No. 42662-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

A.C.M.,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY,
JUVENILE DIVISION

The Honorable Elizabeth Martin, Judge (factfinding/disposition)

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 2

1. Procedural Facts 2

2. Testimony at the fact-finding hearing 2

D. ARGUMENT 14

THE DISPOSITION COURT ERRED IN FAILING TO APPLY THE 150% RULE AND IN FINDING THAT THE SECOND-DEGREE ASSAULT AND ATTEMPTED FIRST-DEGREE ROBBERY COUNTS WERE NOT THE "SAME CRIMINAL CONDUCT" AND COUNSEL WAS PREJUDICIALLY INEFFECTIVE 14

a. Relevant facts 14

b. The 150% rule applied and counsel was ineffective 16

E. CONCLUSION 28

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

State v. Contreras, 124 Wn.2d 741, 880 P.2d 1000 (1994) . . 19, 22, 23, 26

State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237 (1988) 19, 20

State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005) 17, 18

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006) 27

State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008) 17

State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009) 27

State v. Porter, 133 Wn.2d 177, 942 P.2d 974 (1997) 22

State v. S.S.Y., 170 Wn.2d 322, 241 P.3d 781 (2010) 17-19, 21

WASHINGTON COURT OF APPEALS

State v. Adame, 56 Wn. App. 803, 785 P.2d 1144, review denied, 114 Wn.2d 1030 (1990) 21

State v. Calvert, 79 Wn. App. 569, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005 (1996). 21

State v. Clark, 46 Wn. App. 856, 732 P.2d 1029, review denied, 108 Wn.2d 1014 (1987) 20, 21

FEDERAL AND OTHER CASELAW

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 27

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

6th Amendment 1, 27

Article I, § 22 . . . . . 1, 27

RCW 13.40.180(1) 1, 2, 15, 17-19, 23, 26, 27

RCW 9.94A.400(1)(a) 19

RCW 9A.08.020 2

RCW 9A.36.021(1)(a) 2

RCW 9A.36.021(1)(c) 2

RCW 9A.52.020(1)(a)(b) 2

RCW 9A.56.190 2

RCW 9A.56.200(1)(a)(i)(ii) 2

RCW 9A.56.200(1)(iii) 2

A. ASSIGNMENTS OF ERROR

1. The disposition court erred in failing to apply the 150% rule and in concluding that the attempted first-degree robbery and second-degree assault convictions were not the "same course of conduct."

2. Appellant J.C.M. assigns error to the juvenile court's finding in the disposition documents that "[t]he conduct in count(s) I-III DO NOT CONSTITUTE THE same course of conduct."

CP 37 (emphasis in original).

3. J.C.M.'s Article I, § 22 rights and 6th Amendment rights to effective assistance of counsel were violated.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

J.C.M. was accused of, *inter alia*, committing an attempted first-degree robbery and a second-degree assault committed during the same brief incident. The attempted robbery charge was elevated to first degree based upon the use of force which was the same act which amounted to the second degree assault.

Under RCW 13.40.180(1), the juvenile court is required to limit the aggregate length of dispositions to 150% where the crimes are either "committed through a single act or omission" or "through an act or omission which in itself constituted one of the offenses and also was an element of the other."

1. Crimes are committed through a "single act or omission" when they amount to the "same criminal conduct," in light of the defendant's objective intent.

   Did the juvenile court err in holding that the two crimes were not the "same criminal conduct" when they were committed at the same time and place and involved the same victim and were both committed for the sole purpose of effectuating the robbery?

2. Where the attempted robbery charge was elevated to the first-degree based upon the use of force which was the same act which amounted to the second-degree assault, was the assault an "act or omission which in itself constituted one of the offenses and also was an element of the other?"

   Was counsel ineffective in arguing the adult standard of "merger," a double jeopardy principle which the Supreme

Court has held does not apply to juvenile dispositions, and in failing to argue the "element" subsection of RCW 13.40.180(1) applied?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant A.C.M., then a juvenile, was charged by amended information with first-degree burglary, first-degree attempted robbery, and second-degree assault. CP 18-21; RCW 9A.08.020; RCW 9A.36.021(1)(a); RCW 9A.36.021(1)(c); RCW 9A.52.020(1)(a)(b); RCW 9A.56.190; RCW 9A.56.200(1)(a)(i)(ii); RCW 9A.56.200(1)(iii).

After pretrial hearings before Commissioner Megan M. Foley on June 22, 2011, July 6 and 25, 2011, and the fact-finding was held before the Honorable Elizabeth Martin in the juvenile division of the superior court on September 13-16, 2011.[1] Judge Martin found A.C.M. guilty as charged and, on October 6, 2011, imposed consecutive standard range dispositions for each offense, but reduced the disposition length to 104 weeks based upon application of a statutory maximum prohibition, the "300% rule." RP 399, 403; CP 35-40.

A.C.M. appealed and this pleading follows. CP 44-50.

