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STATE OF WASHINGTON

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**SUPREME COURT OF THE  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

S.S.Y, PETITIONER

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Court of Appeals No. 37250-9  
Appealed from the Superior Court for Pierce County  
Superior Court Cause No. 07-8-01424-9

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**SUPPLEMENTAL BRIEF OF RESPONDENT**

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MARK LINDQUIST  
Prosecuting Attorney

By  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

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

1. Did the juvenile court properly impose punishment for robbery in the first degree and assault in the first degree when the offenses: 1) address separate harms; 2) require different proof; 3) each contain an element that the other does not; and where the legislature has indicated its intent to punish each offense separately?

B. STATEMENT OF THE CASE.

Petitioner, S. S. YOUNG, was convicted following a bench trial before the Honorable Judge John A. McCarthy of first degree assault (Count I), and first degree robbery (Count II) in Pierce County Juvenile Court cause number 07-8-01424-9. RP 3<sup>1</sup>, 181. On December 20, 2007, the court sentenced Young to the standard range sentence of 103 to 129 weeks commitment to the Juvenile Rehabilitation Administration on each count to be served consecutively for a total of 206 weeks to 258 weeks, with credit for 120 days time served. SRP 10; CP 7-14. No one disputed that this was the appropriate range for Young's offenses. SRP 1-9.

---

<sup>1</sup> The verbatim record of proceedings shall be referred to as RP.  
The sentencing record of proceedings shall be referred to as SRP.

The evidence adduced at trial showed the following:

Around 6:30 p.m. on August 20, 2007, Sean Curkendall got off the bus from work and started walking home. RP 15-16. He took a shortcut along a trail behind the Labor Ready office listening to music on his MP3 player. RP 17-18. While doing this, Curkendall saw two boys and a girl drinking and smoking. RP 21-22, 32. They called out Curkendall's name; he paused but was in a hurry and decided to continue along the path home. RP 22. The two boys followed him and yelled for him to "wait up." RP 22. Curkendall stopped and when the boys caught up they asked to listen his MP3 player. RP 22. At this point, Curkendall recognized one of the boys as S. Young, as Young had asked to use his phone on a previous occasion. RP 23. Curkendall let Young listen to one headphone of the MP3 player, while the other boy, later identified as Cody Fox, listened to the other headphone. RP 24.

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

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

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

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

Young filed a timely notice of appeal from entry of his disposition. CP 19-28. On appeal, he argued that his convictions for assault and robbery should merge for double jeopardy purposes, and that the trial court failed to properly apply the “150% rule” found in RCW 13.40.180. Neither of these claims was raised in the trial court. SRP 1-12. In a published decision, the Court of Appeals found that the two offenses did not merge for double jeopardy purposes, but remanded the matter to trial court to address whether the 150% rule should apply to Young’s disposition. *State v. S.S.Y.*, 135 Wn. App. 325, 207 P.3d 1273 (2009). Young successfully sought review in this Court.

C. ARGUMENT.

1. YOUNG’S SENTENCES FOR FIRST DEGREE ROBBERY AND FIRST DEGREE ASSAULT DO NOT VIOLATE DOUBLE JEOPARDY AS THE LEGISLATURE INTENDED TO PUNISH EACH OFFENSE SEPARATELY.

The Washington State Constitution, article I, section 9, and the Fifth Amendment to the federal constitution prohibit multiple punishments for the same offense. *State v. Baldwin*, 150 Wn.2d 448, 454, 78 P.3d 1005 (2003); *In re Pers. Restraint of Borrero*, 161 Wn.2d, 532, 536, 167 P.3d 1106 (2007). The state constitution provides the same protection

against double jeopardy as the federal constitution. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

The prosecution can bring, and a jury can consider, “multiple charges arising from the same criminal conduct in a single proceeding.” *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). However, the double jeopardy principles bar multiple punishments for the same offense. *Borrero*, 161 Wn.2d at 536. The Washington Legislature has the power to define criminal conduct and to assign punishment. *State v. Louis*, 155 Wn.2d 563, 568, 120 P.3d 936 (2005); *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). When a claim of improper multiple punishments is raised, the appellate court must determine that the lower court did not exceed the punishment authorized by the legislature. *See Calle*, 125 Wn.2d at 776.

