NO. 43358-3-II (Consolidated)

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JERRO DAGRACA, APPELLANT
and
COREY YOUNG, APPELLANT
(Consolidated)

Appeal from the Superior Court of Pierce County
The Honorable Ronald Culpepper

No. 11-1-04678-0 (DaGraca)
No. 11-1-04679-8 (Young)

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

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

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2. Whether the separate sentences for robbery and kidnapping did not violate the incidental restraint doctrine where the robbery was completed before the kidnapping was committed, and where the incidental restraint doctrine does not properly exist under Washington law?

3. Whether the counts of robbery and kidnapping were not the same criminal conduct where the robbery was completed before the kidnapping was committed?

B. STATEMENT OF THE CASE.

1. Procedure

On November 21, 2011, based on an incident that occurred on November 19, 2011, the State filed an information charging Jerro DaGraca with Count I, Robbery in the First Degree; Count II, Kidnapping in the First Degree. CP JD 1-2. Each count included a firearm sentence enhancement. CP JD 1-2. That same day the State also filed an

information charging Corey Young with: Count I, Robbery in the First Degree; Count II, Kidnapping in the First Degree; and Count III, Unlawful Possession of a Firearm in the First Degree. CP CY 3-4. Counts I and II also included a firearm sentence enhancement. CP CY 3-4.

On March 27, 2012, both cases were assigned to the Honorable Judge Ronald Culpepper for trial. CP JD 132 (Criminal Case Reassignment, filed 03-27-12); CP CY 163 (Criminal Case Reassignment, filed 03-27-12). A jury was empaneled on March 27, 2012. CP JD 136; CP CY 167.

The jury returned verdicts finding DaGraca guilty of both counts, however the jury did not reach a finding as to whether DaGraca was armed with a firearm when he committed the crimes. CP JD 55-58; 142. The jury found Young guilty of all three counts, and found that he was armed with a firearm when he committed both Count I, and Count II. CP CY 70-74; 173.

The court sentenced both Young and DaGraca on April 23, 2012. CP JD 111-123; CP CY139-52; RP CY 04-23-12, p. 4.[1]

[1] The statement of arrangements filed by DaGraca on June 19, 2012 indicates that the VRPs for April 19 and 23 were ordered by DaGraca. *See* CP JD 143-44. However, the VRPs for those dates were not filed under DaGraca's name or case number. *See* CP JD 145. The State infers that it was the intent of DaGraca to rely upon the VRP from the April 23, 2012 sentencing generated under Young's name and case number, as that appears to be what he cites to. *See* DaGraca Br. App. at 2.

For sentencing, DaGraca argued that the robbery and kidnapping counts were the same criminal conduct for purposes of sentencing, while the State argued that they were not. CP JD 89-91; 92-95; 96-105. The court ruled that the two convictions were not the same criminal conduct and sentenced DaGraca to 68 months on Count I, and 72 months on Count II. RP CY 04-23-12, p. 4, ln. 17 to p. 5, ln. 13; p. 17, ln. 13 to p. 18, ln. 4; CP JD 111-123. The court did not enter the total months of confinement on the judgment and sentence, nor did the court specify if the sentences were to be served consecutively or concurrently. CP JD 117; RP CY 04-23-12, p. 17, ln. 13 to p. 18, ln. 4.

For sentencing, Young also argued that the counts I and II were the same course of conduct and additionally that they merged, and that prior offenses in his criminal history were also the same course of conduct. RP 04-17-12; CP CY 101-131. The court ruled that the counts were not the same course of conduct and did not merge, but did hold that Young's prior convictions were the same criminal conduct. RP CY 04-23-12, p. 4, ln. 17 to p. 5, ln. 25; CP CY 145. The court sentenced Young to: Count I, to 87 months plus 60 months for the firearm enhancement (amounting to 147 months total on count I); Count II, 110 months, plus 60 months firearm enhancement (amounting to 170 months total on Count II); and Count III, 54 months. RP CY 04-23-12, p. 26, ln. 10 to p. 27, ln. 15; CP CY 145,

139-152. The court's total period of confinement for Young was 230 months [60 + 60 + 110=230]. CP CY 145.

DaGraca filed a timely notice of appeal on April 23, 2012. CP JD 126. Young timely filed a notice of appeal on April 23, 2012. CP CY 153

This is the State's response to the briefs of appellants.

2. Facts

On November 9, 2011, Officer Michael Wulff was one of six patrol cars that responded to a 7-Eleven store at 100th Street and Gravelly Lake Drive in Lakewood regarding a report of a disturbance that might possibly have involved a DUI. 1RP 18, ln. 9-17.

About 20 minutes into dealing with that call, it was wrapping up when Officer Wulff observed a gray Toyota Camry on Gravelly Lake Drive turn very quickly onto 100th and come very quickly into the parking lot, straight at the officers, who were in semi-circle. 1RP 18, ln. 22-7. Officer Wulff could hear noise coming from the car's tires, and the officers thought the driver was going to possibly run into them by the way he was driving. 1RP 19, ln. 6-8. The car came straight at the officers, who stepped back and were getting ready to jump out of the way, but the car came to a quick stop. 1RP 19, ln. 8-13. Officer Wulff observed three people in the car. 1RP 19, ln. 13-14.