2. Testimony at the fact-finding hearing

D.S., who was 17 at the time of the fact-finding hearing, had been

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[1]The verbatim report of proceedings consists of 9 volumes, which will be referred to as follows:

June 22, 2011, as "1RP;"
July 6, 2011, as "2RP;"
July 25, 2011, as "3RP;"
August 30, 2011, as 4RP;"
the four chronologically paginated volumes containing the fact-finding proceedings of September 13-16, and October 6, 2011, as "RP."

friends with two other boys, A.C.M. and J.C., since seventh grade when they had met at school. RP 37-38. Indeed, he considered both of them friends until the day he accused both of them of committing crimes with him on June 18, 2011, at the home of J.S., another teen from whom D.S. had bought marijuana many times in the past. RP 39-41, 51.

J.S. lived about a ten minute walk from D.S.'s home and D.S. said that both he and A.C.M. had been there, with D.S. going there a lot and A.C.M. going there to buy pot sometimes with D.S. RP 44, 51-52.

According to D.S., A.C.M. and J.C. were at D.S.'s house the night before, on June 17th, when they decided to rob J.S. of his drugs and money. RP 52-55. D.S. said that A.C.M. had been staying with him at his house almost the whole weekend before and J.C. was also over, although D.S. said it was not planned in advance for them to stay the night. RP 54-55. Nevertheless, D.S. testified about both J.C. and A.C.M. arriving at his house that night, saying J.C. showed up around 7 p.m. and A.C.M. arrived at 8 or 9 or later. RP 55. Later, he would say that he was "pretty sure" A.C.M. arrived first. RP 106.

D.S. said the boys smoked marijuana and listened to music, or maybe watched television. RP 55. According to D.S., at some point "the topic" of J.S. came up. RP 56. The boys were talking about how they did not have any money or weed and they wanted to buy some "pot." RP 56. D.S. testified that somehow they ended up discussing robbing J.S. for both money and drugs. RP 56. D.S. said he had seen J.S. with cash and marijuana at his home, but told police it was J.C. who proposed the idea of committing the robbery. RP 59-60. He testified at the fact-finding,

however, that it was an "equal idea." RP 110. He then backtracked and said it was more J.C.'s idea than anyone else's to commit the crime but the planning was equal. RP 111.

At the same time that D.S. was testifying that the issue of robbing J.S. just came up CHK, however, D.S. testified that A.C.M. brought an aluminum, orange and black baseball bat when he came over that night. RP 65. And D.S. also claimed that the purpose of the bat was to use in the robbery, which he admitted meant that, rather than ending up discussing committing the robbery that night as D.S. had testified, that would have to mean the boys had discussed committing the robbery before that night. RP 65.

D.S.'s mom, Cynthia Moore, said it was J.C. - not A.C.M. - who arrived with the orange and black baseball bat. RP 156. She remembered A.C.M. arriving and said he was carrying his usual backpack. RP 156-57. In fact, Moore recalled making a joke about the bat, saying to the boys that it was probably not "the smartest thing for three teenagers to be carrying around a bat in Spanaway at 10:30 at night." RP 157. But Moore also testified that the boys had all gone out for a while and it was when they returned that one of them had the bat, at about 10:30 that night, rather than when they arrived at the home in the first place. RP 178.

Despite his claim that the robbery had been planned in advance and that was why the bat was brought, D.S. admitted that the boys had no plan to use the bat to hit anyone "in an offensive manner" but just "[f]or protection" in case "things got out of hand." RP 65-66.

D.S. testified that the "general plan" was to go to the home of J.S.

when the other teen's parents were not home "and just take" J.S.'s "stuff." RP 60. D.S. was going to send J.S. a text message or call him to see if he had "weed" D.S. could buy first. RP 61. Once he arranged that, they were then going to go to J.S.'s house and rob him. RP 61.

But D.S. also said they had no "specific plans as to how" they would "go about robbing" J.S. "until we got to the house." RP 61.

D.S. said J.C. was going to ring the doorbell to "draw the attention to [sp] the victim to the door." RP 61. D.S. said the plan was to go in the front door and that D.S. was going to "subdue" J.S., with the role of A.C.M. to "help" D.S. do so. RP 62. The boys would then get the money and "weed" from where J.S. usually had it, on his entertainment center in his bedroom. RP 62.

D.S. also said that the boys decided to use ski masks to cover their faces, and that they were originally planning to buy the masks but ended up borrowing two from a friend, going to his house the night of the 17th to do so. RP 63-64. Because there were only two masks, J.C. cut a sort of hat that he had for eyes and mouth and pulled it down to about his chin. RP 64.

At trial, D.S. testified that they had actually planned on committing the robbery the night of the 17th but they "changed it to another night." RP 66. He also said they were planning to do it one night and decided to do it the next day because there were some things they still needed to work out, like getting the masks. RP 66.

But next D.S. said that, when they had not committed the crime the night of the 17th, "basically we weren't planning on doing it," but that

they woke up the next morning and "then I planned to do it." RP 67.

D.S. admitted that he could not recall A.C.M. making any "specific suggestions" about the robbery. RP 60.