Where a defendant contends that he has been punished twice for a single act under separate criminal statutes, the question is “whether, in light of legislative intent, the charged crimes constitute the same offense.” *State v. Graham*, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005) (quoting *In the Matter of the Personal Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)). If the relevant statutes do not expressly authorize multiple convictions, courts apply the *Blockburger* and “same evidence” tests. *Graham*, 153 Wn.2d at 404, citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Under these tests, double jeopardy arises if the offenses are identical both in law and in fact.

*Baldwin*, 150 Wn.2d at 454. Another test that may be applicable in certain contexts is the “merger doctrine.” The merger doctrine is “a doctrine of statutory interpretation used to determine whether the Legislature intended to impose multiple punishments for a single act which violates several statutory provisions.” *State v. Vladovic*, 99 Wn.2d 413, 419 n. 2, 662 P.2d 853 (1983) (citing *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). The merger doctrine applies solely under the following circumstances:

[W]here the Legislature has clearly indicated that in order to prove a particular degree of crime ... the State must prove not only that a defendant committed that crime ... but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes.

*Vladovic*, 99 Wn.2d. at 420-21. As double jeopardy is an issue of constitutional magnitude, it may be raised for the first time on appeal if the error is “manifest.” RAP 2.5(a)(3); *State v. Adel*, 136 Wn.2d 629, 632-33, 965 P.2d 1072 (1998). An appellate court reviews double jeopardy issues de novo. *Freeman*, 153 Wn.2d at 770.

When proof of one crime is necessary to prove an element or degree of another crime, the two crimes merge under “the merger doctrine.” *State v. Vladovic*, 99 Wn.2d. 413, 419, 662 P.2d 853 (1983). The merger doctrine is a tool of statutory interpretation in which a court should presume that the legislature intended to punish both offenses through a greater sentence for the greater crime when the degree of one

offense is raised by conduct separately criminalized by the legislature.

*Freeman*, 153 Wn.2d at 772-773.

There are limits to application of the merger doctrine. If a defendant is convicted of two crimes and one elevates the other, both convictions may stand so long as the elevating crime involves some injury to the person or property of the victim which is separate and distinct from and not merely incidental to the crime of which it forms an element. *State v. Johnson*, 92 Wn. 2d. 671, 680, 600 P.2d 1249 (1979), *cert. dismissed*, 446 U.S. 948, 100 S. Ct. 2179, 64 L.Ed.2d 819 (1980), *overruled in part on other grounds by State v. Sweet*, 138 Wn.2d 466, 980 P.2d 1223 (1999). Also, multiple punishments for crimes that appear to merge will not violate double jeopardy if the legislature intended to punish each crime separately. *Freeman*, 153 Wn.2d at 778. The merger doctrine only applies where the legislature has clearly indicated it intended the offenses to merge. *State v. Sweet*, 138 Wn.2d 466, 478, 980 P.2d 1223 (1999). To determine legislative intent, courts should initially consider whether the legislature explicitly or implicitly intended that the two offenses be punished separately. *Id.* at 772. If there is an independent purpose or effect to each crime, they may be punished as separate offenses, even though, on an abstract level, the two convictions appear to be for charges that would merge. *Freeman*, 153 Wn.2d at 773.

In the present case, the assault in the first degree does not merge into the robbery, as the assault required a different level of proof in order

to obtain a conviction. The legislature also expressly authorized multiple punishments for multiple offenses through their statutory language. Furthermore, each offense contains an element the other does not, further evidencing the legislative intent to punish each separately.

- a. The crimes of first degree assault and first degree robbery do not merge as the proof needed for first degree assault differed from the proof needed for first degree robbery.

In the present case, Young was charged with the crime of first degree assault and first degree robbery. Young contends that his first degree assault charge must merge with his first degree robbery charge.

To prove first degree assault, the State had to prove beyond a reasonable doubt that Young, acting with intent to inflict great bodily harm assaulted the victim and inflicted great bodily harm.” RCW 9A.36.011(1)(c); CP 1-2. “Great bodily harm” is defined as “bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.” RCW 9A.04.110(4)(c).

Contrastingly, to prove first degree robbery, the State had to prove beyond a reasonable doubt that in the commission of a robbery, or of immediate flight therefrom, Young inflicted bodily injury on another.

RCW 9A.56.200(1)(a)(iii); CP 1-2. “Bodily injury” is defined as physical pain or injury, illness, or an impairment of physical condition. RCW 9A.04.110(4)(a).