The driver's window went down and the driver, an Asian male who looked very distressed, yelled out the window at the officers that he was being robbed by the two males in the car and that they had guns. 1RP 20, ln. 1-9. At that time, the two male passengers both bailed out of the car on the passenger's side and immediately took off running in a southeasterly direction. 1RP 20, ln. 11-15.

Four officers immediately gave chase to the suspects. 1RP 20, ln. 22-23. The fleeing suspects were African American males of medium build, somewhat tall. 1RP 23, ln. 17-18.

Officer Wulff was the slowest of the pursuing officers and fell to the rear of the chase, but was still trying to keep the others in view. 1RP 22, ln. 15-17. The two ran around a hedge line toward the back side of the [Lakewood] Towne Center and hopped a fence. 1RP 22, ln. 18-21; p. 23, ln. 1-3. Officer Wulff lost sight of the two when they ran around the hedge line, and as he came into the Towne Center, he saw that one of the suspects was being taken into custody. 1RP 25, ln. 3-11. The other suspect ran straight into the parking lot where officers coming into the area were able to take him into custody as well. 1RP 25, ln. 11-17. Officer Wulff joined the group of officers who detained the first suspect, and in court was able to identify that suspect as the defendant, DaGraca. 1RP 25, ln. 22 to p. 26, ln. 13.

After placing DaGraca into a patrol car that arrived, they walked back to their own vehicles by retracing their steps to look for anything that had been dropped or left behind. 1RP 26, ln. 23 to p. 27, ln. 3. Doing so, at the spot just after the suspects jumped the fence, the officers found a Washington Redskins football jacket and hat that was consistent with clothing they had seen on one of the suspects during the chase. 1RP 27, ln. 20-25.

Moua Yang was an honorably discharged United States Army Veteran, originally from Laos who had been living in Lakewood Washington for a year. 1RP 110, ln. 23-24; 128, ln. 11-13.

On November 19, 2011 Mr. Yang had gone to Walgreen's to get cough medication, returned to his apartment complex, and was parked and sitting in his car, a silver 2010 Toyota Camry, while he talked to friends overseas. 1RP 112, ln. 16-19; p. 113, ln. 2-6. It was roughly between 12:00 and 1:30 a.m. 1RP 112, ln. 22-25. While he was sitting there he was approached by two men that he identified in court as Young and DaGraca. 1RP 113, ln. 11 to p. 114, ln. 9. DaGraca had previously been identified in court that day as wearing a white shirt with a tie. 1RP 25, ln. 5-13. Mr. Yang identified the defendants as the persons who robbed and kidnapped him. 1RP 112, ln. 19-21; p. 113, ln. 11 to p. 114, ln. 9. Mr.

Yang also identified Young as wearing a black shirt in court and as being the person who pointed the gun at him. 1RP 113, ln. 14-21; p. 114, ln. 20.

Young and DaGraca jumped from the other side of the fence to Mr. Yang's apartment complex, and then both came up to Mr. Yang's car door. 1RP 114, ln. 14-16. Mr. Yang thought they were asking for directions, so he opened the car door and stepped out. 1RP 114, ln. 17-23. Young pointed a gun at Mr. Yang. 1RP 114, ln. 20. DaGraca was very close to Young. 1RP 115, ln. 5-9.

The guy with the gun [Young] told Mr. Yang that, "Today is a bad day," and then told Mr. Yang to give him them all his money and anything else he had. 1RP 115, ln. 9-14. Mr. Yang responded, "I'm a veteran I don't know why you guys are doing this and you should know veterans, we don't have money; we're poor." 1RP 115, ln. 16-18. They asked Mr. Yang for money, which he told them he had, and then gave to them the $117 he had on him. 1RP 116, ln. 2-11. He did not give them anything else. 1RP 116, ln. 22-23.

Then the person without the gun [DaGraca] asked the guy with the gun [Young] to search Mr. Yang's pocket for credit cards. 1RP 116, ln. 25. They both searched his pockets. 1RP 118, ln. 4-6. Mr. Yang did not have any credit cards, but his wife had a food stamp card that they took. 1RP 117, ln. 5-7. Mr. Yang asked them to give him back his American ID

because it is hard to make up [replace?] the military ID and they did return it. 1RP 118, ln. 9-14.

During all this, the car was still running, so they turned off the car, took out the key and discussed that the card must have money. 1RP 118, ln. 21. Mr. Yang said it didn't have any money, that it was a food stamp card. 1RP 118, ln. 19-22. They told him to give them the PIN number, and he said he didn't know the PIN number and that even if he did know the PIN number, it is only a food stamp card and there was no cash. 1RP 118, ln. 22 to p. 119, ln. 1. Again he was told to give them the PIN number, so he just made up a PIN number for them because he was so scared. 1RP 119, ln. 1-4.

