# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>TROY A. STRUNKS,<br><br>Appellant. | No. 37927-9-II<br><br>UNPUBLISHED OPINION |

Armstrong, J. — Troy A. Strunks assaulted a woman walking alone in Olympia late at night and forced her into his car before she escaped. A jury convicted Strunks of attempted first degree kidnapping and attempted first degree rape. On appeal, Strunks argues (1) the trial court admitted improper opinion testimony, (2) his trial counsel was ineffective, (3) his convictions violate double jeopardy, (4) insufficient evidence supports the attempted rape conviction, and (5) his weapon sentence enhancement for attempted rape violates double jeopardy. We affirm Strunks's conviction for attempted first degree kidnapping but remand for the trial court to vacate the conviction for attempted rape and resentence Strunks.

FACTS

Amanda Wright, age 25, was walking home alone from downtown Olympia around 2:00 am on September 15, 2007. Wright was intoxicated after an evening out drinking with friends. Troy A. Strunks, age 22, approached her, asked for a light for his cigarette, and said he thought she looked familiar. They talked about where each had gone to high school, and then Strunks said he wanted to show her an old building being remodeled nearby. Wright followed him to a parking lot behind the building and jokingly said, "As long as you don't rape me." II

Report of Proceedings (RP) at 129.

Strunks offered Wright a ride, and when she declined he became angry and pushed her. Wright testified that Strunks then grabbed her, held a knife to her throat, and told her not to fight. He pushed her into his car and she fell backwards into the driver's seat. He crouched down, and Wright testified, "I don't know if he was trying to get my feet to put me in the car, [or] if he was taking his pants off." II RP at 133. She believed he was going to rape her, and decided she would "rather get cut than raped." II RP at 133. She forced her way out of the car and ran to a group of people walking up the street as Strunks drove away. The pedestrians assisted Wright and called the police. Deputy McIver was among the officers who arrived at the scene.

On September 18, 2007, Deputy McIver arrested Strunks for driving with a suspended license. The deputy searched the car and found a pocketknife near the driver's seat. While talking in the patrol car, Strunks mentioned he was in downtown Olympia on the night of September 15. During the course of this conversation, the deputy realized Strunks might be the suspect in Wright's case:

> I just felt in my mind--and had an overwhelming feeling, all of a sudden, that vehicle matched the description of the night of the 15th. He matched the description, his comments, the proximity he . . . put himself [to] 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 was possibly the suspect in that crime down in Olympia.

I RP at 101.

At the police station, Detective Costello interviewed Strunks. Strunks admitted he was drinking in Olympia with a friend and unsuccessfully "hitting on" women on September 15. II RP at 168-69. When asked how he was dressed, Strunks said he was dressed normally, "because

normal gets you laid." II RP at 170. Strunks denied any involvement in Wright's attack. Although Detective Costello released Strunks, the detective attempted to follow him because "[i]n my mind I believe he was the one that committed this crime." II RP at 178-79. Detective Costello showed Wright a photomontage and she identified Strunks as her assailant.

The State charged Strunks with first degree attempted kidnapping and first degree attempted rape. After the State presented its evidence, Strunks moved to dismiss the attempted rape charge due to insufficient evidence of intent to rape. The trial court denied the motion. A jury found Strunks guilty of both charges, and found by special verdicts that Strunks was armed with a deadly weapon and had a sexual motivation for committing attempted kidnapping. The trial court sentenced Strunks to a total of 120 months, including a weapon enhancement for both crimes. Strunks appeals.

## ANALYSIS

### I. Opinion Testimony

Strunks argues the trial court improperly admitted opinion testimony from Deputy McIver and Detective Costello, violating his constitutional right to a jury trial. Strunks objected to Detective Costello's testimony on grounds of relevance, not improper opinion testimony. He did not object to the Deputy McIver's testimony. We decline to consider these alleged errors because Strunks failed to preserve these issues at trial and the alleged errors are not manifestly unconstitutional.

