No. 89718-2
COA No. 68809-0- I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JORELL AVERY HICKS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Bruce I. Weiss

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Jorell Hicks asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Jorell A. Hicks*, No. 68809-0-I (November 18, 2013). A copy of the decision is in the Appendix at pages A-1 to A-11.

C. ISSUES PRESENTED FOR REVIEW

1. A defendant has the constitutional right to be free from being placed twice in jeopardy. Multiple punishments for the same act where the Legislature has not authorized such multiple punishment violates double jeopardy. Imposition of convictions for first degree robbery and drive-by shooting where the same facts establish both offenses violates double jeopardy. Is a significant question of law under the United States and Washington Constitutions presented where the trial court violated double jeopardy when it entered convictions for first degree assault and drive-by shooting where the evidence establishing both offenses was the same?

2. Where the same evidence proved first degree assault and first degree robbery because force was used to take and retain the property, did the trial court violate double jeopardy when it imposed convictions for both offenses?

3. A defendant has a Sixth Amendment and article I, section 22 right to counsel and to the effective representation of counsel. A defendant who is denied the effective assistance of counsel and is prejudiced by that failure at sentencing is entitled to a new sentencing hearing. Here, counsel failed to argue the first degree robbery and the first degree assault convictions were the same criminal conduct. Was Mr. Hicks prejudiced by his attorney's deficient representation thus presenting a significant question f law under the United States and Washington Constitutions requiring reversal of his sentence and remand for resentencing?

D. STATEMENT OF THE CASE

Coletin Kittleson was short of money and concocted a plan to rob someone to obtain money. RP 279. Kittleson was Erin Gunder's supplier of illegal Oxycontin. RP 24. Kittleson knew Ms. Gunder also used heroin, so he decided to ask Ms. Gunder to obtain two ounces of heroin, then forcibly take it from her and sell it to obtain the cash. RP

279-80. Upon Kittleson's request, Ms. Gunder agreed to obtain the amount of heroin Kittleson sought. RP 280.

Kittleson contacted his friend, Devan Bermodes, who had a car, to give him a ride to the meeting with Ms. Gunder. RP 93, 281. Kittleson did not tell Bermodes about his plan. RP 281. Jorell Hicks, another friend of Kittleson's, was aware of the plan, and accompanied Kittleson. RP 279.

The trio arrived at the predetermined location and saw several police cars. RP 282. They decided to change the location of the transfer and contacted Ms. Gunder and told her of the change. RP 283. The trio arrived at this location and parked some distance away from Ms. Gunder's car. RP 283. Kittleson described Ms. Gunder to Mr. Hicks and directed him to her car. RP 285. Kittleson returned to Bermodes's car to await Mr. Hicks. RP 285.

While awaiting Kittleson, Ms. Gunder got out of her car and went to the trunk to retrieve some different shoes. RP 31. According to Ms. Gunder, Mr. Hicks approached her from behind and, while brandishing a firearm, demanded the heroin, which she handed to him. RP 31. Mr. Hicks also demanded Ms. Gunder's wallet and purse, as well as anything in Ms. Gunder's boyfriend, Edward Straw's

possession. RP 32. Mr. Hicks instructed Ms. Gunder to get into the car, then ran back to Bermodes's car where Bermodes and Kittleson were waiting. RP 33, 285.

Bermodes drove away, but Ms. Gunder began to follow. RP 34, 68, 285. Bermodes unsuccessfully attempted to elude Ms. Gunder. RP 103. The trio in Bermodes's car discussed ways to lose Ms. Gunder. RP 286. Mr. Hicks leaned out of the window of Bermodes's car and fired two rounds, one that struck Ms. Gunder's car, which caused Ms. Gunder to stop. RP 287-88.

