70858-9

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No. 70858-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

EDMOND MAYNOR,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The convictions for counts one and two violate the Fifth Amendment prohibition on double jeopardy.

2. The trial court abused its discretion in denying Mr. Maynor's motion for a mistrial, and the error was prejudicial as to counts three and four.

3. Mr. Maynor was deprived of his Sixth Amendment right to the effective assistance of counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. "[S]ince 1975 courts have generally held that convictions for assault and robbery stemming from a single violent act are the same for double jeopardy purposes and that the conviction for assault must be vacated at sentencing." *State v. Freeman*, 153 Wn.2d 765, 774, 108 P.3d 753 (2005). Do the convictions for counts one (robbery) and two (assault) violate Mr. Maynor's Fifth Amendment right to be free from double jeopardy because both were based on Mr. Maynor's threatening Tu Huynh with a gun and firing a shot toward him in order to steal jewelry?

2. A new trial should be granted where prosecutorial misconduct prejudiced the defendant and could not be cured by an instruction. When cross-examining Mr. Maynor, the prosecutor said, "this was not the first time you had contemplated hurting others in an effort to be shot by police,

was it?" The question violated an order in limine and was factually false. Although the trial court sustained Mr. Maynor's objection to the question and instructed the jury to disregard it, the court denied a motion for a mistrial. Should this court reverse the convictions on counts three and four and remand for a new trial, because the evidence of intent was weak and the prosecutor's statement was highly prejudicial?

3. Multiple convictions constitute the "same criminal conduct" for sentencing purposes if they involved the same intent, same victim, and same time and place. A defendant is deprived of his constitutional right to the effective assistance of counsel if his attorney fails to argue that multiple convictions encompass the same criminal conduct and there is a reasonable possibility that the sentencing court would have found the offenses constituted the same criminal conduct had counsel so argued. Mr. Maynor was convicted of first-degree robbery, second-degree assault, and first-degree assault for shooting toward a jeweler inside Westlake Mall in order to steal a tray of rings. Was he deprived of his constitutional right to the effective assistance of counsel when his attorney failed to argue at sentencing that these three counts encompassed the same criminal conduct?

C. STATEMENT OF THE CASE

Edmond Maynor is a 36-year-old man who had never committed a crime before the event at issue in this case. CP 136; RP (6/10/13) 9; RP (8/30/13) 15-16. In 2012, he had an "emotional breakdown." RP (6/17/13) 167. He had lost his job in 2010, got divorced in 2011, and lost his home and car in 2012. RP (6/17/13) 167-68. He was going through a painful custody battle with his ex-wife, and he missed his children. RP (6/17/13) 168.

Mr. Maynor bought a gun because he planned to kill himself. RP (6/17/13) 170. But he found he could not go through with it, and decided instead to rob a jewelry store. His goal was either to obtain something of financial value or be killed. RP (6/17/13) 170-71, 177.

On September 21, 2012, at around 10:30am, Mr. Maynor donned a disguise and went to Express Jewelers in Westlake Center. RP (6/12/13) 19-24; RP (6/13/13) 95-101. He told the clerk, Tu Huynh, that he was looking for an engagement ring. RP (6/13/13) 101. Mr. Huynh took a ring out of the case, and Mr. Maynor drew a gun and demanded the whole tray of rings. RP (6/13/13) 104. The clerk gave him the tray, and as Mr. Maynor started to leave, he turned and fired a shot. RP (6/13/13) 106. The bullet went through Mr. Huynh's sleeve and the wall behind him. RP (6/12/13) 6-17; RP (6/13/13) 107. Mr. Maynor wanted to scare Mr.

Huynh so he could successfully steal the tray of rings. RP (6/17/13) 171-72.

Mr. Huynh chased Mr. Maynor out of the store to the top of the stairwell. RP (6/13/13) 109. Mr. Maynor jumped to the bottom of the stairs, then fired two shots back toward Mr. Huynh, but did not hit him. RP (6/12/13) 26-27, 36-37; RP (6/13/13) 112-14.