We will not consider an issue for the first time on appeal unless it is a manifest error affecting a constitutional right. RAP 2.5(a). In *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d

125 (2007), our Supreme Court recently considered whether a defendant may assign error to allegedly improper opinion testimony for the first time on appeal. The court held: "[T]estimony of an investigating officer or examining doctor, if not objected to at trial, does not necessarily give rise to a manifest constitutional error." *Kirkman*, 159 Wn.2d at 938. Manifest error "requires an explicit or almost explicit witness statement on an ultimate issue of fact." *Kirkman*, 159 Wn.2d at 938. Also, the defendant must show the alleged error actually prejudiced his rights at trial. *Kirkman*, 159 Wn.2d at 926-27. In determining whether the challenged testimony constituted manifest error, the *Kirkman* court emphasized that exceptions to RAP 2.5(a) must be narrowly construed, and that jurors are presumed to follow the court's instructions. *Kirkman*, 159 Wn.2d at 936-37.

Deputy McIver's testimony is not manifest error because it is not "an explicit or almost explicit witness statement" on the ultimate issue of whether Strunks committed the crimes charged. *See Kirkman*, 159 Wn.2d at 938. The deputy merely testified that he realized Strunks matched the description of the suspect in Wright's case: "I knew that Mr. Strunks *could be or was possibly* the suspect in that crime down in Olympia." I RP at 101 (emphasis added).

Detective Costello's testimony is not manifest error because Strunks failed to show he was actually prejudiced by the testimony. *See Kirkman*, 159 Wn.2d at 926-27. Detective Costello was explaining why he decided to follow Strunks after releasing him from the police station when he testified, "In my mind I believe [Strunks] was the one that committed this crime." II RP at 179. Strunks objected on grounds of relevance, and the trial court ruled: "I'll allow the jury to consider it, only not for the truth or falsity of the detective's opinion, but simply to explain what

the detective did, for that limited purpose only." II RP at 180. Although the testimony is an explicit statement that the detective believed Strunks was guilty, the court immediately instructed the jury not to consider the truth or falsity of the detective's opinion. We presume the jury followed the court's instruction and considered Detective Costello's statement only for the purpose of explaining the detective's actions. *See Kirkman*, 159 Wn.2d at 937. Strunks has failed to show the testimony actually prejudiced his defense.

II. Ineffective Assistance of Counsel

Strunks argues his counsel ineffectively represented him by failing to object to Deputy McIver's and Detective Costello's opinion testimony. These arguments fail for the same reasons we discussed above.

We review ineffective assistance of counsel claims de novo. *State v. Binh Thach*, 126 Wn. App. 297, 319, 106 P.3d 782 (2005). Both the federal and state constitutions guarantee effective legal representation for a criminal defendant. *See* U.S. Const. amend VI; Wash. Const. art. I, § 22. A defendant must overcome the strong presumption that counsel was effective by showing that (1) counsel's representation was deficient and (2) the deficient representation prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). Prejudice occurs when there is a reasonable probability that the outcome would have been different if counsel's performance had not been deficient. *In re Pers. Restraint of Pirtle*, 136 Wn.2d at 487. We need not address both prongs of

the test if the defendant makes an insufficient showing on one prong. *State v. Fredrick*, 45 Wn. App. 916, 923, 729 P.2d 56 (1986).

Trial counsel was not deficient for failing to object to Deputy McIver's testimony because the deputy did not offer opinion testimony. A witness may not testify to his opinion of the defendant's guilt. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). As discussed above, Deputy McIver merely testified that he realized Strunks matched the description of the suspect in Wright's case, not that he believed Strunks was guilty.

Trial counsel's objection to Detective Costello's testimony on grounds of relevance did not prejudice Strunks's defense. The trial court immediately instructed the jury not to consider the truth or falsity of the detective's opinion, and to consider the testimony only for the purpose of explaining the detective's actions. Again, we presume the jury followed the court's instruction and did not consider the detective's opinion for the purpose of determining whether Strunks was guilty. *See Kirkman*, 159 Wn.2d at 937.

