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A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing Deputy McIver and Detective Costello to testify as to their personal belief that Strunks was guilty.
2. The trial court erred in allowing Strunks to be represented by counsel who failed to prevent the State from introducing improper opinion testimony.
3. The trial court erred in not dismissing Strunks's conviction for attempted kidnapping in the first degree (Count II) where the attempted kidnapping was incidental to, a part of, or coexistent with his conviction for attempted rape in the first degree (Count I).
4. The trial court erred in failing to take the case from the jury for lack of sufficient evidence to prove beyond a reasonable doubt that Strunks was guilty of attempted rape in the first degree and attempted kidnapping in the first degree.
5. The trial court erred in allowing Strunks, in violation of double jeopardy principles, to be found guilty of attempted rape in the first degree requiring the use of a deadly weapon as an element and then imposing a deadly weapon sentence enhancement.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in allowing Deputy McIver and Detective Costello to testify as to their personal belief that Strunks was guilty? [Assignment of Error No. 1].
2. Whether the trial court erred in allowing Strunks to be represented by counsel who failed to prevent the State from introducing improper opinion testimony? [Assignment of Error No. 2].

3. Whether the trial court erred in not dismissing Strunks's conviction for attempted kidnapping in the first degree (Count II) where the attempted kidnapping was incidental to, a part of, or coexistent with his conviction for attempted rape in the first degree (Count I)? [Assignment of Error No. 3].
4. Whether there was sufficient evidence elicited at trial to prove beyond a reasonable doubt that Strunks was guilty of attempted rape in the first degree and attempted kidnapping in the first degree? [Assignment of Error No. 4].
5. Whether the trial court erred in allowing Strunks, in violation of double jeopardy principles, to be found guilty of attempted rape in the first degree requiring the use of a deadly weapon as an element and then imposing a deadly weapon sentence enhancement? [Assignment of Error No. 5].

C. STATEMENT OF THE CASE

1. Procedure

Troy A. Strunks (Strunks) was charged by third amended information filed in Thurston County Superior Court with one count of attempted rape in the first degree (Count I), and one count of attempted kidnapping in the first degree (Count II). [CP 17-18].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard. Strunks was tried by a jury, the Honorable Richard Strophy presiding. Strunks had no objections and took no exceptions to the court's instructions. [Vol. III RP 294]. The jury found Strunks guilty as charged in Count I of attempted rape in the first degree, and guilty as charged in

Count II of attempted kidnapping in the first degree. [CP 63, 64; Vol. IV RP 353-357]. The jury also found by special verdicts that Strunks was armed with a deadly weapon during the commission of Counts I and II, and found that Strunks had a sexual motivation for committing Count II. [CP 59, 60, 61; Vol. IV RP 353-357].

The court sentenced Strunks to a standard range sentence of 120-months on Count I (84-months for the underlying conviction plus 24-months for the weapon enhancement), and a standard range sentence of 50.25-months on Count II (38.25 months for the underlying conviction plus 12-months for the weapon enhancement) based on an offender score of zero (the court determined that the two crimes constituted the same or similar criminal conduct¹ and Strunks had no prior convictions for purposes of calculating his offender score) with the sentences running concurrently for a total sentence of 120-months. [CP 115-128, 129,130, 131, 132, 133; 4-24-08 RP 11-14].

A timely notice of appeal was filed on June 30, 2008. [CP 134].

This appeal follows.

¹ Of note, while the court found that Strunks's two convictions constituted the same or similar criminal conduct and sentenced Strunks accordingly, the court apparently recognized that these convictions potentially "merged" (violated double jeopardy principles), by stating "and notwithstanding the potential for merger, I'm going to adopt the calculations recommended by the prosecutor in the absence of any cogent argument or legal authorities to the contrary." [4-24-08 RP 13].