Mr. Maynor ran out of the mall, headed northwest on Fourth Avenue, then turned right on Stewart Street. RP (6/12/13) 31. The bell captain of the Mayflower Park Hotel, Roberto Sandoval, heard the commotion and chased Mr. Maynor to Seventh and Stewart. RP (6/13/13) 63-69. Mr. Sandoval pushed Mr. Maynor to the ground, then threw himself on top of Mr. Maynor and wrestled with him. RP (6/13/13) 70-72. According to Mr. Sandoval, Mr. Maynor then shot Mr. Sandoval in the arm. RP (6/13/13) 72-76. According to Mr. Maynor, the gun discharged as both men grabbed for it, and he never intended to hit or harm anyone. RP (6/17/13) 174-78.

Officers responded to the scene and took Mr. Maynor into custody. RP (6/13/13) 150. According to the arresting officer, as he escorted Mr. Maynor to the police car, Mr. Maynor said, "You'd better just kill me." RP (6/13/13) 151.

The State charged Mr. Maynor with one count of first-degree robbery (count one), one count of first-degree assault for the assault of Tu Huynh inside the jewelry store (count two), one count of first-degree assault for the injury to Roberto Sandoval (count three), and one count of first-degree assault for the assault of Tu Huynh on the stairs outside the jewelry store (count four). CP 39-41, 92, 98, 105, 111; RP (6/18/13) 279-98. At trial, witnesses testified to the events described above.

The jury convicted Mr. Maynor as charged on counts one, three, and four, and convicted him of the lesser offense of second-degree assault on count two. CP 119, 122, 124, 126. Mr. Maynor was sentenced to 474 months in prison for these offenses plus their associated firearm enhancements. CP 131-40, 150.

Additional pertinent facts are set forth in the relevant argument sections below.

D. ARGUMENT

1. The convictions for robbery of Tu Huynh in the jewelry store and assault of Tu Huynh in the jewelry store violate the Fifth Amendment prohibition on double jeopardy, requiring vacation of the assault conviction.

A double-jeopardy violation may be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d

136 (2007). This Court reviews *de novo* the question of whether two convictions violate double jeopardy. *Jackman*, 156 Wn.2d at 746.

The Fifth Amendment to the United States Constitution provides, "No person shall … be subject for the same offense to be twice put in jeopardy of life or limb…." U.S. Const. amend. V. Similarly, article I, section 9 of our state constitution provides, "No person shall be … twice put in jeopardy for the same offense." Const. art. I, § 9. These clauses protect defendants against "prosecution oppression." *State v. Womac*, 160 Wn.2d 643, 650, 160 P.3d 40 (2007) (quoting 5 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure* § 25.1(b), at 630 (2d ed. 1999)).

To determine whether multiple convictions violate double jeopardy, courts apply the "same evidence" test. *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995) (citing *Blockburger v. United States*, 284 U.S. 299, 304, 76 L.Ed. 306, 52 S.Ct. 180 (1932)). Under that test, absent clear legislative intent to the contrary, a defendant's double jeopardy rights are violated if he is convicted of offenses that are identical both in fact and in law. *Id.*; *State v. Freeman*, 153 Wn.2d 765, 777, 108 P.3d 753 (2005). In other words, two convictions violate double jeopardy when the evidence required to support a conviction on one charge would have been sufficient to warrant a conviction upon the other. *Freeman*, 153

Wn.2d at 772; *State v. Ralph*, 175 Wn. App. 814, 823, 308 P.3d 729 (2013) *review denied*, 179 Wn.2d 1017, 318 P.3d 280 (2014).

Prosecutors may not "divide a defendant's conduct into segments in order to obtain multiple convictions." *Jackman*, 156 Wn.2d at 749. Furthermore, if the prosecution has to prove one crime in order to prove the other, entering convictions for both crimes violates double jeopardy. *Id.* In other words, entering convictions for two crimes violates double jeopardy if "it was impossible to commit one without also committing the other." *Id.*