Police investigation led to the arrest of Kittleson, Bermodes and Mr. Hicks. Mr. Hicks was charged with first degree robbery, first degree assault, drive-by shooting, unlawful possession of a firearm in the first degree, and possession of heroin with the intent to deliver. CP 147-48. The robbery, assault, and possession of heroin counts also contained sentence enhancements for being armed with a firearm at the time of the commission of the offense. CP 147-48.[1] Following a jury trial, Mr. Hicks was convicted as charged. CP 91-96, 98-99; 3/1/2012RP 1-2. Upon Mr. Hicks's request, the trial court ruled the

[1] Kittleson and Bermodes pleaded guilty prior to trial. Kittleson pleaded guilty to second degree robbery with a firearm enhancement and Bermodes pleaded guilty to second degree robbery. RP 108, 296.

assault and drive-by shooting convictions to be the same criminal conduct, finding Mr. Hicks's intent was to dissuade Ms. Gunder and Mr. Straw from continuing their pursuit of Kittleson, Bermodes, and Mr. Hicks. 5/3/2012RP 10.

On appeal, Mr. Hicks sought remand for resentencing because the assault count should have merged with the drive-by shooting and robbery convictions. In addition, Mr. Hicks contended the assault count and the robbery count constituted the same criminal conduct and his attorney rendered constitutionally ineffective assistance for not moving the trial court to so find. The Court of Appeals affirmed Mr. Hicks' sentence. Decision at 4-11.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

1. THE CONVICTIONS FOR FIRST DEGREE ASSAULT AND DRIVE-BY SHOOTING, AS WELL AS FIRST DEGREE ASSAULT AND FIRST DEGREE ROBBERY SHOULD HAVE BEEN MERGED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that "[n]o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb." Article I, section 9 of the Washington State Constitution provides that "[n]o person shall ... be twice put in jeopardy for the same offense."

The two clauses provide the same protection. *In re Personal Restraint of Borrero,* 161 Wn.2d 532, 536, 167 P.3d 1106 (2007); *State v. Weber,* 159 Wn.2d 252, 265, 149 P.3d 646 (2006). Among other things, the double jeopardy provisions bar multiple punishments for the same offense. *North Carolina v. Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

The Legislature can enact statutes imposing, in a single proceeding, cumulative punishments for the same conduct. "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter,* 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). If the Legislature intends to impose multiple punishments, their imposition does not violate the double jeopardy clause. *Id.* at 368.

If, however, such clear legislative intent is absent, then the *Blockburger* test applies. *Id.; see Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Under this test, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires

proof of a fact which the other does not." *Id.* If application of the *Blockburger* test results in a determination that there is only one offense, then imposing multiple punishments is a double jeopardy violation. The assumption underlying the *Blockburger* rule is that the Legislature ordinarily does not intend to punish the same conduct under two different statutes; the *Blockburger* test is a rule of statutory construction applied to discern legislative purpose *in the absence of clear indications of contrary legislative intent. Hunter,* 459 U.S. at 368.

In short, when a single trial and multiple punishments for the same act or conduct are at issue, the initial and often dispositive question is whether the legislature intended that multiple punishments be imposed. *Id.; State v. Kier,* 164 Wn.2d 798, 804, 194 P.3d 212 (2008). If there is clear legislative intent to impose multiple punishments for the same act or conduct, this is the end of the inquiry and no double jeopardy violation exists. If such clear intent is absent, then the court applies the *Blockburger* "same evidence" test to determine whether the crimes are the same in fact and law. *State v. Calle,* 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995).

a. Imposition of the assault and drive-by shooting convictions violated double jeopardy. The same evidence was used to establish Mr. Hicks was guilty of drive-by shooting and first degree assault, thus imposition of convictions for the two convictions offenses violated double jeopardy.[2] This Court should reverse and strike the drive-by shooting conviction.

In assessing whether two offenses violate double jeopardy, this Court does not consider the elements of the offenses on an abstract level. "'[W]here *the same act or transaction* constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision *requires proof of a fact* which the other does not.'" *In re Personal Restraint of Orange,* 152 Wn.2d 795, 817, 100 P.3d 291 (2004), *quoting Blockburger,* 284 U.S. at 304 (emphasis added). In this analysis, the elements of the crime are considered *as charged and proven. State v. Freeman,* 153 Wn.2d 765, 777, 108 P.3d 753 (2005).

