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COURT OF APPEALS  
DIVISION II

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No. 37927-9-II

STATE OF WASHINGTON

BY 

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

TROY A. STRUNKS,

Appellant.

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

The Honorable Richard Strophy, Judge  
Cause No. 07-1-01684-1

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BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Deputy McIver and Detective Costello testified as to their opinion that Strunks was guilty.
2. Whether defense counsel was ineffective for failing to object at all or to object on the grounds of improper opinion testimony.
3. Whether, under the facts of this case, the convictions for attempted rape in the first degree and attempted kidnapping in the first degree constituted double jeopardy.
4. Whether the State produced sufficient evidence to support the conviction for attempted rape in the first degree and attempted kidnapping in the first degree.
5. Whether imposing the deadly weapon enhancement on the charge of attempted rape in the first degree, which includes the use of a deadly weapon as an element, constitutes double jeopardy.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the substantive and procedural facts.

C. ARGUMENT.

1. Deputy McIver and Detective Costello did not improperly express an opinion that Strunks was guilty.

The general rule is that a witness may not offer his or her opinion as to the defendant's guilt, whether directly or by inference. Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993). Such an opinion may be reversible error because it violates the defendant's constitutional right to a jury trial, which includes an

independent determination of the facts by the jury. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). Whether the testimony constitutes an impermissible opinion depends on the circumstances of the case, which include “the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and other evidence before the trier of fact.” Heatley, supra, at 579. The courts do not take an expansive view of claims that testimony constitutes an opinion as to guilt. Id.

a. Deputy Mclver did not express an opinion as to the defendant’s guilt.

The challenged testimony came while Deputy Mclver was explaining that he had stopped Strunks driving a vehicle in Yelm in the early morning hours of September 18, 2007. [RP 87]<sup>1</sup> The deputy discovered Strunks did not have a valid driver’s license and placed him under arrest. [RP 91] Strunks was placed in the back seat of the patrol car, while the deputy completed paperwork in the front seat. [RP 92] The two engaged in conversation. [RP 96-97] Strunks asked the deputy if he had heard about a shooting incident in Olympia a couple of nights earlier. [RP 97] The deputy testified that he had, and also that he had responded to the call of

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<sup>1</sup> Unless otherwise noted, all references are to the trial report of proceedings.

attempted rape that occurred nearby and shortly thereafter. [RP 98] Strunks told the deputy that he had been in the area at the time. [RP 98]. There was further conversation about how Strunks had been having bad luck with women and he said, "I don't really like girls right now." [RP 100] Suddenly the deputy made the connection between Strunks and the suspect in the attempted rape call, and then followed the testimony to which Strunks assigns error.

I don't know. I just felt in my mind—and had an overwhelming feeling, all of a sudden, that vehicle matched the description of the night of the 15<sup>th</sup>. He matched the description, his comments, the proximity he was that he put himself at the alleged crime at that time. I just had a feeling in my mind, and the term that I use is that I just knew it. I knew that Mr. Strunks could be or was possibly the suspect in that crime down in Olympia.

[RP 101]

This testimony does not even come close to expressing an opinion that Strunks was guilty of attempted first degree rape and attempted first degree kidnapping. All it tells the jury is that Deputy McIver realized that Strunks and his vehicle matched the description of the suspect and suspect vehicle from the incident in Olympia on September 15, and Strunks's statement that he had been in the area at the time reinforced that realization. The officer used the words "alleged crime" and "possibly the suspect." That is a

far cry from expressing his opinion that Strunks was guilty. Had Deputy McIver encountered Strunks on the night and near the scene of the crime, and detained him at that time, it would hardly have constituted an opinion as to guilt if he testified that he stopped Strunks because he matched the description given to the responding officers. The effect here is no different, and there was no opinion expressed.

b. Strunks did not object to McIver's testimony.

Appellate courts will generally not consider issues raised for the first time on appeal. Kirkman, *supra*, at 926. A claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. Id., RAP 2.5(a)(3). Simply reciting the standard does not a manifest error make. "The assertion that the province of the jury has been invaded may often be simple rhetoric." Id., at 928. A manifest error, under RAP 2.5(a)(3), requires a showing of actual prejudice, which in turn requires "a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case." Id., at 935. A manifest error requires "an explicit or almost explicit witness statement" that the defendant is guilty. Id., at 936.

