No. 42509-2-II

IN THE
COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

MAUA SIAMUPENI MUASAU,
Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION/SUMMARY OF THE ARGUMENT

The defendant-appellant in this case, Maua Siamupeni Muasau, was convicted of burglary in the first degree, felony harassment, and assault in the fourth degree, all arising from a single incident. He was sentenced to a total of 124 months in prison, including a 24-month deadly weapon enhancement.

On appeal, Mr. Muasau argues the State failed to prove the charged crimes. It failed to prove felony harassment when it did not prove he "knowingly" threatened to cause harm "in the future," failed to prove assault when it failed to prove an intentional touching that would have been offensive to an ordinary person, and failed to prove burglary when it did not prove Mr. Muasau entered or remained in the building with the intent to commit a crime. Alternatively, if the Court finds the State proved the burglary and either of the other two crimes, trial counsel was ineffective for failing to argue that the assault and harassment were part of the same criminal conduct as

the burglary and thus, should have been treated as a single crime.

II. ASSIGNMENT OF ERROR

A. Assignment of Error

1. The superior court erred in allowing the issue of Mr. Muasau's guilt on the harassment charge to go to the jury when the evidence was insufficient to convict as a matter of law.

2. The superior court erred in allowing the issue of Mr. Muasau's guilt on the assault charge to go to the jury when the evidence was insufficient to convict as a matter of law.

3. The superior court erred in allowing the issue of Mr. Muasau's guilt on the burglary charge to go to the jury when the evidence was insufficient to convict as a matter of law.

4. The superior court erred in permitting Mr. Muasau to be sentenced in violation of his constitutional right to the effective assistance of counsel.

B. Issues Pertaining to Assignment of Error

1. When the evidence showed Mr. Muasau said "smoke 'em" to a coparticipant in the presence of the victim, did the State fail to prove he a) subjectively knew he was communicating a threat and b) communicated a threat to cause harm "in the future" as required by the court's jury instructions, thus failing to prove the felony harassment charge?

2. When the evidence showed Mr. Muasau hit a victim on the cheek with his fist without leaving a mark, but failed to establish the circumstances under which the hit was made, including the force used, whether it was intentional, or how the victim reacted to the hit, did the State fail to prove assault by an intentional touching that would have been offensive to an ordinary person?

3. When the evidence showed Mr. Muasau unlawfully entered the victims' trailer with the intention of retrieving a coparticipant's belongings, but the State failed to prove he either entered the trailer with criminal intent or committed a crime

inside the trailer, did the State fail to prove Mr. Muasau guilty of burglary in the first degree?

4. Was Mr. Muasau's trial counsel ineffective in failing to argue that his burglary and harassment convictions and his burglary and assault convictions encompassed the same criminal conduct when the convictions required the same criminal intent, were committed at the same time and place, and involved the same victim?

III. STATEMENT OF THE CASE

A. Procedural History

By information filed in Pierce County on August 9, 2010, the State charged Mr. Muasau with the following crimes, all alleged to have been committed on August 8, 2010: 1) burglary in the first degree committed while he or an accomplice was armed with a rifle, a deadly weapon, in violation of RCW 9A.52.020(1)(a) and adding additional time to the presumptive sentence as provided in RCW 9.94A.530; 2) felony harassment, committed by knowingly threatening to kill Rusty Parrott, in violation of RCW 9A.46.020(2)(b) and RCW

9A.46.020(1)(a)(i)(b); and 3) assault in the fourth degree, in violation of RCW 9A.36.041(1) and 9A.36.041(2). Clerk's Papers (CP) 1-2.

Coparticipants Damos Handsom, Michael Smith, and Cody Davis were also charged with the burglary, among other crimes. Mr. Muasau, Handsom and Smith were tried together; Davis entered a guilty plea and testified as a defense witness at trial. Verbatim Report of Proceedings for Trial and Sentencing (TRP) & TRP 438-71 (Davis's testimony).

Mr. Muasau was convicted of all crimes following a six-day jury trial held between July 20 and July 28, 2011, the Honorable John R. Hickman presiding. CP 37-39. In addition, the jury found he or an accomplice was armed with a deadly weapon during the burglary. CP 40. Handsom and Smith were also convicted of the charged crimes. CP 173, 174, 397-99.

