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68809-0

68809-0

NO. 68809-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JORELL A. HICKS,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. Did defendant's conviction for first degree assault and his conviction for drive by shooting violate the prohibition against double jeopardy?

2. Did defendant's conviction for first degree assault and his conviction for first degree robbery violate the prohibition against double jeopardy?

3. Has defendant shown that counsel's assistance was ineffective; that defense counsel's representation was both deficient and prejudiced the defendant, by failing to raise a sentencing issue that would have required the sentencing court to make factual determinations and to exercise its wide discretion—specifically, failing to argue that the defendant's convictions for first degree assault and first degree robbery constituted the "same criminal conduct" for sentencing purposes?

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIMES.

Jorell Avery Hicks, defendant, and Coletin Kittleson wanted to get some money, so they planned to rob someone. Kittleson believed that Erin Gunder had money from selling drugs, so he arranged to meet Gunder to purchase two ounces of heroin. Two

ounces of heroin is not a normal amount for personal use. The plan was to forcibly take the heroin and sell it to obtain cash. Devan Bermodes agreed to drive Kittleson and defendant to meet Gunder. Bermodes parked in the Barnes & Noble and Petco parking lot near the stairs to the Old Spaghetti Factory parking lot on 196th Street SW in Lynnwood. Defendant and Kittleson got out of Bermodes' vehicle and walked up the stairs. Kittleson pointed out Gunder and returned to Bermodes' vehicle. Defendant contacted Gunder, who was standing outside her car in the Old Spaghetti Factory parking lot, and said, "Give me your shit." Defendant was wearing a hoodie, had a bandana covering his nose and mouth, and pointing a gun at Gunder. Gunder handed defendant the two ounces of heroin. Defendant pointed the gun at Edward Shaw sitting in the passenger seat of Gunder's car and said, "Give me your wallet." Shaw replied, "I don't have anything." Gunder handed defendant her wallet and purse. Defendant told Gunder to get in her car. Defendant closed the door and ran. 1RP[1]

[1] The verbatim reports of proceedings are referenced as follows:
1RP refers to the three volume report of the jury trial on February 27, 28 and 29, 2012;
2RP refers to the report of the verdict on March 1, 2012; and
3RP refers to the report of sentencing on May 3, 2012.

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Defendant returned to Bermodes' vehicle with Gunder's property. Bermodes drove through the Barnes & Noble parking lot up to the traffic light at Best Buy and Alderwood Mall Parkway. Gunder decided to look for the person who robbed her while Shaw called 911. Gunder drove out of the Old Spaghetti Factory parking lot onto 196th Street and turned right on Alderwood Mall Parkway, heading north. When they got to the traffic light at Best Buy Gunder and Shaw saw Bermodes' vehicle and recognized the front passenger was the person who had just robbed them. Bermodes turned right onto Alderwood Mall Parkway, heading north. Gunder followed trying to get the license plate number of Bermodes' vehicle. Kittleson observed that Gunder and Shaw were following them. While defendant and Kittleson talked about what to do, Bermodes tried to lose Gunder and Shaw. After crossing over I-5 Bermodes turned left onto Alderwood Mall Boulevard, heading southwest. Bermodes next turned right onto 33rd Avenue W, heading north. Bermodes then turned left onto 188th Street SW, heading west. Gunder was still following. In the 3400 block of 188th Street, defendant leaned out the window of Bermodes' vehicle

and fired two shots at Gunder and Shaw. One round struck the hood of Gunder's car directly in front of Shaw. 1RP 33-36, 42, 51-57, 68-69, 71-79, 81-82, 85-87, 98-104, 112-113, 177-179, 285-288, 296-297.

