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Supreme Court No. _____
Court of Appeals No. 23946-2-III

FILED

FEB 22 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant/Respondent,

vs.

RAYMOND CARL HUGHES,

Defendant/Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER.

Petitioner, Raymond Carl Hughes, asks this Court to accept review of the Court of Appeals decision terminating review, designated in Part II of this petition.

II. COURT OF APPEALS DECISION.

The Petitioner seeks review of the Court of Appeals decision filed December 20, 2007, which affirmed his conviction. A copy of the Court's published opinion is attached as Appendix A. A copy of the Court's Order Denying Motion for Reconsideration, filed January 24, 2008, is attached as Appendix B. This petition for review is timely.

III. ISSUES PRESENTED FOR REVIEW.

1. Should the exceptional minimum term sentence be set aside because there is no statutory procedure for judicial fact-finding of the aggravating circumstances used in the present case?

2. Did Mr. Hughes' convictions for second-degree rape and second-degree rape of a child of the same victim violate the constitutional prohibition against double jeopardy, where the evidence required to support a conviction upon one of the charged crimes would have been sufficient to warrant a conviction upon the other?

IV. STATEMENT OF THE CASE.

The pertinent facts are set forth in the initial briefs to the court of appeals and in the court of appeals opinion, and are adopted herein.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

The considerations which govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of these issues because the decision of the Court of Appeals is in conflict with other decisions of this court, the U.S. Supreme Court and the Court of Appeals (RAP 13.4(b)(1) and (2)), and/or involves a significant question of law under the Constitution of the United States and state constitution (RAP 13.4(b)(3)), and/or involves issues of substantial public interest that should be determined by the Supreme Court (RAP 13.4(b)(4)).

Issue No. 1. The exceptional minimum term sentence should be set aside because there is no statutory procedure for judicial fact-finding of the aggravating circumstances used in the present case.

The court of appeals is correct in its holding that in State v. Clarke, 156 Wn.2d 880, 134 P.3d 188, (2006), and State v. Borboa, 157 Wn.2d 108, 135 P.3d 469 (2006), this Court held that Blakely¹ did not apply to the minimum term portion of an indeterminate sentence under RCW

¹ Blakely v. Washington, 542 U.S. ___, 124 S.Ct.2531, 2533 (2004).

9.94A.712, and therefore, judicial fact-finding and imposition of an exceptional minimum term was not improper. Slip Opinion, pp3-4; Borboa, 157 Wn.2d at 117, 135 P.3d 469; Clarke, 156 Wn.2d 891-94, 134 P.3d 188. However, what this Court did not address was whether there is any statutory procedure authorizing judicial fact-finding of aggravating circumstances, such as those proposed in the present case.

RCW 9.94A.712 provides in pertinent part:

(1) An offender who is not a persistent offender shall be sentenced under this section if the offender:

(a) Is convicted of:

(i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion . . .

(3)(a) Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term and a minimum term. . . .

(b) The maximum term shall consist of the statutory maximum sentence for the offense.

(c)(i) Except as provided in (c)(ii) of this subsection, the minimum term shall be either within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.

RCW 9.94A.712(1)(a)(i) and (3)(a), (b), and (c)(i).

From the language in 9.94A.712(3)(c)(i), the statute clearly refers to 9.94A.535 as the statutory authority for imposing a minimum term outside the standard range.

RCW 9.94A.535 provides in pertinent part:

. . . A sentence outside the standard sentence range shall be a *determinate sentence*. . .

(3) Aggravating Circumstances--*Considered By A Jury*--Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537...

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance. . .

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time...

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time.

(j) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization. . .

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment . . .

(q) The defendant demonstrated or displayed an egregious lack of remorse . . .

RCW 9.94A.535, RCW 9.94A.535(3)(b), (g), (i), (j), (n), (o), and (q)

(emphasis added).

Thus, RCW 9.94A.535 applies only to determinate sentences and not indeterminate sentences. Moreover the aggravating circumstances cited above that could be the only conceivable basis for an exceptional minimum term in the present case, may only be found by a jury beyond a reasonable doubt. There is no statutory procedure authorizing judicial fact-finding of these aggravating circumstances and our appellate courts have refused to imply such a procedure.

Sentencing is a legislative power, not a judicial power. State v. Bryan, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980). The legislature has the power to fix punishment for crimes subject only to the constitutional limitations against excessive fines and cruel punishment. State v. Mulcare, 189 Wn. 625, 628, 66 P.2d 360 (1937). It is the function of the legislature and not the judiciary to alter the sentencing process. State v. Monday, 85 Wn.2d 906, 909-910, 540 P.2d 416 (1975). A trial court's discretion to impose sentence is limited to what is granted by the

legislature, and the court has no inherent power to develop a procedure for imposing a sentence unauthorized by the legislature. State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986).

