

72410-0

72410-0

ORIGINAL

NO. 72410-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

YEMANE WELDESELASE,

Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2015 MAY -4 PM 2:51

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA B. DOYLE, JUDGE

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JENNIFER PETERSEN
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

TABLE OF CONTENTS

	Page
A. ISSUES PRESENTED	1
1. Did Weldeselase receive effective assistance of counsel at sentencing when he cannot demonstrate he was prejudiced by his attorney's failure to request the court consider his three felonies to be the same criminal conduct?	1
2. Is remand for resentencing on count three required when Weldeselase's sentence exceeds the statutory maximum sentence?	1
B. STATEMENT OF THE CASE	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	3
C. ARGUMENT	5
1. WELDESELASE RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL	5
2. THE STATE CONCEDES WELDESELASE'S SENTENCE ON COUNT THREE EXCEEDS THE STATUTORY MAXIMUM	11
D. CONCLUSION	11

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 6, 7

Washington State:

In re Pers. Restraint of Brett, 142 Wn.2d 868,
16 P.3d 601 (2001)..... 6

State v. Calvert, 79 Wn. App. 569,
903 P.2d 1003 (1995)..... 8

State v. Dunaway, 109 Wn.2d 207,
743 P.2d 1237 (1987)..... 8

State v. Flake, 76 Wn. App. 174,
883 P.2d 341 (1994)..... 8

State v. Graciano, 176 Wn.2d 531,
295 P.3d 219 (2013)..... 8

State v. Hendrickson, 129 Wn.2d 61,
917 P.2d 563 (1996)..... 6

State v. Lessley, 118 Wn.2d 773,
827 P.2d 996 (1992)..... 8, 9

State v. Palmer, 95 Wn. App. 187,
975 P.2d 1038 (1999)..... 8

State v. Porter, 133 Wn.2d 177,
942 P.2d 974 (1997)..... 8

State v. Thomas, 109 Wn.2d 222,
743 P.2d 816 (1987)..... 6

<u>State v. Vike</u> , 125 Wn.2d 407, 885 P.2d 824 (1994).....	7, 8
<u>State v. Williams</u> , 181 Wn.2d 795, 336 P.3d 1152 (2014).....	10
<u>State v. Williams</u> , 135 Wn.2d 365, 957 P.2d 216 (1998).....	8

Statutes

Washington State:

RCW 9.94A.525(21).....	2
RCW 9.94A.589	7
RCW 9A.52.050	10

A. ISSUES PRESENTED

1. Did Weldeselase receive effective assistance of counsel at sentencing when he cannot demonstrate he was prejudiced by his attorney's failure to request the court consider his three felonies to be the same criminal conduct?
2. Is remand for resentencing on count three required when Weldeselase's sentence exceeds the statutory maximum sentence?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Weldeselase was charged with first-degree burglary, two counts of second-degree assault¹, one count of felony violation of a court order, and one count of fourth degree assault. CP 11-13. The victim of these crimes was Weldeselase's wife, Luula Araya. CP 11-13. The State alleged these offenses were committed against a family or household member. CP 11-13. The State further alleged these offenses were aggravated crimes of

¹ One count of second-degree assault was charged under the "strangulation" prong and the other was charged under the "substantial bodily harm" prong. CP 11-13.

domestic violence because they were committed within sight or sound of Weldeselase's and Araya's minor child. CP 11-13.

Weldeselase was found guilty following a jury trial of first-degree burglary, felony violation of a court order, fourth degree assault, and one count of second-degree assault. CP 86, 88-90. The jury found Weldeselase guilty of the lesser-included offense of fourth-degree assault on count II. CP 87. The jury also found that the offenses were committed against a family or household member and were aggravated crimes of domestic violence. CP 91-95.

At sentencing, the court accepted the State's offender score calculation of eight points. 6RP 4, 20. Four points were assessed for the other two current felonies, which are subject to the domestic violence multiplier under RCW 9.94A.525(21). CP 119-121. Two points were assessed for the other two current domestic violence misdemeanors and two points were assessed for two prior domestic violence convictions. CP 119-121. Defense counsel argued for an exceptional sentence below the standard range. 6RP 9-10.

The court found there was no basis for an exceptional sentence below the standard range and imposed concurrent

sentences at the top of the standard range on the three felonies. CP 99. The court imposed 102 months for first-degree burglary, 82 months for felony violation of a court order, and 70 months for second-degree assault. CP 99. The court also imposed 364 days on each of the misdemeanors to run concurrent with the felony sentences. CP 105.

