

NO. 34149-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD SMITH,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 05-1-00356-0

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the constitutional prohibitions against double jeopardy were violated when each count below involved separate and distinct acts, and when the crimes charges were not identical in fact and law?

2. Whether the assault in the second degree counts should merge with the rape in the first degree count when proof of the assault counts were not necessary to prove an element of the rape count as the charges involved different factual foundations?

3. Whether Smith's convictions for rape in the first degree and assault in the second degree were the same criminal conduct when the two crimes, as a matter of law, cannot constitute the same criminal conduct because one crime has a statutory intent element and the other does not, and when this issue was not properly preserved?

4. Whether a *Petrich* instruction was required below when the State elected which acts it was relying on for each count?

5. Whether Smith has failed to overcome the strong presumption that he received effective assistance of counsel when he failed to show deficient performance or prejudice?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Richard Smith was charged by amended information filed in Kitsap County Superior Court with the following charges: (1) rape in the first degree, with a special allegations of domestic violence and two special allegations that the Smith was armed with a deadly weapon: specifically a razor blade and a hammer; (2) assault in the second degree under the assault with a deadly weapon prong, with special allegations of domestic violence and sexual motivation, and a special allegation that the Smith was armed with a deadly weapon: specifically a beer bottle; (3) assault in the second degree under the substantial bodily harm prong, with special allegations of domestic violence and sexual motivation; (4) unlawful imprisonment, with special allegations of domestic violence and sexual motivation; (5) unlawful possession of a firearm in the first degree; (6) violation of a court order (gross misdemeanor), with a special allegation of domestic violence; and, (7) tampering with a witness, with a special allegation of domestic violence. CP 1. After a jury trial, Smith was found guilty as charged, including the special allegations, except for the special allegations of sexual motivation regarding the second count of assault in the second degree (Count III) and unlawful imprisonment (Count IV). CP 60 and Resp.'s Supp. CP. The Defendant received a standard range sentence. CP 60. This appeal followed.

B. FACTS

Pamela Lagrua has a child in common with the Defendant, Richard Smith. RP 178. On the night of March 16, 2005, Ms. Lagrua went to a bar to meet some friends. RP 179-80. Mr. Smith was at the bar as well, and he exchanged words with Lagrua's new boyfriend, "Brian." RP 180. Smith and Brian argued outside, and Smith told him to meet him at his house. RP 181. Lagrua got in a car with another friend to "go stop it," because she did not want Brian to get hurt. RP 181. She stated she left the bar at approximately 2:00 am when the bar closed. RP 181. When she arrived at Smith's apartment, no one was there, but a "whole bunch" of people arrived shortly thereafter. RP 182. Brian, however, never came to the apartment. RP 182. Ms. Lagrua and approximately ten or eleven people then went into Smith's apartment, where they were drinking and hanging out. RP 182-83.

At some point that night, Smith confronted Ms. Lagrua in the bathroom, was angry at Lagrua, and put his hand around her neck, "choking" her and pushing her against the wall. RP 183-84. Lagrua began crying, and Smith told her to wipe herself up and walked out of the bathroom. RP 184-85. Smith admitted at trial that he had "hit" Lagrua while they were in the bathroom and that he had pinned her against the wall. RP 410.

Marcus Harris had gone to Smith's apartment with Lagrua, and saw Smith and Lagrua go into the bathroom and heard a "bump" or a "bang"

come from the bathroom. RP 343-34, 346-47. Harris stated that when Lagrua came out she was crying and her hair was “kind of wild.” RP 346. Lagrua herself remembered that Harris was still present in the apartment when she came out of the bathroom, but that she did not have a conversation with him after she left the bathroom. RP 185. She also said she didn’t know when Harris left the party, and when asked if she had any idea whether Mr. Smith asked Harris to leave she stated, “When I talked to him the next day he said he told him to leave, that he’d bring me home.” RP 186.

Harris recalled that when he asked Legrua if she was ready to leave, she stated that he had said that if she left with him “he was going to do something to me, or her, or both of us.” RP 348. Lagrua, however, denied during her testimony that Smith ever threatened her about what would happen to her if she did leave. RP 225. In addition, Harris testified that when he left the apartment approximately fifteen minutes later he left on his own accord and that no one made him leave. RP 358.

Harris also testified that at one point he was outside the apartment talking with Smith just prior to the point where he left the party, and that Legrua came to the front door of the apartment. RP 359. Smith, however, closed the door in Legrua’s face, and the impression Harris received was that Smith was not going to let Legrua leave with him. RP 359-60.

Lagrua stated that after Harris left, but while other partygoers were still present, Smith “choked” her a second time. RP 186. She stated she got “mouthy” with Smith, and he choked her in front of everyone. RP 186. He pushed her against a wall and put his arms around her neck and lifted her off the ground. RP 186-87. He used both hands this time, and cut off her breathing “a little bit.” RP 187. Kimberly Dorce testified that she was present at the apartment and saw that a male “pinned” Lagrua up against a wall. RP 302, 306.

Smith told Lagrua that he was going to take her home later after everyone left. RP 187. Eventually Smith told the others in the apartment to leave. RP 188. Smith then told Lagrua to go to the bedroom, but Lagrua told Smith that she wanted to leave. RP 188. Smith responded that he would bring her home after they were done. RP 189. Smith then picked her up from the couch and dragged her into the bedroom. RP 189.

When they got into the bedroom, Smith hit her over the head with what she thought was a gun. RP 189. Smith then threw her on the bed and sat on her and “choked” her with both hands, causing Lagrua to lose consciousness. RP 190. She regained consciousness when Smith punched her in the face. RP 190-91.