Prior to the passage of the present version of RCW 9.94A.535² on April 15, 2005, former RCW 9.94A.535 permitted judicial fact-finding for the aggravating factors previously mentioned. *See* Former RCW 9.94A.535(2). In State v. Hughes, where no statutory procedure existed under former RCW 9.94A.535, this Court refused to imply a procedure on remand for trial courts to empanel a jury to determine whether an exceptional sentence should be imposed. State v. Hughes, 154 Wn.2d 118, 149-52, 110 P.3d 192 (2005), *overruled in part on other grounds by* Washington v. Recuenco, --- U.S. ----, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). This Court concluded that no such inherent authority existed for trial courts to imply such a procedure, stating, "This court has consistently held that the fixing of legal punishments for criminal offenses is a legislative function." Hughes, 154 Wn.2d at 149, 110 P.3d 192 (*quoting* Ammons, 105 Wn.2d at 180, 718 P.2d 796). "[I]t is the function of the legislature and not of the judiciary to alter the sentencing process." Id.

² Often referred to as the "Blakely fix."

(quoting Ammons, 105 Wn.2d at 180, 718 P.2d 796). The Court went on to say:

This court will not create a procedure to empanel juries on remand to find aggravating factors because the legislature did not provide such a procedure and, instead, explicitly assigned such findings to the trial court. To create such a procedure out of whole cloth would be to usurp the power of the legislature.

Id. at 151-52, 540 P.2d 416.

This Court reiterated this principle again in State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130, 1134 (Jan. 25, 2007).

Similarly, in State v. Martin, 94 Wn.2d 1, 7, 614 P.2d 164 (1980), this Court declined to imply a "special sentencing provision" that would allow the death penalty to apply to those who pleaded guilty, in the absence of any statutory provision allowing a jury to be empanelled following a guilty plea. The Court said it "[did] not have the power to read into a statute" such a provision, and that the statute did not allow a trial court to convene a jury solely to consider death. Id. at 8, 614 P.2d 164.

Consistent with the decisions in Pillatos, Hughes and Martin, the only logical conclusion here under the present version of RCW 9.94A.535 is that trial courts do not have inherent authority to engage in judicial fact-finding to impose an exceptional sentence. Since the trial court herein lacked legislative authority and had no inherent power to develop a

procedure for imposing a sentence unauthorized by the legislature, the trial court was correct in its conclusion that no exceptional minimum term sentence could be imposed in this case.

Issue No. 2. Mr. Hughes' convictions for second-degree rape and second-degree rape of a child of the same victim violated the constitutional prohibition against double jeopardy, because the evidence required to support a conviction upon one of the charged crimes would have been sufficient to warrant a conviction upon the other.

This Court most recently reexamined this issue in In re Orange, 152 Wn.2d 795, 100 P.3d 291 (2004). The court held that Mr. Orange's convictions for first degree attempted murder and first degree assault of the same victim violated constitutional prohibition against double jeopardy, because the two crimes were based on the same gunshot in the same incident. Orange, 152 Wn.2d at 820-21, 100 P.3d 291. The court noted that the State alleged in count two of the information that Orange committed the crime of first degree attempted murder, when he "act[ed] with premeditated intent to cause the death of another person and did attempt to cause the death of Marcel Walker." Orange, 152 Wn.2d at 814, 100 P.3d 291. Count three alleged that Orange committed an assault in the

first degree when he, "at the same time as the crime charged in count 2, then and there, with intent to inflict great bodily harm upon another person, did intentionally assault Marcel Walker with a firearm." Orange, 152 Wn.2d at 815, 100 P.3d 291.

In reaching its decision, this Court stated that the Blockburger³ "same elements" and "same evidence" test remains the correct means of determining whether convictions for two offenses violate double jeopardy. Orange, 152 Wn.2d at 815-16, 100 P.3d 291. However, in some cases our appellate courts have misapplied the "same elements" test by merely comparing the statutory elements of the two crimes in a generic sense. Id. 152 Wn.2d at 817-19; State v. Valentine, 108 Wn. App. 24, 29 P.3d 42 (2001). Instead, the Blockburger test requires the court to determine "whether each provision *requires proof of a fact which the other does not.*" Id. 100 P.3d at 302, *citing* Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932) (emphasis added). Thus, double jeopardy will be violated where "the evidence required to support a conviction upon one of [the charged crimes] would have been sufficient to warrant a conviction upon the other." Id. 152 Wn.2d at 820, *citing* State v. Reiff, 14 Wn. 664, 667, 45 P. 318 (1896).

³ Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

Herein, the trial court's acceptance of Mr. Hughes' plea constitutes a "conviction" for double jeopardy purposes. State v. Crisler, 73 Wn. App. 219, 222-23, 868 P.2d 204 (1994), *aff'd sub nom. State v. Gocken*, 127 Wash.2d 95, 896 P.2d 1267 (1995). Moreover, Mr. Hughes did not waive his right to appeal based on a claim of double jeopardy by pleading guilty to the two crimes that constituted the same criminal conduct. In Restraint of Butler, 24 Wn. App. 175, 599 P.2d 1311 (1979); Menna v. New York, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975).

The factual scenario in this case for the purposes of double jeopardy analysis is indistinguishable from Orange. When Mr. Hughes was asked to state in his own words what he did that made him guilty of this offense, he wrote in the Statement of Defendant on plea of guilty for both counts, "I engaged in sexual intercourse with S.E.H. when she was 12 years old on 4/20/04 in Spokane, Washington." (10/14 RP 32) The State also conceded that the two convictions constituted the same criminal conduct. (1/26 RP 6)

As noted in Orange, the trial court and court of appeals herein misapplied the "same elements" test by merely comparing the statutory elements of the two crimes in a generic sense. The court of appeals conceded that the two rape statutes at issue do not specify multiple

punishments for the same act of sexual intercourse. Slip Opinion p. 6; RCW 9A.44.076. Nevertheless, the Court felt the Blockburger test was satisfied, since the two offenses are found in separate code sections, the punishments differ, and the two statutes protect a different class of persons. Slip Opinion pp. 6-7.

The majority opinion of the court of appeals employed the wrong legal analysis. Instead, the Blockburger test required the court to determine "whether *each* provision requires proof of a fact which the other does not." As the dissent pointed out, the differences between the two crimes are illusory, since both require proof of nonconsent because of the victim's status. Slip Opinion p. 1, Schultheis, A.C.J. (dissenting). It is true that second degree child rape requires proof that the victim is between ages 12 and 14, while second degree rape requires proof that the victim is incapable of consent by reason of being physically helpless or mentally incapacitated. RCW 9A.44.076(1); RCW 9A.44.050(1)(b). However, notably the State could prove second degree rape by showing that the mental incapacity is caused by the victim's age. Slip Opinion p. 1, Schultheis, A.C.J. (dissenting); RCW 9A.44.010(4); Duffy v. Dep't of Soc. & Health Servs., 90 Wn.2d 673, 678-79, 585 P.2d 470 (1978).

The dissent also noted that there is no difference in the mens rea or actus reus to draw a meaningful distinction between these offenses. Slip Opinion p. 3, Schultheis, A.C.J. (dissenting). In State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995), this Court noted a distinction in the actus reus—force versus the prohibited relationship—and found the two offenses at issue were not the same under the "same evidence" test or Blockburger. Calle, 125 Wn.2d at 778. Under the statutory scheme at issue here, the vulnerability of the victim is the same because of the strict liability imposed by the inability to consent, either by reason of age or condition. There is no more or less violence or force required in the two crimes, and there is no more or less damage resulting from the two crimes. See Slip Opinion p. 3, Schultheis, A.C.J. (dissenting).

Equally significant, is the result reached by Division One in State v. Birgen, 33 Wn. App. 1, 3, 651 P.2d 240 (1982), *rev. denied*, 98 Wn.2d 1013 (1983). The Birgen court examined the statutes of third degree rape and third degree statutory rape, and held that a defendant cannot be convicted of both nonconsensual rape and statutory rape based on age for a single act of intercourse. Birgen, 33 Wn. App. at 14. In Calle, this Court perceived the Birgen court “was attempting to reach a double jeopardy analysis despite the concurrent sentence rule” then in effect. Calle, 125

Wn.2d at 775. While rejecting the Court's assertion regarding a non-double jeopardy basis for review of multiple punishments, the Calle court found the result in Birgen sustainable. Id.

Thus, contrary to the majority, Calle does not require a different result here. In Calle, this Court held that a single act of intercourse could support convictions for both incest and second degree rape. Calle, 125 Wn.2d 780-82. In doing so, it distinguished the purpose of the rape statutes involved in Birgen from that of the incest statute, which is “to prevent mutated birth but also to promote and protect family harmony, to protect children from the abuse of parental authority, and ‘because society cannot function in an orderly manner when age distinctions, generations, sentiments and roles in families are in conflict.’” Id. at 781 (quoting State v. Kaiser, 34 Wn. App. 559, 566, 663 P.2d 839, *rev. denied*, 100 Wn.2d 1004 (1983)). There is no such distinction in the present case.