Police contacted Gunder and Shaw near the area of the shooting. The area was searched and two .40 caliber shell casings were found on 188th Street in the 3400 block. Based on the information Gunder and Shaw provided, the police located Bermodes' vehicle. Gunder and Shaw were transported to the location and identified Bermodes as the driver and Kittleson as the rear seat passenger. Defendant was located at his residence. Gunder and Shaw were transported to the residence and identified defendant as the person who robbed them at the Old Spaghetti Factory parking lot and who fired two shots at them on 188th Street while leaning out the front passenger window of Bermodes' vehicle. 1RP 36-38, 40-46, 57-58, 79-81, 107, 117-125, 127-128, 131-136, 143-146, 157-166, 169-170, 172, 187, 189, 230-236, 242, 269-270, 273-274, 291, 294.

Search warrants were obtained for Bermodes' vehicle and for defendant's residence. Gunder's wallet and a piece of paper with Gunder's name written on it were found in Bermodes' vehicle.

Gunder's purse was found at defendant's residence. Also located at defendant's residence was a backpack that contained drugs, a .40 caliber handgun, a hoodie and a bandana. Defendant had gun powder residue on his hand.[2] 1RP 149-150, 173-175, 179, 182-184, 191-192, 194, 196-198, 201-205, 210-211, 213-214, 216-218, 253-264, 266, 268, 270-272, 289, 291, 300, 306.

The drugs found in the backpack were tested at the Washington State Patrol Crime Laboratory and found to consist of cocaine, methamphetamine and heroin. The heroin weighed 24 grams, just less than one ounce. Kittleson and defendant divided up the heroin and Kittleson threw his share out the window when being stopped by the police. 1RP 173, 176, 225-227, 260-261, 289-290.

B. PROCEDURAL FACTS.

Defendant was charged by an amended information with five counts: count 1, first degree assault while armed with a firearm; count 2, first degree unlawful possession of a firearm; count 3, first degree robbery with a firearm allegation; count 4, drive by shooting; and count 5, possession of a controlled substance with intent to

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[2] Defendant stipulated that he had previously been convicted of a serious offense. CP 120; 1RP 9-11.

manufacture or deliver with a firearm allegation. CP 147-148; 1RP 8-9.

On March 1, 2012, the jury found defendant guilty as charged on all five counts and returned special verdicts on counts 1, 3 and 5 finding that defendant was armed with a firearm at the time the offense was committed. CP 91-96, 98-99; 2RP 1-23.

On May 3, 2012, defendant was sentenced. Defendant argued and the court found that counts 1 and 4, the first degree assault and the drive by shooting, encompassed the same criminal conduct under RCW 9.94A.589(1)(a). The court also found that defendant used a firearm in the commission of counts 1, 3 and 5. On count 1 defendant's offender score was 9 with a standard sentence range of 240 – 318 months, plus a 60 month firearm enhancement. On count 2 defendant's offender score was 6 with a standard sentence range of 57 - 75 months. On count 3 defendant's offender score was 9 with a standard sentence range of 129 – 171 months, plus a 60 month firearm enhancement. On count 4 defendant's offender score was 9 with a standard sentence range of 87 – 116 months. On count 5 defendant's offender score was 6 with a standard sentence range of 100 – 120 months, plus a 36 month firearm enhancement. Defendant was sentenced to 474

months confinement including 156 month on the three firearm enhancements; all counts to be served concurrently with the enhancements to be served consecutively.[3] CP 17-30, 64-66; 3RP 3-10, 25-30.

III. ARGUMENT

A. NEITHER DEFENDANT'S CONVICTIONS FOR FIRST DEGREE ASSAULT AND FIRST DEGREE ROBBERY NOR DEFENDANT'S CONVICTIONS FOR FIRST DEGREE ASSAULT AND DRIVE BY SHOOTING VIOLATED HIS PROTECTION FROM DOUBLE JEOPARDY.