The two argued, and Smith said, “You don’t think I’ll kill you?” RP 191. Lagrua stated that it got to the point where he was saying this so much

that she told him, "Go ahead and kill me." RP 191. Smith then took a glass beer bottle from the dresser, slammed it on the dresser breaking it, and then cut her arm with it. RP 191-92. Lagrua received two cuts and was bleeding. RP 192. Smith then grabbed a t-shirt and wrapped it around her arm. RP 192.

Smith admitted at trial that he told Lagrua that he'd kill her and that he was angry, but claimed, "But it wasn't intended, I will kill you, as I'm going to do it, because I joke around with Pam, I joke around with a lot of people a lot." RP 419. He also claimed that she cut her own arm with the broken beer bottle, and that he wrapped her arm in a shirt and suggested they go to the hospital. RP 421-23. He claimed, however, that Lagrua did not want to go to the hospital because of her face, which still had an imprint from where Smith had slapped her. RP 423-24.

Smith claimed that after the beer bottle incident, the two went into the bathroom, and that, when the two later returned to the bedroom, it was Lagrua that initiated the sex. RP 426. Lagrua also confirmed that the assault with the beer bottle occurred before the rape, as, when asked what happened after Smith had cut her with the beer bottle, she stated, "That's when he wanted to have sex with me." RP 192.

Lagrua told Smith she did not want to have sex. RP 192. Smith, however, penetrated Lagrua's vagina with his hands and his penis, and

Lagrua stated that it was painful and that she told Smith that it was painful and told him to stop numerous times. RP 194. Lagrua described the intercourse as, “really rough.” RP 237. Smith told her that it wasn’t going to take long and to just take it. RP 194. During the intercourse, Smith also picked up a straight razor and “flinched” it at Lagrua, near her face. RP 194. He also picked up a hammer and “flinched” it at her face. RP 195. Lagrua indicated that this also occurred during the intercourse, and that she was struggling with Smith at the time. RP 196.

Smith also claimed that, “As I was sexing her, I would say, she told me she wanted it harder. So I only met her demands.” RP 427. Smith himself admitted at trial that he had threatened Lagrua with the hammer, but claimed it happened before they had intercourse. RP 430.

Eventually Lagrua got sick and started “dry heaving,” and Smith let her get up. RP 196. Lagrua went to the bathroom and continued “dry heaving.” RP 196. She also urinated on herself in the bathroom. RP 197. Smith himself confirmed these facts at trial. RP 431.

After she dry heaved and urinated, Smith finally agreed to take her home. RP 198. They left the apartment and got into Smith’s car. RP 199. Lagrua asked Smith, “Don’t you think I need to go to the hospital?” RP 244. Smith responded that she could do that when she got home. RP 244. Smith stopped at an ATM to get money, which he said was for their child in

common. RP 199-200. Smith attempted to give her the money, but Lagrua told him to keep the money and to just buy stuff for his son. RP 200, 244. She thought Smith was trying to give her the money to keep her quiet. RP 200.

Smith then dropped Lagrua off at her mother's house, and once she got inside she tripped and fell. RP 201. Lagrua's sister and mother turned on the lights and called the police. RP 201. They asked Lagrua what happened, and she said, "Rick did this." RP 202.

On cross-examination, defense counsel asked Lagrua repeatedly about her alcohol consumption and the fact that she had numerous drinks at the bar and was drinking hard alcohol at the apartment. RP 220, 223-24. Defense also questioned whether she could remember the events of that evening clearly given her level of intoxication. RP 230-31. In addition, defense asked if she had shown any affection towards Smith that night, and asked if she had touched him or kissed him. RP 224-25. Lagrua stated she was intoxicated on the night in question, but did not have any difficulty recalling the events of that night. RP 197-98.

Lagrua's mother, Citus Austin, stated that she opened the door when Lagrua arrived, and saw that she was bleeding and crying. RP 249-50. On a scale of one to ten in terms of how upset Lagrua was, Austin stated that she was a "nine." RP 250. Ms. Austin stated that Lagrua said, "I got raped" and

then collapsed, so Austin called 911. RP 250. Austin asked her what happened, and Lagrua stated she had been raped by Richard Smith. RP 251.

Matthew Smalley, of the Bremerton Police Department responded to the residence and spoke with Lagrua's mother, and then found Ms. Lagrua passed out on a bathroom floor with a cut on her arm. RP 59-60. An aid crew arrived and treated Lagrua. RP 60-61. Lagrua was taken to the hospital where she received stitches in her arm and had a sexual assault examination. RP 202-04. Lagrua sustained bruises on her cheek, neck, arms, and legs, and still has a scar on her arm from the cuts she received. RP 204-05.

Marquell Lewis, a sexual assault nurse examiner at Harrison Memorial Hospital treated Ms. Lagrua on March 17th. RP 63, 68. Lagrua told Lewis that assaulted with beer bottle, threatened with hammer and razor, and sexually assaulted. RP 70. Ms. Lewis found numerous lacerations, marks, bruises and redness in the vaginal exam. RP 83-85. Lagrua also had bruising on her cheeks and broken capillaries or petechiae on her chin. RP 86. Strangulation can cause petechiae. RP 86. There was also a bruise on the left breast, bruises on the left arm, two lacerations on the left wrist, a bruise on the right thing, and a laceration on the right thing. RP 87. Sutures and "steri strips" had been applied to the lacerations. RP 87.

Jane Schupay, a nurse practitioner and the coordinator of the sexual assault nurse practitioner program at Harrison Hospital also testified that the

petechiae on Lagrua's chin were consistent with being strangled. RP 104, 126. Dr. William Moore also treated Ms. Lagrua at Harrison Hospital on March 17th. RP 320. Lagrua told the doctor she had been physically and sexually assaulted by a know assailant. RP 324.