On August 26, 2011, the court imposed concurrent sentences of 100 months for the burglary and 60 months for the felony harassment, with a deadly weapon sentence enhancement of 24 months. CP 98. In

calculating his offender score for the burglary conviction, Mr. Muasau was awarded one point for the felony harassment conviction. CP 89-91. His trial counsel did not argue that the harassment constituted the same criminal conduct as the burglary. See TRP 679-94.

Mr. Muasau filed a timely notice of appeal on August 26, 2011. CP 72-85.

B. Substantive Facts

At the time of the incident, Bill Edmiston lived with Rusty Parrot in Parrott's Lakewood, Washington trailer home. TRP 149, 215. Parrott's cousin, Cody Davis, the son of Edmiston's girlfriend, stayed in the trailer for a short time that summer. TRP 150, 217. Shortly before the incident, Parrott got fed up with Davis and told him to leave. TRP 150, 217.

Around this time, Davis was becoming delusional. Among other things, he accused his mother and Edmiston of murdering his father, who was still alive. TRP 151-52; 182. He also told them he could set off a bomb with a button he could control from the backseat of their

car. TRP 184. He believed his mother was not his mother. TRP 152, 184. He thought there was gold in her car. TRP 249. He believed there was gold that his father had left him in Parrott's trailer. TRP 448. Davis attributed his confused mental state to the fact that he had begun doing drugs again. TRP 444.

When Davis moved out of Parrott's trailer, he did not leave any personal belongings behind. TRP 152, 218. However, he thought he did. TRP 242, 446. In particular, he believed there was gold in the walls of the bedroom he had used. TRP 244-45.

The night of the incident, Davis called Handsom to help him get his things from the trailer. TRP 446-47. The only reason Davis went to the trailer was to get his personal belongings and leave. TRP 454. Handsom enlisted his friend, Smith. TRP 454. Handsom and Smith drove, picking up Davis along the way. TRP 458-59. Mr. Muasau only ended up in the car because he happened to call Davis that night and ask for a ride. TRP 451, 460.

When the men got to the trailer, Davis stood outside the door, saying he wanted to get his things.

TRP 154, 183, 185, 220-21. Thinking there might be trouble, and unwilling to let the men in, Edmiston locked the doors to the trailer and went to block the back door. TRP 153-54.

As Edmiston was trying to hold the back door closed, Mr. Muasau ran at him down the hallway. TRP 154, 160-61 (Edmiston and Parrott sometimes refer to "the big guy;" Edmiston identified the big guy as Muasau). The intruders grabbed Edmiston and Parrott and, at gunpoint, made them get on their hands and knees in the back hallway near the washer and dryer. Mr. Muasau asked for the gold bars and wanted to know where the safe was. TRP 154-56, 161, 231. *But see* TRP 222-23 (Parrott testified Edmiston left the back door to guard the front door and Parrott was holding the back door shut when Davis and three other men escorted Edmiston down the hallway); TRP 286 other evidence indicated the men had broken in the front door); and TRP 462, 485-86 (Davis said he kicked in the back door, let Handsom in through the front door, Smith followed Davis through the back and Muasau stayed in the car).

The intruders all wore black; Handsom and Smith wore masks; Handsom was carrying an AK-47 and wearing a bullet proof vest; one man appeared to be holding a pistol. TRP 158-59, 223-24, 457, 463-64. Neither Mr. Muasau nor Davis was wearing a mask or carrying a weapon. TRP 157-58, 224, 229.

When Parrott tried to call 911, Mr. Muasau grabbed the phone and smashed it on the floor or the wall. TRP 162, 224. According to Parrott, Mr. Muasau then said: "I know you did it. I know you called them. Smoke 'em. Telling his buddies to smoke us." TRP 225. Parrott thought "smoke 'em" meant kill them, or him, and took the threat seriously, fearing for his life. TRP 225.

While the two armed intruders kept Parrott and Edmiston on their knees at gunpoint, TRP 163 & 228-29, Mr. Muasau and Davis went into the bedroom where Davis had stayed and tore the room apart, looking for gold. TRP 162, 173-75, 191, 234.