In light of the above rules, "courts have generally held that convictions for assault and robbery stemming from a single violent act are the same for double jeopardy purposes and that the conviction for assault must be vacated at sentencing." *Freeman*, 153 Wn.2d at 774. Indeed, there is "no evidence that the legislature intended to punish second degree assault separately from first degree robbery when the assault facilitates the robbery." *Id.* at 776. Furthermore, the merger doctrine precludes two convictions where an assault is committed in furtherance of a robbery. *Id.* at 778. The only exception is where the injury from the assault is "separate and distinct from and not merely incidental to" the robbery. *Id.* But in the usual case where the assault furthers the robbery, the assault conviction cannot stand. *Freeman*, at 779 (reversing second-degree

assault conviction under double jeopardy clause because it merged with first-degree robbery conviction); *In re the Personal Restraint of Francis*, 170 Wn.2d 517, 525, 242 P.3d 866 (2010) (vacating second-degree assault conviction under double jeopardy clause because it merged with first-degree attempted robbery conviction).

In this case, the jury was instructed that Mr. Maynor was guilty of first-degree robbery of Tu Huynh, as charged in count one, if he obtained or retained property by use or threatened use of force and he was armed with a deadly weapon. CP 92-93 (instruction 12). The jury was instructed that Mr. Maynor was guilty of second-degree assault of Tu Huynh, as charged in count two, if he assaulted him with a deadly weapon. CP 104 (instruction 23). The instruction required the jury to find the conduct at issue in count two was "separate and distinct from Count IV," but did *not* tell the jury it had to be separate and distinct from count one. CP 104.

Mr. Maynor testified that he fired a shot at the corner wall of the store in order "to scare [Mr. Huynh] into releasing the tray" of rings. RP (6/17/13) 171. When asked what he was thinking when he fired the shot, he said, "I was thinking about getting the tray." RP (6/17/13) 171-72. Consistent with Mr. Maynor's testimony, the State in closing argument discussed the fact that Mr. Maynor allegedly "fired a round in the store" to support both the robbery charge in count one and the assault charge in

count two. RP (6/18/13) 279, 287. Thus, the assault was not a separate and distinct act from the robbery but was incidental to it. *See Freeman*, 153 Wn.2d at 778. Therefore, the assault conviction and its associated firearm enhancement must be vacated, and the case remanded for resentencing. *Francis*, 170 Wn.2d at 531.

2. The convictions for counts three and four should be reversed and the case remanded for a new trial because the prosecutor committed prejudicial misconduct by falsely accusing Mr. Maynor of planning similar crimes in the past.

a. When cross-examining Mr. Maynor, the prosecutor accused him of having planned a similar attack in the past, an accusation which violated a pretrial ruling and was patently false.

Pre-trial, the State acknowledged that Mr. Maynor had no prior convictions of any type and assured the defense and the court that it was "not going to be introducing any prior bad acts of the defendant." RP (6/10/13) 9. However, when cross-examining Mr. Maynor during trial, the prosecutor said, "[t]his is not the first time that you had contemplated hurting others in an effort to be shot by police, was it?" RP (6/17/13) 183. Mr. Maynor said, "What do you mean?" *Id.* His attorney objected and the court excused the jury. *Id.*

The defense reminded the court that the State had promised it was not going to introduce prior bad acts. RP (6/17/13) 184. The State argued

that Mr. Maynor "opened the door" and that his alleged prior plan was necessary to prove intent. RP (6/17/13) 185. The court ruled that it was inadmissible because it was only relevant through a propensity inference and because the prejudicial effect outweighed its probative value. RP (6/17/13) 186-87. Mr. Maynor moved for a mistrial on the basis that "the bell cannot be unrung." RP (6/17/13) 187.

During the hearing on the mistrial motion, defense counsel and the court learned that there was not even a prior plan after all. The prosecutor had claimed that Mr. Maynor's notebook, which was admitted as an exhibit, contained evidence of a prior plan. RP (6/17/13) 184. In fact, though, the notebook detailed the plans for *this* incident based on studies of *others'* past robberies. RP (6/17/13) 189-90. This is the reason the defense had not objected to the notebook's admission. RP (6/17/13) 192. But there was no evidence whatsoever that Mr. Maynor had previously "contemplated hurting others in an effort to be shot by police," as the prosecutor had stated in front of the jury.

The court nevertheless denied Mr. Maynor's motion for a mistrial, instead instructing the jury to disregard the question and its inferences. RP (6/17/13) 201-02.

b. A new trial should be granted because the prosecutor's false accusation was highly inflammatory and could not be cured by an instruction.

