IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JUDE M. LINAREZ, Appellant.	No. 39098-1-II UNPUBLISHED OPINION

Armstrong, P.J. – Jude Linarez appeals the sentence imposed following his conviction of first degree robbery, first degree assault, second degree assault, first degree burglary, and second degree unlawful possession of a firearm. Linarez argues that the trial court erred in failing to merge his first degree robbery and second degree assault convictions and incorrectly calculated the offender scores for each of his convictions. Linarez makes an additional assertion of error in a pro se statement.[1] We affirm.

Facts

Christina Smith was training Rebecca Hayden on her first shift as a motel desk clerk when Linarez walked through the back door, pointed a gun at the women, and demanded money from the safe in the back office. Linarez ordered Smith and Hayden to go into a side office and

[1] RAP 10.10.

get down on the floor. He then called Smith back into the lobby and told her to unlock the back office. When Smith said she did not have a key, Linarez told her to open the door or he would shoot Hayden. Linarez entered the side office, struck Hayden in the head with his gun, and kicked her in the jaw and arm.

Smith fled through the front doors, and Linarez fired shots in her direction. He then grabbed Hayden and pulled her over to a safe located under the front counter. When Linarez told her to open the safe, Hayden said she did not have the key and instead gave him the cash register's drawer. Linarez then opened a drawer containing several identification cards and pointed to them with the gun. Hayden handed him the cards and he left.

Following his arrest, the State charged Linarez with first degree assault, second degree assault, first degree robbery, first degree burglary, and second degree unlawful possession of a firearm. The jury found him guilty as charged and returned special verdicts finding that he was armed with a firearm during the assaults, robbery, and burglary. Based on his criminal history and current convictions, the court calculated offender scores of seven for the assaults, robbery, and burglary, and a score of four for the unlawful possession count. The court imposed standard range sentences for a total sentence of 394 months.

Analysis

I. Double Jeopardy

Linarez argues that the trial court's failure to merge his convictions for first degree robbery and second degree assault violated his right to be free from double jeopardy.

Double jeopardy claims are questions of law that we review de novo. *State v. Kelley*, 168

Wn.2d 72, 76, 226 P.3d 773 (2010). Although the constitutional guaranty against double jeopardy bars multiple punishments for the same offense, the legislature can enact statutes imposing cumulative punishments for the same conduct. *Kelley*, 168 Wn.2d at 76-77; *State v. Wade*, 133 Wn. App. 855, 871, 138 P.3d 168 (2006). If the legislature intends to impose multiple punishments, their imposition does not violate the double jeopardy clause. *Kelley*, 168 Wn.2d at 77. The merger doctrine is one tool for determining legislative intent. *Wade*, 133 Wn. App. at 871. Under this doctrine, "when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime." *State v. Freeman*, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005).

Robbery elevates from second to first degree if, in the commission of the robbery or in immediate flight therefrom, the defendant inflicts bodily injury, which is an assault. *Wade*, 133 Wn. App. at 871; RCW 9A.56.200(1)(a)(iii), .210. In *Freeman*, the court concluded that the legislature intended to punish separately both a robbery elevated to first degree by a first degree assault and the assault itself; the convictions therefore did not violate double jeopardy. *Freeman*, 153 Wn.2d at 775-76. Where second degree assault furthers a robbery, however, the court found no evidence that the legislature intended to punish the crimes separately. *Freeman*, 153 Wn.2d at 776. Those offenses generally will merge unless the assault has an independent purpose or effect. *Freeman*, 153 Wn.2d at 778-80.

In this case, the second degree assault charge was based on Linarez's infliction of injury on Hayden. The robbery charge was elevated to first degree not by that infliction of injury but

by Linarez's possession of a firearm when he took the cash drawer and identification cards. *See* RCW 9A.56.200(1)(a)(ii) (first degree robbery occurs when the defendant displays what appears to be a firearm during the robbery). The prosecuting attorney explained the effect of this charging decision during sentencing:

> [T]he reason he was charged with Robbery in the First Degree is because the defendant was in possession of a firearm. The firearm elevated his crime from a Robbery to a Robbery in the First Degree. That's how he was charged. He was not charged with Robbery in the First Degree for infliction of bodily injury upon Rebecca Hayden. The Assault in the Second Degree against Rebecca Hayden was for infliction of substantial bodily harm which the jury found the defendant did inflict. He was not charged with Assault in the Second Degree against Rebecca Hayden for just causing reasonable apprehension of fear, and so those two crimes, the Robbery in the First Degree and the Assault in the Second Degree, there's no reason that those two crimes would need to merge[.]

Report of Proceedings (RP) (Apr. 3, 2009) at 10.

