

NO. 34149-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD DONNELL SMITH,

Appellant.

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Conviction for Rape in the First Degree and multiple convictions for Assault in the Second Degree, which arose out of a single course of conduct, violated Federal and State Constitutional Double Jeopardy Prohibitions.
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5. Mr. Smith was deprived of his right to effective assistance of counsel.

B. ISSUE PERTAINING TO THE ASSIGNMENTS OF ERROR

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Degree and the two counts of Assault in the Second Degree arose from the same continuous conduct? (Assignment of Error No. 1)

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5. Did Mr. Smith's trial counsel's failure to object to inadmissible hearsay or request a Petrich jury instruction deprive Mr. Smith of his right to effective assistance of counsel? (Assignment of Error No. 5)

C. STATEMENT OF THE CASE

Mr. Smith was charged with: Rape in the First Degree, two counts of Assault in the Second Degree, Unlawful Imprisonment, Unlawful Possession of a Firearm in the First Degree, Violation of a Court Order and Tampering with a Witness (CP 1). The Information alleged that a deadly weapon was used in the rape and one of the assault charges (CP 1). Mr. Smith was found guilty of all charges following a trial by jury (CP 60). He was sentenced to a total of 351 months (CP 60). This appeal follows those convictions (CP 70).

Ms. Lagura saw Mr. Smith during an expected meeting at a local bar on March 16, 2005 (RP 179-180). Ms. Lagura went to Mr. Smith's house after Mr. Smith left the bar (RP 181-182). Ms. Lagura joined the large gathering at Mr. Smith's residence (RP 182). Sometime during that night/early evening Ms. Lagura testified Mr. Smith choked her in the bathroom of the residence (RP 183). She believed Mr. Smith was mad at her (RP 184). Ms. Lagura also testified Mr. Smith later choked her a second time about ten minutes later in front of the other persons at Mr. Smith's residence (RP 186, 226-227). Ms. Lagura testified that her

breathing was cut off a bit during the second choking (RP 187).

Ms. Lagura estimated that she had been at Mr. Smith's residence for forty-five minutes at the time everyone else left (RP 188).

After the other guests left Mr. Smith's apartment, Mr. Smith and Ms. Lagura went to his bedroom (RP 188-189). Ms. Lagura testified that Mr. Smith dragged her into the bedroom and wanted sex (RP 189). Ms. Lagura testified that she was hit on top of the head when she first went into the bedroom (RP 189). She had told Mr. Smith she did not want to have sex and wanted to go home. (RP 188-189). She thought she may have been hit with a gun (RP 189). Ms. Lagura then recalled Mr. Smith threw her on the bed and choked her again (RP 190). Ms. Lagura was struggling against Mr. Smith at that time (RP 241). Ms. Lagura remembers Mr. Smith telling her "to be quiet and just get this over with" (RP 190). Ms. Lagura testified that she lost consciousness during the third choking and regained consciousness when Mr. Smith punched her in the face (RP 191). Ms. Lagura testified that Mr. Smith next broke a beer bottle and cut her arm (RP 191). Ms. Lagura testified these incidents occurred before the sexual intercourse began (RP 192-193). Throughout the encounter Ms. Lagura recalls Mr. Smith

making threats to kill her (RP 192-193). Ms. Lagura believed Mr. Smith was going to kill her (RP 193).

Ms. Lagura testified Mr. Smith forced her to have sex against her will (RP 193). Ms. Lagura recalled Mr. Smith flinched a razor blade by her face during the sexual intercourse (RP 194-195). Ms. Lagura was fearful that Mr. Smith was going to cut her with the blade (RP 195). Ms. Lagura also recalled that Mr. Smith picked up a hammer during the sex act and flinched it on the other side of her head (RP 195). Ms. Lagura was struggling against Mr. Smith during the sex act (RP 196). Ms. Lagura believed that Mr. Smith used the razor blade to make her compliant during the sex act (RP 238).

Ms. Lagura also testified that Mr. Smith choked her while they were having sexual intercourse (RP 241). Ms. Lagura had been heavily drinking that night (RP 230). She estimated her intoxication level to be close to the highest level of intoxication at the time she was in Mr. Smith's bedroom (RP 231). Officer Smalley spoke with Ms. Lagura on the morning of March 17, 2005 (RP 58). Officer Smalley thought Ms. Lagura appeared to be under the influence of something (RP 62).

Ms. Lagura told Ms. Lewis, the sexual assault nurse examiner, that Mr. Smith tried to get her to orally touch his genitals and forced her to masturbate him (RP 72). Ms. Lagura had a blood alcohol level of .081 at the time Ms. Lewis examined her (RP 102).

