

NO. 34999-0-II
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Respondent,

v.

CARL JOSEPH ANTUNEZ,

Appellant.

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY 

ON APPEAL FROM THE
SUPERIOR COURT OF CLARK COUNTY

Before the Honorable Robert L. Harris, Judge

OPENING BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

The State presented insufficient evidence to convict Appellant Carl Antunez of Count 1 (Possession of Stolen Property in the First Degree) and Count 2 (Malicious Mischief in the First Degree).

Counts 1 and 2 constitute the same criminal conduct, and the trial court improperly failed to treat these convictions as a single point in Antunez's offender score.

Defense counsel usurped Antunez's statutory right to allocution.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in not taking Count 1 (Possession of Stolen Property in the First Degree) from the jury or for lack of sufficiency of the evidence.

2. The trial court erred in not taking Count 2 (Malicious Mischief in the First Degree) from the jury for lack of sufficiency of the evidence.

3. The trial court erred in denying the defense motion for new trial or arrest of judgment pursuant to CrR 7.4 or CrR 7.5.

4. The trial court abused its authority under the sentencing statutes by failing to treat Counts 1 and 2 as the same criminal conduct.

5. Antunez received ineffective assistance of counsel when

counsel asked Antunez a question about his employment as a “pressman” when the trial court judge asked Antunez if he had “[a]nything further,” thereby denying Antunez his statutory right to allocation.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in not taking Count 1 from the jury or granting the defense motion for new trial or arrest of judgment for lack of sufficiency of the evidence? Assignments of Error No. 1 and 3.

2. Whether the trial court erred in not taking Count 2 from the jury or granting the defense motion for new trial or arrest of judgment for lack of sufficiency of the evidence? Assignments of Error No. 2 and 3.

3. A sentencing court is required by statute to calculate an offender’s criminal history based upon the rules set forth in RCW 9.94A.589 and case law further defining the statute’s scope. Did the trial court fail to comply with its statutory obligations by neglecting to treat convictions for first degree of possession of stolen property and first degree malicious mischief that were based on items possessed at the same time, owned by the same victim, and possessed with the same objective intent, as the same criminal conduct? Assignment of Error No. 4.

4. A criminal defendant has the right to effective assistance of counsel at sentencing. The trial court judge did not explicitly solicit allocation from Antunez, but did ask him if he had “[a]nything further” to

tell the court. Defense counsel then asked “[y]ou tend to find work as (inaudible) pressman?” Antunez then spoke about his work history. Where trial counsel took over the questioning of his client from the court and did not elicit responses from Antunez about what sentence should be imposed, was trial counsel ineffective? Assignment of Error No. 5.

C. STATEMENT OF THE CASE¹

1. Procedural history:

A jury convicted Carl Antunez of first degree possession of stolen property, contrary to RCW 9A.56.140(1),² RCW 9A.56.150³ in Count 1,

¹This Statement of the Case addresses the facts related to the issues presented in accord with RAP 10.3(a)(4).

² RCW 9A.56.140 provides:

(1) "Possessing stolen property" means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

(2) The fact that the person who stole the property has not been convicted, apprehended, or identified is not a defense to a charge of possessing stolen property.

(3) When a person has in his or her possession, or under his or her control, stolen access devices issued in the names of two or more persons, or ten or more stolen merchandise pallets, or ten or more stolen beverage crates, or a combination of ten or more stolen merchandise pallets and beverage crates, as defined under RCW 9A.56.010, he or she is presumed to know that they are stolen.

(4) The presumption in subsection (3) of this section is rebuttable by evidence raising a reasonable inference that the possession of such stolen access devices, merchandise pallets, or beverage crates was without knowledge that they were stolen.

(5) In any prosecution for possessing stolen property, it is a sufficient defense that the property was merchandise pallets that were received by a pallet recycler or repairer in the ordinary course of its business.

and first degree malicious mischief in Count 2, contrary to RCW 9A.48.070(1)(a).⁴ Clerk's Papers [CP] at 97.

An Information was filed by the State in Clark County Superior Court on June 6, 2005. CP at 1. The State filed an Amended Information on February 17, 2006, adding a count of possession of a controlled substance. The State filed a Second Amended Information on May 16, 2006. CP at 12, 14.

Antunez was tried to a jury on May 17, 18, and 19, 2006, Clark

³ RCW 9A.56.150 provides:

(1) A person is guilty of possessing stolen property in the first degree if he or she possesses stolen property other than a firearm as defined in RCW 9A.41.010 which exceeds one thousand five hundred dollars in value.