At some point during the incident, while Parrot and Edmiston were on their hands and knees on the floor, Mr. Muasau hit Parrott once on his cheek with

his fist. TRP 161, 171-72, 231-32 (Parrott testified "the big guy" hit him). Parrot did not testify as to why or when he was hit or how he felt about it. TRP 231-32. Edmiston stated: "Eventually Cody and [Mr. Muasau] had come out of the back room, and [Mr. Muasau] had hit Rusty in the side of the head." TRP 161. After describing how he himself was hit in the head with a pistol, Edmiston stated: "But other than that, there wasn't really no confrontation in the hallway." TRP 161. The hit left no bruises or marks on Parrott. TRP 232, 292.

The intruders left before the police arrived without taking anything. TRP 193, 196-97.

A neighbor saw the men trying to kick in the trailer door and called 911. TRP 266; Exh. 58A. Police arrived just as a car was pulling out of the trailer's driveway. TRP 274, 276, 357, 359, 360. Police stopped the car and removed Davis, Mr. Muasau, Smith and Handsom. TRP 276, 279, 281, 361.

IV. ARGUMENT

Point I: The Evidence at Trial Was Insufficient to Prove Mr. Muasau Knowingly Threatened to Cause Harm to Parrott in the Future, Intentionally Hit Parrott in an Offensive Manner, or Entered or Remained in the Trailer with the Intent to Commit a Crime

The evidence at trial was insufficient as a matter of law to prove Mr. Muasau guilty of the charged crimes. A challenge to the sufficiency of the evidence requires the Court to view the evidence in the light most favorable to the State. The relevant question is whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In claiming insufficient evidence, the defendant admits the truth of the State's evidence and all reasonable inferences that can be drawn from it: "All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Hosier, 157 Wn.2d at 8; Salinas, 119 Wn.2d at 201.

A. The State Failed to Prove Felony Harassment When it did Not Prove Mr. Muasau "Knowingly" Threatened to Cause Harm "in the Future."

To prove the charged criminal harassment in this case, the State was required to prove that Mr. Muasau, without lawful authority, knowingly threatened to kill Parrott and his words or conduct placed Parrot in reasonable fear that the threat would be carried out. CP 59 (Jury Instruction No. 16); RCW 9A.46.020; State v. J.M., 144 Wn.2d 472, 476, 28 P.3d 720 (2001) (setting forth elements of crime).

While the information and to-convict instruction stated that the threat was to kill Parrot "immediately or in the future," CP 1-2 & CP 59, the instruction defining "threat" specified: "Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future." CP 60 (Jury Instruction No. 17) (instruction also contained true threat language); RCW 9A.04.110(28).

In this case, the State failed to prove Mr. Muasau knowingly threatened Parrott and, to the extent a threat existed, it did not satisfy the definitional

jury instruction as it was not a threat to cause harm in the future.

The State failed to prove Mr. Muasau knowingly threatened Parrott. To satisfy the "knowingly" element of the harassment statute, the State must prove, *inter alia*, Mr. Muasau subjectively knew he was communicating a threat. J.M., 144 Wn.2d 472, 481 (holding the defendant need not know the threat would be communicated to the victim). In this case, however, there was no such evidence of Mr. Muasau's subjective knowledge.

Viewing the evidence in the light most favorable to the State, when Mr. Muasau said "smoke 'em," he was suggesting his coparticipants kill Parrott. He meant it as a suggestion or direction. By contrast, a threat is neither a suggestion nor a direction, but the communication of an intent, CP 60, such as "I am going to kill you." *See, e.g.*, J.M., 144 Wn.2d 472, 474-75 (juvenile said he was going to return with a friend and "do that" at his school, referring to the then-recent shooting at Columbine High School); State v. Allen, 161 Wn. App. 727, 255 P.3d 784 (2011) ("I'm going to kill

you"); State v. Atkins, 156 Wn. App. 799, 236 P.3d 897 (2010) (defendant "stood there screaming he was going to kill" victim). As a result, in this case, the State may have proved Mr. Muasau had the subjective knowledge he was communicating a suggestion, but it failed to prove he subjectively knew he was communicating a threat. Accordingly, this Court should reverse Mr. Muasau's conviction.

