

No. 35719-4-II

COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent

vs.

PAUL V. JOHNS, JR.,

Appellant.

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STATE OF WASHINGTON  
BY \_\_\_\_\_ DEPT. OF JUSTICE  
COURT OF APPEALS  
DIVISION II

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BRIEF OF APPELLANT

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APPEAL FROM THE SUPERIOR COURT FOR  
THURSTON COUNTY

The Honorable Richard Strophy, Judge

Cause No. 06-1-00971-5

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*P. M. 8/24/07*

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in permitting Johns to be represented by counsel who provided ineffective assistance by failing to request special interrogatories after the jury returned its verdict on Count I to determine whether the jury found felony murder and, if so, in failing to argue that double jeopardy principles barred Johns's convictions for kidnapping and/or robbery (Counts II and III).
2. The trial court erred in not dismissing Johns's conviction for robbery (Count III) where the robbery was incidental to, a part of, or coexistent with his conviction for kidnapping (Count II).
3. The trial court erred in permitting Johns to be represented by counsel who provided ineffective assistance in failing to argue that double jeopardy barred his conviction for robbery (Count III) where he was also convicted of kidnapping (Count II).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in permitting Johns to be represented by counsel who provided ineffective assistance by failing to request special interrogatories after the jury returned its verdict on Count I to determine whether the jury found felony murder and, if so, in failing to argue that double jeopardy principles barred Johns's convictions for kidnapping and/or robbery (Counts II and III)? [Assignment of Error No. 1].
2. Whether the trial court erred in not dismissing Johns's conviction for robbery (Count III) where the robbery was incidental to, a part of, or coexistent with his conviction for kidnapping (Count II)? [Assignment of Error No. 2].

3. Whether the trial court erred in permitting Johns to be represented by counsel who provided ineffective assistance in failing to argue that double jeopardy barred his conviction for robbery (Count III) where he was also convicted of kidnapping (Count II)? [Assignment of Error No. 3].

C. STATEMENT OF THE CASE

1. Procedure

Paul V. Johns, Jr. (Johns) was charged by third amended information filed in Thurston County Superior Court as a principal or an accomplice to James C. Faircloth, Jr. (Faircloth) with one count of murder in the first degree based on the premeditated intent to cause death and/or in the alternative based on first degree felony murder the predicate crimes being either robbery or kidnapping (Count I), one count of kidnapping in the first degree (Count II), one count of robbery in the first degree (Count III), and one count of unlawful possession of a firearm in the first degree (Count IV). [CP 13-14]. Counts I-III also included a sentence enhancement allegation that the crimes were committed while armed with a firearm. [CP 13-14].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard. However prior to trial, Johns made several motions in limine, which were all granted. [CP 15-17; RP 3-6]. The exception being a motion for severance of defendants based on the potential that the State would

introduce statements by Faircloth in violation of Bruton and/or Crawford, which the court denied based on the State's assurance that it would not introduce any such statements. [RP 3-6]. The motion to sever defendants was never renewed. Johns was tried by a jury, the Honorable Richard Strophy presiding. Johns stipulated to having a prior serious conviction related to Count IV, unlawful possession of a firearm in the first degree. [CP 45]. Neither Johns nor Faircloth testified at trial.

No objections or exceptions to the court's instructions were made on the record. [CP 54-121]. As to Count I, murder in the first degree charged in the alternative of premeditated intentional murder or felony murder based on the predicate felonies of kidnapping or robbery, the court gave a unanimity instruction requiring the jury to be unanimous upon which alternative the finding of guilt was based. [CP 73-74]. The only special verdicts submitted to the jury involved the sentence enhancement allegations as to Counts I-III. [CP 46-48]. The jury found Johns guilty as charged on all four counts and entered special verdicts on Counts I-III that Johns was armed with a firearm during the commission of these crimes. [CP 46-48, 126-129; RP 1366-1371]. After the jury returned its verdicts, Johns did not ask for special interrogatories to be submitted to the jury regarding whether the murder conviction in Count I was based on a premeditated intentional act or based on felony murder and, if so, as to

which underlying felony (kidnapping and/or robbery) the verdict was based.

