IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27408-0-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
BRIAN RUSSELL MORTENSON,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Sweeney, J. — The State cannot convict a defendant of two separate crimes if both are the same in fact and law, that is, if both convictions follow the same acts and the elements of both crimes are the same. Here, the defendant tried to run a motorcyclist off the road with his car. He then threw a cup of some liquid at the motorcyclist's passenger. And he tailgated and drove aggressively with another motorcyclist. A jury convicted him of two counts of second degree assault and reckless driving. The convictions do not arise from the same acts nor are the elements of these crimes the same. The constitutional prohibition against double jeopardy was not violated. And we therefore affirm the convictions.

FACTS

Brian Mortenson drove westbound out of the Lewiston/Clarkston area on State Highway 12 toward Alpowa grade in his Honda Civic. His four-year-old son was seat-belted in the front passenger seat. The road widens at the bottom of the grade to provide a passing lane. Two west-bound lanes of traffic go up the grade and a single east-bound lane goes down. The posted speed limit up the grade is 60 miles per hour. The grade extends six to seven miles.

A group of five to ten motorcycle riders approached Mr. Mortenson from behind as he ascended up the grade to Alpowa Summit. The riders were spread out in a staggered formation over a couple of miles.

Two riders in the motorcycle group passed Mr. Mortenson in the left passing lane. Joe Bush approached soon thereafter on a touring bike, accompanied by his wife, Kathryne Bush, as passenger. Mr. Bush moved to the left lane and passed Mr. Mortenson. Mr. Mortenson sped up and tailgated Mr. Bush. Mr. Bush returned to the right lane. Mr. Mortenson passed Mr. Bush, returned to the right lane, and slowed down. Mr. Bush moved into the passing lane to avoid rear-ending Mr. Mortenson. Mr. Mortenson became visibly agitated, edged his car into the passing lane and forced the Bushes into the opposite lane of traffic. No cars were in the opposite lane.

Mr. Mortenson continued to change lanes and drive aggressively for several miles. He was very angry. He pounded on the steering wheel and yelled. He also threw a plastic cup with some liquid from his car, and it struck Ms. Bush.

Richard Nelson, another rider in the motorcycle group, saw Mr. Mortenson's erratic driving. Mr. Nelson caught up with and passed Mr. Mortenson to try to take Mr. Mortenson's attention away from the Bushes. Mr. Mortenson then chased Mr. Nelson until they reached the top of the grade. At the top of the grade, Mr. Nelson and the other motorcyclists pulled into a turnout and called the police. Mr. Mortenson drove on.

The State charged Mr. Mortenson with three counts of second degree assault with a deadly weapon, with reckless driving, and with reckless endangerment of his son. A jury found Mr. Mortenson guilty of two counts of second degree assault and reckless driving.

DISCUSSION

Mr. Mortensen argues that his convictions for reckless driving and second degree assault are the same in law and fact and, accordingly, the constitutional prohibition against being placed in jeopardy twice for the same crime has been violated. We review his challenge de novo. *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006).

The State may penalize any defendant for two separate crimes although both

convictions follow a single act, if the controlling statutes require proof of different elements. *State v. Walker*, 143 Wn. App. 880, 885-86, 181 P.3d 31 (2008). The constitutional prohibition against being placed in jeopardy twice for the same crime is not implicated unless the offenses are the same in law and fact. *Id.* This is the so-called *Blockburger* rule. *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Offenses are the same in fact when they arise from the same act or transaction. They are the same in law when proof of one offense would also prove the other. *State v. Martin*, 149 Wn. App. 689, 699, 205 P.3d 931 (2009).

This simple statement of the rule highlights the flaw in Mr. Mortenson's argument. The State charged Mr. Mortenson with crimes that have different elements. To prove reckless driving, the State had to show that Mr. Mortenson drove his car with "willful or wanton disregard for the safety of persons or property." RCW 46.61.500(1). To prove second degree assault, the State had to show that Mr. Mortenson assaulted a person with a deadly weapon under circumstances not amounting to first degree assault. RCW 9A.36.021(1)(c). So the elements of reckless driving are (1) driving a vehicle and (2) a willful or wanton disregard for the safety of others. And the elements of second degree assault with a deadly weapon are (1) assaulting someone and (2) using a deadly weapon. An assault is an act intended to inflict bodily injury with the apparent present ability to do

so. Or, alternatively, it is an act intended to create apprehension and fear of bodily injury that in fact creates such fear. *State v. Kier*, 164 Wn.2d 798, 806, 194 P.3d 212 (2008). A "deadly weapon" is any "weapon, device, instrument, article, or substance, including a 'vehicle' as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." RCW 9A.04.110(6).

The crimes here, then, have different elements. And that could end our inquiry. *State v. Vladovic*, 99 Wn.2d 413, 423, 662 P.2d 853 (1983). But we will also note that the crimes here are supported by evidence of different acts.

Mr. Mortenson argues that the two crimes are the same in law and fact because the nature of Mr. Mortenson's driving proved both offenses. *State v. Potter*, 31 Wn. App. 883, 888, 645 P.2d 60 (1982). In *Potter*, the court held that a conviction for reckless driving and reckless endangerment based on the defendant's excessive speed violated double jeopardy because "proof of reckless endangerment through use of an automobile will always establish reckless driving." *Id.* (emphasis omitted). But proof of reckless driving does not prove assault. And here there were multiple and separate acts by Mr. Mortenson over the course of some period of time that easily support the two separate convictions for his assaults of Mr. and Ms. Bush and his separate conviction for reckless

driving—driving conduct that was independent of the driving conduct that amounted to assault. Moreover, the evidence that supports the reckless driving would not suffice to prove the intent element of assault, so the bulk of the aggressive driving would not support those counts anyway. The convictions for second degree assault and reckless driving are neither the same in law or fact.

We, therefore, affirm the convictions.

A majority of the panel has determined that 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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Sweeney, J.

WE CONCUR:

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Kulik, A.C.J.

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Korsmo, J.