On the morning of the 18th, Moore saw all three boys leave together. RP 157-59. D.S. testified that the boys threw the bat out of the bedroom window before leaving the house, picking it up after that. RP 67. D.S. was dressed in black shoes, black jeans and a black windbreaker, in anticipation of the robbery he intended to commit, but J.C. and A.C.M. were wearing their regular clothes. RP 68. D.S. had sent a text message to J.S. asking if the other boy would have "weed like an hour later," and J.S. responded, "yeah." RP 69. D.S. asked J.S. if his mom was going to be there and, while D.S. did not recall the answer, D.S. said he knew that J.S.'s mom was not going to be at the home. RP 69. D.S. told J.S. that he was going to be there in about an hour, because that way J.S. would not be "ready" for anyone to arrive. RP 70.

J.C. carried the bat over to J.S.'s house. RP 71. D.S. said that, when they got there, the boys kind of "hid" in bushes, then noticed that the garage door was slightly open. RP 71-72. They went into the garage and "tried to formulate a plan" but did not really come up with anything, so they went in through the door to the house from within the garage. RP 72-73.

At that point, they decided to have J.C. go ring the front doorbell from the outside. RP 74. J.C. still had the bat but handed it to A.C.M. RP 75. The idea was that whoever reached him first would subdue J.S. while the other or others would go to J.S.'s room, grab the stuff and leave. RP

76. Although D.S. testified that he assumed "subdue" meant "like, beat him up" or "jump" J.S., D.S. admitted there was never any discussion of how they were actually going to subdue J.S., nor was there any discussion of using the bat. RP 75-77. D.S. then claimed that he had thought someone would just hold J.S. while the robbery was committed. RP 77.

J.C. rang the door bell and, according to D.S., "just ran off" after that. RP 77. It was Earl Smiley, J.S.'s father, who actually answered the door. RP 77. D.S. said that neither he nor A.C.M. said anything from where they were inside the house but that A.C.M. "went up the steps and struck" Smiley with the baseball bat as the man was closing the door. RP 78. D.S. claimed A.C.M. hit Smiley about five times, with the bat and also his feet, when Smiley was on the floor after dropping there, lunging at A.C.M. and going down the steps. RP 77-79. D.S. claimed he was "[j]ust standing there" while this was occurring. RP 80.

Earl Smiley testified about going to answer the door, seeing through the window what appeared like someone running away, opening the door to find noone there, then turning, at which point someone wearing black hit him on the top of the head, presumably with the bat, which Smiley did not see. RP 222.

Smiley went "after" the person, down the steps and into the "rec room," with the assailant still swinging. RP 222. Smiley said he was hit once and went down the steps, following the person into the rec room while the bat kept making contact on his shoulder and left side of his ribs. RP 224.

Smiley was sure he was not "falling down the steps" when he went

after the assailant. RP 236. He was also sure that he never fell to the ground, never was on his hands and knees trying to pursue anyone and was always "upright." RP 237.

D.S., however, testified that Smiley fell past him, down the stairs, and that Smiley was at one point crawling on his hands and knees. RP 79-80. D.S. also said D.S.'s leg might have brushed up against Smiley at that time. RP 113-14. Smiley testified, in contrast, that he never had physical contact with the second assailant, D.S., and never had anyone brush against or fall against him during the incident. RP 238-39.

At some point, J.S. came down the stairs towards the altercation. RP 80-81. According to D.S., something then happened between J.S. and A.C.M., which D.S. said he watched. RP 80-81. D.S. also claimed that, sometime while he was "watching, like, what they were doing," D.S. "blacked out kind of" and when he came back to his "senses," he and J.S. were then fighting. RP 81. But D.S. also said that he had blacked out not while watching the altercation but actually when J.S. got down the stairs and struck D.S. in the face with his fists. RP 82-85.

D.S. said he came back to consciousness at most 10 seconds later and was fighting with J.S., who had D.S. in a chokehold at one point, so D.S. "bit him and bit him [J.S.]" on the arm. RP 83-86. D.S. said that J.S. pulled off his ski mask and they then started a "verbal argument," with J.S. saying things like, "how could you do this to me?" RP 84.

D.S. described it as J.S. "rambling about like how and why I would do that to him." RP 84.

By this point, D.S. said, A.C.M. was gone. RP 84-85. J.S. was

trying to keep D.S. there but D.S. grabbed his "stuff" and left up the stairs, out the front door. RP 85. He saw Smiley, Smiley's wife and brother outside on the cement porch as he ran by. RP 85.

D.S. then went and hid in some bushes in someone's front yard. RP 87. While there, D.S. said, he called J.C. on the cellular telephone, talking to both J.C. and A.C.S. who, D.S. said, were at the home of a mutual friend. RP 90-91.

D.S. did not explain why, if the two other boys were at the home of this friend and that home was, as D.S. claimed, "right like close" to where D.S. was hiding, D.S. did not try to head there. RP 91.

D.S. testified that, while he was hiding in the bushes, he heard the familiar sound of his mom's truck driving by, so he called his mom on the cell phone and told her to stop the truck in order to let him get into the vehicle. RP 92. He testified that his mom was on her way to the deli but, after picking him up, went to his sister's house instead. RP 93.

D.S.'s mom testified, however, that D.S. had called her and said he had been "jumped" and was in trouble. RP 159-60. She said he was crying and told her he had been hurt. RP 159-60. She asked where he was and he said he was hiding in some bushes. RP 160. Once she got him to give her the name of the street he was on, Moore got into her SUV and drove there. RP 160. He then called her on the phone and she stopped and let him in. RP 160.