Young pointed the gun at Mr. Yang and acted like he was punching a number into his phone, but he didn't have a screen on his phone because the screen on his phone was broken. 1RP 119, ln. 6-8. After about 30 seconds, he said it wasn't working, that Mr. Yang was lying. 1RP 119, ln. 8-10. DaGraca said Mr. Yang was really scared, and then the guy [Young] hit Mr. Yang in the stomach and put the gun on his stomach and punched him in the face. 1RP 119, ln. 9-12. Mr. Yang said that they didn't have to do that because all they need is just money, so he would give them all the money. 1RP 119, ln. 13-14. He said they were

young and had a long time to go and don't need to do this. 1RP 119, ln. 14-16.

Young put the gun at him and said, "Disgusting," and then said, "Let's go to 7-Eleven to get food and money. If you don't get money for us, you're dead." 1RP 119, ln. 17-20. Then they pulled him back into the driver's seat so he could drive and the guy with the gun pointed the gun at him the whole time. 1RP 119, ln. 21-23. Young, with the gun, was seated in the front passenger seat, and DaGraca was in the back seat of the car. 1RP 120, ln. 3-5.

They pointed in a direction for him to go for the 7-Eleven. 1RP 120, ln. 11-12. There was a 7-11 right in front of the apartment complex, so Mr. Yang thought they wanted him to go there. 1RP 120, ln. 13-15. Mr. Yang thought he would have a chance to approach people, but the two men were smart and didn't let him go there. 1RP 120, ln. 15-17. Instead, when they got to the parking lot, they pointed him in the direction of another 7-Eleven, and gave him directions on how to get there. 1RP 120, ln. 17-19; p. 120, ln. 1-3. It took about five to seven minutes to get there. 1RP 121, ln. 4-5. During that time, they talked to each other about once Mr. Yang got the money, they were going to kill him and put him in the lake so they could have his car and do whatever party they wanted to do. 1RP 121, ln. 6-12.

As they pointed the direction they wanted him to go, he came to the 7-Eleven. 1RP 121, ln. 20-22. There weren't many ways to turn around and luckily for Mr. Yang, there were seven or eight police cars in that 7-Eleven. 1RP 121, ln. 22-24.

So they told him to go on, and Young put the gun tight at Mr. Yang's body and said to go right and keep it straight, and if he didn't, he was going to shoot Mr. Yang. 1RP 122, ln. 1-5. Mr. Yang told him not to worry and that he was going to do exactly what they said. 1RP 122, ln. 5-7. Then he kept hollering at Mr. Yang and had the gun at him, but Mr. Yang figured he was going to die anyway if he went with them, so he just took his chance, drove into the 7-Eleven and went straight to the police that were standing in the parking lot. 1RP 122, ln. 7-13.

Mr. Yang got out of the car right away, and hollered at the police that he needed help, that the two guys had a weapon, and were trying to kill him for money. 1RP 122, ln. 15-22. The minute he got out, he saw the two guys running too. 1RP 122, ln. 17-18.

After the two were caught, Mr. Yang was able to identify them when they were detained in a police vehicle. 1RP 123, ln. 1-7.

C. ARGUMENT.

1. RCW 13.04.030 IS NOT UNCONSTITUTIONAL.

DaGraca claims that RCW 13.04.030 is unconstitutional. DaGraca Br. App. at 7ff. That statute defines the proceedings over which juvenile court shall have jurisdiction, including several exceptions that exclude certain offenses from juvenile court jurisdiction.

As a preliminary matter it should be noted that DaGraca refers to RCW 13.04.030(1)(e) as the "automatic decline statute." That phrase is inaccurate and misplaced insofar as it occurs nowhere in the statute and inaccurately describes the manner in which the statute operates. This point is important because language matters, and the use of inaccurate language can lead to misunderstanding and misinterpretation of the law.

RCW 13.04.030 establishes the jurisdiction of the juvenile court. The basic structure of the statute is that juvenile court shall have exclusive jurisdiction over all juvenile matters in five subject areas. *See* RCW 13.04.030(1)(a)-(e). Subsection (e) gives the juvenile court exclusive jurisdiction over all proceedings "[r]elating to juveniles alleged or found to have committed offenses, traffic or civil infractions..." or other violations, but then also includes a number of exceptions to the juvenile court's jurisdiction. *See* RCW 13.04.030(1)(e)(i)-(v).

One exception to juvenile court jurisdiction is that the juvenile court may, at its discretion, transfer jurisdiction to the adult superior court pursuant to RCW 13.40.110. RCW 13.04.030(1)(e)(i). The court may set a decline hearing on its own motion, or on the motion of either party. RCW 13.40.110(1). The court must set a decline hearing, if the juvenile is age 16 or 17 and is alleged to have committed one set of crimes, or is age 17 and alleged to have committed another set of crimes. RCW 13.40.110(2). After a decline hearing, the court may order the matter transferred to adult superior court if the court finds that doing so is in the interest of the juvenile, or in the interest of the public. RCW 13.40.110(3).