Mr. Smith did not tell Mr. Harris that Ms. Lagura could not leave with him (RP 415). Mr. Smith did not threaten Mr. Harris (RP 416). Mr. Smith recalled taking Ms. Lagura to a "Seven-Eleven" store to get cash for their son (RP 113-114). Mr. Smith wanted to take Ms. Lagura home but she wanted to return to Mr. Smith's apartment (RP 414). Mr. Smith did not physically restraining Ms. Lagura from leaving his apartment (RP 420). Mr. Smith testified that the sexual intercourse was consensual (RP 427-428).

D. ARGUMENT

1. Under the United States and Washington State Constitutions, are double jeopardy provisions violated when proof of Rape in the First Degree established Assault in the Second Degree and the two counts of Assault in the Second Degree arose from the same continuous conduct? (Assignment of Error No. 1)

Claims of double jeopardy violations are claims of manifest constitutional errors that may be raised for the first time on appeal

State v. Turner, 102 Wn.App. 202, 206, 6 P.3d 1226 (2000). The claim of a double jeopardy violation is a question of law to be reviewed de novo. State v. Zumwalt, 119 Wn.App. 126, 129, 82 P.3d 672 (2003).

(A) The convictions for Rape in the First Degree and Assault in the Second Degree violated double jeopardy provisions of the Federal and Washington State Constitutions.

Multiple convictions for the same offense are prohibited by the double jeopardy clause. Brown v. Ohio, 432 U.S. 161, 165 97 S.Ct. 2221, 53 L.2d 187 (1977); North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), *overruled on other grounds*; Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). Under the Fifth Amendment to the United States Constitution:

Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

Under Article 1, Section 9 of the Washington State Constitution:

No person shall....be twice put in jeopardy for the same offense.

The Washington State Constitution double jeopardy clause prohibits the Courts from imposing more than one punishment for

the same offense. Brown v. Ohio, 432 U.S. at 166. The court may not enter multiple convictions for the same criminal offense on double jeopardy grounds. State v. Freeman, 153 Wn.2d 765, 770-771, 109 P.3d 753 (2005); State v. Vladovic, 99 Wn.2d 413, 422, 662 P.2d 853 (1983).

In analyzing a double jeopardy claim, the court is to examine whether the Legislature intended to impose multiple punishments for a course of conduct. Bell v. United States, 349 U.S. 81, 82-83, 75 S.Ct. 620, 99 L.Ed 905 (1955). In other words, did the Legislature intend to separately punish a rape which is elevated to first degree by virtue of an assault committed and the assault itself? If the Legislature's intent is unclear, the focus of inquiry moves to the same evidence test. State v. Freeman, 153 Wn.2d 765, 772, 108 P.3d 753 (2005). A violation of double jeopardy occurs if the defendant is convicted of offenses that are the same in law and fact. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998); State v. Calle, 125 Wn.2d 769, 88 P.2d 155 (1995). This requires examining the elements of the charged offenses to determine if the charged crimes have elements that differ from each other. State v. Gohl, 109 Wn.App. 817, 821, 37 P.3d (2001), *review denied*, 146

Wn.2d 1012 (2002); Blockburger v. United States, 248 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932)

The Rape in the First Degree statutes and Assault in the Second Degree statutes do not expressly allow multiple punishments for the separate crimes. RCW 9A.44.040; RCW 9A.36.021. Consequently, the court is to utilize the same evidence test in determining if the multiple convictions are appropriate. State v. Freeman, 153 Wn.2d 765, 772; State v. Calle, 125 Wn.2d at 777. Under this analysis the court is to examine the elements of the offenses as charged and proven. State v. Freeman, 153 Wn.2d at 777.

Crimes are the same in law if proof of one would always prove the other. State v. Calle, 125 Wn.2d at 777. Crimes are the same in fact if proved by the same evidence. Id. The factual test is also known as the same evidence test set forth in Blockburger v. United States, 248 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

In the case at hand, Mr. Smith was charged in Count One of the Information of the crime of Rape in the First Degree (CP 1).

The statutory definition of Rape in the First Degree is found in RCW 9A.44.040. That statute provides:

(1) A person is guilty of Rape in the First Degree when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory:

(a) Uses or threatens to use a deadly weapon or what appears to be a deadly weapon or what appears to be a deadly weapon; or

(c) Inflicts serious physical injury, including but not limited to physical injury which renders the victim unconscious;

RCW 9A.44.040(1)(a)(c).

Mr. Smith was charged with two counts of Assault in the Second Degree (CP 1). The charge of Assault in the Second Degree is defined in RCW 9A.36.021. The statute provides in part:

1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) assaults another with a deadly weapon.