Also in the car were D.S.'s sister and brother, both pre-teens, and a family friend. RP 92, 152. D.S. said he did not really tell his mom what was going on because of the others in the truck, although she asked. RP

116. And he also said he "probably lied" to her. RP 127. But he also said that his mom knew he was being sought by police and drove to his sister's house in order to avoid the police they knew would be at their home. RP 93. Ultimately, D.S. ended up being taken by his sister to his mom's house where the waiting officers arrested him. RP 94-95.

Moore conceded that her son, D.S., lied to her when she asked him what happened, initially telling her he had been "jumped" and that he did not know why. RP 161. She confronted him, saying, "there's got to be more to this than what you're telling me." RP 161. Moore said D.S. did not actually tell her the truth about "some of what had happened" until after they were at her daughter's house and in the process of cleaning D.S. up. RP 161-62. All he told her at that point was that "they had went to rob a house and that something went wrong, and that he got beat up by the kid that was living there." RP 163.

D.S. also misled his mother about the reason for the robbery, saying only that it was for money without telling her they were also trying to steal drugs. RP 176.

When he spoke to police, D.S. admitted, he lied to them, too. RP 97, 121, 127. Initially, D.S. told police that the person who was with him was J.J., not A.C.M. or J.C. RP 112. And J.S. testified that, after he unmasked D.S. when he and D.S. were fighting, J.S. demanded to know who the other assailant was and D.S. responded, "J.J." RP 302. J.S. said he told the police what D.S. had said about "J.J." being the second assailant. RP 302. An officer confirmed what J.S. said about D.S. identifying "J.J." as the other perpetrator. RP 197.

At the fact-finding, D.S. flatly denied telling J.S. that it was J.J. RP 111, 115. Instead, D.S. claimed, when the other boy asked who else was committing the crimes with D.S., D.S. did not answer. RP 115. But D.S. also admitted telling the police it was J.J., not J.C. or A.C.M., when he first spoke to them. RP 111-15.

D.S. admitted that the water pipe or "bong" the boys had been smoking marijuana from the night before the incident belonged to someone else, but did not recall telling defense counsel it belonged to "J.J." RP 108. At the fact-finding, D.S. said both that "it wasn't J.J." and "I don't know." RP 108.

Other lies D.S. admitted telling the police included falsely telling them he had not bought drugs from J.S. (RP 125, 127), that he got his mask from J.C., not another boy, "M," who was not involved in the incident otherwise (RP 124, 128), and when he told them the entire incident was not "planned out" and was "just spur of the moment." RP 102, 127. He also lied when he told police he did not know if A.C.M. had hit Smiley with a bat, he said, because he actually did. RP 97, 102. Another lie was telling police it was J.C.'s idea to commit the crime. RP 128.

D.S. maintained, however, that he was being truthful at the fact-finding hearing and in claiming that A.C.M. was involved. RP 128-29. He said he was now being truthful in his claims, including that he did not know anything about the knife found near where he and J.S. had been fighting, that he had "blacked out," and all his other current claims. RP 128-29. But the back of the plea form containing his supposed "truth" still

contained the claim that the crimes were J.C.'s idea "because he had bought weed from this man before," even though he was maintaining at the fact-finding that this claim was not true. RP 128, 132.

According to Moore, after he talked to police, D.S. then told her that J.C. and A.C.M. were with him. RP 163-67. But D.S. still did not say anything about A.C.M.'s "role," other than that, nor did D.S. say anything about wearing masks, or what he said J.C. had done. RP 166.

Moore denied that her son had ever admitted to her that he was ever anything less than "entirely truthful" with police. RP 178. Instead, he had only admitted to his mom that he was not completely truthful with *her*. RP 178.

J.S. testified about hearing his dad "like screaming kind of," after which J.S. ran down the stairs and fought with a masked person who was in the house, ultimately unmasking him and finding out it was D.S.. RP 300-301. J.S. broke his hand in hitting D.S. but denied having put D.S. in a choke hold, saying he was trying to when D.S. "locked on, like a dog," biting him hard. RP 306-308.

According to J.S., he saw D.S. with a knife so that was why he was trying to get D.S. into a chokehold, to stop D.S. from getting back up and grabbing the knife. RP 309. But J.S. also said the reason he thought that the knife that was found later came from D.S.'s pocket was because it did not belong to J.S. and J.S. did not think it belonged to his parents. RP 307.

D.S. testified that J.S. had him in a choke hold and D.S. blacked out before that choke hold. RP 115.

On cross-examination, J.S. denied knowing D.S. from having sold him marijuana, said he did not use marijuana and had never done so, and denied that officers found a pipe in his room. RP 301-303. An officer reported finding such a pipe in J.S.'s bedroom and seeing marijuana posters on the wall. RP 205-206. J.S. said it was not illegal to have posters, denied knowing J.C., denied that D.S. had "texted" him about buying drugs the morning of the incident and referred to A.C.M. as "that fool," who he said he had met along with D.S. in school. RP 304.

