

FILED
Court of Appeals
Division III
State of Washington
3/5/2020 11:23 AM
36859-9-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JASON DAVIS, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Larry Steinmetz
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

I. ISSUES PRESENTED 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT 4

 A. THE RECORD CONTRADICTS DAVIS’ CLAIM THAT HIS COUNSEL WAS UNAWARE THAT THE FIRST-DEGREE BURGLARY WAS A STRIKE OFFENSE AND THAT THERE WAS A POTENTIAL DAVIS COULD BE SENTENCED AS A PERSISTENT OFFENDER. MOREOVER, THERE IS NOTHING DEMONSTRATING THAT DAVIS WISHED TO RESOLVE THE CASE BY A MUTUALLY AGREED-UPON PLEA BARGAIN. 4

 Standard of review. 4

 Deficient performance prong. 12

 Prejudice prong. 14

 B. THE CONVICTIONS FOR RESIDENTIAL BURGLARY AND FIRST-DEGREE BURGLARY DO NOT VIOLATE DOUBLE JEOPARDY IF USING THE “SAME EVIDENCE” TEST BUT DO VIOLATE DOUBLE JEOPARDY IF EMPLOYING THE “UNIT OF PROSECUTION” DOUBLE JEOPARDY ANALYSIS..... 16

 Standard of review. 16

 Double jeopardy analysis – “same evidence” test. 16

IV. CONCLUSION 22

TABLE OF AUTHORITIES

Federal Cases

<i>Blockburger v. United States</i> , 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).....	17
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	5, 15

Washington Cases

<i>Matter of Mockovak</i> , 194 Wn. App. 310, 377 P.3d 231 (2016).....	5
<i>State v. Adel</i> , 136 Wn.2d 629, 965 P.2d 1072 (1998).....	16, 21
<i>State v. Allen</i> , 150 Wn. App. 300, 207 P.3d 483 (2009).....	16
<i>State v. Arndt</i> , 194 Wn.2d 784, 453 P.3d 696 (2019).....	16, 17, 18, 19
<i>State v. Bergeron</i> , 105 Wn.2d 1, 711 P.2d 1000 (1985).....	20
<i>State v. Brooks</i> , 113 Wn. App. 397, 53 P.3d 1048 (2002).....	21, 22
<i>State v. Calle</i> , 125 Wn.2d 769, 888 P.2d 155 (1995).....	19
<i>State v. Crawford</i> , 159 Wn.2d 86, 147 P.3d 1288 (2006).....	13
<i>State v. Edwards</i> , 171 Wn. App. 379, 294 P.3d 708 (2012).....	6
<i>State v. Estes</i> , 188 Wn.2d 450, 395 P.3d 1045 (2017).....	6, 7
<i>State v. Gocken</i> , 127 Wn.2d 95, 896 P.2d 1267 (1995).....	18
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011).....	14
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	5
<i>State v. Hoyt</i> , 29 Wn. App. 372, 628 P.2d 515 (1981).....	18
<i>State v. Hughes</i> , 166 Wn.2d 675, 212 P.3d 558 (2009).....	22
<i>State v. James</i> , 48 Wn. App. 353, 739 P.2d 1161 (1987).....	6
<i>State v. Kyllo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009).....	7

<i>State v. Lopez</i> , 190 Wn.2d 104, 410 P.3d 1117 (2018).....	4
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995), as amended (Sept. 13, 1995)	5, 6
<i>State v. Michielli</i> , 132 Wn.2d 229, 937 P.2d 587 (1997).....	17
<i>State v. Muhammad</i> , 194 Wn.2d 577, 451 P.3d 1060 (2019)	18, 19
<i>State v. Osborne</i> , 102 Wn.2d 87, 684 P.2d 683 (1984)	14
<i>State v. Oseguera Acevedo</i> , 137 Wn.2d 179, 970 P.2d 299 (1999)	14
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).....	5
<i>State v. Stinton</i> , 121 Wn. App. 569, 89 P.3d 717 (2004).....	18
<i>State v. Turner</i> , 169 Wn.2d 448, 238 P.3d 461 (2010)	17
<i>State v. Villanueva-Gonzalez</i> , 180 Wn.2d 975, 329 P.3d 78 (2014).....	21
<i>State v. Vladovic</i> , 99 Wn.2d 413, 662 P.2d 853 (1983).....	17, 19