(2) Possessing stolen property in the first degree is a class B felony.

⁴ RCW 9A.48.070 provides:

(1) A person is guilty of malicious mischief in the first degree if he knowingly and maliciously:

(a) Causes physical damage to the property of another in an amount exceeding one thousand five hundred dollars;

(b) Causes an interruption or impairment of service rendered to the public by physically damaging or tampering with an emergency vehicle or property of the state, a political subdivision thereof, or a public utility or mode of public transportation, power, or communication; or

(c) Causes an impairment of the safety, efficiency, or operation of an aircraft by physically damaging or tampering with the aircraft or aircraft equipment, fuel, lubricant, or parts.

(2) Malicious mischief in the first degree is a class B felony.

County Superior Court Judge Robert Harris presiding. At sentencing on May 25, 2006, Judge Harris imposed a standard range sentence of 20 months for each count, to be served concurrently. CP at 102. Timely notice of this appeal followed. CP at 116.

2. Substantive facts:

a. Overview of testimony

On February 22, 2005, then-Corporal Michael Chylack of the Vancouver Police Department was sent to the 2500 block of F Street in Vancouver, Washington, pursuant to a report of a suspicious vehicle. 1 Report of Proceedings [RP] at 34.⁵ After arriving, Sgt. Chylack saw a white Acura Integra parked on F Street. 1RP at 34. The passenger seat was missing, parts of the dashboard were missing, and the tail lights were missing. 1RP at 35. A window was broken out of the driver's side of the vehicle. 1RP at 44. Exhibit 2. The air bags were missing. 1RP at 44-45. Exhibits 6 and 7. Both tires from the passenger side were missing and replaced by spare "doughnut" tires. 1RP at 35. The license plates were removed and placed inside the car. 1RP at 35. Sgt. Chylack determined that the car was stolen in Portland. 1RP at 35.

⁵The Verbatim Report of Proceedings consists of 2 volumes of transcripts [RP], which are referred to in this Brief as follows:
1RP May 17, 2006, Jury Trial.
2RP May 18, Jury Trial; May 19, 2006, Verdict; and May 25, 2006 Sentencing.

The white 1994 Acura was driven by Megan LeBov. 1RP at 18. The car was bought by her parents in 1999 for LeBov's use. 1RP at 19, 24-26. She last saw the car on February 16, 2005, in Portland, where she lived. 1RP at 20, 25. Her insurance company gave her a settlement check for approximately \$4,000.00. 1RP at 23.

Sgt. Chylack noticed scrape marks on the asphalt leading up to where the car was parked. 1RP at 38. The rear suspension of the car had a drag mark "leading up to it." 1RP at 46. Exhibit 11. He and another officer followed the marks for approximately ten blocks to a driveway at 512 East 16th Street in Vancouver. 1RP at 38. Sgt. Chylack walked up the driveway and saw a black Acura in an open garage detached from the house. 1RP at 39, 95. He saw a seat that was similar in shape and color to the driver's seat in the white Acura on F Street. 1RP at 40. In front of the garage he saw a tire and rim that looked similar to the rim on white Acura. 1RP at 40, 97.

Law enforcement obtained a search warrant for the house, basement, and garage at 512 East 16th Street and executed the warrant on February 22.⁶ 1RP at 56, 81, 82, 97. In addition to the black Acura, law enforcement found an Oregon car registration with Lebov's name on it. 1RP at 53. Law enforcement also found a US Bank statement for

⁶Defense counsel did not challenge the sufficiency of the search warrant affidavit.

Antunez with a Portland address in the car. 1RP at 60.

Christina Lamp, who lived next to the house at 512 East 16th Street, saw both a white Acura and a black Acura at the house. 2RP at 121. She was not sure if it was two cars, or one car that had been painted. 2RP at 126.

The house was rented by Chrystal Pickett, Antunez's former girlfriend. 2RP at 136. She moved into the house at 512 East 16th Street in January, 2005 and Antunez later moved in with her approximately a month before the police searched the house. 2RP at 138, 193. She stated that Antunez had a black Acura that he put in her garage approximately two weeks before the search warrant was served. 2RP at 140, 141. She stated that he planned to fix the black Acura and resell it. 2RP at 142. She stated that a person named Tom "showed up there with a white Acura" 2RP at 142, 175. She testified that Antunez "don't want the car." 2RP at 176, 192. The white Acura was in the driveway for four to five days. 2RP at 157. She testified that men came to the house and took parts off the car. 2RP at 157, 182. She denied that Antunez worked on the white Acura and stated that he "wasn't doing work on the other car." 2RP at 184.

