

NO. 42912-8

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

RONALD DELESTER BURKE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank E. Cuthbertson

No. 10-1-04484-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Where the elements of defendant's crimes are not the same, they are not the same in law and fact and occurred at two distinct crime scenes, do defendant's crimes violate double jeopardy, merge or constitute the same criminal conduct?

2. Did defendant receive constitutionally effective assistance of counsel where defendant cannot show deficient performance or prejudice?

B. STATEMENT OF THE CASE.

1. Procedure

On October 21, 2010, the State charged defendant Ronald Burke with one count of attempted rape in the second degree and one count of assault in the second degree. CP 1-2. The victim of both counts was A.H.¹ CP 1-2.

On October 3, 2011, the State filed an amended information which removed the attempted language from count I. CP 11-12, 10/3/11RP 7².

¹ As this case involves a sex offense, the State will use initial to identify the victim in this matter.

² The State will refer to the sequentially paginated volumes as RP. All other volumes will be referred to with the date prior to RP.

On November 7, 2011, the case was called for trial in front of the Honorable Frank Cuthbertson. RP 4. On November 8, 2011, a CrR 3.5 hearing was held and the court found that all statements offered were admissible. RP 11-116, CP 67-71. On November 15, 2011, the jury found defendant not guilty of rape in the second degree. RP 141, CP 54. However, the jury found defendant guilty of attempted rape in the second degree and assault in the second degree. RP 142, CP 55-56.

Sentencing was held on December 16, 2011. 12/16/11RP 2. Defendant had an offender score of four and his sentencing range was 83.25-110.25 months to life. CP 103-120. The trial court sentenced defendant to a mid-range sentence of 96 months to life on count I with 20 months on count II to run concurrent. 12/16/11RP 14, CP 103-120.

Defendant filed this timely appeal. CP 124.

2. Facts

On October 20, 2010, Dale Kennedy was working as a campus security officer for the University of Washington Tacoma. RP 118-119. As he was finishing his foot patrol, in the early morning hours, he heard a dispatch that there was a rape in progress at 17th and Market. RP 119-120. Mr. Kennedy drove over to the location and a man flagged him down at the intersection of 17th and Fawcett. RP 120. The man said he had seen a

person hunched over a female and the female was saying, "No, No, No."
RP 120. Mr. Kennedy went back to 17th and Court D and found a pair of shoes, pants, a purse, a coat and what looked like white paper towels with a little bit of blood on them. RP 121. Mr. Kennedy did not see any people at that location. RP 121. A man and a woman were eventually located by law enforcement 250 yards from where Mr. Kennedy saw the clothes. RP 123.

In October of 2010, A.H. was a thirty-five year old woman who had been living in a clean and sober house. RP 127-128. A.H. had been a heroin addict since she was 15. RP 130. On October 20, 2010, A.H. had a DOC violation pending against her and a warrant out for her arrest. RP 128. She had consumed two wine coolers earlier in the day and was looking for a place to stay until morning. RP 129, 131, 158. Because of the warrant, she could not go to a shelter. RP 155. Around midnight, she went to Tacoma Avenue and contacted defendant who was at a bus stop. RP 130, 131, 132. A.H. recognized defendant from hanging out with one of her friends on a prior occasion. RP 131, 159. A.H. and defendant shared a drink. RP 132. A.H. said she needed a place to stay and offered defendant \$10. RP 132, 168. A.H. was menstruating and needed a place to clean up. RP 134. Defendant said she could stay with his sister and the two began to walk together. RP 132-133. Defendant asked if A.H.

wanted to sleep in his bed or on the sofa and A.H. said the sofa. RP 133.

A.H. never offered money in exchange for sex. RP 169, 174.