[2] The fact that the trial court found the two offenses to constitute the same criminal conduct does not foreclose a double jeopardy challenge, because a "'[c]onviction in itself, even without imposition of sentence, carries an unmistakable onus which has a punitive effect.'" *Calle,* 125 Wn.2d at 774, *quoting State v. Johnson,* 92 Wn.2d 671, 679, 600 P.2d 1249 (1979), *cert. dismissed,* 446 U.S. 948 (1980).

First degree assault requires an assault with a firearm with the additional intent to inflict great bodily harm. RCW 9A.36.011 (1)(a). Drive-by shooting requires the discharge of a firearm from a moving vehicle. RCW 9A.36.045(1).

The State's evidence establishing the assaults of Ms. Gunder and Mr. Straw consisted of Mr. Hicks firing two shots from a firearm from inside Mr. Bermodes's car, where at least one of the bullets struck Ms. Gunder's car. The State's evidence establishing that Mr. Hicks committed drive-by shooting was precisely the same, shooting a firearm at Mr. Straw and Ms. Gunder from inside Mr. Bermodes's car.

The Court of Appeals that there were additional elements in each offense was that was not required to be proven in the other offense. Decision at 6-7. But this misses the point. Because the proof of the crime of drive-by shooting was all that was required to be proven in order to prove that Mr. Hicks committed a first degree assault, the Double Jeopardy Clause requires vacation of the drive-by shooting conviction. This Court should accept review and so hold.

b. Imposition of convictions for first degree assault and first degree robbery violated double jeopardy. The same evidence was used by the State to prove first degree assault and first degree robbery

and imposition of convictions for both violated double jeopardy. This Court should reverse and order the first degree robbery conviction stricken.

Robbery is proven by the unlawful taking of personal property from another "by the use or threatened use of immediate force, violence, or fear of injury" or effected "to obtain or retain possession." RCW 9A.56.190. First degree robbery applies if, in commission or immediate flight from the robbery, the defendant "[i]s armed with a deadly weapon," or "[d]isplays what appears to be a firearm or other deadly weapon." RCW 9A.56.200(1)(a). Thus force or fear used to *retain* property and effectuate escape establishes robbery. *State v. Manchester* , 57 Wn.App. 765, 770, 790 P.2d 217, *review denied,* 115 Wn.2d 1019 (1990).[3]

Here, the evidence establishing both the assault and the robbery was Mr. Hicks's firing of the handgun at Ms. Gunder's car in an attempt to retain the property taken from her. The Court of Appeals held that "[t]he evidence was available, but not required, to support

[3] The decision in *State v. S.S.Y.,* 170 Wn.2d 322, 241 P.3d 781 (2010), seemingly undercuts Mr. Hicks's double jeopardy argument. But, the Supreme Court in *S.S.Y.* based its decision primarily on the intent of the Legislature as found in the juvenile sentencing statute, RCW 13.40.180, to conclude separate punishment was intended. *Id.* at 330-31. In addition, the Court in *S.S.Y.* failed to analyze the first degree assault and first degree robbery convictions as they were charged and proven. In light of this, this Court should decline to blindly follow *S.S.Y.*

either of the two convictions." Decision at 8. But since robbery included not only the use of force in the taking but also use of force in the retaining the property, the only conclusion was that the same evidence supported both convictions. Thus, imposition of convictions for the assault and robbery based upon the same evidence violated double jeopardy. This Court should accept review and strike the robbery conviction.

2. MR. HICKS'S TRIAL ATTORNEY RENDERED CONSTITUTIONALLY DEFICIENT REPRESENTATION WHEN HE FAILED TO MOVE THE COURT TO FIND THAT FIRST DEGREE ASSAULT AND FIRST DEGREE ROBBERY CONSTITUTE THE SAME CRIMINAL CONDUCT

A criminal defendant has a Sixth Amendment and art. I, § 22 right to counsel. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 58, 77 L.Ed. 158 (1932). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct.