Statutes

RCW 9.94A.030	12, 13
RCW 9.94A.561	13
RCW 9.94A.570	12
RCW 9A.04.110	19
RCW 9A.52.020	18, 22
RCW 9A.52.025	18, 22
RCW 9A.52.050	18

Rules

RAP 2.5.....	16
--------------	----

I. ISSUES PRESENTED

1. Utilizing the “same evidence” test, do the defendant’s convictions for first-degree burglary and residential burglary violate double jeopardy?

2. Should the defendant’s conviction for residential burglary be vacated under the “unit of prosecution” test for double jeopardy if that crime was based on the same unlawful entering or remaining in a dwelling as his first-degree burglary conviction?

3. Does the record contradict the defendant’s ineffective assistance of counsel allegation that his trial counsel was unaware of the defendant’s first-degree burglary charge was a potential third strike offense with the consequence of being sentenced as a persistent offender?

4. Has the defendant established his lawyer was ineffective if the record is silent as to what efforts, if any, defense counsel engaged in to resolve the case short of trial and whether the defendant was willing to settle the case by a mutually agreed plea bargain?

II. STATEMENT OF THE CASE

Jason Davis was charged by amended information in the Spokane County Superior Court with two counts of violation of a no contact order, residential burglary, and first-degree burglary for events occurring in 2017. CP 46-47. All counts involved the same victim, Heather Bell. CP 46-47.

Davis and Bell were married at the time of the commission of the offenses, but each lived at different addresses. RP 66, 68, 100, 160-61.¹ The couple had been separated since 2016 and had a child in common. RP 64, 196-97.

On February 6, 2017, Davis texted Bell, with the message “horny.” RP 89, 165. Bell responded, “LOL.” RP 90. Bell had no sexual interest in Davis at that time. RP 166. Thereafter, several additional texts were exchanged between the pair. RP 90-94. Davis generally had contact with Bell regarding parenting and scheduling issues. RP 162-63. There was no court ordered parenting plan in place at the time. RP 161.

On February 8, 2017, during the evening, Davis entered Bell’s residence located at 2715 East Nebraska Avenue, approached Bell and her friend, Jessica Kane, and screamed and cursed at them. RP 102, 116. Davis, who was very angry, yelled, “I’ll kill you all,” called Kane’s friend, who was also present, a “stupid [n--r],” called the females “bitches,” threatened to burn the house down, and he threatened physical harm toward Kane. RP 62, 103-04. Bell kept yelling at Davis to leave the residence. RP 171. Davis threatened to assault Kane and her friend. RP 170-71. Bell reminded

¹ The trial and sentencing report of proceedings transcribed by Korina Kerbs for the dates of March 5, 2019, March 6, 2019, March 7, 2019, and May 2, 2019 will be referred to simply as “RP.” The pretrial hearings transcribed by Rebecca Weeks for the dates of August 10, 2018, September 21, 2018, January 11, 2019, January 18, 2019, and February 15, 2019, will be referred to “Weeks RP.”

Davis about a no-contact order and Davis remarked something akin to “who is going to stop me.” RP 171.

Kane feared for her safety. RP 104, 106. She ran upstairs and called 911. RP 105. While upstairs, Kane heard “bashing and thumping around” from the downstairs area and heard Bell screaming, at which time Davis left. RP 113. When Kane returned to the downstairs, Bell “was curled [up in] a ball, crying, shaking, sobbing, [and] holding her head.” RP 113.

