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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether imposition of sentence for first degree robbery and first degree assault violate double jeopardy when they do not constitute the same offense under the *Blockburger* test as each count contains an element of the crime that the other does not.
2. Whether the court may review whether Young's claim that his convictions for first degree robbery and first degree assault constitute the same criminal conduct when the issue was not raised and preserved in the trial court.
3. Whether Young has shown he received ineffective assistance of counsel when he alleges a single error of deficient performance and his failure to demonstrate a prejudicial effect on the outcome of his case.

B. STATEMENT OF THE CASE.

1. Procedure

On August 22, 2007, the Pierce County Prosecutor's Office charged SEAN SHAMUS YOUNG, with first degree assault (Count I) and first degree robbery (Count II) in Pierce County Juvenile Court cause

number 07-8-01424-9. CP 1-2. The case proceeded to trial November 28, 2007, in front of the Honorable Judge John A. McCarthy. RP 3¹.

A 3.5 hearing was held in the middle of trial on November 28, 2007, and the court determined Young's custodial statements were admissible with the State's case in chief. RP 76, 122. On November 29, 2008, the court found Young guilty of one count of first degree assault and one count of first degree robbery. RP 181. A sentencing hearing was held on December 20, 2007. SRP 1. The court sentenced Young to the standard range sentence of 103 to 129 weeks commitment to the Juvenile Rehabilitation Administration on each count to be served consecutively for a total of 206 weeks to 258 weeks with credit for 120 days time served. SRP 10; CP 7-14.

Young filed a timely notice of appeal. CP 19-28.

2. Facts

Around 6:30 p.m. on August 20, 2007, Sean Curkendall got off the bus from work and started walking home. RP 15-16. He took a shortcut along a trail behind the Labor Ready office listening to music on his MP3 player. RP 17-18. While doing this, Mr. Curkendall saw two boys and a girl drinking and smoking. RP 21-22, 32. They called out Mr. Curkendall's name; he paused but was in a hurry and decided to continue

¹ The verbatim record of proceedings shall be referred to as RP. The sentencing record of proceedings shall be referred to as SRP.

along the path home. RP 22. The two boys followed him and yelled for him to “wait up.” RP 22. Mr. Curkendall stopped and when the boys caught up they asked to listen his MP3 player. RP 22. At this point, Mr. Curkendall recognized one of the boys as Sean Young, as Young had asked to use his phone on a previous occasion. RP 23. Mr. Curkendall let Young listen to one headphone of the MP3 player, while the other boy, later identified as Cody Fox, listened to the other headphone. RP 24.

While listening to the music, Fox punched Mr. Curkendall in the jaw with his fist. RP 25. Mr. Curkendall stumbled back and then Young punched Mr. Curkendall in his left eye. RP 25. Mr. Curkendall fell to the ground and the two boys proceeded to violently kick and hit him in the head, ribs, and legs. RP 25. Mr. Curkendall tried to protect himself with his hands while the two boys hit away his hands and started kicking his head. RP 26. While yelling out for help, Mr. Curkendall continued to be punched and kicked by the boys. RP 26. The boys were demanding that Mr. Curkendall give up his MP3 player. RP 26.

After 20 minutes of continued beating, Fox stepped on Mr. Curkendall’s wrist while Young took the MP3 player. RP 27. Mr. Curkendall ran home bleeding and without shoes because they were ripped off in the attack. RP 27-28. Mr. Curkendall’s parents testified that when he got home, Mr. Curkendall was coughing up blood and fell on the patio because he could not see. RP 28, 89. Mr. Curkendall’s parents called 911 and took him to Madigan Army Medical Hospital. RP 92-93.

The next day, on his way home from a doctor's appointment, Mr. Curkendall saw Young and Fox walking on the street with the same girl they had been with the previous evening. RP 30. Mr. Curkendall's mother called 911 while his father went out and grabbed Young. RP 32. Officer Jeffrey Montgomery arrived at the scene and detained Young. RP 71-72. After learning about the situation, Officer Montgomery arrested Young and read him his *Miranda* rights. RP 76-77. Young denied doing any of the physical hitting during the assault the day before. RP 76-77.

