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NO. 95396-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SHELLY MARGARET ARNDT,

Appellant.

ON DISCRETIOANRY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 48525-7-II
Superior Court No. 14-1-00428-0

SUPPLEMENTAL BRIEF OF RESPONDENT

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DATED May 3, 2019, Port Orchard, WA

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Court of Appeals applied the correct standard of review of Arndt's evidentiary claims?
2. Whether the Court of Appeals correctly determined that Arndt failed to demonstrate reversible error with regard to her evidentiary claims?
3. Whether the trial court properly entered judgment on both aggravated first-degree murder predicated on arson and on first-degree arson?

II. STATEMENT OF THE CASE

The State relies on the statement of the case presented in its prior briefing in this Court and in the Court of Appeals.

III. ARGUMENT

A. THE TRIAL COURT'S PROPER EXCLUSION OF INADMISSIBLE EVIDENCE DID NOT INFRINGE ON ARNDT'S RIGHT TO PRESENT A DEFENSE OR HER DUE PROCESS RIGHTS.

The State relies on its previous briefing on the issues regarding Arndt's claim that her right to present a defense was violated.

B. THE LEGISLATURE INTENDED TO PUNISH AGGRAVATED MURDER SEPARATELY FROM THE UNDERLYING AGGRAVATING OFFENSE.

In the petition for review, Arndt argued that the decision below conflicted with *State v. Allen*, 1 Wn. App. 2d 774, 407 P.3d 1166 (2017). The State responded that the plain language of *Allen* was in accord with the decision below. Answer, at 12 (“Aggravating circumstances are “not elements of the crime, but they are “aggravation of penalty” factors.” (quoting *Allen*, 407 P.3d at 1169 (quoting *State v. Brett*, 126 Wn.2d 136, 154, 892 P.2d 29 (1995))))). After the State filed its answer, the present matter was stayed pending the outcome of a petition for review in *Allen*.

In *State v. Allen*, 192 Wn.2d 526, 431 P.3d 117 (2018), this Court affirmed the Court of Appeals, but under a different analysis. The Court specifically held “that that RCW 10.95.020 aggravating circumstances ... are elements of the offense of aggravated first degree murder for purposes of the double jeopardy clause.” *Allen*, 192 Wn.2d at 534. However, because *Allen* was a multiple prosecutions case, it does not answer the question presented here in a multiple punishments case. Further analysis is necessary.

The Fifth Amendment and article 1, section 9 of the Washington Constitution protect a defendant from multiple punishments for the same

offense. *State v. Noltie*, 116 Wn.2d 831, 848, 809 P.2d 190 (1991). Subject to constitutional constraints, the Legislature has the power to define offenses and set punishments. *State v. Calle*, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995). The State may bring multiple charges arising from the same criminal conduct in a single proceeding. *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005). Multiple convictions that carry sentences that are served concurrently may violate the rule against double jeopardy. *Calle*, 125 Wn.2d at 773. But double jeopardy is implicated only when the court exceeds the authority granted by the Legislature and imposes multiple punishments when multiple punishments are not authorized. *Id.* at 776.

To determine whether the Legislature intended to punish crimes separately, this Court applies the four-part test enunciated in *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005). First, the Court looks at the statutory language to determine if separate punishments are specifically authorized. *Freeman*, 153 Wn.2d at 776.

If the Court cannot ascertain this from the language itself, it next applies the “same evidence” test.¹ *Freeman*, 153 Wn.2d at 776. Under that test, the Court asks whether one offense includes an element not included

¹ This test is also known as the “same elements” test and the “*Blockburger*” test, enunciated in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). *In re Orange*, 152 Wn.2d 795, 816, 100 P.3d 291 (2005).

in the other and proof of one offense would not necessarily prove the other. *Calle*, 125 Wn.2d at 777. If that is the case, the Court presumes that the crimes are not the same for double jeopardy purposes. *Id.*

Third, if applicable, the Court applies the merger doctrine to determine legislative intent even if two crimes have formally different elements. *Freeman*, 153 Wn.2d at 772. Finally, even if on an abstract level the two convictions appear to be for the same offense or for charges that would merge, the Court must determine whether there is an independent purpose or effect for each offense. *Freeman*, 153 Wn.2d at 773. If so, they may be punished as separate offenses without violating double jeopardy. *Id.*

1. Legislative intent to punish separately is shown by legislative acquiescence in a quarter century of case law holding that separate punishment was proper.

Under the first prong of the *Freeman* test, the Court considers whether there is any implicit or explicit legislative intent that the crimes be punished separately. *Freeman*, 153 Wn.2d at 772. The most obvious example of explicit intent is the burglary anti-merger statute. *Id.* However, the intent may be implicit as well. *E.g.*, *Calle*, 125 Wn.2d at 777-78 (Legislature implicitly intended rape and incest to be treated as separate offenses).