As they were walking, defendant said he needed to get something from his car. RP 135. Defendant then grabbed A.H. by her hair and threw her to the ground. RP 136, 137. A.H. said, "What the fuck? What did I do to you?" RP 137. Defendant said, "Shut up bitch. Just shut the fuck up." RP 137. Defendant then pushed his knee into A.H.'s stomach so she could not talk and kept yelling at her. RP 137. Defendant would not let A.H. up. RP 137. Defendant told A.H., "Take your pants off now, bitch." RP 137. A.H. told defendant she did not want to take off her pants because she was on her period. RP 137-138. Defendant forced her to take off her pants and then inserted his hand into her vagina. RP 138-139, 11/9/11PM RP 21, 23. A.H. screamed and defendant then put the same hand that had been in her vagina in her mouth to try and shut her up. RP 139, 147. Defendant tried to cut her tongue out with his nails. RP 139. Defendant was trying to dislocate her chin and jaw to keep her from screaming. RP 140. He also choked A.H., squeezing her by the throat until she stopped screaming, and then banged her head against the cement. RP 140. Defendant said he was going to fuck her, all three holes and told her to shut up or he would call his boys. RP 147.

Josh Phelps was in front of his apartment building around midnight smoking a cigarette. RP 182. He was near the corner of 17th and Market and head a women repeatedly saying, “no” and “stop.” RP 182. Mr. Phelps drove to Court D and saw what looked like a man on top of a woman, with her pants down, raping her. RP 183. The woman was kicking her legs and the man looked up at Mr. Phelps car. RP 184. Mr. Phelps reversed out of the alley and called 911. RP 184.

Defendant inserted his fingers into A.H.’s vagina three times. RP 141, 160, 11/9/11 PM RP 21. A.H. tried to fight defendant off because she did not want him to go all the way. RP 141, 11/9/11PM RP 21. At one point, a car went through the other alley. RP 142. Defendant got up to look at the car, and A.H. pushed him and ran. RP 142. She only had her shirt on. RP 142. She ran to the next alley. RP 143. A.H. saw an apartment with lights on and windows opened and screamed for help. RP 143. A.H. screamed that defendant was going to kill her. RP 143. Defendant came to her and kicked her feet out from under her and she fell to the ground. RP 143. Defendant told her to go back and get her stuff, A.H. said no, and defendant tried to drag her by her feet. RP 143. A.H. tried to hold onto something but there was nothing but pavement. RP 143-144. Defendant got on top of her and started choking her again. RP 144. A.H. could barely breathe; felt dizzy and prayed to God she would not die.

RP 144. Defendant tried to pop her neck twice. RP 145. As defendant was choking her, the police came. RP 144.

Tacoma Police Officer Jared Tiffany and his partner Ryan Hovey were dispatched to the possible rape at South 17th and Court D. RP 201, 202, 231. Officer Leslie Jacobsen was also dispatched. 11/9/11PM RP 6. Officer Tiffany could hear a female voice screaming. RP 203, 232. Officers Tiffany and Hovey saw two people struggling in a parking lot and saw defendant kneeling over A.H. RP 203-204, 233. Defendant's hands and forearms were covered in blood and the victim had blood on her head, face, legs and lower body. RP 205-206, 235, 11/9/11PM RP 9-10. The victim did not have any pants on. RP 207, 235, 11/9/11 PM RP 9. The victim's eyes were large like she was scared and she was breathing heavy like there had been a struggle. 11/9/11 PM RP 10. When the police arrived, defendant still had his hands around A.H.'s neck. RP 146. Defendant said some other guy was trying to "do her" and he was trying to help A.H. RP 146, 236, 11/9/11PM RP 13. Defendant did not comply with commands and had to be tased. RP 146, 209, 234. The victim said there was no other guy, defendant had tried to rape her and that her head hurt because she had been struck repeatedly. 11/9/11 PM RP 11, 13. The victim said the assault had started down the street and all her clothes were

there. 11/9/11 PM RP 13-14. An ambulance eventually took A.H. to the hospital. RP 147.

Officer Jacobsen walked down the street and found the victim's clothes and purse as well as a chunk of her hair. 11/9/11 PM RP 14.