Although the trial court attempted to cure the error resulting from the prosecutor's surprise statement, nothing short of a new trial can cure the prejudice of this violation. Prosecutors should not be allowed to get away with falsely accusing defendants of prior similar crimes by claiming the jury can simply be instructed to disregard the accusation. As Mr. Maynor's counsel pointed out, once statements of this nature are before a jury, the bell cannot be unrung. The jury will assume the reason the court told it to disregard something is because of a "technicality," and not because the statement is untrue.

Mr. Maynor acknowledges that he cannot show prejudice with regard to count one, which he admitted, or count two, for which the jury convicted him of the lesser offense. However, as to counts three and four, intent was a hotly contested issue, and the jury may well have either acquitted Mr. Maynor or convicted him of lesser offenses had the jury not heard the prosecutor's highly inflammatory and false accusation.

"A prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider." *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1998). Thus,

"[a]lthough prosecuting attorneys have some latitude to argue facts and inferences from the evidence, they are not permitted to make prejudicial statements unsupported by the record." *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008). A statement "calculated to appeal to the jury's passion and prejudice and encourage it to render a verdict on facts not in evidence are improper." *State v. Stith*, 71 Wn. App. 14, 18, 856 P.2d 415 (1993). It is also improper for a prosecutor to violate a pre-trial ruling. *State v. Gregory*, 158 Wn.2d 759, 865-66, 147 P.3d 1201 (2006).

The denial of a motion for a mistrial based on prosecutorial misconduct is reviewed for abuse of discretion. *State v. Lindsay*, ___ Wn.2d ___, ___ P.3d ___, 2014 WL 1848454 (filed 5/8/14) at ¶ 13; *cf. State v. Perez-Valdez*, 172 Wn.2d 808, 814, 265 P.3d 853 (2011) (court reviews whether improper witness statement is so prejudicial to require a mistrial for abuse of discretion). On appeal from a denial of a motion for a mistrial, courts evaluate three factors to determine whether a "trial irregularity" warrants a new trial: (1) the seriousness of the irregularity; (2) whether the improper statement was cumulative of evidence properly admitted; and (3) whether the irregularity could be cured by an instruction. *Perez-Valdez*, 172 Wn.2d at 818.

In this case, these three factors demonstrate that a new trial is required on counts three and four. First, the error was serious. The

prosecutor's accusation violated a pretrial ruling and was factually false. Thus, it was even worse than prosecutorial misconduct that occurs when prosecutors discuss facts that are not in evidence but which are, in fact, true. Furthermore, even if the allegation had been true, the prosecutor violated an order in limine. Pre-trial, the prosecutor assured the court and the defense that because Mr. Maynor had no prior convictions of any type, it would not be introducing any prior bad acts. If the prosecutor thought Mr. Maynor "opened the door" to prior acts, as the prosecutor later claimed, then he should have requested a recess before his cross-examination so he could raise that issue with the court. If he had done so, the jury never would have heard the highly inflammatory untrue statement. The prosecutor should not be able to circumvent the rules by making his own legal determination that the door had been opened and later claim there was no prejudice from his factual and legal errors.

As to the second factor, the statement was not at all cumulative of other evidence. There was no other evidence that Mr. Maynor had previously contemplated harming others (because he hadn't), and no other evidence that Mr. Maynor had committed any prior bad acts (because he hadn't).

Finally, although the trial court properly instructed the jury to disregard the question and its inferences, the bell could not be unrung.

The court did not inform the jury that the statement was false, so the jury likely assumed it was true but that they were supposed to pretend they did not know Mr. Maynor had done something similar in the past. As to counts three and four, the statement was too prejudicial to be cured by an instruction, because intent was heavily contested. Regarding count four, Mr. Maynor testified that he did not intend to harm Mr. Huynh when he fired shots in the stairwell, but only intended to scare him so he would stop following him. Thus, the jury may have convicted him of the lesser offense had it not heard the prosecutor's prejudical statement. As to count three, Mr. Maynor testified that the gun went off when he and Mr. Sandoval were wrestling on the ground, and that he did not intentionally pull the trigger. Indeed, Mr. Maynor's entire defense was that he was so depressed after his multiple setbacks that he just wanted to either be dead or to steal something of value; he never intended to hurt anyone. The prosecutor's false accusation that Mr. Maynor had previously "contemplated hurting others" was therefore too prejudicial to be cured by an instruction. This Court should reverse the convictions on counts three and four, and remand for a new trial.

