No. 45143-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MEKO DEAUNTE JONES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Linda C.J. Lee

BRIEF OF APPELLANT

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3. Imposition of convictions for first degree robbery and first degree kidnapping violated double jeopardy.

4. Defense counsel's failure to move the trial court to find the robbery, assault, and kidnapping convictions to be the same criminal conduct constituted constitutionally deficient performance.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A trial court's authority to impose sentences is statutory. The maximum sentence for a class B felony is 120 months. A sentence for assault in the second degree, a class B felony, cannot exceed 120 months including any enhancements and terms of community custody. Here, Mr. Jones' sentence on the two second degree assault convictions including the firearm enhancements and terms of community custody exceeded 120 months. Is Mr. Jones entitled to remand for resentencing to a proper sentence?

2. A defendant has the constitutional right to be free from being placed twice in jeopardy. The merger doctrine is a derivative of double jeopardy and provides that where one offense elevates the degree of another offense, imposing convictions for both violates double jeopardy. Here, the assault convictions provided the force to elevate the robbery allegation to first degree. Did the court violate double jeopardy when it imposed convictions for second degree assault and first degree robbery for the same act?

3. Application of the merger doctrine bars imposing convictions for robbery and kidnapping where the kidnapping is incidental to the robbery. Here, did the trial court's imposition of convictions for first degree kidnapping and first degree robbery violate double jeopardy where Mr. Jones' kidnapping was merely incidental to the robbery?

4. A defendant has a Sixth Amendment and article I, section 22 right to counsel and to the effective representation of counsel. A defendant who is denied the effective assistance of counsel and is prejudiced by that failure at sentencing is entitled to a new sentencing hearing. Here, counsel failed to argue the robbery, assault, and kidnapping convictions were the same criminal conduct. Was Mr.

Jones prejudiced by his attorney's deficient representation thus requiring reversal of his sentence and remand for resentencing?

C. STATEMENT OF THE CASE

Meko Jones and Kayleigh Littlefield began a romantic relationship, and in 2009 began living together. 6/18/2013RP 17-18. Mr. Jones fathered a son, who was 17 months old at the time of trial, with Ms. Littlefield. 6/18/2013RP 16. On August 20, 2012, Ms. Littlefield decided to move out of the residence she shared with Mr. Jones and took her son with her. 6/18/2013RP 19. Ms. Littlefield still allowed Mr. Jones to regularly visit with his son. 6/18/2013RP 19-20. Ms. Littlefield, Mr. Jones, and their son spent time together at Christmas 2012. 6/18/2013RP 20. Following Christmas, Mr. Jones alleged Ms. Littlefield stopped letting him see his son. 6/25/2013RP 28.

Mr. Jones' anger over his inability to see his son got the better of him and he decided to confront Ms. Littlefield at Bates Technical College in Tacoma, where she was a student. 6/18/2013RP 22; 6/25/2013RP 35. Mr. Jones admitted he did not have a plan when he confronted Ms. Littlefield, but he admitted he was armed with a firearm during the confrontation. 6/25/2013RP 30-37. Mr. Jones confronted

Ms. Littlefield as she arrived at the school. 6/18/2013RP 23; 6/25/2013RP 37.

Mr. Jones was angry and began yelling and cursing at Ms. Littlefield while pointing the gun at her. 6/18/2013RP 23-24; 6/25/2013RP 37. At some point, the gun fired, striking Ms. Littlefield in the abdomen. 6/18/2013RP 28; 6/25/2013RP 38-41. The two walked to Ms. Littlefield's car and Mr. Jones began driving with the gun in his lap. 6/18/2013RP 35; 6/25/2013RP 47. While driving and arguing with Ms. Littlefield, Mr. Jones began hitting the dashboard of the car with the gun in his hand. 6/18/2013RP 36; 6/25/2013RP 48. The gun went off a second time, this time striking the passenger window next to where Ms. Littlefield was seated. 6/18/2013RP 36; 6/25/2013RP 48-49.

Ms. Littlefield and Mr. Jones sat in the car outside Mr. Jones' mother's house talking. 6/18/2013RP 40. At some point, Mr. Jones asked Ms. Littlefield how much money she had in her bank account. 6/18/2013RP 42. When she responded that she had $300, Mr. Jones requested her Automatic Teller Machine (ATM) card and Personal Identification Number (PIN) and drove to a nearby convenience store. 6/18/2013RP 42-46. There, Mr. Jones withdrew $200 from Ms.