The Calle court also noted that the two offenses at issue, incest and rape, were in two separate sections of the criminal code—RCW 9A.64, Family Offenses, versus RCW 9A.44, Sex Offenses,—and serve differing purposes, indicating legislative intent to punish them as separate offenses. Id. at 780.

The same is not true here. The statutes here are both in chapter 9A.44 RCW and they serve a similar purpose. Since courts may not vary the statutory scheme from that enacted by the legislature, Birgen, 33 Wn. App at 14, there is no clear legislative intent to impose multiple punishment for the offenses at issue. Therefore, based on the clear precedent set forth in Calle and Birgen, allowing both convictions to stand violates the constitutional prohibition against double jeopardy.

VI. CONCLUSION.

For the reasons stated herein, Defendant/Petitioner, Raymond Carl Hughes, respectfully asks this Court to grant the petition for review and reverse the decision of the Court of Appeals affirming his conviction.

Respectfully submitted February 22, 2008.



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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 23946-2-III
)	
Appellant,)	
)	Division Three
v.)	
)	
RAYMOND CARL HUGHES,)	PUBLISHED OPINION
)	
Respondent and)	
Cross-Appellant.)	

BROWN, J. — Raymond Carl Hughes pleaded guilty to two sex crimes following one act of sexual intercourse with a 12-year-old girl, S.E.H., who was disabled and incapable of giving consent — rape of a child in the second degree, RCW 9A.44.076(1); and, second degree rape, RCW 9A.44.050(1)(b). The admissions exposed Mr. Hughes to the terms under former RCW 9.94A.712 (2001) that required the sentencing court to order a maximum life sentence and set a minimum term. We delayed decision of the State's appeal of the trial court's decision that it lacked power or authority to set an exceptional minimum sentence under former RCW 9.94A.712 until the mandate issued in *State v. Clarke*, 156 Wn.2d 880, 134 P.3d 188 (2006). The *Clarke* court held that

*Blakely*¹ exceptional sentencing limitations do not apply to indeterminate minimum sentences under former RCW 9.94A.712. First, following *Clarke*, we grant the State's appeal. Second, we reject Mr. Hughes' double jeopardy contentions because we conclude the legislature intended to impose multiple punishments for the single act of sexual intercourse. Accordingly, we affirm Mr. Hughes' convictions and remand for further proceedings.

FACTS

Mr. Hughes engaged in a single act of sexual intercourse with S.E.H., a 12-year-old girl incapable of consent by reason of being physically helpless or mentally incapacitated due to cerebral palsy. He was charged with and pleaded guilty to one count of second degree child rape and one count of second degree rape. Mr. Hughes unsuccessfully moved to dismiss one conviction on double jeopardy grounds. The court declined to consider an exceptional minimum sentence under former RCW 9.94A.712 (2001) because it believed it lacked "power or authority" to grant an exceptional sentence under *Blakely*. Report of Proceedings at 41. The court ordered a top-end minimum sentence of 102 months. The State appealed. Mr. Hughes cross-appealed.

¹ *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

ANALYSIS

A. Exceptional Sentence

The issue is whether the trial court erred in rejecting the State's request to consider an exceptional minimum sentence under former RCW 9.94A.712. The State contends the trial court erred in applying *Blakely* and *Apprendi*² to an indeterminate sentencing. The State is correct.

We review statutory and constitutional issues de novo. *Clarke*, 156 Wn.2d at 887. *Apprendi* held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi*, 530 U.S. at 490. The *Blakely* Court clarified that the “statutory maximum” for *Apprendi* purposes “is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” *Blakely*, 542 U.S. at 303. The court in *Clarke* then held that *Blakely* does not apply to indeterminate minimum sentences under former RCW 9.94A.712 that do not exceed the maximum sentence imposed.

Here, without the benefit of *Clarke*, the trial court considered the sentencing scheme for nonpersistent offenders in former RCW 9.94A.712. The court was required to set a maximum term (the statutory maximum term for the offense) and a minimum term, either within or outside the standard range. RCW 9.94A.712(3). Believing it

² *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

lacked the discretion to order an exceptional sentence under *Blakely*, the trial court denied the State's request for an exceptional minimum term sentence. *Clarke* resolved this issue for the State; the court should have considered the State's exceptional sentencing request. A trial court may impose an exceptional minimum sentence under an indeterminate sentencing scheme when the exceptional sentence does not exceed the maximum sentence imposed. *Clarke*, 156 Wn.2d at 893-94.

B. Double Jeopardy

The issue is whether the trial court erred in rejecting Mr. Hughes' motion to dismiss one conviction under double jeopardy principles. Mr. Hughes contends one conviction should result from one act of sexual intercourse.

Double jeopardy claims are questions of law that we review de novo. *State v. Freeman*, 153 Wn.2d 765, 770-71, 108 P.3d 753 (2005).

