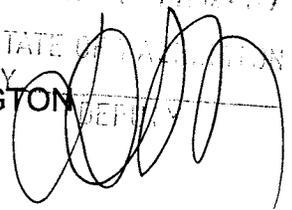


COURT OF APPEALS
DIVISION II

NO. 38429-9-II

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STATE OF WASHINGTON
BY 

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JAMES KOCH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR CLALLAM COUNTY

BRIEF OF APPELLANT

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A. INTRODUCTION

Police and emergency personnel were summoned to the Port Angeles home of Lloyd Koch, and 84 year old man, who, following his wife's death, had shared his home with his adult daughter, Rose Gloyd, for several years. In addition Lloyd's son James Koch lived in the home periodically.¹ Additionally, a second daughter, Shirley Kreaman, lived a few blocks away and was actively involved in her father's care. Ms. Kreaman and Ms. Gloyd, detailed their father's history of neglecting his own personal hygiene and medical needs, and refusing the assistance of others.

In October 2007, police and emergency personnel were called to Lloyd's home and found and found him sitting in a chair. Lloyd was badly dehydrated, his clothes were urine soaked, he had repeatedly defecated on himself, had pressure sores on his back, and had several maggots between his toes. Lloyd was taken to the hospital where he died when aggressive rehydration essentially overwhelmed his heart's ability to pump.

Largely because it could not find anyone else whom to blame for the tragic circumstances of Lloyd's death, the State charged James, and James alone, with first degree criminal

¹ Because Lloyd and James share the same last name they will be referred to by their first names. No disrespect is intended.

mistreatment and first degree manslaughter. The State claimed James, but not his sisters, had a legal duty to provide the basic necessities of life to his father. Thus, the State contended Lloyd's death was a result of James's failure to meet that duty and constituted manslaughter.

However, because James had no statutory or legal duty to act, his failure to act cannot support a conviction of either manslaughter or criminal mistreatment. Moral outrage at the tragic circumstances surrounding Lloyd's death does not equate to proof of a failure to meet a legal duty. At the end of the day, the State's case never rose beyond moral outrage. James' conviction must be reversed and dismissed.

B. ASSIGNMENTS OF ERROR

1. The State did not prove each of the elements of second degree manslaughter beyond a reasonable doubt.

2. The State did not prove each of the elements of first degree criminal mistreatment beyond a reasonable doubt.

3. In the absence of substantial evidence to support each of the charged alternatives, James's conviction of first degree criminal mistreatment violated his right to a unanimous jury.

4. James's convictions of both criminal mistreatment and second degree manslaughter violate the Double Jeopardy Clause of the Fifth Amendment to the United States constitution.

5. The trial court erred and denied James his Sixth Amendment right to a present a defense when it refused to provide the jury the Defense Proposed Instruction which stated:

It is unlawful to use physical force or [sic] upon another person absent that person's consent, even if the actor's purpose is to provide the basic necessities of life.²

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fourteenth Amendment Due Process Clause requires that before a person may be convicted of an offense the state must prove each element of a crime beyond a reasonable doubt.

Generally a manslaughter conviction may not be predicated upon a failure to act. Where, however, a person has legal duty to act and their failure to act results in another's death, the person may be convicted of manslaughter. Here the State alleged James had the duty to provide the basic necessities of life to Lloyd under the provisions of the criminal mistreatment statute, RCW 9A.42.021. In the absence of proof that James had committed the crime of first

² Because the proposed instruction is not numbered counsel cannot comply with the provision of RAP 10.3(g), and has instead provided the full language of the instruction.

degree criminal mistreatment, did the court err in entering convictions of criminal mistreatment and manslaughter?

2. The right to a unanimous jury requires the State offer substantial evidence to support each alternative means on which the jury is charged. The court instructed the jury that to convict James of first degree criminal mistreatment it was required to find he was (1) entrusted with the physical custody of a dependent person; (2) a person who had assumed the responsibility to provide to a dependent person the basic necessities of life, or (3) a person employed to provide a dependent person the basic necessities of life. Where the State did not offer substantial evidence to support either the first or third alternatives, was James denied his right to a unanimous jury?