3. Mr. Maynor was deprived of his constitutional right to the effective assistance of counsel at sentencing because his attorney failed to argue that the three counts involving Tu Huynh encompassed the same criminal conduct.

a. A criminal defendant has a constitutional right to the effective assistance of counsel.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to the effective assistance of counsel in criminal proceedings. U.S. Const. amend VI; Const. art. I, § 22; *United States v. Cronic*, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). A defendant is deprived of this constitutional right if (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

As to the first inquiry (performance), an attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical basis. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); *see also Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d

471 (2003) ("[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms") (quoting *Strickland*, 466 U.S. at 688). While an attorney's decisions are treated with deference, his or her actions must be reasonable under all the circumstances. *Wiggins*, 539 U.S. at 533-34.

As to the second inquiry (prejudice), if there is a reasonable probability that but for counsel's inadequate performance, the result would have been different, prejudice is established and reversal is required. *Strickland*, 466 U.S. at 694; *Hendrickson*, 129 Wn.2d at 78. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). It is a lower standard than the "more likely than not" standard. *Thomas*, 109 Wn.2d at 226.

b. <u>A defendant is deprived of his right to the effective assistance of counsel if his attorney fails to argue same criminal conduct at sentencing and there is a reasonable possibility that the sentencing court would have found the offenses encompassed the same criminal conduct had counsel so argued</u>.

The Sentencing Reform Act ("SRA") provides for the structured sentencing of felony offenders through standard sentence ranges derived from the seriousness of the offense and the defendant's offender score. *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The offender

score is calculated by adding points from the defendant's criminal history as well as other current offenses. RCW 9.94A.589(1)(a). However, multiple current offenses count as only one crime if they constitute the "same criminal conduct." *Id.* "'Same criminal conduct' . . . means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id.*; *State v. Graciano*, 176 Wn.2d 531, 540, 295 P.3d 219 (2013).

Defense counsel's failure to argue same criminal conduct at sentencing can amount to ineffective assistance of counsel. *State v. Phuong*, 174 Wn. App. 494, 547, 299 P.3d 37 (2013); *State v. Saunders*, 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004). The question is whether there is a reasonable possibility that the sentencing court would have found the offenses encompassed the same criminal conduct had counsel so argued. *Phuong*, 174 Wn. App. at 548. If multiple offenses were committed at the same time and place and involved the same victim, and a sentencing court could find they were committed with the same objective criminal intent, counsel's failure to argue same criminal conduct amounts to deficient performance that prejudiced the defendant. *Id.*

c. Mr. Maynor was deprived of his right to the effective assistance of counsel because his attorney failed to argue that the three counts involving Tu Huynh constituted the same criminal conduct.

There is a reasonable possibility that the sentencing court would have found counts one, two, and four encompassed the same criminal conduct had counsel so argued. For all three, the victim was Tu Huynh. CP 39-41 (second amended information). As explained in the double jeopardy section above, counts one and two occurred in precisely the same place at precisely the same time (in Express Jewelers when Mr. Maynor used a gun to obtain and retain the tray of rings).

Count four was also at the same time and place for purposes of "same criminal conduct" analysis. As to time, count four occurred just a few seconds after counts one and two, which satisfies the "same time" element. It is well-settled that "simultaneity is not a requirement." *State v. Porter*, 133 Wn.2d 177, 183, 942 P.2d 974 (1997). In *Porter*, where a defendant sold methamphetamine to a buyer and 10 minutes later sold marijuana to the same buyer, the Supreme Court reversed the trial court's finding that the crimes did not constitute the same criminal conduct. *Id.* at 180. And in *State v. Calvert*, this Court held that forged checks deposited on the same day were the same criminal conduct regardless of whether they were deposited at the same moment. *State v. Calvert*, 79 Wn. App.

569, 574-78, 903 P.2d 1003 (1995). Under *Porter* and *Calvert*, the "same time" requirement is satisfied for all three counts.