2. Facts

In the early morning hours of September 15, 2007, Amanda Wright (Wright) decided to walk home after spending the evening drinking in downtown Olympia bars. [Vol. I RP 37; Vol. II RP 122-123]. Wright testified that she was intoxicated. [Vol. II RP 123]. As she was walking home, she encountered a man, she later identified as Strunks, who told asked her for a light for his cigarette and thought he had gone to high school with her or her sister. [Vol. I RP 20, 37-38; Vol. II RP 126-128]. The two began walking and Strunks wanted to show her a building being remodeled that used to be a mental hospital. [Vol. I RP 20; Vol. RP 129-130]. Wright followed Strunks jokingly saying “so long as you don’t rape me.” [Vol. II RP 130]. The two walked down an alley when Wright decided to leave and suddenly, according to Wright, Strunks grabbed her holding a knife to her throat, which she tried to grab. [Vol. I RP 20; Vol. II RP 131-134]. Strunks dragged her towards a car and tried to shove her into the vehicle saying, “want to die right here.” [Vol. I RP 20; Vol. II RP 131-134]. Wright fought Strunks and managed to get away. [Vol. I RP 20; Vol. II RP 131-134]. Strunks drove off. [Vol. II RP 131-134]. Wright ran across a parking lot and encountered a group of people, who assisted her and called the police. [Vol. I RP 20-21, 35, 45-47, 53-54, 58-60; Vol. II RP 131-134].

The police immediately responded to the scene as the police had been nearby investigating a shooting and found a cigarette butt in the alley where the incident had occurred. [Vol. I RP 16-18, 35]. Wright had no injuries to her hands, but did have a small puncture mark on her neck. [Vol. I RP 19, 32, 38; Vol. II RP 145-147].

On September 17, 2007, Wright received emails on her Myspace page she believed were from her assailant. [Vol. II RP 134-137]. She informed the police who monitored the page. [Vol. II RP 137, 160-161].

On September 18, 2007, Strunks was stopped for a traffic infraction and arrested for driving while license suspended. [Vol. I RP 87-92]. The officer searched Strunks incident to his arrest. [Vol. I 91-96]. Strunks was carrying a knife, which he locked in this vehicle. [Vol. I RP 91-96]. The officer believed Strunks was involved in the incident where Wright was attacked and took a picture of the knife locked in Strunks's car, but did not take it into evidence. [Vol. I RP 95-103]. Strunks was taken to the police station and gave a statement admitting he had been drinking in Olympia trying to pick up girls with a friend, Kyle Dotson (Dotson), on the night that Wright was attacked but denied attacking Wright. [Vol. II RP 165-179].

Wright was shown a photo montage and identified Strunks as her assailant. [Vol. II RP 181-183].

Dotson testified that he had been drinking in Olympia with Strunks on September 14-15, 2007, but did not remember much of the evening due to his heavy drinking. [Vol. I RP 62-65].

Strunks testified in his defense. [Vol. II RP 218-271]. He admitted, contrary to his statement to the police, that he had encountered Wright on September 15, 2007, when he stopped his car to allow Dotson to throw up outside the car. [Vol. II RP 224-229, 262-263]. Strunks said that he and Wright had gone for a short walk, but had gotten into an argument. [Vol. II RP 224-229]. He got mad when she refused his offer for a ride and they got into a shoving match. [Vol. II RP 224-229]. Strunks admitted to grabbing her but denied he held a knife to her throat explaining that he may have held his key chain that had a sharp pointy bottle opener on it to her throat. [Vol. II RP 224-229]. Strunks denied trying to force Wright into his car and denied any intent to kidnap or rape her. [Vol. II RP 224-229, 237].

Wright was recalled and testified that she did not notice Dotson or any other person in Strunks's car during the attack—"I didn't admire the interior. I just got the hell out." [Vol. III RP 283].

D. ARGUMENT

- (1) THE TRIAL COURT ERRED IN ALLOWING DEPUTY McIVER AND DETECTIVE COSTELLO TO TESTIFY AS TO THEIR BELIEF THAT STRUNKS WAS GUILTY.