Another, separate set of exceptions to juvenile court jurisdiction exist where the juvenile is sixteen or seventeen years old on the date of the offense and is alleged to have committed a serious violent offense; a violent offense with specified levels of prior criminal history; robbery in the first degree, rape of a child in the first degree, or drive-by shooting; burglary in the first degree with prior criminal history; or any violent offense where the juvenile is alleged to have been armed with a firearm. RCW 13.04.030(1)(e)(v)(A)-(E). In such cases, the adult court shall have exclusive original jurisdiction. RCW 13.04.030(1)(e)(v)(E)(I). Importantly, the juvenile court simply lacks jurisdiction over matters that fall under the exceptions specified under RCW 13.04.030(1)(e)(v). Under

the plain language of this provision, the juvenile court does not "decline" jurisdiction. Rather, the juvenile court does not have jurisdiction in the first place. Thus, it is not an "automatic decline" statute. Rather, the court simply lacks jurisdiction. DaGraca falls under this provision where he was 17 years of age, i.e. one month and two days short of his eighteenth birthday, when he committed the crimes of robbery in the first degree and kidnapping in the first degree [a serious violent offense].[2]

Early criminal law did not differentiate between adults and minors who reached the age of criminal responsibility. 14 Am. Jur Trials 619, § 4. However, there was a social trend toward more merciful and rehabilitative methods for handling juveniles, so that the first juvenile court was created in Illinois in 1899. 14 Am. Jur. Trials 619, § 4. Washington adopted its first juvenile court legislation in 1905, and from 1913 until 1977 Washington's legislation remained largely unchanged. *See* Jeffrey, K, Day, Juvenile Justice In Washington: A Punitive System in Need of Rehabilitation, 16 U. Puget Sound L. Rev. 399, 407 (1992)[3] (citing Act of Feb. 15, 1905, ch. 18, § 3, 1905 Wash.Laws 34 (repealed

[2] The judgment and sentence lists DaGraca's birthday as 12-21-1993 and the date of his crime as 11-19-2011. *See* CPJD 113.

[3] In case the court deems it relevant, the court should be aware that the author of this article was subsequently disbarred after being convicted of sexual molestation of a minor. *See* ***In re Disciplinary Proceeding Against Day***, 162 Wn.2d 527, 173 P.3d 915 (2007).

1909); Act of Mar. 17, 1909, ch. 190, Wash.Laws 668 (repealed 1913); Act of Mar. 22, 1913, ch. 160, 1913 Wash.Laws 520 (substantially repealed 1977)). *See also* Mary Kay Becker, Washington State's New Juvenile Code, 14 Gonz.L.Rev. 289, 290-91 (1979); Bobbe Jean Ellis, Juvenile Court: The Legal Process as a Rehabilitative Tool, 51 Wash.L.Rev. 697 (1976); Lawrence R. Schwerin, The Juvenile Court Revolution in Washington, 44 Wash.L.Rev. 421 (1969).[4]

Until 1977, Washington's juvenile court system was largely based on a model of juvenile delinquency that was prevalent nationally in the first half of the twentieth century. *See, e.g.*, Day, 16 U. Puget Sound L. Rev. at 402-404, 407. However, in 1967 the United States Supreme Court issued its opinion in ***Application of Gault***, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). In its opinion, the court held that despite the originally benign conception of the juvenile system, many of the aspects that were typical of juvenile delinquency systems were constitutionally inadequate. *See* 43 C.J.S. Infants § 40. As a result, the court's opinion in ***Gault*** precipitated a significant round of reform of juvenile court systems nationally.

[4] These additional articles are cited in the Day article, however, the State is unable to access them electronically.

In Washington, the Legislature adopted the Basic Juvenile Court Act of 1977. *See* Laws of Washington 1977, 1st Ex.S. ch. 291 § 1. As originally adopted, the act did not include the jurisdictional exceptions the defendant challenges here. *See* Laws of Washington 1977 1st Ex.S. c. 291 §4. The legislation as adopted in 1977 did not include most of the exceptions to juvenile court jurisdiction that are present in the current version of the statute. The exceptions challenged by the defendant were adopted in 1994. *See* Laws of Washington 1994 Sp.S. c 7 § 519.

The State is unable to identify any authority that stands for the proposition that the State is constitutionally obligated to maintain a juvenile court system as separate from general superior court. To the contrary, the Washington Supreme Court has held that under the Washington Constitution, the Legislature cannot divest the superior courts of their jurisdiction over juveniles. ***State v. Posey***, 174 Wn.2d 131, 137, 140,272 P.3d 840 (2012) (citing ***State v. Werner***, 129 Wn.2d 485, 496, 918 P.2d 916 (1996)).

The juvenile courts in Washington are jurisdictionally, a separate division of the superior courts. ***Posey***, 174 Wn.2d at 135. As such, juvenile court is merely a special session of the superior court, and where a statute deprives the juvenile court of jurisdiction, the superior court retains its jurisdiction over felony cases under the Washington

Constitution art. IV, § 6. ***Posey***, 174 Wn.2d at 135-36. Under the Washington Constitution, the Legislature cannot restrict the jurisdiction of the superior courts. ***Posey***, 174 Wn.2d at 135.

Where the State is not constitutionally mandated to maintain a juvenile court system, the legislature's grant of authority to the juvenile court system is discretionary and nothing in the constitution prohibits the Legislature from limiting the jurisdiction of juvenile court. ***See, e.g.***, ***Posey***, 174 Wn.2d at 141. Therefore, under the Washington Constitution, the degree of jurisdiction to be granted to juvenile court is discretionary on the part of the Legislature.