Spokane Police Officer Tim Schwering responded to the 911 call. RP 58-59, 60-62. Bell told the officer that Davis had arrived at her residence with their child and he was very agitated. RP 64. Davis advanced on Bell and ultimately struck her several times in the back of her head which caused her to fall to the ground. RP 64-65, 171. While Bell was on the ground, Davis kicked and hit Bell’s chest, thigh and buttocks. RP 65, 171-73, 176. Bell had injuries consistent with the assault.² RP 65, 82-84, 114. Davis left the residence before Schwering’s arrival. RP 67, 148-49. At the time of the assault, Schwering confirmed that a no-contact order was in place preventing Davis from having contact with Bell. RP 66, 148. Davis had previously signed a no-contact order in court on September 26, 2013,

² Photographs were introduced documenting the injuries. RP 82-88.

prohibiting contact with Bell; the order expired on September 26, 2018. RP 149, 203-04.

On February 9, 2017, Officer Aaron Ames contacted and placed Davis under arrest. RP 142-45. Without any questioning by the officer, Davis remarked that he was not at Bell's apartment and he did not violate a no-contact order.³ RP 146. Davis later remarked that he had been at Bell's residence to drop off their daughter, but claimed he did not assault anyone while at the residence. RP 147.

III. ARGUMENT

A. THE RECORD CONTRADICTS DAVIS' CLAIM THAT HIS COUNSEL WAS UNAWARE THAT THE FIRST-DEGREE BURGLARY WAS A STRIKE OFFENSE AND THAT THERE WAS A POTENTIAL DAVIS COULD BE SENTENCED AS A PERSISTENT OFFENDER. MOREOVER, THERE IS NOTHING DEMONSTRATING THAT DAVIS WISHED TO RESOLVE THE CASE BY A MUTUALLY AGREED-UPON PLEA BARGAIN.

Standard of review.

An appellate court reviews a claim of ineffective assistance of counsel de novo. *State v. Lopez*, 190 Wn.2d 104, 117, 410 P.3d 1117 (2018). An appellate court gives great deference to trial counsel's performance and the court begins its analysis with a strong presumption that counsel was

³ The trial court conducted a CrR 3.5 hearing and determined Davis' statements to the officer would be admissible at the time of trial. RP 122-37; CP 200-04.

effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record in the trial court. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995). To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. *Id.* at 334-35. Failure to establish either prong of the test ends the court's inquiry. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

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). There is a strong presumption of effective assistance and the defendant bears the burden of rebutting that presumption by showing the lack of a legitimate strategic or tactical reason for the challenged conduct. *McFarland*, 127 Wn.2d at 336-37. “*Strickland* ... calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind.” *Matter of Mockovak*, 194 Wn. App. 310, 322, 377 P.3d 231, 236 (2016) (citing *Harrington v. Richter*, 562 U.S. 86, 110, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011)) (alteration in original).

Defense counsel has an ethical duty to discuss plea negotiations with his or her clients. *State v. James*, 48 Wn. App. 353, 362, 739 P.2d 1161 (1987). If a lawyer does not discuss plea negotiations with a defendant, it potentially indicates deficient performance. *Id.* “In the plea bargaining context, counsel must communicate actual offers, discuss tentative plea negotiations, and discuss the strengths and weaknesses of the defendant’s case so that the defendant knows what to expect and can make an informed decision on whether to plead guilty.” *State v. Edwards*, 171 Wn. App. 379, 394, 294 P.3d 708 (2012).

To show prejudice, a defendant must demonstrate that there is a reasonable probability that, but for counsel’s deficient performance, the result of the proceeding would have been different. *McFarland*, 127 Wn.2d at 335. In the plea-bargaining context, the defendant must demonstrate a reasonable probability that he would have accepted the offer. *Edwards*, 171 Wn. App. at 394.

