S. Ct. No.
COA No. 33770-7-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

VENIAMIN GLUSHCHENKO,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Veniamin Glushchenko asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The decision of the Court of Appeals which Mr. Glushchenko wants reviewed was filed on September 28, 2017. A copy of the decision is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

A. Was the State's evidence insufficient to prove beyond a reasonable doubt that Mr. Glushchenko was guilty of first degree assault?

B. Did the court abuse its discretion by finding the first degree burglary involving Ugur Erol was not the same criminal conduct as the first degree assault and first degree robbery?

D. STATEMENT OF THE CASE

Mr. Glushchenko was charged by amended information with count I: first degree burglary with a deadly weapon enhancement involving Mr. Erol; count II: first degree assault with a deadly weapon enhancement involving Mr. Erol; count III: residential burglary involving Brenda Eberhart; and count IV: first degree

robbery with a deadly weapon enhancement involving Mr. Erol. (CP 102).

On December 3, 2014, Ms. Eberhart was taking a nap in her residence before going to work. (8/11/15 RP 60-61). She worked from 10 p.m. to 6 a.m. (*Id*. at 61). Waking up from her nap to the sound of breaking glass, she went to the kitchen and turned on the light. (*Id*.). Mr. Glushchenko was standing at the kitchen window where the glass was broken out. (*Id*. at 62). He was outside, standing right up against the window. (*Id*.). He was getting into the house, reached to grab Ms. Eberhart, and said, "Give me your money, bitch." (*Id*.). She told him she had no money. (*Id*.). He stood there for a second. When she started screaming, Mr. Glushchenko left. (*Id*.).

The police responded and were just up the street. (8/11/15 RP 63). They showed up about 10 minutes after Mr. Glushchenko took off. (*Id*.). Ms. Eberhart told the police what had happened and gave a description of the perpetrator. (*Id*. at 63-64). After he was found, the police came back to her residence and asked if she would know him if she saw him again. She said yes and was taken to where he was. (*Id*. at 64-65). Ms. Eberhart identified Mr.

Glushchenko as the person who broke into and was in her house. (*Id*. at 65, 69).

Mr. Erol worked at Hugo's on the South Hill. (8/11/15 RP 71). In his residence on December 3, 2014, he was attacked by an intruder. (*Id*. at 72). Mr. Erol was sleeping when he was woken up. (*Id*. at 72-73). Someone was picking up his laptop on the corner of the coffee table very close to him and his TV was gone. (*Id*. at 73). Next thing he knew, Mr. Glushchenko had two knives and was on the other side of the room about 3' to 4' away. Mr. Glushchenko told him to turn around, but Mr. Erol did not want to have his back to him as he feared being stabbed in the kidneys. (*Id*. at 75). Mr. Erol told him to take what he wanted. (*Id*.).

Mr. Glushchenko kept telling him, "Turn around, bitch." (8/11/15 RP 76). Mr. Erol was just trying to get him out of there. (*Id*.). Mr. Glushchenko swung the knives at Mr. Erol, who eventually realized he was hurt and bleeding. (*Id*. at 77). He was on the couch with Mr. Glushchenko standing above, pinning him to the couch. (*Id*.). The knives were kitchen knives with serrated edges and were probably Mr. Erol's. (*Id*.).

Stabbed more than twice, Mr. Erol felt his life was in danger. (8/11/15 RP 78). He was hoping to make a break for it. (*Id*.). The

intruder said he had three daughters to take care of. (*Id*.). Mr. Erol rushed to the front door and was bleeding from the neck, knee, and shoulder. (*Id*. at 78-79). Mr. Glushchenko went out the back door. (*Id*. at 78). Mr. Erol went to his neighbor, whom he asked to call 9-1-1. (*Id*. at 79). The police showed up and they realized he was hurt. (*Id*. at 80). He went to Sacred Heart and the police returned . (*Id*.). Mr. Erol picked Mr. Glushchenko out from photos the police showed him. (*Id*. at 81-82). He had a Nokia windows phone that was found by Detective Hill when booked into jail. (*Id*. at 83-84).