Moreover, some jurisdictions define juveniles as those less than 17 years old. 2 Children & the Law: Rights and Obligations § 8:5 [Age] (citing Mich. Comp. Laws Ann. §§598.2(a); 600.606; Tex. Penal Code § 8:07; ***Com. v. A Juvenile***, 27 Mass. App. Ct. 78, 534 N.E.2d 809, 810 (1989) (quoting Mass. Gen. L. ch 119, § 52)). Further, under federal law, the defendant's age at time of sentencing governs the penalty imposed, not the defendant's age at the time of the original offense. *See* ***U.S. v. Female Juvenile***, 103 F.3d 14 (5th Cir. 1996).

RCW 13.04.030 which defines the jurisdiction of the juvenile court is not unconstitutional insofar as it excludes certain offenses from juvenile court jurisdiction.

However, the analysis does not end there because the cases upon which DaGraca attempts to rely implicate a rather different issue - one upon which DaGraca nonetheless also ultimately fails to prevail. Properly framed, the question is whether DaGraca, who was not yet quite eighteen years old when he committed the crimes in this case may be punished by the imposition of an adult sentence without violating the United States Constitution. The clear answer is that he may.

DaGraca relies on a number of relatively recent United States Supreme Court opinions in support of his claim. *See* DaGraca Br. App. at 9-13 (citing ***Roper v. Simmons***, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005); ***Graham v. Florida***, --- U.S. ---, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010); ***Miller v. Alabama***, --- U.S. ---, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)).

The Eighth Amendment's protection includes the right not to be subjected to excessive sanctions. ***Miller v. Alabama***, --- U.S. ---, 132 S. Ct. 455, 183 L. Ed. 2d 407 (2012). That right flows from the precept that punishment for crime should be graduated and proportioned to both the offender and the offense. ***Miller***, 132 S. Ct. at 2463. The court views that concept less through a historical prism than according to the evolving standards of decency. ***Miller***, 132 S. Ct. at 2463.

In ***Miller***, the court stated,

> The cases before us implicate two strands of precedent reflecting our concern with proportionate punishment. The first has adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty. *See* ***Graham***, 560 U.S., at ——, 130 S.Ct., at 2022–2023 (listing cases). So, for example, we have held that imposing the death penalty for nonhomicide crimes against individuals, or imposing it on mentally retarded defendants, violates the Eighth Amendment. *See* ***Kennedy v. Louisiana***, 554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008); ***Atkins v. Virginia***, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). Several of the cases in this group have specially focused on juvenile offenders, because of their lesser culpability. Thus, ***Roper*** held that the Eighth Amendment bars capital punishment for children, and Graham concluded that the Amendment also prohibits a sentence of life without the possibility of parole for a child who committed a nonhomicide offense. ***Graham*** further likened life without parole for juveniles to the death penalty itself, thereby evoking a second line of our precedents. In those cases, we have prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death. *See* ***Woodson v. North Carolina***, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion); ***Lockett v. Ohio***, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Here, the confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment.

Miller, 132 S.Ct. at 2463-64.

In ***Miller,*** the court therefore held that a mandatory sentence of life without parole imposed upon a juvenile without the possibility to present

mitigating evidence in support of a lesser sentence violated the Eighth Amendment. ***Miller***, 132 S. Ct. at 2469, 2475.

Because that holding was sufficient to decide the cases before it, the court did not reach the defendant's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles. ***Miller***, 132 S. Ct. at 2469. However, in doing so, the court noted that:

> [...] That is especially so because of the great difficulty we noted in ***Roper*** and ***Graham*** of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transitory immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

Miller, 132 S. Ct. at 2469. [Citations omitted].

The three cases DaGraca relies upon do not support his position for the simple reason that he did not receive either a sentence of death, nor a mandatory sentence of life in prison without parole. Nothing in these cases stands for the proposition that a seventeen year old cannot be tried as an adult. Moreover, under the SRA, the court could impose an exceptional sentence below the standard range, if mitigating factors were established, and the defendant was entitled to present any relevant mitigating evidence he wished in support of such a sentence. *See* RCW

9.94A.535(1). The list of mitigating circumstances is illustrative and not exhaustive. RCW 9.94A.535(1).

Here, not only did the defendants rob Mr. Yang at gun point, they then also kidnapped him at gunpoint. Additionally, they discussed murdering Mr. Yang and dumping his body in the lake so that they could use his car to "party." Moreover, DaGraca had previously been convicted of robbery in the second degree. The court reasonably concluded that the public needed to be protected from him. DaGraca's sentence is appropriate given the nature of his acts, and his prior history of another violent offense. The fact that he was one month and two days short of his eighteenth birthday does not make his sentence unreasonable. Nor does it violate the Eighth Amendment.

2. THE RESTRAINT IN THE KIDNAPPING WAS NOT INCIDENTAL TO THE ROBBERY, AND FURTHER, THE OPINIONS ASSERTING INCIDENTAL RESTRAINT AS A DOCTRINE ARE MISTAKEN WHERE THEY MISAPPLY PRIOR CASE LAW.