As for the same place requirement, all three counts occurred in Westlake Mall. The "same place" requirement is not defeated by the fact that count four occurred just outside the jewelry store by the stairs while counts one and two occurred inside the jewelry store. On this point, *State v. Davis* is instructive. *State v. Davis*, 174 Wn. App. 623, 300 P.3d 465 (2013). There, this Court affirmed a trial court's ruling that an assault and an attempted murder constituted the same criminal conduct, even though the assault occurred inside a cabin approximately 50 feet away from the attempted murder which occurred on the beach outside the cabin. *See id.* at 643. This Court recognized that two offenses may encompass the same criminal conduct even if they do not occur precisely in the same location if "the different physical locations are adjacent and within a short distance of each other." *Id.* at 644. That is the situation in Mr. Maynard's case. Thus, it is reasonably possible the sentencing court would have found that count four occurred in the same place as counts one and two if the "same criminal conduct" issue had been presented.

Finally, all of the offenses were committed with the same objective intent: to obtain and retain the tray of rings. Intent, as used in this analysis, "is not the particular *mens rea* element of the particular crime,

but rather is the offender's objective criminal purpose in committing the crime." *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). To determine whether two crimes involved the same objective purpose, courts look to whether one crime furthered another. *Graciano*, 176 Wn.2d at 540. Courts also consider "how intimately related the crimes are" and "whether, between the crimes charged, there was any substantial change in the nature of the criminal objective." *Phuong*, 174 Wn. App. at 546-47.

In *Saunders*, for example, a kidnap and rape constituted the same criminal conduct because the restraint of the victim allowed the defendant to accomplish his sexual agenda, and the defendant's primary motivation for both crimes was to dominate the victim and cause her pain and humiliation. *Saunders*, 120 Wn. App. at 824-25. Similarly, in *State v. Collins*, a burglary furthered a rape and assault where the defendant's unlawful entry into the building allowed him to accomplish the attacks. *State v. Collins*, 110 Wn.2d 253, 263, 751 P.2d 837 (1988). And in *Phuong*, the sentencing court could have found an attempted second degree rape and unlawful imprisonment involved the same intent where the defendant's objective criminal purpose in dragging the victim to his bedroom and locking the door was to rape her. *Phuong*, 174 Wn. App. at 548. Here, there is a reasonable probability that had the sentencing court

been presented with the argument, it would have found Mr. Maynor had the same objective intent for all three counts: to steal a tray of rings.

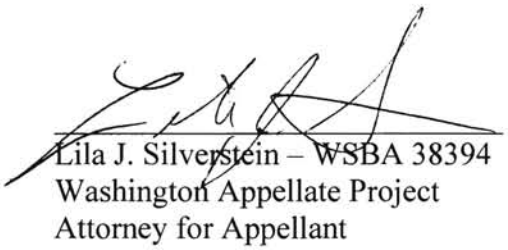
In sum, counts one, two, and four were committed at the same time and place, against the same person, with the same objective intent. There is a reasonable probability that the sentencing court would have determined the three counts constituted the same criminal conduct had counsel so argued. Therefore, the failure to argue same criminal conduct deprived Mr. Maynor of his constitutional right to the effective assistance of counsel. The remedy is reversal of the sentence and remand for a new sentencing hearing. *Phuong*, 174 Wn. App. at 548; *Saunders*, 120 Wn. App. at 825.

E. CONCLUSION

Mr. Maynor asks this Court to vacate the conviction on count two because the conviction violates the Fifth Amendment right to be free from double jeopardy. A new trial should be granted on counts three and four because the prejudice caused by the prosecutor's false accusation regarding Mr. Maynor's past could not be cured by an instruction. In the alternative, the case should be remanded for resentencing at which Mr. Maynor may argue that his offenses against Tu Huynh encompassed the same criminal conduct for offender score purposes.

DATED this 11th day of June, 2014.

Respectfully submitted,



Lila J. Silverstein – WSBA 38394
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Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70858-9-I
v.	)	
	)	
EDMOND MAYNOR,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF JUNE, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] EDMOND MAYNOR 369370 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF JUNE, 2014.

X_____

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