

NO. 42662-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

A.C.M., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Elizabeth Martin

No. 11-8-00745-3

BRIEF OF RESPONDENT

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

1. Did the trial court err with applying the 300 percent rule when it found that the crime of attempted robbery in the first degree and assault in the second degree did not constitute a "single act?"
2. Did the defendant meet his burden under *Strickland v. Washington* of showing both deficient performance and resulting prejudice necessary to succeed on a claim of ineffective assistance of counsel?

B. STATEMENT OF THE CASE.

1. Procedure

On June 22, 2011, the Pierce County Prosecutor's Office ("State") charged A.C.M. ("respondent") with the crimes of burglary in the first degree and attempted robbery in the first degree. CP 1-2; RCW 9A.52.020(1)(a); RCW 9A.56.200(1)(a)(i)(ii). On August 26, 2011, the information was amended to include attempted robbery in the first degree charged with alternative means (armed with a deadly weapon or inflicted bodily injury), and assault in the second degree was also added. CP 18-21; RCW 9A.56.200(1)(iii); RCW 9A.08.020.

On July 13, 2011, respondent waived his right to a speedy trial.
CP 8.

On September 13, 2011, bench trial proceeded before the Honorable Elizabeth Martin. 1 RP 4. On October 6, 2011, the court found the respondent guilty of all charges. CP 41-13; 3 RP 378; 3 RP 380; 3 RP 382. Respondent was sentenced 45 to 104 weeks, 15 to 36 weeks per count, capped at 104 weeks. CP 41-43; RP 403. On October 6, 2011, the respondent filed a timely notice of appeal. CP 44-50.

2. Facts

D.S., J.C., and respondent were all juveniles when the attempted robbery in the first degree and assault in the second degree occurred. CP 23-34 (Finding VI)¹; 1 RP 37; 1 RP 41.

On June 17, 2011, D.S., J.C., and respondent slept over at D.S.'s house. CP 23-34 (Finding VI); 1 RP 55. J.C. brought a bright orange baseball bat over to D.S.' house. CP 23-34 (Finding VI); CP 23-34 (Finding VII). D.S., J.C., and respondent formed a plan to steal marijuana and cash from J.S.² CP 23-34 (Finding VI); RP 57. D.S. and the respondent believed that J.S. had a large amount of marijuana and cash on

¹ An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal according to RAP 10.3(a)(3). *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994).

² Due to the similar names of victims, the older (Earl) Smiley will be referred to as Mr. Smiley, and the younger (Justin) Smiley will be referred to as J.S.

hand to steal because they had purchased marijuana previously from J.S. on multiple occasions. CP 23-34 (Finding VI).

The plan was for D.S., J.C., and respondent to walk from D.S.'s home to J.S.'s home and surprise J.S. CP 23-34 (Finding VI). Then, one or two of the boys would assault and subdue J.S. with the use of the baseball bat, while the third person would run into J.S.'s room to steal the marijuana and money. CP 23-34 (Finding VI).

The night before, D.S., J.C., and respondent went to a friend's house to get two ski masks to cover their faces so that J.S. would not recognize them. CP 23-34 (Finding VI). J.C. made his a ski mask by cutting holes into a beanie that he had. CP 23-34 (Finding VI). J.S. knew D.S., J.C., and respondent from selling them marijuana and from school. CP 23-34 (Finding VI).

On the day of the robbery, D.S. sent a text to J.S. asking to purchase some marijuana. CP 23-34 (Finding VI). J.S. responded to the text and told D.S. to come by and that no one would be home. CP 23-34 (Finding VI). D.S. did not tell J.S. that the respondent and J.C. would be going with him. CP 23-34 (Finding VI).

D.S., J.C., and respondent arrived at J.S.'s home and put on their masks. CP 23-34 (Finding VI). J.C. noticed that one of the garage doors was open a few feet so D.S., J.C., and respondent went into the garage. CP 23-34 (Finding VI). D.S., J.C., and respondent then entered the home

through the garage. CP 23-34 (Finding VI). J.C. was holding the orange baseball bat.

While in the garage, D.S., J.C., and respondent formulated a plan that J.C. would go outside and ring the front doorbell to lure J.S. to the front door. CP 23-34 (Finding VI). D.S. and the respondent would then approach J.S. from behind and assault him. CP 23-34 (Finding VI). Meanwhile, J.C. would run upstairs for the marijuana and money. CP 23-34 (Finding VI). J.C. gave the bat to the respondent before going outside to ring the doorbell. CP 23-34 (Finding VI).