Moreover, the legislative intent that these offenses be separately

punished is reflected in the legislative inaction in the face of cases dating at least back to *State v. Brett*, 126 Wn.2d 136, 170, 892 P.2d 29, 47 (1995), that hold that separate punishment of substantive offenses was proper even when they were also aggravating circumstances under RCW 10.95.020. Although *Allen* has undermined the rationale of those decisions, the fact remains that in nearly 25 years the Legislature could have, but did not, overrule the conclusion that aggravated murder and any underlying offense that was also an aggravator were properly punished separately. See *State v. Edwards*, 84 Wn. App. 5, 13, 924 P.2d 397 (1996), *review denied*, 131 Wn.2d 1016 (1997) (where the Legislature does not amend a criminal statute after judicial construction of such statute, it is presumed that the Legislature agrees with the judicial construction of the statute). The intent of the Legislature is clear, which should end the inquiry.

2. Although the offenses contain the same elements under the same evidence/Blockburger test, that is not the end of the analysis.

Assuming legislative intent were not clear, the Court would apply the *Blockburger* test. *Calle*, 125 Wn.2d at 777. Under this rule, also known as the same evidence test, offenses are not constitutionally the same and double jeopardy does not prevent convictions for both offenses if each offense, as charged, includes an element not included in the other

and proof of one offense would not necessarily prove the other. *Calle*, 125 Wn.2d at 777. This test requires the court to determine whether each statutory provision “requires proof of a fact which the other does not,” 817 (emphasis omitted) (*quoting Blockburger*, 284 U.S. at 304), and whether “the evidence required to support a conviction upon one of [the charged crimes] would have been sufficient to warrant a conviction upon the other.” *Orange*, 152 Wn.2d at 816, 100 P.3d 291 (internal quotation marks and emphasis omitted) (*quoting State v. Reiff*, 14 Wash. 664, 667, 45 P. 318(1896)).

In *Calle*, the court held that convictions for rape and incest that were based on the same act of sexual intercourse did not violate double jeopardy because they were not the same offenses under the “same evidence” test. As the court explained: “Although the offenses charged may be identical in fact—*i.e.*, both occurred when the Defendant had sexual intercourse—they are not identical in law. Incest requires proof of relationship; rape requires proof of force.” *Calle*, 125 Wn.2d at 778.

Nevertheless, in *Orange*, the Court subsequently held that first degree assault and first degree attempted murder were the same offense because they were based on a single gunshot directed at the same victim. *Orange*, 152 Wn.2d at 820. The Court concluded that because the substantial step of the attempted murder—shooting at the victim—was the

first degree assault (assault committed by firearm), the two crimes were the same in law and in fact because the evidence required to support the attempted first degree murder was sufficient to convict Orange of first degree assault.

Here, to convict Arndt as charged of aggravated first-degree murder, the jury had to find:

- (1) That on or about February 22, 2014 through February 23, 2014, the defendant acted with intent to cause the death of Darcy Edward Veeder, Jr.;
- (2) That the intent to cause the death was premeditated;
- (3) That Darcy Edward Veeder, Jr. died as a result of the defendant's acts; and
- (4) That any of these acts occurred in the State of Washington[]; and
- (5) That] the murder was committed in the course of, in furtherance of, or in immediate flight from arson in the first degree.

CP 396, 416.

To convict Arndt of first-degree arson, the jury had to find:

- (1) That on or about February 22, 2014 through February 23, 2014, the defendant caused a fire;
- (2) That the fire damaged a dwelling;
- (3) That defendant acted knowingly and maliciously; and
- (4) That this act occurred in the State of Washington.

CP 400.

Here the convictions are the same under the *Blockburger* test

because aggravated murder as charged *required* proof of every element of first-degree arson. *See Orange*, 152 Wn.2d at 816; *State v. Muhammad*, 419 P.3d 419 (2018), *review granted*, 191 Wn.2d 1019 (2018). Nevertheless the *Blockburger* test is not necessarily dispositive. *Calle*, 125 Wn.2d at 780. Washington courts rely on additional indicia of legislative intent. *Id.* In addition, the Legislature holds the power to criminalize every step leading to the greater crime and the crime itself. *Whalen v. United States*, 445 U.S. 684, 688–89, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980); *Freeman*, 153 Wn.2d at 771. The remaining prongs of the *Freeman* test must be examined. *Muhammad*, 419 P.3d at 432.

