. App. at 495. Accordingly, the court vacated the defendant's second degree assault conviction. *Williams*, 156 Wn. App. at 495. Similarly, the second degree assault conviction in this case will merge with the first degree rape conviction unless we can find that the evidence establishes that the assault had a purpose or effect independent of the rape.

The State maintains that two separate assaults occurred, reasoning that the initial attack on G.S. caused severe and distinct injuries beyond the scope of the rape. *Compare Williams*, 156 Wn. App. at 495 ("[t]he only assault here was the attack and strangulation of [the victim] before and during the act of rape."). But although the initial attack is somewhat separated in time from the rape, we can discern no independent purpose for or effect of Simmons's initial attack. Moreover, the State charged the assault with sexual motivation. *See* RCW 9.94A.835. And, the State points to no evidence that Simmons sought any sort of sexual gratification other than the rape. *See Freeman*, 153 Wn.2d at 779 (acknowledging that there was no evidence in the record to support a conclusion that the violence used by the defendant to complete the crime was "gratuitous," or done to impress his friends, or had some other independent purpose or effect). That Simmons used excessive force during his initial attack—more than was necessary to overcome the smaller G.S.—does not alone support a finding of separate purpose or effect. *See Freeman*, 153 Wn.2d at 779 (excessive violence in relation to the crime charged is not an appropriate basis for avoiding merger, although it may be considered in seeking an exceptional sentence). Finally, although the first assault and the rape were briefly separated in time, the break was not the result of Simmons voluntarily disengaging, which might have suggested a possible change of intent. Rather, it was caused by the car lurching forward, apparently out of control.

Without evidence to suggest another purpose, the State essentially proved that Simmons attacked G.S. to facilitate the rape by arguing the sexual motivation element of the assault. Accordingly, we remand for the trial court to vacate Simmons's second degree assault conviction. *Williams*, 156 Wn. App. at 495.

II. Persistent Offender Status

Simmons argues that the trial court erred in ruling that his Illinois robbery conviction is a "strike" under the POAA because it is neither legally nor factually comparable to the crime of robbery in Washington. We agree.

Under the POAA, a defendant already convicted of two "most serious offenses" must be sentenced to life without parole upon conviction for a third such offense. RCW 9.94A.030(36), .570. Both first degree rape and second degree assault are most serious offenses or "strikes" for purposes of the POAA. RCW 9.94A.030(31)(a), (b). Foreign convictions constitute strikes if they are comparable to Washington's most serious offenses. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 254, 111 P.3d 837 (2005). We review de novo a sentencing court's decision to count a prior conviction as a strike. *State v. Thiefault*, 160 Wn.2d 409, 414, 158 P.3d 580 (2007).

A foreign conviction is equivalent to a Washington offense if there is either legal or factual comparability. *Lavery*, 154 Wn.2d at 255. A foreign offense is legally comparable if "the elements of the foreign offense are substantially similar to the elements of the Washington offense." *Thiefault*, 160 Wn.2d at 415. If the elements of the two statutes are not identical or if the foreign statute is broader than the Washington definition of the particular crime, the trial court

must then determine whether the offense is factually comparable. *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). A conviction is factually comparable if the defendant's conduct would have violated a comparable Washington statute. *Lavery*, 154 Wn.2d at 255.

A. Legal Comparability

Simmons argues that the Illinois robbery statute is not legally comparable to robbery in Washington because Washington law requires specific intent to deprive or steal and Illinois law has only a general intent element.

In Washington, a person commits robbery when he unlawfully takes personal property from the person of another by force, real or threatened. RCW 9A.56.190. The crime of robbery in Washington requires proof that the defendant had the specific intent to steal as an essential, nonstatutory element. *Lavery*, 154 Wn.2d at 255; *see also State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991) (recognizing that the intent to steal is an essential element of the crime of robbery).

In Illinois, a person commits robbery when he or she takes property from the person or presence of another by the use of force or by threatening the imminent use of force. 720 Ill. Comp. Stat. 5/18-1. But unlike robbery in Washington, robbery in Illinois is a general intent crime that can be established with either specific intent, knowledge, or recklessness. *People v. Simms*, 192 Ill. 2d 348, 377, 736 N.E.2d 1092 (2000); *see also State v. Bunting*, 115 Wn. App. 135, 143, 61 P.3d 375 (2003) (concluding that the defendant's Illinois armed robbery conviction did not constitute a strike for the purposes of the POAA).[3] Consequently, robbery is proven if

[3] The State argues that this court should not rely on *Bunting* because in that case, the court compared robbery in Washington and Illinois as the crimes existed in 1972. The State relies on *The People v. Jones*, 149 Ill. 2d 288, 595 N.E.2d 1071 (1992), to argue that since 1972, the

"'the prohibited result may reasonably be expected to follow from the offender's voluntary act even without any specific intent by the offender.'" *People v. Jamison*, 197 Ill. 2d 135, 161, 756 N.E.2d 788 (2001) (quoting *People v. DeBusk,* 231 Ill. App. 3d 229, 241, 172 Ill. Dec. 486, 595 N.E.2d 1156 (1992)).