3. The double jeopardy clauses of the federal and state constitutions protect against multiple prosecutions and multiple punishments for the same offense; offenses which are the same in law and fact. Where James's conviction for second degree manslaughter and first degree criminal mistreatment are the same in law and fact, do his convictions for both crimes violate the Double Jeopardy Clause of the Fifth Amendment?

4. The Sixth Amendment of the United States Constitution guarantees a person the right to present a defense. That right, together with the due process right to jury instructions that accurately state the law, require a court instruct the jury in a manner which allows the defendant to present his defense so long as the instruction is factually supported and accurately states the law. In order to convict James of either charge the jury had to find he had the duty to act. Where the court refused to provide an instruction which accurately stated the law regarding the provision of unwanted medical care, and where that instruction was necessary for James's defense that he did not have a duty to intervene, did the court deny him his rights to present a defense and to a fair trial?

D. STATEMENT OF CASE

It is undisputed that the circumstances of Lloyd's death were tragic. The testimony of medical personal detailed the conditions in which he lived his last few days and died. See, 8/27/08 RP 62-74 (Port Angeles Fire Department paramedic Dan Montana); 8/27/08 RP 101-11 (testimony of emergency room nurse Kari Dankert).

But it was equally undisputed by Lloyd's children that he had long refused their intervention. Ms. Kreaman, called as witness be

the State, provided a detailed history of Lloyd's refusal of medical and personal assistance. 8/28/08 RP 40 (Lloyd's refusal to bathe in the tub, insisting instead upon sponge bath); 8/28/08 RP 42 (Lloyd very secretive about when and if he took medication); 8/28/08 RP 53 (witness contacted Adult Protective Services because of Lloyd's refusal to accept care); 8/28/08 RP 54-55 (Lloyd demanded that home healthcare nurse leave); 8/28/08 55 (Lloyd refused to stay in nursing home). In fact, Ms. Kreaman called Adult Protective Services in August 2007, because her father was refusing assistance from his children and she was concerned James and Ms. Gloyd would be implicated if he died. 8/28/08 RP 53. Ms. Kreaman's fears were well-founded.

The State charged James, but neither of his sisters, with first degree criminal mistreatment and first degree manslaughter. CP 110. A jury convicted James of first degree criminal mistreatment and second degree manslaughter, having been unable to reach a verdict on first degree manslaughter. C52, 55-56.

E. ARGUMENT

1. IN THE ABSENCE OF ANY EVIDENCE THAT JAMES HAD A LEGAL DUTY TO ACT, HIS FAILURE TO ACT CANNOT SUPPORT A CONVICTION OF SECOND DEGREE MANSLAUGHTER OR FIRST DEGREE CRIMINAL MISTREATMENT

a. The State was required to prove the elements of the offense beyond a reasonable doubt. In a criminal prosecution, the Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Evidence is sufficient only if, in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

b. The State failed to offer sufficient evidence to sustain either the manslaughter or criminal mistreatment conviction. To convict a person of first degree manslaughter the State must prove “He recklessly causes the death of another person.” RCW 9A.32.060. To establish second degree manslaughter the State

had to prove Mr. Koch acted with criminal negligence and thereby caused the death of another person. RCW 9A.32.070.

The State never contended James committed any act which caused his father's death. Instead, the premise of the State's case was that James had a duty to act under the criminal mistreatment statute and his failure to do so established he negligently failed to meet a duty of care for his father. Thus, court instructed the jury that to convict James of manslaughter, "the jury had to find he withheld the basic necessities of life" from Lloyd. CP 69, 76 (Instructions 10 and 17).³ But the State's theory that a duty existed was driven more by the tragic circumstances surrounding Lloyd's death rather than any legal duty on James' behalf: the State theorized that because the circumstances leading to Lloyd's death might be shocking to many, someone must have had a duty to intervene.