The double jeopardy protections found in the United States Constitution and the Washington Constitution are coextensive. U.S. CONST. amend. V.; WASH. CONST. art. I, § 9; *State v. Gocken*, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995). A defendant is protected against multiple punishments for the same offense, regardless of whether the sentences are imposed concurrently. *Ball v. United States*, 470 U.S. 856, 864-65, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985); *State v. Johnson*, 92 Wn.2d 671, 600 P.2d 1249 (1979). However, multiple punishments are permissible if the legislature so intended. *State v. Baldwin*, 150 Wn.2d 448, 454, 78 P.3d 1005 (2003) (citing *State v. Calle*, 125

Wn.2d 769, 776, 888 P.2d 155 (1995)); *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983).

The analytic framework for determining legislative intent for a double jeopardy claim differs somewhat from ordinary statutory interpretation. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). A clear indication of legislative intent on the face of the statute or in the legislative history that the charged crimes constitute the same offense is, of course, dispositive. *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006); *Calle*, 125 Wn.2d at 776-77. Absent that indication, Washington courts rely on the presumptive test for legislative intent articulated in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). *Jackman*, 156 Wn.2d at 746 (citing *Calle*, 125 Wn.2d at 778). In Washington, “[u]nder the same evidence rule, if each offense contains elements not contained in the other offense, the offenses are different and multiple convictions can stand.” *Id.* (citing *Baldwin*, 150 Wn.2d at 454). This requires a determination of “whether each provision requires proof of a fact which the other does not.” *Id.* (quoting *Blockburger*, 284 U.S. at 304).

An individual is guilty of second degree rape of a child “when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.” RCW 9A.44.076(1). An individual is guilty of second

degree rape when “the person engages in sexual intercourse with another person” “[w]hen the victim is incapable of consent by reason of being physically helpless or mentally incapacitated.” RCW 9A.44.050(1)(b). The two statutes do not specify multiple punishments for the same act of intercourse. See RCW 9A.44.076; RCW 9A.44.050.

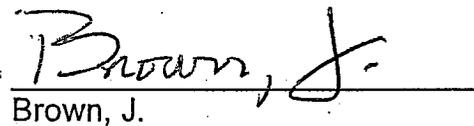
However, the two offenses are found in separate code sections and the punishments differ. Under RCW 9A.44.076(1), second degree child rape requires proof that S.E.H. was a certain tender age and Raymond Carl Hughes was a particular mature age. Under RCW 9A.44.050(1)(b), second degree rape requires a different gravamen, without limitation to her age, that S.E.H. was incapable of consent by reason of physical helplessness or mental incapacitation. Other subsections specify additional discrete groups needing protection from preying actors such as the developmentally disabled from health care providers, residents of facilities for the mentally disordered or chemically dependent from supervisors, and frail elder or vulnerable adults from persons with a significant relationship. Finally, proof of one offense is not required to prove the other offense or elevate the other offense into a more serious crime.

Overall, two distinct protective purposes are served: (1) protecting the very young regardless of physical or mental status, and (2) protecting physically helpless or mentally incapacitated persons of any age who are incapable of protecting themselves from persons of any age. See *Calle*, 125 Wn.2d at 780-81. Although the faces of the

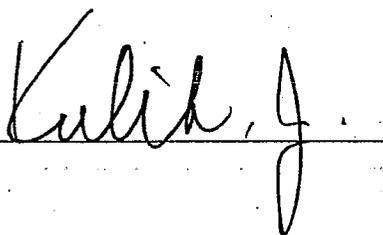
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relevant statutes do not specify multiple punishments, we conclude that the *Blockburger* presumptive test is satisfied. RCW 9A.44.050(1)(b) and RCW 9A.44.076(1) each contains one element not found in the other statute and thus, different evidence is required for conviction. *Jackman*, 156 Wn.2d at 747. The trial court did not err in denying Mr. Hughes' double jeopardy motion.

Affirmed and remanded for further proceedings consistent with this opinion.


Brown, J.

I Concur:


Kulik, J.

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SCHULTHEIS, A.C.J. (dissenting) — The majority concludes that the two offenses here, second degree child rape and second degree rape, are not the same for the purposes of double jeopardy. Although the offenses initially appear to be different, those differences are illusory. Each crime simply requires proof of nonconsent because of the victim's status, which operates to make out a strict liability offense. *See State v. Clemens*, 78 Wn. App. 458, 467, 898 P.2d 324 (1995); *State v. Abbott*, 45 Wn. App. 330, 334, 726 P.2d 988 (1986). Therefore, I must respectfully dissent.