Next, the State failed to prove Mr. Muasau uttered a threat as defined in the jury instructions. The jury instructions defined "threat" to warn specifically of a future injury: "Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future." CP 60 (Jury Instruction No. 17). While the statute permits a threat to refer to immediate or future actions, jury instructions that are not objected to are treated as the properly applicable law for purposes of appeal. State v. Willis, 153 Wn.2d 366, 374-75, 103 P.3d 1213 (2005) (holding unobjected-to omission of "or an accomplice" language in firearm enhancement instruction required State to prove defendant himself was armed); State v. Hickman, 135

Wn.2d 97, 954 P.2d 900 (1998) (under law of the case doctrine, State was required to prove elements of robbery set forth in jury instruction which added the unnecessary element of venue); State v. Nam, 136 Wn. App. 698, 706-707, 150 P.3d 617 (2007) (relying on Hickman to hold when "or presence" language was omitted from robbery jury instruction, State was required to prove the taking was from the victim's person). Accordingly, law of the case doctrine requires the State to have proved Mr. Muasau threatened to cause bodily injury in the future.

That the State failed to prove a future intention is established by cases decided before the harassment statute was amended to permit threats to involve immediate harm. In City of Seattle v. Allen, 80 Wn. App. 824, 911 P.2d 1354 (1996), for example, the court reversed a defendant's conviction for misdemeanor harassment when the defendant, while robbing a store, shouted he "had a gun, he was going to shoot," and said "he was going to shoot us if we didn't do what we was

told." *Id.* at 826.[1] He told another victim he was going to shoot him because he did not follow instructions. *Id.* at 827.

Under these circumstances, the court held the State did not prove the crime, which required a threat to cause harm in the future. It stated, the defendant's "threats to shoot [one victim] because he didn't do what [the defendant] had told him to do and to shoot [the other victim] if he failed to do what [the defendant] told him were threats to cause immediate bodily injury. This evidence is insufficient to prove a threat to cause bodily injury in the future." *See also*, State v. Austin, 65 Wn. App. 759, 831 P.2d 747 (1992) (holding the statement, "[c]ome on, boy, let's fight" while pulling out a knife was not a statement of future harm).

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1. The relevant statute in Allen, similar to the definitional instruction in this case, required the State to prove, *inter alia*, "Without lawful authority, the person knowingly threaten[ed] . . . To cause bodily injury *in the future* to the person threatened or to any other person." Allen, 80 Wn. App. 824, 828 (emphasis in original). The term "or immediately" was added to the statute by the Laws of 1997.

Similarly, in this case the State only proved a threat to cause immediate harm, not harm in the future as required by the jury instructions and law of the case. "Smoke 'em," even more than "I have a gun, I'm going to shoot," implies instantaneous action, not action in the future. For these reasons, the State failed to prove felony harassment as charged to the jury and this Court should reverse Mr. Muasau's conviction for this crime.

B. The State Failed to Prove Mr. Muasau Assaulted Parrott with an Intentional, Offensive Touching.

When the evidence only showed Mr. Muasau hit Parrott once on his cheek, the State failed to establish an intentional, offensive touching. The jury was instructed as to the three common law definitions of assault and the State relied on the first definition: an intentional touching or striking that would be harmful or offensive to an ordinary person who was not unduly sensitive, regardless of the physical injury caused. CP 65 (Jury Instruction No. 22); TRP 594-95. However, the trial testimony failed to

establish either that Mr. Muasau acted intentionally or that the hit was offensive.

First, the State failed to prove the hit was intentional. Parrott testified "the big guy" hit him once on the cheek. He did not testify as to why or when he was hit or whether it seemed that it was an intentional, rather than an accidental touching. He did not indicate the hit was done as punishment for failing to follow orders or to induce him to comply with any direction, but merely that he was hit. TRP 231-32. Edmiston similarly failed to establish an intentional strike, merely stating Mr. Muasau "had hit Rusty in the side of the head." TRP 161. Indeed the hit could easily have been accidental as Parrott was on his knees in the hallway when he was struck with Mr. Muasau's fist. Under these circumstances, the State failed to prove an intentional act and this Court should reverse Mr. Muasau's conviction.