Dr. William Raymond testified that the injury Mr. Curkendall received rendered him legally blind. RP 130, 133. He testified that Mr. Curkendall has extreme sensitivity to light and trouble with depth perception as a result of the trauma. RP 133, 135. To deal with the light sensitivity, Dr. Raymond testified that Mr. Curkendall is required to wear a thick contact lens for ten hours a day. RP 134-136. The damage to Mr. Curkendall's eye is irreparable. RP 134-136.

Young testified at trial that he never touched Mr. Curkendall. RP 151. He said that it was a surprise when Fox hit Mr. Curkendall and he just stood by shocked. RP 151. Young also denied ever taking the MP3 player and stated that he did not see it until Fox took it out of his pocket after the incident. RP 151.

C. ARGUMENT.

1. YOUNG'S SENTENCES FOR FIRST DEGREE ROBBERY AND FIRST DEGREE ASSAULT DO NOT VIOLATE DOUBLE JEOPARDY AS THEY DO NOT CONSTITUTE THE SAME OFFENSE UNDER THE **BLOCKBURGER** TEST; EACH CONTAINS AN ELEMENT THE OTHER DOES NOT.

The Washington State Constitution's double jeopardy clause provides the same protection as the federal Constitution. *In re Pers. Restraint of Borrero*, 161 Wn.2d. 532, 536, 167 P.3d 1106 (2007); see U.S.Const. amend. V; Wash. Const. art. I § 9. The State can bring and a jury can consider "multiple charges arising from the same criminal conduct in a single proceeding." *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). However, the double jeopardy principles bar multiple punishments for the same offense. *Borrero*, 161 Wn.2d at 536. "Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense." *Freeman*, 153 Wn.2d at 771.

Traditionally when there is an absence of clear legislative intent, courts turn to the *Blockburger* test to determine whether the two crimes constitute the "same offense" for double jeopardy purposes. *Freeman*, 153 Wn.2d at 772 (see *State v. Calle* 125 Wn.2d 769, 777-778, 888 P.2d 155 (1995); *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct.

180, 76 L. Ed. 306 (1932)). *Blockburger* states that if each crime contains an element that the other does not, the court should presume that the two crimes are not the same offense and do not violate double jeopardy. *Blockburger*, 284 U.S. at 304. In other words:

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 a fact which the other does not.

Blockburger, 284 U.S. at 304 [citations omitted].

By applying the *Blockburger* test to the elements of first degree robbery and first degree assault, it is clear that the crimes should not merge as they do not constitute the same offense and do not violate double jeopardy. To prove first degree assault, the State had to prove beyond a reasonable doubt that Young “with intent to inflict great bodily harm...assault[ed] [Mr. Curkendall] and inflict[ed] great bodily harm.” RCW 9A.36.011(1)(c). Intent to inflict great bodily harm must be shown as a separate element in the crime of first degree assault. *State v. Peter*, 63 Wn.2d 495, 387 P.2d 937 (1963). But in first degree robbery, intent to inflict bodily harm is not an element. *State v. McCorkle*, 88 Wn. App. 485, 501, 945 P.2d 736 (1997).

A person commits robbery when he “unlawfully takes personal property from the person of another or in his presence against his will.”

RCW 9A.56.190. First degree robbery requires something be taken from another person which is not required in first degree assault. First degree assault requires an intent to inflict bodily harm which is not required by first degree robbery. Based on this, a proper application of the ***Blockburger*** test would conclude that such offenses are not the same and may be punished separately.

Furthermore, appellant's reliance in distinguishing this case from ***State v. Freeman*** goes astray. Appellant contends that Young's crimes must merge because the court in ***Freeman*** found clear legislative intent existed to punish first degree robbery and first degree assault separately based on the differing adult sentencing guidelines. Because the juvenile sentencing guidelines punish first degree assault and first degree robbery the same, appellant deduced this was evidence of legislative intent that they be punished the same. Appellant's brief 5-7. But, the court in ***Freeman*** stated "since we are resolving these cases on other grounds, we will not take this opportunity to analyze these cases in light of ***Blockburger***." ***Freeman***, 153 Wn.2d at 777. As such, this case should be analyzed using the ***Blockburger*** test to determine legislative intent before relying on assumptions supported by weak comparisons.