The court then sentenced Johns to standard range sentences of 548 months on Count I, 68-months on Count II, 171-months on Count II, and 116 months on Count IV with all sentences running concurrently for a total sentence of 796-months (548-months plus 180-months for the three 60-months firearm enhancements on Counts I-III). [CP 138-148; 12-27-06 RP 19-29]. Johns agreed to the State's calculation of his sentencing ranges. [CP 130-137; 12-27-06 RP 16].

A timely notice of appeal was filed on December 27, 2006. [CP 149]. This appeal follows.

2. Facts

On April 13<sup>th</sup> the Thursday before Easter in 2006, Johns and Cami Fennel (Cami) after picking up Johns's cousin, Robbie Jordan (Robbie) and his friend Travis Merriott (Travis) went to Faircloth's home. [RP 77-78, 256-257, 369, 558]. At Faircloth's home, they saw Faircloth and a pregnant Chene Lumsden (Chene), the latter of whom was resting in a back bedroom of the home. [RP 80]. They began socializing and using drugs. [RP 134-135, 266, 371, 561]. At some point, Lynn Sobey (Sobey) arrived to take a shower. [RP 81, 265-271, 372-376, 563]. Thereafter while joking around Sobey's hands were zip tied together, and eventually

cut off after Johns had gone through Sobey's purse. [RP 84-96, 275, 563-588]. At this point, Faircloth joined the party and as part of a "family meeting" accused Sobey of stealing his watch. [RP 84, 87-89, 273-277, 376, 379, 563-587]. Sobey became upset and shoved Faircloth. [RP 90-91, 277-285, 381-408, 563-588]. Faircloth dragged her into the bathroom where he continued the confrontation and pistol whipped her with a gun causing Sobey to bleed, which Sobey stopped by holding a rag to her head. [RP 90-91, 106-107, 285-302, 381-408]. Faircloth began raging and demand that Sobey be taken care of and removed from his home. [RP 89-90, 285-312, 391, 381-408, 563-588]. Faircloth gave Johns the gun and Cami emptied the trunk of her car. [RP 108-110, 117, 122, 131-132, 136-138, 285-302, 381-408, 563-588]. Sobey was again zip tied, and Johns and Robbie walked her out of Faircloth's home driving off in Cami's car. [RP 93-94, 107, 120-122, 124-125, 131, 285-302, 308-408, 563-588].

Robbie testified, after being given deal, that Sobey was placed in the backseat of Cami's car and a hood was placed over her head. [RP 588-608]. John's then drove off in Cami's car to a Weyerhaeuser logging road where the three of them walked to a remote part of the woods. [RP 588-608]. At this point, Johns told Robbie to take Sobey's jewelry and purse. [RP 588-608]. Johns then let Sobey have "last cigarette" and walked her

further into the woods. [RP 588-608]. Robbie then heard a shot and only Johns returned from the woods. [RP 588-608]. While Johns had been gone, Robbie received text messages from, he assumed Faircloth, to get rid of the clothes but bring back the bloody rag. [RP 623-624]. When Johns returned, he admitted that he had to fire two shots as the first had jammed. [RP 608-613]. The two then drove off with Johns giving Robbie the gun to hold while he sorted through the jewelry taken from Sobey then telling Robbie to throw Sobey's purse and other items out of the car. [RP 613-620].

The two returned to Faircloth's home. [RP 139-140, 303, 420]. The next day, Johns and Cami took Robbie and Travis home. [RP 145-146, 164-166]. Thereafter, Johns and Cami went to Robert "Mad Dog" Johnson's home where Johns was seen cleaning a gun and melting down jewelry. [RP 146-149, 925-931]. The gun Johns had was eventually given to James "Scooter" Scroggins, who turned it over to the police. [RP 153-155]. Sobey was never seen after April 13<sup>th</sup> despite several people looking for her after this time. [RP 40-45, 735, 851-856].