Lt. Andrew Hamlin of the Vancouver Police Department testified that he interviewed Chrystal Pickett, who told him that "her boyfriend

brought it home about a week and a half ago” and that he began to take parts from it. 2RP at 202. She stated that he told her that he was taking part of the white Acura and putting on his Acura, which he had wrecked. 2RP at 202.

b. Jury instructions

The State did not noted exceptions to requested instructions not given or objected to instructions given. 2RP at 216.

Defense counsel proposed the following instruction:

Mere proximity to a controlled substance and evidence of momentary handling is not enough to support a finding of possession.

2RP at 216. The court did not give the proposed instruction.

c. Verdict

The jury found Antunez guilty of first degree possession of stolen property and first degree malicious mischief on May 19, 2006. 2RP at 272. CP at 55, 56. The jury was unable to reach a verdict on Count 3 and the court declared a mistrial as to that count. 2RP at 272. CP at 57.

d. Sentencing

The matter came on for sentencing on May 25, 2006. 2RP at 276-93. The State moved to dismiss Count 3 with prejudice. 2RP at 276. CP at 94.

Defense counsel moved for new trial or alternatively, arrest of judgment. 2RP at 280-81. Counsel subsequently filed a written motion on June 1, 2006. CP at 110.

The State argued that that Antunez had an Offender Score of six, with five prior points and one concurrent point. 2RP at 277. Defense counsel argued that that counts are part of the same criminal conduct, and that Antunez's Offender Score is five, giving him a standard range of 14 to 18 months. 2RP at 277, 281-82. The State argued that it requires a different intent to steal a piece of property and to steal a piece of property and destroy it by dismantling it. 2RP at 282-83. Judge Harris denied the motion for new trial, and also found that the two counts are not the same criminal conduct. 2RP at 283. Judge Harris stated:

The question of Possession of Stolen Property in the First Degree and Malicious Mischief, I think they are dissimilar in that sense, that one thing, a person may very well have the property, and it can obviously—there's been a conversion, but it can be recovered.

Here, after they begin to strip it, obviously, the value was taken away in a manner that is inconsistency with the uses and possession of property. So I am going to score it was a six and let somebody else review it.

2RP at 283.

Although he spoke to the court concerning his current parole status, Antunez was interrupted by his own counsel and was not given an opportunity for allocution. 2RP at 284-85.

The court sentenced Antunez to a standard range sentence of 20 months for Counts 1 and 2, to be served concurrently, with credit for three days served. 2P at 286. CP at 97.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO UPHOLD THE CONVICTIONS FOR FIRST DEGREE POSSESSION OF STOLEN PROPERTY AND FIRST DEGREE MALICIOUS MISCHIEF

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, at 201; *State v. Craven*, 67 Wn.App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonable can be drawn therefrom. *Salinas*, at 201; *Craven*, at 928. In cases involving only circumstantial evidence and a series of inferences, the essential proof of guilt cannot be supplied solely

by a pyramiding of inferences. *State v. Bencivenga*, 137 Wn.2d 703, 711 974 P.2d 832 (1999)(citing *State v. Weaver*, 60 Wn.2d 87, 89, 371, P.2d 1006 (1962)).

To convict Antunez of the offense of first degree possession of stolen property, the State had to prove, in part, that he possessed the property, knowing it had been stolen. Bare possession of recently stolen property alone is not sufficient to justify a conviction. *State v. Portee*, 25 Wn.2d 246, 170 P.2d 326 (1946). Possession of recently stolen property coupled with “slight corroborative evidence of other inculpatory circumstances tending to show . . . guilt” will support a conviction. *State v. Couet*, 71 Wn.2d 773, 776, 430 P.2d 974 (1967)(quoting *State v. Portee*, 25 Wn.2d at 253). In *Couet*, the court upheld the conviction where the evidence other than possession indicated that the defendant had lied to the police about being in the vehicle on the night in question, and had given the police an unsubstantiated and improbable story of another person giving him permission to use the car. *Couet*, 71 Wn.2d at 776.