RCW 9A.36.021

In this case the elements of the charges of rape and assault as charged and proven are identical. Both crimes required a

showing that serious physical injury occurred and/or assault occurred, as an element of the offense as charged and as established at trial. The convictions were proven by the same evidence.

Ms. Lagura testified to four deadly weapons in the bedroom where the rape took place. She also testified to various assaults occurring as part of the rape. First the strike on the head with what she believed was a gun, immediately upon entry into the bedroom (RP 189). Second, the broken beer bottle she was cut with accompanying threats to kill. (RP 191). Third, the razor blade flinched at her during the sex act (RP 194-195). Fourth, the hammer also flinched at her during the sex act (RP 195). The manner in which the case was charged and evidence was presented satisfies the same elements test. In this case Rape in the First Degree could not be proven unless an assault was also proven. Assault was a necessary component to the crimes of First Degree Rape and Second Degree Assault. Ms. Lagura testified of multiple deadly weapons used to compel the rape. Consequently, convictions for both assault and rape violate double jeopardy.

This case is analogous with the case of State v. Johnson, 92 Wn.2d 671, 600 P.2d 1249 (1979) (Johnson 1). In that case the defendant used a gun to threaten two teenage girls and to gain their submission. The defendant repeatedly raped the two girls. The court determined that the assaults were connected to the rape and had no independent purpose to the rape. State v. Johnson, 92 Wn.2d at 681. The court found that the legislature intended the punishment for Rape in the First Degree sufficient punishment for crimes incidental to the elements of the rape conviction and proven in aid of the conviction.

As in the State v. Johnson, supra, case, the assaults and rape could be proved by the same evidence. Ms. Lagura testified of multiple additional assaults that did not involve a deadly weapon and multiple assaults involving a deadly weapon (RP 181-189). This issue is especially compelling for the second charge of Assault in the Second Degree (Count III of the Information) (CP 1). The instrument or methodology utilized in the charged offense was not listed in either the Information or jury instruction (CP 1). As a result, the jury could have found the instrument in the Rape in the First Degree charge to be the same instrument used in the charges

of Assault in the Second Degree under the theory of recklessness set forth in the information. The assaults alleged by Ms. Lagura provided a basis for a finding of guilt on the rape and assault charges. The State necessarily proved the assault charges by the proof presented on the first degree rape. Consequently, the convictions for those charges violates double jeopardy provisions found in the Federal and Washington State Constitutions.

In this case the crimes of Rape and Assault are the same in law and in fact. Here the assaults occurred at the same time and place. As Ms. Lagura testified, the purpose of the assaults was to gain submission to allow the rape to occur (RP 191-196). Proof that an assault with a deadly weapon occurred was necessary for both the Assault in the Second Degree charge alleged in Count 2 of the Information and the Rape in the First Degree charge (CP 1). The assault related injuries amounting to Second Degree Assault were necessary to prove the rape conviction. The threats with a deadly weapon were necessary for an Assault in the Second Degree conviction as well as the Rape in the First Degree charge. The prosecution sought a conviction for Rape in the First Degree

based on the use of a deadly weapon which was also an allegation in the charges of Assault in the Second Degree in Count 2. (CP 1).

(B) The convictions for two counts of Assault in the Second Degree violated double jeopardy provisions of the United States and Washington Constitutions.

Alternatively, a double jeopardy violation arose out of the multiple convictions for Assault in the Second Degree. In determining if a double jeopardy violation occurs when a defendant is convicted of a single statute several times, the court is to determine what unit of prosecution is the punishable act under the statute. State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998); State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999).

In this case Mr. Smith was twice punished for the same offense. Specifically, two counts of Assault in the Second Degree.

Double jeopardy protects against two convictions for committing one unit of the crime. State v. Adel, 136 Wn.2d at 634. If the unit of prosecution is unclear in the statute, any ambiguity should be resolved in favor of lenity. State v. Adel, 136 Wn.2d at 634-35; Bell v. United States, 349 U.S. 81, 84, 75 S.Ct. 620, 99 L.Ed. 905 (1955).

Under common law many different acts may constitute assault. The Legislature has not defined the unit of prosecution. It is not clear that the assault alleged in Count Three is an independent unit of prosecution. Ms. Lagura described a chain of events where Mr. Smith established power and control over her which ultimately resulted in a rape (RP 181-196). The multiple assaults were incidental to the rape and transpired with the ultimate purpose of accomplishing the rape. Mr. Lagura testified that Mr. Smith made clear to her that he was going to have sex with her despite her request to leave (RP 188-195). The assaults should be considered as one unit of prosecution. Consequently, the conviction for two counts of Assault in the Second Degree violated Mr. Smith's right against double jeopardy.