In addition, the State failed to prove the touching was offensive, or would have been offensive to an ordinary person. The hit left no bruises or marks on Parrott. TRP 232, 292. Parrott did not describe

disliking the hit, being offended by it, or feeling any pain or injury. There was no description of the force of the hit, whether it was a glancing strike, a direct hit or a soft hit. The evidence was simply that he was hit on the cheek with a fist and no mark was made. Without more, the State failed to prove the hit would have been offensive to an ordinary person and this Court should reverse Mr. Muasau's conviction.

C. The State Failed to Prove Mr. Muasau Entered or Remained in a Building with Intent to Commit a Crime Against a Person or Property Therein.

When the State failed to prove Mr. Muasau committed a crime in the trailer, it also failed to prove the burglary as charged. To establish the burglary in this case, the State was required to prove beyond a reasonable doubt that Mr. Muasau or an accomplice entered or remained unlawfully in a building, with intent to commit a crime against a person or property therein, and that he or another participant in the crime was armed with a deadly weapon. CP 52 (Jury Instruction No. 9); RCW 9A.52.020; *see* State v. Dow, 162 Wn. App. 324, 330, 253 P.3d 476 (2011) (reciting elements of first degree burglary by

commission of assault). The State bears "the burden of proving every element of burglary, including criminal intent." State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006) (discussing RCW 9A.52.040, which allows a permissive inference of criminal intent from an unlawful entry).

As Mr. Muasau has shown above, the State failed to prove he committed a crime in Parrott's trailer. Thus, not only did it fail to prove Mr. Muasau remained in the trailer with criminal intent but, as explained below, it also failed to prove he entered the trailer with such intent. Entering a dwelling unlawfully to retrieve one's belongings is not the same as entering with unlawful intent. In State v. Woods, 63 Wn. App. 588, 821 P.2d 1235 (1991), a boy was temporarily living away from home, barred from returning in the absence of his mother. At a time when the mother was not usually at home, he and his friend, the charged juvenile, tried to open the door with the boy's key, were stymied by a new lock, and proceeded to kick in the door. The purpose of entering the home was to retrieve a jacket and get bus fare. All the boy's belongings were still

in his former bedroom. The boys ran away when the mother surprised them with her presence and yelled at them. 63 Wn. App. 588, 589-90.

Division 1 held the entry to be unlawful, but found the evidence failed to support criminal intent. The only direct evidence of intent was the juvenile's testimony of the intent to retrieve a jacket. Moreover, indirect evidence of intent failed to support a criminal intent when nothing was stolen, the boy could have had bus fare in his room and the boys could have fled out of fear of the mother's anger, not knowledge of guilt. 63 Wn. App. 588, 591-92. Further, the court declined to find that the violent entry was relevant to the intent behind the entry. *Id.*

Similarly, in this case, although there was an unlawful, forced entry, no criminal intent was established. Analogous to what happened in Woods, here the men entered Parrott's trailer with a lawful purpose: to retrieve Davis's gold. That the purpose was the product of Davis's delusional mind does not matter so long as the men actually believed they had a lawful purpose. Similar to Woods, here nothing was stolen.

Moreover, as in Woods, the men in this case left when they did not recover any gold, not because of knowledge of guilt. For the same reasons the State failed to prove criminal intent in Woods, the State failed to prove such intent here.

Under similar circumstances, Division 3 has held that unlawful entry combined with pushing the occupant of the dwelling failed to establish criminal intent. In State v. Sandoval, the defendant kicked in the front door of a stranger's home, shoved the occupant in the chest, pushing him back a few feet, and demanded, "Who are you?" 123 Wn. App. 1, 3, 94 P.3d 323 (2004).

In holding the State established "no fact, alone or in conjunction with others, from which entering with intent to commit a crime more likely than not could flow," the court focused on several factors: "The parties were strangers. The assault was a shove after entering. [The defendant] did not try to sneak in. He was not wearing burglary-like apparel or carrying burglary tools. He did not attempt to flee." 123 Wn. App. 1, 5-6. Nothing was stolen. *Id.* at 6.

Just as the State failed to prove criminal intent in Sandoval, it failed to prove it here. As in that case, here the defendants did not try to sneak in, flee or take any property not belonging to them. Further, as in Sandoval, Mr. Muasau was not wearing any burglary-like apparel or carrying any burglary tools. Accordingly, as in Sandoval, there was insufficient evidence in this case to prove Mr. Muasau intended to commit a crime inside the trailer. Instead, the evidence showed Mr. Muasau was there almost by accident and present to assist with retrieving Davis's possessions.

