

No. 35612-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jason Walker,

Appellant.

Grays Harbor Superior Court

Cause No. 06-1-00095-4

The Honorable Judge F. Mark McCauley

Appellant's Opening Brief

Manek R. Mistry
Jodi R. Backlund
Attorneys for Appellant

BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 352-5316
FAX: (866) 499-7475

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ASSIGNMENTS OF ERROR

1. Mr. Walker's convictions violate double jeopardy.
2. The trial court erred by sentencing Mr. Walker with an offender score of one.
3. The trial court erred by counting each offense in Mr. Walker's offender score without finding that they did not comprise the same criminal conduct.
4. Mr. Walker was denied the effective assistance of counsel.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Jason Walker was charged with Theft in the First Degree and Trafficking in Stolen Property in the First Degree. The state charged him with wrongfully obtaining or exerting unauthorized control over timber valued in excess of \$1500, with intent to deprive. The state also charged him with possessing or obtaining control over stolen timber with intent to sell or dispose of it to another person.

1. Do Mr. Walker's convictions for theft and trafficking in stolen property violate double jeopardy under the facts of this case? Assignment of Error No. 1.

The evidence at trial established that the theft and trafficking took place at the same time and place, involved the same victim, and were committed with the overall criminal purpose of selling the timber. The state suggested that the two crimes were not the same criminal conduct, and should be counted separately. Defense counsel did not object. The court did not enter a finding that the two offenses were not the same criminal conduct, but scored the two offenses separately.

2. Did the trial court err by counting both offenses in the offender score without finding that they were not the same criminal conduct? Assignments of Error Nos. 2-4.
3. Did the trial court erroneously sentence Mr. Walker with an offender score of one? Assignments of Error Nos. 2-4.

4. Was Mr. Walker denied the effective assistance of counsel when his attorney failed to argue that the two offenses comprised the same criminal conduct? Assignments of Error Nos. 2-4.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jason Walker was charged in Grays Harbor Superior Court with Theft in the First Degree and Trafficking in Stolen Property in the First Degree. CP 1-2. Both charges stemmed from an investigation that led forest service rangers to find Mr. Walker, along with others, stacking and splitting old growth cedar in the National Forest on February 26, 2006. RP 14,16-18, 63-66. At that time, there were no permits issued to harvest cedar at that location. RP 15. That investigation also developed information that Mr. Walker had sold old growth cedar to a mill with an expired permit on February 23 and 25, 2006. RP .

At trial, Mr. Walker claimed that he did not have intent as there was no apparent system to transport the blocks, that he did not cut down the trees or develop any intent to sell them unlawfully, and that he may have attempted to commit the crime but did not complete it. RP 41-42, 85, 129-131, 134-147, 171-179. The state argued that the operation was sophisticated and had been there longer than just a day. RP 23-37, 72-77. The state introduced evidence of the previous two sales of cedar to show that Mr. Walker had the intent to take and sell the wood unlawfully. RP 6-8, 86-90, 103-106. In closing argument, the state told the jury that Mr. Walker was trafficking in stolen property because in stacking the wood, he

possessed it with the intent to sell it. RP 163. Mr. Walker was convicted as charged. RP 186.

At sentencing on November 20, 2006, the state indicated that the crimes were not the same course of conduct. RP 195. The court sentenced Mr. Walker, who had no criminal history, with one point, without defense objection. CP 3-9. This timely appeal followed. CP 10-11.