2. Under Washington State law, does a trial court commit error in entering convictions for two counts of Assault in the Second Degree and of Rape in the First Degree when the convictions merge? (Assignment of Error No. 2)

If the court disagrees with double jeopardy violation described above, the court should consider whether the assault and rape convictions should have merged as one offense.

The sentencing court's calculation of an offender score is reviewed de novo. State v. McCraw, 127 Wn.2d 281, 289, 898 P.2d 838 (1995). Illegal or erroneous sentences may be raised for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). RCW 9.94A.589(1)(a) provides that when a defendant is sentenced for two or more current offenses, the offender score for each concurrent conviction is determined by using the other current convictions as if they were prior convictions. RCW 9.94A.589(1)(a) However, in the event the court determined that all or some of the current offenses encompass same criminal conduct, then the current offenses should be counted as one. RCW 9.94A.589(1)(a). The merger doctrine applies when a defendant is convicted of multiple charges for which the Legislature intended to impose one punishment. State v. Sweet, 138 Wn.2d 466, 478, 980 P.2d 1223 (1999). The merger doctrine applies when a crime is elevated to a higher degree by proof of another crime. State v. Eaton, 82 Wn.App. 723, 730, 919 P.2d 116 (1996), *overruled on other grounds by State v. Frohs*, 83 Wn.App. 803, 811, 924 P.2d 384 (1996). Assault has been recognized as a necessary element to a First Degree Rape conviction. In Re

Personal Restraint of Fletcher, 113 Wn.2d 42, 51, 776 P.2d 114 (1989); State v. Vladovic, 99 Wn.2d 413, 419, 662 P.2d 853 (1983); State v. Johnson I, 92 Wn.2d 671, 678, 681, 600 P.2d 1249 (1979); State v. Eaton, 82 Wn.App. At 730.

In the State v. Johnson, *supra*, case the court held that the assault and kidnaping convictions merged with the rape conviction because the Legislature intended that the punishment for Rape in the First Degree would suffice. Since proof of the assault and kidnaping were necessary elements to the charge of Rape in the First Degree. The court determined striking the assault and kidnaping convictions was the appropriate remedy. State v. Johnson, 92 Wn.2d at 682.

Merger of the assault and rape convictions is appropriate following the guidelines for analysis for the issue described in State v. Johnson, 92 Wn.2d at 681. In that case the assault and kidnaping were merged into the rape because: 1) they occurred at the same time and place, 2) the purpose of the kidnaping and assault was to compel the submission to the rape and 3) the crimes resulted in no independent injury. *Id.* The application of these tests demonstrate that merger is appropriate in this case.

Ms. Lagura testified that the assaults and rape occurred at the same time and place; (RP 191-196) the purpose of the assaults were to compel the rape as previously argued, and the injuries were incidental to the rape as previously argued.

In this case the State needed to prove both that rape occurred and an assault occurred. The assault necessarily elevated the charge to Rape in the First Degree. Ms. Lagura testified as to assaults which had the same purpose to establish domination and submission for the rape. Consequently, the assaults were incidental to the rape. The testimony of Ms. Lagura established the use of physical force to gain her submission (RP 191-196). The assaults were committed for the purpose of establishing power and control and ultimately for accomplishing the rape. Since assault charges merged with the rape charge, the court should remand this case for the trial court to merge the offenses and re-sentence Mr. Smith accordingly.

3. Under Washington State law, does a trial court commit error by failing to sentence two counts of Assault in the Second Degree and Rape in the First Degree together as same criminal conduct when the offenses were committed at the same

time and place, involved the same victim and involved the same criminal intent? (Assignment of Error No. 3)

The sentencing court's calculation of an offender score is reviewed de novo. State of McCraw, supra. An illegal or erroneous sentence may be raised for the first time on appeal. State v. Ford, supra. Multiple crimes are considered to be the same criminal conduct if the offenses require the same criminal intent, committed at the same time, and involve the same victim. RCW 9.94A.589(1)(a). Crimes committed during a short period of time to the same victim may constitute same criminal conduct. State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). The issue of intent is to be examined to determine if the criminal intent changed from one crime to the next. State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). Offenses occurring in a close time frame with an unchanging pattern of conduct suggests that it is unlikely that the defendant formed independent criminal intent between each charged offense. State v. Tili, 139 Wn.2d at 124. Similar intent may be found when one crime furthered another or were a part of a scheme or plan. State v. Israel, 113 Wn.App. 243, 295, 54 P.3d 1218 (2002).