2052, 80 L.Ed.2d 674 (1984), *quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 275-76, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942).

The right to counsel includes the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *Strickland*, 466 U.S. at 686. The proper standard for attorney performance is that of reasonably effective lawyer. *Strickland*, 466 U.S. at 687; *McMann*, 397 U.S. at 771. When raising an ineffective assistance of counsel claim, the defendant must meet the requirements of a two prong-test:

> First, the defendant must show counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

While a challenge to the failure to find counts to be the same criminal conduct cannot be raised for the first time on appeal, *State v. Nitsch,* 100 Wn.App. 512, 523-25, 997 P.2d 1000 (2000), the issue can be raised for the first time on appeal where such a failure is due to the deficient representation of defense counsel and a sufficient record exists for the court to determine whether the counts are the same

criminal conduct. *State v. McFarland,* 127 Wn.2d 322, 337-38 n.5, 899 P.2d 1251 (1995).

A person's offender score may be reduced if the court finds two or more of the criminal offenses constitute the same criminal conduct. RCW 9.94A.589(1)(a). Same criminal conduct "means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id.*

The "same criminal intent" element is determined by looking at whether the defendant's objective intent changed from one act to the next. *State v. Dolen,* 83 Wn.App. 361, 364-65, 921 P.2d 590 (1996). The mere fact that distinct methods are used to accomplish sequential crimes does not prove a different criminal intent. *State v. Grantham,* 84 Wn.App. 854, 859, 932 P.2d 657 (1997). The "same time" element does not require that the crimes occur simultaneously. *State v. Porter,* 133 Wn.2d 177, 185-86, 942 P.2d 974 (1997); *Dolen,* 83 Wn.App. at 365. Individual crimes may be considered same criminal conduct if they occur during an uninterrupted incident. *Porter,* 133 Wn.2d at 185-86; *Dolen,* 83 Wn.App. at 365, *citing State v. Walden,* 69 Wn.App. 183, 188, 847 P.2d 956 (1983) (court found a defendant's convictions for second degree rape and attempted second degree rape, committed

by forcing the victim to submit to oral and attempted anal intercourse during one continuous incident, to be same criminal conduct).

The robbery and assaults here occurred at the same time and involved the same victims, Ms. Gunder and Mr. Straw. Thus, the only issue is whether the two offenses shared the same intent. Mr. Hicks submits they do.

In the same criminal conduct context, intent is the offender's objective criminal purpose in committing the crime. *State v. Adame,* 56 Wn.App. 803, 811, 785 P.2d 1144 (1990). Crimes may involve the same intent if they were part of a continuous transaction or involved a single, uninterrupted criminal episode. *State v. Deharo,* 136 Wn.2d 856, 858-59, 966 P.2d 1269 (1998). "This analysis may include, but is not limited to, 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." *State v. Calvert,* 79 Wn.App. 569, 578, 903 P.2d 1003 (1995).

The Court of Appeals held that it was *likely* the trial court would have concluded the assault occurred after the robbery was complete. Decision at 10. But the evidence from trial proved that Mr. Hicks' intent was to retain the items taken from Ms. Gunder and the assault

was in order to retain the property. The robbery was a continuing crime which included the force needed to retain the items, thus the assault was merely the force used in retention. As such, the two offenses constituted the same criminal conduct.

Further, defense counsel's failure to move the trial court to find the offenses to be the same criminal conduct constituted constitutionally deficient performance. There was no legitimate strategic or tactical reason not to have requested the court to find the two offenses were the same criminal conduct. Mr. Hicks would only have benefited from such a request, and would not have suffered adverse consequences. In addition, counsel's performance was prejudicial where the sentencing court would likely have found the offenses were the same criminal conduct because it would have reduced Mr. Hicks's offender score and resulted in a substantial reduction in his standard sentencing range.

