

NO. 35319-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN DAVID COLA,

Appellant.

29
11/13/19
LISE ELLNER
ATTORNEY AT LAW
VASHON, WA



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

The Honorable Serjio Armijo, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Mr. Cola's assault and kidnapping convictions should have merged with the robbery because they all contained the same criminal conduct.

2. Appellant's offender score was improperly calculated using the unlawful possession of a firearm, the assault and kidnapping convictions which should not have been counted separately.

3. Appellant was denied the effective assistance of counsel by counsel's failure to request the court engage in a same criminal conduct analysis.

4. Appellant was denied the effective assistance of counsel by counsel's failure to advise him not to stipulate to an improperly calculated offender score.

5. Appellant's plea was involuntary where he was not advised of his correct offender score.

Issues Presented on Appeal

1. Did the trial court err in failing to merge Mr. Cola's assault and kidnapping convictions because they contained the same criminal conduct as the robbery?

2. Was Appellant's offender score improperly calculated using

the unlawful possession of a firearm, the assault and kidnapping convictions which should not have been counted separately?

3. Was Appellant denied the effective assistance of counsel by counsel's failure to request the court engage in a same criminal conduct analysis?

4. Was Appellant denied the effective assistance of counsel by counsel's failure to advise him not to stipulate to an improperly calculated offender score?

5. Was Appellant's plea involuntary where he was not advised of his correct offender score?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On July 26, 2006 Justan David Cola pleaded guilty to an amended information charging burglary in the first degree with a firearm enhancement in violation of RCW 9A.52.020(1)(a)(b); kidnapping in the first degree with a firearm enhancement (RCW 9.94A.530) in violation of RCW 9A.40.020(1)(b); robbery in the first degree with a firearm enhancement in violation of RCW 9A.56.190 and 9A.56.200(1)(a)(i); assault in the second degree in violation of RCW 9A.36.021(1)(c); and unlawful possession of a firearm in violation of RCW 9.41.040(1)(a). CP 7-20. (Plea attached hereto

as Exhibit A).

The declaration of probable cause provides that Mr. Cola entered the home of C. Grey by force, brandishing a gun. He tied up C. Grey and looked for valuables to steal. When a contractor arrived, P. Shafer, he too was tied up and forced to assist with searching for valuables and loading them into C. Grey's vehicle. P. Shafer fought back and was beaten with a gun. Mr. Cola possessed a gun at all times and fled in C. Grey's car loaded with C. Grey's valuables. C. Grey and P. Shafer were left in the house tied up. Both escaped shortly after Mr. Cola left the house. CP. 5-6.

Mr. Cola's statement of Defendant provides that while armed with a deadly weapon; (1) he committed a burglary intending to commit a crime against a person or property therein; (2) that he abducted a person (P. Shafer) to facilitate the commission of a robbery; (3) that he took personal property belonging to another with intent to steal from and used force to retain possession of the property; (4) that he assaulted P. Shafer with a handgun; and (5) that he unlawfully possessed a firearm. CP 7-9.

Mr. Cola stipulated to a his prior record consisting of 5 prior offenses and was sentenced to 175 months as a base sentence with 180 months of additional flat time for three firearm enhancements. CP 21-22; Supp CP

(Judgment and Sentence August 3, 2006). In the stipulation Mr. Coal specifically agreed that:

if sentenced within the standard range, defendant further waives any right to appeal or seek redress via collateral attack based upon the above stated criminal history and/or offender score calculation.