We agree. We also observe that the two crimes had independent purposes. The second degree assault charge was based on Linarez's actions in kicking and hitting Hayden in an attempt to get Smith to open the locked office door. This assault was complete before the robbery at gunpoint. *See Wade*, 133 Wn. App. at 872 (second degree assault was based on clubbing designed to obtain information and thus had a purpose independent of the later robbery, at gunpoint, of same victim's money and jewelry). Linarez's separate second degree assault and first degree robbery convictions do not constitute double jeopardy.

II. Same Criminal Conduct

Linarez argues here that the trial court erred in calculating his offender scores and the corresponding sentence ranges because, even if they do not merge, his first degree robbery and second degree assault convictions should count as one offense under the "same criminal conduct"

rule. He makes the same claim regarding his convictions for first degree assault and unlawful possession of a firearm.

Current convictions are generally counted as prior convictions for purposes of calculating the defendant's offender score. RCW 9.94A.589(1)(a). Separate convictions count as one under the "same criminal conduct" rule, however, if they were committed at the same time and place, involved the same victim, and required the same objective criminal intent. RCW 9.94A.589(1)(a); *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). The legislature intended the same criminal conduct provision to be construed narrowly, and we will reverse a same criminal conduct determination only on a clear abuse of discretion or misapplication of the law. *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000); *State v. Flake*, 76 Wn. App. 174, 180, 883 P.2d 341 (1994).

The State argues that Linarez has waived this issue on appeal because he did not make a same criminal conduct argument at sentencing. *See State v. Nitsch*, 100 Wn. App. 512, 520-23, 997 P.2d 1000 (2000) (suggesting that a trial court's failure to sua sponte determine whether current offenses constitute the same criminal conduct is not a challenge to an illegal or erroneous sentence that is reviewable for the first time on appeal). Linarez objected to the State's calculation of his offender scores but gave no reason for that objection, stating only that he sought to preserve the issue for his appeal. When the court asked defense counsel to explain her objection, she stated that she did not agree that Linarez's juvenile offense counted or that his violent offenses each received two points.[2] Then, after the court sentenced Linarez according to

[2] The State conceded that Linarez's juvenile offense did not count, and the court did not include it in his offender scores.

the State's offender scores, defense counsel stated that "just for the record, since I made my objection prior to the Court making its ruling, I'd just like to note that we are objecting to the Court's scoring of Mr. Linarez's offender score." RP (Apr. 3, 2009) at 13.

If these objections were designed to trigger a same criminal conduct analysis on the trial court's part, they were poorly crafted. *See In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 875, 50 P.3d 618 (2002) (application of the same criminal conduct involves both factual determinations and the exercise of discretion and may be waived). But, even if we find Linarez's same criminal conduct arguments preserved, they fail on the merits.

In the same criminal conduct context, intent is the offender's objective criminal purpose in committing the crime. *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). Here, the first degree robbery and second degree assault convictions are not the same criminal conduct because, as explained above, they had different purposes. Linarez's objective criminal purpose during the second degree assault was to inflict bodily harm on Hayden, thereby inducing Smith to open the locked office. His objective criminal purpose during the first degree robbery of Hayden was to acquire property. The trial court did not abuse its discretion in counting these two convictions separately in calculating Linarez's offender scores.

Linarez also argues that his first degree assault and unlawful possession of a firearm convictions should count as one offense under the same criminal conduct rule. Again, these offenses had different criminal intents or purposes. The first degree assault conviction was based on Linarez's shooting at Smith as she fled. The criminal intent for that assault was the knowing assault of another with a weapon likely to produce bodily harm, while the criminal intent for the

unlawful possession conviction was to voluntarily possess a firearm despite an order prohibiting such possession. *See State v. Thompson*, 55 Wn. App. 888, 894, 781 P.2d 501 (1989) (objectively viewed, criminal intent for assaults and unlawful possession of firearm changed from one crime to the next). Again, the trial court did not abuse its discretion in counting these offenses separately.

III. Pro Se Issue

Linarez argues in a statement of additional grounds that the trial court erroneously instructed the jury on the elements of first degree assault.

The trial court instructed the jury that Linarez was guilty of first degree assault if he assaulted Smith with a firearm or with a deadly weapon or by a force or means likely to produce great bodily harm or death, and if he acted with the intent to inflict great bodily harm. The court defined "great bodily harm" as "bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ." Clerk's Papers at 83.

Linarez argues that the trial court should have instructed the jury that the actual infliction of great bodily harm was necessary to prove first degree assault, but that is not the case. The trial court properly instructed the jury that bodily injury need not be inflicted for an assault to occur. *See* RCW 9A.36.011(1)(a). The State argued that Linarez committed first degree assault when he fired his gun at Smith. The evidence was more than sufficient to show that Linarez shot at Smith with the intent to inflict great bodily harm and that he committed first degree assault as a result. The court did not err in instructing the jury.

Affirmed.

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:

Hunt, J.

Van Deren, J.