For example, in *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017), our Supreme Court held that Estes’s counsel was ineffective for failing to inform Estes that the impact of the deadly weapon enhancement elevated his offenses to third strikes. *Id.* at 465-66. Estes declined to negotiate a plea from the outset and thus was prejudiced because negotiations may have avoided the third strike. *Id.* at 465-66. The Supreme

Court indicated that it did not matter whether Estes knew “about the impact of the deadly weapon enhancements (without being advised as such by his attorney).” *Id.* at 467 n.3. Rather, the Court focused on defense counsel’s failure to research the impact of the deadly weapon enhancement on Estes’s potential sentencing range and communicate accurate information to Estes when discussing whether to proceed to trial. *Id.* at 467.

Davis claims his lawyer did not have knowledge that Davis was facing a term of life in prison and that his lawyer failed to discuss a plea offer with him prior to trial.⁴ Both claims are belied by the limited record. The following is taken from the record regarding potential plea bargains, the trial court’s on-the-record admonishment to defense counsel that Davis potentially could be sentenced as a persistent offender, and defense attorney Scott Hill’s full acknowledgment two months before trial that Davis was facing a life sentence if convicted of the first-degree burglary.

On November 16, 2017, the court signed an order continuing the trial date; that order included Davis’ signature and both counsels’ signatures on the basis that Davis was “considering a plea bargain.” CP 21.

⁴ “Reasonable conduct for an attorney includes carrying out the duty to research the relevant law.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Failing to research or apply relevant law will constitute deficient performance if it falls below an objective standard of reasonableness based on consideration of all the circumstances. *Id.* at 868-69.

On January 12, 2018, the court signed another order continuing the trial date; that order also included Davis' signature and both counsels' signatures based on "[c]ontinued discovery and/or negotiations." CP 22.

On February 28, 2018, the case was again continued by the court; that order included Davis' signature and both counsels' signatures because of a "consolidated settlement with new case." CP 25.

On April 13, 2018, the court continued the trial date; that order included Davis' signature and both counsels' signatures as a consequence of "[c]ontinued discovery and/or negotiations." CP 26.

On May 25, 2018, the court continued the trial date; that order included Davis' signature and both counsels' signatures due to "[c]ontinued discovery and/or negotiations." CP 27.

On June 19, 2018, the State filed several motions with the court,⁵ including a motion to amend the information to add the charge of first-degree burglary. *See* CP 28-29. In the deputy prosecutor's declaration to the court under paragraph four in support of the amendment, he stated:

Negotiations appear somewhat unlikely to settle so getting the case into a more "triable" posture appears appropriate. 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 SC 18-1-00777-2 and will be subsequently

⁵ Under the current charges, Superior Court cause number 17-1-00553-4.

filed on SC 17-1-00553-4. Waiting longer in the hopes of settlement seems inappropriate given the failure to reach agreement to date.

CP 29.

On July 12, 2018, attorney Hill filed a written objection and briefing regarding the State's motion to amend the information. CP 41-44.

On August 10, 2018, during a pretrial hearing before the Honorable Raymond Clary, defense counsel Hill and Jeremy Schmidt were present with the defendant.⁶ Weeks RP 3. The court inquired about the number of jurors required for this case and the deputy prosecutor made the following remark:

Only really sensitive issue is, in my view, at least, is it is a domestic violence allegation and if found true, if [Davis] were convicted of first degree burglary, [Davis] would potentially fall under the chronic offender statutes for third strike. I don't know that would necessarily be voir dired [sic] with the jury, but the stakes are, obviously, high for Mr. Davis.

Weeks RP 5.

On September 13, 2018, Davis sent a note to the Spokane County Clerk's Office requesting a representative speak to him about his legal financial obligations. CP 55. Davis informed the clerk's office that he was

⁶ At the time of that hearing, Davis had three separate trials scheduled. Weeks RP 3. Attorney Jeremy Schmidt represented the defendant on charges unrelated to the current case. *Id.*

in custody, awaiting trial, and he was “looking at a sentence of 5 years to life.” CP 55.

On January 11, 2019, defense counsel Hill filed a motion, declaration, and briefing in support of his request for the court to order a deposition of a child witness. CP 64-66. In his declaration, attorney Hill acknowledged the potential for a life sentence if Davis were convicted as charged in the amended information. Attorney Hill stated under subsection six of his declaration: “*Since this is a possible life sentence in that it will be a third strike for Mr. Davis it is counsel’s opinion that the interview with [the child witness] is essential.*” CP 65 (emphasis added).