In ***State v. Tvedt***, the court held that the unit of prosecution for robbery is each separate forcible taking of property from, or from the presence of, a person having an ownership or possessory interest in the property. ***State v. Tvedt***, 153 Wn.2d 705, 714-15, 107 P.3d 728 (2005).

[Emphasis added.] The unit of prosecution for robbery is not a course of conduct. ***Tvedt***, 153 Wn.2d at 713.

Further, the court's opinion in ***State v. Larry*** is consistent with the holding of the court in ***Tvedt*** insofar as the court in ***Larry*** recognized that even though the kidnapping and robbery involved the same victim, the kidnapping occurred over a period of time, while the robbery occurred at a single time and place, and was not the same as that involved in the kidnapping. ***State v. Larry***, 108 Wn. App. 894, 916, 34 P.3d 241 (2001).

Thus, under ***Tvedt***, here the robbery was completed when the defendants took Mr. Yang's money and cards. Had the defendant's succeeded in later forcing Mr. Yang to use the card at the 7-Eleven to obtain money or products to be turned over to them, it would have constituted a separate count of robbery. However, that count was never charged because it was never completed, where it was interrupted by Mr. Yang driving up to the police. At most it would have been a count of attempted robbery.

Because the robbery was not a continuing course of conduct, but was already completed when the kidnapping occurred, the defense claim on this issue fails completely.

Both parties argue that the kidnapping cannot be separately punished because the kidnapping was incidental to the robbery. However,

the robbery was completed before the kidnapping occurred because the kidnapping was committed in furtherance of another, second robbery attempt of Yang that was never fulfilled. Here, the restraint in the kidnapping was not incidental to the robbery.

Both DaGraca and Young argue that the robbery and kidnapping counts cannot be punished separately because "...a separate conviction for a 'restraint' crime cannot be upheld on appeal if that restraint was merely 'incidental' to the commission of another crime." See Br. App. DaGraca 15; Br. App. Young at 7-8. This rule is not independently grounded in any rule of constitutional law, or even statutory interpretation. Rather, the rule is purported to derive from several Washington Supreme Court cases. Br. App. DaGraca at 15-16 (citing ***State v. Johnson***, 92 Wn.2d 671, 676, 600 P.2d 1249 (1979); ***State v. Green***, 94 Wn.2d 216, 226-27, 616 P.2d 628 (1980); ***In re Personal Restraint of Brett***, 126 Wn.2d 136, 166, 892 P.2d 29 (1995); ***State v. Korum***, 120 Wn. App. 786, 703-04, 86 P.3d 166 (2004)) .

DaGraca provides a more through analysis of the underlying case law, so the State addresses the analysis of DaGraca. However, the analysis applies equally to both cases. The cases upon which DaGraca relies each has a separate constitutional basis, so that the attempt to generalize a rule from them is misplaced. *See, e.g.*, Br. App. DaGraca at

16 (citing ***Brett***, 126 Wn.2d at 174 under Double Jeopardy; and ***Green***, 94 Wn.2d at 226-27 under Due Process sufficiency analysis). A review of the cases shows that none of them support the claim.

State v. Johnson

In ***State v. Johnson***, the court considered the legislative intent for the charge of rape in the first degree under former RCW 9.79.170(1) which includes a number of felony acts that serve as elements that elevate the crime to the first degree. *See* ***Johnson***, 92 Wn.2d at 674. There the court held:

> As we read the statutes, the legislature intended that conduct involved in the perpetration of a rape, and not having an independent purpose or effect, should be punished as an incident of the crime of rape and not additionally as a separate crime.

Johnson, 92 Wn.2d at 676.

Thus, the opinion in ***Johnson*** involved a question of statutory interpretation of the rape statute, and did not a general rule of constitutional law, nor even a general statutory rule regarding sentencing. DaGraca cites ***Johnson*** for the proposition that "...the statutes defining 'restraint' crimes such as kidnapping are general 'broadly worded,' so that they may seem to encompass any restraint, even one which is incidental to the commission of another charged crime." DaGraca Br. App. 15.

However, this statement in ***Johnson*** related to language in the rape statute as it existed prior to the version the court considered in ***Johnson*** under former RCW 9.79.170(1). Under the older scheme, the degrees of rape were not separated out, so that penalties were instead increased by a pyramid scheme of "pyramiding" charges to penalize the more severe crimes by separately penalizing the incidental conduct separately. By adopting former RCW 9.79.170(1) and breaking out degrees of rape, the Legislature was expressing an different and specific intent as to how rape crimes should be penalized when combined with kidnapping. ***Johnson***, 92 Wn.2d at 676.

Moreover, although the current language of the rape statute under RCW 9A.44.040 is substantially similar to the language under former RCW 9.79.170(1), the opinion in ***Johnson*** pre-dated the adoption of the Sentencing Reform Act, and its provisions with regard to consecutive sentences and same criminal conduct as specified in RCW 9.94A.589(1)(a). Thus, the Legislature has further clarified its position with regard to sentences for what DaGraca refers to as "incidental restraint."

