

No. 42912-8-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

RONALD DELESTER BURKE,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 10-1-04484-3  
The Honorable Frank Cuthbertson, Judge

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OPENING BRIEF OF APPELLANT

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STEPHANIE C. CUNNINGHAM  
Attorney for Appellant  
WSBA No. 26436

4616 25th Avenue NE, No. 552  
Seattle, Washington 98105  
Phone (206) 526-5001

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## **I. ASSIGNMENTS OF ERROR**

1. Appellant's double jeopardy protections were violated when the trial court entered judgment on both second degree assault and attempted second degree rape.
2. The trial court erred in not dismissing Ronald Burke's conviction for second degree assault where the assault was incidental to, a part of, and coexistent with his conviction for attempted second degree rape.
3. Ronald Burke's trial counsel provided ineffective assistance when he failed to request that Burke's second degree assault and attempted second degree rape convictions be treated as the same criminal conduct in calculating his offender score.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Should Ronald Burke's assault and attempted rape convictions merge where the assault was incidental to, a part of, and coexistent with the attempted rape, and where the Legislature has indicated its intent that an assault committed in order to facilitate a rape should not be punished separately because the use of force elevates the degree of rape? (Assignments of Error 1 & 2)

2. Did Ronald Burke's trial counsel provide ineffective assistance when he failed to request that Burke's assault and attempted rape convictions be treated as the same criminal conduct in calculating his offender score, where the two offenses were committed against a single victim, at the same time and place, and where the objective intent of both offenses was to facilitate the commission of a rape? (Assignment of Error 3)

### **III. STATEMENT OF THE CASE**

#### **A. SUBSTANTIVE FACTS**

In October of 2010, A.H. was living in a "clean and sober" house in Tacoma, but did not want to stay there because she had started using drugs again, and because her boyfriend had been harassing her. (RP I 128-29)<sup>1</sup> A.H. was also trying to avoid law enforcement authorities, because a Department of Corrections warrant had been issued for her arrest after she violated conditions of her community custody. (RP I 128) Around midnight of October 19-20, she was wandering the streets of downtown Tacoma looking for a place to sleep. (RP I 119, 131)

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<sup>1</sup> The trial transcripts labeled Volumes I, II-A and III, will be referred to as "RP I", "RP IIA" and "RP III." The remainder of the transcripts will be referred to by the date of the hearing contained therein.

According to A.H., she saw Ronald Delester Burke sitting at a bus stop on Tacoma Avenue South near South 5th Street. (RP I 131) She recognized him from an earlier encounter when he had been with one of A.H.'s friends. (RP I 133) So she approached Burke and offered to pay him \$10.00 in exchange for a place to sleep. (RP I 132) Burke told her that his sister was a Jehovah's Witness, and that A.H. could stay at her house. (RP I 132) According to A.H., Burke offered her a choice between his own bed and the living room sofa, and she told Burke that she would sleep on the sofa. (RP I 133-34)

A.H. and Burke began walking together. (RP I 133) Eventually they came to an area near the University of Washington's Tacoma campus, around Market Street and South 17th Street. (RP I 120, 133, 182) A.H. testified that Burke told her he needed to get something out of his car, and he started walking down an alley. (RP I 135) She did not pay attention to what he was doing because she was concerned about being spotted by the police. (RP I 136)

According to A.H., Burke suddenly grabbed her by her hair and dragged her to the ground. (RP I 136) He told her to "shut the f\*\*k up" and pushed his knee into her stomach to hold her down.

(RP I 137) Burke told A.H. to take her pants off, and she informed Burke that she was menstruating. (RP I 138) Burke forced her to remove her pants anyway. (RP I 138)

A.H. testified that Burke put his fingers into her vagina, then removed them and placed them inside her mouth. (RP I 138-39) She tried to scream, so Burke grabbed at her tongue and cut it with his fingernails. (RP I 138-39) Burke also used his forearm to choke her and banged her head against the ground. (RP I 140) She testified that Burke tried to pry her legs apart so that he could insert his penis, but that she fought him and tried to keep her legs together. (RP I 141)

At the same time, Josh Phelps was standing outside of his apartment building smoking a cigarette. (RP I 182) He heard a woman speaking loudly, repeatedly saying “no” and “stop.” (RP I 182) It sounded like the woman was in trouble, so Phelps got into his car and drove to the area where he believed the voice was coming from. (RP I 183) When he pulled into the alley, he saw a pantsless woman laying on her back and kicking her legs, and a man wearing a gray sweatshirt lying on top of her. (RP I 183, 185) When Phelps’ headlights shone on the pair, the man looked at him. (RP I 184) As Phelps drove away, he called 911 and reported what

he had seen. (RP I 184)

