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

STATE OF WASHINGTON,	)	No. 29694-6-III
Respondent,	)	
v.	)	
BRAIDEN M. CONNOR,	)	UNPUBLISHED OPINION
Appellant.	)	

Brown, J. • Braiden M. Connor appeals his first degree robbery and second degree assault convictions, contending the trial court erred by failing to merge the assault into the robbery, thus throwing off his offender score and resulting standard range sentence. Additionally, Mr. Connor challenges portions of his restitution order as untimely. We agree with Mr. Connor's merger contention and remand for resentencing. Thus, we do not address Mr. Connor's restitution concerns that will again be before the trial court at his sentencing. Accordingly, we vacate Mr. Connor's second degree assault

conviction, and remand for proceedings consistent with this opinion.

FACTS

In June 2010, Mr. Connor was charged with several counts following his involvement in a robbery. He pleaded guilty on December 6, 2010 to amended charges of first degree burglary, second degree assault, and first degree robbery. The prosecutor told the court the victim supported the reduced charges based on Mr. Connor's involvement in the incident compared to his co-defendants. The court then went through the statement on plea of guilty section by section. Mr. Connor acknowledged and agreed he had read the statement and thoroughly reviewed it with his attorney. The plea statement listed Mr. Connor's offender score as 4. The charges partly provided:

> COUNT II: SECOND DEGREE ASSAULT, committed as follows: That the defendant . . . did intentionally assault WILLIAM HANS DAHLEN, and did thereby recklessly inflict substantial bodily harm,
>
> COUNT III: FIRST DEGREE ROBBERY, committed as follows: That the defendant . . . with the intent to commit theft, did unlawfully take and retain personal property . . . from . . . WILLIAM HANS DAHLEN, against such person's will, by use or threatened use of immediate force, violence or fear of injury to said person or the property of said person . . . and in the commission of and immediate flight therefrom, the defendant inflicted bodily injury upon WILLIAM HANS DAHLEN.

Clerk's Papers (CP) at 23-24.

Mr. Connor acknowledged that he understood the recommended sentence, that the recommended sentence would include restitution, and that the sentencing judge was not bound by the recommendation. Relevant to Mr. Connor's merger arguments, the prosecutor recited facts showing the victim:

> [W]as struck repeatedly about the head, arms and legs by the bats, and two of the suspects were demanding his money, and stated if they didn't get the money, that they would kill him.
>
> Mr. Dahlen would have testified that he pointed to his top dresser drawer and told them that his wallet was there. One of the suspects removed the wallet from the drawer . . . . At that point, the suspects fled the residence.

Report of Proceedings at 17.

After accepting Mr. Connor's plea, the court allowed the victim to speak relevant to Mr. Connor's mitigated sentencing request because the victim indicated he would not be at the sentencing hearing. The court requested the parties brief the issue and rescheduled sentencing for January 7, 2011. Based on the victim's earlier statements distinguishing Mr. Connor's role from the other perpetrators, the State questioned whether there was a factual basis for the plea. Counsel for Mr. Connor mentioned accomplice liability. Mr. Connor chose not to make a motion to withdraw his guilty plea. Denying Mr. Connor's exceptional sentence request, the court imposed the recommended sentence in the plea agreement. It left the issue of restitution open for a period of 180 days. Judgment and Sentence was entered on January 10, 2011. The restitution order

was entered July 20, 2011. Mr. Connor appealed.

ANALYSIS

A. Merger and Offender Score

The issue is whether the trial court erred by failing to merge the second degree assault into the first degree robbery with the effect of incorrectly elevating Mr. Connor's offender score.

A sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score. *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994). Thus, a challenge to the offender score calculation may be raised for the first time on appeal. *Id*. We review a sentencing court's calculation of an offender score de novo. *Id*. When calculating an offender score, all other current convictions are counted as if they were prior convictions. RCW 9.94A.589(1). Mr. Connor argues two of his current convictions merged together so his offender score should have been lower.

The merger doctrine avoids double punishment by merging a lesser offense "into the greater offense when one offense raises the degree of another offense." *State v. Collicott*, 118 Wn.2d 649, 668, 827 P.2d 263 (1992). Merger is based on the double jeopardy clauses of the United States and Washington Constitutions. *State v. Parmelee*,

108 Wn. App. 702, 710, 32 P.3d 1029 (2001). "The merger doctrine is relevant only when a crime is elevated to a higher degree by proof of another crime proscribed elsewhere in the criminal code." *Id.* When two crimes merge, the trial court convicts the defendant only of the one offense into which the other offense merges. *Id.* at 711.

Specifically, the merger doctrine is triggered when a completed second degree assault elevates robbery to the first degree. RCW 9A.56.200(1)(a)(i)-(ii); RCW 9A.56.190; RCW 9A.36.021(1)(c); *see State v. Kier*, 164 Wn.2d 798, 805, 194 P.3d 212 (2008); *State v. Freeman*, 153 Wn.2d 765, 780, 108 P.3d 753 (2005) (*Freeman* II). "An exception to merger applies where the offenses committed in a particular case have independent purposes or effects." *State v. Freeman*, 118 Wn. App. 365, 371-72, 76 P.3d 732 (2003) (*Freeman* I). As our Supreme Court explained:

> For example, when the defendant struck a victim *after* completing a robbery, there was a separate injury and intent justifying a separate assault conviction, especially since the assault did not forward the robbery.

Freeman II, 153 Wn.2d at 779.

As a preliminary matter, the State argues Mr. Connor waived his right to appeal his sentence, contending he "stipulated" that the first degree robbery and second degree assault convictions "constituted separate offenses legally and factually for sentencing purposes." Br. of Resp't at 8, 5. The State claims this "agreement" is in section 6(h) of the plea agreement. *See* Br. of Resp't at 6. Actually though, section 6(h) pertains to the

judge imposing an exceptional sentence and mentions nothing of separate offenses. And, as Mr. Connor replies, the section of the plea statement that does acknowledge that two offenses constitute separate offenses (section 6(z)) has been crossed out.

Here, the charging document shows Mr. Connor "inflicted bodily injury" "in the commission of and immediate flight" from the robbery. CP at 24. The prosecutor's factual basis at the plea hearing did not identify any purpose or effect of the assault on the victim apart from effectuating the robbery.

Although the State argues Mr. Connor's accomplices "intentionally inflicted . . . an amount of harm well in excess of that required to facilitate a first degree robbery," Br. of Resp't at 11, our Supreme Court has held the independent purpose "exception does not apply merely because the defendant used *more* violence than necessary to accomplish the crime." *Freeman* II, 153 Wn.2d at 790. "The test is whether the unnecessary force had a purpose or effect independent of the crime." *Id*. Here, the record contains no evidence the assault upon Mr. Dahlen was committed for any other purpose than to facilitate the robbery. Given all, we conclude the second degree assault conduct was charged as an element of the first degree robbery charge, having the effect of elevating the robbery charge. Thus, the two crimes merge, and the lesser offense should be vacated. Therefore, the offender score was miscalculated. The remedy for a miscalculated offender score is remand for resentencing using a correct offender score. *State v. Ford*,

137 Wn.2d 472, 485, 973 P.2d 452 (1999).

Because we remand for resentencing and restitution will again be before the sentencing court, we do not address Mr. Connor's obviated restitution concerns.

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

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Brown, J.

WE CONCUR:

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Korsmo, C.J.

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Siddoway, J.