James did not have a statutory duty to his father. There is no statute or Washington case establishing a child has a legal duty

³ The instructions for both first and second degree manslaughter contained the identical language, thus it does not matter that the jury was unable to agree on the greater charge and convicted James of only the lesser offense. Because the State did not present sufficient evidence that James had a duty to do so, his failure to act does not support any degree of manslaughter.

of care for their parent. Instead, the State contended the duty was created by virtue of the criminal mistreatment statute.

That statute provides:

A parent of a child, the person entrusted with the physical custody of a child or dependent person, a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or a person employed to provide to the child or dependent person the basic necessities of life is guilty of criminal mistreatment in the first degree if he or she recklessly, as defined in RCW 9A.08.010, causes great bodily harm to a child or dependent person by withholding any of the basic necessities of life.

RCW 9A.42.020. The State did not prove James had a duty act under any of the four alternatives. By failing to offer such proof, the State failed to prove either criminal mistreatment or manslaughter.

First, James obviously was not his father's parent.

Second, James was not entrusted with "physical custody" of his father. The term "physical custody" is not defined in the mistreatment statute or in any other statute. Where a term is undefined by statute, a court must give the word its ordinary meaning. State v. Argueta, 107 Wn.App. 532, 536, 27 P.2d 242 (2001). In doing so the Court may rely on the dictionary definition of the term. Id. at 537. The common understanding of "custody" is some legal control or restraint of another's actions. Black's Law

Dictionary defines “custody” as “the care and control of a thing or person for inspection, preservation or security.” Black’s Law Dictionary, p390 (7th Ed., 1999). “Physical custody” is defined as “custody of a person (such as an arrestee) whose freedom is directly controlled or limited.” Id. There was no evidence that James exercised any control or limitation of his father’s freedoms. That fact is reflected in the jury’s verdict finding that James did not abuse a position of trust or a fiduciary duty. CP 54. Ms. Kreaman testified that Lloyd never gave anyone the legal authority to make health-care decisions on his behalf. 8/28/08 RP 73 There was no evidence that James had custody of his father.

Third, James had not “assumed the responsibility to provide to a dependent person the basic necessities of life.” Importantly, at common law a person was not under any legal duty to assist another, with the exception of one’s minor children. State v. Morgan, 86 Wn.App. 74, 82, 936 P.2d 20 (1997) (Schulteis, J. concurring) (citing inter alia, In re Hudson, 13 Wn.2d 673, 126 P.2d 765 (1942)); see also, State v. Lisa, 919 A.2d 145 (N.J. Super. 2007) (concluding New Jersey statute seeking to criminalize failure to act to protect a person was vague as there was not clearly a common law duty to so). In the area of tort liability, Washington

courts have repeatedly held there is no duty to act on behalf of a third party absent a special relationship. See Folsom v. Burger King, 135 Wn.2d 658, 674-75, 958 301 (1998) (citing Restatement (Second) of Torts, §§314A-314B (1965)). Among the “special relationships” recognized by the Restatement and Washington Courts is one in which an “individual voluntarily control[s] another such that opportunities for protection are removed.” Folsom, 135 Wn.2d at 674, n.1.

As discussed previously, James did not exercise either legal or physical control over his father. Nor had James removed his father from opportunities for other protections. The record establishes that Lloyd regularly received meals from “Meals on Wheels.” The record establishes two of James’s sisters were regularly involved in their father’s care. See e.g., 8/28/08 RP 34-53 (Ms. Kreaman testifies regarding the efforts she and her siblings made to provide for Lloyd). The record establishes James was absent from the home on prior occasions due to incarceration. 8/28/08 38. The record establishes Ms. Kreaman called Adult Protective Services in August 2007, because her father was refusing assistance from his children and she was concerned James and Ms. Gloyd would be implicated if he died. 8/28/08 RP