There were two distinct locations. 11/9/11 PM RP 15. The two scenes were at least 200 feet apart. 11/9/11PM RP 17, 18.

Defendant initially claimed he had not done anything, someone else had and that he was just trying to help. RP 212, 238-239. Defendant said he did not know the victim but that they had been walking together. RP 214, 219. Defendant claimed the victim had just flipped, he was not sure how her pants came off and that the injury on his hand was from the victim biting him. RP 215, 216- 217, 218. The injury was too clean and even to be a bite. RP 215. Defendant then changed his story and said the victim took her pants off to have sex with him and they had a \$25 prostitution deal. RP 217. Defendant claimed the victim showed him the place to meet, they hugged and kissed but then she said her boyfriend was watching, he would get mad and she flipped out. RP 217, 221. Defendant then changed his story again and said victim approached him, made a \$25 deal for oral sex, she lead him to an area by the Regence building, started the act, then she took her pants off and said if he paid \$50 he could have intercourse with her. RP 220. Defendant said he did not want to have sex

with her, started to walk away and the victim began yelling for help and police. RP 220. Defendant said A.H. then ran off northbound and he was concerned about her running off with no pants on so he ran after her. RP 222. She grabbed his hand and bit him. RP 222. Defendant claimed he had done nothing wrong and had not assaulted A.H. RP 224.

Defendant later told Detective Williams Muse yet another story. 11/9/11 PM RP 25, 29. Defendant said he was walking down the street drinking wine when the victim came up from behind and said her boyfriend was chasing her and she asked defendant for his protection. 11/9/11 PM RP 32. Defendant did not see anyone chasing her but he walked down the street with the victim who said she would make him a happy man for \$50. 11/9/11 PM RP 32. Defendant said he was not interested in anything sexual. 11/9/11 PM RP 32. Defendant said the victim then lit something up and smoked it and then jumped in the bushes and started removing her clothes. 11/9/11 PM RP 32-33. The victim then tried to leave but defendant was concerned for her safety and so he stayed with her. 11/9/11 PM RP 33, 35.

At trial, defendant testified that he was out walking on the night of October 20, 2010 because he liked nature. 11/10/11 RP 40. Defendant claimed that he had never met the victim before, that she came up to him around midnight, said, "hello big boy" and told him she wanted him to be

her bodyguard. 11/10/11 RP 42. They began to walk and then she offered him sex for money. 11/10/11 RP 43-44. He refused but decided to let her sleep at his house. 11/10/11 RP 44. The victim asked for \$50 for sex, but defendant said he didn't have any money. 11/10/11 RP 46. The victim then went into the bushes and came out different. 11/10/11 RP 46.

Defendant then held the victim, they kissed, she flipped out, went back into the bushes and came out without pants on. 11/10/11 RP 47.

Defendant said he told the victim to put her clothes back on and tried to hold her to calm her down. 11/10/11 RP 48. The victim then bit him and when he tried to leave, she followed him. 11/10/11 RP 49. They both fell down and the victim started to scream and holler. 11/10/11 RP 50.

Defendant told the man who drove by to call 911. 11/10/11 RP 50.

Defendant denied banging the victim's head, penetrating her, or taking off her clothes. 11/10/11 RP 50. Defendant did admit kneeling over the victim, that there was a lot of blood around, more so at the second scene and that no one else was involved. 11/10/11 RP 66, 67, 73. Defendant admitted to telling different stories. 11/10/11 RP 81

A.H. has permanent knots on her head from hitting the cement. RP 140, 152. She could not eat for a week and it was hard to speak because of the cuts under her tongue. RP 142, 152. Some of her hair was pulled out and her neck and face were swollen. RP 151. At some point, A.H. cut

defendant on the arm to get his DNA because she thought she was going to die. RP 145, 147.