The law is clear that a witness cannot give an opinion on the guilt of the defendant because such evidence violates the defendant's constitutional right to a jury trial, which includes the jury's independent determination of the facts. Art. 1, secs. 21 and 22 of the Washington Constitution; Fifth and Sixth Amendments to the United States Constitution; State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). It is well established under settled Washington law that no witness, lay or expert, may comment on the guilt or innocence of the defendant, or offer an opinion as to whether another witness is telling the truth and it is improper for the State to elicit such testimony. State v. Jerrels, 83 Wn. App. 503, 507, 925 P.2d 209 (1996); State v. Casteneda-Perez, 61 Wn. App. 354, 360, 810 P.2d 74 (1991); *see also* City of Tacoma v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993). Moreover, no witness may express a personal belief as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses. State v. Montgomery, 163 Wn.2d 577, 590, 591, 183 P.3d 267 (2008). Opinions on guilt are improper whether direct or by

inference. State v. v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003).

The inappropriateness of such opinion testimony is even more evident when made by law enforcement officers. State v. Carlin, 40 Wn. App. 698, 700 P.2d 323 (1985) (statement made by a government official or law enforcement officer is more likely to influence the fact finder); State v. Demery, 144 Wn.2d at 765. (police officer’s testimony carries an “aura of reliability.”); State v. Barr, 123 Wn. App. 373, 381, 98 P.3d (2004) (law enforcement officer’s opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial).

It is constitutional error for a trial court to admit an officer’s opinion of guilt or innocence of a defendant because such an opinion “may influence the fact finder and thereby deny the defendant of a fair and impartial trial.” Carlin, 40 Wn.App. at 703 (citing State v. Haga, 8 Wn. App. 481, 492, 507 P.2d 159 (1973)); see also Farr-Lenzini, 93 Wn. App. at 465. Such error is not harmless unless the untainted evidence is so overwhelming that it necessarily leads to a finding of guilty. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

[Emphasis added]. State v. Demery, 100 Wn. App. 416, 423, 997 P.2d 432 (2000).

Here, both Deputy McIver and Detective Costello improperly testified as to their personal belief (opinion) as to Strunks’s guilt in the attack on Wright.

Deputy McIver, the police officer who arrested Strunks for a driving offense on September 18th—3 days after Wright was attacked, testified that during his contact with Strunks, Strunks mentioned that he had been in Olympia on September 15, 2007, and asked the deputy whether he had investigated a shooting incident on that date. [Vol. I RP 98-101]. McIver testified that Strunks appeared extremely nervous. [Vol. I RP 100]. McIver was then allowed to improperly express his personal belief as to Strunks's involvement in the attack on Wright as follows:

He was laughing, but in my opinion nervously laughing about things, like that weren't funny, but as a nervous laughter, maybe that's his way of dealing with things. I don't know. I just felt in my mind—and had an overwhelming feeling, all of sudden, that the vehicle matched the description of the night of the 15th. He matched the description, his comments, the proximity he as that he put himself at the alleged crime at that time. I just had a feeling in my mind, and the term that I use is that I just knew it. I knew that Mr. Strunks could be or possibly was the suspect in that crime down in Olympia.

[Vol. I RP 101].

Detective Costello, the police officer who interviewed Strunks on September 18th, testified that Strunks explained his activities in downtown Olympia on September 15th and denied any involvement in the attack on Wright. [Vol. II RP 165-178]. Costello did not place Strunks under arrest for the attack on Wright in fact Costello released Strunks. [Vol. II RP

178]. However, Costello was then allowed to improperly express his personal belief as to Strunks's involvement in Wright's attack as follows:

At that point he was denying being involved. I believed at that time in my mind I believed that he was involved.

...

In my mind I believe he was the one that committed this crime....

[Vol. II RP 179].

In both of these instances, the officers were allowed to improperly express their personal belief that Strunks was guilty of the attack on Wright. This improper opinion testimony was error and this error was not harmless. Strunks was convicted of attempted rape in the first degree (Count I) and attempted kidnapping in the first degree (Count II). Strunks testified that he had gotten into an altercation with Wright—admitting to an assault—but he denied attempting to rape or kidnap her. Wright herself testified that Strunks never said he wanted to rape her, or ever fondled her, or ever touched her breasts. [Vol. II RP 148, 152]. Thus, the evidence that Strunks was in fact guilty of attempted rape and attempted kidnapping was not so overwhelming that the improper opinion testimony of two police officers that Strunks committed the crimes did not materially affect the outcome of the case. This court should reverse Strunks's convictions.