Possession may be actual or constructive: “Actual possession occurs when the good are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods.” *State v. Callahan*,

77 Wn.2d 27, 29, 459 P.2d 400 (1969). No single factor is dispositive in establishing dominion and control. The totality of the circumstances must be considered. *State v. Collins*, 76 Wn.App. 496, 501, 886, P.2d 243, *review denied*, 126 Wn.2d 10106 (1995). A momentary handling is not sufficient to establish the element of personal custody necessary for actual possession; constructive possession requires that the defendant have dominion and control of the property. *Id.* at 29; *State v. Werry*, 6 Wn.App. 540, 494 P.2d 1002 (1972)(it is not sufficient evidence to constitute to constitute a *prima facie* case of possession if there is merely a passing control, such as momentary handling); *State v. Summers*, 45 Wn.App. 761, 728 P.2d 613 (1986)(mere proximity to stolen property or one's presence at the place where it is found, without proof of dominion and control over the property, is insufficient proof of possession).

The evidence presented in this case was insufficient to establish that Antunez acted with knowledge that there was evidence that he may have assumed such to be the case. There is no evidence connecting him to the scene where the car was stolen. There was no evidence that he knew that the white Acura was stolen, he had no reason to believe that car parts removed by Tom were damaging the value of the white Acura, and in fact the testimony is that Pickett loaned money to Antunez, presumably to buy parts from the white Acura through the auspices of Tom. There is no

evidence that the black Acura was registered to Antunez. The testimony presented in this case is not the type of evidence from which a rational trier of fact can infer guilty knowledge on Antunez's part, especially when juxtaposed with the circumstances of those cases where the courts have found sufficient evidence of culpable knowledge. Here, no evidence was presented that Antunez offered an improbable defense of the legal status of the white Acura. *Couet*.

Moreover, there was also insufficient evidence that Antunez had actual or constructive possession of the car or that he exercised dominion and control over the car or the place where the car was discovered. Antunez's mere proximity to the car is insufficient to establish either actual or constructive possession. *Summers*.

Similarly, there is no evidence that he knowingly and maliciously caused physical damage to the Acura. To convict him of first degree malicious mischief, the State must prove that Antunez knowingly and maliciously caused physical damage to the property of another. As argued *supra*, if Antunez did not know and could not reasonably be expected to have known that Tom's white Acura was stolen, he *a priori* could not have knowingly caused physical damage to the Acura.

What is more, the circumstances of this case do not evidence proof beyond a reasonable doubt that Antunez was an accomplice. To support a

conviction of a criminal defendant as an accomplice, there must be evidence that he or she was “ready to assist” or intended to encourage the conduct of his or her co-participant. *State v. Aiken*, 72 Wn.2d 306, 349, 434 P.2d 10(9167). A person’s physical presence at the scene of the offense, however, even with knowledge of what is taking place, is not sufficient to support a charge of aiding and abetting a crime. *In re Wilson*, 91 Wn.2d 487, 588 P.2d 1161 (1979).

A rational trier of fact could not conclude from the evidence presented that Antunez knowingly possessed stolen property or joined in the efforts of Tom or anyone else in committing the crimes for which he was convicted.

Consequently, the evidence and reasonable inferences do not meet the test that any rational trier of fact, after viewing the evidence most favorable to the State, could have found beyond a reasonable doubt that Antunez either possessed the stolen property or acted with knowledge that the car had been stolen or that he was an accomplice to the offenses. Similarly, without the knowledge that the car was stolen, a rational trier of fact could not have found beyond a reasonable doubt that he maliciously removed parts from the car to damage it.

The evidence against Antunez constitutes nothing more than the pyramiding of inferences condemned in *State v. Bencivenga, supra*, with

the result that his convictions should be reversed.

2. **CONVICTIONS FOR POSSESSION OF STOLEN PROPERTY AND MALICIOUS MISCHIEF FOR DISMANTLING THE SAME PROPERTY INVOLVE THE SAME VICTIM, TIME, AND INTENT, AND THEREFORE MUST BE TREATED AS THE SAME CRIMINAL CONDUCT FOR PURPOSES OF SENTENCING**

- a. **Current offenses constitute the same criminal conduct for Sentencing Reform Act (SRA) scoring purposes when they involve the same victim, occur at the same time and place, and share the same criminal intent.**

The Sentencing Reform Act provides for the structured sentencing of felony offenders through standard sentence ranges based upon the seriousness of the offense and the defendant's criminal history. *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). Before sentencing any offender, the court must determine the offender's standard sentence range, and that calculation includes a determination of the offender score. RCW 9.94A.505(2)(a)(i); *State v. Haddock*, 141 Wn.2d 103, 108, 3 P.3d 733 (2000). Generally when an offender is being sentenced for more than one felony offense, each current offense is normally included in the criminal history and thus included in the offender score. RCW 9.94A.589(1).

