FILED

OCTOBER 15, 2014

Court of Appeals
Division III
State of Washington

32188-6-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH HART,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:
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Prosecuting Attorney

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Should the assault conviction be vacated under the principles of double jeopardy?
2. Does the Persistent Offender Accountability Act offend the cruel and unusual punishment clause as applied in this case?
3. May the Defendant challenge the imposition of legal financial obligations for the first time on appeal and when nothing is being collected?
4. Should the court remand to correct a scrivener's error on the judgment and sentence?

IV. STATEMENT OF THE CASE

The Defendant Joseph Hart has been convicted in a stipulated facts trial of murder in the second degree and assault in the second degree of Rodger Lincoln. CP 5-15, 45-102, 108-09.

The Defendant (then 28 years old) had been living with 53 year old Rodger Lincoln and another roommate in a trailer home operated by Lourdes Health Network for its patients housed in the community. CP 5, 42 (FF #12), 43 (FF #21), 76. At 5 p.m. on March 6, 2012, Mr. Lincoln was on the phone with his girlfriend who overheard him arguing with the Defendant. CP 42 (FF #13). The altercation was continuing two hours later. CP 41 (FF #2). The Defendant chased Mr. Lincoln, clad only in his briefs and bathrobe, from the trailer. CP 42(FF #7-8); 74. The Defendant tackled him to the ground, and struck him repeatedly on the head and face leaving a knife buried in Mr. Lincoln's eye socket. CP 42 (FF #7-8). When neighbors yelled at the Defendant to stop, advising that they had called police, the Defendant finally got up and went inside the house. CP 42 (FF #7). Mr. Lincoln called for help for a few seconds and then expired. CP 41 (FF #3), 42 (FF #8).

Mr. Lincoln had been stabbed 37 times and had many

defensive injuries to his hands. CP 43 (FF# 20), 77. The cause of death was the sharp force injury to his head and torso. CP 72. The forensic report found cast-off blood patterns from the living room and out to the deck. CP 49-54. There were drip stains in the kitchen, hallway, bedroom, and bathroom where Mr. Hart returned to wash the blood off before police arrived. CP 52.

The Defendant had two previous convictions which were strike offenses. CP 16-28, 29-40, 44 (FF #22). On August 2, 2004 in Spokane County, the Defendant was convicted by guilty plea of attempted first degree robbery. CP 29. While serving his sentence, the Defendant attacked a Walla Walla inmate because of name-calling. CP 64. The Defendant used a shank that he constructed by melting down a plastic bottle. CP 62. On April 30, 2007 in Walla Walla County, the Defendant was convicted by guilty plea of assault in the second degree. CP 16.

In the week following his arrest, defense counsel acknowledged that there was no competency issue. 1RP[1] 2. However, after several months in jail, the Defendant

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1 The State adopts the Appellant's notation for transcripts: 1RP (transcribed by Joseph King), 2RP (transcribed by Patricia Adams), 3RP (transcribed by John McLaughlin), and 4RP (transcribed by Cheryl Pelletier).

decompensated. On August 17, 2012, the Defendant was found to be incompetent. CP 123-24. He was restored to competency several months later and after resuming his psychiatric medications. CP 55, 57, 123-24.

The Defendant's mental illness has been a known quantity since his first strike offense. CP 37. He is schizophrenic, antisocial, and a drug abuser (cannabis, methamphetamine, heroin, LSD, and alcohol). CP 55. He takes prescribed anti-depressant and anti-psychotic medications. CP 55, 62. He was receiving psychiatric treatment and case management through Lourdes Counseling at the time of the murder. CP 62.

Dr. Strandquist opined that the Defendant was sane during the commission of the offense. CP 63-64. Before the arrest, the Defendant was taking his medications as prescribed and had no psychotic symptoms. CP 62-63. That day, he got into an argument with Mr. Lincoln, went to his room to sit and think, decided to "settle things" with a "prison mentality," retrieved a knife, and went out and stabbed Mr. Lincoln. CP 62. He then returned to his trailer "like nothing happened." CP 63. He said he did not know Mr. Lincoln was dead. CP 63. When he was told he would be charged with

murder, he smiled and laughed. CP 63. The Defendant admitted that if he had reflected on the consequences of his actions, he likely would not have stabbed Mr. Lincoln. CP 63-64. "Failing to stop and think, to consider the consequences, is not the equivalent of lacking the capacity to appreciation nature and quality, nor wrongfulness." CP 64. The Defendant has a significant history of assaultive behavior, and he is trained in martial arts. CP 61-63. Dr. Strandquist considers the Defendant to be a substantial danger to others. CP 60, 64.