Robbie, eventually, was contacted by the police and led them to the location of Sobey's body and the items he claimed he was told by Johns to throw out of the car. [RP 711-717, 964-985, 1035-1061, 1151-1157]. Both Johns and Faircloth were interviewed by the police and

denied any involvement in Sobey's death. [RP 940-953, 1099-1114, 1136-1149]. Johns eventually told the police that Robbie had committed the crime and that he had nothing to do with it. [RP 940-953].

The gun recovered from Scroggins, which had been given to him by Johns after April 13<sup>th</sup>, was tested by the Washington State Patrol Crime Lab and determined to be operable and capable of firing the bullet recovered from Sobey's body. [RP 719-722, 742-750, 901-911]. However, it could not be conclusively established that the bullet found in Sobey's body was fired by the gun Johns had given to Scroggins. [RP 901-911].

Dr. Emanuel Lacsina, the medical examiner conducting the autopsy on Sobey, concluded that Sobey died from a gunshot wound to her head. [RP 1012, 1020]. He testified that it was not impossible that she had committed suicide, but given the forensic evidence, suicide was an unlikely cause of death. [RP 1024-1029].

Neal Haskell, a forensic entomology consultant, testified based on the maggot and insect development on Sobey's body at the time of its discovery that the probable date of death was around April 14, 2006. [RP 503, 534].

D. ARGUMENT

- (1) JOHNS WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S INEFFECTIVE ASSISTANCE IN FAILING TO REQUEST SPECIAL INTERROGATORIES AFTER THE JURY RETURNED ITS VERDICTS REGARDING WHETHER HIS CONVICTION FOR MURDER IN THE FIRST DEGREE (COUNT I) WAS BASED ON A PREMEDITATED INTENTIONAL ACT OR FELONY MURDER WITH THE PREDICATE FELONIES BEING KIDNAPPING AND/OR ROBBERY, DESPITE THE GIVING OF A UNANIMITY INSTRUCTION, WHERE JOHNS WAS ALSO CONVICTED OF KIDNAPPING AND ROBBERY (COUNTS II AND III) WHICH CONVICTIONS VIOLATE DOUBLE JEOPARDY IF HIS MURDER CONVICTION WAS BASED ON FELONY MURDER.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both

prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

a. Overview Of What Occurred.

Johns was charged in Count I with murder in the first degree under the alternatives of premeditated intentional murder or felony murder based on the predicate felonies of kidnapping or robbery, the court gave a unanimity instruction requiring the jury to be unanimous upon which alternative the finding of guilt was based. [CP 13-14, 73-74]. Johns was also charged with kidnapping (Count II) and robbery (Count III). [CP 13-14]. The only special verdicts submitted to the jury involved the sentence enhancement allegations as to Counts I-III. [CP 46-48]. The jury found Johns guilty as charged of all three of these counts as well as an additional count of unlawful possession of a firearm (Count IV) and entered special verdicts on Counts I-III that Johns was armed with a firearm during the commission of these crimes. [CP 46-48, 126-129; RP 1366-1371]. After the jury returned its verdicts, Johns did not ask for special interrogatories to be submitted to the jury regarding whether the murder conviction in Count I was based on a premeditated intentional act or based on felony murder and, if so, as to which underlying felony (kidnapping and/or robbery) the verdict was based. It was incumbent for Johns's counsel to do so because had he done so and the jury answered the special

interrogatories that the murder was felony murder based on kidnapping and/or robbery then double jeopardy would have barred his convictions for kidnapping (Count II) and/or robbery (Count III).

- b. Johns May Not Be Convicted Of Kidnapping (Count II) And Robbery (Count III) Where These Crimes May Have Been Incidental To, Part Of, Or Co-Existent With His Conviction Of Felony Murder (Count I).