A.H. testified that a car drove into the alley as she and Burke struggled. (RP I 142) When Burke looked at the car he loosened his grip, and A.H. was able to break free and run away. (RP I 142) But Burke chased her and knocked her to the ground. (RP I 143) They struggled again, and A.H. used a razor blade she was carrying to cut Burke's hand. (RP I 145)

Tacoma Police Officers Jared Tiffany and Ryan Hovey responded to the 911 dispatch. (RP IIA 231) As they approached the area of South 17th Street and Court D, they rolled down the windows of their patrol vehicle and were able to hear the muffled sounds of a woman crying out. (RP IIA 202, 203, 231, 232) They looked toward the sound, and saw the outline of two people struggling on the ground. (RP IIA 203, 233) As they approached in their vehicle, they could see A.H. lying on the ground and Burke kneeling over her. (RP IIA 204, 205-06, 233) Both were covered in blood. (RP IIA 205-06, 233) A.H. was wearing only a shirt, and Burke was wearing pants and a gray hooded sweatshirt. (RP IIA 207)

Burke initially told police that he was simply trying to help A.H. because another man was "trying to do her." (RP IIA 212,

236) When questioned later, Burke explained that he had agreed to pay A.H. in exchange for sex, but that she “flipped out” because she thought her boyfriend was watching them. (RP IIA 217-18) Burke later told the officers that he had refused to pay her for sex, and that she “flipped out” because her boyfriend would be angry if she returned with no money. (RP IIA 220, 221) A.H.’s story also changed: she originally told police that Burke tried but was unable to insert his fingers into her vagina. (RP I 161)

Burke testified on his own behalf at trial. Burke lives near the area where the incident occurred, and he had gone out for a walk. (RP III 39-40) A.H. approached him and began complaining about her boyfriend, then offered to have sex with Burke in exchange for money. (RP III 42, 43-44) Burke declined. (RP III 44)

Burke saw A.H. go into the bushes with a lighter, and when she returned she was acting differently. (RP III 46-47) She was upset and said that if she did not bring money to her boyfriend he would get angry with her. (RP III 47-48) A.H. took her pants off and kept repeating that her boyfriend would be mad. (RP III 48) Burke grabbed her and tried to calm her down, but she cut his hand. (RP III 48-49) Burke tried to walk away, but A.H. followed

him, fell to the ground, and started screaming. (RP III 50) Burke denied forcing A.H. to remove her clothes and denied putting his fingers into A.H.'s vagina. (RP III 50)

**B. PROCEDURAL HISTORY**

The State charged Burke with one count of second degree rape (RCW 9A.44.050), and one count of second degree assault (RCW 9A.36.021). (CP 11-12) The jury rejected the second degree rape charge and instead convicted Burke of attempted second degree rape. (CP 54-55; RP III 141-42) The jury also convicted Burke of second degree assault. (CP 56; RP III 142) The trial court sentenced Burke using an offender score of four, and imposed a mid-range sentence of 96 months to life. (RP 12/16/11 6, 14; CP 106, 109) This appeal timely follows. (CP 124)

**IV. ARGUMENT & AUTHORITIES**

**A. BURKE'S CONVICTIONS FOR BOTH SECOND DEGREE ASSAULT AND ATTEMPTED SECOND DEGREE RAPE VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY BECAUSE THE ASSAULT WAS INCIDENTAL TO THE ATTEMPTED RAPE AND SHOULD HAVE MERGED WITH THE ATTEMPTED RAPE CONVICTION.**

The jury convicted Burke of attempted second degree rape. (CP 55) The State had charged Burke under RCW 9A.44.050(1)(a), which states: "A person is guilty of rape in the

second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person . . . [b]y forcible compulsion[.]” (CP 11, 38, 41, 46) The jury also convicted Burke of second degree assault. (CP 56) For that crime, the State had charged Burke under RCW 9A.36.021(1)(g), which states that a person is guilty of second degree assault if he or she “[a]ssaults another by strangulation or suffocation.” (CP 11-12) Convictions for both of these crimes violates Burke’s double jeopardy protections because the crimes merge.

Both the Washington State Constitution and the United States Constitution provide that no person should twice be put in jeopardy for the same offense. Wash. Const. art. 1, § 9; U.S. Const. amd. V. Double jeopardy is implicated regardless of whether sentences are imposed to run concurrently. In re Pers. Restr. of Davis, 142 Wn.2d 165, 171, 12 P.3d 603 (2000); see also State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). 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 (2001) (citing RAP 2.5(a); Adel, 136 Wn.2d at 631). Interpretation and application of

the double jeopardy clause is a question of law, and is reviewed de novo. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005); State v. Womac, 160 Wn.2d 643, 649, 160 P.3d 40 (2007).