Police officers located Smith at his home and arrested him, and later that morning, Detectives interviewed Smith. RP 257, 267-68. Smith admitted he had said, "I'll kill you" to Lagrua, but claimed that she had then picked up the beer bottle and cut herself. RP 259, 368. Smith also admitted to the detectives that he had slapped Lagrua, and admitted that they had sex, but claimed it was consensual. RP 260. Smith, however, also admitted that he had threatened Lagrua with a hammer and told her that, "One day I'm going to kill you." RP 261, 372.

Detective Allen Hornburg, a crime scene investigator with the Bremerton Police Department also responded to Smith's apartment. RP 139-41. Hornburg located a razor blade, a bloody t-shirt, and a hammer in the bedroom. RP 144, 149. Blood was also found on the sheets and a pillowcase in the bedroom. RP 150. Broken glass was found in the bedroom next to a dresser, and a broken beer bottle was found in the kitchen garbage. RP 144, 148. A gun was also found in the residence, underneath one of the cushions of a sofa. RP 145, 157.

After charges were filed and a no contact order was entered prohibiting Smith from contacting Lagrua, Smith called Lagrua from the jail. RP 206-07. Smith told her he was sorry for what he had done and that he didn't want to go to jail, and asked her if she was going to court. RP 207. He also asked her to drop the charges. RP 207. He also her that if she didn't show up for court the charges would go away. RP 207-08. Lagrua indicated that she got five or six calls from Smith. RP 208. Smith admitted at trail that he had called her in violation of the no contact order, but denied telling her not to testify. RP 435. At the very end of his direct testimony, Smith admitted that during a phone call he had apologized to her for putting his hands around her neck and slapping her. RP 435. During his previous testimony, however, Smith had denied that he put his hands around her neck. RP 411.

The State argued in its closing argument that Smith was guilty of rape in the first degree because he used force to overcome the victim's resistance to the rape by using the hammer and razor. RP 471-72. In addition, the special verdict forms for Count I show the jury found Smith used a hammer and razor while committing Count I.

With respect to Count II, the State argued in closing that,

Instruction No. 14. Now this is – relates to count two, which is the assault with a deadly weapon, the beer bottle. On or

about March 17th the defendant assaulted with a deadly weapon. You heard the testimony. She indicated he broke the bottle, he cut her on the arm. The act occurred in the State of Washington. The defendant is guilty. Count two.

RP 474. Similarly, in the defense closing, Smith's trial counsel stated that the count two was the assault with a deadly weapon,

Specifically this is the assault that state is alleging, beyond a reasonable doubt, that occurred when Mr. Smith took this beer bottle and swiped it against her arm and cut her.

RP 488. The special verdict form accompanying Count II specifically referenced the beer bottle. CP 76.

With respect to Count III, the State's argument in closing concerning Count III was as follows,

Count Three. March 17th, defendant intentionally assaulted Pam Lagrua. He put his hands around her neck and squeezed until she lost consciousness. The defendant recklessly inflicted substantial bodily harm. That relates to jury instruction No. 9. It's temporary but substantial disfigurement, or causes a temporary but substantial loss or impairment of the function of any bodily part or organ. Now you heard the testimony of the ER doctor. He told you when somebody puts your hands around someone's neck and squeezes and cuts the blood flow, your brain is impaired. And that is why she lost consciousness. That is assault in the second degree.

RP 474-75. In the defense closing, trial counsel argued that with respect to Count III,

What you have to believe, beyond a reasonable doubt to convict him of this charge, is specifically about the choking that she, her breathing was impaired. That she was choked into unconsciousness. And we believe there's reasonable doubt about that.

RP 492.

III. ARGUMENT

A. THE CONSTITUTIONAL PROHIBITIONS AGAINST DOUBLE JEOPARDY WERE NOT VIOLATED BECAUSE EACH COUNT BELOW INVOLVED SEPARATE AND DISTINCT ACTS, AND BECAUSE THE CRIMES CHARGES WERE NOT IDENTICAL IN FACT AND LAW.

Smith argues that his convictions for rape in the first degree and assault in the second degree violated the prohibition against double jeopardy. This claim is without merit because Smith was not punished twice for the same act. Rather, the rape charge was based on Smith's rape of the victim while using a hammer and a razor blade, while the assault counts were based on Smith's assault of the victim with a beer bottle and the strangulation of the victim. In addition, the rape and the assault counts did not violate double jeopardy because the counts were not identical in law and in fact.

An alleged violation of the prohibition against double jeopardy can arise when a defendant contends he has been punished twice for a single act or has received multiple punishments for the same offense. *See, for instance,*

State v. Baldwin, 150 Wn.2d 448, 454, 78 P.3d 1005 (2003), *State v. Graham*, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005).

In the present case, the three disputed charges involved separate and distinct acts. The rape in the first degree charge involved sexual intercourse by forcible compulsion combined with the use of a hammer and a razor. Count II, assault in the second degree charged under the deadly weapon prong, involved an assault with a deadly weapon, namely a beer bottle. Count Three, assault in the second degree charged under the substantial bodily harm prong, involved a strangulation. The three counts, therefore, involved separate acts, and thus double jeopardy does not apply. The question of whether these acts were the same criminal conduct is a separate analysis that will be discussed later, but as the three counts involved separate acts, double jeopardy does not apply.

Even if this court were to conduct a double jeopardy analysis, there was no violation of the prohibition against double jeopardy or the associated merger doctrine, for the reasons outlined below.

The Washington State Constitution, article I, section 9, and the Fifth Amendment to the federal constitution prohibit multiple prosecutions or punishments for the same offense. *Baldwin*, 150 Wn.2d at 454. Within this constraint, however, the legislature has the power to define criminal conduct

and to specify punishment. *Baldwin*, 150 Wn.2d at 454, 78 P.3d 1005 (citing *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995)).

