

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO  
FILE MOTION FOR REHEARING AND  
DISPOSITION THEREOF IF FILED

MARCOS A. RIVERA,

Appellant,

v.

Case No. 5D18-3385

STATE OF FLORIDA,

Appellee.

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Opinion filed December 27, 2019

Appeal from the Circuit Court  
for Orange County,  
Gail A. Adams, Judge.

James S. Purdy, Public Defender, and  
Andrew Mich, Assistant Public Defender,  
Daytona Beach, for Appellant.

Ashley Moody, Attorney General,  
Tallahassee, and Kristen L. Davenport,  
Assistant Attorney General, Daytona  
Beach, for Appellee.

EDWARDS, J.

Marcos A. Rivera (“Appellant”) appeals his convictions for aggravated battery and battery, arguing they violate double jeopardy. Both crimes took place in a single criminal episode or transaction with no meaningful temporal break, involving a single victim at a single location, and the lesser offense of battery is subsumed by the greater offense of

aggravated battery. Applying section 775.021(4)(b), Florida Statutes (2017), the statutory codification of the *Blockburger*<sup>1</sup> test, leads to the conclusion that the dual convictions violate the prohibition against double jeopardy. Accordingly, we reverse Appellant's conviction for battery and remand for further proceedings.

The altercation involving Appellant and Boris Rojas, the victim, occurred at Orlando Speed World. Following a qualifying lap, Rojas pulled off the track, stopped, and was beginning to exit his race car when Appellant grabbed Rojas by the helmet and tried to pull him the rest of the way out of his car. Rojas exited his car and Appellant began striking Rojas, but Rojas was able to push him away. Appellant paused his attack only long enough to put his knife to Rojas' throat while threatening to "put him to sleep." Rojas again pushed Appellant away and immediately afterwards, Appellant resumed striking Rojas.

Initially, Rojas and an eyewitness believed that Appellant was simply punching Rojas with his fist; however, it soon became clear that Appellant was holding a small knife in his hand. Each time Appellant punched Rojas, he also stabbed him. Rojas suffered six stab wounds. Rojas and an eyewitness testified that Appellant was the sole aggressor, and both confirmed that Appellant had a knife. The jury obviously did not believe Appellant's claim that he was unarmed and that Rojas was the aggressor. The jury found Appellant guilty of both aggravated battery and battery. Appellant was adjudicated guilty and sentenced to fifteen years on the aggravated battery conviction and to one year on the battery conviction with jail credit of 491 days allotted to both sentences.

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<sup>1</sup> *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

Appellant did not raise the issue of double jeopardy below and now seeks review based upon the concept of fundamental error, which is permissible under the circumstances of this case. See *Rosado v. State*, 129 So. 3d 1104, 1107 n.1 (Fla. 5th DCA 2013) (noting that because a double jeopardy violation constitutes fundamental error it is cognizable on appeal even if not raised below). Whether separate convictions violate double jeopardy is a question of law and is reviewed de novo. E.g., *Capron v. State*, 948 So. 2d 954, 957 (Fla. 5th DCA 2007).

“The double jeopardy clauses, contained in the Fifth Amendment to the United States Constitution and article I, section 9 of the Florida Constitution, prohibit the imposition of multiple punishments for the same criminal offense.” *Roughton v. State*, 185 So. 3d 1207, 1209 (Fla. 2016). “But the double jeopardy clauses do not prohibit multiple punishments for different offenses arising out of the same criminal transaction or episode if the Legislature intended to authorize separate punishments.” *Id.* (citing *Valdes v. State*, 3 So. 3d 1067, 1069 (Fla. 2009)).

“When the Florida Legislature provides clear direction as to whether a person may be separately convicted or sentenced for offenses arising from the same criminal transaction, the specific legislative directive controls.” *Taylor v. State*, 267 So. 3d 1088, 1090 (Fla. 5th DCA 2019) (citing *State v. Meshell*, 2 So. 3d 132, 136 (Fla. 2009)). There is no contention here by the State, nor do we find, that the Legislature intended to permit multiple convictions and sentences for aggravated battery<sup>2</sup> and battery<sup>3</sup> committed against one victim within the same criminal transaction or episode. “[A]bsent an explicit

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<sup>2</sup> See § 784.045, Fla. Stat. (2015).

<sup>3</sup> See § 784.03, Fla. Stat. (2015).

statement of legislative intent to authorize separate punishments for two crimes, application of the *Blockburger* 'same-elements' test," codified in section 775.021(4), Florida Statutes (2017), "is the sole method of determining whether multiple punishments are double-jeopardy violations." *Gaber v. State*, 684 So. 2d 189, 192 (Fla. 1996) (footnote omitted) (citing *State v. Maxwell*, 682 So. 2d 83, 84 (Fla. 1996)).

"In analyzing [a] double jeopardy claim, [a reviewing court] must first determine whether the [offenses] were part of a separate episode or transaction. If so, double jeopardy is not an issue." *Miles v. State*, 94 So. 3d 662, 663 (Fla. 5th DCA 2012). While there is no exact definition of what constitutes a single criminal transaction, "[t]o determine whether an offense occurred during the same criminal transaction, courts examine 'whether there are multiple victims, whether the offenses occurred in multiple locations, and whether there has been a "temporal break" between the offenses.'" *Id.* (quoting *Staley v. State*, 829 So. 2d 400, 401 (Fla. 2d DCA 2002)). Here there was a single altercation, at a single location, involving a single victim. There was no meaningful temporal break. Appellant began his attack on Rojas by attempting to pull Rojas from his car and then stabbing him in his side. When Rojas pushed him away, Appellant paused his attack only long enough to put his knife to Rojas' throat and threaten to kill him. After Rojas pushed him away again, Appellant immediately resumed stabbing Rojas. The entire attack lasted only a minute or two. The fact that Rojas was able to push Appellant away twice during the attack does not transform it into multiple criminal episodes. This was a single, prolonged attack.

To determine whether convictions for both battery and aggravated battery arising from the same criminal transaction violate double jeopardy, i.e., would constitute

punishment for the same offense, section 775.021(4)(b), Florida Statutes—codifying the *Blockburger* test<sup>4</sup>—is applicable. That section states that:

The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:

1. Offenses which require identical elements of proof.
2. Offenses which are degrees of the same offense as provided by statute.
3. *Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.*

§ 775.021(4)(b), Fla. Stat. (emphasis added). Section 775.021(4)(b)3. is applicable to the instant case. This Court has previously held the elements of battery are subsumed within the elements of aggravated battery. See *Munoz v. State*, 212 So. 3d 1146, 1147–48 (Fla. 5th DCA 2017). This comports with aggravated battery’s statutory definition, which states “[a] person commits aggravated battery who, *in committing battery* . . . causes great bodily harm . . . or . . . [u]ses a deadly weapon.” § 784.045(1)(a), Fla. Stat. (emphasis added). Accordingly, because this was one criminal transaction, and because battery is subsumed within aggravated battery, Appellant’s separate convictions violate double jeopardy.

The appropriate remedy under these circumstances is to vacate the conviction and sentence as to the lesser offense, battery. See *Munoz*, 212 So. 3d at 1147–48.

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<sup>4</sup> See 284 U.S. at 304 (finding that “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not”).

Accordingly, we reverse Appellant's conviction and sentence for battery, and remand to the trial court with instructions to enter an amended judgment finding Appellant guilty only of aggravated battery and sentencing him to fifteen years in the Department of Corrections with credit for jail time and for time served.

REVERSED AND REMANDED WITH INSTRUCTIONS.

ORFINGER and HARRIS, JJ., concur.