C. ARGUMENT.

1. DEFENDANT'S CONVICTIONS DO NOT CONTAIN THE SAME ELEMENTS, ARE NOT THE SAME IN LAW AND FACT AND OCCURRED AT TWO SEPARATE SCENES SO THEY DO NOT VIOLATE DOUBLE JEOPARDY, DO NOT MERGE AND ARE NOT THE SAME CRIMINAL CONDUCT.

a. Defendant's two convictions do not share the same elements and do not violate double jeopardy.

The double jeopardy clause of the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington State Constitution prohibits the imposition of multiple punishments for the same offense. *Whalen v. United States*, 445 U.S. 684, 688, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980); *State v. Westling*, 145 Wn.2d 607, 610, 40 P.3d 669 (2002); *State v. Calle*, 125 Wn.2d 769, 772, 888 P.2d 155 (1995). The federal and state double jeopardy clauses provide identical protections. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Although the protection itself is constitutional, it is for the Legislature to decide what conduct is criminal and to determine the appropriate punishment. *Calle*,

125 Wn.2d at 776. The court's role is limited to determining whether the Legislature intended to authorize multiple punishments. *Id.*

Where the legislature's intent is not expressly stated in the statutes in question, courts turn to the "same evidence" or *Blockburger* test. *In re Personal Restraint of Borrereo*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007) (citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). Under the same evidence test, double jeopardy is violated if a defendant is convicted of offenses that are identical in fact and in law. *Borrereo*, 161 Wn.2d at 537 (citing *State v. Louis*, 155 Wn.2d 563, 569, 120 P.3d 936 (2005)); *Calle*, 125 Wn.2d at 777, 888 P.2d 155 (1995). "If each offense contains an element not contained in the other, the offenses are not the same; if each offense requires proof of a fact that the other does not, the court presumes the offenses are not the same." *Id.* (citing *In re Personal Restraint of Orange*, 152 Wn.2d 795, 816-18, 100 P.3d 291 (2004)); *Calle*, 125 Wn.2d at 777-78.

Defendant's convictions do not violate double jeopardy. The elements of defendant's attempted second degree rape conviction were a substantial step toward sexual intercourse by forcible compulsion. RCW 9A.44.050(1)(a), CP 29-53, instructions 10, 15. The elements of defendant's assault in the second degree charge were assault of A.H. by

strangulation. RCW 9A.36.021(g), CP 29-53, instruction 18. The elements of the two crimes are not the same. It was not necessary to prove strangulation in order for defendant to be found guilty of attempted rape in the second degree. The State can prove forcible compulsion without proving strangulation. The element of strangulation is specific to the assault in the second degree. The two crimes do not share the same elements and do not violate double jeopardy.

The case cited by defendant is distinguishable. In *State v. Martin*, 149 Wn. App. 689, 699, 205 P.3d 931 (2009), defendant was convicted of second degree assault and attempted rape in the third degree. The second degree assault in the case required proof of intentional assault and the intent to commit a felony, in that case rape. *Id.* The court found that as charged, one crime was an anticipatory offense and the other crime was used as a basis for the attempt charge so a review of the elements was not enough. *Id.* The court found that the assault was a substantial step toward the rape and that there was no independent purpose. *Id.* at 700. The same evidence was used to support both charges. In the instant case, defendant was charged under a different prong of the assault statute that did not require defendant to intend to commit a felony in order to commit the assault. Further, the evidence for the two crimes was different. That defendant grabbed the victim by the hair and threw her to the ground,

forced his knee into her stomach, beat her head against the ground, cut her tongue, tried to dislocate her jaw and jammed his hand into her mouth in addition to choking her all were proof of forcible compulsion and a substantial step toward rape in the second degree. RP 136, 137, 139, 140, 147. The victim was then able to break away from defendant, run down an alley and call for help before defendant re-contacted her; threw her to the ground and began to strangle her in an attempt to get her to be quiet. RP 142-145. The evidence supports two separate charges. The basis for one crime is not the same basis for the other.³ The analysis in *Martin* is distinguishable. Defendant's convictions do not violate double jeopardy.

b. Defendant's two convictions do not depend on each other and do not merge.