Courts Article 1, section 9 of the Washington State Constitution and the Fifth Amendment to the United States Constitution provide that no person should twice be put in jeopardy for the same offense. Double jeopardy may be violated by multiple convictions even if the sentences are concurrent. State v. Calle, 125 Wn.2d 769, 775, 888 P.2d 155 (1995). A double jeopardy argument may be raised for the first time on appeal because it is a manifest error affecting a constitutional right. State v. Turner, 102 Wn. App. 202, 206, 6 P.3d 1226, *reviewed denied*, 143 Wn.2d 1009 (2001) (*citing* RAP 2.5(a) and State v. Adel, 136 Wn.2d 629, 631, 965 P.2d 1072 (1998)). The issue is whether the Legislature intended to authorize multiple punishments for criminal conduct that violates more than one criminal statute. State v. Calle, 125 Wn.2d at 772.

A three-prong test is applied to determine legislative intent. First, multiple convictions constitute double jeopardy even if the offenses “clearly involve different legal elements, if there is clear evidence that the

Legislature intended to impose only a single punishment.” In the Matter of Personal Restraint of Anthony C. Burchfield, 111 Wn. App. 892, 897, 46 P.3d 840 (2002) (*citing* State v. Calle, 125 Wn.2d at 780). Because the Legislature is free to define crimes and fix punishments as it will, “the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.” Brown v. Ohio, 432 U.S. 161, 165, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977).

Here, neither the murder in the first degree nor the kidnapping in the first degree nor the robbery in the first degree statutes contain specific language authorizing separate punishments for the same conduct. RCW 9A.32.030; RCW 9A.40.020; RCW 9A.56.200. The offenses at issue here are thus not automatically immune from double jeopardy analysis. In re Burchfield, 111 Wn. App. at 896.

Second, when, as here, the Legislature has not expressly authorized multiple punishments for the same act, this court applies the “same evidence test,” which asks “whether each offense has an element not contained in the other.” *Id.* The statute under which Johns was convicted of murder in the first degree requires a death. RCW 9A.32.030. The kidnapping in the first degree statute requires an abduction. RCW 9A.40.020. The robbery statute requires the taking of property. RCW 9A.56.200. These offenses contain different elements and, therefore, are not established by the “same evidence.” Thus the prohibition against double jeopardy is not violated here by applying the same evidence test.

The “same evidence” test, however, is not always dispositive. In re Burchfield, 111 Wn. App. at 897; In re Personal Restraint of Percer, 150 Wn.2d 41, 50-51, 75 P.3d 488 (2003). This court must also determine whether there is evidence that the Legislature intended to treat conduct as a single offense for double jeopardy purposes. Id. This merger doctrine is simply another way, in addition to the “same evidence” test, by which this court may determine whether the Legislature has authorized multiple punishments. State v. Frohs, 83 Wn. App. 803, 811, 924 P.2d 384 (1996). “Thus, the merger doctrine is simply another means by which a court may determine whether the imposition of multiple punishments violates the Fifth Amendment guarantee against double jeopardy....” Id. The question is whether there is clear evidence that the Legislature intended not to punish the conduct at issue with two separate convictions. State v. Calle, 125 Wn.2d at 778. If a defendant is convicted of two crimes, his or her second conviction will stand if that conviction is based on “some injury to the person or property of the victim or others, *which is separate and distinct from and not merely incidental to the crime of which it forms the element.* [Emphasis Added]. State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979).

Here, Sobey was killed after being bound, driven to a logging road and her jewelry taken from her. This court should construe this as evidence that the first crime (felony murder in the first degree) was not completed as the second crimes (kidnapping in the first degree and/or robbery in the first degree) were in progress, then the kidnapping and/or robbery *were incidental to, a part of, or coexistent with the felony murder in the first degree*, with the result that the second conviction (kidnapping in the first degree (Count II and/or robbery in the first degree (Count III)) will not stand under the reasoning in State v. Johnson, *supra*. This seems especially true given the court's to-convict instruction on Count I, Instruction No. 17 [CP 73-74], which specifically sets forth as an element under the felony murder alternative that Sobey's death during the course of a kidnapping and/or robbery.

The Washington Supreme Court has observed that “[t]he United States Supreme Court has been especially vigilant of overzealous prosecutors seeking multiple convictions based upon spurious distinctions between the charges.” State v. Adel, 136 Wn.2d at 635. Accordingly, if this court determines that the kidnapping in the first degree (Count II) and the robbery in the first degree (Count III) “w[ere] incidental to, a part of, or coexistent” with the felony murder in the first degree (Count I), then Johns’s

convictions in Counts II and/or III cannot be sustained established on these facts and must, therefore, be reversed.

c. The Recent State Supreme Court Case Of State v. Womac Supports The Above Analysis.