On the day of the robbery, Mr. Smiley, J.S.'s father, was preparing to go to the store to get a birthday cake for J.S. CP 23-34 (Finding IX). While he was putting on his shoes, the doorbell rang. CP 23-34 (Finding IX). Mr. Smiley went to answer the door and saw someone dressed in all black, later identified as J.C., running away from the front door. CP 23-34 (Finding IX). CP 23-34 (Finding VI). As Mr. Smiley stood facing the door, his back was to the stairs. CP 23-34 (Finding IX). Out of the corner of Mr. Smiley's eye, he saw someone approach from behind and he was struck in the head. CP 23-34 (Finding IX). The blow caused a bloody laceration. CP 23-34 (Finding VI). Mr. Smiley fell down the stairs to the lower level of the house, and the respondent continued to strike Mr. Smiley in the ribs and right shoulder with the bat. CP 23-34 (Finding VI); CP 23-34 (Finding IX). Mr. Smiley began to fight with respondent. CP 23-34 (Finding VI). The respondent eventually broke free and fled up the

stairs and out the front door. CP 23-34 (Finding IX). The respondent abandoned the bat before he fled. CP 23-34 (Finding IX).

During the fight between respondent and Mr. Smiley, J.S. came downstairs and fought with D.S. CP 23-34 (Finding VI); CP 23-34 (Finding IX). J.S. placed D.S. into a choke hold and J.S. pulled D.S.'s ski mask off. CP 23-34 (Finding VI); 1 RP 83-84. After pulling off D.S.'s ski mask, J.S. recognized D.S. and a verbal argument ensued. RP 84. D.S. eventually broke free from J.S. and fled up the stairs and out the front door. CP 23-34 (Finding VI).

D.S. ran towards his home and hid in some bushes. CP 23-34 (Finding VI). He called J.C. and spoke with J.C. and respondent, who had fled together. CP 23-34 (Finding VI). While hiding in the bushes, D.S. called his mother, Cynthia Moore, when he saw her driving by. CP 23-34 (Finding VI). D.S. told his mother at this point that he had been "jumped" by some people. CP 23-34 (Finding VI).

Ms. Moore picked up D.S. and took him to his sister's home to clean him up. CP 23-34 (Finding VI); CP 23-34 (Finding VII). D.S. was wet, had blood on him, a bruised swollen face, a cut lip, and other superficial injuries. CP 23-34 (Finding VII). While D.S. was being cleaned up, he admitted to Ms. Moore that he was involved in a burglary with respondent and J.C. CP 23-34 (Finding VII). D.S. later told Ms. Moore that the respondent hit someone over the head with a baseball bat. CP 23-34 (Finding VII).

After being informed by D.S.'s sister that the police were waiting at his home, D.S. decided to turn himself, and was arrested at his home. CP 23-34 (Finding VI); 1 RP 95. D.S. confessed his involvement and told the arresting officers that the respondent and J.C. were also involved. CP 23-34 (Finding VI).

Deputy McGinnis responded to the home invasion that had occurred at the Smiley residence. He first came into contact Mr. Smiley and Mrs. Smiley outside of their home. CP 23-34 (Finding VII). Mrs. Smiley was hysterical and Mr. Smiley was hunched over holding his arm and was incoherent. CP 23-34 (Finding VII). Mr. Smiley also had a great deal of blood on his face and head. CP 23-34 (Finding VIII). Mr. Smiley and Mrs. Smiley, and their two children J.S., and William Smiley were all home during the invasion. CP 23-34 (Finding VIII); CP 23-34 (Finding VI).

The scar resulting from the assault is still visible on Mr. Smiley's head and was shown to the court and the parties during trial. CP 23-34 (Finding VI). The scar was 2 to 3 inches long. CP 23-34 (Finding V); CP 23-34 (Finding IX). Mr. Smiley still experiences soreness and pain in his arm, head, and upper body. CP 23-34 (Finding IX). Mr. Smiley suffered a fracture of his right shoulder during the attack. CP 23-34 (Finding IX).

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERR IN APPLYING THE 300 PERCENT RULE BECAUSE THE CRIME OF ATTEMPTED ROBBERY IN THE FIRST DEGREE AND ASSAULT IN THE SECOND DEGREE DID NOT CONSTITUTE A "SINGLE ACT."

When juveniles are convicted of more than one offense, RCW 13.40.180 limits the disposition.

According to *RCW 13.40.180*:

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

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

Respondent discusses *State v. S.S. Y.*, 170 Wn.2d 322, 241 P.3d 781 (2010), however, the facts in this case are distinguishable. SSY was convicted in juvenile court of first degree robbery and first degree assault. *Id.* at 325. SSY and another boy violently beat S.C. to take his MP3 player. *Id.* at 325. This attack led S.C. bleeding and spitting blood, "goose egg" sized bumps on his head, and dislodging an artificial lens inside S.C.'s eye, which caused permanent damage to S.C.'s eye. *Id.* at

326. S.S.Y. argued that his sentence violated double jeopardy protections because there was no evidence that the legislature intended to punish his convictions separately, and he argued that they should merge. *Id.* at 329.