The statute, however, creates an exception when two or more

current offenses constitute the “same criminal conduct.” RCW 9.94A.589(1)(a). The statute 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.” *Id.* Offenses that encompass the same criminal conduct count as one crime for purposes of calculating the offender score. *State v. Taylor*, 90 Wn.App. 312, 321, 950 P.2d 1218 (2002).

The relevant inquiry in determining if crimes share the same criminal intent for sentencing purposes is whether, viewed objective, the defendant’s intent changed from crime to the next. *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). Factors to consider include whether the offenses are intimately related, there is a substantial change in criminal objective between the crimes, and whether one offense furthered another. *See, State v. Edwards*, 45 Wn.App. 378, 382, 725 P.2d 442 (1986), *overruled on other grounds, State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). The sentencing court does not focus on the defendant’s subjective intent, but rather the objective intent. *Haddock*, 141 Wn.2d at 113.

- b. Possession of property stolen, allegedly to secure car parts to install on a second vehicle, and the act of “stripping” the first car to obtain the parts involve same victim and allegedly occurred at the same**

**time and place and therefore constitutes
the same criminal conduct.**

In *Haddock*, the defendant was convicted of possession of stolen property and multiple counts of possession of a stolen firearm. 141 Wn.2d at 106-07. The property and firearms belonged to the same people, were taken at the same time, and were possessed at the same time. *Id.* at 106, 112. The *Haddock* Court found that these offenses constitute the same criminal conduct, as the offenses share the same statutory mental element and were committed for the same general purpose. *Id.* at 112-13. A “single intent to possess stolen property motivated the conduct underlying all seven convictions,” notwithstanding the fact that firearms may in turn be used for different purposes than other personal property. *Id.* at 113-15.

The same reasoning applies here. The State alleged that Antunez possessed stolen property: a car belonging to LeBov. The State’s theory is that he, acting either as an accomplice or principal, stripped the white Acura of usable parts in order to restore a black Acura to running condition. Antunez then planned to sell the car. The criminal intent for both alleged offenses was the same: to transfer car parts to the black Acura for financial gain.

There was no evidence that the car parts were obtained and removed from the white Acura for a different purpose or by different

conduct. Accordingly, the offenses should have been treated as the same criminal conduct at sentencing and scored as a single point in Antunez's offender score. *Haddock*, 141 Wn.2d at 113.

3. **TRIAL COUNSEL WAS INEFFECTIVE BY INTERRUPTING THE JUDGE WHEN HE ASKED ANTUNEZ AT SENTENCING IF HE HAD "ANYTHING FURTHER," THEREBY USURPING ANTUNEZ'S STATUTORY RIGHT TO ALLOCUTION**

- a. **The constitutional right to counsel includes effective representation at a sentencing proceeding.**

The state and federal constitutions guarantee criminal defendants effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995); U.S. Const. amend. 6;⁷ Wash. Const. Art. 1, § 22. Sentencing is a critical stage of a criminal case. *State v. Bandura*, 85 Wn.App. 87, 97, 931 P.2d 174, *rev. denied*, 132 Wn.2d 1004 (1997). As the *Ford* Court stated,

Sentencing is a critical step in our criminal justice system. The fact that guilt has already been established should not result in indifference to the integrity of the sentencing process. Determinations regarding the severity of criminal

⁷ The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

sanctions are not to be rendered in a cursory fashion. Sentencing courts require reliable facts and information.

Ford, 137 Wn.2d at 484.

To prevail in a claim of ineffective assistance of counsel, a defendant must show, “First, [that] counsel’s performance was deficient Second, the defendant must show that the deficient performance prejudiced the defense.” *Strickland*, 466 U.S. at 687. If there is a reasonable probability that but for counsel’s inadequate performance, the result of the trial would have been different, prejudice is established and reversal is required. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

An attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical reason. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); *see also Wiggins v. Smith*, 539 U.S. 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003) (“The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.”) (quoting *Strickland*, 466 U.S. at 688).