On January 18, 2019, the parties were before the court, including the defendant, on defense counsel’s motion to continue the trial date. Weeks RP 29. At that hearing, Judge Clary spoke directly to defense counsel Hill, in the defendant’s presence, and stated that he allowed the time to be shortened to hear the deposition motion because “this is a third strike case and if it doesn’t go well for Mr. Davis, it’s a sentence of life without the possibility of parole.” Weeks RP 39-40. During the same hearing and in response to the court’s question regarding a child witness defense interview, the deputy prosecutor remarked, in pertinent part:

The defendant is facing two files that would be a strike offense. This is residential burglary in the first degree and a separate file, separate

incident, separate witnesses [and] burglary in the first degree. So he has two possible trials where he could face a third strike conviction.

Weeks RP 46.

At the time of sentencing on May 2, 2019, in front of the Honorable John Cooney, the deputy prosecutor made the following remarks about plea bargaining with defense counsel:

Your Honor, the defendant was aware that he was facing a life sentence if convicted of the first-degree burglary charge, as evidenced by statements from the prosecutor's office as mentioned in past briefing. And what I'm getting at, Your Honor, is the defendant went into this trial with eyes wide open as to what he could be facing here.

On June 19th, 2018, the State, in its motion to amend the Information and to join and consolidate, indicated on page one that adding the first-degree burglary to case 17-1-00553-4 does alleviate [sic] that case to a "three strikes" given the defendant's record.

On January 11th, 2019, defense filed a motion to compel witness interviews. In Mr. Hill's declaration he indicates that in subsection 6 of that declaration that since this is a possible life sentence in that it will be a third strike for Mr. Davis, in prior court hearings I was present when Judge Clary indicated this would be a third strike conviction resulting in a life in prison.

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 315-16.

Thereafter, attorney Hill inexplicably argued at sentencing, in pertinent part:

MR. HILL: Your Honor, the reason the legislature required that formal notice be provided to the defendant that they intend to seek persistent offender status upon sentencing –

...

MR. HILL: 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.

And what I'd like to do, Judge, also, is to look at the criminal history. And the legislature, even this year, they are considering these life sentences, sentences that even with -- if you count all of the history, Mr. Davis' history, would result in a sentence, at the most, of 96 months.

RP 319-20.

Deficient performance prong.

Davis alleges that his trial counsel was deficient, asserting his lawyer did not have knowledge that Davis was a potential persistent offender facing a life term of incarceration.⁷ Davis attempts to support this claim with his lawyer's bemused statement at sentencing to Judge Cooney that the State had not provided notice that Davis was a potential persistent

⁷ See RCW 9.94A.030(38)(a); RCW 9.94A.570.

offender subject a life sentence. *See* RP 319-20. The record undermines Davis' claim on appeal and his lawyer's assertion at sentencing.

“A sentencing judge, law enforcement agency, or state or local correctional facility may, but is not required to, give offenders who have been convicted of an offense that is a most serious offense as defined in RCW 9.94A.030 either written or oral notice, or both, of the sanctions imposed upon persistent offenders.” RCW 9.94A.561; *State v. Crawford*, 159 Wn.2d 86, 93-94, 147 P.3d 1288 (2006). Notwithstanding, defense attorney Hill had notice that Davis, if convicted, could be sentenced as a persistent offender. In addition to the oral representations made on the record by the deputy prosecutor in the presence of defense counsel and the defendant, and the pleadings filed by the State concerning Davis' potential persistent offender status as referenced above, attorney Hill's represented to Judge Clary on January 11, 2019, approximately two months before trial, that Davis faced a potential life sentence and “it will be his third strike.” CP 65. Moreover, Judge Clary told attorney Hill, in the defendant's presence, on January 18, 2019, that Davis was facing a “third strike” and if convicted, “it's a sentence of life without the possibility of parole.” *See* Weeks RP 39-40. The origin of defense counsel's unexpected claim at sentencing to Judge Cooney that he had no notice regarding Davis' potential status as a persistent offender is unknown and it is directly contradicted by

defense counsel's earlier representation to the trial court on the record. Davis fails to establish deficient performance.