(2) STRUNKS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO PREVENT THE STATE FROM PRESENTING IMPROPER OPINION TESTIMONY.

Should this court determine that counsel has failed to preserve the above-argued issue by failing to object to McIver's testimony [Vol. I RP 100-101], and in only objecting as to relevance as to Costello's testimony [Vol. II RP 179-180], then Strunks received ineffective assistance of counsel. 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).

Here, both prongs of ineffective assistance are met. First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to prevent the State from introducing improper opinion testimony on Strunks's guilt, and had counsel done so, the trial court would not have allowed the testimony.

Second, the prejudice is self evident. Had counsel properly objected to the admission of the improper opinion testimony, it would not have been before the jury and given the lack of actual evidence of Strunks's "intent to rape" Wright as required for the crimes for which Strunks was convicted, the jury would not have been able to find Strunks guilty.

- (3) STRUNKS MAY NOT BE CONVICTED OF ATTEMPTED KIDNAPPING IN THE FIRST DEGREE (COUNT II) WHERE THE ATTEMPTED KIDNAPPING WAS INCIDENTAL TO, A PART OF, OR COEXISTENT WITH HIS CONVICTION FOR ATTEMPTED RAPE IN THE FIRST DEGREE (COUNT I).

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 rape in the first degree nor the kidnapping in the first degree statutes contain specific language authorizing separate punishments for the same conduct. RCW 9A.44.040; RCW 9A.40.020.² This is not altered by the fact that Strunks was charged and convicted with an attempt of both crimes. The offenses at issue here are thus not automatically immune from double jeopardy analysis. In re Burchfield, 111 Wn. App. at 896.

² Strunks was charged with and convicted of attempted rape in the first degree and attempted kidnapping in the first degree requiring a “substantial step” towards the commission of the specific underlying crime(s). RCW 9A.28.020. Thus the elements of the specific underlying crimes need to be analyzed for purposes of the issue set forth herein.

RCW 9A.44.040, rape in the first degree, provides in pertinent part:

- (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....

RCW 9A.40.020, kidnapping in the first degree, provides in pertinent part:

- (1) A person is guilty of kidnapping in the first degree if he intentionally abducts another person with intent:
 - (b) To facilitate commission of any felony or flight thereafter; or
 - (c) To inflict bodily injury on him....

Of note, Instruction No. 14, [CP 84], the to-convict instruction for attempted kidnapping in the first degree specifically states as an element, “(2) That the act was done with intent to commit rape in the first degree.”

[Emphasis added].

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(s) under which Strunks was convicted of attempted rape in the first degree requires a substantial step towards sexual intercourse using a deadly weapon. RCW 9A.44.040; RCW 9A.28.020. The attempted kidnapping in the first degree statute(s) requires a substantial step towards an abduction with the intent to commit rape in the first degree. RCW 9A.40.020; RCW 9A.28.020; Instruction No. 14 [CP 84]. These offenses appear to contain the same elements and, therefore, may be established by the “same evidence.” In fact, the trial court at sentencing determined that these crimes encompassed the same or similar criminal conduct—occurred at the same time, at the same place, involved the same victim, and had the same intent. [CP 115-128]. Thus the prohibition against double jeopardy may be 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, Wright was grabbed by Strunks, an object (knife or bottle opener) was held to her throat, and she was pushed or stumbled into Strunks car. This court should construe this as evidence that the first crime (attempted rape in the first degree) was not completed as the second crime (attempted kidnapping in the first degree with the intent to commit rape in the first degree) was in progress, then the attempted kidnapping *was incidental to, a part of, or coexistent with the attempted rape in the first degree*, with the result that the second conviction (attempted kidnapping in the first degree (Count II)) will not stand under the reasoning in State v. Johnson, supra. This seems especially true given the court's to-convict instruction on Count II, attempted kidnapping in the first degree, Instruction No. 14 [CP 84], which specifically sets forth as an element that the act was done with the intent to commit rape in the first degree and the trial court's finding at sentencing that the crimes constituted the same or similar criminal conduct.

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 attempted kidnapping in the first degree (Count II) “was incidental to, a part of, or coexistent” with the attempted rape in the

first degree (Count I), then Strunks's conviction in Count II cannot be sustained on these facts and must, therefore, be reversed.