Littlefield's account. 6/18/2013RP 45; 6/25/2013RP 56. The two then returned to Mr. Jones' mother's home where they again began to argue. 6/18/2013RP 50; 6/25/2013RP 59-60. Ultimately, Mr. Jones got out of the car and allowed Ms. Littlefield to drive to St. Joseph's emergency room where she was treated for the gunshot wound. 6/18/2013RP 67-68; 6/25/2013RP 79-81. Mr. Jones drove towards the hospital in his own car but was arrested a short time later by the police. 6/17/2013RP 93-97; 6/18/2013RP 7-9.

Mr. Jones was subsequently charged with two counts of first degree assault, one count of first degree robbery, one count of first degree kidnapping, one count of unlawful possession of a firearm, one count of attempting to elude, one count of felony harassment for threatening to kill Ms. Littlefield's mother, and one count of tampering with a witness for allegedly attempting to persuade Ms. Littlefield to change her testimony. CP 14-18. All of the counts except the attempting to elude, unlawful possession, and tampering counts also contained firearm enhancements. CP 14-18. The jury acquitted Mr. Jones of the two counts of first degree assault, but convicted him of the lesser degree offense of second degree assault. CP 122-24, 142-44. The jury otherwise convicted Mr. Jones as charged. CP 122-145.

D. ARGUMENT

1. THE SENTENCE IMPOSED BY THE TRIAL COURT ON COUNTS ONE AND SIX FOR SECOND DEGREE ASSAULT EXCEEDED THE STATUTORY MAXIMUM

The Sentencing Reform Act (SRA) prescribes the trial court's authority to sentence in felony cases. *State v. Furman,* 122 Wn.2d 440, 456, 858 P.2d 1092 (1993); *State v. Skillman,* 60 Wn.App. 837, 839, 809 P.2d 756 (1991). Whenever a sentencing court exceeds its statutory authority, its action is void. *State v. Wilson*, 307 P.3d 823 (2013).

A sentence imposed contrary to the law may be raised for the first time on appeal. *State v. Anderson,* 58 Wn.App. 107, 110, 791 P.2d 547 (1990). On appeal, a defendant may challenge a sentence imposed in excess of statutory authority because "a defendant cannot agree to punishment in excess of that which the Legislature has established." *In re Personal Restraint of Goodwin,* 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002).

Here, counts 1 and 6, the two convictions for second degree assault, were class B felonies with maximum penalties of ten years' confinement and a fine of $10,000. RCW 9A.20.021(l)(c). A court may not impose a term of community custody that, combined with the

term of confinement, exceeds the maximum term of confinement allowed by RCW 9A.20.021. RCW 9.94A.505(5), RCW 9.94A.701(9).

RCW 9.94A.701(9) provides that "[t]he term of community custody . . . shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021." Here, the trial court imposed the statutory maximum sentence of 120 months of confinement (84 months plus 36 for the firearm enhancement) under RCW 9A.20.021(1)(c) and imposed a community custody term of 18 months that when combined with the term of confinement, was greater than 120 months.

Where the sentence imposed exceeds the statutory maximum, the trial court must reduce the term of community custody. RCW 9.94A.701(9); *State v. Boyd,* 174 Wn.2d 470, 472, 275 P.3d 321 (2012). The proper remedy is to "remand to the trial court to either amend the community custody term or resentence." *Boyd,* 174 Wn.2d at 473.

The trial court's imposition of sentences for counts one and six exceeded the statutory maximum of 120 months. The remedy is for this Court to remand to the trial court for resentencing.

2. THE MERGER DOCTRINE REQUIRES STRIKING SEVERAL OF MR. JONES' CONVICTIONS

a. The Double Jeopardy Clauses of the United States and Washington Constitutions bar multiple punishments for the same offense. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that "[n]o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb." Article I, section 9 of the Washington State Constitution provides that "[n]o person shall ... be twice put in jeopardy for the same offense." The two clauses provide the same protection. *In re Personal Restraint of Borrero,* 161 Wn.2d 532, 536, 167 P.3d 1106 (2007); *State v. Weber,* 159 Wn.2d 252, 265, 149 P.3d 646 (2006). The State may bring multiple charges arising from the same criminal conduct in a single proceeding. *State v. Michielli,* 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997). However, the double jeopardy provisions of the United States and Washington Constitutions bar multiple punishments for the same offense. *North Carolina v. Pearce,* 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *State v. Kier,* 164 Wn.2d 798, 803, 194 P.3d 212 (2008).

The Legislature can enact statutes imposing multiple punishments for the same conduct. "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter,* 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). If the Legislature intended to impose multiple punishments, their imposition does not violate the double jeopardy clause. *Id.* at 368.

