

NO. 35719-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

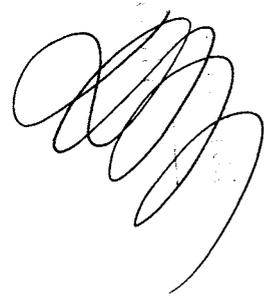
STATE OF WASHINGTON,

Respondent,

vs.

JAMES C. FAIRCLOTH,

Appellant.



BRIEF OF APPELLANT

LISA E. TABBUT/WSBA #21344
Attorney for Appellant

P. O. Box 1396
Longview, WA 98632
(360) 425-8155

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A. ASSIGNMENTS OF ERROR

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CONVICTION. (COUNTS IV AND VI).**

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. **A DEFENDANT CANNOT BE CONVICTED OF AN UNCHARGED ALTERNATIVE TO AN OTHERWISE CHARGED OFFENSE. FAIRCLOTH WAS CHARGED WITH ILLEGALLY POSSESSING A FIREARM UNDER THE ALTERNATIVE THAT HE HAD A PREVIOUS FELONY CONVICTION BUT CONVICTED OF THE ALTERNATIVE OF HAVING A PREVIOUS DOMESTIC VIOLENCE MISDEMEANOR CONVICTION. WAS FAIRCLOTH IMPROPERLY CONVICTED OF UNLAWFUL POSSESSION OF A FIREARM? (ASSIGNMENT OF ERROR 1).**
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C. STATEMENT OF THE CASE

(1) The charges and trial

On December 4-18, 2006, James Faircloth and his co-defendant Paul Johns were tried to a Thurston County jury.¹ Judge Richard Strophy presided. Faircloth was tried on the fourth amended information as follows:

COUNT I: MURDER IN THE FIRST DEGREE WHILE ARMED WITH A FIREARM, RCW 9A.32.030(1)(a) and (c); RCW 9.94A.533(3) – CLASS A FELONY:

In that the defendant, JAMES CLINTON FAIRCLOTH, JR, in the State of Washington, on or about April 13, 2006, as principal or accomplice, with a premeditated intent to cause the death of another person, to-wit: LYNN SOEBY, caused the death of said person and the above-named defendant

¹ The report of proceedings, "RP", referenced in Faircloth's brief is for the trial excluding voir dire and opening statement. The page numbers are sequential with the exception of one volume of verbatim reported by Ralph Bestwick on December 12, 2006. At any time if reference is made to the record other than the sequential pages of the trial, its source will be clearly specified.

did commit or attempt to commit the crime either of (1) robbery in the first or second degree, or (2) kidnapping in the first or second degree, and in the course of or in furtherance of such crime or in immediate flight therefrom, the defendant, or an accomplice, caused the death of a person other than one of the participants in the crime, to-wit: LYNN SOEBY. It is further alleged that the defendant or an accomplice, was armed with a deadly weapon at the time of the commission of the crime as defined in 9.94A.602, to-wit: a firearm.

COUNT II: KIDNAPPING IN THE FIRST DEGREE WHILE ARMED WITH A FIREARM, RCW 9A.40.020; RCW 9.94A.602 AND RCW 9.94A.533(3) – CLASS A FELONY:

In that the defendant, JAMES CLINTON FAIRCLOTH, JR, in the State of Washington, on or about April 13, 2006, as principal or accomplice, did intentionally abduct another person, to wit: LYNN SOEBY, with intent to hold her to facilitate the commission of a felony or flight therefrom and/or to inflict bodily injury on her; and/or to inflict extreme mental distress on her or a third person. It is further alleged that the defendant, or an accomplice, was armed with a deadly weapon at the time of the commission of the crime as defined in 9.94A.533(3), to-wit: a firearm.

COUNT III: ROBBERY IN THE FIRST DEGREE WHILE ARMED WITH A FIREARM, RCW 9A.56.200(1)(a); RCW 9.94A.602 AND RCW 9.94A.533(3) – CLASS A FELONY:

In that the defendant, JAMES CLINTON FAIRCLOTH, JR, in the State of Washington, on or about April 13, 2006, as principal or accomplice, with intent to commit theft, did unlawfully take person property that the defendant did not own from the person or in the presence of LYNN SOEBY, against such person's will, by use or threatened use of a immediate force, violence, or fear of injury to said person or the property of said person or the person or property of another and that force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking, and in the commission of said crime and in immediate flight therefrom, the defendant,

was armed with a deadly weapon and/or inflicted bodily injury upon LYNN SOEBY. It is further alleged that the defendant, or an accomplice, was armed with a deadly weapon at the time of the commission of the crime as defined in 9.94A.602, to-wit: a firearm.

COUNT IV: ASSAULT IN THE SECOND DEGREE WHILE ARMED WITH A FIREARM, RCW 9A.36.021(1)(c), RCW 9.94A.602 AND RCW 9.9A.533(3) – CLASS B FELONY:

In that the defendant, JAMES CLINTON FAIRCLOTH, JR, in the State of Washington, on or about April 13, 2006, did intentionally assault LYNN SOEBY with a deadly weapon. It is further alleged that the defendant, or an accomplice, was armed with a deadly weapon at the time of the commission of the crime as defined in 9.94A.602, to wit: a firearm.