The Defendant was sentenced as a persistent offender. CP 10

The court found that the Defendant has the past, present, and future ability to pay legal financial obligations and imposed mandatory and discretionary costs and fees totaling $31,354.27. CP 8-9.

V. ARGUMENT

A. IF THIS COURT VACATES THE LESSER CONVICTION, IT SHOULD FIRST DETERMINE THAT THERE IS SUFFICIENT EVIDENCE FOR THE GREATER CONVICTION AND AFFIRM IT.

The Defendant complains that the convictions on both

counts amount to a violation of the double jeopardy principle.

The double jeopardy principle is implicated if the crimes of conviction are the same in law and in fact; the court considers whether each requires proof of a fact which the other does not. *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995) (holding that convictions for both incest and second degree rape resulting from a single act of sex did not offend the double jeopardy clause); *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed 306 (1932). The state constitution provides protections equal to, not greater than, the federal constitution. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004).

The same elements test is only a rule of statutory construction, therefore, if there is a clear indication of legislative intent, that intent controls. *State v. Calle*, 125 Wn.2d at 778. The Defendant has conceded that there is no clear legislative intent as to these two crimes. Appellant's Opening Brief (AOB) at 9, n.2, *citing In re Orange*, 152 Wn.2d at 815. Accordingly, the Defendant asserts the same elements test controls here. AOB at 9, n.2.

In *Orange*, the court noted that the same elements test should not merely compare the statutory elements at their most

abstract level, as happened in *State v. Valentine*, 108 Wn. App. 24, 27, 29 P.3d 42 (2001), *review denied*, 145 Wn.2d 1022, 41 P.3d 483 (2002). *In re Orange*, 152 Wn.2d at 818-19. It should consider whether the evidence required to support a conviction for one offense would have been sufficient to warrant a conviction upon the other. *In re Orange*, 152 Wn.2d at 819. The *Orange* court found a double jeopardy violation in convictions of *attempted* murder and *first degree* assault on the same victim Walker. *In re Orange*, 152 Wn.2d at 820 (finding both offenses were committed by the same shot directed at the same victim). However, before Orange aimed at the fleeing Walker, he shot and killed McClure. The court found no double jeopardy violation in convictions for the actual killing of McClure and the attempted killing of Walker, acts the court found to be factually attenuated. *In re Orange*, 152 Wn.2d at 820-21.

In the instant case, the assault alleged required an intent to assault (not kill) and the use of a deadly weapon, but did not require a resulting death. CP 108-09, citing RCW 9A.36.021(1)(c). The murder alleged required an intent to kill (not merely assault) and a resulting death, but did not require the use of a deadly weapon. CP 108, citing RCW 9A.32.050(1)(a). This abstract

comparison of elements initially suggests the crimes are not the same in law.

The Defendant acknowledges that crimes are not the same in fact if one crime begins after the other is over. AOB at 10 (citing *State v. Noltie*, 116 Wn.2d 831, 848, 809 P.2d 190 (1991)). After the Defendant inflicted the stabbing injuries which would result in Mr. Lincoln's death but while Mr. Lincoln was still alive, the Defendant plunged his knife to the hilt into his victim's eye socket and left it there. CP 71 (stab wounds to torso perforated right and left ventricles of heart); CP 76 (knife present in-situ during autopsy, transecting the iris and pupil). This final thrust did not kill Mr. Lincoln. CP 71, 80, 90 (the knife perforated the eyeball and lodged in the bone of the skull). This injury alone would not have been fatal, and occurred after the blows which would prove fatal. The assault was not "also the foundation for his conviction of attempted murder." *State v. Valentine*, 108 Wn. App. at 27. Proof of neither crime was necessary to prove the other. *See State v. Jackman*, 156 Wn.2d 736, 749, 132 P.3d 136 (2007). The perforation of the eye was gratuitous, committed after the killing blows. This Court may find that the crimes are not the same in fact or law.

Neither the trial attorney (2RP 21) nor the trial judge (CP 44; 2RP 38-39) expressed any offense at the amendment of the information to add the second count. However, the State acknowledges that this Court may decide that the State's discussion of the same elements test divides a defendant's conduct into segments making "spurious distinctions" where there is a continuous course of conduct. *See State v. Adel,* 136 Wn.2d 629, 635, 965 P.2d 1072 (1998) (citing *Brown v. Ohio,* 432 U.S. 161, 169, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); *In re Snow,* 120 U.S. 274, 282, 7 S.Ct. 556, 30 L.Ed. 658 (1887)).