While an attorney’s decisions are treated with deference, his or her

actions must be reasonable based on all circumstances. *Wiggins*, 123 S. Ct. at 2541; *State v. Tilton*, 149 Wn.2d 775, 72 P.3d 735 (2003). To assess prejudice, the defense must demonstrate grounds to conclude a reasonable probability exists of a different outcome, but need not show the attorney's conduct altered the result of the case. *Tilton*, 149 Wn.2d at 784.

b. Counsel “hijacked” the court’s solicitation to Antunez to tell the court if he had “[a]nything further” when he asked Antunez a question about his employment as a pressman and failed to ask Antunez questions pertaining to the sentence.

RCW 9.94A.500(1) requires that the defendant be given an opportunity to allocute before the court imposes a sentence. *In re Restraint of Echeverria*, 141 Wn.2d 323, 336, 339 n. 54, 6 P.3d 573 (2000). Failure by the trial court to solicit a defendant's statement in allocution constitutes legal error. *See Echeverria*, 141 Wash.2d 323, 336.

In the case at bar, after discussion of whether any previous offenses washed out and his prior parole in Multnomah County, Oregon, Judge Harris asked Antunez if he had “[a]nything further, sir?” 2RP at 284-85. Before Antunez could respond, his counsel asked him a question about his prior work history. 2RP at 285. Antunez described his work history and his plans for work in the future, immediately after which Judge Harris imposed legal financial obligations and the twenty month sentence

in each count.

c. Antunez was prejudiced by his attorney's usurpation of allocution.

The record reflects that the trial court failed to explicitly ask Antunez if he wished to speak. Failure by the trial court to solicit a defendant's statement in allocution constitutes legal error. *See Echeverria*, 141 Wash.2d at 336. In *State v. Hughes*, 154 Wn.2d 118, 152-53, 110 P.3d 192 (2005), the Washington Supreme Court held that a defendant waives his statutory right to allocution if he does not request an opportunity to exercise that right.

Altunez's counsel failed to object to the failure of the trial court to explicitly request allocution, and instead "hijacked" the trial court's solicitation of a statement by Antunez. 2RP at 285. Had Antunez's attorney permitted him the opportunity to address the court regarding sentencing, rather than his work history and work plans for the future, the court would have learned about Antunez's side of the story. This is particularly important because Antunez did not testify at trial. Instead, the lower court was left with an utter void regarding Antunez's personality, his background, his chance for rehabilitation, and why the court should consider a sentence at the bottom of the range or possibly even an exceptional sentence below the standard range.

E. CONCLUSION

For the foregoing reasons, Carl Antunez respectfully requests that this Court reverse his convictions and order dismissal of the Second Amended Information.

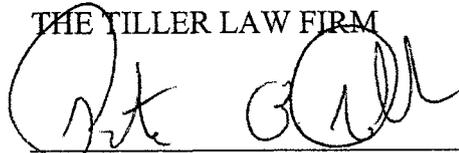
In the alternative, Antunez requests that this matter be returned to the court for allocution and resentencing before another judge with the direction that Counts 1 and 2 involved property obtained simultaneously from the same victim for the same purpose, and therefore must be treated as the same criminal conduct, and that Antunez's offender score be reduced from six to five.

In the unlikely event that he does not prevail, he asks this Court to deny any State request for costs on appeal.

DATED: January 3, 2007.

Respectfully submitted,

THE TILLER LAW FIRM



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Of Attorneys for Carl Antunez

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DIVISION II
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STATE OF WASHINGTON
BY 

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CARL JOSEPH ANTUNEZ

Appellant.

COURT OF APPEALS NO.
34999-0-II

CERTIFICATE OF HAND
DELIVERY/ MAILING

The undersigned attorney for the Appellant hereby certifies that one original Opening Brief of Appellant was hand delivered to the Court of Appeals, Division 2, and copies were mailed to Appellant Carl Joseph Antunez, and Mr. Michael C. Kinnie, Clark County Deputy Prosecuting Attorney, by first class mail, postage pre-paid on January 3, 2007, at the Centralia, Washington post office addressed as follows:

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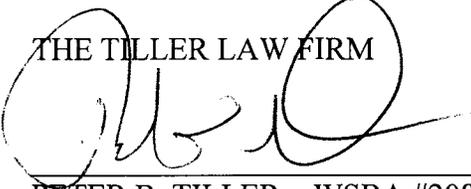
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