53. The establishes that Adult Protective Services visited Lloyd and asked James' sister Rose Gloyd to act as his primary provider, to which Ms. Gloyd agreed. The record establishes Ms. Gloyd was living in the home at the time of Lloyd's death. The record established that Lloyd regularly told visitors to leave. 8/28/08 RP 54-55. The record establishes Ms. Kreaman's name was on one of Lloyd's two bank accounts and lived only a few blocks from Lloyd's home. 8/28/08 RP 17. The record establishes none of Lloyd's children could unilaterally make a decision for their father which he opposed. 8/28/08 RP 74. Ms. Kreaman testified Lloyd had never provided legal authority to any of his children to make health-care decisions. Id. at 73. Finally, Ms. Kreaman testified that Adult Protective Services had encouraged her to obtain a "power of attorney" to make decisions on Lloyd's behalf, but she failed to follow through on that recommendation. 8/28/08 RP 67. There is no evidence that James had placed his father in a position in which James alone controlled Lloyd's actions and in which James alone could protect Lloyd. Thus, no "special relationship" existed.

In Morgan the court affirmed the manslaughter conviction of a man who failed to summon aid for his wife. The evidence in Morgan established the man injected his wife with an "easily fatal

amount” of cocaine and then failed to summon aid, and instead took a shower, when she began experiencing seizures. 86 Wn.App. at 76-77. In recognizing a spousal duty of care, Morgan relied upon the statutory duty of spousal support. 86 Wn.App. at 80 (citing RCW 26.20.035). There is no similar statute mandating a child’s support of his parent.

Morgan also found a duty to summon aid for someone where the defendant created or increased the risk of injury to another. Here, James did not create the risk of injury; he did not cause his father’s diabetes or heart condition. At worst, James failed to respond to the elevating danger confronting his father. But where he did not cause the injury, no duty was violated by the failure to summon aid.

Merely living with another legally competent adult cannot create a duty of care to that person. Morgan implicitly recognized as much when it looked not to cohabitation but the spousal support statute and the creation of the risk of injury to find a duty to summon aid.

Lloyd was not incompetent and he had no legal guardian. Lloyd had the ability and the constitutionally protected right to refuse medical aid. In re the Welfare of Colyer, 99 Wn.2d 114, 121-

22, 660 P.2d 738 (1983), see also, McNabb v. Dep't of Corrections, 163 Wn.2d 393, 400-01, 180 P.3d 1257 (2008). Unwanted medical treatment has long been deemed an assault in Washington. Colyer, 99 Wn.2d at 121 (citing Physician's & Dentists' Business Bur. v. Dray, 8 Wash.2d 38, 111 P.2d 568 (1941)). Ms. Kreaman, the State's witness, provided a detailed history of Lloyd refusal medical and personal assistance. James did not and could not have a duty to force his father to accept unwanted medical care. Thus, James' failure to do so cannot support his manslaughter conviction. James had not assumed responsibility for the care of his father.

Finally, James was not employed to provide care to his father. RCW 9A.42.010(5) provides a person is "employed" where they are "hired" to provide care whether they are paid or not. A person is hired when they are retained to provide a service in return for compensation. Because the statute directs that compensation need not be monetary, the only remaining benefit the State could identify was the fact that James lived in the house. There was no indication of an agreement between James and his father for compensation of any sort in return for acting as a care provider. While James lived in his father's home, so too did his adult sister.

Moreover, Ms. Gloyd had actually agreed to a request by Adult Protective Services to provide for her father if necessary. Yet the State never alleged Ms. Gloyd was employed as her father's care provider. The State did not prove James was employed to care for his father.

At the end the State argued James was responsible for Lloyd's care because no other person was presently available. That contention flies in the face of the testimony of the State's own witness, Ms. Kreaman, that Adult Protective Services had encouraged *her* to seek power of attorney. 8/28/08 RP 67. Even if the State's theory were factually correct, the Restatement does not adopt, and no Washington court has endorsed, a duty by default.