ARGUMENT

I. THE CONVICTIONS FOR THEFT AND TRAFFICKING VIOLATE DOUBLE JEOPARDY.

The double jeopardy clause guarantees that no person shall be twice put in jeopardy for the same offense. U.S. Const. Amend. V; Wash. Const. Article I, Section 9; *State v. Leming*, 133 Wn. App. 875 at 881, 138 P.3d 1095 (2006). Alleged violations of double jeopardy are reviewed *de novo*. *Leming*, at 881. Where a criminal act violates more than one statute, a reviewing court must determine whether the legislature intended to punish that act under both statutes. *Leming*, at 882. If the statutes do not explicitly authorize separate punishments, the court applies the “same evidence” test. *Leming*, at 882, *State v. Jackman*, 156 Wn.2d 736 at 746, 132 P.3d 136 (2006). Under the same evidence test, multiple convictions are permitted if each offense contains an element not contained in the other offense. In other words, each crime must require proof of a fact not

required to establish the other crime. *Jackman*, at 747. The crimes are analyzed “as charged and proved, not merely as the level of an abstract articulation of the elements.” *State v. Freeman*, 153 Wn.2d 765 at 777, 108 P.3d 753 (2005).

For example, in *Leming*, *supra*, the defendant was charged with Assault in the Second Degree (assault with intent to commit a felony), Felony Harassment (the underlying felony for the assault charge), and Assault in Violation of a Court Order (based on the same assault). Division II determined that the convictions for Assault in the Second Degree and Felony Harassment violated double jeopardy.¹ The court reasoned that the Felony Harassment charge required the state to prove that the defendant threatened to kill the victim, and that she feared he would carry out the threat. Similarly, the Assault in the Second Degree charge required the state to prove that the defendant assaulted the victim by “intending to place her in fear that he would carry out his threat to kill her.” *Leming*, at 889. In other words, the court focused on the crimes as charged and proved at trial, rather than simply as abstract elements set forth in the statutes.

¹ By contrast, the two assault charges did not violate double jeopardy, because each offense required proof of a fact not required to establish the other crime-- proof of a court order (for the Assault in Violation of a Court Order), and proof of a threat to kill (for the Assault in the Second Degree). *Leming*, at 885.

The remedy for a violation of double jeopardy is vacation of the lesser conviction. *In re Pers. Restraint of Burchfield*, 111 Wn. App. 892 at 899, 46 P.3d 840 (2002).

A person commits Theft in the First Degree “if he or she commits theft of... [p]roperty or services which exceed(s) one thousand five hundred dollars in value...” RCW 9A.56.030. The word “theft” is defined to include “wrongfully obtain[ing] or exert[ing] unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services...” RCW 9A.56.020. Under RCW 9A.82.050(1), a person commits Trafficking in Stolen Property in the First Degree when he or she “knowingly traffics in stolen property...” The verb “traffic” is defined to include possessing or obtaining control of stolen property “with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.” RCW 9A.82.010(19).

In this case, Mr. Walker was charged with theft by wrongfully obtaining or exerting unauthorized control over timber (with intent to deprive). CP 1; Instructions Nos. 2, 4, 7, Supp. CP. He was charged with trafficking by knowingly possessing or obtaining control of the stolen timber with intent to sell or dispose of it to another person. CP 1; Instructions Nos. 2, 5, 8. Thus the state could obtain convictions for both

charges by proving that Mr. Walker obtained control over the timber and planned to dispose of it, which in fact they did. Proof of the facts required for conviction of trafficking (as charged and presented in this case) also established that Mr. Walker committed theft. Under the facts of this case, it cannot be said that each crime required proof of a fact not required to establish the other offense.² As charged and prosecuted in this case, the two crimes fail the “same evidence” test, and violate double jeopardy. *Leming, supra*. The theft conviction (as the lesser charge) must be vacated and the case remanded for resentencing on the trafficking charge.

Burchfield, supra.

II. THE TRIAL COURT ERRED BY SENTENCING MR. WALKER WITH AN OFFENDER SCORE OF ONE.

A sentencing court must determine the defendant’s offender score pursuant to RCW 9.94A.525. When calculating the offender score, a sentencing judge must determine how multiple current offenses are to be scored. Under RCW 9.94A.589(1)(a),

[W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be

² This case is therefore not controlled by *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997) or by *State v. Strohm*, 75 Wn. App. 301, 879 P.2d 962 (1994), both of which involved trafficking charges based on the actual transfer of stolen property. In this case, the state did not charge Mr. Walker with actually transferring the stolen timber to another person.

determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime... “Same criminal conduct,” as used in this subsection, means 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).