A baseball bat was found on a small couch in the "rec" room. RP 199. The bat was processed for fingerprints but there were no usable prints. RP 260, 273. A small kitchen knife found just inside the front door was also seized and processed but it had no usable prints. RP 269, 274. No other part of the house was processed, nor was a ski mask found by J.S., even though a police forensic officer admitted that it would be possible to test any hair inside the cap for DNA to identify who had worn it. RP 271-75.

The blood found throughout the house was swabbed but the forensic officer did not know if any testing was done on it. RP 274.

A defense investigator confirmed that, during the defense interview, D.S. said they were using "J.J.'s bong" and that J.J. was a friend. RP 323-24.

D. ARGUMENT

THE DISPOSITION COURT ERRED IN FAILING TO APPLY THE 150% RULE AND IN FINDING THAT THE SECOND-DEGREE ASSAULT AND ATTEMPTED FIRST-DEGREE ROBBERY COUNTS WERE NOT THE "SAME CRIMINAL CONDUCT" AND COUNSEL WAS PREJUDICIALLY INEFFECTIVE

At the disposition hearing, the juvenile court found that the second-degree assault and attempted first-degree robbery counts were not the "same criminal conduct," then applied a cap on the disposition under the "300% rule." This Court should reverse and remand for a new disposition hearing, because the juvenile court erred in making its rulings and in failing to apply the 150% rule. Further, new counsel should be appointed on remand, because counsel was prejudicially ineffective in both failing to be aware of the relevant law and in failing to present that law and proper arguments on its application on his client's behalf.

a. Relevant facts

At the disposition hearing, the parties apparently handed the court some cases regarding what they and the court called the "merger issue." RP 391-93. Judge Martin stated she had a chance to "briefly" look at the cases and counsel then told the court that the merger issue "requires the Court to determine whether or not the assault is part of the same criminal conduct as" the attempted robbery. RP 393-94. Counsel pointed out that the assault was used to elevate the degree of the attempted robbery, because it had been "pled as carrying the bat that was the weapon that elevated the degree of the attempted robbery" and also because "the use of the bat that is the assault" was also used to elevate the attempted robbery.

RP 394. As a result, he said, the two crimes should "merge." RP 394-95.

Counsel also said he had only that morning thought of another argument to make, involving the "150 percent" rule of RCW 13.40.180. RP 394. Counsel said that, under the rule, if a juvenile was convicted of multiple crimes which encompassed the same criminal conduct, the "150 percent" rule would mandate that "the additional counts would add only, I think, 150 percent of the most serious" disposition. RP 394.

The prosecutor admitted he had not read the statute but agreed that the question was whether the attempted robbery and assault were "the same course of criminal conduct." RP 395.

Judge Martin asked if there would still be an attempted first-degree robbery if A.C.M. had only had the bat and threatened use of it rather than actually using it. RP 395. Counsel said he thought so but because the force used to effectuate the attempted robbery was the assault, the two crimes should "merge." RP 395.

At that point, the prosecutor declared, "13.40.180 is the 300 percent rule, not the 150 percent rule, so I don't think it would apply, or even if it did apply," it would not change anything. RP 396. The court noted that, under the 300% rule, the maximum would be two years and the prosecutor agreed. RP 396.

The prosecutor also argued that the charges did not "legally or factually" merge, because the robbery was charged as an attempt and could have been committed by any other acts such as leaving D.S.'s house with the masks and bat and the plan to go commit the robbery or going into the garage with the bat. RP 396. The prosecutor also stated that "the

attempted robbery was completed before the assault ever occurred," so that the two crimes were not "the same course of criminal conduct," and that Smiley was the victim of the assault but J.S. the victim of the attempted robbery. RP 397.

Counsel disputed the idea that the attempted robbery was "completed" prior to the assault and argued that Smiley was the victim of attempted robbery as well, because it was his house. RP 398.

In declining to find that the assault and attempted robbery were the same criminal conduct, the juvenile court said

> The way I analyze it is I do think the assault is separate from the attempted robbery, because I think that the assault - - the attempted robbery took place once they were in the house with the bat, and the assault then took place later. I'm not so sure about the victim issue. I tend to agree with you, as the homeowner, that he was at least within the scope of victim for the perceived theft, but I am going to find that it is not the same criminal conduct and it does not merge.

RP 398-99. Applying the "300 percent" rule, the court then imposed a disposition of 45-104 weeks, which was 15-36 weeks per count running consecutively but "capped out" at 104 weeks. RP 402-403.

b. <u>The 150% rule applied and counsel was ineffective</u>

The juvenile court erred in failing to apply the 150% rule and in finding that the attempted first-degree robbery and the second-degree assault were not the "same criminal conduct." Further, counsel was prejudicially ineffective in his handling of the issue.

At the outset, the "merger" doctrine, discussed at length by the parties below, does not actually apply. The doctrine, part of the analysis in determining whether a double jeopardy violation has occurred, was

addressed in the juvenile disposition context in State v. S.S.Y., 170 Wn.2d 322, 241 P.3d 781 (2010). In that case, the Supreme Court noted that, because the legislature may constitutionally choose to impose multiple punishments for the same offense, the real question with double jeopardy or "merger" is whether there was evidence that the legislature had such intent. 170 Wn.2d at 328-29.