Officer John Yen was on duty December 3, 2014, when he was dispatched to 2708 E. 32nd in Spokane. (8/11/15 RP 97-98). He heard a voice calling for help and saw Mr. Erol holding his neck and bleeding everywhere. (*Id*. at 99). The suspect was not there. (*Id*. at 100-01). Officer Yen was sent to Sacred Heart to show Mr. Erol a photo lineup of possible suspects. (*Id*. at 102). Mr. Erol picked out Mr. Glushchenko. (*Id*. at 105-06).

Corporal Joseph Denton was on duty December 3, 2014. He responded to 2708 E. 32nd around 1653 hours. (8/11/15 RP 112). He took photos of the scene. (*Id*. at 116). Corporal Denton also went to 2728 E. 32nd where there was another incident and he saw a broken-out window. (*Id*. at 120-21).

Dr. Rana Ahmad, a trauma surgeon at Sacred Heart, testified Mr. Erol had multiple lacerations with the two most prominent being at the neck and thigh. (8/11/15 RP 128-31). The neck wound was the most significant injury as it went through the platysma, the last layer of protection in the neck, below which are "very important life-threatening structures." (*Id*. at 131). Without any treatment, the neck wound was life-threatening. (*Id*. at 132). Doctor Ahmad said the leg wound could be life-threatening as well. (*Id*.). When a neck wound is past the platysma, it is more than a superficial wound. (*Id*. at 135-36). The doctor said Mr. Erol was very lucky. (*Id*. at 135).

Officer Nathan Gobble was on duty December 3, 2014, and responded to a possible burglary. (8/11/15 RP 144-45). Then another call came from 2708 E. 32nd that someone was attacked. (*Id*. at 146). He turned his focus to this call. A male covered in blood was calling for help. (*Id*. at 146-47). His neck was cut open "pretty significantly." (*Id*. at 147). The victim gave a physical description of the attacker and noted he had a slight Russian accent. (*Id*.). The medics came and Mr. Erol was still bleeding significantly. (*Id*. at 148). He was taken to the hospital with Officer Gobble following the ambulance. (*Id*. at 149). Mr. Erol gave the

officer consent to search his home, where he found two steak knives and a third with the blade broken in half, a TV, and a backpack. (*Id*. at 151).

Officer Paul Buchmann was called out to do a canine track at 2708 E. 32nd. (8/11/15 RP 162). He figured the suspect most likely went west down 32nd and a perimeter was set up. Officer Buchmann started tracking at the suspect's last known location. (*Id*. at 164-65). His dog picked up the scent and went down 30th to Mt. Vernon. (*Id*. at 165). Other officers already had a possible suspect in custody. (*Id*. at 168).

Lieutenant Rex Olson helped out on the December 3, 2014 call. (8/11/15 RP 173). He went to the Off Regal Bar and saw the suspect hiding between two cars. (*Id*. at 176-77). Lieutenant Olson watched him get up, go across the lot, and approach the back door of the bar. (*Id*. at 177). He stopped and detained the suspect, Mr. Glushchenko. (*Id*.). After handcuffing and putting him on the ground, the lieutenant saw blood on the back of Mr. Glushchenko's hands. (*Id*. at 179).

Officer Glenn Bartlett was on duty December 3, 2014, when Mr. Glushchenko was arrested. (8/11/15 RP 181). The officer photographed the suspect's hands and believed he saw blood on

them. (*Id*. at 181-82). He took four swabs from Mr. Glushchenko. (*Id*. at 184).

Detective Hill was assigned Mr. Glushchenko's case on December 4, 2014. (8/11/15 RP 189-91). He got a search warrant for buccal swabs of blood evidence from Mr. Glushchenko and Mr. Erol. (*Id*. at 192). Swabs were also taken from a big-screen TV that had blood stains on it. (*Id*. at 193). Detective Hill did not recover the laptop, but did find Mr. Erol's phone. (*Id*. at 193-94). Mr. Glushchenko had the phone among his property at the jail. (*Id*. at 194). The phone was a Nokia, the brand of phone taken from Mr. Erol's residence. (*Id*. at 195). Detective Hill testified two of the steak knives had blades 4.5" long and the third had a blade 5" long. (*Id*. at 238).