COUNT V: ASSAULT IN THE SECOND DEGREE WHILE ARMED WITH A FIREARM, RCW 9A.36.021(1)(c), RCW 9.94A.602 AND RCW 9.94A.533(3) – CLASS B FELONY:

In that the defendant, JAMES CLINTON FAIRCLOTH, JR, in the State of Washington, on or about April 13, 2006, did intentionally assault ROBBIE JORDAN with a deadly weapon. It is further alleged that the defendant, or an accomplice, was armed with a deadly weapon at the time of the commission of the crime as defined in 9.94A.602, to-wit: a firearm.

COUNT VI: UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE, RCW 9.41.040(2)(a)(i); CLASS C FELONY:

In that the defendant JAMES CLINTON FAIRCLOTH, JR, in the State of Washington, on or about April 13, 2006, did knowingly have in his possession or in his control a firearm, after having previously been convicted of a felony.

CP 8-9.

(2) The facts.

Lynn Soeby² ("Soeby") led an unfortunate life as a methamphetamine-addicted couch surfer who "did checks" to support herself. RP 366. Sometime around April 13, 2006, Soeby's life ended in the woods off a Weyerhaeuser logging road in Thurston County. RP 530, 713. She died from a single gunshot wound to her head. 882; RP December 12, 2006³ 49-50.

On April 13⁴, Soeby called James Faircloth⁵, her ex-boyfriend, and asked if she could stop by his apartment to do her laundry and take a shower. RP 83, 265, 267, 303, 372. He agreed. RP 372. When Soeby arrived, several persons were in the apartment: Faircloth; his roommate, Paul Johns⁶ ("Johns"); Chene Lumsden ("Chene"), Faircloth's friend and sometime girlfriend of Johns; Cami Fennel ("Cami"), Johns' current girlfriend; Robbie Jordan ("Robbie"), Johns' cousin; and Travis Merriott ("Travis"), friend of Robbie Jordan. RP 80, 87, 249, 261, 356-57, 362-63, 549.

² The spelling occurs in the record as "Sobey" and "Soeby." It is unknown which is correct.

³ "RP December 12, 2006" refers to the verbatim report of court reporter Ralph Beswick. Mr. Beswick reported a portion of the testimony heard on December 12.

⁴ This is an approximate date. The event occurred just before Easter. RP 165.

⁵ Faircloth is frequently referred to in the record by his nickname, "OJ". RP 54.

⁶ Johns is frequently referred to in the record by his nickname, "Playboy." RP 54.

All of the persons in the apartment either smoked or “slammed”⁷ methamphetamine prior to Soeby’s arrival. RP 69-70, 81, 87, 134, 556.

A dispute arose when Faircloth discovered his watch was missing. RP 88, 273, 376, 570. Soeby had a reputation for being a petty thief who would take just about anything. RP 83. Faircloth accused Soeby of taking his watch. RP 376-78. Johns attached himself to Soeby using a zip tie. RP 85, 563. Johns sat down in the living room with Soeby and dumped out her purse in an effort to find the watch. RP 84-85, 275, 563, 566. Faircloth said that the zip tie was too tight and needed to be cut off Soeby. RP 296. Cami cut it off. RP 86. Soeby denied taking the watch, got up, angrily brushed past Faircloth, and returned to the bathroom to gather her things and leave. RP 90, 277-78, 571-72. Faircloth was angered by Soeby’s disrespect toward him. RP 571. He followed her into the bathroom. RP 91, 381. They argued. RP 91, 382. Faircloth hit Soeby on the side of her head with a handgun.⁸ RP 383, 390, 573. He also pointed the gun at Soeby and threatened to shoot her. RP 383. Robbie yelled at Faircloth that Faircloth should not hit a

⁷ “slam” means to inject

⁸ The testimony about Faircloth hitting Soeby with the gun in the bathroom is the factual basis for Count IV, second degree assault on Soeby.

woman. RP 576. Faircloth pointed the gun at Jordan and told him to shut up or he would shoot him.⁹ RP 577.

Faircloth left the bathroom. RP 93. Cami joined Soeby in the bathroom. Soeby's head was bleeding. RP 93. Cami used a towel to clean up the blood. RP 93. When Cami left the bathroom, Soeby's hands were zip tied. Testimony differed as to who put the zip ties on Soeby. One version had Cami putting the zip ties on Soeby at Faircloth's direction. RP 393. Another version had Johns putting the zip ties on Soeby after he talked to Faircloth. RP 93.

Faircloth announced to the others in the apartment, "Somebody needs to get rid of [Soeby]. She needs to be taught a lesson." RP 391. Johns told Cami to clean out the trunk of her car. RP 108. Cami did so. RP 110.

