31175-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TYLER L. JAMISON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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Prosecuting Attorney

Andrew J. Metts
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I.

ASSIGNMENTS OF ERROR

1. The trial court erred in convicting Mr. Jamison on both count I and count II.

2. The trial court erred in sentencing Mr. Jamison on both count I and count II.

3. The trial court erred in entering Finding of Fact 2.1:

> These offenses occurred over a several hour period of time and count II also included assaults that had occurred repeatedly in the weeks prior.

(CP 252).

4. The trial court erred in entering Finding of Fact 2.2:

> The types of assaults occurring on April 5, 2010 were distinct and caused several different types of harm. Count II occurred over the course of several weeks.

(CP 252).

5. The trial court erred in entering Conclusion of Law 3.1:

> The offenses in count I and II are separate courses of conduct and the defendant shall be sentenced for each of these convictions.

(CP 252).

II.

ISSUES

A. DO THE CONVICTIONS IN THIS CASE VIOLATE "DOUBLE JEOPARDY"?

B. CAN THE TWO CONVICTIONS IN THIS CASE BE "SAME CRIMINAL CONDUCT" WHEN THEY ARE BOTH FACTUALLY AND LEGALLY DIFFERENT?

III.

STATEMENT OF THE CASE

The State accepts the defendant's version of the Statement of the Case with the following additions:

Dr. James Reggin testified that he initially saw S.A.J. on April 6, 2010. RP 221. The doctor reported that the child was "normal looking" and she had bruising over her left upper eyelid which was bright red. RP 222. There were dark bruises over the midline sternum. RP 222. She also had a bruise on the right lower cheek and there were bruises over the back on the spinous process. RP 222. The child had a bruise over the left ear over her upper earlobe. RP 222. The doctor reported that her fontanelle was tense and bulging there was some splitting of the cranial sutures. RP 222. The child's pupils were slowly reactive. An examination

showed that she had retinal hemorrhages. RP 222. The child had a prominent withdrawal response when her legs were touched. RP 223.

The doctor reported her as "critically ill." RP 223. He testified that the victim showed minimal response to her external environment. RP 235. The doctor noted that the child had "cortical blindness." RP 235. On subsequent evaluations Dr. Reggin noted that follow-up MRI scans showed that the child's upper brain had been replaced by fluid. RP 236.

Dr. Todd Ewert testified that the victim had pain due to rib fractures that extended from the third through the eighth ribs. RP 335. Dr. Ewert testified that he obtained a CT of essentially the child's entire body. RP 336. The doctor notes that the victim had a "subdural hematoma," rib fractures on her left and right chest and prior rib fractures from an earlier injury. RP 336. Dr. Ewert stated that the child had been abused and that accounted for the way the bones were broken. RP 354.

Dr. Michelle Messer stated that in her practice she had never seen an accidental cause for the types of brain injuries involved in this case. RP 658-59.

Detective Neil Gallion testified that he had an interview with the defendant to inquire about the circumstances involved in this case. RP 893. Detective Gallion asked the defendant what he wanted to tell the officers and the first thing the defendant said was "I am the one who did it." RP 894. The defendant stated that the child would be crying and he could not figure out how to

stop her from crying. RP 894. The defendant stated that at one point the victim wouldn't take her bottle and he couldn't get her to stop crying so he put his fingers on her throat just make her stop crying. RP 896. The defendant also talked with the detectives about putting his hand over the child's mouth and nose and he would do that until she turned pale. RP 901.

IV.

ARGUMENT

A. THE DEFENDANT'S CONVICTIONS CANNOT CONSTITUTE DOUBLE JEOPARDY CONSIDERING THAT THEY ARE DIFFERENT BOTH FACTUALLY AND LEGALLY.

The defendant was charged under two functionally different sections of RCW 9.36.120(1)(b)(i) and RCW 9.36.120(1)(b)(ii). RCW 9.36.120(B)(i) requires that the defendant being 18 years or older did intentionally assault S.A.J. who was a child under the age of 13 years and did thereby inflict great bodily harm.

RCW 9.36.120(1)(b)(ii) reads similarly to RCW 9.36.120(1)(b)(i) in the first part of the statute but adds additional elements not required in Count I. In addition to the age and assault elements of RCW 9.36.120(1)(b)(i), RCW 9.36.120(1)(b)(ii) requires that the assault on the child "... resulted in bodily harm that is greater than transient physical pain or minor temporary

marks...." RCW 9.36.120(1)(b)(ii). Thus, there is a difference between the amounts of physical injury required to prove the assaults of Count I and Count II.