Brittany Noll was a DNA forensic scientist with the WSP Crime Lab. (8/12/15 RP 222). She testified the DNA on the steak knives matched Mr. Erol on two of them and the other both Mr. Erol and Mr. Glushchenko. (*Id*. at 227). DNA was also tested from Mr. Glushchenko's sweatpants with two stains matching Mr. Erol, but excluding Mr. Glushchenko; another stain matched both Mr. Erol and Mr. Glushchenko. (*Id*. at 227, 231-32).

The State rested and Mr. Glushchenko presented no witnesses. (8/12/15 RP 240, 241, 243). The defense had no objections or exceptions to the court's jury instructions. (*Id*. at 247).

The jury returned guilty verdicts on count I: first degree burglary; count II: first degree assault; count III: residential burglary; and count IV: first degree robbery. (CP 184, 185, 187, 188). Deadly weapon verdicts were returned on counts I, II, and IV. (CP 190-92).

Mr. Glushchenko agreed with the understanding of defendant's criminal history. (CP 220). There was also no dispute as to his offender score coming into sentencing. (CP 211). The court determined Mr. Glushchenko's offender score for sentencing purposes was 8 for counts I, II, and IV and 7 for count III. (CP 225). The court also found counts II and IV were the same criminal conduct as well as the deadly weapon enhancements on those counts. (CP 227, 240). Mr. Glushchenko was sentenced to 291 months total confinement, including two deadly weapon enhancements adding 48 months. The court sentenced him to 243 months on count II: first degree assault, with lesser sentences on the other counts running concurrently. (CP 227). An amended judgment and sentence was later entered with the court sentencing

Mr. Glushchenko to a concurrent 126 months on count IV: robbery, which merged with the assault, and consecutive to the deadly weapon enhancements. (CP 239-40).

The Court of Appeals affirmed in an unpublished opinion. (App.).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be accepted by this court because the Court of Appeals decision conflicts with decisions of the Supreme Court and other decisions of the Court of Appeals. RAP 13.4(b)(1), (2).

As to the sufficiency of the evidence for the first degree assault conviction, the Court of Appeals determined RCW 9A.36.011(1)(a) only requires proof that the defendant intended to inflict great bodily harm – not that the defendant actually inflicted great bodily harm. *State v. Alcantar-Maldonado*, 184 Wn. App. 215, 225, 340 P.3d 859 (2014). From this premise, the court found intent could be inferred "as a logical probability from the facts and circumstances." *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). But it also acknowledged specific intent could not be presumed. *Id*.

The Court of Appeals nonetheless clearly presumed specific intent, which it is forbidden to do. *Wilson*, 125 Wn.2d at 217. Mr.

Glushchenko went into Mr. Erol's apartment to commit a burglary as his only intent was to steal. He did not go there with the intent to assault him. Piling a presumption of intent on top of a singular intent to steal, not to assault, is improper as facts cannot be based on guess, speculation, or conjecture. *See State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). Review is appropriate as the opinion conflicts with other decisions of the Supreme Court and the Court of Appeals. RAP 13.4(b)(1), (2).

Mr. Glushchenko also claimed the trial court abused its discretion by finding the first degree burglary of Mr. Erol's home was not the same criminal conduct as the robbery and assault. For purposes of deciding this issue, the Court of Appeals assumed the trial judge did not consider the burglary antimerger statute "[t]o avoid the need to remand." (Op. at 8).