If, however, such clear legislative intent is absent, then courts apply the *Blockburger* test. *Id.; see Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Under this test, "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 a fact which the other does not." *Id.* If application of the *Blockburger* test results in a determination that there is only one offense, then imposing two punishments is a double jeopardy violation. The assumption underlying the *Blockburger* rule is that the Legislature ordinarily does not intend to punish the same conduct under two different statutes; the *Blockburger* test is a rule of statutory construction

applied to discern legislative purpose *in the absence of clear indications of contrary legislative intent. Hunter,* 459 U.S. at 368.

In short, when a single trial and multiple punishments for the same act or conduct are at issue, the initial and often dispositive question is whether the legislature intended that multiple punishments be imposed. *Id.; Kier,* 164 Wn.2d at 804. If there is *clear* legislative intent to impose multiple punishments for the same act or conduct, this is the end of the inquiry and no double jeopardy violation exists. If such clear intent is absent, then the court applies the *Blockburger* "same evidence" test to determine whether the crimes are the same in fact and law. *State v. Calle,* 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995).

This Court uses a three-part test in determining whether convictions violate double jeopardy. *State v. Freeman,* 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005). First, the Court determines whether there is express or implicit legislative intent based on the criminal statutes at issue. *Kier,* 164 Wn.2d at 804. Second, if legislative intent is unclear, the Court turns to the *Blockburger* "same evidence" test, which asks if the crimes are the same in law and fact. *Kier,* 164 Wn.2d at 804.

Finally, the Court determines whether the merger doctrine is applicable. *Kier,* 164 Wn.2d at 804.

Double jeopardy challenges are reviewed *de novo. Freeman,* 153 Wn.2d at 770. The remedy for violations of double jeopardy is to vacate the lesser offense. *State v. Hughes,* 166 Wn.2d 675, 686 n. 13, 212 P.3d 558 (2009); *State v. Chesnokov*, 175 Wn.App. 345, 349, 305 P.3d 1103 (2013).

Here, the relevant statutes do not explicitly authorize separate punishments. Additionally, the offenses are not the same under the *Blockburger* same evidence test. Thus, the issue is whether the offenses merge for the purposes of double jeopardy.

b. The merger doctrine bars imposition of convictions for robbery and assault and robbery and kidnapping. The merger doctrine applies at the time of sentencing and is designed to correct violations of double jeopardy. *State v. Parmelee,* 108 Wn.App. 702, 711, 32 P.3d 1029 (2001). The benchmark for determining the appropriate remedy is legislative intent. *Freeman,* 153 Wn.2d at 771-72. Merger is a doctrine of statutory interpretation used to determine whether the legislature intended to impose multiple punishments for a single act that violates several statutory provisions. *In re Personal*

Restraint of Fletcher, 113 Wn.2d 42, 50-51, 776 P.2d 114 (1989). Whether the merger doctrine bars double punishment is a question of law reviewed *de novo*. *State v. Williams,* 131 Wn.App. 488, 498, 128 P.3d 98 (2006).

Under the merger doctrine, when the degree of one offense is raised by conduct that the legislature has separately criminalized, courts presume that the legislature intended to punish both offenses once through a greater sentence for the greater crime. *Freeman,* 153 Wn.2d at 772-73. Two offenses merge under the merger doctrine if, "to prove a particular degree of crime (*e.g.,* first degree rape) the State must prove not only, that a defendant committed that crime (*e.g.,* rape) 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)." *Freeman,* 153 Wn.2d at 777-78, *quoting State v. Vladovic,* 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983). Thus, where a predicate offense is an underlying element of another crime, generally the predicate offense will merge into the second, more serious crime and the court may not punish it separately. *Vladovic,* 99 Wn.2d at 421.

i. The convictions for the two counts of second degree assault merged with the count for first degree robbery where the assault provided the force necessary to elevate the degree of robbery to first degree. The merger doctrine is relevant when a crime is elevated to a higher degree by proof of another crime proscribed elsewhere in the criminal code. *Parmelee,* 108 Wn.App. at 710. When a second degree assault is the conduct that elevates a robbery to the first degree, there is "no evidence that the legislature intended to punish second degree assault separately from first degree robbery when the assault facilitates the robbery." *Freeman,* 153 Wn.2d at 776. Such second degree assault committed in furtherance of a robbery merges with the robbery unless a merger exception applies. *Id.* at 778.

While there is no *per se* rule that assault in the second degree merges into robbery in the first degree, the Supreme Court has repeatedly determined that second degree assault merges into first degree robbery when there is no independent purpose for each crime. *Freeman*, 153 Wn.2d at 774; *Chesnokov,* 175 Wn.App. at 350.