In State v. Wanrow, 91 Wn.2d 301, 588 P.2d 1320 (1978), the State Supreme Court rejected an argument that a defendant cannot be convicted of both felony murder and the underlying felony. The court upheld both convictions by considering statutory merger and due process finding neither was principle violated. However, recently in State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007), the State Supreme Court apparently reversed this decision by analyzing the issue in terms of double jeopardy.

In Womac, the defendant was charged in three separate counts and convicted of homicide by abuse, felony murder based on criminal mistreatment, and assault. The trial court accepted all three convictions, but imposed sentence only on the homicide by abuse. On appeal, remanded the case for resentencing on the homicide by abuse and conditionally dismissed the felony murder and assault convictions so long as the homicide by abuse conviction withstood further appeal. The State Supreme Court vacated the felony murder and assault convictions on double jeopardy grounds holding Womac had in actuality committed a

single offense against a single victim yet was held accountable for three crimes in violation of double jeopardy prohibition against multiple punishments for a single offense. In doing so, the State Supreme Court engaged in the three-part analysis set forth above in section (c). The State Supreme Court determined that double jeopardy was violated even though Womac received no sentence on the felony murder and assault convictions as “conviction” in itself, even without imposition of sentence, carries an unmistakable onus which has a punitive effect. In sum, the court held:

As this court noted in Calle, “[i]t is important to distinguish between charges and convictions—the State may properly file an information charging multiple counts under various statutory provisions where evidence supports the charges, *even though convictions may not stand* for all offenses where double jeopardy protections are violated.

[Citations omitted]. State v. Womac, 160 Wn.2d at 657-58.

That is what exactly what has happened here. The State properly filed an information charging multiple counts (the murder charge included a felony murder alternative as well as charges for the underlying felonies), obtained convictions on these multiple counts, but all the convictions cannot stand given double jeopardy principles for the reasons set forth above. Under the facts of this case, it was imperative to know whether the jury convicted Johns based on felony murder, and if so, based on what predicate felony in order to properly determiner whether double jeopardy

principles were violated. Absent a definitive answer to this issue, it is likely that Johns has been convicted of crimes and is serving a sentence in violation of double jeopardy principles. This court should reverse Johns's convictions on Counts I-III.

- d. Johns Was Prejudiced By His Counsel's Failure To Request Special Interrogatories After The Jury Returned Its Verdicts Where Double Jeopardy Principles Would Have Barred His Convictions For Kidnapping And/Or Robbery If The Jury Found That Count I Was Felony Murder.

The record does not reveal any tactical or strategic reason why trial counsel would have failed to properly present authority for his motion for mistrial given he was alleging in part prosecutorial misconduct and a violation of the appearance of fairness doctrine (grounds not covered by CrR 7.4). For the reasons set forth in the preceding section of this brief, had counsel done so, the trial court should have granted the motion for mistrial.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is apparent—but for counsel's failure to request special interrogatories after

the jury reached its verdict on Count I it cannot be said that the jury did not in fact find Johns guilty of felony murder with the result that Johns would not have also been convicted of kidnapping (Count II) and/or robbery (Count III) under double jeopardy and his total sentence would have been reduced.

e. Conclusion.

Based on the above, this court should reverse Johns's convictions in Counts I-III.

- (2) JOHNS MAY NOT BE CONVICTED OF ROBBERY (COUNT III) WHERE THE ROBBERY WAS INCIDENTAL TO, A PART OF, OR COEXISTENT WITH HIS CONVICTION FOR KIDNAPPING (COUNT II).<sup>1</sup>

Here, neither the robbery nor the kidnapping statutes contain specific language authorizing separate punishments for the same conduct. RCW 9A.56.200; RCW 9A.40.020. The offenses are thus not automatically immune from double jeopardy analysis. In re Burchfield, 111 Wn. App. at 896.