The burden is on the State to establish that multiple convictions do not stem from the same criminal conduct. *State v. Dolen*, 83 Wn.App. 361 at 365, 921 P.2d 590 (1996), *review denied at* 131 Wn.2d 1006, 932 P.2d 644 (1997), *citing* RCW 9.94A.110; *State v. Jones*, 110 Wn.2d 74, 750 P.2d 620 (1988) and *State v. Gurrola*, 69 Wn.App. 152, 848 P.2d 199, *review denied*, 121 Wn.2d 1032, 856 P.2d 383 (1993).

In determining whether multiple offenses require the same criminal intent, the sentencing court ““should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next.... [P]art of this analysis will often include the related issues of whether one crime furthered the other...”” *State v. Garza-Villarreal*, 123 Wn.2d 42 at 46-47, 864 P.2d 1378 at 1381 (1993), *quoting State v. Dunaway*, 109 Wn.2d 207 at 215, 743 P.2d 1237 (1987), 749 P.2d 160 (1988).

Two appellate cases illustrate the analysis. In *State v. Miller*, 92 Wn.App. 693, 964 P.2d 1196 (1998), Division II of the Court of Appeals

held that the charge of Attempted Theft of a Firearm and Assault in the Third Degree constituted the same criminal conduct under the facts of that case. In *Miller*, the defendant assaulted an officer while struggling to get his gun. The Court held that the “assault on [the officer,] when viewed objectively, was ‘intimately related’ to the attempted theft. Miller could not deprive [the officer] of his holstered weapon without assaulting him.” *Miller*, at 708. Similarly, in *State v. Taylor*, 90 Wash.App. 312, 950 P.2d 526 (1998), Division II held that the two crimes at issue—Assault in the Second Degree and Kidnapping—constituted the same criminal conduct under the facts of that case:

The evidence established that [the defendant’s] objective intent in committing the kidnapping was to abduct [the victim] by the use or threatened use of the gun and that his objective intent in participating in the second degree assault was to persuade [the victim], by the use of fear, to not resist the abduction. The assault began at the same time as the abduction, when [the defendant] entered the car. It ended when the kidnapers exited the car and the abduction was over. And there is no evidence that [the defendant] engaged in any assaultive behavior during the kidnapping that did anything beyond facilitating and furthering the abduction.

Further, because the assault and kidnapping were committed simultaneously, it is not possible to find a new intent to commit a second crime after the completion of the first crime... Thus, this record supports only a finding that the offenses were part of the same criminal conduct and [the defendant] is entitled to have the two offenses counted as one crime.

State v. Taylor, 90 Wn.App. 312 at 321-322, 950 P.2d 526 (1998).

Here, Mr. Walker was convicted of theft of timber and trafficking in stolen timber. The evidence at trial established that the two crimes occurred at the same time and place, and involved the same victim. RP 13-133. Furthermore, under the state's theory of the case, Mr. Walker's overall criminal purpose did not change from one crime to the next; instead, the theft (obtaining the timber with intent to deprive the owner) furthered the trafficking (the intended sale of the timber). RP 159-171, 180-183. Because of this, the two crimes comprised the same criminal conduct, and should not have scored against each other in Mr. Walker's criminal history. RCW 9.94A.589(1)(a); *Garza-Villarreal*.

The prosecutor argued that the two crimes were not the same criminal conduct and should score against each other, but did not present any evidence in support of this argument. RP 195. Any such evidence would necessarily have contradicted the evidence introduced at trial, which established that the two offenses *were* the same criminal conduct.

Mr. Walker should have been sentenced with an offender score of zero. The sentence must be vacated and the case remanded to the trial court for correction of the offender score and resentencing with an offender score of zero.