Chene, seven months pregnant, never left Faircloth's bedroom while Soeby was in the apartment although she could see into the living room and bathroom area of the apartment from her perch on Faircloth's bed. RP 137, 288. At some point, Chene, Sobey, and Faircloth were in Faircloth's bedroom. Soeby's hands were zip tied together. RP 393-395. Soeby told Faircloth that she

⁹ The testimony about Faircloth pointing the gun at Robbie forms the factual basis for Count V, the second degree assault on Robbie. The jury ultimately found guilty on the lesser charge of unlawful display of a weapon.

would not tell anyone about what had happened and that she just wanted to leave. RP 399. Faircloth told Soeby that he couldn't just let her go. RP 399. Faircloth, who had his gun on his hip, accused Soeby of taking things. RP 395, 405. Soeby was crying. RP 403. Faircloth went through Soeby's pockets, removed some items, and put the items on the bed. RP 401. Faircloth also removed a watch from Soeby's arm.¹⁰ RP 402. Faircloth picked up the items from the bed and took them and Soeby into the living room. RP 406.

Shortly thereafter, Johns and Robbie left the apartment with zip-tied Soeby between them. RP 120-22, 580. Soeby's leather jacket was over her shoulder. RP 584. Johns carried Soeby's purse and her duffle bag. RP 268, 299, 585. The bloody towel from the bathroom was in the duffle bag. RP 456-57, 585. Before they went out the door, Faircloth gave Johns a handgun. RP 118. Chene gave Johns her cell phone before he left with Soeby. RP 406.

Johns put Soeby in the back seat of Cami's car. RP 410, 585. Johns put a black hood over Soeby's head. RP 586. Johns drove. RP 410. Robbie, who asked to be driven home, sat in the

¹⁰ The prosecutor argued in closing that this was the start of the facts supporting the first degree robbery charge.

front passenger seat. RP 410, 577, 579. Rather than dropping Robbie off at home, Johns drove past it and stopped at the end of a gated logging road. RP 585-86, 590-91. Johns took Soeby out of the car, removed the hood from her head, and had Robbie cut off the zip ties. RP 595-96. Johns, Soeby, and Robbie walked three abreast up the logging road for about fifteen minutes. RP 597, 602-03. Soeby was calm. RP 603. Johns gave Soeby a last cigarette. RP 598. Johns removed Soeby's numerous rings, bracelets, necklaces, and earrings from her person.¹¹ RP 605. Johns and Soeby walked into the brush. RP 606. A few minutes later, Robbie heard a single shot. RP 608. Johns walked out of the brush alone singing Amazing Grace. RP 611. Johns told Robbie that he had Soeby sit down before shooting her once in the head. RP 610-11.

Johns and Robbie walked back down the road and got in the car. RP 613. While Johns drove himself and Robbie back to Faircloth's apartment, Johns told Robbie to throw Soeby's purse and duffel bag out the car window. RP 617-19. Robbie did so. RP 618-19. Johns threw some of Soeby's jewelry out the window. RP 617. Johns received two text messages from Faircloth on the trip

¹¹ The prosecutor argued in closing that this was a continuing robbery that had begun with Faircloth taking Soeby's watch from her in the apartment bedroom. RP 1267-68.

back to Faircloth's apartment. RP 415, 622-23. The messages instructed Johns to throw his clothes away and to bring back the bloody towel because it had Soeby's blood and Faircloth's hair on it. RP 622-623.

Once back at the apartment, Johns went into Faircloth's bedroom and handed him a note. RP 418, 449. Faircloth looked at the note and gave it back to Johns. RP 422. Faircloth later told Chene that he had a debt of \$2,000. RP 447.

After Johns return, Chene saw Faircloth holding the gun she'd seen him with earlier. RP 407-08, 427, 485. Chene saw Faircloth put the gun in a backpack in his bedroom. RP 428, 430. Chene later noticed that the backpack was gone. RP 433.

Some hours later while out and about, Johns and Cami ran into Robert "Scooter" Scroggins. RP 154-55, 729. Johns showed Scooter a pistol and told Scooter that the pistol belonged to Faircloth. RP 742. Scooter decided to keep the gun. RP 742. Scooter was later arrested on an unrelated matter by a City of Olympia police officer. RP 720-71. The officer confiscated the gun, placed into evidence, and eventually turned over to the Thurston County Sheriff's Office. RP 721, 727, 751-52.

Cami told her mother, Carmen Sanchez, about Soeby leaving the apartment with Johns and Robbie. RP 160. Sanchez, who had been Soeby's cellmate at Purdy, looked for Soeby at her usual hangouts but could not find her. RP 41-42.

At the urging of Sanchez, Cami spoke with Thurston County Sheriff's Detective Eugene Duprey. Cami told Duprey about the events of April 13 at Faircloth's apartment. RP 43, 163. This conversation led Duprey to contact and take statements from Chene, Travis, and Robbie. Robbie eventually led the police to the logging road where he had walked with Johns and Soeby. RP 651, 653. Soeby's decomposing body was found on May 23 about 40 yards off the road. RP 711, 879-80. The police also found Soeby's intact purse near where Robbie said he'd thrown it from the car. RP 653.

Robbie was originally charged with first degree kidnapping for his involvement in the case. RP 654. In exchange for his testimony, Robbie's kidnapping charge was reduced to first degree rendering criminal assistance. RP 655.