Thus, the level of injury needed to support a conviction for first degree assault far exceeds the degree of injury needed to prove first degree robbery. The same evidence used to prove injury necessary to satisfy the elements of robbery in the first degree will not necessarily prove that an assault in the first degree occurred. In the case now before the court, the State’s evidence showed that the victim received multiple minor injuries to his lower body, any one of which would satisfy the requisite level of proof for “bodily injury” under the first degree robbery statute. In contrast, the blows and kicks to the victim’s head injured his eye and left him permanently legally blind. This injury satisfies the requisite level of proof of “great bodily harm” required under the first degree assault charge, and demonstrates that the legislature’s proscription against first degree assault was meant to prevent an independent harm from that proscribed by robbery in the first degree. As the harm needed to be proved in each crime varied drastically and required different evidence, this reflects a legislative intent to punish each crime separately. Young’s crimes of first degree assault and first degree robbery do not merge.

- b. The legislature intended juveniles who commit first degree robbery and first degree assault to be punished for both crimes.

Multiple convictions will not merge if the legislature intended each crime to be punished separately. *Freeman*, 153 Wn.2d 778. If the statutes explicitly authorize separate punishments, the separate convictions do not offend double jeopardy. *Id.* at 773. Absent explicit authorization, courts look to legislative intent, both explicit and implicit. *Id.* Evidence of legislative intent may be found on the face of the statute, in the legislative history, or in the structure of the statutes. *Id.* The fact that two statutes are directed at eliminating different evils or are located in different chapters of the criminal code is also evidence of the legislative intent to punish them as separate offenses. *Id.*; *State v. Timothy K.*, 107 Wn. App. 784, 791, 27 P.3d 1263 (2001).

In *Freeman*, this Court held unequivocally that convictions for first degree robbery and first degree assault do not merge, as the legislature explicitly authorized separate punishments. *Freeman*, 153 Wn.2d at 773. In reaching this conclusion, the court relied on the fact that the standard sentence range for each crime differed, evidencing a legislative intent to punish each crime separately. The court stated:

We do find some evidence that the legislature specifically did not intend that first degree assault merge into first degree robbery: the hard fact that the sentence for the

putatively lesser crime of assault is significantly greater than the sentence for the putatively greater crime of robbery.

*Freeman*, 153 Wn.2d at 778.

Young contends that because the standard sentence range for first degree assault and first degree robbery are the same under the Juvenile Sentencing Act, that the analysis used in *Freeman* is distinguishable. He suggests that the legislature did not intend to punish these crimes differently because they did not authorize a more severe punishment for one crime as in *Freeman*. But this analysis improperly focuses on one difference between the adult and juvenile sentencing provision, and fails to take into account the many other differences between them. For example, when an adult is sentenced on multiple convictions – assuming there is no more than one serious violent offense - the other current offenses will increase his offender score on each count, but the defendant will be sentenced to concurrent sentences. See RCW 9.94A.525, .530, and .589. In this situation the standard range for the crime with the highest offense level will usually provide the longest standard range, and the sentences on other crimes will be subsumed within it. In the juvenile system, other current offenses do not increase an offender score, and the sentences on multiple offenses will run consecutively. See RCW 13.40.0357 and 13.40.180. In juvenile court, lengthier sentences on

multiple crimes flow from consecutive sentencing policies and not due to an increased offender score on the crime with the highest offense level and corresponding longer standard ranges. Looking at the juvenile sentencing provisions, while the legislature did not authorize a more severe standard range punishment for assault in the first degree than it did for robbery in the first degree, it did authorize more severe punishment for a juvenile who commits both assault in the first degree and robbery in the first degree, than for a juvenile that commits only one crime.

The legislature clearly intended to authorize multiple punishments for multiple juvenile offenses, and expressly did so in RCW 13.40.180, which provides:

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

- (1) Where the offenses were committed through a single act or omission, omission[sic], or through an act or omission which in itself constituted one of the offenses and also was an element of the other, the aggregate of all the terms shall not exceed one hundred fifty percent of the term imposed for the most serious offense.
- (2) The aggregate of all consecutive terms shall not exceed three hundred percent of the term imposed for the most serious offense; and

(3) The aggregate of all consecutive terms of community supervision shall not exceed two years in length, or require payment of more than two hundred dollars in fines or the performance of more than two hundred hours of community restitution.

This provision clearly authorizes multiple punishments on offenses arising from “a single act or omission, omission[sic], or through an act or omission which in itself constituted one of the offenses and also was an element of the other.” This court should reject Young’s argument distinguishing his case from *Freeman*, and uphold the trial court’s imposition of sentence on both offenses.