In his videotaped confession, the defendant admitted that he undertook various forms of what could be called "smothering" the child. By his own account, the defendant blocked the child's airway using various techniques. Ultimately, these actions led to S.A.J. being declared brain dead. According to doctor Reggin, x-rays revealed multiple fractures in various parts of the victim's body. The smothering actions were different than the actions that caused the fractures. Logic dictates that the defendant could not have performed all of the assault actions at one time. So, factually, the defendant cannot claim "double jeopardy" violations.

"The applicable rule is 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 an additional fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed 306 (1932). According to the court in *State v. Marchi*, 158 Wn. App. 823, 243 P.3d 556 (2010), "[w]e must answer two questions—whether the two charged crimes arose from the same act and, if so, whether the evidence supporting conviction of one crime was sufficient to support conviction of the other crime." *In re Orange*, 152 Wn.2d 795, 820, 100 P.3d 291 (2004).

The solution to the *Blockburger* test is straightforward in this case. The elements of RCW 9.36.120(1)(b)(i) and RCW 9.36.120(1)(b)(ii) are legally different. RCW 9.36.120(1)(b)(i) requires an intentional assault against a child that recklessly inflicts bodily harm. Proving these elements will not suffice to prove a first degree child assault under RCW 9.36.120(1)(b)(ii). To prove first degree child assault under RCW 9.36.120(1)(b)(ii) requires proof that an assault "caused substantial bodily harm, and the person has previously engaged in a pattern or practice either of (A) assaulting the child which has resulted in bodily harm that is greater than transient physical pain or minor temporary marks or (B) caused the child physical pain or agony that is equivalent to that produced by torture" RCW 9.36.120(1)(b)(ii). The defendant's assaults on S.A.J. qualify under either (A) or (B).

The Legislature's intent was discussed in *Marchi*, *supra*:

> Based on the vulnerability of young victims, the legislature passed RCW 9A.36.120 to enhance penalties and to address concerns arising from an adult perpetrator's ongoing child abuse of a child younger than 13. Final Legislative Report, 52nd Leg., at 118 (Wash.1992). The Senate Journal also contains pertinent points of inquiry buttressing the legislature's concern with ongoing child abuse. During debate on the statute, Senator Gary Nelson specifically noted, 'We are trying to get to those situations where an adult repeats the offense against a child—several times—and based on the harm done to the child establishes then whether it is going to be assault against the child in the first, second, or third degree.' 1 Senate Journal, 52nd Leg. Reg. Sess., at 302 (Wash.1992). He added that the intent was not to modify the existing law but rather to put child assault between simple assault and homicide by abuse to 'reflect what might be the continuous or

> repetitive type of assaults that are done against children.' 1 Senate Journal, 52nd Leg. Reg. Sess., at 302 (Wash.1992).

State v. Marchi, 158 Wn. App. at 831.

The defendant argues that "[w]here a defendant is convicted of violating one statute multiple times, [t]he proper inquiry is what 'unit of prosecution' has the Legislature intended...." Brf. of App. 12. The defendant misses the point here. The defendant was not charged under one statute, but rather, he was charged under two statutes which require different legal elements and factual elements.

Count I charged what could be described as a "basic" child assault that recklessly inflicted "great bodily harm." Of course, there was an age difference requirement but that is the same in both Count I and Count II. Count II required the State prove that the defendant caused "substantial bodily harm," and that the defendant had previously engaged in a pattern or practice either of assaulting the child, causing bodily harm that is greater than transient physical pain or minor temporary marks, or (B) causing the child physical pain or agony that is equivalent to that produced by torture. It is difficult to accept that repeatedly cutting off the child's air supply could be anything but torture.

One need go no farther than the fact that Count I required proof of the infliction of "great bodily harm" and Count II only required proof of "substantial bodily harm."

There is no basis in this case for the argument that the defendant's "double jeopardy" rights were violated.

B. THE ACTIONS CHARGED IN COUNT I AND COUNT II WERE NOT "SAME CRIMINAL CONDUCT."

To constitute the "same criminal conduct" for purposes of determining an offender score at sentencing, both crimes must involve: (1) the same criminal intent; (2) the same time and place; and (3) the same victim. If any one of these elements is missing, multiple offenses cannot be considered to be the same criminal conduct and they must be counted separately in calculating the offender score.