The state called Neal Haskell, a forensic entomologist, who explained how he used maggots collected from Soeby's body to

determine that Soeby died sometime between April 13 and April 20. RP 519-30, 543.

A Washington State Patrol forensic scientist compared the cartridge recovered from Soeby's head with the pistol seized from Scooter. RP 903-04. Although the scientist could not say that the cartridge was fired from the recovered pistol, she testified that it could have been. RP 907-909.

Faircloth and Johns were interviewed by the police as part of the investigating into Soeby's disappearance and death. RP 1099-1113, 1134-1150. Faircloth acknowledged that Soeby came to his apartment, they argued, and that she'd been injured by his gun. RP 1099-1113 1134-1150. Faircloth denied having anything to do with Soeby's death. RP 1099-1113, 1134-1150. Johns similarly denied involvement in Soeby's death. RP 1153-1160.

(3) Procedural history.

(i) Pre-trial motions.

No CrR 3.5 or 3.6 hearings were held before trial.

(ii) Defendant and co-defendant trial testimony.

Neither Faircloth nor Johns testified at trial.

(iii) Stipulated proof on unlawful possession of a firearm.

To prove the underlying conviction supporting the unlawful possession of a firearm charge, the state, without objection, had admitted into evidence a certified copy of a Faircloth's 2005 Thurston County District Court misdemeanor judgment and sentence for fourth degree assault (domestic violence). See exhibit 121.

(iv) Jury Instructions.

Faircloth took no exceptions and made not objections to the jury instructions and did not propose any instructions. RP 1374.

The court instructed the jury that to find Faircloth guilty of the unlawful possession of a firearm, it would have to find that Faircloth had been convicted of assault in the fourth degree, domestic violence, between July 1, 1993, and before April 13, 2006. CP 78 Instruction 50).

The jury was given several lesser included instructions as to Faircloth: second degree murder through intentional murder and, alternatively, felony murder (down from first degree murder); unlawful imprisonment (down from first degree kidnapping); second degree robbery (down from first degree robbery); assault in the

fourth degree (down from second degree assault on Soeby); and unlawful display of a weapon (down from the second degree assault on Robbie). CP 46, 47, 48-49, 54, 56, 60, 61, 62, 69, 70, 72.

(v) The verdict.

The jury returned guilty as charged with verdicts of first degree murder, first degree kidnapping, first degree robbery, second degree assault on Soeby, and second degree unlawful possession of a firearm. CP 93, 95, 97, 99, 103. The jury returned with the lesser unlawful display of a weapon on Count 5, down from the original felony assault charge against Robbie. CP 101, 102. The jury also returned special verdicts that Faircloth or an accomplice was armed with a firearm at the time of the murder, the kidnapping, the robbery, and the assault on Soeby. CP 94, 96, 98, 100.

(vi) No interrogatories on the verdict.

Other than the special firearm verdict, no other special verdicts or interrogatories were requested on the jury's verdict.

(vii) Sentencing.

The court heard sentencing on December 27. RP December 27, 2006 3-32. Faircloth did not object to the calculation of his

offender score. RP December 26, 2006 12-13. The court sentenced Faircloth to the maximum standard range sentence, 672 months, including 18 years for firearm enhancements.¹² RP December 27, 2006 ; CP 106, 109.

As part of the judgment and sentence, the court imposed a life-time no contact provision with all of the witnesses and the Soeby family. CP 108. The no contact provision did not specify which convictions it applied to. CP 108.

D. ARGUMENT

1. FAIRCLOTH WAS IMPROPERLY CONVICTED OF AN UNCHARGED ALTERNATIVE OF SECOND DEGREE UNLAWFUL POSSESSION OF A FIREARM.

The fourth amended information, upon which James Faircloth was tried, alleged under count 6 that Faircloth could not legally possess a firearm because he had a prior felony conviction. At trial, however, the court instructed the jury, and the state proved, that Faircloth could not possess a firearm because he had a prior domestic violence conviction occurring between July 1, 1993, and April 13, 2006. But because Faircloth cannot be convicted of an

¹² Sixty months each on the class A felonies (first degree murder, first degree kidnapping, and first degree robbery) and 36-months on the class B second degree assault.

uncharged offense, his conviction for unlawful possession of a firearm must be reversed.

A charging document is generally constitutionally sufficient if it notifies a criminal defendant of the nature of the accusation with reasonable certainty, thereby permitting the defendant to develop a proper defense and to offer any resulting judgment as a bar to a second prosecution for the same offense. *State v. Davis*, 60 Wn. App. 813, 816, 808 P.2d 167 (1991), *aff'd*, 119 Wn.2d 657, 835 P.2d 1039 (1992). When a statute sets forth alternative means by which a crime can be committed, the charging document may charge none, one, or all of the alternatives, provided the alternatives charged are not repugnant to one another. *State v. Noltie*, 116 Wn.2d 831, 842, 809 P.2d 190 (1991); *State v. Severns*, 13 Wn.2d 542, 548, 125 P.2d 659 (1942); *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). If the information alleges only one alternative, however, it is error for the fact finder to consider uncharged alternatives, regardless of the strength of the evidence presented at trial. *Bray*, 52 Wn. App. at 34 (holding that trial court committed prejudicial error when it instructed jury on uncharged alternative means of committing forgery); see *Severns*, 13 Wn.2d at 548; *State v. Doogan*, 82 Wn. App. 185, 188, 917 P.2d 155 (1996).