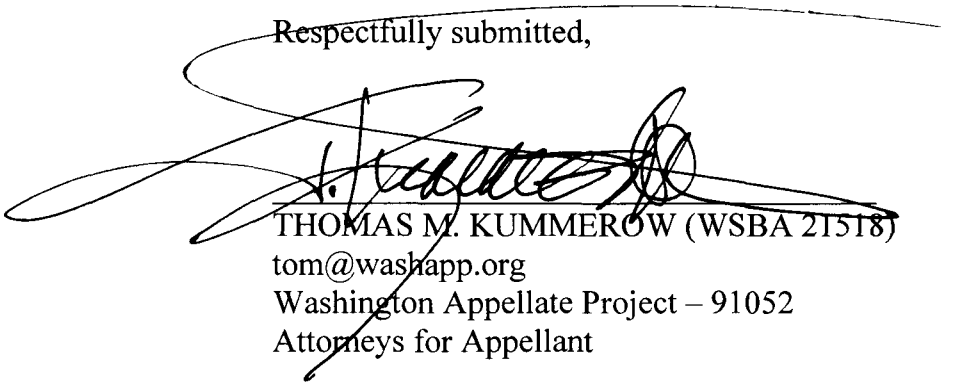
This Court should accept review and rule counsel was ineffective for failing to move to move the trial court for a finding that the robbery and assault constituted the same criminal conduct.

F. CONCLUSION

For the reasons stated, Mr. Hicks asks this Court to accept review and reverse his sentence and remand for resentencing.

DATED this 18th day of December 2013.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JORELL AVERY HICKS, Appellant.	)	No. 68809-0-I DIVISION ONE UNPUBLISHED OPINION FILED: November 18, 2013

SPEARMAN, A.C.J. — A jury convicted Jorell Hicks of several crimes based on evidence of a drug-related robbery and shooting. Hicks claims the trial court violated double jeopardy principles by entering convictions for first degree robbery and drive-by shooting because the underlying conduct was also the basis for his first degree assault conviction involving the same victims. Hicks also contends he was denied the effective representation of counsel at sentencing because counsel failed to argue that his robbery and assault convictions encompassed the same criminal conduct. We reject his arguments, and affirm.

FACTS

Coletin Kittleson was, at times, a drug supplier to Erin Gunder. In August 2011, in need of money, Kittleson and his friend Jorell Hicks devised a plan to rob Gunder of drugs and resell the drugs for cash. Kittleson arranged for Gunder to procure two

ounces of heroin and sell it to him. Another friend of Kittleson's, Devan Bermodes, agreed to drive Kittleson and Hicks to meet Gunder.

Upon arriving at the Walmart parking lot where Kittleson had arranged to meet Gunder, Kittleson noticed police cars in the vicinity. Kittleson contacted Gunder and told her to meet him at the Old Spaghetti Factory parking lot instead. Bermodes parked in a parking lot below the Old Spaghetti Factory parking lot with a staircase connecting the two lots. Kittleson and Hicks walked up the stairs together and Kittleson pointed out Gunder to Hicks. Kittleson went back to the car to wait.

Gunder was out of the car, facing the trunk, when Hicks approached her from behind and said "'Give me your shit.'" Verbatim Report of Proceedings (VRP) at 31. Hicks pointed a gun at Gunder, and she gave him the drugs. When Hicks was not satisfied and continued to demand that she give him everything she had, Gunder handed Hicks her wallet and purse. Hicks then pointed the gun at Edward Straw, Gunder's boyfriend, who was sitting in the front passenger's seat. Straw said he had nothing to give. Hicks ordered Gunder to get in the car. He closed the car door after her and took off running.