James did not have a legal duty to summon aid for his father. Thus, his failure to do so cannot support a conviction of manslaughter of any degree. Morgan, 86 Wn.App at 81. In addition James is not guilty of criminal mistreatment.

c. This Court must reverse and dismiss the charges.

The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. Jackson, 443 U.S. at 319; State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The Fifth Amendment's Double Jeopardy Clause bars retrial of a

case, such as this, where the State fails to prove an element.

North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). Because the State failed to prove James committed either manslaughter in any degree or first degree criminal mistreatment the Court must reverse his convictions and dismiss the charges.

2. BECAUSE THE STATE DID NOT PRESENT SUFFICIENT EVIDENCE TO PROVE EACH OF THE CHARGED ALTERNATIVES OF FIRST DEGREE CRIMINAL MISTREATMENT, JAMES WAS DENIED HIS RIGHT TO A UNANIMOUS JURY.

A defendant in a criminal case has a constitutional right to a conviction only by a jury which unanimously agrees that the crime charged has been committed beyond a reasonable doubt. Const. art 1, § 22; State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984) The right to jury unanimity may be violated where an elements instruction describes separate crimes or where an elements instruction describes separate means of committing a single crime. State v. Stephenson, 89 Wn.App. 217, 222, 948 P.2d 1321 (1997). In certain situations, an accused person has the right to express

unanimity on the means by which he is alleged to have committed a crime. State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994).

The threshold test governing whether unanimity is required on an underlying means of committing a crime is whether sufficient evidence exists to support each of the alternative means presented to the jury. If the evidence is *sufficient* to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction because we infer that the jury rested its decision on a unanimous finding as to the means. On the other hand, if the evidence is *insufficient* to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed.

Id. at 707-08 (citations omitted, emphasis in original).

By way of example, Washington courts have found alternative means were created (1) where the defendant could have committed first-degree murder that was (a) premeditated or (b) done in the course of the commission of robbery, i.e., felony murder; State v. Fortune, 128 Wn.2d 464, 471, 909 P.2d 930 (1996); (2) where the defendant was alleged to have committed rape in the first degree (a) by kidnapping or (b) with a deadly weapon; State v. Whitney, 108 Wn.2d 506, 510-11, 739 P.2d 1150 (1987); and (3) where the legislature defined theft as (a) by taking;

(b) by embezzlement; (c) by color or aid of deception; (d) by appropriating lost or misdelivered property or services; Stephenson, 89 Wn.App. at 223.

The Legislature has also created alternative means for committing the offense of first degree mistreatment. The State must prove the person was (1) a child's parent; (2) entrusted with the physical custody of a child or dependent person; (3) a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or (4) a person employed to provide to the child or dependent person the basic necessities of life. RCW 9A.42.020. The court instructed the jury on the last three of these alternative means. CP 80.

Without repeating the discussion of the insufficiency of the State's evidence to establish the crime of criminal mistreatment, assuming the State offered sufficient evidence to prove that James assumed responsibility for Lloyd's care, there is not substantial evidence to establish either that James had "physical custody" or that he had been "hired" to provide care to his father.

Rather than establish legal custody of Lloyd, the record establishes that none of his children possessed such control, that none of his children sought such legal authority, and that Lloyd had

never provided such authority on his own. In fact the only evidence of such legal process was the testimony that Ms. Gloyd had agreed to Adult Protective Services's request that she act as Lloyd's primary provider, and the testimony of Ms. Kreaman that she contacted Adult Protective Services and had discussed but did not pursue obtaining power of attorney. While there was evidence that James's name appeared along with his father's on a checking account, there was a similar joint account bearing Ms. Kreaman's name. While James lived in his father's home, so too did his sister Ms. Gloyd. There is no evidence that James exercised any legal or physical control of Lloyd.

In addition, there is no evidence James was "employed" to provide the basic necessities of life to his father. There is no record that James received any compensation to provide for his father. To the extent living in his father's home could be compensation, the same must have been true of Ms. Gloyd. But the State never alleged Ms. Gloyd had a duty to act.