It is illegal in Washington for a person to possess a firearm if he has been convicted of a felony not enumerated in RCW 9.41.040(1)(a). RCW 9.41.040(2)(a)(i). Alternatively, it is also illegal to possess a firearm after having been convicted of fourth degree assault against a family or household member if the assault was committed on or after July 1, 1993. RCW 9.41.040(2)(a)(i).

Here, the content of the original information and the first amended information were confusing. Both alleged that Faircloth had previously been convicted of “the felony offense of Assault in the Fourth Degree.” CP 2, 3. However, the second amended information, the third amended information, and finally the fourth amended information clarified the state’s charging intent when it specified that it intended to prove that Faircloth “[had] previously been convicted of a felony.” CP 4-5, 6-7, 8-9. At trial, the court instructed the jury that to find Faircloth guilty of unlawful possession of a firearm it had to find, Faircloth “had, on or after July 1, 1993, and before April 13, 2006, been convicted of assault in the fourth degree – domestic violence.” CP 78 (Instruction 50). Accordingly, instructing the jury and finding guilt on the uncharged domestic violence conviction alternative on the unlawful firearm possession

charge was in error. Faircloth's conviction on count VI must be reversed.

2. **FAIRCLOTH WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S INEFFECTIVE ASSISTANCE IN FAILING TO REQUEST SPECIAL INTERROGATORIES AFTER THE JURY RETURNED ITS VERDICTS REGARDING WHETHER HIS CONVICTION FOR MURDER IN THE FIRST DEGREE (COUNT I) WAS BASED ON A PREMEDITATED INTENTIONAL ACT OR FELONY MURDER WITH THE PREDICATE FELONIES BEING KIDNAPPING AND/OR ROBBERY, DESPITE THE GIVING OF A UNANIMITY INSTRUCTION, WHERE JOHNS WAS ALSO CONVICTED OF KIDNAPPING AND ROBBERY (COUNTS II AND III) WHICH CONVICTIONS VIOLATE DOUBLE JEOPARDY IF HIS MURDER CONVICTION WAS BASED ON FELONY MURDER.¹³**

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. *State v Graham*, 78 Wn.App. 44, 56, 896 P.2d 704 (1995); *State v. Early*, 70 Wn.App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); Competency of counsel is determined

¹³ This issue is being borrowed from the brief of co-defendant's Johns. Its author is Patricia Pethick.

based on the entire record below. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing *State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. *State v. Tarica*, 59 Wn.App. 368, 374, 798 P.2d 296 (1990).

a. Overview of What Occurred.

Faircloth was charged in Count I with murder in the first degree under the alternatives of premeditated intentional murder or felony murder based on the predicate felonies of kidnapping or robbery, the court gave a unanimity instruction requiring the jury to be unanimous upon which alternative the finding of guilt was based. (CP 8-9, 48-49). Faircloth was also charged with kidnapping (Count II) and robbery (Count III). The only special verdicts submitted to the jury involved the sentence enhancement allegations as to Counts I-V. The jury found Faircloth guilty as charged first degree murder, first degree kidnapping, and first degree robbery. After the jury returned its verdicts, Faircloth did not ask for special interrogatories to be submitted to the jury regarding whether the murder conviction in Count I was based on a premeditated intentional act or based on felony murder and, if so,

as to which underlying felony (kidnapping and/or robbery) the verdict was based. It was incumbent for Faircloth's counsel to do so because had he done so and the jury answered the special interrogatories that the murder was felony murder based on kidnapping and/or robbery, then double jeopardy would have barred his convictions for kidnapping (Count II) and/or robbery (Count III).

- b. Faircloth may not be convicted of kidnapping and robbery where these crimes may have been incidental to, part of, or co-existent with his conviction of felony murder.**

Courts Article 1, Section 9 of the Washington State Constitution and the Fifth Amendment to the United States Constitution provide that no person should twice be put in jeopardy for the same offense. Double jeopardy may be violated by multiple convictions even if the sentences are concurrent. *State v. Calle*, 125 Wn.2d 769, 775, 888 P.2d 155 (1995). A double jeopardy argument may be raised for the first time on appeal because it is a manifest error affecting a constitutional right. *State v. Turner*, 102 Wn.App. 202, 206, 6 P.3d 1226, *review denied*, 143 Wn.2d 1009 (2001) (*citing* RAP 2.5(a) and *State v. Adel*, 136 Wn.2d 629, 631, 965 P.2d 1072 (1998)). The issue is whether the Legislature

intended to authorize multiple punishments for criminal conduct that violates more than one criminal statute. *Calle*, 125 W.2d at 772.