Gunder immediately started the car, and as she pulled out of the parking lot, she saw a Cadillac starting to pull out of the lower parking lot. Since it was the only car in the parking lot below and Hicks ran in that direction, Gunder assumed the robber must be in that car. She decided to follow it. Both vehicles pulled out onto the street, and Gunder got behind the Cadillac and followed it while Straw spoke to a 911 dispatch operator. Gunder was able to see three people in the car: the person who robbed her

sitting in the front passenger's seat, the driver, who appeared to be Hispanic and had a shaved head, and a white male in the back seat.

The group in the Cadillac realized Gunder was following them and tried to elude her by making several turns. When Gunder continued to follow, Hicks leaned his upper body out of the window, pointed the gun at Gunder's car, and fired two shots. One bullet struck the hood of the car on the passenger's side. Gunder stopped the car and flagged down a passing police officer.[1]

A short time later, police officers stopped Bermodes and Kittleson in the Cadillac described by Gunder and Straw. Gunder's wallet was in the car. Gunder and Straw identified Bermodes as the driver and Kittleson as the back seat passenger. Police arrested Hicks at his residence. In the residence, the police recovered a .40 caliber firearm, a hoodie, a bandana, Gunder's purse, a prescription bottle in Gunder's name, and a package containing nearly an ounce of heroin, in addition to some other drugs.[2] Hicks's right hand tested positive for gunpowder residue.

The State charged Hicks with five counts: first degree assault, first degree robbery, unlawful possession of a firearm, drive-by shooting, and possession of a controlled substance with intent to deliver. With respect to three counts: assault, robbery, and possession with intent to deliver drugs, the State alleged that Hicks was armed with a firearm at the time he committed the crimes.

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[1] Two .40 caliber shell casings were recovered from the area where Gunder stopped.

[2] Kittleson testified that he threw his share of the stolen drugs out the window. A second package was never recovered.

Kittleson and Bermodes entered guilty pleas and testified at Hicks's trial.[3] Hicks also testified and denied that he had anything to do with the robbery and shooting. Hicks said that on the day in question, he helped Kittleson move out of his apartment in the afternoon and then Kittleson showed up at his house later in the evening. The jury convicted Hicks as charged.

At sentencing, Hicks's counsel argued that the drive-by shooting and assault counts encompassed the same criminal conduct. The trial court agreed and counted those crimes as a single offense for purposes of calculating Hicks's offender score on the assault count. The court imposed standard range concurrent sentences on four of the five counts plus three firearm enhancements.[4]

Double Jeopardy

Hicks challenges his convictions for robbery and drive by-shooting on double jeopardy grounds.

Both the United States and Washington State constitutions protect persons from being twice put in jeopardy for the same offense. State v. Turner, 169 Wn.2d 448, 454, 238 P.3d 461 (2010); U.S. CONST. AMEND. V; CONST. ART. I, § 9. This includes, "being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after conviction, and (3) punished multiple times for the same offense." State v. Linton, 156 Wn.2d 777, 783, 132 P.3d 127 (2006) (citing State v.

[3] Kittleson pleaded guilty to second degree robbery with a firearm enhancement and Bermodes pleaded guilty to second degree robbery.

[4] The sentencing court did not impose a sentence on the drive-by shooting conviction, presumably because of the finding of same criminal conduct. Considering that the State did not object below and imposition of a separate concurrent sentence on this count would not change the total confinement, the State does not assert a cross appeal.

Graham, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005)). However, the State may bring multiple charges arising from the same criminal conduct in a single proceeding without offending double jeopardy. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). Our supreme court has consistently rejected the notion that "offenses committed during a 'single transaction' are necessarily the 'same offense'" for purposes of double jeopardy. State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983). Because double jeopardy is a question of law, our review is de novo. Freeman, 153 Wn.2d at 770.