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 769, 772, 888 P.2d 155 (1995). The Washington Supreme Court has set forth a three part test for determining whether the legislature intended multiple punishments arising from the same criminal conduct. Courts first consider express or implicit legislative intent based on the criminal statutes involved. State v. Kier, 164 Wn.2d 798, 803-04, 194 P.3d 212 (2008); State v. Martin, 149 Wn. App. 689, 699, 205 P.3d 931 (2009).

In this case, none of the relevant statutes address whether multiple convictions for a single act of assault with intent to rape are authorized.<sup>2</sup> See RCW 9A.44.050, RCW 9A.36.021. When the relevant statutes do not expressly disclose the legislative intent, courts ask if the crimes are the same in law and in fact (also known as the Blockburger test). Kier, 164 Wn.2d at 804 (citing Calle, 125

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<sup>2</sup> This is in contrast to statutes such as RCW 9A.52.050, which expressly authorizes cumulative punishment for crimes committed during the commission of a burglary.

Wn.2d at 777–78; Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). The “Blockburger” or “same evidence test,” asks whether each statute “requires proof of a fact which the other does not.” Calle, 125 Wn.2d at 778 (quoting Blockburger, 284 U.S. at 304).

However, while the Blockburger and same evidence tests are considered significant indicators of legislative intent, the Supreme Court has recognized “that these tests are not always dispositive of the question whether two offenses are the same.” Calle, 125 Wn.2d at 780. The merger doctrine is another means by which a court may interpret legislative intent to determine whether the imposition of multiple punishments violates the Fifth Amendment guarantee against double jeopardy. State v. Frohs, 83 Wn. App. 803, 809, 811, 924 P.2d 384 (1996).

The merger doctrine states that whenever it is necessary, in order to prove a particular degree of a crime, that the State also prove that the crime is accompanied by conduct that is defined as a crime elsewhere in the criminal code, an additional conviction for the “included” crime cannot be allowed to stand unless it involves 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 an element. Frohs, 83 Wn. App. at 807; State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979).<sup>3</sup> Thus, courts should apply the doctrine of merger when the degree of one offense is raised by conduct that is defined as a crime elsewhere. Kier, 164 Wash.2d at 804.

In Johnson, the Supreme Court noted that by enacting the new criminal code, which included different degrees of rape, “the legislature has removed the necessity or occasion for the pyramiding of charges . . . by creating more clearly defined degrees of crimes . . . and specifying the types of conduct incidental to the crime which will call forth more severe penalties.” 92 Wn.2d at 676. The Court concluded that “the legislature intended that conduct involved in the perpetration of a rape, and not having an independent purpose or effect, should be punished as an incident of the crime of rape and not additionally as a separate crime.” Johnson, 92 Wn.2d at 676.

In State v. Williams, the defendant and K.W. were strangers who went to an alley together to smoke crack cocaine. 156 Wn. App. 482, 488, 234 P.3d 1174 (2010).<sup>4</sup> After they ingested the

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<sup>3</sup> *Overruled on other grounds in State v. Sweet*, 138 Wn.2d 466, 980 P.2d 1223 (1999).

<sup>4</sup> *Review denied*, 170 Wn.2d 1011, 245 P.3d 773 (2010).

drugs, K.W. turned to leave. But Williams grabbed K.W. from behind and put his forearm across her neck, pushed her to the ground, and began strangling her. K.W. blacked out, and Williams raped her. 156 Wn. App. at 488. Williams was convicted of second degree assault with sexual motivation (which required proof of infliction of substantial bodily harm), and first degree rape (which required proof of infliction of serious physical injury including injury which renders the victim unconscious). 156 Wn. App. at 489; RCW 9A.36.021; RCW 9A.44.040.

In addressing Williams' double jeopardy claim, the appellate court bypassed the "same elements" test because it concluded that the second degree assault merged with the first degree rape. Williams, 156 Wn. App. at 495. The court reasoned that the assault and the infliction of substantial bodily harm provided the necessary element of serious physical injury required for a first degree rape conviction. 156 Wn. App. at 494–95. And because Williams attacked and strangled K.W. solely to further the rape, the assault had no purpose or effect independent of the rape. 156 Wn. App. at 495. Accordingly, the court vacated Williams' second degree assault conviction. 156 Wn. App. at 495.