- c. The crimes of first degree assault and first degree robbery do not merge when analyzed under the *Blockburger* test as each contains an element the other does not.

As first degree robbery and first degree assault are separate crimes under the *Blockburger* analysis, this provides additional evidence of the legislative intent to punish both crimes separately. Traditionally when there is an absence of clear legislative intent, courts turn to the *Blockburger* test to determine whether the two crimes constitute the “same offense” for double jeopardy purposes. *Freeman*, 153 Wn.2d at 772 (see *State v. Calle*, 125 Wn.2d 769, 777-778, 888 P.2d 155 (1995); *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). *Blockburger* states that if each crime contains an element

that the other does not, the court should presume that the two crimes are not the same offense and do not violate double jeopardy. *Blockburger*, 284 U.S. at 304. In other words:

where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

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

By applying the *Blockburger* test to the elements of first degree robbery and first degree assault, it is clear that the crimes do not constitute the same offense so that imposition of sentence on both does not violate double jeopardy. To prove first degree assault, the State had to prove beyond a reasonable doubt that Young acted “with intent to inflict great bodily harm” when he assaulted the victim and that he inflicted great bodily harm.” RCW 9A.36.011(1)(c). While “intent to inflict great bodily harm” must be shown as a separate element in the crime of first degree assault, *State v. Peter*, 63 Wn.2d 495, 387 P.2d 937 (1963), intent to inflict injury is not an element in the crime of first degree robbery. *State v. McCorkle*, 88 Wn. App. 485, 501, 945 P.2d 736 (1997).

Conversely, a person commits robbery when he “unlawfully takes personal property from the person of another or in his presence against his will.” RCW 9A.56.190. This element of a “taking” is not an element of first degree assault. RCW 9A.36.011(1)(c). Each crime contains an

element that the other does not. This application of the *Blockburger* test results in a conclusion that these offenses are not the same in law and may be punished separately.

- d. Whether remand for determination of whether the 150% rule in RCW 13.40.180 is proper depends on whether this is an issue of manifest constitutional magnitude.

The Supreme Court has held a defendant who fails to identify a factual dispute for the court's resolution and fails to request an exercise of the court's discretion waives his right to appeal such an issue. *In Re Goodwin*, 146 Wn.2d 861, 875, 50 P.3d 618 (2002). The courts have reasoned that "trial courts should not be required, without invitation, to identify the presence or absence of an issue and rule thereon." *State v. Nitsch*, 100 Wn. App. 512, 525, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030 (2000).

In the present case, Young failed to bring the provisions of RCW 13.40.180 to the trial court's attention and ask the court to make a factual determination about whether Young's crimes were governed by subsection (1) – the 150% rule- or subsection (2) – the 300% rule. As stated above, RCW 13.40.180 authorizes a court to impose multiple punishments for multiple juvenile offenses so long as the aggregate term does not exceed one hundred fifty percent or three hundred percent of the term for the most

serious offense depending on whether the offenses flowed from the same act or omission or were completely separate. This indicates that the trial court is required to make a factual determination about the nature of the charges. This type of assessment is similar to the “same criminal conduct” analysis that was addressed in *Nitsch*, that involves a mixed question of fact and law. Under *Nitsch*, a defendant fails to properly preserve this issue for appeal, if it is not raised and litigated in the trial court. Young did not preserve this challenge in the trial court. Should this Court agree with this analysis, then it should affirm Young’s convictions and sentence as entered by the trial court.

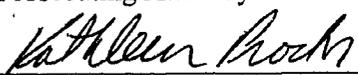
The Court below, however, viewed this claim as part of the constitutional double jeopardy issue. It seemed to question whether, under RCW 13.40.180, the legislature had authorized the trial court to impose a sentence above one hundred fifty percent of the term for the most serious offense. If this Court concurs in this analysis, then it should affirm the decision below and remand to the trial court for consideration of whether application of RCW 13.40.180(1) is appropriate.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions and sentence, or in the alternative, affirm defendant's convictions but remand to the trial court.

DATED: January 19, 2010.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

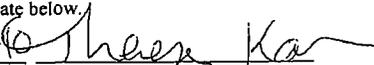
  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

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Chelsey McLean  
Rule 9 Legal Intern

Certificate of Service:

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

1-18-10   
Date Signature