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STATE OF WASHINGTON
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NO. 37250-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

SEAN YOUNG, Appellant.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The sentencing court erred in failing to find that Young's convictions for first-degree assault and first-degree robbery merged for purposes of sentencing.
2. Young's convictions and sentences for assault and robbery violate the double jeopardy prohibitions.
3. The juvenile court exceeded its statutory authority by sentencing Young to full consecutive sentences on both offenses in violation of RCW 13.40.180.
4. Young's trial counsel was ineffective for failing to raise RCW 13.40.180 and remind the court that because the acts constituting assault formed an element of the robbery conviction, the sentence should be only one hundred and fifty percent of the most serious offense.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the acts constituting assault in the first degree elevated the robbery to first-degree robbery, did it violate double jeopardy

where the sentencing court entered judgment and consecutive sentences for the two convictions?

2. Did Young's assault one conviction constitute a "single act" forming an element of the robbery one conviction, within the meaning of RCW 13.40.180(1), requiring the court to impose only one hundred and fifty percent of the sentence for the most serious offense, rather than consecutive sentences?
3. Was Young's counsel ineffective for failing to argue that RCW 13.40.180(1) applied to this case?

III. STATEMENT OF THE CASE

On August 20, 2007, sixteen-year-old Sean Young was hanging out with his girlfriend and an older friend named Cody Fox when an acquaintance named Sean Curkendall walked by. RP 15, 25. One of the boys called out to Curkendall and he stopped to talk with them. RP 22.

According to Curkendall, as Curkendall let Young listen to his MP3 player, Fox suddenly punched Curkendall, knocking him down. RP 25. Curkendall testified that Fox and Young then continued to hit and kick him in his face and body, demanding that he let go of the MP3 player he was still holding. RP 26. Finally, Fox stepped on Curkendall's wrist and Young took the MP3 player. RP 27.

Young denied that he had taken part in the assault or the robbery. RP 150-51. Young said that Fox's assault on Curkendall took him by surprise and that he did not know Fox had taken the MP3 player until afterward. RP 150-51.

As a result of the assault, Curkendall's right eye was permanently injured and he now has decreased vision and has to wear a special contact lens to deal with extreme light sensitivity. RP 129.

Young was tried as a juvenile on charges of first degree assault and first degree robbery. CP 1-2. Following a bench trial, he was convicted on both charges. CP 33. He was sentenced to 103-129 weeks on each count, consecutive. CP 8, RP 12/20/07 10. This appeal timely follows.

IV. ARGUMENT

ISSUE 1: THE JUVENILE COURT VIOLATED DOUBLE JEOPARDY BY ENTERING JUDGMENT AND CONSECUTIVE SENTENCES FOR FIRST DEGREE ASSAULT AND FIRST DEGREE ROBBERY WHERE THE ASSAULT WAS REQUIRED TO ELEVATE THE ROBBERY TO FIRST DEGREE.

Young's conviction for first-degree assault should merge into his conviction for first-degree robbery.

The double jeopardy clauses of the State and Federal constitutions prevent the imposition of multiple punishments for the same offense. U.S. Const. Amend. 5; Const. art. 1, §9; *State v. Calle*, 125 Wn.2d 769, 772, 776, 888 P.2d 155 (1995). The protection is constitutional, but because

the legislature is free to define crimes and fix punishments as it will, “the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.” *Brown v. Ohio*, 432 U.S. 161, 165, 53 L.Ed.2d 187, 97 S. Ct. 2221 (1977).

Merger is a “doctrine of statutory interpretation used to determine whether the Legislature intended to impose multiple punishments for a single act which violates several statutory provisions.” *State v. Vladovic*, 99 Wn.2d 413, 419 n.2, 662 P.2d 853 (1983). The merger doctrine is limited to sentencing decisions. *State v. Michielli*, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997). The standard of review is de novo. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). A double jeopardy claim can be raised for the first time on appeal. RAP 2.5(a)(3), *State v. Zumwalt*, 119 Wn. App. 126, 82 P.3d 672 (2003).