3. Merger analysis does not apply, and would not indicate that merger would be appropriate, even if it did.

The merger doctrine is used to determine legislative intent if two crimes have formally different elements. *Freeman*, 153 Wn.2d at 772. Because under *Blockburger* test first degree murder aggravated by arson contains all the elements of arson, merger does not come into play.

Moreover, if the predicate crime injures the person or property of the victim or others in a separate and distinct manner from the crime for which it serves as an element, the crimes do not merge. *State v. Harris*, 167 Wn. App. 340, 355, 272 P.3d 299, *review denied*, 175 Wn.2d 1006 (2012). Here, by setting the fire, in addition to killing her boyfriend, Arndt also destroyed the home of her sister. The crimes should therefore not

merge. *State v. Vladovic*, 99 Wn.2d 413, 421, 662 P.2d 853, 857 (1983) (merger not proper if crime involved “some injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element.”) (quoting *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979), disapproved on other grounds, *State v. Sweet*, 138 Wn.2d 466, 478, 980 P.2d 1223 (1999)).

4. Under the independent purpose test, separate convictions for arson and aggravated first-degree murder are proper.

The final step under *Freeman* is to determine whether there is an independent purpose or effect for each offense. *Freeman*, 153 Wn.2d at 773. This analysis requires the Court to presume that the offenses were intended to be punished separately “unless there is a clear indication that the legislature did not intend to impose multiple punishments.” *State v. Womac*, 160 Wn.2d 643, 652, 160 P.3d 40 (2007) (quoting *State v. Gohl*, 109 Wn. App. 817, 821, 37 P.3d 293 (2001), review denied, 146 Wn.2d 1012, 52 P.3d 519 (2002)); see also *Calle*, 125 Wn.2d at 780, (recognizing that this presumption “should be overcome only by clear evidence of contrary intent”).

The Court may discern legislative intent from the legislative history, the structure of the statutes, the fact the two statutes seek to eliminate different evils, or any other source of legislative intent. *Ball v.*

United States, 470 U.S. 856, 862–64, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985); *Calle*, 125 Wn.2d at 777-78. If each criminal statute serves an independent purpose or effect, the State may punish violations of the two statutes as separate offenses. *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979). The process is recursive, returning to the Legislature’s intent again and again. *Freeman*, 153 Wn.2d at 777. In *Calle*, this Court upheld convictions of rape and incest on the rationale that the two crimes lay in distinct chapters within the criminal code and each crime served to protect different societal interests, despite the same act forming the basis for each crime.

Here, an examination of the statutes and their purposes evidences a legislative intent to punish these crimes separately. First, the statutes are located in different chapters of the criminal code, as was the case in *Calle*. Indeed, aggravated premeditated murder is created by two separate statutes found in two different *titles* of the Revised Code of Washington: RCW 9A.32.030(1)(a) and RCW 10.95.020(11)(e), and are found under chapters titled “Homicide” and “Capital punishment–Aggravated first degree murder,” respectively. First-degree arson, RCW 9A.48.020(1), on the other hand is found under the chapter denominated “Arson, reckless burning, and malicious mischief.” Moreover the offense themselves are punished under entirely different chapters: RCW ch. 9.94A and RCW

10.95.030(1).

Additionally, each statute contemplates different purposes. The primary purpose of the arson statute is to protect property. A comparison of the remaining offenses in RCW ch. 9A.48 shows that the entire chapter is primarily intended to prevent harm to property: RCW 9A.48.020 & .030 (arson); RCW 9A.48.040 & .050 (reckless burning); and RCW 9A.48.070, .080, & 090 (malicious mischief); RCW 9A.48.105 (criminal street gang tagging and graffiti); and RCW 9A.48.110 (defacing a state monument); and RCW 9A.48.120 (civil disorder training). RCW ch. 9A.32 addresses only the taking of human lives, and RCW 10.95.020 serves to narrow the circumstances under which a sentence of life without parole may be imposed.² Finally, as noted above, legislative intent that these offenses be separately punished is reflected in the legislative inaction in the face of cases dating at least back to *Brett*.

Arndt has failed to identify any clear evidence of legislative intent that these crimes are not to be punished separately. Thus, the trial court did not violate her right against double jeopardy by entering convictions on both offenses.

² And formerly whether a death sentence might be imposed. *But see State v. Gregory*, 192 Wn.2d 1, 5, 427 P.3d 621 (2018) (abolishing death penalty in Washington).

IV. CONCLUSION

For the foregoing reasons, and those set forth in the State's prior briefing, Arndt's conviction and sentence should be affirmed.

DATED May 3, 2019.

Respectfully submitted,
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A handwritten signature in black ink, appearing to read 'RS', with a long horizontal stroke extending to the right.

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