The State did not provide substantial evidence of all three charged alternatives and James was denied his right to a unanimous jury.

3. BECAUSE IT VIOLATES DOUBLE
JEOPARDY, JAMES'S CONVICTION OF
FIRST DEGREE CRIMINAL MISTREATMENT
MUST BE VACATED

a. A single act cannot give rise to multiple

punishment absent a clear statement of legislative intent. The double jeopardy clauses of the state and federal constitutions protect against multiple prosecutions for the same conduct and multiple punishments for the same offense. U.S. Const. amend. V; Const. art. I, § 9; Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); United States v. Dixon, 509 U.S. 688, 696, 113 S.Ct. 2349, 125 L.Ed.2d 556 (1993). A conviction and sentence will violate the constitutional prohibition against double jeopardy if, under the "same evidence" test, the two crimes are the same in law and fact. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). If two convictions violate double jeopardy protections, the remedy is to vacate the conviction for the crime that forms part of the proof of the other. State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005).

Washington's "same evidence" test mirrors the federal "same evidence" test adopted in Blockburger. In re the Personal

Restraint Petition of Orange, 152 Wn.2d 795, 816, 100 P.3d 291

(2004); Adel, 136 Wn.2d at 632.

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, 284 U.S. at 304 (emphasis added).

The fact that each statute at issue contains an element not found in the other is irrelevant, as Blockburger requires “proof of an additional fact which the other does not.” Id.; compare State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983) (concluding a double jeopardy violation does not occur if there is an element in each offense not included in the other and proof of one does not necessarily prove the other). The incorrectness of the conclusion in Vladovic is illustrated by a series of United States Supreme Court’s decisions.

In Harris v. Oklahoma, the Court concluded convictions of both felony murder with the predicate crime of robbery and of the substantive crime of robbery violated the Double Jeopardy Clause even though the felony murder statute on its face did not require proof of robbery. 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054

(1977). In Illinois v. Vitale, the Court concluded the Double Jeopardy Clause would be violated if the state's proof of manslaughter required proof of the misdemeanor crime of failure to slow to avoid accident of which the defendant had already been convicted. 447 U.S. 410, 420-21, 100 S.Ct. 2267, 65 L.Ed.2d 228 (1980). In Dixon, the Court found that pursuant to the Blockburger test, a defendant could not be convicted of both contempt for violating conditions of release by possessing drugs, and of the substantive offense of possession of drugs, even though the defendant could commit contempt without possessing drugs. 509 U.S. at 698. Thus, in making the determination of whether proof of one offense establishes another, the inquiry must focus on the offenses as they are charged and prosecuted in a given case, and not on the statutory language of the involved offenses as Vladovic and other Washington cases suggest. Put another way, that it is possible under different circumstances to commit one of the offenses without committing the other is simply not relevant to the inquiry.

Freeman endorsed a case-by-case approach to assess whether two crimes violate double jeopardy prohibitions as they are charged and prosecuted in a particular instance. 153 Wn.2d at

773-79. The court set forth the following analysis: (1) Do the statutes authorize separate punishments? (2) Are the two crimes, as charged and proved, the same in law and fact? (3) Do the crimes merge? (4) Did the commission of the “included” crime have an independent purpose or effect from the other crime? Id.

To the extent that it authorizes courts to find no double jeopardy bar to multiple punishments where legislative intent is ambiguous, however, the Freeman test is directly contrary to federal precedent. See Dixon, 509 U.S. at 699; Whalen v. United States, 445 U.S. 684, 692, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). To withstand a double jeopardy challenge, the federal cases require an express statement of legislative intent for separate punishments. Whalen, 445 U.S. at 691-92.⁴ The United States Supreme Court has said the Blockburger test is simply “a rule of statutory construction” which seeks to determine the legislative intent. Albernez v. United States, 450 U.S. 333, 340, 102 S.Ct. 1137, 67 L.Ed.2d 275 (1981).