The Washington State Supreme Court found that the legislature intended to punish first degree robbery and first degree assault as separate crimes. *Id.* at 332. The court defined a “single act or omission” under RCW 13.40.180(1) as “equivalent to the same criminal intent” test and cited *Contreras*, 124 Wn.2d at 748. *S.S.Y.*, 170 Wn.2d at 333.

This case is factually distinguishable from *S.S.Y.* because the convictions at issue are first degree robbery and second degree assault. In addition, the issue addressed in *S.S.Y.* was merger, and not analyzing the meaning of a “single act” according to RCW 13.40.180(1).

Defendant misapplies *State v. Contreras*, 124 Wn.2d 741, 880 P.2d 1000 (1994) to this case. In *Contreras*, a juvenile respondent argued that the crimes of custodial assault, unlawful imprisonment, and first degree escape were a “single act.” *Id.* at 743. While escaping from a detention facility, Contreras and three other juveniles overpowered two detention workers, threw them on the floor, and forced the workers into a recreation area and locked the door. *Id.* at 743. The Court held that after viewing Contreras’ crimes under an objective intent standard, he had the single criminal intent to leave the detention facility. *Id.* at 748.

In contrast to *Contreras*, respondent did not act with a single criminal intent when he attempted to rob J.S., and assault Mr. Smiley. The

respondent first formulated a plan to commit robbery, and then attempted the robbery by taking a substantial step when he entered the Smiley's home with a bat. The assault occurred with a completely different intent because the attempted robbery occurred prior to the assault and the assault was not part of the attempted robbery on Mr. Smiley.

The State may bring multiple charges arising from the same criminal conduct in a single proceeding. *State v. Kier*, 164 Wn.2d 798, 803, 194 P.3d 212 (2008). However, constitutional protections against double jeopardy prohibit multiple punishments for the same offense. *Kier*, 164 Wn.2d at 803. The standard of review for double jeopardy claims and legislative intent is *de novo*. *Kier*, 164 Wn.2d at 804. The legislature defines offenses, and decides whether the offenses are intended to be separate. *State v. Francis*, 170 Wn.2d 517, 521, 242 P.3d 866 (2010).

The Washington State Supreme Court applies a three-part test to determine whether the legislature intended multiple punishments in a particular situation. *Kier*, 164 Wn.2d at 804. First the court considers express or implicit legislative intent based on the criminal statutes involved. *Id.* at 804. If the legislative intent is unclear, then the court will turn to the "same evidence" test, *Blockburger* test, which asks whether the crimes are the same in law and fact. *Id.* at 804, citing, *Blockburger v. U.S.*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Third, if applicable, the merger doctrine may help determine legislative intent where the degree of one offense is elevated by conduct constituting a

separate offense. *Id.* at 804. In addition, even if two convictions would appear to merge under this analysis, defendant's conduct may be punished separately if the defendant's particular conduct demonstrates independent purpose or effect of each. *Id.* at 804.

Respondent argues that the trial court erred with applying the 300 percent rule during disposition, instead of the 150 percent rule because the first degree robbery and second degree assault constituted the "same criminal conduct." Brief of Appellant at 14.

Although *State v. Cole* is an adult conviction, the facts and law are very similar to the present case. *State v. Cole*, 117 Wn. App. 870, 73 P.3d 411, *review denied*, 151 Wn.2d 1005 (2004). Cole was convicted of attempted first degree robbery and second degree assault, both arising from the use of a knife. 117 Wn. App. 870, 873, 73 P.3d 411, *review denied*, 151 Wn.2d 1005 (2004). Cole argued that his two convictions violated the constitutional prohibition against double jeopardy by imposing two punishments for the same offense because the incident was one transaction, the same criminal conduct. *Id.* at 873.

The court held that to impose more than one punishment for conduct that violated more than one criminal statute is not necessarily a violation of double jeopardy. *Id.* at 875. The fundamental question for the purpose was whether the Legislature intended the result. *Id.* at 875. First degree robbery and second degree assault are not the same in law because they involve different legal elements including different elements of

intent. *Id.* at 875. Therefore, there is a strong presumption that the Legislature intended to punish the use of the knife as two separate offenses. *Id.* at 875. Another important indicator of Legislative intent was that the criminal statutes are located in different chapters of the criminal code. *Id.* at 875.