Prejudice prong.

Davis also fails to establish he was prejudiced by his lawyer's performance for several reasons. A defendant establishes actual prejudice by showing that there is a reasonable probability that the result of the proceeding would have been different but for counsel's unprofessional errors. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 34 (internal quotation marks omitted). Prejudice is not established if the record shows that the defendant benefited from his or her lawyer's representation. *State v. Oseguera Acevedo*, 137 Wn.2d 179, 198-99, 970 P.2d 299 (1999). In addition, prejudice is not established if the record shows defense counsel engaged in a legitimate strategy or tactic. *State v. Osborne*, 102 Wn.2d 87, 99-100, 684 P.2d 683 (1984).

There is nothing in the record to support a claim that the defendant had no knowledge he was facing a life term of incarceration and that his lawyer did not discuss the potential sentencing consequences if Davis proceeded to trial. Indeed, Davis was present in court when Judge Clary advised defense counsel that the defendant, if convicted of the first-degree

burglary, would potentially face a life term of incarceration as it would be his “third strike.”

Moreover, the records contains no information that Davis would have accepted an offer, that his trial counsel did not communicate any offers to the defendant, what advice was given by trial counsel, whether Davis was amenable to negotiating a plea bargain, what legal research was conducted by defense counsel, whether the sentencing consequences associated with the various adversarial routes Davis had available (e.g., plea bargain or trial) were discussed, or whether Davis was willing to resolve the charges short of proceeding to trial.

Charting the various pleadings filed in this case, it appears the parties moved from a posture of negotiating a global resolution, with defendant’s participation, of all Davis’ charges before proceeding toward and ultimately trying the current charges. “It is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence.” *Strickland*, 466 U.S. at 689. Davis fails to establish any prejudice from this record. Accordingly, his claim of ineffective assistance of counsel fails having failed to establish either prong of ineffective assistance of counsel.

B. THE CONVICTIONS FOR RESIDENTIAL BURGLARY AND FIRST-DEGREE BURGLARY DO NOT VIOLATE DOUBLE JEOPARDY IF USING THE “SAME EVIDENCE” TEST BUT DO VIOLATE DOUBLE JEOPARDY IF EMPLOYING THE “UNIT OF PROSECUTION” DOUBLE JEOPARDY ANALYSIS.

Standard of review.

An appellate court reviews double jeopardy claims de novo. *State v. Arndt*, 194 Wn.2d 784, 815, 453 P.3d 696 (2019).

Davis asserts that his convictions for residential burglary and first-degree burglary violate double jeopardy. He contends the first-degree burglary and residential burglary are legally and factually identical because the State had to establish that he unlawfully entered a dwelling for both crimes. *See Appellant’s Br.* at 16-20.

Double jeopardy analysis – “same evidence” test.

Although Davis raises a double jeopardy argument for the first time on appeal, this Court and the Supreme Court have held that a double jeopardy argument may be considered for the first time on appeal because the contention implicates a manifest error affecting a constitutional right. *See RAP 2.5(a)(3); State v. Adel*, 136 Wn.2d 629, 631-32, 965 P.2d 1072 (1998); *State v. Allen*, 150 Wn. App. 300, 312, 207 P.3d 483 (2009).

Article I, section 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 State may bring multiple charges arising from the same criminal conduct in a single proceeding. *State v. Michielli*, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997). But trial courts may not enter multiple convictions for the same offense without offending double jeopardy. *State v. Vladovic*, 99 Wn.2d 413, 422, 662 P.2d 853 (1983).