Our courts employ a three-part framework for double jeopardy analysis. Freeman, 153 Wn.2d at 771-73. First, if there is clear express or implicit legislative intent to punish the crimes separately, then we look no further. Freeman, 153 Wn.2d at 771-72. If the legislative intent is unclear, we turn to the "same evidence" test which asks if the crimes are the same in law and in fact.[5] State v. Calle, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995). Third, if applicable, the merger doctrine may help determine legislative intent. Vladovic, 99 Wn.2d at 419. Even if the two offenses appear to be the same, when each one has an independent purpose or effect, then the two offenses may be punished separately. Freeman, 153 Wn.2d at 773.

Hicks makes no attempt to establish that the offenses of first degree assault, first degree robbery, and drive-by shooting are legally identical. Instead, Hicks asserts that the offenses are the same in fact because his single act of firing a gun at Gunder and Straw was an element of all three offenses.

[5] Washington's "same evidence" test is sometimes referred to as the "same elements" test or "the Blockburger test." Freeman, 153 Wn.2d at 772 (citing Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

The same evidence test considers "whether each provision requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). "If each crime contains an element that the other does not, we presume that the crimes are not the same offense for double jeopardy purposes." Freeman, 153 Wn.2d at 772. Offenses are not the same in fact and law if there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other. Calle, 125 Wn.2d at 777; Vladovic, 99 Wn.2d at 423. We view the elements "as charged and proved," not in the abstract. Freeman, 153 Wn.2d at 777.

As charged in this case, drive-by shooting, first degree assault, and first degree robbery each contain a statutory element that is absent from the others. See RCW 9A.36.011(1); RCW 9A.36.045; RCW 9A.56.190, RCW 9A.56.200(1)(a)(i). The offenses are not the same in law and Hicks does not argue otherwise.

However, comparison of the statutory elements at an abstract level does not end the analysis. In re Pers. Restraint of Orange, 152 Wn.2d 795, 818, 100 P.3d 291 (2004); State v. Nysta, 168 Wn. App. 30, 46-47, 275 P.3d 1162 (2012), review denied, 177 Wn.2d 1008 (2013). We must look at the statutory elements and the facts used to prove those elements to determine whether each offense required "proof of a fact which the other d[id] not." Blockburger, 284 U.S. at 304.

As the offenses were charged and proved in this case, evidence that Hicks fired a gun was required to prove both his convictions for drive-by shooting and first degree assault. But each offense also required proof of a fact that the other did not. With respect to first degree assault, the State was required to prove that Hicks's shooting

was directed at Gunder and Straw with the intent to inflict great bodily harm. To prove drive-by shooting, the State was required to prove that Hicks discharged a weapon from a vehicle or in proximity to a vehicle in a manner that created a substantial risk of death or serious injury to another person.

As to the robbery, Hicks points out that the jury could have relied on the evidence that he fired a gun at Gunder's car, and concluded that by doing so, he not only assaulted the occupants, but also satisfied one of the elements of robbery by using force to retain their property. But, to prove robbery, the State was also required to demonstrate that Hicks took property from Gunder's person against her will by using force or threatening force, violence, or injury.

In re Pers. Restraint of Orange, 152 Wn.2d at 814-20, is instructive. In that case, the State charged Orange with both attempted murder and first degree assault for the single shot that hit a single victim. In the charging document, the State alleged that Orange committed attempted first degree murder when he acted with premeditated intent to cause the death of another and "did attempt to cause the death of [M.W.]. In re Orange, 152 Wn.2d at 814. The State alleged that Orange committed first degree assault when he "'at the same time as the [attempted murder], then and there, with intent to inflict great bodily harm upon another person did intentionally assault [M.W.] with a firearm.'" In re Orange, 152 Wn.2d at 815 (quoting Opening Br. of Pet'r, App. A (Second Am. Information) at 1-2). Our supreme court held that in order to determine whether an attempt crime is the same offense as another crime, the court must substitute the generic element of a "'substantial step'" for the specific conduct relied upon to prove the substantial step. Orange, 152 Wn.2d at 818. Because the

substantial step toward murder, shooting the victim, was the same evidence that proved the assault, and the evidence required to prove attempted murder was sufficient to prove first degree assault, the crimes were the same offense. Orange, 152 Wn.2d at 820.