In addition, merger did not apply in *Cole* because the State did not need to prove assault, or any other offense, in order to elevate the attempted robbery to the first degree. *Id.* at 876. The State had to prove that Cole, with intent to commit robbery, used a knife to the point of taking a substantial step toward committing the robbery. *Id.* at 876.

Similar to *Cole*, the respondent committed two separate offenses with the use of the bat, with two separate intents. The respondent intended to rob J.S. of drugs and money when respondent snuck into J.S.'s home with the bat. The respondent's assault on Mr. Smiley displayed different intent where the respondent hit Mr. Smiley numerous times in back of the head, and all over his body. Not only did the respondent commit two completely separate offenses, the attempted robbery would have been committed even if the respondent did not assault Mr. Smiley. In fact, this is an even stronger example of separate crimes, because unlike in *Cole*, there are two victims in this case: J.S. and Mr. Smiley. Also, as in *Cole*, merger does not apply in this case because the State did not need to prove assault in order to elevate attempted robbery to the first degree.

The court properly applied the 300 percent rule because attempted robbery in the first degree and the second degree assault did not encompass a single act. 4 RP 398-399. The trial court correctly held that the assault was separate from the robbery because the attempted robbery occurred before the assault, there was independent and different intent for each crime, and there were two different victims.

2. DEFENDANT HAS FAILED TO
DEMONSTRATE INEFFECTIVE ASSISTANCE
OF COUNSEL.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. 668 at 687. The threshold for the deficient performance prong is high. *Strickland*, 466 U.S. 668 at 687; *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). "To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome a strong presumption that counsel's performance was reasonable." *Grier*, 171 Wn.2d 17 at 33. "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *Id.* at 33.

Second, a defendant must show that he or she was prejudiced by the deficient representation. *Strickland*, 466 U.S. 668 at 687. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. 668 at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. 668 at 694. "A court should presume,

absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law and must exclude the possibility of arbitrariness, whimsy, caprice, nullification, and the like.” *Grier*, 171 Wn.2d 17 at 34; *see also Strickland*, 466 U.S. 668 at 694-95.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme Court has stated: “The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003). Where a defendant claims that counsel failed to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991).

The respondent alleges that his counsel was ineffective because he was unaware that the “merger” rule did not apply to respondent’s case and did not understand the scope of the 150 percent rule. Brief of Appellant 27.

The record reflects that respondent’s counsel understood that the main issue for the respondent during his disposition was to be given as short a sentence as possible. The respondent’s counsel did this in two ways: 1) by arguing that the 150 percent rule applied because the crimes were committed during a “single act,” and 2) that the crimes merged. 4 RP 393-394. The respondent’s counsel brought to the courts attention “RCW 13.40.180, the juvenile statute that says... that where the crimes if a

juvenile is convicted of multiple crimes and the crimes encompass the same criminal conduct, there's a limit on sentence of... 150 percent of the most serious..." 4 RP 394. Therefore, the respondent's attorney correctly raised, understood, and addressed the issue of the 150 percent rule by arguing that the attempted robbery and assault constituted a single act. 4 RP 395.

Furthermore, it was not unreasonable for the respondent's counsel to discuss merger during the juvenile case where the Washington State Supreme Court has previously addressed merger when deciding a juvenile case. *See S.S.Y.*, 170 Wn.2d at 329.

Even if the respondent's counsel did confuse merger and the 150 percent rule, he was arguing the correct principles. Respondent's counsel understood that the most important issue for his client was to get him the shortest disposition possible by arguing that the respondent's actions constituted a "single act." Therefore, the respondent's counsel was not deficient.

Even if the court does find that respondent's counsel's performance was deficient, the outcome of the case would not have been different because the defendant committed two separate crimes. Therefore, the court properly applied the 300 percent rule during the disposition.

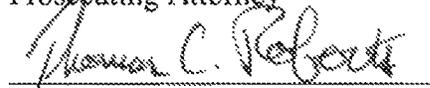
Respondent has failed to demonstrate that his attorney's representation fell below an objective standard of reasonableness, and the respondent failed to show that "but for" the deficient representation, the outcome of the trial would have been different. Therefore, the respondent cannot meet his burden on either prong of the test.

D. CONCLUSION.

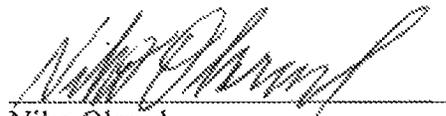
For the reasons argued above, the State respectfully requests that the Court affirm defendant's convictions.

DATED: July 12, 2012

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THOMAC C. ROBERTS
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Niko Olsrud
Rule 9

Certificate of Service:

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

1/2/12
Date Signature