It is also worth noting that the court's opinion in ***Johnson*** was also subsequently overturned with regard to its interpretation of the burglary anti-merger statute. *See* ***State v. Read***, 100 Wn. App. 776, 792, 998 P.2d

897 (2000) (citing ***State v. Sweet***, 138 Wn.2d 446, 478, 980 P.2d 1223 (1999)).

Accordingly, the trial court did not abuse its discretion when it held that the robbery and the kidnapping were not the same criminal conduct. Indeed, the court would have abused its discretion had it ruled otherwise. For this reason, the defense claim regarding the sentence is without merit and should be denied.

State v. Green

In ***State v. Green***, the court considered whether there was sufficient evidence to support a determination of kidnapping as a predicate offense to aggravated murder in the first degree. ***Green***, 94 Wn.2d at 219, 224-25. In doing so, the court considered the meaning of Initiative 316, and whether, in adopting it, the voters intended to employ the kidnapping statute in a convoluted way to eliminate the distinction among intentional killings. ***Green***, 94 Wn.2d at 229.

Thus, the holding in ***Green*** was not a question of constitutional law, but rather one of statutory interpretation. In that context, the court concluded that evidence of the killing itself did not establish the restraint necessary to prove kidnapping based upon restraint by the use of deadly force under RCW 9A.40.010(2)(b) [which is one of the alternative means

of committing aggravated murder]. ***Green***, 94 Wn.2d at 229. If the deadly force used to commit the murder was sufficient to establish kidnapping for purposes of aggravating first degree murder, it would have meant that every first degree murder could also be charged as aggravated, thereby erasing the distinction between first degree murder and aggravated first degree murder.

It is also worth noting that under the facts at issue in ***Green***, the "kidnapping" cited to by the defense occurred prior to the rape and murder of the victim, which is why the court held it was integral to the crime of murder and not a separate kidnapping. *See* ***Green***, 94 Wn.2d at 226-27. Finally, ***Green***, like ***Johnson***, is also a case that was issued prior to the adoption of the SRA and RCW 9.94A.589(1)(a).

State v. Korum

The court of appeals opinion in ***Korum*** reviewed and relied upon the prior case law in ***Green*** and ***Johnson***. ***Korum***, 120 Wn. App. at 705. However, the facts in ***Korum*** involved a number of home invasion robberies where the defendant and accomplices restrained the victims prior to completing the robberies. As the court in ***Korum*** stated, "[here], in contrast, restraining the victims was contemporaneous with the robberies; and aside from the victim in Count 3, who was moved to the

next door trailer, there was no removal of the victims from their homes, and no transportation under cover to another location." For this reason, ***Korum*** too is inapplicable.

Additionally, the analysis in ***Korum*** on this issue has been rejected by Divisions I and III even where the restraint occurred before the robbery was complete. *See* ***State v. Grant***, 172 Wn. App. 496, 295 P.3d 771 (2012); ***State v. Butler***, 165 Wn. App. 820, 831, 269 P.3d 315 (2012). The court in ***Grant*** disagreed with ***Korum***, on the basis that the analysis in ***Korum*** misapplied ***Green***. ***Grant***, 172 Wn. App. at 503. However, it should be noted that in another recent opinion, relying in part on ***Korum***, Division II again held that that the kidnapping and robbery charges merged where the restraint occurred prior to the completion of the robbery so that it was incidental to it. ***State v. Lindsay***, 171 Wn. App. 808, 659, 288 P.3d 641 (2012).

In re Personal Restraint of Brett

In ***Brett***, the defendant asserted for the first time on appeal that the jury instructions failed to set forth the lack of incidental restraint as an essential element of kidnapping. ***Brett***, 126 Wn.2d 174. By asserting it as an error in the elements of the crime, Brett attempted to frame the issue as constitutional so it could be raised for the first time on appeal. ***Brett***, 126

Wn.2d at 174. However, the court did not reach the issue because it was not constitutional insofar as incidental restraint was not an element of kidnapping, but rather the nature of the restraint determines whether the kidnapping will merge into a separate crime to avoid double jeopardy. ***Brett***, 126 Wn.2d at 174. That issue Brett raised in a separate assignment of error. ***Brett***, 126 Wn.2d at 174.

The facts in Brett involved a conviction for aggravated first-degree murder and first degree felony murder. Brett argued that the murder was not committed in the course of kidnapping in the first degree because the restraint was incidental to the murder, so there was no abduction. ***Brett***, 126 Wn.2d at 166. Thus, the opinion in ***Brett***, like those in ***Johnson*** and ***Green***, involved a question of statutory interpretation of aggravated murder in the first degree. ***Brett***, 126 Wn.2d at 168. Moreover, the court in ***Brett*** held that the argument was without merit and that the kidnapping aggravator did not merge into the robbery where there was sufficient evidence that the murder was committed in the course of or in furtherance of first degree kidnapping. ***Brett***, 126 Wn.2d at 166-67.

Nothing in ***Brett*** supports the novel rule the DaGraca attempts to extract from the cases he cites. Moreover, in ***Brett***, as with the other cases cited by DaGraca, the restraint occurred prior to the completion of the crime that was elevated by the kidnapping. Accordingly, ***Brett*** is

inapplicable under the facts of this case, were the kidnapping occurred after the robbery of Mr. Yang was complete.