Notably the State could prove second degree rape by showing that the mental incapacity is caused by the victim's age. RCW 9A.44.010(4) defines incapacity as "that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause." Our courts have long held and our legislature has long recognized that persons are disabled by virtue of their minority. *E.g., Duffy v. Dep't of Soc. & Health Servs.*, 90 Wn.2d 673, 678-79, 585 P.2d 470 (1978). We have also noted that minors lack the legal capacity to

consent to sexual relations because they are too immature to rationally or legally consent. *Clemens*, 78 Wn. App. at 467; *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 68; 124 P.3d 283 (2005).

Further, the “mental age” of a victim in a mental disability rape case can be used to determine whether the victim is capable of consent. *State v. Ortega-Martinez*, 124 Wn.2d 702, 714, 881 P.2d 231 (1994). And the condition of the victim in this case could be proven by the victim’s appearance. *See State v. Summers*, 70 Wn. App. 424, 430-31, 853 P.2d 953 (1993) (finding testimony of second degree rape victim provided sufficient evidence from which a jury could determine mental incapacity and holding that a victim’s mental ability is not always a topic requiring expert testimony); *State v. Biggs*, 57 Wash. 514, 516, 107 P. 374 (1910) (proving statutory rape with circumstantial evidence).

Moreover, the legislature has historically grouped the disabled and minors together for special treatment. *See, e.g.*, RCW 4.16.190 (providing for the tolling of the statute of limitations for persons under 18 years old or who are “incompetent or disabled”).

Even if the offenses at issue pass the *Blockburger*¹ test, the statutory language and structure lead to the conclusion that the legislature did not intend multiple punishments

¹ *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

here. The *Blockburger* test is merely a useful canon of statutory construction and it is only one point of the inquiry. *State v. Freeman*, 153 Wn.2d 765, 776, 108 P.3d 753 (2005); *Garrett v. United States*, 471 U.S. 773, 779, 105 S. Ct. 2407, 85 L. Ed. 2d 764 (1985); *Albernaz v. United States*, 450 U.S. 333, 340, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981). The test is “essentially a factual inquiry as to legislative intent,” not a conclusive presumption of law. *Garrett*, 471 U.S. at 779. Therefore, “[i]f the facts that must be proved for the two statutes are not the same, the court must then determine if there are other indicia of legislative intent that suggest the legislature did not intend to authorize multiple punishments for the same act.” *State v. Jackman*, 156 Wn.2d 736, 750, 132 P.3d 136 (2006). This determination can be made with evidence of legislative intent that *Blockburger*’s same elements test does not take into consideration.

In the two crimes here, there is no difference in the mens rea or the actus reus to draw a meaningful distinction between these offenses. That was not the case in *State v. Calle*, 125 Wn.2d 769, 888 P.2d 155 (1995). In *Calle*, the court noted a distinction in the actus reus—force versus the prohibited relationship. Under the statutory scheme at issue here, the victim can be no more or less vulnerable or exploited by the reason of the strict liability imposed by the inability to consent, either by reason of the victim’s age or condition. There is no more or less violence or force required in the two crimes. There is no more or less damage resulting from the two crimes.

The purpose of statutory rape statutes is to “protect persons too immature to rationally or legally consent.” *Clemens*, 78 Wn. App. at 467. Both of the statutes at issue here are clearly meant to protect persons from sexual intercourse who are vulnerable and incapable of legal consent due to either their youth (second degree child rape) or other incapacitating condition (second degree rape). *See Christensen*, 156 Wn.2d at 68 (noting that child rape statutes in chapter 9A.44 RCW are for the protection of those who cannot rationally or legally consent).

The two crimes also have a defense in common for lack of knowledge. *See* RCW 9A.44.030(1) (providing a defense if the defendant did not know that the victim was mentally incapacitated); RCW 9A.44.030(2) (providing a defense if at the time of the offense the defendant reasonably believed the alleged victim to be a lawful age).

In *State v. Birgen*, 33 Wn. App. 1, 14, 651 P.2d 240 (1982), Division One of this court examined the third degree rape and statutory rape in the third degree statutes. It held that a defendant cannot be convicted of both nonconsensual rape and statutory rape based on age for a single act of intercourse. Then, in *Calle*, our Supreme Court cited *Birgen* for what it perceived to be “attempting to reach a double jeopardy analysis despite the concurrent sentence rule” then in effect.² *Calle*, 125 Wn.2d at 775. The Supreme Court nonetheless agreed with the ultimate reasoning in *Birgen*. *Id.*

² As aptly explained in *State v. Eaton*, 82 Wn. App. 723, 728, 919 P.2d 116 (1996): “When *Birgen* was decided, Washington followed the concurrent sentence rule.