The merger doctrine is a judicial doctrine designed to prevent cumulative punishments where lesser included offenses do not include conduct that lies outside of the greater offense's definition. *State v. Collicott*, 112 Wn.2d 399, 410 11, 771 P.2d 1137 (1989). The Washington Supreme Court defined the concept of merger:

The merger doctrine is a rule of statutory construction which only applies where the Legislature has clearly

³ The State even noted this distinction in their closing. The State noted that the second struggle occurred after the truck had driven by. RP 99. The State also described the physical force necessary to overcome resistance and separately described the strangulation to get the victim to stop yelling. See RP 105, 108.

indicated that in order to prove a particular degree of crime (e.g., first degree rape) the State must prove not only that a defendant committed that crime but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (e.g., assault or kidnapping).

State v. Vladovic, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983). This doctrine is to be narrowly construed. *Collicott*, 112 Wn.2d at 410. As already illustrated above, defendant did not have to commit assault in order to commit attempted rape in the second degree or vice versa. Neither of defendant's two crimes elevated the other. This is distinguishable from the case cited by defendant. In *State v. Williams*, 156 Wn. App. 482, 494, 234 P.3d 1174 (2010) defendant was charged with assault in the second degree and rape in the first degree. The fact that defendant strangled the victim is what provided the necessary element to make the rape charge rape in the first degree. *Id.* Further, the assault was used to effectuate the rape and had no independent purpose. *Id.* at 495. In the instant case, the fact that defendant strangled the victim was not required in order to prove any element of attempted rape in the second degree. The fact that defendant committed an assault was not necessary to prove attempted rape in the second degree. The fact that defendant strangled the victim at a second scene 200 yards away from the first scene where the attempted rape happened, are two distinct incidents with two

independent purposes. RP 121, 123, 11/9/11RP 13-14, 15, 17, 18. The crimes of assault in the second degree and attempted rape in the second degree do not merge.

- c. Defendant's convictions occurred at two distinct scenes are not the same criminal conduct.

Under RCW 9.94A.589(1)(a), two crimes shall be considered the “same criminal conduct” only when all three of the following elements are established: (1) the two crimes share the same criminal intent; (2) the two crimes are committed at the same time and place; and (3) the two crimes involve the same victim. *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). The Legislature intended the phrase “same criminal conduct” to be construed narrowly. *State v. Flake*, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). If one of these elements is missing, then two crimes cannot constitute the same criminal conduct. *Lessley*, 118 Wn.2d at 778. An appellate court will generally defer to a trial court’s decision on whether two different crimes involve the same criminal conduct, and will not reverse absent a clear abuse of discretion or a misapplication of the law. *State v. Haddock*, 141 Wn.2d 103, 3 P.2d 733 (2000).

Two crimes share the same intent if, viewed objectively, the criminal intent did not change from the first crime to the second. *Lessley*,

118 Wn.2d at 777. To find the objective intent, the courts should begin with the intent element of the crimes charged. See *Flake*, 76 Wn. App. at 180; *State v. Dunaway*, 109 Wn.2d 207, 216, 743 P.2d 1237 (1987). A defendant's subjective intent is irrelevant. *Lessley*, 118 Wn.2d at 778. "In deciding if crimes encompassed the same criminal conduct, trial courts should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next." *Dunaway*, 109 Wn.2d at 215.

The Supreme Court of Washington has held that objective intent is "measured by determining whether one crime furthered another." *Lessley*, 118 Wn.2d at 778. Defendant argues that the assault in the instant case was incidental to the attempted rape charge. However, the evidence does not support this conclusion.