Observing that a determination of whether two or more offenses involve the same criminal conduct is reviewed for an abuse of discretion, the Court of Appeals noted there is no abuse when the record adequately supports either conclusion. *State v. Aldana Graciano*, 176 Wn.2d 531, 537-38, 295 P.3d 219 (2013). It reviewed the arguments on appeal:

Mr. Glushchenko argues that the only criterion

> about which there could be any doubt is whether his criminal intent remained the same during his three crimes against Mr. Erol, and there could be no *reasonable* doubt that it did. He appears to contend that he entered the home intending to steal and to do whatever was necessary to accomplish that aim. The State, on the other hand, argues that although Mr. Glushchenko entered Mr. Erol's home with the intent to steal, he did not intend to encounter anyone – and once he did, he could have abandoned the effort and left. It contends that stabbing Mr. Erol could not possibly have been Mr. Glushchenko's intent when he entered the home.
>
> Either conclusion could be drawn from the evidence. The trial court did not abuse its discretion. (Op. at 8-9)

To the contrary, the State's argument is the same as Mr. Glushchenko's argument. He contended he entered Mr. Erol's home with the intent to steal and everything ensuing thereafter was done with the same intent. The State argued Mr. Glushchenko could not possibly have intended to stab Mr. Erol when he entered the home. Indeed, the intent never changed from the intent to steal. Since the record only supports that one conclusion on whether the crimes constituted the same criminal conduct, the sentencing court abused its discretion in arriving at a contrary result. *Aldano Graciano*, 176 Wn.2d at 537-38. The opinion

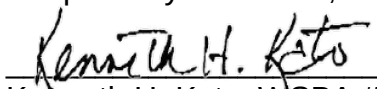
conflicts with this Supreme Court case so review is warranted under RAP 13.4(b)(1).

F.. CONCLUSION

Based on the foregoing facts and authorities, Mr. Glushchenko respectfully urges this court to grant his petition for review.

DATED this 29th day of October, 2017.

Respectfully submitted,



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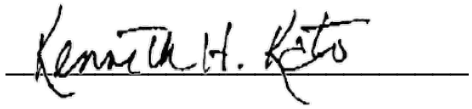
CERTIFICATE OF SERVICE

I certify that on October 29, 2017, I served a copy of the petition for review by USPS on Veniamin Glushchenko, # 346348, 1830 Eagle Crest Way, Clallam Bay, WA 98326; and through the eFiling portal on Brian O'Brien at his email address.



APPENDIX

Renee S. Townsley
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CASE # 337707
State of Washington v. Veniamin "Ben" Glushchenko
SPOKANE COUNTY SUPERIOR COURT No. 141043547

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

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FILED
SEPTEMBER 28, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. VENIAMIN "BEN" GLUSHCHENKO, Appellant.	)	No. 33770-7-III
	)	UNPUBLISHED OPINION

SIDDOWAY, J. — Veniamin Glushchenko appeals his convictions for first degree burglary, first degree assault, residential burglary, and first degree robbery arising out of back to back crimes committed at two homes in a residential neighborhood. He challenges (1) the sufficiency of the evidence to support the jury's verdict finding him guilty of first degree assault, (2) the trial court's sentencing determination that his first degree burglary was not the same criminal conduct as the robbery and assault into which it escalated, and (3) the trial court's failure to conduct a *Blazina*[1] inquiry into his ability to pay legal financial obligations. We are unpersuaded by those three challenges or by additional errors alleged in a pro se statement of additional grounds. We affirm.

[1] *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

FACTS AND PROCEDURAL BACKGROUND

On a late afternoon in December 2014, Veniamin Glushchenko broke into a home on 32nd Avenue in Spokane. He was in the process of taking a laptop computer from a coffee table near where the homeowner, Ugur Erol was sleeping, when Mr. Erol woke up. Upon seeing Mr. Erol awake, Mr. Glushchenko told him to "turn around" but Mr. Erol did not—he saw that Mr. Glushchenko was holding what appeared to be two steak knives, and he feared that if he turned around, Mr. Glushchenko would stab him in the back. Report of Proceedings (RP)[2] at 74. When he failed to turn away, an angered Mr. Glushchenko began swinging the knives at Mr. Erol, slashing him several times. Hurt, bleeding, and fearing additional injury, Mr. Erol fled out his front door. He called 911 from a neighbor's home.