If the legislature authorized cumulative punishments for both crimes, then double jeopardy is not offended. *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005). “Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense.” *Freeman*, 153 Wn.2d at 771, citing *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004).

Where a defendant contends that he has been punished twice for a single act under separate criminal statutes, the question is ‘whether, in light of legislative intent, the charged crimes constitute the same offense.’ *Graham*, 153 Wn.2d at 404 (quoting *Orange*, 152 Wn.2d at 815). A court must first consider any express or implicit legislative intent. *Freeman*, 153 Wn.2d at 771-72.

If the relevant statutes do not expressly authorize multiple convictions, the inquiry is not at an end; rather, the courts next applies the *Blockburger* ‘same evidence’ test. *Graham*, 153 Wn.2d at 404, 103 P.3d 1238, citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

Second, if the legislative intent is not clear, a court may turn to the *Blockburger* test. *Freeman*, 153 Wn.2d at 773, citing *State v. Calle*, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995); *Blockburger*, 284 U.S. at 304, 52 S. Ct. 180. If each crime contains an element that the other does not, a court presumes that the crimes are not the same offense for double jeopardy purposes. *Freeman*, 153 Wn.2d at 772, citing, *Calle*, 125 Wn.2d at 777, 888 P.2d 155; *Blockburger*, 284 U.S. at 304, 52 S. Ct. 180 (establishing “same evidence” or “same elements” test).

Furthermore, under the ‘same evidence’ test, a defendant's double jeopardy rights are violated if he or she is convicted of offenses that are identical in fact and law. *Calle*, 125 Wn.2d at 777. But, ‘if each offense, as charged, includes elements not included in the other, the offenses are different and multiple convictions can stand.’ *Calle*, 125 Wn.2d at 777, 888 P.2d 155; see also *State v. Vladovic*, 99 Wn.2d 413, 423, 662 P.2d 853 (1983). When applying the *Blockburger* test, a court does not consider the elements of the crime on an abstract level, rather, 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 offense or only one, is whether each provision requires proof of a fact which the other does not. *Freeman*, 153 Wn.2d at 772, citing *Orange*, 152 Wn.2d at 817, 100 P.3d

291 (quoting *Blockburger*, 284 U.S. at 304, 52 S. Ct. 180 (citing *Gavieres v. United States*, 220 U.S. 338, 342, 31 S. Ct. 421, 55 L. Ed. 489 (1911))).

Stated another way, under the same evidence test, offenses must be identical in law to invoke double jeopardy. *Baldwin*, 150 Wn.2d at 454, 78 P.3d 1005. If each offense includes elements not included in the other, the offenses are not identical in law, and multiple punishments can be imposed. *In the Matter of the Personal Restraint of Fletcher*, 113 Wn.2d 42, 49, 776 P.2d 114 (1989) (citing *Vladovic*, 99 Wn.2d at 423). Elements of the offenses are different where each provision requires proof of a fact, within the context of the case, which the other does not. *See Freeman*, 153 Wn.2d at 772; *see also, Orange*, 152 Wn.2d at 817-18.

The Washington Supreme Court has “repeatedly rejected the notion that offenses committed during a ‘single transaction’ are necessarily the ‘same offense.’” *Vladovic*, 99 Wn.2d at 423, *citing State v. Roybal*, 92 Wn.2d 577, 512 P.2d 718 (1973). Rather, to be the “same offense” for purposes of double jeopardy, the offenses must be the same in law and in fact. *Vladovic*, 99 Wn.2d at 423. Additionally, factually separate acts charged as separate crimes do not constitute double jeopardy, even if they occur during a relatively short period of time. *See, e.g., Fletcher*, 113 Wn.2d at 49 (assault did not take place until after robbery and kidnapping were complete).

In the present case, the Defendant has claimed that his convictions for rape in the first degree and assault in the second degree violated the double jeopardy provisions of the Washington and Federal constitutions. App.'s Br. at 7.

The first step in analyzing this claim must be to exam the basis for each count. Count I involved a rape in the first degree with the allegation that Smith was armed with a hammer and a razor. CP 1-3, 75. Count II was a charge of assault in the second degree under the deadly weapon prong with the allegation that Smith was armed with a beer bottle. CP 3, 76. Count II was a charge of assault in the second degree under the substantial bodily harm prong, and the parties agreed in their closing arguments that this charge was based on the strangulation of the victim. CP 4, RP 474-75, 492.

As mentioned above, the State maintains that double jeopardy does not apply because different acts support each claim. Even if the court were to perform a double jeopardy analysis, however, there is no double jeopardy violation in the present case.

Under a double jeopardy analysis, the state would concede that the relevant statutes do not expressly authorize multiple convictions, and that the inquiry should, therefore, next turn to the *Blockburger* or 'same evidence'

test. *See, Graham*, 153 Wn.2d at 404, 103 P.3d 1238, *citing Blockburger*, 284 U.S. at 304, 52 S. Ct. 180.

The charges in the present case are not the “same offense” for double jeopardy purposes under the same evidence test, because each crime contains an element that the other does not. In addition, the crimes are not identical in fact and law.

Rape in the first degree requires a showing that the defendant engaged in sexual intercourse with the victim, an element that is not required in assault in the second degree as charged in either count II or Count III. Assault in the second degree as charged in count II requires a showing of intent, while rape does not require a showing of intent. For these reasons, the crimes in count I and count II are different in law, and are not the “same offense” for double jeopardy purposes. Similarly, assault in the second degree as charged in Count III requires an “intentional assault,” an element not required under Count I. For this reason, the crimes in count I and count III are different in law, and are not the “same offense” for double jeopardy purposes.