CP 21-22; In the judgment and sentence, Mr. Cola's offender score for each offense was calculated as follows:

Court No.	Offender Score	Seriousness Level	Standard Range (not including enhancement)	Plus Enhancement	Total Standard Range (including enhancement)	Maximum Term
I	13	VII	87-116 Mos	60 MOS	147-177	LIFE
II	12	X	149-189MOS	60 MOS	209-258 MOS	LIFE
IV	12	IX	129-171 MOS	60 MOS	189-241 MOS	LIFE
VI	12	IV	63-84 MOS	NONE	63-84 MOS	10 YEARS
VII	8	VII	77-102 MOS	NONE	77-102 MONTHS	10 YEARS

Supp CP (Judgment and Sentence August 34, 2006). Mr. Cola stipulated to this calculation of current offenses. CP 21-22. This timely appeal follows. CP 24-25.

a. Sentencing Hearing

On August 3, 2006, Mr. Cola was sentenced to 355 months in the custody of the Department of Corrections. He is 18 years old. RP 3. Mr. Cola was sentenced to concurrent sentences of 175 months for kidnapping in the first degree, 171 months for robbery in the first degree, 116 months for burglary in the first degree and 102 months for unlawful possession of a firearm plus three consecutive 60 month firearm enhancements. RP 3-4. Mr. Cola was remorseful and accepted responsibility for his actions. RP 8. Counsel for Mr. Cola did not request the court engage in a “same criminal conduct” analysis for calculating the offender score and he did not advise Mr. Cola that some of his current offenses should have merged into each other.

b. Plea Hearing.

Mr. Cola was properly advised during his plea hearing regarding the majority of his rights; with the exception that his attorney improperly advised him that the offender score calculations presented were correct. RP 6 (Plea Hearing). Mr. Cola stipulated to an offender score without being advised that certain offenses should have merged and that his attorney should have requested the court engage in a same criminal conduct analysis for offender score calculation purposes.

C. ARGUMENT

1. APPELLANT SHOULD NOT HAVE BEEN PUNISHED SEPERATELY FOR HIS ROBBERY, KIDNAPPING AND SECOND DEGREE ASSAULT CONVICTIONS.

- a. Assault

The trial court erred in entering separate convictions for the second degree assault charge and the first degree robbery charge against Mr. Cola. The assault had no separate or independent purpose other than to accomplish the robbery, and the use of the gun during the assault elevated the robbery to a first degree charge. Under the facts presented in the charging document, the statement of probable cause and the defendant's plea statement the assault had the same purpose and intent as the robbery. Mr. Cola's sole purpose during this incident was to steal property. Given that the assault had no independent purpose or effect, under State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005), it merged into the robbery conviction.

The Court in Freeman specifically undertook an analysis of whether the merger doctrine or Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932) required separate punishment for the separate crimes of assault and robbery. The Court concluded that the merger doctrine did not require separate punishment unless, "the degree of one offense intended

is raised by conduct separately criminalized by the legislature”. Freeman, 153 Wn.2d 772-72, citing, State v. Vladovic, 99 Wn.2d 413, 419 662 P.2d 853 (1983). Thus where an individual is charged with robbery in the first degree and assault in the first degree, there is no merger because the penalty for assault elevates the degree of robbery and has a higher standard range than the robbery. State v. Freeman, 153 Wn.2d at 775-76.

Alternatively when the individual is charged with robbery in the first degree and assault in the second degree, because the standard range for assault in the second degree is much lower than the standard range for robbery in the first degree, “we find no evidence that the legislature intended to punish second degree assault separately from first degree robbery when the assault facilitates the robbery.” State v. Freeman, 153 Wn.2d at 776.

The Court in Freeman concluded that under Blockburger, the traditional analysis for determining if crimes are the same i.e. “whether each provision requires proof of a fact which the other does not” creates only a rebuttable presumption that the legislature intended for separate punishment unless the crimes are the same under the Blockburger test. Under Freeman, the courts must undertake an individual analysis of each case to determine whether separate punishment was intended by the legislature. Freeman, 153 Wn.2d at 772, quoting, Blockburger, 284 U.S. at 304.

After examining the Blockburger test and the merger doctrine, the Court in Freeman concluded that the determinative factor for whether punishment for two crimes was intended is whether there is an independent purpose or effect to each crime, rather than whether the crimes are the same at law. State v. Freeman, 153 Wn.2d at 779. Thus if there was a separate injury not incidental to the commission of the greater offense, then the merger doctrine would apply. “The test is whether the unnecessary force had a purpose or effect independent of the crime.” State v. Freeman, 153 Wn.2d at 779.