Not long thereafter, Brenda Eberhart was taking a nap at her 32nd Avenue home when she was awakened by the sound of shattering glass. When she entered her kitchen and turned on the light, she saw Mr. Glushchenko standing outside her broken kitchen window. He tried to grab her and demanded that she give him her money. When she said she did not have any and then began screaming, Mr. Glushchenko left.

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[2] All citations to the verbatim report of proceedings are to the two consecutively-paginated volumes containing trial proceedings taking place from August 10 through 13, 2015, and Mr. Glushchenko's sentencing on August 27, 2015.

Officer Nathan Gobble responded to Mr. Erol's 911 call and obtained his description of the intruder. Lieutenant Rex Olson apprehended Mr. Glushchenko, who fit the description, a few blocks from Mr. Erol's home, in a parking lot near the Off Regal Bar. Mr. Glushchenko drew the lieutenant's attention because he appeared to have been hiding between cars, but got up and approached the door of the bar when the lieutenant pulled into the lot. The lieutenant noticed blood on the back of Mr. Glushchenko's hands as he was handcuffing him.

Officers responding to Ms. Eberhart's home took her to where Mr. Glushchenko was being held following his apprehension and she identified him as the man who broke the window at her home. Later that evening, Mr. Erol, who had been taken to the hospital for treatment of his wounds, identified Mr. Glushchenko from a photo array. Officers who had been given permission by Mr. Erol to search his home found what Mr. Erol would identify as Mr. Glushchenko's weapons: two of the household's steak knives, with blades between four and a half and five inches in length.

As crimes against Mr. Erol, the State eventually charged Mr. Glushchenko with first degree burglary, first degree robbery, and first degree assault, all with deadly weapon enhancements. It charged him with residential burglary for his crime against Ms. Eberhart. The challenges made on appeal focus on the convictions for the crimes against Mr. Erol.

At trial, evidence was presented that when officers responded to Mr. Erol's 911 call, he was bleeding from his neck, his knee, and had wounds on his shin, shoulder, head, and ear. In addition to offering photographs of his wounds as evidence, the State called Dr. Rana Ahmad, who treated Mr. Erol at the emergency room. Dr. Ahmad testified that Mr. Erol's 11-centimeter neck wound and thigh wound were the most prominent of his wounds. He testified that Mr. Erol's neck wound would have been life threatening if he had not received treatment, because he could have bled to death or the wound could have become infected. Dr. Ahmad classified the wound as "deep" even though neither the esophagus nor any of the large arteries or veins were injured, because the slash wound passed through both the fat layer and a muscle layer. RP at 136.

Mr. Erol testified that when he ran out of the front door of his house, he believed he was escaping a life-threatening assault by Mr. Glushchenko.

At the conclusion of trial, the jury found Mr. Glushchenko guilty of all charges. It returned special verdicts finding that he was armed with a deadly weapon when committing the first degree burglary, first degree robbery, and first degree assault.

At sentencing, the trial court heard argument about whether the burglary, robbery, and assault involving Mr. Erol constituted the same criminal conduct for sentencing purposes. It determined that only the robbery and assault constituted the same criminal conduct, based on its finding that Mr. Glushchenko's original intent, before Mr. Erol awoke and the situation escalated, had been only to steal. It sentenced Mr. Glushchenko

to a midrange sentence of 243 months' confinement and an additional 48 months' confinement for two deadly weapon enhancements, for a total of 291 months. It also imposed $800 in legal financial obligations, to which Mr. Glushchenko did not object.

Mr. Glushchenko appeals.

ANALYSIS

Evidence sufficiency

"A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm . . . [a]ssaults another with . . . any deadly weapon." RCW 9A.36.011(1)(a). Mr. Glushchenko first argues that the State's evidence was insufficient to support the essential element of first degree assault that the defendant intended to inflict great bodily harm. The jury was properly instructed that for purposes of that element, "Great bodily harm means bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ." Clerk's Papers (CP) at 164; RCW 9A.04.110(4)(c).