In addition, the assault counts are different in fact from the rape count. The State elected to use the hammer and razor (and the rape itself) as the facts supporting count I, while different facts, namely the cutting of the

victim with the beer bottle were used as the facts supporting count II. Similarly, the strangulation was used as the basis for Count III and was not even argued basis for Count I. For these reasons the counts were not “the same in fact,” and thus there is a second, independent basis to find that the counts were not the “same offense” for double jeopardy purposes.

In short, this was not a case where the defendant fired a single bullet that the State then used as the factual basis for multiple charges. Rather, the State used different evidence to support each charge. The jury could have chosen to believe Smith’s testimony that the victim cut herself with the beer bottle and thereby acquit him of Count II. Even if the jury had reached this conclusion, however, they could have still convicted Smith of Count I because the State provided different evidence to support this charge; namely that Smith raped the victim while using a hammer and a razor. Because the State used different evidence to support each charge, the three counts complied with the *Blockburger* test and the “same evidence” test.

Smith argues, however, that the charges arose from the same “continuous conduct.” App.’s Br. at 6. While a course of conduct may be relevant to an analysis of whether the offenses were the “same criminal conduct” pursuant to RCW 9.94A.589, this analysis is not relevant to a double jeopardy claim. Rather, attempting to characterize the various acts as a continuous course of conduct is essentially trying to impose a “same

transaction” test rather than the “same evidence” test. The same transaction test, however, has been previously rejected by Washington courts in the double jeopardy context, as mentioned above. *Vladovic*, 99 Wn.2d at 423, *citing Roybal*, 92 Wn.2d at 577. Smith’s attempt to use such a “transactional” analysis here, therefore, must fail.

B. THE ASSAULT IN THE SECOND DEGREE COUNTS SHOULD NOT MERGE WITH THE RAPE IN THE FIRST DEGREE COUNT BECAUSE PROOF OF THE ASSAULT COUNTS WERE NOT NECESSARY TO PROVE AN ELEMENT OF THE RAPE COUNT AS THE CHARGES INVOLVED DIFFERENT FACTUAL FOUNDATIONS.

Smith next claims that his convictions for rape in the first degree and assault in the second degree should merge. This claim is without merit because proof of the assault counts were not necessary to prove an element of the rape charge. Rather, the rape charge was based on Smith’s rape of the victim while using a hammer and a razor blade, while the assault counts were based on Smith’s assault of the victim with a beer bottle and the strangulation of the victim. In addition, the assault convictions may be punished as separate offenses because there was an independent purpose or effect to each, and there was an injury to the victim in each charge that was separate and distinct from, and not merely incidental to, the crime of rape.

The Merger Doctrine

Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, a court may presume the legislature intended to punish both offenses through a greater sentence for the greater crime. *Freeman*, 153 Wn.2d at 772-73, citing *Vladovic*, 99 Wn.2d at 419. Crimes merge, however, when proof of one is necessary to prove an element or the degree of another crime. *Vladovic*, 99 Wn.2d at 419.

The State would concede that Washington courts have previously held that assault may be a necessary element of first degree rape. See *Fletcher*, 113 Wn.2d at 51; *Vladovic*, 99 Wn.2d at 419; *State v. Johnson*, 92 Wn.2d 671, 678, 681, 600 P.2d 1249 (1979); *State v. Eaton*, 82 Wn. App. 723, 730, 919 P.2d 116 (1996).

In the present case, however, because the State utilized different evidence for the rape and assault count, the assault counts were not necessary for the charge of the rape in the first degree. Rather, as stated above, even if the jury had acquitted Smith of the assault counts, the jury could have still found him guilty of rape in the first degree because the evidence the State relied on to support the rape charge was different than the evidence used to support the assault counts. Merger, therefore, would be inappropriate, since the assaults as charged were not necessary to prove an element of the rape charge. *Vladovic*, 99 Wn.2d at 419.

Independent Purpose or Effect Exception

Finally, even if on an abstract level two convictions appear to be for the same offense or for charges that would merge, if there is an independent purpose or effect to each, or if there is some injury to the victim which is separate and distinct from and not merely incidental to the crime of which it forms an element, the crimes do not merge and may be punished as separate offenses. *Freeman*, 153 Wn.2d at 773; *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979) (holding that ‘as to any such offense which is proven, an additional conviction cannot ... stand unless it involves 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.’); *see also Vladovic*, 99 Wn.2d at 421 (‘[I]f the offenses committed in a particular case have independent purposes or effects, they may be punished separately.’)

In the present case, therefore, even if the assault counts here had been necessary elements of the rape count, merger would still not be proper since the crimes involved separate injuries and independent purposes or effects.

The rape, for instance, caused vaginal injuries to the victim, as well as the emotional injury associated with rape. The assault with the beer bottle, however, caused lacerations to the victim’s arm requiring stitches. Similarly, the strangulation caused the victim to lose consciousness and caused

“petechiae.” Each crime charged, therefore, caused independent injuries. In addition, each crime carried independent purposes or effects.

It is important to note that the present case involved a rape that occurred in the context of domestic violence. Washington courts have noted that,

[W]hile rape is a crime with diverse implications, it is most often a crime of aggression, power, and violence. The focus of the crime is not simply sexual violation, but also the fear, degradation and physical injury accompanying that act.

Calle, 125 Wn.2d at 781.

In the present case, it is necessary to exam the facts and evidence as a whole to place the crimes in their proper context. The evidence was that while Smith and Lagrua had a previous relationship and had a child in common, Lagrua had begun to see other men. RP 178, 180. On the night in question, Lagrua went to Smith’s apartment to stop a fight that she thought was going to occur between Smith and her new boyfriend. RP 181. Smith then went into a bathroom with Lagrua and put his hands around her neck “choking” her and pushing her against a wall, thereby asserting his power and control over the victim. RP 183-84. Later, he strangled her in front of others at the party, further degrading her and asserting his power and control. RP 186-87. He next dragged her into a bedroom, threatened to kill her, and cut

her with the broken beer bottle. RP 191-92. The implications of these acts is readily apparent. Finally he raped her while “flicking” a hammer at her head and holding a razor blade. RP 194-95. Only after the victim was “dry-heaving” and had had urinated on herself while on the bathroom floor, did Smith finally agree to take her home. RP 196-98. Even then, Smith refused to take her to the hospital, telling her she could do that when she got home. RP 244.

