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NO. 36859-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

JASON DAVIS,
Appellant.

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

The Honorable John O. Cooney, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Mr. Davis was denied his constitutional right to effective assistance of counsel when his trial counsel failed to investigate the possibility of Mr. Davis receiving a life sentence if he was convicted of burglary in the first degree, thereby depriving Mr. Davis of the opportunity to engage in meaningful plea negotiations.
2. Mr. Davis's conviction for residential burglary violates the constitutional prohibition on double jeopardy because it is the same in law and fact as his conviction for burglary in the first degree based upon unlawful entry into Ms. Bell's home for purposes of assault.

Issues Presented on Appeal

1. Was Mr. Davis denied his constitutional right to effective assistance of counsel when his trial counsel failed to investigate the possibility of Mr. Davis receiving a life sentence if he was convicted of burglary in the first degree after trial, thereby

depriving him of the opportunity to engage in meaningful plea negotiations?

2. Does Mr. Davis's conviction for residential burglary violate the constitutional prohibition on double jeopardy when it is the same in law and fact as his conviction for burglary in the first degree based upon unlawful entry into Ms. Bell's home for purposes of assault?

B. STATEMENT OF THE CASE

Jason Davis is married to Heather Bell and the couple have a daughter together. RP 160. Although Mr. Davis and Ms. Bell are still legally married, they have initiated divorce proceedings and had been living separately before this incident. RP 161. Following their separation, Ms. Bell secured a no-contact order prohibiting Mr. Davis from coming to their house or contacting her. RP 176-77, 203. Mr. Davis and Ms. Bell continued to share custody of their daughter. RP 161, 196-97.

Ms. Bell continued to contact Mr. Davis regarding their daughter on a regular basis despite the existence of the no-contact order. RP 178, 206-07. On February 8, 2017, Mr. Davis was

scheduled to drop the couple's daughter off at Ms. Bell's house. RP 196-98. The couple exchanged text messages about the drop-off and then Ms. Bell waited for Mr. Davis to arrive with their daughter. RP 165-67, 169.

Ms. Bell was seated at her kitchen table with two friends when Mr. Davis arrived. RP 169. According to Ms. Bell, her daughter entered the house first and Mr. Davis followed closely behind. RP 169-171. Ms. Bell testified that Mr. Davis was angry when he entered the house and that he yelled at her and her friends. RP 170-71. Ms. Bell's friends ran upstairs and hid in a bedroom. RP 103.

Mr. Davis testified that he was walking to the door with his daughter to drop her off and could see inside the house once the door was opened. RP 199-200. When he observed drug paraphernalia inside the house, he became angry because he did not want his daughter exposed to drugs. RP 200. Mr. Davis and Ms. Bell yelled at one another as Mr. Davis entered the house. RP 171, 201.

Testimony regarding what happened once Mr. Davis entered the house varied between witnesses. According to Ms. Bell, she

told Mr. Davis to leave and pushed him towards the door before turning around to go back in the house. RP 171. Ms. Bell testified that after she turned around, Mr. Davis struck her in the back of her head and knocked her to the ground before kicking and punching her in the head while she was down. RP 171. Ms. Bell's friend testified at trial that she did not see what happened downstairs after Mr. Davis entered but that she could hear "thumping" sounds. RP 112-13.

Mr. Davis testified that Ms. Bell spat on him and attempted to slap him as she told him to leave the house. RP 201. Mr. Davis admitted that he pushed Ms. Bell out of the way because she blocked his way as he was leaving. RP 201. Mr. Davis denied striking her in the head. RP 201-02.

Police photographed visible injuries to Ms. Bell's person including redness and bruising on her neck, chest, and thigh. RP 82-83; Ex. 15-18. Ms. Bell reported the incident to law enforcement and gave the police Mr. Davis's new girlfriend's address. RP 141-42. Police contacted Mr. Davis at his girlfriend's apartment and arrested him. RP 145.

Procedural Facts

The state charged Mr. Davis with two counts of felony violation of a no-contact order: one for the text message conversation with Ms. Bell and one for allegedly assaulting her during the incident at Ms. Bell's home. CP 46-47. The state also charged one count of residential burglary and one count of burglary in the first degree. CP 46-47. All of the charges included an allegation of domestic violence. CP 46-47. Both burglary charges provided Mr. Davis unlawfully entered the "dwelling" or "building" "of HEATHER D. BELL, located as 2715 E. Nebraska Ave. Spokane, WA..." CP 46-47.