The double jeopardy clause of the Fifth Amendment protects a defendant from being punished multiple times for the same offense. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). The Washington Constitution provides the same protection. State v. Graham, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005); Adel, 136 Wn.2d at 632. Even when sentences for multiple offenses are served concurrently, double jeopardy protection remains applicable because of the other adverse consequences of multiple convictions. State v. Calle, 125 Wn.2d 769, 773, 888 P.2d 155

[3] The court did not impose confinement on count 4, drive by shooting. Under RCW 9.94A.589(1)(a) offenses encompassing the same criminal conduct are counted as one crime with sentences to be served concurrently. Since the State did not object at the time of sentencing, and because a concurrent sentence on count 4 would not change the amount of defendant's total confinement, the State, therefore, declines to raise the issue on cross appeal. RAP 12.1; State v. Johnson, 119 Wn.2d 167, 170, 829 P.2d 1082 (1992); State v. Newlum, 142 Wn. App. 730, 738, n. 5, 176 P.3d 529 (2008); State v. Barnett, 17 Wn. App. 53, 56, 561 P.2d 234, 236 (1977).

(1995). A double jeopardy challenge may be raised for the first time on appeal. Adel, 136 Wn.2d at 632. The question of whether a defendant's double jeopardy protection has been violated is a question of law reviewed de novo. State v. Frodert, 84 Wn. App. 20, 25, 924 P.2d 933 (1996).

To successfully prevail on his double jeopardy challenge, defendant must affirmatively establish that he has been twice punished for the same offense. Although the protection against multiple punishments is constitutional, the Legislature has the power to determine what type of conduct is prohibited under the law and to determine the appropriate punishment. Calle, 125 Wn.2d at 776. The inquiry thus becomes whether the Legislature intended to authorize multiple punishments for the actions which led to defendant's convictions. State v. Baldwin, 150 Wn.2d 448, 454, 78 P.3d 1005 (2003); State v. Leming, 133 Wn. App. 875, 882, 138 P.3d 1095 (2006).

1. Express Or Implicit Legislative Intent.

> Because the question largely turns on what the legislature intended, we first consider any express or implicit legislative intent. Sometimes the legislative intent is clear, as when it explicitly provides that burglary shall be punished separately from any related crime. RCW 9A.52.050. Sometimes, there is sufficient evidence of legislative intent that we are

> confident concluding that the legislature intended to punish two offenses arising out of the same bad act separately without more analysis. E.g., Calle, 125 Wn.2d at 777–778 (rape and incest are separate offenses).

State v. Freeman, 153 Wn.2d 765, 771-772, 108 P.3d 753 (2005). The Court has found that the legislature intended to punish first degree assault and first degree robbery separately. Freeman, 153 Wn.2d at 776, 779-780; State v. S.S.Y., 170 Wn.2d 322, 331-332, 241 P.3d 781 (2010).

Where legislative intent is not clear, courts turn to the Blockburger / same evidence test. Freeman, 153 Wn.2d at 772; Calle, 125 Wn.2d at 777.

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The Blockburger test is similar to Washington's 'same evidence' test. Calle, 125 Wn.2d at 777. In order to be the same offense for purposes of double jeopardy the offenses must be the same in law and in fact. If there is an element in each offense that is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not

constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses. Freeman, 153 Wn.2d at 772; Calle, 125 Wn.2d at 777.

2. Different In Law.

Here, the crimes of first degree assault, first degree robbery and drive by shooting are found in different sections of the criminal code.

a. First Degree Assault.

> A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:
>
> (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death;

RCW 9A.36.011 (1)(a).

b. First Degree Robbery.

> A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial.

RCW 9A.56.190.

> (1) A person is guilty of robbery in the first degree if:
>
> (a) In the commission of a robbery or of immediate flight therefrom, he or she:
>
> (i) Is armed with a deadly weapon; or
>
> (ii) Displays what appears to be a firearm or other deadly weapon;

RCW 9A.56.200 (1)(a)(i) and (ii).

c. Drive By Shooting.

> A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

RCW 9A.36.045 (1).