Viewed in their proper context, therefore, the assaults were not mere crimes used to facilitate the rape, but were separate and distinct acts of domestic violence used to degrade Lagrua and to allow Smith to assert his power and control over her. The rape itself was another act of domestic violence used to demonstrate Smith’s power and control over Lagrua. Unlike a kidnapping of a victim when the defendant is merely taking the victim to an isolated location in order to commit a later rape, the assaults here were not merely committed to further the rape. Rather, Smith’s actions demonstrated a pattern of abusive behavior through the numerous acts he committed against a victim that had begun to date other men. The assaults, therefore, were not mere acts committed to further the rape, but were independent acts carried out by Smith to demonstrate his power and control. Each act additionally caused it’s own fear, degradation and physical injury. For these reasons, even if the assault counts here had been necessary elements of the rape count, merger

would still not be proper since the crimes involved separate injuries and independent purposes or effects.

C. SMITH'S CONVICTIONS FOR RAPE IN THE FIRST DEGREE AND ASSAULT IN THE SECOND DEGREE WERE NOT THE SAME CRIMINAL CONDUCT BECAUSE THE TWO CRIMES, AS A MATTER OF LAW, CANNOT CONSTITUTE THE SAME CRIMINAL CONDUCT BECAUSE ONE CRIME HAS A STATUTORY INTENT ELEMENT AND THE OTHER DOES NOT, AND BECAUSE THIS ISSUE WAS NOT PROPERLY PRESERVED.

Smith next claims that his convictions for rape in the first degree and assault in the second degree should be considered the same criminal conduct. This claim is without merit because the assault counts required proof of intent, while the rape count did not, and thus the counts cannot be considered the same criminal conduct under the law. In addition, Smith failed to raise this issue below, thereby precluding him from raising the issue on appeal.

RCW provides that 9.94A.589(1)(a) multiple current offenses are counted separately for offender score purposes unless the offenses involve the same criminal conduct. Current offenses involve the same criminal conduct only 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). Where one crime requires proof of intent and the other does not, the two crimes are not the same criminal conduct. *State v. Hernandez*, 95 Wn. App. 480, 485,

976 P.2d 165 (1999). Courts narrowly construe the requirements for same criminal conduct. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

In addition, Washington courts have held that, “where one crime has a statutory intent element and the other does not, the two crimes, as a matter of law, cannot constitute the same criminal conduct.” *Hernandez*, 95 Wn. App. at 485-86, *citing*, *State v. Flake*, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). That one crime has a statutory intent element, which the other crime lacks, “is tantamount to the two crimes having different statutory intents; therefore, the two crimes cannot constitute the same criminal conduct.” *Hernandez*, 95 Wn. App. at 486.

Finally, a defendant must argue to the sentencing court that crimes were the same criminal conduct or the issue is not properly before the appellate court. RAP 2.5; *State v. Nitsch*, 100 Wn. App. 512, 521-24, 997 P.2d 1000, *review denied*, 11 P.3d 827 (2000); *State v. George*, 67 Wn. App. 217, 221 n. 2, 834 P.2d 664 (1992), *overruled on other grounds by*, *State v. Ritchie*, 126 Wn.2d 388, 395, 894 P.2d 1308 (1995).

In the present case, the charges of assault and rape each require a different criminal intent. Second degree assault requires intent either to create apprehension of bodily harm or to cause bodily harm. RCW 9A.36.021(1)(a); *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995).

Rape, however, does not require proof of intent. RCW 9A.44.040(1)(c); *State v. Walden*, 67 Wn. App. 891, 894, 841 P.2d 81 (1992). Thus, as one crime requires proof of intent and the other does not, the two crimes are not the same criminal conduct. *Hernandez*, 95 Wn. App. at 485.

In addition, as the issue was not raised below it cannot be argued for the first time on appeal. *Nitsch*, 100 Wn. App. at 521-24, *George*, 67 Wn. App. at 221 n. 2.

For all of the above reasons, Smith's claim that the rape and assault convictions constituted the same criminal conduct must fail.

D. A *PETRICH* INSTRUCTION WAS NOT REQUIRED BELOW BECAUSE THE STATE ELECTED WHICH ACTS IT WAS RELYING ON FOR EACH COUNT.

Smith next claims that the trial court erred by giving a unanimity instruction to the jury. This claim is without merit because the state elected which acts it was relying on for the rape count and the assault count.

In multiple acts cases several acts are alleged, any one of which could constitute a single crime charged. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). In such cases, the State must elect which act it will rely upon for a conviction or the court must instruct the jury that all 12 jurors

must agree that the same underlying act was proven beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

Election of a particular act may be established if the State's closing argument, when considered with the jury instructions and the charging documents, makes it clear which act or acts the State is relying on for each charge and there is no possibility that the jury could have been confused as to which act related to which charge. *State v. Bland*, 71 Wn. App. 345, 352, 860 P.2d 1046 (1993) (State's closing argument clarifying the particular act for each count supported a conclusion that the State made an election).