A jury found Mr. Davis guilty as charged and returned affirmative special verdicts as to the domestic violence allegation on all counts. CP 179-185. After being convicted of burglary in the first degree, the state sought a life sentence based on Mr. Davis being a persistent offender under RCW 9.94A.570. RP 310-17.

The state produced certified judgments showing that Mr. Davis was previously convicted of burglary in the first degree in 2001 and assault in the second degree in 1997, both of which qualify as "most serious offenses" under RCW 9.94A.030(33). RP

311-13.

The state noted at sentencing that it provided notice of a possible life sentence in its motion to amend the information to add the charge of burglary in the first degree:

Adding the First Burglary to case SC 17-1-00553-4 does elevate that case to a three strikes case given the defendant's record. Three strikes notice has already been tendered on 18-1-00777-2 and will be subsequently filed on 17-1-00553-4.

CP 29; RP 315. The state also indicated that they had offered a plea agreement that would have avoided Mr. Davis's third strike:

I did submit in writing and to counsel an offer on plea negotiations that did make defense aware that Mr. Davis has two prior convictions for most serious offenses, if you were convicted of one or both of this first-degree burglary charges, referencing my offer, that this would be a third strike resulting in a sentence of life without possibility of parole. And again, on the final page of my offer letter there I indicated my offer to dismiss or reduce a burglary first degree charges that could result in life in prison would expire at a date indicated in that letter there.

RP 316. Despite these prior statements, Mr. Davis's trial counsel appeared unaware that the state would be seeking a life sentence if Mr. Davis was convicted of burglary first degree:

[DEFENSE COUNSEL]: It changes the way – there's another case that's pending here, Judge, in which the court – or in which the State did file a notice of intent. We knew they were going to seek it on the next case, but because of this case – because they did not file the same notice, Judge,

we would have negotiated this case differently if we'd have known that was going to be an option today.

RP 319-20. The trial court did not merge any of Mr. Davis's convictions at sentencing and sentenced him to life in prison without the possibility of parole. RP 334. Mr. Davis filed a timely notice of appeal. CP 295.

C. ARGUMENT

1. MR. DAVIS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL COUNSEL FAILED TO INVESTIGATE THE IMPACT OF A CONVICTION FOR BURGLARY IN THE FIRST DEGREE; AND FAILED TO INFORM MR. DAVIS OF A POSSIBLE LIFE SENTENCE WIHTOUT THE POSSIBILITY OF PAROLE

Counsel's failure to investigate the possibility of a sentence of life without the possibility of parole and his failure to discuss this with Mr. Davis violated Mr. Davis's constitutional right to counsel because this performance deprived Mr. Davis of essential information necessary for him to make a fully informed decision about the state's plea offer.

The Sixth Amendment to the United States Constitution and art. I, § 22 of the Washington Constitution guarantee the right to effective assistance of counsel. U.S. Const. Amend. VI; Wash.

Const. art. I, § 22. This Court reviews ineffective assistance of counsel claims de novo. *State v. Jones*, 183 Wn.2d 327, 338-39, 352 P.3d 776 (2015).

The two-prong *Strickland v. Washington* test applies for evaluating whether a defendant had constitutionally sufficient representation. 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017).

Under *Strickland*, the defendant must show both (1) deficient performance and (2) resulting prejudice to prevail on an ineffective assistance claim. *Estes*, 188 Wn.2d at 458 (citing *Strickland*, 466 U.S. at 687).

Performance is deficient if it falls “below an objective standard of reasonableness based on consideration of all the circumstances.” *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice exists if there is a reasonable probability that “but for counsel’s deficient performance, the outcome of the proceedings would have been different.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); *Strickland*, 466 U.S. at 694.