If there is doubt as to the legislative intent for multiple punishments,

⁴ An example of an express statement of intent for separate punishments may be found where the Legislature has authorized courts to punish a burglary separately from any other crime committed incidentally to the burglary. RCW 9A.52.050. Another example can be found in RCW 9A.41.042(6) which expressly permit’s convictions for both unlawful possession of a firearm and theft of the same firearm and requires consecutive sentences.

principals of lenity require the interpretation most favorable to the defendant. Whalen, 445 U.S. at 694.

Freeman concluded that in the absence of express legislative intent for multiple punishment, the fact that the constituent crime has a greater punishment suggests the legislature intended separate offenses. 153 Wn.2d at 775-76. But the United States Supreme Court's decisions do not permit such supposition, instead requiring an express intent for multiple punishment and requiring ambiguity be resolved against multiple punishments. Whalen, 445 U.S. at 692-94. In the absence of an express legislative intent for multiple punishments, whether one crime has a lesser or greater punishment is irrelevant and does not overcome the constitutional presumption against the imposition of multiple punishments.

b. James's convictions of both criminal mistreatment and manslaughter violate the double jeopardy protections of the State and Federal Constitutions. The scenario presented here mirrors that in Harris, where the Court concluded a person could not be convicted of both felony murder and the predicate offense. 433 U.S. at 682. Here the State could not prove manslaughter unless it could establish James had violated his duty under the

criminal mistreatment statute; a “felony manslaughter” of sorts.

Just as in Harris, James could not be guilty of the homicide as well as the predicate crime.

Recognizing this, the trial court stated the counts were “one and the same and the two charges merge.” 102/08 RP 10. The State too agreed at sentencing the offenses “merged for sentencing purposes.” 10/6/08 RP 14. The Judgment and Sentence, however, lists both convictions, and merely treats them as same criminal conduct. CP9.

Under Dixon, Harris and State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007), James’s multiple convictions for manslaughter as well as criminal mistreatment violated constitutional prohibitions against double jeopardy. Womac provides that the violation is no less real merely because the trial court only sentenced the James on a single count after, concluding the mistreatment charge constituted the same criminal conduct

In fact, Womac involved identical circumstances. In Womac, the defendant was convicted of homicide by abuse, second degree felony murder, and first degree assault. Womac, 160 Wn.2d at 647. The trial court found all three crimes were the same criminal conduct, imposed sentence on only one offense, but allowed all

three convictions to remain on Womac's record. Id. at 648, 654. The Supreme Court reversed and remanded with direction that the other two convictions be vacated: "Womac remains exposed to danger as three separate convictions (arising from a single offense) remain on his record after the trial court determined that sentencing on all three would violate double jeopardy." Id. at 651. The Court explained, "The State may bring (and a jury may consider) multiple charges arising from the same criminal conduct in a single proceeding. Courts may not, however, enter multiple convictions for the same offense without offending double jeopardy." Id. at 658 (internal citations omitted, emphasis in original).

Under Womac, James is entitled to have his sentence reversed and the matter remanded so the conviction for first degree criminal mistreatment may be vacated.

4. THE COURT DENIED JAMES OF HIS RIGHT TO A FAIR TRIAL AND HIS RIGHT TO PRESENT A DEFENSE WHEN IT REFUSED TO INSTRUCT THAT PROVIDING UNWANTED MEDICAL ASSISTANCE TO AN ADULT CONSTITUTES AN ASSAULT

a. James's right to present a defense and a fair trial required the court to fully instructed on the applicable law. An accused person has a due process right to have the jury accurately

instructed on his theory of defense, provided the instruction is supported by the evidence and accurately states the law. U.S. Const. amends. V, VI, XIV; California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); Winship, 397 U.S. at 364. If these prerequisites are met, it is reversible error to refuse to give a defense-proposed instruction. State v. Agers, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

b. Although recognizing it properly stated the law, the court refused to James proposed instruction regarding a person's right to refuse care. James asked the court to instruct the jury that

It is unlawful to use physical force or [sic] upon another person absent that person's consent, even if the actor's purpose is to provide the basic necessities of life.