The crimes of first degree assault, first degree robbery and drive by shooting are different in law. "If each crime contains an element that the other does not, we presume that the crimes are not the same offense for double jeopardy purposes." Freeman, 153 Wn.2d at 772, citing Calle, 125 Wn.2d at 777; Blockburger, 284 U.S. at 304. The legislative intent to punish these crimes separately is indicated by the fact that the statutes are directed at different evils. Cf. Calle, 125 Wn.2d 780-781 (finding the rape and incest statutes directed to separate evils, double jeopardy did not

prevent convictions for both offenses arising out of a single act of intercourse). First degree assault and first degree robbery do not violate double jeopardy. Freeman, 153 Wn.2d at 776, 779-780; S.S.Y., 170 Wn.2d at 331-332. Assault and drive-by shooting do not violate double jeopardy because each requires proof of facts that the other does not. State v. Larson, 160 Wn. App. 577, 593, 249 P.3d 669 review denied, 172 Wn.2d 1002, 257 P.3d 666 (2011).

3. Different In Fact.

Each crime required proof of an element the other crimes did not require.

a. First Degree Assault.

> To convict the defendant of the crime of assault in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 16th day of August, 2011, the defendant assaulted Erin Gunder and/or Edward Shaw;
>
> (2) That the assault was committed with a firearm;
>
> (3) That the defendant acted with intent to inflict great bodily harm; and
>
> (4) That this act occurred in the State of Washington.

CP 111 (Jury instruction 8, WPIC 36.02).

b. First Degree Robbery.

To convict the defendant of the crime of robbery in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 16th day of August, 2011, the defendant unlawfully took personal property from the person or in the presence of another;

(2) That the defendant intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person;

(4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5)(a) That in the commission of these acts or in immediate flight therefrom the defendant was armed with a deadly weapon or

(b) That in the commission of these acts or in the immediate flight therefrom the defendant displayed what appeared to be a firearm or other deadly weapon;

(6) That any of these acts occurred in the State of Washington.

CP 123 (Jury instruction 20, WPIC 37.02).

c. Drive By Shooting.

To convict the defendant of the crime of drive by shooting, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 16th day of August, 2011, the defendant recklessly discharged a firearm;

(2) That the discharge created a substantial risk of death or serious physical injury to another person;

> (3) That the discharge was either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm to the scene of the discharge; and;
>
> (4) That this act occurred in the State of Washington.

CP 127 (Jury instruction 23, WPIC 35.31).

The crimes of first degree assault and first degree robbery were not the same in fact. Each required proof of an element that the other did not require. The fact that Gunder and Shaw were assaulted was irrelevant to the crime of first degree robbery. Proof of an assault is not necessary to prove first degree robbery. Likewise, while first degree robbery required proof of taking Gunder's property, the taking of property was irrelevant to the crime of first degree assault.

Similarly, the crimes of first degree assault and drive by shooting were not the same in fact. Larson, 160 Wn. App. at 593. Gunder and Shaw were assaulted when defendant fired two shots at them from a vehicle. The mere fact that the same conduct is used to prove each crime is not dispositive. Freeman, 153 Wn.2d at 777. Proof of an assault is not necessary to prove drive by shooting. The reckless discharge of a firearm from a motor vehicle was not required to prove the crime of first degree assault. Because the elements of the crimes are different, defendant has

failed to meet his burden under the Blockburger and same evidence tests to show that the crimes are the same for double jeopardy purposes.

4. Merger Does Not Apply.

Merger only applies where the Legislature has clearly indicated it intended the offenses to merge. State v. Sweet, 138 Wn.2d 466, 478, 980 P.2d 1223 (1999); State v. Vladovic, 99 Wn.2d 413, 420-421, 662 P.2d 853 (1983). The merger doctrine is an aid in determining legislative intent. Freeman, 153 Wn.2d at 772; Sweet, 138 Wn.2d at 477. Under the merger doctrine, when separately criminalized conduct raises another offense to a higher degree, the court presumes that the Legislature intended to punish both offenses only once, namely for the more serious crime with the greater sentence. Freeman, 153 Wn.2d at 772–773; State v. Leming, 133 Wn. App. 875, 882, 138 P.3d 1095 (2006). Here, none of defendant's convictions raised another offense to a higher degree.