III. Double Jeopardy for Attempted Kidnapping and Attempted Rape

Strunks argues his convictions violate double jeopardy and that the attempted kidnapping conviction merges with attempted rape. The State concedes that the attempted kidnapping should merge with attempted rape. We agree with Strunks that the crimes merged, but hold that the attempted rape conviction merges with attempted kidnapping.

We review double jeopardy claims de novo. *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006). The merger doctrine is a rule of statutory construction used to determine whether the legislature intended to authorize multiple punishments for a single act. *State v.*

*Freeman*, 153 Wn.2d 765, 771-72, 108 P.3d 753 (2005); *State v. Vladovic*, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983). Under the merger doctrine, when a particular degree of crime requires proof of another crime, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime. *See Freeman*, 153 Wn.2d at 772-73; *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979). A separate conviction for the included crime will not stand unless it involved an injury to the victim that is separate and distinct from the greater crime. *Johnson*, 92 Wn.2d at 680.

Strunks's attempted kidnapping conviction was elevated to the first degree because he committed the crime with intent to commit first degree rape. Strunks committed the two crimes simultaneously, and neither resulted in a separate and distinct injury to Wright. Because first degree kidnapping required proof that Strunks intended to commit first degree rape, we presume the legislature intended to punish both offenses through a greater sentence for first degree kidnapping. *See Freeman*, 153 Wn.2d at 772-73. Although the parties assert that attempted kidnapping merges with attempted rape, the attempted rape conviction was elevated to the first degree for use of a deadly weapon. Kidnapping was not an element of first degree rape in this case, so attempted kidnapping does not merge with attempted rape. *See Johnson*, 92 Wn.2d at 680.

## IV. Sufficiency of the Evidence for Attempted Rape

Strunks argues that the State failed to prove attempted first degree rape. In considering a challenge to the sufficiency of the evidence, we construe the evidence in the light most favorable to the State and ask whether any rational trier of fact could have found guilt beyond a reasonable

doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim that the evidence was insufficient admits the truth of the State's evidence and all reasonable inferences drawn from that evidence. *Salinas*, 119 Wn.2d at 201.

A conviction for attempted first degree rape requires proof beyond a reasonable doubt that the defendant intended to force the victim to engage in sexual intercourse by using a deadly weapon, and that the defendant took a substantial step toward committing that crime. *See* RCW 9A.04.100 (proof beyond a reasonable doubt); RCW 9A.28.020 (criminal attempt); RCW 9A.44.040 (first degree rape). When viewed in the light most favorable to the State, the evidence shows: Strunks spent the evening unsuccessfully hitting on women; he was dressed normally because "normal gets you laid"; he was intoxicated; he approached a female walking by herself late at night; he lured her into a dark parking lot, grabbed her, held a knife to her throat, told her not to struggle, and threw her into his car on her back; he crouched down in front of her, and she believed he was going to rape her. A rational trier of fact could reasonably infer from the State's evidence that Strunks intended to have sexual intercourse with Wright when he attacked her.

V. Double Jeopardy and Weapon Sentence Enhancement

Strunks argues his conviction for attempted first degree rape and weapon sentence enhancement violates double jeopardy. A sentence enhancement for an offense committed with a weapon does not violate double jeopardy, even where the use of the weapon is an element of the crime. *See State v. Nguyen*, 134 Wn. App. 863, 866, 142 P.3d 117 (2006). Strunks acknowledges this, but raises the double jeopardy claim because the Supreme Court recently accepted review of a case, *State v. Kelley*, 146 Wn. App. 370 (2008), *review granted*, 165 Wn.2d

1027 (2009), that raises this issue. Unless and until the Supreme Court chooses to overturn this rule, Strunks's weapon enhancement does not violate double jeopardy.

We affirm Strunks's conviction for attempted first degree kidnapping but remand for the

trial court to vacate the attempted rape conviction and resentence Strunks.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Quinn-Brintnall, J.

Van Deren, C.J.