The Court found such intent in the juvenile disposition context in RCW 13.40.180(1), which provides that terms for separate juvenile offenses must run concurrently when they are, *inter alia*, either "committed through a single act or omission" or "through an act or omission which in itself constituted one of the offenses and also was an element of the other." S.S.Y., 170 Wn.2d at 327, quoting, RCW 13.40.180(1). Under the statute, where two dispositions meet those requirements, the "aggregate of all the terms" must not "exceed one hundred fifty percent of the term imposed for the most serious offense." RCW 13.40.180(1).

Examining the "element" prong of RCW 13.40.180(1), the S.S.Y. Court noted that, in the adult sentencing situation, the Court has frequently found legislative intent to impose only one punishment - and therefore that merger must occur - where the degree of one crime is elevated by commission of another crime and both are separately charged. S.S.Y., 170 Wn.2d at 329-30; citing, State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005); see also, State v. Kier, 164 Wn.2d 798, 802, 194 P.3d 212 (2008). Indeed, in the adult context, the Court had previously held that, where charges of robbery was elevated to first-degree by acts amounting to

and charged separately as second-degree assaults, the crimes had to "merge" in order to avoid violating double jeopardy, unless it could be shown that the assaults had "an independent purpose or effect." Freeman, 153 Wn.2d at 779-80. As a result, unless a second-degree assault which elevates a robbery for first-degree had a purpose separate and distinct from - not merely incidental to - the robberies, the crimes had to merge. 153 Wn.2d at 779-80.

S.S.Y., however, declined to follow this line of cases in the juvenile context, based upon "the contrast between the adult sentencing scheme involved in Freeman and the juvenile" scheme. S.S.Y., 170 Wn.2d at 331. In S.S.Y., the disposition ranges for the two offenses were the same, unlike in the adult context, where the fact that the higher offense had a greater sentence was deemed to show Legislative intent for only one sentence to be imposed when one crime elevated the degree of the other. 170 Wn.2d at 330.

But the most significant evidence of legislative intent for the S.S.Y. Court was RCW 13.40.180(1), because it specifically contemplated that separate dispositions would be entered even when one offense "constituted one of the offenses and also was an element of the other." S.S.Y., 170 Wn.2d at 331-32. This language, the S.S.Y. Court held, showed "legislative intent to punish offenses separately when one offense constitutes an element of another, albeit not to exceed 150 percent of the term imposed for the most serious offense" 170 Wn.2d at 331.

As a result, the S.S.Y. Court found, the "merger" doctrine and double jeopardy concerns were not at issue in the juvenile context when

the degree of a crime is elevated by another charged crime. 170 Wn.2d at 331-32. Instead, in such situations, the issue is whether RCW 13.40.180(1) applies, limiting the total aggregate disposition but not imposition of a separate disposition for each offense. 170 Wn.2d at 332-33.

Thus, the question before the disposition court in this case was not whether there should be "merger" of the first-degree attempted robbery and second-degree assault convictions, as argued below. Instead, under S.S.Y., the question was whether either subsection of RCW 13.40.180(1) was met and thus the 150% rule applied.

The discussion below, focused on the question of whether the offenses were the "same criminal conduct" for the purposes of "merger" was not, however, completely off the mark. For the first subsection of RCW 13.40.180(1), the "single act or omission" inquiry does, in fact, require looking at the "same criminal conduct" issue. State v. Contreras, 124 Wn.2d 741, 880 P.2d 1000 (1994). In Contreras, the Court held that, applying rules of statutory interpretation and in order to avoid an absurd result, the "single act or omission" question should be answered using the same analysis as that used in the adult context when asking whether crimes were the "same criminal conduct," with the "focus on the objective intent of the defendant." 124 Wn.2d at 747-48.

In determining whether the "same criminal conduct" test has been met in the adult context (under RCW 9.94A.400(1)(a)), the court asks whether the crimes were committed at the same time and place, involved the same victim and had the same criminal intent. See State v. Dunaway,

109 Wn.2d 207, 214-15, 743 P.2d 1237 (1988). In Dunaway, the Supreme Court explained the "criminal intent" element and said trial courts "should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next," and this analysis "will often include the related issues of whether one crime furthered the other and if the time and place of the two crimes remained the same." Dunaway, 109 Wn.2d at 214-15. Thus, in Dunaway, where two defendants committed armed robbery of different stores and, after the robberies, attempted to kill the clerks, the crimes were not the "same criminal conduct" because the criminal intent of the robberies was to acquire the property while the intent of the subsequent attempted murders were to kill someone. 109 Wn.2d at 216-17. The Court also noted that "neither crime furthered the commission of the other" even if the purpose of the attempted murders was to prevent being caught for the robberies. Id. Even if the murders were attempted "in an effort to escape the consequences of the robberies, they in no way furthered the ultimate goal of the robberies," nor did the robberies further the attempted murders. Id.

In contrast, in State v. Clark, 46 Wn. App. 856, 857-58, 732 P.2d 1029, review denied, 108 Wn.2d 1014 (1987), two counts of first-degree robbery and one count of first-degree assault were held to be the "same criminal conduct." Three people were at a car, with two (women) on one side and a third on the other side when a man approached the two women, stood between them, pointed a gun, demanded their purses and took them, then shot the third person at the car, a man standing on the other side, in the chest when he refused to give up a wallet. 46 Wn. App. at 857-58.