2. YOUNG DID NOT PRESERVE HIS ISSUE REGARDING SAME CRIMINAL CONDUCT IN THE TRIAL COURT; THIS ISSUE IS NOT REVIEWABLE ON APPEAL.

The sentencing guidelines for juveniles convicted of two or more offenses requires that the terms run consecutively unless:

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.

RCW 13.40.180(1).

There is little case authority regarding this statute; the most prominent case on point is *State v. Contreras*, 124 Wn.2d 741, 880 P.2d 1000 (1994). In that case, the Supreme Court held that the same analysis used in the Sentencing Reform Act(SRA) concerning whether multiple offenses constitute the “same criminal conduct” should be used in construing RCW 13.40.180(1) and 13.40.020(6)(a) in the Juvenile Justice Act concerning how multiple offenses should be sentenced. *Id.* at 748. Under the SRA, multiple offenses constitute the “same course of conduct” if they contain “the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.400(1)(a).

An appellate court does not review issues on appeal that were not raised in the trial court, absent manifest errors concerning a constitutional

right. RAP 2.5(a)(3). Whether multiple offenses constitute the same criminal conduct is an issue reviewed under an abuse of discretion standard. *State v. Nitsch*, 100 Wn. App. 512, 521, 997 P.2d 1000, review denied, 141 Wn.2d 1030 (2000). The determination of whether two crimes constitute the same criminal conduct involves both factual determinations and an exercise of discretion. *In Re Goodwin*, 146 Wn.2d 861, 875, 50 P.3d 618 (2002)(citing *Nitsch*). The Supreme Court has held a defendant who fails to identify a factual dispute for the court's resolution and fails to request an exercise of the court's discretion waives his right to appeal such an issue. *Goodwin*, 146 Wn.2d at 875. The courts have reasoned that "trial courts should not be required, without invitation, to identify the presence or absence of an issue and rule thereon." *Nitsch* at 525. In the present case, Young failed to raise the issue of whether his two offenses constituted the same criminal conduct in the trial court and get a factual determination on this claim. As such, he has failed to properly preserve this issue for appeal.

3. YOUNG RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE ALLEGED ERROR IS A SINGULAR INCIDENT AND NOT SO PREJUDICIAL AS TO AFFECT THE OUTCOME OF TRIAL.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred.

Id. “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney’s performance was deficient, and (2) that he or she was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there

is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (C.A. 9, 1995).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. *Id.* An appellate court is unlikely to find ineffective

assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that defendant did not receive effective assistance of counsel. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). In determining whether trial counsel's performance was deficient, the actions of counsel are examined based on the entire record. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994).

In reviewing the entire record, the failure to raise a single issue does not constitute ineffective assistance of counsel. Whether counsel's actions constitute an error of such a magnitude as to require reversal of defendant's convictions is determined by cumulative errors in the representation overall. A single alleged mistake does not rise to the level requiring reversal. When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must

demonstrate not only that the legal grounds for such a motion or objection was meritorious, but also that the verdict would have been different if the motion or objections had been granted. *Kimmelman*, 447 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990).

Defendant fails to show that the trial court would have found Young's convictions constitute the "same criminal conduct" had this issue been raised below. The two crimes have different objective intents. The objective intent in robbing someone is to take something of value belonging to another person. The objective intent in assaulting someone is to harm that person or put them in fear of harm. The present case is analogous to *Nitsche* where the court found, in dicta, Nitsche's objective intents in burglarizing and assaulting someone were different. *Nitsch* at 525-526. When the outcome of the issue is uncertain, as it is here, defendant cannot argue that raising such an issue would have altered the outcome of trial as required by *Strickland*.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions and sentence.

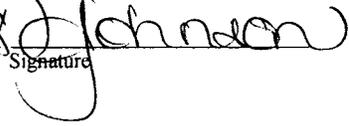
DATED: OCTOBER 15, 2008

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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