5. Same Criminal Conduct.

The Legislature has validated the concept of multiple convictions arising out of the same criminal act. RCW 9.94A.589. At sentencing the court found that the first degree assault and drive

by shooting were the same criminal conduct. CP 18; 2RP 10. RCW 9.94A.589(1)(a), requires multiple current offenses encompassing the same criminal conduct to be counted as one crime in determining the defendant's offender score: "'Same criminal conduct,' as used in this subsection, means 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). Sentences imposed under this subsection are to be served concurrently. Id. Thus, it is clear that the legislative intent includes the possibility that a single act may result in multiple convictions, and simply limits the consequences of such convictions. State v. Calle, 125 Wn.2d 769, 781-782, 888 P.2d 155 (1995).

B. DEFENDANT HAS NOT SHOWN THAT COUNSEL'S REPRESENTATION WAS DEFICIENT NOR THAT HE WAS PREJUDICED BY COUNSEL'S PERFORMANCE.

Defendant argues that he was denied effective assistance of counsel. He claims that counsel was ineffective by not arguing that the first degree assault and first degree robbery convictions were the same criminal conduct for purposes of sentencing. Appellant's Brief 12-16. Application of the same criminal conduct statute involves both factual determinations and the exercise of discretion.

State v. Nitsch, 100 Wn. App. 512, 523, 997 P.2d 1000, review denied, 141 Wn.2d 1030 (2000). Failure to raise same criminal conduct at sentencing waives the right to appeal the issue. In re Goodwin, 146 Wn.2d 861, 875, 50 P.3d 618 (2002); State v. Jackson, 150 Wn. App. 877, 892, 209 P.3d 553 (2009). However, the issue can be raised on appeal under a claim of ineffective assistance of counsel. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

As shown below defendant's convictions for first degree assault and first degree robbery did not involve the same criminal conduct for sentencing purposes. Thus, defense counsel's failure to argue same criminal conduct for first degree assault and first degree robbery was not ineffective assistance. State v. Allen, 150 Wn. App. 300, 316-317, 207 P.3d 483 (2009).

1. Effective Assistance Of Counsel.

Effective assistance of counsel is guaranteed by both the federal and the state constitutions. In re Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005); *see* U.S. Constitution, amendment VI; Washington Constitution, Article I, § 22. To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an

objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. McFarland, 127 Wn.2d at 335; State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the 2-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). If one of the two prongs of the test is absent, the court need not inquire further. Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726, review denied, 162 Wn.2d 1007, 175 P.3d 1094 (2007).

Competency of counsel is determined upon the entire record below. McFarland, 127 Wn.2d at 335; State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972); State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969). Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. McFarland, 127 Wn.2d at 335; State v. Crane, 116 Wn.2d 315, 335, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); State v. Blight, 89 Wn.2d 38, 45-46, 569 P.2d 1129 (1977).

Courts engage in a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335; State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); Thomas, 109 Wn.2d at 226. "The burden is on the defendant to show from the record a sufficient basis to rebut the 'strong presumption' that counsel's representation was effective." State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); McFarland, 127 Wn.2d at 337; Thomas, 109 Wn.2d at 226. Because of this presumption, the defendant must show that there were no legitimate strategic or tactical reasons for the challenged conduct. McFarland, 127 Wn.2d at 336. In assessing performance, "the court must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy." In re Rice, 118 Wn.2d 876, 888-889, 828 P.2d 1086 (1992). Prejudice requires a showing that but for counsel's performance it is reasonably probable that the result would have been different. State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007); Thomas, 109 Wn.2d at 226.

a. Defendant Has Not Shown That There Was No Strategic Or Tactical Reason For Counsel's Conduct.