The State's interest here is not to obtain multiple convictions, but to protect the community and apply the public's intent in passing the initiative which resulted in the Persistent Offender Accountability Act (POAA). *State v. Thorne*, 129 Wn.2d 736, 765-67, 921 P.2d 514 (1996) (discussing the findings and intent of the POAA), *abrogated on other grounds by Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). The language of the statute is unambiguous, leaving no room for prosecutorial discretion. *State v. Thorne*, 129 Wn.2d at 765.

Independently either count would be a "most serious

offense" and a third strike. RCW 9.94A.030(32) and (37). Therefore, a conviction on either count satisfies the State that the public is protected and the public policy in POAA is forwarded.

The proper remedy for multiple punishments for the same offense is to vacate the "lesser" offense. *In re Burchfield*, 111 Wn. App. 892, 899, 46 P.3d 840 (2002). This holding is cited with approval by the Washington Supreme Court. *State v. Weber*, 159 Wn.2d 252, 265, 149 P.3d 646 (2006). The lesser offense is either the lesser included offense or the offense which carries the lesser sentence. *State v. Weber*, 159 Wn.2d at 265-67.

To establish that an offense is a lesser included offense, first, each of the elements of the lesser offense must be a necessary element of the offense charged; second, the evidence in the case must support an inference that the lesser crime was committed. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Assault is the lesser included offense where the murder was committed through repeated assaults. Assault would also be the conviction which carries the lesser sentence.

The parties are in agreement that the assault is the lesser conviction and that if there is a violation of double jeopardy, the

murder conviction remains.

However, if this Court chooses to vacate the assault conviction, the State requests this Court first review the murder conviction for sufficiency of the evidence. A sufficiency challenge may arise at any time, even if not raised on direct appeal or in a timely collateral attack. RCW 10.73.100(4). Before this Court vacates a conviction, which would on its own safeguard the community, the State requests this Court find now that there is sufficient evidence of the remaining conviction.

B. THE IMPOSITION OF THE LIFE SENTENCE IS NOT CRUEL AND UNUSUAL PUNISHMENT.

The Defendant challenges the application of POAA in his particular case as cruel and unusual punishment.

The Defendant argues *Miller v. Alabama,* --U.S. --, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), *Graham v. Florida,* 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), and *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) apply to him. AOB at 22. They do not.

Roper prohibited death sentences for offenders who were

under 18 at the time of the offense. *Graham* prohibited LWOP (life without possibility of parole) sentences where the defendant was under 18 at the time of the offense and the crime was not murder. *Miller* prohibited LWOP sentences where the defendant was under 18 at the time of the offense. None of these cases address a three strikes law. None address sentences for offenders who are 18 or older at the time of the offense.

A few months ago, the Washington Supreme Court considered a challenge that an LWOP life sentence was cruel and unusual under *Graham* and *Miller*. *State v. Witherspoon*, 180 Wn.2d 875, 889-90, 329 P.3d 888, 895 (2014). The court found that *Graham* and *Miller* "unmistakably rest on the differences between children and adults and the attendant propriety of sentencing children to life in prison without the possibility of release," but "Witherspoon was an adult when he committed all three of his strike offenses." *Witherspoon*, 180 Wn.2d at 890. The Washington Supreme Court found those cases "readily distinguishable" for this reason. *Id.* That distinction applies equally here.

The Defendant asks that this Court overturn his sentence under the Washington constitutional provision. AOB at 16. The state constitutional provision barring cruel and unusual punishment is more protective than the Eighth Amendment to the federal constitution. *State v. Fain*, 94 Wn.2d 387, 392-93, 617 P.2d 720 (1980). In analyzing a claim of cruel and unusual punishment under the Washington constitution, the court considers four factors: (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction. *State v. Fain*, 94 Wn.2d at 397.

The Defendant has not engaged in a *Fain* analysis.