In the case of State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999), the court determined that multiple rapes encompassed the same criminal conduct and should have been counted as one crime for offender score purposes. Id., at 124-125. In that case the defendant was charged with three counts of rape. The defendant was charged with anal and vaginal penetration with fingers and vaginal penetration with the penis immediately following. The court concluded that the offenses occurred almost simultaneously in time and were committed with the same criminal intent. Id. at 123. Same criminal conduct was found in the case of State v. Palmer, 95 Wn.App. 187, 975 P.2d 1038 (1999). The court found that the offenses were “continuous and patterned”. State v. Palmer, 95 Wn.App. at 192.

Remand is necessary for a recalculation of the offender score unless record clearly indicates that the trial court would impose the same sentence. State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1995).

In this case two of the three tests are obviously met. The alleged assaults and rape occurred at the same time and involved the same victim. Ms. Lagura testified that approximately forty-five

minutes elapsed between the time she arrived at Mr. Smith's apartment and the start of the assaults in Mr. Smith's bedroom. The assaults Ms. Lagura described occurring in the bedroom: hit on the head, breaking of the beer bottle, flinching with the razor blade, flinching with the hammer happened consecutively, one after the other (RP 191-196).

As to the third test, the criminal intent for the charges of rape and assault was the same. Ms. Lagura testified that she felt that the assaults were done to gain her submission to allow the sexual assault (RP 188-189). Ms. Lagura testified the assaults were combined with threats and comments such as, "be quiet and this will be over" (RP 190). The facts of this case show that the assaults were committed in furtherance of the rape. Consequently, the crimes encompass same criminal conduct. This case should be remanded back to the trial court for re-sentencing.

4. Under Washington State law, does a trial court commit error by failing to instruct a jury of the requirement for an unanimous finding on a specific act? (Assignment of Error No. 4)

In the event evidence is presented of multiple acts upon which a conviction may be based upon, the State must either elect

the act upon which it is relying on for a conviction or the jury must be instructed that the jury must unanimously agree that the same criminal act has been proven beyond a reasonable doubt. State v. Petrich, 101 Wn.2d at 572.

The jury must conclude beyond a reasonable doubt that the criminal act charged in the Information was committed to sustain a conviction. State v. Petrich, 101 Wn.2d 566, 685 P.2d 173 (1984), *citing* State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). The prosecution must prove each element of a charged offense beyond a reasonable doubt. U.S. Const. 14th Amendment; In Re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed 368; State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The jury must make an unanimous finding as to which particular act constituted a crime. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). The jury is to find separate and distinct acts for each count. State v. Hayes, 81 Wn.App. 425, 914 P.2d 788 (1996), *citing* State v. Noltie, 116 Wn.2d 831, 842-43, 809 P.2d 190 (1991). Failure to properly instruct the jury on necessity of a unanimous finding violates a defendant's constitutional right to an unanimous verdict

and right to a jury trial under the United States Constitution. State v. Kitchen, 110 Wn.2d at 409.

A manifest constitutional error occurs when a jury is not properly instructed on the unanimity requirement. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991). The defendant may raise such an error for the first time on appeal. Id. An alleged Petrich instruction error is of constitution magnitude which may be raised for the first time on appeal. State v. Holland, 77 Wn.App. 420, 424, 891 P.2d 49, *review denied*, 127 Wn.2d 1008, 898 P.2d 308 (1995). Reversal is required if the reviewing court cannot conclude that all jurors agreed on the same act to support convictions on each count. State v. Holland, 77 Wn.App. at 425.

The case of State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984) requires a specific instruction be given when a defendant is charged with only one count of criminal conduct but the evidence indicates several distinct similar criminal acts were committed. Id. If the prosecution declines to elect a specific act as a basis for the charge, a jury instruction to assure the jury's understanding of the requirement of unanimity is required. State v. Petrich, 101 Wn.2d at 572. A defendant may be convicted of a crime only when the

jury unanimously determines the crime alleged in the information was committed. State v. Petrich, 101 Wn.2d at 569.

The need for the Petrich instruction is determined with a three part test. The first test is to determine what must be proven under the statute governing the crime alleged. State v. Hanson, 59 Wn.App. 651, 800 P.2d 1124 (1990). The instruction is appropriate when the crime charged requires proof of a single act rather than a continuing course of conduct. Id.

The second part of the test is to examine what the evidence disclosed. The evidence should be viewed in light most favorable to the party proposing the instruction. Seattle v. Cadigan, 55 Wn.App. 30,37, 776 P.2d 727 (1989).

Finally, the court must determine if the evidence demonstrates more than one violation of the statute. State v. Hanson, supra.

The appellant has argued previously in this brief that the court should determine that the evidence presented at trial showed a continuous course of conduct and therefore the multiple charges violated double jeopardy principles. If the court chooses to reject the argument, the court should determine that the assaults

described were separate incidents which requires the Petrich instruction to be provided to the jury as described above.