Defendant's actions constitute separate and distinct criminal conduct. In *State v. Grantham*, 84 Wn. App. 854, 932 P.3d 657 (1997). Grantham was convicted of two counts of second degree rape. After Grantham and his victim attended a party together, he took her to an apartment and tried to kiss her, but she resisted and asked to go home. *Id.* at 856. Grantham slapped his victim, called her names, forcibly removed her clothes, and repeatedly slammed her head into the wall. *Id.* He then

forced his victim to her knees facing into the corner of the room and anally raped her. *Id.*

After Grantham withdrew his penis from his victim's anus, she remained crouched in the corner. *Id.* Grantham began kicking her and telling her to get up and turn around. *Id.* When she still did not comply, Grantham forced her to turn around by grabbing her face and chin. *Id.* He demanded his victim perform oral sex on him and when she kept her mouth closed, he slammed her head against the wall and forced her to comply. *Id.*

The trial court found Grantham's two convictions were separate and distinct criminal conduct. *Id.* at 857. In addressing the issue of whether the two counts were same criminal conduct, the reviewing court noted that while the crime occurred at the same place and against the same victim, the two crimes were committed "not simultaneously, although relatively close in time." *Id.* at 858. The court framed the critical issues as:

the question is whether the combined evidence of a gap in time between the two rapes and the activities and communications that took place during that gap in time, and the different methods of committing the two rapes, is sufficient to support a finding that the crimes did not occur at the same time and that Grantham formed a new criminal intent when he committed the second rape.

Id. The court also mentioned that it was important to consider the impact of repeated sexual penetrations on the victim:

Repeated acts of forcible sexual intercourse are not to be construed as a roll of thunder, -- an echo of a single sound rebounding until attenuated. One should not be allowed to take advantage of the fact that he has already committed one sexual assault on the victim and thereby be permitted to commit further assaults on the same person with no risk of further punishment for each assault committed. Each act is a further denigration of the victim's integrity and a further danger to the victim.

Id. at 861 (quoting *Harrell v. State*, 88 Wis.2d 546, 277 N.W.2d 462, 469 (1979)). A period of time between assaults, therefore, not only defeats the "same time" prong of the same criminal conduct test, it also defeats the "same objective intent" prong, because:

If at the scene of the crime the defendant can be said to have realized that he has come to a fork in the road, and nevertheless decides to invade a different interest, then his successive intentions make him subject to cumulative punishment and he must be treated as accepting the risk whether he in fact knew of it or not.

Grantham, 84 Wn. App. at 861 (again quoting *Harrell*, 88 Wis.2d at 466).

The court noted *Grantham* finished one act of rape before committing the other, that he had the presence of mind between rapes to threaten his victim not to tell, and that he used new physical force to gain the victim's compliance a second time. *Grantham*, 84 Wn. App. at 859. That evidence was sufficient to establish that *Grantham* "had the time and

opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act.” *Id.* Grantham “chose the latter, forming a new intent to commit the second act. The crimes were sequential, not simultaneous or continuous.” *Id.* Thus, the trial court properly concluded the crimes were not same criminal conduct because they did not occur at the same time and did not involve the same objective intent. *Id.*, at 661.

In the instant case, the assault and attempted rape committed by defendant were separate and distinct criminal acts. The acts in this case occurred at two separate and distinct crime scenes that were over 200 yards away. *See* RP 123, 143, 11/9/11 PM RP 13-14, 15, 17, 18, 11/10/11 RP 15, 18, 25, 34, 66. The victim’s clothes, purse and a large clump of her hair were found at the first scene. RP 121, 11/9/11 RP 14. Defendant and the victim were found at the second scene. RP 121, 123, 203-204, 233. When defendant was found, his hands were still around the victim’s throat, choking her. RP 146. While the victim testified that defendant choked her at the first scene while he was trying to rape her, she also testified about the other things defendant did to her at the first scene. Defendant repeatedly struck the victim’s head against the cement, he severely cut her tongue, he jammed his hand into her mouth, and he tried to dislocate her chin and jaw. RP 136, 137, 139, 140, 147. All of these things in addition to choking occurred at the first scene. These facts made up the basis for the attempted rape charge.