CP 51 (citing Colyer, 99 Wn.2d 114). The court refused, stating the instruction was "an incomplete statement of what is a very complex law in this case." 9/4/08 RP 8.

The instruction was not incomplete. The instruction accurately sets forth what has long been the law in Washington: that unwanted medical treatment constitutes an assault. Colyer, 99 Wn.2d at 121 (citing Physician's & Dentists' Business Bur., 8

Wash.2d 38). While refusing the instruction, the court acknowledged

I think you can certainly argue from just common sense that to the extent Lloyd Koch was his own decision maker that you can't use force to override his decision, that would be in accordance with the law and certainly the issue of who was responsible for his care may well have been him.

Thus, the Court understood that unwanted contact, even if it involved the basic necessities of life, could be an assault under the law. The court was wrong, however, in concluding that even in the absence of an instruction, defense counsel could make such an argument.

The jury was instructed "You must apply the law from my instruction to the facts that you decide have been proved, and in this way decide the case." CP 58. The jury was instructed further "The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP 59. In the absence of an instruction that defined the legal limits of intervention, defense counsel could not meaningfully present such an argument.

The evidence established that Lloyd had long been resistant to the assistance of his family and others. Yet the State argued to

the jury that James had a duty to ignore what his father had long voiced merely because his father was no longer able to make his wishes known: "at the time he was in the chair he was not even able to talk any more, not even able to make his wishes known."

9/4/08 RP 71. From that silence, the State argued James had not only the right but the duty to intervene.

As the trial court recognized, simply because a person reaches an age at which they can no longer actively voice their opposition does not mean the assistance is now welcome. Silence is not consent. The proposed instruction made it clear that if intervention was unwanted it was an assault to intervene; that a touching is no less offensive merely because the person is unable to say so. At a minimum the instruction would have required the jury to determine whether the Lloyd wanted intervention, rather than to simply assume he wanted aid from his from his silence. The instruction was an accurate and necessary statement of the law.

The court was also incorrect to refuse the instruction on the basis that the law defining the legal right or duty to intervene was complex. The complexity of a legal question cannot be a basis to refuse to provide clarity and guidance to a jury. Indeed, the opposite must be true. The instruction was necessary to ensure

the jury fully understood the interplay of the rights and obligations of the involved parties.

c. The Court must reverse James's conviction. A constitutionally error is presumptively prejudicial and requires reversal unless the State can establish beyond a reasonable doubt the jury would have reached the same verdict without the error. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The instruction here addressed the critical issue in the case: whether James had either a right or duty to act. If James did not have the legal right to intervene without risk of committing a crime he could not have had the legal duty to intervene. The proposed instruction provided contrary legal authority to the State's assumption that silence required intervention. Indeed, the instruction undercut that core assumption. The failure to provide the instruction deprived James of a fair trial and of his right to present a defense. The State cannot prove beyond a reasonable doubt that the error was harmless.

F. CONCLUSION

Because the State did not prove either of the two charges beyond a reasonable doubt, this Court must reverse both

convictions. Alternatively the Court must reverse both convictions in light of the trial court's refusal to properly instruct the jury and due to the lack of jury unanimity on the criminal mistreatment conviction. Finally, James cannot be convicted of both manslaughter and criminal mistreatment.

Respectfully submitted this 6th day of May, 2009.

A handwritten signature in black ink, appearing to read "Gregory C. Link", written over a horizontal line.

GREGORY C. LINK -25228
Washington Appellate Project
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 JAMES KOCH,)
)
 Appellant.)

NO. 38429-9-II

BY _____
STATE OF WASHINGTON
MAY 7 2009
COURT OF APPEALS
DIVISION TWO

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF MAY, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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