Absent contrary legislative intent, an assault committed in furtherance of a robbery merges with the robbery. *Freeman*, 153 Wn.2d at 778. In this case, to prove first degree robbery as charged and argued by the State, the State had to prove and the judge had to find that Young committed an assault in furtherance of a robbery. The trial judge found that Young:

Committed ASSAULT IN THE FIRST DEGREE by unlawfully and feloniously, with intent to commit great bodily harm, did intentionally assault Sean Curkendall and thereby caused significant, permanent harm, loss, great bodily injury, and disfigurement. Further, the respondent committed ROBBERY IN THE FIRST DEGREE by unlawfully and feloniously taking personal property belonging to Sean Curkendall's; to wit: MP3 player; away from him and against his will, by use of force and the commission thereof, inflicted bodily injury upon Sean Curkendall.

CP 33.

Because the assault in this case was clearly in furtherance of the robbery, unless there is contrary legislative intent, Young's convictions must merge. In *State v. Freeman*, the State Supreme Court addressed "the question of whether the legislature intended to punish separately both a robbery elevated to first degree by assault and an assault itself." 153 Wn.2d at 771. The Court held that under the adult sentencing scheme, there was evidence that the legislature intended to punish first degree assault and first degree robbery separately because the legislature had given a longer sentence (111 months) to the lesser offense—assault one—and a shorter sentence (41 months) to the greater offense—robbery one.¹ *Freeman*, 153 Wn.2d at 775-76, 778. However, because this was not true in the adult sentencing grid for second-degree assault and first-degree robbery, those offenses were held to merge. 153 Wn.2d at 778.

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In both cases, to prove first degree robbery as charged and proved by the State had to prove the defendants committed an assault in furtherance of the robbery. *Compare* RCW 9A.56.200 (first degree robbery) with RCW 9A.36.011 (first degree assault). As charged and proved, without the conduct amounting to assault, each would be guilty of only second degree robbery. *Compare* RCW 9A.56.210, .190 (defining second degree robbery) *with* RCW 9A.56.200 (defining first degree robbery). Under the merger rule, assault committed in furtherance of a robbery merges with robbery and without contrary legislative intent or application of an exception, these crimes would merge. *[citation omitted]* However, as noted above, we do find some evidence that the legislature specifically did not intend that first degree assault merge into first degree robbery: the hard fact that the sentence for the putatively lesser crime of assault is significantly greater than the sentence for the putatively greater crime of robbery. We find this evidence persuasive. Accordingly, we conclude the merger doctrine applies to merge Zumwalt's first degree robbery and second degree assault convictions, but not Freeman's first degree assault and robbery convictions.

(Italics added.) *Freeman*, at 778.

Although the convictions in this case were first degree assault and first degree robbery, this case is distinguishable from *Freeman* and like *Zumwalt* because under the Juvenile Sentencing Act, the sentences for first degree assault and first degree robbery are equal. RCW 13.40.0357. Under the Juvenile Sentencing Act, both first degree robbery and first degree assault are A Category offenses. RCW 13.40.0357. Thus, on the grid, the sentence for both is the same—103-129 weeks. RCW 13.40.0357. Therefore, unlike the adult sentencing scheme, there is no

“hard fact” in the juvenile sentencing scheme to show the legislative intent that these offenses be punished separately.

Under *Freeman*, the two offenses in this case must merge absent contrary legislative intent. Because under the juvenile sentencing act, both offenses carry the same sentence, there is no evidence that the legislature specifically intended that these offenses be punished separately.

Therefore, the assault one conviction must merge into the robbery one conviction.

ISSUE 2: THE JUVENILE COURT ERRED BY SENTENCING YOUNG TO CONSECUTIVE SENTENCES WHEN YOUNG’S ASSAULT ONE CONVICTION CONSTITUTE A “SINGLE ACT” FORMING AN ELEMENT OF THE ROBBERY ONE CONVICTION, WITHIN THE MEANING OF RCW 13.40.180(1), REQUIRING THE COURT TO IMPOSE ONLY ONE HUNDRED AND FIFTY PERCENT OF THE SENTENCE FOR THE MOST SERIOUS OFFENSE.

Young was sentenced to two consecutive terms of 103-129 weeks on his assault one and robbery one convictions. RP 12/20/07 10, CP 8.

Defense counsel at sentencing asked the court to take into account

Young’s exemplary behavior in juvenile detention, but did not object to the court’s ultimate sentence. RP 12/20/07 6.