In *Bland*, the defendant argued that the assault conviction could have been based on his punching of a victim named Jefferson, his threatening Jefferson with a gun, and/or his near shooting of victim named Carrington. *Bland*, 71 Wn. App. at 350. The court, however, found that the State had “clearly elected” the defendant’s threat of Jefferson with the gun as the single act it was relying on for count I and the defendant’s shooting of a gun and near miss of Carrington as the single act it was relying on for count II. *Bland*, 71 Wn.App at 351. The court’s decision was based on the fact that the State had specified that the alleged assaults were both committed with a deadly weapon, and the State used special verdict forms, “one effect of which was to make sure that all the jurors were relying on the deadly weapon acts to

convict for the assault charges.” *Bland*, 71 Wn.App at 351. The court also pointed out that,

In addition, during closing argument the State made it clear, once more, that Bland’s threatening of Jefferson with the gun was the act the State was relying on for count 1 and Bland’s near shooting of Carrington with the gun was the act relied upon for count 2.

Bland, 71 Wn.App at 352. The court, therefore, held that it was clear from the record, the charging document, and the special verdict forms that the State elected which actions it was relying on and that there was no possibility that the jury could have been confused as suggested by the defendant. *Bland*, 71 Wn. App. at 352.

In State v. Rivas, 97 Wn. App. 349, 352, 984 P.2d 432 (1999), the jury was instructed on all three common law definitions of assault, but no evidence was offered at trial of actual battery or attempted battery, two of the three alternative means. Because the charging document identified the defendant's act of holding a knife to the victim's throat as the assault and the prosecutor focused only on the common law assault alternative means (arguing that the defendant held the knife over the victim and threatened her, causing her fear and apprehension), this court held that there was no danger that the jury's verdict rested on an unsupported alternative means, and affirmed the verdict. *Rivas*, 97 Wn. App. at 353-55.

In the present case, even if this court finds that this a “multiple acts” case as to either count, the State clearly elected (1) Smith’s rape while using the razor and hammer as the single act it was relying on for count 1 and (2) Smith’s cutting of the victim with the beer bottle as the single act it was relying on for count 2; and. (3) Smith’s strangulation of the victim as the act it was relying on for count 3.

With respect to Count I, the State did elect which act it was relying on, as evidenced by the special allegations and special verdict’s accompanying count I, where the State argued, and the jury found, that Smith committed the rape while armed with a razor and a hammer. CP 1-3, 75. In addition, the State argued at closing that Smith was guilty of rape in the first degree because he used force to overcome the victim’s resistance to the rape by using the hammer and razor. RP 471-72. The record, therefore, indicates that the State elected which act it was relying on, and the defense understood this and argued the case consistent with this election. No *Petrich* instruction, therefore, was required.

With respect to Count II, the State again elected which act it was relying on as the charging language stated it was an assault with a deadly weapon, and the special verdict form accompanying Count II specifically referenced the beer bottle. CP 3, 76. In addition, when the State argued Count II in closing, the prosecutor stated,

Instruction No. 14. Now this is – relates to count two, which is the assault with a deadly weapon, the beer bottle. On or about March 17th the defendant assaulted with a deadly weapon. You heard the testimony. She indicated he broke the bottle, he cut her on the arm. The act occurred in the State of Washington. The defendant is guilty. Count two.

RP 474. Similarly, in the defense closing, Smith’s trial counsel stated that the count two was the assault with a deadly weapon,

Specifically this is the assault that state is alleging, beyond a reasonable doubt, that occurred when Mr. Smith took this beer bottle and swiped it against her arm and cut her.

RP 488. The record, therefore, indicates that the State elected which act it was relying on, and the defense understood this and argued the case consistent with this election. No *Petrich* instruction, therefore was required.

With respect to Count III, the State again elected which act it was relying on. In closing, the State’s argument concerning Count III was as follows,

Count Three. March 17th, defendant intentionally assaulted Pam Lagrua. He put his hands around her neck and squeezed until she lost consciousness. The defendant recklessly inflicted substantial bodily harm. That relates to jury instruction No. 9. It’s temporary but substantial disfigurement, or causes a temporary but substantial loss or impairment of the function of any bodily part or organ. Now you heard the testimony of the ER doctor. He told you when somebody puts your hands around someone’s neck and squeezes and cuts the blood flow, your brain is impaired.

And that is why she lost consciousness. That is assault in the second degree.

RP 474-75. In the defense closing, trial counsel argued that with respect to Count III,

What you have to believe, beyond a reasonable doubt to convict him of this charge, is specifically about the choking that she, her breathing was impaired. That she was choked into unconsciousness. And we believe there's reasonable doubt about that.

RP 492. The record, therefore, indicates that the State elected which act it was relying on, and the defense understood this and argued the case consistent with this election. No *Petrich* instruction, therefore, was required.

As the State elected which acts it was relying on through the charging document and through its closing argument, and the jury returned special verdict forms indicating that they understood this election, no *Petrich* instruction was required. Smith's argument to the contrary, therefore, must fail.

E. SMITH HAS FAILED TO OVERCOME THE STRONG PRESUMPTION THAT HE RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE FAILED TO SHOW DEFICIENT PERFORMANCE OR PREJUDICE.

Smith next claims that he received ineffective assistance of counsel. This claim is without merit because Smith has failed to show that counsel's

performance was deficient and not based on legitimate trial strategy, and has also failed to show prejudice from the alleged deficiencies.

To establish that counsel was ineffective, Smith must show (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d at 225-26, 743 P.2d 816 (1987), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). A reviewing court will find counsel to be ineffective if his representation fell below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997).

A defendant is prejudiced where there is a reasonable probability that but for the deficient performance, the outcome of the case would have differed. *In re Pers. Restraint Petition of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A defendant must prove both prongs of the test in order to prove ineffective assistance of counsel. *State v. Kruger*, 116 Wn. App. 685, 693, 67 P.3d 1147, review denied, 150 Wn.2d 1024, 81 P.3d 120 (2003).