For the reasons articulated by the court in ***Grant*** and ***Butler***, the incidental restraint doctrine does not in fact exist, but rather is based upon a misunderstanding of ***Green***, etc. That same criticism applies equally to Young's reliance on ***State v. Elmore*** and ***State v. Saunders*** where ***Saunders*** too relies upon ***Green***, and ***Elmore*** relies upon ***Saunders***. *See* Young Br. App. at 8 (citing ***State v. Saunders***, 120 Wn. App. 800, 817, 86 P.3d 242 (2004), *review denied*, 156 Wn.2d 1034, 137 P.3d 864 (2006) (quoting ***State v. Green***, 94 Wn.2d 216, 227, 616 P.2d 628 (1980); ***State v. Elmore***, 154 Wn. App. 885, 901, 228 P.3d 760 (2010)).

The incidental restraint doctrine does not apply under the facts of this case because the robbery was completed before the kidnapping commenced. Moreover, incidental restraint is not a valid doctrine under Washington law where it is based upon a misinterpretation of ***Green*** and ***Green*** pre-dated the SRA.

3. THE COURT DID NOT ERR WHEN IT HELD THAT THE ROBBERY AND KIDNAPPING CHARGES WERE NOT THE SAME CRIMINAL CONDUCT.

The "same criminal conduct" doctrine is a statutory provision under the Sentencing Reform Act. *See* RCW 9.94A.589(1)(a).

For the purposes of sentencing "same criminal conduct" involves crimes that (a) involve the same criminal intent; (b) were committed at the same time and place; and (c) involve the same victim. RCW 9.94A.589(1)(a) (formerly RCW 9.94A.400(1)(a)); ***State v. Tili***, 139 Wn.2d 107, 123, 985 P.2d 365 (1999); ***State v. Lessley***, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). The absence of any one of these criteria prevents a finding of same criminal conduct. ***State v. Vike***, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

The Legislature intended the phrase "same criminal conduct" to be construed narrowly. ***State v. Flake***, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). Therefore, the courts construe the statute defining same criminal conduct narrowly to disallow most assertions of same criminal conduct. ***State v. Wilson***, 136 Wn. App. 596, 613, 150 P.3d 144 (2007).

To determine whether two or more criminal offenses involve the same criminal intent, the Washington Supreme Court established the objective criminal intent test, which requires a court to focus on "the extent to which a defendant's criminal intent, as objectively viewed, changed from one crime to the next." ***State v. Dunaway***, 109 Wn.2d 207, 214-15, 743 P.2d 1237 (1987); ***State v. Lessley***, 118 Wn.2d 773, 777-778, 827 P.2d 996 (1992)).

An appellate court will generally defer to a trial court's decision on whether two different crimes involve the same criminal conduct and will not reverse absent a clear abuse of discretion or a misapplication of the law. ***State v. Haddock***, 141 Wn.2d 103, 110, 3 P.3d 733 (2000); ***State v. Maxfield***, 125 Wn.2d 378, 402, 886 P.2d 123 (1994). The presumption is that a defendant's current offenses must be counted separately in calculating the offender score unless the trial court enters a finding that they "encompass the same criminal conduct." RCW 9.94A.589(1)(a).

If the court makes a finding that some or all of the current offenses encompass the same criminal conduct, then those offenses shall be counted as one crime for purposes of determining the defendant's offender score and concurrent or consecutive sentences. ***State v. Bobenhouse***, 143 Wn. App. 315, 330, 177 P.3d 209 (2008) (citing RCW 9.94A.589(1)(a)).

In ***State v. Larry***, the court held that the defendant's convictions for kidnapping and robbery were not the same criminal conduct. ***State v. Larry***, 108 Wn. App. 894, 916, 34 P.3d 241 (2001). The court held that a comparison of the robbery and kidnapping statutes demonstrates that they have different objective criminal intents. ***Larry***, 108 Wn. App. at 916.

The defense arguments on this issue fail for a simple reason. They are predicated on the assumption that the robbery here was ongoing, so

that it was not completed when the kidnapping took place. However, that position is contrary to law for the reasons explained in section 2 above.

Accordingly, the court did not abuse its discretion where it found that the robbery and kidnapping counts were not the same criminal conduct.

D. CONCLUSION.

The statute excluding serious violent offenses from juvenile court jurisdiction is not unconstitutional. Nor was DaGraca's sentence in violation of the Eighth Amendment where the SRA allows for and exceptional sentence below the standard range based upon the presentation of mitigating evidence. Given the serious nature of the offenses in this case, as well as DaGraca's prior history of a violent offense, the sentence imposed was reasonable.

The separate sentences for robbery and kidnapping did not violate the incidental restraint rule where the robbery was completed before the kidnapping occurred. Moreover, incidental restraint is not a valid doctrine in Washington where it is predicated upon a misapplication of ***Green***.

The robbery and kidnapping counts were not the same criminal conduct.

Because the defendants' claims fail, the appeals should be denied.

DATED: April 19, 2013.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

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.

4/19/13
Date Signature

PIERCE COUNTY PROSECUTOR

April 19, 2013 - 2:11 PM

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sheriarnold2012@yahoo.com
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