A foreign conviction is not legally comparable to a Washington crime where the foreign crime is a general intent crime and the Washington crime requires specific intent. *Lavery*, 154 Wn.2d at 255-56. In *Lavery*, the issue was whether Lavery's federal conviction for bank robbery was comparable to the Washington crime of second degree robbery and, thus, a strike under the POAA. *Lavery*, 154 Wn.2d at 255-56. Given that federal bank robbery is a general intent crime and Washington's second degree robbery requires the specific intent to steal, the court held the crimes are not comparable. *Lavery*, 154 Wn.2d at 255-56. The court also reasoned that because Washington's robbery is more narrowly defined than federal robbery, a person could be convicted of federal bank robbery without being guilty of second degree robbery in Washington. *Lavery*, 154 Wn.2d at 256. Thus, Lavery's federal robbery conviction and second degree robbery in Washington were not legally comparable. *Lavery*, 154 Wn.2d at 256.

As in *Lavery*, Simmons could have been guilty of robbery in Illinois without being guilty

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Illinois Supreme Court has recognized the implied element of intent to deprive. The State misapprehends *Jones*. In *Jones*, the Court concluded that the indictment charging armed robbery sufficiently charged both the conduct and the mental states required for the lesser included crime of theft, which requires proof of intent to deprive the victim of his property. *Jones*, 149 Ill. 2d at 295. The Court explained that even though the robbery statute does not expressly set forth a mental state, it is not an absolute liability crime and must be established with either intent, knowledge, or recklessness. *Jones*, 149 Ill. 2d at 297. Because all three of these mental states are implied in the definition of robbery, including the intent to deprive, the intent element of theft was sufficiently pleaded in the information. *Jones*, 149 Ill. 2d at 297-98. The State fails to acknowledge that in addition to the specific intent to deprive, knowledge and recklessness are also implied mental states of robbery.

of robbery in Washington. Thus, the Illinois robbery conviction is not comparable to a Washington robbery conviction.

B. Factual Comparability

Next, Simmons argues that his Illinois plea agreement does not establish the specific intent element of robbery in Washington.

If the elements of the foreign conviction are different from or broader than the elements of the parallel crime in Washington, the court must determine whether the underlying facts, necessarily proved beyond a reasonable doubt or expressly admitted by the defendant, make the offense comparable. *See Lavery*, 154 Wn.2d at 258 (holding that although *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), does not require that prior convictions be proved beyond a reasonable doubt, the rule in *Apprendi* does not apply to foreign crimes that are not facially identical to Washington offenses); *see also Thiefault*, 160 Wn.2d at 416 n.2 (noting that although the State offered to produce evidence describing the defendant's conduct, none of the documents contained facts admitted or stipulated to, or otherwise proved beyond a reasonable doubt).

Here, Simmons pleaded guilty to robbery in an Illinois court. Before accepting the plea, the trial court had the prosecutor read facts of the case on the record. The pertinent part of the robbery was described as follows:

> [Simmons] placed his right arm around [the victim's] neck and dragged her about 30 feet north on 4th Street. While he dragged her, he punched her in the back of the head numerous times. [The victim] yelled into phone [sic] for someone to call the police. Mr. Simmons then grabbed the phone from her and broke it in half.

Clerk's Papers at 136. Simmons then stated he was pleading guilty of his own free will, which the

court accepted. He did not, however, expressly stipulate to or agree with the facts reported by the prosecutor during his colloquy with the court. Nor did he stipulate to any facts as part of his plea agreement.

The State argues that because the statement of facts was read in full to Simmons before he pleaded, the record is sufficient to demonstrate that Simmons, in admitting guilt, conceded to the facts underlying the robbery charge. But the State offers no authority to support the proposition that a defendant can stipulate to facts by acquiescence or by failing to object. "Any attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic." *Lavery*, 154 Wn.2d at 258. Moreover, despite the State's account of the hearing, the court discussed the voluntariness of Simmons's plea, and Simmons stated his intent to plead guilty *before* the prosecutor read the facts into the record. Simmons did tell the judge that his defense attorney had discussed with him the evidence in the case and the factual basis for the charge. This does not establish that Simmons stipulated to facts proving that he had the specific intent required in Washington. The record suggests only that the prosecutor read the facts into the record so the court could determine whether to accept the plea agreement.

As in *Lavery*, Simmons neither admitted nor stipulated to facts that would have established his specific intent to permanently deprive the victim of her property. *Lavery*, 154 Wn.2d at 258. Accordingly, the two crimes are not factually comparable, and the trial court erred by counting Simmons's Illinois robbery conviction as a strike under the POAA. Accordingly, we remand for the trial court to vacate the second degree assault conviction and resentence Simmons

on the first degree rape conviction only.[4]

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, P.J.

We concur:

Quinn-Brintnall, J.

Johanson, J.

[4] Simmons also argues that his rape and assault convictions should have encompassed the same criminal conduct for the purposes of calculating his offender score and that counsel was ineffective for failing to argue this point. But because the trial court did not calculate his offender score, we need not address this argument. RAP 2.2(a). The sentencing court will have the opportunity to calculate Simmons's offender score at resentencing. Moreover, because Simmons was sentenced as a persistent offender, counsel cannot have been ineffective for failing to argue a moot issue.