In this case Ms. Lagura testified that Mr. Smith assaulted her multiple times during the evening (RP 181-189). WPIC 4.25 should have been given. (The Petrich instruction)

The “to convict” jury instructions failed to describe which assault presented at trial could be the basis for the conviction (CP 16). It is impossible to determine which of the many assaults presented at trial the jury. In applying the three part test as outlined in the State v. Petrich, supra, it is apparent that a Petrich instruction should have been given. First, the crimes of rape and assault require proof that an assault occurred. Both crimes alleged assault and required proof of one act. Either the infliction of serious bodily harm or use of a deadly weapon. Secondly, the evidence disclosed that multiple assaults may have occurred. Ms. Lagura testified that multiple assaults occurred as previously described in this brief (RP 181-189). Ms. Lewis also testified that Ms. Lagura told her of two other incidents which could be construed as an assault without a deadly weapon (RP 72). Thirdly, the evidence demonstrated more than one possible violation of assault, both with and without

deadly weapons, as previously argued in this brief. The test outlined in State v. Petrich, *supra*, was satisfied in this case.

The “to convict” jury instruction for Assault in the Second Degree failed to instruct the jury to unanimously find that one alleged assault was the basis for the conviction (CP 16). Although the Special Verdict Form indicates that the jury was to determine that Mr. Smith was armed with a beer bottle for deadly weapon enhancement purposes the “to convict” instruction was faulty (CP 16). The beer bottle is absent from the “to convict” instruction (CP 16). The jury was not instructed to unanimously find that Mr. Smith used a beer bottle to commit the crime of Assault in the Second Degree. The failure to provide such an instruction violated Mr. Smith’s right to an unanimous jury trial. Mr. Smith should be granted a new trial.

The failure to give a Petrich instruction in regards to the second charge of Assault in the Second Degree is even more problematic. The “to convict” instruction required the jury to find that Mr. Smith recklessly inflicted bodily harm (CP 16). The instruction lacked any reference to which of the many assaults that resulted in significant bodily harm was to be unanimous basis for

the conviction. Ms. Lagura testified that she was choked repeatedly, cut with a beer bottle and hit on the head (RP 181-189). Any of which could have been the basis for a conviction. This case is complicated due to the many assaults described by witnesses. Consequently, the failure of the court to provide a Petrich instruction was improper and deprived Mr. Smith of the right to an unanimous jury trial. Mr. Smith should be given a new trial as the result of the error.

5. Did Mr. Smith's trial counsel's failure to object to inadmissible hearsay or request a Petrich jury instruction deprive Mr. Smith of his right to effective assistance of counsel?
(Assignment of Error No. 5)

In all criminal prosecutions, a defendant has the right to assistance of counsel. U.S. Const. Amend VI; Wash. Const. Article I, Sec. 22. A defendant has the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) Claims of ineffective assistance of counsel require a showing that the performance of counsel fell below an objective standard of reasonableness and the appellant was prejudiced as a result of the deficient performance. Strickland

v. Washington, 466 U.S. 668, 678, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice is established if within a reasonable probability the outcome of the proceedings would have been different if counsel's error had not occurred. State v. McFarland, 127 Wn.2d 322, 3340-34, 899 P.2d 1251 (1995). Additionally, the appellant must show that the challenged conduct had no strategic or tactical purpose. State v. McFarland, 127 Wn.2d at 336; State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

Hearsay is defined as:

A statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.

ER 801

Hearsay is not admissible except as provided for by these rules, by other court rules, or by statute.

ER 802

In the case at hand, multiple hearsay statements were introduced to the jury. The statements were made without objection by defense counsel. The failure to object to the hearsay was ineffective assistance of counsel. Counsel's failure to object

was both conduct below a reasonable standard and prejudicial to Mr. Smith.

(A) Ms. Lagura's statement.

Ms. Lagura testified as follows:

Q: Do you have any idea whether Mr. Smith asked him to leave?

A: When I talked to him the next day, he said he told him to leave, that he'd bring me home.

(RP 186)

At this point in the testimony Ms. Lagura testified as to what Mr. Harris told her in repeating a conversation between himself and Mr. Smith. This statement is double hearsay as Ms. Lagura is repeating statements made to her by Mr. Harris who was telling her of a statement made by Mr. Harris. Trial counsel did not object. The statement resulted in prejudice to Mr. Smith. Mr. Smith denied telling Mr. Harris to leave (RP 415). The introduction of the inadmissible statement provided a basis for the jury to determine that Mr. Smith committed the crime of unlawful imprisonment. It is impossible to say that the jury did not use that statement to convict Mr. Smith of that crime. No possible trial tactic or strategy suggested that admission of the statement was proper.