Here there was no opinion expressed, except that McIver realized Strunks matched the description of the suspect in the attempted rape. He immediately contacted Olympia police and had no further conversation with Strunks. [RP 101] Even if this could be construed as an opinion, Strunks has not demonstrated a manifest error. It is a showing of actual error that makes it “manifest.” Kirkman, supra, at 927. It is not reasonable to conclude that the remarks to which Strunks assigns error changed the outcome of the trial. Had they never been uttered, the jury would still have had the same quantum of evidence and the outcome would have been the same.

c. While Detective Costello did testify that he believed Strunks was guilty, he made only one brief remark and the court instructed the jury to consider it only to explain the detective’s actions.

Detective Costello testified that after he interviewed Strunks and let him leave the Yelm Police Department, he followed him to determine where he went, because “In my mind I believe he was the one that committed this crime--.” [RP 179] Strunks objected on the grounds of relevance, and the court ruled:

I’ll allow the jury to consider it, only not for the truth or falsity of the detective’s opinion, but simply to explain what the detective did, for that limited purpose only.

[RP 180]

“A party may assign evidentiary error on appeal only on a specific ground made at trial.” Kirkman, *supra*, at 926, *citing to State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). The purpose of the rule is that an objection gives the court the opportunity to prevent or cure error; “[f]or example, a trial court may strike testimony or provide a curative instruction to the jury.”. Id. A trial court has broad discretion to determine the admissibility of testimony touching on the ultimate issue of guilt. Heatley, *supra*, at 579. Strunks objected on the grounds of relevance, and the court gave a limiting instruction.

Strunks is now assigning error to the testimony on the grounds that it violates his right to have the jury independently determine the facts. The trial court was not given the option of preventing or curing that error, and this court should decline to review this assignment of error.

In any event, Strunks has again failed to prove a manifest error. If the jury had never heard the statements of which he complains, there is no reason to believe the verdict would have been different. He argues that the evidence of attempted rape and attempted kidnapping was less than overwhelming, and thus the

officers' opinions may have tipped the balance. But he must produce more than speculation to carry his burden of proving a manifest error, and he has not done so. He has made no showing of "practical and identifiable consequences."

The likelihood that Costello's comment influenced the verdict is even more remote considering that Strunks admitted to assaulting the victim. Had Strunks maintained his original story that he wasn't even in the area, the testimony might have been more problematic. But where Strunks put himself at the scene and admitted to assault, the jury had only to decide whether his version or the victim's version was more credible. Further, while the limiting instruction was in response to a relevance objection, it does also tell the jury that it was not to consider Costello's statement for its truth, which addressed the issue of improperly influencing the jury. Therefore, there was no error.

2. Defense counsel was not ineffective for failing to object to McIver's testimony, or for objecting to Costello's testimony on the basis of relevance.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient

performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have been different. In the Matter of the Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). 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. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn.2d 1012 (1974).

A defendant must overcome the presumption of effective representation and demonstrate (1) that his lawyers' performance in not objecting to the challenged testimony was so deficient that he was deprived of "counsel" for Sixth Amendment purposes and (2) that there is a reasonable probability that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

A reading of the record as a whole shows that the defense attorney's performance was certainly not such as to essentially deprive Strunks of counsel. The Supreme Court has noted that "[t]he decision not to object is often tactical." Kirkman, *supra*, at 935. Tactical decisions, even if later determined to be incorrect, are not a basis for a claim of ineffective assistance of counsel. Here, it would have been useless for trial counsel to object to McIver's testimony, as it was not opinion evidence and was not otherwise inadmissible. Counsel did object to Costello's testimony, and the court addressed that objection. There was nothing ineffective about defense counsel's representation.

3. The State concedes that the convictions for attempted first degree rape and attempted first degree kidnapping merge.

Article I, section 9 of the Washington constitution and the Fifth Amendment to the federal constitution provide co-extensive protection against double jeopardy, which includes multiple punishments for the same offense. State v. Faagata, 147 Wn. App. 236, 243, 193 P.3d 1132 (2008). “There are no non-double jeopardy reasons for reviewing multiple punishments—rather, the foundation for such review is the constitutional prohibition against double jeopardy.” State v. Calle, 125 Wn.2d 769, 775, 888 P.2d 155 (1995) The “dispositive question” is whether the legislature intended to punish the two crimes separately. If the legislature authorized two punishments for the two crimes, double jeopardy is not violated. State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005) Review is de novo. Id., at 770.

The first consideration, then, is whether there is either express or implicit legislative intent apparent from the statutes. Id., at 771-72. This occurs, for example, in RCW 9A.52.050, which makes other crimes committed during a burglary separately punishable. Here the convictions are for attempted first degree rape

and attempted first degree kidnapping; neither statute specifically addresses the intent of the legislature.