The amended information charging assault in the second degree provides, “...on or about the 12th day of June, 2006, did unlawfully and feloniously, under circumstances not amounting to assault in the first degree, intentionally assault P. Shafer with a deadly weapon.”. The crime was committed at the same time and place as the robbery, and was used to elevate the robbery to a first degree robbery (use of weapon). CP 7-9. The amended information charging robbery provides in relevant part, “...on or about the 12th day of June, did unlawfully and feloniously take personal property belonging to another with intent to steal from the person or in the presence of C. Grey, the owner thereof or a person having dominion and control over said property...

Mr. Cola was charged and convicted of one count of robbery in the first degree, one count of burglary in the first degree, one count of assault in the

second degree, one count of kidnapping in the first degree and one count of unlawful possession of a firearm in the first degree. CP 7-9. The assault was incidental to the robbery. The charging documents and the plea statement do not set forth an independent purpose for the commission of the assault other than to effectuate the robbery, and the facts of the instant case made clear that the sole purpose of the entire incident was to take valuables.

In Freeman, the Court held that unless the legislature explicitly intended for separate punishments for crimes based on and in furtherance of the same purpose or effect, they merge. Freeman, 153 Wn.2d at 776. The legislative history assault and robbery do not indicate a legislative intent to bar merger. Considering the facts of the instant case, it is clear that the assault of P. Shafer did not have an independent purpose or effect distinct from the robbery. The act was in furtherance of the crime of robbery and did not have a purpose other than to subdue P. Shafer to gain access to the valuables in the house. The assault should have merged into the robbery.

b. Kidnapping

The court erred in entering a separate conviction for the kidnapping because it too had no independent purpose other than to accomplish the robbery. Freeman, supra. The kidnapping also merged into the robbery

conviction under the Supreme Court opinion in State v. Korum, 120 Wn. App. 686, 705, 86 P.3d 166 (2004), reversed in part on other grounds, 157 Wn.2d 614, 141 P.3d 13 (2006), which recently affirmed the rule that "the mere incidental restraint and movement of a victim which might occur during the course of a [crime] are not, standing alone, indicia of a true kidnapping." State v. Green, 94 Wn.2d 216, 227, 616 P.2d 628 (1980). The Court reiterated that once the valuables had been obtained by force, the robbery was completed and any abduction or restraint occurring during this short period of time would merge into the robbery as a matter of law. State v. Korum, 120 Wn. App. at 705, citing, State v. Johnson, 92 Wn.2d 671, 676, 600 P.2d 1249 (1979).

The statement of defendant in the plea form and the amended charging document delineate the elements of the crimes charged. The amended information charging kidnapping provides in relevant part that, Mr. Cola "...on or about the 12th day of June, 2006, did unlawfully and feloniously, with intent to facilitate the commission of a felony, to-wit: robbery or flight thereafter, intentionally abduct P. Shafer.". CP 7-9. The kidnapping was an incidental restraint with no independent purpose. The kidnapping should have merged into the robbery charge under State v. Korum, supra.

The restraint of P. Shafer had no independent purpose other than to keep him from interfering with the robbery. Under Korum, supra, the kidnapping charge should have merged with the robbery conviction. Both the assault and kidnapping convictions should be reversed.

2. FOR PURPOSES OF CALCULATING APPELLANT'S OFFENDER SCORE HIS UNLAWFUL POSSESSION OF A FIREARM, HIS ASSAULT AND HIS KIDNAPPING CONVICTIONS ENCOMPASS THE SAME CRIMINAL CONDUCT AND HIS ROBBERY AND UNLAWFUL POSSESSION OF A FIREARM ALSO ENCOMPASS THE SAME CRIMINAL CONDUCT.