A three-prong test is applied to determine legislative intent. First, multiple convictions constitute double jeopardy even if the offenses “clearly involve different legal elements, if there is clear evidence that the Legislature intended to impose only a single punishment.” *In re Pers. Restraint of Burchfield*, 111 Wn.App. 892, 897, 46 P.3d 840 (2002) (citing *Calle*, 125 Wn.2d at 780). Because the Legislature is free to define crimes and fix punishment as it will, “the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.” *Brown v. Ohio*, 432 U.S. 161, 165, 53 L.Ed. 2d 187, 97 S. Ct. 2221 (1997).

Here, neither the murder in the first degree nor the kidnapping in the first degree nor the robbery in the first degree statutes contain specific language authorizing separate punishments for the same conduct. RCW 9A.32.030; RCW 9A.40.020; RCW 9A.56.200. The offenses at issue here are thus not automatically immune from double jeopardy analysis. *In re Burchfield*, 111 Wn.App. at 896.

Second, when, as here, the Legislature has not expressly authorized multiple punishments for the same act, this court applies the “same evidence test,” which asks “whether each offense has an element not contained in the other.” *Id.* The statute under which Faircloth was convicted of first degree murder requires a death. RCW 9A.32.030. The first degree kidnapping statute requires an abduction. RCW 9A.40.020. The robbery statute requires the taking of property. RCW 9A.56.200. These offenses contain different elements and, therefore, are not established by the “same evidence.” Thus the prohibition against double jeopardy is not violated here by applying the same evidence test.

The “same evidence” test, however, is not always dispositive. *In re Burchfield*, 111 Wn.App. at 897; *In re Personal Restraint of Percer*, 150 Wn.2d 41, 50-51, 75 P.3d 488 (2003). This court must also determine whether there is evidence that the Legislature intended to treat conduct as a single offense for double jeopardy purposes. *Id.* This merger doctrine is simply another way, in addition to the “same evidence” test, by which this court may determine whether the Legislature has authorized multiple punishments. *State v. Frohs*, 83 Wn.App. 803, 811, 9243 P.2d 384 (1996). “Thus, the merger doctrine is simply another means by

which a court may determine whether the imposition of multiple punishments violates the Fifth Amendment guarantee against double jeopardy...". *Id.* The question is whether there is clear evidence that the Legislature intended not to punish the conduct at issue with two separate convictions. *Calle*, 125 Wn.2d at 778. If a defendant is convicted of two crimes, his second conviction will stand if that conviction is based on "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 the element.* (emphasis added). *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979).

Here Soeby was killed after being bound, driven to a logging road, and her jewelry taken from her. This court should construe this as evidence that the first crime (felony first degree murder) was not completed as the second crimes (kidnapping in the first degree and/or robbery in the first degree) were in progress, then the kidnapping and/or robbery *were incidental to, a part of, or coexistent with the felony murder in the first degree*, with the result that the second conviction (kidnapping in the first degree (Count II) and/or robbery in the first degree (Count III)) will not stand under the reasoning in *State v. Johnson, supra*. This seems especially

true given the court's to-convict instruction on Count I, Instruction No. 18 (CP 44-45), which specifically sets forth as an element under the felony murder alternative that Soeby's death occurred during the course of a kidnapping and/or robbery.

The Washington Supreme Court has observed that "(t)he United States Supreme Court has been especially vigilant of overzealous prosecutors seeking multiple convictions based upon spurious distinctions between the charges." *Adel*, 136 Wn.2d at 635. Accordingly, if this court determines that the kidnapping in the first degree (Count I) and the robbery in the first degree (Count III) "w(ere) incidental to, a part of, or coexistent" with the felony murder in the first degree (Count I), then Faircloth's convictions in Counts II and/or III cannot be sustained established on these facts and must, therefore, be reversed.

c. The recent State Supreme Court case of *State v. Womac* supports the above analysis.

In *State v. Warrow*, 91 Wn.2d 301, 588 P.2d 1320 (1978), the State Supreme Court rejected an argument that a defendant cannot be convicted of both felony murder and the underlying felony. The court upheld both convictions by considering statutory merger and due process finding neither principle was violated.

However, recently in *State v. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007), the State Supreme Court apparently reversed this decision by analyzing the issue in terms of double jeopardy.

In *Womac*, the defendant was charged in three separate counts and convicted of homicide by abuse, felony murder based on criminal mistreatment, and assault. The trial court accepted all three convictions, but imposed sentence only on the homicide by abuse. On appeal, the court remanded the case for resentencing on the homicide by abuse and conditionally dismissed the felony murder and assault convictions so long as the homicide by abuse conviction withstood further appeal. The State Supreme Court vacated the felony murder and assault convictions on double jeopardy grounds holding *Womac* had in actuality committed a single offense against a single victim yet was held accountable for three crimes in violation of double jeopardy prohibition against multiple punishments for a single offense. In doing so, the State Supreme Court engaged in the three-part analysis set forth above in section (c). The State Supreme Court determined that the double jeopardy was violated even though *Womac* received no sentence on the felony murder and assault convictions as a “conviction” in

itself, even without imposition of sentence, carries an unmistakable onus which has a punitive effect. In sum, the court held:

As this court noted in *Calle*, "(i)t is important to distinguish between charges and convictions - the State may properly file an information charging multiple counts under various statutory provisions where evidence supports the charges *even though convictions may not stand* for all offenses where double jeopardy protections are violated.