Evidence is sufficient if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* We defer to the fact finder on issues of witness credibility

and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

First degree assault requires proof of specific intent, which is intent to produce a specific result: in the case of first degree assault, to inflict great bodily harm. *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). In determining intent, the "jury may consider the manner in which the defendant exerted the force and the nature of the victim's injuries to the extent that it reflects the amount or degree of force necessary to cause the injury." *State v. Pierre*, 108 Wn. App. 378, 385, 31 P.3d 1207 (2001). While specific intent may not be presumed, the jury may infer it "as a logical probability from all the facts and circumstances." *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994).

Mr. Glushchenko argues that the State presented no evidence that Mr. Erol's wounds presented a risk of probable death, or any significant permanent disfigurement, or any impairment of the function of any body part or organ. But RCW 9A.36.011(1)(a) does not require proof that the defendant *inflicted* great bodily harm; it requires that the defendant *intended* to inflict great bodily harm. *State v. Alcantar-Maldonado*, 184 Wn. App. 215, 225, 340 P.3d 859 (2014).

Mr. Glushchenko also argues that his intent was only to steal, but there was evidence from which jurors could find otherwise. Mr. Erol testified that Mr. Glushchenko assaulted him angrily, repeatedly telling him, "[T]urn around bitch," and

continued the assault even after Mr. Erol tried to convince Mr. Glushchenko to take what he wanted and leave. RP at 76. Mr. Erol told jurors that he "realized that my life was in danger," and he thought he was "going to bleed out" unless he made a run for the front door and escaped. RP at 78. Dr. Ahmad affirmed that the wounds inflicted by Mr. Glushchenko were deep. And since Mr. Erol *did* make a run for it, rational jurors could infer that Mr. Glushchenko had intended to inflict even more harm had Mr. Erol not escaped.

The evidence was sufficient.

Same criminal conduct

Mr. Glushchenko argues next that the trial court abused its discretion in finding, for purposes of calculating his offender score, that the first degree burglary of Mr. Erol's home was not the same criminal conduct as the robbery and assault.

If concurrent offenses encompass the same criminal conduct, they are treated as one crime for the purpose of calculating the defendant's sentence. RCW 9.94A.589(1)(a). The Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, defines "same criminal conduct" as "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). All three criteria must be present for a finding of same criminal conduct. *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). For purposes of the "same criminal intent" criterion, intent can be measured by whether one crime furthered

another. *Id.* Although this issue would be moot if the trial court applied the burglary antimerger statute, Mr. Glushchenko insists that the court did not consider that statute in his case. Br. of Appellant at 12.[3] To avoid the need to remand we will assume he is correct.[4]

This court will not disturb a trial court's determination of whether two crimes involve the same criminal conduct unless there is clear abuse of discretion or a misapplication of the law. *State v. Elliott*, 114 Wn.2d 6, 17, 785 P.2d 440 (1990). "Under this standard, when the record supports only one conclusion on whether crimes constitute 'same criminal conduct,' a sentencing court abuses its discretion in arriving at a contrary result." *State v. Aldana Graciano*, 176 Wn.2d 531, 537-38, 295 P.3d 219 (2013). "[W]here the record adequately supports either conclusion," however, the matter lies within the trial court's discretion. *Id.* at 538.

Mr. Glushchenko argues that the only criterion about which there could be any doubt is whether his criminal intent remained the same during his three crimes against

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[3] RCW 9A.52.050 provides, "Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary." A sentencing court may exercise discretion to impose separate punishments for burglary and crimes committed during the burglary even if the crimes encompass the same criminal conduct. *Lessley*, 118 Wn.2d at 781.

[4] The trial court mentioned the antimerger statute in explaining and announcing its sentence. *See* RP at 315. But it also discussed the "same criminal conduct" criteria and found that Mr. Glushchenko did not have the same criminal intent in committing the burglary as he did in committing the robbery and assault.