For offender score calculation purposes, crimes that have the "same criminal conduct" are not counted separately. "Same criminal conduct" is defined as crimes that have the same objective criminal intent, are committed at the same time and place and involve the same victims. Such crimes are not counted separately. RCW 9.94A.589; State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000); State v. Williams, 135 Wn.2d 365, 368, 957 P.2d 816 (1998), citing, State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

The first inquiry is whether the crimes share the same criminal intent. If so, the second inquiry is whether the defendant committed the crimes for different purposes. If the purpose and intent of each crime was the same, and

the victim was the same, the sentencing court must find that the crimes involved the same criminal conduct. State v. Haddock, 141 Wn.2d 103, 112-13, 3 P.3d 733 (2000).

Interpretation of a statutory provision is a question of law, and is reviewed de novo. Haddock, 141 Wn.2d at 110. However, an appellate court, reviews sentences under the Sentencing Reform Act for abuse of discretion. *Id.* In Haddock, the Supreme Court held that the trial court either abused its discretion or made an error of law or both in counting separately Haddock's 14 possession of stolen property and possession of stolen firearm counts. Therein, the crimes were committed at the same time and place, the mental element for the crimes was the same, the victim was the same and the purpose for committing the crimes was also the same. Haddock, 141 Wn.2d at 111-16.

Similarly in Williams, the defendant's two deliveries of a controlled substance at the same time to two different buyers constituted "the same criminal conduct" even though Williams sold the drugs to two different buyers. This is so because, the buyers are not the victims; the public is. Williams, 135 Wn.2d at 368, citing, State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

All of the crimes in the instant case had the same criminal purpose: to steal property by force; and, were committed at the same time and place. The use of force varied from displaying a handgun to assault to kidnapping. CP 7-9. The declaration of probable cause describes in the most detail the events surrounding the crimes committed. It reveals that Mr. Cola entered the home of C. Grey by force, brandishing a gun. He tied up C. Grey and looked for valuables to steal. When a contractor arrived, P. Shafer, he too was tied up and forced to assist with searching for valuables and loading them into C. Grey's vehicle. P. Shafer fought back and was beaten with a gun. Mr. Cola possessed a gun at all times and fled in C. Grey's car loaded with C. Grey's valuables. C. Grey and P. Shafer were left in the house tied up. Both escaped shortly after Mr. Cola left the house. CP. 5-6.

Mr. Cola's statement of Defendant supports the declaration of probable cause. Therein he admitted that while armed with a deadly weapon; (1) he committed a burglary intending to commit a crime against a person or property therein; (2) that he abducted a person (P. Shafer) to facilitate the commission of a robbery; (3) that he took personal property belonging to another with intent to steal from and used force to retain possession of the property; (4) that he assaulted P. Shafer with a handgun; and (5) that he unlawfully possessed a firearm. CP 7-9.

In Haddock, the Supreme Court expressly stated that when a defendant is charged with unlawful possession of a firearm and is also charged with an assault or with a crime that uses the weapon against a specified victim, the victim is the named person rather than just the general public. Williams, 141 Wn.2d at 111. In reaching this conclusion, the Supreme Court explained that the when a crime “directly inflicted specific injury on individuals”, they are the victims and not the general public. Id. P. Shafer and C. Grey are the victims of the unlawful possession of a firearm charge. P. Shafer is also the victim of the kidnapping and assault, while C. Grey is the victim of the robbery.

In Haddock as in the instant case, the defendant stipulated to five prior offenses. The trial court in Haddock incorrectly counted four or more of his other current offenses toward his offender score for a score of 9. The Court of Appeals reversed and assigned Haddock an offender score of 7. The Supreme Court using a “same criminal conduct analysis” ultimately determined that Haddock’s six counts of possession of stolen firearms and his one count of possession of stolen property did not encompass the same criminal conduct because the victim was different; the public for the unlawful possession of a firearm and a named individual for the unlawful possession of stolen property. Haddock, 141 Wn.2d at 110-111. However, Mr. Haddock’s

eight counts of unlawful possession of a firearm and one count of count of possession of stolen property were considered “the same criminal conduct” because the offenses involved the same victim, were committed at the same time, and required the same criminal intent. Haddock’s offender score increased one point for these offenses for a total score of 6. Haddock, 141 Wn.2d at 115.