The Washington Supreme Court undertook this four part analysis in the recent case of *State v. Witherspoon*, 180 Wn.2d 875, 329 P.3d 888, 895 (2014). There, the defendant's third strike was robbery in the second degree. When the victim came upon the defendant loading her property into his vehicle, he implied that he had a gun. *State v. Witherspoon*, 180 Wn.2d at 881. The *nature of the offense* involved a threat of violence against another person. *Id.* at 888. The *legislative purposes* behind the POAA include

deterrence of other criminals who commit most serious offenses and the segregation of those criminals from the rest of society. *Id.* *Other states*, albeit only four others, include second degree robbery as a third strike offense. *Id.* And *in Washington*, life sentences have been imposed with second degree robbery as a strike offense. *Id.* at 888-89. After considering the four *Fain* factors, the court upheld the LWOP sentence, finding it did not violate the state constitution's prohibition against cruel and unusual punishment.

In the present case, where the third strike is a murder, the outcome of a *Fain* analysis is obvious. The intentional taking of a human life is the most serious and violent of crimes. It is the type of offense which results in life sentences in Washington and other states. Imposition of a life sentence after a third strike murder offense is not cruel or unusual under the Washington constitution.

The Defendant argues that his first two strike offenses would not have been strike offenses *had he been a juvenile*. AOB at 23. But of course those are not the facts. He was not a juvenile. And the law does not permit the courts to treat an adult as a juvenile, regardless of mental capacity, maturity, etc.. RCW 13.04.011(2) (strictly defining a juvenile offender as someone *under* the

chronological age of eighteen).

Although he was in his twenties when he committed those offenses, the Defendant argues that he had the maturity of a juvenile. There are no facts on the record to support that assertion. Mental illness does not equate with immaturity. The Defendant was and remains mentally ill. However, his schizophrenia is treatable, and was being managed successfully at the time of his last offense. He was competent for trial and the court did not find him insane at the time of the offense. There was no finding that his managed illness contributed to his offenses.

On the other hand, a personality disorder is not a mental disease, is inflexible, is not treatable, and not a matter of development or maturation. *Foucha v. Louisiana*, 504 U.S. 71, 75, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). Like a great many incarcerated persons, the Defendant has antisocial personality disorder. *Hudson v. Palmer*, 468 U.S. 517, 526, 104 S.Ct. 3194, 3200, 82 L.Ed.2d 393 (1984) ("Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial criminal, and often violent, conduct.")

The Defendant points to a law review article, which cites a

news article (Malcolm Ritter, "Scientists: Teen Brain Still Maturing," Associated Press (December 2, 2007)), which in turn discusses an MRI study about activity in the brain as people age. AOB at 22. Even if this study had any legal relevance, which it does not, it does not speak to this particular Defendant's maturity. Therefore, it does not speak to the argument that the law is cruel *as applied to the Defendant*. The law treats everyone eighteen and above as adults. The Defendant cannot show that this treatment of him in his first and second strikes was unconstitutional.

The Defendant argues that *Miller* requires an individualized inquiry before imposing LWOP. AOB at 21. But, as the *Witherspoon* court explained, the court has no application to adult offenders. *Miller* does not regard a three strikes statute and does not regard adult offenders. There is no authority for the Defendant's proposition that he could or should have been treated as a juvenile at 20 or 22. There is no authority for his proposition that the individualized inquiry discussed in *Miller* has any application to the POAA. The POAA statute has been repeatedly upheld as constitutional. *State v. Witherspoon*, 180 Wn.2d 875; *State v. Smith*, 150 Wn.2d 135, 75 P.3d 934 (2012); *State v.*

Manussier, 129 Wn.2d 652, 921 P.2d 473 (1996), *cert. denied* 117 S.Ct. 1563 (1997); *State v. Rivers*, 129 Wn.2d 697, 921 P.2d 495 (1996); *State v. Thorne*, 129 Wn.2d 736.

The Defendant quotes *Roper v. Simmons*, 543 U.S. at 570, for the proposition that a heinous crime committed by a juvenile does not prove an irretrievably depraved character. AOB at 19, 20. He argues that a youth's character and traits are not yet fixed. AOB at 18. The Defendant committed all three of his strike offenses when he was not a youth, but an adult. They occurred over a span of nine years. All three involve stabbings. This suggests that his violence and lack of concern for the physical well-being of others is a fixed trait. His character is demonstrably violent.

The stabbings continued despite interventions of punishment and treatment. The final offense, 37 stab wounds to the relatively vulnerable (unarmed, unclothed, mentally ill, and older) victim, resulted in death. The Defendant was under psychiatric care and case management when the third strike offense occurred. While properly medicated and suffering no psychotic symptoms, at the age of 28, the Defendant murdered his roommate after an

argument.