For all these reasons, the State failed to prove Mr. Muasau committed the charged burglary and this Court should reverse his conviction.

Point II: Trial Counsel was Ineffective at Sentencing When he Failed to Argue the Crimes Constituted the Same Criminal Conduct for Sentencing Purposes

If this Court finds sufficient evidence to support the burglary and either the harassment or assault charge, Mr. Muasau's rights to effective counsel were violated when counsel failed to argue the crimes

constituted the same criminal conduct. The right to counsel includes the right to effective counsel. *See* U.S. Const. amend. VI; Wash. Const. art. 1 § 22. To demonstrate ineffective assistance of counsel, the defendant must show both a) that defense counsel's representation fell below an objective standard of reasonableness and b) prejudice. Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (reaffirming adherence to the Strickland test).

The Court begins with "a strong presumption that counsel's performance was reasonable." Grier, 171 Wn.2d 17, 33. Moreover, "legitimate trial strategy or tactics" fall outside the bounds of an ineffective assistance of counsel claim. *Id.* Nevertheless, "the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 34 (citation omitted).

In this case, counsel's performance was deficient when he failed to raise a same criminal conduct argument at sentencing. Deficient performance "requires

showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Grier, 171 Wn.2d 17, 33-34, *quoting*, Strickland, 466 U.S. at 687. Here the error was that serious when counsel failed to make the obvious argument under RCW 9.94A.589(1)(a).

RCW 9.94A.589(1)(a) requires that when two or more crimes can be considered the same criminal conduct, they must be treated as one crime if they were committed at the same time and place, involved the same victim, and involved the same objective criminal intent. State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999).

The felony harassment and burglary in this case meet this test as they were committed at the same time and place, against one victim and, to the extent the State proved the crimes, involved the same objective criminal intent. For similar reasons, to the extent the assault and burglary were proven, they also satisfy the RCW 9.94A.589(1)(a) test.

Under these circumstances, counsel's performance was deficient when he failed to raise this issue.

Moreover, counsel's failure prejudiced Mr. Muasau when there was a reasonable probability the trial court would have treated the two crimes as the same criminal conduct with the correct argument. Prejudice is shown if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. 668, 694; Grier, 171 Wn.2d at 34. When application of the statute would have reduced Mr. Muasau's offender score by one point, he was prejudiced by his counsel's failure to make this argument.

The burglary antimerger statute does not alter this analysis. That statute provides that "[e]very person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately." RCW 9A.52.050. It gives "the sentencing judge discretion to punish for burglary, even where it and an additional crime encompass the

same criminal conduct." State v. Lessley, 118 Wn.2d 773, 781, 827 P.2d 996 (1992).

However, in this case, the record reveals that, had defense counsel established that the two crimes were the same criminal conduct, the trial court likely would have declined to apply the antimerger statute. Although the court expressed compassion for Parrott's fear during the incident, TRP 689, it also expressly believed the circumstances compelled leniency:

> But I think some leniency should be shown to you just in the sense as to how stupid and senseless this whole thing was. I sense that the jury felt the same way but followed the instructions of the court. I think this was a tough case for this jury, but they followed the law and they followed the instructions of the Court.

TRP 690. In addition, the court was not following an agenda that was separate from that of counsel, in that it imposed a sentence recommended by both the State and defense counsel. TRP 690. Accordingly, the record makes plain that the trial court would have declined to apply the burglary antimerger statute in this case, and would have, instead, sentenced Mr. Muasau under RCW

9.94A.589(1)(a) had counsel made the appropriate argument.

For all these reasons, trial counsel's performance was both deficient and prejudicial and this Court should reverse Mr. Muasau's sentence.

V. CONCLUSION

For all of these reasons, Maua Siamupeni Muasau respectfully requests this Court to reverse his convictions or, in the alternative, to reverse his sentence and remand for resentencing.

Dated this 18th day of April, 2012.

Respectfully submitted,

/s/ Carol Elewski
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CERTIFICATE OF SERVICE

I certify that on this 18th day of April, 2012, I caused a true and correct copy of Appellant's Brief to be served, by e-filing, on:

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