Birgen examined the same statutory scheme and legislative history before the court today. It stated:

In 1975 the rape and carnal knowledge sections of the criminal code were replaced with sections dividing both “rape” and “statutory rape” into three degrees, similar to the present structure. LAWS OF 1975, 1st Ex. Sess., ch. 14, p. 172. The Legislature removed the requirement that the victim of a “rape” be over the age of 10, and added an offense of nonconsensual intercourse as third degree rape.

Birgen, 33 Wn. App. at 13.

From this revision, the *Birgen* court stated:

We find no indication, however, that by these changes the Legislature intended to permit multiple convictions where a single act of intercourse violated both the rape and the statutory rape sections. Rather, the legislative changes indicate an intent to further grade sexual offenses by the degree of force used and the age of the victim. The severity of the punishments for the different degrees of both rape and statutory rape indicate that the Legislature took into account the heinous nature of the crimes when defining them as it did.

Id. at 13-14.

In 1988 the legislature again revised the statutes. In this revision, the “statutory rape” crimes that described unlawful sexual intercourse were referred to as “child rape.”

Under that rule, when the State brings several charges against a defendant for the same act or transaction and obtains convictions on all counts, no double jeopardy issue arises if the defendant receives concurrent sentences that do not exceed the penalty for any of the offenses because he is being punished but once for his unlawful act. *Calle*, 125 Wn.2d at 772. Because the defendant in *Birgen* received concurrent sentences for his multiple convictions, the concurrent sentence rule required the court to reject his double jeopardy claim. It nonetheless reversed, concluding that concurrent sentences could be reviewed ‘for non-double jeopardy reasons.’ 33 Wn. App. at 5.”

Former RCW 9A.44.090 (LAWS OF 1988, ch. 145, §§ 12, 24). The new child rape statutes took into consideration the age differential between victim and perpetrator.

Significantly, the legislature also revised the indecent liberties statute at that time, which proscribed certain sexual contact. It denoted a new crime, child molestation, which it broke down into three degrees, depending on the age differential between perpetrator and victim: RCW 9A.44.083, .086, .089 (LAWS OF 1988, ch. 145, §§ 5, 6, 7). Although the crime of indecent liberties remained to proscribe sexual contact by forcible compulsion or when the victim is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless. RCW 9A.44.100 (LAWS OF 1988, ch. 145, § 10).

The legislature, also in 1988, added two degrees of a crime that it denoted as sexual misconduct with a minor, which made unlawful sexual intercourse (first degree) or sexual contact (second degree) with a victim between 16 and 18 years old, when the perpetrator was at least 60 months older than the victim, is in a significant relationship to the victim, and abuses a supervisory position within that relationship in order to engage in sexual intercourse or contact. RCW 9A.44.093, .096 (LAWS OF 1988, ch. 145, §§ 8, 9).

As noted in *Birgen*, this shows a legislative intent to sort offenses by the degree of force and the age of the victim as well as the abuse of trust inherent to crimes based on

the relationship between the perpetrator and victim. 33 Wn. App. at 14. This trend has continued. See RCW 9A.44.100.³

The *Birgen* court properly concluded:

[T]hat the Legislature has not authorized multiple rape convictions arising out of a single act of sexual intercourse violating more than one of the statutory sections defining rape and statutory [or child] rape. The history of the rape statutes shows legislative intent and judicial recognition that both the rape and the statutory [or child] rape statutes define a single crime of rape with the degree of punishment dependent on the underlying circumstances. The rape statutes continued to describe a single crime even after they were broken into separate statutory sections.

³ Later, the legislature expanded the definition of the crime to include:

“(c) When the victim is a person with a developmental disability and the perpetrator is a person who is not married to the victim and who:

“(i) Has supervisory authority over the victim; or

“(ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense;

“(d) When the perpetrator is a health care provider, the victim is a client or patient, and the sexual contact occurs during a treatment session, consultation, interview, or examination. It is an affirmative defense that the defendant must prove by a preponderance of the evidence that the client or patient consented to the sexual contact with the knowledge that the sexual contact was not for the purpose of treatment;

“(e) When the victim is a resident of a facility for persons with a mental disorder or chemical dependency and the perpetrator is a person who is not married to the victim and has supervisory authority over the victim; or

“(f) When the victim is a frail elder or vulnerable adult and the perpetrator is a person who is not married to the victim and who:

“(i) Has a significant relationship with the victim; or

“(ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense.” RCW 9A.44.100(1).