III. IF THE OFFENDER SCORE ISSUE IS WAIVED, MR. WALKER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

The right to counsel is guaranteed by the Sixth Amendment and Fourteenth Amendment to the U.S. Constitution and by Article I, Section 22 of the Washington Constitution. Furthermore, the right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). This includes the right to the effective assistance of counsel at sentencing. *See, e.g., State v. Saunders*, 120 Wn. App. 800 at 824, 86 P.3d 232 (2004); *State v. McGill*, 112 Wn. App. 95 at 101, 47 P.3d 173 (2002).

The test for ineffective assistance of counsel consists of two prongs: (1) whether defense counsel's performance was deficient, and (2) whether this deficiency prejudiced the defendant. *State v. Holm*, 91 Wn.App. 429, 957 P.2d 1278 (1998), *citing Strickland, supra*. The defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Holm, supra*, at 1281.

To establish deficient performance, a defendant must demonstrate that counsel's representation fell below an objective standard of

reasonableness based on consideration of all the circumstances. *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000). To prevail on the prejudice prong of the test for ineffective assistance of counsel, an appellant must show that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.” *State v. Saunders*, 91 Wn.App. 575 at 578, 958 P.2d 364 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *In re Fleming*, 142 Wn.2d 853 at 866, 16 P.3d 610 (2001). A claim of ineffective assistance is reviewed *de novo*. *State v. S.M.*, 100 Wn.App. 401 at 409, 996 P.2d 1111 (2000).

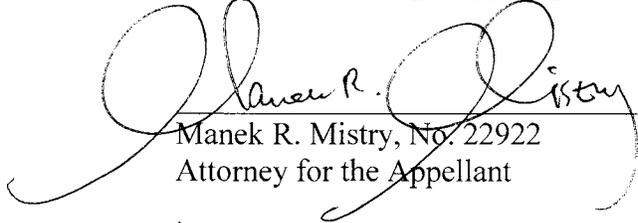
In this case, Mr. Walker’s attorney did not object to the prosecutor’s assertion that the offenses should be counted separately. RP 195-196. This was deficient, as the evidence established that the offenses occurred at the same time and place, and involved the same victim and criminal intent, as outlined above. Had defense counsel objected, Mr. Walker would have been sentenced with an offender score of zero. Accordingly, if the offender score issue is not preserved, Mr. Walker was denied the effective assistance of counsel at sentencing. His sentence must be vacated and the case remanded for a new sentencing hearing. *Saunders, supra; McGill, supra.*

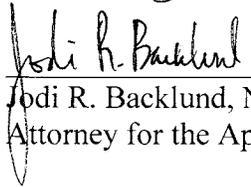
CONCLUSION

For the foregoing reasons, Mr. Walker's conviction for theft must be reversed, and the case remanded for resentencing on the trafficking charge. In the alternative, the sentence must be vacated and the case remanded for sentencing with an offender score of zero.

Respectfully submitted on June 13, 2007.

BACKLUND AND MISTRY


Manek R. Mistry, No. 22922
Attorney for the Appellant


Jodi R. Backlund, No. 22917 
Attorney for the Appellant

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Jason D. Walker
1549 Kirkpatrick Rd.
Humptulips, WA 98552

and to:

Grays Harbor Co. Prosecuting Atty
102 West Broadway Ave., Rm 102
Montesano, WA 98563

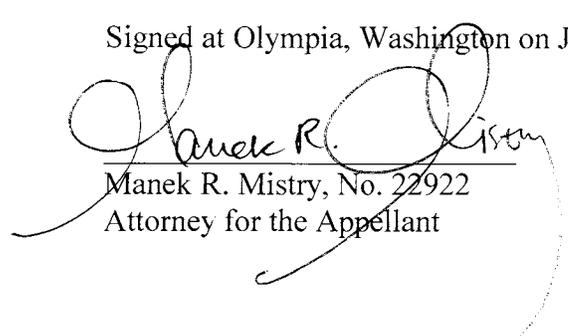
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All postage prepaid, on June 13, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 13, 2007.


Manek R. Mistry, No. 22922
Attorney for the Appellant