Other cases support the conclusion that Mr. Cola’s unlawful possession of a firearm, his kidnapping and his assault charges should not have been counted separately. In State v. Zumwalt, 119 Wn. App. 126, 82 P.3d 672 (2003) aff’d, sub nom. State v. Freeman, supra, the Court held that where defendant's first degree robbery conviction was based on his physical attack of the robbery victim, his conviction for second degree assault merged into the robbery conviction because they were based on the same underlying physical attack and the double jeopardy problem was not cleared up by the imposition of concurrent sentences for the convictions.

In State v. Rowland, 97 Wn. App. 301, 983 P.2d 696 (1999), two counts of theft of a firearm constituted the "same criminal conduct" because the crimes were identical acts, occurring at the same time and place with the same victim burglarized, and with the same criminal intent.

In State v. Miller, 92 Wn. App. 693, 964 P.2d 1196 (1998) review

denied, 137 Wn.2d 1023, 980 P.2d 1282 (1999) ,the Court held that for the purposes of calculating an offender score for sentencing, the attempted theft of a police officer's gun and the assault that took place during the struggle for the gun constituted the "same criminal conduct. "

In State v. Anderson, 72 Wn. App. 453, 864 P.2d 1001 review denied, 124 Wn.2d 1013, 879 P.2d 293 (1994), the Court held that assault and escape crimes were the "same criminal conduct" under RCW 9.94A.589 where the defendant committed the assault on a guard transporting him in order to further his escape from the guard's custody.

In State v. Walden, 69 Wn. App. 183, 847 P.2d 965 (1993), the trial court abused its discretion in failing to count defendant's convictions for second degree rape and attempted second degree rape as same criminal conduct for purpose of calculating offender score where only one victim was involved, time and place of both crimes was same, and both crimes furthered a single criminal purpose, unlawful sexual intercourse.

In State v. Longuskie, 59 Wn. App. 838, 801 P.2d 1004 (1990), the trial court erred in not treating first degree kidnapping and child molestation as one crime for determining the defendant's offender score since child molestation was the objective intent of the kidnapping and was the underlying felony which enabled the state to elevate the kidnapping charge to first

degree.

In State v. Green, 46 Wn. App. 92, 730 P.2d 1350 (1986), rev'd on other grounds, State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237 (1987), the Court held that although a robbery and attempted murder would not merge for purposes of indictment, the crimes were part of a single, continuing sequence of events. Thus, for sentencing purposes, the crimes encompassed the same criminal conduct and should not have been counted on the other's scoring form.

In the instant case, as in Haddock, and the cases cited herein, applying the same criminal conduct analysis, Mr. Cola's offender score should have increased by only one point for the five current offenses because the five counts together encompassed the "same course of criminal conduct under RCW 9.94A.400(1)(a)". Haddock, 141 Wn.2d at 112. Based on Haddock, supra, and William, supra, Mr. Cola's offender score should have increased by two points. This Court should reverse and remand for a reduction in Mr. Cola's offender score by three points.

a. Appellant Did Not Waive His Right To Challenge His Offender Score.

Generally, a defendant cannot waive a challenge to a miscalculated offender score. In re Personal Restraint Petition of Goodwin, 146 Wn.2d 861,

874, 50 P.3d 618 (2002). See also State v. McCorkle, 137 Wn.2d 490, 496, 973 P.2d 461 (1999) (court's failure to calculate the standard range based on classification of prior convictions was "legal error" subject to review). Further a court is not bound by an erroneous concession related to a matter of law. Goodwin, 146 Wn.2d at 875. The remedy for an erroneous sentence in reversal of the erroneous portion of the sentence. Goodwin at 887.