A car, driven by Mr. Phelps, drove by while the attempted rape was happening. RP 142, 183-184. This distracts defendant and the victim is able to break away and run away from the first scene. RP 142-143. Defendant pursues the victim. RP 143. The victim sees a house with lights on and windows open and calls for help, screaming that defendant is going to kill her. RP 143. Like the defendant in Grantham, there is a break in time and defendant has the choice to pursue further criminal actions. Defendant forms a new criminal intent in pursuing the victim, knocking her to the ground, trying to drag her away and eventually getting on top of her and strangling her until she cannot breathe, is dizzy and praying not to die. RP 143-145. The evidence at this point supports the independent purpose that defendant is seeking to keep the victim quiet. The attempted rape had already been committed by this time. The assault of the victim at the second scene is a new crime with an independent purpose. The two crimes are not the same criminal conduct.

2. DEFENDANT RECEIVED
CONSTITUTIONALLY EFFECTIVE
ASSISTANCE OF COUNSEL AS DEFENDANT
CANNOT SHOW DEFICIENT PERFORMANCE
OR PREJUDICE.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution, and in Article 1, Sec. 22 of the Constitution of the State of Washington. The right to effective

assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* The court has elaborated on what constitutes an ineffective assistance of counsel claim. The court in *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986), stated that “the essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial rendered unfair and the verdict rendered suspect.”

The test to determine when a defendant’s conviction must be overturned for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by the Washington Supreme Court in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986). The test is as follows:

First, the defendant must show that the counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as “counsel” guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. See also **State v. Walton**, 76 Wn. App. 364, 884 P.2d 1348 (1994), review denied, 126 Wn.2d 1024 (1995); **State v. Denison**, 78 Wn. App. 566, 897 P.2d 437, review denied, 128 Wn.2d 1006 (1995); **State v. McFarland**, 127 Wn.2d 322, 899 P.2d 1251 (1995); **State v. Foster**, 81 Wn. App. 508, 915 P.2d 567 (1996), review denied, 130 Wn.2d 100 (1996).

State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), cert. denied, 506 U.S. 56 (1992), further clarified the intended application of the **Strickland** test.

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

Citing **Strickland**, 466 U.S. at 689-90.

Under the prejudice aspect, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the

result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. Because the defendant must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a finding of lack of prejudice without determining if counsel’s performance was deficient. *Strickland*, 466 U.S. at 697, *Lord*, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. *McFarland*, 127 Wn.2d at 335 (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Strickland*, 466 U.S. at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993), *cert. denied*, 510 U.S. 944 (1993). Defendant has the “heavy burden” of showing that counsel’s performance was deficient in light of all surrounding circumstances. *State v. Hayes*, 81 Wn. App. 425, 442, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996). Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S. at 689.

Defendant argues that his counsel was ineffective for failing to argue that his crimes constituted the same criminal conduct. A review of the record shows that counsel was an advocate for his client. Counsel made motions in limine, argued a CrR 3.5 hearing and objected as

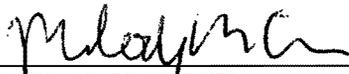
necessary throughout the case. Counsel cross-examined witnesses and put on a defense case. There is nothing that supports a claim that counsel was ineffective. Further, as argued above, the two crimes defendant committed were committed at different scenes and with independent intent. Neither crime furthered the other. The two convictions do not violate double jeopardy, they do not merge and they are not the same criminal conduct. As a challenge on any of these theories would have been unlikely to succeed, defense counsel cannot be said to be ineffective to failing to make such an argument. Defendant cannot meet his burden of showing deficient performance or prejudice.

D. CONCLUSION.

The State respectfully requests this court affirm defendant's convictions and sentence.

DATED: January 14, 2013

MARK LINDQUIST
Pierce County
Prosecuting Attorney



MELODY CRICK
Deputy Prosecuting Attorney
WSB # 35453

PIERCE COUNTY PROSECUTOR

January 14, 2013 - 1:52 PM

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