In an ineffective assistance of counsel claim defendant has the burden to demonstrate that counsel's representation was deficient. McFarland, 127 Wn.2d at 337. A criminal defendant can rebut the presumption of reasonable performance by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011), quoting Reichenbach, 153 Wn.2d at 130. Here, defendant simply presumes that there was no legitimate strategic or tactical reason. Appellant's Brief 16. Conversely, the court employs a strong presumption that counsel's conduct constituted sound strategy. Reichenbach, 153 Wn.2d at 130; McFarland, 127 Wn.2d at 335-336; Brett, 126 Wn.2d at 198; Rice, 118 Wn.2d at 888-889; Thomas, 109 Wn.2d at 226.

Defendant's claim of ineffective assistance fails because counsel's performance did not fall below an objective standard of reasonableness. Under the facts of the present case, there was a much stronger argument for finding same criminal conduct for the assault and drive by shooting than for the assault and robbery. Counsel requested the trial court find the assault and drive by

shooting were the same criminal conduct. Rather than watering down his argument by asserting the weaker argument counsel chose to focus on the stronger argument. This was a tactical and strategic decision well within the boundaries of reasonable performance. Counsel's performance was not deficient.

b. Defendant Has Not Shown That The Result Would Have Been Different But For Counsel's Performance.

Defendant also has the burden to demonstrate that there is a reasonable probability that, except for counsel's ineffective assistance, the result of the proceeding would have been different. McFarland, 127 Wn.2d at 335. When the offenses do not involve the same criminal conduct counsels failure to argue same criminal conduct at sentencing is not ineffective assistance. Allen, 150 Wn. App. at 316-317. Defendant cannot establish prejudice if his convictions for first degree assault and first degree robbery were not the same criminal conduct.

2. Defendant's Convictions For First Degree Assault And First Degree Robbery Did Not Involve The "Same Criminal Conduct" For Sentencing Purposes.

For purposes of calculating the offender score at sentencing, multiple offenses encompass the same criminal conduct if the crimes involve the same (1) objective criminal intent, (2) time and place, and (3) victim. RCW 9.94A.589(1)(a); State v. Tili, 139

Wn.2d 107, 123, 985 P.2d 365 (1999), aff'd, 148 Wn.2d 350, 60 P.3d 1192 (2003). If any one of these elements is missing, multiple offenses cannot be considered to be the same criminal conduct and they must be counted separately in calculating the offender score. State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

a. Not The Same Time And Place.

While the robbery and assault involved the same victims, the crimes did not take place at the same time or place. The same time and same place elements of the same criminal conduct test are satisfied if the crimes were part of a continuing, uninterrupted sequence of conduct. State v. Porter, 133 Wn.2d 177, 186, 942 P.2d 974 (1997) (same criminal conduct where undercover officer purchased methamphetamine and immediately thereafter purchased marijuana from defendant); State v. Price, 103 Wn. App. 845, 856, 14 P.3d 841 (2000) (not same criminal conduct where defendant fired first shot at victim in a parked car and then pursued the vehicle and fired two more shots while driving along side). Here, the acts giving rise to the assault were separate from the acts comprising the robbery. The assault was sequential to the robbery, not simultaneous or continuous with the robbery. Wilson, 136 Wn. App. at 615; State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d

657 (1997). In the present case the two crimes were not part of an uninterrupted, simultaneous method of conduct.

The robbery and the assault took place at two distinct and separate locations. Further, the two crimes did not take place within a sufficiently proximate time. Defendant robbed Gunder while standing in the Old Spaghetti Factory parking lot on 196th Street. The robbery was completed when defendant fled on foot with Gunder's property. The assault took place several minutes later and several blocks away when the parties were in cars driving on 188th Street and defendant leaned out the window of Bermodes' moving vehicle and fired two shots at Gunder and Shaw. The two incidents took place at two different times and at two different physical locations. Consequently, the robbery and assault do not constitute the same criminal conduct. Price, 103 Wn. App. at 856.

b. Not The Same Criminal Intent.