The Court held that "all three of Clark's crimes should have been considered part of the same conduct, since there was no substantial change in the nature of Clark's criminal objective." Id.

Notably, the question of intent is not answered by examining whether the two crimes have different "intent" elements in the statutes defining them. See State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144, review denied, 114 Wn.2d 1030 (1990). Instead, the court looks at the defendant's objective criminal purpose, which includes asking such questions as "the extent to which one crime furthered the other, whether they were part of the same scheme or plan and whether the criminal objectives changed." See State v. Calvert, 79 Wn. App. 569, 578, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005 (1996).

Notably, in S.S.Y., the Supreme Court expressed "concerns" about this Court's decisions about when crimes constitute a "single act" under the test. S.S.Y., 170 Wn.2d at 332. The Court noted that those decisions have adopted a separate "per se rule, holding, as a matter of law, [that] two offenses cannot encompass the same criminal intent if the offenses require different mental elements." 170 Wn.2d at 333 n. 5. And the Court characterized those holdings as a departure from its precedential decisions on the issue. 170 Wn.2d at 332. Because it was not preserved for appeal, the S.S.Y. Court did not go further into the issue, but its concern about this Court's holdings should cause caution in following any such "per se rule". Id.

In finding that the two crimes did not "merge" in this case and were not the "same criminal conduct," the juvenile court relied on its

belief that the assault was "separate" from the attempted robbery, because "the attempted robbery took place once they were in the house with the bat, and the assault then took place later." RP 398-99.

But that does not answer the question. Crimes can be the "same criminal conduct" regardless whether they were committed at exactly the same instant. See, State v. Porter, 133 Wn.2d 177, 183, 942 P.2d 974 (1997) (rejecting a "simultaneity requirement" and holding crimes were at the "same time" under the statute when they were 10 minutes apart). Instead, the question is whether they were part of a continuous "sequence of conduct over a very short period of time." 133 Wn.2d at 183.

Further, the question when trying to determine whether crimes are the "same criminal conduct" for the purposes of sentencing is not whether one was completed before the other. Contreras, supra, is instructive. In that case, the defendant was accused of custodial assault, unlawful imprisonment and first-degree escape when he and others overpowered two workers at a detention facility, threw them to the floor, forced them into a recreation area, locked the door and escaped out the back door. 124 Wn.2d at 743. The court of appeals adopted a "purely temporal test," asking whether one crime was "completed" before the other occurred in deciding whether the "single act or omission" standard was met. Id. Applying that test, the court of appeals concluded that the crimes were not committed in a "single act or omission," because the assault was completed before the imprisonment and the imprisonment "was in turn completed before Contreras escaped from the facility." 124 Wn.2d at 744-45.

On review, the Supreme Court reversed, finding that the crimes met the "single act or omission" requirement applying the "same criminal conduct" analysis. Contreras, 124 Wn.2d at 747-48. The crimes were all committed "with the single criminal intent to leave the detention facility," the Supreme Court pointed out. 124 Wn.2d at 748. In addition, the Court noted, the custodial assault and unlawful imprisonment crimes "occurred in a very short period of time as part of a continuous act of escape." Id. As a result, they were the "same criminal conduct" and therefore met the "single act or omission" standard of RCW 13.40.180(1), so that the 150% rule applied. Id.

Here, the crimes all occurred with the same criminal intent i.e., to try to steal drugs and money from the home. And the assault clearly furthered the attempted robbery, given that the assault was the conduct which the prosecution claimed made that attempted robbery a first-degree offense.

Further, the juvenile court's conclusion in this case is belied by its own findings regarding guilt, as well as the way the case was charged and argued by the prosecution. The second-degree assault was charged in the alternative, with the allegation that A.C.M. either intentionally assaulted someone and recklessly inflicted substantial bodily harm, or that he intentionally assaulted another with a deadly weapon, "to-wit: a BASEBALL or SOFTBALL BAT." CP 20-21 (emphasis in original). The attempted first-degree robbery was also charged in the alternative, accusing A.C.M. or either having taken a substantial step towards committing the crime of robbery while armed with a baseball or softball

bat or for taking a substantial step towards committing the crime of robbery and inflicting bodily injury. CP 18-19.

In closing argument, in arguing that A.C.M. was guilty, the prosecutor reminded the court that the attempted robbery in the first degree "has been charged based on the use or display of a deadly weapon by the Respondent or an accomplice" and the other was that "bodily injury was inflicted upon one of the - - the person who was robbed, or attempted to be robbed." RP 328. He said that the crimes had been committed because, *inter alia*, "the Respondent not only displayed what appeared to be a deadly weapon but he, in fact, used a deadly weapon, and he also inflicted bodily harm." RP 329.

In fact, the prosecutor relied on both the "substantial bodily harm" and the "being armed with a deadly weapon" to prove the assault and also as an "element for Attempted Robbery First Degree." RP 349. Indeed, the prosecutor said, "**for all three crimes**, the presence and use of the deadly weapon is an element in all three crimes." RP 350 (emphasis added). Indeed, it was the prosecutor who first raised the specter of "merger," declaring that the court should find A.C.M. guilty of both alternative means of each crime and could "address whether there are any merger issues at sentencing." RP 350.