In State v. Martin, the defendant was convicted of second

degree assault and attempted third degree rape. 149 Wn. App. at 699. Martin argued that convictions for both crimes violated double jeopardy, and the appellate court agreed. The Court first noted that “where one crime is an anticipatory offense and another crime is both charged separately and used as the basis for the attempt charge, an abstract comparison of elements is not enough.” 149 Wn. App. at 699.

Instead, the court determined that Martin's convictions for second degree assault and attempted third degree rape violate the constitutional prohibition against double jeopardy because they were the same in fact and law. Martin, 149 Wn. App. at 701. “The two charges were predicated on the same conduct: Martin's assault with intent to rape D.S. The assault was the substantial step towards the rape; there was no independent purpose. The evidence required to support Martin's conviction for attempted third degree rape was the same evidence used to convict him of second degree assault.” 149 Wn. App. at 699 (footnotes omitted). The court vacated the lesser offense, which in that case was third degree rape. 149 Wn. App. at 710.

Similarly here, a strict comparison of the elements of attempted second degree rape and second degree assault does

not adequately address the double jeopardy question. Instead, this Court should apply the merger doctrine because the use or attempted use of force elevates the crime of rape from third degree to second degree.<sup>5</sup> Under that approach, it is clear that Burke's second degree assault conviction should merge with his attempted rape conviction. As noted by the prosecutor in closing argument, "the reason for the strangulation, the reason for blocking her breath is to subdue her, is to get her to stop fighting" so that the rape could be completed. (RP III 108) Burke attacked and strangled A.H. solely in an attempt to accomplish a rape, so the assault had no purpose or effect independent of the rape.

This Court should vacate the lesser of the two crimes, second degree assault, and should remand Burke's case for resentencing with an adjusted offender score.

B. BURKE'S COUNSEL WAS INEFFECTIVE AT SENTENCING BECAUSE HE FAILED TO REQUEST THAT THE COURT TREAT BURKE'S CONVICTIONS AS THE SAME CRIMINAL CONDUCT.

1. *Burke's assault and attempted rape convictions encompass the "same criminal conduct" and should have been counted as one crime when calculating his offender score.*

If "some or all of the current offenses encompass the same

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<sup>5</sup> Compare RCW 9A.44.060 and RCW 9A.44.050.

criminal conduct[,] then those current offenses shall be counted as one crime.” RCW 9.94A.589(1)(a). “Same criminal conduct,” is defined as “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). “Intent in this context means the defendant's objective criminal purpose in committing the crime.” State v. Walker, 143 Wn. App. 880, 891, 181 P.3d 31 (2008).

All three requirements are met in this case. The victim of both offenses was A.H., the offenses occurred at the same time and at the same place. And the offenses involved the same objective intent: to force A.H. to have sexual intercourse. The two offenses encompass the same criminal conduct, and should have been treated as such for the purpose of calculating Burke’s offender score.

2. *Trial counsel's failure to raise the same criminal conduct issue at sentencing was ineffective.*

Effective assistance of counsel is guaranteed by both the United States and Washington State constitutions. U.S. Const. amd. VI; Wash. Const. art. I, § 22 (amend. x); Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995).

A criminal defendant claiming ineffective assistance of counsel 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); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995).

Both prongs are met in this case. First, there is no tactical or strategic reason why trial counsel would fail to argue for a lower offender score, and had counsel done so, the trial court would have found that Burke's two convictions did constitute the same criminal conduct. Second, the prejudice is self-evident. Had counsel properly argued this sentencing issue, Burke's offender score, and corresponding standard range, would have been lower and Burke would have received a shorter sentence.

## **V. CONCLUSION**

As our State Supreme Court has found, by elevating the seriousness and punishment when force is used to perpetrate a rape, the Legislature indicated its intent that an assault committed

in the course of a rape should not be punished separately. Furthermore, Burke's assault was incidental to, a part of, and coexistent with the attempted rape. The two crimes must merge, and this Court should vacate Burke's assault conviction. In the alternative, because the two convictions encompassed the same criminal conduct, they should have been counted as one offense in calculating Burke's offender score. Trial counsel's failure to raise this issue at sentencing was ineffective and prejudicial. For either or both of these reasons, Burke's case should be remanded for resentencing.

DATED: August 29, 2012



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STEPHANIE C. CUNNINGHAM

WSB #26436

Attorney for Appellant Ronald D. Burke

**CERTIFICATE OF MAILING**

I certify that on 08/29/2012, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Ronald D. Burke, DOC#951546, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.



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STEPHANIE C. CUNNINGHAM, WSBA #26436

# CUNNINGHAM LAW OFFICE

**August 29, 2012 - 3:15 PM**

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