However, the court in State v. Nitsch, 100 Wn. App, 512, 997 P.2d 1000, review denied, 141 Wn.2d 1030 (2000), held that a defendant can waive a challenge to the trial court's failure to determine whether the defendant's current offenses were the same criminal conduct under RCW 9.94A.58^c because in its view the decision to find "same criminal conduct is discretionary".

Although Mr. Cola stipulated to both his offender score and to the calculation of his current offenses, he did not do so after being properly advised by competent counsel. Counsel's failure to properly advise Mr. Cola of the consequences of pleading to an improperly calculated offender score and his failure to request the court engage in a same criminal conduct analysis constituted ineffective assistance of counsel which denied Mr. Cola his Federal and State constitutional rights to due process: specifically the right to make a knowing, voluntary and intelligent decision to plead guilty. United

States Constitution, Fourteenth Amendment; Washington State Constitution, Article 1 subsection 3; State v. Walsh, 143 Wn.2d 1, 8-9, 17 P.2d 591 (2001) (defendant's reliance on miscalculation of improperly calculated offender score could be raised for the first time on appeal). A defendant may claim for the first time on appeal that his plea was involuntary. *Id.*

3. APPELLANT'S PLEA WAS INVOLUNTARY AND HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY FAILED TO REQUIRE THE COURT TO CONDUCT A SAME CRIMINAL CONDUCT ANALYSIS BEFORE ACCEPTING APPELLANT'S PLEAS TO MULTIPLE COUNTS THAT CONSTITUTED THE SAME CRIMINAL CONDUCT AND WHERE COUNSEL FAILED TO OBJECT TO THE IMPROPER CALCULATION FO THE OFFENDER SCORE.

Counsel's failure to object to the calculation of Mr. Cola's offender score and his agreement to the offender score constitute ineffective assistance of counsel. A criminal defendant has the constitutional right to effective assistance of counsel. The state and federal constitutions guarantee defendants reasonably effective representation by counsel at all critical stages of a proceeding. U.S. Const., amend 6; Wash. Const. art 1 sect. 22; 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). A stage of a proceeding is considered critical if it “presents a possibility of prejudice to the defendant.” State v. Harell, 80 Wn. App. 802, 804, 911 P.2d 1034 (1996), citing, Garrison v. Rhay, 75 Wn. App. 98, 102, 449 P.2d 92 (1968). It is defense counsel’s effective representation that is supposed to ensure that the defendant is able “to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or to take an appeal.” Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct 3308, 77 L.Ed.2d 987 (1983).

Plea negotiations and entry of a guilty plea present a potential for prejudice to the defendant and thus, the effective assistance of counsel is required during this critical stage of a case. State v. James, 48 Wn. App. 353, 361 n.2, 362, 739 P.2d 1161 (1987), citing, Hill v. Lockhart, 474 U.S. 52, ‘06 S.Ct. 366, 370, 88 L.Ed2d 293 (1985). A plea based on mutual mistake regarding the standard sentencing range renders a plea involuntary. State v. Walsh, 143 Wn.2d at 8-9.

To obtain relief based on a claim of ineffective assistance of counsel, a criminal defendant must establish that: (1) his counsel’s performance was deficient; and (2) the deficient performance prejudiced his case. Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

An attorney's failure to engage in reasonable investigation can result in ineffective assistance of counsel. Personal Restraint Petition of Rice, 118 Wn.2d 876, 909, 828 P.2d 1086 (1992), citing, Code v Montgomery, 799 F.2d 1481 (11th Cir. 1986) (counsel ineffective by failing to investigate alibi witness).