In its oral ruling, the juvenile court held that A.C.M. was guilty of burglary for entering or remaining unlawfully with the intent to commit the crime of theft from J.S. of his money and/or drugs. RP 374. The court also declared that "both alternatives" had been met for first-degree

burglary, by which the court said it meant both "being armed with a deadly weapon and assault." RP 374. The judge found that the bat was a deadly weapon and also that the "victim did suffer substantial bodily harm as a direct result of the use of the bat." RP 375.

The juvenile court also said that "the entry into the house for the purpose of committing a theft therein establishes a substantial step toward the commission of Robbery in the First Degree." RP 379. The court relied on the attempt to take the property from J.S. in his home, that the purpose of entering the house was "to commit theft of drugs and/or money that were believed to be" there in J.S.'s room. RP 379.

But the court also relied on the "force being the use of the bat on Earl Smiley, the homeowner, and owner of the properly within which the drugs and money were alleged to be found." RP 379-80. The court said force or fear was used by the "use of the bat, and the presence of the bat." RP 380. The court finally relied on the use and presence of the bat in finding the element that "the Respondent was armed with a deadly weapon or, in the alternative, that in the commission of these acts, the defendant inflicted bodily injury." RP 380.

The court then stated it was relying on "[t]he same reasons I outline with regard to First Degree Burglary," regarding the bat being a deadly weapon and the homeowner suffering bodily injury. RP 380.

In the written findings, the court indicated that the "substantial step" for proving the robbery was any one of a number of acts: when the boys 1) walked over to the home carrying the bat they intended to use to assault J.S. so they could steal his pot/money; 2) had ski masks and a

beanie in their possession and intended to use it to conceal their identities; 3) intended to take money and/or drugs from J.S. with intent to use force or threat of force; 4) intended to inflict bodily injury on the victim using the baseball bat and 5) that the bat was intended to be used in "such a manner as to cause substantial bodily harm or was readily capable of causing death." CP 33-34.

Thus, the court's own findings and the prosecutor's arguments belie the court's later declaration, at the disposition hearing, that the assault and the attempted robbery were somehow so "separate" that they were not the "same criminal conduct." And again, the issue is not whether the crimes were "separate" but rather whether they occurred at the same time and place, involved the same victim and shared the same criminal intent.

Here, just as in Contreras, the crimes were all committed with a single criminal intent: that of committing the robbery. Further, all of the crimes occurred within minutes of or contemporaneous with each other. The juvenile court erred in finding that the second-degree assault and the attempted first-degree robbery were not the "same criminal conduct" and this Court should so hold.

In any event, even if the juvenile court had correctly decided that the assault and the attempted first-degree robbery were not the "same criminal conduct," reversal and remand for a new disposition hearing would still be required, because the second subsection of RCW 13.40.180(1) applied. Under that provision, the 150% rule applies if the offenses involved "an act or omission which in itself constituted one of the

offenses and also was an element of the other." Here, the assault and first-degree robbery clearly meet those requirements. It was the acts constituting the assault which raised the attempted robbery to first-degree. See 328, 349-50, 378-80; CP 18-21. Thus, the assault "constituted one of the offenses and also was an element of the other," the attempted first-degree robbery, in this case.

As a result, the 150% rule applied not only under the first clause of RCW 13.40.180(1) but also under the second. Remand for resentencing with application of that rule is required.

Finally, on remand, new counsel should be appointed, because counsel for A.C.M. was prejudicially ineffective. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth Amend.; Art. I, § 22. It is well-settled that, to be effective, counsel has a duty to be aware of the law relevant to his client's case. See, State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); Strickland, 466 U.S. at 690-91.

Here, counsel was not so aware, in multiple ways which prejudiced his client. First, he was apparently unaware that the "merger" rule did not apply to his client's case. And even in the unlikely event that it could be deemed "strategic" to argue the wrong law to the court on your client's behalf, it is also apparent from the record that counsel did not know the scope of the 150% rule, because he utterly failed to argue the second

clause, which clearly applied. As a result, his client received a disposition longer than that which was authorized by law.

The juvenile court erred in finding that the second-degree assault and first-degree attempted robbery were not the "same criminal conduct," and in failing to apply the 150% rule, and counsel was ineffective. This Court should so hold and should reverse and remand for a new disposition hearing, at which A.C.M. should be provided with new, constitutionally effective counsel.

E. CONCLUSION

For the reasons stated herein, this Court should hold that the lower court erred in concluding that the second-degree assault and first-degree attempted robbery charges. In addition, the crimes were subject to the 150% rule, because the assault was charged separately but was an element of the first-degree attempted robbery. Finally, new counsel should be appointed on remand, because counsel not only failed to be aware of the relevant law but also failed to argue all relevant provisions of the 150% rule, which should have been applied to his client's case.

DATED this 28th day of March, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING AND MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel at the Pierce County Prosecutor's office via portal upload this date and to A.C.M., Canyon View Group Home, 260 N. Georgia Ave., East Wenatchee, WA. 98802.

DATED this 28th day of March, 2012.

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