2. SUBSTANTIVE FACTS

Weldeselase and Luula Araya are married and have three children together. 2RP 52-53. At the time of trial, they had been married 19 years. 2RP 52-53. They were both born and raised in Eritrea and emigrated to the United States in 1993. 2RP 53. At the time of trial, their eldest daughter was 19 and attending college on the east coast. 2RP 53. Araya lived with their 17-year-old daughter and 15-year-old son. 2 RP 53.

Weldeselase and Araya separated in February 2012 when the court imposed a no-contact order prohibiting Weldeselase from having in-person contact with Araya. 2RP 54. During the days leading up to October 26, 2013, Weldeselase repeatedly called Araya trying to persuade her to have the no-contact order lifted so he could return home. 2RP 55. On the evening of October 26, 2013, he called her at work angry and yelling at her about changing

her religion. 2RP 57-58. Weldeselase was so persistent that Araya eventually hung up on him. 2RP 59.

Araya arrived home from work at 11:30 p.m. and parked her car inside her gated driveway. 2RP 61. Immediately after Araya stepped out of her car, Weldeselase grabbed her by her uniform with one hand with his other hand in his pocket. 2RP 62.

Weldeselase told Araya that he had a gun in his pocket and he ordered her to open the door. 2RP 62. Araya refused and Weldeselase pushed her against the wall of her house so hard her shoes came off her feet. 2RP 63-64.

At that moment, Araya's niece, who had been staying at her home, heard Araya outside and opened the front door. 2RP 66. Once the door was opened, Weldeselase grabbed Araya by the wrist and pulled her into the home. 2RP 66-67. Once inside, he pulled her into their 17-year-old daughter's bedroom where the daughter had been doing homework. 2RP 67. Weldeselase pushed Araya down onto their daughter's bed as their daughter stood in the corner of the bedroom. 2RP 68. Weldeselase grabbed Araya by the hair and began punching her with a closed fist in her face, ears and head. As he was punching Araya, Weldeselase held a small knife in his fist. 2RP 71. When Araya's daughter tried to

intervene, Weldeselase began to hit her as well. 2RP 70.

Weldeselase then suddenly stopped, laid his head on Araya's lap and asked for forgiveness. 2RP 72.

Meanwhile Araya's 15-year-old son heard his father's voice and screaming, and he took his phone and ran out of the house to a bus stop where he called 911. 3RP 19-23. He did not see his father and did not witness the assault. 3RP 25.

Officer Michael Griffin was one of the first officers to arrive. 2RP 34. Officer Griffin could hear two females yelling and crying inside the house. 2RP 35. He entered the house and walked toward the bedroom. 2RP 35. When he entered the bedroom, he saw Weldeselase standing over Araya, who was lying on the bed with her hands up in front of her face. 2RP 36. He saw blood on the walls, on the floor, on Araya, and on Araya's daughter's shirt. 2RP 36-37. Araya's clothing was torn. 2RP 39. Araya was treated at the hospital for facial contusions and a fractured nose. 2RP 27-28.

C. ARGUMENT

1. WELDESELASE RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Weldeselase argues that counsel rendered ineffective assistance by failing to request that the court exercise its discretion

to find the convictions for burglary in the first degree, assault in the second degree, and felony violation of a no-contact order constituted the same criminal conduct. Weldeselase's claim is meritless. Weldeselase cannot show that he was prejudiced by counsel's failure to make this request.

Ineffective assistance of counsel claims present a mixed question of law and fact. In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). As a result, they are reviewed *de novo*. Id. To prevail on an ineffective assistance of counsel claim, the defendant must show (1) that his attorney's conduct fell below an objective standard of reasonableness and (2) that this deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Prejudice exists where "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). If the defendant fails to demonstrate either prong, the inquiry ends. Id.

Courts presume that counsel has provided effective representation and are "highly deferential" when scrutinizing

counsel's performance. Strickland, 466 U.S. at 689. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction . . . and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id.

On review, the relevant inquiry is "whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. There is a "wide range" of reasonable performance and a recognition that even the best criminal defense attorneys take different approaches to defending someone. Id. at 689.

In determining whether counsel's deficient performance resulted in prejudice, courts presume that the judge or jury acted according to law. Strickland, 466 U.S. at 694.