In *Kier,* for example, Qualgine Hudson was driving home and his cousin, Carlos Ellison, was in the passenger seat. 164 Wn.2d at 802. Three men in another car honked their horn at Hudson. *Id.* Mr.

Hudson pulled over, got out of the car, and began talking to one of the men. *Id.* Mr. Kier got out of the other car and pointed a gun at Mr. Hudson. *Id.* Mr. Hudson ran away, and Mr. Kier then approached Mr. Ellison, who was still in Mr. Hudson's car, and pointed the gun at him. *Id.* Mr. Kier ordered Mr. Ellison to get out of the car. *Id.* After Mr. Ellison got out, Mr. Kier and his two accomplices drove away with both cars. *Id.* at 803. Mr. Kier was found guilty of second degree assault and first degree robbery. *Id.*

The Supreme Court concluded that "the completed assault was necessary to elevate the completed robbery to first degree." *Id.* at 807. The Court further explained, "The merger doctrine is triggered when second degree assault with a deadly weapon elevates robbery to the first degree because being armed with or displaying a firearm or deadly weapon to take property through force or fear is essential to the elevation." *Id.* at 806.

Here the decision in *Kier* is directly applicable. The two assaults provided the force necessary to elevate the robbery to first degree. Accordingly, the assaults should have merged with the robbery.

ii. The convictions for first degree robbery and first degree kidnapping merged where the kidnapping was incidental to the robbery. If the evidence proving one crime is also necessary to prove a second crime or a higher degree of the same crime, the appellate court will consider whether the facts show that the additional crime was committed incidental to the original crime. *State v. Johnson,* 92 Wn.2d 671, 680, 600 P.2d 1249 (1979). If one crime was incidental to the commission of the other, the merger doctrine precludes additional convictions; but if the offenses have independent purposes or effects, the court may impose separate punishment. *Freeman,* 153 Wn.2d at 778; *Vladovic,* 99 Wn.2d at 421. To establish an independent purpose or effect of a particular crime, that crime must injure the person or property of the victim or others in a separate and distinct manner from the crime for which it also serves as an element. *Freeman,* 153 Wn.2d at 779; *Johnson*, 92 Wn.2d at 680; *State v. Lindsay,* 171 Wn. App. 808, 288 P.3d 641 (2012), *review granted*, 177 Wn.2d 1023 (2013).

In *State v. Korum,* this Court held as a matter of law that kidnapping was incidental to robbery when (1) the restraint was for the sole purpose of facilitating robbery; (2) the restraint was inherent in the

robbery; (3) the victims were not transported from their home; (4) the duration of restraint was not substantially longer than necessary to complete the robbery; and (5) the restraint did not create an independent, significant danger. 120 Wn.App. 686, 707, 86 P.3d 166 (2004), *rev'd in part on other grounds and aff'd in part,* 157 Wn.2d 614, 620, 141 P.3d 13 (2006). In reversing the kidnapping convictions, this Court reasoned, "That all robberies necessarily involve some degree of forcible restraint, however, does not mean that the legislature intended prosecutors to charge every robber with kidnapping." *Korum,* 120 Wn.App. at 705. As our Supreme Court held in *State v. Green,* restraint and movement of a victim that are merely incidental and integral to commission of another crime, such as rape or murder, do not constitute the independent, separate crime of kidnapping. 94 Wn.2d 216, 226-27, 616 P.2d 628 (1980).

Here, the restraint of Ms. Littlefield and subsequent movement were merely incidental to the robbery. The restraint was ultimately for the purpose of robbing Ms. Littlefield. The kidnapping and robbery convictions should have merged. Mr. Jones is entitled to reversal of his sentence and remand for resentencing.

3. MR. JONES' TRIAL ATTORNEY RENDERED CONSTITUTIONALLY DEFICIENT REPRESENTATION WHEN HE FAILED TO MOVE THE COURT TO FIND THAT THE ASSAULT, ROBBERY AND KIDNAPPING CONVICTIONS CONSTITUTED THE SAME CRIMINAL CONDUCT

a. Mr. Jones had the right to the effective assistance of counsel. A criminal defendant has a Sixth Amendment and art. I, § 22 right to counsel. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 58, 77 L.Ed. 158 (1932). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 275-76, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942).

The right to counsel includes the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *Strickland*, 466 U.S. at 686. The proper standard for attorney performance is that of a reasonably effective lawyer. *Strickland*, 466 U.S. at 687; *McMann*, 397 U.S. at 771. When

raising an ineffective assistance of counsel claim, the defendant must meet the requirements of a two prong test:

> First, the defendant must show counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed 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.

Strickland, 466 U.S. at 687.