(B) Statement made by Ms. Austin.

Ms. Austin testified as follows:

A: She just went down on the floor and sit there for a little bit. Then I asked her what's wrong with her. She goes, "I got raped."

(RP 251)

Q: Who did she say raped her?

A: Richard Smith.

(RP 251)

The above statements were hearsay. Ms. Austin was repeating statements attributed to Ms. Lagura. Trial counsel did not object to the testimony. The statement prejudiced Mr. Smith. Mr. Smith testified that the sexual intercourse was consensual (RP 427-428). This statement provided corroboration of Ms. Lagura's testimony indicating that the sex was not consensual. This statement also allowed the jury to hear another person testify that Ms. Lagura was raped. It is impossible to determine whether the jury used this otherwise inadmissible statement to convict Mr. Smith of rape. No trial tactic or strategy suggested that admission of the statement was proper.

(C) Statement of Mr. Harris.

Mr. Harris recited conversations he had with Ms. Lagura. He testified as follows:

And she said that he said if she left with me he was going to do something to me, or her, or both of us.

(RP 348)

The above statement was hearsay. Counsel did not object. The ineffective assistance of counsel resulted in prejudice to Ms. Smith. There was no possible trial strategy or tactic that suggested the admission of the hearsay was proper. Again, Mr. Smith testified that no such threats were made or that he prevented Ms. Lagura from leaving (RP 415). The admission of the otherwise inadmissible statement bolstered Ms. Lagura's credibility by corroborating her statement and provided a basis for determining Mr. Smith's guilt on the charge of unlawful imprisonment. It is impossible to determine that the jury did not use the statement to convict Mr. Smith. Trial counsel's repeated failure to object to inadmissible hearsay statements deprived Mr. Smith of effective assistance of counsel.

E. CONCLUSION

Mr. Smith should be granted a new trial to remedy the multiple violations of his constitutional rights that occurred throughout the trial. The convictions for assault violated double jeopardy provisions of the Federal and Washington State Constitutions. Furthermore, the convictions for assault should have merged with the conviction for rape. This Court should remand this case to the trial court with instructions to dismiss the assault charges and the deadly weapon enhancement based on one of the assault convictions. At a very minimum, this Court should remand this case for re-sentencing since the assaults and rape occurred out of the same criminal conduct.

Respectfully submitted this 1st day of June, 2006.



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ATTACHMENT F-1

JURY INSTRUCTION NO. 10

ATTACHMENT F-1

INSTRUCTION NO. 10

To convict the defendant of the crime of rape in the first degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 17th day of March, 2005, the defendant engaged in sexual intercourse with P.L.;
- (2) That the sexual intercourse was by forcible compulsion;
- (3) That the defendant used or threatened to use a deadly weapon or what appears to be a deadly weapon or inflicted serious physical injury; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

ATTACHMENT F-2

JURY INSTRUCTION NO. 14

ATTACHMENT F-2

INSTRUCTION NO. 14

To convict the defendant of the crime of assault in the second degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 17th day of March, 2005, the defendant assaulted P.L. with a deadly weapon; and

(2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

ATTACHMENT F-3

JURY INSTRUCTION NO. 15

ATTACHMENT F-3
INSTRUCTION NO. 15

To convict the defendant of the crime of assault in the second degree as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 17th day of March, 2005, the defendant intentionally assaulted P.L.;
- (2) That the defendant thereby recklessly inflicted substantial bodily harm on P.L.; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

ATTACHMENT F-4

RCW 9.94A.589

RCW 9.94A.589

ATTACHMENT F-4**Consecutive or concurrent sentences.**

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

(b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

(c) If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

(2)(a) Except as provided in (b) of this subsection, whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.

(b) Whenever a second or later felony conviction results in community supervision with conditions not currently in effect, under the prior sentence or sentences of community supervision the court may require that the conditions of community supervision contained in the second or later sentence begin during the immediate term of community supervision and continue throughout the duration of the consecutive term of community supervision.

(3) Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

(4) Whenever any person granted probation under RCW 9.95.210 or 9.92.060, or both, has the probationary sentence revoked and a prison sentence imposed, that sentence shall run consecutively to any sentence imposed pursuant to this chapter, unless the court pronouncing the subsequent sentence expressly orders that they be served concurrently.

(5) In the case of consecutive sentences, all periods of total confinement shall be served before any partial confinement, community restitution, community supervision, or any other requirement or conditions of any of the sentences. Except for exceptional sentences as authorized under RCW 9.94A.535, if two or more sentences that run consecutively include periods of community supervision, the aggregate of the community supervision period shall not exceed twenty-four months.