When a defendant's act supports convictions under two criminal statutes, an appellate court considering a double jeopardy challenge must determine whether, considering legislative intent, the charged crimes constitute the same offense. *Arndt*, 194 Wn.2d at 815. Second, if the legislative intent is not clear, a court may apply the *Blockburger*,⁸ or "same evidence," test. *Id.* at 815-16. Third, a court may look to the merger doctrine, which 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...

Vladovic, 99 Wn.2d at 422.

⁸ 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

Fourth, a court may look to “consideration of any independent purpose or effect that would allow punishment as a separate offense.” *Arndt*, 194 Wn.2d at 816.

A person is guilty of first-degree burglary if “with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor ... (b) assaults any person.” RCW 9A.52.020(1); RP 257-58; CP 173.

A person commits residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle. RCW 9A.52.025; RP 256; CP 167. An antimerger statute applies to burglary. This statute reflects the legislature’s expression of its intent that the predicate crime and the burglary do not merge. RCW 9A.52.050; *see State v. Hoyt*, 29 Wn. App. 372, 378, 628 P.2d 515 (1981). A violation of a protection order can serve as the predicate crime for residential burglary, which satisfies the second element of the crime. *State v. Stinton*, 121 Wn. App. 569, 573, 89 P.3d 717 (2004).

Double jeopardy applies if the multiple punishments cannot survive the “same elements” test which examines whether each offense contains an element not included in the other. *State v. Muhammad*, 194 Wn.2d 577, 618, 451 P.3d 1060, 1084 (2019); *State v. Gocken*, 127 Wn.2d 95, 101,

896 P.2d 1267 (1995). To be the “same offense” for purposes of double jeopardy, the offenses must be the same in law and in fact. *Arndt*, 194 Wn.2d at 815; *see also State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995) (“where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not).

If there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses.

Valdovic, 99 Wn.2d at 423. A reviewing court considers the elements as charged and proved, not abstractly. *Muhammad*, 194 Wn.2d at 620.

Under the “same elements” analysis, there is no double jeopardy bar to convicting Davis of first-burglary and residential burglary. First-degree burglary and residential burglary are not the same offenses in law because each offense contains an element that the other does not. *See Calle*, 125 Wn.2d at 778. First-degree burglary requires the State establish that, in addition to unlawfully entering or remaining in a building,⁹ that the

⁹ For purposes of the first-degree burglary statute, the word “building” is separately defined as “in addition to its ordinary meaning, includes any dwelling.” RCW 9A.04.110(5). “Dwelling” means any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging. RCW 9A.04.110(7).

defendant is either armed with a deadly weapon or that he or she assaults another inside a dwelling – an element not required for residential burglary. On the other hand, residential burglary requires that, in addition to unlawfully entering or remaining in a dwelling, that the defendant intend to commit a crime against persons or property inside the dwelling. The State need not prove intent to commit a specific crime. *State v. Bergeron*, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985).

Likewise, the first-degree burglary and residential burglary are not the same in fact and as proved at trial. The first-degree burglary statute required proof that Davis unlawfully entered Bell's home and that he assaulted her. The residential burglary statute, as charged and proved, did not require the State to establish that Davis assaulted Bell, as was required by the first-degree burglary charge, but rather that he violated a no-contact order issued by the court. Indeed, it was the State's theory and argument to the jury that Davis committed residential burglary by unlawfully entering Bell's home with intent to violate the no contact order. *See* RP 273-75. The deputy prosecutor argued to the jury, "As soon as [Davis] enters that home, he violates the no contact order... He is committing a crime against a person. So when he enters in that home and he knows he's entering into that home, he's entering with intent to commit a crime." RP 275. In the instant case, first-degree burglary and residential burglary are neither legally nor

factually identical and do not violate double jeopardy under the “same evidence” test.