Offenses that are considered the same criminal conduct are scored as one offense. RCW 9.94A.589(1)(a). "Same criminal conduct" refers to two or more crimes requiring the same criminal intent, committed at the same time and place, and involving the same victim. Id.; State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). The definition of "same criminal conduct" is to be construed narrowly so that most crimes are not considered the same criminal conduct. State v. Palmer, 95 Wn. App. 187, 190-91, 975 P.2d 1038

(1999); State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997); State v. Flake, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). If any one of the three elements is missing, the offenses are not the same criminal conduct. State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). The defendant bears the burden in this fact-based inquiry. State v. Graciano, 176 Wn.2d 531, 536, 295 P.3d 219 (2013).

To determine whether two or more criminal offenses involve the same criminal intent, courts are required to focus on "the extent to which a defendant's criminal intent, as objectively viewed, changed from one crime to the next." State v. Dunaway, 109 Wn.2d 207, 214-15, 743 P.2d 1237 (1987); Lessley, 118 Wn.2d at 777-78. Whether the defendant's intent changed is determined "in part by whether one crime furthered the other." State v. Williams, 135 Wn.2d 365, 368, 957 P.2d 216 (1998) (quoting Vike, 125 Wn.2d at 411). Other factors to consider include whether the crimes were part of the same scheme or plan or whether the defendant's criminal objectives changed. State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995).

Here, Weldeselase's burglary, second-degree assault, and felony violation of the no-contact order occurred within a relatively

short time span, but they did not occur in the same place.

Weldeselase's actions took place in different rooms of the house.

Weldeselase's burglary was complete when he pulled Araya through the front door of her home while holding her wrist. The second-degree assault occurred inside Araya's 17-year-old daughter's bedroom.

Moreover, while Araya was a single victim in the second-degree assault and the felony violation of a court order,

Weldeselase's burglary victimized Araya's daughter as well.

Araya's daughter was present when Weldeselase pulled Araya through the front door of their home and assaulted her. Because more than one victim was involved in the burglary, it was not the same criminal conduct as the second-degree assault and felony violation of a court order. See Lessley, 118 Wn.2d 773 at 779.

Even if Weldeselase's crimes were committed at the same time and place and involved the same victim, the crimes did not involve the same criminal intent. Viewed objectively,

Weldeselase's burglary was complete when he pulled Araya through the front door of her home while holding her wrist. The intent behind the burglary was to enter the home. Weldeselase then moved to Araya's daughter's bedroom where he repeatedly

struck Araya breaking her nose. The intent behind the assault was to hurt Araya. The intent behind the felony violation of a court order was to contact Araya in violation of that order. The criminal objective of each crime was realized independently of the others.

Weldeselase argues that his intent was the same because he only acted out of a desire to be reunited with his family. However, this argument focuses on Weldeselase's subjective intent. The cases make clear that the test is an objective one.

In addition, the burglary anti-merger statute gives the sentencing court authority to punish Weldeselase separately for burglary and second-degree assault, even if it found the crimes constituted "same criminal conduct" RCW 9A.52.050; State v. Williams, 181 Wn.2d 795, 801, 336 P.3d 1152, 1155 (2014) (holding that the burglary anti-merger statute allows the trial court to separately punish a defendant for burglary and another offense constituting "same criminal conduct" only for current offenses).

Weldeselase's crimes do not constitute "same criminal conduct." As a consequence, he has not demonstrated "a reasonable probability" that the result would have been different had his attorney raised that argument, and he cannot demonstrate that he was prejudiced by any deficiency on the part of counsel.

2. THE STATE CONCEDES WELDESELASE'S SENTENCE ON COUNT THREE EXCEEDS THE STATUTORY MAXIMUM.

The State concedes that Weldeselase's 82-month sentence for felony violation of a court order exceeds the court's sentencing authority under the Sentencing Reform Act. The 82-month sentence exceeds the statutory maximum of five years confinement for this Class C felony. Remand is required.

D. CONCLUSION

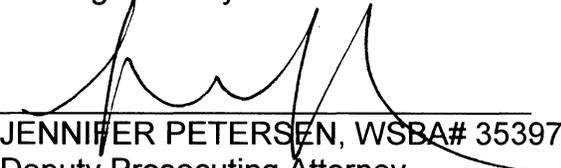
For all of the foregoing reasons, the State respectfully asks this Court to remand for resentencing on count three only and to affirm the sentence on all remaining counts.

DATED this 30th day of April, 2015.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
Prosecuting Attorney

By:


JENNIFER PETERSEN, WSBA# 35397
Deputy Prosecuting Attorney
Attorneys for the Respondent
WSBA Office #91002

ORIGINAL

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer J. Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. YEMANE WELDESELASE, Cause No. 72410-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.


Name Jennifer Petersen
Done in Seattle, Washington

May 1, 2015
Date May 1, 2015

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 MAY -4 PM 3:19