This is precisely the sort of most persistently, dangerous offender from which the public demands protection by imposition of a life sentence without possibility of parole. *State v. Thorne*, 129 Wn.2d at 765-66. The sentence as applied in this case is constitutional.

C. THE COURT SHOULD NOT ENTERTAIN A CHALLENGE TO THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS MADE FOR THE FIRST TIME ON APPEAL.

The Defendant challenges the court's imposition of legal financial obligations, arguing that there is insufficient evidence of his present or future ability to pay.

The Court of Appeals recently addressed this challenge in *State v. Duncan*, 18 Wn. App. 246, 327 P.3d 699 (2014), noting that the challenge is "recurrent" in appeals. *State v. Duncan*, 18 Wn. App. at 249. The court held that it would decline to address for the first time on appeal a claim that the record did not support the trial court's findings regarding ability to pay discretionary LFO's. The opinion explains that an offender may decline to challenge the finding at the trial level, because the State's burden of proof is so

low. *State v. Duncan*, 18 Wn. App. at 250. But also an offender has good strategic reasons to waive the issue at the time of sentencing when there are "more important issues at stake." *State v. Duncan*, 18 Wn. App. at 251. At the moment the judge is considering the incarceration penalty for the offense, the offender should be trying to portray himself in the best light. Therefore, it is "unhelpful" to portray oneself as perpetually unemployed and irretrievably indigent. *State v. Duncan*, 18 Wn. App. at 250. And, in any case, the matter can be readdressed later by a petition for remission at the more pertinent time, i.e. the time of collection. *Id.*

This authority should decide the matter without further discussion. The Court of Appeals will not hear a challenge to LFO's that is not preserved below. The Defendant did not challenge the imposition of discretionary LFO's. The challenge is not preserved.

Furthermore, it is premature for this court to address the assigned error for two reasons. Challenges to LFOs are not properly before a court until the State seeks to enforce them. *State v. Hathaway,* 161 Wn. App. 634, 651, 251 P.3d 253 (2011); *State v. Smits,* 152 Wn. App. 514, 524, 216 P.3d 1097 (2009). A person is

not an "aggrieved party" under RAP 3.1 "until the State seeks to enforce the award of costs and it is determined that [the defendant] has the ability to pay." *State v. Mahone,* 98 Wn. App. 342, 349, 989 P.2d 583 (1999); *see also State v. Blank,* 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). "Mandatory Department of Corrections deductions from inmate wages for repayment of legal financial obligations are not collection actions by the State requiring inquiry into a defendant's financial status." *State v. Crook,* 146 Wn. App. 24, 27–28, 189 P.3d 811 (2008). Therefore, "[i]nquiry into the defendant's ability to pay is appropriate only when the State enforces collection under the judgment or imposes sanctions for nonpayment." *State v. Crook,* 146 Wn. App. at 27.

If the State seeks to collect, the Defendant may petition the court at that time for remission under RCW 10.01.160(4).

D. THE STATE DOES NOT OBJECT TO CORRECTION OF A SCRIVENER'S ERROR.

The Defendant notes that there is an error in the selection of language for second paragraph on CP 12. The language comes from RCW 9.94A.030(37)(b) (regarding a two strike sex offense)

rather than RCW 9.94A.030(37)(a) (regarding a three strike "most serious offense").

The State agrees the judgment should be amended with the correct statutory language. The language should also be amended to cite RCW 9.94A.030(32)(b), rather than section (33)(b) which does not exist.

Note that if the Court remands to strike the conviction for count two, then the entire paragraph may simply be removed.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: October 15, 2014.

Respectfully submitted:

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Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) SS.
County of Franklin)

COMES NOW Abigail Iracheta, being first duly sworn on oath, deposes and says:

That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity.

I hereby certify that on the 15th day of October, 2014, a copy of the Respondent's Brief was delivered to Joseph Hart, Appellant, Washington Corrections Center, 2321 West Dayton Airport Road, Shelton WA 98584 by depositing in the mail of the United States of America a properly stamped and addressed envelope and to Elaine Winters, opposing counsel, Elaine@washapp.org by email per agreement of the parties pursuant to GR30(b)(4).

Abigail Iracheta

Signed and sworn to before me this 15th day of October, 2014.

Deborah L. Ford

Notary Public in and for
the State of Washington,
residing at Kennewick
My appointment expires:
May 19, 2018