RCW 13.40.180 provides in relevant part:

Where a disposition is imposed on a youth for two or more offenses, the terms shall run consecutively, subject to the following limitations:

(1) Where the offenses were committed through a single act or omission, omission, *or through an act or omission which in itself constituted one of the offenses and*

also was an element of the other, the aggregate of all the terms shall not exceed one hundred fifty percent of the term imposed for the most serious offense; . . .

(Italics added.) The test for determining whether the phrase “single act or omission” should be applied to the facts of the case is the same as the test for “same course of conduct,” which is whether the objective intent remained the same. *State v. Contreras*, 124 Wn.2d 741, 880 P.2d 1000 (1994).

In this case, the assault “itself constituted one of the offenses and was also an element of the other,” the robbery. The objective intent for both was to get possession of the MP3 player—the assault was committed to force Curkendall to release the MP3 player he was holding. Therefore, it is clear that RCW 13.40.180(1) applied. Consequently, it was error for the court to impose consecutive sentences, rather than one hundred fifty percent of the greater offense, as RCW 13.40.180(1) requires.

The sentence in this case exceeded the statutory authority under RCW 13.40.180, which authorized consecutive sentences only where the exceptions listed in RCW 13.40.180(1) did not apply. It is clear on the face of this judgment that RCW 13.40.180(1) applies here. Therefore, imposing consecutive sentences was in error and the sentence must be reversed.

ISSUE 3: YOUNG WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS DEFENSE ATTORNEY FAILED TO BRING RCW 13.40.180 TO THE COURT'S ATTENTION AND ASK FOR A SENTENCE OF 150% OF THE GREATER SENTENCE, RATHER THAN CONSECUTIVE SENTENCES.

If the court finds that counsel's failure to object to the sentence below and raise RCW 13.40.180 has waived review of this issue, then Young's sentence should still be reversed due to ineffective assistance of counsel. It is clear that RCW 13.40.180(1) required a sentence lower than the two consecutive sentences imposed. However, Young's trial attorney never brought this issue to the attention of the court, nor did he object to the sentence imposed. This constituted ineffective assistance of counsel and therefore requires the reversal of the sentence and remand for re-sentencing with competent counsel.

The Sixth Amendment right of a criminal defendant to have a reasonably competent counsel is fundamental and helps ensure the fairness of our adversary process. *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). This fundamental right to effective counsel ensures that a defendant's conviction or sentence will not stand if it was brought about as a result of legal representation that fell below an objective standard of reasonableness. *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 1034, 145 L. Ed. 2d 985 (2000).

To prevail, the defendant must show that his attorney was “not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment” and that the errors were so serious as to deprive him of a fair trial. *In re Personal Restraint of Pirtle*, 136 Wn.2d 467,487, 965 P.2d 593 (1998) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The first element is met by showing counsel’s conduct fell below an objective standard of reasonableness. The second element is met by showing that, but for counsel’s unprofessional errors, there is a reasonable probability the outcome of the case would have been different. *Pirtle*, 136 Wn.2d at 487 (citing *In re Personal Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992)).

Counsel’s conduct fell below an objective standard of reasonableness in this case because he did not bring RCW 13.40.180(1) to the court’s attention, nor did he object to the consecutive sentences. If counsel had objected and alerted the court to the lower sentence required under RCW 13.40.180(1), there is more than a reasonable probability that Young would have been sentenced to a lesser sentence. Therefore, Young’s sentence must be reversed and remanded for re-sentencing.

V. CONCLUSION

Young's convictions and sentences for first degree assault and first degree robbery violate the prohibitions of double jeopardy because the assault elevated the robbery to first degree and therefore, the offenses should merge. Therefore, Young's sentences must be reversed and remanded for resentencing.

In the alternative, the Juvenile Sentencing Act requires the court to sentence Young to only 150% of the greater sentence where a single act is both one offense and an element of the other, as was the case here. Therefore, Young's sentence of the equal of 200% of the greater offense is in excess of the statutory authority and must be reversed. If the court deems this issue to have been waived by trial counsel's failure to object at sentencing, then the sentence must be reversed for ineffective assistance of counsel.

DATED: July 15, 2008

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CERTIFICATE OF SERVICE

I certify that on July 15, 2008, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

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