When determining if two crimes share the same criminal intent the court focuses on whether the defendant's intent, viewed objectively, changed from one crime to the next, and whether commission of one crime furthered the other. State v. Freeman, 118 Wn. App. 365, 377, 76 P.3d 732 (2003) aff'd, 153 Wn.2d 765, 108 P.3d 753 (2005); Price, 103 Wn. App. at 857.

i. The Underlying Statutes Require Different Intents.

First, the court objectively views each underlying criminal statute to determine whether the required intents are the same or different for each offense. Price, 103 Wn. App. at 857. First degree robbery requires the intentional taking of property from another person while armed with a deadly weapon or displaying a firearm. RCW 9A.56.200 (1)(a)(i) and (ii). First degree assault requires assaulting another person with a firearm with the intent to inflict great bodily harm. RCW 9A.36.011 (1)(a). Viewed objectively the underlying criminal statutes require a different intent for first degree robbery and first degree assault. Price, 103 Wn. App. at 857.

ii. Defendant's Intent Changed From One Crime To The Next.

If the court finds the required criminal intents are the same, the court next objectively views the facts usable at sentencing to determine whether the defendant's intent was the same or different with respect to each offense. Price, 103 Wn. App. at 857. The court's focus is on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987). When defendant robbed Gunder in the parking lot he

displayed the firearm to obtain possession of her property and to overcome her resistance to the taking; his intent was to take Gunder's property. After completing the robbery and fleeing the scene, defendant proceeded to commit the assault. Defendant's intent changed. A defendant who, upon completing a crime, has time to pause, reflect and either cease his criminal activity or proceed to commit further criminal acts, forms a new intent to commit the second act. State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997). After defendant completed the robbery, instead of ceasing his criminal conduct, defendant decided that he would commit a further criminal act, shooting a firearm at Gunder and Shaw. Price, 103 Wn. App. at 858. The defendant had completed the robbery, followed by the formation of a new objective intent. Grantham, 84 Wn. App. at 859. These crimes did not share the same criminal intent, and therefore, did not encompass the same criminal conduct.

iii. One Crime Did Not Further The Commission Of The Other.

When dealing with sequentially committed crimes, this inquiry can be resolved in part by determining whether one crime furthered the other. Price, 103 Wn. App. at 857; State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). Clearly, the robbery did

not further the assault. Defendant shot at Gunder and Shaw to deter them from following him and reporting the robbery. Committing a subsequent crime to escape the consequences of a prior crime does not further the goal of the prior crime. State v. Dunaway, 109 Wn.2d 207, 217, 743 P.2d 1237 (1987). Shooting at Gunder and Shaw in an effort to escape the consequences of the robbery did not further the goal of the robbery.

Here, the underlying criminal statutes require different criminal intents, defendant had completed the robbery prior to forming the intent to assault Gunder and Shaw, and neither crime furthered the commission of the other. Therefore, these crimes did not encompass the same criminal conduct.

3. Defendant Has Not Shown That Counsel's Assistance Was Ineffective.

While theoretically defense counsel could have argued same criminal conduct, defendant has not shown a reasonable probability that the argument would have been successful. Failure to argue same criminal conduct at sentencing when the offenses do not involve the same criminal conduct is not ineffective assistance of counsel. Allen, 150 Wn. App. 300, 316-317. Defendant has not met his burden of rebutting the strong presumption that counsel's

representation was not deficient and that counsel's conduct consisted of sound trial strategy. Defendant has not shown that counsel's representation fell below an objective standard of reasonableness. Nor has defendant met his burden of showing that he was prejudiced by defense counsel's performance. He has not shown that but for counsel's performance, his sentencing would have been different. Strickland, 466 U.S. at 678. Defendant's argument fails under both prongs.

IV. CONCLUSION

For the reasons stated above defendant's sentence should be affirmed.

Respectfully submitted on April 8, 2013.

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