Unlike the circumstances in Orange, this is not a case where evidence of a single act was required to prove multiple offenses and was the sole available evidence to prove those charges. The evidence that Hicks fired one bullet at Gunder's car was all that was required to prove first degree assault. This evidence was available, but not required, to support either of the other two convictions. The crime of drive-by shooting was also established by evidence that Hicks fired a second bullet. The crime of robbery was established by the evidence that Hicks robbed Gunder at gunpoint, threatening the use of force by displaying a firearm, and deploying that threat of force for the purpose of obtaining her property and preventing any resistance.

In sum, first degree robbery, first degree assault, and drive-by shooting were not the same offenses. It follows that the three convictions did not violate the prohibition against double jeopardy.

Same Criminal Conduct

Hicks argues that his trial counsel rendered ineffective assistance because he failed to argue at sentencing that the robbery and assault counts encompassed the same criminal conduct.[6] To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of

[6] A defendant may raise the issue of same criminal conduct for the first time on appeal in the context of an ineffective assistance of counsel claim, even if he did not raise the argument in the trial court. See State v. Saunders, 120 Wn. App. 800, 825, 86 P.3d 232 (2004).

reasonableness based on consideration of all the circumstances, and that the deficient performance caused prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If one of the two prongs of the test is absent, we need not inquire further. Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

We presume effective representation and the defendant bears the burden of showing the absence of legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). To show prejudice, the defendant must prove that, but for the deficient performance, there is a reasonable probability that the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). In this context, Hicks must show that it was objectively unreasonable not to raise a same criminal conduct argument, and that there is a strong probability such an argument would have been successful had it been raised.

Multiple current offenses are presumptively counted separately in determining a defendant's offender score unless the trial court finds that current offenses encompass the "same criminal conduct." RCW 9.94A.589(1)(a). Crimes constitute the "same criminal conduct" when they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). 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); if any one of the factors is missing, the multiple offenses do not encompass the same criminal conduct. State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). Moreover, because a finding by the

sentencing court of same criminal conduct always favors the defendant, "it is the defendant who must establish [that] the crimes constitute the same criminal conduct." State v. Graciano, 176 Wn.2d 531, 539, 295 P.3d 219, 223 (2013).

Hicks cannot establish a likelihood that counsel's argument would have prevailed. It is likely the court would have concluded that the assault occurred after the robbery was complete and some blocks away from the parking lot where Hicks took property from Gunder at gunpoint. There was also evidence that the occupants of the Cadillac noticed Gunder was following them and had some discussion about what to do. This evidence suggests that after robbing Gunder, Hicks had the opportunity to reflect and form a new intent to commit assault. See State v. Wilson, 136 Wn. App. 596, 615, 150 P.3d 144 (2007) (where defendant had time to complete the assault and form a new intent to threaten the victim, assault and felony harassment had different objective intents). Also, in assaulting Gunder and Straw with a firearm, Hicks had the objective intent of inflicting physical injury or fear of injury. When he earlier pointed a gun at them and demanded their property, he manifested a different intent—to deprive them of personal property by force.

Defense counsel had argued successfully that Hicks's convictions for drive-by shooting and assault were the same criminal conduct for scoring purposes. Considering that these offenses took place at the same time and place, it was reasonable for counsel to conclude that this was Hicks's strongest argument and focus on the issue most likely to benefit his client. Although Hicks claims there was no legitimate tactical reason for counsel to refrain from making a second same criminal conduct argument, he overlooks the possibility it could have detracted from his better

argument. Because Hicks fails to meet his burden to show that counsel was deficient or the result of sentencing probably would have been different had counsel raised the argument, the claim of ineffective assistance of counsel fails.

We affirm.

Spearman, A.C.J.

WE CONCUR:

Schindler, J.

Leppelwick, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 68809-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent John Juhl, DPA
Snohomish County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: December 18, 2013