To prevail, the defendant must affirmatively prove prejudice

and show a reasonable probability the outcome would have differed. *State v. Crawford*, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006); *Strickland*, 466 U.S. at 693). A “reasonable probability” is lower than a preponderance standard. *Estes*, 188 Wn.2d 450, 458 (citing *Strickland*, 466 U.S. at 69) It is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

There is a strong presumption that counsel’s representation was reasonable. *Kyllo*, 166 Wn.2d at 862. Performance is not deficient if counsel’s conduct can be characterized as legitimate trial strategy or tactics. *Id.* at 863. However, the approach to ineffective assistance cannot be “mechanical”, but rather should focus on the fundamental fairness of the proceeding. *Estes*, 188 Wn.2d at 458 (citing *Strickland*, 466 U.S. at 696).

A defendant’s right to effective assistance of counsel is constitutionally guaranteed at all “critical stages” of a criminal proceeding. *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005) (citing *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987)). This includes meaningful investigation before and during plea negotiations. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010) (juvenile denied effective assistance of counsel based

on attorney's failure to investigate).

Counsel has a duty to assist a defendant in evaluating a plea offer. RPC 1.1 provides: "A lawyer shall provide competent representation to a client. Competent representation requires ... thoroughness and preparation reasonably necessary for the representation." RPC 1.2(a). "In a criminal case, the lawyer shall abide by the client's decision, *after consultation with the lawyer*, as to a plea." (emphasis in original); *A.N.J.*, 168 Wn.2d at 111 (quoting *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (citing *State v. Cameron*, 30 Wn. App. 229, 232, 633 P.2d 901(1981))).

Effective assistance of counsel includes assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial." *A.N.J.*, 168 Wn.2d at 111 (quoting *State v. S.M.*, 100 Wn. App. 401, 413, 996 P.2d 1111 (2000)).

Trial counsel has a duty to research, know the record, and apply the relevant law when representing a criminal defendant. *Estes*, 188 Wn.2d at 460 (citing *In re Pers. Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91, 102, 351 P.3d 138 (2015)); *A.N.J.*, 168 Wn.2d at 109. Failure to do so constitutes deficient performance

when the matter is “at the heart of the case.” *Estes*, 188 Wn.2d at 460 (citing *Kyllo*, 166 Wn.2d at 868).

The circumstances analyzed in *Estes* and *Crawford*, , illustrate ineffective assistance of counsel in the context of persistent offender cases where the defendants are not advised of the potential for a life sentence without the possibility of parole during plea negotiations.

In *Estes*, the defendant had two prior convictions for “most serious offenses.” *Estes*, 188 Wn.2d at 455. The State charged the defendant with felony harassment and assault in the third degree while alleging that he committed both offenses with a deadly weapon. *Estes*, 188 Wn.2d at 455. The deadly weapon enhancements elevated both charges to “most serious offenses” and would result in a life sentence if the defendant was found guilty. *Estes*, 188 Wn.2d at 455. *Estes*’s trial counsel was unaware that the deadly weapon allegations elevated the charges to “most serious offenses” until sentencing. *Estes*, 188 Wn.2d at 460.

The Washington Supreme Court held that trial counsel’s failure to research statutes related to “most serious offenses” before trial was deficient performance by trial counsel, because

failing to discuss this potential with Estes, denied Estes the opportunity to engage in meaningful plea negotiations where the record indicated there was a possibility he “would have negotiated a different outcome” had he been fully informed. *Estes*, 188 Wn.2d at 463, 466.

In *Estes*, the court reversed the defendant’s conviction because the record showed that the state was willing to work on a plea agreement that avoided a life sentence for the defendant before trial began. *Estes*, 188 Wn.2d at 465. Thus, the fact that trial counsel was unaware that the defendant was facing a third strike prejudiced the defendant because he was unable to properly evaluate the plea offer that would have avoided a life sentence. *Estes*, 188 Wn.2d at 465.

Similarly, in *Crawford*, trial counsel failed to research the defendant’s prior, out-of-state conviction to determine whether it qualified as a “most serious offense” in Washington, which subjected the defendant to a possible life sentence if convicted. *Crawford*, 159 Wn.2d at 91. After the defendant was convicted and sentenced to life in prison, he appealed, and the Washington Supreme Court held that trial counsel’s performance was deficient

because she was unaware of crucial information that should have been conveyed to the defendant in deciding whether to proceed to trial or accept a plea agreement. *Crawford*, 159 Wn.2d at 99.