"A claim of ineffective assistance of counsel presents a mixed question of fact and law reviewed *de novo*." *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

While a challenge to the failure to find counts to be the same criminal conduct cannot be raised for the first time on appeal, *State v. Nitsch,* 100 Wn.App. 512, 523-25, 997 P.2d 1000 (2000), the issue can be raised for the first time on appeal where such a failure is due to the deficient representation of defense counsel and a sufficient record exists for the court to determine whether the counts are the same criminal conduct. *State v. McFarland,* 127 Wn.2d 322, 337-38 n.5, 899 P.2d 1251 (1995); *State v. Phuong,* 174 Wn.App. 494, 547, 299 P.3d 37 (2013).

b. Where multiple current offenses constitute the same criminal conduct the trial court must count them as a single offense. A person's offender score may be reduced if the court finds two or more of the criminal offenses constitute the same criminal conduct. RCW 9.94A.589(1)(a). Same criminal conduct "means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id.*

The "same criminal intent" element is determined by looking at whether the defendant's objective intent changed from one act to the next. *State v. Dolen,* 83 Wn.App. 361, 364-65, 921 P.2d 590 (1996). The mere fact that distinct methods are used to accomplish sequential crimes does not prove a different criminal intent. *State v. Grantham,* 84 Wn.App. 854, 859, 932 P.2d 657 (1997). The "same time" element does not require that the crimes occur simultaneously. *State v. Porter,* 133 Wn.2d 177, 185-86, 942 P.2d 974 (1997); *Dolen,* 83 Wn.App. at 365. Individual crimes may be considered the same criminal conduct if they occur during an uninterrupted incident. *Porter,* 133 Wn.2d at 185-86; *Dolen,* 83 Wn.App. at 365, *citing State v. Walden,* 69 Wn.App. 183, 188, 847 P.2d 956 (1983) (court found a defendant's convictions for second degree rape and attempted second degree rape, committed

by forcing the victim to submit to oral and attempted anal intercourse during one continuous incident, to be same criminal conduct).

c. The offenses shared the same intent, were committed at the same time, and involved the same victim. The robbery, assaults, and kidnapping occurred at the same time and place and involved the same victim, Ms. Littlefield. Thus, the only issue is whether the offenses shared the same intent. Mr. Jones submits they do.

In the same criminal conduct context, intent is the offender's objective criminal purpose in committing the crime. *State v. Adame,* 56 Wn.App. 803, 811, 785 P.2d 1144 (1990). Crimes may involve the same intent if they were part of a continuous transaction or involved a single, uninterrupted criminal episode. *State v. Deharo,* 136 Wn.2d 856, 858-59, 966 P.2d 1269 (1998). "This analysis may include, but is not limited to, the extent to which one crime furthered the other, whether they were part of the same scheme or plan and whether the criminal objectives changed." *State v. Calvert,* 79 Wn.App. 569, 578, 903 P.2d 1003 (1995).

The objective intent of Mr. Jones was to convince Ms. Littlefield to let him see his son. While Mr. Jones testified he did not have a specific plan when he first confronted Ms. Littlefield, clearly his

anger arose from Ms. Littlefield's refusal to allow him to visit with his son and all of the subsequent offenses arose from that goal. The kidnapping was for the purpose of getting Ms. Littlefield to listen to him and the assaults were designed to further that goal when she argued with him. The robbery was to obtain a gun to further convince Ms. Littlefield to capitulate by threatening to use the gun to kill her mother. As such, the offenses constituted the same criminal conduct.

Further, defense counsel's failure to move the trial court to find the offenses to be the same criminal conduct constituted constitutionally deficient performance. There was no legitimate strategic or tactical reason not to have requested the court to find the offenses were the same criminal conduct. Mr. Jones would only have benefited from such a request, and would not have suffered adverse consequences. In addition, counsel's performance was prejudicial where the sentencing court would likely have found the offenses were the same criminal conduct because it would have reduced Mr. Jones's offender score and resulted in a substantial reduction in his standard sentencing range.

d. Mr. Jones is entitled to remand for resentencing. The remedy for ineffective assistance at sentencing for a failure to argue same criminal conduct is to remand for a new sentencing hearing in which Mr. Jones' counsel can argue that the offenses encompass the same criminal conduct. *Phuong,* 174 Wn.App. at 548.

In the instant matter, counsel's deficient performance resulted in prejudice to Mr. Jones: an incorrect offender score. As a result, this Court must reverse his sentence and remand for resentencing.

E. CONCLUSION

For the reasons stated, Mr. Jones asks this Court to reverse his sentences and remand for resentencing.

DATED this 27th day of January 2014.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent, v. MEKO JONES, Appellant.	)))))))))	NO. 45143-3-II

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