(Citations omitted). *Womac*, 160 Wn.2d at 657-58.

That is exactly what has happened here. The State properly filed an information charging multiple counts (the murder charge included a felony murder alternative as well as charges for the underlying felonies), obtained convictions on these multiple counts, but all the convictions cannot stand give double jeopardy principles for the reasons set forth above. Under the facts of this case, it was imperative to know whether the jury convicted Faircloth based on felony murder, and if so, based on what predicate felony in order to properly determine whether double jeopardy principles were violated. Absent a definitive answer to this issue, it is likely that Faircloth has been convicted of crimes and is serving a sentence in violation of double jeopardy principles. This court should reverse Faircloth's convictions on Counts I-III.

- d. Faircloth was prejudiced by his counsel's failure to request special interrogatories after the jury returned its verdicts where double jeopardy principles would have barred his convictions for kidnapping and/or robbery if the jury found that Count I was felony murder.**

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. *State v. Leavitt*, 49 Wn.App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." *Leavitt*, 49 Wn.App at 359. The prejudice here is apparent - but for counsel's failure to request special interrogatories after the jury reached its verdict on Count I, it cannot be said that the jury did not in fact find Faircloth guilty of felony murder with the result that Faircloth would not have also been convicted of kidnapping (Count II) and/or robbery (Count III) under double jeopardy and his total sentence would have been reduced.

Therefore, based on the above, this court should reverse Faircloth's convictions in Counts I-III.

3. FAIRCLOTH MAY NOT BE CONVICTED OF ROBBERY WHERE THE ROBBERY WAS INCIDENTAL TO, A PART OF, OR COEXISTENT WITH HIS CONVICTION FOR KIDNAPPING.¹⁴

Here, neither the robbery nor the kidnapping statutes contain specific language authorizing separate punishments for the same conduct. RCW 9A.56.200; RCW 9A.40.020. The offenses are thus not automatically immune from double jeopardy analysis. *In re Burchfield*, 111 Wn.App. at 896.

Second, when, as here, the Legislature has not expressly authorized multiple punishments for the same act, this court applies the “same evidence test,” which asks “whether each offense has an element not contained in the other.” *Id.* The statute under which Faircloth was convicted for robbery requires that a person take property of another. RCW 9A.56.200. The kidnapping statute requires an abduction. RCW 9A.40.020. The two offenses therefore can be said to contain different elements and, thus, are not established by a strict review of the “same evidence” test. Thus the prohibition against double jeopardy is not violated here by applying the same evidence test in its strictest interpretation.

¹⁴ For the sole purpose of avoiding needless duplication, the prior discussion in the preceding section of this brief, (section (2)(b)), of the law relating to double jeopardy analysis is hereby incorporated by reference.

The “same evidence” test, however, is not always dispositive. *In re Burchfield*, 111 Wn.App. at 897. This court must also determine whether there is evidence that the Legislature intended to treat conduct as a single offense for double jeopardy purposes. *Id.* This merger doctrine is simply another way, in addition to the “same evidence” test, by which this court may determine whether the Legislature has authorized multiple punishments. *Frohs*, 83 Wn.App. at 811. “Thus, the merger doctrine is simply another means by which a court may determine whether the imposition of multiple punishments violated the Fifth Amendment guarantee against double jeopardy...” *Id.* the question is whether there is clear evidence that the Legislature intended not to punish the conduct at issue with two separate convictions. *Calle*, 125 Wn.2d at 778. If a defendant is convicted of two crimes, his or her second conviction will stand if that conviction is based on “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 the element.* (emphasis added). *Johnson*, 92 Wn.2d at 680.

Here, the record demonstrates that Soeby was bound and driven to a logging road where her jewelry was taken from her.

Should this court construe the evidence presented in this trial that the first crime (kidnapping) had not yet come to an end before the second crime (robbery) began, then the robbery *was incidental to, a part of, or coexistent with the kidnapping*, with the result that the second conviction (the robbery) will not stand under the reasoning in *State v. Johnson, supra*; see also Instruction No. 25, kidnapping to-convict instruction (CP 53).

The Washington Supreme court recently observed that “(t)he United States Supreme Court has been especially vigilant of overzealous prosecutors seeking multiple convictions based upon spurious distinctions between the charges.” *Sate v. Adel*, 136 Wn.2d at 635. Accordingly, if this court determines that the robbery “was incidental to, a part of, or coexistent” with the kidnapping, then Faircloth’s robbery conviction (Count III) cannot be established on these facts and must, therefore, be reversed.