[2002 c 175 § 7; 2000 c 28 § 14; 1999 c 352 § 11; 1998 c 235 § 2; 1996 c 199 § 3; 1995 c 167 § 2; 1990 c 3 § 704. Prior: 1988 c 157 § 5; 1988 c 143 § 24; 1987 c 456 § 5; 1986 c 257 § 28; 1984 c 209 § 25; 1983 c 115 § 11. Formerly RCW 9.94A.400.]

NOTES:

Effective date -- 2002 c 175: See note following RCW 7.80.130.

Technical correction bill -- 2000 c 28: See note following RCW 9.94A.015.

Severability -- 1996 c 199: See note following RCW 9.94A.505.

Index, part headings not law -- Severability -- Effective dates -- Application -- 1990 c 3: See RCW 18.155.900 through 18.155.902.

Application -- 1988 c 157: See note following RCW 9.94A.030.

Applicability -- 1988 c 143 §§ 21-24: See note following RCW 9.94A.505.

Severability -- 1986 c 257: See note following RCW 9A.56.010.

Effective date -- 1986 c 257 §§ 17-35: See note following RCW 9.94A.030.

Effective dates -- 1984 c 209: See note following RCW 9.94A.030.

ATTACHMENT F-5

RCW 9A.36.021

ATTACHMENT F-5**RCW 9A.36.021****Assault in the second degree.**

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture.

(2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.

(b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.

[2003 c 53 § 64; 2001 2nd sp.s. c 12 § 355; 1997 c 196 § 2. Prior: 1988 c 266 § 2; 1988 c 206 § 916; 1988 c 158 § 2; 1987 c 324 § 2; 1986 c 257 § 5.]

NOTES:

Intent -- Effective date -- 2003 c 53: See notes following RCW 2.48.180.

Intent -- Severability -- Effective dates -- 2001 2nd sp.s. c 12: See notes following RCW 71.09.250.

Application -- 2001 2nd sp.s. c 12 §§ 301-363: See note following RCW 9.94A.030.

Effective date -- 1988 c 266: "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1988." [1988 c 266 § 3.]

Effective date -- 1988 c 206 §§ 916, 917: "Sections 916 and 917 of this act shall take effect July 1, 1988." [1988 c 206 § 922.]

Severability -- 1988 c 206: See RCW 70.24.900.

Effective date -- 1988 c 158: See note following RCW 9A.04.110.

Effective date -- 1987 c 324: See note following RCW 9A.04.110.

Severability -- 1986 c 257: See note following RCW [9A.56.010](#).

Effective date -- 1986 c 257 §§ 3-10: See note following RCW [9A.04.110](#).

ATTACHMENT F-6

RCW 9A.44.040

RCW 9A.44.040
Rape in the first degree.

ATTACHMENT F-6

(1) A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory:

(a) Uses or threatens to use a deadly weapon or what appears to be a deadly weapon; or

(b) Kidnaps the victim; or

(c) Inflicts serious physical injury, including but not limited to physical injury which renders the victim unconscious; or

(d) Feloniously enters into the building or vehicle where the victim is situated.

(2) Rape in the first degree is a class A felony.

[1998 c 242 § 1. Prior: 1983 c 118 § 1; 1983 c 73 § 1; 1982 c 192 § 11; 1982 c 10 § 3; prior: (1) 1981 c 137 § 36; 1979 ex.s. c 244 § 1; 1975 1st ex.s. c 247 § 1; 1975 1st ex.s. c 14 § 4. (2) 1981 c 136 § 57 repealed by 1982 c 10 § 18. Formerly RCW 9.79.170.]

NOTES:

Severability -- 1983 c 73: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1983 c 73 § 2.]

Severability -- 1982 c 10: See note following RCW 6.13.080.

Severability -- 1981 c 137: See RCW 9.94A.910.

Effective date -- 1981 c 136: See RCW 72.09.900.

CERTIFICATE OF MAILING

I, JEANNE L. HOSKINSON, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day I had the Brief of the Appellant in the above-captioned case hand-delivered or mailed as follows:

Original Brief of the Appellant Mailed To:

Clerk of Court
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

Copy of Brief of the Appellant Hand-Delivered To:

Mr. Randall Sutton
Kitsap County Prosecuting Attorney's Office
614 Division Street, MS-35
Port Orchard, WA 98366

Copy of Brief of the Appellant Mailed To:

Richard D. Smith / DOC #838876
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Shelton, WA 98584

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STATE OF WASHINGTON
BY

DATED this 2nd day of June, 2006, at Port Orchard, Washington.

Jeanne L. Hoskinson
JEANNE L. HOSKINSON
Legal Assistant