There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. at 689, 104 S. Ct. 2052; *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it

cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel. *State v. Benn*, 120 Wn.2d 631, 665, 845 P.2d 289 (1993); *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

An error is harmless when, in light of all the evidence presented at trial, it was unlikely to have affected the jury's verdict because the State's case was believable and its evidence corroborated. *State v. Stockton*, 91 Wn. App. 35, 43, 955 P.2d 805 (1998) citing *State v. Millante*, 80 Wn. App. 237, 246, 908 P.2d 374 (1995), review denied, 129 Wn.2d 1012, 917 P.2d 130 (1996); *State v. Padilla*, 69 Wn. App. 295, 301, 846 P.2d 564 (1993).

In the present case, Smith argues that trial counsel's failure to request a Petrich instruction deprived Smith of his right to effective assistance of counsel. App.'s Br. at 27. As outlined above, however, a *Petrich* instruction was not warranted because the State elected which acts it was relying on for each count. Smith, therefore, has failed to show that counsel's performance was deficient and that deficient performance prejudiced him.

Smith next argues that that trial counsel' failure to object to three instances of hearsay deprived Smith of his right to effective assistance of counsel. App.'s Br. at 27. Smith's argument fails, however, because counsel's failure to object in each instance was likely due to the fact that the statements were admissible, or because trial counsel made a strategic decision

to allow the statements to come in as they actually served to impeach the victim. In any event, Smith has failed to show that there was a reasonable probability that but for admission of the three statements, the outcome of the case would have differed.

Lagrua's statement

Smith claims that trial counsel was ineffective for failing to object when, (after the State asked if she knew is Smith asked Harris to leave the apartment) the victim briefly stated,

When I talked to him the next day, he said he told him to leave, that he'd bring me home.

RP 186. Mr. Harris, however, did not describe Smith ever telling him to leave (as Lagrua claimed in the alleged hearsay). *See* RP 358. The introduction of this inconsistency, therefore, actually served to impeach Lagrua to some extent. Counsel may well have anticipated this fact and simply not objected as the minimal prejudicial impact of the cumulative evidence was outweighed by the potential impeachment value of the statement.

In addition, as the evidence was cumulative, the prejudicial impact from the admission of the statement was minimal. Although Smith argues that the statement "provided a basis for the jury to determine that he

committed unlawful imprisonment,” there was ample testimony of a much more direct nature that provided the basis for the unlawful imprisonment charge. App.’s Br. at 29. Lagrua, for instance, testified that she wanted to leave the apartment, but Smith refused to let her leave and “dragged” her into the bedroom. RP 189. Harris also testified that, just prior to his leaving the apartment, he was outside talking to Smith and Legrua came to the front door, but Smith closed the door in her face, leaving Harris with the impression that Smith was not going to let Legrua leave. RP 359-60. Given this evidence, the contested statement was cumulative, and Smith has not shown that there was a reasonable probability that but for admission of the statement, the outcome of the case would have differed.

Defense counsel, therefore, was not ineffective for failing to object, as the failure to object could have been a legitimate trial strategy, and Smith has failed to show any prejudice when the evidence was cumulative and potentially served to impeach the victim.

Austin’s statement

The next statement Smith claims counsel should have objected to was Ms. Austin’s statement that Lagrua had stated she had been raped by Smith. App.’s Br. at 30. Austin, however, testified that Lagrua made these statements when she arrived home bleeding and crying, and when Lagrua was

a “nine” on a scale of one to ten in terms of how upset she was. RP 250. Defense counsel, therefore, had a legitimate reason for not objecting, as the statement was an excited utterance. In addition, the evidence was cumulative and, therefore, caused no conceivable prejudice.

Harris’s statement.

The final statement that Smith claims his trial counsel should have objected to was Mr. Harris’s testimony that Lagrua told him that if she left with him, Smith was “going to do something to me, or her, or both of us.” RP 348. Smith fails to show that the trial counsel’s failure to object was not a legitimate trial strategy. Trial counsel could have chosen not to object (and thereby draw further attention to the statement) because he or she felt that any objection would have been overruled on the basis that the statement was an excited utterance or even a present sense impression. Furthermore, even if the statement had originally been sustained, the State could have gone back and asked Harris numerous foundational questions about the victim’s emotional state in order to lay further foundation for an excited utterance. Trial counsel, therefore, could have reasonably believed that an objection, even if sustained, would have only further prejudiced Smith.

In addition, trial counsel may not have objected because Harris’s statement contradicted Legrua’s testimony that she did not have a

conversation with Harris after she left the bathroom and that she didn't know when Harris left the party. RP 185. In addition, Lagrua denied that Smith ever threatened her about what would happen to her if she did leave. RP 225. Harris's statement, therefore, served to contradict Legrua and served to question her ability to accurately recall the events of the evening. As this was a central theme of the defense case, trial counsel's failure to object could have been a legitimate trial strategy.

Smith, however, claims that he was prejudiced because Harris's statement bolstered Legrua's credibility. App.'s Br. at 31. This argument fails, however, as the out of court statement was a statement by Legrua herself. Smith fails to explain how an alleged statement by Lagrua could have bolstered her own credibility, especially given the fact that the statement contradicts her trial testimony to some degree.

As Smith's trial counsel, therefore, may have chosen not to object due to a legitimate trial strategy, and because the statements were likely admissible, Smith has failed to show ineffective assistance or prejudice.

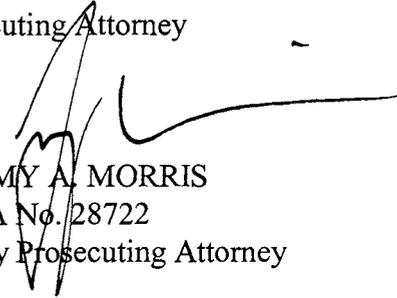
IV. CONCLUSION

For the foregoing reasons, Smith's conviction and sentence should be affirmed.

DATED October 3, 2006.

Respectfully submitted,

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