4. FAIRCLOTH WAS PREJUDICED AS A RESULT OF HIS COUNSEL’S FAILURE TO ARGUE DOUBLE JEOPARDY FOR THE REASONS SET FORTH IN SECTION (3).¹⁵

A criminal defendant claiming ineffective assistance must prove (1) that the attorney’s performance was deficient, i.e. that the

¹⁵ It has been argued in the preceding sections of this brief that the issues can be raised for the first time on appeal. This portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. *Graham*, 78 Wn.App. at 56; *Early*, 70 Wn.App. at 460. Competency of counsel is determined based on the entire record below. *White*, 81 Wn.2d at 225. A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. *Tarica*, 59 Wn.App. at 374. Assuming, arguendo, this court finds that counsel waived the error claimed and argued in section (2) of this brief by failing to argue double jeopardy as to the robbery and corresponding kidnapping conviction, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to make this argument where if it had been made Faircloth would have been convicted of fewer crimes.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result

would have been different. *State v. Leavitt*, 49 Wn.App. at 359. A “reasonable probability” means a probability “sufficient to undermine confidence in the outcome.” *Id.* at 359. The prejudice here is apparent in that Johns would have been convicted of fewer crimes and his total sentence would be reduced if the double jeopardy arguments had been made because had counsel done so, the outcome would have been different.

5. THE LIFETIME NO CONTACT PROVISION IMPROPERLY EXCEEDED THE STATUTORY MAXIMUM OF 10-YEARS ON FAIRCLOTH’S SECOND DEGREE ASSAULT CONVICTION AND 5 YEARS ON HIS SECOND DEGREE UNLAWFUL POSSESSION OF A FIREARM CONVICTION

As a condition of Faircloth’s sentence, the court imposed a lifetime no contact order with Lynn Soeby’s family and all of the witnesses in the case. While a lifetime condition of sentence may be appropriate for class A felonies with a statutory maximum of life, no contact orders cannot exceed the statutory maximum for the underlying offense. *State v. Armendariz*, 160 Wn.2d 106, 119-20, 156 P.3d 201 (2007). Faircloth was convicted of three class A felonies, one class B felony, second degree assault, one class C felony, second degree unlawful possession of a firearm, and unlawful display of a firearm. The no contact condition failed to specify which charge or charges it applied to. Without this

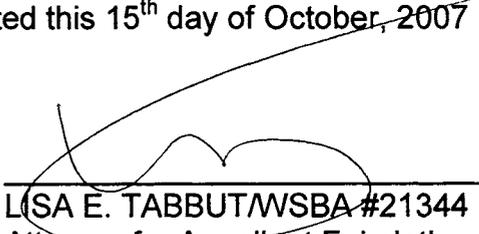
distinction, the order seemingly applies to all of the charges even though it is error to enter it on the second degree assault and the second degree unlawful possession of a firearm.

Faircloth must be remanded for clarification of his judgment and sentence.

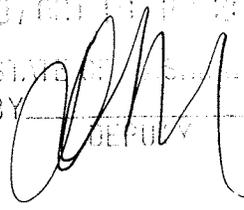
E. CONCLUSION

Based on the above, Faircloth respectfully request this court to reverse and dismiss his convictions in Counts I, II, III and VI as well as clarify the length of the no contact provision included in the judgment and sentence on the remaining counts.

Respectfully submitted this 15th day of October, 2007



LISA E. TABBUT/WSBA #21344
Attorney for Appellant Faircloth

CLERK OF SUPERIOR COURT
COUNTY OF SNOHOMISH
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STATE OF WASHINGTON
BY  DEPUTY

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

STATE OF WASHINGTON,) Court of Appeals No. 35719-4-II
Respondent,)
vs.) AFFIDAVIT OF MAILING
JAMES C. FAIRCLOTH,)
Appellant.)

LISA E. TABBUT, being sworn on oath, states that on the 15th day of October 2007, affiant deposited in the mails of the United States of America, a properly stamped envelope directed to:

Carol L. La Verne
Thurston County Deputy Prosecuting Attorney
2000 Lakeridge Dr. SW
Olympia, WA 98502-6001

James C. Faircloth, Jr. / DOC# 301770
Monroe Correctional Complex
P.O. Box 777
Monroe, WA 98272-0777

AFFIDAVIT OF MAILING - 1

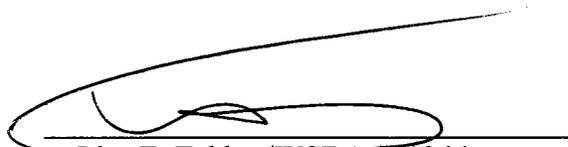
LISA E. TABBUT
ATTORNEY AT LAW
P.O. Box 1396 • Longview, WA 98632
Phone: (360) 425-8155 • Fax: (360) 425-9011

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and that said envelope contained the following:

- (1) APPELLANT'S BRIEF
- (2) AFFIDAVIT OF MAILING

Dated this 15th day of October 2007



Lisa E. Tabbut/WSBA #21344
Attorney for Appellant

SUBSCRIBED AND SWORN to before me this 15th of October 2007.



Stanley W. Munger
Notary Public in and for the
State of Washington
Residing at Longview, WA 98632
My commission expires 05/24/08



AFFIDAVIT OF MAILING - 2

LISA E. TABBUT

ATTORNEY AT LAW

P.O. Box 1396 • Longview, WA 98632
Phone: (360) 425-8155 • Fax: (360) 425-9011