Although not directly argued here, courts may apply the “unit of prosecution” test to analyze claims of double jeopardy. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 980-81, 329 P.3d 78 (2014). Under this test, the court must determine whether the legislature intended to punish a person for multiple criminal acts or for the entire course of conduct. *Adel*, 136 Wn.2d at 634. The unit of prosecution for burglary is each separate entry into a building. *State v. Brooks*, 113 Wn. App. 397, 400, 53 P.3d 1048 (2002). In *Brooks*, the defendant assaulted one individual on a patio adjacent to an apartment, and then forced entry into the apartment, and assaulted another. *Id.* at 388. Brooks was charged with two counts of first-degree burglary. Brooks argued on appeal that that his two convictions for first-degree burglary arose out of a single incident of unlawfully entering or remaining, which violated double jeopardy. *Id.* at 388-89. The State did not argue that Brooks committed two different acts of entering or remaining in the apartment. The *Brooks* court determined that the unit of prosecution for the crime of burglary is the act of unlawfully entering or remaining in a building. *Id.* at 400. Since the defendant only entered the apartment once, Division One of this Court held that Brooks could only be convicted of one

count of first-degree burglary and his two convictions for the same violated double jeopardy. *Id.* at 400.

As in *Brooks*, the State did not argue Davis entered or remained in Bell's residence at different times for purposes of the residential burglary and first-degree burglary charges; the State argued Davis unlawfully entered or remained in Bell's residence only once. If this Court follows the reasoning of the *Brooks* court, Davis' convictions for residential burglary and first-degree violate double jeopardy. In such situations, the conviction for the lesser offense should be vacated. *State v. Hughes*, 166 Wn.2d 675, 686 n.13, 212 P.3d 558 (2009). First-degree burglary is classified as a class A felony. RCW 9A.52.020(2). Residential burglary is designated as a class B felony. RCW 9A.52.025(2). Thus, Davis' conviction for residential burglary should be vacated if the Court determines Davis' convictions for first-degree burglary and residential burglary violate double jeopardy based on the unit of prosecution double jeopardy analysis.

IV. CONCLUSION

With a strong presumption that Davis' trial counsel was effective, Davis fails to establish his trial counsel was ineffective in that the record supports the conclusion that his trial counsel was fully aware first-degree burglary was a strike offense and that Davis could be sentenced as a

persistent offender. Moreover, the record is incomplete and does not establish Davis was prejudiced.

Davis' convictions do not violate double jeopardy under the "same evidence" test as each conviction is different in law and the State proffered different evidence for each offense. However, if this Court employs the "unit of prosecution" test to determine double jeopardy, Davis' convictions for residential burglary and first-degree burglary violate double jeopardy. If this Court so finds, this Court should vacate the residential burglary conviction.

Respectfully submitted this 5 day of March, 2020.

LAWRENCE H. HASKELL
Prosecuting Attorney



Larry Steinmetz, WSBA #20635
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

JASON DAVIS,

Appellant.

NO. 36859-9-III

CERTIFICATE OF
SERVICE

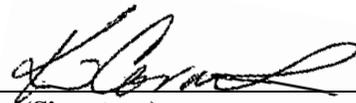
I certify under penalty of perjury under the laws of the State of Washington, that on March 5, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Spencer Babbitt
babbitts@seattleu.edu

Lise Ellner
liseellnerlaw@comcast.net

3/5/2020
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

March 05, 2020 - 11:23 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36859-9
Appellate Court Case Title: State of Washington v. Jason Leroy Davis
Superior Court Case Number: 17-1-00553-4

The following documents have been uploaded:

- 368599_Briefs_20200305112313D3497007_3527.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Davis Jason - 368599 - Resp br - LDS.pdf

A copy of the uploaded files will be sent to:

- Liseellnerlaw@comcast.net
- babbitts@seattleu.edu
- valerie.liseellner@gmail.com

Comments:

Sender Name: Kim Cornelius - Email: kcornelius@spokanecounty.org

Filing on Behalf of: Larry D. Steinmetz - Email: lsteinmetz@spokanecounty.org (Alternate Email: scpaappeals@spokanecounty.org)

Address:
1100 W Mallon Ave
Spokane, WA, 99260-0270
Phone: (509) 477-2873

Note: The Filing Id is 20200305112313D3497007