Mr. Erol, and there could be no *reasonable* doubt that it did. He appears to contend that he entered the home intending to steal and to do whatever was necessary to accomplish that aim. The State, on the other hand, argues that although Mr. Glushchenko entered Mr. Erol's home with the intent to steal, he did not intend to encounter anyone—and once he did, he could have abandoned the effort and left. It contends that stabbing Mr. Erol could not possibly have been Mr. Glushchenko's intent when he entered the home.

Either conclusion could be drawn from the evidence. The trial court did not abuse its discretion.

Legal financial obligations

For the first time on appeal, Mr. Glushchenko argues that the trial court imposed legal financial obligations (LFOs) without conducting the individualized on the record inquiry into ability to pay required by *Blazina*. He asks that we remand so that the required inquiry can be made.

Mr. Glushchenko overlooks the fact that the trial court imposed only mandatory LFOs[5] and restitution. A *Blazina* inquiry is required only for discretionary LFOs. *State v. Clark*, 191 Wn. App. 369, 373, 362 P.3d 309 (2015) (citing *State v. Lundy*, 176 Wn.

[5] A $500 victim assessment fee, a $100 DNA (Deoxyribonucleic acid) collection fee, and a $200 filing fee, none of which is subject to RCW 10.01.160(3). *State v. Clark*, 191 Wn. App. 369, 374, 362 P.3d 309 (2015).

App. 96, 102, 308 P.3d 755 (2013)), *review granted in part*, 187 Wn.2d 1009 (2007). No remand is required.

STATEMENT OF ADDITIONAL GROUNDS

In a pro se statement of additional grounds (SAG), Mr. Glushchenko asserts his innocence, claiming he had an alibi for the night the crimes were committed and that DNA testing would exonerate him. He complains about the criminal justice system in general and about the investigation, trial, and criminal justice system participants in his case in particular. Only four errors are sufficiently identified for review. *See* RAP 10.10(c) (A SAG must "inform the court of the nature and occurrence of alleged errors"; we will not search the record in support of claims.).

Prosecutorial vindictiveness. Mr. Glushchenko argues his due process rights were violated because the prosecutor acted vindictively when he amended the charges to include first degree robbery after Mr. Glushchenko refused the offer of a plea deal. Prosecutorial vindictiveness as a basis for appeal exists "when 'the government acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights.'" *State v. Korum*, 157 Wn.2d 614, 627, 141 P.3d 13 (2006) (quoting *United States v. Meyer*, 810 F.2d 1242, 1245 (D.C. Cir. 1987)). "'[A] prosecutorial action is "vindictive" only if *designed* to penalize a defendant for invoking legally protected rights.'" *Id.* (quoting *Meyer*, 810 F.2d at 1245).

When a prosecutor adds charges following a defendant's exercise of legally protected rights, it does not amount to vindictiveness or even give rise to presumption of vindictiveness unless "a defendant can prove that 'all of the circumstances, when taken together, support a realistic likelihood of vindictiveness.'" *Id.* (quoting *Meyer*, 810 F.2d at 1246). Courts have "emphatically rejected the notion that filing additional charges after a defendant refuses a guilty plea gives rise to a presumption of vindictiveness." *Korum*, 157 Wn.2d at 629.

In this case, the State agreed not to charge certain counts in exchange for a plea agreement, a practice explicitly permitted by RCW 9.94A.421(5). When plea negotiations failed, it moved to amend the information to add the count of first degree robbery. The court granted its request. Mr. Glushchenko provides no support for his claim of prosecutorial vindictiveness aside from his bald assertion, which is insufficient.

Ineffective assistance of counsel. Mr. Glushchenko complains that his trial lawyer failed to present evidence of his alibi and "threatened [him] to not testify," implicitly asserting ineffective assistance of counsel. SAG (Attachment) at 3.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must demonstrate both that defense counsel's representation was deficient and that the deficient representation prejudiced the defendant. *State v.*

McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). When, as here, ineffective assistance of counsel is raised on direct appeal, the burden is on a defendant to show deficient representation based on the record established in the proceedings below. *Id.* at 335. If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition. *Id.*

The record on appeal does not demonstrate that Mr. Glushchenko had an alibi witness whom his trial lawyer unreasonably failed to call to testify. It does not demonstrate that Mr. Glushchenko's failure to testify was the result of a threat by his lawyer.[6] If Mr. Glushchenko wishes to pursue these claims, he will need to file a personal restraint petition supported by evidence.