Here, as in *Estes*, the prosecutor was submitted a plea offer that expressed his willingness to negotiate a plea agreement to reduce Mr. Davis's sentence to less than life without the possibility of parole. CP 29; RP 315-16, 319-20. Trial counsel's role under the constitution required him to know the record, research and investigate the consequences of a life sentence, and discuss this with Mr. Davis during plea negotiations. *Estes*, 188 Wn.2d at 463, 466.

Mr. Davis attorney failed to provide basic effective of assistance of counsel which prejudiced Mr. Davis. During sentencing, Mr. Davis's trial counsel stated that he would have handled the case differently "if we'd have known [a life sentence] was going to be an option today." RP 320. The fact that trial counsel was unaware that burglary in the first degree qualifies as a 'most serious offense' due to its status as a class A felony demonstrates deficient performance based on a lack of research and preparation during the plea negotiation phase.

RCW 9A.52.020 and RCW 9.94A.030(33) provide that Mr. Davis faced a mandatory life sentence if convicted of burglary in the first degree. If counsel has conducted basic research of this relevant applicable law, he could have advised Mr. Davis of the consequences of proceeding to trial versus engaging in a plea negotiation.

As in *Estes* and *Crawford*, counsel's performance was deficient by counsel's failure to conduct basic research to advise Mr. Davis of the risk in going to trial on a "most serious offense."

While the court did not find prejudice in *Crawford*, the *Estes* court pointed out that the distinction between the two cases is that in *Crawford*, the record did not contain any evidence that the state would have been willing to offer a plea agreement that would have avoided a life sentence for the defendant. *Estes*, 188 Wn.2d at 465 (citing *Crawford*, 159 Wn.2d at 100-02).

Under *Estes*, trial counsel's deficient performance prejudiced Mr. Davis because "effective assistance includes 'assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial.'" *Estes*, 188 Wn.2d at 464 (quoting *A.N.J.*, 168 Wn.2d at 111).

Mr. Davis's case is analogous to *Estes*. Mr. Davis's trial counsel failed to adequately investigate the risks facing Mr. Davis if he was convicted of burglary in the first degree. Before Mr. Davis decided to go to trial on that charge, the state offered to resolve the case in a manner that would have avoided a life sentence.

In Mr. Davis's case, the record shows that the state made a plea offer that, if accepted, would have avoided a life sentence. The state discussed the offer at sentencing, but counsel indicated he never discussed this with Mr. Davis, and further indicated he would have negotiated the case differently had he known a life sentence was on the table. RP 316, 320. This establishes prejudice - a reasonable probability the outcome would have differed because trial counsel's performance denied Mr. Davis the opportunity to accurately weight the risks and benefits of proceeding to trial.

Given the gravity of a life sentence without the possibility of parole, there is a reasonable probability Mr. Davis would have engaged in plea negotiations to secure a sentence less than life without the possibility of parole. the outcome of the proceedings against him would have been different had he been fully advised of the possibility of a life sentence. This court should reverse his

convictions and remand the case for a new trial.

2. MR. DAVIS'S CONVICTION FOR RESIDENTIAL BURGLARY VIOLATES THE PROHIBITION ON DOUBLE JEOPARDY BECAUSE IT IS BASED ON THE SAME ACTS UNDERLYING HIS CONVICTION FOR BURGLARY IN THE FIRST DEGREE

Art. I, §, 9 of the Washington Constitution and the Fifth Amendment to the federal constitution protect persons from a second prosecution for the same offense and from multiple punishments for the same offense imposed in the same proceeding. *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010). The principle of double jeopardy prohibits courts from imposing multiple punishments for the same offense. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 980, 329 P.3d 78 (2014) (citing *Dep't. of Revenue v. Kurth Ranch*, 511 U.S. 767, 769 n. 1, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994)). Double jeopardy claims are reviewed de novo. *State v. Hernandez*, 172 Wn. App. 537, 545, 290 P.3d 1052 (2012) (citing *State v. Hughes*, 166 Wn.2d 675, 681, 212 P.3d 558 (2009)).

When statutes do not expressly permit multiple punishments for the same underlying conduct, appellate courts evaluate double

jeopardy claims using the “same evidence” test. *Hughes*, 166 Wn.2d at 681-82. Under this test, crimes may not be punished separately if they are the same in law and fact. *State v. Freeman*, 153 Wn.2d 765, 777, 108 P.3d 753 (2005).