Recent caselaw from our State Supreme Court supports this conclusion. Formerly, as set forth 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, the appellate court 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. 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 attempted rape in the first degree charge as well as an attempted kidnapping in the first degree charge including the element of the intent to commit rape in the first degree), obtained convictions on these multiple counts and even obtained a sentence on both convictions, but all the convictions cannot stand given double jeopardy principles for the reasons set forth above. This court should reverse Strunks's conviction on Count II.

- (4) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT STRUNKS WAS GUILTY OF ATTEMPTED RAPE IN THE FIRST DEGREE AND ATTEMPTED KIDNAPPING IN THE FIRST DEGREE.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct, 2781 (1979). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, Strunks was charged with and convicted in Count I of attempted rape in the first degree and in Count II of attempted kidnapping in the first degree including as an element the “intent to commit rape in the first degree.” [CP 17-18, 63, 64, 84]. There is no question that Wright

was attacked on September 15, 2007. In fact, Strunks admitted to assaulting Wight. [Vol. II RP 224-229]. However, Strunks was not charged nor convicted of assault. In order to sustain convictions for attempted rape and attempted kidnapping the State bore the burden of proving beyond a reasonable doubt that Strunks's actions evidenced a substantial step towards the commission of rape—Count I charged this crime and Count II required as an element an intent to rape. This is a burden the State cannot satisfy. Wright, herself admitted, that Strunks never threatened to rape her, nor did he fondle her; he did not even touch her breasts. [Vol. II RP 148, 152]. Strunks denied any such intention. [Vol. II RP 224-229]. Absent evidence that Strunks took a substantial step towards rape, the State failed to elicit sufficient evidence to prove beyond a reasonable doubt that Strunks committed the crimes for which he was convicted. This court should reverse his convictions.

- (5) DOUBLE JEOPARDY PRINCIPLES WERE VIOLATED WHERE STRUNKS USE OF A DEADLY WEAPON WAS BOTH AN ELEMENT OF ATTEMPTED RAPE IN THE FIRST DEGREE AND BASIS FOR IMPOSING A DEADLY WEAPON SENTENCE ENHANCEMENT.

In the instant case, Strunks was convicted in Count I of attempted rape in the first degree (requiring the use of a deadly weapon) [CP 64, 77, 79], the jury returned a special verdict finding that the crime was committed while Strunks was armed with a deadly weapon [CP 61], and

the sentence imposed on Count I included a deadly weapon sentence enhancement. [CP 115-128].

It has long been the law that sentence enhancements for offenses committed with weapons do not violate double jeopardy even where the use of the weapon is an element of the crime. State v. Pentland, 43 Wn. App. 808, 811-12, 719 P.2d 605 (1986). This principle has consistently been upheld. See State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 (2006), *review denied* 163 Wn.2d 1053, 187 P.2d 752 (2008), *cert. denied* (Dec. 1, 2008); State v. Kelly, 146 Wn. App. 370, 189 P.3d 853 (2008).

However, the State Supreme Court has recently accepted review of Kelly on the issue of whether double jeopardy principles are violated when a defendant's use of a weapon is both an element of the crime and the basis for imposing a weapon sentence enhancement. [S.C. No. 82111-9]. In light of this and out of abundance of caution, Strunks asserts that under Art. 1 sec. 9 of the Washington Constitution and the Fifth Amendment to the United States Constitution, the double jeopardy prohibition against multiple punishments prevents him from being sentenced for the crime of attempted rape in the first degree, which crime includes a deadly weapon as an element, and also being sentenced to a deadly weapon sentence enhancement. See Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); Sattazahn v.

Pennsylvania, 537 U.S. 101, 111-12, 123 S. Ct. 732, 154 L. Ed. 2d 588
(2003).

E. CONCLUSION

Based on the above, Strunks respectfully requests this court to reverse and dismiss his convictions.

DATED this 25th day of March 2009.

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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 25th day of March 2009, 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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STATE OF WASHINGTON
BY [Signature]
DEPUTY

Signed at Tacoma, Washington this 25th day of March 2009.

Patricia A. Pethick
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