Offender score. Mr. Glushchenko argues for the first time on appeal that his offender score was a "two" prior to trial. At sentencing, he agreed that his pretrial offender score was four:

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[6] In fact, the record tends to undercut that assertion. At the close of the State's case, Mr. Glushchenko's trial lawyer asked for a brief recess to confer with his client, after which he reported to the court:

> I don't have any defense witnesses to present. I did tell Mr. Glushchenko that whether he testified or not, despite whatever my advice is, it's totally his decision. His decision at this point is not to testify.

RP at 241.

> THE COURT: . . . he's a four. Are you stipulating that he's a four?
> [DEFENSE COUNSEL]: Your Honor, my calculations he's a four on the residential burglary, five on the other.
> [PROSECUTOR]: That's correct.
> . . . .
> THE COURT: Okay. So the criminal history that I have in front of me other than the second one, which has the Florida conviction which isn't countable at this point, do you have any issues with this prior criminal history?
> [DEFENSE COUNSEL]: No. I reviewed that with Mr. Glushchenko before, and he doesn't have a dispute as to the countable criminal history.
> THE COURT: Okay. And he did not sign this.
> [DEFENSE COUNSEL]: He did sign it. I think he signed it with an X.
> THE COURT: So, Mr. Glushchenko, is that your signature, that X on there?
> [MR. GLUSHCHENKO]: (Defendant nods head.)
> THE COURT: You don't have an actual signature?
> [MR. GLUSHCHENKO]: (Defendant shakes head.)

RP at 306-07.

"At sentencing, the State bears the burden to prove the existence of prior convictions by a preponderance of the evidence." *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113, (2009). While due process imposes the burden of providing an adequate record on the State, "This is not to say that a defendant cannot affirmatively acknowledge his criminal history and thereby obviate the need for the State to produce evidence." *Id.* Affirmative acknowledgment requires more than the mere failure to object to a prosecutor's recitation of criminal history or the mere agreement with the ultimate sentencing recommendation. *Id.* at 928. Here, Mr. Glushchenko affirmatively

acknowledged the correctness of the criminal history and pretrial offender score provided by the State, so he cannot object to the adequacy of the record.

In addition, while a defendant cannot agree to a sentence in excess of statutory authority, "waiver can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion." *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). Before we even reach a *Goodwin* analysis of waiver, however, a defendant must show that a sentencing error *was* made, not merely that one might have been made. *State v. Ross*, 152 Wn.2d 220, 231-32, 95 P.3d 1225 (2004). Mr. Glushchenko does not make a threshold showing that an error was made.

Excessive sentence. Finally, Mr. Glushchenko argues that the trial court's imposition of two deadly weapon enhancements caused his sentence to exceed the statutory maximum. The total sentence for a given offense, including enhancements to the sentence for that offense, cannot exceed the statutory maximum. RCW 9.94A.533(4)(g); *State v. DeSantiago*, 149 Wn.2d 402, 421, 68 P.3d 1065 (2003).

Mr. Glushchenko's crimes to which the deadly weapon enhancements applied were all class A felonies. RCW 9A.52.020(2) (first degree burglary); RCW 9A.36.011(2) (first degree assault); RCW 9A.56.200(2) (first degree robbery). The maximum allowable sentence for a class A felony is life imprisonment. RCW 9A.20.021(1)(a).

Even with the enhancements, Mr. Glushchenko's sentence does not come close to the statutory maximum.

Affirmed.

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

Siddoway, J.

WE CONCUR:

Fearing, C.J.

Lawrence-Berrey, J.

October 29, 2017 - 8:04 PM

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