“A guilty plea is open to attack on the ground that counsel did not provide the defendant with ‘reasonably competent advice.’” Hawkman v. Parratt, 661 F.2d 1161, 1165 (8th Cir. 1981), quoting, Cuyler v. Sullivan, 466 U.S. 335, 344, 100 S.Ct. 1708, 1716, 64 L.Ed.2d 333 (1980). “When a defendant pleads guilty on the advice of counsel, the attorney has the duty to advise the defendant of the available options and possible consequences.” Hawkman, 661 F.2d at 1170, quoting, Beckham v. Wainwright, 639 F.2d 262, 267 (5th Cir. 1981) (citations omitted). “A guilty plea must represent the informed, self-determined choice of the defendant among practicable alternatives; a guilty plea cannot be a conscious, informed choice if the accused relies upon counsel who performs ineffectively in advising him regarding the consequences of entering a guilty plea and of the feasible options.” Hawkman, 661 F.2d at 1170, citing, United States v. Cannon, 553 F.2d 1052, 1056 (7th Cir. 1977). A plea cannot be considered voluntary and intelligent unless counsel assists the defendant “in evaluating the evidence against him and in discussing

the possible *direct* consequences of a guilty plea.” State v. Holley, 75 Wn. App. 191, 197, 876 P.2d 73 (1994) (italics in original).

Additionally, while the invited error doctrine precludes review of error caused by the defendant,¹ the same doctrine does not act as a bar to review of a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996), citing, State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995).

In the instant case, both prongs of the test for ineffective assistance of counsel are met. For the first prong, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to properly object to the calculation of the offender score when the kidnapping, unlawful possession of a firearm and the assault charges constituted the same criminal conduct and the robbery and the unlawful possession of a firearm charge constituted the same criminal conduct and all offense were part of the same course of conduct under RCW 9.94A.400(1)(a) and therefore should not have been counted separately. There is also no possible tactical or strategic reason why counsel would have permitted Mr. Cola to stipulate to his offender score because under Freeman, supra, and Korum, supra, the assault and kidnapping charges should have been dismissed where they had no

independent purpose and were merely incidental to the robbery. Counsel's failure to advise Mr. Cola of the availability of a "same criminal conduct analysis and his failure to advise Mr. Cola that his multiple current offenses should not have counted as five points constitutes deficient performance of counsel.

The instant case is similar to State v. Walsh, *supra*, where the defendant was misinformed regarding his correct offender score. The error was inadvertent and involved mutual mistake, nonetheless, Walsh's plea was involuntary because the correct calculation of an offender score creates a direct and immediate consequence of a plea that the defendant must be apprised of before pleading guilty. Mr. Cola was never properly advised of his correct offender score and his attorney never attempted to engage the court in a same criminal conduct analysis. Thus Mr. Cola did not make a knowing, voluntary and intelligent decision to plead guilty. As in Walsh, counsel's performance was deficient.

Second, the prejudice is self-evident. Had counsel: (i) objected to the calculation of the offender score; (ii) requested the court engage in a "same criminal conduct" analysis under RCW 9.94A.589(1)(a) and .400(1)(a); (iii) and not permitted Mr. Cola to stipulate to his offender score, the trial court

¹ See State v. Henderson, 114 Wn.2d 867, 870, 292-P.2d 514 (1990).

would not have imposed a sentence in excess of that permitted under RCW 9.94A.589(1)(a) and .400(1)(a); State v. Freeman, supra, State v. Korum, supra, and Walsh, supra..

D. CONCLUSION

Mr. Cola respectfully requests this Court reverse his kidnapping and assault convictions and remand for recalculation of his offender score considering the kidnapping, robbery, assault and unlawful possession of a firearm as not counting separately.

DATED this 21st day of January 2007

Respectfully submitted,

LISE ELLNER
WSBA No. 20955
Attorney for Appellant

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STATE OF WASHINGTON
BY: [Signature]
COURT CLERK

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce C County Prosecutor's office, appeals department 930 Tacoma Ave. S. County- City Building Rm 946, Tacoma WA 98402 and Justin D. Cola DOC# 888738 Washington State Penitentiary 1313 13th Avenue Walla, Walla, WA 99362 a true copy of the document to which this certificate is affixed, on January 21, 2007 Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

Signature