The appellate court must consider the elements of the crimes as charged and proved rather than “an abstract articulation of the elements.” *Freeman*, 153 Wn.2d at 777. Multiple punishments for the same act violate the constitutional prohibition on double jeopardy if “the evidence required to support a conviction upon one of [the charged crimes] would have been sufficient to warrant a conviction upon the other.” *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 820, 100 P.3d 291 (2004).

To convict a defendant of residential burglary, the state must prove that the defendant entered or remained unlawfully in a **dwelling** with the intent to commit a crime therein. RCW 9A.52.025 (emphasis added). To prove that a defendant committed burglary in the first degree, the state must show that the defendant entered or remained unlawfully in a **building** with the intent to commit a crime therein, and that he or she assaulted another person while inside. RCW 9A.52.020 (emphasis added).

The state charged Mr. Davis in both counts with a single unlawful entry into Ms. Bell's house located at "2715 E. Nebraska Ave. Spokane, WA..." CP 46-47.. To prove burglary in the first degree as charged in this case, as well as residential burglary, required unlawful entry into Ms. Bell's home. The conduct the legislature intended to criminalize in enacting burglary statutes is the actual entry into a building with intent to commit a crime inside. *State v. Brooks*, 113 Wn. App. 397, 399-400, 53 P.3d 1048 (2002). Brooks was charged with first degree burglary for one act of entry into a dwelling, with multiple assaults therein. The court held this constituted only one single act of burglary.

In *Hernandez*, this court applied this concept of a single entry into a single home in a situation factually analogous to Mr. Davis's case. The defendant in *Hernandez* was convicted of burglary in the first degree and residential burglary based on one unlawful entry into Menza's home but merged those convictions for sentencing. *Hernandez*, 172 Wn. App. at 545. The defendant appealed his convictions and claimed that these convictions violated the prohibition on double jeopardy. *Hernandez*, 172 Wn. App. at 545.

The Court of Appeals affirmed the convictions, but only because the trial court merged them at sentencing. *Hernandez*, 172 Wn. App. at 545. The court held that “convictions for both first degree burglary and residential burglary do not violate double jeopardy protections **when they concern burglaries of different homes.**” *Hernandez*, 172 Wn. App. at 539 (emphasis added).

Here, as in *Hernandez and Brooks*, even viewing the evidence in a light most favorable to the state, the record shows that Mr. Davis only entered Ms. Bell’s home once, where he committed one assault. RP 169-171, 210-11. Mr. Davis’s unlawful entry was the same for both the residential burglary and burglary in the first degree.

Here, contrary to the legislative interpretation in *Brooks* and the holding in *Hernandez*, the trial court did not merge the offenses at sentencing and imposed concurrent sentences for both convictions based on a single entry into Ms. Bell’s home. *Hernandez*, 172 Wn. App. at 545. CP 246; RP 334. The fact that the trial court imposed a sentence for both residential burglary and burglary in the first degree means that Mr. Davis is being punished twice for the same offense in violation of the constitutional

prohibition on double jeopardy.

The remedy for double jeopardy violations is to vacate the residential burglary that could not be committed as charged in this case without also committing first degree burglary. *State v. Knight*, 162 Wn.2d 806, 810, 174 P.3d 1167 (2008) (citing *State v. Womac*, 160 Wn.2d 643, 658-60, 160 P.3d 40 (2007)). Mr. Davis requests that this court vacate his conviction for residential burglary.

D. CONCLUSION

Mr. Davis respectfully requests this Court reverse his convictions and remand for a new trial based on received ineffective assistance of counsel. Mr. Davis also requests this Court vacate his conviction for residential burglary based on a violation on the prohibition on double jeopardy.

DATED this 11th day of December 2019.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Spokane County Prosecutor's Office SCPAAppeals@spokanecounty.org and Jason Davis/DOC#415842, Airway Heights Corrections Center, PO Box 2049, Airway Heights, WA 99001 a true copy of the document to which this certificate is affixed on December 11, 2019.. Service was made by electronically to the prosecutor and Jason Davis by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink, appearing to read "Lise Ellner", is written on a light-colored rectangular background.

Signature

LAW OFFICES OF LISE ELLNER

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