33 Wn. App. at 14.

Calle does not require a different result here. In *Calle*, our Supreme Court held that a single act of intercourse could support convictions for both incest and second degree rape. Again, although the court held that “the result in *Birgen* is sustainable” on double jeopardy grounds, the court distinguished the statutes involved in *Birgen*. *Calle*, 125 Wn.2d at 775, 781. The *Calle* court noted that the purpose of the rape statutes in chapter 9A.44 RCW—which includes the nonconsensual rape and statutory (or child rape) statutes—is to prohibit unlawful sexual conduct based on aggression, power, and violence. *Id.* at 781. And, as previously observed, I would conclude that the purpose further encompasses the abuse of power and trust inherent to the age differential and relationship between the victim and the perpetrator.

The *Calle* court differentiated that purpose of the rape statutes from that of the incest statute, which is “to prevent mutated birth but also to promote and protect family harmony, to protect children from the abuse of parental authority, and ‘because society cannot function in an orderly manner when age distinctions, generations, sentiments and roles in families are in conflict.’” *Id.* (quoting *State v. Kaiser*, 34 Wn. App. 559, 566, 663 P.2d 839 (1983)). There is no such distinction here.

The court also noted that the second degree rape offense and the incest offense are defined in two separate sections of the criminal code. *Calle*, 125 Wn.2d at 780. “Incest and bigamy now constitute RCW 9A.64, Family Offenses, while second degree rape is

defined in RCW 9A.44, Sex Offenses.” *Id.* Thus, the court concluded that the “differing purposes served by the incest and rape statutes, as well as their location in different chapters of the criminal code, are evidence of the Legislature’s intent to punish them as separate offenses.” *Id.* The same is not true here. The statutes here are both in chapter 9A.44 RCW and they serve a similar purpose.

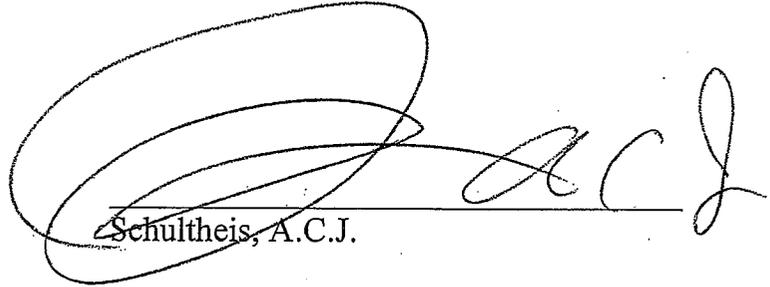
The two statutes at issue here—second degree rape of a child and second degree rape—are more aptly described by *Birgen* than by *Calle*.

Since legislatures often produce little evidence of their intent regarding multiple punishment, the rule of lenity is often an appropriate tool of statutory construction in such contexts. *See Busic v. United States*, 446 U.S. 398, 406, 100 S. Ct. 1747, 64 L. Ed. 2d 381 (1980). The rule “merely means that if [the legislature] does not fix the punishment for a [state] offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses.” *Bell v. United States*, 349 U.S. 81, 84, 75 S. Ct. 620, 99 L. Ed. 905 (1955). Washington courts have adopted these principles and recognized that in the absence of a clear indication that the legislature intended multiple punishment for the unitary conduct, the court should apply the rule of lenity to presume that the legislature did not intend multiple punishment. *Jackman*, 156 Wn.2d at 751. The rule applies here.

Because this court may not vary the statutory scheme from that enacted by the legislature, *Birgen*, 33 Wn. App. at 14, there is no clear indication of legislative intent to

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impose multiple punishment, and in light of the clear precedent set forth in *Calle* and *Birgen*, I would reverse.



Schultheis, A.C.J.

FILED

JAN 24 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

STATE OF WASHINGTON,

Appellant,

v.

RAYMOND CARL HUGHES,

Respondent and
Cross-Appellant.

No. 23946-2-III

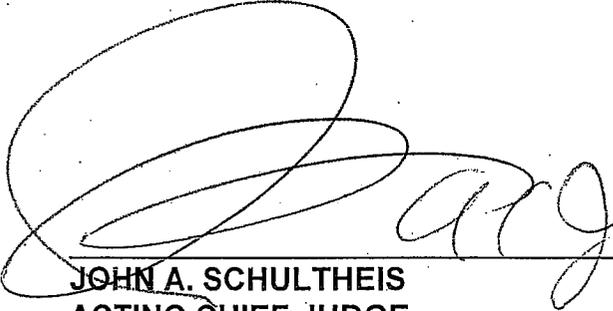
ORDER DENYING MOTION
FOR RECONSIDERATION

THE COURT has considered Respondent's motion for reconsideration of this Court's opinion under date of December 20, 2007, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, Respondent's motion for reconsideration is hereby denied.

DATED: January 24, 2008

FOR THE COURT:



JOHN A. SCHULTHEIS
ACTING CHIEF JUDGE