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<sup>1</sup> For the sole purpose of avoiding needless duplication, the prior discussion in the preceding section of this brief, [section (1)(b)], of the law relating to double jeopardy analysis is hereby incorporated by reference.

Second, when, as here, the Legislature has not expressly authorized multiple punishments for the same act, this court applies the “same evidence test,” which asks “whether each offense has an element not contained in the other.” Id. The statute under which Johns was convicted for robbery requires that a person take property of another. RCW 9A.56.200. The kidnapping statute requires an abduction. RCW 9A.40.020. The two offenses therefore can be said to contain different elements and, thus, are not established by a strict review of the “same evidence” test. Thus the prohibition against double jeopardy is not violated here by applying the same evidence test in its strictest interpretation.

The “same evidence” test, however, is not always dispositive. In re Burchfield, 111 Wn. App. at 897. This court must also determine whether there is evidence that the Legislature intended to treat conduct as a single offense for double jeopardy purposes. Id. This merger doctrine is simply another way, in addition to the “same evidence” test, by which this court may determine whether the Legislature has authorized multiple punishments. State v. Frohs, 83 Wn. App. 803, 811, 924 P.2d 384 (1996). “Thus, the merger doctrine is simply another means by which a court may determine

whether the imposition of multiple punishments violates the Fifth Amendment guarantee against double jeopardy....” *Id.* The question is whether there is clear evidence that the Legislature intended not to punish the conduct at issue with two separate convictions. State v. Calle, 125 Wn.2d at 778. If a defendant is convicted of two crimes, his or her second conviction will stand if that conviction is based on “some injury to the person or property of the victim or others, *which is separate and distinct from and not merely incidental to the crime of which it forms the element.* [Emphasis Added]. State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979).

Here, the record demonstrates that Sobey was bound and driven to a logging road where her jewelry was taken from her. Should this court construe the evidence presented in this trial that the first crime (kidnapping) had not yet come to an end before the second crime (robbery) began, then the robbery *was incidental to, a part of, or coexistent with the kidnapping*, with the result that the second conviction (the robbery) will not stand under the reasoning in State v. Johnson, *supra*; *see also* Instruction No. 24, kidnapping to-convict instruction [CP 83].

The Washington Supreme court recently observed that “[t]he United States Supreme Court has been especially vigilant of overzealous prosecutors seeking multiple convictions based upon spurious distinctions

between the charges.” State v. Adel, 136 Wn.2d at 635. Accordingly, if this court determines that the robbery “was incidental to, a part of, or coexistent” with the kidnapping, then Johns’s robbery conviction (Count III) cannot be established on these facts and must, therefore, be reversed.

(3) JOHNS WAS PREJUDICED AS A RESULT OF HIS COUNSEL’S FAILURE TO ARGUE DOUBLE JEOPARDY FOR THE REASONS SET FORTH IN SECTION (2).<sup>2</sup>

A criminal defendant claiming ineffective assistance must prove (1) that the attorney’s performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney’s unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both

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<sup>2</sup> It has been argued in the preceding sections of this brief that the issues can be raised for the first time on appeal. This portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Assuming, arguendo, this court finds that counsel waived the error claimed and argued in section (2) of this brief by failing to argue double jeopardy as to the robbery and corresponding kidnapping conviction, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to make this argument where if it had been made Johns would have been convicted of fewer crimes .

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is apparent in that Johns would have been convicted of fewer crimes and his total sentence would be reduced (at the very least the removal of the 60-months firearm enhancement) if the double jeopardy arguments had been made, had counsel done so, the outcome would have been different.

E. CONCLUSION

Based on the above, Johns respectfully requests this court to reverse and dismiss his convictions in Counts I-III.

DATED this 24<sup>th</sup> day of August 2007.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 24<sup>th</sup> day of August 2007, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 24<sup>th</sup> day of August 2007

Patricia A. Pethick  
Patricia A. Pethick

BY  STATE OF WASHINGTON  
07 AUG 27 AM 10:10  
COURT OF APPEALS  
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