As in the preceding argument, the State discussed the two different charges and the differing elements. The State maintains that the two counts cannot be the "same criminal conduct" because the defendant had to form different intents for Count I and Count II.

The defendant wishes to find fault in the trial court's Findings of Fact. Trial court findings of fact will be upheld if there is substantial supporting evidence. *State v. Maxfield*, 125 Wn.2d 378, 403, 886 P.2d 123 (1994).

Finding of Fact 2.1 states that "these offenses occurred over a several hour period of time and Count two also included assaults that had occurred repeatedly in the weeks prior." CP 252.

This finding of fact is beyond amply supported by the several hundred pages of transcript in which doctor after doctor testified as to the amount of damage that had been done to S.A.J. The State agrees that the victim in Count I and Count II was the same. The State does not agree that the criminal intent was the same for each of the injuries received by the victim. Some of the injuries sustained by the victim may have fallen under the general heading of "making the child stop crying." The State maintains that the defense is essentially arguing that since each of the injuries caused to the child were for the purpose of quieting the child, the intent was the same for all that happened to S.A.J. There was testimony from various doctors. that there were numerous bruises found on the victim. It would appear from the testimony and from the video confession of the defendant that he would often engage in attempts to quiet the child by conducting what a dispassionate observer would term "choking". Dr. Todd Ewert testified that the victim had multiple rib fractures in addition to the multiple forms of damage to the head that, combined with the smothering, essentially destroyed the bulk of the victim's brain. The victim is now permanently blind and will never be able to live a self-sustaining life. Her brain has been dissolved to what amounts to brain stem activity.

The defendant wishes to argue that the injuries to the victim occurred over a very short period of time, in fact, a few hours on one morning. The defense constructs this limited timeframe by the simple expedient of ignoring the large

quantity of injuries sustained by S.A.J. It would have been physically impossible to break the rib structure of a one-month old child, smother the child to the point of brain anoxia and leave the quantity of bruises on the victim [as were found by the physicians] in the short number of hours allowed by the defendant's argument. Even if the defendant had done nothing but focus on damaging his child, it would have taken many hours and days to complete the tasks.

The defendant argues that he had the same criminal intent for each of the multiple injuries caused in this case.

As for "time and place", it is difficult to see exactly how the defense determines when and where each and every injury occurred. If even one of the three elements for "same criminal conduct" is missing the defendant cannot prevail on his arguments.

The defendant also challenges Finding of Fact 2.2. This finding holds that the types of assaults occurring on April 5, 2010, were distinct and caused different types of harm. CP 252. The trial court also found that injuries for Finding of Fact 2.2 occurred over a several week period of time. CP 252.

Some of the testimony cited as supporting Count I also overlaps and supports Count II. The testimony of the physicians presented by the State formed a panoply of injuries sustained by the victim.

The defendant challenges the trial court's Conclusion of Law 3.1 which states that the actions of the defendant were not "same criminal conduct." CP 252.

The appellate court reviews a "same criminal conduct decision" for clear abuse of discretion or misapplication of the law. *State v. Elliott*, 114 Wn.2d 6, 785 P.2d 440 (1990). The trial court presented some of his thinking on this topic at sentencing. RP 1168-70.

The defendant has not shown that the trial court abused its discretion or misapplied the law. The defendant certainly disagrees with the trial court's decision, but the decision is very well supported.

Ultimately, these arguments make little difference in the outcome of the defendant's sentencing. The trial court volunteered that it would sentence the defendant to 30 years on just one count. RP 1174.

V.

CONCLUSION

For the reasons stated above, the State respectfully requests that the convictions and sentencing of the defendant be upheld.

Dated this 19th day of June, 2013.

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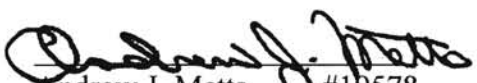
Prosecuting Attorney



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 31175-9-III
v.	)	
	)	CERTIFICATE OF MAILING
TYLER L. JAMISON,	)	
	)	
Appellant,	)	

I certify under penalty of perjury under the laws of the State of Washington, that on June 19, 2013, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

Jill Reuter
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and mailed a copy to:

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6/19/2013 (Date) Spokane, WA (Place) (Signature)