If legislative intent is unclear, a reviewing court then applies the same elements test similar to that set forth in Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Freeman, *supra*, at 772; that is, whether the offenses are the same in law and in fact. State v. Cole, 117 Wn. App. 870, 875, 73 P.3d 411 (2003) “Offenses are not constitutionally the same if there is any element in one offense not included in the other and proof of one offense would not necessarily prove the other.” Faagata, *supra*, citing to State v. Womac, 160 Wn.2d 643, 652, 160 P.3d 40 (2007). If they are not the same in law, the strong presumption is that the legislature intended for the two to be punished separately, even if they are committed by the same act. Id.

In Strunk’s case, the two offenses are not the same in law. First degree rape, RCW 9A.44.040, requires an act of sexual intercourse, while first degree kidnapping, RCW 9A.40.020, does not; kidnapping requires abduction and rape does not. The fact that the two offenses are in separate chapters of the criminal code is a further indication that the legislature intended separate

punishments. State v. Cole, 117 Wn. App. 870, 875, 73 P.3d 411 (2003).

Even where the crimes are not the same in law, however, they may run afoul of the merger doctrine.

The merger doctrine is a rule of statutory construction which our Supreme Court has ruled only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime the State must prove not only that the defendant committed that crime but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes.

State v. Frohs, 83 Wn. App. 803, 806, 924 P.2d 384 (1996) (citing to State v. Vladovic, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983)).

Here, the kidnapping charge was elevated to first degree because it was done with the intent to commit first degree rape. [Instruction No. 14, CP 84] The rape charge was elevated to first degree because of the use of a deadly weapon. [Instruction No. 9, CP 77] The State concedes that the two should merge, particularly since at sentencing, the State agreed, and the court found, that the two crimes constituted the same criminal conduct for sentencing purposes. [04/24/08 RP 6].

4. The State presented sufficient evidence to support convictions for attempted first degree rape and attempted first degree kidnapping.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, *supra*, at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical

probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

Strunks argues that there was no proof produced at trial that he intended to rape the victim. He is correct that there were no statements that he intended to rape her, nor did he fondle her. On the other hand, he didn't get much chance to do so, since she was able to break free almost immediately after being pushed into his vehicle. [RP 132-33].

The evidence that the jury did have was that the victim was female, alone, and intoxicated; it was late at night. [RP 121-23] Strunks approached her on the street and lured her into a dark parking lot with a questionable story about looking at a remodeled

building. [RP 129] She agreed to accompany him “as long as you don’t rape me.” [RP 130] He put a knife to her throat, [RP 131] and told her he would kill her if she fought. [RP 132] Strunks told Deputy McIver that he had not had good luck with women that night and that “I don’t really like girls right now.” [RP 100] He told Detective Costello that he had been hitting on different women at the bars without success. [RP. 169] He said he was dressed “normal” “because normal gets you laid.” [RP 170] He later contacted the victim via her MySpace page [RP 135-37, 231-33], an odd thing to do in any event, but particularly if his intentions were other than sexual.

The jury is the sole judge of the credibility of the witnesses and the sole fact finder. It obviously did not believe Strunks’s story. The evidence showed an attack on the victim that would be difficult to explain for any reason other than sexual motivation. There was no evidence, for example, that he intended to hold her for ransom or that he wanted to kill her just for the sake of killing her. There was evidence that he had spent a long evening looking unsuccessfully for sex, that he was also intoxicated, and he was presented with what would have appeared to him to be a reasonably helpless woman walking alone. Taking the evidence

and the reasonable inferences flowing from it, in the light most favorable to the State, it was sufficient to support the convictions for attempted first degree rape and attempted first degree kidnapping.

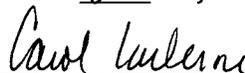
5. Imposing the deadly weapon enhancement on the charge of attempted first degree rape, which includes the use of a deadly weapon as an element, does not constitute double jeopardy.

Strunks acknowledges that current law does not support his argument that the deadly weapon enhancement attached to the attempted first degree rape charge constitutes double jeopardy. Until such time as that law changes, the State relies on the cases cited by Strunks in his brief to support its argument that there is no double jeopardy.

#### D. CONCLUSION

The State concedes that the two convictions merge and that only the attempted first degree rape charge should stand. There was no improper opinion testimony, there was sufficient evidence to support the attempted rape charge, and defense counsel was not ineffective. The State respectfully asks this court to affirm the conviction for attempted first degree rape.

Respectfully submitted this 8<sup>th</sup> day of June, 2009.



\_\_\_\_\_  
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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

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DIVISION II

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 9 day of June, 2009, at Olympia, Washington.

  
CAROLINE M. JONES